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Title

Comparative Analysis of Scope of Jurisdiction of Arbitrators under the Ethiopian Civil Code of 1960

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Abstract

Arbitration has become an important means of dispute resolution. This dispute resolution mechanism can work efficiently only if its autonomy is protected against unwarranted and obstructing court intervention. The doctrine of separability and competence-competence as well as arbitration friendly interpretation of ambiguous and unclear arbitration clauses are important features of modern arbitration law designed to maintain the autonomy and efficiency of the arbitration process. This thesis surveys the position of the civil code of Ethiopia with respect to these important features of modern arbitration law and shows how the code has left much to be desired compared to the arbitration laws of major jurisdictions and UNCITRAL model law, and makes suggestions for judicial activism and legislative amendment to update the code with these developments of arbitration law.

Introduction

"their [African states] participation in international transactions, of vital importance to their economic development, required the use of arbitration for the settlement of commercial arbitration."[1]

In Africa, as well as in Ethiopia in particular, although arbitration in its traditional and cultural understanding of solving individual disputes amicably through local elders is deep rooted the concept as we lawyers today understand it is a very recent development[2]. For Africa, arbitration in its modern conception has a more far reaching value than being a mere instrument of dispute resolution. As it has been rightly indicated in the motto above by the American branch of the International Law Association Committee on international arbitration, African states need to incorporate the formulation of comprehensive, effective and efficient arbitration law regime as part of their development endeavor through international business transaction and foreign investment.

It is widely submitted that arbitration, compared with litigation, provides a more expeditious, flexible and cost effective dispute resolution mechanism through competent individuals selected for their specialized knowledge with the power to give a final and binding award with no or limited recourse to ordinary courts. This does not mean that arbitration is impeccable means of dispute resolution mechanism which is immune from any criticism. One of the common criticisms against arbitration is that if both parties are not committed to resolving the dispute through the arbitration process, there is tremendous opportunity for a party to delay the arbitration process by submitting numerous motions to the courts which affects the very foundation of the arbitration process to provide a quick and efficient dispute resolution mechanism.

[1] Report On International Commercial Arbitration Progress (1963-1964) *International Law Association* 137 at 140 as Quoted In 24 International And Comparative Law Quarterly(1975) :397

[2] Tilahun Teshome, "The Legal Regime Governing Arbitration In Ethiopia: A Synopsis," *Ethiopian Bar Review* 1(2):1

This criticism is a result of the fact that the development of arbitration as a speedy and efficient dispute resolution mechanism "brings with it increasing substantive and procedural challenges to the arbitration process"[3] by a party who has interest in delaying the overall process. One of the procedural challenges made to the arbitration process is the tribunal's lack of jurisdiction to determine the validity of a contract containing the arbitration clause. According to this objection a tribunal can not invalidate the main contract with out the risk that its decision will call into question the validity of the arbitration clause from which the tribunal derives its power which in turn calls into question the validity of the award given by the tribunal.

The same is true for a challenge made against the arbitration clause. Since arbitrators derive their power from the parties' agreement, a challenge to this agreement would logically leave them powerless to hear a case until it was determined that the agreement was indeed effective, conferring on them the authority to resolve the relevant disputes. This objection necessitates the intervention of the judiciary for the sole purpose of deciding the jurisdiction of the arbitrators which in practice will cause inconvenience, delay and unnecessary costs which destroys the overall purpose of arbitration as a speedy and efficient means of solving dispute.

It is to resolve these practical problems that the modern laws of commercial arbitration have developed the doctrines of separability and competence-competence. The doctrine of separability by holding that the arbitration clause has independent existence or is "separable" from the main contract and the doctrine of competence-competence by conferring the arbitrators the power to rule on challenges directed against the arbitration clause are designed to protect the autonomy of the arbitration process from early and obstructing judicial intervention.

[3] John Zadkovich , "Divergence And Comity Among The Doctrines Of Separability And Competence-Competence," *Vidobona Journal Of International Commercial Law And Arbitration* 12(1) (2008): 1

The other important development in protecting the autonomy and efficiency of the arbitration process is arbitration-friendly interpretation of defective and ambiguous arbitration clauses. Restrictive interpretation approach which requires interpretation of doubtful arbitration clauses against the jurisdiction of arbitrators on the assumption that arbitration is a rival to the normal jurisdiction of courts is giving way to liberal and neutral interpretation of arbitration clauses. This is a move based on the arbitration-friendly attitude that arbitration is no more an enemy or rival to court jurisdiction but rather a friend which shares the work load of ordinary courts so that arbitration clauses have to be interpreted liberally in favor of arbitration or at least neutrally based on the common intention of the parties as applied to any contractual clauses.

Is the civil code of Ethiopia clear enough in incorporating the doctrines of separability and competence-competence, which, nowadays, have become the cornerstones of modern arbitration law? If not, is there any possibility for the judiciary to endorse the doctrines through the exercise of its power of interpretation? Or is legislative reform necessary? Concerning interpretation of arbitration clauses article 3329 of the civil code clearly provides for restrictive interpretation of the jurisdiction of the arbitrators. On the other hand, in 2005 the Federal Cassation Court Of Ethiopia in the case between *Zemzem private limited company v. Education Department of Hiilibabor Zone* (case No16896) decided for the jurisdiction of the arbitrators by interpreting arbitration clause which provides for option between court and arbitration jurisdiction. Is this decision a clear departure from the restrictive interpretation rule of article 3329? If so, is it a tenable solution for unfriendly attitude of the code towards the jurisdiction of arbitrators? Or do we need a legislative intervention to update the code with the current development of arbitration friendly rules of interpretation?

This thesis surveys these issues and shows how the code has left much to be desired compared to arbitration laws of major jurisdictions and UNCITRAL model law. Based on this survey the thesis makes suggestions for judicial activism and legislative amendment to update the code with the modern developments of arbitration law with respect to the doctrine of separability and competence-competence as well as rule of interpretation of arbitration clauses.

For the purpose of addressing these issues the phrase "Scope of jurisdiction of arbitrators" is used in the title of the thesis to refer to the jurisdiction of the arbitrators to decide on (1) the validity of the main contract containing arbitration clause which is a question of separability covered under chapter one; (2) the validity and existence of the arbitration clause which is a matter of competence-competence dealt under chapter two and (3) the scope of arbitration agreement which has to be seen in the broader context of interpretation of defective and doubtful arbitration clauses addressed under chapter three. This will be followed by conclusion and recommendation.

Chapter One

Jurisdiction of Arbitrators and the Doctrine of Separability

1.1 Background and definition of the doctrine

1.1.1 Background

Unlike judges, arbitrators do not get their jurisdiction from the law enacted by the legislature. They rather derive their authority from an arbitration agreement concluded by the parties according to the law. This agreement can be made either in the form a *compromise* which is a separate agreement to submit to arbitrators a dispute already at hand at the time of concluding the contract or in the form of *clause compromissoire* which is a clause in a contract to resolve disputes which may arise in the future relating to the underlying contract containing the clause.[4]

Formerly there was a widespread understanding among jurisdictions that an arbitration agreement made in the form of *clause compromissoire* is unenforceable because it does not fulfill the requirement of a valid arbitration agreement to clearly specify the subject matter of the dispute submitted to arbitrators.[5] An arbitration clause included as part of a main contract to submit a future dispute to arbitration is used to be declared invalid on the ground that the subject matter of a possible future dispute can not be specified before the actualization of the dispute.[6]

[4] Tibor Varady, John J. Barceló And Arthur T. Von Mehren, *International Commercial Arbitration: A Transnational Perspective*, 3rd ed.(United States of America: Thomson/West, 2006), 85

[5] Arthur Taylor Von Mehren, "International Commercial Arbitration: The Contribution Of The French Jurisprudence," *Louisiana Law Review* 46 (1986):1045; see also Thomas E. Carbonneau, "The Elaboration of a French Court Doctrine on the International Commercial Arbitration: A Study In Liberal Civilian Judicial Creativity," *Tulane Law Review* 55 (1980): 2 "In French domestic arbitration law an agreement to submit future disputes to arbitration is unlawful under article 2061 of the French civil code except in commercial cases specified under article 631 of the code de commerce." Similarly on the development of the Spanish arbitration law concerning the validity of clause compromissoire, see the comment made under supra n. 1, 831-832

[6] Ibid Arthur Taylor Von Mehren, 1047

But currently *clause compromissoire* is not only recognized as a valid form of arbitration agreement but also has become a much more usual form of arbitration agreement one can find in practice.[7] The civil code of Ethiopia also recognized the validity of both forms of arbitration agreement under article 3328[8] only with a caveat under sub article 3 that arbitration clause to submit future dispute to arbitration shall not be valid unless it concerns disputes which flow from a contract or other specific legal obligation, a limitation which has a very minimal practical significance considering the fact that in practice most arbitration clauses are included in contractual agreements.

Once the validity of arbitration clause is recognized as established rule of arbitration, the issue of whether the arbitration clause is separable from the contract in which it is contained has become crucially important.[9] As we will see later in this chapter the issue of whether or not the invalidity of the main contract results in the invalidity of the arbitration clause is very crucial in the proper exercise of jurisdiction by the arbitrators. Whether or not the fate of the arbitration clause depends on the fate of the underlying contract is important to determine whether the arbitrators have the autonomy to exercise their jurisdiction or not.

The doctrine of separability is mainly relevant in connection with arbitration clause inserted in a substantive agreement (*clause compromissoire*). But in the case of a separate agreement to submit existing dispute to arbitration (*compromise)* it is unlikely to face the issue of separabiltiy which assumes the existence of underlying contract containing arbitration clause to

[7] Tibor Varady, "On The Appointing Authorities In International Commercial Arbitration," *Emory Journal Of International Dispute Resolution* 2 (1987): 311

[8] Article 3328 (1)and (2) of the civil code provide :

(1) the dispute referred to arbitration may be an existing dispute,

(2) The parties to a contract may also submit to arbitration disputes which may arise out of the contract in the future.

