

# The Extent of Court Intervention in Arbitration Proceedings: Ethiopian Arbitration Law in Focus

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## Abstract

Arbitration, the contractual alternative of dispute settlement, though it has scored greater efficiency and become a venerable mode of dispute settlement in this business world; it has been encumbered by court intervention, nowadays. Court intervention is appropriate and justified almost in all jurisdictions in different degrees and contexts. However, unless its justifications, instances, and extent are well stipulated and fettered under national arbitration law, unwarranted interventions could restrain arbitration proceedings so that parties' wished benefits and interests remain in vain. Therefore, this article is going to deal with rationalities, instances, and the extent of court intervention in arbitration proceedings. In doing so, it strives to divulge the extent of court intervention under international and Ethiopian arbitration laws. For this, the article uncovered that Ethiopian arbitration law is exposed to unwarranted and inimical court intervention in arbitration proceedings. There are premature court interventions and broader judicial review circumstances under the Civil Procedure Code and the Civil Code of Ethiopia. Underscoring the existence of the higher extent of court intervention instances, this article also tried to pinpoint solutions calling for an optimal extent of court intervention in arbitration proceedings. In doing so, parties can have a fair degree of autonomy and freedom guaranteeing and underpinning an efficient arbitration system. Last, as a way forward, the article has also called, including ratification of the New York Convention (1958), modification of the Ethiopian arbitration law in light of the modern arbitration laws from the international arbitration laws, foreign jurisdictions, and arbitration rules of renowned arbitral institutions.

**Keywords:** Court intervention, Instances and extent of court intervention, Public policy, arbitration proceedings, party autonomy and freedom, efficiency, and dispute settlement.

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## A Prelude: Why Courts Intervene in Arbitration?

Regarding court intervention in arbitration, some practitioners want courts out of arbitration, at least, until an award is rendered. Others prefer to resort to court as and when the need arises for authoritative judicial pronouncement or decision on points of law, and on complex procedural and interlocutory issues in the course of arbitration [ <sup>1</sup> ]. These two stranded

arbitration had been used to resolve the contention between the two mothers over a baby boy by which the proceeding finally ended conferring the baby boy to the compassionate true mother. *See at: Hailegabriel G. Feyissa, "The Role of Ethiopian Courts in Commercial Arbitration", Mizan Law Review, Vol. 4, No. 2, (Autumn 2010), P. 298.* Philip II, the father of Alexander the Great, also utilized arbitration to settle territorial disputes stemmed from a peace treaty with southern states of Greece in 337 B.C. ago. Later, arbitration had played a significant role throughout the Babylonian days, Greeks, Egyptians, Romans, England, and Indians. Arbitration, for the first time, used to solve commercial disputes in the Babylonian days. *See at: Xavier G., "Evolution of Arbitration as A Legal Institutional and the Inherent Powers of the Court",*

<sup>1</sup> Torgbor E., "Courts and the Effectiveness of Arbitration in Africa", *Arbitration International*, Vol. 32, (2017), P. 379. Arbitration is a venerable mode of dispute settlement antedating litigation.<sup>1</sup> It has been in use since King Solomon, as to biblical theory,

arguments have already in agreement as to court intervention in the arbitration; they have only a difference as to the right time when courts intervene in arbitration.

However, the first question this article would like to answer is what is the very reason that permitted and enabled courts to intervene in arbitration? Given this question has got a plausible answer as to the rationalities of court intervention in arbitration, who enabled and allowed courts to do so? How and when has this intervention should be done? What is the right extent of court intervention in arbitration? If the preceding questions answered in the positive and in a logical and tenable way, the last question, regarding the determination of the right extent of court intervention, can be answered well. This article is going to answer such questions respectively.

When we question why later coming courts intervene in an antique and worthy arbitration, the literal answer usually is given is that since arbitration negates public policy. However, the prejudicing judicial attitude also aimed at dwindling the growing influence and reign of arbitration. Despite this projected antagonism, the need for a speedy and flexible tool of dispute settlement by the business sector has made commercial arbitration still flamboyant [2].

