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COMPARATIVE ANALYSIS OF ETHIOPIAN ARBITRATION LAW AND THE UNCITRAL MODEL LAW: ASSESSING THE LIMITS OF PARTY AUTONOMY THROUGH ERROR OF LAW AND INARBITRABILITY

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Abstract

The recent trends in ratifying the 1958 New York Convention and the reform of the arbitration law in Ethiopia have partly ameliorated the restrictions to party autonomy in international commercial arbitration. Nevertheless, the disproportionate involvement of Ethiopian courts in the matter of setting aside and enforcement of foreign arbitral awards on the grounds of error of law and inarbitrability is still a subject of much debate in both the statutory and case law arbitration system. The indeterminate statutory approach concerning the characterization of administrative contracts, a mandatory rule that in principle prohibits the arbitrability of administrative contracts and the rule that allows Cassation Court review of awards on an error of law are among the main factors that enable the unrestrictive degree of court involvement on this issue. In this thesis, the author examines the theory that justifies the judicial intervention in international commercial arbitration on inarbitrability and error of law grounds in Chapter II. Chapter III attempts to analyze the differences in the grounds for setting aside and reviewing awards in the UNCITRAL Model Law and the New York Convention compared to the current Ethiopian arbitration law. Chapter IV considers the inarbitrability of administrative contracts in Ethiopia in the context of international arbitration and discusses its impact on party autonomy. Chapter V examines two Federal Cassation Bench cases that characterized the Ethiopian case-law standpoint on the review of awards based on the error of law ground. In Chapter VI, the author concludes that the approach to the issues of inarbitrability of administrative contract and the error of law could lead to a *de novo* court review of awards and hence there is a need to balance the competing demands for the freedom of parties in international contract and the public interest by providing an authoritative judicial interpretation; without which arbitration in Ethiopia will remain an unpromising dispute resolution mechanism, particularly in the international commercial arbitration context.

Table of contents

List of abbreviations

CC	The 1960s Civil Code of Ethiopia
CPC	The 1965 Ethiopian Civil Procedure Code
EDF Rules	European Development Fund Rules
FDRE	Federal Democratic Republic of Ethiopia
GAFTA Procedural Rules	Grain and Feed Trading Association Procedural Rules
ICC	International Chamber of Commerce
ICSI	International Center for Settlement of Investment Disputes
ICA	International Commercial Arbitration
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
PCA	Permanent Court of Arbitration
PIL	Private International Law
UNCITRAL	The United Nations Commission on International Trade Law

Chapter I: Introduction

1.1 Background of the research

While there are many definitions to the concept of International Commercial Arbitration, (hereinafter ICA), this dissertation employs the definition adopted in the UNCITRAL Model law as it is embraced in the current Ethiopian arbitration law[1]. Generally, the practicality of ICA as a dispute resolution mechanism that aims at providing a viable legal infrastructure for modern, globalized markets with a high number of impersonal market participants requires the support of either coercive state sanctions or systems of organized blacklisting.[2] The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) is the paramount legal document that lays the foundation for commercial arbitration.[3] Furthermore, the UNCITRAL Model Law on International Commercial Arbitration (Model Law) "was specifically designed to apply to international commercial arbitration." [4] Nevertheless, the role of national arbitration laws with a parallel objective to the NYC and the Model Law are also paramount to functionality of ICA as an effective dispute resolution system.

The particularities of national arbitration laws may not be able to provides a universal procedure for the settlement of international disputes and ICA, to the extent possible, should be detached from such particularities of national laws. Nevertheless, national law is still paramount for the overall autonomy of ICA. As Joshua D H Karton explained it well, "[i]f ICA is to be an autonomous forum on a separate, international plane, it must be supported by the national systems of enforcement that make arbitration possible." [5] The reason is that, even in an international context, contracting parties would not count on an international court[6] that may deal with an international business dispute.

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[1] The author accords with the definition of the word 'commercial' that appears as a footnote to Article 1(1) of the Model Law since this approach is adopted in the current Ethiopian Arbitration Proclamation.
[2] Walter Mattli and Thomas Dietz, eds., *International Arbitration and Global Governance: Contending Theories and Evidence* (2014), 190.
[3] Won L. Kidane, *The Culture of International Arbitration* (Oxford University Press,L 2017), 119.
[4] Blackaby et al., *Redfern and Hunter on International Arbitration*, 10.
[5] Joshua D. H. Karton, *The Culture of International Arbitration and The Evolution of Contract Law* (Oxford, New York: Oxford University Press, 2013), 123.
[6] Blackaby et al., *Redfern and Hunter on International Arbitration*, 38. "There is no international court to deal with international business disputes."

Developing countries were suspicious of detaching ICA from national laws claiming that it would be simply another means by which multinational corporations based in developed countries could exploit natural resources without fear of legal sanction.[7] Such pessimism had been perceptible in the Ethiopian arbitration system and Ethiopian lawyers as the Ethiopian arbitration regime had been treating both domestic and international arbitrations alike for several decades.[8] National law of one state alone is usually inadequate to deal with international arbitration problems since the jurisdiction of any given state is generally limited to its territory.[9] Ethiopia had been among the recalcitrant states that failed to ratify the NYC,[10] and its international arbitration legal regime had not been addressed properly in the national laws until recently.[11] The identical treatment of purely domestic arbitration and arbitration involving international contracts coupled with the Ethiopian hesitation in joining the 1958 NYC has contributed to restricting party autonomy in ICA.

The golden rule which must preface any discussion of applicable law in ICA is the doctrine of party autonomy, which allows parties to freely contract on any terms they wish, so long as the bargain they strike does not violate public policy.[12] Party autonomy prevails in determining the law applicable to the procedure and the merits of the dispute in ICA.[13] The scope of choice-of-law possibilities is principally greater in ICA than in state litigation because the legal practice in international arbitration allows the choice of both national laws or private transnational law codifications, such as the

[7] Karton, *The Culture of International Arbitration and The Evolution of Contract Law*, 124.
[8] "International Arbitration Through the Prism of Users from a Developing Country, Ethiopia," *Young ICCA Blog*, accessed October 24, 2015 www.youngicca-blog.com. "The prevailing perception is that it[International Arbitration] is expensive, unaffordable, and a game by westerners for westerners**.**"
[9] Blackaby et al., *Redfern and Hunter on International Arbitration*, 6.
[10] "Ethiopia Accedes to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards | United Nations Commission On International Trade Law," accessed November 29, 2020 https://uncitral.un.org. "…effected on 24 August 2020, Ethiopia becomes the 165th State party to the Convention. The Convention will enter into force for Ethiopia on 22 November 2020."
[11] Blackaby et al., *Redfern and Hunter on International Arbitration*, 6.
[12] Sam Luttrell, "An Introduction to Conflict of Laws in International Commercial Arbitration Comment," *Int'l Trade & Bus. L. Rev.* 14 (2011): 404–13.
[13] Ramona Elisabeta Cirlig, "The Arbitral Tribunal's Authority to Determine the Applicable Law in International Commercial Arbitration: Patterns and Trends Studies and Comments," *Juridical Trib.*, no. 1 (2019): 18–32.

UNIDROIT Principles.[14] Parties to the ICA favor a neutral forum with few substantial principles.[15] One of the principles that has universally acclaimed recognition in commercial arbitration is party autonomy.[16]

The concept of party autonomy in ICA under the Ethiopian arbitration law is uncertain and subject to variation. Prior to the ratification[17] of the NYC on Recognition and Enforcement of Foreign Arbitral Awards in 2020 and the enactment of Arbitration and Conciliation Working Procedure Proclamation No.1237-2021[18](hereinafter, the current arbitration Proclamation), Ethiopia applied the same rules to both domestic arbitration and ICA since there were no separate arbitral legal frameworks that enable courts to distinguish between pure domestic and international arbitration.[19] As part of an effort to overhaul the Ethiopian arbitration system, the 1958 NYC came into force on 13 March 2020 following the publication of the accession of the Convention in the Federal *Negarit Gazette*.[20] After this, the Ethiopian Parliament adopted a stand-alone Arbitration Proclamation on April 20201. The current Ethiopian arbitration Proclamation brought significant improvements, particularly in the incorporation of the principle of *kompetenz-kompetenz,* the recognition of institutional arbitration, and the inclusion of provisions that demand the court to support arbitration and provision that limits the court's intervention during the arbitration process. However, there are still some points of concern regarding the principles of party autonomy in ICA and its limitations under the current statutory and case law systems of Ethiopian arbitration.

[14] Walter Mattli and Thomas Dietz, *International Arbitration and Global Governance: Contending Theories and Evidence*, 179.
[15] Slavomír Halla, "Non-Signatories in International Commercial Arbitration: Contesting the Myth of Consent," *International and Comparative Law Review* 18, no. 2 (December 1, 2018): 59–84.
[16] Michal Malacka, "Party Autonomy in the Procedure of Appointing Arbitrators," *International and Comparative Law Review* 17, no. 2 (December 20, 2017): 93–109.
[17] NewYork Convention, "Ethiopia Ratifies the New York Convention," accessed October 28, 2021 www.newyorkconvention.org.
[18] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021 (Ethiopia 2021).
[19] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia* (Cham : Springer , c2021, n.d.), 20. "Ethiopia does not have two completely separate regimes for domestic and international arbitrations. By and large, the same rules apply to all commercial arbitrations."
[20] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Ratification Proclamation No.1184-2020 (Ethiopia 2020).

This study sheds light on how to identify some of the infrequent limits to party autonomy in international commercial arbitration in the Ethiopian arbitration law perspective. Specifically, issues related to the varied conceptions of the inarbitrability of administrative contracts and the error of law as a ground for court-review of awards and their implication on limiting party autonomy will be analyzing in detail throughout this thesis. The thesis also includes a general background of the Ethiopian arbitration system with a view of providing readers a brief historical understanding of the Ethiopian arbitration system, the non-arbitrability of administrative contracts and the notion of arbitral tribunal's error of law as a ground of court-reviews of arbitral awards. However, the main focus will be on the issues of international commercial arbitration.

In this chapter, there are four sections. Section 1.2 deals with the objectives of the research and definitions of relevant terms that would be applied throughout this thesis. In section 1.3, the methodology of this research will be addressed. Subsequently, the thesis structure would be addressed at the last section of this chapter.

1.2 The objective of the research

The underlying problem mainly contemplates on the Ethiopian statutory and case law arbitration systems' obscurity on the notions of non-arbitrability of admirative contracts and the "fundamental or basic error of law"[21] and its impact on limiting party autonomy in ICA. Even in the new Arbitration Proclamation of Ethiopia, administrative contracts are categorized as non-arbitrable cases.[22] Besides, the question of fundamental error of law as a ground for reviewing international arbitral awards despite the parties' agreement on the finality of the arbitral award is still subject to controversy. Hence, one of the central rationales for this study is to explore the post-award approach of the Ethiopian courts for international arbitral awards in reviewing such awards on the grounds of arbitrability and error of laws and thereby help parties in international arbitration from facing a surprise review in the Federal Cassation Court of Ethiopia.

[21] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021. Article 49 paragraph 2 "Unless there is agreement to the contrary, an application for cassation can be submitted where there is a fundamental or basic error of law"
[22] *Ibid.* Art.7(7)

Although Ethiopia currently, is working on updating its arbitration laws partly in line with the UNCITRAL Model Law, clarification on the notion of arbitrability of administrative contracts and the power of the Federal Cassation Court on reviewing international arbitral awards on 'error of law' grounds is still paramount. The Ethiopian case law also remains problematic concerning the characterization of the "fundamental or basic error of law" exception. Therefore, the overall Ethiopian arbitration law's idiosyncrasies and apathy on the aforementioned issues may lead to the court's discretionary power being used to undermine a party's autonomy in an agreement to arbitrate a dispute particularly in ICA context.

Another aim of the study is to investigate the impact of the current stand-alone arbitration law in controlling the long-standing courts' intervention in the arbitral proceedings and the concept of supporting the principle of party autonomy in international commercial arbitration on a comparative basis. An arbitration law that warrants the interest of international commerce and regulates the arbitral procedure in compliance with internationally accepted standards might enhance the efficacy of arbitral dispute resolution in Ethiopia. The achievement of the research aim will require the pursuit of the following objectives. One of the targets is to examine the nature of party autonomy limitations on ICA in the Ethiopian legal regime. Another related purpose of this thesis is to assess the impact of the Ethiopian court intervention on arbitration proceedings efficacy and to evaluate the factors that lead to the court's involvement, particularly in the ICA context. The other objective of this research is to investigate the main differences (if any), which exist between the Model Law and the Ethiopian Arbitration Proclamation and the effects on the issues of arbitrability and error of law as a ground for setting-aside international arbitral awards.

The upcoming chapters will explore the effects of treating domestic and international arbitration similarly on the efficacy of international commercial arbitration, including its impact on party autonomy and the degree of court intervention. Firstly, the author deals with the analysis of limits to party autonomy in ICA. Following that, the author addresses the discretionary power and control of the arbitral proceeding in the framework of the notion of international commercial arbitration. The overall purpose of this thesis is to answer the question of whether the Ethiopian legal

regime's degree of limit to the party's contractual freedom to arbitrate and the degree of courts review of arbitral award and intervention in the arbitral proceedings is still welcomed in ICA or if it is an obstacle to the development of arbitration as a favorable alternative dispute settlement in the subject matter.

1.3 Research methodology

With the consideration of the recent Ethiopian ratification of the 1958 NYC and the enactment of the national arbitration statute mostly comparable to the UNCITRAL Model Law, the author employs a comparative methodology. The subject matter of this comparative analysis takes into account mainly the provisions of both instruments concerning party autonomy and the involvement of courts. Besides, this study will include certain Federal Supreme Court Cassation case analysis. However, as the author was unable to access sufficient arbitration awards, partly due to the confidential nature of arbitration awards, this study will concentrate solely on analyzing pertinent Cassation Court cases. The comparative methodology helps to identify the position of the current Ethiopian arbitration system compared to the current development in the ICA. Furthermore, as part of the comparative understanding of the Ethiopian perspective of ICA, the research includes a historical account of the general Ethiopian arbitration system in chapter III and the findings from the compressed historic analysis are significant supplements to better comprehend the Ethiopian Arbitration law. The finding also serves as an insightful tool for recommendation in the prospective reform of the Ethiopian arbitration system and could be used as an instrumental exegesis of the Ethiopian arbitral regime.

This study also takes selected pro-arbitration jurisdictions' (France and England) arbitration statutes as a point of comparison as it aims to take a glimpse of the views of both civil and common law systems on the subject matter. One of the reasons why this author chooses comparative study as a methodology is that, as one commentator argued, '[a]rbitrations are comparative law in action.'[23] The use of comparative law methodology is a typical aspect of arbitral decision-making.[24] Therefore,

[23] Karton, *The Culture of International Arbitration and The Evolution of Contract Law*, 137.
[24] Ibid.

for the aforementioned reasons and as it is difficult to access enough data for a case-analysis the author employe limited case study and resorts to much of a comparative interpretation of statutory provisions.

1.4 Thesis structure

This study has six chapters. The first chapter covers the preface of the thesis and a brief account of the scope of the thesis. Chapter II considers the underlying theory on non-arbitrability and public policy to lay out the foundational parameters of the thesis. This chapter examines, among others, the degree to which non-arbitrability is related to public policy, the difference between domestic and international public policy concepts in arbitration, and the reason behind the non-arbitrability of administrative contracts. Chapter III covers a concise account of the Ethiopian legal system with the aim of enlightening readers unfamiliar to the Ethiopian arbitration law. This chapter includes four main segments. The first section examines the core history, sources, and societal absorption of transplanted laws in the Ethiopian legal system in general. In the second major section of this chapter, the main aspects of the now-modified statutory arbitration law of Ethiopia are addressed to provide an informative glimpse into the comparative progress of the Ethiopian arbitration legal regime focusing on the rules governing post-award proceedings. The third section discusses the promising developments introduced in the current stand-alone Arbitration Proclamation. The last section deals with the downsides of the current arbitration with an interim conclusion that sums up the core points of the chapter.

Following the analytical discussion of the general notion of International Commercial Arbitration under the past and present Ethiopian arbitration legal system, this thesis analyzes the concepts of limits to party autonomy in ICA, taking into account the notions of administrative contract and public policy in Chapter IV. The principle of party autonomy is subject to certain limitations, particularly regarding equal treatment of parties, non-signatories, arbitrability, and public order.[25] For that reason, the main focus of this discussion is the limitation of party autonomy that appears to go beyond the

[25] Malacka, "Party Autonomy in the Procedure of Appointing Arbitrators."

ones that the pro-arbitration jurisdictions and the NYC have acknowledged. This chapter discusses in detail the approach of the Ethiopian Federal Cassation Court's involvement in reviewing an arbitral award on the ground of inarbitrability of administrative contracts involving international commercial arbitration and the principle of public policy.

Chapter V details another important aspect of this thesis. The research analysis the current statutory approach concerning grounds for reviewing arbitral awards by the national court, adopted in the new arbitration Proclamation to the counterpart reasons adopted in the NYC and the Model law. The main goal for assessing these rules is to raise an understanding of the rather implied limits to the principle of party autonomy in the ICA context, that are entrenched in the current Ethiopian arbitration law. The research, as well, addresses the notion of public policy as adopted in the New York Convention in comparison to the Ethiopian perspective of public policy as a ground for reviewing international arbitral awards in the context of ICA. In conclusion, this chapter also covers the comprehensive analysis of case law studies rendered by the Ethiopian Federal Supreme Court Cassation Bench. Ultimately, the thesis provides the results and recommendations that demonstrates clarity as to the position of the Ethiopian arbitration regime regarding limits to party autonomy to the stakeholders[26] in Chapter VI.

[26] The term stakeholders in this context refers, but not limited, to the active participants in the arbitration system such as arbitration lawyers, counsels, arbitral institution staff and students.

Chapter: II The General Justification of Inarbitrability, Public Policy, and the Rationale for Excluding Administrative Contracts from Arbitration

2.1 Introduction

One of the topics where the contractual and jurisdictional aspects of international commercial arbitration clash head-on is the notion of arbitrability.[27] Various jurisdictions consider the public interest or rights of certain weaker parties as a general justification for treating certain categories of subject matters as non-arbitrable.[28] The prevailing explanation to the notion of inarbitrability(non-arbitrability) deals with the question that whether a certain category of dispute can be resolved by arbitration or exclusively reserved for court litigation.[29] This concept has a wide range of connotations in some jurisdictions.[30] However, for this research, the author embraced Professor Gary B. Born's definition of the notion of inarbitrability which refers to the "categories of subjects or disputes."[31] that are deemed by a particular national law to be incapable of resolution by arbitration, even if the parties have otherwise validly agreed to arbitrate such matters.

This chapter analyses the general doctrine of inarbitrability and its disparity with the concept of public policy in the context of international commercial arbitration. Sections 2.4 and 2.5 respectively address the distinction between the concepts of inarbitrability and public policy and the

[27] Julian D. M. Lew, Loukas A. Mistelis, and Stefan Kröll, *Comparative International Commercial Arbitration*, c2003 ed. (The Hague; London; New York: Kluwer Law International, n.d.), 187.
[28] George A. Bermann, *International Arbitration and Private International Law General Course on Private International Law (Volume 381)*, 2016, 171. "…[D]ifferent jurisdictions consider that different categories of claims implicate the public interest or the rights of weaker parties sufficiently to justify reserving them for adjudication by national courts and treating them as off-limits to arbitration."
[29] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2012), 68. "[T]he question…whether the subject matter can be arbitrated, or whether the particular dispute must be resolved in court…is the usual definition of arbitrability. In the United States, however, the term arbitrability is also used to describe the question of who determines the arbitrators' jurisdiction—the arbitrator or the court.
[30] A. Bermann, *International Arbitration and Private International Law General Course on Private International Law (Volume 381)*, 164. "In the United States, for example, a dispute may be termed 'non-arbitrable' if, for any of a large number of different reasons, an agreement to arbitrate that dispute will not be enforced. It may not be enforced, for example, because no arbitration agreement was ever formed; because an agreement, though formed, is invalid and unenforceable; because the dispute falls outside the universe of disputes that the parties submitted to arbitration; because the party against whom the agreement is invoked is not bound by it, or because the right to arbitrate was waived, was subject to conditions precedent that were never satisfied, or is time-bared."
[31] Gary B. Born, *International Commercial Arbitration, Second Edition*, 2nd edition, vol. I (Alphen aan den Rijn, The Netherlands: Wolters Kluwer Law & Business, 2014), 944.

domestic notion of inarbitrability. The final deliberation of this chapter focuses on the reason behind the non-arbitrability of administrative contracts as this topic relates directly to the title of this thesis.

The overall aim of this chapter is to provide a theoretical background for this thesis and place the primary purpose of this research into perspective. In the following sections, the author examines the theoretical framework that undergirds the rationale behind innaritrability and public policy generally and the inarbitrability of administrative contracts in ICA context. In doing so, this discussion demonstrates the conceptual loopholes of the current Ethiopian arbitration law concerning non-arbitrability and public policy defenses in general and inarbitrability of administrative contracts in particular and thereby revels its peculiarity.

Nevertheless, it is not the purpose of this chapter to look critically at the theories of non-arbitrability and public policy, but rather to demonstrate the generally accepted principles of non-arbitrability and public policy defenses under the ICA perspective and thereby examine the extent to which these principles are consolidated under the Ethiopian law of arbitration. On this basis, the general notion of non-arbitrability and public policy in the concept of ICA will be addressed under sections 2.2 and 2.3 respectively. Sections 2.4 and 2.5 included fairly detailed accounts concerning the disparity and common feature of public policy and inarbitrability. Section 2.6 concludes with a brief discussion of the general notion of administrative contract's inarbitrability, a subject that this author will examine in detail in the next chapter from an Ethiopian arbitration law perspective.

2.2 Inarbitrability in general

Inarbitrability is an intricate concept in nature and purpose as the concept emerges from national arbitration laws with international implications.[32] In terms of nature, the concept has a binary feature, objective and substantive arbitrability. Objective arbitrability (arbitrability *ratione materiae*) refers to the categories of disputes unable to be resolved by arbitration.[33] In other words, objective

[32] Loukas A. Mistelis, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International B.V., 2009), 7. "It follows that arbitrability is a multi-faceted and multi-purpose concept which despite national origins has an international dynamic."

[33] Philippe Fouchard and Berthold Goldman, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International B.V., 1999), 313. Objective arbitrability comes into play "where the subject-matter of the dispute submitted to arbitration is not one which can be resolved by arbitration."

arbitrability refers to a principle where a certain legal system considers certain types of disputes to be outside the domain of arbitration taking into account the sensitivity of the issue and the interest of society.[34] Subjective arbitrability (arbitrability *ratione personae*) on the other hand, refers to the capacity of entities or individuals such as states, authorities or public entities to enter into an arbitration agreement.[35]

Inarbitrability as a principle has no common or consistent purpose particularly in the international arbitration context and as a result, the chance for a harmonized regulation under the context of international arbitration is hardly expected.[36] Generally, the inarbitrability principle is defined by domestic law domestic laws[37]. As a result, variations on the purpose to exclude a certain subject matter from the domain of arbitration are logically anticipated because under the international arbitration context, a subject matter expressly listed as non-arbitrable in one country's national law could be arbitrable in another jurisdiction taking into account each country's interest on the issue.[38]

On a similar note, the literature-based dichotomy of objective and subjective inarbitrability an absorbable discrepancy. For instance, the general reasoning provided for 'subjective nonarbitrability' is mainly based on policy consideration and the outdated concept of sovereignty advocating the prohibition of private dispute resolution mechanisms as a principle.[39] By contrast, the *raison d'être* for 'objective nonarbitrability' relates to the very nature, efficacy and capability of arbitration in resolving disputes concerning certain subject matters.[40]

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[34] Ibid. at 331–32.
[35] Ibid. at 312–13. Subjective arbitrability concerns "where certain individuals or entities are considered unable to submit their disputes to arbitration because of their status or function."
[36] A. Bermann, *International Arbitration and Private International Law General Course on Private International Law (Volume 381)*, 174. "We can safely say that the prospects for unification or harmonization across jurisdictions of laws on arbitrability, as on the public policy defence, are exceedingly remote."
[37] Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 187. "National laws often impose restrictions or limitations on what matters can be referred to and resolved by arbitration."
[38] Ibid. at 188. "A number of disputes which are not arbitrable under the law of one country are arbitrable in another country where the interests involved are considered to be less important."
[39] Mistelis, *Arbitrability*, 6. "[T]he restrictions on the state's entitlement to enter into arbitration agreements are based on policy considerations. To a certain extent, most of these restrictions are influenced by the old concept that it is against sovereign dignity to submit to any type o dispute resolution system not controlled by the state itself."
[40] Ibid. at 9. "It is a matter of the efficiency and effectiveness of the arbitration process that one should assume and imply the consent of the parties that an arbitral reference is limited to matters that are arbitrable.

The international feature of the concept of 'inarbitrability' is debatable and some authors even went to question the very existence of the notion of transnational or international arbitrability.[41] Some authorities argue that the determining factors in categorizing a subject matter as an issue incapable of being determined by arbitration are individual states' socio-economic and political policies.[42] In other words, in cases involving international elements, national arbitration laws play a significant role in determining the boundaries of arbitrability.

Nevertheless, in spite of the significant connection of the principle of inarbitrability to national laws, it has guaranteed a solid and historical recognition of various legal instruments associated with international arbitration law. The 1923 *Geneva Protocol on Arbitration Clause* under Article 1 refers to the international arbitration agreements concerning matters (commercial or otherwise) "capable of settlement by arbitration." [43] Likewise, the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards under Art. 1(b) sanctioned foreign arbitral awards if "the subject matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon."[44] Therefore, the fact that the inarbitrability doctrine, basically, is a national law issue does not imply that international arbitration legal instruments have been excluded from including the principle.

This doctrine is also recognized by the most acclaimed international convention concerning international commercial arbitration, the 1958 *New York Convention*. [45] This Convention provides two provisions (Articles II (1) and V(2)(a)) underpinning the argument concerning the application of the principle of inarbitrability as a ground against the recognition and enforcement of international

In this respect, it is consistent with the mandate and functions of arbitration tribunals, and indeed with the nature of arbitration, that not all matters can be arbitrated."

[41] Ibid. at 3. "While it may be argued that the issue of what disputes are arbitrable has now become less of a problem, the question is ultimately still in the control of national courts and national laws, and it is still unclear as to whether an international or transnational concept of arbitrability exists."

[42] Blackaby et al., *Redfern and Hunter on International Arbitration*, 111. "Each state decides which matters may or may not be resolved by arbitration in accordance with its own political, social, and economic policy."

[43] Jus Mundi, "Protocol on Arbitration Clauses (1923)," accessed January 15, 2023 https://jusmundi.com.

[44] Convention on the Execution of Foreign Arbitral Awards Geneva, 26 September 1927.

[45] Mistelis, *Arbitrability*, 87. "Several provisions of the New York Convention address directly or indirectly the issue of arbitrability. More specifically the question is dealt with in Articles I, II, and V."

arbitration agreements and foreign arbitral awards.[46] The UNCITRAL Model Law under Articles 34(2)(b)(i) and 36(1)(b)(i) also provides a parallel provision to the aforementioned rules of the NYC, that limits its scope of applicability to arbitrable disputes, or to use the language of the Model Law "disputes capable of settlement by arbitration."

However, the concept of inarbitrability, which is recognized under the NYC lacks clarity and it is open for interpretation.[47] The ambiguity concerning the notion of inarbitrability under Article V(2)(a) of the Convention commences with the language of the provision: "…subject matter of the difference …not capable of settlement by arbitration" because factual or practical hindrances such as the inaccessibility of decisive evidence or the absence of parties from the arbitral proceeding could be included within the scope of this language.[48] Despite that, scholars adopted a prevailing interpretation of the 'subject matter not capable of settlement by arbitration' that refers to the national law's exclusion of particular claims or disputes from arbitration.[49] This research assented to the literature-based explanation of the term ' subject matter of the difference not capable of settlement by arbitration' for clarity and consistency as those factors are paramount for the enforceability of arbitration agreements and awards under the international arbitration perspectives.

[46] Born, *International Commercial Arbitration, Second Edition*, I:946. "Together, these provisions [Articles II(1) and V(2)(a)] permit the assertion of 'nonarbitrability' defenses to the recognition and enforcement of otherwise valid and binding international arbitration agreements and awards under the Convention."

[47] Ibid. "The drafting history of Article V(2)(a) provides limited guidance in interpreting the provision. The initial drafts of what became Article V(2)(a) referred to the 'subject matter of the award,' paralleling the Geneva Convention, which used the same formula. That provision was subsequently revised to refer in the final version of Article V(2)(a) to 'the subject matter of the difference.' These changes do not appear to have a material impact on interpretation of the Convention."

[48] Ibid. at 947–48, I. "It is not entirely clear what the…New York Convention…mean when [it] refer[s] to a subject matter or dispute 'not capable of settlement by arbitration.' As a factual and logistical matter, it would be possible to settle almost any dispute by arbitration…[t]here might be situations where indispensable evidence was physically unavailable, preventing meaningful decision, or where none of the parties could participate in arbitral proceedings. Even these…circumstances would not, however, fall comfortably within the exception in Article V(2)(a)…and would instead more readily be covered by Article II(3)'s exception for arbitration agreements that are 'incapable of being performed.'

[49] Ibid. at 948, I.

2.3 The general concept of public policy in arbitration

Public policy in a broad sense is characterized by ambiguity, flexibility,[50] and lack of a working definition.[51] Nevertheless, commentators have made attempts to spell out the discrepancies among the notions of procedural, substantive, domestic, international, and transnational public policies. Traditionally, international public policy has two facets, procedural and substantive.[52] Some of the instances that amount to violations of the international procedural public policy categories include violation of the required due process due to lack of impartiality, failure to provide a reason-driven award, and *de facto* refusal of an arbitrator from the arbitral proceedings.[53] Instances of substantive public policy on the other hand, amounts to abuse of national sovereignty, duress, fraud and corruption, and excessive penalty or damages.[54]

In arbitration, the issue of public policy comes into play when the award is subject to the court's review at the setting-aside or enforcement stages, and there is a general rule of thumb that arbitrators are accountable to the 'transnational' or 'truly international' public policy, which is "a broad notion encompassing certain basic principles that arbitrators must respect in all circumstances, regardless of the will of the parties or the applicable rules."[55] Notwithstanding that the literature-based argument on the presence established principle of international public policy, the prevailing

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[50] Franco Ferrari, *Limits to Party Autonomy in International Commercial Arbitration* (JurisNet, LLC, 2016), 340. "As it is well known, this concept[public policy] has different facets and is understood in different ways depending on the context."

[51] Monique Sasson, "Public Policy: Is This Catch-All Provision Relevant to the Legitimacy of International Commercial Arbitration?," *Kluwer Arbitration Blog*, June 18, 2022, 1, http://arbitrationblog.kluwerarbitration.com. "…there is no autonomous definition of public policy."

[52] Nicholas Poon, "Striking a Balance between Public Policy and Arbitration Policy in International Commercial Arbitration Legislation and Case Notes," *Sing. J. Legal Stud.* 2012, no. 1 (2012): 188. "Public policy encompasses both substantive and procedural aspects."

[53] Sasson, "Public Policy," 2-3. "Some examples of the second category [procedural public policy] were: I) breach of due process for lack of impartiality; ii) failure to adequately motivate the award; iii) *de facto* exclusion of one arbitrator from the tribunal's deliberations."

[54] Ibid. at 2. "Examples of the first category [substantive public policy] were: i) violation of national sovereignty (the award directed the respondent to return an area of its national waters for three years to the opposing party); ii) duress(one of the parties was led to understand that he would be kept in prison if he did not sign the arbitration clause), iii) fraud and corruption(there were two conflicting judgments: a) a French court judgment holding that the court had the power to investigate whether the award was tainted by corruption and finding that the court was not bound by the findings of the arbitral tribunal; b) and a English case holding that since the arbitral tribunal had jurisdiction to determine the issue of illegality, there was a very limited scope of an English court to re-examine the issue of illegality); and iv) penalty(disproportionately high penalty) or damages(extremely high interest rate)."

[55] Ferrari, *Limits to Party Autonomy in International Commercial Arbitration*, 340.

understanding is that domestic laws are the principal source of the public policy issue in the international arbitration proceedings and the so-called 'transnational public policy' plays a complementary role.[56] Besides, public policy in the context of international arbitration, as opposed to domestic arbitration, is less practical and is largely academic.[57]

As a reinforcement to the aforementioned assertion on the absence of material difference between the notional and international public policy doctrines, other prominent commentators also emphasized that significant variation concerning the national and international public policy dichotomy is missing as far as arbitration is concerned.[58] Even so, domestic and international public policy have distinctive interpretations among scholars. For instance, Mark A. Buchanan describes the concept of domestic public policy as local standards or rules subject to no alteration by the parties agreement and a "stated justification for striking down entire contracts or contract clauses or for refusing to enforce an arbitral award on grounds of immorality, unconscionability, economic policy, unprofessional conduct, and diverse other criteria."[59] The Committee on International Commercial Arbitration of the International Law Association (ILA)'s report on public policy challenges to the enforcement of international arbitral awards, on the other hand, identified the principle of international public policy as narrower in scope compared to the purely domestic one and limited to " the violation of really fundamental conceptions of the legal order in the country concerned."[60] The ILA report further suggested the presence of the 'truly international' or 'transnational' public policy concepts which presumed a universal application.[61] In essence, no established definition international

[56] A. Bermann, *International Arbitration and Private International Law General Course on Private International Law (Volume 381)*, 331. "The current consensus appears to be that national laws are the main source of public policy invoked by arbitrators, while transnational public policy provides a backstop."
[57] Karl-Heinz Bockstiegel, "Public Policy as a Limit to Arbitration and Its Enforcement," *Disp. Resol. Int'l* 2, no. 1 (2008): 125. "…in the modern practice o courts and arbitral tribunals, public policy does not seem to be a major obstacle to international arbitration. At least that can be said for international as distinct from national arbitration."
[58] Blackaby et al., *Redfern and Hunter on International Arbitration*, 599. "There is nothing new, as far as arbitration is concerned, in differentiating between national and international public policy. Indeed, it is a consistent theme to be found in the legislation and judicial decisions of many countries."
[59] Mark A. Buchanan, "Public Policy and International Commercial Arbitration: Introduction," *American Business Law Journal (1986-1998)* 26, no. 3 (Autumn 1988): 3.
[60] Blackaby et al., *Redfern and Hunter on International Arbitration*, 600.
[61] Ibid. "Narrower still, the ILA identified a further category—namely, 'truly international', or 'transnational', public policy—which it found to be of 'universal application—comprising fundamental

public policy gains significant acceptance in the international arbitration context overriding the concept of domestic public policy.

Nevertheless, recent empirical research concerning challenges to the public policy grounds on the enforcement and setting-aside of an award suggests that the public policy defense continues to significantly impact international commercial arbitration.[62] This research indicated that occasionally, certain courts employed a wide interpretation of public policy that could lead the court to review of the award on merits, a juncture "that carries dangers for international arbitration."[63] Therefore this current findings of the empirical research suggests that the foregoing standpoint that 'public policy under international arbitration is largely impractical' could be a mistaken assumption.

2.4 The salient characteristics of inarbitrability and public policy

The notion that certain categories of claims should be precluded from the arbitration domain, although with divergent justifications, is still gaining sanction in the national laws of different jurisdictions. One of the factors that cause the incoherence of inarbitrability's rationalization across jurisdictions is the relationship between inarbitrability and public policy. Different authorities in the field of international arbitration have diverse views on the interplay of public policy and nonarbitrability in international arbitration. Redfern and Hunter, for example, purported that the concept of inarbitrability is essentially a public policy issue.[64] Professor George A. Bermann also suggested that an argument against inarbitrability of certain subject matters with a potential implication on the public interest or the presumptive venerability of one or both parties to the

rules of natural law, principles of universal justice, jus cogens in public international law, and the general principles of morality accepted by what are referred to as " civilized nations"."

[62] Sasson, "Public Policy." "…objections based on public policy have been raised in 44% of enforcement proceedings and in 38% of setting-aside proceedings. The success rates of these objections were only 19% and 21%, respectively; however, the number of times in which the public policy objections have been upheld cannot be dismissed as insignificant."

[63] Ibid. at 3. "…there are some judgments where the courts channeled through public policy a revised determination of the merits of the underlying dispute; this is, of course, a development that carries dangers for international arbitration."

[64] Blackaby et al., *Redfern and Hunter on International Arbitration*, 112. "Whether or not a particular type of dispute is 'arbitrable' under a given law is, in essence, a matter of public policy for that law to determine."

arbitration agreement could be justified by the public policy defense.[65] Professor G.A. Bermann went on and claimed that the notion of inarbitrability is a result of political judgment aiming at promoting arbitration while maintaining national courts' access for certain claims that as a matter of public policy warrants such court's access.[66]

On the other hand, prominent authors in the ICA discipline such as Professor Gary B. Born argue that, despite their close connection, there are circumstances where the inarbitrability and public policy concepts cannot be interchangeable. In the words of this scholar, "[t]he nonarbitrability doctrine under the New York Convention is also closely related to—but distinguishable from—principles of mandatory law and public policy."[67] One of the factors that distinguishes the notion of public policy and mandatory laws from the doctrine of inarbitrability is grounded on the likely arbitrability of the mandatory laws.[68]

Public policy and inarbitrability are related in that they both share a distinctive nature and also a common approach, which is emphasized in Article V (2) of the *New York Convention*.[69] Sub-section (a) of the aforementioned provision has to do with the possible nonenforcement of foreign arbitral awards at the enforcement stage if the subject matter is considered to be inarbitrable as per the law of the enforcement state.[70] Sub-section (b), on the other hand, provides that challenges against the enforcement or recognition of foreign awards are probable on public policy grounds of an

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[65] A. Bermann, *International Arbitration and Private International Law General Course on Private International Law (Volume 381)*, 166. "Public policy may be thought to frown upon the arbitration of those claims, due either to the special importance to the public interest of the underlying claim or the presumed vulnerability of one of the parties, or both."

[66] Ibid. at 166–67. "Defining the exceptions to arbitrability is a political exercise, entailing judgment about the proper reconciliation between promoting arbitration, on the one hand, and preserving access to the courts for certain claims that, as a matter of public policy, warrant such access, on the other."

[67] Born, *International Commercial Arbitration, Second Edition*, I:950.

[68] Ibid. at 951, I. "If a legislature does not preclude arbitration of a mandatory law provision, then agreements to arbitrate such matters will be valid and enforceable. That is, merely because a dispute involves matters of mandatory law or public policy does not necessarily mean that the dispute is nonarbitrable".

[69] Ibid. at 952, I. "The separate treatment of issues of public policy and nonarbitrability within Article V(2)'s 'escape' provisions, rather than under the general provisions of Article V(1), both reflects and confirms their common, and exceptional, character."

[70] United Nations Convention on the Recognition and Enforcement » New York Convention, June 10, 1958. Article V(2)(a) provides that Recognition and enforcement of an arbitral award may be refused if …[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country [enforcing state's law]".

enforcement state. In any case, one thing is clear when it comes to the principle of inarbitrability under the New York Convention's perspective: the Convention hardly puts forth any parameters that help identify non-arbitrable matters from the arbitrable ones or a categorical definition of inarbitrability. The answer to the question of inarbitrability's definition lies in domestic laws but, only after the paradox concerning which national laws determine inarbitrability in case of more than one possible applicable laws is settled in advance.[71]

2.5 The domestic notion of inarbitrability

Some scholars in the international commercial arbitration discipline suggested that where the notion of non-arbitrability is considered by national courts, it would initially be more appropriate to distinguish domestic and international non-arbitrability. [72] Of course, the international non-arbitrability notion to which this thesis refers to the domestic arbitration law's conception of 'international inarbitrability', since it is generally the role of national laws to determine "what matters can be referred to and resolved by arbitration." [73] The point is that, there is a scope-wise disparity in the inarbitrability requirements for international and domestic arbitrations[74] and there is a probability that subject matter specified as inarbitrable by national law from a domestic standpoint could end up as arbitrable in the international arbitration context.[75]

Different jurisdictions adopted this differential treatment of the inarbitrability principle in international and domestic settings taking into account the competing interests of the need to maintain an exclusive national court jurisdiction for certain exceptional subject matters and the general public

[71] A. Bermann, *International Arbitration and Private International Law General Course on Private International Law (Volume 381)*, 167–68. "[T]he New York Convention does not attempt to identify the matters that may be considered as non-arbitrable, or even to identify the criteria by which non-arbitrability is to be determined. Nor are we close to an international consensus over what kinds of claims should be considered non-arbitrable. To learn what may or may not be legally arbitrated, one must turn to national law. But which national law?"
[72] Born, *International Commercial Arbitration, Second Edition*, I:957.
[73] Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 187.
[74] Born, *International Commercial Arbitration, Second Edition*, I:957. "In many jurisdictions, nonarbitrability rules are materially broader in domestic than in international matters."
[75] Ibid. "[T]he fact that a particular matter is nonarbitrable in a domestic setting under a particular national law does not necessarily mean that it will be nonarbitrable in an international setting; rather, local nonarbitrability rules are often interpreted as applicable only in domestic matters."

interest of promoting trade and commerce by enacting a pro-arbitration legal system.[76] In common law jurisdictions, such as the United States of America, the Federal Supreme Court adopted a case law reflecting a policy of different treatment for the inarbitrability issues in domestic and international contexts. That policy is reflected under the much-celebrated case of *Mitsubishi Motors Corp vs. Soler Chrysler Plymouth Inc.*[77] The arbitration rules of some of the Civil Law countries, such as Switzerland, have provided a separate approach toward the notion of arbitrability in international and domestic matters. According to some scholars, the inarbitrability defense in the Swiss arbitration law takes a different approach to international and local arbitration.[78] This different approach is believed to be due to Article 177(1) of the Swiss *Private International Law*, which allows for a more flexible interpretation of arbitrability in international cases compared to domestic ones.

In conclusion, national courts and legislations apply non-identical criteria for international and domestic arbitrations when determining whether a subject matter is arbitrable or not.The non-identical criteria for determining inarbitrability derives from the preemies that in the international context, "national conception of public policy and mandatory law should be moderated, in light of the existence of competing public policies of other states and the shared international policy of encouraging the resolution of international commercial disputes through arbitration." [79] Therefore, although, as a matter of principle, the inarbitrability issue is defined by national laws, some authors argue that member states to the NYC are obliged to adopt the inarbitrability exception under the ICA's

[76] Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 199. "Every national law determines which types of disputes are the exclusive domain of national courts and which can be referred to arbitration…reflecting the political, social and economic prerogatives of the state, as well as its general attitude towards arbitration. It involves a balancing of the mainly domestic importance of reserving certain matters for exclusive decision of courts with the more general public interest of promoting trade and commerce through an effective means of dispute settlement. Therefore, the decision may be different in cases arising in a purely national context from that in relation to international transaction."

[77] Monroe Leigh, "Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 105 S.Ct. 3346," *The American Journal of International Law* 80, no. 1 (1986): 170. "As the dissent underscores, the Court's decision marks a liberal application of the Federal Arbitration Act and reflects an increasingly laissez-faire attitude toward international contractual arrangements. The Court itself acknowledged its acceptance of dichotomy between domestic notions of arbitrability, which are of a more limited scope, and international norms where federal policy favors broad arbitral authority."

[78] Born, *International Commercial Arbitration, Second Edition*, I:961.

[79] Ibid. at 957, I.

context to be more specific, non-discriminatory and in line with the practices of other contracting states.[80]

The position of the UNCITRAL Model Law concerning the prominent role of national laws in characterizing the inarbitrability principle is also recognized under Article 1(5). As per this provision, the provisions of the Model law "shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration."[81] In line with the aforementioned principle adopted in the Model Law, some civil law countries recognize the inarbitrability rules in specific contexts that involve economic interests taking into account "local political considerations."[82] The following section will deal with one example of a specific type of subject matter—administrative contracts—hat some jurisdictions, including Ethiopia, statutorily exclude from the domain of arbitration. This issue directly relates to this research's main topic.