[9] See, Arthur Taylor Von Mehren, Supra n. 5: 5

submit future dispute to arbitration.[10] In Ethiopia as stated above because of the recognition of the validity of arbitration clause contained in a contract, the issue of separability is likely to arise in the courts of Ethiopia and arbitration tribunals. The main objective of this chapter is how to resolve this issue based on the content of the civil code.

1.1.2 Definition

According to the doctrine of separability, if an arbitration agreement is made in the form of a clause in a contract (*clause compromissoire*), the arbitration clause is deemed to have independent existence from the main contract in which it is contained[11]. For example, when two parties enter into a sales contract and provide for arbitration clause in their contract, they notionally enter into two separate contracts: contract of sale and contract of arbitration. Since the two contracts have independent existence, the invalidity of the sales contract does not result in the invalidity of the arbitration clause. The fate of the arbitration clause does not depend on the fate of the contract containing it in the sense that it may survive the invalidity of the contract in which it is contained.

The notion of separability as applied to arbitration clause differs from the notion of severability as used in the general contract law.[12] The idea of severability as normally understood in contract law provides that a contract will not be invalidated as a whole because of the invalidity of one of its clauses unless the invalid clause is so essential to the parties that they might not enter in to the contract without it.[13] This means the severability doctrine in contract

[10] Christian Herrera Petrus, "Spanish Perspectives On The Doctrines Of Kompetenz-Kompetenze And Separability: A Comparative Analysis Of Spain's 1988 Arbitration Act," *The American Review Of International Arbitration* 11 (2000): 20

[11] John Zadkovich, "Divergence and Comity Among the Doctrines of Separability and Competence-Competence" *Vindobona Journal Of International Commercial Law And Arbitration* 12(1) (2008):1

[12] Id:2

[13] Id.:2

law is concerned for the survival of the main contract from the invalidity of one of its clause whereas the separabitlity doctrine in arbitration law talks about the reverse in the sense that it refers to the survival of the arbitration clause from the invalidity of the main contract.[14]

The doctrine of separability plays an important role in ensuring the effective functioning of the arbitration tribunal. The doctrine by rescuing the arbitration clause from the invalidation of the main contract will enable the arbitrators to hear any dispute in relation to the main contract including disputes concerning the existence, validity and termination of the main contract without risking the loss of their jurisdiction by invalidating the main contract.[15] That means an arbitrator "may declare the contract invalid but still retain jurisdictions to decide as to the consequence of that invalidity."[16] In addition separability protects the arbitration process from court intervention. When a party to a contract with arbitration clause goes to a court in disregard of the arbitration clause challenging only the validity of the container contract, the court will send the issue to the arbitrators whose jurisdiction will remain intact despite a challenge to the validity of the main contract.[17]

However the doctrine is not immune from criticism. The criticism is based on a logical argument that when a contract is invalidated all its clauses which are part of that contract are invalidated too.[18] Since the arbitration clause is inextricably linked to the main contract containing it, it is illogical to say that the arbitration clause will survive the invalidity of the main contract. If the container is not there, the content can not be there. Judge Schwebel, putting the argument in this respect says:

[14] Ibid
[15] Robert H. Smit, "Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or can Something Indeed Come from Nothing?" *the American review of international arbitration* 13(19) (2002): 2
[16] Ibid
[17] John J. Barceló, "Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective," *Vanderbilt Journal of International Law 36(2003):* 1119
[18] See Robert H. Smit, Supra n 15: 3

> "If an agreement contains an obligation to arbitrate disputes arising under it, but the agreement is invalid or no longer in force, the obligation to arbitrate disappears with the agreement of which it is a part. If the agreement was never entered into at all, its arbitration clause never came into force. If the agreement was not validly entered into, then, prima facie, it is invalid as a whole, as must be all of its parts, including its arbitration clause"[19]

It is also beyond the expectation of the parties when they are told that they have concluded two contracts while they are signing only one contract document.[20] Then what are the justifications for adopting the doctrine of separability if it is so absurd in the scale of logical thinking?

1.2 Justifications for the doctrine

Scholars and national courts provide various justifications for the doctrine of separability so strong that nowadays "the doctrine has become part of universal consensus among arbitration practitioners, accepted by most legal systems"[21] and international arbitration laws and rules. The justifications for the doctrine of separability range from the mere legal fiction of a contract within a contract to practical, legal and policy considerations of adopting the doctrine.

1.2.1 Legal fiction of a contract within a contract

This justification is made based on a theoretical conception that an arbitration clause and the main contract containing it are two different kinds of contracts i.e. one is procedural the other is substantive.[22] The arbitration clause is procedural in the sense that it provides for the means or mechanism through which a future dispute can be resolved. This is more of a procedural law attribute. On the other hand the main contract refers to the respective rights and obligations of

[19] Stephen M. Schwebel, *International Arbitration: Three salient problems* (1987) : 11 cited in Smit, Supra nt. 12 :3
[20] See Smit, Supra n. 15: 3
[21] Alan Uzelac, "Jurisdiction Of The Arbitral Tribunal: Current Jurisprudence And Problem Areas Under The UNCITRAL Model Law," *International Arbitration Law* 8(5) (2005): 2
[22] See Smit, Supra n. 15: 3

the parties in relation to the main subject matter of their agreement. This gives the main contract a character of substantive law. Therefore, when the parties sign a contract containing arbitration clause they are conceptually signing two different kinds of contracts having independent existence in the same document. In this respect judge M. Schwebel stated that "when the parties to an agreement containing an arbitration clause enter into that agreement, they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principal contract."[23]

1.2.2 Implied intention of the parties

This justification- without going into sleight of hand or legal legerdemain in creating a legal fiction of a contract within contract which is a controversial justification for the doctrine of separability[24]- tries to base itself on ordinary contract interpretation.[25] Even though the parties do not expressly agree that the arbitrators have the power to investigate and rule on disputes relating to the validity of the main contract, they have implied intention to submit this dispute to the arbitrators when they agree to submit any dispute arising out of or relating to the contract. As judge Schwebel put it:

> When parties enter into an arbitration agreement which is widely phrased, they usually intend to require that all disputes, including disputes over the validity of the contract, are to be settled by arbitration. This may be an implied term of the contract. For instance, applying the officious bystander test, if the parties when concluding the agreement had been asked, "Do you mean, in providing that 'any dispute arising out of or relating to this agreement' shall be submitted to arbitration, to exclude disputes over the validity of the agreement?", surely they would have replied that they did not mean to exclude such disputes. Applying the separability doctrine thus gives effect to the will of the parties.[26]

[23] Ibid
[24] See Zadkovich, Supra n. 11: 3 (quoting authors Craig et al, who state that the true justification for the doctrine is indeed practical rather than theoretical)
[25] See Barceló , Supra n.17 :1120
[26] Quoted in, Jack Lee Tsen-Ta, "Separability, Competence-Competence And The Arbitrator's Jurisdiction In Singapore," *Singapore Academy Of Law Journal* 7 (1995): 422

Therefore following this ordinary interpretation of contracts, the doctrine of separability effectuate the intention of the parties to resolve their dispute relating to the validity of the container contract through their preferred means of dispute resolution mechanism(arbitration) rather than through litigation.

1.2.3 Preserving the autonomy and integrity of the arbitral process

This justification provides that the doctrine of separability protects the arbitration process from unwarranted judicial intervention and frivolous challenges by a party who has interest in delaying the arbitration process. This is a practical consideration that, had it not been for separability doctrine, a recalcitrant party to the dispute would have delayed the arbitration process by challenging the validity of the contract containing an arbitration clause and calling for the intervention of the court in the process for the purpose of settling the dispute on the validity of the main contract.[27] The doctrine of separability by empowering the arbitrators to rule on the validity of the container contract protects the process of arbitration from this kind of ill conceived objections and "serves to avoid court interference with substantive contract issues that were intended to be arbitrated."[28]

1.2.4 Pro-arbitration policy consideration

Some Courts, particularly in the United States, justify the doctrine of separability based on the overall pro-arbitration policy of the country[29]. In Prima paint corp. v. Flood and Conklin Mfg. Co. the majority opinion of the supreme court held that when a party to a contract with a

[27] Ibid
[28] See Smit, Supra n. 15 : 3
[29] See Barceló ,Supra n. 17: 1120

widely phrased arbitration clause generally alleges that the contract is induced by fraud with out any specific reference that the fraud relates to the arbitration clause, the case has to be referred to arbitration. One of the reasons espoused by the court in arriving at this conclusion of separability was a pro- arbitration policy of the country by indicating the "clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."[30]

1.2.5 Insuring certainty in the business community

The doctrine of separability also gives predictability to the business community by effectuating their intention to resolve all disputes relating to their contractual and other relationships through neutral, speedy and cost efficient arbitration process of their choice. Particularly in the international business context the business community without their common understanding and expectation that any disputes would be resolved in a neutral and non national arbitral forum, it would be difficult for them to engage in business relationship abroad with full confidence and security.[31]

1.3 Universal acceptance of the doctrine

Most of the above justifications bring a general consensus among scholars, national and international legal systems to the extent that currently the doctrine of separability has achieved an almost universal recognition. Professor *Tibor varady* in one of his articles indicated that nowadays "the separability of the arbitration clause from the rest of the contract is generally

[30] Prima paint Corp. v. Flood and Conklin MFG CO., 388 U.S 395 (1967) at 404
[31] See Smit, Supra n 15:3

accepted."[32] In addition, according to professor *Barceló*, currently "the separability principle has been adopted with very much the same content, in most of the world's legal orders."[33]

The wide and universal acceptance of the doctrine of separability is evidenced by the recognition of the principle under the UNCITRAL model law on international commercial arbitration which was adopted by the United Nation Commission on International Trade Law on June 21, 1985. This model law which is an embodiment of the current modern conception of arbitration law was adopted to serve as a proposal for national legislation. This model law in its article 16(1) provides:

> The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. a decision by the arbitral tribunal that the contract is null an void shall not entail ipso jure the invalidity of the arbitration clause.

