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COMMERCIAL ARBITRATION AND ACCOMODATION OF THIRD PARTIES IN ETHIOPIA

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Declaration

I, Mr. Girmachew Nigussie, declare that the thesis comprises my own work. In compliance with widely accepted practices, I have duly acknowledged and referenced all materials used in this work.

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List of Acronyms

AAA	American Arbitration Association
AACCSA-AI	Addis Ababa Chamber of Commerce Sectoral Association Arbitration Institute
AAU	Addis Ababa University
ADR	Alternative Dispute Resolution
Art	Article
Civ. C	Civil Code
Civ. Pro. C	Civil Procedure Code
CRCICA	Cairo Regional Centre for International Commercial Arbitration
EACC	Ethiopian Arbitration and Conciliation Center
ECCSA	Ethiopian Chamber of Commerce and Sectoral Associations
FAA	Federal Arbitration Act
FDRE	Federal Democratic Republic of Ethiopia
ICC	International Chamber of Commerce
LICA	London Court of International Arbitration
NA.I	Netherlands Arbitration Institution
UNCITRAL	United Nations Convention on International Trade Law
USA	United States of America

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Abstract

Currently, as commercial transactions become more complex, certain procedural problems are becoming more common. One of the most troubling issues in this area of law concerns participation of third parties (through joinder, intervention or opposition to setting aside of arbitral award) into an arbitration. In fact, if all parties agreed, the problem will be somehow resolved. Otherwise, when parties disagree and third parties object participation, the issue will be difficult.

Third parties under the Ethiopian arbitration rules are uncovered. Regarding the practice, the courts and Arbitration tribunals are found to be different in interpretation of the law. Sometimes, they extend arbitration to third parties through litigation provisions, sometimes they become hesitant. The understandings of Practitioners and Academicians who have exposure in commercial arbitration are also divergent. Some are proponents, some are opponents and some are in the middle way in relation to participation of third parties in commercial arbitrations.

So, the problem is obvious. But, transactions comprises multiparty and multi contracts in which parties will not be signatory of the same arbitration agreement are becoming in growth. Generally, in Ethiopia, since multiparty arbitration proceedings would enhance the scope, efficiency, certainty and effectiveness of commercial arbitration system, rules and procedures that allow the intervention and joinder of indispensible third parties in bilateral arbitration arrangement, as well as mechanism of challenging the award by interested third parties need to be regulated expressly and effectively. The practices also need to be developed.

Introduction

Arbitration is becoming basic means of commercial dispute resolutions mechanism in contemporary global commercial and investment relations. Mostly, the basic rules and procedures relating to arbitration in general and commercial arbitration in particular focus on parties in arbitration. But, currently modern commercial (business) transactions and disputes are becoming complex and networked that comprise multi signatories (existing) and non-signatory parties (third parties) even in a single or related transactions.

Currently, as commercial transactions become more complex, certain procedural problems are becoming more common. One of the most troubling issues in this area of law concerns participation of third parties (through joinder, intervention or opposition of arbitral award) into an arbitration. In fact, if all parties agreed, the problem will be somehow resolved. Otherwise, when parties disagree and third parties object participation, the issue will be difficult.

Thus, the core issue addressed in this paper is the accommodation of third parties in commercial arbitration system of Ethiopia. The paper analyses and answers the following specific questions: What are third parties in commercial arbitration with in the contemporary complex and multiparty commercial transactions that need to be accommodated?; What are the relevancies of accommodating third parties in commercial arbitration in general?;How can Arbitration, specifically, commercial arbitration accommodates non signatory parties (third parties)?; How is the accommodation of third parties in commercial arbitration treated in other national jurisdictions and international and regional arbitration institutions, in general?;How is the accommodation of third parties in arbitration (specifically, in commercial Arbitration) treated under Ethiopian Arbitration laws; under both substantive and procedural laws relating to Arbitration)?; What relevance does accommodation of non-signatory third parties in commercial arbitration will have in Ethiopia?; How are third parties being accommodated in current commercial arbitrations, in practice?; If any, what measures need to be taken so that Ethiopia will have efficient, effective, attractive and competitive detailed rules and procedures that can accommodate third parties in commercial arbitrations?

The paper discussed the issue within four chapters: The first chapter provides the proposal. In chapter two commercial arbitration and accommodation of third parties in general has been

discussed: specifically, this chapter has dealt with arbitration and commercial arbitration constitutes in general; plus, it also analyzes third parties and their relevancies in commercial arbitration. Then, it has tried to analyze the mechanisms of accommodation of third parties in arbitration and the extent to which their accommodation shall be possible. Lastly, for better appreciation of the issue it has also tried to overviews some experiences from Nationals as well as International and Regional institutions' arbitration rules and cases.

Chapter three discussed Arbitration as a means of commercial dispute resolution and accommodation of third parties in commercial arbitration in Ethiopia: Specifically, this chapter analyses: arbitration as means of resolution of commercial disputes in Ethiopia; the issue of third parties in Ethiopian commercial arbitration; whether and how accommodation of third parties is possible in Ethiopian commercial arbitration system; third parties under Ethiopian arbitration rules; third parties under the civil code and civil procedure codes of Ethiopia ordinary provisions; weather and to what extent the ordinary litigation provisions of the civil procedure code relating to third parties will be applied to Arbitration. Then, this chapter has also try to see and analyze the practice in Ethiopia in relation to how third parties are participated/accommodated in commercial arbitration and the experiences under Arbitration Institution and the draft Arbitration rule of Ethiopian Arbitration and Conciliation Center. Chapter Four comprises Conclusions, Recommendations, Bibliographies and Attachments of relevant cases.

Chapter one

Proposal of the study

1. Back ground of the study

Arbitration is becoming basic means of commercial dispute resolutions mechanism in contemporary global commercial and investment relations.[1] Mostly, the basic rules and procedures relating to arbitration in general and commercial arbitration[2] in particular focus on parties in arbitration[3]. But, currently modern commercial (business) transactions and disputes are becoming complex and networked that comprise multi signatories (existing) and non-signatory parties (third parties) even in a single or related transaction.[4] Therefore, in commercial arbitration there need to have effective detailed rules and procedures that can accommodate non signatory or third parties whose presence or participation will make the arbitration effective and efficient.

In some national arbitration rules and international arbitration institutions rules, more or less, there are attempts to develop rules and procedures that will accommodate third parties in ongoing commercial arbitrations[5], just like ordinary civil litigations entertained within the public

[1]Pouget Sophie, *Arbitrating and Mediating Disputes: Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment,* The World Bank Financial and Private sector Development Network Global Indicators and Analysis Policy Department, *2013, p.4, available at: https://www.openknowledge.Worldbank.org.(last accessed March 20/2018)[Here in after, Pouget Sophie]*

[2] In this paper commercial arbitration, in wider sense, refers to arbitration, conducted in institutional or ad-hock arbitration arrangements, relating to commercial or trade(business) related disputes

[3] Many model, international, regional as well as national arbitration rules, because of the dependence on arbitration submission (agreement) which is considered as the base of arbitration , basically focus on the existing contracting parties and gives priority to parties autonomy and freedom .

[4]Note that: in this paper third party refers to non-signatories who are not party to arbitration agreement but that have direct or indirect interest or connection on the subject matter and that need participation in ongoing arbitration. For example, in bilateral arbitration agreement and arbitration process, non-signatory third parties such as: guarantors, creditors, in agency the principals, in construction contracts sub-contractors or workers, in group of companies' cases parent/holding/ or subsidiary (affiliated) companies, third party beneficiaries, insurance companies in insurance cases, in property cases joint owners and the like indispensible third parties will need accommodation in ongoing arbitration proceedings.

[5]For example, From National Laws on Arbitration, see: Netherlands code of civil procedure (Art.1045); Switzerland's rule of international arbitration, 2012, Art 4(1)); USAs' experience specially, the South Carolina uniform arbitration act (section 15-48-60) and Utah arbitration act (subsection 78B-11-111), and the 2013 Belgian Judicial Code Article 1709. From the experience of known Arbitral Institution, see: LICA Arbitration rules, 2014(Art 22(1) (viii)); the 2015 Netherlands Arbitration Institution Arbitration rule,art.37;the new 2017 ICC Arbitration rule Art 7 and 8;and Finland Arbitration Institute Arbitration rule, Art 10. From International Conventions, see also the new 2013 UNCITRAL Arbitration rule art 17(5)

Justice system by ordinary courts in which third parties to the ongoing litigations may be accommodated through mechanisms such as: intervention which refers to the device used by outsiders to make themselves parties to the arbitration, joinder which refers to the technique used by an existing party to bring a third party into an arbitration and opposition of arbitral awards.[6]

In Ethiopia also with the growing global complex and multiparty commercial transactions and disputes, to have attractive (competitive) and effective commercial arbitration system, it needs to have detailed rules and procedures that enable commercial arbitrations to accommodate third parties whose presence or participation will make arbitration effective and efficient.

Thus, the paper will examine the Ethiopian arbitration laws (both the substantive and procedural rules) [7] weather they have detailed rules and procedures that can accommodate third parties in commercial arbitration. Plus, somehow, it will examine how third parties are participated or presented in Ethiopian commercial arbitrations system in practice. Finally, by analyzing the need or the relevance of accommodating third parties in commercial arbitration and by analyzing other national jurisdictions' and arbitration institutions' experience (to take a lesson), moreover, by analyzing the vacuum of the rules and procedures under Ethiopian arbitration systems, it will recommend possible measures that need to be taken in order to make the Ethiopian arbitration system attractive, competitive, efficient and effective.

2. Research problems and questions

The paper is focus on the following specific questions;

- What are third parties in commercial arbitration with in the contemporary complex and multiparty commercial transactions that need to be accommodated?
- What are the relevancies of accommodating third parties in commercial arbitration in general?
- How can Arbitration, specifically, commercial arbitration accommodates non signatory parties (third parties)?

[6]Strong, S.I, *Third Party Intervention and Joinder as of Right in international Arbitration: An Infringement of Individual Contract Right or a Proper Equitable Measure*, 31 Vand. J.Transnat'l.915 (1998), p.919, available at: http://scholarship.law.missiour.edu/facpubs (last accessed, May 15/2018) [Here in after,Strong, S.I]

[7] Basically, the main source of Ethiopian substantive arbitration rules is the Ethiopian civil code (from Art.3325-3346) and the Ethiopian procedural arbitration rules is the Ethiopian civil procedure code (from Art. 315-319,350-357 and 461.)

- How is the accommodation of third parties in commercial arbitration treated in other national jurisdictions and international and regional arbitration institutions, in general?
- How is the accommodation of third parties in arbitration (specifically, in commercial Arbitration) treated under Ethiopian Arbitration laws; under both substantive and procedural laws relating to Arbitration)?
- What relevance does accommodation of non-signatory third parties in commercial arbitration will have in Ethiopia?
- How are third parties being accommodated in current commercial arbitrations, in practice?
- If any, what measures need to be taken so that Ethiopia will have sufficient, effective, attractive and competitive detailed rules and procedures that can accommodate third parties in commercial arbitrations?

3. Scope of the study

The scope of this paper is limited to analyzing the accommodation of third parties under Ethiopian Commercial Arbitration system and forwarding possible recommendations.

4. Objectives of the research

Currently, in the growing global economy, unlike the classical ones in which business were mostly bilateral, business relations is becoming complex, networked and comprises many parties (multilateral) interest, even within a single or related transactions. Thus, generally, within the growing multiparty transactions and disputes, arbitration systems that can accommodate existing parties and third parties would enhance the efficiency and effectiveness of arbitration (specifically commercial Arbitration) system and will make it to be attractive and competitive with in the current competitive world.

Thus, in general the objectives of this paper are;

- Examining the Ethiopian arbitration laws (both the substantive and procedural rules) weather they have detailed rules and procedures that can accommodate third parties in commercial arbitration.

- Examining how third parties are taking part or presented in Ethiopian commercial arbitrations in practice.
- Analyzing the need or the relevance of accommodating third parties in commercial Arbitration in Ethiopia
- Finally, by analyzing other national jurisdictions' and Arbitration institutions' experience (to take a lesson) and the vacuum of the rules and procedures under Ethiopian Arbitration system, it will recommend possible measures that need to be taken in order to make the Ethiopian arbitration frame work (system) efficient, effective and competitive.

Thus, in terms of significance, the paper may serve as ground for further research in the area; it may also be uses as source for Legislators, Executives, Judiciary, Businesspersons as well as arbitration institutions as reference or stand for further appreciation and resolution of the issues.

5. Methodology of the Research

Generally, regarding methods, the paper follows conceptual and legal analyses and interpretation in a comparative manner. So, depending on the cases, it employs doctrinal legal research methods with a comparative study. Plus, somehow, to examine the practice in current commercial arbitration systems it employs non doctrinal (empirical) method and to obtain a lesson from other countries' and arbitration institutions' experience, it employs comparative research methods.

Thus, regarding data sources and sample selection:

- Regarding Primary sources, authoritative legislations: Ethiopian legislations (mainly, the Ethiopian civil code and civil procedure code); selected Arbitration rules of other Nations and International arbitration institutions' arbitration rules relating to the issue will be analyzed and interpreted, purposively.
- Regarding secondary sources: Books, Articles, Journals, Internet sources, Cases, Expert interviews (discussions), unpublished materials and reports that are related with the issue will be analyzed and interpreted, selectively and purposively.

Moreover, on the way of examining our arbitration system, for further clarification and to take a lesson in eclectically manner, with comparative analyses, the paper will try to over view some

national arbitration rules and arbitration institutions' arbitration rules that have better experience on accommodation of third parties in arbitration (particularly in commercial arbitrations).

To assess the conceptual and practical issues in Ethiopia, interviews and discussions (depending on the circumstance) will be employed with: selected scholars of AAU; experts of Arbitration Institution of AACCSA and ECCSA; selected experts have experience in ad-hock arbitration, and Judges in courts. It will also see relevant Ethiopian and foreign cases or decisions

6. Limitations of the study

The research counters the following limitations. The first limitation is that there are no detailed books and literatures on the issue and even those limited sources at international level dealing with this topic are e-books which are difficult to access them easily. In Ethiopia too, since the area is new, it is very hard to get detailed materials written on the arbitration system of Ethiopia (particularly, in relation to accommodation of third parties). Plus, Cases and judicial opinions play an appreciable role in legal research. But, Case scarcity is another constraint of this study (the accessed materials are employed). However, maximum efforts have been made to address the issues.

Chapter two

Arbitration as a means of commercial dispute resolution and accommodation of third parties in commercial arbitration in general

2.1 Arbitration in general

Arbitration has taken on an increasingly important role in international commercial transactions and has become the preferred dispute resolution mechanism in many types of transnational contracts.[8]Studies find that more than two-thirds of multinational corporations prefer commercial arbitration over traditional litigation.[9]

Different legislations and materials define arbitration in similar concept but indifferent ways. To see some of them; Latham & Watkins under the Guide to International Arbitration defines arbitration as "it is a private form of binding dispute resolution, conducted before an impartial tribunal, which emanates from the agreement of the parties but which is regulated and enforced by the state."[10]

In addition, according to the American Association of Arbitrations' [here in after AAA] Guide to Commercial Mediation and Arbitration for Business People, arbitration is defined as it is:

"the referral of a dispute to one or more impartial persons for final and binding determination, and which is Private and confidential, designed for quick, practical, and economical dispute resolution in which Parties can exercise additional control over the arbitration process by adding specific provisions to their contracts' arbitration clauses or, when a dispute arises, through the modification of certain aspects of the arbitration rules to suit a particular dispute."[11]

[8]*Pouget Sophie, supra note., 1, p.4.*
[9] Ibid
[10]Latham & Watkins, *Guide to International Arbitration,* 2014,p.1, available at: www.lw.com (accessed at sep. 23/2017) [here in after; Latham and Watkins,]
[11] AAA, A Guide to Commercial Mediation and Arbitration for Business People, 2013. Available at; www.adr.org (last accessed at May 10/2018) [here in after, AAA Guide]

Black's Law Dictionary also defines the term arbitration *as "a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.*"[12]

Thus, generally, as stated commonly from the above instruments, it can be summarized that arbitration is the basically a consensual process whereby the parties to a dispute brings their case for binding resolution to a third party called the arbitrator(s), who undertakes to settle the dispute in accordance with the principles of law.

The base of Arbitration is "arbitration agreement or submission" which is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defiend legal relationship, whether contractual or not.[13]

In Ethiopia, the Ethiopian the Civil Code defines Arbitration as;

"A contract whereby the parties to a dispute entrust its solution to a third party, the arbitrator who undertakes, to settle the dispute in accordance with the law."[14]

Thus, in Ethiopia Arbitration is also seen as a contractual based non-judicial dispute settlement mechanism whereby parties to a dispute resort to a third party (or parties) whose decision over the dispute is based on law and which is binding as regular court decisions. in fact, in many cases, parties have autonomy to agree even on the procedures.[15]

Generally, arbitration is typically conducted by either one or three arbitrator(s), referred to in each case as the "tribunal". The tribunal is the equivalent of a judge (or panel of judges) in a court action. However, the arbitrators are selected by the parties (either directly or indirectly through a third party or institution) and, as a result, the parties maintain some control over who is to determine their dispute. Commonly, the tribunal's powers and duties are fixed by the terms of the parties' agreement (including, in particular, any arbitration rules which have been adopted) and the national laws which apply in each case. Under most leading legal systems, arbitrators are

[12]Black's law dictionary,p.100

[13] UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006, Art.7,available at,http://www.uncitral.org (last accessed May 9/2017) [Here in after, UNCITRAL Model Law on International Commercial Arbitration,2006]

[14] Civil code of Ethiopia, 1960, Negarit Gazzeta, Extraordinary issue, proc. No.165, 19th year, No.2, Art.3325 (1), [here in after; Ethiopian civ. C.]

[15] Id., see for example:Arts.3325(2),3330,3331

obliged to make their awards according to the applicable law unless the parties have agreed otherwise and the tribunal is obliged to follow due process and ensure that each party has a proper opportunity to present its case and defend itself against that of its opponent. However, in other respects, the procedure can be very flexible.

Concerning its distinguishing features, although arbitration is usually, considered as an Alternative Dispute Resolution Mechanism, it is jurisdictional and adversarial process like the regular courts.[16] Whereas, other Alternative Dispute Resolution mechanisms, [here in after, ADR], such as: Negotiation, Mediation as well as Compromise, are not jurisdictional and adversarial process. what distinguishes it from litigation with in regular courts is also that litigation processes are carried out in front of a court of law whose judge(s) is (are) sovereign-appointed, whereas arbitral processes are carried out in front of a private judge or a panel of private judges appointed by the parties or somebody acting on their behalf. Plus, arbitration is somehow flexible than litigation.

Arbitration is also different from expert determination, because, whereas arbitration is normally regulated by national arbitration laws which safeguard the constitution of the tribunal and the procedure to be followed, expert determination is virtually unregulated. Specially, in the international context, arbitration also benefits from enforcement conventions which allow the direct enforcement of awards. The decisions of experts only have the force of contract and, to enforce them, a new action must be brought in the appropriate jurisdiction for breach of contract. On a decision-making level, the distinction is also that whilst the arbitrators may be selected for their experience in particular fields, they are tasked with deciding the dispute primarily upon the basis of the parties' submissions and the applicable law, whereas experts use their own knowledge to come to their decision. [17]

[16] Latham & Watkins, Supra note 10.p.2. under this Guide to International Arbitration, in relation to ADR it is stated that even if sometimes practitioners refer to arbitration as a form of alternative dispute resolution ("ADR"), the acronym "ADR" is more often used to describe non-binding procedures (such as mediation), thereby distinguishing between litigation and arbitration on the one hand, and ADR on the other. But, non-binding procedures are not really an "alternative" to litigation and arbitration because, unless the parties reach a settlement, they must still resort to a binding procedure, such as arbitration or litigation, to resolve their dispute. This has caused some to redefine ADR as "amicable dispute resolution", thereby emphasizing that mediation and related approaches depend upon the voluntary cooperation and agreement of the parties.

[17] Ibid

Relating to its types, there are different types of arbitration which can be distinguished depending on various factors.[18]For instance, a distinction usually made between international and domestic arbitration[19]; noncommercial versus commercial or investment arbitration; ad-hoc ("non-administered" i.e., an arbitration in which the parties create their own procedural rules and handle the administration of the arbitration themselves) versus institutional arbitration (which are to be administered by institutions ("institutional arbitrations**)**[20]; Compulsory versus voluntary Arbitration and Court-Annexed Arbitration, etc.

Thus, generally, it can be said that arbitration is non-judicial but decisional and adversarial dispute settlement scheme that is manly based on arbitration agreement and the law, and it can be conducted with sole or multiple arbitrators in ad-hoc or institutional base.

Currently, as different data and researches indicates, settling disputes that arise in commercial or business (trade and investment) related transactions through ADR mechanisms, especially with arbitration is growing faster and comparing to litigations, sometimes it seems to be preferable and appropriate for commercial or business activities which needs smooth (flexible, private or confidential and speedy) business relationships and which requires neutrality and technical expertise.[21] As studies shows, at international level, because of the support of the New York convention 1958[22] which many states adopted, in terms of recognition and enforcement, it is also preferable even than litigation.

Moreover, currently, because of the expansion and globalization of cross-border investment and trade, more complex commercial relationships (multi contractual and parties based relations) between businesses, investors and states are common and in many cases, arbitration became the standard method for resolving these relations. Thus, currently, arbitration is considered as a

[18]In many literatures based on different factors there are many of types of Arbitration; ex. In addition to the above classifications specific in stances such as Labor Arbitration, Family Arbitration, etc. can be mentioned.
[19] According to criteria such as the nationality of the parties, the nature of the dispute and the applicable law
[20]There are a number of arbitral institutions and rules to choose from, some focus on disputes in particular subject matters and some are fully international in scope and are used by parties throughout the world.
[21]*Pouget Sophie, supra note., 1, p.4*
[22]Convention on the Recognition and Enforcement of Foreign Arbitral Award, June 7,1958, New York[here in after; New York convention]

primary means of resolving complex, transnational commercial disputes and as a means of economic benefits for a state of being perceived as "arbitration friendly."[23]

2.2 Commercial arbitration and third parties in general

2.2.1. Commercial arbitrations in general

In relation to arbitration, there are different approaches of determining what constitutes commercial or trade relations in different commercial laws. Consequently, it is important to mention that there are, for example, corporate, financial, maritime, sale, labor, construction, investment, Intellectual property and many other specialties each with different approaches. This article will examine the legal framework of commercial arbitration in a wider sense.

Here, concerning what constitutes or covers commercial arbitration the UNCITRAL in its Model law on International commercial Arbitration takes a wider scope and interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not, that include, but are not limited to transactions such as, any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, franchising, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business cooperation, carriage of goods or passengers by air, sea, rail or road.[24]

When we come to Ethiopia, even if it is not adequate and conclusive enough, what constitutes commercial activities or relations has been tried to be regulated under the commercial code of Ethiopia[25] and mainly the civil code and the maritime codes has also their own relevance.[26] Plus,

[23] *Pouget Sophie, supra note., 1, p.5*
[24] UNCITRAL Model Law on International Commercial Arbitration, 2006, supra note, 13, Art.1 (1). Here the model paw provides detailed elaboration, through foot note, as what constitutes commercial arbitration with in the model law
[25] Commercial Code of Ethiopia, 1960, Negarit Gazzeta, Extraordinary issue, proc. No.166, 19th year, No.3, Art.5, [here in after, Ethiopian comm. C.]
[26] Id, arts 1 and 2

there are also scattered legislations that regulate in one or another way the commercial relations.[27]

However, for purpose of effective appreciation of the issue at hand, somehow, this paper follows UNCITRALs' wider approach to the concept of commercial arbitration. Thus, here commercial arbitration refers to arbitrations (institutional or ad hock) in relation to all business or trade (commercial) relations and it includes investment, banking, insurance, Intellectual properties, construction, sale, maritime, labor, distribution agreement, commercial representation or agency, factoring, leasing, consulting, engineering, licensing, franchising, exploitation agreement or concession, corporate and other forms of industrial or business cooperation, carriage of goods or passengers by air, sea, rail or road and many other trade or commercial related disputes.

In relation to rules and institutions, as it will be discuss latter in another part, there are international and regional arbitration rules and institutions designed specifically for commercial arbitration even with specific industry sectors. Plus, some states have also separate rules for commercial arbitration.

2.2.2 Third Parties in commercial arbitrations in general

Traditionally, the base of arbitration and the arbitration tribunal is mainly the arbitration agreement or submission and party autonomy. Thus, because of the principle of relativity or privity of contract, it is mainly considered as consensual and binding up on the parties. But, many instances can be mentioned when third parties' interest will come to picture with in bilateral arbitration arrangement, both in civil (non-business) and commercial (trade and investment) relations or transactions.

Mostly, with in different materials, the term "third party" is used as referring to a person who never consented to an arbitration agreement concluded between two or more parties (existing contracting parties). In fact, the term "non-signatory party" also often used interchangeably with the term third party. But, as will be shown in the subsequent paragraphs, a non-signatory party should be distinguished from a third party, as, strictly speaking, the former is a person that has

[27] For Example; Proclamations and regulations concerning Commercial Registration and License; Trade Competition and Consumers Protection; Intellectual Properties, Banking and Insurance Business as well as the maritime code of Ethiopia, in one or another way determines and regulates commercial activities.

consented (or named) to an arbitration agreement and thus is bound by it, notwithstanding the fact that the person failed to sign it, whereas, third party is used to refer to someone who is not even a named party in agreement.[28] Thus, in this the issue at hand the term "third party" is preferred over the term "non-signatory party." In fact, a third party is a non-signatory, but, sometimes, a non-signatory will not be third party.[29]

In this paper, third party also refers to non-consented and non-signatories of the arbitration agreement or submission, but those have direct or indirect interests or connections on the subject matter and need participation in ongoing arbitration (in relation to commercial related arbitrations). For example, in bilateral arbitration agreement and arbitration process, non-signatory third parties such as guarantors, creditors, third party beneficiaries, assignees, successors, in agency relations the principals or agents, in construction contracts sub-contractors or workers, in group of companies' cases parent/holding/ or subsidiary (affiliated) companies or share or stake holders, , insurance companies in insurance cases, in property cases joint owners and the like indispensible third parties will need accommodation in ongoing arbitration proceedings.

In Modern business transactions, particularly in the international context, have become extremely complicated, requiring the participation of several parties for the delivery of large-scale projects.[30] For example, a typical construction project may involve the employer and the main contractor but also an engineer or an architect, several subcontractors, suppliers, and financiers. Similarly, the complicated structure of many multinational groups of companies requires several affiliates or subsidiary companies, shareholders, directors or stakeholders of the same group to become actively involved in the execution of a contract concluded by only one company of the group.

[28]Brekoulakis Stavros, *The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room*, 2009, penn state Law Review, vol.113:4, p.1166, available at; www.pennstatelawrevies.org. [last accessed at May 25/2018],[Here in after; Brekoulakis(2009)]

[29]Passey Max D., *The shortcoming of arbitration in the modern world: the third parties limitation*,2016,global poletics review, vol.2,no.2,p.78,available at, http://globalpoleticisreview.com, (last accessed at May 25/2018)[here in after; passey Max D. (2016)]

[30]Brekoulakis(2009),Supra not, 28, p.1167

In addition, the types of cases in which a need for joinder of or intervention by a third party in an ongoing arbitration might arise are numerous, and include[31]: vertical construction contracts (i.e., owner-contractor-third party subcontractor); horizontal construction contracts (i.e., contractor-engineer-third party architect); indemnification contracts (i.e., injured party-liable party-third party indemnificatory); reinsurance contracts (i.e., injured party-insurer-third party reinsurer); intellectual property contracts (i.e., patent holder-manufacturer- third party distributor); copyright distribution contracts (i.e., copyright holder-distributor in country A-third party exclusive distributor in country B which has experienced parallel imports from country A); employment contracts (i.e., employee-employer-third party subcontractor); securities contracts (i.e., seller-buyer-third party financier); franchise contracts (i.e., franchise owner-franchise holder in country A-third party franchise holder in country B); and tort cases referred to arbitration by consent or contract (i.e., injured party-product distributor-third party manufacturer).

The same also applies in case of guarantee transactions. Here, the debtor will have an interest in joining the guarantor to its arbitration proceedings against the creditor, especially when the final award is favorable to the debtor. Otherwise, the creditor will be free to initiate second proceedings against the guarantor and to recover the debt, in which case the guarantor will have a recourse claim against the debtor. Plus, in the case where one person is jointly liable with another who is a party to the arbitration, if an award is given against one of the parties, it will then be at least of persuasive significance against the other person. The same will also apply when a third party interferes with a transaction between two signatory parties by committing a fraud or some other legal wrong.[32]

Generally, in all the above examples, the determination of a dispute in bilateral arbitration proceedings will take place against the interests of third parties of the multilateral commercial project. Consequently, it is likely that the bilateral arbitration proceedings will adversely affect the legal or financial interests of third parties that are closely related to the dispute as well as for the interest of existing parties that will require third parties joinder and this risk is generally

[31]Id.,p.1168

[32] Ibid

recognized in litigation. Even if, not provided adequately, this remedy somehow is also provided with in limited institutional and state arbitration rules.[33] In addition, currently, many researches also reveal that third party interests and existing parties' interest over third parties are in general worthy of protection.

2.3 Should commercial Arbitration be open For Third Parties or non-signatories?

In current networked and complex commercial transaction which mostly consists of multi parties in a single or related serious of transactions, the issue of third parties is one of the problems relating to arbitration.[34]

The opposition to third parties involvement in arbitration argument is mainly based on the principles of arbitration agreement (submission) and party autonomy (its private or confidential and flexible nature) in arbitration. Thus, based on the principle of privity of contract or relativity of contract, they oppose the participation of third parties through joinder, intervention or opposition. Here, they believe that those third parties bear no relevance to arbitration, which naturally leaves their interests unprotected.[35] As result, a dispute arising between two persons bound by an arbitration agreement in connection with a multiparty project will have to be resolved by arbitration exclusively between these two parties and other parties cannot participate in the resolution of the dispute through arbitration, even if they have played an active role in the actual project. Thus, notwithstanding any legitimate interest they might have in the outcome of the dispute, these parties will remain third parties both to the arbitration proceedings and the arbitral award.

However, the contractual and thus relative nature of arbitration frequently leads to unfavorable results. This is particularly grave in the context of multiparty commercial relationships, where the consensual limitations of arbitration preclude any person not bound by an arbitration agreement (in which every interested party will not be signatory of the same arbitration provision) from taking part in arbitration proceedings.

[33] See supra note.,5
[34] Strong, S.I, supra note.,6,p.918
[35] Brekoulakis(2009),Supra not, 28, p.1171

Because, as stated earlier, modern business transactions, both in domestic and in the international context, have become extremely complicated, requiring the participation of several parties for the delivery of large-scale projects. Plus, multiparty commercial projects are usually executed through several bilateral contracts which contain bilateral dispute resolution arrangements, usually in the form of either arbitration or choice of courts agreements.[36] This practice will leads to the "jurisdictional fragmentation of the multiparty project, and irreconcilable decisions" where the several parties involved are subject to the jurisdiction of different adjudicatory fora (arbitral tribunals or national courts). [37]

So, currently as international transactions become more complex, certain procedural problems are becoming more common. One of the most troubling issues in this area of law concerns participation of third parties (through joinder, intervention or opposition) into an arbitration.[38]In fact, if all parties agreed, the problem will be somehow resolved. Otherwise, when there is requirement of consent the issue will be difficult.

Vast majority of national civil procedures provide for extensive third party mechanisms which gives opportunity to participate interested or connected third parties in the bilateral proceedings and prevent possible adverse effects. Furthermore, under specific circumstances, some national civil procedures give a third party the right to challenge the judgment issued in bilateral proceedings even though the third party never participated in the original proceedings. Even if not provided adequately, this remedy somehow is also provided with in limited institutional and state arbitration rules. Thus, the fact that third-party recourse against the awards has been accepted in some jurisdictions provides evidence that the interests of a third party might well be, directly or indirectly, adversely affected by arbitration proceedings. In addition, currently, many researches also reveal that third party interests and existing parties' interest over third parties are in general worthy of protection and are obtaining acceptance.

Thus, generally, it can be conclude that although it is a private dispute resolution system, arbitration should not remain a closed system, exclusively reserved for those parties that are contractually bound by an arbitration agreement. Instead, arbitration(specially commercial

[36] Id.,p.1168
[37] Ibid
[38]Strong, S.I, supra note.,6,p.918

arbitration), to be effective and efficient, should be a dispute resolution system which under particular circumstances be flexible and able to accommodate related third parties in a dispute pending before a tribunal and this concept is also coming to be supported by different studies. States and institutions are also amending there legislations in favor of participation of third parties in arbitration.

2.4 The relevance of accommodation of third parties in arbitration

As stated above, with the existing complex multi-party business relations the accommodation of related third parties in seems to be logical and has been obtaining acceptance. Because, accommodating non signatory indispensible third parties' in arbitration has the following relevancies and these are also supported by studies.[39] These relevancies are;

- It will increase the efficiency of arbitration by preventing overlapping proceedings and expanding the material scope of arbitration. Because, accommodation will have a far-reaching and effective dispute resolution impact, which would be welcome in the context of multiparty projects. This would also reduce the risk of conflicting determinations from fragmented proceedings and would expand arbitration's domain.
- It will Protect the interest of the existing parties; because, sometimes the existence of indispensible third party will be necessary even for existing parties. In fact, both the existing parties; the claimant and respondent, as their interests on this issue will be invariably divergent, some parties might benefit from the presence of a third party in their arbitration proceedings. However, other parties will have no interest in joining a third party to their arbitration proceedings. Over all, the presence of a third party will not equally serve the interests of both parties to arbitration. However, there will be occasions where the interests of one of the parties and, possibly the interests of a third party, will be better served by multiparty arbitration proceedings.
- It will regulate Overlapping and duplication Proceedings and irreconcilable awards; because, multiparty of arbitration proceedings will prevent the commencement of several fragmented bilateral proceedings with overlapping subject matters.