2.6 The implication of administrative contract's inarbitrability on party autonomy in ICA

The statutory designation of administrative contracts as one of the inarbitrabable subject matters under Ethiopian arbitration law, which is addressed in detail in Chapters III and IV of this thesis, is an important facet of this study's theme. This section is intended to spell out the notion and the general principle of administrative contracts with an economic nature and the arbitrability to lay down a theoretical underpinning of the subject matter in general. The French law notion of the administrative contract will be used as a main point of reference in this theoretical discussion for two main reasons. One, for years, scholars have considered the French administrative legal regime as a

[80] Ibid. at 601, I. "…Contracting States must treat the nonarbitrability doctrine as an exceptional dispensation from the Convention's basic structure, rules of substantive validity, choice-of-law regime and purpose. In turn, that imposes the obligation on Contracting States to adopt nonarbitrability exceptions only when tailored to achieving specifically-defined, articulated public policies and only by means that are non-discriminatory and not inconsistent with the practices of other Contracting States. Those limitations apply with particular force to commercial matters, which have historically been treated as arbitrable(under the Geneva Protocol and most national arbitration regimes.)"

[81] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. Article 1(5)

[82] Born, *International Commercial Arbitration, Second Edition*, I:961–62. "…[C]vil law jurisdictions retain nonarbitrability rules in specific contexts…(often in response to local political considerations) which clearly involve pecuniary value."

preferred source for undertaking a doctrinal analysis concerning administrative contracts.[83] The second reason is that the Ethiopian administrative contract law is primarily based on Volume 3 of the 1956 French scholarly writings known as *Traité théorique et pratique des contrats administratifs.*[84] Both reasons explain why the author mainly employes the French law perspective of administrative contracts and its arbitrability as a main comparative point in analyzing the inarbitrability of administrative contracts in the Ethiopian perspective.

In the French legal system, contracts that involve the government can be categorized as either administrative or civil. This classification has a significant impact on conflict resolution, especially in terms of which court has jurisdiction to address disputes arising from contracts.[85] A legislative text or case law determines whether a contract is a civil or administrative one and accordingly, public works contracts or contracts entailing possession of public land are among the statutorily defined types of administrative contracts.[86] Case law on the other hand, determines the characteristics of the contract (administrative or civil) taking into account factors such as the parties' identity, purpose of the contract and its content.[87]

[83] Georges Langrod, "Administrative Contracts: A Comparative Study," *The American Journal of Comparative Law* 4, no. 3 (1955): 329–30. "The Whole problem of 'administrative contract' …remains intricate…[e]ven in French administrative law, which provides a particularly adequate framework to grasp and characterize specific phenomena,…[yet,] [o]ther contemporary legal systems(so far as they do not imitate the French pattern) exhibit practically no theoretical inquires in this field: mere empiricism prevails. Thus there is much to be done everywhere in the way of doctrinal analysis."

[84] Rene David, "Administrative Contracts in the Ethiopian Civil Code," *J. Ethiopian L.* 4, no. 1 (1967): 145.

[85] George A. Bermann and Etienne Picard, eds., *Introduction to French Law*, First Edition (Alphen aan den Rijn : Frederick, MD: Kluwer Law International, 2008), 85–86. "Contracts entered into by the government may be either 'civil' or 'administrative in nature. (Again, an English-speaking writer would refer to 'government contracts, whereas a French writer would prefer the term 'administrative contracts'.) The proper characterization will affect the rights and obligations of the parties and at the same time determine which set of courts, civil or administrative, is competent to resolve disputes arising out of the contract."

[86] Ibid. at 86.

[87] Ibid. "In the absence of a text, the characterization of a contract will depend on factors drawn from case law, viz. the parties, the purpose, and the content (and more particularly, the presence or absence of certain characteristic clauses). Ordinarily a contract cannot be considered administrative unless one of the parties is a governmental entity (*une personne morale de droit public).*"

The basic factors that distinguish administrative contracts from ordinary contracts in French administrative law mainly rest on the rules governing performance and liability.[88] The rules governing the performance of administrative contracts provide the public entity exclusive rights to dictate the terms of the contracts (except for terms relating to price) and a limited unilateral power to terminate the contract even in the absence of any fault on the part of the other contracting party. The rationale given for the aforementioned prerogatives provided to the public authority revolves around the need for the protection of 'the public interest'.[89]

Thus far, the focus of the aforementioned analysis was intended to establish the general nature and peculiarity of the administrative contract compared to the regular private contract under French administrative law before proceeding to the analysis concerning its arbitrability. A detailed analysis of the French administrative contract is not within the scope of this research. Accordingly, the next sub-section will focus on the arbitrability of administrative contracts from an international commercial arbitration perspective.

2.6.1 French law's position on inarbitrability of administrative contracts

In France, there have been times when the country's jurisprudential and doctrinal positions were against the arbitrability of issues involving administrative contracts.[90] This position had emanated from the combined readings of the statutory provisions of Articles 1004 and 83 of the 1806 French Code of Civil Procedure.[91] French Courts, despite the lack of clear prohibition of the nonarbitrability of administrative contracts in the statutory provisions of the civil procedure code, had devolved into an interpretative rule, impeding the state and local authorities from entering into

[88] Ibid. "While the rules governing administrative contracts are not particularly distinctive from those of private contract law, as far as issues of formation and validity are concerned, they differ as to the rules governing performance and liability."
[89] Ibid. at 87–89.
[90] Fouchard and Goldman, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 314.
[91] Ibid. "Article 1004 of the 1806 version of the French Code of Civil Procedure provided that 'disputes subject to notification to the *Ministère Public*[the public prosecutor's office] cannot be referred to arbitration.' Article 83 of the same Code stipulated that 'actions…concerning… the state, the public domain, local authorities and public entities [must be] referred to the public prosecutor.'"

arbitration agreements, based on the aforementioned articles.[92] Likewise, under the domain of domestic arbitration, the French Civil Code under Article 2060 obligated that " disputes concerning public collectivities and public establishments cannot be referred to arbitration."[93]

However, it is important enough to mention that, starting from the 1981 statutory and case law reforms, French arbitration law has adopted a distinctive legal regime for international commercial arbitration, that is "more liberal and subject to lesser control from …courts" [94] than domestic arbitration. One of the reasons for this dichotomy is the development of international arbitration into a typical dispute resolution mechanism for international business disputes and the presence of competition between arbitration and litigation in the domestic domain.[95] As part of the 1981 reforms and subsequent ones, French arbitration law provides a categorical interpretation concerning what makes the concept of 'international arbitration' different from the domestic one.[96] That is why the approach of French arbitration law, which is more permissive of arbitrability, applies to "a dispute submitted to arbitration concerning a transaction which is not economically limited within the boundaries of a country."[97]

Parallel to the line of the foregoing reasonings, the case law dealing with the nonarbitrability of disputes involving administrative contracts entered into by the government or government-owned entities in France has long been rendered inapplicable to international arbitrations.[98] The Paris Court of Appeal set forth the principle concerning the arbitrability of administrative contracts under the

[92] Ibid. "These two provisions [Articles 1004 and 83 of 1806 French CPC] were interpreted by the courts as meaning that the state and local authorities could not validly enter into arbitration agreements with respect to domestic disputes."
[93] Ibid.
[94] Guido Carducci, "The Arbitration Reform in France: Domestic and International Arbitration Law," *Arbitration International* 28, no. 1 (March 1, 2012): 147.
[95] Ibid. "Why? Clearly because, according to Philippe Fouchard, while domestic arbitration still faces the competition of litigation before national courts, international arbitration become the 'normal' dispute resolution mechanism for international business disputes."
[96] Ibid. at 148–49. "Since the 1981 reform [and earlier in case law], French arbitration law has clearly adopted an 'economic' definition, wherein arbitration is 'international' when it involves international trade, or more precisely, '*met en cause les intérêts du commerce international'*."
[97] Ibid. at 149.
[98] Fouchard and Goldman, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 318. "The restrictions imposed in French domestic law on the arbitrability of disputes involving the government and government-owned entities have long been held inapplicable in international arbitration."

international arbitration perspective in the 1957 *Myrtoom Steam Ship vs Agent judiciaire du Trésor* case.[99] In this case, the court of appeal categorically declared that the restriction on arbitrability of administrative contracts was limited to domestic contracts.[100] Subsequent court rulings have also approved this principle regarding the arbitrability of administrative contracts in international arbitration.[101]

Nevertheless, there had been unresolved issues concerning the arbitrability of administrative contracts under the French arbitration system that the 1981 reforms failed to address.[102] The first issue was related to the position of the *Conseil d'Etat*—the highest French Administrative Court regarding the exclusion of arbitration clauses in the contract for the construction of a leisure park that involved a foreign party.[103] The *Conseil d'Etat* cited two reasons to substantiate the decision: the governing law of the contract was French law, and the absence of a statutory provision allowing for the inclusion of an arbitration clause.[104] One other issue had been related to both the ambiguity and the applicability of the ruling in the *Trésor Public v Galakis*'s case (a case that allows French public entities to refer their disputes to arbitration) to foreign public entities.[105]

Fortunately, as cited in the *Fouchard and Goldman* book, the Paris Court of Appeals in the *Gatoil vs National Iranian Oil co*. case, came up with a judgment that cleared up the perplexity surrounding the legitimacy of including an arbitration clause in an administrative contract and whether the decision of the Paris Court of Appeals in the *Galakis* case is applicable to foreign government-owned entities as well.[106] In this case, *Gatoil*, a Panamanian private company, applied to set-aside an award that had been rendered in Paris against the government-owned National Iranian

[99] Ibid.
[100] Ibid. at 318–19. "The Court held that 'the prohibition[preventing the government from submitting its disputes to arbitration] is confined to domestic contracts and does not apply to contracts which are international in nature.'"
[101] Ibid. at 319.
[102] Ibid. "The French government decree of May 12, 1981, which brought about the reform of French international arbitration law, was not intended to modify the position taken by the French courts on arbitrability. Neither…could it confirm the position… as a decree cannot formally repeal or amend a law."
[103] Ibid. at 319–20.
[104] Ibid. at 320.
[105] Ibid.
[106] Ibid.

Oil Company(NIOC) at the Paris Court of Appeals. *Gatoil*, in their application for setting-aside the award, claimed that the arbitration agreement was void *ab intio* since the constitutional obligation of the Iranian government-owned companies for securing ex-ante parliamentary authorization to enter into an arbitration agreement had not been fulfilled by NIOC.[107] Nevertheless, the Paris Court of Appeals rejected *Gataoil*'s argument reasoning that it was against international public policy for states or state-owned entities to rely on their national law's provision in challenging the validity of the international arbitration agreements in which they freely negotiated.[108] As a result, the issues concerning the possibilities of the incorporation of an arbitration clause in a contract involving government entities and the application of the *Galakis* case law to an arbitration case involving foreign government companies have been settled.

However, the French case law regarding the arbitrability of administrative contracts in international commercial arbitration lacks a corresponding theoretical clarification. Professor Emmanuel Gaillard, claimed that the lack of doctrinal analysis on the basis for allowing arbitrability of administrative contracts in international arbitration and its prohibition under the national arbitration emanated from the French Court's indifference to providing a clear-cut theory on the principle of nonarbitrability of administrative contracts. In the words of Professor *Gaillard*, "the courts no longer considered it necessary to discuss the nature of the prohibition nor indeed the basis for not applying it in international arbitration."[109] The lack of an articulated theoretical framework on the arbitrability of administrative contracts in the French legal system has mainly negatively affected jurisdictions, such as most of those in Latin America[110] in which the national arbitration law is influenced by the

[107] Ibid. at 320–21.
[108] Ibid. at 321. "This argument was rejected by the Paris Court of Appeals on the grounds that: international public policy…[Prohibited] NIOC from availing itself of restrictive dispositions in its national law to withdraw a posteriori from the arbitration to which the parties agreed;…similarly, neither can Gatoil base its objections to the capacity and powers of NIOC upon the dispositions of Iranian law since international public policy is not concerned by conditions set in this domain in the internal legal order."
[109] Ibid. at 319.
[110] Jennifer Cabrera, Dante Figueroa, and Herfried Wöss, "The Administrative Contract, Non-Arbitrability, and the Recognition and Execution of Awards Annulled in the Country of Origin: The Case of Commisa v Pemex," *Arbitration International* 32, no. 1 (March 1, 2016): 126. Most of the Latin American States legal system is "rooted in the French tradition"

French arbitration regime.[111] The Ethiopian notion of arbitrability concerning administrative contracts, which will be addressed in the next consecutive chapters in detail, is also faced with a lack of theoretical clarity since its primary source is the French arbitration regime.

2.7 Provisional closure

This chapter began with a discussion of the basic concept of inarbitrability to spell out the commonly accepted principles of inarbitrability according to the international arbitration perspective. This discussion was followed by an explanation concerning the general theory of public policy in international commercial arbitration and elaboration on the defining elements that distinguish the principle of inarbitrability from the notion of public policy. This chapter also highlighted the theoretical difference between the domestic and international perspective of inarbitrability. Additionally, the chapter examined the topic of the inarbitrability of administrative contracs from ICA perspective and to support the analysis, the author referred to French administrative law on arbitrability and its rationale, as this subject matter is closely related to the main focus of this thesis.

In Chapter II, the author attempted to achieve two paramount goals. First objective was to establish the theoretical framework of the and to support the main body of the thesis, which aims to determine the appropriate balance for the limits to party autonomy in the Ethiopian arbitration law. Second, to find out the alignment with the commonly accepted doctrinal underpingis of limits to party autonomy. Another main target of the analysis in this chapter was to establish the scope of this research, which is mainly focused on limits to party autonomy under the Ethiopian arbitration law and which will be discussed in greater detail in the subsequent chapters.

[111] Ibid. at 126. "Unfortunately, French law can provide little guidance on arbitration-related issues arising from state contracts to countries like Mexico, since the highly sophisticated French courts are capable of solving issues arising from administrative contracts under the so-called *marchés publics*(tender markets for awarding public contracts), and these disputes are hardly ever arbitrated."

Chapter III: Arbitration from an Ethiopian Perspective

3.1 Introduction

While a complete history of the Ethiopian legal system is beyond the scope of this thesis, excerpting a brief historical introduction could be helpful to understand the role of the transplanted arbitration-related laws in promoting the modern concept of arbitration in Ethiopia. This chapter begins with depicting a concise history of the Ethiopian legal system and the sources that accompany it. This follows with a summary description regarding the absorption of the transplanted laws.

Under section 3.2 of this chapter, aspects of the arbitration regime under the currently repealed arbitration laws which had been incorporated in the 1960s CC and the 1965 CPC of Ethiopia will be discussed. The manner of procedural conduct and the legally sanctioned degree of flexibility accorded to contracting parties and arbitrators will also be subject to deliberations under sub-section 3.2.1. Following this, in section 3.3, the discussion will deal with the provisions of the CPC concerning post-award proceedings.

Section 3.4, which covers the existing arbitration statute of Ethiopia, will have three sub-sections. Problems and gaps that are addressed in the new law and its drawbacks will be spelled-out consecutively. As a conclusion, the author includes some suggestions and propositions regarding the way forward.

3.1.1 A succinct history and sources of the Ethiopian legal system

Prior to the1908, Ethiopia, as a state, has no legal system[112] with formal sources that could apply throughout its jurisdiction because this era was characterized by a rule of men not a rule of law. However, there is no consensus among scholars regarding the non-existence of a legal system with formal sources at least before the 20th century[113]. Some scholars such as *J.Vanderlinden*, submitted

[112] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 6. "Though Ethiopia existed as a state for centuries, one is hard pressed to show that it had a 'legal system' in the sense of a *corpus* of laws with formal source that was applied methodically, consistently and throughout its jurisdiction."

[113] J. Vanderlinden, "An Introduction to the Sources of Ethiopian Law from the 13th to the 20th Century," *J. Ethiopian L.* 3, no. 1 (1966): 231. " In the field of legislative enactments, the second period of Ethiopian legal history is very different from the first in that we possess evidence of a legislative concept much closer to that to which European legal historians are accustomed. The first of these documents appears in 1908 with a set of proclamations defining the functions of the various Minsters, members of the newly appointed Cabinet. This appointment is the first of Menilke's moves towards the organization of his country on

that the private compilation known as *Ftha-negest*(Law of Kings) which was claimed to be introduced between the fourteenth and sixteenth century, "was never promulgated as legislation"[114]. Rather, the text of the *Ftha-negest* served Ethiopian lawyers as a "quasi-official" legal document and as a textbook for law schools.[115]

Another academic contends the assertion by *J. Vanderlinden* that the *Ftha-negest* has never been a formal source of the Ethiopian Legal system.[116] He claimed that a law enacted in 1908 to establish ministers and define their duties formally incorporated the *Ftha-negest* as its integral part.[117] This scholar alluded to the existence of another argument that considered the *Ftha-negest* as "the law of the land"[118]. However, he provided no further citation or authority concerning the other proponents of this assertion.

In 1931, Ethiopia, for the first time, introduced a constitution modeled after the 1889 *Meiji* Constitution of Japan to control the provincial nobility and effectively centralization the country.[119] Ethiopian laws at that time, were largely focused on the public law area; private and social relations were mainly governed by a religious and customary law of various ethnic groups until the 1950s.[120] Laws that are related to the private sphere such as the 1960s Civil, Commercial and Maritime Codes and the 1965 CPC has enacted between the period 1955 and 1965.

European lines and it was to be followed by some others of which evidence was fortunately reserved in Balambaras Matama Selassie Wolde Meskel's Zekra Nagar."

[114] Vanderlinden, "An Introduction to the Sources of Ethiopian Law from the 13th to the 20th Century," 250.

[115] Ibid. " From that time on, the Fetha Negast provided Ethiopian lawyers with the quasi-official basis of their law; although the text was never promulgated as legislation, it was applied throughout the country and also taught in schools where law was a subject of study."

[116] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 7. ""The assertion by Vanderlinden that the *Fetha Negast* was never promulgated is not correct. It was formally incorporated into Ethiopian law but only as recently as in 1908."

[117] Ibid.

[118] Ibid. at 6..

[119] Norman J. Singer, "The Ethiopian Civil Code and the Recognition of Customary Law," *Hous. L. Rev.* 9, no. 3 (1971–1972): 467. "There was an attempt at the inception of the reign of Emperor Haile Sellassie I in 1930 to modernize the legal system. The first act was the promulgation of the Constitution of 1931. This was a 55 article document, largely based on the Meiji Constitution of Japan."

[120] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 8.

The bulk[121] of codifications during the 1955–1965-time frame has been controversial when it comes to the Codes' contents and purposes. Some commentators argue that the absence of systematic scrutiny of the Ethiopian custom in the drafting process broadened the points of divergence of the then newly enacted laws with the contents of the existing legal systems.[122] As per the objective of some of the codification, the drafter of the 1960 CC Professor *René David* submitted that the anticipation of the then Ethiopian authorities was to use the codes as an instrument of change for the 'society they wish to create'. Hence, some authors have concluded that most of the codes enacted during the period between 1955 and 1965, particularly laws related to commerce and arbitration are "essentially foreign in content."[123]

3.1.2 Predominant source of the Ethiopian Civil Code

At the time of the Civil Code's adoption (a code that had been introduced as the substantive part of the Ethiopian statutory arbitration law for the first time), the question of the model—Continental or Common Law—that had been supposed to be followed by the Ethiopian legal system "was not resolved *a priori*"[124]. Rather, the CC, in the words of the drafter, was a "work of synthesis"[125] that consulted different national laws[126], regional uniform laws[127] and provisions with common law

[121] Beru, "Brief History of the Ethiopian Legal Systems - Past and Present," 351. "[a] new wave of codes was to be drafted in various disciplines in the 1950s and 1960s."
[122] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 9. " As for the customs of the country,[Ethiopia] there was not much for the drafters to rely up on as there was no systematic survey of the customs of the country in existence at the time."
[123] Ibid.
[124] Rene David, "Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries," *Tul. L. Rev.* 37, no. 2 (1962–1963): 190.
[125] Rene David, "Sources of the Ethiopian Civil Code," *J. Ethiopian L.* 4, no. 2 (1967): 346. " In this work of synthesis, it was natural to utilize the efforts which have been made from time to time to create uniform European law."
[126] Ibid. at 347. "The principal sources that were used in this way were the civil codes of Egypt, France, Greece, Italy and Switzerland."
[127] Ibid. "…the draft uniform laws that were prepared in Rome on sale of goods, arbitration, and liability of hotel owners were generally adopted by the Ethiopian Civil Code."

elements.[128] Put differently, at least fourteen[129] countries' laws have been consulted in the drafting process of the CC.

The Swiss Federal Code of Obligations was the primary source of the law of obligations.[130] French law, however, played "a general and pervasive role"[131] overall. The other codes were disregarded by the drafters in the eventual evaluation as they provided "less material".[132] As a result, the primary source of the 1960 CC cannot categorically be ascribed to a single national law.

As to procedural law, the CPC was drafted by a common law-trained Ethiopian scholar.[133] The reason why the common law-trained jurist had been offered to prepare the draft of the CPC was that Professor *René David,* a civil law scholar and the drafter of the CC, declined the offer to prepare the draft[134]. The preparation of the CPC by the Common Law trainee following the refusal of the drafting offer by the Civil law professor could explain that the inclusion of the common law tradition in the codification process is a result of an impromptu decision. Hence, planned or not, when it comes to the question of sources and models, it would be unassailable to conclude that the Ethiopian legal system is characterized by the hybrid of common and civil law traditions. [135]

The 1996 Federal Courts Proclamation ,a statute that was enacted mainly to determine the civil and criminal jurisdiction of the Ethiopian Federal Courts, is the most recent legislative

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[128] Ibid. "…some articles of the Ethiopian Civil Code are of common law inspiration. Examples of this are the manner of determining breach of contract damages, the frequent reference to the idea of 'reasonable time,' and the detailed rules provided for specific cases of delictual liability."
[129] Norman J. Singer, "Modernization of Law in Ethiopia: A Study in Process and Personal Values," *Harv. Int'l. L. J.* 11, no. 1 (1970): 88–89. Law of nations with whom Ethiopia has 'cultural, commercial and maritime connections'…namely Egypt, France, Greece, Italy, Switzerland, India, England, America, South Africa, Israel, Portugal, Turk, Iran and Soviet Union have been consulted in the drafting process of the Civil Code.
[130] David, "Sources of the Ethiopian Civil Code," 348. "…it is possible to say that the principal source of the Ethiopian Civil Code with respect to the law of obligations was the Swiss Federal Code of Obligations."
[131] Singer, "Modernization of Law in Ethiopia," 88.
[132] David, "Sources of the Ethiopian Civil Code," 348. "The other codes, in the final analysis, provided less material: the Italian Civil Code often appeared too dogmatic and too subtle, the Greek Civil Code too casuistic, and the Egyptian Civil Code too concise."
[133] Beru, "Brief History of the Ethiopian Legal Systems - Past and Present," 353. Nerayo Esayas an Ethiopian jurist, drafted the Civil Procedure Code in 1965.
[134] Singer, "Modernization of Law in Ethiopia," 81. "The Civil Procedure Code was originally part of the task that Professor David undertook, but it was finally drafted by members of the Codification Department of the Ministry of Justice under the leadership of the late Ato Nirayo Ensayas Vice-Minister of Justice and was promulgated by Decree in 1965."
[135] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 11.

development that formally introduced a common law feature into the Ethiopian legal system and thereby reinforced the hybrid nature of the countries legal regime.[136] This proclamation had been amended four times in less than two and half decades (1998[137], 2001,[138] 2003[139] and 2005[140]) and finally repealed in 2021 and replaced by a new proclamation.[141] Yet, the amended, re-amended, repealed and or the recent proclamation in force, shares one provision which proclaimed that an 'interpretation of law' by no less than five judges seating in the Cassation Bench of the Federal Supreme Court shall be binding on all courts in Ethiopia.[142] This provision formally introduced a judge-made law into the Ethiopian legal system along with the long-standing statutory system.

3.1.3 Absorption of the transplanted laws by Ethiopian society

For more than six and half decades now, most of the codified laws' absorption by Ethiopian society is, to a large extent, inconsequential.[143] Legal scholars put forth different factors for the paucity of intake in the transplanted laws in Ethiopia. Lack of local content of the received laws[144] and a limited number of qualified professionals who can understand, interpret and apply the borrowed laws had been among the factors that negatively affects the assimilation of the introduced laws in Ethiopia.[145]

A little, if any, consideration has been given by the drafters to accommodate the Ethiopian custom that had served as a significant source of law until the codification of the civil code.[146] One of the

[136] Federal Courts Proclamation, Pub. L. No. 25, (Ethiopia 1996).
[137] Ethiopia - Federal Courts (Amendment) Proclamation No. 138/1998. (Ethiopia).
[138] Federal Courts (Amendment) Proclamation No.254/2001 (Ethiopia).
[139] Proc No. 321-2003 Federal Courts (Amendment) (Ethiopia).
[140] A Proclamation to Re amend the Federal Courts Proclamation number 25/1996, 454 (Ethiopia 2005).
[141] Federal Courts Proclamation No. 1234/2021 (Ethiopia).
[142] *Ibid.* Art. 10 (2) "Interpretation of law rendered by the Cassation Division of the Federal Supreme Court with not less than five judges shall be binding from the date the decision is rendered."
[143] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 17. " In 1974, nearly fifteen years after the adoption of the codes, Brietzke observed ' judges typically cite irrelevant provisions of the codes to ' dress up' their opinion and make little attempt to explain how exactly the Code provisions apply to the facts at hand. Sadly, today, over fifty years after the adoption of the codes, this same problem remains entrenched even at the highest court in Ethiopia."
[144] Ibid. at 15. "…the Codes adopted by Ethiopia had little, if any, local content. They were essentially programmatic. This must have impacted negatively their absorption."
[145] Ibid. at 16.
[146] Vanderlinden, "An Introduction to the Sources of Ethiopian Law from the 13th to the 20th Century," 241. "Not much can be said about custom as a source of law in Ethiopia, for although it was until recently the most important source of that law, it has not been until recently the subject of any systematic study."

reasons for the overlook of the custom in the codification process was the lack of well-known and scientifically studied and recorded customs.[147] Hence, as per the scholars who had studied the reception of the codified Ethiopian laws suggestion, lack of deliberation on the local contents such as customary laws in the transplanted codes could be one of the factors frustrating absorptions of the new law by the society.

However, the level and degree of absorption and the consideration of local contents in the drafting process of the CC differs depending on the areas of law. In the part of the CC which deals with the law of obligations and the Commercial Code, the local content is insignificant and the source is, to a large extent, a foreign one.[148] Particularly in the area of contract and commerce, the expert drafter of the CC Professor *René David* stated the overlook of custom.[149] In the area of arbitration, which is the main subject matter of this thesis, Professor *Norman J. Singer* argued that customary law is indirectly recognized.[150] Overall, the assessment of some researchers regarding the absorption of the CC, even more than six decades after its enactment, remains to be limited.[151]

[147] Ibid. at 242. "In the case of Ethiopia, it must be admitted that custom before the contemporary period, is not very well known. Apart from what can be gathered from travel reports (and these are often a very unreliable source, since their autors were neither members of the local community nor specialized scholars with the necessary scientific background) and some socio-anthropological works…"

[148] George Krzeczunowicz, "Code and Custom in Ethiopia," *J. Ethiopian L.* 2, no. 2 (1965): 430. Requirements applied by the drafters in the codification process "caused the Civil Code's Book on Obligations and the separately enacted Commercial Code to be overwhelmingly foreign in origin, as in these essentially modern branches of law there was an understandable lack of indigenous rules responding to the set requirements."

[149] David, "Civil Code for Ethiopia," 204. "The whole part concerning contracts is in fact a new part in the Code which fills a gap in Ethiopian law but which runs against no tradition. This is true likewise for the whole Code of Commerce."

[150] Singer, "The Ethiopian Civil Code and the Recognition of Customary Law," 462. " The codification project by Ethiopia, which has been the most radical in recent times, has in fact dealt with the concept of customary law, both by specific inclusion of customs in the Civil Code and the indirect recognition of customary law through Title XX of the Civil Code on arbitration and conciliation."

[151] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 21. The absorption and application of the transplanted Ethiopian commercial laws " has been modest, at best."

3.2 Aspects of the arbitration regime under the Ethiopian CC and CPC

Prior to the introduction of the 1960s CC and other Codes with arbitration provisions, the modern concept of arbitration had been foreign to the Ethiopian legal system.[152] Concerning the initial statutory source, the overall notion of the arbitration legal regime provided for in the CC said is to be modeled after the French legal system.[153] That being the case, currently, there is a considerable difference between the French arbitration legal regime and the Ethiopian arbitration law included in both the CC and the CPC. For instance, the French legal system has a divergent approach to domestic and international arbitrations.[154]

On the other hand, the Ethiopian arbitration law adopted no distinct approach to international commercial arbitration and applies the same rules to both domestic and international arbitration[155] until the enactment of the recent Arbitration and Conciliation Working Procedure Proclamation. The arbitration laws included in the CC and CPC "seem to be designed for domestic disputes"[156]. Save in the case of enforcement of foreign arbitral awards, both codes treat domestic and international arbitration in the same manner.[157] That is why, some Ethiopian scholars had argued these local

[152] Hailegarbriel Feyissa, "The Role of Ethiopian Courts in Commercial Arbitration," *Mizan L. Rev.* 4 (2010): 301. "The modern concept of commercial arbitration had, however, been alien to Ethiopia until at least mid-20th century, when Ethiopia developed most of its current codes on private law."
[153] Singer, "The Ethiopian Civil Code and the Recognition of Customary Law," 493. "In the Code[Civil Code] one finds the general concept of arbitration as it exists in the French legal system."
[154] Thomas E. Carbonneau, "French Jurisprudence on International Commercial Arbitration, The Part Two: Arbitration in a Comparative Perspective - Recent Developments in Common Law, Civilian, and Socialist Legal Systems: Chapter VII," *Resolving Transnational Disputes through International Arbitration (Thomas E. Carbonneau, Ed.)* 1 (1984): 146. " In their early *jurisprudence*, the French courts approached matters involving domestic and international commercial arbitration from distinct doctrinal perspectives. Generally, they evidenced a more liberal and favorable attitude toward arbitration involving international commercial interests."
[155] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 20. " Ethiopia does not have two completely separate regimes for domestic and international arbitrations. By and large, the same rules apply to all commercial arbitrations."
[156] Bezzawork Shimelash, "The Formation, Content and Effect of an Arbitral Submission under Ethiopian Law," *J. Ethiopian L.* 17 (1994): 69–115.
[157] Feyissa, "The Role of Ethiopian Courts in Commercial Arbitration," 302. " The pertinent provisions of the Civil Code and CPC do not distinguish, except in the context of execution of foreign arbitral awards, between domestic and international arbitration. It may thus appear that the Codes' provisions on arbitration do not apply to 'international' arbitration."

arbitration laws could be a potential obstacle to commercial arbitration and the Ethiopian path to joining the 1958 NYC membership.[158]

Another aspect of the now-amended Ethiopian arbitration law was the inclusion of rules mandating the inarbitrability of administrative contracts.The CPC under Article 315 sub-article 2 puts forth the inarbitrability of administrative contracts and there is a potential risk of non-enforcement of foreign arbitral awards if the contract that leads to the arbitration is characterized as administrative one per this article.[159] Some authors suggested that sub-article 2 of 315 of the CPC had a history of serving as an excuse for the non-enforcement of international arbitral awards involving Ethiopian administrative agencies.[160] For instance, Professor Zekarias Kenea,(citing the Ethiopian High Court's holdings in the *Water and Sewerage Authority vs. Kundan Singh Construction Ltd. Case*) stated that the court rejected the argument of the defendant for the arbitrability of disputes relating to administrative contracts based on the aforementioned provision of the CPC.[161] In this regard, in the interest of clarity, there is a need for a brief excerpt regarding the disparity between the CC and the CPC concerning the arbitrability of the administrative contract's principle and the subsequent subdivision that will address this subject matter.

3.2.1 Structural disparity of the CPC and the CC on administrative contract's arbitrability

As indicated in Section 3.1.2 of this chapter, the discrepancy between the CC and the CPC can be traced back to the sources of those codes as the CC is mainly influenced by the French legal system (civil law system) while the CPC is related to the Indian legal system (a common law origin). Furthermore, unlike the CPC, which includes a rule (Article 315(2)) that categorically prohibits the arbitrability of disputes relating to administrative contracts, the CC does not have such a provision.

[158] Mesfin Beyene, "Towards a Better Commercial Arbitration: Should Ethiopia Ratify the New York Convention," *Mizan L. Rev.* 13, no. 1 (2019): 149. "The current local laws and practices…are not conducive to commercial arbitration, and will be setbacks to the implementation of the Convention[the Convention on the Recognition and Enforcement of Foreign Arbitral Awards]"
[159] Ibid. at 146.
[160] Feyissa, "The Role of Ethiopian Courts in Commercial Arbitration," 314. "…this provision[315(2)of the CPC] has successfully been invoked by government agencies to challenge enforcement of arbitration agreements and awards."
[161] Zekarias Kenea, "Arbitrability in Ethiopia: Posing the Problem," *J. Ethiopian L.* 17 (1994): 120.

Rather, the part of the CC that deals with the substantive arbitration law is silent about the non-arbitrability of administrative contracts and this silence had resulted in divergent interpretations[162]. Professor Zekarias, to his astonishment, found two articles of the law of the CPC that could amplify the material discord between the provisions of the CC regulating the law of administrative contract and the substantive laws of arbitration concerning the principle of non-arbitrability in general and the inarbitrability of administrative contracts in particular.[163] Other academics also submitted that the Ethiopian courts had been holding up a divergent position concerning the arbitrability of administrative contracts.[164]

On the other hand, *Tecle Hagos Bahta*(a senior lecturer of Law), argued that the provision of the CPC that restricted the arbitrability of administrative contracts has fallen into obsolescence due to the consistent practice of subjecting disputes relating to administrative contracts to arbitration[165] and the general unfamiliarity of Ethiopian legal scholars of the administrative contracts' jurisprudence. [166] Besides, he claimed that the argument concerning the non-arbitrability of administrative contracts has turned out to be a mere academic due to five reasons.[167] The inclusion of arbitration clauses in the Regulation of most public institutions that may potentially engage in an administrative contract in international transactions is the first one on the list of his reasons.

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[162] Feyissa, "The Role of Ethiopian Courts in Commercial Arbitration," 315. "The statutory silence has been taken by some as indicative of arbitrability, as opposed to inarbitrability, of administrative contracts."
[163] Kenea, "Arbitrability in Ethiopia," 119. " First of all it is surprising to find a provision that reads: No Arbitration may take place in relation to Administrative Contracts as defined in Article 3132 of the Civil Code or in other case where it is prohibited by law in the Civil Procedure Code but nothing to that effect or even similar to that is stated in anyone of Articles 3325-3346 of the Civil Code…An issue of interpretation of … Article 315(2) of the Civil Procedure Code on the one hand and Articles 3325-3346 of the Civil code on the other might… arise…This becomes even more glaring as one considers the provisions of Article 315(4) of the Civil Procedure Code which states that 'Nothing in this chapter shall affect the provisions of Articles 3325-3346 of the Civil Code.'"
[164] Tecle Hagos Bahta, "Conflicting Legal Regimes Vying for Application: The Old Administrative Contracts Law Or The Modern Public Procurement Law For Ethiopia," *African Public Procurement Law Journal* 4, no. 1 (June 1, 2017): 23, https://applj.journals.ac.za. "Courts have, also been divided in their position in this respect."
[165] Ibid. "However, some have argued the provision [Article 315(2) of the CPC] has fallen into desuetude. This is due to the consistent practice, notwithstanding the 'prohibitive' clause, of arbitrating administrative contract disputes.."
[166] Ibid. "[I]n Ethiopia, only few legal scholars are conversant with the contents or the legal provisions of the administrative contracts law."
[167] Ibid. at 23–24.

The determination of the *Multilateral Development Banks* (*MDB*), bilateral donors, and regional development banks to apply their standard bidding documents such as the Harmonized Edition (2006), the *FIDIC(Red Book)* of 1999, and the *European Development Fund(EDF*) Rules for projects financed by those institutions are anther two justifications of the aforementioned author. He also stated the implied sanction of the arbitrability of administrative contracts by the Federal Supreme Court Cassation Bench in the case between *Zemzem PLC vs Illubabor Zonal Department of Education* and the non-inclusion of a clause for the application of administrative contracts in the 2011 Federal Public Procurement and Property Administration Agency's standard conditions of contracts as compelling evidence that the principle concerning non-arbitrability disputes relating to administrative contracts lacks both legal and practical significance.

However, the author of this thesis has certain reservations with the above author's inference that the principle of non-arbitrability of disputes relating to administrative contracts in Ethiopia is no longer enforceable. One of the primary reasons why this author has a partial reservation on the aforementioned argument is the inclusion of the non-arbitrability of administrative contracts principle under Article 7 of the recent stand-alone arbitration law of Ethiopia. A detailed analysis in this respect will be conducted in the next Chapter.

3.2.2 The notions of objective arbitrability, arbitration agreement's interpretation and *Kompetenz-kompetenz* in the CC

The notion of objective arbitrability as explained in section 2.2 of the preceding chapter mainly refers to the domestic statutory limitations on the types of subject matters that can be referred to and resolved through arbitration. The French legal system which had been claimed to be the predominant source of the Ethiopian CC is said to be contained a principle governing the principle of objective arbitrability under Article 2060 of paragraph one of the 1972 Code of Civil Procedure.[168] Whereas in the Ethiopian Civil Code that includes the now repealed Arbitration law, almost nothing had been prescribed concerning the principle of 'objective arbitrability' except for what is stated under

[168] Fouchard and Goldman, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 330–31.

Article 315(2) which could be qualified as a provision mainly relating to the principle of subjective arbitrability.[169]

As to the interpretation of arbitration agreements, Article 3329 of the CC specifically addresses how the provision relating to the jurisdiction of arbitrators should be interpreted. This Article mandates a "restrictive' interpretation of any ambiguity concerning the jurisdiction of arbitrators and reads as follows; "[t]he provisions of the arbitral submission[agreement] relating to the jurisdiction of the arbitrators shall be interpreted restrictively." Commentary of scholars on the interpretive guidance in the aforementioned article implies that, if indeed some degree of doubt is evident on the scope, validity or existence of the arbitration contract, then restrictive interpretation of the said doubt normally favors adjudication over arbitration.[170]

When it comes to the *Komptenz-Kompetenz* principle, the conventional practice under modern international and institutional rules of arbitration makes it clear that the arbitral tribunal has the power to decide upon its jurisdiction: in anther terms, "its competence to decide upon its competence." [171] This was not the case in the Ethiopian CC. Article 3330(2) of the CC envisaged the provability of contract-based *kompetenz-kompetenz*.[172] However, sub-article 3 of the same provision puts forth an absolute prohibition on the competence of the arbitrator to decide on the validity of the arbitration agreement.[173] As a result, the so-called "positive *kometenz-kompetenze*"[174] notion had no statutory backing in the CC and the absence of a term that indicates otherwise in the arbitration contract may lead any challenge regarding the jurisdiction of the arbitrator to litigation.

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[169] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 62. " It is not easy to list down subject matters that are inarbitrable in the Ethiopian context. This is so because the law does not expressly deal with the issue of 'objective' arbitrability."

[170] Ibid. at 51. " The implication of this provision[Article 3329] is that any doubt regarding the existence, validity and scope of an arbitration agreement is to be resolved in favor of adjudication rather than arbitration. This was the typical approach in the era the Civil Code of Ethiopia was promulgated."

[171] Blackaby et al., *Redfern and Hunter on International Arbitration*, 340.

[172] Civil Code of The Empire Of Ethiopia (Ethiopia 1960). Article 3330(2) It[the arbitration contract] may in particular authorize the arbitrator to decide disputes relating to his own jurisdiction.

[173] *Ibid.* Article 3330(3) The arbitrator may in no case be required to decided whether the arbitral submission is or is not valid.

[174] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 118. …Positive *Kompetenze-Kompetenze* refers to a "doctrine that 'permits an arbitral tribunal to determine its own jurisdiction where that is challenged."

The principle of negative *kompetenze-kompetenze*, a notion that generally prohibits court interventions after the constitution of the arbitral tribunal too, had been foreign to the Ethiopian arbitration regime under the Civil Code.[175] The previous Ethiopian arbitration law had no statutory restriction that regulates court intervention in the arbitral proceedings. Such lack of regulation could potentially enable a party to the abirritation agreement to challenge the jurisdiction of the arbitral tribunal in two venues; first, before the arbitral tribunal itself at the time-frame mandated by the CPC to invoke a preliminary objection. The time-frame for objecting to the 'local jurisdiction' as defined under Article 234(1)(c) of the CPC has a temporal relationship with the time-frame for the submission of a statement of defense and it is applicable almost in the same fashion for both civil litigations and arbitral proceedings.[176] As a result, some authors concluded that Ethiopian Courts can entertain "challenges to arbitral jurisdiction at any stage of the arbitral proceeding so long as the objections had been made to the arbitral tribunal itself in a timely manner"[177] and this is material evidence that explains the non-applicability of the 'negative *kompetenze-kompetenze*' principle under the previous Ethiopian arbitration regime.

3.2.3 Procedural manner of arbitration in the previous Ethiopian arbitration law

The focus of this sub-section is mainly on the procedure by which arbitral tribunals conducted the arbitration proceedings as per the arbitration rules prescribed under the CPC and the CC of Ethiopia. Besides, the degree of the legally sanctioned procedural flexibilities for both the contracting parties and the arbitral tribunals by those Statutes will be addressed. With regard to the procedural conduct of arbitration, Article 3345 (1) of the CC makes a cross-reference to the CPC.

Apart from the incoherences between the two codes on the principle of non-arbitrability which is stated under sub-section 3.2.1 of this Chapter, one can observe a disparity between the CPC and the CC on the principles required to be followed by arbitrators on determining a substantive governing law in the absence of an express choice by the contracting parties. For instance, arbitral

[175] Ibid. at 136.
[176] Ibid.
[177] Ibid.

tribunals (as per Article 317(2) of the CPC) are mandated to ground their decision based on "law" unless the parties' contract precludes them from doing so.[178] Differently, the CC authorized the arbitral tribunal to settle a dispute based on the "principle of law".[179]

However, it is worth mentioning that there are authors who have a different interpretative position concerning the arbitral tribunal's mandate to follow the letter of law under sub-article 317(2) of the CPC. Some authors contend that the phrase, "unless by the submission it has been exempted from doing so", under this sub-article allows contracting parties to disregard the explicitly stated procedural rules. According to those scholars, this provision can be interpreted as a provision that allows parties to choose a private code of procedure (Institutional Arbitration Rules). Therefore, judging from the argument of the aforementioned scholars, arbitrators are under no obligation to strictly follow every provision under the CPC, and parties to an arbitration agreement may "tailor-make"[180] the applicable procedural rules.

On top of that, the position of the Ethiopian procedural arbitration law is not clear on the possibility of parallel proceedings when arbitral jurisdiction is challenged. The concept of 'parallel proceedings in the arbitration perspective refers to a situation where parties to an arbitration agreement are commencing the same or closely related disputes simultaneously in different forums, such as before national courts or arbitral tribunals, for a variety of reasons.[181] These parallel proceedings may end up with a contradictory decision of the different forums and could be used as a dilatory tactic. As a result, unlike in the previous Ethiopian Arbitration laws, different national laws,

[178] "Civil Procedure Code of The Empire of Ethiopia," no. 52. Article 317 (2) 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.
[179] Civil Code of The Empire of Ethiopia (Ethiopia 1960). Article 3325(1) The arbitral submission 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.
[180] Ibid. "If parties may by agreement incorporate arbitral codes, which can only mean rules of arbitration institutions, which for the most part are procedural rules, one may contend the parties to an arbitration agreement can also tailor-make the rules of procedure they want to be applied to their dispute. At least there is no prohibition against that in Ethiopian law."
[181] Bernardo M. Cremades and Ignacio Madalena, "Parallel Proceedings in International Arbitration," London, *Arbitration International* 24, no. 4 (December 1, 2008): 508. " Parallel proceedings may occur between different arbitral tribunals, or between national courts and arbitral tribunals. Parties may start parallel proceedings for different reasons, including to seek the widest legal protection or to increase their chances of success."

the NYC and the Model law have adopted a general principle that prohibits national courts from hearing disputes submitted to arbitration so long as such justification is raised by one of the parties within the applicable time limit.[182] In respect of the discretional scope for the arbitrators in choosing the set of norms to resolve the substantive disputes, unlike the CPC which mandated the application of the law, the CC allows room for the application of the 'principles of law'[183] even without the authorization of the contracting parties.[184] As a consequence, some legal commentators praised the position of the CC as "very liberal compared to jurisdictions that require arbitrators to decide based on law"[185]

3.3 Post-award provisions in the CC and the CP

The previous section began with the general aspects of the Ethiopian arbitration system under the previous rules of arbitration which had been prescribed under both the CC and CPC. The previous section also included a brief analysis of issues such as the difference in both Codes on arbitrability of administrative contracts, objective arbitrability, the principle of *Kopetenz-kompetenz* and the general aspects of arbitral proceedings under three sub-sections. This section assumes the arbitration proceeding has culminated and the award has been rendered. Hence, the focus of this section's discussion shifts to the procedures by which the Ethiopian CPC regulated post-award proceedings.