Following this international proposal for national legislation England and Germany have adopted their own arbitration act of 1996 and 1998 respectively endorsing the principle of separability as important part of their legislation.[34]In the United States too in the case of *prima paint Corp. v. Flood and Conklin MFG CO.* the United States Supreme Court adopted the principle of separability by holding that when an allegation of fraud is made in the formation of a

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[32] Professor Tibor Varady, "On the Option of a Contractual Extension of Judicial Review of Arbitral Awards or: What Is Actually Pro-Arbitration?" Zbornik PFZ, 56(2-3) (2006) : 457

[33] See Barceló, Supra n 17 :1116

[34] The English arbitration act of 1996 part 1 section 7 provides:

unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement,

The German arbitration law of 1998 section 1040 also clearly adopts the principle of separability by providing:

The arbitral tribunal may rule on its own jurisdiction and in this connection on the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

contract containing a clause to arbitrate any controversy relating to or arising out of the contract and the breach thereof, the dispute has to be sent to arbitrators as long the allegation is not directed to the arbitration clause itself. In addition the doctrine has also assumed wide recognition by the arbitration rules of major arbitration institutions.[35]

1.4 Consequences of the doctrine of separability

The wide acceptance of the doctrine has played a tremendous role in the autonomous and efficient functioning of the arbitration process by protecting the tribunal from unwarranted court intervention and party challenges made in bad faith to obstruct the proceeding. Firstly, if a party attacks the validity of the underlying contract containing the arbitration clause the arbitrators can proceed to rule on the validity of the main contract without the need to interrupt for the sake of judicial assistance. Since according to separability principle the arbitrators' decision to invalidate the main contract does not affect the validity of the arbitration clause, the arbitrators can decide on the consequences of the invalidity of the underlying contract with out compromising their jurisdiction and the validity of their award. Secondly, if the matter is before a court because of a motion to compel arbitration, to stay arbitration or as a result of a suit in disregard of arbitration clause, the court should send the matter to arbitration despite a challenge against the main contract. This will insure the autonomy and proper functioning of the tribunal and effectuate the intention of the parties to submit any dispute relating to their contract to a neutral and efficient decision making body.

[35] For example the international chamber of commerce arbitration rules of 1998 in its article 6(2) provides*: unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void;* see other examples: American Arbitration Association International rule of 2003 art. 15(2),; Arbitration rules of the London Court of International Arbitration of 1998 art. 23(1); China International Economic and Trade Arbitration commission (CIETAC) Rules of 2005 art. 5(4)

Given this universal consensus on the justification, acceptance and benefits of the doctrine, there is little doubt that separability is nowadays a general principle of modern arbitration law not only in national but also in the international legal systems. The next issue is in all this international legal process where is the position of the doctrine in the 1960 civil code of Ethiopia? Is the civil code in line with the universal trend of endorsing the doctrine of separability as a fundamental principle of modern arbitration law?

1.5 The position of the Ethiopian civil code

The law governing arbitration in Ethiopia is found in the 1960 civil code and the 1965 civil procedure code.[36] The former carries provisions dealing with the substantive aspects of arbitration while the latter mainly regulates the procedures employed in arbitration proceeding. Both the substantive and the procedural law regime say nothing about the doctrine of separability. This silence doesn't mean that the country rejects the doctrine. The courts through the exercise of their power of interpretation can endorse the principle as long as there is no any mandatory provision forbidding the application of the principle in the Ethiopian legal system. Parties to the contract can also agree to empower the arbitration tribunal to rule on the validity of the main contract by incorporating in their contract institutional arbitration rules endorsing the doctrine of seprability as there is no any mandatory law prohibiting such agreement.

1.5.1 Incorporation through judicial interpretation

a. Interpreting broadly phrased clause

As indicated above in this chapter, one of the justifications provided for the adoption of separability is that when the parties enter into an arbitration agreement which is widely phrased,

[36] Civil code of the Empire of Ethiopia, Articles 3325 up to 3346; Civil Procedure Code of the Empire of Ethiopia, Articles 315 up to 319 and 350 up to 357

they usually intend to require that *all* disputes, including disputes over the validity of the contract (the container contract) are to be settled by arbitration. Is there any possibility for the courts of Ethiopia to use this justification of the implied intention of the parties to apply the doctrine of separability for an arbitration agreement which is widely phrased? To answer this question we have to make clear from the outset that this justification of separability through the implied intention of the parties is not free of criticism and doubt. Some writers argue that when two parties enter into a contract "it is almost always very far from their minds and from the minds of their legal advisers that they are entering into two separate contracts."[37] This shows that it is open to doubt or at least arguable whether there is implied intention of separability on the part of the parties in entering a widely phrased arbitration agreement. The question that naturally follows is to whose favor should we resolve the doubt? Should we resolve it in favor of those who argue for the existence of separabitlity or otherwise? The answer to this question depends on whether this issue arises in a court which has a pro-arbitration law at its disposal or not.

Having this in mind, when we survey the relevant provisions of the civil code of Ethiopia one can find article 3329 which provides:

> "*The provisions of the arbitral submission relating to the jurisdiction of the arbitrators shall be interpreted restrictively."*

This means when a judge is faced with a doubt as to whether a certain dispute falls within the jurisdiction of the arbitrators the judge has to interpret it restrictively in the sense that she has to resolve the doubt not in favor of the arbitration but rather against the jurisdiction of the arbitrator. The supreme court of Italy- a country which has the same position as the civil code of Ethiopia with respect to interpretation of arbitration clause relating to jurisdiction, once stated:

> "the submission of disputes to arbitration implies an exceptional exclusion of the jurisdictional function of the national judge.[T]he interpretation of the arbitration

[37] See Robert H. Smit, Supra n 15: 3

clause must be made in a restrictive way" and , in doubt, " the natural jurisdiction" of national courts must prevail over the "special one" of the arbitral tribunal[38].

This mistrust of arbitration is also reflected in article 3329 of the civil code of Ethiopia. This will not enable the Ethiopian courts to read in the arbitration clause the implied intention of the parties accepting the principle of separability, because this interpretation would be more favorable to the jurisdiction of the arbitration which is contrary to article 3329 which requires restrictive interpretation of the arbitration clause in the sense that the doubt has to be solved against the jurisdiction of the arbitrators.

Of course, this is a result one can deduce only on the assumption that the controversy among scholars on the implied intention of the parties concerning separability equally creates doubt in the minds of the Ethiopian judges. If Ethiopian judges, despite the controversy among scholars, believe that an arbitration clause which provides that "any dispute arising out of or relating to this agreement shall be submitted to arbitration" is very clear to include a dispute relating to the validity of the main contract the result will be different. This would be a desirable result that could enable the Ethiopian courts to adopt the doctrine of separability which is an important feature of modern arbitration law to promote the smooth and autonomous functioning of arbitration as a vital means of dispute resolution mechanism.

b. Interpretation based on the structure of the code

The other justification for the doctrine of separability is that conceptually the main contract and its arbitration clause are two different kinds of agreements. This is a legal fiction which provides that when two parties enter into a contract containing arbitration clause, the

[38] Supreme Court, 26 May 1989, No. 2538, Mass. Foro It., 1989, P. 370. Cited In Milo Molfa, "Pathological Arbitration Clauses And The Conflicts Of Laws," *Hong Kong Law Journal* 37 (2007): 9

parties are in effect entering into two contracts.[39] The arbitration clause concerns issues of procedural disputes resolution whereas the underlying contract concerns the substantive rights and obligations of the parties in their contractual relationships.[40] In other words the arbitration clause is an independent contract within a contract whose fate is not determined by the fate of the container contract. Is there any thing in the code that can indicate by way of interpretation the intention of the legislature as to the conceptual distinction of the arbitration clause and the container contract?

One can argue for the existence of the doctrine of separability on the ground that arbitration agreement is treated under the code as one of the special contracts independent from the other contracts which deal with the substantive rights and obligations of the contracting parties. To further clarify the real import of this argument, in Ethiopia there is no special act solely adopted for the regulation of arbitration but rather an agreement to submit a civil dispute to arbitration is treated as a special contract under the civil code. That means arbitration is regulated from articles 3325-3346 which are placed in chapter 2 of title 20 which in turn is one of the titles making up book 5 of the code entitled "special contracts".

Under this structure of the code arbitration agreement is dealt separately outside of the title regulating contracts in general and independently of other special contracts which concern with the determination of substantive rights and obligation of the contracting parties. The code treated as a special contract not only a submission agreement (*compromise*) which is a separate agreement to submit existing dispute to arbitration but also arbitration clause *(clause compromissoire*) which is a clause in the main contract to submit to arbitration any dispute which may arise in the future relating to the contract. Under this structure of the code when two

[39] See Jack Lee, Supra n 26: 423

[40] Robert H. Smit, Separability And Competence-Competence In International Arbitration: Ex Nihilo Fit? Or Can Something Indeed Come From Nothing? *The American review of international arbitration* 13(19) (2002):3

parties, for example, conclude a sales contract containing arbitration clause, the main contract of sale is governed by the rules relating to sales contract whereas the arbitration clause is regulated independently and separately as a second contract under chapter two of title 20 of the code. From this one can conclude that when the legislature decided to treat arbitration clause (*clause compromissoire*) as a special type of contract separate from the main contract containing it there is the intention to incorporate the doctrine of separability under the civil code of Ethiopia. This is supported by the fact that some authors[41] include as a basic element of the definition of separability or autonomy of the arbitration clause the possibility that such clause be subject to a body of law different from that governing the rest of the agreement.