What impels us to resort to arbitration is for its continuous economic rationale of value for money and perceived shortcomings of the current judicial system and legal practice. If so, eschewing excessive judicial intervention is plausible for the following reasons [3]:

- First, arbitration is stemmed from the consent of parties to avoid litigation and courts must not interfere into parties' freedom of contract;
- Second, arbitration, unencumbered by excessive court interference, is vital to enhance international trade and attracting foreign investment; and

- Third, courts themselves may benefit in refraining from unnecessary intervention in commercial arbitration saving their limited judicial resources and time.

Though arbitration is a contractual alternative of dispute settlement it is not totally immune from court arbitration; hence court intervention is required. Court intervention is not always appropriate, however. A certain degree of order and coordination is important if both arbitration and litigation, in this globalized world, need to be conducted efficiently and economically [4]. That is why English law emphasizes the effectiveness and probably attraction of arbitration is to be determined based on the possibility of more or less circumscribed court intervention at potentially critical points: e. g to

determine whether or not an arbitration agreement exists, to assist its implementation if it does via appointing, removing, or replacing an arbitrator, or to order injunction on proceedings brought in breach of an agreement to arbitrate, to issue interim measures, and to enforce or in some cases to set aside any award [5].

Questioning why courts intervention is sought for the above purposes, conceptually, the answer is related to the functions, capacities, and constraints on the arbitral tribunal and court can be viewed in the context and doctrines of: (i) arbitrability; (ii) legality; and enforceability of the parties' contract: and, when pertinent; (iii) considerations of public policy which can be taken as a point of reference in the relationship between arbitration and court. For example, when the arbitration agreement or law lacks or has inadequate provisions on arbitrability, this constraint invites an arbitral or judicial interpretation of the parties' contract [6].

To see the above reason for court intervention for reason of public policy, to start with its meaning, public policy is a very slippery concept which opens itself for a wide range of interpretations, however. That is not without reason an English judge described it as "... a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you to sound law. It is never argued at all, but when

*Asian Law Institute, Working Paper Series No. 009, P. 1-2.* And, for the first time, England had an Arbitration Act in 1697, pre-existing King's court. *See at: Bockstiegel H. K., "Past, Present, and Future Perspectives of Arbitration", Arbitration International, Vol. 25, No. 3, (LCIA, 2009), P. 294.*

<sup>2</sup> Hailegabriel, cited above at note 1, PP. 298-299.

<sup>3</sup> Abwuor O. J., "Role of Courts in Arbitration: A Critical Analysis of the Kenyan Arbitration Act No. 4 of 1995", A Master's Thesis Submitted to School of Law, University of Nairobi, (September, 2012), P.45.

<sup>4</sup> Mance J., "Arbitration: a Law unto itself?" *Oxford Arbitration International*, Vol. 32, (February, 2016), P. 240.

<sup>5</sup> Id, P. 224.

<sup>6</sup> Torgbor E., Cited above at note 1, PP. 382-383.

other points fail” [7]. A coincident courtesy argument favoring public policy was also posed against this famous saying by another English judge, after the lapse of 150 years. This counter-argument for public policy holds that “with a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice” [8].

In municipal law, public policy is employed to set imperative or mandatory rules from which the parties cannot deviate. And, it is a notion which changes in time and space. It is not also an exhaustive list of rules that the award must respect but rather a moving and changing core of the legal order of the state. That is the reason why public policy cannot easily understand theoretically, but in practice. And, the real content of public policy can be understood only with state laws; thereby, it adds unpredictability [9].

Courts are also vested with supervisory jurisdiction over both domestic and international commercial arbitration. They have a major role to play in making the new commercial arbitration legislation via intervening in the arbitration proceedings and reviewing arbitration awards. In this regard, however, both court and arbitration should play their respective separate but connected and related roles in dispute resolution [10].

In a nutshell, what should be underscored here is that if arbitration, as an important dispute settlement mechanism, is required to work efficiently, its autonomy should be protected from unwarranted and obstructing court intervention. For this, the doctrine of severability, competence-competence, and friendly interpretation of ambiguous and unclear arbitration clauses which are essential characteristics of arbitration law are crafted to maintain autonomy and efficiency of arbitration processes [11].