3.3.1 Appeal against arbitral award

There are hardly any jurisdictions that allow any form of appeal on substantive grounds from an arbitral award. [186] The reason is that unrestricted right of appeal from arbitral award could undermine some of the very expectations of the parties to arbitration: expectations such as

[182] Ibid. at 510–11. " The arbitration agreement prevents national courts from hearing disputes submitted to arbitration, as required by the NY Convention…Article II(3) of the NY Convention is reflected in Article 8(1) of the UNCITRAL Model Law…and different national laws. The underlying reasoning is to prevent one of the parties to an arbitration from resorting to parallel court litigation as a mere dilatory tactic."
[183] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 94. "Principles of law refers to the objective and abstract notions developed over time. They may be derived from domestic, foreign or common rules of legal thinking."
[184] Ibid.
[185] Ibid.
[186] Blackaby et al., *Redfern and Hunter on International Arbitration*, 591.

confidentiality, speed/efficacy, neutrality, and the required expertise in the arbitration field.[187] This was[188] not the case in the arbitration laws of Ethiopia under the CC and the CPC. As per Article 350(1) of the CPC, an appeal from any arbitral award, as a general rule had been statutory.[189] Art 351(a), of the same code, also builds up on the legitimacy of appeal from an award even on the merit issues where the award is "on its face wrong in a matter of law or fact". Besides, the arbitration law under both codes greatly allowed a wide room for a judicial review of awards on substantive grounds.[190]

An appeal based on procedural grounds, as well, had been possible according to the Ethiopian CPC. Deficiencies regarding the notice of arbitration to the parties and unequal treatment of parties in the arbitration process are among the procedural grounds for appeal under Art. 351(c) i, ii, and (d) i of the CPC. Hence, since the appeal, like recourse for setting-aside of awards, is an acceptable measure of control of arbitral processes under the CPC, the possible effect of the appeal from an award on the grounds of procedural irregularities would be confirmation, variation, or reverse of the award.[191]

3.3.2 Setting-aside(annulment) of award

Setting-aside is a form of challenge to an award by the losing party to invalidate the award per the statutory grounds available at the *Lex Arbitri*.[192] The arbitration regime under the Ethiopian CPC on the setting-aside is not comparable to the procedural grounds for setting-aside in the Model Law.[193] A recourse for setting-aside on procedural grounds that exegetically[194] comes close to the

[187] Ibid. at 591–92.
[188] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021 (Ethiopia 2021). Currently, appeal from an award is prohibited in principle under Article 49(1) of the current arbitration law.
[189] "CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA." Article 350(1) " Any party to arbitration proceedings may, in the terms of the arbitral submission and on the conditions laid down in Art.351, appeal from any arbitral award."
[190] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 182.
[191] Ibid. at 177.
[192] Blackaby et al., *Redfern and Hunter on International Arbitration*, 570.
[193] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 175.
[194] Ibid. " A reasonable interpretation of these two grounds arguably covers the Model Law grounds for the setting aside of an award, according to which an award may be set aside if the composition of the arbitral authority or procedure is at variance with the agreement of the parties or the applicable law."

grounds incorporated under Art. 34(2) (iv) of the Model Law had been included under Article 356 (b) and (c) of the CPC.[195] Likewise, procedural issues such as lack of due processes which were recognized as grounds for setting aside under the Model Law had been considered as grounds for appeal under the Ethiopian CPC.[196]

On a related note, the effect of the setting-aside of an arbitral award on an arbitration agreement had not been addressed under the arbitration laws of the Ethiopian CPC.[197] Hence, the possibility of establishing a different tribunal following the setting-aside of an award based on the grounds stated under Art.356(b) and (c) (failure of arbitrators to act together or delegation of arbitral authority to co-arbitrator) is not guaranteed. This could open an illegitimate opportunity for the party who intends to dispense with the arbitration post-disputes and a mere mistake of law on the part of the arbitrator/s on delegating their arbitral authority to a co-arbitrator could frustrate the party's autonomy to settle disputes by arbitration.

3.3.3 Enforcement of awards

The Civil Procedure Code, for no specified reason, failed to include a provision regarding the recognition of arbitral awards. Hence, there will be no deliberation regarding the recognition of awards in this sub-section. Likewise, the single provision that deals with the enforcement of arbitral award—Article 461—was incorporated under a chapter titled "Execution of Foreign Judgments" in the CPC. Owing to the cross-reference stated under article 461(1)(a) of the CPC, reciprocity in the enforcement of foreign arbitral awards, like foreign judgment, should be ensured under the prerequisite incorporated under article 458(a).[198] Professor *Robert Allen Sedler* in his deliberation on

[195] "CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA." A cumulative reading of Art. 355(1) and 356(b) and (c) states that parties to arbitration proceedings may apply for set aside of awards where arbitrators fails to act together…and or if the arbitrator delegated any part of his authority to a stranger, one of the parties, or a co-arbitrator.

[196] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 177. " [t]he due process grounds for the setting aside o awards under Model law Article 34(2)(a)(ii) either fall within the express words of Article 351 or otherwise come under it."

[197] Ibid. at 176. "Ethiopian Law does not deal with what happens to the arbitration agreement where the award is set aside." Particularly, it is silent on whether the arbitration agreement survives, and under what circumstance, if at all, a different tribunal is established."

[198] "CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA." " Permission to execute a foreign judgment shall not be granted unless…the execution of Ethiopian judgments is allowed in the country in which the judgment to be executed was given."

recognition of foreign judgments under the Ethiopian CPC briefly addressed the notion of reciprocity and he underscored the presumption of enforcement of Ethiopian court's judgment by other countries in the absence of proof to the contrary.[199] On the other hand, *Ibrahim Idris* inferred that the notion of reciprocity could be employed to be a reprisal instrument against a state as its basis, but which may, at the same time, have a detrimental effect on virtuous individuals.[200]

Some academics who conducted case studies involving foreign judgments[201] on the question of reciprocity suggests that the Ethiopian court's perception of the notion of reciprocity has been erratic[202]. Besides, the approach adopted by the Ethiopian Courts concerning reciprocity is not only inefficient but also counterproductive and to a high degree narrow.[203] As a result, critiques have been advocating for a change in the "erroneous" court interpretation of the notion of reciprocity in the recognition and enforcement of foreign arbitral awards[204]. Fortunately, most of the drawbacks concerning the enforcement of awards in the CPC that are mentioned in this section have been addressed in the current stand-alone Arbitration Proclamation which will be the main subject of discussion in the following section.

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[199] Robert Allen Sedler, *Ethiopian Civil Procedure* (Addis Ababa: Faculty of Law, Haile Sellassie I University in association with Oxford University Press, 1968), 394. "…there must be reciprocity in the sense that execution of Ethiopian judgments is permitted in the country in which the judgment sought to be executed was rendered. If the courts of that country refuse to execute Ethiopian judgments, the Ethiopian Court must, in turn, refuse to execute their judgment. Inasmuch as most countries will execute the judgment of other countries, it should be presumed that any country will execute the judgment of other countries, it should be presumed that any country will execute an Ethiopian judgment unless the contrary is proved."

[200] Ibrahim Idris, "Ethiopian Law of Execution of Foreign Judgments," *J. Ethiopian L.* 19 (1999): 24.

[201] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 213. " …[n]o Ethiopian court cases…[concerning court's understanding of the notion of reciprocity]could be found in relation to foreign arbitral awards."

[202] Tecle Hagos Bahta, "Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia," *Mizan L. Rev.* 5 (2011): 123. " Incessant confusion looms large in our courts with regard to the interpretation and application of the principle of reciprocity. In this respect, Ethiopian courts have been giving inconsistent interpretations."

[203] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 217–2018. "Overall, the approach taken by the Ethiopian courts is not only unhelpful but could also be counterproductive. We come across cases in which even Ethiopian nationals are victimized just because of the insistence on reciprocity that is narrowly understood."

[204] Bahta, "Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia," 139. "…it is suggested that Ethiopian courts should extricate themselves from the existing conundrum…in relation to its erroneous interpretation and application in the recognition and enforcement of foreign judgments and apply it in a manner that encourages the international mobility of arbitral awards."

3.4 The recent statutory arbitration law of Ethiopian

Almost a year after the accession/ratification[205] of the 1958 New York Convention (NYC) in Ethiopia, a stand-alone arbitration law was introduced to the Ethiopian legal regime for the first time and passed on April 2/2021. The preamble of the proclamation indicates that the Ethiopian Parliament has introduced the arbitration law to uphold the resolution of investment and commerce-related disputes, promoting party autonomy and thereby ensuring an efficient, cost-effective, and expert dispute resolution mechanism. The Arbitration Proclamation's prefaces also manifested another purpose of the current arbitration statute: aiding the implementation of international treaties ratified by Ethiopia. In this section, the relevant provisions of the current 'Arbitration and Conciliation Working Procedure Proclamation No.1237/2021, which significantly mirrors, the UNCITRAL Model Law on International Commercial Arbitration will be examined.

With the ratification of the NYC and the enactment of the Arbitration Proclamation, Ethiopia introduced a rather new and modern era of arbitral regimes.[206] The paramount points at issue concerning the current Arbitration Proclamation include, *inter alia*, its relation to the outdated arbitration law, its application and interpretation, and the general modification that have been made in the current statutory system of Ethiopian arbitration law. In addition, this section will examine the general effect of the new law and the potential difficulties which exist now or may arise or may arise from it.

[205] Tecle Hagos Bahta, "The Ratification of the New York Convention in Ethiopia: Towards Efficacy and Avoidance of Divergent Paths," *Mizan L. Rev.* 15, no. 2 (2021): 511. (There is a discrepancy regarding the date of entry into force of the New York Convention in Ethiopia: March 13/2020—the date of publication of the official *gazzete* and November 22/2020—the official date of registration of the ratification as per the NYC requirements and the question as to which date prevails remains controversial.)
[206] Ibid. at 493. "

3.4.1 Ethiopian arbitration regime on ICA following the enactment of the Proclamation

As discussed earlier in this paper, prior to the new Arbitration and Conciliation Proclamation, the CC and the CPC were dealing with commercial arbitration in Ethiopia. The CC governs specifically the substantive part of the arbitration. The CPC on the other hand, deals with the procedural part of arbitration with similar procedural rules applicable to court litigations. The old arbitration law, on its common applicability, did not distinguish between domestic and international arbitration and it appeared to be designed for domestic disputes[207] which makes it all the more unfriendly to international commercial arbitrations.

In ratifying the NYC and adopting a proclamation, to some extent, based on the UNCITRAL Model Law, Ethiopia has reasonably committed itself to the recognition and enforcement of arbitration awards made in convention countries. This commitment for significant reform of arbitration laws evidences the country's endorsement of international arbitration as a preferred means of dispute resolution. One can also observe from the reading of the first paragraph of the Proclamation's preamble that adopting measures that promotes arbitration in commercial and investment disputes is among the objective of the new proclamation.[208]

Compared to the previous arbitration regime, the new proclamation, by and large, coincides with the provisions of the Model Law. The current Proclamation introduced a noteworthy augmentation on the issues of finality, arbitrability, the role of courts in the arbitral proceedings, the power of arbitrators and the concept of severability. The subsequent section will deliberate on the major changes made in the current arbitration proclamation and their relationship with the Model Law.

3.4.2 Provisions regarding the scope and application of the Proclamation

As mentioned in the above section, the previous arbitration system of Ethiopia had been a domestic one. Unlike its predecessor, the current arbitration law applies to commerce-related

[207] Shimelash, "The Formation, Content and Effect of an Arbitral Submission under Ethiopian Law," 90.
[208] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021 (Ethiopia 2021). " WHEREAS, the establishment of Alternative Dispute Resolution and Conciliation helps to complement the right to justice and, in particular, contribute to the resolution of investment and commercial disputes and to the development of the sector;"

domestic arbitration and international arbitration seated in Ethiopia.[209] The term "international" is characterized in Article 4 of the Proclamation in almost duplicative fashion to Article 1(3) of the Model Law. The Proclamation, therefore, adopted the list of connecting factors incorporated in the Model Law to determine whether or not arbitration is international. These factors include the parties' place of business during the conclusion of the arbitration contract, the place of the arbitration referenced in the arbitration clause, the place that has the closest connection to the dispute's subject-matter, the place of performance, and the terms of the arbitration clause indicating the existence of relation to more than one country and the habitual or principal residence[210] of the parties.

The term "commercial" in the Proclamation is defined under Article 2(7) but comes out as a phrase that reads as "Commercial Related". [211] The phrase "Commercial Related" in the Proclamations appears to have a synonymous connotation with the language of the Model Law under footnote number two which reads as "commercial nature". The provision also expressly embraces the list of transactions included in the footnote of the *UNCITRAL Model law* as an illustrative transaction that the current Ethiopian arbitration law might also consider 'commercial'. The illustrative nature of the provision, like the manual stated in the footnote of the Model Law, suggested a wide interpretation of the term 'commercial' save for the transactions expressly stated as non-commercial by the Proclamation. This Proclamation, as it will be detailed in the following sub-section, also includes a provision that regulates the formation of a valid arbitration agreement and the supportive role of courts in the arbitration proceedings.

[209] *Ibid.* Art.3(1) "…this Proclamation shall apply to commercial related national arbitration, international arbitration whose seat is in Ethiopia and national conciliation proceedings."
[210] In the absence of one of the parties' places of business, reference is to be made to the parties "habitual residence" according to Art. 1(4)(b) of the Model Law. Whereas the Proclamation employs the phrase "principal residence" for the same situation under sub-article 2 of Art.4.
[211] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021. Art. 2(7) "Commercial Related" includes business relationship for the supply and exchange of goods or services, agreement for distribution, commercial agent, lease, construction, consultancy, engineering, license for commercial purpose, investment, finance, bank, insurance, mining; joint venture and other business organizations that are not prohibited by this Proclamation, transportation of persons and goods by air, sea and land and includes similar businesses arising from contractual or extra-contractual relations of a commercial nature;"

3.4.3 Provisions relating to arbitration agreements and obligatory referral to arbitration

Article 6 of the current Proclamation slightly modified the disputed[212] mandatory formal requirements of an arbitration agreement that had been included under Art.3326(2) of the Civil Code by introducing some sub-sections from Art.7 Option I of the Model Law as amended in 2006.[213] Nevertheless, sub-article 2 of the same provision surprisingly includes rather strict requirements, somehow different from the requirements under Article II (2)[214] of the NYC. The 'signature' precondition under NYC has been questioned by some states and is generally considered an extraneous matter in a written arbitration agreement.[215] However, in the Ethiopian Proclamation, not only the parties' signatures but also two witnesses are necessary conditions for an arbitration agreement to be considered a written one.

As a precondition for the commencement of arbitration, a legislative or interpretative flaw concerning Article 6 of the Proclamation could play a determinantal role in the settlement of disputes by arbitration. For instance, Ethiopian courts may consult this provision at a preliminary stage when a party objects to their jurisdiction pursuant to the mandatory formal requirements of an arbitration agreement stated in the above article. The Arbitration proceedings, from the gate go would be subject to a serious frustration assuming that the court followed the mandatory requirements for strict application of the two witnesses for conclusion of valid arbitration agreements. The flaw in Article 6 may make Article 8(1) of no consequence, even though it is an arbitration-friendly provision of the Proclamation that mirrors the same Article and sub-article of the Model Law. Therefore, a strict application of sub-article (2) of Article 6 annuls an arbitration agreement that fails to include two

[212] Feyissa, "The Role of Ethiopian Courts in Commercial Arbitration," 307. "Applying the theory of Art 3326(2) of the Civil Code, some arbitration agreements must, under the pain of nullity, be (1) written, (2) signed by the parties, and (3) attested by capable witnesses.
[213] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021. Art.6(3) and (5) partially emulates Sub-art 4 of Art.7 of the Model Law.
[214] United Nations Convention on the Recognition and Enforcement » New York Convention. Art.II(2) provides that "[t]he term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement signed by the parties, or contained in an exchange of letters or telegrams."
[215] Blackaby et al., *Redfern and Hunter on International Arbitration*, 76. "The requirement for signature by the parties has given rise to problems in some states, but the general view is that a signature is not necessary, provided that the arbitration agreement is in writing."

witnesses and there may not be a reference to arbitral tribunals. Further analysis of the effects of the mandatory witness's requirement will be undertaken later in the section which covers the drawbacks of the new arbitration Proclamation.

3.4.4 The current Proclamation and the role of courts pre-commencement of arbitration

Ethiopian scholars have varied observations on the role courts played at the stages of the arbitral proceedings in the past. Some authors argue that a minor yet important role, had been played by the Ethiopian courts in enforcing arbitration agreements in practice[216], and hence, even if it was limited, the courts had been playing a 'supportive role' by not sticking to the letter of the law. Others did not consider the role played by Ethiopian courts in the past to be friendly to commercial arbitration and that the previous arbitration law had been allowed a "premature court intervention"[217] that seriously frustrate the smooth and efficient resolution of commercial disputes by arbitration.

The current Proclamation, on the other hand, outlawed court intervention as a general rule. Article 5, a provision that corresponds in all elements to its counterpart in the Model Law, prohibits court intervention save for expressly provided exceptions in the Arbitration Proclamation. In addition, Article 8, a provision that stands in correlation with the same article under the Model Law, enables courts to play a supportive role before the commencement of the arbitration. This article lays out the course which Ethiopian courts should take when faced with a proceeding subject to a valid arbitration agreement and empowers them to refer the case to arbitration. Sub-article 2 of Article 8 of the Proclamation makes it clear that litigation of a dispute subject to an arbitration agreement should stay unless the arbitration agreement is "void and becomes ineffective". Likewise, this article corresponds to the obligation of courts under Article II (3) of the NYC, which mandates the court to refer parties to the arbitration and refuse proceedings of cases subject to a valid arbitration agreement. Therefore,

[216] Feyissa, "The Role of Ethiopian Courts in Commercial Arbitration," 313. "Where a party insists on arbitration, Ethiopian courts have practically declined to assume jurisdiction on the merits, and accordingly, refers disputes to arbitration."
[217] Ibid. at 333. "…Ethiopian Courts have generally assumed extended roles with regard to commercial arbitration which is supposed to function with minimal court intervention. In this regard, they are obviously assisted by the national arbitration law which, inter alia, licenses…premature judicial intervention during arbitral proceedings;"

by introducing this provision that facilitates the enforcement of arbitration agreements in the new Proclamation, it appears that the Ethiopian Parliament intends to positively embrace necessary supportive court intervention at the gateway of the arbitration process.

The new arbitration law also recognizes two arbitration-friendly court interventions before the commencement of arbitration, default provision regarding the composition of the tribunal and challenges of its jurisdiction. Article 12(3)(b)[218] sets forth the possibility of requiring court intervention in case of failure by the parties to make a commensurate provision regarding the composition of the arbitral tribunal. This sub-article provides an almost verbatim element and pre-conditions for courts intervention in the establishment of an arbitral tribunal stated under Art. 11(3)(a) and (b) of the Model Law.[219] As to the challenge of arbitrators' preliminary decisions on its jurisdiction, the Proclamation's sub-articles (5) and (6) of Article 12, which are in line with Article 16(3) of the Model Law,[220] may also lead to another court intervention at an earlier stage of arbitration according to sub-articles (5) and (6) of Art.19. The court intervention in this respect is a positive intervention since such intervention requires no stay of arbitral proceedings.[221]

[218] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021. Art. 12(3)(b) Notwithstanding paragraph (a) of Sub-Article 3 of this Article, where one of the contracting parties fail to appoint the co-arbitrator within 30 days from the date of receipt of the notice by the other party, or where the two arbitrators fail to agree on the appointment of the third arbitrator within 30 days from the date of their appointment or where the contracting parties fail to agree, in the case of a sole arbitrator, the First Instance Court shall appoint such arbitrator upon the request of one of the parties.

[219] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. Art.11(3)(a) and (b) …if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court…in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

[220] *Ibid.* Art.6(3) states that "If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

[221] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021. Art.19(5) promulgated that "An objection against the decision of the tribunal on its jurisdiction shall be submitted to First Instance Court within one month from the date of rendering of such decision. Sub-Art. (6) The submission objection in accordance with Sub-Article (5) of this Article shall not prevent the tribunal from continuing with the arbitration proceedings and rendering an award."

3.4.5 The court's role at the arbitration proceedings and the current Proclamation

In some exceptional circumstances, it may be necessary to involve national courts during arbitration proceedings in order to ensure that everything runs smoothly. This is especially true when there is a need for a court-assisted interim measure of protection.[222] The Ethiopian arbitration regime before the current Proclamation had been silent regarding the tribunals' power to issue an interim measure. However, some commentators have argued that the absence of express provision as to the arbitrators' power in issuing interim measures should not be interpreted as a prohibition and hence, the previous Ethiopian arbitration law allows arbitrators to grant interim orders[223].

Nevertheless, the current Proclamation lays out a mechanism to ameliorate the bewilderment surrounding the power of the tribunal to issue an interim measure. Art 20(1) of the current Proclamation, as in Article 17(1) of the Model Law, clearly authorized the arbitral tribunals to issue interim measures unless there is a parties' agreement to the contrary. Likewise, a somehow modified[224] version of the court-ordered issuance of the interim measure in Article 17J of the Model Law is also included as an alternative under Article 27 of the Proclamation.

The language used in Article 27 of the Ethiopian arbitration Proclamation indicate that parties seeking recourse for an interim measure have the option to choose between the tribunal and the competent court. Two potential risks come with the recourse for interim measures to a court: breach of an arbitration agreement and unpredictability on the answer to the question of where to seek interim relief. The first possible risk, breach of an arbitration agreement, that might arise with applying for an interim measure before a court is a waiver of the arbitration agreement.[225] Yet, the current

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[222] Blackaby et al., *Redfern and Hunter on International Arbitration*, 420–21. "It may become necessary…to ask the competent court to assist in taking evidence, or to make an order for the preservation of property that is the subject of the dispute, or to take some other interim measure of protection."

[223] Feyissa, "The Role of Ethiopian Courts in Commercial Arbitration," 322. " The absence of express statutory provisions prohibiting arbitral tribunals from awarding preliminary or interim reliefs coupled with some inference from such provisions as Art 317(3) of the CPC reflect the legislative policy of permitting arbitrators to award preliminary or interim reliefs."

[224] The language, "shall have" in Art.17J of the Model Law implicates an imperative duty of a court to assume power of issuing an interim measure. On the other hand, Article 27 of the Proclamation which reads as " [c]ontracting parties may request a court for an order of interim measure irrespective of the place of the arbitration of the arbitral tribunal", seems to be a rather optional issuance of interim measures by a court at the request of parties.

[225] Blackaby et al., *Redfern and Hunter on International Arbitration*, 424.

arbitration law under Article 9 addressed this concern by introducing a provision similar to the same article of the Model law, that allows the application of interim relief from a court without undermining party autonomy. The other concern which deals with the question of where to apply for an interim measure, to the relevant court or an arbitral tribunal, highly depends on the applicable law and the nature of the relief sought.[226]

However, in certain cases, the grant of interim measures by the arbitral tribunal may face practical enforceability challenges due to various reasons. [227] This often makes it dependent on courts for recognition and enforcement, which is why courts are sometimes involved in facilitating the arbitral proceedings. An example is Article 37(1) of the Ethiopian arbitration Proclamation, which acknowledges the requirement for court assistance in gathering evidence, aligning with the wording found in the corresponding provision of the Model law under Article 27.

As explained under section 3.2.3 of this chapter, there had been no explicit provision in the CC or the CPC that authorizes a court to grant an order for suspension of arbitration in the event of parallel proceedings. Nevertheless, Ethiopian courts, in reality, have applied Articles 76 and 121 of the CPC to order an anti-arbitration injunction that negatively affects the smooth conduct of the arbitration.[228] The classical example of an anti-arbitration injunction is the ICC Arbitration Case between *Salini Constrruttori Spa vs The Federal Democratic Republic of Ethiopia, Addis Ababa Water, and Sewerage Authority.* In this case, the Ethiopian party whose recourse to remove an arbitrator on the ground of 'partiality' was rejected by the ICC Court, instituted an appeal to the Ethiopian Court based on the Ethiopian CC. The Ethiopian Supreme Court issued an injunction

[226] Ibid. at 425. (Urgency of the matter and concern on the voluntarily enforcement of emergency arbitrators' order in unestablished tribunal may makes recourse to a court for an interim measure a viable option.) Regarding the nature of the relief sought, in measures relating to attendance witnesses, preservation of evidence, document disclosure status quo preservation and relief on parallel proceedings could be order either by a court, emergency arbitrator or arbitral tribunal depending on the national laws of countries.

[227] Ibid. at 421–23. There are …five situations in which the tribunal's powers may be insufficient and which thus lead a party favouring recourse to a national court; this includes lack of power due to public policy reasons, inability of arbitrators to issue an interim measure prior to the establishment of the tribunal, lack of binding effect of the arbitrator-issued interim order on the third party, inability of arbitrary-ordered interim measure to fulfill the finality prerequisite under the NYC that enables international enforcement of the award/interim measure and difficulty of making an *ex parte* application.

[228] Feyissa, "The Role of Ethiopian Courts in Commercial Arbitration," 323.

enjoining the arbitral proceedings.[229] Many scholars have criticized this court order as a barrier that hinders the overall effectiveness of arbitration as a way to resolve disputes.[230]

3.4.6 Post-award role of courts and the current Proclamation

A significant number of national arbitration statutes include a provision that allows a second chance for an award that otherwise could have been annulled.[231] In a like manner, the new Ethiopian arbitration law authorized courts to remit an action for setting-aside of an arbitral award to the tribunal.[232]The purpose of the remission under the Proclamation appears to be comparable to what is provided under Art.34(4) of the Model Law; enabling the arbitral tribunal, *inter alia*, to dispose of the grounds for setting-aside the award.[233] This provision indicates the involvement of courts in the arbitration process to provide some assistance.

Article 19(2) and (3) further the goal of efficient arbitral proceedings by requiring objections regarding the arbitral Tribunal's absence of 'material jurisdiction' on the subject matter of the dispute to be raised early on in the processes or "as soon as the existence of such condition is discovered"[234] in case of post-award challenges. This article, to a large extent, maintains an analogous position with the Model Law. The Model Law under Art.16(2), requires an application against the tribunal's lack of jurisdiction to be made "not later than the submission of the statement of defence."

The current arbitration law also promulgates a provision that regulates an arbitral process seated in Ethiopia. As per Art.50 of the Proclamation, an action for setting-aside an award may be

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[229] Blackaby et al., *Redfern and Hunter on International Arbitration*, 436–37.
[230] Feyissa, "The Role of Ethiopian Courts in Commercial Arbitration," 323.
[231] Blackaby et al., *Redfern and Hunter on International Arbitration*, 576–77. Many national arbitration laws… "take their cue from the UNCITRAL Model Law by linking remission to setting-aside proceedings and thereby limiting the scope of grounds for remission to the narrow grounds available for setting aside. In these countries, the power to remit is essentially a means to 'cure' awards that might otherwise need to be set aside."
[232] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021 (Ethiopia 2021). Art.50(6) "The Court may, by taking into account the reason for the submission of the application, refer the matter to the tribunal before of which the case was initially heard by suspending the award wholly or partially."
[233] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. Art.34(4) "The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings… in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."
[234] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021. Art 19(3)

brought to the court that has jurisdiction over the case had the case not been submitted to arbitration. The principal parts of the grounds for setting-aside (incapacity, invalid arbitration agreement, arbitrator's excess of power, procedural irregularities, inarbitrability, and conflicts with public policy) included in the Model Law were adopted by the Ethiopia Arbitration Proclamation with a slight difference in language and some additional grounds. The following subdivisions of this sub-section will spell out the grounds for the annulment of an award under the Proclamation compared to the grounds under the Model Law and the New York Convention.

In parallel to the Model Law,[235] the Proclamation contemplates two segments of causes of actions for an application to set an award aside: grounds for setting-aside upon the party's application or upon the court's motion. The first segment includes lack of capacity to conclude an arbitration agreement, invalidity of the arbitration agreement, procedural irregularities,[236] arbitrators' partiality, dependence or bribery, award deals with matters beyond the arbitration agreement, incompatibility of arbitral procedure and composition of tribunals with the arbitration agreement. The other section deals with grounds such as subject matters not capable of settlement by arbitration under Ethiopian law and awards in conflict with public morality, policy, or national security.

3.4.7 Grounds for setting-aside upon party's application

The first ground for challenging an award upon a party's application outlined under Art.50(2)(a). This provision allows a party who lacks "capacity to conclude an arbitration agreement as provided for in the law in force" to seek an annulment of the arbitral award. The English version of sub-article(2)(a) employs an indeterminate phrase "as provided for in the law in force" regarding the issue of the law governing capacity. The Amharic version, "ተፈፃሚነት ባለው ሕግ መሠረት" (literarily translated as 'based on the applicable law') is more apprehensible compared to the English version. This ambiguity could lead to a counterproductive result on the efficacy of an arbitration proceeding because, in the context of an international arbitration agreement, more than one system of law may

[235] Model Law Art.34(2) (a) i-iv) and (b) (i)(ii)
[236] Lack of proper notice as to the appointment of arbitrators, commencement of arbitral proceeding and inability to present once own case are the procedural irregularities stated under Art.50(2)(c)

be involved to govern capacity.[237] Lack of capacity is also stated under the Model law as a ground for setting-aside an award.[238]

The second basis for an aggrieved party to submit an action to annul an award provided under Art.50(2)(b) of the Proclamation is an arbitration agreement that is 'void and null or subject to the lapse of time', based on the applicable law chosen by the parties or in the absence of choice, based on the Ethiopian arbitration law. The definition part of the Proclamation remains silent on what renders an arbitration agreement "null and void" or an arbitration contract an "expired agreement." The wordings in sub-article(2)(b) ("null and void", except for the "inoperative or incapable of being performed", appears to be derived from Article 8(1) of the Model Law and Article II (3) of the New York Convention. However, the phrase "or such agreement has expired" did not track the Model Law or the NYC language. This choice of words by the legislator may create perplexity in determining the validity of an arbitration agreement and may open room for wide interpretation.

Equally significant in this matter is the potential role of Article II (3) of the NYC in addressing the language obscurity prescribed under Article 50(2)(b) of the Proclamation. As Ethiopia recently joined the NYC, courts may look at the factors that make an arbitration agreement 'null and void' as per Article II (3) of the Convention in addressing applications for setting-aside of arbitral awards. However, there is no consensus on the interpretation of the "null and void, inoperative or incapable of being performed" terminologies.[239] Hence the author suggests that the language issue deserves an authoritative interpretation by the Supreme Court Cassation Bench.

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[237] The law applicable to issues of capacity and/or validity in an agreement to arbitrate could be law of the seat, law of enforcing state or the law chosen by the parties as per Articles 7 and 34(2)(a)(i) of the Model Law and Articles II and V(1)(a) of the New York Convention

[238] UNCITRAL Model Law Art.34(2)(a)(i)

[239] Jan Engelmann, *International Commercial Arbitration and the Commercial Agency Directive: A Perspective from Law and Economics*, Softcover reprint of the original 1st ed. 2017 edition (Place of publication not identified: Springer, 2018), 21–22. "What exactly determines the validity of an arbitration agreement in this sense is not always clear. For example, the meaning of 'null and void, inoperative or incapable of being performed' as expressed in Art.II (3) New York Convention was not addressed in the *travaux pre´paratoires*."

Not being able to get an equal opportunity to present one's own case may amount to a violation of the mandatory procedural provision as per Article 28 of this Proclamation[240], a provision that mirrors Article 18 of the Model Law.[241] Nonetheless, the denial of opportunity to present one's own case is also puts forth as a prerequisite for setting-aside an award upon parties' application [emphasis added on the party's motion-based application] under Art.50(2)(c) of the same Proclamation. In the words of this provision, an application for setting-aside of an award "may be lodged" if the applicant "shows that he has not been given proper notice about the appointment of arbitrators, arbitration proceedings, or has not been able to present his case during the proceedings." The reason why the Ethiopian lawmakers put the violation of mandatory procedural provision under the list of grounds for setting-aside an award 'upon application by a party' appears to be inexplicable. In conclusion the inclusion of the violation of mandatory procedural rule as a ground for setting-aside an award upon on application of party in Article 50(2)(c) conflicts with Article 28 of the same Proclamation.

The other sub-article to be raised upon the motion of an aggrieved party is paragraph(2)(d) of the provision.[242] This paragraph explicitly prohibited bribing an arbitrator and mandates an award to be made by an impartial and independent tribunal under the pain of annulment based the on parties' application. The requirement for an impartial tribunal, along with other preconditions, is regarded as an instance of the "transnational procedural public policy"[243] and this could be deduced from the part of the provision that deals with public policy. This issue will be discussed in fair detail under the section that deals with the drawbacks of the new Ethiopian arbitration law.

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[240] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021 (Ethiopia 2021). Art. 28 "Parties to the arbitration agreement shall be treated equally and shall be given the opportunity to present their cases and shall have the right to be heard."

[241] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. Art.18 "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

[242] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021. Art.50(2)(d) …"The arbitrators did not make the award by maintaining their impartiality or independence or have delivered the award by receiving bribe;"

[243] Ferrari, *Limits to Party Autonomy in International Commercial Arbitration*, 203. (…such transnational procedural public policy would include:(i) the right to equal treatment and (ii) the adequate opportunity to present one's case. The first one mainly includes: an impartial tribunal…"

Another circumstance stated under Article 50(2)(e) that could amount to a precondition for an action to be set-aside upon parties' application is when arbitrators cross the line delineating their power in the arbitration contract. The second phrase of this sub-article reads as "or the award rendered is beyond jurisdiction [*sic*] the tribunal". The counterpart of this provision in the Model law stated under Article 34(2)(a)(iii) did not use the word 'jurisdiction'. There appears to be a plausible reason behind the word choice and the omission of the term 'jurisdiction' in the Model law because a recourse for setting-aside based on the grounds stipulated under the aforementioned sub-article of the Model Law "contemplates a situation in which an award has been made by a tribunal that did have jurisdiction to deal with the dispute, but which exceeded its powers by dealing with matters that had not been submitted to it."[244]

The mention of the word 'jurisdiction' under Art.50(2(e) could cause potential uncertainty because the notion of jurisdiction according to the Ethiopian Civil Procedure Code has two categories: local[245] and material.[246] The policy behind local jurisdiction is primarily forum convenience[247] and any party who failed to challenge the lack of local jurisdiction as a preliminary objection according to Art.244(3) of the CPC may risk waiver of his right to challenge the local jurisdiction. The issue concerning material jurisdiction, on the other hand, deals with the question of whether or not a case is subject to an adjudicatory organ other than the courts.[248] According to Article 9(2) of the CPC, courts are required to dismiss a case if they notice a lack of material jurisdiction, even if neither party raises an objection regarding the court's jurisdiction.[249] Therefore, the term "jurisdiction", could raise

[244] Blackaby et al., *Redfern and Hunter on International Arbitration*, 584.
[245] Sedler, *Ethiopian Civil Procedure*, 33. ""Local jurisdiction refers to the *area of Ethiopia* in which the case is to be tried..."
[246] Ibid. at 27. "Material jurisdiction refers to the power of the court to hear the kind of case that is before it."
[247] Ibid. at 33. "The rules relating to local jurisdiction exist primarily for the convenience of the parties."
[248] Ibid. at 27. "Material jurisdiction also involves the question of whether the case to be heard before the courts at all, e.g., may the case not have to be brought before an administrative tribunal or some other agency?"
[249] "CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA." Art.9(2) "When and as soon as a court is aware that it has not material jurisdiction to try a suit, it shall proceed in accordance with Art.245 notwithstanding that no objection is taken under Art.244 to its material jurisdiction."

an interpretation issue regarding the dichotomy of material and local jurisdiction at the setting-aside stage. Additionally, the interpretation issue can lead to annulment of awards upon courts motion.

The final procedural issue that is regarded as a ground for an action to setting-aside an award based on the application of parties is stated under Article 50(2)(f) of the arbitration law. This ground of challenge is related to the inconformity of the composition of the tribunal and the procedure of the arbitration agreement. This sub-article replicates the initial clause of Article 34(2)(a)(iv) of the Model Law with a slight modification in language, including a qualifying wording and the time-limit difference to institute an application for setting-aside an award. As per the last sentence of Article 50(2)(f) of the Proclamation,[250] the implication to the outcome of the award determines the adequacy of the prerequisite stated in this sub-article, to be considered as grounds for setting-aside an award. The time-limit for instituting the action for setting-aside is thirty days from the date on which the aggrieved party received the award, unlike the period under Art.34(3) of Model Law which is three months. Hence except for some differences in the time limit, the condition for challenging awards in the setting aside stage on grounds of the arbitral tribunals' composition in the Proclamation closely resembles to the requirements stated in the Model law.

3.4.8 Grounds for setting-aside upon court's motion

A noteworthy correlation between the Model Law and the Ethiopian arbitration law regarding grounds for setting aside an award can also be observed in sub-article 4(a)(b) of Article 50. A closer look at this provision implies that a court-initiated setting-aside of an award would be authorized in a parallel manner with Art.34(2)(b)(i) and (ii) of the Model Law. As per the Ethiopian arbitration law, if a court has probable cause to believe that the likely recognition and enforcement of the award is the cause of a "problem on public morality, policy or national security", or the subject matter is not arbitrable under the proclamation, the court should set-aside the award on its motion. Details about the Ethiopian concept of public policy, the public policy justification against International commercial

[250] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021 (Ethiopia 2021). Art.50(2)(f) The process of establishment of the tribunal and the procedure applicable in the course of the proceedings contradicts with agreement of the contracting parties and has influenced outcome of the award."

arbitration and whether or not the concept of transnational public policy is treated differently from the domestic one will be addressed in the next chapter.

3.4.9 Modified version of appeal and recourse for a cassation court review of awards

As stated under section 3.3.1 of this chapter, many national arbitration laws predominantly excluded appeal as a form of recourse against awards. The existing Ethiopian arbitration law, unlike its predecessor, also prohibit (as a general rule) an appeal from an arbitral award. Nevertheless, there are two exceptions to the general principle against appeal as a form of arbitral award challenge. The first is the incorporation of an 'appeal-clause' in the party's arbitration agreement. Where the contracting parties, in their arbitration contract, agree to include an 'appeal-clause' they can do so as per Article 49(1) of the Proclamation[251] and that would have a possible repercussion in expanding the grounds for court review of an award. This article appears to be modeled after §69(2) of the 1996 English Arbitration Act.

Sub-article (2) of the same article, (Article 49 of the Proclamation) on the other hand, allows parties to an arbitration agreement to restrict the likely review of awards by a Cassation Bench on the grounds of "fundamental or basic error of law." The Ethiopian judicial review of arbitral awards by the cassation bench is more or less related to a case-law system and details of this article will be discussed in the next chapter. The next chapter will also scrutinize Article 49 of the Proclamation which deals with the party's autonomy to expand and restrict the grounds for court review of an arbitral award by way of agreement. The paramount question to be addressed there is the issue concerning the review of arbitral awards by a cassation bench in commercial arbitration. It will be suggested that Ethiopian arbitration law has its peculiar features that potentially conflict with the NYC and negatively affect the efficiency and legitimacy of international Commercial arbitration.

[251] *Ibid.* Art. 49(1) "Unless the contracting parties agree otherwise in their arbitration agreement, no appeal shall lie to the court from an arbitral award."

3.5 Downsides in the current Proclamation and their repercussions on ICA

This section focuses on the paramount discrepancy of some of the provisions in the current arbitration law of Ethiopia from a comparative perspective with their counterpart articles in the Model Law and the 1958 New York Convention. The section commences with the stipulation of the 'two witnesses' signatures' as a mandatory formal requirement for a valid arbitration agreement under Article 6(2) and its mismatch with the formality preconditions stated under Article II (2) of the NYC. The author examines the prospective conflict between the Convention and the Proclamation's provisions regulating the formality of an arbitration agreement and their implications for party autonomy in the context of ICA.

3.5.1 Witnesses as a *conditio sine qua non* to conclude a valid arbitration agreement

Article 6(1) contains a comprehensive explanation of a 'written arbitration agreement' and in its sub-article 2, a mandatory requirement necessitates, among other things, the presence and signature of two witnesses, even in cases where the agreement was made "orally, by conduct or any other means." The requirement of two witnesses mandated under Article 6(2) may pose a critical question as to whether or not the form prerequisites are supposed to be fulfilled under the pain of invalidity of the arbitration agreement. The qualifying phrase, "or by any other means", included under sub-article 2 of this article also added another complexity to the concept of 'written arbitration agreement' because as stated under sub-article 3 of the same provision, an arbitration agreement made by an "electronics media" satisfies the "in written form" prerequisites subject to the accessibility of the electronic information.

The language such as "or by any other means" under sub-article (2) and "shall be deemed to have been made in writing" under sub-article (3) of Art.6 potentially open several interpretative issues. One of the interpretative questions could be whether or not the signature of the two witnesses under sub-article (2) applies to the arbitration agreement concluded by electronic communication stated under sub-article (3) of the same article. There is no conundrum in construing that an arbitration agreement by electronic communications needs no signature of two witnesses if one strictly follows the letter of the law in interpreting sub-article (2). The qualifying phrase "or by any other means"

under sub-article (2) suggested that the definition of the written requirement for an arbitration agreement has an exclusive nature and the room for illustrative interpretation and flexibility appears to be restricted. Therefore, it is safe to conclude that sub-article (3) is a poorly drafted exception[252] to what is deemed a 'written arbitration contract' under the current arbitration law.

Likewise, there is no indication implicitly or explicitly; whether or not the writing requirement in Article 6 also serves as a prerequisite for an arbitration clause contained in the underlying contract. An arbitration clause is mentioned in the proclamation under Article 19(1), a provision codifying the adoption of the doctrines of competence-competence and severability.[253] Article 19(1) impliedly indicates that the standards for determining the validity of the container contract and the arbitration clause are different because it clearly states the possibility of upholding a valid arbitration clause even after a "null and void…principal agreement".[254] However, if the form requirements under Art.6(2) have to be extended to the arbitration clause, its validity would be challenged at least for a lack of two witnesses and their signatures.

The parallel provisions of the New York Convention that deals with the definition of 'writing arbitration agreement', as well, have been debatable and leveled as narrow.[255]The writing requirement of the NYC under Article II (2) underlines that the written prerequisite under Article II (1) includes an 'arbitration clause' contained in the principal contract.[256] Another issue that arises from the form

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[252] The Ethiopian Legislators, unlike in this article (Art.6), mostly employs qualifying words to indicate the exception to the main rules or principles. For instance, the exception-qualifying word "notwithstanding" and the qualifying -phrase "without prejudice to" are mentioned 20 times in this Arbitration Proclamation to denote the exceptions from the rules.

[253] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021. Art.19(1) "For this purpose, arbitration clause which is included in an agreement shall be deemed to be a separate and independent agreement."

[254] *Ibid.* Art.19(1) ". The fact that the principal agreement becomes null and void shall not make the arbitration clause null and void."

[255] Joseph F Morrissey and Jack M Graves, *International Sales Law and Arbitration: Problems, Cases and Commentary* (Alphen Aan Den Rijn; Frederick, MD: Kluwer Law International ; Sold and distributed in North, Central and South America by Aspen Publishers, 2008), 394. "The New York Convention…included a relatively narrow definition of an 'agreement in writing.'"