Even though one can criticize this argument as farfetched; the writer believes that the argument can not be disregarded as totally irrelevant. It is a logical and sensible step that the courts of Ethiopia might be prepared to take to rectify the silence of the civil code on the doctrine of separability which is an important doctrine designed to promote arbitral autonomy and efficiency. It can give a leeway for the judiciary to accommodate the doctrine of separability - which has already become a universally accepted modern feature of arbitration law- in the legal system of the country.

1.5.2 Incorporation through the rules of arbitration institutions

Incorporating the principle in the rules of arbitration institutions is the other possible way through which the principle of separability can be applied in Ethiopia in those cases where the

[41] Alfonso-Luis Calvo Caravaca, *El Arbitraje Comercial Internacional* 93 (1989), cited in Christian Herrera Petrus, "Spanish Perspective on the Doctrine of Kompetenz-Kompetenz and Separability: A Comparative Analysis Of Spain's 1988 Arbitration Act," *The American Review Of International Arbitration* 11 (2000): 20; similarly, Robert H. Smit. "Separability And Competence-Competence In International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?" *The American Review of International Arbitration* 13 (2002):2, providing that "importantly, separability means that the law, substantive legal rules, or facts governing or otherwise relevant to the formation and validity of the arbitration agreement may be different from those governing or otherwise relevant to the underlying contract."

parties have accepted these rules as part of their arbitration agreement. All the leading international arbitration rules[42] have included the principle of separability which is a reflection of the universal acceptance of the doctrine in international commercial arbitration practice. Currently in Ethiopia a move towards institutional arbitration is manifested by the coming into picture of the *Addis Ababa Chamber Of Commerce And Sectoral Association Arbitration Institute* and *The Ethiopian Arbitration and Conciliation Centre*. These institutions have drawn up their own rules of arbitration and mediation and have commenced providing their services to those interested.[43]

The 2005 arbitration rules of the *Ethiopian Arbitration And Conciliation Centre* clearly adopts the principle of separability by providing that "a provision in a contract that provides for an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not imply the invalidity of the arbitration clause."[44] In this respect one can say that the *Ethiopian Arbitration and Conciliation Centre* arbitration rules is one step ahead of that of the *Addis Ababa Chamber Of Commerce And Sectoral Association Arbitration Institute*[45] which remains silent as to the place of the doctrine of separability which has already acquired the status as a cornerstone of modern arbitration rules and laws. Unless the chamber rectify this by clearly providing for the place of the separability doctrine under its rules, it could be a point of controversy among prospective parties to the arbitration rules which may result in delay in the arbitral proceeding.

[42] See e.g., *International Chamber Of Commerce (ICC) Arbitration Rules Of* 1998, art. 6(4*); American Arbitration Association (AAA) Rules Of* 2003, art.15 (2*); Arbitration Rules of the London Court of International Arbitration (LCIA) of 1998* art. 23.1; China *International Economic and Trade Arbitration Commission (CIETAC) Rules of 2005 Art.* 5(4)*; World Intellectual Property Organization Arbitration Rules*, art 36; UNCITRAL *Arbitration Rules, Art. 21*

[43] Tilahun Teshome, "The Legal Regime Governing Arbitration in Ethiopia: A Synopsis," *Ethiopian bar review*1(2) (2007) :140

[44] See article 19 (2) of The *Ethiopian Arbitration And Conciliation Centre* rules of arbitration of 2005.

[45] Look at *The Addis Ababa Chamber of Commerce And Sectoral Association Arbitration Institute Revised Arbitration Rules* of 25 November 2008

The continued acceptance of the doctrine of separability in most jurisdictions and international arbitration rules to the extent of becoming universal principle of arbitration will finally lead to the application of the principle in the legal system of Ethiopia. We need only wait for an authoritative decision of the cassation division of the federal Supreme Court of Ethiopia affirming the principle through the exercise of its power under proclamation number 454/2005 to give binding interpretation of laws that can be applicable to the lower courts of the country. Alternatively an amendment of the civil code boldly affirming the doctrine of separability so as to update the law to the current development of arbitration law that promote autonomous and effective arbitration process is very welcome. This also would go inline with the current effort in the country to promote alternative dispute resolution mechanisms (of which arbitration is a component) as part of the overall judicial administration reform program.

Chapter Two

Jurisdiction of Arbitrators and the Doctrine of Competence-Competence

2.1 Definition of the doctrine of competence-competence

Once the arbitration clause is saved by the doctrine of separability from being invalidated as a result of a jurisdictional challenge based on the invalidation of the main contract, a party can still raise a wide variety of challenges on the jurisdiction of the arbitrators which are directed not to the main contract but to the arbitration clause itself. These jurisdictional challenges can be made based on:

> (1) invalidity and nonexistence of the arbitration clause, (2) the disputed issue is not within the scope of the arbitration agreement; (3) some precondition for permissible arbitration has not been met (for example a time limit on initiating arbitration); (4) a party seeking arbitration has waived its right to arbitrate or is estopped from that right; (5) the tribunal is not properly established as agreed by the parties.[46]

The doctrine of competence-competence which is also known by the German term *Kompetenz-Kompetenz* and a French term *competence de la competence* is generally understood to describe the competence of the arbitrators to rule on the aforementioned jurisdictional challenges which are made based on difficulties relating to the arbitration clause itself.[47] The doctrine holds that the arbitrators have the competence to rule on these challenges despite the fact that it is logically inconceivable to allow the arbitrators to decide on challenges which are made against the arbitration clause itself which is a condition precedent to their own

[46] See John J. Barceló Supra n 17:1118-1119 (listing the first four grounds); Peter Schlosser, "the Competence of Arbitrators and of Courts," *Arbitration International* 8 (1992): 200 (indicating the last ground as a possible objection on the jurisdiction of the arbitrators)

[47] Janet A. Rosen, "Arbitration Under Private International Law: The Doctrine Of Separability And Competence De La Competence," *Fordham International Law Journal* 17 (1994): 3

jurisdiction.[48] As will be seen later in this chapter the doctrine is adopted as a matter of practical convenience than logical consideration.

Despite the variations-as will be seen infra - among the legal regimes of different countries as to the exact extent of the practical consequences of the doctrine with respect to the allocation of jurisdiction between the courts and the arbitration tribunal, there is major agreement in the literature and widespread recognition in the national and institutional rules on international arbitration that arbitrators must be allowed at least provisionally to rule on their own jurisdiction.[49] In this respect what is the position of the doctrine of competence-competence in the Ethiopian legal system in light of the formulation of article 3330 of the civil code? This is the central issue of this chapter.

2.2 Relationship with separability

The doctrine of separability focuses on the jurisdiction of arbitrators to decide on challenges on the main contract containing arbitration clause whereas the doctrine of competence-competence focuses on the jurisdiction of the arbitrators to decide on challenges directed against the arbitration clause itself.[50]Though the doctrine of competence-competence is a distinct concept, it is very much related with the doctrine of separability. Both concepts are designed to protect the arbitration process from unwarranted early court intervention by according the arbitrators the power to decide on challenges on the validity of the contract containing the arbitration clause and the arbitration clause itself.[51]

[48] Robert H. Smit "Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?" *The American Review Of International Arbitration* 13(19) (2002): 2
[49] See Christian Herrera Petrus Supra n 10: 2
[50] William W. Park, "Determining Arbitral Jurisdiction: Allocation Of Tasks Between Courts And Arbitrators," *The American Review Of International Arbitration* 8(133) (1997):6
[51] See Barceló, Supra n 17: 1116

Competence-competence is said to be a doctrine that "picks up where separability ends."[52]This can be well explained by the illustration provided by William W. Park.[53] An American company concluded a contract with a business consultant that the later agrees to help the former to secure an engineering contract in the Middle East. The American company refused to pay the consultant on two grounds. First, the contact was signed by a person who has no authority to act on their behalf. Second, the contract was concluded for the purpose of bribing government officials which rendered the contract void because of illegality. According to the separability doctrine the arbitrators can validly render an award on the first objection by invalidating the main contract based on the illegality of object of the contact without affecting the validity of the arbitration clause from which the arbitrators' jurisdiction emanate. On the other hand the doctrine of competence-competence empowers the arbitrators to rule on the second objection which has direct effect on the validity of the arbitration clause which is the source of their jurisdiction.

Therefore, the doctrine of separability will enable the arbitration clause to survive the invalidity of the main contract containing the arbitration clause, this in turn give the arbitrators the chance to examine their own competence by examining the challenges on the arbitration clause. Had it not been for the two sisterly principles working together, the arbitrators would not have had this power to give a one- stop adjudication of all issues presented to them. It seems it is because of this interrelation between the two doctrines that some statues put separability and competence-competence in the same article[54].

[52] See Lee, Supra n 26:421
[53] See William W. Park. Supra n 50:6
[54] See some national arbitration laws taken from UNCITRAL model arbitration law article 16(1) which provides: "The arbitral tribunal may rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contact is null and void shall not entail ipso jure the invalidity of the arbitration clause."

2.3 Consequences of competence-competence

As it is indicated in the definition section of this chapter, apart from jurisdictional challenge made based on the invalidity of the container contract a party to an alleged arbitration agreement can raise various objections on the jurisdictions of the arbitration tribunal. These objections could be made based on allegations that the arbitration clause is nonexistent or invalid, the matter is beyond the personal and subject matter reach of the arbitration clause, the arbitration tribunal is constituted improperly or there is waiver or lapse of the time which prevent the commencement of the arbitration proceeding.