[39] Brekoulakis(2009),Supra not, 28, pp.1172-1181; see also Strong, S.I, supra note.,6,pp.978-989

- Overall, arbitration has the same purpose as litigation: to effectively resolve a specific dispute. Consequently, this functional equilibrium between substance and procedure in principle should also apply to arbitration. Thus, many scholars Argue that the principle of procedural autonomy should be subject to certain limitations, namely that arbitration arrangements cannot altogether overturn the substantive arrangements involving several parties and when several parties have created a multiparty substantive network, the principle of procedural party autonomy should be in tune with the wider substantive background.
- It will promote equity and due process considerations. In particular, based on principle of equity, it can be argued that the interests of the third parties should be taken into account. Plus, whenever the presence of the third party is indispensable for one of the parties to the arbitration proceeding to make its case before the tribunal. Unless the third party is allowed to participate in the arbitration, the existing party to the proceedings will be unable to present its case and therefore due process will be violated. .
- It will also protect the non-signatories and minimize unnecessary oppositions. Because, even if arbitration will be binding up on the parties only, sometimes directly or indirectly third parties interest will be negatively affected. Thus, when a third party want to intervene, unless it is allowed the arbitration will affect the rights and interests of third parties negatively and latter will be aground to opposition to setting aside the award.
- It can also increase its scope of enforcement because, if third parties affected and if parties are not treated equally, this may be a ground not to give recognition and enforcement of the arbitral award (New York convention) especially at international level.[40]

Generally, since multiparty arbitration proceedings would enhance the scope, efficiency and effectiveness of arbitration, procedural rules that allow the participation of third parties in

[40]International arbitrations raise issues not only of domestic public policy, but international public policy as well and many states and arbitral institutions will limit arbitral procedures or awards that contravene public policy and often will overturn or refuse to enforce such awards. Plus, if arbitration affects due process principles (equality of the parties and the opportunity for each party to fully present its case) it may be ground not to recognize and enforce it and these may be occurred during denial of participation of relevant third parties

arbitration through the intervention and joinder as well as mechanism of challenging the arbitral ward by third parties through opposition or appeal need to be regulated effectively.

2.5 How and to what extent commercial arbitration can accommodate third parties

participation of third parties in an arbitration proceeding is a complex procedure requiring different considerations and depending on many factors that must be selected by the parties during the drafting of the arbitration agreement, including: selection of the arbitration institution, defining governing law of the arbitration agreement and the relevant contract, as well as the law of dispute resolution of the future arbitration. In spite of the issues' complexity, in some known arbitration institutions as well as some national jurisdictions, third party's participation in the arbitration proceeding is becoming accepted and there is no strict ban on the third party participation in the arbitration proceeding.

2.5.1 Mechanisms or approaches of accommodation of third parties to arbitration proceedings

As discussed above, in principle even if arbitration is binding to signatories of arbitration agreement (parties), sometimes it may directly or indirectly affect the interest of third parties. Plus, for effectiveness and efficiency purpose participation of third parties in an ongoing arbitration proceedings will be necessary or relevant (inevitable). Third parties may be also in need of protection from arbitral award in which they didn't participate.

In general, just like litigation, in one or another way, intervention and joinder of non-signatories are the main mechanisms of accommodation of third parties in ongoing arbitration proceedings. Plus, even if it will not use for participation in an ongoing arbitration proceedings, opposition of arbitral award by third parties is also mechanism of participation in arbitration.

2.5.1.1 Joinder and intervention of third parties

The question of joinder and intervention of third parties are the same. Both deal with the participation of the third party to the existing arbitration proceeding. However, they seem opposite sides of one coin. Because, Joinder refers to the technique used by an existing party to

bring a third party in to the arbitration in a situation when one of the parties to the arbitration proceeding seeks to add a third party, whereas intervention is the device used by outsiders to make themselves parties to Arbitration when they wants to become parties to the existing arbitration proceeding.[41]These methods, depending on different circumstances, are recognized under many states and institutional arbitration rules and are the common mechanisms of accommodation or participation of third parties in arbitration.[42]

These approaches (mainly joinder and intervention of third parties) may be used; when there is agreement of the parties (when necessary); when there is law which opts third party participation even without parties' consent. In addition, when there is no allowing express law, when consolidation or merger of two or more separate and independent arbitration proceedings into one is possible within the given jurisdiction, since depending on the circumstance sometimes consolidation of separate arbitrations may also bring the issues of participation of new non signatory third parties in to the ongoing arbitration proceedings, and here it can be one way of participating third parties in an ongoing arbitration proceeding. In addition, studies reveal that when the law is not clear and when it can be difficult to obtain parties' consent, through interim (provisional) measures by courts or tribunals, third parties will be accommodated.[43] Here, many states and arbitral institutions grant the courts, the arbitral tribunals, or both, the power to enter various types of interim relief. Thus, as a practical matter, requests for joinder or intervention of third parties will most likely be made in the form of a request for interim or provisional relief.

2.5.1.2 Opposition to setting aside the award

Like joinder and intervention, this rule is recognized almost under all states and institutional arbitration rules. Even if, it mainly used by parties to the arbitration and it will not use for participation of third parties in an ongoing arbitration proceedings, opposition of arbitral award (by the parties seeking joinder of third parties or by third parties need have to be participating) can also be used as mechanism for third parties participation in arbitration. Because, courts or arbitral tribunals, depending on different circumstances, will accept the opposition and participation of third parties and then may order setting aside or remand of the case.Because, if

[41]Strong, S.I, supra note.,6
[42]Brekoulakis(2009),Supra not, 28, p.942
[43]Strong, S.I, supra note.,6,p.942

third parties nonexistence affects the party as well as third party directly or indirectly and will beyond the scope of the arbitration submission and it conflict with the public policy or due process, this will be ground of setting aside or refusal of recognition and enforcement of arbitral awards.[44]

For this argument, proponents' argue that the non-accommodation of third parties will be aground not to give the arbitral award recognition and enforcement if it contravene law and policy or affect parties' equal opportunity of presenting the case. Thus, even after the award, if it will affect their interests directly or indirectly, parties will oppose the decision or third parties can also request setting aside or opposition of the decision in which interested third parties have not been made the party.

2.5.1.3 The power of deciding third parties participation in arbitration

Regarding the power (as to whom the request of third parties' participation in arbitration will be presented and decided), there is no uniform approach and thus, the participation of third parties will be entertained by the tribunal or the court even sometimes by administrative bodies other than the court or the tribunal.

Generally, the main mechanisms or approaches of participation of third parties in arbitration are depending on different circumstances allowing joinder, intervention of third parties and opposition by third parties either through the court or the arbitration tribunal.

2.5.2 To what extent commercial arbitration can accommodate third parties

Here, it should be clear that joindr, intervention and consolidation of third parties should not be always possible arbitrarily. Thus, it should be justifiable and there should be good grounds or conditions (connecting factors) that need to be fulfilled.

Regarding the circumstances, to order consolidation or merger of different arbitration proceedings the Netherlands has standards; it may be ordered in so far as it doesn't cause unreasonable delay in the pending proceeding; as long as the arbitration proceedings are so closely connected; as long as it leads to good administration of justice in terms of hearing and

[44] New York convention, supra note.,22

decision and to avoid irreconcilable decisions from separate proceedings.[45]These standards can also be used as connecting factors to order third parties participation in arbitration.

In Switzerland, as it will be discussed in detail latter, to extend arbitration to third parties, the tribunal is required to take into account all circumstances it deems relevant and applicable.[46] Among the circumstances that may be taken into account in the exercise of a Swiss Rules arbitral tribunal are, inter alia, the object of the contract, the intensity of the relationship of the third party toward the object of the contract, the links between the already pending claim and the claim raised by or made against the third party, the role a party has played in the negotiation or performance of the agreement, the existence between the parties of a community of obligations and interest, procedural efficiency, confusion and fraud

In addition, for this purpose it is relevant to see some Theoretical Bases for Involving Third Parties. Accordingly, many studies proposes that where joinder of non-signatory parties is not controlled adequately by statute or the arbitration rules and is not barred by contract, one or more of the following common law doctrines may be applicable to justify decision of joinder or intervention of third parties by the arbitrators.[47] In addition, these rules, depending on the case or circumstances, are also considered as standard to extend arbitration to third parties. These doctrines are;[48]

- Implied consent: in the absence of an express agreement to arbitrate, litigants can sometimes involve third parties in arbitration by implying consent. This includes "extending the arbitration clause" to parties which may have ratified or otherwise manifested an intent to be bound by an arbitration agreement, for example through the negotiation or performance of the contract, or related agreements. It is likewise relevant that such third parties may have benefitted from the contract, or acted in such a way that it would be inequitable for a party to avoid arbitration of the dispute
- Group of companies' doctrine: Generally, this doctrine allows a non- signatory company to benefit from or be bound by an arbitration agreement signed by another company

[45] Netherlands code of civil procedure, Art. 1046(2), available at, www.nai-nl.org (last accessed at, April 15/2018)[here in after, Netherlands code of civil procedure]
[46]Switzerland's Rule of International Arbitrations, Art 4(1),available at,http://www.swissarbitration.org (last accessed May 5/2018)[here in after, Switzerland's Rule of International Arbitration]
[47]passey Max D. (2016),supra note.,29,pp.80-86
[48] Ibid;

within the same group. The analysis focuses on the relations and dealings between separate corporate entities within the group, and their respective roles in the conclusion, performance and termination of the relevant contract.

- Agency**:** Here, non-signatory agents who carry out contractual duties on behalf of their contracting principals and who are charged by signatories with malfeasance in arbitration disputes may compel and join in arbitration between the signatories. The critical nexus is the agency relationship
- Equitable Estoppels: Here**,** Non-signatory parties may compel or be joined in arbitrations where claims are asserted against them alleging misconduct in performance of legal duties, where the claims are intertwined with claims asserted against signatory parties under agreements under which arbitration is authorized. The doctrine of equitable estoppels is available to non-signatories who wish to stay litigation pending arbitration, and to compel arbitration of claims related to a contract with an arbitration clause and asserted in litigation by a signatory to a contract. The signatory is said to be "equitably estopped" to avoid arbitration. Thus, third party may be bound to an arbitration agreement under principles of estoppels or abuse of right. This may occur, for example, where a party asserts that the lack of its signature on a contract precludes enforcement of the arbitration clause contained therein, but has at the same time maintained that other provisions of the contract should be enforced for its benefit, or where a non-signatory has received a direct benefit from the contract containing the arbitration clause.
- Inextricable Nexus: Non-signatory parties, whose claims and defenses have an indisputably "inextricable nexus" to contracts requiring arbitration for resolution of disputes, can join and be joined
- Third party beneficiaries: Here, an intended, third party beneficiaries of a contract containing an arbitration clause may compel or be joined in arbitration with a contracting party. The underlying rationale is that a party that has obtained advantages from a contract must also accept what may be disadvantages of the contractual relationship it has stepped into.
- Incorporation by Reference: Non-signatories frequently are successful in compelling arbitration or being joined in arbitration where contract terms of one contract containing an arbitration clause are incorporated by reference into other contracts with parties who

are non-signatories to the original contract. A key issue often is the strictness of contractual interpretation of the incorporated contract and arbitration clause

- Assignment or succession: In cases of assignment, and statutory or contractual succession, an arbitration agreement may be deemed transferred or found binding on the successor even absent express agreement to the arbitration agreement.
- Assumption: Non-signatories, such as performance bond sureties or contract guarantors who have agreed to take over and complete contracts after default of their principles, and lenders who foreclose on defaulting owners' construction loans and must complete projects under construction, often end up assuming obligations to arbitrate with signatory parties under the defaulted contracts. Upon assumption of a contract, an assuming party ordinarily "steps into the contractual shoes" of the defaulting party
- Alter Ego or "Piercing/lifting/ the corporate Veil": An alter ego is bound to the same respect as a contracting party it controls. Where a corporate contracting party lacks independent control and substance of its own, its corporate form may be pierced and the controlling entity held liable for the controlled party's obligations. Thus, a subsidiary or affiliate's separate identity may be disregarded and a parent or affiliate will be bound by an arbitration agreement where that company (it may be individual shareholders) has used its subsidiary or affiliate to commit a fraud or has otherwise abused the corporate form.

Thus, as stated above not to be arbitrary, these various theories can be used as a standard to determine the extent or connecting factors (even to overcome lack of consent) and to accommodate non signatory third parties in arbitration.

Overall, arbitration has the same purpose as litigation: it is a means to effectively resolve a specific dispute. Consequently, this functional equilibrium between substance and procedure in principle should also apply to arbitration. Thus, the principle of procedural autonomy should be subject to certain limitations and arbitration arrangements cannot altogether overturn the substantive arrangements involving several parties. When several parties have created a multiparty substantive network, the principle of procedural party autonomy should be in conformity with the wider substantive background. Thus, when third parties request participation and have interest on the subject matter, arbitration should be open to third parties. Because,

parties have already gave their consent and institute the tribunal. Once parties agree to settle their disputes in arbitration and take their case to the tribunal, it should not be allowed to them to settle their dispute by excluding interested third persons. Even if, confidentiality issue will be raised, this should not be used to impede and impair third parsons' interest. Plus, unless arbitration accommodates interested third parties, it will not be efficient and effective since later it will be set-aside. So, when interested/indispensible third parties request intervention or bring application of setting aside of the award to the arbitration tribunal, the discretion to decide third parties' participation based on their relation and interest with the parties and the subject matter need be given to the tribunal.

On the other hand, coming to third parties, as long as their claim or duty over the subject matter is interconnected and when mostly derived from one/more of the parties' interest in arbitration, ordering them to be joined in arbitration should not be considered as violation of their right to choose the forum. Especially, when third parties claim or duty derived from one of the parties' interest or duty through: subrogation, assignment, succession, agency, guarantee, sellers or buyers' relation, piercing corporate veil, committing fraud and the like…, allowing arbitration tribunals to order third parties participation, even with lack of consent, should not be considered as violation of the right of third parties. Because, as long as third parties' duties or rights are independent that derived or emanated from existing parties' interest or duty, their connection with the parties or subject matter is strong. So, the circumstances themselves can justify that third parties have accepted the possibilities of extension/transfer of rights and duties beyond the parties.

2.6 ***Overviews of other jurisdictions' experience in general***

Commercial arbitrations procedures, for the most part, are regulated by laws and rules passed by various states and arbitral institutions. Some non- governmental organizations have also contributed to the growing number of proposed arbitral procedures (like *UNCITRAL*). This section will highlight only those provisions that are relevant to the discussion. The solutions adopted in different states and arbitration rules of institutions regarding third parties are different. Full review of every provision of every arbitral body's procedural rules would exceed the scope of this Article, thus, this section will highlight only the relevant rules of some of the more important or innovative states and institutions. Plus, the discussion' focus will be on those

provisions that provide an explicit or implicit basis for granting intervention, ioinder and opposition in an existing arbitration. In addition, it will concentrate primarily on setting forth the rules of the arbitration institutions as they currently exist.

2.6.1 From International Conventions; UNCITRAL Arbitration rules

UNCETRAL has tried to provide many model arbitration rules with many amendments, among these; the 2010 UNCITRAL Arbitration Rules(as revised in 2013) and the UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006 which is specially designed to commercial arbitrations are relevant for the purpose of this article.

The 2010 UNCITRAL Arbitration Rules (as revised in 2013, and with new article 1, paragraph 4, as adopted in 2013) with in limited circumstances expressly permits joinder of third parties; thus, in Article 17(5) it provides that:

"The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration".

Here, according to Article 17(5) of the 2013 UNCITRAL model law, the joinder of a third party in an arbitration, as well as the manner of such joinder, shall be decided by the arbitral tribunal upon the request of a party or a third party after hearing all parties and the third party to be joined as well as after considering all relevant circumstances that assures such joinder would not result in prejudice to any of the parties. Plus, always need to have parties' agreement (prior the dispute or latter agreement). In fact, it is silent as to intervention by third parties, but, by the same logic, if intervention by third parties requested, it seems to be entertained by the tribunal in similar manner with joinder.

In addition, according to model rule of Article 17(1) the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable

opportunity of presenting its case.[49] The arbitral tribunal, in exercising its discretion, shall also conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.[50]

In addition, under UNCITRAL the arbitral tribunal may, at the request of a party, grant interim measures (any temporary measures) at any time prior to the issuance of the award, to orders a party to, Maintain or restore the status quo pending determination of the dispute; Take action that would prevent, or refrain from taking action that likely to cause current or imminent harm or prejudice to the arbitral process itself; Provide a means of preserving assets out of which a subsequent award may be satisfied; or Preserve evidence that may be relevant and material to the resolution of the dispute.[51] These lists are not exhaustive and similar measures, for purpose of the due process of the arbitration, may be ordered.

Thus, proponents of accommodation of third parties in arbitration by combining article 17(1) and 26 of the rule, they argue that even if UNCITRAL model rules are limited to all parties agreement and lacks adequate and detailed provisions on the participation and protection of third parties (through joinder and intervention), since it provides wider discretion for the tribunal to conduct the arbitration in such manner as it considers appropriate, as long as, the parties are treated with equality and at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case, it conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute, by invoking as a grounds of entrimrelief (provisional measures) arbitral tribunals can allow joinder or intervention.

Coming to see the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 which is specially designed to commercial arbitrations, it is silent as to participation of third parties in arbitration. However, with in some conditions, it provides the power for the tribunal to order any safeguarding interim or provisional measures at

[49] The 2010 UNCITRAL Arbitration Rules (as revised in 2013, and with new article 1, paragraph 4, as adopted in 2013), Art.17(1),available at, http://www.uncitral.org (last accessed may 19/2018) [here in after; UNCITRAL Arbitration rule,2013]
[50] Ibid
[51] Id., Art.26

any time prior to the issuance of the award[52]. Plus, the tribunal has also power to decide on its own jurisdiction (competency competency theory), it has given the power to order discontinuance of the proceeding if it finds difficult to continue in some conditions.[53] By combining the above discretions or powers of the tribunal proponents argue that under the model commercial rule of UNCITRAL the tribunal, if it is willing, may accommodate third parties in arbitration.

In addition, proponents for their in favor of accommodation of third parties in arbitration arguments invoke the model rules' grounds of setting aside[54] and argue that if third parties nonexistence affects the party or the third party directly or indirectly, since it will be beyond the scope of the arbitration submission and in conflict with the public policy of the given state, latter, it will lack recognition and enforcement. For their argument they also invoke the New York convention and argue that non accommodation of third parties in arbitration will be aground not to give the arbitral award recognition and enforcement if it contravenes law, policy or parties equal opportunity of presenting the case. Thus, even after the award third parties can also request setting aside or opposition if it will affect its interest directly or indirectly.

2.6.2 The experiences of known Arbitral Institutions: -

2.6.2.1 London Court of International Arbitration *(here in after, the LCIA) Arbitration rule*

In relation to participation of third parties in arbitration, the *LICA Arbitration rule* under *Art.*22 (1) (viii)) provides that;

"The Arbitral Tribunal shall have the power, upon the application of any party but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) may decide to allow one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration

[52] UNCITRAL Model Law on International Commercial Arbitration,2006, supra note.,12,Art.17
[53] Id.,Arts.16,18 and 19
[54] Id.,Art.34

Agreement and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.''[55]

Thus, although it requires the absence of contrary agreement of the parties and consent of the third party (in written agreement) with the party requesting the joinder, the LCIA expressly permits on application of a party to the arbitration the joinder of third parties even over the objection of existing parties to the arbitration.

Here, LCIA requires only the consent of the applicant and the third party, but not the consent of the other party. In other words, under LCIA, if one existing party wants to allow joinder and the third party agrees to be joined, the other party to the arbitration cannot block the joinder. In fact, under the LCIA Rules, it is unclear whether a third party could intervene over the objections of all parties signatory to the arbitration. Thus, unless courts resort to other powers or discretion relating to interim (provisional) measures, if both parties objected it seems that joinder and intervention seems fall in difficult.

In addition, under the LICA Arbitration rules regarding consolidation of arbitrations the Arbitral Tribunal has the power, upon the application of any party but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) to decide with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations into a single arbitration subject to the LCIA Rules where all the parties to the arbitrations to be consolidated so agree in writing.[56]

Thus, based on this approach even during consolidation or merger of different arbitration proceedings or agreements third parties will exist and then if all parties (including third parties) consented, the tribunal cans accommodate third parties.

Under Article 27 of the *LICA Arbitration rules, 2014* the tribunal has the power to decide correction of award(s) and provide additional award(s) up on the application of any party or on its own motion. Thus, it can be said that third parties may also request correction if their interest affected directly or indirectly.

[55]LCIA arbitration rule,2014, Art.22(1)(viii), available at,http://www.lcia.org/dispute-resolution/lcia-arbitration-rules-2014.aspx (last accessed May 25/2018, [here in after; LCIA Arbitration rule,2014]
[56] Id., Art.22(1)(ix)

2.6.2.2 The 2015 The Netherlands Arbitration Institute(here in after the NAI) Arbitration rule

The 2015 the Netherlands Arbitration Institute Arbitration rule gives place to third parties and thus, under article 37 (Joinder and intervention) it provides that;

"1. At the written request of a third person who has an interest in arbitral proceedings to which these Rules apply, the arbitral tribunal may allow that person to join or intervene in the proceedings, provided that the same arbitration agreement as between the original parties applies or enters into force between the parties and the third person. By the allowance of the joinder or intervention, the third person shall become a party to the arbitral proceedings.

2. The request shall be submitted to the administrator. The administrator shall send a copy of the request to the parties and to the arbitral tribunal as soon as possible.

3. The arbitral tribunal shall give the parties the opportunity to make their opinions on the request known. The arbitral tribunal may give the third person the opportunity to make its opinion on the request known.

4. The arbitral tribunal may suspend the proceedings after receipt of a request as referred to in paragraph 1. After the lifting of the suspension or allowance of a joinder or an intervention, the arbitral tribunal shall arrange the further course of the proceedings, unless the parties have made provision for this by agreement.

5. regardless of whether the same arbitration agreement as between the original parties applies or enters into force between the parties and the third person, by submitting the request for joinder or intervention, the third person agrees that the provisions of Section Six and Article 61 shall apply."

In addition, in relation to Impleader (joinder) the rule provides that at the request of a party and after giving the parties and the third person the opportunity to make their opinions on the request known, the arbitral tribunal may allow that party to implead a third person, provided that the

same arbitration agreement as between the original parties applies or enters into force between interested party and the third person.[57]

Here, the NAI arbitration rule has stipulated conditions to allow the party to implead a third person. Thus, it provides that the arbitral tribunal shall not allow the impleader if the arbitral tribunal finds it implausible, in advance, that the third person will be required to bear the adverse consequences of a possible award against the interested party or is of the opinion that impleader proceedings are likely to cause unreasonable or unnecessary delay of the proceedings.[58]

Thus, under NAI arbitration rule it is clear that joinder and intervention are permitted for intervention if the third party accedes to the arbitration agreement by an agreement in writing between him and the parties to the arbitration agreement, and for impleader what suffice is existence of an agreement of the third parties with one of the parties in the arbitration agreement. Once agreement is obtained, the third party becomes a party to the arbitration and is liable for its share of costs in accordance with the NAI Rule.

In addition, Article 39 regarding Consolidation the rule provides that, unless the parties have agreed otherwise, In respect of arbitral proceedings pending in the Netherlands to which the rules apply, a party may request the consolidation of the existing arbitration with other arbitral proceedings pending within or outside the Netherlands to which the Rules apply.[59] Here, the NAI Arbitration rule has provided conditions to order Consolidation. Accordingly, consolidation may be ordered insofar as it does not cause unreasonable delay in the pending proceedings, also in view of the stage they have reached, and the two arbitral proceedings are so closely connected that good administration of justice renders it expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings[60].

Accordingly, through consolidation, if the conditions meet and there is no contrary agreement joinder or intervention of third party seems open in NAI.

[57] Netherlands Arbitration Institution' arbitration rule, 2015, Art.38, available at, http (last accessed May 21,[here in after; NAI arbitration rule,2015]
[58] Ibid
[59] Id., Art.39
[60] Ibid

2.6.2.3 The new 2017 ICC Arbitration rule

The new 2017 ICC Arbitration rule (from article 7 - 10 gives) provisions to complex multi party and multi contract arbitrations.[61]

Thus, the new ICC Rules provides for special article concerning joinder of additional parties in arbitration under Art.7 and provides that;

"A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the "Request for Joinder") to the Secretariat. The date on which the Request for Joinder is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party. Any such joinder shall be subject to the provisions of Articles 6(3)–6(7) and 9. No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The Secretariat may fix a time limit for the submission of a Request for Joinder."[62] *(Emphasis added)*

The stated Article 7 of the ICC Rules provides for the a mechanism for enabling a third party, who is not yet a party of the arbitration proceedings to join the arbitration by submitting Request for Joinder to the Secretariat. This request for Joinder can be addressed by any existing party to the arbitration proceedings at any time before the confirmation of the appointment ofany arbitrator has been done by the ICC court. Accordingly, both a claimant and a respondent may request the joinder of an additional party. Here, the major issue related to joinder of additional parties is in the composition of the arbitration court, which will not be allowed to join a third party unless all parties agree. In fact, ICC is silent as to intervention of third parties, unless third parties resort to other options.

Moreover, regarding how to proceed the arbitration with the new one , the ICC rule provides that the joinder will follow article Articles 6(3)–6(7) and 9 of the rule; how to answer for claim

[61] ICC arbitration rules,2017, pp.Art.7-10; (i.e. Article 7 Joinder of Additional Parties; Article 8 Claims between Multiple Parties; Article 9 Multiple Contracts; Article 10 Consolidation of Arbitrations).available at, http://iccwbo.org/publication/arbitration-rules-andmedation-rules/](last accessed May 5/2018) [here in after;ICC arbitration rule,2017]

[62] Id., Art.7(1)

(duty), consequence of not to answer the claim and the power of the court to decide and proceed.[63]

Regarding Constitution of the Arbitral tribunal during joinder, it provides that where an additional party has been joined, and where the dispute is to be referred to three arbitrators, the additional party may, jointly with the claimant(s) or with the respondent(s), nominate an arbitrator for confirmation.[64] If it requires sole arbitrator and fail to agree the court will appoint.[65] ICC has also provisions in relation to coasts arrangement when third parties intervene or joind.[66]

In relation to problems arising in multi contractual relations ICC also provide recognition that claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made in one or more arbitration agreements under the Rules. Thus, in this case, when the new parties exist, they have the possibility to be joind or to intervene.

In addition, regarding consolidation of Arbitrations the ICC provides power to the Court to order consolidation of two or more arbitrations pending under the Rules into a single arbitration, at the request of a party and when the parties have agreed to consolidation.[67] Thus, in this case, when the new parties exist, they have the possibility to be joind or to intervene.

2.6.2.4 The Cairo Regional Centre for International Commercial Arbitration (the "CRCICA") rule

From Africa this paper has tried to see the experience of the Cairo Regional Centre for International Commercial Arbitration (here in after, the "CRCICA") which provides all domestic, international, institutional, and ad-hock arbitration services,[68] but, unfortunately, the present CRCICA arbitration rules are based upon the UNCITRAL model arbitration rule with minor modifications emanating mainly from the Centers' role as an arbitral institution and an appointing authority. Especially, in relation to third parties joinder Art 17(6) of CRCICA arbitration rule is equivalent to Art 17(5) of the UNCETRAL model Arbitration law.

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[63] Id., art*6(3)–6(7) and 9*
[64] Id.,Art.12(7)
[65] Ibid
[66] Id.,Art.37(4)
[67] Id.,Art.10
[68] *Cairo Regional Centre for International Commercial Arbitrations' Arbitration rule,2011,preamble p.9,Available at, http://crcica.org.eg/rules/arbitration/2011/cr_arb_rules_en.pdf (last accessed May 5/2018),[here in after CRCICA Arbitration Rule,2011]*

Thus, as stated above under UNCITRAL model law, in CRCICA the joinder of a third party in an arbitration, as well as the manner of such joinder, shall be decided by the arbitral tribunal upon the request of a party or a third party after hearing all parties and the third party to be joined as well as after considering all relevant circumstance that assures such joinder would not result in prejudice to any of the parties. Plus, always need to have parties' agreement (prior the dispute or latter agreement).[69] In fact, it is silent as to intervention by third parties, but, by the same logic, if intervention by third parties requested, it seems to be entertained by the tribunal in similar manner with joinder.

2.6.2.5FINLANDS CHMABER OF COMMERCE/ The Finland Arbitration Institut

The Finland Arbitration Institute rule regulates, expressly, conditions for joinder of additional parties to arbitration and has also expressly recognized multi parties and multi contract arbitration proceedings.

In Fenlands Arbitration Institution Arbitration rule, under article 10 the conditions in relation to joinder and intervention of additional parties are expressly provided.

Accordingly, where a party to a pending arbitration under the Rules (the applicant) wishes to join an additional party to the arbitration, it shall submit its request for arbitration against the additional party (the Request for Joinder) to the Institute. The Request for Joinder shall be submitted to the Institute prior to the transmission of the case file to the sole arbitrator and Failure to comply with this time limit shall result in the dismissal of the Request for Joinder by the Institute, unless all parties to the arbitration, including the additional party, agree to the joinder.[70]

In addition, If the additional party wishes to submit a Request for Joinder, it shall do so within a time limit to be set by the Institute and then if allowed, the additional party may make claims against any other party like new arbitration.[71]

[69] Id.,Art.7(6)
[70] Finland Arbitration Institute Arbitration rule, Art 10, Available at, https://arbitration/rules/arbitration-rules/ (last accessed May 5/2018)
[71] Ibid

In Finland, the power to decide joinder is provides to the board and where the Board decides to accept the Request for Joinder, all parties will be deemed to have waived their right to nominate an arbitrator, and the Board may revoke the confirmation and appointment of the sole arbitrator and follow the normal rules in the appointment of the sole arbitrator.[72] In relation to coast, it provides that if the applicant fails to pay the Filing Fee upon filing the request for joinder, the Institute shall direct the applicant to make the payment within the time limit set by the Institute and if the applicant fails to comply, the Board may dismiss the Request for Joinder.[73]

In relation to, Appointment of a sole arbitrator in multi-party proceedings, the rule provides that the claimant(s) and the respondent(s) may jointly nominate the sole arbitrator for confirmation within 15 days from the date on which the Request for Arbitration was received by the respondent(s). Where an additional party has been joined it may nominate the sole arbitrator for confirmation jointly with the claimant(s) and the respondent(s) and If the claimant(s) and the respondent(s) fail to nominate the sole arbitrator for confirmation or within such other time limit as the Institute may have set, the Board shall appoint the sole arbitrator.[74] Where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator. Otherwise the power is given to the board. [75]

In addition, regarding Consolidation of arbitration, At the request of a party, the Board may consolidate two or more arbitrations pending under the Rules into a single arbitration if all claims in the arbitrations are made under the same arbitration agreement or where the claims in the arbitrations are made under different arbitration agreements, the disputes in the arbitrations arise in connection with the same legal relationship and the arbitration agreements do not contain contradictory provisions that would render the consolidation impossible.[76] The conditions what the Board shall take into account are the identity of the parties in the different arbitrations, the connections between the claims made in the different arbitrations, whether any arbitrator has been confirmed or appointed in any of the arbitrations and, if so, whether the same or different

[72] Ibid
[73] Ibid
[74] Id.,Art.18
[75] Ibid
[76] Id.,Art.13

persons have been confirmed or appointed and any other relevant circumstances. When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.[77] Thus, generally, in this case, when the new parties exist, they have the possibility to be joined or to intervene.

Thus, Fenlands chamber of commerce arbitration rule, through joinder, intervention and consolidation, third parties may be parties with in arbitration and it has also expressed provisions in relation to (payment of fee and appointment, and other relevant procedures) multi parties and contracts arbitrations.

2.6.2.5 Specialized Industry specific arbitral institutions Rules

Unlike many of the larger arbitral institutions, several industry- specific arbitral bodies specifically address consolidation of claims and seem likely to permit intervention and joinder of third parties over the objection of existing parties.

This "non-consensual approach" is more frequent in arbitration rules related to specific industries, such as construction, commodities, securities, or maritime. For Example, AAA Construction Industry Arbitration Rules and Mediation Procedures Including Procedures for Large, Complex Construction Disputes has expressed provision in relation to consolidation or joinder even without consent.[78] The AAA New Jersey Residential Construction Lien Arbitration Rules[79], the AAA Supplementary Procedures for Securities Arbitration, art. 2 (The demand or answer may assert a third-party claim against another party, if the third party is obliged to arbitrate the subject of that party's claim under these rules. The arbitrator is authorized to resolve any dispute over such joinder,)[80] the New York Stock Exchange Arbitration Rules Art. 612(d)

Here, of course, during mandatory joinder or intervention, it could be argued that the consensual principle is not actually violated, even when the rules allow for multiparty proceedings on a non-

[77] Ibid

[78] American Arbitration Associations[here in after, AAA), *Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes),* R-7,available at, http://www.adr.org (last accessed May 20/2018)

[79] AAA, *New Jersey Residential Construction Lien Arbitration Rules,*2012,Art.8,Available at, http://www.adr.org (last accessed May 20/2018)

[80] AAA, Securities Arbitration supplementary procedures ,1999, art 2, Available at, http://www.adr.org (last accessed May 20/2018)

unanimous basis. Because, the fact that, the parties have initially referred to a set of arbitration rules in their arbitration agreement means that they have consented to all the provisions included therein. In fact, it is arguable whether all parties agreeing on a set of rules are perfectly aware of the existence of non- consensual third-party mechanisms.