<sup>7</sup> Birhanu, B. Beyene, “The Degree of Court’s Control on Arbitration under the Ethiopian Law: Is It to the Right Amount?”, *Oromia Law Journal*, Vol. 1, No. 1, (2012), P. 41.

<sup>8</sup> Ibid.

<sup>9</sup> Koca, *infra* note 29, P. 45.

<sup>10</sup> Croft, C., “Recent Developments in Arbitration in Australia”, *Journal of International Arbitration*, (2010), Vol. 28, P. 599.

<sup>11</sup> Solomon E. Gerese, “Comparative Analysis of Scope of Jurisdiction of Arbitrators under the Ethiopian Civil Code of 1960”, LLM Short Thesis Submitted to Central

## Instances and Extent of Court Intervention in Arbitration Proceedings under International Arbitration Laws

The instances and extent of court intervention in arbitration proceedings may vary from jurisdiction to jurisdiction; since the role and the extent of the powers that courts may exercise relating to arbitration is different. The general approach national legislation takes towards alternative dispute resolution mechanisms, which can range from an open mistrust to full acknowledgment of their autonomy may also determine [12]. Of course, success in the arbitral proceeding may not only be dependent upon arbitrators and arbitration practitioners. Rather the whole process must be well supported by arbitral institutions, and essentially by courts. Moreover, all concerned stakeholders must play their part in maintaining the quality of arbitral processes and outcomes, and in reducing delay and expense. Courts, whether they are facilitating or enforcing, are also tasked with understanding and supporting arbitration in all these respects – and they must be impartial, efficient and knowledgeable, and experienced with respect to international and domestic arbitration law and practice [13]. In short, to maintain the right extent of court intervention in arbitration, it would be better to be ruled as to the principle that underscores to avoid frontier disputes occurred between the public world of the courts and the private world of arbitration [14].

Again, to come to court interventions in arbitration proceedings, it is vivid that courts at the seat of arbitration may intervene in the process at three stages: prior to commencement of the arbitration; during the arbitration and after the publication of the final award (a stage which they share with the enforcing court). Before the commencement of an arbitration

European University, (2009), PP. 6-20, 43-45, and 47-57.

<sup>12</sup> Carbone, G., “The Interference of the Court of the Seat with International Arbitration”, *Journal of Dispute Resolution*, (2012), P. 217.

<sup>13</sup> Croft C., “How the Judiciary can Support Domestic and International Arbitration”, *Arbitrators and Mediators Institute of New Zealand Annual Conference*, (Auckland, 25-27<sup>th</sup> July 2013), P. 116.

<sup>14</sup> San I. A., “Court Control of Arbitral Process”, *Nigerian Bar Association Section on Business Law Workshop on ADR as an Alternative and Expeditious and Cost-effective Means of Dispute Resolution*, (Lagos, 5<sup>th</sup> July 2006), P. 4.

reference, for example, one party to the dispute may question the existence or scope of the arbitration agreement before a national court so that the other party will be obliged to assert the agreement. Such litigation may result in an anti-suit injunction. At this stage, the involvement of the court can support the arbitral reference where a bouncing view is taken to ensure the effectiveness of the arbitration agreement. It may also lead to courts frustrating the arbitration process even before its commencement, however. Hence, issues, such as lack of consent, time limits, taking steps in the proceedings, writing requirements, among others, may be raised to frustrate the existence and performance of the arbitration agreement [15].

Another occasion in relation to the doctrine of competence-competence is that situations where one party to an arbitration agreement refuses or fails to participate in the arbitral reference but instead chooses to litigate the very question of the existence of the arbitration agreement and its import. Here, contesting the existence or validity of the arbitration agreement is not an issue. It is the forum of contestation that raises concerns. This is particularly happening where arbitration laws that expressly bestow jurisdiction on the arbitral tribunal to determine its jurisdiction and all matters relevant thereto. Some parties, in defiance of this requirement, still approach the courts to make that determination and some courts, especially first instance courts, take jurisdiction and determine the question. This tells us the fact that such courts lack jurisdiction to so determine since their action effectively takeovers the powers conferred by their own law on the arbitral tribunal [16].