These objections could be raised before the arbitration tribunal or before ordinary courts. What are the theoretical scenarios that may occur when these objections are made either before the arbitration tribunal or ordinary court? By looking at these scenarios we will analyze the possible consequences of the various positions taken by different jurisdictions and compare them with the contents of the relevant provisions of the civil code of Ethiopia.

2.3.1 Objections of jurisdiction raised before the arbitration tribunal

When the above objections on the jurisdictions of the arbitration tribunal are made before the tribunal itself, the tribunal can respond to the objections in either of two ways. The tribunal may either stop the proceeding by referring the matter to a court on the ground that the tribunal has no jurisdiction to rule on its own jurisdiction or continue hearing the matter on the ground that it has the competence to rule on its own jurisdiction.

a. Stop the proceeding and refer the matter to court

If the arbitration tribunal discontinues the proceeding and refers the objections made against its jurisdiction to a court on the legal ground that the tribunal has no jurisdiction to decide

on its own jurisdiction, the law on which the tribunal bases its decision does not endorse the doctrine of competence-competence. Those who argue that the arbitrator has to stop the proceeding and refer the matter to ordinary court in case of jurisdictional objections directed to the arbitration clause raise both logical and practical arguments to support their assertion.[55]

Argument based on logic: This argument is made on logical or theoretical thinking that "since arbitrators derive their power from the parties agreement, a challenge to this agreement's validity or existence would logically leave them powerless to hear a case until it was determined that the agreement was indeed effective."[56] Unlike judges of the ordinary courts arbitrators get their jurisdiction from the agreement of the parties. If the validity of this agreement is attacked and put into question, the arbitrators will not have a base for their jurisdiction to decide on their own jurisdiction. According to this argument "an arbitrator has no power to decide his own jurisdiction and determine the validity of the arbitration clause as it is not within his jurisdiction whether or not a condition precedent to his jurisdiction has been fulfilled."[57] In other words there is arguably no foundation for an arbitrator's authority to decide his or her own jurisdiction because an arbitrator's authority derives exclusively from the parties' arbitration agreement. Arbitrators therefore lack authority to decide anything unless and until their authority under the arbitration agreement is established.

The problem with this criticism is that it focuses only on a challenge of invalidity and non existence of the arbitration clause in disregard of the other jurisdictional challenges which are listed in the definition section of this chapter. For example, in the case of the personal or subject matter reaches of an arbitration clause, one can not think of the same logical inconsistency which

[55] See Robert H. Smit, Supra n 48: 5
[56] See Christian Herrera Petrus, Supra n 10: 1
[57] Bernard G. Poznanski, "The Nature and Extent Of An Arbitrator's Powers In International Commercial Arbitration," *International Arbitration* 4(3) (1987):97 Cited in Christian Herrera Supra n 10:19

is raised in relation to the validity and non existence of the arbitration clause. The other problem with this criticism is that even with respect to the validity and existence of the arbitration clause, although it is true that the doctrine of competence-competence is illogical, the criticism will not solve the practical problems- discussed in the next section- which will follow from denying the arbitrators the power to rule on their own jurisdiction.

Argument made based on practical consideration: those who argue that the arbitration tribunal should not be given the power to decide on its own jurisdiction try to support their argument further on practical consideration. They argue that arbitrators who are paid for their service are very unlikely to consider objections to their jurisdiction objectively because of their financial interest in assuming the jurisdiction in order to secure their service fee.[58] In this respect a judge of second circuit court of the United States once pointed out:

> Our deference to arbitrators has gone beyond the bounds of common sense. I cannot understand the process of reasoning by which any court can leave to the unfettered discretion of an arbitrator the determination of whether there is any duty to arbitrate. I am even more mystified that a court could permit such unrestrained power to be exercised by the very person who will profit by deciding that an obligation to arbitrate survives, thus ensuring his own business. It is too much to expect even the most fair-minded arbitrator to be impartial when it comes to determining the extent of his own profit. We do not let judges make decisions which fix the extent of their fees….How, then; can we shut our eyes to the obvious self-interest of an arbitrator?[59]

Although it is not impossible to think of this practical consequence, it is hard to imagine professional arbitrators particularly those trained ones having experience in international arbitration taking the risk of assuming jurisdiction which they are not supposed to assume for the sake of immediate personal interest. This will compromise their reputation which is detrimental to their future career to be part of international arbitration which is highly competitive. In this

[58] See Robert H. Smit, Supra n 48 : 5
[59] Ottley V. Sheepshead Nursing Home , 688 F. 2d 883, 898(2d Cir. 1982) (Lumbard, J., Dissenting) Cited In Robert H. Smit , Supra n 48: 5

respect one author noted that "one would expect that in most cases the arbitrator does not exceed the scope of his authority, but is careful to remain within the bounds of his jurisdiction, so as to protect his reputation as an arbitrator."[60]

b. Continue the proceeding

In the previous section we have seen that in the absence of the doctrine of competence-competence arbitrators facing objections to their jurisdiction may take the alternative to discontinue the proceeding and refer the matter to the court and wait until the court gives decisions at to their jurisdiction. We have also seen the logical and practical justifications forwarded by those who argue for this measure. But today the arguments against the doctrine of competence-competence seem to have lost ground in the sense that "the right of the arbitrators to rule on their own jurisdiction is an almost fully uncontroversial part of the well-established doctrine and practice in international arbitration."[61]There is a general consensus among national legal systems that the arbitrators have to be empowered to rule on their own competence without discontinuing the proceeding for the sake of judicial assistance.[62] This is sometimes referred to as the positive effect of the doctrine of competence-competence as opposed to the negative effect which requires the courts to refrain from interfering in the arbitration process before the tribunal gives its ruling on its own jurisdiction.[63]

The doctrine of competence-competence prevails in international and national arbitration practice and law because of practical justification that "it serves as a measure to protect against

[60] Shirin Philipp, "Is The Supreme Court Bucking The Trend? First Options V. Kaplan In Light Of European Reform Initiative In Arbitration Law," *Boston University International Law Journal* 14(119) (1996):22
[61] Alan Uzelac, "Jurisdiction Of The Arbitral Tribunal: Current Jurisprudence And Problem Areas Under The UNCITRAL Model Law, *International Arbitration Law Review* 8(5) (2005): 2
[62] John Zadkovich, "Divergence And Comity Among The Doctrines Of Separability And Competence-Competence," *Vindobona Journal Of International Commercial Law And Arbitration*, 12(1) (2008):5
[63] See Barceló, supra n 17 :1124

having an arbitration derailed before it begins."[64] The arbitration tribunal need not stop the proceeding for the mere fact that one of the parties objects its jurisdiction. If the arbitration tribunal discontinued the proceeding and request for court clarification whenever objection is made against its jurisdiction, a recalcitrant party who has interest in derailing the proceeding would use it as delaying tactic.[65] This bad faith objection to the jurisdiction of arbitrators for the purpose of slowing down the process of arbitration is well articulated by one commentator stating:

> To the party honestly seeking arbitration, delaying tactics by the respondent can be source of great frustration. One of the most commonly used devices…is to object the jurisdiction of the arbitrators, thereby hoping to paralyze or endlessly delay the arbitration proceeding whilst the state courts proceed to decide whether the arbitrators have jurisdiction at *all.*[66]

It is to protect the arbitration process against this type of ill conceived objection by a party to a dispute and prevent unwarranted court intervention that almost every legal system accepts the doctrine of competence-competence in the sense of empowering the tribunal to rule on its own jurisdiction (positive competence-competence).

The general consensus on the positive aspect of competence-competence is testified by its recognition under the UNCITRAL Model law on International Commercial Arbitration law, as its name, indicates adopted by the united Nation Commission On International Trade Law to serve as a model for national legislations. Article 16(1) of this model law empowers arbitration tribunal to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. What is the position of the civil code of Ethiopia with respect to the positive aspect of competence-competence?

[64] William W. Park, "Determining An Arbitrator's Jurisdiction: Timing And Finality In American Law," *Nevada Law Journal* 8(135) (2007):4
[65] Ibid.
[66] Natasha Wyss, "First Options of Chicago, Inc. v. Kaplan: A perilous approach to Kompetenz-Kompetenz," (1997), *Tulane Law Review* 72 (1997):13

2.3.2 Ethiopian civil code and positive competence-competence

Unlike other jurisdictions the positive aspect of competence-competence doesn't seem to be a settled issue under the Ethiopian legal system. This is because of the ambiguous formulation of article 3330 of the civil code which provides:

> *Art. 3330. - Scope of jurisdiction.*
>
> *(I) The arbitral submission may authorize the arbitrator to decide difficulties arising out of the interpretation of the submission itself.*
> *(2) It may in particular authorize the arbitrator to decide disputes relating to his own jurisdiction.*
> *(3) The arbitrator may in no case be required to decide whether the arbitral submission is or is not valid.*

Sub-articles one and two permit the parties to authorize the arbitrators to decide on difficulties arising out of the interpretation of the arbitration agreement itself, particularly challenges relating to their own jurisdiction. The content of these two provisions gives the impression that Ethiopia has adopted the doctrine of competence-competence. But this impression is blurred when one reads sub-article three which deny the arbitrators in absolute terms the power to decide on the validity of the arbitration agreement. In this respect one Ethiopian scholar indicated that "this provision is not clear enough to convey the intention of the legislature through, especially when it is considered in conjunction with the other stipulations made in that same article under sub articles one and two."[67] The issue is, until the necessary legislative refinements are made to remove this doubt can we make sense out of the formulation of the article so as to determine the real intent of the legislature? This task falls under the proper function of the Ethiopian judiciary which has the constitutional duty and responsibility to interpret ambiguous provisions of the law so as to arrive at the intention of the legislature. What possible interpretation can the courts make out of it?