[256] United Nations Convention on the Recognition and Enforcement » New York Convention. Art.II(1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
(2) The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters and telegrams.

requirements under Article II of the NYC pertains to its impact on the enforcement of awards.[257] Nonetheless, the UNCITRAL has been trying to clarify the writing requirements relating to the agreement and the award based on a purposive interpretation of the Convention.[258] Therefore, even the writing requirements under Article II of the Convention, short of the UNCITRAL recommendation, are more lenient than the requirement stated under Article 6 of the Ethiopian arbitration law.

The Ethiopian arbitration law compared to the NYC appears to be more demanding and more stringent regarding the formalistic requirements. Unlike in the Convention, the signature of parties in a stand-alone arbitration agreement would not suffice the written requirement under the Ethiopian arbitration law because the imperative presence and signature of the two witnesses are missing. Furthermore, it is arguable whether or not the requirement for witnesses' signatures extends to electronic communication and the arbitration clause included in the principal contract. Therefore, it is safe to conclude that the witnesses' signature under the current Ethiopian Arbitration Proclamation reflects more stringent and idiosyncratic form requirements compared to the Convention's and other contemporary national arbitration laws'[259] formality standards.

3.5.2 Ambiguities in Article 50(2)(a) and(b) and their implications on setting-aside proceedings

Under the Ethiopian CC, four essential elements are required as a prior condition for the conclusion of a valid agreement and capacity is one of them. 260 Capacity, as a rule, is

[257] Moses, *The Principles and Practice of International Commercial Arbitration*, 209. "…there is a question whether the writing requirement of Art.II, which applies to agreements, also serves as a requirement f enforcement of awards under Art.IV through VII."

[258] Ibid. at 23. "In July 2006, UNCITRAL adopted recommendations regarding the interpretation of Articles II(2) and VII(1) of the Convention…[T]he recommendation is that it should be applied 'recognizing that the circumstances described therein are not exhaustive.'…UNCITRAL has also recommended that VII(1), which by its terms only applies to arbitration awards, be interpreted to apply to arbitration agreements as well."

[259] Blackaby et al., *Redfern and Hunter on International Arbitration*, 75. "…the trend in modern national legislation has moved towards the relaxation of this [in writing] formal requirement."

[260] Civil Code of The Empire of Ethiopia (Ethiopia 1960). Art.1678 "No valid contract shall exist unless:
(a) the parties are capable of contracting and give their consent sustainable at law;
(b) the object of the contract is sufficiently defined and is possible and lawful'
(c) the contract is made in the form prescribed by law, if any."

presumed261 and lack of capacity, if established, may render a contract invalid upon the request of the party whose capacity is questioned.262 The CC also demands that a party who raises a lack of capacity as a ground for invalidity should bear the burden of proof regarding his or her incapacity.263

Lack of capacity to conclude an arbitration agreement is stated under the Proclamation, as a ground of challenge in situations such as applications for interim measures, the setting-aside of awards, and the enforcement of awards[264].The notion of capacity in the context of interim measures and enforcement of award is beyond the scope of this subsection's deliberation and a detailed analysis of both articles is intentionally omitted. Incapacity as a ground for annulment of award as per Art.50(2)(a) of the Proclamation could be raised if "[t]he applicant does not have the capacity to conclude an arbitration agreement as provided for in the law in force"[265].

This author contends that the wording of Article 50(2)(a) relating to the law governing capacity and Article 41(3) of the current arbitration law potentially leads to interpretative issues when parties to international arbitration fail to include a choice-of-law clause. As far as international arbitration is concerned, the current Ethiopian arbitration law makes it clear that the substantive laws of Ethiopia do not apply automatically in the absence of choice by the parties.[266] There is a choice-of-law provision that is meant to regulate the capacity of corporate bodies under Article 197 of the Civil Code.[267] The current arbitration Proclamation under Article 41(3), also includes a default rule

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[261] *Ibid.* Art.192 sets out that "[e]very physical person is capable of performing all the acts of civil life unless he is declared incapable by the law" and as per Art.196(1), "[c]apacity is presumed."
[262] *Ibid.* Art.1808(1) "A contract which is affected by a defect in the consent or by the incapacity of one party may only be invalidated at the request of that party."
[263] *Ibid.* Art.196(2) "Any person who alleges the disability of a physical person shall prove that such person is under a disability."
[264] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021 (Ethiopia 2021). See Articles 26(1)(a), 50(2)(a) and 52(2)(a)
[265] The phrase "the law in force" in the Proclamation appears to exacerbate the interpretive concerns because a close reading of paragraph two of the preamble, Art.77(1) and (2) and Art.50(2)(a) leads to different answers to the question of what "the law in force" refers to in this Proclamation. The 'law in force' under paragraph two of the preamble, Art.77(1) and (2) refers to the amended arbitration laws included under the Civil Code and the Civil Procedure Code. On the other hand, the same (law in force) under Art.50(2)(a) seems to indicate a default applicable law determined by choice-of-law rules.
[266] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021. Art.41(4) "Where the subject matter of the dispute does not have an element of international arbitration, Ethiopian law shall apply."
[267] Civil Code of The Empire of Ethiopia. Art.197 "The capacity of bodies corporate…shall be regulated, according to their nature, by the provisions applicable to them."

for choice-of-substantive law authorizing tribunals to select a substantive law that is "close and relevant to the subject matter of the dispute." Nevertheless, unlike the Model Law which suggests tribunals apply a conflict of law rules in determining the applicable law in the absence of choice,[268] the Ethiopian arbitration law remain silent about the possibility of using Private International Law (PIL) by arbitrators. Instead, it employs a language that is close and relevant to the subject matter of the dispute, but has little, if any, significance in determining the governing substantive law and potentially opens more room for interpretation. Moreover, nowhere in the arbitration Proclamation does state the yardsticks for determining the applicable law in the absence of choice by the parties.

The Arbitral tribunal and Ethiopian Courts will face the potential challenge of determining an applicable substantive law when parties' choice of governing law in the arbitration agreement is absent as the Proclamation provides a proper default provision[269]. National courts at the seat of arbitration are supposed to follow their conflict of law rules in determining the governing substantive law.[270] Yet, the absence of statutory PIL in the Ethiopian legal regime could make the task of determining applicable law by courts more daunting in Ethiopia. The reason is that Ethiopia, for unspecified reasons, failed to enact a stand-alone PIL despite scholars advocating for statutory conflict of law rules for the past seven decades.[271] Besides, the current arbitration law under sub-article (2) of Article 41 includes a provision that mandates contracting parties to exclude national PIL from their substantive choice-of-law clause. Therefore, in the context of an application for annulment of awards on the ground of incapacity, it is hard to find a conclusive answer supported by the current Ethiopian

[268] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. Art.28(2) "Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."
[269] Ferrari, *Limits to Party Autonomy in International Commercial Arbitration*, 333–34. The traditional approach that had been required arbitrators to apply conflict rules of seat in determining the substantive applicable law was abandoned and arbitrators are no longer bounded by any specific national conflict of law rules.
[270] Morrissey and Graves, *International Sales Law and Arbitration*, 430. " A national Court sitting in the place of would be required to follow its own conflict of laws rules."
[271] Norman Bentwich, "Private International Law in Ethiopia," *The International Law Quarterly* 4, no. 1 (January 1, 1951): 111. ("…the law of Ethiopia has not yet developed any fixed rules of Private International Law…[b]ut there is such a thing as an International Law of Necessity, in this inter-dependent world."

arbitration law to the questions regarding the law governing capacity and the elements that define the term 'law in force' under sub-article (2) paragraph (a) of Art.50.

One may argue that, since Ethiopia is a member state of the NYC, courts may consult the relevant provision of the Convention in addressing the issue of substantive law governing capacity. The Convention under Article V(1)(a)[272] points out that "…the law of the country where the award was made", the substantive law of the *lexi arbitri*, is an applicable law governing the validity of arbitration agreements when the choice of parties is absent. However, the Convention also is not without interpretative issues when it comes to the choice of applicable law to govern the incapacity of parties to the arbitration contract.[273]

Some distinguished scholars in the field of ICA take advantage of the uncertainty surrounding substantive choice-o-law approaches to promote incompatible theories, leading to confusion in determining the applicable law for governing an arbitration agreement. Professor Gary B. Born purports that the application of the "validation principle"[274], in which he claims that it is a principle confirming the purpose of the NYC, the UNCITRAL Model Law, and the objectives of the parties concluding an international arbitration agreement, is the preferred way-out to the problem of identifying the governing law of the arbitration contract. On the contrary, Professor George A. Bermann contends that the law applicable to the capacity issue should be selected based on the enforcing state's choice-of-law rules[275] and calls the doctrine of the 'validation principle' a

[272] United Nations Convention on the Recognition and Enforcement » New York Convention. Art.V(1)(a) "The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made…"

[273] A. Bermann, *International Arbitration and Private International Law General Course on Private International Law (Volume 381)*, 442–43. "The Convention refrains…from indicating the criteria according to which the law applicable to the capacity of any given party is to be determined."

[274] Gary B. Born, "The Law Governing International Arbitration Agreements: An International Perspective Conflict of Laws in Arbitration," *SAcLJ* 26, no. Special Issue (2014): 834. "[v]lidation principle provides that, if an international arbitration agreement is substantively valid under any of the laws that may potentially be applicable to it, then its validity will be upheld, even if it is not valid under any of the other potentially applicable choices of law."

[275] A. Bermann, *International Arbitration and Private International Law General Course on Private International Law (Volume 381)*, 443. "The most reasonable conclusion may be that national courts in which recognition or enforcement of an award is sought should apply forum choice of law rules to determine the law 'applicable' to the capacity issue(with disadvantage that jurisdictions differ among

"dubious"[276] one. This author stands by Professor George A. Bermann's argument that enforcement of state law in determining capacity issues holds to the principle of certainty and predictability in international arbitration.

In the Ethiopian case, despite the country's recent adoption of the NYC, the prescribed languages under Articles 41(3) and 50(2)(a) of the arbitration Proclamation have the potential to undermine the international commercial arbitration process. Terminologies such as "close and relevant to the subject matter of the dispute" and "as provided in the law in force" leave the determination of applicable law to govern the validity of international arbitration agreement in the absence of parties' choice to the courts. This problem, if not addressed, could have a far-reaching negative effect on the predictability of international arbitration in Ethiopia and even well-intentioned courts may produce conflicting decisions since there are no statutory PIL rules that could help them apply a consistent choice-of-law approach in determining the applicable law for an arbitration agreement.

Another point that could potentially pose an interpretative concern is stated under Article 50(2)(b). As mentioned previously under subdivision 3.4.7 of this chapter, the terms "inoperative or incapable of being performed" which is included under Articles II (3) of the NYC and Article 8(1) of the Model Law are missing in the Current Ethiopian arbitration law. Instead, the legislator introduced a different term, namely 'an expired arbitration agreement' flowing the terms "null and void", which is also included in the NYC and the Model Law.

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themselves as to the law applicable to the capacity of persons and the result that the Convention's designation of a common choice of law becomes illusory)."

[276] Ibid. "It has been suggested that…courts should apply a so called 'validation principle'…[t]his conclusion is dubious."

Commentators in the ICA discipline ascribed distinctive interpretations to the terms null and void[277], inoperative[278] and incapable of being performed[279] which are included in both the Convention and the Model Law. As per the arbitration scholars, such as Margaret L. Moses's analysis, the "expired arbitration agreement" stated as a ground for setting aside under Article 50(2)(b) is one instance of an 'inoperative' agreement under Article II (3) of the Convention. Instances such as the existence of a term indicating litigation in the main contract, a defective arbitration clause, or the death or incapacity of a specific arbitrator at the time of the dispute that could render the arbitration agreement 'incapable of being performed' do not exist in the current arbitration statute of Ethiopia. However, this problem could be addressed by referring to the relevant provisions of the Convention and their interpretations in the international arbitration context.

3.5.3 Departure from the fundamental rules of procedure as a ground for setting-aside applications upon parties' motions

Arbitration law commentators have been holding a position for quite some time now that most national arbitration laws have reached a consensus regarding procedural due process.[280]This agreement encompasses fundamental rules of procedure, including equal treatment and the right or opportunity to be heard, with some exceptions regarding its details.[281] The current Ethiopian arbitration law, like most national arbitration laws, mandated the observance of certain principles of

[277] Blackaby et al., *Redfern and Hunter on International Arbitration,* 138. "An arbitration agreement is 'null and void' if it is 'devoid of legal effect', for example owing to mistake, duress, or fraud."
[278] Moses, *The Principles and Practice of International Commercial Arbitration*, 32. " An arbitration agreement may be inoperable if it is barred by res judicata,…the parties revoked it or inter into an agreement to settle the dispute…a required time limit had expired."
[279] Blackaby et al., *Redfern and Hunter on International Arbitration,* 138. "[t]he expression 'incapable of being performed' appears to refer to more practical aspects of the prospective arbitration proceedings. It applies, for example, if it is for some reason impossible to establish the arbitral tribunal."
[280] Gabrielle Kaufmann-Kohler, "Globalization of Arbitral Procedure," *Vand. J. Transnat'l L.* 36, no. 4 (2003): 1321–22. "A comparative review of recent statutes and cases shows a consensus about two overriding principles, [p]arty autonomy in matters of procedure and due process…well established across national arbitration regimes. The term 'due process' here refers to a number of notions with varying names under different national laws, including natural justice, procedural fairness, the right or opportunity to be heard, the so-called *principe de la contradiction* and equal treatment."
[281] Ibid. at 1322. "Consensus on principles does not mean agreement on details…[e]ven though there is consensus on the core principle, the exact parameters of due process may fluctuate from one legal system to another."

due process. Article 50(2) (c), (e) and(f) puts forth three grounds: all of which relate to the aspects of due process, for the application to annul an award upon parties' motion. Three of the aforementioned procedural grounds[282] along with two other grounds[283] that may be raised by national courts *sua sponte* are, to a large extent, similar to the grounds for the application to set-aside an award which is stated under Article 34 of the Model Law and hence a detailed comparative analysis regarding those grounds is unwarranted.

Among the list of grounds for an application to annul an award under Article 50 of the Proclamation, sub-article (2)(d) deserves a special mention for two main reasons; the express adoption of lack of arbitrator's impartiality, independence or delivery of an award infected by bribery as a ground for setting-aside and consideration of that ground as a discretionary basis of application for setting-aside of an award that should be raised at the initiative of the parties. Neither Article V of the NYC nor Article 34 of the Model Law has explicitly included those lists as a ground for an application to set-aside an award. The inclusion of this paragraph, along with the language, "[a]n application to have an arbitral award set aside may be lodged…" under the first paragraph of sub-article (2) demonstrates the non-exhaustive nature of the list of grounds for the application to set-aside an award in this provision. The qualifying words "may be lodged',on top of implying the existence of more circumstances that could be listed as a ground for setting-aside, implies inconsistency with the Model law's qualifying words, "only if", which indicates the exhaustive nature of the grounds stated under Article 34(2) of that law.

Secondly, the lack of an independent and impartial tribunal or awards given by bribing arbitrators amounts to a violation of so-called procedural public policy.[284] Given the incorporation of

[282] Lack of proper notice regarding the arbitrator's appointment and commencement of proceedings, addressing subject-matter beyond the agreement to arbitrate and constitution of tribunal not in line with the parties' agreement.
[283] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. See Art.34(2)(b)(i) and (ii) . See also Art.50(4)(a)(b) of the Ethiopian Arbitration proclamation.
[284] Fifi Junita, "Public Policy Exception in International Commercial Arbitration - Promoting Uniform Model Norms," *Contemp. Asia Arb. J.* 5, no. 1 (2012): 54. "The principle of procedural public policy has been recognized widely by national courts, if the proceedings deviate from the basic principles of procedural law in such a way that they cannot any more be considered as a fair trial or due process particularly in cases of lacking a valid submission to arbitration,…lack of impartiality of the tribunal, and of awards resulting from fraud."

public policy as a ground for setting-aside under sub-article (4)(b) of the same provision, (Article 50), one might ask whether the inclusion of bribery or lack of an independent and impartial tribunal under sub-article(2)(d) is necessary at all. This is because Ethiopian courts, on their motions, can set-aside an award tainted with bribes by invoicing the public policy ground under sub-article(4)(b). Therefore, the language and pattern of this sub-article appear to indicate the parochial characteristics of the current Ethiopian arbitration law rather than the grounds for setting-aside under the Model Law and the Convention.[285]

3.6 Interim conclusion

The preceding chapter analyzed the interrelation of the erstwhile Ethiopian arbitration law that had been embedded in the Ethiopian CC and CPC with some of the Model Law and the NYC's provisions with the purpose of examining the changed provisions that have a significant impact on arbitration cases transcending the Ethiopian border. This chapter commenced with a brief description of the historical development of the Ethiopian legal system. This aimed to highlight the origins and sources of the Ethiopian arbitration regime, as well as the significant changes being made today in a comparative manner. Even though the repealed substantive law of arbitration had originated from the French legal system which has a long-established divergent system applying to both domestic and international arbitration, the Ethiopian arbitration law encompassed in both the CC and the CPC, unlike French law, adopted no distinct systems for domestic and international arbitration.

Ethiopian lawmakers, in 2020, ratified the 1958 New York Convention with the aim to meet the present realities relating to the settlement of international business disputes, taking into account the obsolete nature of the previous arbitration regime This change was also complemented by the enactment of an arbitration and conciliation statute in 2021. Hence, it is logical to conclude that the

[285] Blackaby et al., *Redfern and Hunter on International Arbitration*, 582. "Pursuant to the Model Law, an action for setting aside an award may be brought before the designated courts of the state in which an award was made pursuant only to the grounds exhaustively set out in the Law. These grounds are taken from Article V of the New York Convention…[a]rticle V of the New York Convention sets out the grounds on which recognition and enforcement of an international award may e refused, while Article 34 of the Model Law sets out the same grounds (with only slight differences of language) on which an award may be set aside."

current arbitration law significantly comports with the general international arbitration principles inscribed in both the Model Law and the New York Convention. However, chapter II explored significant inconsistencies with the rules of the NYC and the Model Law that may negatively affect the predictability and efficiency of international arbitration. These inconsistencies are primarily associated with the rules governing the formality of arbitration contracts, grounds for setting aside, and post-award court reviews.

Although the focus of the analysis in this chapter was mainly on pointing out the major changes in the new arbitration legislation and its drawbacks, an attempt was made to compare the diverging rules with their counterparts in the Convention and the Model Law. Furthermore, as the author delve further into the subject matter, it will be necessary to conduct a comprehensive analysis of the concepts of inarbitrability, public policy, and the review of awards by the Supreme Court Cassation Bench. These concepts were briefly mentioned in the preceding two chapters. In addition, it is expected that the research provides a detailed examination of the inarbitrability of administrative contracts in Ethiopia's case-law system as these matters are directly relevant to the thesis's title. Therefore, the next two chapters will dwell on the principle of administrative contract's arbitrability from the Ethiopia law's perspective and the case-law system of Ethiopia.

Chapter IV: Inarbitrability of Administrative Contracts according to the Ethiopian Law Perspective and the Quasi case-law System

4.1 Introduction

The incorporation of the case-law-like regime, Cassation System, into the Ethiopian legal system can be traced back to the beginning of the 20th century when France and Ethiopia signed the *Treaty of Amity and Commerce* in 1908.[286] One of the main purposes of the 1908 Franco-Ethiopian Treaty had been to establish a special system of court and applicable law for French expatriates in Ethiopia as the then Ethiopian law was considered to be discordant with European laws.[287] Three and half decades later, another treaty, Anglo-Ethiopian Agreement, enabled the judgeship appointment of mainly British citizens in the Ethiopian Judicial System.[288] Nevertheless, as stated in the aforementioned chapter, it is the 1996 Federal Court Proclamation that consolidated the hybrid ,family of common and civil law systems, nature of the Ethiopian legal system.

In addition to a brief analysis of the Federal Supreme Court Cassation Bench cases concerning the inarblitrability of administrative contracts, this chapter delves into the question of whether, and to what extent, the notion of inarbitrability of administrative contracts and public policy as per the new Ethiopian arbitration law affects the autonomy of parties in international commercial arbitration. In addressing the notion of inarbitrability, the paramount focus will be on the inclusion of an administrative contract in the list of non-arbitrable subject matters under the new arbitration law and its impact on international commercial arbitration.

The second part of this chapter focuses on the Ethiopian notion of public policy in the context of international commercial arbitration. Taking into account the relatively discrete treatment of the public policy notion in domestic and international arbitration perspectives, this research will analyze the provisions containing the 'public policy' exception as a ground for non-enforcement of interim

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[286] Mehari Redae, "Cassation over Cassation and Its Challenges in Ethiopia," *Mizan L. Rev.* 9, no. 1 (2015): 178.

[287] Peter H. Sand, review of *Review of Recht und Politik in Äthiopien: Von der traditionellen Monarchie zum modernen Staat*, by Heinrich Scholler, *The American Journal of Comparative Law* 57, no. 3 (2009): 757.

[288] "Accordo Anglo-Etiopico Del 19 Dicembre 1944," *Oriente Moderno* 27, no. 1/3 (1947). Art.III (1) "The Imperial Ethiopian Government will retain or appoint British or other foreign persons of experience or special qualifications to be advisers or officers of their administration and judges as they find necessary."

measures, setting-aside, or recognition and enforcement of awards. The specific objective of this analysis is to demonstrate the approach of the Ethiopian Arbitration Act on the application of public policy exceptions and its implication on the principle of party autonomy in international commercial arbitration. Subsequently, an interlocutory conclusion and recommendation will be included at the close of this chapter.

4.2 Administrative contracts according to the Ethiopian law perspective in comparison to its French counterpart

In the interest of clarity, there is a need to provide a comprehensive understanding of the Ethiopian law of administrative contracts for foreign readers before delving into the discussion on the inarbitrability of such contracts. The doctrine of the administrative contract emanated from the dual, regular and administrative, nature of the French court system.[289] Yet, one also can legitimately argue that Ethiopian administrative law is mainly inspired by the French scholars' doctrine concerning the theory of administrative contract in general.

For one, besides the drafter's explicit statement regarding the existence of disparities between the Ethiopian Administrative Contract Law and the French one,[290] the model of the Ethiopian law of administrative contract included under the special title XIX of the Civil Code is not the French statutory or case laws of administrative contract; rather it is French scholarly writing.[291] Moreover, unlike the other titles of the Civil Code,[292] the Ethiopian Codification Commission had failed to examine the compatibility of the preliminary draft of the title relating to administrative contracts with

[289] Khalifah Alhamidah, "Administrative Contracts and Arbitration, in Light of the Kuwaiti Law of Judicial Arbitration No. 11 of 1995," *Arab L.Q.* 21, no. 1 (2007): 41. "The theory of administrative contracts arose from the existence of the two types of courts in the French judiciary; those for ordinary disputes, which are subject to ordinary courts, i.e. civil, commercial, or criminal circuits, and those in which the public administration is involved, which fall within the administrative court's competence."
[290] David, "Administrative Contracts in the Ethiopian Civil Code," 146. "[T]he regulation of administrative contracts in the Ethiopian Civil Code differs in many respects from that in French administrative law."
[291] Ibid. at 145. "…[W]here could one find a model for such a set of rules?...the basis here had to be scholarly writing. An excellent treatise on administrative contracts had just appeared in France. We had only to put into legislative terms the propositions formulated by this work…"
[292] Ibid. at 146. "…there were checks to assure that the rules of the code [Civil Code] would correspond to the needs and sentiments of the Ethiopian nation...this draft, after it was translated into Amharic[local language],…studied and revised, first by a Codification Commission made up of Ethiopians and then by the Ethiopian Parliament, which had the final power to adopt the text of the Civil Code."

the Ethiopian legal system and the lawmakers adopted the preliminary draft without any modification.[293] Hence, the legislation procedure that lead to the enactment of the preliminary draft of administrative contracts law, without the necessary review and deliberations, turns out to be a material evidence for the existence of substantial influence from French scholars on the Ethiopian law of administrative contracts.

Secondly, as explained in Chapter II Section 2.6 of this thesis, a formal procedure that helps to identify the nature, civil or administrative, of contracts involving a government organ may have a significant implication on the rights and obligations of the contracting parties and the jurisdiction of the prospective adjudicative (administrative court or ordinary civil court) body. In the French legal system, statutes and case laws jointly determine whether a contract has an administrative or civil nature.[294] The Ethiopian Civil Code, on the other hand, has no clear-cut definition of what an administrative contract is, except for the general principle prescribed under Art.3132 that puts forth three yardsticks to identify the nature of administrative contracts.[295] The drafter of the CC acknowledges the lack of a well-defined interpretation of "administrative contracts" under Ethiopian law and suggests consulting the French commentaries on the same subject matter for a complete understanding of the comprehensive definition of administrative contract provided under Article 3132.[296]

David, 146.[293] Ibid. "The preliminary draft became the proposal of the Commission without change, and it was adopted by Parliament without amendment."

[294] Bermann and Picard, *Introduction to French Law*, 86.

[295] Civil Code of The Empire of Ethiopia (Ethiopia 1960). Art.3132 A contract shall be deemed to be an administrative contract where:

a) It is expressly qualified as such by the law or by the parties, or
b) It is connected with an activity of the public services and implies a permanent participation of the party contracting with the administrative authorities in the execution of such service, or
c) It contains one or more provisions, which could only have been inspired by urgent consideration of general interest extraneous to relations between private individuals.

[296] David, "Administrative Contracts in the Ethiopian Civil Code," 147. "Sub-articles 3132(b) and (c) provide a general definition of administrative contracts, for the interpretation of which one can refer to French treatises."

Additionally, under the French system, the concept 'administrative contract' is basically described as an "agreement between unequal parties" [297] that grants exclusive power to the administration or a contract that has a relationship with a public service. For example, contracts of concession (*la concession de service public*) [298] and public procurement contracts (*le marche public*)[299] are categorized as the main types of administrative contracts by French lawyers. In fact, besides the particularities of its form, content and performance, an administrative contract under the French legal regime generally falls outside of the jurisdictional power of the civil court.[300]

However, there is an exception to this general principle in the French legal system. In France, following the end of the First World War, various partial or full nationalization of the economy had been undertaken and the participation of the state in commercial and industrial activities expanded.[301] As a result, there was a common understanding that was developed over a long time that some of the public authority's acts or activities may have "a private character"[302] and the public agencies may also own private property (*domaine privé*).[303] Therefore, if a state organ engaged in commercial or industrial activities, it was the ordinary court, not the administrative court, that had the jurisdiction over a dispute that may have arisen out of these activities,[304] and unlike Ethiopia, the French legal system is less ambiguous on the question of what an administrative contract is.

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[297] Lionel Neville Brown et al., *French Administrative Law: L. Neville Brown, John S. Bell With the Assistance of Jean-Michel Galabert*, 5th edition (Oxford : New York: Oxford Univ Pr, 1998), 202. " The French regard an administrative contract as essentially an agreement between unequal parties."

[298] Ibid. at 204. "The concession grants the operation of a public service to …a private person…responsible for running the service within the framework settled by the public authority granting the concession…local water services in France are typically run by private companies who have concession from local communes to provide water in their area. Water users pay these companies for the service."

[299] Ibid. "public procurement contract…concerned with the provision of a particular object or activity for the public service. This may take the form of public works, such as constructing a road or a school, supplies, such as stationery or vehicles, or services, such as cleaning or catering."

[300] Ibid. at 203.

[301] Ibid. at 132.

[302] Ibid. at 141. "For it has long been accepted that a public authority may confer a private character upon some of its acts or activities... Similarly, a public authority may own what is regarded as private property (*domaine privé*…"

[303] Ibid. "Property is regarded as private where its managed and exploited by the public authority in the manner of a private owner:…"

[304] Ibid. at 132.

In the context of Ethiopian administrative law, as in the French Administrative law, the identity of one of the parties to the contract, cannot solely determine whether a contract is considered administrative.[305] The non exclusivity of the identity factor might suggest, parallel to the French law of administrative, contract the availability of a binary choice for the government agencies to enter into a contract with private companies. A 'binary choice' in this context may indicate that the administrative body can also legally enter into an agreement, that could be categorized as 'non-administrative', a civil contract, with a private company and this by implication may affect the rights and obligation of the contracting parties and the potential dispute settlement mechanisms.

Since the promulgation of the Ethiopian CC in the 1960s, which incorporated the rules governing administrative contracts, the French doctrine of administrative contract law, the primary source of Ethiopian law for such contracts, has undergone significant improvements.[306] The same is not true for the Ethiopian law of administrative contracts. More than five decades from the drafter's publicized anticipation of the need for eventual amendment[307] and disclosure of the existence of "beyond doubt"[308] flaws in the special rules relating to administrative contracts, nothing has been done to amend those rules by the legislators so far.

Apart from the drafter of the Civil Code, some Ethiopian scholars have been raising critical voices on the need to amend the rules applicable to administrative contracts. For instance, *Tecle Hagos* described the Ethiopian administrative contracts law as "the most marginalized and stagnant

[305] David, "Administrative Contracts in the Ethiopian Civil Code," 147. The provisions of the Civil Code relating to administrative contract "do not apply to all contracts concluded by the administrative authorities. As in France, the specialized rules only apply where they are needed, to contracts termed 'administrative contracts' by the law."
[306] Bermann and Picard, *Introduction to French Law*, 61. "More recently, especially since the end of the 1960s, the French Parliament has intervened more and more often in the field of administrative law, and done so with greater precision and on larger issues."
[307] David, "Administrative Contracts in the Ethiopian Civil Code," 147. "This title can be improved at an appropriate time,.."
[308] Ibid. at 146–47. "In the case of the other titles, the discussion with the Commission resulted in improvements on the preliminary draft. …Title XIX was not the subject of such a discussion, and circumstances also prevented me from revising my preliminary draft six months or a year after fishing it. Thus, a mere preliminary draft, rather than a true proposal, became law, and it is beyond doubt that various imperfections resulted from this procedural failing."

area of law"[309] citing the persistent improvement and clarity of its source—the French *contrats administratif*. Nonetheless, in this respect, it is relevant to mention the presence of a scholarly argument that questions the practicalities of the rules of the Ethiopian Civil Code governing administrative contracts, who cite the enactment of separate Proclamations that somehow amended the some rules of administrative contracts in the C.[310] However, since a detailed analysis of the laws governing general administrative contract is beyond the scope of this thesis, the focus of the forthcoming deliberation is on the non-arbitrability of administrative contracts under the perspective of current Ethiopian arbitration law.

4.2.1 Inarbitrability of administrative contracts and the current Ethiopian arbitration law

Despite the wide scope of the concept of arbitrability,[311] this author mainly focuses on the issue of non-arbitrability of 'administrative contracts' in the Ethiopian law perspective and its implication on international commercial arbitration. In other words, the main focus of this section will only be on the likely consequences of the exemption of administrative contracts from arbitration proceedings coupled with the lack of specified contours that could help define, what an administrative contract is, on the party autonomy in international commercial arbitration.

There are two main reasons for focusing on the inarbitrability of administrative contracts different from the other subject matters listed as outside the domain of arbitration as per the Ethiopian arbitration law. The first reason is related to the approach adopted by the special title of the Ethiopian Civil Code concerning administrative contracts, an approach that is highly receptive to an interpretative openness and atypical of the Civil Procedure Code's position regarding the same subject matter. The Civil Code is silent on this subject matter but, the Civil Procedure Code puts forth a

[309] Tecle Hagos Bahta, "Adjudication and Arbitrability of Government Construction Disputes," *Mizan L. Rev.* 3, no. 1 (2009): 7. "It is saddening to learn that…whilst the French *contrats administratif* has been continuously refined and developed under the case law of the French *Conseil d'Etat*, the Ethiopian Administrative Contracts Law has been perhaps the most marginalized and stagnant area of law."
[310] Bahta, "Conflicting Legal Regimes Vying for Application," 15. "…attempt is made to show how the administrative contracts law provisions in Civil Code have been gradually replaced by the promulgations of new laws particularly intended to deal with public procurement laws."
[311] Mistelis, *Arbitrability*, 7. "…arbitrability is a multi-faceted and multi-purpose concept which despite national origins has an international dynamic. It defines the classes of disputes that *may* be removed from the scope of arbitral reference and placed at the exclusive jurisdiction of given national courts."

prohibitive provision mandating disputes relating to an administrative contract to be outside of the domain of arbitration.[312] The other reason for this research to focus on inarbitrability of administrative contracts is that albeit the repeated and relatively harsh criticism of scholars on the inarbitrability of disputes relating to administrative contracts,[313] the new arbitration legislation also includes an otherwise obscure sub-article under the category of non-arbitrable subject matters. In conclusion, the main purpose on focusing on inarbitrability of administrative contracts is to demonstrate that the inarbitrability principle in the recent Ethiopian law conflicts with international best practices and its primary source, the French administrative law and thereby excessively limits party autonomy in the ICA.

Initially, French legal jurisprudence, as in Ethiopia, had no definite position regarding the arbitrability of administrative contracts.[314] Arbitration of administrative disputes was also forbidden in France for a considerable period of time.[315] Nevertheless, starting from the second half of the 20th century, French ordinary courts started to follow a different approach regarding the arbitrability of administrative contracts that involved a foreign party and the Court of Cassation asserted that the principle prohibiting the arbitrability of 'international administrative contracts'[316] was no longer binding.[317]

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[312] "Civil Procedure Code of The Empire of Ethiopia." Art.315(2)

[313] Bahta, "Adjudication and Arbitrability of Government Construction Disputes," 17. "One key issue that should be properly addressed and which has been a bone of contention in the Ethiopian arbitration law and practice, however, is whether administrative contract disputes can be validly submitted to arbitration."

[314] Alhamidah, "Administrative Contracts and Arbitration, in Light of the Kuwaiti Law of Judicial Arbitration No. 11 of 1995," 37. "Both France and Egypt have faced the question of the relationship between arbitration and administrative contracts. In the beginning, jurists were deeply divided, and different attitudes were expressed through judicial decisions, issued by the courts in the two countries However, new economic activity and the desire to attract foreign investment as well as domestic capital have caused the French and Egyptian legislatures to present legislation advocating faster and easier alternatives to litigation, namely arbitration."

[315] Ibid. "In France, the doctrine that prohibited arbitration in administrative disputes prevailed for a long time."

[316] Ibid. at 38. "Administrative contracts are international when their execution requires the transportation of money and services across state boundaries."

[317] Ibid. at 37–38. "…since 1957, the French ordinary courts have accepted arbitration in administrative contracts whenever international parties are involved… French Court of Cassation declared that the principle prohibiting arbitration should not be applied to the state and its public administration in cases involving international relationships."

The position of the Ethiopian statutory rules governing the arbitrability of administrative contracts contrasts with not only the general French legal system but also the primary source of Ethiopian administrative law, which is the academic book titled the *Traité Théorique Et Pratique Des Contrats Administratifs, Tome III*. As stated in Chapter II, the Ethiopian Civil Code provides no guidance concerning the arbitrability of disputes relating to administrative contracts and this has been a source of divergent understanding and inconsistent interpretation of the subject matter. Additionally, the Ethiopian law of administrative contract remains silent on the inarbitrability of administrative contract, despite its main source, *Traité Théorique Et Pratique Des Contrats Administratifs,* includes an entire chapter addressing the subject matter.[318]

An *ex-ante* or *ex-post* agreement to arbitrate disputes relating to administrative contracts, as a rule, had been prohibited in the general principle inscribed under the primary source of the Ethiopian administrative law. In other words, *"Le principe est l'interdiction pour les personnes publiques de compromettre par la voie du compromis d'arbitrage ou de la clause compromissoire*"[319], or according to the google-assisted English translation, public entities, in principle, had prohibited from entering into arbitration contracts or including arbitration clauses in the administrative contract. Additionally, Professor André de Laubadère, the author of the book mentioned in the above paragraph, claimed that Articles 83 and 1004 of the 1806 French Code of Civil Procedure are the basis for prohibiting the arbitrability of administrative contracts in principle.[320]

Nevertheless, the book also stated two paramount exceptions to the general rule concerning the inarbitrability of administrative contracts. One of the special cases that derogates the prohibiting principle of an administrative contract's non-arbitrability in France, had been related to public works and supply contracts. As stated in the statute known as *La loi du 17 avril 1906,* government organs

[318] laubadère André De, *Traité Théorique Et Pratique Des Contrats Administratifs,* vol. III (Paris: Librairie générale de droit et de jurisprudence, 1956), 283.
[319] Ibid. at 285, III.
[320] Ibid. ''Nous avons déjà eu l'occasion (supra, n° 215) de signaler ce principe et d'indiquer son fondement, à savoir la conjugaison de l'article 1004 du Code de procédure civile qui exclut la faculté de compromis pour les contestations sujettes à communication au ministère public et de l'article 83 du même Code qui déclare ' communicables'les causes concernant 'l'ordre public, l'Etat, le domaine, les communes, les établissements publics'…''

and the state itself can enter into an arbitration agreement to resolve disputes relating to the liquidation of their expenses for public works and supplies.[321]

The other exception, which is directly related to this research, discussed whether or not the prohibitive principle is applicable to the *Les établissements publics industriels ou commerciaux* (government-owned industrial or commercial establishments). The standpoint of the then French scholars on the applicability of this prohibitive principle to government owned industrial or commercial organizations was in the negative.[322] That means, the scholastic work, which served as a primary source of the Ethiopian Administrative Law, on arbitrability of disputes involving government owned commercial enterprises, as a rule, and from the outset, had upheld the arbitrability of the administrative contracts of a commercial nature.

However, although it was not the primary source of Ethiopian law, Article 83 of the 1806 French Code of Civil Procedure had explicitly included *Les établissements publics industriels ou commerciaux* in the list of government organs incapable of entering into arbitration agreements. Moreover, the 1906 Statute (a *La loi du 17 avril 1906*) that legislatively authorized recourse to arbitration for some administrative contracts had failed to include government-owned commercial and industrial enterprises.[323] Yet, the rules governing the non-arbitrability of administrative contracts under the French Civil Procedure Code or the 1906 statutory law are not relevant because as mentioned earlier, the French statutory law concerning administrative contracts is not the primary source of the Ethiopian administrative law.

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[321] Ibid. at 286, III. "La loi du 17 avril 1906 a autorisé l'Etat, les départements et les communes, à recourir à l'arbitrage dans les conditions prévues par le Code de procédure civile 'pour la liquidation de leurs dépenses de travaux publics et de fournitures'.''

[322] Ibid. at 287, III. "Mais on s'est demandé précisément si l'interdiction du recours au compromis et à la clause compromissoire était valable pour eux[Les établissements publics industriels ou commerciaux]. La négative a été soutenue avec beaucoup de force, au moins en ce qui concerne les établissements Electricité de France et Gaz de France…"

[323] Ibid. "On vient de voir que les établisements publics figurent expressément parmi les personnes publiques, énumérées dans l'article 83 du Code de procédure civile, auxquelles le recours à l'arbitrage est en principe interdit et que, par ailleurs, ils ne figurent pas parmi celles auxquelles la loi de 1906 permelce recours pour la liquidation de leurs marchés."

When it comes to Ethiopia's administrative law perspective, despite the explicit inclusion of topics concerning the arbitrability of administrative contracts in the primary source, the Civil Code, as addressed in Chapter II of this thesis, remained muted for undefined reasons. What is more baffling is that Article 7(7) of the new Arbitration Proclamation also affirmed that disputes concerning an administrative contract, in principle, are not the type of disputes capable of settlement by arbitration. It is true that the prohibitive rule concerning the inarbitrabity of administrative contracts in the new arbitration legislation's context is not without exception. The language of the phrase "except where it is not permitted by law" under the aforementioned sub-article appears to voice the existence of *de jure* exception to the general principle of non-arbitrability of administrative contracts.

Nevertheless, neither the general rule nor the exception stated under the aforementioned article concerning the arbitrability of administrative contracts in Ethiopia is comprehensible, particularly for readers who are alien to the Ethiopian legal system. There are two primary justifications the claim regarding the uncertainty within sub-article 7 of Article 7. Firstly, having a clear understanding of the term 'administrative contract' is essential in order to recognize the limitation outlined in that sub-article, which the arbitration Proclamation or the CC failed to include, as stated in section 4.2 of this chapter. Hence, the ill-defined concept of 'administrative contract' in the Civil Code may render the explicit principle on non-arbitrability disputes related to administrative contracts under the new arbitration Proclamation to be nonsensical and the question concerning the arbitrability of administrative contracts far from being settled.

In addition to the intricate nature of the prohibition principle regarding the inarbitrabilty of administrative contracts, there is also criticism surrounding the exception mentioned in the previous article. This exception pertains to the arbitrability of specific types of administrative contracts in Ethiopia where the law explicitly allows for arbitration. However, this exception also has raised concerns as it gives rise to interpretative challenges because of the ambiguity of some of the rules that allow arbitrability.[324] Therefore, neither the general rule nor the exception under Article 7(7) of the

[324] Bahta, "Adjudication and Arbitrability of Government Construction Disputes," 29–30. Some of the various legislative enactments (otherwise known as 'enabling clauses') entitling the administrative bodies to settle their disputes out of court are "dubious whether they allow for arbitration or not."

current Arbitration Proclamation provides a categorical resolution to the long-overdue obscurity surrounding the arbitrability of administrative contracts in Ethiopia.

The uncertainty concerning the arbitrability of administrative contracts on the part of the statutory system of arbitration may also have a serious implication on party autonomy under the international commercial arbitration context. This legislative uncertainty on this subject matter has an even more detrimental effect when one takes into account the state-owned entities' role in international commerce in the Ethiopian context.[325] Consequently, undertaking an in-depth analysis of the inarbitrability of administrative contracts[326] and their implication on party autonomy has paramount significance.

The crucial implication that could limit party autonomy in this issue emanate not from the characterization of administrative contracts as non-arbitrable subject matter per se. It is rather concerned with their scope, excluding administrative contracts as a general rule, and the absence of common yardsticks that could help determine which matter falls under an administrative contract, or a clear-cut definition of what an administrative contract is. The following section will examine in detail the potential fallouts of the rule governing the non-arbitrability of administrative contracts on party autonomy.

4.2.2 The indeterminate aspect of Art.7(7) and its implication on limiting party autonomy in ICA

The English version of Art.7 sub-article 7 of the current Ethiopian Arbitration Proclamation seems to be grammatically erroneous because a cumulative reading of the main article and the sub-article says that 'administrative contract is non-arbitrable as per the arbitration law except in cases where it is prohibited by another law'. To use the exact words of the Proclamation with a slight change

[325] Feyissa, "The Role of Ethiopian Courts in Commercial Arbitration," 314. "Numerous cases related to enforcement of arbitration agreement involve government agenesis. This is particularly because government agencies—the most notable Ethiopian participants in international commercial arbitrations--often try to take advantage of the unsettled Ethiopian law on arbitrability of administrative contracts."
[326] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 84. "Entities that are directly or indirectly affiliated with the Ethiopian state routinely raise the defence of inarbitrability. As a result, the discussion of arbitrability in Ethiopia cannot be complete without looking at the meaning and nature of administrative contracts."

in the arrangement of words and punctuation, 'Administrative contract shall not be submitted for arbitration except where it is not permitted by law'.

On the other hand, the literal translation of the Amharic version reads as 'administrative contracts are non-arbitrable unless specifically permitted by law'.[327] Grammar-wise, the Amharic version seems to be plausible. On top of that, in Ethiopia, federal statutes are publicized in Amharic and English and some Proclamations includes an authoritative language-clause that helps determine the prevailing language in case of different interpretation or inconsistency. For instance, Article 106 of the current Federal Constitution provides that Amharic is the authoritative language in case of conflicts or inconsistency between the two languages.[328]

However, the Arbitration Proclamation includes no provision that governs the potential language conflicts. This author argues that the grammatical flaws in the English version of the aforementioned sub-article and the absence of a rule that helps determine the authoritative language in case of conflict can place adjudicators (judges or arbitrators) and lawyers in a precarious situation. The task of ascertaining the legitimate meaning of the rules in the Ethiopian Civil Code which includes the general rules governing administrative contracts is perplexing not only to parties who are not familiar with the Ethiopian legal system but also to Ethiopian lawyers as there is no guidance or consolidated principles governing statutory interpretation in Ethiopia.[329] Therefore, the presence of grammatical errors in the English version of the mentioned sub-article, particularly the utilization of a double negative in the rule concerning the inarbitrability of administrative contracts, could potentially lead to an interpretation that considers the arbitrability of administrative contracts as a default rule. This interpretation would turn out to be in direct contrast with the Amharic version of the same provision which prohibits arbitrability of disputes relating to administrative contracts in

[327] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021 (Ethiopia 2021). Art.7(7) Amharic version states that "አስተዳደራዊ ውሎች በልዩ ሁኔታ በሕግ ካልተፈቀደ በስተቀር፤ለግልግል ዳኝነት አይቀርቡም" ።

[328] The Constitution of the Federal Democratic Republic of Ethiopia (Ethiopia). Art.106 "The Amharic Version of this Constitution shall have final legal authority."