Upon commencement of an arbitral proceeding, issues such as arbitrator appointment and challenge, and application for interim measures of protection may also be litigated before the courts. Finally, after the award has been passed, issues of enforcement and challenge of the award demand national courts again either at the seat or place of enforcement. Any of these stages, in most African jurisdictions, can entail the start of legal proceedings from the court of the first instance all the way to the Supreme Court. And, such practices consume time, increase cost and frustrate those disputants who wish to

progress the resolution of the dispute in their chosen forum of arbitration. It is such interferences, or interventions that earn courts the reputation of not being arbitration-friendly or of being interventionist. Either it may be correctly or wrongly held, there is a perception that courts in most African jurisdictions do not play a supportive role towards arbitration whether in domestic or international arbitration. Some African states for example like Mauritius have taken various steps to guarantee very limited interference or interventions inviting recourse to the courts by established specialist commercial courts manned by judges with specialist knowledge of arbitration law and practice to adjudicate arbitration-related litigation [17].

Instances of court intervention in arbitration proceedings have also been recognized in different international arbitration model laws and rules. And, though not pretty much clear, instances and extent of interventions can be examined there. The UNCITRAL Model Law on International Commercial Arbitration prescribes limited court intervention in arbitration [18]. The specific functions there are limited to [19]: assisting with the appointment of an arbitral tribunal [20]; deciding challenges [21]; terminating the arbitral mandate [22]; ruling on jurisdiction [23]; deciding applications for setting aside an award [24]; staying court proceedings when there is a valid arbitration agreement governing the parties' dispute [25]; Providing parties with interim measures of protection [26]; recognition and enforcement of interim measures issued by an arbitral tribunal subject to a number of grounds for resistance [27]; assisting in taking evidence [28]; and recognizing and enforcing an arbitral award [29].

As mentioned in the above paragraph, Art. 5 of the UNCITRAL Model Law indicates an implicit recognition of the autonomous theory of arbitration. Underscoring the extent of court intervention is helpful

<sup>15</sup> Onyema E., "The Role of Arbitration Institutions in the Development of Arbitration in Africa", Paper presented on Panel 3: Projecting Arbitration in Africa, (AU Commission, Addis Ababa, 23 July 2015), P. 145.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Art. 5, UNCITRAL Model Law on International Commercial Arbitration.

<sup>19</sup> Id., Art. 6.

<sup>20</sup> Id., Art. 11, 13 & 14.

<sup>21</sup> Id., Art. 13.

<sup>22</sup> Id., Art. 14.

<sup>23</sup> Id., Art. 16.

<sup>24</sup> Id., Art. 34.

<sup>25</sup> Id., Art. 8.

<sup>26</sup> Id., Arts. 9 & 17.

<sup>27</sup> Id., Art. 17.

<sup>28</sup> Id., Art. 27.

<sup>29</sup> Id., Arts. 35 & 36.

to bring a clear line between the possible field in which the court can arbitrate and the rest. It limits clearly the interference of the courts and brings a possibility of the autonomy of arbitration proceedings in certain areas; still it is not a full acknowledgment of the autonomous theory of arbitration but rather a starting point, however [30].

### **Instances and the Extent of Court Intervention in Arbitration Proceedings under Ethiopian Arbitration Law**

In this section, the different instances and extent of court interventions in arbitration proceedings under Ethiopian law are going to be analyzed. Here, Ethiopian courts intervene in arbitration proceedings at the three stages, i.e., before and upon the commencement of the proceeding, during, the proceeding and after the proceeding/rendition of the award are examined.

In order to appreciate and determine whether the extent of court intervention in arbitration is to the right amount, too much, or too little, let us see court intervention in these aforementioned instances turn by turn, albeit that there are no clearly known standards working across jurisdictions that enable us to determine the right extent of court intervention in arbitration proceedings. For this, our parameters are long-established and widely recognized principles and theories of arbitration, international model arbitration laws, the experience of foreign jurisdictions, and some court cases concerning arbitration can be taken.