[67] See Tilahun Teshome, Supra n 43: 137

The civil code article 3330, in allocating the power to rule on the jurisdiction of the arbitrators between courts and the arbitrators, appears to have classified jurisdictional challenges which are directed to the arbitration clause in to two: challenges which relate to the validity and existence of the arbitration clause and jurisdictional challenges based on grounds other than the validity and existence of the arbitration clause.

a. Challenges other than the validity of the clause

As it is indicated before in this chapter it is said that the doctrine of competence-competence is not limited to the power of the arbitrator to decide the validity and existence of the arbitration clause. The doctrine includes the wider power of the arbitrator to decide not only the validity and existence of the arbitration clause but also other various challenges directed against the arbitration clause. These include: (1) objection that the dispute is not within the scope of the arbitration agreement; (2) some precondition for permissible arbitration has not been met (for example a time limit on initiating arbitration); (3) a party seeking arbitration has waived the right to arbitrate or is estopped from that right and (5) the tribunal is not properly established as agreed by the parties. Though all these challenges are made on the jurisdiction of the arbitrator based on the content of the arbitration clause, they don't question the validity of the arbitration clause as such.

These challenges on the jurisdictions of the arbitrators which are made on grounds other than the validity and existence of the arbitration clause are covered by sub articles 2 and 3 of article 3330. According to these two sub articles parties to the arbitration agreement can authorize the arbitrators to rule on the objections as long as these objections don't question the validity and existence of the arbitration clause. The arbitrators can continue the proceeding and decide on the objection on condition that the parties have given them this power. But if there is

no such authority from the parties the arbitrators have to stop the proceeding and refer the matter to a court. Therefore, one can say that sub article 2 and 3 of the article 3330 of the civil code have incorporated a weak form of positive competence-competence which is dependent on the agreement of the parties and limited only to grounds that don't affect the validity and existence of the arbitration clause.

Therefore, parties are advised to give clear authorization to the arbitrators to rule on their own jurisdiction with respect to jurisdictional objections other than the validity of the arbitration clause so that the arbitration process will be protected from court intervention and the consequent delay. In this respect it would be a wise solution for the parties to incorporate in their agreement article 9(2) of *The 2005 Rules Of Arbitration Of The Ethiopian Arbitration And Conciliation Center* which provides that " without prejudice to mandatory provisions of the applicable law, objections made against arbitration agreement that subscribes to these rules for the resolution of a dispute shall be heard and decided by the arbitration tribunal to be set up in accordance with the provisions of these rules,"

b. Challenges on the validity and existence of the clause

Jurisdictional objections based on the invalidity of the arbitration clause are covered by sub-article 3 of article 3330. According to this sub-article, if the jurisdictional challenge is made based on the validity and existence of the arbitration clause, the arbitrators don't have the power to give their ruling on the objections. Unlike in the case of the other objections the prohibition under article 3330(3) with respect to jurisdictional challenges based on the validity and existence of arbitration clause is so absolute that the parties can not even empower the arbitrators to give ruling on the objections.

The consequence of this stand of the code is that arbitrators, facing objections against their jurisdiction based on the ground of invalidity of the arbitration clause, have to stop the proceeding and refer the matter to courts so that the later can decide on the jurisdiction of the arbitrators. This will open the way for court intervention and delay in the arbitration process. This is one aspect of anachronistic stance of the civil code which requires legislative intervention to incorporate the positive aspect of competence-competence which is a universally accepted modern aspect of arbitration law designed to insure the autonomy and efficiency of arbitration process.

2.3.3 Objections of jurisdiction raised before a court

We have said that objection to the jurisdiction of arbitrators based on challenges directed to the arbitration clause itself can be raised either before the arbitration tribunal or ordinary courts. In the preceding section we have seen a situation where a party raises the objections before arbitration tribunal. In this section we will see a situation where a party raises the objections before a court.

Despite arbitration agreement between the parties a dispute on jurisdiction of arbitrators can end up in a court proceeding either because one of the parties bring a suit to the court in violation (in disregard of) the arbitration clause or a party may bring a claim to a court to compel an arbitration proceeding against the other party who refuse to submit to arbitration proceeding, or a party may demand stay of arbitration proceeding alleging lack of jurisdiction on the part of the arbitrators. In these situations depending on the level of acceptance of the doctrine of competence-competence in the country in which the court is situated, the court may refer the objections to the arbitrators without making any scrutiny as to the viability of the objections or after making a minimal scrutiny of the objections to give the arbitrators at least the first chance

to assess and rule on their own jurisdiction. This is what is referred to as the negative effect of the doctrine of competence-competence.[68] Or in the absence of the doctrine of negative competence-competence the court may refrain from sending the matter to the arbitrators and make its own complete assessment of the objections on the jurisdiction of the arbitrators to give a decision having a *res- judicata* effect on the arbitrators.[69] In this section we will see the positions taken by different legal systems and asses the status of the Ethiopian civil code with respect to the issue of negative competence-competence.

a. Referring to the arbitrators with no scrutiny

As indicated before a court faced with an objection to the jurisdiction of arbitrators based on challenges on the existence, validity, scope or other difficulties relating to the arbitration clause may resist jurisdiction and leave the matter for the decision of the arbitrators without making any scrutiny on the nature and weight of the objection. This position is reflected in article 1458[70] of the French new civil procedure code of 1981 which requires the court to decline jurisdiction and refer the matter to the arbitrators without making any assessment on the viability of the objection, if the case is already pending before the arbitration tribunal. This is the highest form of negative competence-competence originally adopted by the French legal system which is well known for its pro-arbitration character[71]. But if the arbitration proceeding has not

[68] See Barceló , Supra n 17 :1124

[69] Gaillard, E., 'Prima Facie Review Of Existence, Validity Of Arbitration Agreement' New York Law Journal 225 (105), available at: http://www.nylj.com

[70] Article 1458:

> *"Whenever a dispute submitted to an arbitration tribunal by virtue of an arbitration agreement is brought before the court of the state, such court shall decline jurisdiction. If the arbitral tribunal has not yet been seized of the matter, the court should also decline jurisdiction unless the arbitration agreement is manifestly null";* reprinted in Fouchard, Gailard, Goldman, On The International Commercial Arbitration, 672 (Emmanuel Gaillard & John savage eds., 1999)

[71] See Barceló supra n 17 : 1124

yet been started the court has to make minimal scrutiny of the objection before sending the matter to arbitration.[72]

The French legal system adopted this position based on a policy consideration to protect ongoing arbitration proceeding against court intervention.[73] A party coming to court while there is pending arbitration proceeding where she can present her objection is likely to be acting in bad faith with the purpose to obstruct the arbitration. But one has to take note of the fact that this reference without scrutiny is made with the understanding that the courts will have the full power to review (*de novo*) the decision of the arbitrators on their own jurisdiction after the rendering of the award.[74]

In the United States, if the jurisdictional objections relate to lapse of time to initiate the arbitration proceeding or waiver of the right to arbitrate by one of the parties, it is presumed that the power to decide on these objections belongs to the arbitrators.[75] In this case the American position of negative competence-competence is even more robust than the French position in the sense that the arbitrators' decision on the objections based on time limit and waiver is only subject to limited judicial review as opposed to *de novo* review which is the case in France.[76]

b. Referring to the arbitrators after minimal scrutiny

This is a negative competence- competence which is a bit lesser (but still robust) in effect than the one explained in the preceding section.[77] In this case the court decline jurisdiction and refer the matter to the arbitrators only after making a minimal (*prima facie*) scrutiny of the

[72] Ibid
[73] See Gaillard, supra n 70:680
[74] Gaillard, E., prima facie review of existence, validity of arbitration agreement, 225 New York law Journal, available at: (http:// www.nylj.com)
[75] Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002)
[76] See Barceló Supra n 17:1134
[77] Id : 1122

objection made against the jurisdiction of the arbitrators. What does this minimal investigation mean? What makes it different from the full investigation role of the court? In order to understand the meaning of minimal scrutiny by the court we have to consider what practical consequences will follow in applying this standard of investigation.

The first consequence of the minimal investigation requirement is that the court will only make *prima facie* investigation as to the jurisdiction of the arbitrators. The court is not required to conduct full investigation in the merits of the existence and validity of the arbitration agreement to refer the matter to the arbitrators.[78] Rather the court will refer the mater to arbitrators, if there is a reasonable likelihood that a valid and enforceable arbitration agreement exits between the parties[79]. In other words the court will deny jurisdiction to arbitrators only if it is obvious (manifest) that there is no valid and enforceable arbitration agreement between the parties. This is designed to avoid delay in the initiation and progress of the arbitration tribunal which might arise as a result of allowing initial full investigation of jurisdiction of arbitrators by courts.[80] The intervention of the court is limited to conducting a prompt and summery investigation of the existence and validity of the arbitration agreement in order to avoid delay in the all arbitration process.