[329] George Krzeczunowicz, "Statutory Interpretation in Ethiopia," *J. Ethiopian L.* 1, no. 2 (1964): 322. "In the absence of any legislative judicial or doctrinal principles governing statutory interpretation in Ethiopia, we have attempted to abstract some applicable principles by analogy from the Civil Code provisions of interpretation of contracts."

principle. Relatedly, the result of such inconsistencies in the statutory system of Ethiopian arbitration coupled with the absence of established rules of interpretation may create unbounded court discretion in determining the arbitrability of disputes related to administrative contracts and by extension restricts party autonomy in arbitration.

Apart from the grammatical complexities in the English version, the provision lacks clarity and guidance on how to specify which type of contract related to administrative dispute is legally sanctioned as arbitrable, and whether or not an administrative contract involving a foreign element is, in principle, non-arbitrable. As per the reading of Article 7, the inarbitrability of disputes relating to administrative contracts, be it international or domestic[330], is the general principle rather than an exception.[331] This suggests that, at least in the statutory portion of the Ethiopia arbitration system, there seems to be a lack of modernization in terms of adopting a more flexible approach to the arbitrability of such disputes. This is in contrast to the stance taken by other third-world jurisdictions regarding the same subject matter.[332]

The interpretative problem in Article 7 is also unexplainable through context-based or legislative intent rules of interpretation.[333] For instance, when examining paragraph three of the preamble of the current arbitration Proclamation, which is a section of the Act that provides insight into the overall purpose and intention of the legislators, it states that one of the motivations for enacting the Proclamation is to establish a comprehensive framework for determining arbitrable cases, taking into account the current circumstances of the country.

[330] Mistelis, *Arbitrability*, 55. "All international disputes of an economic nature are *prima facie* arbitrable in most jurisdictions, and it would be hard to find a dispute arising out of the operation of global commerce that is not."
[331] Ibid. at 65. "Before, legal systems specified what subject matter is arbitrable. Today, with arbitration being the rule rather than the exception in international settings, legal system need to determine what disputes are not arbitrable."
[332] Ibid. at 61. "While local impediments to the arbitrability of certain types of disputes continue to exist in the third world, they are more reminiscences of past unpleasant arbitration experiences, than true reflections of present and potentially future attitudes."
[333] Krzeczunowicz, "Statutory Interpretation in Ethiopia," 319. Context-based and legislative intent-based rules of interpretation have been recognized as applicable rules of interpretation for an ambiguous law in Ethiopia.

However, in spite of such a general rule in the preamble, the indeterminate nature of the framework adopted under Article 7, which is supposed to be more specific, makes it difficult to delineate the arbitrable type of administrative contracts. As a result, the complexity in determining what is arbitrable and what is not under the Ethiopian statutory system of arbitration remains to be unsettled.

To sum up, the provisions of the current arbitration statute concerning administrative contracts seem to exacerbate the existing perplexity on the arbitrability of administrative contracts for at least two main reasons. First, despite the specific repeal[334] of the older provision regarding the non-arbitrability of administrative contracts in the Civil Procedure Code, an administrative contract is still non-arbitrable, as a general rule, as per Art.7(7) of the Amharic version of the current Proclamation. Secondly, since the arbitration Proclamation and the Civil Code do not properly characterize what an administrative contract is, there is uncertainty in determining the classes of administrative contracts envisioned as non-arbitrable as per Art.7(7) of the current Arbitration Proclamation.

Another blurry point on this subject matter with far-reaching impact on limiting party autonomy at the pre-and post-award arbitration processes is the question regarding the jurisdiction of the arbitral tribunal in determining the arbitrability of administrative contracts. As per Art.19(1) of the arbitration law, an arbitral tribunal is authorized to determine issues such as "whether it has jurisdiction to hear the case or not." The term 'jurisdiction' in this article appears to imply 'material jurisdiction', which among others answers the question of whether or not a case is subject to an adjudicator other than courts. This is as opposed to the notion of judicial or local jurisdiction, which mainly focuses on forum convenience and the authority of a particular state's court to render a binding judgment against an individual or his property respectively.[335]

The general principle recognized in Article 19(1), that an arbitral tribunal has the power to determine questions concerning the arbitrability of administrative contracts seems plausible and in

[334] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021 (Ethiopia 2021). Art.78(2), "The provisions of the civil procedure code from Articles 315 to 319…which deals about arbitrator[*sic*] repealed by this proclamation."

[335] Sedler, *Ethiopian Civil Procedure*, 19–44. For a detailed analysis of the implication and distinction among the judicial, material, and local jurisdictions in the Ethiopian civil procedure context, see Sedler on pages 19-44.

line with the Model law's approach. Nevertheless, it would be difficult to conclude with certainty that the effect and interpretation of the concept of material jurisdiction under Article 231(1)(b) of the Civil Procedure Code, Article 19(2), and Article 50(4)(a) of the Arbitration Proclamation are in harmony. The reason is that the effect of the lack of material jurisdiction under the Civil Procedure Code requires a court, at any stage of the proceeding, upon its motion, even when the litigating parties fail to object on the ground of lack of material jurisdiction, to dismiss the case. On the other hand, the consequence of not raising a preliminary objection[336] in the right time-frame, as a rule, amounts to a waiver of this right.[337]

Unlike in the Civil Procedure Code, the Ethiopian legislator, on employing the term 'material jurisdiction' in the current arbitration Proclamation appears to be following a discursive style of writing. The rambling style of writing the rules happened because an objection against "material jurisdiction" under Art.19(2) of the arbitration statute should be presented prior to the commencement of the hearing on substances as a preliminary challenge. When it comes to the statute of limitation, the term 'material jurisdiction' in this sub-article is in stark contrast with the same term under Art.9(2) of the Civil Procedure Code that mandates no period of limitation for raising want of 'material jurisdiction' as a justification.[338]

Art.19(3) of the Proclamation, on the other hand, puts forth the time-frame for raising want of material jurisdiction as a ground to be raised "as soon as the existence of lack of material jurisdiction is discovered" unless the arbitral tribunal is convinced that the delay for bringing up an objection against the lack of material jurisdiction is supported by a "sufficient justification"[339] The

[336] "Civil Procedure Code of The Empire of Ethiopia." Art.244(2) in an exhaustive tone listed the categories of preliminary objections including lack of jurisdiction.
[337] Sedler, *Ethiopian Civil Procedure*, 48. "Where a preliminary objection is not raised at the first hearing, it is deemed to be waived unless 'the ground of objection is such as to prevent a valid judgment from being given.'"
[338] "Civil Procedure Code of The Empire of Ethiopia." Art.9(2) "When and as soon as the court is aware that it has not material jurisdiction to try a suit, it shall proceed in accordance with Art. 245[dismiss the suit] notwithstanding that no objection is taken under Art.244[preliminary objection] to its material jurisdiction."
[339] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021. Art. 19(4) "The Tribunal may accept a late submission of an objection with regard to the material jurisdiction or the scope of its jurisdiction if it believes that there is sufficient justification for the delay."

phrase "as soon as the want of material jurisdiction noticed" suggests that there is a potential for raising an objection based on the lack of material jurisdiction at any point during the arbitral process, including post-award proceedings such as setting-aside or recognition and enforcement of arbitral awards. Furthermore, it is possible for the Ethiopian courts to interpret the lack of material jurisdiction mentioned in this article as an "unwaivable right" during the stages of setting-aside recognition, or enforcement.

Certainly, one could argue that the provisions concerning jurisdiction in the Civil Procedure Code have no binding effects on arbitration proceedings and even if in that case, the provision in the arbitration statute prevails in case of conflict either by applying either the 'posterior law prevails over the prior law' rule or the 'special law derogates from the general one' rule of statutory interpretation in case of contradiction.[340] Nevertheless, a compelling counter-argument can be made regarding the applicability of the provisions in the CPC pertaining to material jurisdiction in arbitration cases. The current Arbitration Proclamation counts the Civil Procedure Code as an "applicable law" in the arbitration proceedings in the absence of contradiction.[341] Moreover, the provisions of the Civil Procedure Code concerning objections against lack of material jurisdiction that should be raised by the court's motion as per Articles 9(2) and (Art.231(1)(b) are not explicitly mentioned under the list of repealed provisions in the current arbitration proclamation.[342] Therefore, the 'material jurisdiction' saga will remain unsettled and could negatively affect the efficacy and the finality principle at the referral, challenge, and enforcement stages of arbitration proceedings.

At the phase of setting-aside proceedings, the party opposing the award or the court on its motion may raise the inarbitrability of administrative contracts as per Art.50(4)(a) of the arbitration Proclamation. Pursuant to this sub-article, the court on its motion, may set-aside an award predicated on a subject matter considered to be inarbitrable "under the Ethiopian arbitration law. At the

[340] Krzeczunowicz, "Statutory Interpretation in Ethiopia," 321.
[341] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021. Art.79 "The Provisions of the Civil Procedure Code that may help the implementation of the…arbitration proceedings …and not contravene this Proclamation shall be applicable."
[342] *Ibid.* (The specifically repealed provisions of the Civil Procedure Code are listed under Art. 78(2) and these are Articles 315 to 319, 350, 352, 355-357, and 461.)

enforcement stage, the Proclamation contains two provisions requiring courts to double-check the inarbitrability of administrative contract as a subject matter included in the list of 'non-arbitrable cases' under Art.7 of the same proclamation. The first provision mandates the court to reject enforcement of the arbitral award[343] if the award was based on subject matter that is considered non-arbitrable in the arbitration statute.[344] The second provision authorized courts to refuse recognition or enforcement of foreign arbitral awards if the award was based on subject matter considered to be non-arbitrable by Ethiopian law.[345]

There is a need for an authoritative cassation bench's interpretation of the above-explained statutory rules governing the inarbitrability of administrative contracts in the interest of promoting party autonomy and limiting the sources of uncertainty in ICA. Accordingly, as the implementation of the prohibitive rule on the arbitrability of an administrative contract essentially requires a definite principle that clarifies the ambiguity of the Civil Code and helps define what an administrative contract is, the Cassation Court could play a central role in addressing this ambiguity by providing a guideline that spells out the distinguishing features of administrative contracts. Thus, the Cassation Court could bring clarity to the otherwise ambiguous part of the prohibitive rule on the non-arbitrability of administrative contracts under Article 7 by including a clear pronouncement on whether or not the scope of the prohibition extends to types of administrative contracts that involves foreign elements and with a commercial nature.

Additionally, the issue surrounding the applicability of the "material jurisdiction" principle under the CPC as a ground for challenging the arbitrability of administrative contracts is a matter that demands an authoritative interpretation by the Cassation Court. The consideration of this principle as a legitimate ground for challenging arbitrability results in unwarranted court intervention throughout

[343] The term "set-aside" in sub-article 3 of this provision appears to be the result of an incorrect word choice and it is incoherent with the title of the provision Art.52 which is 'Objection to Enforcement of Arbitral Award'.
[344] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021. Art.52(3)(a) mandated the court to "set aside the arbitral award if…[t]he matters upon which the award is based is not arbitrable under this Proclamation".
[345] *Ibid.* Art.53(2)(e) states that "a foreign arbitral award shall not be recognized or enforced …[w]here the matter on which the award is rendered is not arbitrable under Ethiopian law".

different stages of the arbitration process and jeopardizes the core principles of finality and efficiency that underpin the ICA system. Therefore, it is essential to seek a binding Supreme Court Cessation Bench interpretation that ensures clarity on this matter.

4.3 Administrative contracts' inarbitrability and case-law under the Ethiopian legal system

The issue regarding the inarbitrablity of a particular administrative contract and the very notion of an administrative contract, like in the statutory regime, is also unsettled in the caselaw-like Cassation System of the Ethiopian legal regime.[346] The particular focus of this section is to point out the lack of authoritative Cassation Bench rulings that address the ambiguity in the statutory part of the Ethiopian arbitration law on the concept of arbitration contracts in general and on their arbitrability. Accordingly, this section charts the position of the Federal Cassation Court on the aforementioned issues with a reference to the rulings of the court in two domestic cases. Nevertheless, detailed scrutiny of all the facts and rulings in those cases is beyond the scope of this work for the reason that both cases are purely domestic and the primary focus of this thesis is on commercial-nature administrative contract cases that contain foreign elements.

In the case between *Woira Wood and Metal Works Cooperative Society vs. Addis Ababa City Administration Trade and Industry Bureau*, one of the issues addressed by the Federal Court Cassation Division was a challenge to the very concept of what an administrative contract is. Accordingly, the Federal Supreme Court Cassation Bench attempted to identify the applicable guiding principles in defining the general notion of administrative contracts. In this domestic case, the appellant, *Woira Wood and Metal Works Cooperative Society*, instituted an application to the Cassation court against the judgment of the Federal Court of Appeal as to the concept of an administrative contract.

The appellant, in defining the concept of an administrative contract, based its argument on the cumulative interpretation of the Civil Code provisions of Article 3132(a) and particularly on the clause "where it is expressly qualified as such by the law" in addition to Articles 1444(2), 1446 and

[346] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 85–86.

1447(1) which are, rules governing public domains in general. Nevertheless, the Cassation Court rejected the interpretation of the term administrative contract by the appellant as the court's appraisal regarded that interpretation as "not in line with the substance and purpose of the provision of the Civil Code stated under Art.3132(b), apart from being too narrow".[347] As a rule of thumb, the Cassation Bench, in this case, ruled that the contested contract should be considered an administrative contract; adding that, in determining whether a contract is an administrative contract based on Art.3132 of the Civil Code, the criteria that ought to be taken into account should include yardsticks such as the type of the contract, the subject-matter of the contract, and the identity of the contracting parties in addition to the express terms of the contract.[348]

This author is of the opinion that the ambiguity surrounding the interpretation of administrative contracts is far from being settled not only in the statutory system of the Ethiopian arbitration system but also in the quasi-case law despite the attempt of the Cassation court in establishing an authoritative interpretation of the concept in the aforementioned case. The Cassation Bench's interpretation of the administrative contract, in this case, stresses that in determining whether a contract is an administrative contract or not, "የ ውለታውን ጉዳይ"[349](the subject matter of the contract) should be considered apart from the factors expressly listed under Art.3132 of the Civil Code. In effect, the effort of the Cassation Court in defining the term administrative contract in this case seems to aggravate the interpretative issue around this concept in the statutory law rather than resolving it. The reason for that is, the explanation and the ruling of the Federal Cassation Court as to the concept of administrative contract interpretation, which was expected to serve as a guiding principle in resolving the statutory ambiguity on the subject matter, appeared to be oversimplified; so simplistic

[347] Ibid. at 107. "…የአሁን አመልካች ክርክር ያስነሳው ጉዳይ የአስተዳደር ውል ነው ወይስ አይደለም? የሚለውን ለመለየት በፍ/ብ/ሕ/ቁ.3132 ላይ በህግ ተለይቶ በተደረገ ጊዜ ነው የሚለውን ድንጋጌ መነሻ በማድረግ...ያቀረቡት ክርክር...በፍ/ብ/ሕ/ቁ.3132(ለ) ይተመለከተውን ድንጋጌ ይዘት እና ዐላማ የተከተለ የ ትርጉም መስመር አይደለም..."

[348] Ibid. at 115. "ከእነዚህም መስፈርቶች አንጻር አንድ ውል የአስተዳደር ውል ነው ለማለት የግድ በውሉ ላይ በግልጽ መነገር ብቻ ሣይሆን የውሉን ዓይነት የውለታውን ጉዳይ እንዲሁም የተዋዋዮችን ማንነት በ ማየት መለየት እንደሚገባ በዚሁ ህግ የተደነገገ በመሆኑ..." As stipulated in this law, in terms of these requirements, [the requirements enumerated under Art.3132] to say that a contract is an administrative contract, not only is it necessary to expressly qualify it as such in the terms of the contract, but also, the type of the contract, subject-matter of the contract, as well as the identity of the contracting parties, should be taking into account…"

[349] Ibid. at 107.

indeed, that one commentator who reviewed the case assumed that as per the ruling of the Cassation court, "the fact that one of the parties was an administrative authority was a sufficient condition for the Cassation Bench's characterization of the contract as an administrative one."[350]

The second ruling of the Federal Cassation bench which related in some respect to the inarbitrability of administrative contracts was rendered in the case between *Tana Water Well Drilling and Industry PLC vs. Diredawa Administration Water and Sewerage Authority*.[351] In this case, the concept of administrative contracts had not been disputed. The court cited the identity of the respondent, a public service provider, and the intended purpose of the activity, the drilling of deep wells, as factors that categorically determined the purpose of the contract. Such contracts which, "inarguably made for the public use"[352] falls under the category of the administrative contract according to Art.3132(b) of the Civil Code.

It is also important to point out that the disputed issue, in the *Tana Water Drilling and Industry PLC* case, was not mainly related to arbitration per se; the paramount issue was whether or not an administrative contract could be submitted to another type of alternative dispute settlement mechanism known as 'adjudication'.[353] Nonetheless, the Cassation Court in addressing the challenge against the jurisdiction of an adjudicator to entertain disputes relating to arbitration contracts ruled that for ascertaining jurisdiction, adjudication and arbitration are analogous[354]. Hence, based on the

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[350] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 87.

[351] Tana Water Well Drilling and Industry PLC vs. Diredawa Administration Water and Sewerage Authority, No. 127459 (Supreme Court October 3, 2017).

[352] Ibid. at 4. "ተጠሪ ለህዝብ አገልግሎት የሚሰጥ ተቋም ሲሆን ለክርክሩ መንሻ የሆነው የውሃ ጉድጓድ ቁፋሮም ለህዝብ ጥቅም ልመስጠጥ[*sic*] የታሰበ በመሆኑ ዉሉ ለህዝብ ጥቅም ይተደረገ ውል መሆኑ የሚያከራክር አይደለምም።"

[353] Peter Rosher, "Adjudication in Construction Contracts," *Int'l Bus. L.J.* 2016, no. 5 (2016): 497–98. Adjudication is among the dispute resolution mechanisms that are "less confrontational than arbitration…,quick and inexpensive procedure pursuant to which parties refer their dispute to an impartial third party tasked with rendering an immediately binding decision."

[354] *Tana Water Well Drilling and Industry PLC vs. Diredawa Administration Water and Sewerage Authority* at 6. "አርቢትሬተር የአስተዳደር ውሎችን በተመለከተ መዳኘት የማይችል ከሆነ አድጁዲኬተር ከሚሰጠው የዳኝነት ባህሪ አንጻር የአስተዳደር ውሎችን ሊዳኝ የሚችል አይሆንም። ምክንያቱም አድጁዲኬተርም ሆነ አርቢትሬተር አስገዳጅ ውሳኔ የሚሰጡ አማራጭ የሙግት መፍቻ አካላት ስለሆኑ ነው።" 'If the arbitrator does not have jurisdiction over the issues relating to administrative contracts, the adjudicator, taking into account the nature of the decision, should not have jurisdiction over the same subject matter. This is because both adjudicator and arbitrator are personnel of ADR capable of providing binding decisions.' (The English version is a literal translation of the Amharic by this author.)

aforementioned premise, the court mentioned two significant rationales concerning the inarbitrability of administrative contracts. In the first justification, the court stated that it is a policy option of the government for issues relating to administrative contracts to reserve them under the exclusive jurisdiction of the regular court. In the words of the rulings in this case, cases related to disputes arising out administrative contracts are supposed to be reserved for a court established on the principle of rule of law to achieve the intended objective of the administrative contract.[355] Nevertheless, the court mentioned no reference or explanation regarding the details of the 'intended purposes to be reached by an administrative contract', and hence the purposive-like interpretative approach of the court provided inadequate information on the principle of administrative contracts' inarbitrability.

The other rationale mentioned in the court analysis for the inarbitrability of administrative contracts was based on the alleged incompetency of the institutions of the Alternative Dispute Resolution Mechanism in Ethiopia. The court asserted that it could be inferred from the content of Art.315 of the Civil Procedure Code that the legislator determined an administrative contract to be categorized as an 'inarbitrable subject matter'. One of the reasons given by this court to support this assertion was the lack of competent Alternative Dispute Settlement Institutions, endowed with full responsibility and accountability, and capable of protecting "the government and the public interest" in Ethiopia.[356] The court's general referral to Art.315 of the CPC's "content" for determining the legislator's implied rationale ,the incompetence of Alternative Dispute Resolution Institutions, in restricting the arbitrability of administrative contracts in this case is problematic for at least two reasons.

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[355] *Ibid.* "…የአስተዳደር ውሎች ጉዳይ የህግ የበላይነትን መርህ በአደረገው መደበኛ ፍርድ ቤት መታየቱ በውሎቹ ሊደረስበት የታሰበውን ዓላማ ለማሳካት እንደሚያስችል ታምኖበት የተወሰደ የመንግስት ፖሊሲ አማራጭ እንደሆነ መገንዘብ ተገቢ ነው።"

[356] *Ibid.* "በተለይም በአገራችን ሥርዓት ተበጅቶላቸው በጠነከረ አኳኋን የሚመሩ የመንግስትንና ህዝብን ጥቅም ሊያስጠብቁ የሚችሉ የተሟላ ኃላፊነትና ተጠያቂነት የተሰጣቸው አማራጭ ሙግት መፍቻ ተቋማት ከአለመጠናከራቸው አንጻር የአስተዳደር ውሎች በግልግል ዳኝነት እንዳይታዩ ህግ አውጭው አካል ለመምረጡ ከ ፍ/ብ/ሥ/ሥ/ህ/አንቀጽ 315 ይዘት መገንዘብ ይቻላል።"

'Particularly in our country, [Ethiopia], it can be understood from the content of Art. 315 of the Civil Procedure Code that the reason the Legislator has chosen to deny arbitrability of administrative contracts is related to the incompetence of the Alternative Dispute Resolution Institutions which are not endowed with full responsibility and accountability, lack organization and strong management, and are incapable of protecting the government and public interests.' (*The English version of the Amharic citation is the author's translation*.)

On the one hand, of the four sub-articles of the provision, only sub-article (2) is relevant to administrative contract issues and it is a clear-cut prohibitive rule. The text of sub-article (2) of Art.315 reads as follows: "No arbitration may take place concerning administrative contracts as defined in Art.3132 of the Civil Code or in any other case where it is prohibited by law." Although the definition of 'administrative contract' in the Civil Code, as mentioned earlier is a broad one, the Civil Procedure Code provides an opt-out provision regarding the inarbitrability of such kinds of contracts in rather precise terms. Therefore, it is puzzling why the cassation court suggested a content-based interpretation of Art.315 of the CPC by invoking unstated reason, particularly when the provision's language is fairly explicit. Thus, the content-based interpretation of this provision adds no elucidation to the confusion around the inarbitrability of administrative contracts in the statutory law of arbitration. Secondly, neither the Civil Procedure Code nor the Civil Code regarded the incompetence of ADR Institutions as one of the reasons for excluding administrative contract disputes from their jurisdiction. Therefore, the court's approach in addressing institutional incompetence of ADRs, in the absence of any term that speaks of those concepts, as one of the reasons for the non-arbitrability of administrative contracts appears to be an interpretive amendment of Art.315(2) of the CPC and not an ordinary judicial interpretation of the provision.

In a nutshell, the rulings of the Federal Supreme Court Cassation Bench on the aforementioned two domestic cases provide the following points regarding the position of the practical law in Ethiopia concerning the concept of administrative contracts and their inarbitrability. In the *Woira Wood and Metal Works Cooperative Society vs. Addis Ababa City Administration Trade and Industry Bureau* case, the Court, demanded the interpretation of administrative contracts in the Civil Code to include subject matter of the contract, which was beyond the expressly listed factors. That "subject matter of the contract" term opens another interpretative issue because the court has made no explanation in this case as to the source, implication, or purpose for which the inclusion of this factor was necessitated. In the *Tana Water Well Drilling* case, the Cassation Bench reiterated the legislator's intention in excluding issues of administrative contracts from ADR jurisdiction. Accordingly, the court concluded that one of the main reasons for prohibiting arbitrability of

administrative contracts was the lack of institutional sophistication on the side of the Ethiopian ADR Institutions and noted that this reason could be inferred from the contents of Art.315(2) of the CPC. However, the court's analysis of the concept of administrative contract and the attempt to discern the legislature's intent for prohibiting arbitrability of issues concerning administrative contracts by interpreting unambiguous rule (Art.315(2)) appears to create more questions than provide answers to the disputed subject matter.

4.3.1 The position of the Federal Cassation Bench on the inarbitrability of administrative contract disputes in the international arbitration context

In arbitration cases involving foreign elements, the principle concerning the inarbitrability of disputes relating to administrative contracts adopted in the Ethiopian arbitration regime appears to be tacitly ignored in practice. Ethiopian Courts, so far, have expressed no clear-cut exclusion or sanction of administrative contracts' inarbitrability when the case involves a foreign element. This section analysis three cases that involve disputes relating to administrative contracts with a foreign element that support the line of argument regarding the obscurity of the Ethiopian Courts' standing on the principle of administrative contracts' inarbitrability in cases involving foreign elements.

The International Chamber of Commerce (ICC) administered arbitration between *Salini Constuttori S.p.A vs. Addis Ababa Water and Sewerage Authority (AAWSA),*[357] an arbitration that relates to one of the paramount examples of the type of administrative contract is one of the cases evidenced that assertion. The purpose of the contract was to build an emergency water sewerage reservoir for the city of Addis Ababa[358]. The principal concern for addressing this arbitration case is to demonstrate that the quasi-case law system in Ethiopia has failed to take a straightforward position concerning the arbitrability of disputes relating to administrative contracts containing foreign

[357] Jus Mundi, "Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority, ICC Case No. 10623/AER/ACS," 9, accessed August 23, 2022 https://jusmundi.com. The identity of the respondent in this case is contested because "the party to the Contract and to the arbitration agreement is the Addis Ababa Water and Sewerage Authority rather than The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority."

[358] Mundi, "Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority, ICC Case No. 10623/AER/ACS." "The contract was for the construction of an emergency raw water sewerage reservoir for the city of Addis Ababa in Ethiopia, together with a connected 10km 'Transmission Main' to the water treatment facility located at the existing Legadagi Reservoir."

elements. Hence, a detailed analysis of the facts of the case and rulings of the court and the arbitral tribunal concerning other issue is beyond the scope of this dissertation. The main focus is on the failure of the respondent, *Addis Ababa Water and Sewerage Authority (AAWSA),* the Federal First Instance Court or the Federal Supreme Court Cassation Bench, on their motion,[359] to raise non-arbitrability of administrative contract as a defense. Additionally, this analysis focuses on the implication of the respondent and the court's inaction on the applicability of the non-arbitrability principle to cases of administrative contracts involving international elements.

In this case, the Addis Ababa Water and Sewerage Authority (AAWSA) raised considerable objections in different venues. AAWSA raised objections challenging the tribunal's jurisdiction to the case at hand and the seat of the arbitration at the ICC's Arbitral Tribunal[360] and the Federal First Instance Court of Ethiopia.[361] The Authority also raised an objection based on the lack of arbitrator's impartiality at the ICC Court.[362]Nevertheless, none of those objections include the inarbitrability of disputes related to administrative contracts as a ground for challenging the jurisdiction of the arbitral tribunal or the award. AAWSA, in challenging the tribunal's jurisdiction before the Ethiopian Federal First Instance Court and the Federal Court of Cassation had been based on Article 3342(3) of the Ethiopian Civil Code, a provision allowing a court-appeal against an arbitrator.[363] This provision has nothing to do with the provision of the Civil Procedure Code (Article 315(2)) that governs the non-arbitrability of administrative contracts. Therefore, both the First Instance Court and the Supreme Court Cassation Bench remained silent on the inarbitrability issue despite the existence of a provision (Article 231(1)(b) of the Civil Procedure Code) that allows them to pose such issues on their motion.

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[359] As mentioned in Section 4.2.2 of this Chapter, the Ethiopian law of Civil Procedure authorized courts to raise challenges concerning material jurisdiction on their own motion.

[360] Mundi, "Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority, ICC Case No. 10623/AER/ACS," 5. "…the Respondent objected that there was no relevant agreement between the parties to arbitrate disputes between them under the ICC Rules…the parties had agreed to submit their disputes under the contract to *ad hoc* arbitration under Article 3325 *et seq*. of the Civil Code of Ethiopia."

[361] Ibid. at 19. "The Respondent…had commenced a separate action before the Federal First Instance Court of the Federal Democratic Republic of Ethiopia…for the purposes of obtaining a judgment that the Tribunal lack jurisdiction over this arbitration."

[362] Ibid. at 16. "…the Respondent submitted to the ICC court a challenge…in accordance with Article 11 of the ICC Rules of Arbitration in order to request the removal and replacement of the three arbitrators…"

[363] Ibid. at 125.

It would be logical to conclude that the position of the Ethiopian Courts on the principle of administrative contract's inarbitrability under international arbitration context is less obvious.

Nevertheless, there are some commentators, such as Professor Won L. Kidane who argued that the claimant's (*Salini Constuttori S.p.A*) exhortation to the ICC arbitration implies its speculation that the Ethiopian courts would refuse enforcement of the arbitration agreement on the grounds of the administrative contract's inarbitrability.[364] Yet, the inference of the professor has not been collaborated by a precedent case on similar subject matters. For that reason, the hypothesis on the prospective challenge against the arbitrability of the contract in this case at the Ethiopian courts that has been advocated by the aforementioned professor helps little to appreciate the standing of Ethiopian Courts on the non-arbitrability principle in administrative contracts involving foreign elements.

Moreover, Professor Won L.Kindane, in asserting the prospective prohibition of arbitration of administration contracts grounded his argument on the influence of the French Civil Code on its Ethiopian counterpart and the fact that the drafter of the Ethiopian Civil Code was a French scholar.[365] Even so, he cited an erroneous provision (Article 315(2)) of the Code of Civil Procedure[366] to support his line of argument on the likely position of the Ethiopian Civil Code regarding the inarbitrability of administrative contracts. As mentioned in Chapter II of this thesis, the Ethiopian Civil Code is silent regarding the inarbitrability of administrative contracts and this silence has been a source of incompatible interpretation issues on the inarbitrability of administrative contracts. As stated in section 2.1.2 of this thesis, Professor René David, the drafter of the Ethiopian Civil Code, was also offered to draft the Ethiopian Code of Civil Procedure to which he negatively responded. That was why the Ethiopian Code of Civil Procedure, as cited under Chapter III section 3.1.2 of this thesis, was drafted by a common law-trained Ethiopian scholar named Nerayo Esayas. Consequently, the law

[364] Kidane, *The Culture of International Arbitration*, 58. "In fact, one of the reasons the claimant in this case, insisted on an ICC arbitration might have been because it suspected that the Ethiopian courts would uphold that notion [non-arbitrability of administrative contracts] if asked to enforce the arbitration agreement."
[365] Ibid. "Indeed, the Ethiopian Civil Code, drafted by the renowned comparatist René David, again inspired by the French Civil Code, seems to disallow the arbitrability of administrative contracts."
[366] Ibid. "Article 315(2) of the Ethiopian Civil Code [*sic*] reads….

that categorically mandated cases related to an administrative contract to be outside of the domain of arbitration is in the Code of Civil Procedure, not the Civil Code, and therefore it was not inspired by the French Civil Code or even a civil law legal system.

One may argue that pointing out Professor Won's flaw in citing the rule governing the inarbitrability of administration contracts might be considered a pedantic viewpoint of the author of this thesis for the reason that both codes are concurrently applicable to govern the substantive and procedural issues of a case. Besides, there could an argument based on the premise that cross-referral between the CPC and CC had been a common practice. Nevertheless, there are at least two main reasons that suggest otherwise. First, as cited in section 2.6.1 of this paper, the 1806 French Law of Civil Procedure Code is the text that instituted the principle prohibiting arbitrability of administrative contracts, not the French Civil Code. Moreover, as detailed in section 3.1.2 of this dissertation, the drafter of the Ethiopian Civil Code made it clear that there is no single national law that could be regarded as a source of the Ethiopian Civil Code. Particularly, the primary source of Title XIX of the Ethiopian Civil Code that governs administrative contracts, as stated under section 4.2 of this chapter, is not even a legal instrument; it is a theoretical book written by Professor *André de Laubadère.* Therefore, this author is of the opinion that indicating such mis-citation should not be considered a pedantic point of view as this literature might help readers to be cognizant of the Ethiopian court and arbitration law's position on the arbitrability of administrative contracts.

Relatedly, there is also another international arbitration case involving an administrative contract in which the Federal Democratic Republic of Ethiopia, one of the respondents,[367] disregarded the challenge on grounds of inarbitrability. This case was administered by the Permanent Court of Arbitration (PCA) and it was between *Consta Joint Venture* and *Chemin De Fer Djibouto-Ethiopien(the Ethiopian-Djibouti Railway*).[368] In this case, the claimant was an Italian joint venture

[367] Jus Mundi, "Consta Joint Venture v. Chemin de Fer Djibouto-Ethiopien (the Ethiopian-Djibouti Railway), representing the Federal Democratic Republic of Ethiopia and the Republic of Djibouti, PCA Case No. 2013-32," accessed August 25, 2022 https://jusmundi.com. The respondent is listed in the award as "The Federal Democratic Republic Of Ethiopia And The Republic Of Djibouti, Represented By The Ethiopian-Djibouti Railway(Chemin De Fer Djibouto-Ethiopien)"
[368] Ibid.

named *Consta JV* founded by two entities, *Consorzio Stabile Consta Soc. Consortile per Azioni* and *G.C.F. Generale Costruzioni Ferroviarie S.p.A. Consta JV* (the claimant) initiated the arbitral proceeding on July 18, 2013, by filing a notice of arbitration against the respondent per the applicable procedural law[369],which is Article 18 of the European Development Fund (EDF) Rules[370], claiming for, among others, a declaration of contract termination, payment of damages and extra costs and expenses.[371] The dispute that led to this arbitration arose out of the November 29, 2006 contract for the rehabilitation of the Ethiopian-Dijbouti railway. The central issue in this case was mainly focused on two main issues. The first issue was whether the Ethiopian-Djibouti Railway should be held accountable for causing a delay in completing the railway rehabilitation work and for not paying the Claimant for the work already done. The other issue was related to contribution of the Claimant for the nonperformance of the project according to the terms of the construction contract.[372] The claimant (*Consta JV*) won the arbitration case[373] but the Ethiopian Supreme Court Cassation Bench reversed the award on the ground of 'fundamental error of law'.[374]

From Article3244(1) of the Ethiopian Civil Code's perspective, the contract in the *Consta JV*'s arbitration case falls under the category of public work contracts[375]and the applicable substantive law to the contract was Ethiopian law.[376] The respondent, in his statement of rejoinder, explicitly

[369] Ibid. at 1. "The present Permanent Court of Arbitration (the 'PCA') Case No.2013-32 is conducted under the Procedural Rules on Conciliation and Arbitration of Contracts Financed by the European Development Fund(the 'EDF Rules'"…

[370] Decision No 3/90 of the ACP-EEC Council of Ministers of 29 March 1990 adopting the general regulations, general conditions and procedural rules on conciliation and arbitration for works, supply and service contracts financed by the European Development Fund (EDF) and concerning their application, 382 OJ L (U.S. 1990).

[371] Mundi, "Consta Joint Venture v. Chemin de Fer Djibouto-Ethiopien (the Ethiopian-Djibouti Railway), representing the Federal Democratic Republic of Ethiopia and the Republic of Djibouti, PCA Case No. 2013-32," 23.

[372] Ibid. at 3.

[373] Ibid. at 162. "iv. Claimant is not found responsible for delays to the project on account of delays in the track work…ix. Claimant is for any non-conformity of materials or works with the terms of the Contract."

[374] Detail analysis of the ruling of the Cassation Court on the challenge against this arbitral award will be addressed in the next chapter.

[375] Bahta, "Adjudication and Arbitrability of Government Construction Disputes," 7. "To be specific,…public works contracts (also referred to as construction contracts for public works or public works for civil engineering construction) are classed, ipso jure, as falling into the administrative contracts legal regime."

[376] Mundi, "Consta Joint Venture v. Chemin de Fer Djibouto-Ethiopien (the Ethiopian-Djibouti Railway), representing the Federal Democratic Republic of Ethiopia and the Republic of Djibouti, PCA Case No.

stated that the contract is a type of administrative contract (public procurement contract)[377].Nevertheless, as in the case between *Salini Constuttori S.p.A vs. Addis Ababa Water and Sewerage Authority (AAWSA),* the inarbitrability of administrative contracts was not an issue in the arbitral proceeding.

The *Ethiopian Grain Trade Enterprise (EGTE) vs. Agricom International SA* is another most recent international arbitration case that could fall under the domain of administrative contracts according to the relevant provisions of the Ethiopian Civil Code. As per Article 5(1) of the Council of Ministers Regulation No.369/2015, the then[378] 'Ethiopian Grain Trade Enterprise (EGTE) was a government-owned entity established to purchase "selected agricultural and industrial products and basic commodities from both local and foreign markets competitively and as such to stabilize the domestic market". The contract that led to this dispute arose out of an agreement for the supply of milling wheat, concluded on November 25, 2011, between the Swiss supplier *Agricom International SA* and the *Ethiopian Grain Trade Enterprise (EGTE)*. The claimant (EGTE), after terminating the contract citing performance delay, initiated arbitration at the legal seat of the arbitration (London), claiming that it sustained damages and finally won the award.

Agricom International SA took the case to the Ethiopian Supreme Court Cassation Bench hoping to reverse or amend the award on the grounds of 'fundamental error of law'.Yet, even at the Cassation court proceedings, the plea concerning the inarbitrability of the administrative contract had never been at issue. Although, a Cassation Bench judge, in his dissenting opinion mentioned some of the defining elements of administrative contracts, a contract carried on by a public enterprise to satisfy a public need, [379] the base of his dissenting argument was jurisdiction not inarbitrability of

2013-32," 27. "Article 14.1 of the EDF Rules requires the Tribunal to apply the law of the State of the contracting authority, in this case Ethiopian law…"

[377] Ibid. at 45. "Respondent considers, in his response to Claimant, that public procurement contracts, such as the one at issue, differ from private contracts because they have a public purpose and are based on government authority."

[378] The Ethiopian Grain Trade Enterprise had been reorganized and re-named the Ethiopian Trading Businesses Corporation (ETBC) in 2015 by the Council of Ministers Regulation No.369/2015.

[379] Agricom International SA vs. Ethiopian Trading and Business Corporation (ETBC), 24 The Federal Democratic Republic of Ethiopia: Directorate of Research and Legal Support 115–16 (Supreme Court 2019). "…ነገርግን ከተዋዋዮቹ አንዱ የኢትዮጵያ መንግስት መ/ቤት ሆኖ የተዋዋሉበት ነገር ለ ኢትዮጵያ እና ህዝቦቿ ጥቅም እንዲሰጥ መሆኑ ተረጋግጦ አለ [sic]… (…[H]owever, while it was proven that one of the contracting parties was an

administrative contracts. The facts of this case and the judgment of the Cassation Court will be analyzed in detail in the next chapter.

In summary, the common thread in these three arbitration cases is that the inarbitrability of administrative contracts had never been raised as a ground of challenge. In all three cases, the applicable substantive law was Ethiopian law which includes a statuary rule that could put the arbitrability of administrative contracts in a situation of a borderline case. The main difference that is visible in those cases is that the legal seat of the arbitration in the *Ethiopian Grain Trade Enterprise vs. Agricom International SA* was London. Therefore, it is logical to assume that the Ethiopian case-law regime's reticent position on the question of arbitrability of administrative contracts in the international arbitration context could create positive leeway for party autonomy as the silence of the court on the subject matter could be interpreted as a positive response to the question of administrative contracts' arbitrability in international arbitration contexts. At the same time, the unsettled position of the Ethiopian case-law on the 'non-arbitrability' of disputes relating to administrative contracts coupled with the ambiguity of the concept in the statutory arbitration system could open a variety of interoperative issues.

4.4 The Ethiopian perspective of public policy in ICA

The overall notion of public policy and the disparity concerning this concept in the domestic and international arbitration context was covered in section 2.3 of this research. In this section, the focus will be shifted to the idea of public policy under the Ethiopian arbitration system. This section in particular explores the potential role of the three terminologies, public morality, government policy and national security, in complicating the understanding of public policy as a concept and eventually limiting the party autonomy in ICA. These terminologies appear to be structured as interchangeable concepts to the notion of public policy in current Ethiopian Arbitration Proclamation. The scope of application of these three terminologies, which are foreign to Article V(2)(b) of the NYC, appears to cover both domestic and international arbitrations according to the literal translation of the provisions.

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agency of the Ethiopian government, and the contract was to provide service for Ethiopia and its public,…" (The English version is a literal translation by this author.)

Additionally, in current Ethiopian arbitration law, it appears that the worthwhile differences concerning the concept of 'international and domestic public policy' in ICA have been overlooked by the legislators.

The introduction of such peculiar terminologies in the current Ethiopian Arbitration Proclamation happened despite the enactment of the Proclamation following the ratification of the 1958 New York Convention. This somehow discordant wording might have the potential to add further complexities to the already indeterminate public policy concept under Article V(2)(b) of the NYC. As indicated in the above paragraph, some of the phrasings in the new arbitration statute include "public morality or Government policy"[380], "public morality and security"[381], public morality, policy or national security"[382] and "public policy, moral and security"[383].

The Proclamation also contained a provision, Article 3(2), the application of which appears to be mandatory irrespective of where the legal seat of the arbitration is. This provision enables the scope of the articles that include the foregoing indeterminate terminologies in addition to the term public policy to cases involving a foreign element. Article 3(2) of the Proclamation puts forth a cross-reference to the rules of the Proclamation with a comparable implication to both the domestic and international arbitration or arbitral awards. For instance, rules concerning the Court's refusal to enforce interim measures, final arbitral awards, and the recognition and enforcement of foreign arbitral awards are among the list of the provisions that have similar implications to both international and foreign awards, and all of these provisions contain divergent wordings in describing the concept of public policy. The literal readings of another provision in the Proclamation, Article 26(1)(e) also suggest that 'government policy and public morality' could be applied alternatively as a justification against the recognition or enforcement of interim measures. This provision which governs the grounds

[380] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021 (Ethiopia 2021). Art.26(1)(e) "A court may refuse the request for recognition or enforcement of an order[sic] interim measures…[w]here the recognition or enforcement of the interim measure conflict[s] with public morality or Government policy."
[381] *Ibid.* Art.43(2)
[382] *Ibid.* Art.50(4)(b) "The Court may set aside the arbitral award if [t]he recognition and enforcement of the arbitral award creates problem on public morality, policy or national security".
[383] *Ibid.* Art.53(2)(f) "[A] foreign arbitral award shall not be recognized or enforced…[w]here the arbitral award contravenes public policy, moral and security."

for refusing recognition or enforcement of an interim measure, states "public morality or Government Policy" as one of the mandatory lists for the refusal of recognition or enforcement of both domestic and international interim measures based on the court's motion. To sum up, one could not tell that Ethiopian arbitration law allows different application of the public policy principle for international arbitration cases, from the reading of the above provisions.

Under the Model Law, the seeming counterpart provision to the foregoing Ethiopian arbitration laws provision employs the term public policy as a ground for refusing enforcement or recognition of an interim measure. This provision, which is stated under Art.17I (1)(b)(ii), cross-refers to the 'public policy' terminology stated under Art.36(1)(b)(ii) of the same law. Accordingly, the wordings of the Ethiopian arbitration law, 'public morality or government policy' are foreign not only to the New York Convention but also to the Model Law and this varied and interchangeable terminologies could make the ambiguity surrounding the notion of public policy much worse.