Before or upon commencement of an arbitration proceeding, selection and appointment of arbitrators are one of the instances that the extent of court intervention is examined. The Ethiopian law recognizes the importance of the principles of party freedom and equality in the appointment of arbitrators. Parties are free not only in appointing arbitrators, but also in determining the identity, the number, the qualification, and jurisdiction of the same [31]. And, under the pain of nullity, any arbitration agreement is required to give each party equal rights concerning the

appointment of arbitrators [32]. Here, it is the parties' agreement that does the function of the selection and appointment of arbitrators. If there is a gap under parties' arbitration agreement as to the selection and appointment of arbitrators, usually it is filled by either institutional arbitration rules referred to in the contract or national laws that usually contain default rules. In our case, this default rule is stipulated under the Civil Code [33].

In the same way, under the draft Arbitration Rules of AACCSA, parties are given the freedom to agree on the selection and appointment of their arbitrator (s) [34]. Courts fill the gap when parties are in default to complete the selection and appointment of arbitrators [35]. Moreover, persons in active judicial service are not allowed to be appointed as arbitrators [36]. This is a deliberate prohibition purposefully made to maintain the institutional and functional independence of courts and arbitration. If this kind of clause is not inserted and judges are free to be appointed as arbitrators, the probability a conflict of interest and mishmash between the features of arbitration and courts would happen. After completion of the selection and appointment of arbitrators, parties have been endowed the right to challenge arbitrators upon their disqualification before the arbitral tribunal itself; and if unsuccessful, it is appealable to the court of law within ten days [37]. This resort to the court for rectification is crucial in maintaining the efficiency and impartiality of arbitrators.

Another area of court intervention implicated under the Civil Code is concerning the determination of the jurisdictional challenge of arbitrators. It is common to see the jurisdiction of arbitrators is defined in the arbitration agreement; plus, mandatory statutory provisions set limits on the competence of arbitrators. Nowadays, there are few limits on the power of arbitrators to rule on a range of both preliminary and core issues, however. Numerous jurisdictions allow arbitrators to rule on their jurisdiction; but subject to judicial review only after an award on the merits has been rendered. This approach resembling the principle

<sup>30</sup> Koca E., "Possibility of an Autonomous International Commercial Arbitration", Master's Thesis submitted to University of Lapland Faculty of Law, (Spring 2017), PP. 31-32.

<sup>31</sup> Art. 3331, the 1960 Civil code of the Empire of Ethiopia; Hailegabriel, cited above at note 1, P. 308.

<sup>32</sup> Id., Art. 3335, Civ. C.

<sup>33</sup> Id., Art. 3334 (1) Civ. C.

<sup>34</sup> Art. 2, Draft Arbitration Rules of AACCSA.

<sup>35</sup> Id., Art. 9 (1) (a), (c), (d).

<sup>36</sup> Id., Art. 9 (1) (e).

<sup>37</sup> Art. 3342 (3), Civ. C.

of *competence-competence* is good for avoiding unnecessary delays to premature court intervention [<sup>38</sup>].

When we see the principle of separability, simply, the Civil Code says that arbitration clauses are separate from general contractual provisions. And, the immediate effect of the separation leads to the conclusion that the arbitration agreement would not be affected by the termination of the general contract. The justification behind this principle is that the parties agreed on the institution of the adjudication process, where the jurisdictional power of arbitrators is stemmed from to evaluate all the issues of the general contract including its validity. However, according to Art. 3330 (3) of the Civil Code, arbitrators do not have the power to rule over the validity or otherwise of the arbitration submission. Hence, this doesn't fulfill the principle of separability and is vague goes against the independence of the tribunal [<sup>39</sup>]; because, this approach is vulnerable for judicial scrutiny of arbitration agreements [<sup>40</sup>]. That is court intervention to rule whether the arbitration submission is valid or not. So, Ethiopian arbitration law that makes the principles of competence-competence dependent upon inseparability principles is not in line with the modern arbitration law and goes against the independence of arbitration tribunals.