2.6.3 From National Laws and experience on Arbitration

2.6.3.1 Netherlands code of civil procedure

In Netherlands, the arbitration rules are found within its code of civil procedure. The Netherlands is among the few states to address third parties' participation in arbitration.

Because, according to the Code of Civil Procedure of Netherlands at the written request of a third party who has an interest in the outcome of the arbitral proceedings, the arbitral tribunal may permit such party to join the proceedings, or to intervene therein and the arbitral tribunal shall send without delay a copy of the request to the parties. In addition, a party who claims to be indemnified by a third party may serve a notice of joinder on such a party and copy of the notice shall be sent without delay to the arbitral tribunal and the other party.[81]

But here, the joinder, intervention or joinder for the claim of indemnity may only be permitted by the arbitral tribunal, having heard the parties, if the third party accedes by agreement in writing between him and the parties to the arbitration agreement.[82]

Regarding the procedure to be followed after joinder and intervention, unless the parties have agreed there on the power is vested to the arbitral tribunal to determine the further conduct of the proceedings (relating to coast, appointment or approval of arbitrators, claim and answers, and other procedures)[83]

One of the most novel aspects of the Netherlands Act is its approach to consolidation of arbitrations. If two (or more) arbitrations are taking place in The Netherlands and are somehow "connected," then they may be consolidated by request of one of the parties (unless the parties

[81] Netherlands code of civil procedure, Art 1045, available at, www.nai-nl.org (last accessed at April 15/2018)
[82] Ibid
[83] Ibid

agree otherwise), even over the objection of other parties.[84] Thus, this is a good innovation for joinder and intervention of third parties, because a liberal consolidation policy could eventually lead to liberal treatment of third parties.

To order consolidation or merger of different arbitration proceedings the Netherlands has standards. Accordingly, it may be ordered in so far as it doesn't cause unreasonable delay in the pending proceeding; as long as the arbitration proceedings are so closely connected; as long as it leads to good administration of justice in terms of hearing and decision and to avoid irreconcilable decisions from separate proceedings.[85] These standards can also be used to order third parties in arbitration.

Plus, in the Netherlands Act consolidation provision, the issue of consolidation is decided by a court at a very early stage, thus avoiding the possibility that the award will be set aside later on the grounds that the arbitrators exceeded their authority by consolidating the arbitrations. This will avoid unnecessary cost and delay if the consolidation order is overturned.

2.6.3.2 Switzerland's rule of international arbitration

Switzerland is among few jurisdictions which are friendly and recognize third parties participation with in arbitration. Because, Switzerland's rule of international arbitration, 2012(Art 4(1) and (2) provides liberal consolidation of arbitrations even with new parties and participation of third parties through intervention and joinder are expressly allowed.

According to Article 4(2) of the Swiss Rules;

"Where a third party requests to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable."

[84] Id.,Art.1046; Here, unlike Art.1045 multiparty proceedings will not require the consent of all parties and the agreement of one of the party and third party to be joined will suffice
[85] Ibid

In addition, According to Article 4(1) of the Swiss Rules, the Chambers (the administrative body) taking in to account all circumstances, including the links between the two cases and the progress already made in the existing proceedings can order consolidation of arbitrations even with new parties.

Thus, unlike the other institutional rules, under the Swiss Rules there is no requirement of consent of parties at the time of joinder or intervention. Consequently, none of the parties can object if a third party is willing to join the arbitration proceedings. In fact, it needs taking into account all circumstances it deems relevant and applicable. Thus, it is clear that parties electing these rules are deemed to have already consented to the intervention of third parties, and cannot thereafter object if a third party applies to join the proceedings.

Under the Swiss Rules, the decision to allow a third party to intervene in a pending arbitral proceeding is at the discretion of the tribunal, which should consult with all parties and take into account all relevant circumstances, and the power to decide on consolidation is provided to the chamber (administrative body).

Among the circumstances that may be taken into account in the exercise of a Swiss Rules arbitral tribunal are, inter alia, the object of the contract, the intensity of the relationship of the third party toward the object of the contract, the links between the already pending claim and the claim raised by or made against the third party, the role a party has played in the negotiation or performance of the agreement, the existence between the parties of a community of obligations and interest, procedural efficiency, confusion and fraud.

Here, it can be said that the Swiss Rules provide a flexible approach to third parties participation which is friendlier to the extension of arbitration agreements.

To see the practice, in its landmark October 2003 decision, the Swiss Federal Tribunal considered the extension of an arbitration agreement to a non-signatory as admissible when the given the third parties' significant involvement in the performance of the contract is

demonstrated, it was fully aware of its contents. Here, the Swiss Federal Tribunal took a more liberal approach to non-signatories in 2003.[86]

In this case, three Lebanese companies (X, Y and Z) entered into a construction contract containing an arbitration clause. When a dispute arose, Z commenced proceedings against X, Y and Mr. A (who was not a party to the agreement), claiming that Mr. A actively participated in the negotiations and performance of the contract. The Federal Tribunal held that the fact that Mr. A owned companies X and Y, held the construction permit for the works under the contract between X, Y and Z and represented the relevant construction project personally in the media were not sufficient grounds for extending the arbitration agreement to Mr. A. However, the Federal Tribunal, applying the principle of good faith, bound Mr. A to the arbitration agreement because he was actively involved in both the management of X and Y and the actual performance of the contract with Z.

Accordingly, here it can be understood that Swiss law and courts are open for third parties in arbitration (even absent the express consent of all parties involved), but do not generally extend an arbitration agreement to non-signatories and the extension of the binding nature of arbitration to non-signatories in Switzerland depends on strong connecting factors such as the role played by the non-signatory in the performance of the agreement containing the arbitration clause.

2.6.3.3 USAs experience; specially the South Carolina uniform arbitration act and Utah arbitration act

In the United States, international arbitration is addressed at the federal level through the Federal Arbitration Act (FAA). Various states have also passed their own international arbitration measures, which apply to the extent that they do not conflict with the FAA. The FAA is silent on the issue of intervention and joinder, state statutes appear to be permitted to fill the gap. But, the revised uniform arbitration act under section 10 allows, unless otherwise agreed or prohibit

[86] (Y.S.A.L. v Z Sarl ATF 129 III 727-4P.115/2003),Available at, http://www.swissarbitrationdecisions.com (last accessed at May 5/2018)

consolidation, the court to order consolidation of separate proceedings based different agreement, between the same parson or one of them is a party with third party.[87]

Because the U.S. statute on arbitration is not very explicit, there is a discernible link between arbitral procedure and civil procedure, and some elements of U.S.A civil procedure have been incorporated into international arbitration taking place in the United States. U.S. law on arbitration seems to be standing in favor of consolidation where common issues of law and fact exist and, for the most part, this policy has been based on efficiency, economy, expedience, and equity.[88] In addition, mostly through interpretation, courts address intervention and joinder as of right, at least in the context of domestic arbitration and usually they use the standard as it is in civil litigation.[89] Cases often deal with the review of arbitral awards and whether non-parties to the arbitration are allowed to intervene in the appeal, even though they are not technically bound by the award.[90]

In USA, at the state level, two jurisdictions, South Carolina and Utah, have passed legislation providing for joinder of necessary third parties to arbitration. Here, the Utah Uniform Arbitration Act 2008, art. 78B-11-111, even if it doesn't expressly provide rules relating third parties, its rule of Consolidation of separate arbitration proceedings allow for the court upon motion of a party to order, unless parties agreed otherwise, consolidation of separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person. The law also provides grounds for merger and these conditions are when the claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions; the existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.[91] Thus, if the above

[87] USA, Revised uniform arbitration act, 2000, section 10 ,available at, www.uniformlaws,org (last accessed May 12/2018)
[88]Strong, S.I, supra note.,6,p.959
[89] Id., p.960, Here, courts use the US Federal Rules of Civil Procedure art 24 for intervention and article 29 for joinder.
[90] Ibid
[91] Utah Uniform Arbitration Act, 2008, art.78B-11-11,available at, http://le.utah.gov/xcode/Title78B/chaptr11/c78B-11.pdf (last accessed April 23/2018)

conditions fulfilled, the law seems to be open for third parties in participation of arbitration in which it is not a signatory.

In USA, the South Carolina uniform arbitration act (section 15-48-60),[92] allows participation of third parties. The act provides that up on application to the arbitration panel, by a party, a third person shall be joind as a party in the arbitration if: in the absence of third person complete relief cannot be achieved among those already existing parties; third party claims an interest relating to the subject of the action and is so situate that the disposition of the action in his absence may as practical matter impair or impede his ability to protect that interest; or lead any of the persons already parties to a substantial risk of incurred double, multiple or otherwise inconsistent obligations by reason of third party's claimed interest. It also provides that any person joind as a party to the arbitration shall have the same time to answer which was given to the initial defendant in the case. Thus, if the above conditions fulfilled, participation of third party is open in arbitration and if third party participation will denied, opposition can be brought and this may be also ground of change of award by arbitrators and this also can be ground of appeal to the court.[93]

Generally, the South Carolina law does not require the party being joined to consent to the process. The Utah law avoids this problem by requiring joined parties to be "a party to the arbitration agreement." However, neither, provisions discuss the right of a non-party to intervene in the arbitration and the Utah law, by requiring a joined party to be a signatory to the arbitration agreement, may preclude intervention by a stranger to the contract.

2.6.3.4The France Experience

The French law on international arbitration contains no provisions specifically permitting domestic courts to intervene in the arbitral process, suggesting that joinder of or intervention by third parties would not be possible absent consent of the parties. However, the courts do have the ability to grant interim relief (on an urgent basis), in accordance with the corresponding rules of civil procedure, without affecting the ultimate determination of the dispute.

In France as an interim measures it is possible that a third party to the arbitration agreement to join the arbitration proceeding either as a claimant or a respondent under the "group of companies" doctrine and according to this doctrine, if a party-signatory to the arbitration

[92]South Carolina code, title 15 chapter 48 uniform arbitration act, available at, http://www/lawserver.com/law/state/sauth-carolina (last accessed April 23/2018)

[93] Id.,sec.15-48-100 and sec.15-48—200(6)

agreement is part of a group of companies then the arbitration agreement shall be extended to one or more companies in the same group. However, in France the arbitration courts have only agreed to extend arbitration agreements to another company (third party) in the same group if the third party has played a part in the conclusion, performance or termination of the contract containing the arbitration agreement and if it was the common intention of the parties that the third party shall be bound by the contract and the arbitration agreement within it.[94] In addition, "assignment" doctrine and the doctrine of "incorporation by reference" have also been accepted by the French courts.[95]

Here, the first and best-known case applying the group of companies' doctrine is Dow Chemical Group v Isover-Saint-Gobain case.[96] In Dow Chemical, two companies within the Dow Chemical group (Dow AG and Dow Europe) each entered into distribution agreements with a number of companies whose obligations were assumed by Isover-Saint-Gobain. Each agreement contained an arbitration clause. When a dispute arose, the two Dow Chemical companies that signed the agreements together with their American parent (Dow USA) and its French subsidiary (Dow France) (which are non-signatories) commenced arbitration against the Isover-Saint-Gobain. Then Isover-Saint-Gobain objected to the claims brought by the non-signatory claimants, but the tribunal (the ICC) rejected the objection after finding that:

- The non-signatory companies had in fact made all the deliveries to Isover-Saint-Gobain under the agreements.
- The relationship could not have been formed without the approval of the American parent company.
- The American parent had absolute control over those subsidiaries that were directly involved or could contractually have become involved in the performance or termination of the distribution agreements.

The tribunal therefore concluded that, given the role the non-signatories played in the transactions, the non-signatories were de facto parties to the contracts and could invoke the arbitration clauses contained within them.(here its base is also an impliedconsent theory)

[94] ICC,(Dow Chemical Group v. Isover-Saint-Gobain Case No.4131, Interim award, Sept. 23, 1982). available at, http://www.trans-lex.org/204131/_/icc-award-no-4131-yca-1984-131-et-seq-/
[95] Ibid
[96] Ibid

Then since the arbitration was ICC arbitration in Paris, the Isover challenged the ICC findings before the court of appeal in Paris; the court finds that it is not contrary to the agreement since the non-signatories played an important role in the performance of the contract. Thus, the Paris Court of Appeals also accepted the award.

Like the Dow case, in the Dallah case[97], ICC arbitration to third parties and the French Supreme Court cassation bench also accepted (affirmed) the award. Here, the group of companies' doctrine was also found to bind a non-signatory to arbitration in the Dallah case. The Paris Court of Appeals dismissed an application to set aside an ICC award rendered in Paris, thereby rejecting the argument by the government of Pakistan that it was not a party to the arbitration agreement signed by a Saudi Arabian company (Dallah) and a trust established by a Pakistani presidential ordinance and affirmed the extension to the Pakistan government which was non signatory. The Paris Court of Appeals considered the Pakistani government's involvement in the pre-contractual dealings with Dallah and in performing and terminating the agreement. It found that the government had behaved at all times as if it were a "true party" to the agreement, rather than the trust. Further, the trust had expired and therefore ceased to exist before the arbitration.[98]

Thus, the Dallah case applied in Dow Chemical, that an arbitration agreement may be extended to a non-signatory based on an implicit intention of the parties that such non-signatory be bound, as evidenced by the non-signatory's involvement in various phases of contract formation and performance. Under certain circumstances, French law also permits the application of an arbitration agreement signed by a company to the (non-signatory) individual who controls that company when the non-signatory individual was the sole decision maker for a group of companies or when fraudulently used the corporate veil of the companies to avoid paying creditors for debts incurred for his benefit. Thus, the court through piercing the corporate veil principle also extends arbitration to third parties.

In addition, in France arbitrators are not bound by procedural rules established by the courts, thus, arguments for joinder or intervention based on an analogy to judicial civil procedure will be

[97](Government of Pakistan, Ministry of Religious Affairs v Dallah Real Estate and Tourism Holding Company (17 February 2011) (CA Paris), available at,www.arbitrtion-icca.org (last accessed May 10/2018)
[98] Ibid

difficult.[99] However, the French Code specifically states that the guiding principles of litigation, as setforth in certain specific articles shall always be applicable to arbitral proceedings.[100] Among these guiding principles is the notion that the object of the dispute may be modified by incidental claims provided they are sufficiently connected to the original claims and this suggests that joinder of claims, if not parties, is possible. However, in the right circumstances, joinder of additional claims might require the participation of additional parties and then will be accepted.

Another of the "guiding principles" of French litigation is the notion that "no party may be judged unless it has been heard or summoned." This would appear to mean that a significant, though indirect, effect on an absent third party would also be impermissible and later can oppose the award and participate in the process.

2.6.3.5 Belgium experiences

The national laws of Belgium also provide for joinder and intervention mechanisms. Thus, according to Article 1709 of the Belgian Judicial Code any interested third party may request from the Arbitral Tribunal an ex parte intervention in the proceedings and a party may also be call upon a third party to intervene in the proceedings. However In any event, the admissibility of such interventions requires an arbitration agreement between the third party and the parties involved in the arbitration. That agreement is subject, moreover, to the unanimous consent of the Arbitral Tribunal.[101]

Thus, Belgium is open for third parties in arbitration, but it requires agreement of the all parties and unanimous consent of the arbitral Tribunal. However, unless otherwise agreed by the parties, the arbitral tribunal has discretion to order any interim or conservatory measures it deems necessary.[102] Thus, if it thinks in the positive it may order participation of third parties. Otherwise, if intervention or joinder refused or denied and the arbitral tribunal has exceeded its

[99] France Arbitration Rule,2011, Article 1464,available at, www.sccinstitute.com (last visited may 10/2018)
[100] Ibid
[101] Belgian Judicial code, 2013, art 1709,available at, www.cepani.be/en/arbitration/Belgian-judicial-code-provisions (last visited May 5/2018)
[102] Id.,art.1691

powers, or the subject matters' scope widened to third parties and if this may also be in conflict with public policy it may be a ground for to set aside the award.[103]

[103] Id.,art.1717; here, it doesn't requires only the application of parties, but, even third party affected may also apply to setting aside the award.

Chapter Three

Arbitration as a means of commercial dispute resolution and accommodation of third parties in commercial arbitration in Ethiopia

3.1 Arbitration as means of resolution of commercial disputes in Ethiopia

In Ethiopia, even if, the current arbitration rules enacted since 1960s, arbitration in a sense of customary means or traditional arbitration is common for a long period of time. The Ethiopian law also recognized both mediation and conciliation under the civil procedure code in addition to arbitration.[104]

For the major part of Ethiopian legal history, non-judicial dispute settlement methods played a significant role in resolving of disputes in a traditional Ethiopian society. "Shimgilina" is one of the many traditional Ethiopian dispute settlement devices which could be approximated to what is now known as arbitration.[105]In addition, Ethiopian laws used "shimigilina", "Giligil" "yezemed dagna", as it refers to arbitration.[106] Nonetheless, shimguilina seems a much wider concept than the modern notion of "arbitration". The former combines aspects of different ADR mechanisms including mediation, conciliation, and compromise and, of course, arbitration.[107] This traditional alternative dispute settlement device is still popular among the 21st century Ethiopian businesses, which often rely on it to settle disputes.[108] Hence, even it can be said that arbitration has not been unknown to the traditional Ethiopian society.

Ethiopia has not separated arbitration rules for international and domestic arbitrations as well as for commercial and non-commercial arbitrations. Currently, the main sources of Ethiopian

[104] Ethiopian Civ. C., supra note.,14,Arts.3307-3317(compromise) and art.3318-3324(conciliation)
[105]Tilahun Teshome,"*The Legal Regime Governing Arbitration in Ethiopia*", 2007, Ethiopian Bar Review, 1(2), pp. 117-118(here in after, TilahunTeshome)
[106] Ethiopian Civ. C., supra note, 14, Arts.3325-334.the civil code mostly refers Arbitration as ''Yezemed Dagna''; Civil procedure code of Ethiopia, Art.315-319; Art.350-351 and A4t 461. The Civ. Pro, c. refers confusingly Arbitration as "Giligil" and "Shimigilina", these laws refers Arbitration in Amharic Confusingly. Even, the Civil Code use "Giligil" as the Amharic equivalent of the concept of compromise in Articles 3307-3325.but, currently new laws, courts Arbitration institutions use mostly "Giligil Dagninet" to refers to Arbitration.
[107]Tilahun Teshome, Supra note.2; Fekadu Petros, "Underlying Distinctions between ADR, Shimglina and Arbitration", 2009, Mizan Law Review, 3(1), p.124
[108]AdisA beba Chamber of Commerce and Sectoral Associations Annual report of 2017, available at AACCSA. According to this annual report in one year 54 cases commercial related cases have been brought to its Arbitration Institute.

arbitration laws generally applicable (to commercial and non-commercial disputes), are the 1960 Civil Code and the 1965 Civil Procedure Code. The civil code (the main source substantive civil rules from Arts. 3325 – 3346) and civil procedure code (the main procedural base of civil cases from Arts.315 -319, Art 350-357, and Art 350-357 Art 461) brought formal rules and procedures relating to Arbitration. In addition, Art.317 (1) of the civ. Pro.C. of Ethiopia provides that the procedure to be followed in arbitration shall be as near as other civil procedure litigation provisions. So, when necessary, the Civil Procedure Code has relevance to the arbitration proceedings. There are also other laws which embrace arbitration for settling disputes, such as the Mining Operations Proclamation No. 678/2010 and the Energy Proclamation No. 810/2013, the labor proclamation No 377/97, the Family code proclamation No/2000 and the National payment proclamation No.718/20011. Besides, the bilateral investment treaties which Ethiopia signed incorporate arbitration as one means of resolving state-state and investor-state investment disputes.[109] It is, however, worth noting that Ethiopia is not a party to the Now York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

Under Ethiopian arbitration law, arbitral awards are generally binding as court decisions.[110] However, they may be either subject to appeal which is waivable, and can be setting aside, or which cannot be waived.[111] Additionally, the Federal Supreme Court Cassation Division, which is mandated with the highest judicial power and whose rulings have precedential effect, recently decides that even if parties in arbitration agree to waive their appeal right the Federal Supreme court Cassation Division has the power to review decisions of arbitral bodies for alleged basic error of law. [112]The Cassation Division declared this position in its decision in *National Mining Corporation PLC v. Dani Drilling PLC*.[113]

[109] Currently, main bilateral investment treaties that Ethiopia signed contain arbitration clauses.
[110]Civil Procedure code of Ethiopia, 1965, Negarit Gazzeta, Extraordinary issue, Decree No.52, 25th year, No.3, Art 318(2), [here in after, civ. Pro. C.]
[111] Id., Art. 350
[112] The FDRE constitution,1995,NegaritGazzeta, Extraordinary issue, proc.No.1, 1st year, No.1, Art Art.80(3)(a)
[113] Federal Supreme courts cassation decision (National Mining Corporation PLC v. Dani Drilling PLC), October 29/2003 E.C cassation Registration Number 42239, Federal Court Cassation Court decisions No 10

Regarding enforcement of foreign arbitral awards, they can be enforced in Ethiopia subject to the conditions incorporated in the Civil Procedure Code, which include reciprocity and legality of an arbitral award.[114]

In practice, currently settling commercial or business relating disputes with arbitration is becoming common like the rest of the world. Specially, commercial arbitration is becoming common at regional and intentional level with multiparty and contracts (complex) transactions and this is also true in Ethiopia. Currently, arbitration is becoming familiar with business communities in Ethiopia. Moreover, as a seat of African Union, UN Economic Commission for Africa and many countries' Embassies, Ethiopia has potential to be the best forum for arbitration in Africa. However, the rules have not been updated since 1960s and the practices of arbitration in ad hoc and institutional arrangement are under development.

Currently, in Ethiopia the need to settle commercial disputes through arbitration is becoming growth.[115] Institutions are becoming established; the Arbitration Institute of the Addis Ababa Chamber of Commerce and Sectoral Associations (here in after; AACCSAA-CI) and Bahir Dar University Arbitration Center (which is under arrangement not that much active), Arbitration Center of the Ethiopian Chamber of Commerce and Sectoral Association which is infant and under experience sharing have been established.[116] Improvements with institutional arbitration are also indicative of the current trend toward a better utilization of arbitration in commercial disputes. These arbitral bodies primarily target at the business community as potential clients for their services. Moreover, as these institutions can accept cases involving foreigners, they can eventually perhaps play a significant role as an alternative center for commercial arbitration that involves transnational transactions as well.[117] Apart from institutional arbitration, many commercial related cases are also settled through *ad-hoc* arbitration in Ethiopia and they are becoming common. In general, somehow, it can be said that even if they are not developed, Ethiopia has legal and institutional frameworks through which commercial disputes may be resolved by arbitration, instead of litigation through national courts.

[114] Civ. Pro. C., supra note.,110, Arts.456-461
[115] Supra note.,108
[116] Ethiopian Chamber Of Commerce has established Arbitration Center, recently, its Establishing Rule Approved, in march 2018
[117] Interview with Yohanis W/Gebreal, Director of The AACCSA Arbitration Institute, on participation of third parties in Ethiopian Arbitration system, May 2018.[here in after; AtoYohanis]

3.2 Third parties in Ethiopian commercial Arbitration

As stated in part one, in Ethiopia the base of arbitration and the arbitration tribunal is also mainly the arbitration agreement and party autonomy. Thus, because of the principle of relativity or privity of contract, arbitration is mainly considered as consensual and binding up on the parties. But, there are many instances in which third parties interest will come to picture with in bilateral arbitration arrangement, both in civil (non-business) and commercial (trade and investment) relations or transactions.

Ethiopia since it is networked with and cannot be out of the world, those possible problems that have been seen in part one in relation to existence of indispensible third parties in commercial arbitrations is also Ethiopia's experience. Currently, multiparty and contractual transactions are becoming common in Ethiopia. Doing business by Networked or multilateral companies (through both international and domestic companies) is becoming common. Foreign Direct Investment is becoming developed and International companies and individual foreigners mostly opt arbitration to settle commercial disputes.[118] In relation to commercial transactions and projects, Insurance and banks involvement as a guarantor is increasing; doing construction transactions through sub-contractors are becoming common. In labor cases outsourcing of labor activities is becoming common.etc. Thus,, third parties (non-consented and non-signatories of the arbitration agreement, but those have direct or indirect interests or connections on the subject matter) such as; guarantors, creditors, third party beneficiaries, assignees, successors, in agency relations the principals or agents, in construction contracts sub-contractors or workers, in group of companies' cases parent/holding/ or subsidiary (affiliated) companies, share or stake holders, Insurance companies in insurance cases, In outsourced labor cases workers, In property cases joint owners and the like indispensible third parties will need participation in ongoing arbitration proceedings. Thus, the issue is also at stake in Ethiopia.

In addition, in Ethiopia problems in relation to accommodation of third parties are growing. Here, there are cases in which parties request intervention, there are also a number of cases in which parties request joinder of third parties, and there are also instances in which third parties

[118] Ibid In Ethiopia Most Trade and Investment agreements or transactions with Foreigners have Arbitration Clauses.

brought opposition to set aside the award. The problem is also being common with in Arbitration Institutions.[119]

The need of third parties participation in arbitration arises in different scenarios. These are:

1. During intervention two scenarios will arise:
- ❖ When third parties request to take part in the proceeding and the parties agree; in this case since all parties considered as agreed and since it will be considered as the submission amended, it will be easy to decide and proceed
- ❖ When third parties request to take part in the proceeding and one (some) or all of the parties in the arbitration agreement objected; this is a problem

2. During joinder cases will arise in three scenarios;
- ❖ When one/some or all of the parties request the joinder of third parties. Here, if all the parties and the third parties themselves consented, this will be easy to decide since the arbitration agreement will be considered as amended.
- ❖ When some of the parties requested joinder and some of them objected, this will be a problem even the third parties requested to be joined consented
- ❖ When one or some of the parties request joinder of third parties in the proceeding and some or one of the parties and the third parties themselves objected, this will be difficult.

3. During opposition the case will arise in two scenarios;
- ❖ If third parties object the awards and the parties object the jurisdiction of the tribunal, this need solution.
- ❖ If third parties object the award and all consented to be adjudicated by the tribunals, this will not be problem as the tribunal obtained agreement.

The above scenarios are common and becoming to be increased because of the growing of multilateral parties and contracts, multilateral corporations, transnational and affiliated companies, networked and connected related transactions.

In practice there are also real cases both within Ad-hoc and Institutional arbitration arrangements and there are also court cases in relation to participation of third parties in arbitration. So, it can be said that the need of third parties participation in commercial arbitration is becoming growth. The practice is not uniform along tribunals and the court itself, later it is discussed in detail.

[119] Ibid.; Interview with Ato selam setegn, Director of ECCSA Legal and Arbitration Service, on participation of third parties in Ethiopian Arbitration system, May 2018. [here in after; interview with Selam Setegn] There are also decided and pending practical cases

3.3 Whether and how accommodation of third parties is possible in Ethiopian commercial arbitration system

3.3.1 Third parties under the arbitration rules

As repeatedly stated, the main sources of Ethiopian arbitration rules both for the commercial and non-commercial arrangements are the civil code (the main source substantive civil rules from Arts. 3325 – 3346 Civ. C.) and civil procedure code (the main procedural base of civil cases from Arts.315 -319, Art 350-357, and Art 350-357 Art 461 of civ. Pro. C.). However, relating to the accommodation of third parties (through joinder, intervention before the award made and bringing opposition of the award) neither substantive nor procedural arbitration rules of Ethiopia expressly stipulate mechanisms.

Here, Art.3325 (1) of the civil code the base provides that *"the arbitral submission is the contract whereby the parties to a dispute entrust its solution to a third party, the arbitrator, who undertakes to settle the dispute in* ***accordance with the principles of law****.* (Emphasis added).

Thus, since Arbitration is required to be entertained based on the principle of the law, even if it is contract based, just like litigation it is decisional not negotiation based. Plus, based on the above assertion "*…in accordance with the principles of law" it* can be said that the procedure to be followed is also required to be in accordance with the law that allows participation of third parties. But, from the close reading of Art 3329(1) and Art 3325(1) of the civil code, it can be construed that the jurisdiction of the Arbitrators is limited that shall be interpreted restrictively. Plus, even courts will appoint Arbitrators during failing agreement between the arbitrators.[120] The law even seems focus on bilateral arbitration arrangements. Because, the provisions even do not provide rules and procedures in relation to appointment of arbitrators in case of multiparty disputes.[121] Thus, from the close reading of the substantive Arbitration rules of the civil code (from Art 3325-3346), it can be conclude that in the substantive Arbitration rules there is no any provision relating to protection of the rights of third parties or their participation. Plus, the law itself seems restricting tribunals' power up on the arbitration agreement.

[120] Civ. Pro. C., supra note.,110,Art.3332(3)
[121] Ibid

Whereas, relating to the procedure to be followed by the arbitration tribunal Art 3345 (1) (2) of the civil code gives Reference to Civil Procedure Code. It provides that *"the procedure to be followed by the arbitration tribunal shall be* ***as prescribed by the Code of civil procedure.*** *And the same shall apply to matters arising out of the execution of the award or to appeals against such award*."[122](Emphasis added)

Based on this provision, when we come to see our civil procedure law provisions relating to arbitration, concerning the participation of indispensible third party in arbitration, like the substantive Arbitration rules of the civil code, under the procedural Arbitration laws (The Civil Procedure Code, from Arts.315 -319 the procedure to be followed on arbitration, Art 350-357 which are provisions relating to appeal and setting aside grounds of arbitral award and Art 461 of civ. procedure code the provision relating to the execution of foreign awards in Ethiopia.), there is no any expressed provision as to the participation and protection of third parties in Arbitration, rather they emphasized on parties right and duty and procedures to be followed in case of bilateral arbitration agreements.

Regarding the application of the ordinary litigations, particularly, Art 317 provides that;

(1) *The procedure before an arbitration tribunal, including family arbitrators,* ***Shall, as near as may be, the same as in a civil court.****[Emphasis added]*
(2) *The tribunal shall in particular hear the parties and their evidence respectively and decide according to the law unless by the submission it has been exempted from doing so.*
(3) *Summonses may be issued for the attendance of witnesses who may be sworn: Provided that, where a witness fails to appear in answer b the summons, either party may apply to the court for the issue of summons. In which case the provisions of Arts. 111-121shall applies.*
(4) *When a party, who has been given the opportunity to be heard and produce his evidence, fails to do so, the tribunal may give its award in default.*

But, the referring provision, Art.317 (1) of the civ. Pro. C. by itself is arguable. Because, it states that "*The procedure before an arbitration tribunal, including family arbitrators, Shall, as near as may be, the same as in a civil court. [Emphasis added]* Thus, what does the phrase "as near as

[122] Id., Art.3345(1)(2)

may be" sated under art 317(1) refers to, is it mandatory or optional? Does it apply to parties in agreement only or is it mandatory to apply ordinary provisions of the civil code and extend the arbitration proceeding to non-parties through joinder and intervention even over the objection and otherwise agreement?, while the law itself mainly gives the base and choice to parties' agreement. It is unclear.

But, coming to the regular civil proceeding rules relating to protection of third parties, generally, the civil procedure code ; from Article 35- 43, including and Art 358 and 418 provides mechanisms in which third parties interest, as well as, parties interest on third parties will be accommodated in regular civil proceeding; through mandatory and optional joinders, intervention mechanisms, public prosecutor intervention, interpleader, and then opposition right(both right to oppose the decision and order of injunction). So, in the regular civil cases (litigation), relatively, it can be said that from pre-trial stage up to the execution of decision, third parties interest are somehow protected, parties interest over third parties somehow also can be protected.

3.3.2 Third parties under the civil code and civil procedure codes ordinary provisions

In principle, because of privity of contract or relativity of contractual agreements, contract is a law up on the parties and cannot bind third parties.[123]But, exceptionally there are scenarios by which third parties will be participant .the civil code in relation to assignment, succession, guarantors, subrogation, and third party beneficiaries.[124]Arbitration is based on expressed writing agreement and binding up on the parties so even if the substantive law is silent can the general contract law principles are applicable? In this case, as arbitration is a contract through interpretation it can be said that such third parties will be participated since the general rules of contract law can be applied to special contracts up on Art 1676 of the civil code.[125] However, somehow, even if it seems logical, the code itself under its special arbitration rule provides that arbitration powers/jurisdictions under the arbitration agreement shall be interpreted

[123] Civ. C., supra note.,14,Art.1731
[124] Id., Arts.1952-2000, provides about third parties in relation to contracts.
[125] Id.,Art.1676(2)

restrictively.[126]Thus, this is arguable, plus, even if it may be used to extend arbitration to some third parties such as successes, assignees, it will not be solution to other types of third parties which have interrelated but separated interests.

Coming to see participation of third parties in litigation the civil procedure codes' ordinary provisions[127] seems the following: According to the civil procedure code of Ethiopia, litigation proceedings are based on the existence of vested interest of the claimant over the subject matter of the suit.[128] Thus, In relation to multiparty proceedings Art 35 -43 of the cpc provides the procedures to be followed in litigation proceeding.

In relation to joinder of claimants under Art.35 it is provided that:

"All persons in whom any right to relief in respect of or arising from the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, may be joined in one action as plaintiffs where, If such persons brought separate actions any common question of law or fact would arise"[129]

Accordingly, weather in the same or series/related/ transaction if different persons brought separate actions any common question of law or fact would arise; those persons can join and brought action against one or more persons.