The second provision which includes a list of words that could potentially substitute the term 'public policy' in the NYC is stated under Article 52(3) (b) of the Arbitration Proclamation. The cumulative reading of this article and Article 3(2) of the same law suggests that Ethiopian courts, on their motion, should "set aside" the enforcement of foreign and domestic awards when "[t]he recognition or enforcement of the arbitral award create[sic] problem on [sic] public morality, policy or national security." The three terms (public morality, policy, or national security) in this article are not defined in the definition section of the Proclamation and it is not clear whether the list is considered to be a cumulative requirement to establish the 'public policy' defense against the enforcement of national or domestic arbitral awards.

It seems that when drafting Article 52, the drafter(s) had in mind the phrase of the Model Law stated under Art.34(2) (b)(2) (ii), which allows a national court to 'set aside' an award when it finds that "the award is in conflict with the public policy of this State". The drafters' true intent could be inferred from their employment of terms not in line with the title of the provision[384] and languages

[384] *Ibid.* The title of Art.52 reads as "Objection to Enforcement of Arbitral Award". Yet the body of this article includes such as 'setting aside' and 'recognition' of arbitral awards.

somehow analogous to the provision of the Model Law regulating recourse against the award. In that case, this provision appears to be drafted out of negligence as the application for 'setting-aside' an award has already a stand-alone provision under Article 50 of the same Proclamation, and the recognition of awards, be it domestic or international, is governed by Article 53 of the arbitration Proclamation.

One may argue that the term 'recognition' under Art.52(3)(b) might relate to domestic arbitration awards unlike its counterpart under Article 53 which specifically refers to the recognition of 'foreign arbitral awards'. Nevertheless, such an argument would turn out to be untenable as Article 52 is included, as a mandatory provision the application of which is not limited due to the internationality of the award or the arbitration, in the list of provisions that are stated under Article 3(2) of the same law. Based on this premise, it is also logical to contend that the word "foreign" which is stated under the title of Article 53 does not add any nuance and is misleading. The reason is, according to Article 3(2) of the same statute, this article is equally applicable to both domestic and international arbitration and per the cumulative readings of those articles, public policy as a ground for refusing recognition of arbitral awards in both the domestic and international context of arbitration are substantially reciprocal. Therefore, Article 52(3)(b) of this Proclamation in essence is nothing but a duplication of the provision regulating recognition of foreign arbitral awards under Article 53(2)(f).

The final article containing the concept of public policy is Article 53(2)(f)—a provision supposed to govern the recognition and enforcement of 'foreign' arbitral awards. This article uses a parallel term (public policy) with Article V(2)(b) of the NYC, as some of the list of grounds for denying recognition or enforcement of foreign arbitral awards but along with two different words: "moral and security". Readers also need to be cognizant of the term 'foreign' in this article as this language could lead to an interpretation that the Ethiopian arbitration law treats the public policy distinctively in an application for the enforcement of foreign arbitral awards. As mentioned in the preceding paragraph, Article 2(3) of the Proclamation makes the term 'foreign" superfluous since the cross-reference in this article dictates that "public policy objections, to apply both foreign and domestic arbitrations."

To sum up, the public policy notion in the current Ethiopian Arbitration Law is penned in a way that mandates equal application of the public policy justification in both domestic and international commercial arbitration. The incorporation of undefined phrases such as public morality, government policy, and national security cause a precarious circumstance on issues such as whether those terminologies are interchangeable with the public policy concept contained under the NYC. The ambiguity caused by these seemingly interchangeable concepts also leads to unrestricted court discretions. This interpretative issue concerning the notion of public policy in the statutory law of Ethiopia could also have a far-reaching influence in the context of ICA as there is no court interpretation of the concept of public policy under the arbitration proclamation about the same notion stated under the NYC so far.[385]

In the interest of clarity, this author is not arguing that the mere terminology disparity among the New York Convention, the Model Law, and the Ethiopian Arbitration Law in describing the notion of 'public policy' is a major problem in itself. The language discrepancy between the national arbitration laws and the language of the international convention has been an expected contingency for a considerable time.[386] The lack of a clear-cut difference between the concept of 'international' and 'national' public policy in the Ethiopian arbitration law is also not a major concern of this thesis. After all, as Redfern and Hunter rightly put it, "[t]here is nothing new, as far as arbitration is concerned, in differentiating between national and international public policy."[387] Rather, the central problem is the addition of another list of nebulous and ill-defined notions such as government policy and public morality to the already ambiguous concept of public policy in a seemingly interchangeable structuring and a lack of authoritative court interpretation of those concepts.

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[385] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 228. "Ethiopian Courts have not, as yet, got the opportunity to analyse the convention[NYC] grounds for resisting recognition and enforcement of foreign awards."

[386] Blackaby et al., *Redfern and Hunter on International Arbitration*, 59. The New York Convention and the Model Law "have helped to link national systems of law into a network of laws that, while they may differ in their wording, have as their common objective the international enforcement of arbitration agreements and of arbitral awards."

[387] Ibid. at 599.

Consequently, the readings of the aforementioned articles containing the divergent terminologies in describing the concept of public policy evidenced the lack of serious clarity on the Ethiopian court's approach towards the restrictive court intervention in reviewing arbitral awards on the grounds of public policy. Additionally, one cannot tell based on the letter of the law in the recent Proclamation whether the Ethiopian Courts are supposed to follow a restrictive approach in considering the public policy challenges in the enforcement, setting-aside or recognition and enforcement of international arbitration or arbitral awards. In fact, the mandatory nature of Art.2(3) seems to dictate the identical treatment of recourses against the non-enforcement of interim measures, enforcement, and recognition of arbitral awards based on public policy grounds in both domestic and international arbitrations. It also is possible that the mandatory application of Art.2(3) has the potential to lead to an unregulated court-review of international awards, and that could significantly compromise party autonomy and the principle of finality in international commercial arbitration.

Therefore, while it would be ambitious to propose a legislative amendment to a statute enacted less than two years ago, an authoritative court interpretation could be introduced to address the problems surrounding the concept of public policy in Ethiopian Arbitration law. In doing so, an effort should be made to elucidate whether or not there is a disparity between the concepts of 'government policy', 'public morality', 'national security' and 'public policy'. There is also a need for court deliberation if there is different treatment of the application of 'public policy' defense regarding the setting-aside, enforcement, and recognition of arbitral awards between purely domestic arbitration and international arbitration. This author is of the opinion that the above propositions secure a relatively balanced approach, ensuring the Ethiopian legal system's fundamental principles without undermining the party autonomy in international commercial arbitration.

4.5 Intervening conclusion

In this Chapter, the thesis addressed the notion of inarbitrability in administrative contracts and the concept of public policy adopted in the current Ethiopian Arbitration statute. The analysis also covered the implication of both notions on the principle of party autonomy under the perspective of international commercial arbitration. Furthermore, intending to explore the historical background

and the source of Ethiopian administrative contract law, the chapter included a brief comparative analysis of French law on administrative contracts in general and the primary source of the Ethiopian Administrative Contract law, a theoretical book written by a French scholar.

The Ethiopian Administrative Contract law's source can be traced back to the French legal system, despite the difference in the degree of the relationship with the French statutory admirative laws, the case law or the scholar's doctrine. Nevertheless, unlike its source, and despite its drafters' call for amendment, the otherwise stagnant statutory Law of the Ethiopian Admirative Contract has remained the same for more than five decades now. One of the main problems concerns the very concept of what constitutes a contract to be regarded as an administrative one and this problem has a direct implication on the notion of the 'inarbitrability of administrative contracts', which was one of the major focuses of the analysis in this chapter.

The current arbitration law under Art.7(7) states that a dispute relating to an administrative contract, as a rule, is inarbitrable. Nevertheless, the definition part of this Proclamation fails to include general guidance that helps determine questions such as which matters as per the Ethiopian arbitration law could be categorized as administrative contracts. There is also no express rule that helps determine the exceptions to the inarbitrability principle, types of administrative contracts with statutory authorization of arbitrability, in the arbitration Proclamation and this lack of clarify affect the requirements for certainty in the enforcement of the arbitration agreement and the principle of party autonomy.

The case law of the Ethiopian legal system has also failed to put an authoritative settlement on the controversies surrounding the inarbitrabitlity of administrative contracts. In the *Woira Wood* case, the Federal Supreme Court Cassation Bench attempted to identify the contours that help define the concept of administrative contracts; yet the interpretation of the Supreme Court appears to open more questions than answers. Another domestic Cassation case (*Tana Water Well Drilling*) that attempted to conceptualize the legislative intention behind Art.315(2) of the Civil Procedure Code failed to provide meaningful clarity on the notion concerning the inarbitrablity of administrative contracts. However, looking at the positions taken by the Ethiopian Administrative Agencies involved

in international arbitration and the Ethiopian Cassation Bench in the *Salini Constuttori S.p.A, Consta JV* and the *Ethiopian Grain Trade Enterprise (EGTE)* cases, there seems to be a tacit avoidance of the requirement for the inarbitrability of administrative contracts, at least, in the international arbitration perspective.

The second main focus of this chapter was on the Ethiopian viewpoint regarding the concept of public policy in international commercial arbitration. The current arbitration law of Ethiopia adopted varied terminologies to describe the concept of public policy and it failed to identify the disparity between transnational and domestic concepts of public policy. On top of that, as of yet, the Federal Supreme Court Cassation Bench has never had an opportunity to provide an authoritative interpretation, that takes into account the public policy concepts adopted in the New York Convention which was recently ratified by Ethiopia. Therefore, the question as to what approach the Ethiopian courts will take regarding the interpretation of public policy as a ground for challenging arbitral awards is still unsettled. The relatively much debated and still undetermined grounds for challenges of arbitral awards, which sometimes interchange with the public policy ground under Ethiopian case law, is the "basic or fundamental error of law" notion; the next chapter will deal with that ground in detail.

Chapter V: Merit-based Court Review of Arbitral Awards under the Ethiopian Arbitration System

5.1 Introduction

The French arbitration system, which had a significant influence on Ethiopia's first arbitration law included in the Civil Code restricts the grounds for reviewing arbitral awards based on merit, particularly in international arbitration context.[388] Additionally, challenges to arbitral awards on the basis of errors in law or facts made by the arbitral tribunal are generally not considered legitimate. In Ethiopia on the other hand, as stipulated in section 3.3.1 of this paper, appeal from arbitral awards on both substantive and procedural grounds had been possible prior to the enactment of the recent Arbitration Proclamation. Moreover, in practice, despite the silence of the Civil Code and the Civil Procedure Code on the possibility of Cassation Court-based review of arbitral awards,[389] the Federal Supreme Court Cassation Bench has been dealing with merit-based review of both domestic and international arbitral awards. This chapter will focus on the position of the current Arbitration Act concerning the court review of arbitration on non-procedural grounds and the practical aspect of the Cassation Court's substantive review of arbitration awards on cases involving foreign elements. The principal goal is to illustrate the contemporary position of the Ethiopian arbitration system regarding the substantive review of arbitral awards and the potential implication of such a position on party autonomy in the context of international commercial arbitration.

The analysis in this chapter contains two main segments: a section that covers the statutory response to the merit-based court review of international commercial awards and the case-law's reaction to the same subject-matter. The first part will particularly deal with two sub-articles of Article 49 of the current arbitration law, that modifies somewhat the previous position of the Ethiopian arbitration system regarding the court review of arbitration awards. The first rule, sub-article (1) of Article 49, appears to rule out the right to appeal against arbitration awards while at the same time

[388] Fouchard and Goldman, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 943. "French arbitration law allows no control by the courts over the arbitrators' decision on the merits of a dispute, except with regard to compliance with the requirements of the French conception of international public policy. An error of fact or law by the arbitral tribunal, however blatant, will not constitute a ground on which an award can be set aside or refused enforcement."

[389] Seyoum Yohannes Tesfay, *International Commercial Arbitration:Legal and Institutional Structure in Ethiopia*, 190. "Legislations in force in Ethiopia do not directly address the question of whether arbitral awards are subject to review on cassation. Only case law does that."

authorizing parties to contractually expand the merit-based review of arbitral awards by the Court of Appeal. Sub-article 2 of the same article, on the other hand, maintains, as a rule, the right to apply against awards to the Cassation Court on the 'fundamental or basic error of law' grounds except for the party's freedom to contract out this right. In the second part, the Ethiopian Federal Cassation Courts' decisions concerning the 'fundamental error of law' principle as a ground to review arbitral awards will scrutinize to explore the Ethiopian case law's standpoint on merit-based review of international arbitral awards.

5.2 Contractual expansion of judicial review of arbitral awards by an Appellate Court

The current Ethiopian Arbitration Law's effort to strike a balance between the two competitive[390] and at the same time paramount principles of arbitration, the principles of party autonomy and finality, deals, not only with the question of laws but also with the points of facts. The concept of party autonomy is one of the principal features of international commercial arbitration since it allows parties, among others, to tailor the arbitration proceedings as they see fit, subject to the minimal exceptions in the applicable law.[391] The principle of finality, on the other hand, deals with the need to have efficient and less expensive enforcement of arbitral awards by limiting some of the judicial reviews of awards such as appeals against arbitral awards in this case.[392]

Two main rationales are advocated by the pro and against the idea of contract-based expansion of court review of arbitral awards in general. Proponents of contractually expanded judicial review of awards mainly base their assertion on four grounds: avoidance of arbitrator's law-making effort, limiting potential disregard or misinterpretation of the applicable law[393], meeting parties'

[390] Mark D. Wasco, "When Less Is More: The International Split over Expanded Judicial Review in Arbitration Note," *Rutgers L. Rev.* 62, no. 2 (2009–2010): 608. "[W]hen parties contract for expanded judicial review, these two forces [party autonomy and finality] come into direct conflict."
[391] Ibid. "Party autonomy gives parties the freedom to choose how their arbitration will be run and what should be included within it."
[392] Ibid. "Finality ensures that once an arbitration award has been rendered, the award will be quickly and efficiently enforced without the delay and expense of dealing with appeals."
[393] Ibid. at 614. "[P]arties should be able to contract for expanded review to overcome the fear that a 'maverick' arbitrator will render a decision on the merits that is not in accordance with the applicable law."

expectations,[394] and furthering efficiency[395]. The argument against expanded judicial review of arbitral awards, on the other hand, counts on the need to have speedy, efficient,[396] and confidential[397] awards in the arbitration system by prohibiting the contract-based expansion of court reviews of arbitral awards. This section will spell out the legitimacy of the judicial review of an arbitral award based on the parties' agreement on points of fact under Ethiopian arbitration law.

A brief comparative analysis of US and English arbitration law on this point will be conducted to spell out the recent Ethiopian Arbitration law's compatibility with the pro-arbitration jurisdictions. There is a simple reason for selecting those countries' arbitration regimes as a point of comparison. The contract-based expansion of arbitral awards review by regular courts had been a highly debated issue for a considerable time in the US despite disagreements among the courts.[398].In the English Arbitration Act as well, subject to a rigorously regulated precondition of securing court leave, a court- review of arbitral awards based on findings of fact in the award is possible if the decision of the tribunal is "obviously wrong".[399]

When it comes to the contract-based expansion of court review of arbitral awards under the Ethiopian arbitration law perspective, the *contrario* reading of Art.49(1) of the Arbitration Proclamation seems to allow parties, who anticipate that an arbitral tribunal may render an award tainted by a factual error, to contractually expand an appellate court review of such awards. To use the language of the Proclamation, "[u]nless the contracting parties agree otherwise in their arbitration

[394] Ibid. at 615. "Arbitration clauses are creatures of contract and the most fundamental tenet of contract law is to meet parties' expectations to ensure that when parties agree, those agreements are enforced."
[395] Ibid. In the absence of permissive law for contract-based expansion of arbitral awards review, "parties will be forced to choose other less efficient means to insulate themselves from any future dispute…[they] may choose to forgo arbitration as a means to govern their disputes or …may take out more insurance in order to protect themselves against 'maverick decisions."
[396] Ibid. at 615–16. "Arbitration provides a means to bypass the slow, costly, and often inefficient national court systems through a process that provides quick decisions that are enforceable without time consuming appeals…Expanded judicial review rids arbitration of these benefits by including an expensive and time consuming appeal process."
[397] Ibid. at 616. " Arbitration procedures are often subject to strict confidentiality so that information about the process, evidence submitted, and the subsequent decision is never released to the public…if parties are allowed expanded review, courts will necessarily be forced to examine the facts in order to decide the case on its merits…thereby extirpating the confidentiality that gives arbitration one of its main benefits."
[398] Blackaby et al., *Redfern and Hunter on International Arbitration*, 597.
[399] Arbitration Act 1996 1996. Article 69(3)(c)(i)

agreement, no appeal shall lie to the court from an arbitral award." Generally, the contract-based explanation of court-review of award on substantive issues would not be a ground of appeal against an arbitral award in most jurisdictions with developed arbitration law[400].

Nevertheless, there is a further exception to the exceptional rule that permits contract based-expansion of review of arbitral awards in the current Ethiopian arbitration law. Sub-article 3 of the same article that allows parties to expand merit-based review award by agreement, puts a limitation to this right depending on the nature of the grounds for which the award has been relied on. According to this sub-article, whenever the party's express agreement allows for the application of equity or common commercial practices in rendering the award or if the applicable substantive law provides for such, the right to expand the court's review of awards by agreement will not be legitimate. Furthermore, consent awards and the requirement for a record of the award's reason by the tribunal are subject to no appeal.[401] Therefore, readers should be cognizant of the double-faced exceptions to the agreement-based right to expand review of awards on merit in the Court of Appeal under the Ethiopian arbitration law.

The Proclamation in allowing private parties to expand the grounds for review of awards by a court of appeal, seems to follow a different approach from the Model Law and even from the England Arbitration Act or the US arbitration system. In the Model law, there is no mention of the party's freedom to expand the court review of arbitral awards by the court of appeal. Section 69(3)(c)(i) of the English Arbitration Act, an appeal against the award is possible on the question of fact providing that all the parties to the proceedings have agreed to that and are able to secure a court leave to that effect.[402]. In the US arbitration regime, the possibility of expanding the scope of courts'

[400] Blackaby et al., *Redfern and Hunter on International Arbitration*, 596. "[A]lmost all states with developed laws of arbitration refuse to allow appeals from arbitral tribunals on issues of fact."
[401] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021 (Ethiopia 2021). Art. 49(3) "Notwithstanding any agreement to the contrary, no appeal shall lie from arbitral award rendered in accordance with Sub-Article (5) of Article 41, Article 43, and Sub-Article (2) of Article 44 of this Proclamation."
[402] Arbitration Act 1996.

review of awards had been the subject of divergent arguments.[403] For instance, the California 9th Circuit US Court of Appeals in the case of *LaPin1e Tech,Corp. vs Kyocera Corp.,130 F.3d 884(9th Cir.1997*), reversed a district court's decision for a limited review of awards based on Sections 10 and 11 of the Federal Arbitration Act, holding that parties by agreement may subject an award to an expanded court review on grounds such as "unsupported factual findings or errors of law".[404] Nevertheless, the court of appeal did not take long to reconsider its position on the possibility of contract-based expansion of grounds for a court review of awards. In a request for a rehearing *en banc*, in the *Kyocera Corp. vs. Prudential-Bache Trade Servs.,Inc.,299 F.3d 769(9th Cir.2002),* case, the 9th Circuit overruled its previous ruling on the parties' power to expand the grounds of review of awards by agreement.[405]. On top of that, the US Supreme Court in the *Hall Street Associates, LLC vs. Mattel, Inc,* ruled that parties are not authorized to expand the scope of judicial review of awards by agreement.[406]

In Ethiopia on the other hand, the literal readings of sub-article (1) of Article 49 of the new arbitration law appear to legitimize, the parties' agreement to an expanded review of arbitral awards on the error of facts, particularly in domestic arbitration. From the reading of this sub-article, it is less clear whether or not the right to contractually expand court review of arbitral awards is restricted to domestic arbitrations only or equally applicable to international arbitrations as well.[407] In other words, the cumulative reading of Art.49(1) and (3) leaves no doubt that if the parties to a contract

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[403] Blackaby et al., *Redfern and Hunter on International Arbitration*, 597. "For some time, there remained a difference of opinion between different US courts as to whether or not parties might expand the scope of review."

[404] "341 F.3d 987," accessed October 12, 2022 https://law.resource.org. While we [the majority] "affirmed the district court's determination that Kyocera presented no basis for modifying the arbitral award on statutory grounds, …we remanded to allow the district court to apply the parties' contractually expanded standard of review of unsupported factual findings or errors of law".

[405] Ibid. " We therefore overrule LaPine I[*LaPine Tech,Corp. vs Kyocera Corp.,130 F.3d 884(9th Cir.1997*], affirm the district court's 1995 conclusion, and hold that a federal court may only review an arbitral decision on the grounds set forth in the Federal Arbitration Act. Private parties have no power to alter or expand those grounds, and any contractual provision purporting to do so is, accordingly, legally unenforceable."

[406] "U.S. Reports: Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).," image, *Library of Congress, Washington, D.C. 20540 USA,* accessed October 13, 2022 www.loc.gov.

[407] Blackaby et al., *Redfern and Hunter on International Arbitration*, 592. "France distinguishes between 'domestic' and 'international' arbitrations, and does not permit appeals on points of law to its courts from an international award."

have declared their intention in the arbitration agreement, an appeal against the award based on an error of fact is enforceable. Moreover, unlike the English Arbitration Act, which strictly limits the right to appeal with a preconditional mandate to seek leave to appeal, no provision in the current Ethiopian Arbitration law mandates parties to secure court leaves for filing an appeal against the award on the question of fact.

As a consequence, the approach adopted under Art. 49 (1) and (3) of the current Ethiopian arbitration system, appears to open up a wide space for compromising the principle of finality in the international arbitral process in the interest of party autonomy. For instance, this provision could authorize a potential disregard of the principle of finality in the interest of deterring arbitrators' failure to evaluate the admissibility of evidence in rendering the award following the requirements in the Ethiopian Civil Procedure Code.

At this point, it is worth noting that based on Article 79 of this Proclamation, the Ethiopian Court of Appeals may apply the Civil Procedure Code rules in evaluating the admissibility and relevance of evidence presented in the arbitral proceedings. That is to mean that, if the contracting parties opted-in a court appeal on the point of facts, the discretionary power provided to the arbitral tribunal to determine the rules of the arbitral procedure which includes "matters relating to admissibility, relevance, and evaluation of evidence" would be inapplicable in the court litigation proceedings. Consequently, the statutory position regarding the contract-based expansion of court review of awards, despite its adherence to the principle of party autonomy, may undermine the otherwise expedited dispute resolution system in the arbitration proceedings and lead to a prolonged, uneconomical, and time-consuming judicial review process. On top of that, the approach adopted in this article also conflicts with the position of the major arbitration jurisdictions, particularly from international arbitration perspectives.

In a nutshell, despite the palpable problem of finding a balance between the competing interests of public policy and the principle of finality in domestic arbitration laws, the principle of

finality appears to have gained relative favor internationally. [408]That international favor for the principle of finality does not seem to be the case in the current arbitration law of Ethiopia. Parties can bypass the principle for a limited court review of arbitral awards on the application for a setting-aside at the seat of arbitration provided under Art.50 of the same Proclamation. This thesis suggests that the potential problem of finality, a full-fledged review of awards in the court of appeal, as a result of applying the contract-based expansion of post-award court review could be mitigated by providing an authoritative Cassation Court's interpretation. The pro-arbitration national policy mentioned in the preamble of the arbitration Proclamation could serve as a pre-text for the binding interpretation.[409] By implementing this approach, the potential problem of finality in the Ethiopian arbitration could significantly minimized.

5.3 Error of law as a ground for a court-review of arbitral awards in Ethiopia

Prior to the enactment of the recent stand-alone Arbitration Proclamation, Ethiopian arbitration law considered "fundamental" or "basic" error of law principle as a mandatory ground for reviewing arbitral awards despite the existence of a finality clause in the arbitration agreement. The current arbitration statute maintains court review of awards on points of law as a rule, but with an exception that allows parties to exclude it by agreement. Article 49(2) of the Proclamation, a provision that regulates the review of arbitral awards by the Cassation Bench reads as follows: "Unless there is an agreement to the contrary, an application for cassation can be submitted where there is a fundamental or basic error of law."

One thing is clear from the literal reading of this provision. Contrary to the previous practice of the Ethiopian arbitration system that had mandated cassation court review of awards on points of law, Art.49 (2) of the current proclamation permits parties to enter into a prior agreement excluding

[408] Ibid. "It is not easy to strike a balance between the need for finality in the arbitral process and the wider public interest in some measure of judicial control if only to ensure consistency of decisions and predictability of the operation of the law. Internationally, however, the balance has come down overwhelmingly in favour of finality and against judicial review, except in very limited circumstances."
[409] Proclamation No. 1237-2021 Arbitration and Conciliation, Working Procedure, 1237–2021 (Ethiopia 2021). "WHEREAS, arbitration and conciliation help in rendering efficient decision by reducing the cost of the contracting parties, protecting confidentiality, allowing the participation experts and the use of simple procedure which provides freedom to contracting parties;"

such kind of review. The inclusion of a rule that allows parties to opt-out the Cassation Court review on error of law ground in the new Proclamation is a relatively positive development toward adhering to the principle of party autonomy in the statutory part of the Ethiopian arbitration system.

However, the fundamental error-of-law notion included in the new arbitration act is not without problems as there are at least two open questions that could lead to an interpretative issue in this provision. One is the current Ethiopian arbitration law appears to extend its application to an error of foreign substantive laws chosen by the parties. In other words, it is less clear whether or not the applicability of the right to exclude the cassation court review on points of law is limited to domestic arbitration. Secondly, the language of this sub-article suggests that parties are not allowed to make an application to the Cassation Court to determine 'any' error of law committed by the arbitral tribunals. The sole ground for the review of arbitral awards rather is a somewhat more intolerable error of law that could be categorized as being a 'fundamental or basic' error by the Cassation Bench. Nevertheless, the current arbitration law does not give guidance as to what constitutes a "fundamental or basic error of law" that could justify an application for the review of arbitral awards by the Cassation Bench.

One may argue that such perplexity in the meaning of fundamental or basic errors of laws, could be determined by referring to another Ethiopian statutory law[410] that puts forth a seemingly exhaustive list of requirements for establishing the meaning of those terminologies under the perspective of the Ethiopian legal system. For instance, as per Art.2(4) of the Federal Courts Proclamation, there are ten lists of factors that constitute a fundamental or basic error of law that, according to Article 10 of the same Proclamation, warrants Cassation Court review of any final

[410] Federal Courts Proclamation No. 1234/2021 (Ethiopia). Art.2(4) "'Basic or fundamental error of law' shall be final judgment, ruling, order or decree which may be filed in Federal Supreme Court Cassation division pursuant to Article 10 of this Proclamation and/or contains either one or similar of the following basic error and grossly distresses justice:

a) in violation of the constitution
b) by misinterpreting a legal provision or by applying an irrelevant law to the case;
c) by not framing the appropriate issue or by framing an issue irrelevant to the litigation;
d) by denying to an award judgment to a justiciable matter;
e) by giving an order in execution proceedings unwarranted by the main decision;
f) in the absence of jurisdiction over the subject matter dispute;
g) an administrative act or decision rendered in contradiction with the law
h) in contravention to binding decision of the Federal Supreme Court Cassation Division.[sic]

decisions, orders, or decrees by the courts, administrative organs, or arbitral tribunals. These lists include violations of constitutional provisions, misinterpretation or misapplication of applicable laws, erred, or irrelevant framing of issues, failure to determine justiciable matters, incoherence between an order for enforcement of judgment and the principal decision, lack of material jurisdiction, and unauthoritative decision or act of administrative organs in contradiction to the authoritative rulings of the Federal Supreme Court Cassation Court. While this provision is generally referring to all categories of binding decisions, provided by different kinds of adjudicatory organs, it is also relevant to arbitral tribunals' final awards.

Based on the cumulative reading of Article 10(1)(h) and (2) of the Federal Court Proclamation, the Federal Supreme Court Cassation Division has jurisdiction to review a "final decision rendered by an [sic]alternative dispute resolution mechanisms" on the grounds of the basic or fundamental error of laws grounds and provides an authoritative interpretation. A final decision given by an arbitral tribunal—a form of alternative dispute mechanism—is, therefore, subject to the Cassation Courts review if for instance, the arbitral tribunal in providing the award, misinterpreted the applicable law, wrongly framed the issue, failed to provide an award on justiciable matters or provide an award in contrast to the autorotative interpretation of laws given by the previous decision of the Cassation Bench in relevant cases. However, it would be unsound to assume that cross-referring to another exclusively domestic statute would settle the interpretative issue. The absence of an express statutory provision that differentiates the parameters that should be applied in establishing the 'basic or fundamental' error of law in the context of international arbitral awards in the current Arbitration Proclamation would still make the interpretation issue far from being settled even if a cross-reference to the domestic legislation was considered to be a legitimate assumption.

When it comes to international commercial arbitration, it is important to note that applying the previously mentioned domestic proclamation to define the "fundamental or basic error" in the arbitration laws may result in unintended outcomes. The cross-reference to the domestic Proclamation would automatically legitimate arbitrators' blunders in the interpretation of the law, inappropriate framing of issues, and failure in observing the relevant precedent cases of the Federal Supreme Court

published in a local language as a ground that warrants court review of awards under the "fundamental or basic error of law" pretext. This in effect would undermine the two paramount principles of arbitration (party autonomy and finality) and potentially lead to a wider, perhaps, *de novo* review of both the procedural and substantive aspects of the arbitral awards. Therefore, this author strongly advised to exercise caution when considering this course of action.

As a recommendation, parties to international commercial arbitration who are contemplating settlement of disputes by arbitration seated in Ethiopia should be cognizant of the very real possibility that the award might be subject to an extensive court review on grounds different from the limited and widely accepted reasons for review of arbitral awards in the setting-aside stages at the seat of arbitration. At the same time, it is also worth noting that this risk can be mitigated with a contractual clause that requires a complete restriction of judicial reviews of awards on fundamental or basic errors of laws. Therefore, parties to international commercial arbitration are advised to proactively opt-out Article 49(2) of the Proclamation if they are considering their seat of arbitration to be in Ethiopia and avert the unwanted and lengthy post-award court proceedings. The aforementioned problems on court review of arbitral awards exclusively refer to the statutory laws of Ethiopian arbitration. The case law also contains a controversial judgment regarding the doctrine of errors of laws as a ground for court reviews and will be addressed in detail in the subsequent section.

5.4 Authoritative decisions of the Federal Supreme Court Cassation Bench on the error of law by arbitral tribunals

As suggested throughout the previous section, regardless of the statutory improvements that the Ethiopian legislators made recently on this subject matter, the perspective of the case-law-like system of Ethiopia on the power of the Federal Cassation Court to review arbitral awards on the ground of 'fundamental or basic error of law' needs to be examined. The main purpose of undertaking this examination is to get a full picture of the Ethiopian arbitration system as this regime is characterized by the hybrid nature of the statutory and case-law systems. This section will deal with two relevant cases concerning the 'fundamental or basic error of law' doctrine in the case-law system. Unlike the error of laws committed in any final decision of courts, in which the Federal Supreme

Court Cassation Court has a Constitutionally guaranteed power to provide authoritative and binding interoperation, this court's power to review arbitral awards on the error of law grounds remains to be controversial. This analysis provides an important insight into the position of the cassation court regarding the review of international arbitral awards and the perplexity in this court's interpretation of the fundamental or basic error of law principle.

5.4.1 Ethiopian-Djibouti Railway Enterprise vs. Consta Joint Venture

On November 29, 2006, *Consta Joint Venture* (*Consta JV*), an Italian contractor, and the *Ethiopian-Djibouti Railway Enterprise*, a joint enterprise of the Ethiopian and Djibouti governments, entered into a railway maintenance contract. In February 2013, *Consta JV* notified the *Ethiopian-Djibouti Railway Enterprise* of the termination of the contract citing payment default for partially completed works and non-observance of "basic obligations under the contract". [411] *The Ethiopian-Djibouti Railway Enterprise*, on the other hand, sent *Consta JV* a counter-notice of the contract termination on February 19, 2013.[412] Such dispute led to the onset of the Permanent Court of Arbitration's (PCA) administered arbitration seated in Addis Ababa, Ethiopia.

Consta JV, the then claimant, initiated the arbitration by filing a complaint that contained three main counts: breach of contract that caused the delay of the project for 644 days, failure to provide rail transportation per the transport agreement, and delay of interim and full payments in breach of the IPCs (Interim Payment Certificates) 6 through 9 and IPAs (Interim Payment Agreements) 7 through 11. The defendant, Ethiopian-*Djibouti Railway Enterprise*, filed a counterclaim based on among others factors, accounts of fraud in the conclusion of the main contract, non-conformity of materials or works with the terms of the contract, and delays to the project. Nevertheless, the claimant, Consta *JV*, won the arbitration on almost all accounts[413] and was awarded

[411] Mundi, "Consta Joint Venture v. Chemin de Fer Djibouto-Ethiopien (the Ethiopian-Djibouti Railway), representing the Federal Democratic Republic of Ethiopia and the Republic of Djibouti, PCA Case No. 2013-32," 15–16.
[412] Ibid. at 16.
[413] Ibid. at 161. The Arbitral Tribunal found the Claimant (*Consta JV*) responsible on one account, "breach of good faith for failure to notify Respondent of the change to G.C.F.'s participation in Consta JV" out of ten accounts.

more than 20 million Euros.[414] The defendant objected to this final award and applied for the review of the arbitral awards by the Cassation Bench of the Ethiopian Federal Supreme Court.

5.4.2 The Cassation Bench's review of the award in the ConstaJV Vs. Ethiopian-Djibouti Railway Enterprise

Aggrieved by the decision of the Arbitral Tribunal, the *Ethiopian-Djibouti Railway Enterprise*[415] filed an application, dated 26th May 2016, for the review of the award by the Ethiopian Federal Supreme Court Cassation Bench on 'fundamental error of law' grounds. The appellant, in its complaint, cited two reasons in asserting the jurisdiction of the Cassation Bench to review the award: finality and the doctrine of precedent. The government agency claimed that the applicable procedural rule of the arbitration (EDF Rules) mandated the arbitral tribunal's decision to be considered as the final judgment of the member countries' court and hence the Federal Cassation Bench has jurisdiction to review any final court judgments according to the binding precedent in the *National Mineral Ltd. Vs. Danni Drilling Ltd.* (Case No.42249.)

5.4.3 Arguments of the appellant at the Cassation Bench

The Appellant argued that the arbitral tribunal committed a "fundamental error of law" in the following instances. First, it contends that the tribunal, in deciding that *Consta JV* was not responsible for fraud or fraudulent misrepresentation after or prior to the conclusion of the maintenance contract,[416] disregarded the requirements for the formation of a valid contract under Article 1704 of

[414] Ibid. at 163. "In summary, on account of its responsibility for breaches of the Contract, the Tribunal orders Respondent to pay Claimant a total of €20,664,767 subject to nine percent simple interest calculated from the date of this award until the date of full payment."
[415] Case No. 128086Judgment of the Federal Democratic Republic of Ethiopia Supreme Court Cassation Bench,26 May 2018

[416] Ibid. at 66. The Arbitral tribunal decided that "there was no fraud because Claimant[Consta JV] did not engage in deceitful practices. Claimant represented at the time of contracting that G.C.F. would be a legal participant in Consta JV and that it would actually participate in the performance of the contract. As the parties recognize, G.C.F. was in fact a legal participant in the Consortium and in fact continues to be exposed to joint and several inability for the Consortium's actions."

the Ethiopian Civil Code[417] and thereby committed a fundamental error of law. In other words, the secretive change of the G.C. F.'s share in the Joint Venture Agreement, from 30% to 0.2%, a nominal stake, makes *Generale Costruzioni Ferroviarie S.p.A.* ineligible to fit the tender threshold. According to the appellant, the fundamental reason for the formation of the railway maintenance contract and for *Consta JV* to win the auction, has been the shared and combined knowledge, responsibility and resources that the two companies have set up in their joint venture. Furthermore, the appellant asserted that the respondent (*Consta JV*) failed to discharge its contractual obligation under Article 12.7 and 64.2(h) of the General Conditions for Works Contracts (GCC), an obligation which requires prior notice of any changes made to the internal structure, including stock dividends and this act reveals the malicious intent of the respondent before and after the formation of the contract and thereby contested the holdings of the tribunal[418] regarding the obligation of the respondent under Article12.7 Secondly, the appellant submitted that the tribunal's reliance on the report of the Navigant Consultant Company regarding damages calculation, in providing its award, overlooked the provision of the Ethiopian Civil Code (Articles 1799-1801)[419] and that as well, amounts to a commission of the fundamental error of law.

Relatedly, the appellant claims that, in the arbitration proceedings, there was a lack of good faith on the part of the Tribunal in fairly and equitably taking and assessing the evidence produced by

[417] Civil Code of The Empire of Ethiopia (Ethiopia 1960). Art.1704(1) "A contract may be invalidated on the ground of fraud where a party resorts to deceitful practices so that the other party would not have entered into the contract, had he not been deceived."

[418] Mundi, "Consta Joint Venture v. Chemin de Fer Djibouto-Ethiopien (the Ethiopian-Djibouti Railway), representing the Federal Democratic Republic of Ethiopia and the Republic of Djibouti, PCA Case No. 2013-32," 68. "Although the Tribunal considers that Claimant's failure to inform breached good faith, it does not find that Respondent[Ethiopian-Djibouti Railway Enterprise] has demonstrated that any harm to Respondent followed either from the change to G.C.F.'s participation or from Claimant's failure to inform Respondent regarding its changed participation. Respondent did not establish that G.C.F had exceptional technical capacities that would have avoided or overcome the problems that arose and it did not establish that it would have acted on the change to G.C.F.'s participation had it known earlier."

[419] Ibid. at 60. The Tribunal's decision regarding the report by the Navigant Company stated that the reports are "based (i) on Sintagma's extensive and generally reliable quantity surveying, (ii) on a through review of the available documentation, and (iii) on careful and appropriate analysis. Further, the Respondent has not produced expert reports aimed at rebutting Navigant reports, which were prepared by a reputable company and whose authors possess strong credentials."

both parties.[420] Moreover, the Appellant disputed the Tribunal's holding regarding the obligation of *Consta JV* under Articles 12.1[421] and 17.1[422] of the GCC(General Conditions for Works Contract) concerning the provision of a finalized design for the work and claims that the tribunal's interpretation of those articles conflicted with the mandate stipulated under Article 1733 of the Ethiopian Civil Code, a provision which prohibits interpretation of unambiguous contract terms.[423]. Based on the above-mentioned submissions, the appellant argued that arbitral tribunal committed a fundamental error of law and thereby requested a reversal of the award and payment of damages incurred by the cost of the proceedings.

5.4.4 Summary of the argument of the respondent (Consta JV) at the Cassation Bench

The respondent declined any liability on termination of the contract and questioned the relevance of the precedent judgment on Case No.42239 (*National Mineral Corporation Vs. Dani Drilling Plc.*)[424] to the case at hand. The respondent also contested the jurisdiction of the Cassation

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[420] Decisions of the Federal Supreme Court Cassation Bench at 133, Ethiopia-Djibouti Railway V.Consta JV, 23 The Ethiopian Federal Supreme Court (Federal Supreme Court of Cassation 2018). "የግልግል ዳኝነት ጉባኤው የአብላጫው ድምጽ ከግራ ቀኞቸው የቀረቡትን ማስረጃውች ከወገንተኝነት በጸዳ ሁኔታ በእኩልነት በመመዘን መዳኘት ሲገባው ቅን ልቦና በጎደለው አካሄድ የተጠሪን ማስረጃውች ሙሉ ለሙሉ በመቀበል፤ የአመልካችን ማስረጃውች ሳይመዘን መጣሉ የማስረጃ አቀባበልን፤ የማስረጃ ምዘና ደንቦችን የሚጥስ ውሳኔ መስጠቱ መሰረታዊ የህግ ስህተት የተፈጸመበት ነው።" in a literal English translation, ([while the Majority of the Arbitral Tribunal should have evaluated equally the evidences produced by both parties, it rejected the evidences produced by the then respondent [Ethiopian-Djibouti Railway Enterprise] without proper revaluation, in violation of the rules regarding the acceptance and assessment of evidences and accepted all the evidences produced by the Respondent [the then Claimant] in bad faith and thereby commits a fundamental error of law.

[421] Mundi, "Consta Joint Venture v. Chemin de Fer Djibouto-Ethiopien (the Ethiopian-Djibouti Railway), representing the Federal Democratic Republic of Ethiopia and the Republic of Djibouti, PCA Case No. 2013-32," 97. "Article 12.1 GCC provides…[t]he contractor shall, with due care and diligence, and in accordance with the provisions of the contract, design the works to the extent stated in the contract, and execute, complete and remedy any defects in the works. The contractor shall provide all superintendence, personnel, materials, plant, equipment and all other items, whether of a temporary or permanent nature required in and for such design, execution, completion and remedying of any defects, insofar as specified in, or can be reasonably inferred from, the contract."

[422] Ibid. at 35. "Article 17.1 GCC…provides that '[t]he contractor shall draw up, and submit for the approval of the supervisor, a programme of performance of the contract, in accordance with the special conditions. The programme shall contain at least the following: […]the time limits within which submission and approval of the drawings are required'"

[423] Ethiopia-Djibouti Railway V.Consta JV, 23 The Ethiopian Federal Supreme Court, at 134.

[424] National Mineral Ltd.V.Danni Drilling Ltd., Ethiopian Law Information Portal 352 (Federal Supreme Court of Cassation 2010). "…ጉዳያቸው በግልግል ዳኝነት እንዲታይላቸው የተስማሙበት[sic] ወገኖች የግልግል ዳኝነቱ የሚሰጠው ውሳኔ የመጨረሻ ነው በማለት ስለ ተስማሙ ብቻ ጉዳዩ በሰበር ሥርዓቱ እንዳይታይ ፍላጎት አሳይተዋል ተብሎ መሠረታዊውን የሕግ ስህተት ላለማረም ምክንያት ሊሆን የሚችል አይደለም።" Literal English translation by the author; '…even if the parties agreed that the decision of the Arbitral Tribunal to be final, the fact that the parties have intended

Bench citing Art.80(3)(a) of the FDRE Constitution and Proclamation No.25/1996. Article 80(3) a of the FDRE Constitution regulates the jurisdiction of the Federal Cassation Bench, although there appears to be an inconsistency[425] between the Amharic and English versions of the article. The respondent cited Articles 33 and 34 of the EDF Procedural Rules as well and asserted that the award according to those provisions, is not considered a final judgment given in Ethiopia and therefore the Cassation Bench has no jurisdiction to review the award. Furthermore, the respondent mentioned the international principles of arbitration, specifically, the finality principle, enshrined under the NYC and ICSID Conventions as part of its contention that the Cassation Bench did not jurisdiction to review the arbitral award.[426]

Consta JV refuted the appellant's allegation regarding the validity of the container contract and the alleged secretive agreement to modify the value of members' shareholding in the Joint venture. According to the respondent, the appellant's claims stem from a misinterpretation of Articles 12.7 and 64.2h of the GCC.[427] *Consta JV*, the respondent, also proposed an alternative argument that even a breach of the aforementioned provisions of the GCC is not sufficient enough to establish the commission of fraudulent or malicious activity during the formation of the railway maintenance contract by the respondent.[428] Besides, according to the respondent's statement of defense, the appellant was aware years ago of the supposed breach of those provisions and the changes in the percentage of the shareholding in the joint venture and continued its participation in the execution of

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to avoid the Cassation Bench's system of review cannot be a reason for not reviewing the award on fundamental error of law grounds.'

[425] The Constitution of the Federal Democratic Republic of Ethiopia (Ethiopia). The Amharic version of the Constitution, (the authoritative language) Art.80(3)(a) stated that the Cassation Bench of the Federal Supreme Court has a jurisdiction to review "any final decision" on error of law grounds; the term 'any final decision' could include the final decisions of courts, Arbitral Tribunals, Administrative Court or even Religious Courts. On the English version on the other hand, the reviewing power of the Cassation Bench is limited to the final decision of "courts".

[426] Ethiopia-Djibouti Railway V.Consta JV, 23 The Ethiopian Federal Supreme Court, at 135.