Amidst, courts intervene during the arbitration proceedings; pending the arbitral proceeding. Keeping the autonomy of arbitration unaffected, Ethiopian law also recognizes the importance of the right of parties to an arbitration to apply for court assistance whenever appropriate [<sup>41</sup>]; and such applications will never be considered as a deviation or breach of the arbitration agreement [<sup>42</sup>]. This is helpful to use actual of courts; for example to compel parties to arbitrate and give

evidence [<sup>43</sup>]; and to issue summons [<sup>44</sup>]. And, coincidentally, arbitrators still can grant orders for interim measures of protection and measures relating to the attendance of witnesses; to be masters of their own procedure as far as there is fairness [<sup>45</sup>]; and be flexible in the realm of procedural fairness if they are authorized to do so by the parties [<sup>46</sup>].

In sum, once the arbitration proceeding set in motion, the procedure to be followed is governed by the civil procedure code [<sup>47</sup>]. And, thereafter the procedure to be followed is made like the normal court procedure [<sup>48</sup>]. There, the tribunal can also give interim orders of protection or ask courts to have such order to be given. In short, despite the informality of the proceeding, the procedure is almost tantamount to the civil court [<sup>49</sup>]. Here above, provisions depict that courts are required and made to play a supportive role in arbitration proceedings; and even may not be properly considered as an intervention.

Last, another array of instances of court intervention to be examined is after the rendition of the award or after the finalization of the arbitration proceeding. That is first, issues of appeal, set aside and refusal; second, cassation review of an arbitral award; and third, issues of recognition and enforcement of an award as instances of court intervention are the point of discussion, here below.

Regarding the appeal, irregularities listed under Art.351 (1) (b-d), Civ.Pro.C are clear enough to invite unlimited court intervention since the irregularities completely oppose the parties' expectation of arbitration, and fairness and justice. From the very start it could have been better if arbitration should not take the form of appeal; because the grounds paving the appeal avenue most probably snatches parties' wish of keeping themselves out of court trial for the resolution of disputes via arbitration. The avenue of setting aside is well encapsulated in a way to maintain the fair balance between the two parties' autonomy and freedom and interest for court intervention [<sup>50</sup>].

<sup>38</sup> Hailegarbriel, cited above at note 1, PP. 309-310.

<sup>39</sup> Michael Teshome, "Laws and Practice of Commercial Arbitration in Ethiopia: A Brief Overview", PP. 17-18. <[www.abbyssinialaw.com](http://www.abbyssinialaw.com)> <accessed on June 30, 2018>.

<sup>40</sup> Hailegabriel, cited above at note 1, P. 311. Hailegabriel also added that this approach of Ethiopian arbitration law is unique from the UNCITRAL Model Law and numerous national laws on international arbitration which recognize the jurisdiction of arbitrators to rule on their own jurisdiction, including any objections with respect to the existence and validity of the arbitration agreement.

<sup>41</sup> Art. 317(3) of the 1965 Civil Procedure Code of the Empire of Ethiopia; together with and 3344(2) of the Civ. C.

<sup>42</sup> Ibid.

<sup>43</sup> Hailegabriel, supra note 1, P. 322.

<sup>44</sup> Art. 317 (3), Civ. Pro. C.

<sup>45</sup> Art. 317 (2), Civ. Pro. C.

<sup>46</sup> Arts. 351 and 356, Civ. Pro. C.

<sup>47</sup> Art. 3345, Civ. C.

<sup>48</sup> Art. 317 (1), Civ. Pro. C.

<sup>49</sup> Tilahun Teshome, "The Legal Regime Governing Arbitration in Ethiopia: A Synopsis", *Ethiopian Bar Review*, Vol. 1, No. 2, (February 2007), P. 137.

<sup>50</sup> Birhanu, cited above at note 7, P. 52.