In relation to joinder of defendants, art 36 C.P.C provides the rule by which a number of defendants may be joined in a single suit. In this kind of joinder, one plaintiff or plaintiffs entitled to join under Art. 35 C.P.C can sue more than one defendant. Here, there are a series of different rules governing joinder of defendants. Among other things, Art. 36(3) Where a suit concerns property administered by several trustees, executers or administrators, and (4) concerns recovery of immovable property occupied by many occupants) deal with indispensable and conditionally necessary parties, and Art. 36(1), (2) when the case arises from the same contract,

[126] Id.,Art.3329
[127] The term "Ordinary provisions" here is used to refer to provisions which are out of the provisions relating to Arbitration (art 315-319, art 350-357 AND art 461).
[128] Civ. Pro. C., supra note110.,Art.33(2)
[129] Civ.pro. c., supra note.,110,Art.35

and (5) Where the plaintiff is in doubt as the person from whom he is entitled to redress deal with permissive joinder.[130]

Thus, According to the civil code, where two or more plaintiffs are joined, their claims must arise from the same or series of transactions and there must be a common question of law or fact. And where two or more defendants are joined, there must be a common question of law or fact, or all the defendants must be parties to the same contract, or the plaintiff must be in doubt as to the person against whom he is entitled to a relief. However, the civil procedure Code does not expressly deal with the question of mandatory joider except in cases of Art.36 (3) and (4) which requires the joinder of parties in certain cases, and Art. 40(2) which provide discretion to the court to order joinder of indispensible third parties whose presence is necessary for the determination of all the questions involved in the suit.

Regarding, the time, Art.39 (2) of the civ. Pro. C. provides that

"Any objection on the ground of misjoinder or nonjoinder of parties shall be raised <u>at the earliest possible opportunity</u> and any objection not so raised shall be deemed to have been waived"[Emphasis added]

Accordingly, the court opts earliest time to request joinder or intervention issues

In relation to joinder, courts have discretion to add indispensible third parties in to the suit*; accordingly Art 40(2) provides that;*

"The court may at any time, of its own motion or on the application of either party and on such terms as it shall fix, order that the name of any party improperly joined as plaintiff or defendant be struck out and that there <u>be added the name of any person who ought to have been joined as plaintiff or defendant or whose presence is necessary for the determination of all the questions involved in the suit:</u> Provided that no person shall be added as plaintiff without his consent"[131](emphasis added)

[130]Sedler, Allen Robert, *Ethiopian civil procedure*,1968,Hilesilasie1st University, Addis Ababa,Ethiopia,p.77 [here in after; sedler]
[131] Civ. Pro. C., supra note.,110, Art 40(2)

Thus, the court at any time has discretion to add indispensible third party as far as their presence is necessary for the determination of all the questions involved in the suit.

In addition, relating to Joinder of third party, Art 43(1) (4) provides that;

"(1) Where a defendant claims to be entitled to contribution or indemnity from any person not a party to the suit, he may in his statement of defense show cause why the third party is liable to make contribution or indemnity and the extent of such liability and apply to the court for an order that such person be made a party to the suit.

(4) The provisions of this Article shall apply by analogy where a defendant claims to be entitled to contribution or indemnity from any other defendant in the suit: Provided that nothing in this sub-article shall prejudice the plaintiff against any defendant in the suit."(Emphasis added)

Thus, according to these provisions, where a defendant claims to be entitled to contribution or indemnity from any person even a party to the suit, defendants can request joinder of third parties or even other concerned party to the suit. Here, the provisions relating to third party defendant provide an effective device which all claims arising from the same basic transaction can be determined in a single suit.[132] So, Impleader is proper only when the defendant shows that he is entitled to contribution or indemnity from a third person.[133]

In relation to intervention by third parties, in Ethiopian Civil Procedure law; it is allowed for interested third party at any time before judgment. Because, Under Art.41 (1) of CPC it is provided that

"Any person interested in a suit between other parties may intervene therein at any time before judgment."[134]

Thus, here what mater is existence of alleged interest in a suit otherwise it is allowed at any time before judgment. But, here, the fact that the intervener could have been joined as plaintiff under Art 35 or been joined as defendant under Art 36 does not necessarily mean that he is entitled to intervene in an action to which he was not an original party. The crucial point is whether one is interested in a suit between other parties. Art 41 of the civ. Pro. C. requires that the intervener be interested in the suit that has been filed between other parties; it does not permit him to add his

[132] Sedler, supra note.,130,p.92
[133] Id.,p.93
[134]Civ.pro.c., supra note.,110,Art.41(1)

own independent claim to that suit merely because he could have originally joined that claim. In this case, it will be of no interest to the intervener whether the original party plaintiff is successful or not.[135] Therefore, where the intervener seeks independent relief on his own claim and when he is not interested in the subject matter of the suit between the original plaintiff and the defendant, he is not entitled to intervene under Art 41of the civil procedure code of Ethiopia. Thus, one test that has been proposed to determine whether intervention is proper is either the intervener will gain or lose by the direct legal operation of the judgment to be rendered in the suit between other parties.[136] If that is the case, then he would be said to be interested in the subject matter of their suit, in relation to intervention of third parties, under Art.42 of the civ. Pro. C. it is provided that the public prosecutor in case when it deems necessary to intervene, can be intervene in civil matters, mainly for public purpose.

In addition, under the civil code of Ethiopia third parties can also object the decisions given by the court when it affects their interest, In relation to this, the civ. Pro. C. under Art.358 provides that:

***"Any person** who may or could have been made a party to a suit and whose interests are affected by a judgment in a suit may file an opposition to the judgment before the judgment is executed."*[137] (Emphasis added)

Accordingly, third parties, even if it became after the judgment but before execution, can challenge the decision of the court which has been given in their absence. There for, Indispensable third parties under Art.41 or third party defendants under Art.43 and, art 40 persons whose presence is necessary for the determination of all questions involved in the suit and other real-parties-in interest; those parties whose interest could be affected, and should have been made parties to the suit can bring opposition to the court against the decision.[138]

In addition, based on the civil procedure code art.418, third parties during attachment made by the court can bring objection or opposition to the court showing that it has interest. In this case

[135] Sedler, supra note.,130,p.97
[136] Ibid
[137] Civ. pro. c., supra note.,110,Art 358(1)
[138] Ibid

the court will decide on claim and objection as based on Arts.420 and the following articles of the civ. Pro. C.

In general, the Ethiopian civil procedure code provides some provisions relating to mandatory joinder of plaintiff (Mandatory joinder of plaintiffs is not the rule, though.)and defendant as well as intervention of indispensible third parties. Thus, based on our civil procedure code when the requirements meet, there will be joinder of plaintiff as well as defendant (including mandatory joinder) and intervention of third parties.

In addition, third parties can also bring opposition to set aside the judgment before execution and even can oppose and bring application when the property in which they claim interest ordered to be injected.

So, as discussed in part one these arrangements will expand the scope of the civil action and its enforcement and it has the advantage of, among other things, administering justice as efficiently, economically, and avoids multiple suits and to some extent avoids inconsistency of judgments.

But, because of the nature of arbitration are all these devises binding in arbitration before the tribunal over the objection/disagreement. Let see next

3.3.3 Weather and to what extent the ordinary litigation provisions of the civil procedure code relating to third parties will be applied to Arbitration

Regarding whether third party indispensible can join or intervene in ongoing arbitration proceeding or challenge the award through opposition , Art 317(1) can be invoked and said that why not the normal civil procedure provisions relating to joinder, intervention and opposition of third parties are applied in arbitration proceeding.

However, the referring provision, Art.317 (1) of the civ. Pro. C. by itself is arguable. Because, it states that "*The procedure before an arbitration tribunal, including family arbitrators, Shall, as near as may be, the same as in a civil court. [Emphasis added]*

Thus, what does the phrase "as near as may be" sated under art 317(1) refers to, is it mandatory or optional? Does it apply to parties in agreement only or is it mandatory to apply ordinary

provisions of the civil code and extend the arbitration proceeding to non-parties through joinder and intervention even over the objection and otherwise agreement?, while the law itself mainly gives the base and choice to parties' agreement. It is unclear and arguable.

In addition, Even if Art 317(1) provides that arbitration procedures shall be as near as civil proceedings, the law itself seems opting to gives parties autonomy to choose the procedure. Because, Art 317(2) provides that:

"The tribunal shall in particular hear the parties and their evidence respectively and decide according to law unless by the submission it has been exempted from doing so." [Emphasis added)

In addition, even if under Art.3325 (1) of the civil code arbitrators are required to undertakes or settle the dispute in accordance with the principles of law, under the same article art 3325(2) it is provided that:

The arbitrator may be instructed only to establish a point of fact without deciding on the legal consequences flowing there from. [Emphasis added)

Thus, both the substantive and procedural rules prefers to give freedom to the parties to choose what procedure arbitrators can follow and what/how matters to decide.

In addition, Under Art.3325 of the civil code it is provided that the base of arbitration is arbitration agreement or submission. Plus, the civil code under Art.3329 (2) provides that the tribunals' power under the arbitration agreement shall be interpreted restrictively. Moreover, according to Art.356 (1) of the civ. pro.c., when the tribunal trespass the scope of the parties submission or if arbitrator decided 'matters not referred to him' this is mentioned as aground to set aside the arbitration. The civil procedure code has also express provisions under the arbitration rules in relation to appeal or application of setting aside, how to hear evidence, make the award and execute awards, but, it is silent as to participation of third parties in to the arbitration proceeding through joinder or intervention. In relation to opposition to set aside the award, even if art 356(3) indicates that application of opposition to set aside the award is possible as similarly stated under Art 358, it is not clear to whom the application/opposition will

be brought, is it similar to appeal (to court) or is it as similar to Art 358 (to the tribunal)? It is not clear or expressly regulated.

Generally, all the above issues that whether how and to what extent the ordinary civil procedure (litigation) rules will be applicable on third parties or not needs expressed answer.

To elaborate these, in case of nonexistence of agreement or consent of the parties or the third party indispensable, how joinders and intervention of third party indispensable are possible and will be effective? Is it possible to order mandatory joinder or intervention with the very nature of arbitration; which is agreement based? Is it through the regular courts or through the arbitration tribunal which is instituted mainly up on/by the parties' agreement and how the tribunal or the court will entertains the case?

In addition, when existing party and third party agree, it will be relatively easy. But, even in this case, how will be the composition of the tribunal, what effects will it has on fee, choice of law and other proceedings?

Moreover, if one/more/all of the existing parties objected or if the third party that is requested to join failed to give consent, how the Arbitration tribunals will precede the arbitration? Can it render compulsory joining and intervention, while its jurisdiction is as discussed above limited, how it can do so? Can third party be ordered to be joined without his consent in the tribunal that instituted up on/by other parties' agreement? The question should be also answered even for the regular courts; can they even order third person to be joined in ongoing arbitration proceeding without his consent, will it not affect the right of third parties to be adjudicated in ordinary courts.

If the answer will be positive, means that if it is said that Arbitration tribunal or the court can decide joinder or intervention of third party; how can the Arbitration tribunals forced third party? What implication will it has on composition, fee, choice of law and procedure and the like? Because, especially in mandatory joinder or intervention the parties will most probably disagrees on the fee, choice of law, composition of tribunal and it will need some rearrangement.

If the answer will be in the negative and the tribunal cannot order joinder, intervention and acceptance of opposition; what will be the fate of third parties' rights and interests which directly

or indirectly will be affected by arbitration award? In fact, Arbitration contract will not be binding on third parties (but, it is equal to ordinary courts' decision and decrees)[139], so, will it not create duplication of cases in courts or arbitrations tribunals over the same subject matters, even will it not affect the third party at least indirectly, will it not create latter possibilities of having inconsistent decisions, Will it not made the execution complicated? Indeed, it will.

In addition, by invoking Art.353 (3) cum. Art.358 of civ. Pro. C., some argues that third party cannot join or intervene without agreement, but after the award is given the party or third party interested can request setting aside or opposition on the ground that there is irregularity and injustice.[140] However in this case, to which body can the third party submits its opposition; to the Arbitration tribunal or to the court and what will be its effect? Because, hear it is stated that the application of opposition is similar with appeal)[141]. Plus, if it can be said that third party can submit application to the court as per art 358 of the CPC, What will be its effect? Moreover, if the court remands the dispute to Arbitration tribunal, how third party be compelled to take his case before the tribunal in which he had not say, how could be the composition, fee, choice of law, the procedure and the like rearranged? All the above questions need to be addressed.

Therefore, as stated above, on one side, based on Art 317(1) of civ. pro. c., it can be argued that since arbitration is required to be proceeding as similar as the regular civil courts, joinder and intervention of third parties and opposition of the award later is possible within the tribunal. However, as this paper try to show above, because of the very nature of Arbitration (the limited powers of tribunals on agreement), there is lack of clarity: even Art 317(1) is not clear whether it is binding and applies to third parties; in relation to the power of the Arbitration tribunal to render compulsory intervention or joinder and to accept opposition over its award; and as to the rule and procedure to be followed after joinder or intervention (if any) on composition of Arbitrators, allocation of fee and relating to choice of law and procedure.

In addition, in case of opposition of the award by third parties, there is no clarity to which application can be brought, if application can be brought before tribunal there is lack of clarity as

[139] Ethiopian Civ. C., supra note, 14, Art.1731 cum. Civ. Pro. C., supra note.,110,Art.318(2)
[140] Interview with Ato Messele Nigussie, Judge at Federal First Instance Court, on participation of third parties in Ethiopian Arbitration system, May 2018may 2018[here in after; Messele Nigusie]
[141] Civ. Pro. C. supra note.,110,Art.353(3)

to its effect (in case of possibilities of remand) on the composition, fee, choice of law and the procedure and the like, unless third parties agreed.

Thus, based on the existence of the above issues that need to be addressed, it can be conclude that our civil procedure and civil code have not expressly provide adequate and detailed mechanisms in relation to the accommodation of indispensible third parties in arbitration, mainly in case of objection or otherwise agreement of parties or objection of third parties. So, it is controversial.

This paper has tried to see and analyze the practice in relation to how third parties are participated/ accommodated in commercial arbitration. As this study revels, with in both ad-hoc and institutional arbitration arrangements the requests to participate third parties in arbitration are becoming common. There are cases in which participation of third parties requested and decided in different manners. For example;

In one ad-hoc arbitration arrangement the tribunal refuses to extend the arbitration to third parties. Here, for its decision the tribunal justifies that the tribunal is not entrusted the power to accept and see opposition to set aside of the award from third parties.[142]

In this case w/ro Tirsit Tolosa brought an opposition to the tribunals (ad-hoc) established to see the applicants and respondents case. Here, the tribunal rejected the application or the opposition and decide that the tribunal has not power or jurisdiction to see third parties opposition. the tribunal in its decision reason out the following; the tribunal is instituted based on agreement and its power is based on the scope of the agreement; the civil procedures code Art 317(1) is optional and not apply to third parties, rather it applies only to the parties that agreed to submit their dispute to arbitration; provisions relating to opposition of decisions/awards (from art 358-360) do not expressly provide power to the tribunal to accept and see oppositions from third parties, rather these provisions apply to the ordinary courts judgment and decree; After the award the provisions allow appeal even only to the parties with limited grounds (350-357). Then, the tribunal concludes that it has no jurisdiction over third parties.

[142]Ato kidanie Yohanis and w/ro Emira ASefa (applicants) vs. Ayat share company (respondents) it raise in transaction/ sale of houses, March 12, 2008 E.C (see the attachments, the decision is attached at the end of this paper)

Then, this case brought to the Federal Supreme Court, through appeal, by the third party (w/ro Tirsit Tollosa (appellant) vs. Ato kidanie, w/ro Emira and Ayats.c (respondents)).[143] Then, the Court rejected or reversed the tribunals' decision and reason out as follows;

"In relation to the procedures to be followed in arbitration Art 3345 of the civil code refers to the civil procedure code of Ethiopia and art 317(1) of the civil procedure code provides that procedures in arbitration ***Shall, as near as may be, the same as in a civil court***.. So, arbitration tribunals have power to accept and see oppositions from third parties pursuant to Art.358/1/ of the civil procedure code." Then, court concludes that arbitration tribunals have power to see and decide third parties opposition on their award based on art 3345(1) of the civil code and art 317(1) of the civil procedure code cumulative with Art.358 of the civ. pro. C.

Here, contrary to the decision of the above case, in another case in relation to Art.317 (1) of Civ. Pro. C, , the Federal supreme court cassation bench in its decision reason out that this provision does not mean that arbitration shall follow strict litigation procedure of regular courts, rather, it is about due process (giving equal opportunity to hearing, production of evidence, examination of evidences and decision procedure) that arbitration will follow between the parties in arbitration.[144]According to this decision, unlike the appellate court's decision, it will be difficult to extend arbitration to third parties.

Generally, in the above case (the first case), the appellate court and the tribunal are found to be different in interpretation of the law: the tribunal is opponent of the application of ordinary civil procedure (litigation) provisions to third parties with in the tribunal; Whereas, the Federal Supreme appellate court is proponent of the application of litigation procedures to arbitration. According to the appellate court decision, arbitration tribunals have power to order mandatory interventions, joinder even with the parties and third parties objection or disagreement and Tribunals also have power to accept and decide oppositions from third parties.

In another case, while the arbitration tribunal decides expressly in favor of accommodation of third parties in arbitration, the Federal Supreme Court cassation bench in relation to third parties in arbitration gives decision with unclear reasoning, still it also does not expressly allow or prohibit third parties accommodation in arbitration/or.(Dansie Girumu vs. Ato Temesgen Demissie.[145]

[143] Federal supreme court appellate court, w/ro Tirsit Tollosa (appellant) vs. Ato kidanie, w/ro Emira and Ayats.c (respondents),supreme Court civil appeal case No.126145, Decided at December 10/2009, (see the attachments, the decision is attached at the end of this paper)

[144] Federal supreme court cassation division, ,Ato Mukemal Mehamed vs. Ato Miftah Kedir, case No.38794,March 24,2001

[145]The Federal Supreme Court, w/ro Dansie Girumu vs. Ato Temesgen Demissie, case No. case No.13732, December 26/2010. (see the attachments, the decision is attached at the end of this paper)

In this case the parties in the tribunal were between Dr. Abinet Girmay (Central University College) (respondent) and Ato Temesgen Demissie was applicant. the case arises in relation to buildings (applicant claims that it is his house and Doctor Abinet is rented not owner of the building. whereas, the Respondent argues that the building is not under ownership of the applicant, rather, it belongs to himself). Then, the tribunal decides in favor of the applicant. But, later in the meantime, third party (W/ro Dansie Girumu) brought opposition to the tribunal to setting aside the award. Then, the award creditor objects and argues that the third party cannot bring the opposition to the tribunal and the tribunal has not power over third parties. But, the tribunal decides that based on art 3345 of civ. C. and art.317 (1) and 358 of the Civ. Pro. C. the tribunal has power emanated from the law.[146]in fact, latter after see the merit of the case the tribunal confirms its award(decision).

Here, the third party brought appeal against the award creditor and the Federal Supreme Court appellate court confirms the tribunals' award. Then, the case brought to the Federal Supreme Court Cassation division and the cassation bench reversed the tribunals 'award and the appellate court' decision.

Here, the cassation bench decision is not clear enough. The court decides that the subject matter under arbitration tribunals were lease contract, the tribunal should not see the case, rather, it should refer the case to ordinary courts which have jurisdiction. Here, it gives reasoning in which third parties should not be part of the arbitration. Generally, from the reasoning of the court's decision the following can be extracted;

- the tribunals power is based on the agreement or contract of the two parties and it is applicable/binding only to the parties /3325/1731 of the civil code
- the tribunals power need to be construed restrictively up on Art 3329 of the civil procedure code
- Third parties do not institute/elect arbitrators and they have constitutional right to be adjudicated with in independent courts under Art.37 cum 78 of the FDRE constitution.
- Since tribunals will not be independent and the third parties do not consented Arbitration need not derogate third parties constitutional right to be adjudicated in an independent judiciary.

Therefore, even, the position of the court is not clear and rather, its' reasoning seems against to accommodation of third parties in arbitration. Because, according to the Supreme Court cassation decision or analysis:

[146] Interview with Ato Philipos Ayinalem, Former Federal High court Judge currently he is Attorney, on participation of third parties in Ethiopian Arbitration system, May 2018[here in after; interview with philipos Ayinalem]

- The arbitrators jurisdiction is limited to the parties and there agreement only/3329/1731, thus, related and indispensible third parties in arbitration will not be ordered to be joined unless consented/agreed and will not allowed to intervene over the parties' disagreement.
- Even in the above case this case it is the third that submitted an application to the tribunal by its consent. So, it can be considered as agreed to the tribunals' power impliedly, but here the court considered the third party as it not consented. Thus, according to its analyses latter implied submission or consent even is not possible.
- The court has also reason out that arbitrators will have power only on those parties instituted the tribunal or elected arbitrators; tribunals will not be independent so arbitration should not derogate third parties constitutional right to be adjudicated in an independent judiciary. So, according to the cassation decision the mere fact that third parties do not elect arbitrators or institute the tribunal will against their right to access to justice through independent courts, so mandatory joinder is not possible even if the third parties are indispensible. This means also that tribunals are not equal with courts while they have constitutional recognition.[147] But, here it can be raised that there are appeal rights and tribunals have also legal and constitutional recognition why not tribunal considered as dependent organs as far as duly instituted and there are not grounds of independence. even why also considered as it will affects right to access to justice, is access to justice will be served through regular courts only, why not through ad hock tribunals unless there is other ground shows independence.
- On the other hand, against to its reasoning the court also states that "it does not mean that the tribunal should refuse the opposition from the very beginning," but, since it concerns ownership of the house, the tribunal should sett- aside the award and refer the case to the court that have jurisdiction. You see! even if, lease were the base, the first award also concern ownership issue, latter the third party also submitted ownership issue, so why not the tribunal see the case and decide it, why this become against to law, as far as the tribunal duly instituted (arbitrators duly elected) and as long as third parties do not challenge the tribunals independence, why not tribunals considered as independent organ. Based on its reasoning, its position over the power of Arbitration tribunals in relation to order and see third parties participation is not clear. Because, On the one hand, the court reason out as tribunals have not jurisdiction over third parties in arbitration, on the other hand, it states as the tribunal can't refuse to accept third parties opposition. What does it mean? It is confusing.

Generally, the Supreme Court cassation bench' decision is not clear enough. Rather, it seems against to accommodation of third parties in arbitration. Because, its reasoning focuses on parties' consent or agreement; limited power of tribunals, right of constitution/election of arbitrators, independence of the tribunals, the right of third parties to take their cases to regular courts. Therefore, according to its decision, if mandatory third party participation ordered by

[147] The FDRE constitution, supra note, 112, Art.34 (5), 37(1) cum. 78(5); in civil cases out of court dispute resolution mechanisms are allowed and have constitutional recognition.

arbitration tribunal, it will be against to contract, the law and scope of tribunals' jurisdiction. So, the court's decision is not clear enough on its position. Even, its analyses will open debate to restrict the tribunals' power over third parties. In fact, in this case the tribunal expressly is pro extension of arbitration to third parties.

The experience with in Arbitration institutions is also different. For example under the newly established arbitration center of Ethiopian Chamber Of Commerce, there is a pending case between "Y" /first claimant/ and "Z" / intervener claimant/ VS "X" Real estate company.[148]Here, two persons claim rights over one house. Then, when intervention requested by interested third party, the tribunal extends the arbitration to third parties, over the objection of the parties, through ordering mandatory intervention of third parties based on Art 41 of the Civ. Pro. C. in fact, the tribunal has not yet arbitration rule and the rules are under drafting and the center is under experience sharing.[149]

Whereas, under the AACCSA Arbitration Institute, generally, the practice there is against to extension of arbitration to third parties, unless all parties agreed.[150] So, the position is on hesitation of extension, unless all parties agree. The rules of ACCSA-AI are also silent. Here, it can be said that the position of the ACCSA-AI is against to mandatory joinder, intervention and opposition. For one thing its rule is silent. For another thing, in practice the tribunals' power is limited and based on only the parties' agreement. If third parties objected or if one party objected, tribunals hesitate to order mandatory joinder. For example; in the case between Ethiopian biodiversity institutes (applicant) vs. Respondents; (1st cobalt constriction, 2nd Nib Insurance Company and 3rd Nib Bank S.C[151] the applicant brought an application against the above three respondents, but has not arbitration agreement with the 3rd party. Then, the 3rd party raises first instance objection in relation to the tribunals' jurisdiction and objected not to be joined since it has not an agreement or contract. Whereas, the 2nd party has requested the intervention of the 3rd party, but, the tribunal in its decision accepted the 3rd parties' argument and decides in favor of the 3rd party, to be out of the case. Here, even if the tribunal has additional reasoning (even if the claim arise from the same cause of action and interconnected, it

[148] Interview with selam setegn, supra note.,119
[149] Ibid
[150] Interview with Ato Yohanis w/ Gebireal, supra note.,117
[151]AACCSA-AI, Ethiopian Biodiversity Institutes (applicant) vs. Respondents; 1st cobalt constriction, 2nd Nib Insurance Company and 3rd Nib Bank S.C, Case No.275, 09/10/09 E.C., (see the attachments, the decision is attached at the end of this paper)

considered the issue as unrelated), it seems that it focuses on agreement and consent of the parties rather than the connection of the main substance of the case.

In addition, this case before it comes to the tribunal; it had been seen by federal high court between Ethiopian biodiversity Institutes (applicant) vs. Respondents; 1st cobalt constriction, 2nd Nib Insurance Company and 3rd Nib Bank S.C.[152]. Here, the court rejected the case since except the 3rd respondent the other has an arbitration agreement. The court in its reasoning does not expressly states that the 3rd party will be bound by the arbitration agreement of the parties and do not clearly accept or reject it, rather it impliedly send the case to the tribunal to decide whether it has jurisdiction or not. Its reasoning seems that if the 3rd party were accused separately it could see the case even if it were indispensible party to the arbitration by the mere fact that it expressly dose not consented to the submission, because, the court reserved from ordering joinder of the 3rd party.

Generally, from the above cases it can be said that there are inconsistent decisions and there are pro and against arguments of accommodation of third parties in arbitration tribunals through mandatory joinder, intervention, and opposition by applying ordinary litigation procedures.

Practitioners (experienced) and academicians' understandings/arguments are also different. Some are opponents and some are proponents of possibilities of accommodation of third parties in Ethiopian arbitration system using ordinary provisions of the civil procedure code. Some are also in the middle way.

Regarding opponents; In fact most of them support the accommodation in strict and exceptional circumstances but argue that since the Ethiopian law doesn't expressly allows or regulates third parties participation in arbitration, it is difficult to say that the ordinary civil procedures will regulate arbitration in a wider since.[153]

For example, prof. zekaryas and Ato yohanis W/Gebireal states that it is obvious that third parties interest will be affected by the award or parties will in need of participation of third

[152]Federal High court, Ethiopian Biodiversity Institutes (applicant) vs. Respondents; 1st cobalt constriction, 2nd Nib Insurance Company and 3rd Nib Bank S.C, High court registration no 175146 date of decision 7/02/09, see the attachments, the decision is attached at the end of this paper)

[153]Interviews with Prof. Zekaryas Kenea, professor at AAU and has exposure of arbitration, May 25/2018;Ato Hagos Debasu, Attorny has Arbitration Exposure, May 26/2018;Ato Yohanis W/Gebireal, supra note.,117;Mesele Nigussie, supra note.,140

parties to make their case effective, however, there need to have expressed detailed rules and procedures of accommodation of third parties without affecting the very purpose of Arbitration; confidentiality and flexibility.[154]

For their argument proponents invoke art 3325 of the civ. Code as arbitration is agreement based and art 3329 as the law itself provides that the tribunals' power/jurisdiction shall be interpreted in limited and strict way, plus, since based on art. 3332, 3325(2) and 317(2) tribunals' power is up on the hand of parties, it will not be possible to order third parties participation in conflict of their agreement and objection.[155]

Plus, they invoke art. 317(1) itself and argue that its expression is not clear enough and it is not also mandatory to follow strict procedures of the litigation procedures. For their argument proponents for example; Ato Mesele Nigusie, prof. Zekaryas kenea, Ato Hagos Debasu And Ato Yohanis WoldeGebireal argue that both 3345(2) and 317(1) refers and deals about agreement based arbitration and applicable upon agreed parties themselves, rather not about third parties.[156]

Here, prof. Zekaryas Kenea; Ato Hagos Debasu and Ato Yohanis Wolde Gebrieal argue that if the tribunal orders mandatory joinder and intervention over objection, it will be considered as the tribunal trespass its scope or jurisdiction and this will be even ground of appeal as per Art 356(1).[157] However, Ato Hagos Debasu has reservation and argues that arbitration is based on agreement but, guarantors, if the arbitration clause is found within the main contract, even if they do not expressly agreed they will be obliged since from the circumstance it can be assumed that they consented limpidly, Successors and agents can be participated because of the principle of transfer of right and liability.[158]

Opponents for their argument they invoke also other arbitration procedures provided expressly under the civil procedure code and argue that the code provides some procedures of arbitration expressly, but it opt out matters relating to joinder, opposition, and intervention in relation to the

[154] Ibid
[155] Ibid
[156] Ibid
[157] Id.,Hagos, Prof. Zekaryas kenea and Yohanis W/Gebireal
[158] Id, Hagos Dabasu

power of the tribunal and what third parties can do is protecting their interest through regular courts.[159]

Among these there are experts who face the problem in an arbitration tribunal and decide that the tribunal has not power over third parties.[160] In addition, Ato Yohanis W/Gebireal also states that Arbitration is possible based on agreement of all parties only and if not tribunals has not power to compel parties as well as third parties over their objection. He also states that the practice in AACCSA –AI is also only based on agreement and consent otherwise the tribunal will not see the third parties case.[161]

Then opponents conclude that since the law is not expressed clearly, in case of disagreement to joinder and intervention as well as opposition, what parties/third parties can do is requesting solution from the ordinary court not the tribunals. Here, opponents argue also that wider interpretation of the civil code even affect the very natures of arbitration. So, everything seems to be left for the parties and third parties agreement until the law provides express power to the tribunal. Here, they argue that Ethiopian arbitration rules, unless it takes ordinary civil procedure provisions by analogy, are silent in relation to third parties participation and effect, but it is also difficult to apply strict provisions by analogy, it needs express allowance. Because, when parties also agrees otherwise of joinder and intervention, compelling them to accept intervention or joinder may be in conflict with the substantive rule of the civil code and substantive nature of arbitration; arbitration agreement.

On the other side, Proponents argue that even if arbitration is mainly based on the arbitration submission and agreement, the law has also its own share. They argue that the tribunals' power is emanated from both the arbitration submission and the law. So once the tribunal is instituted, indispensible third parties need to be accommodated even without parties' and third parties consent through mandatory order. For their argument they invoke Art 317(1) and 3345(2) and

[159] Id, Yohanis W/Gebreal and Hagos Debasu
[160] Ibid
[161] Id., Yohanis W/Gebreal

resort to ordinary provisions of the civil procedure code relating with joinder, intervention and opposition.[162]

Here, Ato Philipos Ayinalem Argues that Art 317(1) is sufficient to apply ordinary/litigation proceedings to arbitration and he argue that just like courts arbitration tribunals can compel third parties even over his objection and can order any necessary mandatory orders. He said also that even the law do not prohibit the application of ordinary provisions to litigation, so if it is not prohibited it can be considered as allowed. He also said that in practice there are arbitration cases in which he order mandatory participation of third parties[163]

Ato Yosef Aemiro, Selam Setegn and Mechael Teshome argues that under Ethiopian law whether ordinary provisions will be applicable to arbitration or not is not expressly provided and Art 317(1) seems non mandatory, but, since the award is equal to court judgment and it will affect third parties interest laws should be interpreted in favor of accommodation of indispensible third parties in arbitration even over disagreement of the parties.[164]

Ato Selam Setegn also argue that arbitration to be effective and efficient should accommodate third parties even unless it will be certain, it will not be also investment attractive since foreigners opt to end their disputes in neutrally instituted Arbitration tribunals than national courts. He also stated that within ECCSA Arbitration Institution in one pending arbitration case they ordered intervention over parties' disagreement[165]

Generally, Proponent's argument is based on two bases; by the interpretation of the law and from /pragmatic/ analyses. Because, in one way, using the law, specially, Art 317(1) and Art 3345(1) they argues that third party participation can be ordered through ordinary litigation provisions. In another way, they argue that unless arbitration accommodates indispensible third parties it will not be effective, efficient, so the law even if it is unclear, still should be interpreted purposively so that it can accommodate third parties. Proponents also argue and justify that since award is equal to courts decree and judgment, both parties and third parties interest will be affected,

[162] Interviews with Philipos Ayinalem, supra note.,146; Interview with Ato Yosef Aemiro, AAU lecturer, Attorney, And Have arbitration Exposure, May 2018; Interview with Ato Michael Teshome, Attorney, Wright book on Ethiopian Arbitration, May 2010;Ato Selam Setegn, supra note.,119;interview with w/ro Firie hiyiot, senior Legal Expert at AACCSA-AI),Des. 2017
[163] Id., philps Aynalem
[164] Id.,yosef Aemiro,Slam Setegn and Michael Teshome
[165] Id.,selam Setegn

unless third parties allowed participation. Plus, to save time and coast; to decrease duplication of proceedings and possibilities of irreconcilable awards; to minimize latter oppositions to set aside the award, the law should be construed in favor of accommodation of third parties in arbitration even over parties' disagreement objection.

There are also some practitioners argue in the middle way. For example; Ato Fekadu Petros Argus that in principle Arbitration is based on agreement but depending on different circumstances it can accommodate third parties. he argue that within a bilateral arbitration arrangement if third party requests to intervene in arbitration this submission can be considered as the third party gives consent and in this case the tribunal can allow the intervention even over the objection of parties. Because, parties once has already give their consent and submit their case to the tribunal so it should not be allowed to them to object third parties as far as he/she has interest in the case. On the other side, he argues that if the third party object to be joind it is difficult to compel him, because, he doesn't give consent and this will affect his right to bring his cases in regular courts.[166]

Here, ato Messle Nigussie who is a judge at Federal First instance court also argue that opposition is possible to the court. But, he said that compelling third parties to join in arbitration is difficult, because, it will affects their right to take their cases to regular courts. Specially, even if arbitration has advantages of flexibility, expertise, and confidentiality, because is more costly than national courts third parties will not want to take their cases to arbitration. Specially, in Ethiopian poor society this will affect third parties. Otherwise, if third party agrees since the parties have already given their consent to be adjudicated by the tribunal, intervention can be ordered even over the objection of the parties.