[427] Ibid. at 136. "አመልካች ለነዚህ የዉሉ ድንጋጌዎች የሰጠው ትርጉም የተሳሳተ ነው።" English translation: 'The appellant's interpretation of those provisions the contract [Articles 12.7 and 64.2 (h) of the GCC] is erroneous.'

[428] *Ibid.* "ተጠሪ እነዚህን የዉሉን አንቀጽ ተላልፏል ቢባል እንኳን ግዴታውን መተላለፉ ብቻ ውሉን እንደጣሰ ከማስረዳት ባለፈ እነዚህ የዉል ግዴታውች በመጣስ የማታለልና የማጭበርበር ወይም የተንኮልን ተግባር ፈጽሟል ብሎ ለመደምደም የሚያስችል አይደለም።" English translation: 'Even if the Respondent is said to have been breached the aforementioned provisions of the contract, although it might be considered as a breach of contractual obligations, it cannot be concluded that the Respondent is involved in a deception, fraud or fraudulent acts.'

the maintenance contract nonetheless.[429] The respondent went on and asserted that the changes in the shareholdings of the G.C.F have no implication on the 'joint and several liability' of the members of the consortium; it only refers to the internal organization of the joint venture and hence *Consta JV* has no obligation to get prior consent of the Appellant for such kinds of agreements.[430]. On top of that, the respondent maintains that *Consta*, despite the alleged changes in the joint venture, has the necessary experience and track record of performance that enables it to discharge the obligation in the construction project.[431]

Concerning the OLAF (European-Anti Fraud Office) report[432], the respondent contended that the report had been in a rudimentary stage because it was not ratified and sanctioned by the Director General and it was prepared several years after the termination of the contract. Moreover, *Consta JV*, claimed that the report makes no reference to inherent fraud in the container contract except for the breach of the contract's obligation and missteps committed by various parties in the process.[433] Citing the above reasons, the respondent contested the jurisdiction of the Cassation Bench to review the award and in an alternative request, demanded that the court to uphold the decision of the arbitral tribunal and thereby ordered the appellant to pay the respondent the costs and legal fees.

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[429] *Ibid.* "አመልካች ይህ የዉል ድንጋጌ አለመከበሩም ከአምስት አመት በፊት እራሱ ለተጠሪ በጻፈው[sic] ደብዳቤዎች አውቆ እና የውሉ አፈጻጸም እያስቀጠለ ቆይቶ አሁን የውሉ መጣስ ማጭበርበር ነው ውሉ ይፍረስልን በማለት ያቀረበው ጥያቄ ተቀባይነት የለዉም። English translation: 'The letter[s] that the Appellant himself wrote to the Respondent five years ago made it evident that the Appellant knew the non-observance of those provisions and the current claim of the Respondent (after continuation of the performance of the contract for a considerable time) that the contract is fraudulent and should be invalidated, is immaterial.'

[430] *Ibid.* " በ ኮንስታ እና በ ጂሲኤፍ መካከል የተደረገው ስለሥራ ተግባራት፣ እና ስለትርፍና ኪሳራ ክፍፍል የሚደረግ የውስጥ ስምምነት ባለድርሻዎቹ ለአመልካች ባላቸው የአንድነትና የነጠላ ኃላፊነት ላይ ውጤት የሚኖረው አይደልም። ይህን የውስጥ ስምምነት ለማድረግ ደግሞ የአመልካችን የቅድምያ ስምምነት የሚጠይቅ አይደለም።" English translation: 'The internal agreement between *Consta* and *G.C.F* concerning activities and distribution of profits and losses, has no effect on the joint and several liability of the shareholders to the Appellant; it does not require the prior consent of the Appellant in order to conclude this agreement.'

[431] *Ibid.* "ኮንስታ ፕሮጀክቱን በውጤታማነት ልማከናወን የሚያስችለውን ልምድና ያፈጻጸም ሪከርድ ያለው ነው።" English translation: '*Consta* has the experience and track record to successfully execute the Project [the Railway Maintenance Work].'

[432] Mundi, "Consta Joint Venture v. Chemin de Fer Djibouto-Ethiopien (the Ethiopian-Djibouti Railway), representing the Federal Democratic Republic of Ethiopia and the Republic of Djibouti, PCA Case No. 2013-32," 61. The Appellant, in his statement of defence at the Arbitral tribunal's proceeding, had submitted that the report "finds evidence of fraud or irregularity".

[433] Ethiopia-Djibouti Railway V.Consta JV, 23 The Ethiopian Federal Supreme Court, at 136.

5.4.5 The cassation court's analysis

The Cassation Bench commenced its examination by addressing the issue of jurisdiction, a question of whether the Federal Supreme Court Cassation Bench has jurisdiction to review the award on 'fundamental error of law grounds', and concluded that it had legitimate jurisdiction to look over the matter. The Cassation Court considered Articles 37 and 80(3)(a) of the FDRE Constitution,[434] Article 10 of the Federal Courts Proclamation No.25/1996, cumulative with Article 2(4) of Proclamation No.454/2005,[435] Articles 351 and 356 of the Civil Procedure Code and the precedent case No.42239 in assessing whether it has jurisdiction to review the award.[436] Furthermore, the Cassation Court refers to various conventions, soft laws, and statutes such as the 1985 NYC, the Inter-American Convention on International Commercial Arbitration(B-35),[437] the UNCITRAL Model

[434] Ibid. at 138. "...የኢ.ፌ.ዴ.ሪ.ሕገመንግስት...አንቀጽ (3)(ሀ) መሰረት የፌደራል ጠቅላይ ፍ/ቤት መሰረታዊ የሆነ የሕግ ስህተት ያለባቸውን ማንቸውንም የመጨረሻ ዉሳኔ በሰበር የማየትና የማረም ስልጣን ይኖረዋል በማለት ደንግጓታል...በፍርድ ሊወሰን የሚገባውን ጉዳይ ለ ፍ/ቤት ውይም ለሌላ በሕግ የዳኝነት ስልጣን ለተሰጣቸው አካላት ማቀረብና ውሳኔ ውይም ፍርድ የማግኘት መብት በሕገመንግስቱ አንቀጽ 37 ሥር ተመልክቷል። English translation: 'As per Article 80(3)(a) of the FDRE Constitution, it has been regulated that the Federela Supreme Court, in its Cassation Bench, has a jurisdiction to review any final decision on a fundamental error of law ground…[and] Article 37 of the Cconstitution provides a right to a fair trial and an opportunity to litigate on a court of law or other body that is authorized by a law to adjudicate a justiciable matter.'

[435] Ibid. at 144.

[436] Ibid. at 142. "ከእነዚህ የሕጉ ድንጋጌዎች መረዳት እንደሚቻለው የግልግል ብይን ውይም ውሳኔ ብሕጉ በተመለከትዉ አግባብ እና ምክንያቶች በፍ/ቤት ታይቶ ሊታረም እንደሚችል ነው እንጂ በምንም መልኩ ሊታረም ይማይችል የመጨረሻ ዉሳኔ ነው ለማለት የሚቻልበት ሁኔታ የለም...የሄው ችሎት በ አመልካች ብሔራዊ ማዕድን ኮርፖሬሽን ኃ/የግ/ማህበር እና በተጠሪ ዳኒ ድሪሊንግ ኃ/የተ/የግ/ማህበር መካከል በነበረው ክርክር በሰ.መ.ቁ.42239 …በሰጠው ውሳኔ ተከራካሪ ወገኖቹ የግልግል ዉሳኔ የመጨረሻ ውሳኔ ነው ብለው ቢስማሙም፣ በግልግል ውሳኔዉ መሰረታዊ የህግ ስህተት የተፈጸመበት እንደሆነ ለዚህ ችሎት ቀርቦ የማይታይበት የህግ ምክንያት የለም በማለት...ወስኗል።" English translation: As can be understood from these provisions[afroementioned Articles], arbitration award or decision can be reviewed and corrected based on prescribed procedures and grounds but there is no way to say that the arbitration award is a final decision that cannot be reviewed in any way…this Bench, in a case between *National Mineral Corporation Plc. Vs. Dani Drilling Plc.* (Case No.42239) …ruled that 'even though the parties agree that the arbitration decision is final, there is no legal basis that precludes the Cassation Bench from reviewing arbitral awards on fundamental error of law ground.''

[437] Ibid. at 140. "የ ፓናማ ስምምነት… የሚባለው በ አንቀጽ 5 እና 6 ሥር እንደተመለከተው የግልግል ብይን የታየበት ሕግ አገር[sic]፣ ይህን ብይን እውቅና ለመንፈግና ተፈጻሚነቱን እምቢ ማለት የሚልባቸውን[sic] ምክንያቶች አስቀምጧል።" English translation: 'The Panama Convention… as referred under Articles 5 and 6, lays down grounds for refusing recognition and enforcement according to the law of the country in which the arbitral award is rendered[sic]. There appears to be a miss-quote by the Cassation bench concerning to the applicable law mentioned under 5 because, the law chosen by the parties (Art.5(1)(a)) and the law of the enforcement State(Art.5(2)(a)and(b) are also applicable to determine recognition or enforcement of the award besides the law of the Arbitration Seat.

Law,[438] the US FAA,[439] the 1996 English Arbitration Act,[440] the Swiss Intercantonal Arbitration Act,[441] and the Uniform Arbitration Act (UAA)[442] to substantiate its position that final arbitral awards are subject to a court review. The State of New Jersey's Arbitration Act and the Practice of the US Federal Courts are also mentioned in the Cassation Bench's analysis.

However, the relevance of the cited provisions from other jurisdictions arbitration law and conventions to the present case requires additional clarity, as their connection to the matter is not clearly established. Furthermore, as will be detailed in the next section, the provisions of the other jurisdictions cited by the court appear to be less relevant to the 'error of law' ground for review of awards as most of the cited statutes, soft laws or conventions, except the English Arbitration Act which includes "error of laws or facts" as a ground for court-review of arbitral awards. In any case, the court underscored that when the seat of the arbitration is in Ethiopia and the applicable substantive law is Ethiopian law, there is no statutory law that precludes the Cassation Court from reviewing the award on grounds of error of law.[443]

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[438] Ibid. at 139. የ ዩኒስትራል ሞዴል ህግ አንቀጽ 34 የግልግል ብይን ውድቅ የሚደረግትን ምክንያቶች ያስቀምጣል። English translation: 'Article 34 of the UNCITRAL Model law sets out the grounds for setting-aside of an award.'

[439] Ibid. at 140. "የ አሜሪካ የ ፌደራል ግልግል ሕግ...የግልግል ዳኝነት ብይን የሚታረምበትን በጠባብ ምክንያቶች መሆኑን ያመለክታል...በ ሕጉ ክፍል 10(ሀ)ሥር የግልግል ብይን የሚሰረዝበትን ምክንያቶች ይዘረዝራል...በዚህ ድንጋጌ ሥር የ ሕግ ስህተት አልተመለከተም።" English translation: 'The US Federal Arbitration Act…states that an arbitral award may be reviewed on a limited grounds…Section 10(a) of the Act listed the grounds for vacating[setting-aside] an arbitral award… error of law is not mentioned[as a ground for setting-aside] under this Section.'

[440] Ibid. at 141. " እ.ኤ.አ. 1996 የወጣው የእንግሊዝ የግልግል ሕግ አንቀጽ 69...ተከራካሪ ወገኖች የሕግ ስህተት በማንሳት ለፍ/ቤት ይግባኝ በማቅረብ የግልግል ብይን እንዲታረም መጠየቅ እንደሚችሉ ያመለክታል።" English translation: Section 69 of the 1996 English Arbitration Act indicates that parties to the arbitration proceeding can appeal to court for revive of an arbitral award citing error of law.'

[441] *Ibid.* "በሲዊዘርላንድ ኢንተርካንቶናል የግልግል ህግ አንቀጽ 36 ደግሞ የግልግል ብይን የተሰጠው በተሳሳታ[] የፍሬ ነገር ድምዳሜ መሰረት በማድረግ የሆነ እንደሆነ ውይም ግልጽ የሆነ የሕግ ወይም ርትዕ ጥሰት የተፈጸመበት እንደሆነ ፍ/ቤት ብይኑን እንዲሰረዝ የሚፈቀድ መሆኑን ማየት ይቻላል።" English translation by this author: 'Article 36 of the Swiss Intercantonal Arbitration Act also allows the courts to set-aside an arbitral award that is based on factual errors or clear violation of the law or equity.'

[442] Ibid. at 140. "ዩኒፎርም አርቢትሬሽን አክት ክፍል 23...መሰረት የግልግል ብይን በማመልከት ለፍ/ቤት ብይኑን ለማሰረዝ የሚችልባቸውን ምክንያቶችን ያሳያል።" This authour's English translation: Section 23 of the Uniform Arbitration Act…provides the grounds for setting-aside an arbitral award by a court."

[443] Ibid. at 145. "ሲጠቃለል ይህ ሰበር ስሚ ችሎት፣ የግልግል ዳኝነት ጉባኤው መቀመጫ አዲስ አበባ ከተማ ኢትዮጵያ እስከሆነ ድረስ እና ጉዳዩም ታይቶ ውሳኔ የተሰጠበት በኢትዮጵያ ሕግ መሰረት በመሆኑ፣ ከፍ ሲል ከተጠቀሱት የ ዓለም አቀፍ ስምምነቶች እና የ አገሮች ልምድ እንድሁም የ ኢትዮጵያ ሕጎች እና ይህ ሰበር ችሎት በ በርካታ መዛግብት ከሰጣቸው አስገዳጅ የ ሕግ ትርጉም አንጻር፣ ተከራካሪ ወገኖቹ የ ግልግል ዳኝነት ጉባኤው ዉሳኔ የመጨረሻ ዉሳኔ ነው ብሎ ቢስማሙም ውሳኔው መሰረታዊ የሆነ የ ህግ ስህተት የተፈጸመበት እንደሆነ በሰበር ከማየት የሚከለክለው የ ሕግ መሰረት የለም።" English translation by this author: 'In conclusion, as long as the arbitration seat is in Addis Ababa Ethiopia, and the applicable law was Ethiopian, and in light of the aforementioned international treaties, the experiences of other countries, the Ethiopian laws as well as the precedents given in many cases by this court, even if the disputing parties agree that the decision of the

The second issue addressed by the Cassation Bench was the issue of whether or not the railway rehabilitation contract was valid. On this issue, the Cassation Court concluded that the Railway Rehabilitation Contract was invalid because of the deceitful act of the respondent.[444] The court's assessment indicates that the reduction of G.C. F's shareholding in the joint venture agreement to 0.2% just five days before the contract's conclusion[445] along with the *Consta JV*'s report stating that the bidding winner was a consortium consisting of 70% *Consorzion Consta* and 30% *G.C. F's* shares[446] serves as objective evidence of fraudulent conduct by the current Respondent.[447]

Additionally, the Cassation Court conducted a legal analysis of the relevant provisions in the Ethiopian law of contract on the basis that the applicable substantive law in the arbitration agreement was Ethiopian.[448] In the court's legal analysis, six articles of the Ethiopian Contract Law, Articles

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arbitral tribunal is final, there is no legal basis that preclude the Cassation Court from reviewing the award on error of law grounds.'

[444] Ibid. at 152. "በግራቀኛቸው መካከል ህዳር 20 ቀን 1999 ዓ.ም...የተደረገው የባቡር መስመር ሥራ ውል የአሁን ተጠሪ በአመልካች ላይ በፈጸመው የተንኮል ተግባር የተደረገ ስለሆነ ውሉ ፈራሽ ነው ብለናል።" This author's English translation: 'We have pronounced that the contract for the work of railway dated November 29, 2006 is null and void due to the fraud committed by the current Respondent against the Appellant.'

[445] Ibid. at 147. "...የ አውሮፓ አንቲ_ፍራዉድ ቢሮ ባዘጋቸው የመጨረሻ ሪፖርት ይህ ውል ከመፈረሙ አምስት ቀን ቀደም ብሎ ጂሲኤፍ በ ኮንስታ ጂቪ ያለውን ተሳትፎ ከ 30% ወደ 0.2% ዝቅ ማድረጉን እና በዚህም ተጠሪ የጠቅላላ ዉል ክፍል አንቀጽ 12.7 መጣሱን አረጋግጧል።" English translation: '…In the final report of the European Anti-fraud Office, five days prior to signing of this contract, G.C.F reduced its participation in Consta JV from 30% to 0.2% and this confirms that the Respondent violated Article 12.7 of the General Conditions for Works Contracts [GCC]'

[446] *Ibid.* " የአሁን ተጠሪ ለባቡር መስመር ስራው አመልካች ያወጣውን ጨረታ ተወዳድሮ እና ጨረታውን አሸንፎ...ውል ያደረገው በ ኮንሶርዚዮ ኮንስታ 70% የ አክስዮን ድርሻ እና ጂሲኤፍ 30% የ አክስዮን ድርሻ ባላቸው አባላት የተዋቀረ የ እሽሙር ማህበር መሆኑን ለ አመልካች በ መግለጽ እንደሆነ ያከራከረ ጉዳይ አይደለም። ነገርግን...የ እሽሙር ማህበሩ ውስጥ የ ጂሲኤፍ የ አክስዮን ድርሻ እና ተሳትፎ 30% ሳይሆን 0.2% መሆኑ ተረጋግጧል። ይህም የ አሁን ተጠሪ አመልካች ባወጣው ጨረታ ሲሳተፍ እና ውል ስያደርግ የእሽሙር ማህበሩ አባላት የ ሌላቸውን የ አክስዮን ድርሻ እና የ ተሳትፎ መጠን እንዳላቸው ለ አመልካች በመግለጽ ያደረገ መሆኑን ያስገነዝባል።" English translation: 'It is not disputed that the current Respondent competed for the tender for the Railway Project issued Appellant, won the tender and concluded the contract by explaining to the applicant that the Joint Venture was made by 70% Consorzio Consta's shareholding and 30% G.C.F's shareholdng. Yet…, it has been confirmed that G.C. F's share and participation in the Consortium was not 30% rather it was 0.2%. This indicates that the current Respondent participated in the tender and signed the contract by telling the Appellant the members of the Consortium had shares and participation that actually did not had at that time.'

[447] Ibid. at 148. "...የ አሁን ተጠሪ በ አመልካች ላይ በፈጸመዉ የ ተንኮል ወይም የ ማጭበርበር ተግባር አመልካች ከ ተጠሪ ጋር ይህን ዉል ሊያደርግ የቻለ በመሆኑ፣ በ አመልካች በኩል ዉሉን ሲያደርግ የፈቃድ ጉድለት መኖሩን የሚያረጋግጥ ነው።" English translation: '…[S]ince the Appellant was able to enter into this contract with the respondent due to the fraud or fraudulent action of the current Respondent, it is evident that the Appellant was lacking a consent when singed the contract.'

[448] Ibid. at 145. "በ አውሮፓ ልማት ፈንድ ስነስራዓት...አንቀጽ 14.1 መሰረት የግልግል ዳኝነት ጉባኤው የ ኢትዮጵያ ሕግን ተግባራዊ ማድረግ እና የ ኢትዮጵያ ሕግ እስከፈቀደ ድረስ የ ንግድ ልማድ ከግምት ዉስጥ መግባት[sic] እንደሚገባ ተመልክቷል። ስለሆነም ለተያዘው ጭብጥ ምላሽ ለመስጠት በዚህ ጉዳይ የ ኢትዮጵያ የ ዉል ሕግን መፈተሽ ተገቢ ሆኖ ተገኝቷል።" English translation: " As per Article 14.1 of the European Development Fund Regulation, it is stated that the Arbitral Tribunal should apply the Ethiopian law and trade practice—to the extent it is permitted by the Ethiopian law. Thus, it is found to be appropriate to consult the Ethiopian Contract law in order to address the issue at hand.'

1678(a), 1679, 1731(1), 1696, 1704(1), and 1808(1), were specifically cited in evaluating the validity of the railway maintenance contract. However, the court assessed in fair detail Article 1704(1) of the Civil Code to address the Appellant's claim of fraud. Sub-article (1) of this article stated that "fraud" may invalidate a contract when one party has deceived the other to the point that he or she would not have otherwise entered into the contract, and the Cassation Court mainly applied these legal standards in interpreting whether or not the conclusion of the railway rehabilitation contract had been based on the fraudulent activity of the respondent.

As per the Cassation Court's analysis of the factual accounts, the fact that the current respondent, during the bidding process, maliciously informed the appellant that the successful bidder would be a consortium with 70% shares owned by *Consorzio Consta* and 30% owned by *G.C.F* had two main repercussions. First, as a consequence of the deceptive information, the appellant held a mistaken understanding of the joint venture's structure which later contributed to the respondent's winning of the auction and thereby concluding the contract for the railway rehabilitation.[449] Second, the conduct of the respondent is substantive evidence that the main contract was formed as a result of the misleading information.[450] In light of these factors and heeding the prohibition stated under Art.1704(1) in conjunction with Art.1808(1) of the Civil Code,[451] the Cassation Court ruled that the

[449] Ibid. at 147. " ይህ ደግሞ አመልካች ስለተጠሪ የእሽሙር ማህበር አደረጃጀት እና አወቃቀር ትክክል ያልሆነ ግንዛቤ እንዲወስድ እና የተሻለ ተወዳዳሪ አድርጎ በመውሰድ ጨረታውን አንዳሸነፈ በምቁጠር ውል አብሮ እንድያደርግ ያደረገዉ መሆኑን ያሳያል።' English translation: This[the communication of erroneous information about the amount G.C.F's shares in the Joint Venture] indicates that the Appellant took an incorrect understanding of the organization and structure of the Joint Venture that made him entered into a contract with the Respondent assuming that the Respondent had won the auction by being a first-rate competitor."

[450] Ibid. at 150. "የ አሁን ተጠሪ የ እሽሙር ማህበሩ ውስጥ የጂሲኤፍ[sic] የሌለውን ድርሻ እንዳለው በመግልጽ አመልካች በማያውቀው ሁኔታ ወደ ዉሉ እንዲገባ ባያደርገው ኖሩ[sic] ውሉን የማያደርግ መሆኑን ያመለክታል።" English translation: 'It indicates that had the current Respondent didn't misled the Appellant by explaining that G.C.F that amount of shares in the joint venture that it actually did not, the Appellant wound have not entered into the contract.'

[451] *Ibid.* "የፍ/ብ/ሕ/ቁ.1704(1) ሥር የተመለከተዉ የተንኮል ተግባር በዉሉ ላይ ተጽኖ የማይፈጥር ተራ ወይም ቀላል ነገር ሳይሆን መሰረታዊ የሆነ ነገር መሆን እንዳለበት መገንዘብ ያስፈልጋል...የአሁን ተጠሪ የፈጸመዉ የተንኮል ተግባር በግራ ቀኙቸው መካከል የተደረገዉን ዉል ለማስፈረስ በቂ ምክንያት ይሆናል..[ስለሆነም] አመልካች በዚህ ምክንያት ዉሉን እንዲፈርስለት ለመጠየቅ እንደሚችል በፍ/ብ/ሕ/ቁ.18088(1) ሥር ተመልክቷል።" English translation:' It is important to note that the act of fraud reffered under Art.1704(1) of the CC should not be something ordinary or inconciquencial that does not affect the contract, rather fundamental…The fraudulent act committed by the current Respondent is an adequate reason to annul the contract made between them…[Thus], for this reason, the Appellant can request the invalidation of the contract according to Art.1808(1) of the CC.'

current respondent's conduct was a fraudulent act and overturned the judgment of the Arbitral Tribunal.

5.4.6 Comments

The Cassation Court in the aforementioned case mainly addressed the issue of the validity of the main contract, the railway rehabilitation contract, under the pretext of a 'fundamental error of law' notion and was attempting to determine whether or not the PCA administered arbitral tribunal committed a fundamental error of law in interpreting Article 1704(1) of the Ethiopian Civil Code. This article in conjunction with Article 1808(1) of the same code allows a contracting party to request invalidation of a contract if there is a fraudulent act in the inducement of the contract. Thus, the claim of fraud in this case has no relation with the arbitration clause or the arbitral proceedings; it is rather a fraud allegation related to the substantive issue in the container contract.

The main question of law arising in the Cassation Court proceeding was whether or not the action of the respondent in reducing their share of G.C.F in the Joint Venture, from 30% to 0.2% by a series of three secretive agreements without notifying the appellant, amounts to an act of fraud under Article 1704(1) of the Ethiopian Civil Code. Relatedly, whether the arbitral tribunal made an erroneous interpretation of the law at issue, the Cassation Court undertook an in-depth review of the substance of the award. Such an extensive court-review of awards on substantive issues is one of the defining characteristics of the expansive approach in reviewing arbitral awards and indeed; an approach that may have far-reaching effects on limiting party autonomy in international commercial arbitration.

The Cassation Court in its analysis of this case made an important suggestion that when reviewing arbitral awards, a due regard should be taken on the scope of the court's review of arbitral awards. The court's suggestion also includes that the review should be conducted in a way that does not compromise the expectation of the parties to international arbitration for an efficient and cost-effective dispute settlement, party autonomy or, the progress of international investments. For the sake of clarity, the author has made a literal English translation of the court's analysis which was written in Amharic language and reads as follows:

…however, it should be noted that the issue of correcting or annulling arbitral awards by the court should not be in a way that completely nullifies the very purpose of establishing an arbitration. Some of the reasons why parties choose their disputes to be resolved by arbitration are their hope to be adjudicated by the arbitrator/s of their choice, party autonomy, and time and cost savings. Moreover, it is also obvious when it is said that arbitral awards should be subject to court reviews, the impact of the review on the international business community and attraction of foreign investment should be taken into account. Although the arbitration award is not immune from being reviewed by the court, it is essential to understand that the review should take into consideration those circumstances and it should be narrow and based on the stated provisions of the law.[452]

The recognition of this general principle on the need to have a restrictive court review of awards, in this case, appears to suggest that the Ethiopian arbitration system adopted the 'restrictive approach' that heeds the international trade order regarding the court review of arbitral awards Nevertheless, when deciding the above case, the Federal Cassation Court applied a wide review that included the arbitral tribunal's assessment of evidence[453] and reasonings concerning the underlying contract under the pretext of the 'fundamental error of law'. This approach is a typical example of an extended approach to reviving an arbitral award on account of both law and facts. Therefore, the court's suggestion on the need to have a restrictive approach in reviewing arbitral awards and its action, which is undertaking an extensive review that includes the arbitral tribunal's evaluation of facts and evidence, in the same case ended up being at odds with one another.

Furthermore, the references to the experience of other jurisdictions made to corroborate the justification of the court on the importance of the court's review of awards is fairly complicated. In this case, as mentioned in the previous section, the Federal Cassation Court referred to several international conventions and national arbitration laws of other jurisdictions to emphasize that the

[452] Ibid. at 144–45. "ነገርግን በፍ/ቤት የግልግል ብይን የማሳረም ወይም የማሰረዙ ጉዳይ ተዋዋይ ወገኖች የግልግል ዳኝነት ጉባኤን የሚያቋቁሙበት ዓላማ ሙሉ ለሙሉ ዋጋ በሚያሳጣ መልኩ መሆን እንደሌለበት መገንዘብ ያስፈልጋል። ተከራካሪ ወገኖች በግልግል ዳኝነት ጉባኤ እንዲታይላቸው ከሚፈልጉባትቸዉ ምክንያቶች መካከል የተሰወኑትን[sic] ለመጥቀስ በመረጡት ገላጋይ ዳኞች ለመዳኘት ካላቸው ፍላጎት፣ የተከራካሪ ወገኖች ነጻነት፣ ጊዜያቸዉን ለመቆጠብ እና ወጪን ለመነቀስ[sic] የሚሉት ናቸው። ከዚህም በላይ የግልግል ብይን በፍ/ቤት ሊታረም ይገባል ሲባል በዓለም አቀፍ ደረጃ ያለዉን የንግዱን ማህበረሰብ ዝንባሌ እና በዓለም አቀፍ ደረጃ ኢንቨትመንት ከመሳብ አንጻር ያለውን ተጽኖ ከግምት ያስገባ መሆን እንዳለበት ግልጽ ነው። የግልግል ዳኝነት ጉባኤ በፍ/ቤት ከመታየት የማይድን ቢሆንም እነዝህን ሁኔታዎች ታሳቢ በማድረግ በሕጉ በተመለከቱት ሁኔታዎች መሰረት በጠባቡ መሆን እንዳለበት መረዳት ያስፈልጋል።

[453] Ibid. at 149. The court contested the Arbitral tribunals ruling regarding the relevance of the OLAF's report as a documentary evidence and stated that Conserzio Consta alone could not provide the necessary technical capability in performing the Railway Maintenance contract. The Tribunal in its ruling regarding the OLAF' report has been stated that it "must make its own independent factual and legal assessment…[and] it does note that OLAF is not a judicial body and did not engage in an adversarial process to arrive at its findings."

review of arbitral awards by a court was supported by the relevant international conventions and arbitration laws of both common and civil law jurisdictions. The Court, specifically cited Article V of the New York Convention, Articles 5 and 6 of the Inter-American Convention (B-35 Panama Convention), Section 10(a) of the U.S. Federal Arbitration Act, and Section 69 of the 1996 English Arbitration Act. Nevertheless, the court added no explanation regarding the cited provision concerning their relevance to the case at hand. In fact. the main issues of this case, the fundamental error of law or fraud, are not expressly mentioned as a ground for review of awards under Article V of the New Convention a provision explicitly cited by the Cassation Court. The list of grounds stated under Article 5 of the Panama Convention, also, never mentioned the error of laws or fraud as grounds for court review of arbitral awards.

Even the Section that specifically regulated 'fraud' as a ground for review of arbitral awards under the English Arbitration Act (§68(2)(g)) is missing from the court's analysis. Instead, the court cited §69, a provision that considers the substantive error of law as a ground for review of arbitral awards on substantially limited circumstances. The only provision cited in this court's analysis that specifically mentioned 'fraud' as a ground for court review of the arbitral award and remotely related to the case at hand is §10(a) of the US Federal Arbitration Act. Section 10(a) is mainly concerned with allegations of fraud related to the arbitration proceedings, not to the container contract's validity issue which is the issue in the Ethiopian case. Therefore, in citing the above authorities, the Cassation Court appears to suggest that post-award court review of awards is the prevailing view internationally and arbitration-friendly jurisdiction and international arbitration conventions are a pro-court review of arbitral awards. The truth is exactly the opposite.

Of course, there may be instances where an award can be reviewed by national courts on an exceptional circumstance such as the violation of public policy and illegality.[454] It is also true that

[454] Gary Born, *International Commercial Arbitration Volume 3 International Arbitral Awards / Gary B. Born*, Third edition, vol. III (Alphen aan den Rijn: Kluwer Law International BV, 2021), 3603. " It is clear that the concept of 'public policy,' for the purposes of annulment of international arbitral awards, refers to a relatively narrow category of non-waivable rules of mandatory law that are fundamental to the legal or social order of a jurisdiction, often involving criminal prohibitions or comparable mandatory rules."

almost all national arbitration laws,[455] including the 1996 English Arbitration Act and the U.S. FAA, which were cited by this court, under Sections 68(2)(g) and 10(a)(1) respectively state "fraud" as a ground for annulling an international arbitral award. Nevertheless, unlike the Ethiopian court's viewpoint in this case, the approach of the English[456] and American court's[457] review of awards based on 'fraud' refers to a mainly procedural review with a substantially limited scope, excluding the substantive review of awards. All in all, unlike the Ethiopian Federal Cassation Court's approach to this case, that sanctioned almost a complete merit-based review of the arbitral award under the pretext of fraud on the container contract, renowned academics such as Professor Gary B. Born contends that "allegations of fraud in underlying dispute, not in arbitration, are not grounds for vacating award."[458]

The author of this thesis aligns with Professor Garry's viewpoint on this matter. This alignment is based on the reasons outlined in the previous illustration. The alternative stance could potentially undermine the principles of party autonomy and finality within the context of international commercial arbitration.

5.5 Agricom International SA vs. Ethiopian Trading and Business Corporation

This case arises out of a contract for the purchase of wheat signed on November 25, 2011, between the appellant *Agricom International SA,* a Swiss Company, and the respondent *Ethiopian Trading and Business Corporation (*ETBC)—a government agency formerly known as the *Ethiopian Grain Trade Enterprises* (EGTE). The contract included an arbitration clause that reads as if the parties agreed to settle their dispute with an arbitration seated in London according to Ethiopian substantive law and the procedural law of the Grain and Feed Trading Association (GAFTA

[455] Ibid. at 3627, III. "It is reasonably clear that fraud is a ground for annulling an international arbitral award under virtually all national arbitration regimes."
[456] Ibid. at 3629–30, III."English Courts have required a showing of deliberate fraud(not inadvertent or negligent misrepresentations) which affected the substance of the arbitrator's decision…Negligent failures to comply with discovery orders will not amount to fraud, even in cases of serious dereliction of disclosure obligations."
[457] Ibid. at 3629, III. "U.S. courts have generally rejected claims of fraud based only on alleged misstatements of fact by counsel in the arbitration, in the absence of deliberate and wrongful deception through the use of fraudulent evidence. Fraud is almost always confined to cases involving a party's use of perjured testimony or fabricated evidence during the arbitral proceedings."
[458] Ibid. at 3632, III.

Procedural Rule No.25). The *Ethiopian Grain Trade Enterprise*, following the provision of contract-cancelation notification to the current appellant on October 12, 2012, terminated the contract on the ground that *Agricom International SA* had failed to supply wheat according to the terms of the contract.

Right after the termination of the contract, *EGTE* made a separate purchase of wheat in which it claimed that the new purchase caused Enterprise to incur over 11.5 million US Dollars in additional cost and then initiated an arbitral proceeding in London claiming, 11,549,000 US Dollars in damages. *Agricom International SA*, on the other hand submitted a series of counter-claims to the arbitral tribunal contending that it was unable to execute its obligation to supply the 200, 000 metric tons of wheat due to *EGTE's* failure to provide the required Bank L/C (Letter of Credit) on time. Additionally, *Agricom* contended that the notification for the termination of the contract was not in line with the mandatory prerequisites enshrined under the applicable substantive law, which in this case is the Ethiopian law of contract.[459]

Even so, the arbitral tribunal, on February 27, 2018, decided that the contract is terminated following the legal requirements stated under the Ethiopian Contract Law. Consequently, the then EGTE (now ETBC) won the arbitration and was fully awarded the requested amount of damages (11,549,000 US Dollars). [460] Aggrieved by the decision of the Arbitral Tribunal, *Agricom International SA* filed an application, dated March 27, 2018, to the Ethiopian Federal Supreme Court Cassation Bench, for a court review of the award and the Cassation Court accepted its application as this paper will detail in the subsequent sections.

[459] Agricom International SA vs. Ethiopian Trading and Business Corporation (ETBC), 24 The Federal Democratic Republic of Ethiopia: Directorate of Research and Legal Support 105 (Supreme Court 2019).
[460] Ibid. at 106. "ጉዳዩ በዚህ መልክ የቀረበለት የግልግል ጉባኤ ክርክርና ማስረጃውን መርምሮ ተጠሪ [sic]ውሉን ያቋረጠው በአግባቡነው፤ውሉን ለማቋረጥ የተሰጠው ማስጠንቀቅያም የኢትዮጵያ ህግ የሚጠይቀውን የሚያሟላ ነው፤ እንዲሁም ተጠሪ 11,549,000.00 (አስራ አንድ ሚልዮን አምስት መቶ አርባ ዘጠኝ ሺህ) የአሜሪካን ዶላር እንዲከፍል የካቲት 20/2010 ዓ.ም ባሳለፈው ፍርድ ወስኗል።" English translation: 'The Arbitral Tribunal, after examination of the arguments and evidences presented by the parties, decided on February 27,2018 that [EGTE] has terminated the contract legitimately; that the notice to terminate the contract meets the requirements of the Ethiopian law of contract as well; and that the Respondent [Agricom International SA] shall pay the claimed amount of damages which is $11,549,000.00 (American Dollars Eleven-million Five-hundred and Forty-nine thousands).'

5.5.1 Summary of the appellant's (Agricom International SA) argument at the Cassation Court

The Appellant (*Agricom International SA*) first asserted that the Federal Supreme Court Cassation Bench had jurisdiction to review the arbitral award by citing *Case No. 42239* as precedent that the arbitral award is final and binding upon both parties and that the applicable substantive law to the arbitration had been Ethiopian.[461] According to the appellant's argument, the Federal Cassation Court has complete jurisdiction over the question of substantive law, no matter where the award is made as long as the parties' choice of substantive law is Ethiopian law.[462] The appellant further submitted that "the fact of the parties' agreement to arbitrate in an Arbitral Institution in a particular country may mean that they have accepted the procedural rules of that institution, but it does not mean that they waived their rights in the substantive law."[463]

Furthermore, the appellant contested the legitimacy of the respondent's termination of the contract for two main reasons: the nature of the notification for termination of the contract and the preemptive obligation of the respondent prior to the submission of notice for undertaking legitimate termination.[464] The appellant also submitted an alternative argument regarding the calculation of

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[461] *Ibid.* "አመልካች...ውሳኔው የተሰጠው በኢትዮጵያ ህግ ላይ ተመስርቶ መሆኑንና ውሳኔውም የመጨረሻና በሁለቱ ወገኖች ላይ ተፈጻሚነት ያለው መሆኑ መደንገጉን፤ እንድሁም የፌዴራሉ ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት በሰበር መዝገብ ቁጠር 42239 ከሰጠው ውሳኔ አንጻር ጉዳዩን ተቀብሎ ለመዳኘት እንደሚችልና ህገመንግስታዊ ሥልጣን ያለው መሆኑን ጠቅሶ ማመልከቻውን አቅርቧል።" English translation: 'The Appellant stated in his statement of appeal… that the [Cassation Bench] could review the award and has a constitutionally authorized jurisdiction to do so since the decision [arbitral decision] had been rendered based on the Ethiopian law and is final and binding on both parties: as well as, per the [precedent] ruling of the Federal Supreme Court Cassation Bench under Case No.42239.'

[462] Ibid. at 109. "…ሁለቱ ወገኖች ጉዳያቸውን በኢትዮጵያ መሰረትዊ ህግ መሰረት ለመገዛት ፈቃደኛነታቸውን በውል ከገለጹ የኢትዮጵያን ህግ አስመልክቶ ክርክር ቢነሳ ጉዳዩ ከሰበር ሰሚው ስልጣን ውጪ የሚሆንበት የህግ መሰረት የለም፤… ፍርዱ በየትም ቦታ ቢሰጥ ውይም ውሳኔ የሰጠው አካል የተከተለው ሥርዓት ምንም ይሁን የተሰጠው ውሳኔ የኢትዮጵያ የህግ መስፈርቶችን አያሟላም የሚል ጥያቄ ከተነሳ ውሳኔ የሚሰጠው በ ህግ ስልጣን የተሰጠው ሰበር ሰሚ ችሎት ብቻ ነው..." There is no legal basis for a dispute on a question of law to be outside the jurisdiction of the Cassation Bench if the parties in their contract chose the Ethiopian substantive law as an applicable law…, no matter where the award is given or regardless of the procedure followed by the adjudicatory body, if there is a question that the decision is not inline with the requirements of the Ethiopian law, it is the Cassation Court who has an exclusive legal authority…'

[463] *Ibid.* "ተዋዋዮች በአንድ የግልግል ተቋም አማካኝነት በተወሰነ ሃገር ለመዳኘት ፈቃድ መስጠታቸው የግልግል ተቋሙን የሚመራበትን ሥርዓት መቀበላቸውን ከሚያረጋግጥ በቀር መሰረታዊውን ህግ በተመለከተ ያላቸውን መብት ተንፍገዋል ማለት አይደለም።

[464] Ibid. at 106. "...ተሰጠ የተባለው ማስጠንቀቅያ በ 16/02/2005 ዓ.ም ከተጠሪ በተላከ መልእክት ይተነሳና የተሰረዘ በመሆኑ፤ ይህም ባይሆን ማስጠንቀቅያው የተሰጠው ተጠሪ ይራሱን ግዴታ ሳይወጣና በቂ ግዜም ሳይሰጥ የ ፍትሐብሔር ህጉንና የሰበር ውሳኔዎች ያስቀመጣቸው ምስፍርቶች ሳያሟላ ስለሆነ በአግባቡ ባልተቋረጠ ውል ላይ ተመስርቶ...የተሰጠው የግልግል ጉባኤው ውድቅ እንዲደረግ [አመልካች] ጠይቋል።" English translation: 'The Appellant contested that the said notice of cancelation has been canceled and or revocked by another letter dated October 26/2012 sent from the Respondent and if this objection is not accepted, the notice had been given by the Respondent prior to the discharge of its

damages. According to this assertion, the damages calculation should be made taking into account the performance bond and therefore EGTE/ETBC can only claim $5,855,000 as per the performance bond for the non-supplied 200,000 metric tons of wheat. [465] For all of these reasons, the appellant requested the Cassation Bench to overturn the award and if the request for overturning the award was not accepted, the appellant alternatively demanded for the amount of damages to be calculated as per the performance bond.[466]

5.5.2 Excerpt of the respondent's assertion at the Cassation Court

On October 2, 2018, the respondent (EGTE/ETBC) submitted a written statement of defense relating to the jurisdiction of the Cassation Court and the substantive claim of the appellant. With regard to the jurisdiction issue, the respondent argued that the Federal Supreme Court had no jurisdiction to review the arbitral award. As per the respondent's contention, London, being the legal seat of the arbitration, limits the Ethiopian Cassation Court's jurisdiction to review the arbitral award. Thus, regardless of the applicable substantive law, in situations where the seat of the arbitration is a foreign country, the precedent *Case No. 42239* that authorizes the Court to review any final judgment on the fundamental error of law grounds, is irrelevant.[467] The respondent added that the parties' choice of the GAFTA Arbitration Rule as an applicable procedural law was basically to bypass the court's

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own contractual duty and without given sufficient time that meets the requirements set out by the Civil Code and the Ruling of the Cassation Court regarding the proper cancelation of contract.'

[465] Ibid. at 105. "ይህ የሚታለፍ ቢሆንና የደረሰ ጉዳት አለ ከተባለ ተጠሪ ሊጠይቅ የሚችለው ለ200,000 ሜትሪክ ቶን የዋጋ መጠን በተሰጠው የመልካም ሥራ አፈፃፀም ሰነድ ማለትም 5,855,000.00(አምስት ሚሊዮን ስምንት መቶ ሃምሳ አምስት ሺህ) የአሜሪካን ዶላር ብቻ ነው በማለት ተከራክሯል።" '[Agricom International SA] argued that if this argument [the argument regarding the illegitimacy of the cancelation] is not acceptable and if it is said that there is a damage, the Respondent can only claim 5,855,000.00(Five-million Eight-hundred and fifty-five US Dollars), as per the Performance Bond.'

[466] Ibid. at 109.

[467] Ibid. at 106–7. የግልግል ዳኝነቱ መቀመጫ ኢትዮጵያ ውስጥ ባልሆነ የግልግል ዳኝነት የተሰጠ ውሳኔ በመሆኑ ለኢትዮጵያ ፍርድ ቤት ጉዳዩ እንዲታይ የሚቀርብበት የ ህግ መሰረትም ልምድም የለም፤...ስለሆነም ይህ የሰበር አቤቱታ ስልጣን ለሌለው ፍ/ቤት የቀረበ በመሆኑ ውድቅ ሊደረግ ይገባል። አመልካች በሰ/መ/ቁ 42239 የተሰጠውን ውሳኔ በመጥቀስ አቤቱታውን ያቀረበ ቢሆንም በሁለቱ መዛግብት ክርክር ያስነሳው ጉዳይ፣ የውሉ ሁኔታዎች እና የግልግል ጉባኤው መቀመጫ ፈጽሞ የተለያየ በመሆኑ በሰ/መ/ቁ 42239 የተሰጠው ገዢ ትርጉም በዚህ መዝገብ ላይ ተፈጻሚ ሊሆን አይገባም..." English translation: The Respondent argued that 'since the award has been given by an Arbitral Tribunal that is not seated in Ethiopia, there is no legal basis or experience for the case to be brought before the Ethiopian Courts…[T]hus, this appeal should be rejected as it was submitted to a court that has no jurisdiction…[A]lthough the Appellant, in his appeal, sited the decision in Case No.42239, the authoritative interpretation in the sited Case.No.42239 is not applicable to the case at hand since the disputed issues in both cases, the nature of the contract and the seat of the arbitration are completely different.

interventions. Moreover, in response to the appellant's argument concerning the revocation of the notice of contract termination by another letter, the respondent asserted that this issue is particularly related to evidence and not a question of law.[468] Therefore, EGTE/ETBC contended that the Federal Supreme Court Cassation Court had no jurisdiction to review the case.