The balance between the two concerns. When we come to the cassation review of arbitral awards, the laws defining the cassation power of supreme courts are not aimed to give answers as to out of court dispute resolution mechanism. Plus, whether cassation review is a non-waivable avenue unlike the avenue of setting aside, and as a default avenue unlike an appeal, is not also provided under Ethiopian arbitration laws. The amount of time consumed at a cassation bench and the plasticity of the meaning of the term basic error of law justify that the avenue of cassation is not provided under the Ethiopian arbitration law either as a non-waivable avenue of judicial review of awards or as a default avenue. Arbitration law, especially concerning its principles of parties' autonomy, and finality and privacy, don't warrant a cassation review of arbitral awards [<sup>51</sup>]. Party autonomy and consequent recognition by the courts need to be not upheld. Cassation review of arbitral awards is against parties' wish to arbitrate; not to litigate [<sup>52</sup>].

### **Optimizing the Extent of Court Intervention in Arbitration Proceedings**

Now, we have seen that involvement of national courts is crucial to the overall efficacy of arbitration, both domestic and international; and instances may appear at all stages of the arbitral proceedings calling for court intervention. Yet, it should be underscored that a balance should be maintained between the levels of court involvement and the smooth functioning of arbitration, which is parties a contractual alternative to judicial dispute settlement. A dream of a pure autonomous arbitration is not possible in this real world. However, conditions for the implementation of an autonomous system should be observed. And, regarding the state involvement in arbitration, not the presence or the absence of the state is debatable but rather the level and quality of its presence should be examined [<sup>53</sup>].

When state power is used in a virtuous manner, it could increase the overall quality of arbitration proceedings. That is state interference is not always a problem. Instances of interferences can be is beneficial when framed carefully. The role of the state must be framed as precisely as possible, especially in international commercial arbitration. That is businesses must not get afraid of the drawback of state power. The state's role must be framed in a way to allow only interventions as far as there are abuses of arbitration. If so, the state intervention is required and suitable since it does retain police powers and the sense of justice, which are good for arbitration processes too. It is also believed that state intervention via courts without undermining the autonomous of arbitration; it largely restores its legitimacy and brings limits to a private system. In sum, it can be said that the state is the lesser evil that allows legitimacy and fluidity in the functioning of arbitration [<sup>54</sup>].

I may address those questions at a later time, but I want to confine myself to the question of why national courts have a vested interest in arbitration proceedings. Art 317(1) of the Civil Procedure Code say that the procedure before an arbitration tribunal, including family arbitrators, shall, as nearly as possible, be the same as in civil court- summon, evidence gathering, hearing of witnesses, trial, pre-trial, presenting claim and statement of defense must correspond to ordinary court proceedings. The Ethiopian Civil Procedure Code precludes the informality of proceedings. Why? I believe the answer emanates from the nature of the arbitration.

Arbitration, in any legal system, serves as a private system that gives a right to parties to resolve their disagreement. Every arbitration tribunal's constitution similarly states the same thing. That is arbitration is considered as a contract between/among the parties. It is real that an arbitration tribunal decision doesn't bind third parties. So, a national law, which is presumed to be autonomous, needs to regulate a privately established quasi-judicial authority. Even if procedural laws recognize the freedom the parties have to contract on anything they please; nothing will allow arbitration to be a way to escape the law, however [<sup>55</sup>].

<sup>51</sup> Birhanu B. Beyene, "Cassation Review of Arbitral Awards: Does the Law Authorize It?", *Oromia Law Journal* Vol. 2, No.2, PP. 136-137.

<sup>52</sup> Seid D. Mekonnen, "Court Review of Arbitral Awards through the Power of Cassation: A Case Comment on National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pv. Ltd. Co.", *Mekelle University Law Journal*, Vol. 3, (2015), P.119.

<sup>53</sup> Koca, cited above at note 29, P. 77.

<sup>54</sup> Ibid.