Like Fekadu Petros, Ato Ali Muhamed also takes the middle way and argues that:

"Concerning third parties Ethiopian law is not clear and has not rules; Art 317(1) of civ.pro.c. Should be interpreted narrowly, since it intends to deal about the proceedings to be followed up on arbitration that will be conducted within agreed parties; rather, it does not deal with third parties. when Art 317(1) say that arbitration proceeding shall be as near as may be the same as in a civil court, it doesn't mean that all litigation provisions will apply to arbitration and tribunals will do everything as regular courts. Rather, it tells us the proceeding to be followed up on agreed parties: due process in terms of hearing and judgment."[167]

Then, concerning participation of third parties in Arbitration Ato Ali Mohamed argues that: "Even if arbitration is assumed as a contract, it should be open to indispensible third parties. So, when third parties request participation and have interest on the subject matter, arbitration should

[166] Interview with Fekadu Petros, Lecturer at AAU and has also Arbitration Exposure, on participation of third parties in Ethiopian Arbitration system,May,2018

[167]

be open to third parties and the discretion should be up on the tribunal." Here, for his position he reasons out that "parties have already given their consent and institute the tribunal. Even if, confidentiality issue will be raised, this should not be used to impede and impair third parsons' interest. Plus, unless it accommodates interested third parties, the arbitration itself will not be efficient and effective since later it will be set-aside." Then, he said the discretion to decide third parties participation is up to the tribunal.

Based on his argument, it can be said that he accepts the possibilities of intervention of third parties in arbitration, even with the objection of parties and the discretion is up on the tribunal to allow or refuse third parties intervention. However, concerning joinder of third parties he argues that:

"Even if third parties are indispensible, unless they give consent to be adjudicated by the tribunal, they should not be compelled. Because, it is their right to choose the forum and even parties sometimes may abuse the tribunal against third parties. Thus, when third parties do not consented to join, the tribunal shall stop the arbitration proceeding. Since, even courts do not see cases in which they have not jurisdiction, otherwise, when we compel third parties, there should be strong safeguarding mechanisms.[168]

So, ato Ali is in the middle way. According to his arguments, the tribunals can accept third parties intervention even with existing parties' objection, but, cannot order joinder of third parties unless third parties consented to be joind.

Generally, as discussed above, in Ethiopia, because of nonexistence of expressed, clear, adequate rules, there are inconsistent practices (understandings and decisions) in relation to accommodation of third parties in arbitrations and both theoretically and practically there is inconsistent interpretation of the law. So the problem is obvious, but, now a day, multiparty and multi contract transactions in which parties will not be signatory of the same arbitration agreement are becoming increased.

Thus, based on the existence of the above issues that need to be addressed, it can be conclude that our civil procedure and civil code have not adequate and detailed problem solving mechanisms as to the accommodation of participation and protection of third parties interest in Arbitration. The practice is also inconsistence.

[168] Interview with Ato Ali MUhamed, Former Federal Supreme Court Cassation Bench Judge(currently he is attorney), on participation of third parties in Ethiopian Arbitration system, May, 2018

3.4 How is the experiences /the issue of third parties/ under arbitration Institutions and the draft rule in Ethiopia

When we come to see the AACCSA-AI rules of Arbitration, it also doesn't contain provisions as to participation and protection of third parties.[169] Thus, if parties and third party agreed, somehow, it will be easy to address the issue. Here, the practice is also against to accommodation of third parties. There are number of cases in which participation of even indispensible third parties denied.[170] So, a third party to participate in arbitration, there should be all parties' agreement and consent of third parties otherwise. In AACCSA-AI without agreement third party will not allowed to participate in arbitration.

Recently, Ethiopian Chamber of Commerce and Sectoral Associations has established arbitration center, and Bahir Dar University has also arbitration center. But, both have not developed rules and procedures rather they are under experience sharing. Specially, ECCSA Arbitration Center is starting to draft rules and procedures.[171]

Coming to see the Ethiopian Arbitration and Conciliation Center draft arbitration rules[172], under article 40(1), it provides that;

"A person who should have been a party to the arbitral proceedings and whose interests are affected by the award *may file an opposition on the award to the court that would have material jurisdiction on the dispute were it not for the arbitration. The third party filing the opposition may, under pain of losing his right to take the case to a court, take his case to the tribunal that rendered the award complained of on such terms as to arbitration fee and other costs as the tribunal may decide.[emphasis added]*

2. The opposition shall be made within a period of sixty days following the petitioner's knowledge of the award and in any way before the execution of the award complained of.

3. The form and effect of opposition shall be governed by the relevant provisions of this Code."

And the draft Arbitration rule under Article 41 it also provides that:

[169] AACCSA-AI Arbitration Rule,available at, www.adischamber.com
[170] Interview with ato yohanis W/G, Director of AACCSA-AI
[171] Interview with Ato selam setegn, supra note.,119
[172] Ethiopian Arbitration and Conciliation Center (here in after EACC) Draft Arbitration Rule, Art 40

"Unless an order for stay of execution is obtained following an application for setting aside or an appeal, an award made by any arbitration tribunal shall be executed by the appropriate law enforcement organs of the State and in accordance with the relevant rules on the execution of judgments specified in this Code in the same manner as a judgment or order of a court is executed. Nothing in this Article shall affect the special provisions on the recognition and enforcement of foreign arbitral awards."[173]

But, the draft rule failed to address, expressly, joinder or intervention of indispensable third party in ongoing bilateral arbitration arrangement. Because, as per Art 40 (1) it tries to address only the right of the third party to challenge the award after it has been made. Even, in relation to opposition, the draft rule in principle gives the power to accept and decide opposition to ordinary courts. In fact, it provides exceptional circumstances, with the phrase *"under pain of losing his right to take the case to a court,*[174]*"*in which up on their choice third parties can apply opposition to the tribunal.

In addition, when it say *"A party who should have been a party to the arbitral proceedings and whose interests are affected..."*[175] is it refers to a party who had been a party in the Arbitration Agreement (submission)? Or, is it refers to any third party who was not a party in the arbitration Agreement or submission. It is open to debate or controversy and need to be addressed expressly. The questions what will be the fate of the award and how the issue will be entertained are also need to be addressed. If third party brings an application to the court, can the court remand the case to the tribunal without third parties' consent, and what will be its effect. It is unclear.

In general, since multiparty arbitration proceedings would enhance the scope, efficiency, effectiveness and certainty of arbitration, rules and procedures that allow intervention and joinder of indispensible third parties in bilateral arbitration arrangements as well as mechanism of challenging the award need to be regulated expressly and effectively. Therefore, with necessary conditions and circumstances participation of third parties in commercial arbitration need to be made effective.

[173] Id.,Art.41
[174] Id.,Art.40(1)
[175] Ibid

4. Chapter Four

Conclusions, Recommendations, Bibliographies and Attachments

4.1 Conclusions

The core issue addressed in this paper is the accommodation of third parties in commercial arbitration system of Ethiopia. Generally, the paper discussed the issue within three chapters.

The first chapter provides the proposal. In chapter two commercial arbitration and accommodation of third parties in general has been discussed: specifically, this chapter has dealt with arbitration and commercial arbitration constitutes in general; plus, it also analyzes third parties and their relevancies in commercial arbitration. Then, it has tried to analyze the mechanisms of accommodation of third parties in arbitration and the extent to which their accommodation shall be possible. Lastly, for better appreciation of the issue it has also tried to overviews some experiences from Nationals as well as International and Regional institutions' arbitration rules and cases.

Chapter three discussed Arbitration as a means of commercial dispute resolution and accommodation of third parties in commercial arbitration in Ethiopia: Specifically, this chapter analyses: arbitration as means of resolution of commercial disputes in Ethiopia; the issue of third parties in Ethiopian commercial arbitration; whether and how accommodation of third parties is possible in Ethiopian commercial arbitration system; third parties under Ethiopian arbitration rules; third parties under the civil code and civil procedure codes of Ethiopia ordinary provisions; weather and to what extent the ordinary litigation provisions of the civil procedure code relating to third parties will be applied to Arbitration. Then, this chapter has also try to see and analyze the practice in Ethiopia in relation to how third parties are participated/accommodated in commercial arbitration and the experiences under arbitration Institution and the draft Arbitration rule of Ethiopian Arbitration and Conciliation Center.

Generally, from this paper, it can be conclude that, traditionally, the base of arbitration and the arbitration tribunal is mainly the arbitration agreement and party autonomy. Thus, because of the principle of relativity or privity of contract, arbitration has mainly considered as consensual and binding up on the parties. However, in principle, even if arbitration is binding to signatories of arbitration agreement (parties), sometimes it may directly or indirectly affect the interest of third

parties. Plus, for effectiveness and efficiency purpose participation of third parties in arbitration proceedings is becoming necessary or relevant (inevitable). Third parties may be also in need of protection from arbitral award in which they didn't participate.

Currently, as commercial transactions become more complex, certain procedural problems are becoming more common. One of the most troubling issues in this area of law concerns participation of third parties (through joinder, intervention or opposition of the award) into an arbitration. In fact, if all parties agreed, the problem will be somehow resolved. Otherwise, when parties disagree and third parties object participation, the issue will be difficult.

Regarding to what extent commercial arbitration can accommodate third parties, this paper reveals that participation of third parties should not be always possible arbitrarily, rather, it should be justifiable and for effectiveness and efficiency purpose there should be good grounds or conditions (connecting factors) that need to be fulfilled. such as; the object of the main contract, the intensity of the relationship of the third party towards the object of the contract, the links between the already pending claim and the claim raised by or made against the third party, the role a party has played in the negotiation or performance of the agreement, the existence of a community of obligations and interest between the parties, procedural efficiency, existence of confusion and fraud. In addition, this paper discuses some theoretical bases/standards/ that can serve as a base for involving third parties, even with objection of participation.

Coming to Ethiopia, currently settling commercial or business relating disputes with arbitration is becoming common, like the rest of the world. Arbitration Institutions for purpose of commercial arbitration are established, many cases are also settled through *ad-hoc* arbitration and ad-hock tribunals are becoming common. Specially, commercial arbitration is becoming common at national and intentional level with multiparty and contracts (complex) transactions and this is also true in Ethiopia.

Coming to the issues of third parties: in Ethiopia, mostly arbitration is assumed as it is based on party autonomy principle, which is consensual; it is also considered as contract that based on agreement of the parties only. However, now a day with in the growing complex multiparty trade and investment relationships, it is necessary to have mechanisms to accommodate indispensable non signatory third parties, for the purpose of the interest of contracting parties themselves as

well as the indispensible third party. Moreover, now a day third parties are becoming common with in current complex networked multilateral and parties trading relations(business relations),Ethiopia cannot be out of the globe. As this study revels, there are also different understandings, interpretations both theoretically and practically as to their relevance and the procedure to be followed in relation to participation of indispensible third parties through joinder, intervention, and opposition. Especially, it is becoming difficult when there is no agreement or consent and express reference as to third parties.

Ethiopia has not separated arbitration rules for international and domestic arbitrations, as well as for commercial and noncommercial arbitrations. Currently, the main sources of Ethiopian arbitration law are the Ethiopian Civil Code (Arts. 3325 – 3346) and Civil Procedure Code (Arts.315 -319, Art 350-357, and Art 350-357 Art 461 of civ. Pro. C.).

As this paper revels, in Ethiopia multiparty and multi contractual transactions are becoming common and in most cases third party non signatories of the arbitration tribunal will seek to intervene or may bring opposition to the tribunals, and sometimes parties in the meantime or at the beginning may request joinder of third parties. In practice, there are real cases both within Ad-hock and institutional arbitration arrangements and there are also court cases in relation to third parties participation. Thus, it can be said that in Ethiopia the need of third parties participation in arbitration is becoming growth in practice and there are many cases in which third parties participation requested (either through joinder or intervention in ongoing arbitration arrangement and also through application of opposition to set aside the award). The practice is not uniform along tribunals and the court itself.

The courts and tribunals interpretation are found to be different in interpretation of the law. Sometimes, they extend the arbitration to third parties through litigation provisions, sometimes they become hesitant. The understanding of practitioners' and academicians, who have exposure in commercial arbitration, are also divergent: Some are proponents; some are opponents; and some are in the middle.

Thus, because of nonexistence of expressed, clear, adequate rules and procedures, there are inconsistent understandings and decisions in relation to accommodation of third parties in arbitrations both within courts, institutional and ad hock arbitration tribunals. Both theoretically

and practically it is in need of solution. The existing institutions rules are also silent concerning third parties. The problem is obvious. But, transactions comprises multiparty and multi contracts in which parties will not be signatory of the same arbitration agreement are becoming in growth. So, depending on expressly provided circumstances or conditions, Ethiopia needs expressly stipulated third party joinder and intervention rules, as well as mechanism of opposition of arbitral awards by interested third parties in commercial arbitration,:

Here, on the one hand, When disputes arises within the same or series of transaction, when there exist the same issue of laws and fact and when the claim raised by or made against the third party derived itself from the parties' interest or duty, mandatory joinder and intervention should be allowed. Because, regarding parties to the arbitration, once they agreed to settle their dispute in arbitration and bring their cases before the tribunal, it should not be allowed them to exclude interested third parties. Rather, when interested third parties' intervention needed, the discretion shall be up on the tribunal. Regarding third parties, when the claim raised by or made against them derived itself from the parties' interest or duty, from the connecting circumstances it can be assumed that they are part of the agreement and making them to be joined in arbitration cannot be considered as violation of their right to choose the forum.

In fact, in these exceptional circumstances, when participation of third parties needed, firstly, efforts have to be made so that parties and third parties come to agreement by themselves, but if parties and third parties do not come to agreement the discretion shall be up on the tribunal to order third parties participation having analyzed the overall circumstances; the relation/connection/ and relevance of third parties with parties and the subject matter. Moreover, depending on real circumstances, during mandatory joinder of third parties, unless parties come in to agreement, rearrangements need to be made on coast, choice of procedure, and composition of arbitrators. Plus, if parties in to the arbitration agreement were agreed to waive some of their rights (for example appeal right), third parties need not to be obliged to waive their rights.

On the other hand, when the claims raised by or made against the third party are independent that can rather stand by them and if latter they will not be qualified as ground of setting- aside the arbitral award, even if there are related claims or duties, both intervention and joinder should be permissive that will based up on consent. However, even in this case, efforts have to be made so that they come to agreement and settle their disputes in one forum. Generally, depending on expressly provided circumstances or conditions, Ethiopia needs expressly stipulated both

permissive and mandatory third party joinder and intervention rules in commercial arbitration, as well as mechanism of opposition of arbitral awards by interested third parties: Based on the above conclusions the paper recommends the following measures to be taken.

4.2 Recommendations

Generally, in Ethiopia, since multiparty arbitration proceedings would enhance the scope, efficiency, certainty and effectiveness of commercial arbitration system, rules and procedures that allow the intervention and joinder of indispensible third parties in bilateral arbitration arrangement as well as mechanism of challenging the award by interested third parties need to be regulated expressly and effectively.

Thus, this paper recommends the following;

1. First and for most, the whole rules and procedures relating to arbitration are not updated: found separately and seem not to be designed for commercial purpose, for international and institutional arbitration arrangements. So, it needs comprehensive amendment, and there rules and procedures concerning third parties, multiparty and multi contractual based arbitrations need to be expressly stipulated. Therefore, the law maker should enact expressed and detailed rules and procedures in relation to third parties participation in commercial arbitration.
2. Alternatively, since the current laws are creating ambiguity, and are not clear and expressed, the civil procedure code arbitration rules should be amended and provide express rules and procedures that can accommodate third parties in commercial arbitration. Here, the law has to provide expressly articulated conditions and circumstances to allow joinder and intervention of third parties in arbitration as well as mechanism of challenging the award by interested third parties, saving the nature and purposes of arbitration.
3. The Ethiopian civil code substantive arbitration provisions also need to be amended so that it has rules that promote multiparty and multi contracts based arbitration arrangement.
4. Arbitration Institutions need to have effective and efficient rules, procedures and practices in relation to accommodation of third parties. So, they need to enact or amend arbitration rules and procedures. The practice there needs also to be developed in relation to accommodation of third parties in commercial arbitration.
5. The Federal Supreme Court cassation bench whose decision has binding effect shall come up with clear decisions in relation to participation of third parties in arbitration. Other courts and Arbitration tribunals should promote accommodation of third parties and interpret the laws in favor of accommodation of third parties in commercial arbitration.

4.3 **Bibliographies**

I. Books and Articles

1. Passey Max D., *The shortcoming of arbitration in the modern world: the third parties limitation*,2016,global politics review,vol.2,no.2, available at, http://globalpoleticisreview.com, (last accessed at May 25/2018)
2. Pouget Sophie, *Arbitrating and Mediating Disputes: Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment,* The World Bank Financial and Private sector Development Network Global Indicators and Analysis Policy Department, *2013, available at: https://www.openknowledge.Worldbank.org. (last accessed March 20/2018)*
3. Sedler, Allen Robert, *Ethiopian civil procedure*,1968,Hilesilasie1st University, Addis Ababa, Ethiopia
4. Stavros Brekoulakis, *The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room*, 2009, Penn state Law Review, vol.113:4, available at; www.pennstatelawrevies.org. [last accessed at May 25/2018]
5. Strong, S.I, *Third Party Intervention and Joinder as of Right in international Arbitration: An Infringement of Individual Contract Right or a Proper Equitable Measure*, 31 Vand. J.Transnat'l.915 (1998),available at: http://scholarship.law.missiour.edu/facpubs (last accessed, May 15/2018)
6. Tilahun Teshome, "*The Legal Regime Governing Arbitration in Ethiopia*", 2007, Ethiopian Bar Review, 1(2)

II. Legal instruments

A. Foreign laws (conventions, National laws and Arbitration Institutions rules)

1. AAA, Securities Arbitration supplementary procedures ,1999,Available at, http://www.adr.org (last accessed May 20/2018)
2. AAA, *New Jersey Residential Construction Lien Arbitration Rules*,2012,Available at, http://www.adr.org (last accessed May 20/2018)
3. American Arbitration Associations, *Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes*, available at, http://www.adr.org (last accessed May 20/2018)
4. Belgian Judicial code, 2013,available at, www.cepani.be/en/arbitration/Belgian-judicial-code-provisions (last visited May 5/2018)

5. Cairo Regional Centre for International Commercial Arbitrations' Arbitration rule,*2011,Available at, http://crcica.org.eg/rules/arbitration/2011/cr_arb_rules_en.pdf (last accessed May 5/2018),*
6. Finland Arbitration Institute Arbitration rule, Available at, https://arbitration/rules/arbitration-rules/ (last accessed May 5/2018)
7. France Arbitration Rule,2011,available at, www.sccinstitute.com (last visited may 10/2018)
8. ICC arbitration rules,2017,available at, http://iccwbo.org/publication/arbitration-rules-andmedation-rules/
9. LCIA arbitration rule,2014, available at,http://www.lcia.org/dispute-resolution/lcia-arbitration-rules-2014.aspx (last accessed May 25/2018,)
10. Netherlands Arbitration Institution' arbitration rule, 2015, available at, http://www.nai-nl.org (last accessed May 21
11. Netherlands code of civil procedure, available at, www.nai-nl.org (last accessed at, April 15/2018)
12. Netherlands code of civil procedure, available at, www.nai-nl.org (last accessed at April 15/2018)
13. South Carolina code, uniform arbitration act, available at, http://www/lawserver.com/law/state/sauth-carolina (last accessed April 23/2018)
14. Switzerland's Rule of International Arbitrations, available at, http://www.swissarbitration.org (last accessed May 5/2018)
15. The 2010 UNCITRAL Arbitration Rules (as revised in 2013, and with new article 1, paragraph 4, as adopted in 2013),available at, http://www.uncitral.org (last accessed may 19/2018)
16. UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006,available at, http://www.uncitral.org (last accessed May 9/2017)
17. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award, June 7,1958, New York
18. USA, Revised uniform arbitration act, 2000,available at, www.uniformlaws,org (last accessed May 12/2018)
19. Utah Uniform Arbitration Act, 2008, available at, http://le.utah.gov/xcode/Title78B/chaptr11/c78B-11.pdf (last accessed April 23/2018)

B. Ethiopian legislations

1. Civil code of Ethiopia, 1960, Negarit Gazzeta, Extraordinary issue, proc. No.165, 19th year, No.2
2. Civil Procedure code of Ethiopia, 1965, Negarit Gazzeta, Extraordinary issue, Decree No.52, 25th year, No.3
3. Commercial Code of Ethiopia, 1960, Negarit Gazzeta, Extraordinary issue, proc. No.166, 19th year, No.3

4. The FDRE constitution,1995,Negarit Gazzeta, Extraordinary issue, proc.No.1, 1st year, No.1

III. Cases

a. Ethiopian cases

1. AACCSA-AI, Ethiopian Biodiversity Institutes (applicant) vs. Respondents; 1st cobalt constriction, 2nd Nib Insurance Company and 3rd Nib Bank S.C, Case No.275, 09/10/09 E.C., (see the attachments, the decision is attached at the end of this paper)
2. Ato kidanie Yohanis and w/ro Emira Sefa (applicants) vs. Ayat share company (respondents) it raise in transaction/ sale of houses, March 12, 2008 E.C (see the attachments, the decision is attached at the end of this paper)
3. Federal High court, Ethiopian Biodiversity Institutes (applicant) vs. Respondents; 1st cobalt constriction, 2nd Nib Insurance Company and 3rd Nib Bank S.C, High court registration no 175146 date of decision 7/02/09 E.C, see the attachments, the decision is attached at the end of this paper)
4. Federal supreme court appellate court, w/ro Tirsit Tollosa(appellant) vs. ato kidanie, w/ro Emira and Ayats.c (respondents),supreme Court civil appeal case No.126145, Decided at December 10/2009 E.C (see the attachments, the decision is attached at the end of this paper)
5. Federal Supreme courts cassation decision (National Mining Corporation PLC v. Dani Drilling PLC), October 29/2003 E.C cassation Registration Number 42239, Federal Court Cassation Court decisions No 10
6. Federal Supreme courts cassation decision, Ato Mukemal Mehamed vs. Ato Miftah Kedir, case No.38794,March 24,2001 E.C
7. The Federal Supreme Court cassation decision, w/ro Dansie Girumu vs. ato Temesgen Demissie, case No. case No.13732, December 26/2010 E.C (see the attachments, the decision is attached at the end of this paper)

b. Foreign cases

1. (Government of Pakistan, Ministry of Religious Affairs v Dallah Real Estate and Tourism Holding Company (17 February 2011) (CA Paris), available at,www.arbitrtion-icca.org (last accessed May 10/2018)
2. (Y.S.A.L. v Z Sarl ATF 129 III 727-4P.115/2003),Available at, http://www.swissarbitrationdecisions.com (last accessed at May 5/2018)
3. ICC, (Dow Chemical Group v. Isover-Saint-Gobain Case No.4131, Interim award, Sept. 23, 1982). available at, http://www.trans-lex.org/204131/_/icc-award-no-4131-yca-1984-131-et-seq-/

IV. Others

1. AAA, A Guide to Commercial Mediation and Arbitration for Business People, 2013. Available at; www.adr.org (last accessed at May 10/2018)
2. AACCSA-AI Arbitration Rule, available at www.adischamber.com
3. Adis Abeba Chamber of Commerce and Sectoral Associations Annual report of 2017, available at AACCSA.
4. Black's law dictionary.
5. Ethiopian Arbitration and Conciliation Center (here in after EACC) Draft Arbitration Rule
6. Ethiopian Chamber Of Commerce and sectoral associations Arbitration center Establishing Regulation, march 2018
7. Latham & Watkins, *Guide to International Arbitration,* 2014, available at: www.lw.com (accessed at sep 23/2017)

V. Interviews

1. Interview with Ato Ali Muhammad, Former Federal Supreme Court Cassation Bench Judge(currently he is attorney), on participation of third parties in Ethiopian Arbitration system, May, 2018
2. Interview with Ato Hagos Debasu, Attorny has Arbitration Exposure, on participation of third parties in Ethiopian Arbitration system May 26/2018;
3. Interview with Ato Messele Nigussie, Judge at Federal First Instance Court, on participation of third parties in Ethiopian Arbitration system, May 2018may 2018
4. Interview with Ato Michael Teshome,Attorney, Wright book on Ethiopian Arbitration, on participation of third parties in Ethiopian Arbitration system, May 2010;
5. Interview with Ato Philipos Ayinalem, Former Federal High court Judge currently he is Attorney, on participation of third parties in Ethiopian Arbitration system, May 2018
6. Interview with Ato selam setegn, Director of ECCSA Legal and Arbitration Service, on participation of third parties in Ethiopian Arbitration system, May 2018.
7. Interview with Ato Yosef Aemiro, AAU lecturer, Attorney, And Have arbitration Exposure, on participation of third parties in Ethiopian Arbitration system May 2018;
8. Interview with Fekadu Petros, Lecturer at AAU and has also Arbitration Exposure, on participation of third parties in Ethiopian Arbitration system,May,2018
9. Interview with w/ro Firiehiyiot, senior Legal Expert at AACCSA-AI), on participation of third parties in Ethiopian Arbitration system Des. 2017
10. Interview with Yohanis Wolde Gebreal, Director of The AACCSA Arbitration Institute, on participation of third parties in Ethiopian Arbitration system, May 2018.

11. Interviews with Prof. Zekaryas Kenea, professor at AAU and has exposure of arbitration, on participation of third parties in Ethiopian Arbitration system, May 25/2018;

VI. Internet sources

1. *http://crcica.org.eg/rules/arbitration/2011/cr_arb_rules_en.pdf (last accessed May 5/2018),*
2. http://globalpoleticisreview.com, (last accessed at May 25/2018)
3. http://iccwbo.org/publication/arbitration-rules-andmedation-rules/
4. http://le.utah.gov/xcode/Title78B/chaptr11/c78B-11.pdf (last accessed April 23/2018)
5. http://scholarship.law.missiour.edu/facpubs (last accessed, May 15/2018)
6. http://www.adr.org (last accessed May 20/2018)
7. http://www.lcia.org/dispute-resolution/lcia-arbitration-rules-2014.aspx (last accessed May 25/2018,)
8. http://www.nai-nl.org (last accessed May 21
9. http://www.swissarbitration.org (last accessed May 5/2018)
10. http://www.swissarbitrationdecisions.com (last accessed at May 5/2018)
11. http://www.trans-lex.org/204131/_/icc-award-no-4131-yca-1984-131-et-seq-/
12. http://www.uncitral.org (last accessed may 19/2018)
13. http://www.uncitral.org (last accessed May 9/2017)
14. http://www/lawserver.com/law/state/sauth-carolina (lastaccessed April 23/2018)
15. https://arbitration/rules/arbitration-rules/ (last accessed May 5/2018)
16. *https://www.openknowledge.Worldbank.org. (last accessed March 20/2018)*
17. www.adischamber.com
18. www.adr.org
19. www.arbitrtion-icca.org (last accessed May 10/2018)
20. www.cepani.be/en/arbitration/Belgian-judicial-code-provisions (last visited May 5/2018)
21. www.lw.com
22. www.nai-nl.org (last accessed at April 15/2018)
23. www.nai-nl.org (last accessed at, April 15/2018)
24. www.pennstatelawrevies.org. [last accessed at May 25/2018]
25. www.sccinstitute.com (last visited may 10/2018)
26. www.uniformlaws,org (last accessed May 12/2018)

4.4 Attachments/annexes/

መጋቢት 12 ቀን 2008 ዓ.ም

የግልግል ዳኝነት ጉባኤ ስብሰባ፤

አቶ ሐጎስ ደበሱ

ተ/ፕሮፌሰር ዘካሪያስ ቀነአ

አቶ ኪሩቤል ኃይለማርያም

አቶ ዘነበ ጥላሁን

ዶ/ር ያሬድ ለገሠ

ከሳሾች ... 1ኛ/ አቶ ኪዳኔ ዮሐንስ በቀለ (ሁለት ሰዎች) ስላልተጠሩ አልቀረቡም፤

2ኛ/ ወ/ሮ እምሯ አሰፋ ስላልተጠሩ አልቀረቡም፤

ተከሳሽ ... አያት አክሲዮን ማኅበር ስላልተጠራ አልቀረበም፤

አመልካች ... ወ/ሮ ትርሲት ቶሎሳ ሕጋዊ ወኪላቸው ወ/ሮ አልማዝ ደምሴ ተሰማ እና ጠበቃቸው አቶ ኢሳያስ መኮንን ወ/የሱስ ቀረቡ /ሁለቱም የውክልና ሥልጣን ይዘው ቀረቡ/፤

ጉባኤው በከሳሾች እነ አቶ ኪዳኔ ዮሐንስ በቀለ (ሁለት ሰዎች) እና በተከሳሽ አያት አክሲዮን ማኅበር መካከል የነበረውን ክርክር አይቶ የካቲት 11 ቀን 2008 ዓ.ም ውሳኔ የሰጠ ሲሆን፤ የመቃወም አመልካች ነኝ ሚሉ ሴት ከጠበቃ ጋር በየካቲት 30 ቀን 2008 ዓ.ም ከጉባኤው ሰብሳቢ ዘንድ ቀርበው በቃል ስላመለከቱና የጽሑፍ አቤቱታም ይዘናል ስላሉ ጉባኤው አቤቱታቸውን ተቀብሎ ተገቢ ትእዛዝ መስጠት እንዲችል መጋቢት 8 ቀን 2008 ዓ.ም ተሰበሰበ፡፡

የጉባኤው አባላት በቃል የቀረበውን አቤቱታ መነሻ በማድረግ በስልክ ተነጋግረው ዛሬ በስብሰባ ለመነጋገር ሲስማሙ አመልካችም ስብሰባው በሚጀመርበት ሰዓት አቤቱታቸውን በጽሁፍ እንዲያቀርቡ ይነገራቸው ስለተባለ በቃል ላመለከቱት ሰዎች መልእክቱ በወቅቱ ተነግሯቸዋል፡፡ በዚሁ መሠረት አመልካች የፍትሐ ብሔር ሥ/ሥ/ ሕግ ቁጥር 358 የሚደነግገውን በመጥቀስ በመጋቢት ቀን 2008 ዓ.ም የተጻፈ የመቃወሚያ አቤቱታ /3 ገጽ/፣ የማስረጃ ዝርዝር መግለጫ ማመልከቻ /2 ገጽ/ እና የሰነድ ማስረጃዎች ፎቶ ኮፒ /18 ገጽ/ በስብሰባ ወቅት አቅርበዋል፡፡

አመልካች በከሳሾች እና በተከሳሽ መካከል ስለተነሳው ክርክር ምክንያት የሆነውን ቤት በሰኔ 18 ቀን 2004 ዓ.ም በተደረገ ውል ከአያት አ/ማ ገዝቼአለሁ፣ የቤቱንም ዋጋ በሙሉ ከፍዬ ቤቱን በሐምሌ 22 ቀን 2006 ዓ.ም ሙሉ ለሙሉ ተረክቤ እያስተዳደርኩኝ እገኛለሁ፡፡ የቤቱ ባለቤት ስለሆንኩ ቤቱን በተመለከተ ለጉባኤው ክስ መቅረቡን ሳላውቅና ሳልጠራ ጉባኤው በየካቲት 11 ቀን 2008 ዓ.ም የሰጠው ውሳኔ መብቴንና ጥቅሜን ይጎዳል፤ ስለሆነም ጉባኤው

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መቃወሚያዬን ተቀብሎ ነገሩን ካጣራ በኋላ መቃወሚያ የቀረበበትን ፍርድ እንዲሰርዝልኝ ሲሉ አመልክተዋል፡፡

የንግድ ሥራን ወይም ቤት ገንብቶ መሸጥን የሚመለከት ውል የሚያደርጉ ወገኖች የውሉን አፈጻጸም በተመለከተ በመካከላቸው ክርክር ቢነሳ ጉዳያቸው ከፍርድ ቤት ውጭ በግልግል ዳኝነት እንዲታይ በውላቸው ላይ ስምምነት ካደረጉ ስምምነታቸው በፍትሐ ብሔር ድንጋጌ መሠረት እውቅና አግኝቶ ተፈጻሚ እንደሚሆን ይታወቃል፡፡ በተጨማሪም፣ ጉባኤው ለዳኝነቱ ሥራ ሂደት አግባብነት ያለው የፍትሐ ብሔር ሥ/ሥ/ ሕግ መሆኑን ተገንዝቧል፡፡ በተጠቀሰው ዓይነት ስምምነት መሠረት የሚቋቋም የግልግል ጉባኤ የዳኝነቱን ሥራ የፍትሐ ብሔር ሥ/ሥ/ ሕግ ድንጋጌዎችን ተክትሎ ማከናወን እንደሚገባው የሕጉ ቁጥር 317(1) የሚደነግግ ቢሆንም ጉባኤው በተዋዋዮች የውል ስምምነት መሠረት የሚቋቋም በመሆኑ የዳኝነት ሥልጣኑ ውስን ነው፤ በተዋዋዮቹ ወገኖች መካከል የሚነሳ ክርክርን ከማየት ውጭ የዳኝነት ሥልጣን አይኖረውም፡፡ በሌላ በኩል ግን የሕጉ ቁጥር 317(1) እና ቁጥር 319 ድንጋጌዎች ያሁን የመቃወም አመልካች ላቀረበት አቤቱታ አግባብነት ስላላቸው አቤቱታው ከሕጉ ድንጋጌዎች አንጻር ተመርምሯል፡፡