In response to the substantive claims by the appellant, the respondent submitted that the appellant's argument concerning the revocation of the October 23, 2012 warning which related to the failure of the applicant to deliver the wheat on time had no contractual or legal basis as the notice had been given in compliance with the rules of the Civil Code and the authoritative interpretation of the Cassation Court in *Case No.57280* regarding the matter.[469] With regard to the issues concerning the amount of damages, EGTE/ETBC claimed that the computation made by the appellant was erroneous and not in line with Article 13 of the contract which stipulated that the guarantee for good performance is 10% of the value of the contract.[470] In addition, as per the respondent's argument, the purpose of the percentage stated in the performance bond was to limit the amount of guaranteed responsibility, not the amount of damages which was the interpretation of the appellant in this case.[471]

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[468] Ibid. at 107–8. "በተዋዋይ ወገኖች የአርብትሬሽን የሥነስርዓት ህጎች የሚወሰኑትም ከፍርድቤቶች ጣልቃ ገብነት ለመራቅ ሲባል ነው። በሌላም በኩል አመልካች በአቤቱታው የገለፀው ጥቅምት 9/2005 ዓ.ም የተሰጠው ማስጠንቀቅያ ጥቅምት 16/2005 ዓ.ም በተጻፈ ደብዳቤ ተነስቷል? ወይስ አልተነሳም? የሚለው ክርክር ማስረጃን የሚመለከት በመሆኑና ውሳኔም የተሰጠው ማስረጃዎቹ ታይተው በመሆኑ በዚህ ረገድ የቀረበው ክርክር የህግ ክርክር አይደለም ለሰበር ችሎቱ በህግ በተሰጠው ስልጣን መሰረት ሊታይ የሚችል አይደለም ተብሎ ውድቅ ይደረግልን በማለት መቃወሚያውን አቅርቧል።" English translation: The Respondent claimed that 'procedural rules of arbitration are selected by the parties to avoid court's intervention. On the other hand, [the Respondent] contends that the Appellant's claim on whether or not the October 19, 2012 notice [for termination of the contract] had been revoked by the latter notice dated October 26, 2012 is not a legal argument and as the issue was related to evidence and the decision was made following the consultation of those evidences, the argument on this point should be rejected and should not be submitted to the Cassation Court as the Court has no legal authority to entertain the issue.'

[469] Ibid. at 108. "ማስጠንቀቅያው ተነስተዋል ወይም ተሰርዟል በማለት ያቀረበው ክርክር የውልም ሆነ የህግ መሰረት የሌለው ነው። የተሰጠው ማስጠንቀቅያም በ ፍትሐብሔር ህጉ የተመለከቱትን ድንጋጌዎች እንዲሁም በሰ/መ/ቁ 57280 የተሰጠውን የህግ ትርጉም ባሟላ መልኩ የተደረገ ነው። English translation: 'His[the Appellant's] contention that the warning has been lifted or revoked has no legal or contractual basis. The warning was given in accordance with the provisions of the Civil Code and the binding legal interpretation given in Case. No.57280.'

[470] *Ibid.* "የመልካም ሥራ አፈጻፀም ዋስትና(ቦንዱ)በተመለከተም በ አመልካች አቤቱታ የተጠቀሰው መጠን ስህተት ነው፤ በውሉ አንቀጽ 13 እንደተቀመጠው የመልካም ሥራ አፈጻፀም ዋስትናው የሚገባው የውሉን ዋጋ 10% መሆኑን ስለሚደንግግ ይህ ሲሰላ 14,637,500.00 የአሜሪካ ዶላር ይሆናል፤…"English translation: 'Concerning the performance bond the amount mentioned in the Appellant's statement is incorrect. As stated under Article 13 of the contract, the duly guaranteed performance bond is 10% of the contract's value and this is calculated to be $14,637,500.00.'

[471] *Ibid.* "ውሉ የመልካም ሥራ አፈጻፀም ዋስትና(ቦንድ) መጠኑን ሲያስቀምጥ የዋሱን ኃላፊነት መጠን ለመገደብ እንጂ የጉዳቱን መጠን ለመገደብ እንደሆነ ያስቀመጠው ነገር የለም፤ ከቦንዱ በላይ ጉዳት ቢደርስ ተጨማሪ ካሳ መጠየቅ አይቻለም የሚል መደምደሚያ ላይ የሚያደርስ ነገርም የለም፤..." The contract, in setting out the amount of the performance bond, did not stated that the stated number is to limit the amount of damage, but to limit the guarantee's amount; there is nothing

Accordingly, the respondent requested the court to reject the review of the arbitral award and for it to be upheld.

5.5.3 The Cassation Bench's assessment of the case

The Cassation Bench, in this case, gave priority to the issue of jurisdiction despite the Cassation Inquiry's proposal for the review of the substantive issue.[472] A Cassation Inquiry in this case refers to a division of three Federal Supreme Court judges in charge of providing a judgment on the relevance of the application against any final judgment on the ground of 'fundamental /basic error of law' prior to its submission to the Cassation Bench which consists of five judges.[473] Consequently, the threshold question that was addressed in this court was whether the Cassation Bench had a jurisdiction to review the award on the error of law ground for the reason that the applicable substantive law in the arbitral proceeding was Ethiopian, while the legal seat of the arbitration was outside of Ethiopia. The other issue was related to the question of whether or not the authoritative precedent judgment of the Cassation Bench in Case No.42239 was relevant. The Cassation Bench responded negatively to both issues and conformed to the current EGTE/ETBC argument that the court had no legal jurisdiction to review the award and thereby upheld the arbitral tribunal's decision.

The court in this case emphasized the law that should be applied to determine whether an error of law is categorized as a substantive or procedural issue is the applicable procedural.[474] Additionally, the court stressed that since the parties in this case had chosen an arbitration rule of a

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that could lead to the conclusion that additional compensation cannot be claimed in case of damages beyond the bond.'

[472] Ibid. at 110. "...በሰበር አጣሪ ችሎቱ እንዲታይ የተያዘው ጭብጥ ፍሬ ጉዳዩን የተመለከት ቢሆንም ከዚህ በፊት የችሎቱን ምላሽ የሚጠይቀው ነጥብ የአሁን ተጠሪ ይህ ሰበር ስሚ ችሎት ጉዳዩን ተቀብሎ ለመወሰን ስልጣን የለውም በማለት ያቀረበው ክርክር ነው።" English translation: '…although the issue selected by the Cassation Inquiry is related to the substantive subject matters, the issue that requires a prior resolution of this court is the argument of the current Respondent that 'the Cassation Court has no jurisdiction to accept and entertain this issue.'

[473] Federal Courts Proclamation, Pub. L. No. 25, 96 (Ethiopia 1996). Article 22(1)

[474] *Agricom International SA vs. Ethiopian Trading and Business Corporation (ETBC)*, 24 The Federal Democratic Republic of Ethiopia: Directorate of Research and Legal Support at 111. "እንደሚታወቀው በአንድ በተሠጠ ውሳኔ ላይ ይግባኝ የማለት መብት መሰረታዊ መብት ሆኖ የሚቆጠር ሲሆን የይግባኝ መብቱ ዝርዝር አፈጻፀም ግን የሚወሰነው በ ሥነ ሥርዓት ህጎች ነው። ስህተቱ የሥነ ሥርዓትም ሆነ የፍሬ ነገር ቢሆን ሊሰማና ሊታረም የሚችለው ለጉዳዩ ተፈጻሚነት ባለው የሥነ ሥርዓት ደንብ እየተመራ ነው። English translation: "As it is known, the right to appeal against a final judgment is considered to be a basic right, yet the detail execution of the right to appeal is determined by procedural laws. Whether the error is a matter of procedure or substance, it should be litigated or corrected based on the applicable procedural law.

London-based arbitral institution and the current appellant had appealed twice to the London Commercial High Court, its argument concerning the absence of appeal on substantive issues in the seat of the arbitration was immaterial.[475] As a result, the Cassation Court's analysis seems to suggest that one of the overriding base that determines the right to challenge a foreign arbitral award on the 'fundamental error of law' ground in Ethiopia is the applicable procedural law, not the substantive law. This stance is different from the justifications given by the same court in the *Ethiopian-Djibouti Railway Enterprise* case to maintain jurisdiction for review of international arbitral awards on the error of law grounds. As mentioned in 5.4.3 of this chapter, the cassation court stated that one of the reasons for upholding jurisdiction is the fact that the applicable substantive law was the Ethiopian law of contract even though the applicable arbitration rule was a foreign one.

Relatedly, the Cassation Court addressed the appellant's bold argument, which was based on the Ethiopian statutory and case law arbitration system. The argument asserted that the Federal Court's Cassation Bench has exclusive jurisdiction to deliver an authoritative judgment on the issue of a "fundamental error of law" when the applicable substantive law to the arbitration is Ethiopian. The appellant was also claimed that, regardless of the seat of the tribunal or the applicable procedural law, the Federal Cassation Court has exclusive jurisdiction, a jurisdiction that is supported by the Constitution, the statutory and case law—on the question of law issues concerning the Ethiopian substantive law.[476] The majority court, however, declined the statutory and precedent-based argument

[475] *Ibid.* "ስለሆነም የግልግል ዳኝነቱ አካል የሚመራበትን ሥነስርዓት ላይ ግራቀኙ ስምምነት አድርገው በዚሁ አግባብ ሁለት ግዜ የይግባኝ አቤቱታ ለለንደኑ ከፍተኛ ፍርድቤት መቅረቡ ባላከራከረበት ሁኔታ አመልካች ፍሬነገርን ወይም መሰረታዊ የህግ ስህተትን አስመልክቶ ለመደበኛው ፍርድቤት ያቀረብኩት ቅሬታ የለም በማለት ያቀረበው ክርክር የሥምምነታቸውን ይዘት እና ጉዳዩ የሚገዛበትን ህግና ልምድ የተከተለ ባለመሆኑ ተቀባይነት የለውም። English translation: 'Where the parties' agreement on the applicable rule of procedure and the submission of two appeals based on this procedure to the London High Court is not disputed, the Appellant's contention that 'there is no appeal that I have submitted to the regular court on the merit or on fundamental error of law grounds' is unacceptable as it is not in line with the content of the contract and the rules and customs of the governing law.'

[476] Ibid. at 111–12. "በሌላ በኩል አመልካች አጥብቆ የሚከራከረው ሁለቱ ወገኖች ጉዳያቸውን በኢትዮጵያ መሰረታዊ ህግ መሰረት ለመገዛት ፈቃደኝነታቸው በውል ከገለጹ የኢትዮጵያን ህግ አስመልክቶ ክርክር ቢነሳ...ፍርዱ በየትም ቦታ ቢሰጥ ውይም ውሳኔ የሰጠው አካል የተከተለው ሥርዓት ምንም ይሁን የተሰጠው ውሳኔ የኢትዮጵያ የህግ መስፈርቶችን አያሟላም የሚል ጥያቄ ከተነሳ ውሳኔ የሚሰጠው ሰበር ሰሚ ችሎቱ ብቻ ነው በሚል ነው። ለዚህ ክርክራቸው መሰረት የሚያደርጉትም በሰ/መ/ቁ 42239 የተሰጠውን አስገዳጅ ትርጉም እና የህገ መንግስቱን አንቀጽ 80 እንዲሁም የአዋጅ ቁጥር 454/97 ድንጋጌን ነው።" English translation: 'On the other hand, what the Appellant strongly ague is that if the parties choose Ethiopian substantive law as a governing law and if there is a dispute over the Ethiopian law,… a question that the decision is not in conformity with the Ethiopian law's requirements, it is only the Cassation Bench that has the power to resolve such questions no matter where the decision is made and regardless of the procedure followed by the adjudicator.' The

of the appellant stating that the cited case and statutory provisions are not relevant to the case at hand because the legal seat of the arbitration is not in Ethiopia. The roughly translated and summarized ruling of the majority court in this case reads as follows:

Altogether, the contracting parties have agreed to settle their dispute by an arbitral tribunal established based on the Grain and Feeds Trading Association (GAFTA)'s Arbitration Rule No.125 in England and since the award is rendered following this procedure; as it has been proved that the current Appellant had been appealed against the arbitral award to the High Court in London in line with the terms of the contract and the rules of the applicable procedural law; whereas the authoritative interpretation(which the current Appellant cited in his application to this Cassation Court) in Case No.42239 is not applicable when the seat of the arbitral tribunal is determined to be in a foreign country by the parties agreement or according to the applicable law; …whereas the power to review a fundamental error of law, entrusted to the Federal Supreme Court Cassation Bench according to Article 80(3)(a) of the FDRE Constitution and Article 10 of the Proclamation for the Establishment of the Federal Courts No.25/1996 (as amended by Article 2 of Proclamation No.454/2005), is irrelevant to the case at hand; we [the majority of the Federal Cassation Bench] therefore ruled…[that]…the cassation application for the review of the arbitral award No:4496& 4515 by the cassation court has no contractual or legal basis and hence unacceptable.[477]

In summary, the court ruled that the precedent case, Case No.42239 does not apply when the seat of the arbitral tribunal is determined to be in a foreign country based on the parties' agreement or the applicable law. In addition, the court determined that the power to review a fundamental error of law, entrusted to the Cassation Bench was deemed irrelevant to the case. As a result, the majority of the court ruled that the cassation application for the review of the arbitral award had no contractual or legal basis and was therefore unacceptable.

5.5.4 Dissenting opinion

In his dissenting opinion, Judge Tsehay Menkr argued that because one of the parties to the agreement was a government agency and the intended goal for concluding the contract was for the

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basis for his argument is the binding interpretation of the Cassation Case No.42239, Article 80 of the Constitution as well as the provision of Proclamation No.454/2005.'

[477] Ibid. at 114–15. "በአጠቃላይ ግራቀኙ ወገኖች በ Grain and Feeds Trading [A]ssociation (GAFTA) የሥነ ሥርዓት ህግ ቁጠር 125(GAFTA Rules NO. 125) መሰረት በሚቋቋም የግልግል ዳኝነት አካል በእንግሊዝ ሃገር ክርክራቸውን ለመቋጨት የተስማሙ በመሆኑና የግልግል ዳኝነቱ ውሳኔ የተሰጠውም ይህን ስርዓት ተከትሎ በመሆኑ፤ አመልካቹም በግልግል ጉባኤው ውሳኔ ላይ የይግባኝ ቅሬታውን በውል ስምምነታቸው እና በህግ በተዘረጋው ስርዓት መሰረት ለንደን ለሚገኘው ከፍተኛ ፍርድ ቤት ቅሬታውን በየጊዜው ያቀርብ እንደነበር የተረጋገጠ በመሆኑ፤ አመልካች አቤቱታውን ለዚህ ሰበር ችሎት ለማቅረብ በዋቢነት በጠቀሰው የሰ/መ/ቁ42239 የተሰጠው የህግ ትርጉም የግልግል ጉባኤው መቀመጫ በተዋዋዮች በስምምነት ወይም ከህግ በተሰጠ ስልጣን በውጭ ሃገር እንዲሆን ተደርጎ በውጭ ሃገር የተሰጠ ፍርድን የሚመለከት ባለመሆኑ፤ እንዲሁም ለፌዴራሉ ጠቅላይ ፍርድ ቤት ሰበር ችሎት በኢፌዴሪ ህገ መንግስት አንቀጽ 80(3)(ሀ) እና በፌዴራል ፍርድ ቤቶች ማቋቋሚያ አዋጅ ቁጥር 25/1988 አንቀጽ 19(በ አዋጅ ቁጥር 454/97 አንቀጽ 2 እንደተሻሻለ) የተሰጠው መሰረታዊ የህግ ስህተትን የማረም ስልጣን የተያዘውን ጉዳይ የሚመለከት ባለመሆኑ ... APPEAL AWARD NO: 4496 & 4515 በኢፌዴሬ ጠቅላይ ፍርድቤት ሰበር ችሎት ታይቶ እንዲታረም የቀረበው የሰበር ማመልከቻ በግራቀኙ የተደረገውን ስምምነት እና ህጉን መሰረት ያደረገ ባለመሆኑ ተቀባይነት የለውም በማለት...ወስነናል።"

public benefit, the Federal Court Cassation Bench's rejection of the application for review of the award on the error of law grounds and the majority's ruling that the Cassation Bench lacks jurisdiction on the case at hand might have run counter to the Ethiopian national interest and, the principles of legality and morality.[478] Tsehay also contended that an unjustified agreement by a government agency to arbitrate a dispute in an arbitral tribunal seated in a foreign country with foreign procedural law should not preclude the Federal Supreme Court Cassation Bench from reviewing foreign awards based on the fundamental error of law.[479] The judge mentioned that a contract that involves a government agency and with a potential impact on the national interest requires the approval of the Federal Attorney General to ensure that the contract is not in conflict with the national interest.[480] As a result, the solitary dissenting judge stressed that he found the majority's ruling on the question of jurisdiction and the rejection of the application for review of the foreign arbitral awards based on the 'fundamental error of law' to be unsatisfactory in light of protecting the national interests.

[478] Ibid. at 115–16. "ከተዋዋዮች አንዱ የኢትዮጵያ መንግስት መ/ቤት ሆኖ...የተዋዋሉበት ነገር ለኢትዮጵያ እና ህዝቦቿ ጥቅም እንዲሰጥ መሆኑ ተረጋግጦ አለ[sic] ...የግልግል ዳኝነቱ መቀመጫም ሆነ የሚመራበት የስነስርዓት ህግ በኢትዮጵያ ባለመሆኑ እና የሚሰጠው ፍርድም የለንደን ፍርድ እንደሆነ መቆጠሩ በኢትዮጵያ ፍ/ቤት ፍርዱ ላይ መሰረታዊ የህግ ጥሰት ተፈጽሟል የሚል ወገን አቤቱታ ሲያቀርብ ፍ/ቤቱ የማየት ስልጣን የለውም የሚባል ከሆነ...ውሉ በራሱ ለህግና ለሞራል ተቃራኒ የሆነ ውል በመሆኑ ከመነሻው ተቀባይነት ያልነበረበት ውል ነው ባይ ነኝ።" Direct English translation by this author: 'While one of the contracting party is a government agency, while it has been confirmed that the contract is for the benefit of Ethiopia and its people,..if it is said that (although a party appeals against the award to the Ethiopian Court on the fundamental error of law grounds) the court has no jurisdiction just because the seat of the arbitration or the applicable procedural law is not Ethiopian and the award is considered to be a London Award, I would say that the contract itself is null from the beginning since it would against the law and morale.'

[479] Ibid. at 116. "...መንግስት በሚያስተዳድረው መ/ቤት የተወከሉ የስራ ኃላፊዎች ጉዳዩ በውጭ ሃገር እንዲታይ እና በውጭ አገር ህግም[] እንዲመራ የተስማሙበትን ልዩ ምክንያት ሳያስቀምጡ...ስምምነት በማድረጋቸው ብቻ የኢትዮጵያ ፍ/ቤቶች በተለይም የሰበር ሰሚ ችሎቱ ስልጣን የለውም ለማለት የሚቻልበት አግባብ ተገቢነት ያለው አይደለም።" English translation by this authority: 'It is not appropriate to say that the Ethiopian Courts, particularly the Cassation Bench, has no jurisdiction to review an award just because Officials of the government-administered agency have agreed that the disputed should be settled in a foreign country and be governed by a foreign law without mentioned the specific reason.'

[480] Ibid. at 117. "…ተዋዋይ ወገኖች መንግስታዊ አካላት ከሆኑ የሚዋዋሉትን ውሎች የመንግስትን እና የአገሪቱን ጥቅም በሚያስጠብቅ ሁኔታ መዋዋል ያለባቸው መሆኑ ስለታመነበት የፌዴራል ጠቅላይ ዐቃቤ ህግን ለማቋቋም እና ስልጣኑን ለመወሰን በወጣው አዋጅ ቁጥር 943/2008 አንቀጽ 6/4/ለ መሰረት የፌዴራል ጠ/ዐቃቤ ህግ ውሎችን እንዲመረምር መደረጉ..." English translation by this author: ' As it was believed that contracts concluded by government agencies should be negotiated in a manner that protected the interests of the government and the country, the Federal Attorney General has been made to examine such contracts as per Article 6(4)(b) of the Federal Attorney General Establishment Proclamation No. 943/2016…'

5.5.5 Comments

In the case of *Agricom International SA vs. Ethiopian Trading and Business Corporation*, the Ethiopian Federal Supreme Court Cassation Bench considered the concepts of the legal seat of arbitration and the applicable law to the arbitral proceedings to be significant elements in a recourse against a foreign arbitral award on the 'error of law' grounds. In this regard, the majority court also insinuated that challenging a foreign award on grounds other than those listed under the New York Convention is inadmissible.[481] Thus, given the above Cassation Court's reasonings, it would be plausible to assume that, at least impliedly, the court's verdict sanctioned that the 'fundamental error of law justification' is no longer a basis for challenging the recognition or enforcement of foreign arbitral awards in Ethiopia, provided that the parties in advance have agreed upon the legal seat of the arbitration to be outside of Ethiopia.

However, two interpretative issues arise in connection with the court's analysis in this case. In the first issue, at least at face value, the implied stance of the majority judges in excluding the "fundamental error of law" defense from the list of grounds for challenging foreign arbitral awards appears to be in favor of the principle of finality providing that the party-chosen seat of the arbitration is in a foreign country. Despite the implied disregard of the error of law defence, the court's analysis seems to induce uncertainty about whether this defense can be raised as a basis for challenging international arbitral awards, in situations when parties failed to specify the seat of arbitration or the applicable procedural rule. In other words, the court in this case, failed to explain what would happen if a party to an arbitration agreement without a specified legal seat requested a cassation bench review of 'awards. Additionally, the court's analysis has no answer to the application court review on point of law against awards that are "deemed to be international" according to the definition of international

[481] Ibid. at 114. " ...የግልግል ጉባኤው የሰጠው ውሳኔ እንደ እንግሊዝ አገር ውሳኔ የተቆጠረ በመሆኑ መሰረታዊ የህግ ስህተት ለማሳረም በሚል ለዚህ ፍርድ ቤት መቅረቡ ተገቢ ባይሆንም ውሳኔው እውቅና የሚያገኘውና ተፈጻሚም የሚሆነው ከአንድ አገር ውጪ የተሰጠን ውሳኔ አፈፃፀም በተመለከተ በ 1958 በወጣው የኒዮርክ ዓለም አቀፍ ኮንቬንሽን መሰረት በመሆኑ በዚህ አግባብ አቤቱታ ሊቀርብና ሊስተናገድ አይገባም ማለት ግን አይመንም።" English translation: '…although it is inappropriate to appeal to the Cassation Court on the fundamental error of law grounds, as the award is considered to be an English award, this does not mean that this court is not accepting a challenge against the recognition and enforcement of foreign arbitral awards based on the 1958 New York Convention.'

awards provided in the current Ethiopian arbitration act. Therefore, one can argue that the analysis of the Cassation Bench in this case is not fully settled the jurisdictional issue, particularly as an authoritative judgment that is supposed to settle the controversy over the jurisdiction of the court on the question of law issues with a view of avoiding further confusion. In effect, this indetermination on the applicability of error of law defence for post-award court review in Ethiopian arbitration system could have unintended repercussions on the principle of finality and thereby limits the party autonomy in ICA.

The second issue that the majority court's analysis appears to overlook in this case is the role of the seat when the subject matter itself is not arbitrable under the Ethiopian substantive law. The dissenting judge tacitly hinted that the container contract could be regarded as an administrative contract. The judge, in his statement of dissent, pointed out some of the elements, government agencies and private companies' contract-based activities to provide public service and the purpose for the conclusion of the contract, that are stated to be taking into account when defining the concept of an administrative contract under Article 3132 of the Ethiopian Civil Code. As explained in section 4.2, disputes arising out of an administrative contract were arguably inarbitrable under Ethiopian arbitration law even prior to the enactment of the current stand-alone arbitration law. Therefore, two points are not clear from the majority court's analysis of this issue as well. The first point refers to which law, the law of the seat of arbitration or the applicable substantive law, should be applied to determine whether or not a contract is an administrative contract. The other point concerns that, assuming the main contract in the case is an administrative contract, which law, the law of the seat or the Ethiopian la, would be applicable to determine the arbitrability of the contract. It is hardly possible to get an answer to those questions from the court's analysis and the jurisdiction issue of the cassation bench remains to be unresolved even in these authoritative rulings of the Federal Supreme Court Cassation Bench.

5.5.4 Correlation and deference between the two Cassation Bench cases

The Cassation Court in the *Ethiopian-Djibouti Railway Enterprise vs. Consta JV* ruled out that the court has absolute jurisdiction to review arbitral awards on the fundamental error of law

grounds so long as both the legal seat of the arbitration and the applicable law substantive law are connected to Ethiopia. In this case, two concurrent elements, the seat of arbitration and applicable law, were mentioned as defining factors in the argument given in support of the Federal Cassation Courts' exclusive jurisdiction to review international arbitral awards on the fundamental error of law grounds. A year later, in *Agricom International SA vs. Ethiopian Trading and Business Corporation*, the same court decided "the seat of the arbitration" was the sole factor for the determination of the Federal Court Cassation Bench's jurisdiction to review international arbitral awards on the fundamental error of law grounds.

The only significant difference between the two cases was that in *Agricom International SA*, the seat of arbitration was London. The legal place of arbitration in the Consta *JV vs. Ethiopian-Djibouti Railway Enterprise*, on the other hand, was Addis Ababa. The other minor difference was that in the *Consta JV* arbitration case, The Ethiopian party (*Ethiopian-Djibouti Railway Enterprise*) had been a losing party while in the *Agricom International SA*, the Ethiopian side, a government-owned agency (*EGTE/ETBC*) had been the winner in the arbitral proceedings. Other than this differences, in both cases, the applicable substantive law was the Ethiopian Civil Code and both arbitration agreements included a foreign institutional rule of arbitration. The nature of the container contract in both cases was parallel as both contracts can be categorized as administrative contracts according to the Ethiopian CC.

In conclusion, taking into account the aforementioned reasons, the controversy surrounding the court review of international arbitral awards seems to remain unresolved in the Ethiopian case-law system. It is the view of this author that the problem concerning the potential review of an international arbitral award, be it a domestic or foreign, is not properly addressed in the recent Arbitration Proclamation. The Proclamation under Article 2(8) defines a foreign award as one made in a foreign country based on the international conventions acceded to and ratified by Ethiopia or, when the arbitration seat is outside of Ethiopian territory. This statute provides no explicit description as to what constitutes a "domestic award" according to Ethiopian arbitration law as there is no stated factor that could help determine the nationality of the international arbitration award rendered in

Ethiopia in the absence of the party's choice of legal seat. Moreover, according to the default provision stated under Article 30(2), it is the arbitral tribunal, not a national court, that determines the seat of arbitration when parties fail to agree on that issue. If the parties fail to specify the seat of arbitration in their arbitration agreement, there is a chance to treat awards made in Ethiopia, whether or not the award is purely domestic or international, as both foreign and domestic. This uncertainty in establishing the nationality of an award in the absence of the parties' choice of seat in the statutory arbitration law makes the seemingly resolved issue of reviewing foreign arbitral awards by the case law under the *Agricom International SA* case far from being resolved.

Chapter VI: Conclusion

The long-standing indifference toward the principle of party autonomy in ICA sanctioned by the rules of arbitration in the 1960 Ethiopian Civil Code and the Code of Civil Procedure, in general, appears to be enhanced by the enactment of the recent stand-alone Arbitration Proclamation. The inclusion of rules demanding limited court intervention in the arbitral proceedings coupled with the determinate rules regulating the supporting role of national courts prior to or after the commencement of the arbitral proceedings suggests that the current Ethiopian statutory arbitration law is sanctioned by the prevailing pro-party autonomy tilt under the ICA system. The Ethiopian legislators deserve credit for devising a series of specific rules explicitly designed to differentiate purely domestic arbitration and international arbitration. Chapter III highlighted a series of clear-cut rules, largely analogous to the provisions of the UNCITRAL Model Law, which expressly devised to uphold party autonomy in all stages of the arbitral proceedings that the recent Ethiopian arbitration Proclamation included. Based on the recent changes, in the statutory system of Ethiopian arbitration law, one could unequivocally submit that by and large, the lawmakers have made a commendable stride in the last two years in ameliorating the extraneous limits to party autonomy in ICA that had been adopted in the Civil Code and the Code of Civil Procedure. Nonetheless, despite the aforementioned welcomed developments, some rules, such as those concerning the formality requirements of arbitration agreements, administrative contracts, and regulating grounds for the setting-aside of an arbitral award demonstrate that the statutory solution for balancing the party's freedom in ICA and the protection of public interest in the recent arbitration law remains to be controversial. Additionally, the quasi-case law of the Ethiopian arbitration system provides no solution to the ambiguities concerning the court review of foreign arbitral awards on the grounds of the fundamental or basic error of law.

As discussed in the first chapter, the foundational purpose of this dissertation has been to point out the limits of party autonomy in ICA compared to the statutory limits adopted under the UNCITRAL Model Law and the 1958 NYC. Therefore, to highlight the concluding remarks of this research, a synopsis of the statutory restrictions of the party's freedom in international commercial arbitration adopted in the Ethiopian arbitration system will be conducted in section 6.1 of this chapter. However, there will be no detailed concluding remarks for each research question as each chapter

includes an interim conclusion that already covers the issue. Bearing that in mind, section 6.2 will conduct a summary of the main results of the statutory analysis on the indeterminate nature of the rule governing the non-arbitrability of administrative contracts. Section 6.3 will then impart the findings concerning the perplexity in the Cassation Court's jurisdiction to review international arbitral awards on the error of law ground. Finally, Section 6.4 will discuss recommendations and the areas of further research on the subject matter.

6.1 Provisions of the arbitration Proclamation restricting party autonomy in ICA

The current Ethiopian Arbitration Act contains several provisions that promote party autonomy in the conclusion and enforcement of international commercial arbitrations. However, it is worth noting that certain provisions in the Act are notably more restrictive compared to the rules outlined in the 1985 New York Convention, thereby limiting the freedom of the parties involved. Article 6(2) for example includes a rather strict requirement somehow different from the requirements under Article II (2) of the NYC for concluding a valid arbitration agreement. Apart from the signature requirement which was also adopted under the NYC, Article 6(2) demands two witnesses as a necessary formal requirement for a written arbitration agreement. This sub-article also seems to make Article 8(1) of the same Proclamation, a pro-party autonomy provision that demands Ethiopian courts to refer disputes subject to a valid arbitration agreement, impractical. The reason for such impracticality stems from the simple failure of contracting parties to fulfill the two-witness requirement adopted in that sub-article as this failure puts the validity of the arbitration contract in question. Consequently, at the pre-arbitration stage, the Ethiopian court might still litigate a dispute subject to an arbitration agreement based on the non-fulfillment of the two-witness requirement and thereby limits party autonomy at the threshold stage of the arbitral proceedings.

Additionally, Articles 50(2(a) and 41(3) in the current Proclamation include provisions hardly comprehendible and susceptible to various interpretations. As discussed in Chapter III, both provisions failed to provide arbitrators and courts the necessary guidelines on how the law governing the substantive validity of an international arbitration agreement could be selected in the absence of parities' choice. There is also a need to be aware of the formulation of sub-article (2)(d) of Article 50

as it appears to suggest an illustrative list of grounds for applications to setting-aside an arbitral award. This illustrative approach could potentially have a significant impact on the principle of finality in arbitration as it may allow parties or courts to include other grounds by interpretation. Furthermore, the sub-article includes examples of procedural public policy breaches, which is supposed to be a mandatory ground, as a ground for setting aside an award based on party's motion.

As argued in Chapter III, the *modus operandi* for providing a list of grounds for challenging arbitral awards at the setting-aside stage should be adopting an approach presenting an exhaustive list of grounds in the arbitration legislation. Furthermore, the Ethiopian courts, upon their motion, should set aside an arbitral award if it is determined that the award was rendered by a biased or dependent tribunal as bias on the part or arbitrator or tribunal is an instance procedural public policy violation. In conclusion, Article 50(2)(d) warrants careful attention as it could potentially impact the finality of arbitral awards and conflicts the mandatory rule of procedural public policy with the non-mandatory rules.

6.2 Recapitulation on the indefinite nature of the rules governing inarbitrability of administrative contracts and the case-law's response

Chapter IV of this thesis covered the problems surrounding the principle of the inarbitrability of administrative contracts under the Ethiopian arbitration regime. This chapter started with an overview of the concept of the administrative contract stipulated under Article 3132 of the 1960s Ethiopian Civil Code. As the French doctrine on the law of administrative contracts was the primary source of the Ethiopian legislation, the assessment concerning the subject matter, analyzed by comparing the concept with the notion of an administrative contract in the French legal regime. Following the establishment of the conceptual definition of the term "administrative contract", the analysis putted the rules of the current Ethiopian arbitration legislation governing inarbitrability of administrative contracts under the international commercial arbitration context for a comparative analysis with other rules, such as the NYC.

Some of the main questions in Chapter IV relate to the impact of the inadequately defined concept of administrative contract in restraining the scope of arbitrability of disputes concerning an

administrative contract under the international commercial arbitration perspective. The definition of administrative contracts provided under the Ethiopian Civil Code is barely comprehendible. The French doctrine of administrative contracts, relating to the clarity on the very concept of "administrative contract", has fewer problems than the Ethiopian ones.

Another central question on this issue is associated with Amharic and English grammar and language conflicts stated in Article 7(7) of the Arbitration Proclamation. Due to the language problem in this sub-article, two plausible explanations concerning the principle of the non-arbitrability of administrative contracts appear to exist. In the Amharic version, non-arbitrability of administrative contracts is the "rule". In other words, disputes relating to administrative contracts are arbitrable in exceptional circumstances when there is explicit statutory authorization. The English version, on the other hand, appears to suggest arbitrability of disputes concerning administrative contracts is the principle, not an exception. As a result, the linguistic confusion concerning the inarbitrability of administrative contract in this sub-article, which is characterized by obscurity and perplexity may undermine the principles of certainty and party autonomy in International Commercial Arbitration.

This thesis under Chapter IV also addressed briefly the arbitral tribunal's jurisdiction to rule on disputes concerning the arbitrability of administrative contracts. Strictly construed, there is a clear divergence between the provisions (Article 19(1)) of the new Arbitration Proclamation and Article 231(1)(b)) of the Civil Procedure Code relating to the adoption of the *Competence-competence* principle in the Ethiopian Arbitration legislations. The provision in the new arbitration statute appears to recognize the arbitral tribunal's competence to rule on questions relating to the arbitrability of administrative contracts and thereby maintain the *Competence-competence* principle. In the Civil Procedure Code provision, on the other hand, parties, and courts, on their own motion, can challenge arbitration by invoking a lack of material jurisdiction, non-arbitrability of a subject matter, before the arbitral proceedings, during or at the post-award stages of the arbitration. The lack of coherence between the provisions of the arbitration Proclamation and the CPC can lead to confusion and conflicting interpretations, particularly when it comes to the rules related to the principle of *competence-competence* in the current Ethiopian arbitration regime. Without a clear understanding of

the interrelationship between these laws, one may arrive at different and contradictory conclusions regarding the adoption of the *competence-competence* principle in Ethiopian law of arbitration.

6.2.1 Summary of the Federal Supreme Court Cassation Bench rulings in cases involving administrative contracts

Chapter IV includes a brief overview of five Federal Supreme Court Cassation Division rulings that address the interpretation administrative contracts and their arbitrability in order to examine the current discourse on the general principle of administrative contracts' inarbitrability in the practical law. Of these, two cases are purely domestic. In the first national case, the Cassation Cour touched on the conceptual interpretation of administrative contracts, but provided little detail and clarity on the concept. The other domestic case pertained to the court's analysis of the reasons for the exclusion of disputes relating to administrative contracts from the arbitration domain. The court in this analysis cited Article 315(2) of the Civil Procedure Code which regulates the prohibition of disputes relating to administrative contracts in language that demands no purpose-based interpretation. Notwithstanding, the court embodied two rationales, government policy and organizational incapability of the ADR Institutions in Ethiopia, for the probation stipulated in the aforementioned sub-article. Two of the justifications appear to result from the overinterpretation of the otherwise clear provision.

The remaining cases that involve foreign elements indicate an approach shift by the Cassation Court towards remaining silent on the non-arbitrability of disputes relating to administrative contracts. In this respect, it seems that the Ethiopian case-law system of arbitration preferred to be in a borderline situation. The Cassation Court's intermediate stance on this issue could lead to two different conclusions. For one, interpreting the court's silence may provide a favorable leeway for respecting party autonomy in regards to arbitrability of disputes related to administrative contracts in the ICA context. At the same time, this silence, along with the ambiguity on arbitrability of administrative contracts in the statutory arbitration system, could open up several interpretative concerns which seriously affect certainty and predictability under the ICA system.

6.3 Summary of the statutory and case-law analysis on the application of 'error-of-law' as a ground of review

In the context of the ICA, court review of awards on the error-of-law ground, be it fundamental or basic error, is no longer a convincing ground for post-award court review of arbitral awards in most of the pro-arbitration jurisdictions as this could lead to inefficient, lengthy, and costly court litigation and eventually thwart the legitimate expectation of the parties for final and binding arbitral awards. The Ethiopian legislators, in contemporary arbitration Act, amended the procedure by which an application for review of arbitral awards on error-of-law grounds could be submitted to the appellate court or the Court of Cassation. The new arbitration statute limits the wide-scale post-award court review of arbitral awards by modifying the rules of the Civil Code on appeals against arbitral awards. Article 49(1) of the Proclamation prevents, if not absolutely, application against awards to the court of appeal. The legislation, under sub-article 2 of the same provision also placed a significant restriction on the power of the Cassation Court to review an arbitral award based on error-of-law by enabling parties to contract out this rule. As a result, it is logical to claim that the contemporary Ethiopian arbitration legislation becomes more pro-party autonomy and the principle of finality than the previous arbitration rules in the Civil Code.

However, the introduction of a contract-based expansion of court review in the form of appeal by the preceding provision seems to reflect a local peculiarity since there is no parallel rule in the Model Law. Furthermore, it could have an antagonistic effect on the principle of finality under the ICA perspective since there are no requirements for the parties to secure a court leave for appeal as in the English Arbitration Act. The undefined prefixes to the term "error of law", fundamental or basic, are also likely to be destructive to the principle of party autonomy in international commercial arbitration as the Proclamation did not guide how to interpret those terms if parties fail to contract-out Article 49(2) of the proclamation in advance. Another potential issue arises from the possibility of including an error-of-law by the arbitral tribunal in interpretation of the party-selected foreign substantive law as a ground of post-award review by the Ethiopian Cassation Court. This concern stems from the absence of a specific provision in the Proclamation that explicitly excludes error of

foreign law as a basis for Cassation Court review of international arbitral awards. Therefore, even in the most recent Ethiopian arbitration legislation, arbitral tribunals' blunders in the interpretation of the Ethiopian law, or party-chosen foreign substantive law, inappropriate framing of issues, and failure to observe binding Federal Supreme Court Cassation Court cases could lead to a substantive review of international arbitral awards. This post-award court review in effect, seriously limits the principles of party autonomy and finality under the international commercial arbitration perspectiv

As the two Cassation Bench cases, *Ethiopian-Djibouti Railway Enterprise* and *Agricom International SA*, demonstrate, the case law also appears to pursue a merit-based extensive court review of arbitral awards on the error of law ground. From the Cassation Court's ruling in the *Ethiopian-Djibouti Railway Enterprise* case, one can infer that international commercial arbitration can be a subject of an expansive post-award court review on the substantive error of law ground if the applicable substantive law and the legal seat of the arbitration are in Ethiopia. The court's analysis, in this case, considered the legal seat of arbitration and the applicable substantive law as concurrent factors for assuming jurisdiction to review an international commercial award.

Meanwhile, in the *Agricom International SA* case, the same court ruling demonstrated that the applicable substantive law is not a requirement for assuming jurisdiction on error of law grounds. The court in this case denied an application to review awards based on error on Ethiopian substantive law due to the fact that the legal seat of the arbitration was not located in Ethiopia. This decision was made without any explicit overruling of the concurrent requirement established in the precedent case of the *Ethiopian-Djibouti Railway Enterprise*. As discussed in Chapter V, the only significant difference between *Ethiopian-Djibouti Railway Enterprise* and *Agricom International SA* was the seat of arbitration.

The court analysis in the *Agricom International SA* case contains explanations with textual ambiguity concerning the applicability of the fundamental or basic error of law basis in challenging a foreign arbitral award. The Cassation Court's decision to disregard the error-of law concept as a legitimate ground for challenging foreign arbitral awards could be seen as favoring party autonomy and finality under the ICA perspective. Nonetheless, as a precedent case ment to settle future disputes

on the matter, it did not fully address the issues surrounding errors of law, especially when parties fail to select the legal seat of arbitration.

The majority court in the *Agricom International SA* case also overlooked two important points that may have unintended consequences on the finality of the ICA awards if the main contract falls under the category of administrative contracts. From the readings of the court's analysis in this case, it is difficult to infer which law, the law of the seat or the applicable substantive law, would be applied to determine whether the main contract is an administrative contract or not. Additionally, the courts' analysis in this authoritative case failed to include a ruling that could help determining the applicable law that governs arbitrability of the administrative contract.

6.4 Recommendations and future directions

Apart from the ratification of the 1958 New York Convention, the recently enacted Ethiopian arbitration legislation introduced a significant number of rules that could enhance predictability on the enforcement of international commercial arbitration contracts and the recognition and enforcement of foreign arbitral awards. At the same time, the presence of textual ambiguity in both the recent statutory and case law of the Ethiopian arbitration system is likely to be the antithesis of the most acclaimed principles of international commercial arbitration, the principle of party autonomy and finality. This research identified two sets of limitations of the current arbitration statute that have far-reaching implications for the principle of party autonomy, issues related to the mandatory formal requirements of the arbitration agreement and issues surrounding the inarbitrability of administrative contracts. Both these limitations have the potential to seriously impact the party autonomy principle in ICA. The more daunting effect of those limitations in the recent Ethiopian arbitration law is that their consequence extends from the enforcement of international arbitration agreements to the recognition and enforcement of foreign arbitral awards.

Therefore, given the reality of the country's recent accession of the NYC, the author recommends that the Ethiopian Federal Supreme Court Cassation Bench should adopt the minimal approach in the post-award review of arbitral awards. The court should also provide an authoritative decision that addresses the interpretative issues in the precedent cases and ambiguous provisions

concerning the formal requirement in concluding arbitration agreements and the arbitrability of administrative contracts under the recent arbitration legislation. The statutory limitations that this research identifies requires no legislative amendments. The Cassation Court could address those limitations based on the recently demonstrated tilt of the Ethiopian lawmakers towards the pro-arbitration policy and its, arguably law-making power, granted by the 1995 Proclamation. Additionally, it would be relatively cost-effective and feasible to address the abovementioned problems with an authoritative Cassation Division decision than proposing a legislative amendment.

Essentially, this dissertation seconds the adoption of both minimal pre-award and post-award court involvement in the Ethiopian arbitration system, particularly under the international commercial arbitration perspective. The findings and recommendations in this research can provide valuable insights for the ongoing efforts in the country to establish an arbitration system that uphold party autonomy. The inputs from this research that identified the disproportionate restrictions of party autonomy arising from language-related challenges in the statutory arbitration system and the interpretative issues in the case-law of Ethiopia, can contribute to the development of a more supportive arbitration framework in the country.

As a way forward, researchers may find out researchable subject matter in this paper. For instance, this research touched upon the general notion of the concepts of national and international public policies and their role in limiting party autonomy. However, it is important to note that this research does not include a comprehensive analysis of the Ethiopian understanding of public policy as a limitation on party autonomy within the context of international commercial arbitration. This omission is partly due to the lack of Cassation Court cases specifically addressing this issue, especially following the adoption of the 1958 New York Convention by the country. Therefore, a further study could examine the application of the so called “international public policy” as a limit to enforcement of international contracts and recognition or enforcement of foreign arbitral awards in Ethiopian arbitration system.

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