<sup>55</sup> Michael Teshome, "Arbitration and Ethiopian National Courts", A blog post, <[www.abysinnialaw.com](http://www.abysinnialaw.com)> <accessed 01 July, 2018>

Ethiopian arbitration law allows parties, based on their arbitral submission, to entrust their disputes and their solution to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the principles of law [56]. This refers that parties have been given freedom, based on their dispute settlement clauses of a contract allow parties to choose arbitration. The Ethiopian Civil Procedure Code confers equal status to arbitral awards, and allows their execution and appeal process to follow the same procedure as an ordinary court decision [57]. The national law seems to guard the private dispute resolution system from abuse. For instance, Ethiopian law makes administrative contracts non-arbitrable [58].

The judicial nature of the arbitration compels the state to control it through different avenues. Especially, when arbitrating under obsolete arbitration law, the judiciary feels like arbitration proceedings go against judicial sovereignty, the independence of the judiciary, and its ability to conduct a judicial review of legislation and executive action. It is a given fact that procedural laws aspire to maintain judicial sovereignty, and the judiciary, itself, retains sovereignty via appeal, setting aside and/or refusal procedure [59]. However, occasionally, there are undue court interventions in arbitration proceedings. A recent cassation decision struck down the arbitration final clause that prohibited the parties from appealing their case [60]. Last but not least, it should be underlined that national courts have vested interest in arbitration because it is a private quasi-judicial dispute settlement method. Unless national procedural law, through courts, exercises authority over contractually constituted arbitration panels for fear that it may be abused, and become a way to escape the law [61].

## Concluding Remarks and Ways Forward

To wrap up, it is common and natural to evidence that there is no absolute party autonomy and freedom whether in arbitration or any other contractual relations. So, limited court intervention should be allowed in arbitration proceedings as far as it is beneficial to parties and meet public policy concerns reflecting the established interest of the society. In short, court intervention in arbitration can be used as a double-edged sword, in safeguarding the interest of parties under arbitration proceeding and those individuals outside of it.

To encapsulate an appropriate court intervention in arbitration proceedings, a modern arbitration law should clearly and unequivocally stipulate instances and extent of court intervention so that it is possible to make courts friend of arbitration and supportive of arbitration proceedings than antagonists and interventionist.

The current arbitration law of Ethiopia though it confers parties some degree of fair autonomy and freedom in their arbitration agreement; there are unnecessary court interventions too. For instance, arbitrators do not have a jurisdiction to rule over the validity or otherwise of an arbitration submission and this erodes the independence of arbitral tribunals inviting premature court intervention in arbitration proceedings. Plus, the extended grounds of appeal (Art. 351 (b-c)) opens the door for unwarranted court intervention but it could have been restricted. Moreover, the avenue of refusal is not made ostensible. Cassation review of arbitral awards is also out of the purview of the Ethiopian arbitration law; there is no clear legal basis empowering cassation review of arbitral awards.

All the aforementioned are the broad base of judicial review of arbitral awards that are unhealthy for creating an efficient arbitration system in the country. Ethiopia's recognition and enforcement of foreign arbitral awards are so tantamounting to prohibition or indirect refusal so that the country needs to ratify the New York Convention (1958). If Ethiopia could ratify the convention, in this reciprocated globalized world, it can make both domestic and international commercial arbitrations efficient that can respond to the demand of the current business world.

<sup>56</sup> Ibid; see also Art. 3325, Civ. C.

<sup>57</sup> Arts. 319/2/, 355/3/, 352, Civ. Pro. C.

<sup>58</sup> Art. 315/2/, Civ. Pro. C. However, now there are tendencies making administrative contracts arbitrable by which made non-arbitrable for long for reasons of public policy justifications. For example, the newly enacted public private partnership proclamation has made administrative contracts arbitrable. See Art. 62 and ff. of Proclamation No. 1076/2018.

<sup>59</sup> Michael, cited above at note 55.

<sup>60</sup> Federal Supreme Court Cassation Bench Decision File No. 42239/2003.

<sup>61</sup> Michael, cited above at note 55.

In sum, the extent of court intervention under Ethiopian law is high and not emanated from a clearly understood arbitration rule. For this, arbitration law of the country needs to be modified in a way to clearly state instances and a fair extent of necessary court intervention in arbitration proceedings.

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