In this respect unlike other modern arbitration statutes the 1981 civil procedure code of France is unequivocal in the sense that according to article 1458 the court has to decline jurisdiction and refer the matter to arbitrators seized of the matter unless the arbitration agreement is manifestly null. The word "*manifestly*" is used to limit the power of the court only

[78] See Gaillard, Supra n 74
[79] Frederic Bachand, "Does Article 8 Of The Model Law Call For Full Or Prima Facie Review Of The Arbitral Tribunal's Jurisdiction?," *Arbitration International* 22(3) (2006):463
[80] Id 466

to make prima facie as opposed to full scrutiny of the validity and existence of the arbitration agreement.[81]

The text of article 8(1) of the UNCITRAL Model law is not as clear as the French civil procedure code in limiting the power of the court only to prima facie scrutiny of the existence and validity of the arbitration agreement. Article 8(1) of the model law provides:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Because of the absence of a word "manifestly" as used in article 1458 of the French civil procedure code or similar expression to the same effect, the model law article 8(1) becomes a point of controversy among scholars and national courts.[82] The debate relates to whether a court seized of a referral application can undertake full scrutiny of the validity and existence of the arbitration agreement or whether it can only exercise prima facie investigation before referring the matter to the arbitration tribunal. Despite this controversy those who support the application of the prima facie standard make stronger argument based on the textual interpretation and the legislative history of the model law which has the primary objective of preventing delay in the arbitration process as result of court intervention which can best be served by limiting the power of the court to make only minimal investigation and giving the arbitrators the first opportunity to rule on their own jurisdiction.[83]

[81] See, Barceló, Supra n 17:1128
[82] See, Bachand, Supra n 79:463
[83] Id : 465-476

The1996 British and the 1998 German arbitration acts[84] which are enacted based on the proposal of the UNCITRAL Model law adopted the model law position with some exceptional situations where courts can make full investigation of the arbitral jurisdictions before arbitrators make ruling on their own jurisdictions.[85]

In the United States, as indicated by the decision of the United States Supreme Court in the case of First Options v. Kaplan,[86] if the jurisdictional objection relates to whether the merit of the dispute falls within the arbitration agreement, it is highly likely for the court to send the dispute to the arbitrators because of the presumption in favor of the arbitration proceeding in case of dispute on scope. In this respect professor Barceló stated:

> Perhaps a better way of putting the consequence of First Options' reverse presumption on scope question is that a court will almost always decide to include a disputed merits-based issue and hence will send that merit-based issue to the arbitrators.[87]

Therefore according to First Options if the jurisdictional dispute relates to the scope of the arbitration agreement the court will refer the issue to the arbitrators after making a presumptive assessment that the dispute falls within the scope of the arbitration agreement.

The other consequence of limiting the power of the court to minimal investigation is that the decision of the court to refer the matter to the arbitrators does not constitute *res-judicata* against both the arbitrators and the court[88]. Firstly, despite the decision of the court at the reference stage declaring the prima facie existence and validity of the arbitration agreement, the arbitrators still have the power to fully investigate the merits of the dispute on their jurisdiction

[84] See article 9(1) (4) of the England arbitration act of 1996 and article 1032(1) of the German arbitration act of 1998 which are equivalents of article 8(1) of the UNCITRAL Model law.
[85] These exceptions will be discussed in the subsection dealing with full scrutiny by the courts.
[86] First options of Chicago v. Kaplan , 514 U.S 938 (1995)
[87] See, Barceló, Supra n 17:1133
[88] See, Gaillard, Supra n 74

and give their own decision.[89] The purpose of limiting the power of the court to conduct only a prima facie investigation of the arbitral jurisdiction is to give the arbitrators the first chance to fully investigate and rule on their own jurisdiction. This primary power of the arbitrators to rule on their own jurisdiction plays a tremendous role in ensuring the autonomy of the arbitrators.[90]

Secondly, from the perspective of the court, despite its *prima facie* decision as to the existence and validity of the arbitration agreement before referring the matter to the arbitrators the court still retains the power to make full review of the decision of the arbitrators on their own jurisdiction after the award.[91] The limitation of scrutiny to *prima facie* investigation at the reference stage is designed not to deny the court the power to conduct full scrutiny of the jurisdiction of the arbitrators but rather to defer the exercise of this power after the arbitrators' award. This deferral is justified by the need to avoid or limit judicial intervention as a result of dilatory jurisdictional objection by a recalcitrant party.

One can find this effect of the prima facie decision of the court hearing a referral application in the wordings of article 8(1) and 16(1)(2) of the UNCITRAL Model Law.[92]Even though the court has the power to make *prima facie* investigation of the arbitrators' jurisdiction and refer the matter to the arbitrators according to article 8(1) of the model law, the arbitrators still maintain their power to fully investigate and rule on their own jurisdiction as per article 16(1). The ruling of the arbitrators assuming jurisdiction after this full investigation will be subject to full review by the court as provided in article 16(2) irrespective of the fact that the court has referred the matter to the arbitration under article 8(1).

[89] See, Bachard, Supra n 79:466-467
[90] Id :467
[91] See, Gaillard, Supra n 74
[92] Article 8(1) provides: "a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."; article 16(1) provides: "(1)the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. …"

In united sates we have said that if the jurisdictional dispute relates to whether the merit of the dispute falls within the scope of the arbitration agreement the court will refer the issue to the arbitrators after making presumptive assessment that the merit of the dispute falls with the scope of the arbitration agreement. This presumptive assessment by the court will not have a *res-judicata* effect on the arbitrators in the sense that the arbitrators can still investigate the issue of the scope and give their own decision.[93]

Finally, since the power of the court to make full scrutiny of the arbitrators' jurisdiction is deferred until the arbitrators rule on their jurisdiction, the exercise of the prima facie investigation at the reference stage will not stop the commencement or the progress of the arbitration proceeding. The arbitrators can exercise their power, despite a pending *prima facie* investigation on their jurisdiction before a court. This is clearly provided under article 8(2) of the UNCITRAL Model law which provides that while the *prima facie* investigation of the arbitrators' jurisdiction is pending before a court, "the arbitral proceeding may nevertheless be commenced or continued and an award may be made."[94]

c. Making complete scrutiny with no reference to arbitrators

The third and final possible way that the court may follow is to make the full investigation of the jurisdictional objections itself without the need to refer the matter to the arbitrators to rule on their own jurisdiction. This third alternative happens only in the case of the absence of the doctrine of negative competence-competence, while jurisdictions which follow the first and second alternatives endorse the negative competence-competence.

[93] See Barceló supra n 17 : 1133
[94] See article 8(2) of the UNCITRAL Model Law of 1985

First, in this case the standard used by the arbitrators is full (as opposed to *prima facie*) investigation of the substantive arguments as to the jurisdiction of the arbitrators.[95] The court will send the matter to the arbitrator only if it finds that the objection is unacceptable on its merit. This will cause delay in the commencement and continuance of the arbitration proceeding. Secondly, since the court make full substantive investigation and rule on the jurisdiction of the arbitrators in a final manner, the decision will have *res-judicata* effect both against the arbitrators and the court itself. Thirdly, theoretically the arbitrators can not commence or continue the arbitral proceeding until the court renders a final decision on their jurisdiction.[96]

In the United States disputes relating to the validity and existence of the arbitration agreement belong to the jurisdiction of the courts unless the parties agree otherwise.[97] This means a court seized of dispute relating to arbitral jurisdiction which is attacked based on the invalidity or non existence of the arbitration agreement, the court will assume jurisdiction on the dispute in the sense that it makes full investigation on the dispute and give binding decision. Therefore in the United States as far as jurisdictional objections based on the validity and existence of the arbitration agreement are concerned the doctrine of negative competence-competence is not applicable[98].

In principle both the arbitration acts of England and Germany accept the model law approach in limiting the power of the court only to prima facie investigation of the arbitral jurisdiction before the arbitral award is rendered. But both acts make some variations on the model law by providing some exceptional situations where courts can make full investigation of

[95] See Bachand, Supra n 79 :465
[96] Id :466
[97] First options, 514 U.S 938 (1995)
[98] See Barceló , Supra n 17:1134

the arbitral jurisdiction at a referral stage[99]. The arbitration act of England provides two exceptions under article 32 and 72. According to article 32 of the act the court can make full investigation of the jurisdiction of the arbitrators where both parties agree to that effect or where the arbitrators permitted the applications upon the satisfaction of other additional conditions listed in the article. The court can also make full investigation and give final ruling on the jurisdiction of the arbitrators if a person alleged to be a party to arbitration proceeding but who does not take part on the proceeding apply for a ruling on the jurisdiction of the tribunal according to article 72 of the act.

The German act also provides one exception under article 1032(2) which is similar to article 72 of the British act. According to this provision of the German act prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible. In such case the court will make full investigation of the jurisdiction of the arbitration tribunal. Even though in both the England and the German case one can say that the decision of the court after the full investigation will have *res-judicata* effect (article 32(6) of England act) this investigation power will not have the effect of stopping the commencement and continuance of arbitration proceeding. (Article 32(4) of the England arbitration act and article 1032(3) of the German arbitration act)

2.3.4 Ethiopian civil code and negative competence-competence

We have said at the prelude of the preceding section that a court facing objection on arbitral jurisdiction can theoretically follow three alternative ways. The court can refer the matter with no scrutiny to allow the arbitrators to have the first chance to investigate and rule on their own jurisdiction. Or the court can send the matter to the arbitrators after conducting

[99] See Bachand, Supra n 79:467-469

minimal investigation as to the weight of the objection by leaving to the arbitrators the power to fully investigate and rule on their own jurisdiction after which the court will exercise its full review power. Finally the court can make full investigation on the jurisdiction of the arbitrators and give binding decision denying the arbitrators the power to rule on their own jurisdiction. We have assessed these scenarios based on their practical consequences by investigating different legal systems.

What is the position of the Ethiopian civil code in this respect? The Ethiopian civil code holds different positions depending on the nature of the jurisdictional challenges and the content of the parties' agreement. This approach makes the Ethiopian civil code similar with the American legal system although the two systems differ in substance.

a. Challenges based on the validity and existence of the arbitration clause

Article 3330(3) of the 1960 civil code of Ethiopia provides that "*The arbitrator may in no case be required to decide whether the arbitral submission is or is not valid.*" In this provision the phrase 'arbitral submission' refers to both arbitration agreement and arbitration clause.[100] This means the jurisdiction to rule on the validity of the arbitration clause is vested in the court. The arbitrators have no power to rule on the validity and existence of the arbitration clause. This position of the civil code makes it similar with the American legal system where negative competence-competence is absent with respect to the validity and existence of the arbitration clause. But in the case of Ethiopia the exclusion of negative competence-competence concerning jurisdictional challenges based on the validity and existence of the arbitration agreement is more absolute than the American legal system in the sense that unlike the American system under the

[100] See article 3328(3) of the 1960 civil code of Ethiopia which provides: "An arbitral submission relating to future disputes shall not be valid unless it concerns disputes which flow from a contract or other specific legal obligation" (in this article the phrase 'arbitral submission' is used to refer to arbitration clause.)

civil code of Ethiopia even the parties can not agree to empower the arbitrators to rule on the validity and existence of the arbitration clause.