የግልግል ጉባኤ ውሳኔ ከሰጠ በኋላ በውሳኔው ላይ ጥያቄ ማንሳት የሚችሉት ተከራካሪ ወገኖች ብቻ እንደሆኑ ከቁጥር 350 እስከ 357 የተመለከቱት የፍትሐ ብሔር ሥ/ሥ/ ሕግ ድንጋጌዎች ያስረዳሉ፡፡ እንዲህ ዓይነት ጥያቄዎች ሊቀርቡ የሚችሉትም ውሳኔውን ለሰጠው ጉባኤ ሳይሆን ለይግባኝ ሰሚ ፍርድ ቤት ነው፡፡ የመቃወም አመልካች አቤቱታ ያቀረቡት በፍትሐ ብሔር ሥ/ሥ/ ሕግ ቁጥር 358 የተደነገገውን በመጥቀስ ሲሆን፣ ከቁጥር 358 እስከ 360 የተመለከቱ የሕጉ ድንጋጌዎችን መሠረት በማድረግ ጉባኤው ውሳኔውን እንዲሰርዝላቸው የሚጠይቅ ነው፡፡ የመቃወም አመልካች ጥያቄ በግልግል ጉባኤ የተሰጠ ውሳኔን በሚመለከት ሕጉ ከደነገገው ውጭ በመሆኑ በጥንቃቄ ተመርምሯል፡፡

ቤት ገንብቶ መሸጥን በተመለከተ በክሳሾችና በተከሳሽ መካከል በመጋቢት 12 ቀን 1997 ዓ.ም በተደረገው የውል ስምምነት (ቁጥር F2883-SK0123) መሠረት የፌደራል የመጀመሪያ ደረጃ ፍርድ ቤት የልደታ ምድብ ችሎት በመ/ቁ/ 217477 ላይ በሕዳር 15 ቀን 2007 ዓ.ም በሰጠው ፍርድ ላይ ተከራካሪ ወገኖች እያንዳንዳቸው ሁለት ሁለት የግልግል ዳኞች እንዲሰይሙ ሲል ውሳኔ ቢሰጥም ጉባኤው በተጠቀሰው የተከራካሪዎቹ የውል ስምምነት መሠረትና በእነርሱ ምርጫ የተሰየመ ነው፡፡ ያሁን አመልካች ግን በተጠቀሰው የውል ስምምነት ተዋዋይ ወገን አልነበሩም፡፡ ጉባኤው የተሰየመው አላይ በስም በተጠቀሱ ተከራካሪ ወገኖች መካከል የተነሳን ክርክር አይቶ እንዲወስን ሲሆን፣ እንደ ፍርድ ቤት ሰፊ የዳኝነት ሥልጣን የተሰጠው ሳይሆን በተዋዋዮቹ ወገኖች መካከል የሚነሳ ክርክርን አይቶ ውሳኔ እንዲሰጥ የተቋቋመ ውስን የዳኝነት ሥልጣን ያለው ነው፡፡ ከዚህም በላይ ጉባኤው የዳኝነት ሥልጣኑን ተግባራዊ ሲያድርግ በፍትሐ ብሔር ሥ/ሥ ሕግ በግልጽ የተደነገገውን መሠረት በማድረግ መሆን አለበት፡፡ ጉባኤው ሕጉ በግልጽ ከደነገገው አልፎ ሥልጣን አለኝ ማለት አይችልም፡፡ በሌላም በኩል የካቲት 11 ቀን 2008 ዓ.ም በክርክሩ ላይ ውሳኔ ስለሰጠ ጉባኤው የተቋቋመበትን ዓላማ ያጠናቀቀ መሆኑን ጉባኤው አውስቷል፡፡

የፍትሐ ብሔር ሥ/ሥ/ ሕግ ከቁጥር 358 እስከ 360 የሚደነግገው ሲታይ የሕጉን ቁጥር 358 ድንጋጌን በመጥቀስ የሚቀርብ የመቃወሚያ አቤቱታን መሠረት አድርጎ ጉባኤው ውሳኔና

ትእዛዝ መስጠት እንዲችል በግልጽ ሥልጣን ስላልተሰጠው የራሱን ውሳኔ መሠረዝ የሚችልበት የሕግ አግባብ ያለመኖሩን ተገንዝቧል። በዚህም መሠረት ጉባኤው የሚከተለውን ትእዛዝ ሰጥቷል።

ትእዛዝ፣

ጉባኤው በፍትሐ ብሔር ሥ/ሥ/ ሕግ ቁጥር ከቁጥር 358 እስከ 360 በተደነገገው መሠረት አቤቱታቸውን ተቀብሎ ትእዛዝና ውሳኔ ለመስጠት የሚያስችል ሥልጣን ስለሌለው አመልካች ጥያቄአቸውን ሥልጣን ላለው የዳኝነት አካል ያቅርቡ ሲል መዝገቡን ዘግቶታል።

የመቃወም አመልካች ያቀረቡት አቤቱታ በአዳሪ ተይዞ ከታዩ በኋላ ዛሬ መጋቢት 12 ቀን 2008 ዓ.ም ይህ ትእዛዝ ተሰጥቷል።

የፍ/ይ/መ/ቁ.126145

ታህሳስ 10 ቀን 2009 ዓ.ም

ዳኞች፡- ብርሃኑ አመነው

ገበየሁ ፈለቀ

ኃይሉ ነጋሽ

አመልካች፡- ወ/ሮ ትርሲት ቶሎሣ ጠ/ኢሳያስ መኮንን ቀረቡ

መልስ ሰጪዎች፡- 1ኛ አቶ ኪዳኔ ዮሐንስ-ከጠ/ቢጋሻው ኃ/ገብርኤል ጋር ቀረቡ

2ኛ ወ/ሮ እምራ አሰፋ-

3ኛ አያት አክሲዮን ማህበር -ጠ/ደረጀ ወርቁ ቀረቡ

መዝገቡ የተቀጠረው መርምሮ ተገቢውን ለመስራት እንደመሆኑ ተመርምሮአል።

በዚሁ አግባብ ዋናውን ጉዳይ ላይ ውሣኔ ከመሰጠቱ በፊት የተጨማሪ ማስረጃ አቤቱታ ላይ ተከታዩ ትእዛዝ ተሰጥቷል።

<u>ትእዛዝ</u>

1ኛ እና 2ኛ መዋስ ሰጪዎች ሐምሌ 5 ቀን 2008 ዓ.ም በተፃፈ አቤቱታ በፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 345 መሠረት ተጨማሪ ማስረጃ ለማቅረብ አንዲፈቀድላቸው ጠይቀዋል። ይኸው አቤቱታ ግልባጭ ለይግባኝ ባይ ደርሶ አስተያየት እንዲሰጡ ተደርጓል። ይግባኝ ባይ ህዳር 2 ቀን 2009 ዓ.ም በተፃፈ አስተያየት አቅርበዋል። ይዘቱም ባጭሩ ተጨማሪ ማስረጃ እንዲቀርብ የተጠየቀበት አግባብ በሥር ፍርድ ቤት ተጠይቆ የተሰራበት ወይም ሳይቀርብ የቀረበት ምክንያት ያልተገለፀ ከመሆኑ አኳያ እና ይግባኙ የቀረበው የግልግል ጉባኤ የይግባኝ ባይን ወደ ክርክሩ ሊገባ ጥያቄ ባለመቀበሉ በመሆኑ የማስረጃ ጉዳይ ወደ ክርክሩ ሊገባ የሚታይ ነው ተብሎ ውድቅ እንዲደረግ ጠይቋል።

እኛም ይህንኑ ከሕጉ ጋር በማገናዘብ መርምረናል። በመሠረቱ ተጨማሪ ማስረጃ በይግባኝ ሰሚ ፍርድ ቤት ሊቀርብ የሚችልበት አግባብ በፍ/ብ/ሥ/ሥ/ህግ አንቀጽ 345(ሐ)

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327/3/ የተደነገገ ስለመኖሩ ልብ ይሰዋል። ይህ ተፈፃሚ የሚሆነው በህጉ ተመለክቱት ሁኔታዎች ተሟልተው ሲገኙ መሆኑም ይታወቃል። በተያዘው ጉዳይ መልስ ሰጪዎች በፍ/ብ/ሥ/ሥ/ሕጉ አንቀጽ 345 መሠረት አድርጉ ያቀረቡት የተጨማሪ ማስረጃ ማቅረብ ጥያቄ ተቀባይነት አለው ወይስ የለውም ከመባሉ በፊት በዚህ ፍርድ ቤት የተያው ክርክር ይዘት መታወቅ አለበት።

በዚህ ፍርድ ቤት ይግባኝ ባይ ያቀረቡት ቅሬታ በሥር ፍርድ ቤት በመልስ ሰጪዎች መካከል በግልግል ጉባኤ ታይቶ በተወሰነው ጉዳይ ላይ መብትና ጥቅም አለኝ ሲሉ በፍ/ብ/ሥ/ሥ/ህግ ቁጥር 358 መሠረት ያቀረቡት የመቃወሚያ አቤቱታ ግልግል ጉባኤ የማስተናገድ ሥልጣን የለኝም በማለቱ ይህንን ለማስለወጥ እና ወደ ጉዳዩ ተገብቶ የግራ ቀኙን ክርክር ተሰምቶ እንዲወን እንዲደረግ ነው። ይህ ሁኔታ የሚያስገነዝበን ይግባኝ ባይ ገና ወደ ክርክሩ ለመግባት እንዲቻላቸው የሥነ ሥርዓት ሕጉ በሚፈቅደው መሠረት በሩ እንዲከፈትላቸው እንጂ ክርክራቸው ተሰምቶ በፍሬ ጉዳዩ ውሣኔ የተሰጠበት አይደለም።

ይግባኝ ባይ ወደ ክርክሩ ሲገቡ የሚያቀርቡት ማስርጃ እንዲሁም አሁን 1ኛ እና 2ኛ መልስ ሰጪች የሚያቀርቡት ማስረጃ እና ክርክር ታውቆ ውሣኔ ባላገኝ ጉዳይ በዚህ ፍርድ ቤት ገና በሥነ ሥርዓታዊ ጥያቄ ላይ የፍሬ ነገር ክርክር ለማስረዳት እንድቻላቸው ለማቅረብ የጠየቁት የተጨማሪ ማስረጃ ጥያቄ አሁን በዚህ ፍርድ ቤት ከተያዘው የሥነ ሥርዓት ጥያቄ አኳያ ሲታይ አግባብነነት የሌለው እና ጊዜውን የመጠበቅ ባለመሆኑ አቤቱታቸው ተቀባይነት የለውም ብለናል።

በዚሁ መሠረትም ዋናው ይግባኝ ቅሬታና የግራ ቀኙ ክርክር ተመርምሮ ተከታዩ ውሣኔ ተሰጥቷል።

ውሣኔ

ይግባኙ የቀረበው በ1ኛ፣ 2ኛ ፣ እና 3ኛ 3ኛ መልስ ሰጪዎች መካከል የነበረውን ክርክር ጉዳይ አይቶ ፍርድ የሰጠው የግልግል ዳኝነት ጉባኤ ይግባኝ ባይ በጉባኤው የተሰጠው ውሣኔ መብትና ጥቅሜን ይመለከታል ሲሉ የመቃዋም አቤቱታ በፍ/ሥ/ሥ/ህግ ቁጥር 358 መሠረት የሰረዙትን አቤቱታ ጉባኤው እንዲህ አይነት አቤቱታ ተቀብሎ ውሣኔ ለመስጠት የግልግል ጉባኤ ሥልጣን የለውም በማለት ጉባኤው መጋቢት 12 ቀን 2008 ዓ.ም የሰጠውን ትእዛዝ ለማስለወጥ ነው።

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የይግባኝ ባይ ጠበቃ መጋቢት 29 ቀን 2008 ዓ.ም ጽፎ ባቀረቡት ቅሬታ ይዘት ባጭሩ በፍ/ብ/ሥ/ሥ/ህግ አንቀጽ 317/1/ እንዲሁም በፍ/ብ/ሥ/ሥ/ሀ/ቁ. 3345 መሠት የግልግል ዳኝነት ጉባኤ የዳኝነት አፈፃፀም በሥነ ሥርዓት ሕጉ በተደነገገው አካሄን ስለመሆኑ መደንገጉን ተከትሎ በክርክር ተካፋይ ያልነበሩት ይግባኝ ባይ ፍርድ መብታቸውን የነካባቸው መሆኑን ገልፀዉ ወደ ክርክሩ እንዲገቡ በፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 358 መሠረት ያቀረቡትን አቤቱታ የግልግል ጉባኤው አለመቀበሉ ስህተት ነው ተብሎ እንዲሻር እና ወደ ክርክሩ እንዲገቡ እንዲወሰን የሚል ነው።

ይህ ፍርድ ቤት ይግባኝ ቅሬታ ከመረመረ በኋላ የግልግል ጉባኤ በሥነሥርዓት ሕጉ የሚመራ መሆኑ እየታወቀ በፍ/ብ/ሥ/ሥ/ህግ ቁጥር 358 የቀረበውን አቤቱታ አልተቀበልም ማለቱን አግባብነት ለማጣራት መልስ ሰጪዎች መልስ እንዲሰጡ አዟል።

በዚህ መሠረት የ1ኛ እና 2ኛ መልስ ሰጪዎች ጠበቃ ሐምሌ 5 ቀን 2008 ዓ.ም የተፃፈ የመቃሚያ መልስ ክርክር አቅርቧል።

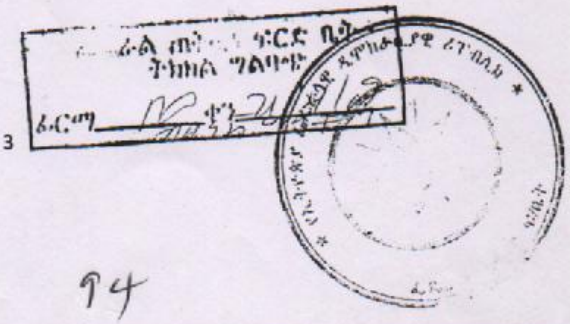
ይዘቱም ባጭሩ የግልግል ጉባኤ ጉዳዩን እንደገና ለማየት የሚያስችለው የሥነ ሥርዓት ሕግ መሠረት የለም የሚል ሆኖ በአማራጭም የፍሬ ነገር ክርክር አቅርቧል።

የ3ኛ መልስ ሰጪ ጠበቃ ሐምሌ 5 ቀን 2008 ዓ.ም ጽፎ ያቀረቡት መልስ ይግባኝ ባይ ያቀረቡትን መቃሚያ ግልግል ጉባኤ እንዲቀበል ቢታዘዝ ተቃውሞ እንደሌለው ገልጿል።

የጉዳዩ አመጣጥ እና የግራ ቀኙ ክርክር ከላይ ባጭሩ የተገለፀ ሲሆን እኛም ይግባኙ ያስቀርባል ሲባል የተያዘውን ጭብጥ መሠረት በማድረግ ከሕጉ ጋር በማገናዘብ መርምረናል።

ከመዝገቡ መገንዘብ እንደሚቻለው ጉዳዩ በመጀመሪያ የዳኝነት ሥልጣን በግልግል ጉባኤ ታይቶ ውሣኔ የተሰጠው በ1ኛ እና 2ኛ መልስ ሰጪዎች ከተከሳሽነት በ3ኛ መልስ ሰጪ ተከሳሽነት በተደረገ ክርክር ላይ ነው።

የአሁኑ ይግባኝ ባይ በዚህ የግልግል ጉባኤ የዳኝነት ሥልጣን ውሣኔ የተሰጠበት ጉዳይ መብትና ጥቅም አለኝ በሚል ምክንያት በፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 358 መሠረት መቃወሚያ አቤቱታ አቅርቧል።



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የግልግል ዳኝነት ጉባኤ ግን ጉባኤው በፍ/ብ/ሥ/ሥ/ህግ አንቀጽ 358 መሠረት መቃወሚያ ለማስተናገድ ሥልጣን የለኝ ብሏል።

ይህ ተገቢ ነው ወይ? የሚለውን ጥያቄ ለመመርመር የግልግል ዳኝነት አመራር አስመልክቶ በፍ/ብ/ሥ/ሥ/ህጉ እና በፍ/ብ/ሥ/ሥ/ ሕጉ የተደነገጉትን ማየት ይገባል።

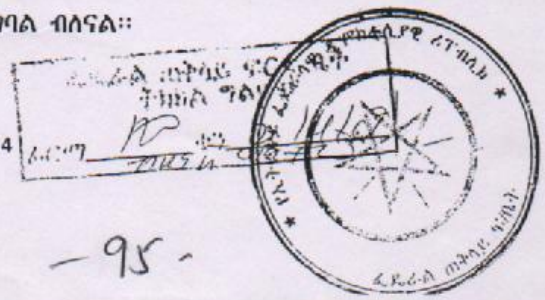
የግልግል ዳኝነት የክርክር አመራር አስመልክቶ በፍ//ብ/ሥ/ሥ/ህግ አንቀጽ 317/1/ መርህ ተደንግጓል ይኸውም የሥነ ይርዓት ሕጉ ጋር በተመሳሳይ አኳሀን መመራት እንዳለበት ተመልክቷል። ከዚህም ባሻገር በፍ/ብ/ሥ/ሥ/ ሕጉ አንቀጽ 3345 እንደተደነገገው የዘመድ ዳኝነት የክርክር አመራርም ሆነ የውሣኔው አፈፃፀም በፍ/ብ/ሥ/ሥ/ሕግ በተደነገገው አግባብ ስለመሆኑ ተመልክቷል።

በመሆኑም የፍ/ብ/ሥ/ሥ/ህግ አንቀጽ 317/1/ እንደሁም በፍ/ብ/ሠ/ሥ/ህግ አንቀጽ 3345 ዳንጋጌ ይዘት በጣምራ ስንመለከት የግልግል ዳኝነት ክርክር አመራርም ሆነ ውሣኔ አይደለም በፍ/ብ/ሥ/ሥ/ሕጉ በተመለከተው አግባብ ሊመራ እንደሚገባ መገንዘብ ይቻላል፡

በተያዘው ጉዳይ የግልግል ጉባኤው አቤቱታውን አልተቀበለም ያለው በፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 358 የሚቀርበው አቤቱታ በግልግል ውሣኔ ቅሬታ ያለው ወገን አቤቱታ ሊያቅርብ የሚችለው በፍ/ብ/ሥ/ሥ/ህግ ቁጥር 350-357 በተደነገገው አግባብ ብቻ ነው በማለት ነው።

በግልግል ጉባኤ የተጠቀሰው ድንጋጌ ቁጥር 350-357 የሚመለከተው በግልግል ወይም የቤተሰብ ሽምግልና ዳኞች በሰጡት ውሣኔ ይግባኝ ስለሚቀርብና ውሣኔውን ስለማሰረዝ የሚመለከት እንጂ ውሣኔ በተሰጠው አካል ዘንድ ውሣኔው ላይ ያልተከራከረ ሦስተኛ ወገን አቤቱታ የሚያቀርብበትን ሥርዓት አንዘጽ 359 እስከ 360 ያለውን የሚከለክል ሆኖ አልተደነገገም።

ስለሆነም የግልግል የዳኝነት አጠቃላይ ክርክሩ አመራር በፍ/ሥ/ሥ/ሕጉ ስለመሆኑ በሕጉ በግልግል ተደንግጉ እያለ የክርክሩ ተካፋይ ያልነበሩት ይግባኝ ባይ በወሰነው መብቱ ተነክቷል ሲሉ በፍ/ሥ/ሥ/ሕና ቁጥር 358 መሠረት ያቀረቡትን አቤቱታ ተቀብሎ የመመርመር እና ተገቢውን ውሣኔ የመስጠት ሥልጣን እያለው አቤቱታውን አልቀበልም ማለቱ ሥነ ሥርዓታዊ ባለመሆኑ ሊታረም ይገባል ብለናል።



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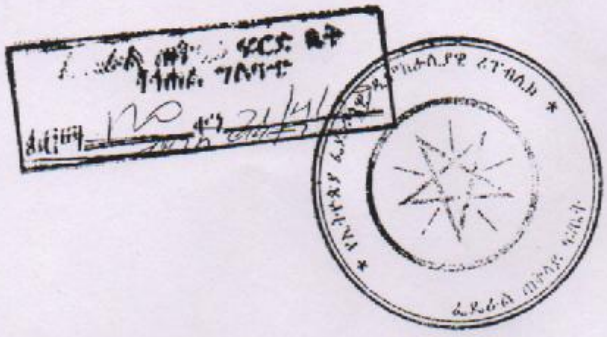
የግልግል ጉባኤው የይግባኝ ባይን የመቃወሚያ አቤቱታ ተቀብሎ የማከራከር ሥልጣን በፍ/ብ/ሥ/ሥ/ህግ 317/1/ እና በፍ/ብ/ሕግ 3345/1/ መሠረት ተሰጥቶታል ብለናል።

በዚሁ መሠረት አቤቱታቸውን ተቀብሎ ግራ ቀኙን አከራክሮ የመሰለውን ውሣኔ እንዲሰጥ ብለን በፍ/ብ/ሥ/ሥ/ህግ ቁጥር 353 መሠረት መልሰናል ይባፍ። መዝገቡ ይመለስ።

የማይነበብ የሦስት ደኞች ፊርማ አለበት።

ብ/ግ



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09/10/09

በአዲስ አበባ ንግድና የዘርፍ ማሕበራት ምክር ቤት የግልግል ተቋም
የግልግል ዳኝነት ጉባኤ የተሰጠ ብይን

የግልግል ዳኞች

አሊ መሃመድ ሰብሳቢ የግልግል ዳኛ

በላወርቅ ሺመላሽ የግልግል ዳኛ

አስቻለው አስፋው የግልግል ዳኛ

ተከራካሪ ወገኖች

አመልካች፡ የኢትዮጵያ ብዝሃ ህይወት ኢንስቲቱት

ተጠሪዎች፡ 1ኛ. ኮባልት ኮንስትራክሽን
2ኛ ንብ ኢንሹራንሽ ኩባንያ
3ኛ ንብ ባንክ አ. ማ

አመልካች ጥር 23 ቀን 2009 ዓ.ም በተጻፈ የክስ ማመልከቻ ባቀረበው ክስ ከተጠሪ ጋር ግንቦት 30 ቀን 2012 ዓ.ም (ግንቦት 23 ቀን 2004 ዓ.ም) በገቡት ውል 1ኛ ተጠሪ ለአመልካች በፍቼ ከተማ የጀኑቲክ ሃብት ማዕከል በ240 ቀናት ውስጥ ገንብቶ ሊያስረክብ የተስማማ ቢሆንም ግንባታውን በውሉ መሰረት ማጠናቀቅ ባለመቻሉ አመልካች ውሉን ሐምሌ 10 ቀን 2007 ዓ.ም ማቋረጡን ጠቅሶ ፤ 1ኛ ተጠሪ የውሉ አካል የሆነውን የማቀዝቀዣ ክፍል ከዱባይ ለማስመጣት እንዲችል ከአመልካች ላይ በብድር መልክ የወሰደውን ብር 5,094,775.00 ያልመለሰ በመሆኑ፤ የቅድሚያ ክፍያ ብር 1,877,258.99 ወስዶ ያላወራረደ በመሆኑ፤ 2ኛ ተጠሪም የብር 1,396,257.96 የአፈጻጸም ዋስትና እንዲሁም የብር 2,118,579.50 እና የብር 5,094,775.00 የቅድመ ክፍያ ዋስትና የሰጠ በመሆኑ፤ 3ኛ ተጠሪም ከላይ የተጠቀሰውን ማቀዝቀዣ 1ኛ ተጠሪ ከዱባይ እንዲያስመጣ ብር 2,294,775.00 በዝግ ሂሳብ አስቀምጦ ለዕቃው ግዢ ብቻ መክፈል ሲገባው ለ1ኛ ተጠሪ የከፈለ በመሆኑ፤

1ኛው ተጠሪ የግንባታውን ቦታ በአጭር ጊዜ ውስጥ እንዲያስረክብ፤ ለቅድሚያ ክፍያ እና ለማቀዝቀዣ እቃ ግዢ የተከፈለውን ገንዘብ ከነወለዱ እንዲመልስ እንዲሁም በውሉ መሰረት ባልተጠናቀቀው ሥራ ተመን የሚታሰብ 20 በመቶ ካሳ ጨምሮ በድምሩ ብር 9,950,583.67 ለአመልካች እንዲከፍል፤

2ኛ ተጠሪ በሰጠው ቦንድ እና በገባው የቅድሚያ ክፍያ እና የአፈጻጸም ዋስትና መሰረት ከ1ኛ ተጠሪ ጋር በአንድነትና በነጠላ ብር 9,189,180.45 እንዲከፍል ፤

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3ኛ ተጠሪም በዝግ ሂሳብ ተቀምጦ የነበረውን እና ለ1ኛ ተጠሪ የከፈለውን ገንዘብ ብር 2,836,574,52 በአንድነትና በነጠላ ለአመልካች እንዲከፍል ፣ እንዲወሰንባቸው አመልክቷል፡፡

1ኛው ተጠሪ በ22/06/09 በተጻፈ መከላከያ መልስ ግንባታው በውሉ በተቀመጠው ጊዜ ሊጠናቀቅ ያልቻለው በቦታው የነበሩ ነዋሪዎች ካሳ ስላልተከፈላቸው በፈጠሩት ሁከት እና ሳይቱ ላይ ወራጅ ውሃ የሚያቋርጥ በመሆኑ እንደሆነ እንዲሁም የውሃ እና የመብራት አቅርቦት ያለመኖሩ እና የግንባታ ውሉም ሆነ ፕላኑ ክፍተት ያለበት መሆኑን፣ በተጨማሪም አማካሪ ድርጅቱ ክፍያን በጊዜ ገደቡ ያለመክፈል ለግንባታው መጎተት እና ለውሉ መቋረጥ ምክንያት በመሆኑ አመልካች የጠየቀው ወለድ አግባብነት የሌለው መሆኑን ገልጸዋል፡፡

1ኛው ተጠሪ በ22/06/09 በተጻፈ መከላከያ መልስ ግንባታው በውሉ በተቀመጠው ጊዜ ሊጠናቀቅ ያልቻለው በቦታው የነበሩ ነዋሪዎች ካሳ ስላልተከፈላቸው በፈጠሩት ሁከት እና ሳይቱ ላይ ወራጅ ውሃ የሚያቋርጥ በመሆኑ እንደሆነ እንዲሁም የውሃ እና የመብራት አቅርቦት ያለመኖሩ እና የግንባታ ውሉም ሆነ ፕላኑ ክፍተት ያለበት መሆኑን፣ በተጨማሪም አማካሪ ድርጅቱ ክፍያን በጊዜ ገደቡ ያለመክፈል ለግንባታው መጎተት እና ለውሉ መቋረጥ ምክንያት በመሆኑ አመልካች የጠየቀው ወለድ አግባብነት የሌለው መሆኑን ገልጸዋል፡፡ በተጨማሪም አመልካች እና 1ኛው ተጠሪ ለማቀዝቀዣ ክፍሉ ግዢ እንዲውል በገቡት የብድር ውል 1ኛ ተጠሪ የወሰደውን ብር 5,094,775.00 ባይመልስ አመልካች ሊጠይቁ የሚችሉት 2ኛውን ተጠሪ ብቻ መሆኑን፣ 1ኛ ተጠሪ በገባው የግንባታ ውል መሰረት ለሰራው ሥራ ያልተከፈለው ብር 1,670,759.62 ያለ መሆኑንና ይህም ለእዳው ሊታሰብና ሊቀነስ የሚገባው መሆኑን፣ በቅድመ ክፍያ ያልተወራረደ ተብሎ የተጠየቀው ብር 1,877,258.99 የታሰበው ቫትን ጨምሮ በመሆኑ የቫት ክፍያ ለአመልካች ሊከፈል ስለማይገባ ትክክለኛው መጠን ብር 1,633,399.13 መሆኑን እና 1ኛ ተጠሪ ለሰራው ሥራ ካልተከፈለው ብር 1,670,759.62 ጋር ሲቀናነስ ከአመልካች ለ1ኛ ተጠሪ የሚመለስ ብር 38,360.49 መኖሩን፣ ከዚህ ሌላ ከ1ኛ ተጠሪ ክፍያ ላይ ለሪቴንሽን የተቆረጠ ብር 355,002.16 ተቀናሽ ሊደረግ የሚገባ መሆኑን፣ እንዲሁም የቀሪው ሥራ ግምት አመልካች እንደሚለው የብር 7,711,978.00 ሳይሆን የብር 3,563,352.99 በመሆኑ ባልተጠናቀቀ ሥራ ላይ ታሳቢ የሚደረገው 20% ሲሰላ 1ኛ ተጠሪ ሊጠየቅ የሚገባው ብር 712,670.59 ብቻ መሆኑን በመግለጽ 1ኛ ተጠሪ ላይ የቀረበው ክስ ውድቅ እንዲደረግ አመልክተዋል፡፡

2ኛው ተጠሪ የካቲት 03 ቀን 2009 ዓ.ም. በተጻፈ ባቀረቡት ማመልከቻ በ2ኛ ተጠሪ በተሰጠው የቅድሚያ ክፍያ ዋስትና እና የመልካም ሥራ አፈጻጸም ዋስትና ላይ አለመግባባት በተፈጠረ ጊዜ ጉዳዩ በግልግል ዳኝነት እንደሚታይ እንጂ በአ.አ ንግድና የዘርፍ ማህበራት ም/ቤት የግልግል ተቋም እንዲታይ የማይደነግግ መሆኑን በመግለጽ፣ ጉዳዩ በግልግል ተቋሙ ይታይ ቢባል እንኳ በአንድ ወገን በአመልካች በሌላ ወገን ደግሞ በ1ኛ እና 2ኛ ተጠሪ በሚመረጡ የግልግል ዳኞች እና እነዚሁ የግልግል ዳኞች በጋራ ከተቋሙ ወይም ከተቋሙ ውጪ በሚመርጡ ሰብሳቢ የግልግል ዳኛ ጉባኤው የሚቋቋም ከሆነ ለቀረበው ክስ መልስ የሚሰጥ መሆኑን ገልጸአል፡፡

2ኛ ተጠሪ በቀጣይ ሰኔ 15 ቀን 2009 ዓ.ም በተጻፈ ባቀረበው መከላከያ መልስ ለግንባታው ሥራ መቋረጥ ምክንያት የሆነው አመልካች ለነዋሪዎች ተገቢውን ካሳ በወቅቱ ባለመክፈሉ፣ በቦታው ላይ የውሃና መብራት አቅርቦት ባለመኖሩ እንዲሁም ክፍያ በወቅቱ ባለመከፈሉ መሆኑን፣ አመልካች 2ኛ ተጠሪ በሰጠው የብር 1,877,258.99 ቅድሚያ ክፍያ ዋስትና መሰረት እንዲፈጸምለት ለ2ኛ ተጠሪ ያሳወቀው የዋስትና ውሉ ዘመን ካለፈ ከአንድ አመት በኋላ መሆኑን እና አመልካች የ1ኛ

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ተጠሪን የሥራ ውል ያራዘመው ለ2ኛ ተጠሪ ሳያሳውቅ መሆኑን እንዲሁም የገንዘቡ መጠን ስሌት እንዴት እንደመጣ በ2ኛ ተጠሪ የማይታወቅ መሆኑን፤ 2ኛ ተጠሪ የሰጠውን የብር 5,094,755.00 የቅድሚያ ክፍያ ዋስትና በተመለከተ 2ኛ ተጠሪ የብድር ዋስትና ለመስጠት የማይፈቀድለት መሆኑንና ዋስትናውንም ያልሰጠ መሆኑን፤ አመልካች 1ኛ ተጠሪ የወሰደውን ብድር ያለመመለሱን ለ2ኛ ተጠሪ በዋስትና ውሉ ዘመን ያሳሳወቀ መሆኑን፤ አመልካች 2ኛ ተጠሪ በሰጠው የብር 1,396,257.90 የመልካም ሥራ አፈጻጸም ዋስትና መሰረት እንዲፈጸምለጽ ለ2ኛ ተጠሪ ያሳወቀው የዋስትና ውሉ ዘመን ከተጠናቀቀ በኋላ መሆኑን፤ በመግለጽ በዋስትና ውሎቹ መሰረት ለመፈጸም የማይገደድ በመሆኑ እንዲሁም 1ኛ ተጠሪ እንደውሉ ያለመፈጸሙ በማስረጃ ስላልተረጋገጠ ክሱ ውድቅ እንዲደረግ የጠየቀ ሲሆን በክሱ ላይ የቀረበው የገንዘብ መጠንም የተጋነነ መሆኑን እና 2ኛ ተጠሪ ወለድ እንዲሁም ወጪና ኪሳራም ሊጠየቅ እንደማይገባው ተከራክሯል፡፡

3ኛ ተጠሪ የካቲት 14 ቀን 2009 ዓ.ም በተጻፈ መቃወሚያ መልስ ላይ በአመልካች እና በ3ኛ ተጠሪ መካከል የሚፈጠር አለመግባባት በግልግል ዳኝነት እንዲታይ ስምምነት የሌለ መሆኑን እና የግልግል ተቋሙም ጉዳዩን ለማየት ሥልጣን የሌለው መሆኑን እንዲሁም በአመልካች እና በ3ኛ ተጠሪ መካከል የተፈጠረው አለመግባባት ከግንባታ ውሉ አፈጻጸም ጋር የማይገናኝ የሌተር ኦፍ ክሬዲት ጉዳይ እንደመሆኑ በግንባታ ውሉ ውስጥ በተጠቀሰው የግልግል ዳኝነት ስምምነት ውስጥ የማይሸፈን መሆኑን በመግለጽ 3ኛ ተጠሪ ከክሱ እንዲወጣ እንዲወሰን አመልክተዋል፡፡

የግልግል ዳኝነት ጉባኤው 2ኛና 3ኛ ተጠሪዎች ያቀረቡትን የመጀመሪያ ደረጃ መቃወሚያ መርምሮ የሚከተለውን ብይን ሰጥቷል፡፡

ብይን

የ2ኛ ተጠሪ መቃወሚያ በ2ኛ ተጠሪ በተሰጠው የቅድሚያ ክፍያ ዋስትና እና የመልካም ሥራ አፈጻጸም ዋስትና ላይ አለመግባባት በተፈጠረ ጊዜ ጉዳዩ በግልግል ዳኝነት እንደሚታይ እንጂ በአ.አ ንግድና የዘርፍ ማህበራት ም/ቤት የግልግል ተቋም እንዲታይ የማይደነግግ መኖኑን በመግለጽ ጉዳዩ በግልግል ተቋሙ ይታይ ቢባል እንኳ የግልግል ዳኞቹ በአንድ ወገን በአመልካች በሌላ ወገን ደግሞ በ1ኛ እና 2ኛ ተጠሪ በሚመረጡ እና እነዚሁ የግልግል ዳኞች በጋራ ከተቋሙ ወይም ከተቋሙ ውጪ በሚመርጡት ሰብሳቢ የግልግል ዳኛ ጉባኤው የሚቋቋም ሊሆን እንደሚገባው ተከራክሯል፡፡ በመሰረቱ ተከራካሪ ወገኖች አለመግባባታቸው ለግልግል ዳኝነት እንዲፈታ በሚስማሙበት ወቅት በተቋሙ በኩል እንዲካሄድ አለመስማማታቸው ጉዳያቸው በግልግል ዳኝነት ጉባኤው እንዳይካሄድ አያግደውም፡፡ በዚህ ጉዳይም ሁለቱ የግልግል ዳኞች በአመልካች እና በ1ኛ ተጠሪ በኩል ተመርጠው ሰብሳቢውን የግልግል ዳኛ እነዚሁ የግልግል ዳኞች የመረጡ በመሆኑ ሂደቱ ሥርዓቱን የተከተለ መሆኑን ያረጋግጣል፡፡ 2ኛ ተጠሪም በቃል ሲያስረዱ በዚህ አካሄድ የተሰየመውን ጉባኤ እንደሚቀበሉ ያረጋገጡ ሲሆን መከላከያ መልሳቸውንም ለማቅረብ እድል እንዲሰጣቸው ጠይቀዋል፡፡ በመሆኑም የግልግል ጉባኤው ጉዳዩን ማየት የሚችል ስለሆነ 2ኛ ተጠሪ ለክርክሩ መከላከያ መልሳቸውን እንዲያቀርቡ እና ክርክሩ እንዲቀጥል ብይን ተሰጥቷል፡፡

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የ3ኛ ተጠሪ መቃወሚያ በአመልካች እና በ3ኛ ተጠሪ መካከል የሚፈጠር አለመግባባት በግልግል ዳኝነት እንዲታይ ስምምነት የሌለ መሆኑን እና የግልግል ተቋሙም ጉዳዩን ለማየት ሥልጣን የሌለው መሆኑን፤ እንዲሁም በአመልካች እና በ3ኛ ተጠሪ መካከል የተፈጠረው አለመግባባት ከግንባታ ውሉ አፈጻጸም ጋር የማይገናኝ የሌተር ኦፍ ክሬዲት ጉዳይ እንደመሆኑ በግንባታ ውሉ ውስጥ በተጠቀሰው የግልግል ዳኝነት ስምምነት ውስጥ የማይሸፈን መሆኑን በመግለጽ 3ኛ ተጠሪ ክሱ እንዲወጣ እንዲወሰን የሚል ነው፡፡ የግልግል ዳኝነት ጉባኤው እንደመረመረውም 3ኛው ተጠሪ ዝግ ሂሳብ እንዲከፍት በተደረገበት ግንኙነት ውስጥ አለመግባባት ቢከሰት በግልግል ዳኝነት እንዲታይ ስምምነት የሌለ መሆኑን መረዳት ተችሏል፡፡ በመሆኑም 3ኛው ተጠሪ ከዚህ የክስ ሂደት እንዲወጣ ብይን ተሰጥቷል፡፡

ትዕዛዝ

የብይኑ ግልባጭ ለተቋሙ እና ለተከራካሪ ወገኖች ይድረስ

ክሱን ለመስማት ለ07/10/09 ከጠዋቱ በ3፡00 ሰዓት ተቀጠረ፤

የግልግል ዳኞች ፊርማ

አሊ መሐመድ	በዛወርቅ ሺመላሽ	አስቻለው አስፋው
ሰብሳቢ የግልግል ዳኛ	የግልግል ዳኛ	የግልግል ዳኛ

የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ
የፌዴራል ከፍተኛ ፍርድ ቤት

የክ/መ/ቁ 175146

7/02/2009

ዳኛ ስንታየሁ ዘሰቀ

ከሳሽ፡- የኢትዮያ ብዙሀ ህይወት ኢንስቲትዩት አልቀረቡም

ተከሳሾች፡- 1ኛ ክባልቡ ኮንስትራክሽን ሃ/የተ/የግ/ማህበር ነ/ፈጅ

2ኛ ንብ ኢንሹራንስ ኩባንያ ነ/ፈጅ ተስፋዬ ሽብሩ

3ኛ ንብ ኢንተርናሽናል ባንክ አልቀረቡም

መዝገቡ ለዛሬ የተቀጠረው መርምሮ በቀረበው የመጀመሪያ ደረጃ መቃወሚያ ላይ ብይን ለመስጠት ነው፡፡ ፍ/ቤቱም መርምሮ የሚከተለውን ብይን ሰጧል፡፡

ብ ይ ን

ከሳሽ የካቲት 14 ቀን 2008 ዓ/ም ጽፎ ባቀረበው የክስ አቤቱታ ከሳሽ በኦሮሚያ ክልል በሰሜን ሸዋ ዞን ግራር ካርሶ ወረዳ በፍቼ ከተማ የጀኔቲክ ሀብት ማዕከል ህንፃ ለማስገባት ከ1ኛ ተከሳሽ ጋር እ.ኤ.አ ግንቦት 30 ቀን 2012 ግንቦት 2/ ቀን 2004 ዓ.ም የግንባታ ውል ስምምነት የፈጸምን ሲሆን በዚህ ውል መሰረት 1ኛ ተከሳሽ ግንባታው በ240 ቀናት ውስጥ አከናውኖ ማስረከብ ያለበት ቢሆንም በውሉ መሰረት መፈጸም አልቻለም፡፡ 1ኛ ተከሳሽ የውሉ አበል የሆነውን የማቀዝቀዣ ክፍል ማሽን ሲዲባይ ለማስመጣት የገንዘብ እጥረት ገጥሞኛል በማለት ጥያቄ በማቅረቡ ከዋናው ክፍያ እንደሚቀነስ ታሳቢ ተደርጎ የካቲት 16 ቀን 2007 ዓ.ም በተደረገ ስምምነት መሰረት ብር 5,094,775 ብድር መልስ የወሰደ ቢሆንም እቃውን አላስገባም ገንዘቡንም አላስመለሰም የተከፈልነው ቅድመ ክፍያ ብር 1,877,258.99 አላወራረደም፡፡

2ኛ ተከሳሽ በቦንድ ቁጥር GS /2/BDPBC/02/10/12 በኢንደርስመንት ቁጥር BD/0058/14PAC/396,257.96 በቦንድ ቁጥር GS/2/BDABC/0211/12 በኢንደርስመንት ቁጥር BD/0059/14 የብር 2,118,579.50 እንዲሁም ቦንድ ቁጥር GS/2/ BDABC10640115 በኢንደርስመንት ቁጥር BD/0042115 የብር 5,094,775 [illegible] የቅድመ ክፍያ

መዝገብ ቤት

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የስትና ያለ በመሆኑ በገዛው ግዴታ መሰረት ክፍያውን እንዲከፍል ቢጠየቅም ፈቃደኛ ሳልሆንም 3ኛ ተከሳሽም 1ኛ ተከሳሽ የማቀዝቀዣ ክፍል ማሽኑ ከጫባይ እንዲያስመጣ ክፍያ በተፈጸመበት ወቅት 113,250 የአሜሪካን ዶላር ወይም ብር 2,294,775 በተከሳሽ በኩል በዝግ ሂሳብ እንዲቀመጥ ሰማቀዝቀዣ ክፍሉ እቃ ግዥ ብቻ እንዲውል ማረጋገጫ የሰጠ ቢሆንም እቃው ሳይገባ ለ1ኛ ተከሳሽ ክፍያ ፈጽሞ ተገኝቷል። ስለሆነም ከ1ኛ ተከሳሽ ጋር የተደረገው ውል የተቋረጠ በመሆኑ 1ኛ ተከሳሽ ባለበት ሁኔታ የግንባታ ቦታውን እንዲያስረክቡ መክፈል ያለበትን አጠቃላይ የክፍያ ብር 9,415,635.08 2ኛ ተከሳሽ በሰጠው የዋስትና ሰነድ መሰረት ከ1ኛ ተከሳሽ ጋር በአንድነት እንዲከፍል 3ኛ ተከሳሽም ከ1ኛ 2ኛ እና ተከሳሾች ጋር በአንደነትና በነመጠሳ ብር 2,647,724.26 እንዲከፍሉ ይጠይንልን በማለት ዳኝነት ጠይቋል።

1ኛ ተከሳሽ ሚያዚያ 3 ቀን 2008 ዓ/ም ጽፎ ባቀረበው መክላከያ መልስ ክሳሽ እና 1ኛ ተከሳሽ ባደረጉት የግንባታ ውል ጠቅላላ ድንጋጌዎቹ እንዲሁም በውሉ ላይ ግዴታዎች ላይ በሁለቱ ተዋዋይ ወገኖች መካከል የሚነጋጭ ግጭቶችና አለመግባባቶችን ተመልክቶ ሁሳኔ የሚሰጠው አካል የአዲስ አበባ ንግድ ምስክር ቤት የግልግል ክውንስል እንደሚሆን የተመለከተ በመሆኑ በዚህ ውል መሰረት ከግንባታ ውሉ ጋር ተያያዘው ለሚነሱ አለመግባባቶችና የይገባኛል ጥያቄዎች በቀጥታ ለግልግል ካውንስል መቅረብ የለበት በመሆኑ ክሳሽም 1ኛ ተከሳሽ በወሉ መሰረት ግዴታውን አልተወጣም የሚል ክሆነ ክሱም ማቅረብ ያለበት ለአዲስ አበባ ንግድ ምክር ቤት የግልግል ካንውስል እንጂ ለዘህ ፍ/ቤት ሊቀርብ የሚገባ በመሆኑ ፍ/ቤቱ ጉዳዩን የማየት ስልጣን የለውም ተብሎ መዝገቡ ግልግል በማለት የመጀመሪያ ደረጃ መቃወሚያ አቅርቧል።

2ኛ ተከሳሽ መጋቢት 29 ቀን 2008 ዓ.ም ጽፎ ባረበው መክላከያ ልስ 2ኛ ተከሳሽ ለክሳሽ በሰጠው የመልካም ስራ አፈጻጸም ዋስትና ቦንድ ተራ ቁጥር 7 እንዲሁም የቅድሚያ ክፍያ ዋስትና ቦንድ ተራ ቁጥር 5 መሰረት የሞስትና ቦንድ ተራ ቁጥር 7 እንዲሁም የቅድሚያ ክፍያ ዋስትና ቦንድ ተራ ቁጥር 5 መሰረት የዋስትና ቦንድ መሰረት በማድረግ የሚፈጠር አለመግባበት በግልግል ዳኝነት መታየት እንዳለበት የተመለከተ በመሆኑ ክሳሽ ክሱን መቅረብ ያለበት ለመደበኛው ፍ/ቤት የማየት ስልጣን የሌለው በመሆኑ መዝገቡ ይዘጋልን ከሳሽና 1ኛ ተከሳሽ ባደረጉት የግንባታ ውል ጠቅላላ ድንጋጌዎች እንደሁም በውሉ ላይ ግዴታዎች መሰረት በሁለቱ ተዋዋይ ወገኖች መካከል የሚፈጠር ግጭቶችና አለመግባባቶች የሚታየው እና ሹሳኔ የሚሰጠው በአዲስ አበባ

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ንግድ ምክር ቤት የማልማሉ ካውንስል አንጂ ስዚህ ፍ/ቤት ባለመሆኑ የቀረበውን ጉዳይ ፍ/ቤቱ የመዳኘት ስልጣን የሌለው በመሆኑ መዝገቡ ይዚጋል በማለት የመጀመሪያ ደረጃ መቃወሚያ አቅርቧል::

3ኛ ተከሳሽ ሚያዚያ 3 ቀን 2009 ዓ/ም ጽ/ፎ ባቀረበው መክላከያ መልስ ከሳሽ በተክላሾች ላይ የቀረበው ክስ 1ኛ እና 2ኛ ተከሳሾችን ብተመለከተ ተጣምሮ ሊቀርብ የሚችልና በከሳሽ እና 1ኛ እና 2ኛ ተክላሾች መካክል አሰ የሚባለው የውል ግንኙነት መሰረት ያደረገ ሲሆን 3ኛ ተክሳሽ ጋር ግን ምንም የውል ግንኙነት የሌለው በመሆኑ በዚህ ጉዳይ ተጣምሮ መክላከሉ አግባብነት የሊለው ስለሆነ ክሱ ውድቅ ይደረግልን በማሰት የመጀመሪያ ደረጃ መቃወሚያ አቅርቧል ::

ፍ/ቤቱም ስነ ስርዓት ህጉ በሚያዘው መሰረት በቀረበው የመጀመሪያ ደረጃ መቃወሚያ ላይ ግራ ቀኙን በቃል ሚያዚያ 13 ቀን 2008 ዓም በዋለው ችሎት ቢቀል ያከራክር ሲሆን ክሳሽ ክስ የቀረበበትን ጉዳይ ፍ/ቤቱ የመዳኘት ስልጣን ያለው መሆኑን 3ኛ ተክሳሽ በጉዳዩ ሊክሰስ የሚገባ መሆኑን በመግለጽ በተክሳሾች የቀረበው መቃወሚያ ውድቅ እንዲደረግ ተከራክሯል ተክሳሾችም በጽሁፍ ያቀረቡትን መክራከሪያ በማጠናከር ተከራክረዋል:: ግራ ቀኙ በመቃወሚያው ላይ በቃል ያስመዘገቡት መሉ ክርክርም ከመዝገቡ ላይ ሰፍሯል

በዚህ መዝገብ የቀረበው ክርክር ከላይ በአጭሩ ያስቀመጥነውን ሲመለከት ፍ/ቤቱም

1. ከሳሽ በዚህ መዝገብ ተክሳሾች ላይ ያቀረበውን ክስ ፍ/ቤቱ የመዳኘት ስልጣን አለው ወይስ የለውም
2. ከሳሽ በ3ኛ ተከሳሽ ላይ ክሱም ለማቅረብ የሚያስል መብት ወይም ጥቅም አለው ወይስ የሉውም የሚሉትን ጭብጦች በዋነኛበት በመያዝ መዝገቡን አግባብነት ካላቸው ህግጋት ጋር በማገናዘብ መርምሯል:: በመጀመሪያ ደረጃ የያዝነውን ጭብጥ በቅድሚያ ስንመለከት ከሳሽ በዚህ መዝገብ በተክሳሾች ላይ ክስ ያቀረበው ከፍ/ቤቱም ጽኝነት የጠየቀው 1ኛ ተክሳሽ በፍቺ ከተማ የጅኔረተር ሀብት ማዕከል ሀንዳ ለመገንባት ከሳሽ ጋር ግንቦት 23 ቀን 2004 ዓ.ም የግንባታ ውል የፈፀመ ቢሆንም በወሉ መሰረት ሳይፈጸም ውሉ

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የተቋረጠ በመሆኑ 1ኛ ተከሳሽ የግንባታ ቦታውን እንዲያስረክብ የወሰደውን እና መክፈል የሌበትን ነጥያ እንዲከፍል 2ኛ ተከሳሽም በሰጠው ሞስትና ግዴታ መሰረት ክስ የቀረበበትን ገንዘብ ከ1ኛ ተከሳሽ ጋር በአንድት እንዲከፍል ግሰሰብን በማለት መቃወሚያ የቀረቡት ጉዳይ መሥኮየት ያለበተ ስለሁሉ እንዲሁም በዋስትና ስነዱ መሰረት በግልግል ዳኝነት ነው በማለት ነው።

በመሰረቱ ማንኛውም ሰው በፍርድ ተይቶ ሊወሰን የሚገባው ጉዳይ ለፍ/ቤት ወይም ለሌላ በህግ የዳኝነት ስልጣን ለተሰጠው አካል አቅርቦ ፍርድ ወይም ውሳኔ የማግኘት መብት /the right of access to justice/ አለው ይህም በኢፌዴሪ ህገ መንግስት አንቀጽ 37/1/ ስር እንዲሁም ሀገራችን በፈረመቻቸው እና ባጸደቀቻቸው አለም አቀፍ 37 /1/ ስር እንዲሁም ሀገራችን በፈረማቸው እና ባጸደቃቸው አለም አቀፍ እንዲሁም አህጉራዊ አቀፍ ሰነዶች ላይ ተመልክቶ ይገኛል በዚህ የሰዎች ተፈጥሯዊ በሆነ መብት በመጠቀም ጉዳዩን ለፍ/ቤት በማቅረብ ማስማት ፍርድ ወይም ውሳኔ ማግኘት የሚችለው ግን ከሳሹ ክስ ያቀረበበትን ጉዳይ ፍ/ቤቱ ተቀብሎ ለማስማት እና ውሳኔ ለመስጠት የሚያስችል ስልጣን በተለይም ብሄራዊ የዳኝነት ስልጣን እና የስረ ነገር ስልጣን ያለው ሲሆን ከሳሹ ክስ ያቀረበበት ጉዳይ በፍርድ ተግቶ ሊወሰን የሚችል አግባብነት ጉዳይ ከሆነ /having justrciable matter /እና ከሳሹ ክስ ባቀረበበት ጉዳይ ላይ በህግ ጥበቃ ሊደረግ የሚችል ከህግ ወይም ከውል የመነጨ መብት ወይም ጥቅም ያለው ከሆነ ነው ይህንም ከላይ ከየቀስነው ድንጋጌ እንዲሁም ከፍ/ብ/ስ/ስ/ህ/ቁ 4 9 33/2 /3/ 231/1/ሀ/ለ/ 244 /2/ህ/ መ/ ድንጋጌዎች ይዙት መረዳት ይችላል

ሰዎች ከህግ እንደገለጽነው ጉዳያቸው ለፍ/ቤት አቅርበው ውሳኔ የማግኘት መብት ያላቸው ቢሆንም ይህን መብታቸውን በነጻ ፈቃዳቸው በሚያደርጉት የውል ስምምነት ቀሪ ሊያደርገው ወይም ተጨማሪ ቅድመ ሁኔታ ሊያስቀምጡበት ይችላሉ በመሆኑ ተዋዋይ ወገኖች ባደረጉት የውል ስምምነት ሙሉ ተስትሎ አስመግባት ቢፈጠር የህ አለመግባባት ከፍ/ቤት ውጪ በለሎች አራጥ የመጣት ፍቻ መበንገድ /alternatrue dispute resolutron mechanisms / እንዲታገ እና እንዲመከን በመስማማት

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የተጠረጠረ በመሆኑ 1ኛ ተከሳሽ የግንባታ ቦታውን እንዲያስረክብ የወሰደውን እና መክፈል የሌበትን ክፍያ እንዲከፍል 2ኛ ተከሳሽም በሰጠው የሞስትና ግዴታ መሰረት ክስ የቀረበበትን ገንዘብ ከ1ኛ ተከሳሽ ጋር በአንድነት እንዲከፍል ግለሰብን በማለት መቃወሚያ የቀረቡት ጉዳይ መታየት ያለበት በውሉ እንዲሁም በዋስትና ለነዱ መሰረት በማልማል ዳኝነት ነው በማለት ነው::

በመሰረቱ ማንኛውም ሰው በፍርድ ተይቶ ሲወሰን የማገባው ጉዳይ ለፍ/ቤት ወይም ለሌላ በህግ የዳኝነት ስልጣን ለተሰጠው አካል አቅርቦ ፍርድ ወይም ውሳኔ የማግኘት መብት /the right of access to justice/ አለው ይህም በኢፌዴሪ ህገ መንግስት አንቀጽ 37/1/ ስር እንዲሁም ሀገራችን በፈረመቻቸው እና ባጸደቀቻቸው አለም አቀፍ 37 /1/ ስር እንዲሁም ሀገራችን በፈረማቸው እና ባጸደቃቸው አለም አቀፍ እንዲሁም አህጉራዊ አቀፍ ሰነዶች ላይ ተመልክቱ ይገኛል በዚህ የሰዎች ተፈጥሯዊ በሆነ መብት በመጠቀም ጉዳዩን ለፍ/ቤት በማቅረብ ማለማት ፍርድ ወይም ውሳኔ ማግኘት የሚችለው ግን ክሳሹ ክስ ያቀረበበትን ጉዳይ ፍ/ቤቱ ተቀብሎ ለማስማት እና ውሳኔ ለመስጠት የሚያስችል ስልጣን ቢኖለይም ብዙሌራዊ የዳኝነት ስልጣን እና የስረ ነገር ስልጣን ያለው ሲሆን ክሳሹ ክስ ያቀረበበት ጉዳይ በፍርድ ተግቶ ሊወሰን የሚችል አግባብነት ጉዳይ ከሆነ /having justrciable matter /እና ክሳሹ ክስ ባቀረበበት ጉዳይ ላይ በህግ ጥበቃ ሊያረግ የሚችል ከህግ ወይም ከውል የፅሓፈኔ መብት ወይም ጥቅም ያለው ከሆነ ነው ይህንም ክላይ ከየቀስነው ድንጋ እንዲሁም ከፍ/ብሄ/ስ/ስ/ህ/ቁ 4 9 33/2 /3/ 231/1/ሀ/ለ/ 244 /2/ህ/ መ/ ድንጋጌዎች ይዙት መረዳት ይችላል

ለሥች ከህግ እንደገለጽነው ጉዳያቸው ለፍ/ቤት አቅርበው ውሳኔ የማግኘት መብት ያላቸው ቢሆንም ይህን መብታቸውን በነጻ ፈቃዳቸው በሚያደርጉት የውል ስምምነት ቀሪ ሊያደርገው ወይም ተጨማሪ ቅድመ ሁኔታ ሊያስቀምጡበት ይችላሉ በመሆኑ ተዋዋይ ወገኖች ባደረጉት የውል ስምምነት ውሉ ተነትሎ አለመግባባት ቢፈጠር የህ አለመግባባት ከፍ/ቤት ውጪ በሌሎች አራጭ የመፍታት ፍቻ መበንገድ /alternatrue dispute resolutron mechanisms / እንዲቃገ እና አንዲወሰን በመስማማት

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በውላቸው ላይ ካስቀመጡ በህግ አግባብ የተደገፉ ውድቅ በተዋዋ ወገኖች መካከል ህግ በመሆኑ በዚህ ውል መሰረት ሊዳኙ እና ሊገዙ የሚገባ በመሆኑ አለመግባባቱ ሲፈጠር ጉዳዩ መቅረብ ያለበት በውሉ ላይ በተቀመጠው የመፍትሔ መሳሪያ መንገድ ሊሆን ይገባል በዚህ ጊዜ ፍ/ቤቱ ጉዳዩን ተቀብሎ ለመዳኘት የሚያስችል የስረ ነገር ስልጣን የሌለው በመሆኑ ፍ/ቤቱ አለመግባቱን ወይም ክሱን ተቀብሎ መገኘት አይችልም ይህም ከፍ/ብ/ህ/ቁ 1731/1/ 3307 እና ተከታይ ድንጋጌዎች እንዲሁም ከፍ/ብ/ስመ/ህ/ቁ 315 እና ተከታይ ድንጋጌዎች ይዘት መረዳት ይቻላል

ተዋዋይ ወገኖች ባደጉት ውል ላይ በመካከላቸው ውሉን ተከትሎ የሚፈጠር አለመግባባት በግልግል ዳኝነት ታይቶ መወሰን እንዳለበት በመስማማማት ካስቀመጠ ተዋዋይ ወገኖች በዚህ ስምምነት መሰረት ሊዳኙ የሚገባ አንዳቸውም የሚገደዱ በመሆኑ አለመግባባቱ ሲፈጠር መቅረብ እና ታይቶ መወሰን ያለበት በግልግል ዳኝነት ጉባኤ ነው። ይህ የግልግል ዳኝነት ደግሞ ተቋማዊ /Institutional arbitration/ወይም ተቋማዊ ያልሆነ /adhoc arbiraton/ ሊሆን ይችላል። ተዋዋይ ወገኖች ባደረጉት የግልግል ስምምነት /arbitration clause/ ላይ የግልግል ዳኝነቱ የሚከናወንበት የግልግል ተቋም በመምረጥ ካስቀመጡ የግልግል ዳኝነቱ የሚከናወንበት የግልግል ተቋም በመምረጥ ካስቀመጡ የግልግል ዳኝነቱ መፈጸም ያለበት ይህም ግን አለመግባባቱ መቅረብ ያለበት በውላቸው ላይ መርጠው ባሰቀመጡት ወይም ስልጣን በሰጡት የግልግል ተቋም ሊሆን ይገባል።

እንደመታወቀው በሀገራችን በአሁን ሰአት ተቋማዊ በሆነ ስርዓት የግልግል ዳኝነት አገልግሎት ለንግዱ ማህበረሰብ እንዲሁም ለሌሎች ተቋመ መርጠው ለሚቀርቡ መንግስታዊ ተቋማት የሀገር ውስጥ እንዲሁም የውጭ ሀገር ሰዎች እና ድርጅቶች በመስጠት ላይ የሚገኘው የአዲስ አበባ ንግድ እና ዘርግ ማህበራት የግልግል ተቋም ሲሆን ይህ ተቋም በህግ አግባብ የተቋቋመ የራሱ የግልግል ተቋም ሲሆን ይህ ተቋም በህግ አግባብ የተቋቋመ የራሱ የግልግል ዳኝነት ስርዓት የሚመራበትን ስነስ ርዓት ወይም ደንብ ያለው የግልግል ተቋም /arbitration institute/ ከመሆኑም ተዋዋይ ወገኖች በውላቸው ላይ ይህን የግልግል ተቋም መርጠው ካስቀመጡ

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ፈጣልግል ዳኝነት ስርአቱ መፈጸም ያለበት በዚህ ተቋም የግልግል ደንብ ሲሆን አለመግባባቱም መቅረብ እና መወሰን ያለበት በውሉ ላይ ስልጣን ለሰጡት ለዚህ ተቋማዊ ለሆነው ለአዲስ አበባ የንግድ ስራ የዘርፍ ማህበራት ምክር ቤት ስር በሚገኘው የግልግል ተቋም ነው

ከእነዚህ ሁኔታዎች አኳያ የያዝነውን ጉዳይ ስንመለከት ከላይ እንደገለጽነው 1ኛ ተከሳሽ ክስ የቀረበበትን ጉዳይ ፍ/ቤቱ የመዳኘት ስልጣን የለውም በማለት መቃወሚያ ያቀረበው ከሳሽ ጋር ባደረግነው የግንባታ ውል ጠቅላላ ድንጋጌዎች /general condition of contract/ አንቀጽ 25/3/ እንዲሁም በውሉ ላይ ሁኔታዎች / speral condition of contract/ ላይ በተዋዋይ ወገኖች መካከል የሚነሱ አለመግባባቶችን አይቶ ውሳኔ የመስጠት ስልጣን ያለው የአዲስ አበባ ንግድ ምክር ቤት የግልግል ካውንስል እንደሆነ ተመልክቷል በማለት ነው።

ፍ/ቤቱም ጉዳዩን እንደተመለከተው ከሳሽ እና 1ኛ ተከሳሽ ግንቦት 23 ቀን 2004 ዓ/ም የግንባታ ውል ስምምነት ያደረጉ ሲሆን በዚህ ውል አካል በሆነው የውሉ ጠቅላላ ድንጋጌዎች አንቀጽ 24 እና ተከታታይ ድንጋጌዎች ስር በመካከላቸው ግጭት ሲፈጠር በምን መልኩ መታየት እና መወሰን እንደሌለበት የተመለከተ ሲሆን ይኸውም በመጀመሪ ግጭቱ ለመሆኑዲሱ መቅረብ እንዳለበት ከዚያም መሀንዲሱ በሰጠው ውሳኔ ቅሬታ ካለ ጉዳዩ ለግልግለ ዳኛ መቅረብ ያላባቸው መሆኑን ይህ የግልግል ዳኝነት መቅረብ ያለበት በውሉ ልዩ ሁኔታዎች ላይ ለተጠቀሰው ለአዲስ አበባ የንግድ ምክር ቤት የግልግል ተቋም እንደሆነ ከአንቀጽ 24 እስከ 26/1/ ባሉት ድንጋጌዎች ስር ተመልክቷል።

ከእነዚህ ሁኔታዎች መረዳት የሚቻለው ደግሞ ከሳሽ እና 1ኛ ተከሳሽ ባደረጉት ውል ላይ ወደፊት በመካከላቸው አለመግባባት እና ግጭት ሲፈጠር ይህ ግጭት ከፍ/ቤት ውጪ በሆነ አለመግባባት መፍቻ መንገድ ታይቶ እንዲወሰን የተስማሙ ይህም ማለት በስምምነት የፍ/ቤትን የዳኝነት ስርዓት አለመግባቱ እንዲታይ ስልጣኑን ቀሪ ያደረጉ /dousting the jurisdiction of the court/ መሆናቸውን ነው። ከሳሽ ላይ የተወሰነውን ጉዳይ በግልጽ በመለየት ይህ ጉዳይ በግልግል ዳኝነት መታየት አለበት

በማለት ካስቀመጣቸበት ሁኔታ ደንግሞ በትርጉም በግልግል ዳኝነት የሚታየው ጉዳይ መሆንዲስ በሚሰጠው መደያዊ ውሳኔ ወይም አስተያየት የሚሸ ጉዳዮች ናቸው ሲባል የማይችል በመሆኑ ክሳይ በዚህ ረገድ ያቀረበው ክርክር ፍ/ቤቱ አልተቀበለውም። ከዚህ በተጨማሪ ክሳሽ ዘንባው የውል ስምምነት መሰረት የመግባት የመዳኘት ግዴታ ያለበት በመሆኑ ክሳሽ የስቶዲዮር መ/ቤት መሆኑ ብቻውን አለመግባቡቱ ከውሉ ውጪ በፍ/ቤት ክው መታየት ያለበት ሲባል የማይችል በመሆኑ በዚህ ረገድ ያቀረበውን ክርክርም ፍ/ቤቱ አልተቀበለውም በአጠቃላይ ክሳሽ ከ1ኛ ተከሳሽ ጋር ያደረገውን የግንባታ ውል ስምምነት ተከትሉ የሚፈጠረውን አለመግባባት ፍ/ቤቱ የመዳኘት ስልጣን የሌለው በመሆኑ ክሳሽ ክስ የቀረበበትን ጉዳይ ፍ/ቤቱ የመዳኘት ስልጣን የለውም በማለት ፍ/ቤቱ በይኗል።

2ኛ ተከሳሽ 1ኛ ተከሳሽ ከክሳሽ ጋር ያደረገው የግንባታ ውል ተከትሉ በሰጠው የአፈጻጸም ቅድመ ክፍያ ዋስትና ሰነዶች ላይ በግልጽ አለመግባባት ሲፈጠር ይህ አለመግባባት ክፍ/ቤት ውጪ በግልግል ዳኝነት ታይቶ መወን እንዳለበት በእንቀጽ 7 ስር ተመልክቷል ክሳሽ በ2ኛ ተከሳሽ ላይ ላቀረበው ክስ መሰረት የሚደረገው ይህን የዋስትና ሰነድ በመሆኑ በዚህ የዋስትና ሰነድም ክሞናው የግንባታ ውል ጋር ተያያዥነት ያለው በመሆኑ ከእነዚህ ሁኔታዎች አንጻያ ጉዳዩ መታየት ያለበት በሰነዱ መሰረት በግልግል ዳኝነት ሲሆን የሚገባ በመሆኑ በ2ኛ ተከሳሽ ላይ የቀረበውን ጉዳይ ፍ/ቤቱ የመዳኘት ስልጣን የለውም ተብሏል።

3ኛ ተከሳሽን በተመለከተ ክሳሽ ክስ ያቀረበው ከ1ኛ እና 2ኛ ተከሳሾች ጋር በማጣመር በአንድነትና በነጠላ ገንዘቡን እንዲከፍል እንዲወሰንበት በመሆኑ ይህም ማለት በ3ኛ ተከሳሽ ላይ የቀረበው ክስ ለብቻ ተለይቶ የቀረበ ወይም ለብቻ የሚታይ ሳይሆን ከ1ኛ እና 2 ተከሳሾች ላይ የቀረበው ክስ ፍ/ቤቱ መዳኘት ስልጣን የለውም ከተባለ ደግሞ በ2ኛ ተከሳሽ ላይ የቀረበውን ክስ እ ይቶ የመመለከን ስልጣን የሌለው በመሆኑ 3ኛ ተከሳሽ በጉዳዩ ሊከሰስ ይገባል ወይስ አይገባም የሚለውን ጉዳይም መታየት እማ መወሰን ያለበት ጉዳዮን እይቶ የመወሰን ስልጣን በተሰጠው የግልግል ዳኝነት ኃላፊ በመሆኑ ፍ/ቤቱ ይህን ጉዳይ ሳይመለከት ቀርቷል ::

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[illegible] በዚህ መዝገብ በተከሳሽ ላይ የቀረበውን ክስ ፍ/ቤቱ አይተ[illegible]ምር ጉዳዩ አይቶ መወሰን የሲቪክት በመሆኑ ምክ-ን በዓ/መ/ስ/ሰ/ህ/ቁ 244 /2/ /ሠ/ስና 245/2/ መሰረት ዘግቶታል።

ት ዕ ዛ ዝ

ተከሳሾች በዚህ ክስ ምክንያት ያወጡትን ወጪ ቡ-መሰከተ የወጪ.ና ኪሳራ ዝርዝር አቤቱታ በማቅረብ የመጠየቅ መብታቸው ተጠብቋል ይግባኝ ሰመጠየቅ መዝገቡ ተግልብጦ ይሰጠው

መዝገቡ ተዘግቷል ወደ መዝገብ ቤት ይመለስ።

ዳኛ ፈርማ፡- በንታየሁ ዘለቀ

20/2/2009

ማ/አ

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የኢትዮጵያ ፌደራላዊ ዲሞክራሲያዊ
ሪፐብሊክ ፌደራል ጠቅላይ ፍርድ ቤት

የሰ.መ.ቁ.137302
ታህሳስ 26 ቀን 2010 ዓ.ም

ዳኞች፡- 1. ዳኜ መላኩ
2. ተሾሊት ይመሰል
3. ቀነዓ ቂጣታ
4. ተሾመ ሽፈራዉ
5. ፀሐይ መንክር

አመልካች፡- ወ/ሮ ዳንሴ ጉርሙ - ጠበቃ አቶ ዳኛቸው ቱሉ ቀርበዋል

ተጠሪ፡- አቶ ተመስገን ደምሌ - ጠበቃ አቶ ብርሃኑ ታዬ ጋር ቀርበዋል

ይህ መዝገብ የተቀጠረዉ ለምርመራ ሲሆን ተመርምሮ የሚከተለዉ ፍርድ ተሰጥቷል።

ፍ ር ድ

ይህ የሰበር ጉዳይ የቤት ክርክርን የሚመለከት ሲሆን ለችሎቱ ሊቀርብ የቻለዉ የአሁን አመልካች የፌዴራል ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት በመ.ቁ.132562 ጥር 25 ቀን 2009 ዓ.ም የሰጠዉ ዉሳኔ መሰረታዊ የሕግ ስህተት የተፈጸመበት ስለሆነ እንዲታረምልኝ በማለት ያቀረቡትን አቤቱታ መርምሮ ለመወሰን ነዉ።

የጉዳዩ መነሻ ሲታይ በግልግል ጉባኤ ዳኞች ዘንድ የአሁን አመልካች የመቃወም አመልካች፣ የአሁን ተጠሪ ደግሞ የመወቃወም ተጠሪ ሁኖ ሲከራከሩ ነበር። ይህ ችሎት የፌዴራል ጠቅላይ ፍ/ቤት የመ.ቁ.110552 አስቀርቦ እንደተመለከተዉ፣ ይህ ጉዳይ የተጀመረዉ የአሁን ተጠሪ በሥር ተከሳሽ ዶ/ር አብነት ግርማይ ላይ ባቀረቡት ክስ መነሻነት ሲሆን፣ የክሱም ይዘት በአጭሩ፡- በከሳሽ እና ተከሳሽ መካከል ሰኔ 23 ቀን 1997 ዓ.ም / June 30/2005 GC/ በተደረገዉ የኪራይ ዉል ተከሳሽ በአዲስ አበባ ከተማ በቦሌ ክ/ከተማ በቀድሞ ወረዳ 17 ቀበሌ 15 /በአሁኑ በቦሌ ክ/ከተማ ወረዳ 4 አስተዳደር/ ክልል ዉስጥ የሚገኘዉን የቤት ቁጥር 414 የሆነዉን ሕንጻ ተከራይተዉ ሲጠቀሙበት ቆይተዉ የኪራይ ዉሉ የተቋረጠ በመሆኑ ለቤቱ እድሳት ከሳሽ ያወጣዉን ወጪ እንዲከፍሉኝ፣ ያልተከፈለዉን ዉዝፍ የኪራይ ክፍያ እንዲከፍሉኝ፣ የመማር ማስተማሩ ሂደት በቤት ጥበት ምክንያት ተጎዳብኝ በማለቱ 5 ክፍል በከሳሽ ተሰርቶ [illegible] ከቆዩ በኋላ ነባሩን በር በብሎኬት ዘግቶና አጥሩን አፍርሶ

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ሌላ መዉጫ በር በመስራት የሚገለገልበት ያላስረከበዉን 5 ክፍል ቤት እንዲያስረክብ፣ በእነዚህ ክፍሎች ላይ የኪራይ ክፍያ በገቢያ ዋጋ እንዲከፍለኝ በማለት ክሷል። ተከሳሽ በበኩሉ ባቀረበዉ መልስ አምስት ክፍል ቤቶችን በተመለከተ ከሳሽ የባለሀብትነት ማረጋገጫ ማስረጃ ያላቀረበ በመሆኑ መብትና ጥቅም የለዉም፣ ተከሳሽ ቤቱን የሚመለከተዉ አካል በማስፈቀድ የሰራ ነዉ በማለት እና በሌሎች ነጥቦች ላይ መከላከያ ክርክራቸዉን አቅርቧል።

ከዚህ በኋላ የግልግል ጉባኤዉ ግራ ቀኛቸዉን በማከራከር በሰጠዉ ዉሳኔ የሕንጻ ኪራይ ዉሉን መሰረት በማድረግ የዉዝፍ ኪራይ ክፍያ፣ ለሕንጻዉ እድሳት እንዲሁም ወጪና ኪሳራ በተመለከተ ሊከፈል ይገባል ያለዉን ገንዘብ በመወሰን፣ ተከሳሽ በኪራይ ዉሉ መሰረት ከተከራየዉ ዋናዉ ቤት ይዞታ ዉጭ ባለዉ ቦታ የተሰሩትን 5 ክፍሎች በከሳሽ የተሰሩ መሆናቸዉን የሰዉ ምስክሮች ያረጋገጡ ስለሆነ ተከሰሽ በዉል የያዛቸዉንና በርክክብ ወቅት ያላስረከባቸዉን አምስት ክፍል ቤቶችን ከነአጥር ግቢዉ ለከሳሽ እንዲያስረክብ እና በሌሎች ጉዳዮች ላይ ተገቢ ነዉ ያለዉን ዉሳኔ ሰጥቷል።

ከዚህ ዉሳኔ በኋላ የመቃወም አመልካች ወ/ሮ ዳንሴ ጉርሙ በፍ/ብ/ሥ/ሥ/ሕ/ቁ.358 መሰረት የፍርድ መቃወሚያ ማመልከቻ አቅርቧል። የመቃወሚያ አቤቱታቸዉ ይዘት በአጭሩ፡ በቦሌ ክ/ከተማ ወረዳ 4 ክልል ዉስጥ የሚገኝ በ950 ካ.ሜ ቦታ ስፋት ላይ ያረፈዉ ቤት በእነ ወ/ሮ አየለች ወርቁ ስም ተመዝግቦ ካርታ የተሰጠበትን የመቃወም አመልካች በሽያጭ ዉል ገዝተዉ የተላለፈላቸዉ እና የሊዝ ዉል ከቦሌ ክ/ከተማ መሬት አስተዳደር ጽ/ቤት የፈጸሙበትን፣ እንዲሁም የቤቱን ስመ ሀብት ወደ አመልካች ለማዛወር በሂደት ላይ እያለሁ፣ ይህ ቤት እንደፍርድ ባለዕዳ ንብረት ተቆጥሮ የአፈጻጸም ትዕዛዞች የተሰጠበት ስለሆነ እነዚህ አምስት ክፍል ቤቶች የመቃወም አመልካች ንብረት ስለሆኑ የተሰጠዉ ዉሳኔ እንዲሻርልኝ በማለት አመልክቷል።

በዚህ የመቃወሚያ ማመልከቻ ላይ ከሳሽ አቶ ተመስገን ደምሴ የመጀመሪያ ደረጃ መቃወሚያ እና አማራጭ መልስ ያቀረቡ ሲሆን፣ የመጀመሪያ ደረጃ መቃወምያ በአጭሩ፡ የመቃወም አመልካች ወደ ክርክሩ ለመግባት መብትና ጥቅም የላቸዉም፣ ይህ ጉዳይ የግልግል ጉባኤ የሰጠዉ ዉሳኔ በይግባኝ የፌዴራል ጠቅላይ ፍ/ቤት በመ.ቁ.110552 በ10/3/2008 ዓ.ም በሰጠዉ ፍርድ ጸንቷል፣ አመልካች በአፈጻጸም ላይ ጣልቃ ገብተዉ መብታቸዉን ማስከበር ነበረባቸዉ፣ የመቃወም አመልካች የዚህ ንብረት ባለሀብት ስለመሆናቸዉ ካርታ አላቀረቡም፣ አመልካች በዉል ገዝቻለሁ ያሉት ቤት የቤት ቁጥር የለዉም፣ የመቃወም አመልካች አቤቱታ ዉሳኔ ከተሰጠበት [illegible] ጋር የሚገናኝ አይደለም ጉባኤዉ የመቃወም አቤቱታዉን አይቶ

የመወሰን ስልጣን የለውም፣ እንዲሁም በአማራጭ መልስ እንዳቀረቡ ተመልክቷል። ተከሳሽ ዶ/ር አብነት ግርማይ በወረዳዉ አስተዳደር በኩል መጥሪያና አቤቱታዉ በድርጅቱ ቤት ላይ ቢለጠፍም ባለመቅረባቸዉ ሳይከራከሩ ቀርተዋል።

በመቀጠል የግልግል ጉባኤዉ፣ ግራ ቀኞቸዉን በማከራከር፣ የቀረበዉን የሰነድ ማስረጃ በመመዘን፣ አስቀድመዉ የተሰሙትን የሰዉ ምስክሮች ቃል በመመርመር፣ በሰጠዉ ብይን ከሳሽ እነዚህን ቤቶች መስራታቸዉን በምስክሮች ቃል ያስረዱ ሲሆን የመቃወም አመልካች ይህን የሚያስተባብል ማስረጃ ያላቀረቡ በመሆኑ የመቃወም አመልካች ክስ ባቀረቡት አምስት ክፍል ቤቶች ላይ በዉል ወይም በሕግ የተረጋገጠ መብትና ጥቅም የላቸዉም በማለት ከሳሽ ያቀረበዉን የመጀመሪያ ደረጃ መቃወሚያ በመቀበል አቤቱታቸዉን በፍ/ብ/ሥ/ሥ/ሕ/ቁ.33 /2/ /3/ እና 244 /2፣ መ/ መሰረት ዉድቅ በማድረግ ወስኗል። የሥር የመቃወም አመልካች ይህን ዉሳኔ በመቃወም ይግባኝ ለፌዴራል ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት ያቀረቡ ሲሆን፣ ፍ/ቤቱም ግራ ቀኞቸዉን በማከራከር በሰጠዉ ዉሳኔ ምክንያቱን በማስቀመጥ የግልግል ጉባኤዉን ዉሳኔ በማጽናት ወስኗል። የአሁን የሰበር አቤቱታዉ የቀረበዉ በዚህ ዉሳኔ ቅር በመሰኘት ለማስለወጥ ነዉ።

የአሁን አመልካች በ29/5/2009 ዓ.ም የተጻፈ አራት ገጽ አቤቱታ አቅርቧል። የአቤቱታዉ ይዘት በአጭሩ፡ ለክርክር ምክንያት የሆኑት በ950 ካ.ሜ ቦታ ላይ ያረፉት 5 ክፍል ቤቶች በእነ ወ/ሮ አየለች ወርቁ ስም የተመዘገበ እና በሽያጭ ለአመልካች ተላለፈ እንዲሁም አመልካች ከቦሌ ክ/ከተማ መሬት አስተዳደር ጋር የሊዝ ዉል ፈጽመዋል። አመልካች ይህን ንብረት በእጃቸዉ አድርገዉ የሚቆጣጠሩ እና የሚያስተዳደሩ ሆኖ ሳለ የግልግል ጉባኤዉ እና የፌዴራል ጠቅላይ ፍ/ቤት ንብረቱ የአሁን ተጠሪ ነዉ በማለት የሰጡት ዉሳኔ መሰረታዊ የሕግ ስህተት የተፈጸመባቸዉ ስለሆኑ እንዲታረምልን፣ የጠበቃ አበል ከወጪ ጋር እንዲወሰንልን በማለት አመልክቷል።

የሰበር አጣሪ ችሎት ጉዳዩን በማየት በዚህ ጉዳይ የሚጣራ ነጥብ አለ በማለት ተጠሪ መልስ እንዲሰጡ ባዘዘዉ መሰረት መጋቢት 4 ቀን 2009 ዓ.ም የተጻፈ አራት ገጽ መልስ አቅርቧል። የመልሱም ይዘት በአጭሩ፡ በዚህ ጉዳይ የግልግል ጉባኤዉ የሰጠዉ ብይን እና የፌዴራል ጠቅላይ ፍ/ቤት የሰጠዉ ፍርድ ጉዳዩን በሕግ አግባብ አጣርተዉ የሰጡት ዉሳኔ እና የህግ ስህተት የሌለባቸዉ ስለሆኑ አመልካች ያቀረቡት የሰበር አቤቱታ ዉድቅ ተደርጎ የሥር ዉሳኔ እንዲጸናልኝ በማለት በዝርዝር ተከራክሯል። የአሁን አመልካች የሰበር አቤቱታቸዉን በማጠናከር የመልስ መልስ አቅርቧል።

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የጉዳዩ አመጣጥ ከላይ የተመለከተዉ ሲሆን ይህ ችሎት የግራ ቀኞቸዉን ክርክር አግባብነት ካላቸዉ የህግ ድንጋጌዎች ጋር በማገናዘብ እንዲሁም ‹‹የግልግል ጉባኤዉ ይህን ጉዳይ ተቀብሎ ግራ ቀኞቸዉን አከራክሮ የመወሰን ስልጣን አለዉ ወይስ የለዉም?›› የሚለዉን ነጥብ እንደጭብጥ በመያዝ እንደሚከተለዉ መርመሮታል፡፡ ይህ ችሎት የሰበር አጣር ችሎት በጉዳዩ ፍሬ ነገር ከያዘዉ ጭብጥ አስቀድሞ የስልጣን ጥያቄ ሚላሽ ማግኘት ያለበት ጉዳይ ሆኖ በመገኘቱ የስልጣን ጥያቄን እንደጭብጥ ለመያዝ ችሏል፡፡ ተከራካሪ ወገኖች ባየነሱትም የዳኝነት ጥያቄን የሚያይ ፍ/ቤት በመጀመሪያ ደረጃ ጉዳዩን ለማየት የስራ ነገር ስልጣን ያለዉ መሆኑን በራሱ አነሳሽነትም ቢሆን ማረጋገጥ እንደሚገባዉ የፍ/ብ/ሥ/ሥ/ህ/ቁ.9 /2/ ሥር ተመልክቷል፡፡ ተከራካሪ ወገኖች ባያነሱትም ፍ/ቤት የስልጣን ጥያቄ በማንሳት ጉዳዩን ለማየት ስልጣን የሌለዉ እንደሆነ የፍ/ብ/ሥ/ሥ/ሕ/ቁ.244 /2፤ ሀ/ እና 245 /2/ መሰረት ክሱ ተቀባይነት የለዉም ብሎ መወሰን እንደሚገባዉ ተደንግጓል፡፡ ይህ ደግሞ ለግልግል ጉባኤዉም የሚሰራ በመሆኑ የስልጣን ጉዳይ የሚላሽ የሚያስፈልገዉ ጉዳይ ነዉ፡፡

በዚህ አግባብ እንደመረመርነዉ የግልግል ጉባኤዉ በከሳሽ አቶ ተመስገን ደምሴ እና በተከሳሽ ዶ/ር አብነት ግርማይ መካከል ያለዉን ክርክር ተቀብሎ ለመወሰን ስልጣን ያገኘዉ ሁለቱ ግለሰቦች ሰኔ 23 ቀን 1997 ዓ.ም / June 30/2005 GC/ ባደረጉት የሕንጻ ኪራይ ዉል መነሻነት መሆኑን ከሥር ዉሳኔዎች ግልባጭ መገንዘብ ይቻላል፡፡ የዚህ ዉል አንቀጽ 11 በአከራዩ እና ተከራዩ መካከል ከዉሉ ጋር ተያይዞ የሚነሱትን ግጭቶች በስምምነት ለመፍታት፣ ይህ ካልተቻለ ጉዳዩ ግራ ቀኞቸዉ በሚመርጡት ገላጋይ ሽማግሌዎች ታይቶ ዉሳኔ እንደሚሰጥበት መስማማታቸዉን ያመለክታል፡፡ የሕንጻ ኪራይ ዉሉ የተፈጻሚነት አድማስ ደግሞ በዉሉ አንቀጽ 1 የተመለከተ እና የቤት ቁጥር 414 ሕንጻ ከነግቢ እና በጊዜያዊነት የተሰሩትን ተገጣጣሚ ግንባታዎችን እንደሚመለከት እና ይህን የሚያመክት አባሪም የዉሉ አካል እንደሆነ ያሳያል፡፡ በዚህ ዉል የአከራይ እና የተከራይ መብትና ግዴታ በዝርዝር ተመልክቷል፡፡ በመሆኑም የግልግል ጉባኤዉ በዚህ ጉዳይ ስልጣን ሊኖረዉ የሚችለዉ በዉሉ የተፈጻሚነት ወሰን ድረስ እንደሆነ የሚያከራክር አይደለም፡፡

እንደሚታወቁ ተዋዋይ ወገኖች የፍ/ብ/ሕ/ቁ.1678 ሥር የተመለከቱትን ሁኔታዎችን በማሟላት ዉል የደረጉ እንደሆነ፣ በሕግ የተቋቋመዉ ዉል ዉሉን ባቋቋሙት ተዋዋይ ወገኖች መካከል ሕግ እንደሆነ የፍ/ብ/ሕ/ቁ.1731 /1/ ሥር ተደንግጎ እናገኛለን፡፡ አንድ ዉል አስገዳጅነት የሚኖረዉ ዉሉን ፈቅደዉና ተስማምተዉ በተዋዋሉ ተዋዋይ ወገኖች ላይ እንጂ

የዉሉ አካል ባልሆኑት ሶስተኛ ወገኖች ላይ አስገዳጅነትም ሆነ ተፈጻሚነት እንደሌለዉ መገንዘብ ያስፈልጋል።

ይህ ከሆነ ደግሞ የአሁን ተጠሪ እና የሥር ተከሳሽ ዶ/ር አብነት ግርማይ መካከል የተደረገዉ የኪራይ ዉል ተፈጻሚነት ዉሉን ባደረጉት ተዋዋይ ወገኖች ብቻ ላይ ነዉ፤ በዚህ ዉል መነሻነት የሚነሳዉም አለመግባባት በግልግል ጉባኤዉ ታይቶ ዉሳኔ ሊሰጥ የሚችለዉ በእዚህ ሰዎች መካከል ብቻ ነዉ። በዚህ የኪራይ ዉል መሰረት የኪራይ ክፍያ፣ የቤቱ እድሳትና የጥገና ጉዳይ፣ ተከራይ በዉሉ በግልጽ ተገልጾ የተረከበዉን ሕንጻ፣ ክፍሎች እና ዕቃዎች ከማስረከብ ጋር የተያያዙትን ጉዳዮች የሚያጠቃልል እንደሆነ ማየት ይቻላል። እነዚህን ጉዳዮች በተመለከተ በአከራይ እና ተከራይ መካከል አለመግባባት የተነሳ እንደሆነ በዚህ ዉል አግባብ ሊፈታ እንደሚገባ ግልጽ ነዉ። እነዚህ ተዋዋይ ወገኖች በኪራይ ዉል ምክንያት በመካከላቸዉ የሚነሳዉን አለመግባበት በገላጋይ ሽማግሌዎች እንዲታይላቸዉ መስማማታቸዉ ደግሞ በፍ/ብ/ሕ/ቁ.3325 እና ተከታይ ድንጋጌዎች መሰረት ተቀባይነት ያለዉ ጉዳይ ነዉ። በመሆኑም ተዋዋይ ወገኖች በመካከላቸዉ የሚነሳዉን አለመግባባት በሽምግልና ዳኝነት ለመጨረስ መስማማታቸዉ የሕጉን ዓላማ የተከተለ እንደሆነ የሚያከራክር አይደለም። ይሁን እንጂ የሽምግልና ዳኝነት ስልጣን በጠባቡ መተርጎም እንዳለበት የፍ/ብ/ሕ/ቁ.3329 ሥር ተደንግጎ እናገኛለን። ከእነዚህ የሕግ ድንጋጌዎች መገንዘብ እንደሚቻለዉ ተዋዋይ ወገኖች በምን አግባብ የገላጋይ ዳኞችን መምረጥ እንደሚችሉም በዝርዝር ተመልክቷል። ስለሆነም በዚህ አግባብ የተቋቋመዉ የግልግል ጉባኤ ስልጣን ሊኖረዉ የሚችለዉ በዚህ አግባብ ተስማምተዉ ገላጋይ ዳኞችን መርጠዉ ስልጣን በሰጡት ወገኖች ብቻ ላይ እና በዚህ አግባብ እንዲታይላቸዉ በተስማሙበት ጉዳይ ወሰን ድረስ ብቻ እንደሆነ መገንዘብ ያስፈልጋል።

ከዚህ አንጻር አሁን ወደ ተያዘዉ ጉዳይ ስንመለስ የአሁን አመልካች ባቀረቡት መቃወሚያ በከሳሽ እና በተከሳሽ በተደረገዉ ክርክር መነሻነት የተሰጠዉ ዉሳኔ መብቴን ይነካል፣ እነዚህ ለክርክር ምክንያት የሆኑት አምስት ክፍል ቤቶች የፍርድ ባለዕዳ የዶ/ር አብነት ግርማይ ንብረት ሳይሆኑ አመልካች በሽያጭ ዉል ከሌሎች ግለሰቦች ገዝተዉ የተላለፉላቸዉ እና የሊዝ ዉል የፈጸሙበት የግል ሀብታቸዉ እንደሆነ በመግለጽ ነዉ። የአሁን ተጠሪ በበኩላቸዉ ባቀረበዉ ክርክር እነዚህ ቤቶች የራሱ ንብረት መሆናቸዉንና ባለሀብት ተጠሪ እንደሆኑ ምስክሮች አረጋግጠዋል፣ አመልካች መብት እንደሌላቸዉ በመግለጽ ነዉ። ከዚህ ክርክር መገንዘብ እንደሚቻለዉ ግራ ቀኛቸዉ የፍ/ብ/ሕ/ቁ.1204-1206 ባሉት ድንጋጌዎች አግባብ የባለሀብትነት መብት በተመለከተ የመፋለም ክርክር ማቅረባቸዉን የሚያመለክት

እንደሆነ ነዉ። እንዲሁም ከጅምሩም በከሳሽ እና በተከሳሽ መካከል እነዚህን አምስት ክፍል ቤቶች በተመለከተ ሲካሄድ የነበረዉ የመፋለም ክርክር እንደነበር የቀደመዉ የግራ ቀኛቸዉ ክርክር፣ መቃወሚያ ያቀረበበት የግልግል ጉባኤዉ ዉሳኔ እና የፌዴራል ጠቅላይ ፍ/ቤት ዉሳኔ የሚያስገነዝብ ጉዳይ ነዉ። ከፍ ሲል እንደተጠቀሰዉ በአመልካች እና በተጠሪ መካከል በተደረገዉ ክርክር የግልግል ጉባኤዉም ሆነ የፌዴራል ጠቅላይ ፍ/ቤት የመጀመሪያ ደረጃ መቃወሚያ ላይ ዉሳኔ እንደሰጡ ቢገለጽም የዉሳኔያቸዉ ይዘት ሲታይ ግን ለክርክር ምክንያት የሆኑት አምስት ክፍል ቤቶች ማን እንደሰራቸዉ፣ ቤቶች የማን ንብረት እንደሆኑ የቀረቡትን የሰነድ ማስረጃዎች በመመዘን እንዲሁም አስቀድሞ የተሰሙትን የተጠሪን የሰዉ ምስክሮች በመመርመር የባለሀብትነት መብት ላይ ዉሳኔ እንደሰጡ የዉሳኔዎቹ ግልባጭ ያመለክታል።

ይህ ከሆነ ደግሞ ምላሽ የማግኘት ያለበት ጉዳይ የግልግል ጉባኤዉ በአመልካች እና በተጠሪ መካከል የተነሳዉን የአምስት ክፍል ቤቶችን የባለሀብትነት መብት ጋር የተያያዘ የመፋለም ክርክር ተቀብሎ ግራ ቀኛቸዉን አከራክሮ ዉሳኔ ለመስጠት የዉልም ሆነ የሕግ ስልጣን አለዉ ወይስ የለዉም? የሚለዉ ነጥብ ነዉ። ከፍ ሲል እንደተመለከተዉ የአሁን ተጠሪ ባቀረበዉ ክስ ለክርክር ምክንያት የሆኑት አምስት ክፍል ቤቶችን በተመለከተ በኪራይ ዉሉ እንደተሸፈኑ ሳይሆን የሥር ተከሳሽ እነዚህን ቤቶች አጥር ሰርተዉ ሌላ በር ከፍተዉ በሕገ ወጥ መንገድ ሲገለገሉበት እንደነበር እና የኪራይ ዋጋም ቢሆን በኪራይ ዉሉ ላይ የተመለከተዉ ሳይሆን በገበያ ዋጋ በወር በብር 25 ሺህ ብር ተሰቦ እንዲከፈላቸዉ መጠየቃቸዉን ያሳያል። የዚህ የዳኝነት ጥያቄ እንደሚያመለክተዉ እነዚህ ቤቶች በኪራይ ዉሉ የተካተቱ ነበር ወይ? የሚለዉን ጥያቄ የሚያነሳ ነዉ። ከዚህም በላይ እነዚህን ቤቶች በተመለከተ በከሳሽ እና ተከሳሽ መካከል የመፋለም ክርክር መነሳቱን የዉሳኔዉ ግልባጭ ያመለክታል። ይህ በእንዲህ እንዳለ በአሁን ተጠሪ እና በሥር ተከሳሽ ዶ/ር አብነት ግርማይ መካከል የተደረገዉ የሕንጻ ኪራይ ዉል ተፈጻሚነት ያለዉ በእነዚሁ ተዋዋይ ወገኖች ላይ እንጂ የአሁን አመልካች ላይ እንዳልሆነ ግልጽ ነዉ። ይህ ዉል የሚፈጥረዉ መብትና ግዴታ አመልካችን የማይመለከት እና ዉሉን መነሻ ያደረገ አለመግባባት ቢከሰትም በገላጋይ ዳኞች እንዲፈታ ለማድረግ የሚገደዱበት አግባብ አይኖርም። እንዲሁም የአሁን አመልካች እነዚህን የግልግል ዳኞች መርጠዉ ጉዳያቸዉ እንዲታይላቸዉ ስልጣን የሰጡት ነገር ባለመኖሩ የግልግል ጉባኤዉ የአመልካችን የዳኝነት ጥያቄ ለመዳኘት የህግ ስልጣን የለዉም። ይህ ሲባል ግን የግልግል ጉባኤዉ የአመልካችን መቃወሚያ ከጅምሩ ስልጣን የለኝ በሚል ምክንያት ዉድቅ እንዲያድግ ሳይሆን አመልካች ያቀረቡትን የፍርድ መቃወሚያ ማመልከቻ መሰረት በማድረግ

02/05/10

አስቀድሞ እነዚህ አምስት ክፍል ቤቶችን በተመለከተ የባለሀብትነት መብት ላይ የሰጠዉን ዉሳኔ የፍ/ብ/ሥ/ሥ/ሕ/ቁ.360 /2/ መሰረት ተገቢዉን በመወሰን ነዉ። ይህ ማለት የግልግል ጉባኤዉ በኪራይ ዉል የተመለከቱትን ቤቶች የባለሀብትነትን መብት በተመለከተ የመፋለም ክርክርን ሰምቶ ዉሳኔ ለመስጠት ስልጣን እንደሌለዉ በመገንዘብ በእነዚህ አምስት ክፍል ቤቶች ላይ አስቀድሞ የሰጠዉን ዉሳኔ ማንሳት ይገባዉ ነበር።

የአሁን አመልካች በበኩላቸዉ የራሴ ንብረት ናቸዉ የሚሏቸዉን እነዚህን ቤቶች በተመለከተ በገላጋይ ዳኞች እንዲታይላቸዉ የተስማሙት ነገር የለም፤ የመረጡትም የገላጋይ ዳኛ አለመኖሩን የሥር ዉሳኔ ግልባጭ ያመለክታል። ይህ ከሆነ ደግሞ የአሁን አመልካች በኢ.ፌ.ዲ.ሪ.ሕገ መንግስት አንቀጽ 37 እና 78 መሰረት ነጻና ገለልተኛ በሆነ መደበኛ ፍ/ቤት ጉዳያቸዉ ታይቶ ዉሳኔ እንዲሰጥበት ሕገ መንግስታዊ መብት አላቸዉ። ምክንያቱም በዚህ ጉዳይ ዉሳኔ የሰጠዉ የግልግል ጉባአዉ ለአመልካች ነጻና ገለልተኛ የዳኝነት አካል ነዉ ለማለት ስለማይቻል ነዉ። አመልካች በሕገ መንግስቱ የተጠበቀላቸዉ በሕግ በተቋቋመ ነጻና ገለልተኛ የዳኝነት አካል በሆነዉ የመደበኛ ፍ/ቤት የመዳኘት መብት የሚነፈጉበት አግባብ የለም።

በመሆኑም የግልግል ጉባኤዉ ለክርክር ምክንያት የሆኑትን አምስት ቤቶችን በተመለከተ የባለሀብትነትን የመፋለም ክርክር ሰምተዉ መወሰን ስልጣን እንደሌለዉ በመገንዘብ አስቀድሞ በእነዚህ ቤቶች ላይ የሰጠዉን የዉሳኔ ክፍል በመሻር ግራ ቀኞቸዉ በዚህ ጉዳይ ከፈሰጉ ክርክራቸዉን ስልጣን ላለዉ ፍ/ቤት ማቅረብ እንደሚችሉ በመጠቆም መወሰን ሲገባዉ፣ በልተሰጠዉ ስልጣን እነዚህን አምስት ቤቶች በተመለከተ ማስረጃ በመመዘን ተጠሪ ባለሀብት ናቸዉ በማለት ዉሳኔ መስጠቱ መሰረታዊ የሕግ ስህተት የተፈጸመበት ሲሆን የፌዴራል ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎትም በበኩሉ ከስልጣን አንጻር ጉዳዩን በመመርመር የግልግል ጉባኤዉን ብይን ማረም ሲገባዉ ከዚህ ይልቅ የራሱን ዝርዝር ምክንያቶችን በማከል የሥር ብይን በማጽናት የሰጠዉ ዉሳኔ መሰረታዊ የህግ ስህተት የተፈጸመበት ነዉ።

ሲጠቃለል የግልግል ጉባኤዉ የማይንቀሳቀስ ንብረት የባለሀብትነት የመፋለም ዳኝነት ጥያቄን ተቀብሎ ግራ ቀኞቸዉን አከራክሮ የመወሰን ስልጣን ሳይኖረዉ ለክርክር ምክንያት የሆኑት አምስት ክፍል ቤቶች የአሁን ተጠሪ ንብረት ናቸዉ፣ አመልካች ግን መብትና ጥቅም የላቸዉም በማለት የሰጡት ዉሳኔ እና የፌዴራል ጠቅላይ ፍ/ቤት ይህን ዉሳኔ በማጽናት የሰጠዉ ዉሳኔ መሰረታዊ የሕግ ስህተት የተፈጸመባቸዉ ስለሆኑ የሚከተለዉ ተወስኗል።

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ው ሳ ኔ

1. የግልግል ጉባኤው እነዚህን አምስት ክፍል ቤቶች በተመለከተ ጥር 25 ቀን 2007 የሰጠው የዉሳኔ ክፍል እና መስከረም 4 ቀን 2009 ዓ.ም የሰጠዉ ብይን እና ይህን ብይን በማጽናት የፌዴራል ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት በመ.ቁ.132562 ጥር 25 ቀን 2009 ዓ.ም የሰጠዉ ዉሳኔ መሰረታዊ የሕግ ስህተት የተፈጸመባቸዉ ስለሆኑ በፍ/ብ/ሥ/ሥ/ሕ/ቁ.348 /1/ መሰረት ተሽሯል።
2. የግልግል ጉባኤው ለክርክር ምክንያት የሆኑትን አምስት ክፍል ቤቶችን በተመለከተ የባለሀብትነት የመፋሰም ክርክር ሰምቶ ለመወሰን ስልጣን የለዉም ብለናል።
3. የአሁን ተጠሪም ሆነ የአሁን አመልካች አሁን ለክርክር ምክንያት የሆኑትን እነዚህን አምስት ክፍል ቤቶች በተመለከተ ስልጣን ባለዉ ፍ/ቤት ክስ አቅርበዉ መብታቸዉን ከመጠየቅ ይህ ዉሳኔ የሚያግዳቸዉ አይሆንም ብለናል።
4. የግልግል ጉባአዉ ጥር 25 ቀን 2007 ዓ.ም የሰጠዉ ዉሳኔ ከፍ ሲል ከተጠቀሱት አምስት ክፍል ቤቶች ዉጭ በሌሎች ጉዳዮች ላይ የሰጠዉ የዉሳኔ ክፍል ጸንቷል።
5. የዚህ ዉሳኔ ግልባጭ ለግልግል ጉባኤዉ እና ለሥር ፍ/ቤት ይድረስ ብለናል።
6. ግራ ቀኞቸዉ በዚህ ችሎት የደረሰባቸዉን ወጪና ኪሳራ የየራሳቸዉን ይቻሉ።
7. በ30/5/2009 ዓ.ም የተሰጠዉ የእግድ ትዕዛዝ በዚህ ዉሳኔ ተነስቷል። ይጻፍ።

መዝገቡ ተዘግቷል።

የማይነበብ የአምስት ዳኞች ፊርማ አለበት

ሠ/አ