The practical consequences of this position are far reaching in compromising the autonomy and efficiency of the arbitration tribunal. First, the court facing issues concerning the validity of the arbitration clause will engage in full as opposed to prima facie investigation of the issue. The court will refer the matter to the arbitrators only after ascertaining substantively that there is a valid arbitration agreement. Second, the arbitrators can not commence or proceed the arbitration proceeding until the court makes its final determination as to the jurisdiction of the arbitrators. This means a recalcitrant party who has interest in dragging the arbitration process can interrupt the arbitration process or delay its commencement by making ill-conceived objection on the validity of the arbitration clause which requires the intervention of ordinary courts. This will cause delay and cost which is against the all purpose of submitting to arbitration process.

b. Challenges other than validity and existence of the arbitration clause:

Jurisdictional challenges other than the validity and existence of the arbitration clause are covered by the sub article 1 and 2 of article 3330. Sub articles one and two of article 3330 provides:

> *(I) The arbitral submission may authorize the arbitrator to decide difficulties arising out of the interpretation of the submission itself.*
> *(2) It may in particular authorize the arbitrator to decide disputes relating to his own jurisdiction.*

Even though these two sub articles do not list the nature of objections which can be raised under these sub-articles, presumably the jurisdictional challenges which can be covered by these two

sub- articles may include objections based on the scope of the arbitration agreement, lapse of time of initiating the arbitration proceeding, waiver of the arbitration by one of the parties, or improper composition of the arbitration tribunal. As far as these objections are concerned the parties can authorize the arbitration tribunal to rule on them. A court holding disputes on the jurisdiction of the arbitrators based on these objections other than the validity and existence of the arbitration clause has to refer the matter to the arbitrators on condition that the parties agree to submit these objections to the decision of the arbitrators.

The problem is what if the parties don't agree to give this authority to the arbitrators to rule on objections against their jurisdiction on grounds other than the validity of the arbitration clause. Does this mean that the authority belongs to the court? Having seen the content of article 3329[101] which requires restrictive interpretation of the arbitration clause, it is very unlikely to hold that the arbitrators will have the jurisdiction to rule on these objections unless they have been given clear authority by the parties.

In conclusion, in the case of jurisdictional objections based on the validity of the arbitration clause, the civil code of Ethiopia excludes the doctrine of negative competence-competence in absolute terms in the sense that the parties can not even agree to authorize the arbitrators to rule on the objection. In case of jurisdictional objections other the validity and existence of the arbitration clause the negative competence-competence is so weak that it depends on whether the parties have agreed to authorize the arbitrators to rule on them.

[101] Article 3329 of the civil code provides: "The provision of the arbitral submission relating to the jurisdiction of the arbitrators shall be interpreted restrictively"

Chapter Three

Interpretation of Arbitration Agreement

3.1 General

The doctrine of competence-competence in its positive aspect empowers the arbitrators to investigate and rule on jurisdictional challenges which are directed to the arbitration clause itself. This is further reinforced by the negative competence-competence which requires the courts to give the arbitrators a first chance to rule on their own jurisdiction by deferring the judicial review until the arbitrators rule on their own jurisdiction. The next issue is what rules or method of interpretation should the arbitrators or the courts should use to investigate or review the jurisdictional objections directed to the arbitration clause?

3.2 Arbitration clauses requiring interpretation

Arbitrators derive their jurisdiction from the will of the parties. The will of the parties in turn is expressed in the arbitration agreement which can be concluded in the form of a separate agreement to submit existing dispute to arbitrators or in the form of arbitration clause in the underlying contract to submit future disputes relating to or arising from the contract. Therefore a properly drafted arbitration agreement is an important precondition for the exercise of jurisdiction by arbitrators.[102]

According to Frederic Eisemann, an arbitration clause has to be framed so as to fulfill the following four objectives:[103]

(1) to produce mandatory consequences for the parties;

[102] Norbert Horn, "The Arbitration Agreement In Light Of Case Law of the UNCITRAL Model Law (ARTS. 7AND 8)," *International Arbitration Law Review* 8(5) (2005):2

[103] Benjamin G. Davis, "Pathological Clauses: Frédéric Eisemann's Still Vital Criteria" (1991) *Arbitration International* 7(4) (1991):.366.

(2) to exclude the intervention of state courts in the settlement of disputes, at least before the issuance of an arbitral award;
(3) to give powers to the arbitral tribunal to resolve the disputes likely to arise between the parties; and
(4) to permit efficient and rapid arbitral proceedings.

A clause which fails to satisfy one or more of these objectives is said to be pathological, a word first used by Frédéric Eisemann to express defective arbitration clauses.[104] Even though pathological clauses can take a wide variety of forms leaving gaps or ambiguities calling for interpretation of courts or arbitrators, they can generally be categorized as clauses which are inconsistent, uncertain or inoperable.[105]

3.2.1 Inconsistent clauses

These are clauses which are framed in such way that it is not clear whether the parties have agreed to submit to arbitration to the exclusion of court jurisdiction. This happens when in the same contract the parties agree to arbitrate and in addition make a forum selection agreement referring to national courts.[106] For example the agreement may state:

> "any dispute or difference shall […] be adjudicated upon under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with those Rules […] The courts of England shall have exclusive jurisdiction over [contractual disputes] to which jurisdiction the parties hereby submit." [107]

In the same vein an arbitration clause, which was, in one case, faced by the High Court of Hong Kong provides:

[104] Stephan Wilske, **"**Pathological Designation Of Arbitration Institutions - Two Recent Decisions On a Contract Drafter's Nightmare," *International Arbitration Law Review*, 9(3)(2006):2
[105] A. Redfern, M. Hunter, N. Blackaby and C.Partasides, *Law and Practice of International Commercial Arbitration*, 4th edn. (Kluwer Law International, 2004) :165
[106]Milo Molfa, "Pathological Arbitration Clause and the conflict of laws," *Hong Kong Law Journal* 37 (2007): 9
[107] Ibid

> "all disputes arising out of or in connection with this bill of lading shall, in accordance with Chinese law, be resolved in the courts of the People's Republic of China, all be arbitrated in the people's republic of China"[108]

In these two examples of arbitration clauses the parties included two different and exclusive dispute resolution mechanisms in the same contract. The clauses require interpretation whether the parties agree to submit to arbitration or to the ordinary courts.

3.2.2 Uncertain clauses

Uncertainty occurs when the arbitration clause is formulated in such a way that the parties have the option not a duty to refer a dispute to arbitration.[109] Since there is no mandatory agreement to submit dispute to arbitration, disagreement may arise as to the presumed common intention of the parties on the arbitration process. For example in a recently decided case in Ethiopia, the Cassation division of the Federal Supreme Court faced with the issue of interpretation of an arbitration clause which states:

> "If the parties can not settle their dispute through negotiation, one of the parties can resort to legal remedy or arbitration"[110]

The lower courts declined to send the matter to the arbitration on ground that the clause did not provide for a mandatory arbitration proceeding. The Cassation Court reversed this decision holding that the clause is clear enough to submit the dispute to arbitration.

3.2.3 Inoperative clauses

Even though there are different forms of inoperative clauses the most usual forms are those which make reference to arbitration institutions which are nonexistent or cease to exit[111].

[108] High Court, Hong Kong, February 17, 1993, William Company V. Chu Kong Agency Ltd., Clout Case 44 At 9 Cited In Norbert Horn, "The Arbitration Agreement In Light Of The Case Law Of The UNCITRAL Model Law (ARTICLE 7 AND 8)", *International Arbitration Law Review,* 8(5) (2005):4
[109] See Millo Molfa Supra N 106:9
[110] Zemzem Private Limited Company V. Education Department Of Hilibabor Zone, Federal Supreme Court Of Ethiopia, Cassation File No. 16896 (2005)
[111] See Millo Molfa Supra N 106: 11

Unlike the other types of defective arbitration clause it is difficult to give effect to inoperable clauses by using liberal interpretation.

3.3 Interpretation approaches

Currently there is division of opinions among legal commentators, legal systems and courts as to which approach the court should follow in interpreting defective arbitration clauses. Some espoused for liberal interpretation to give effect the clauses as a gesture of being arbitration friendly[112]. Others, holding that arbitration agreement is an exception to the ordinary jurisdiction of courts, argue that arbitration clause has to be interpreted restrictively as any other exceptions[113]. Still others, arguing parity of arbitration clause with any contractual clause, sell out the idea that arbitration clause has to be interpreted neutrally as any contractual clause.[114]

3.3.3 Restrictive interpretation

This approach of interpretation holds that arbitration clauses have to be interpreted more restrictively than other contractual clauses. According to this interpretation approach if there is any inconsistency, uncertainty or any other doubt as to the existence, validity or scope of arbitration clause, the doubt has to be resolved against the jurisdiction of arbitrators.[115] For example the supreme court of Italy facing with inconsistent arbitration clause containing reference to both arbitration and national court rejected the jurisdiction of arbitration by holding:

> "the submission of disputes to arbitration implies an exceptional exclusion of the jurisdictional function of the national judge.[T]he interpretation of the arbitration

[112] See Millo Molfa supra n 106: 9
[113] Derek P. Auchie, the liberal interpretation of defective arbitration clauses in international commercial contracts: a sensible approach, international arbitration law review 10(6) (2007):5
[114] E. Gaillard and J. savage (eds.), *Fouchard, Gaillard and Goldman on International Commercial Arbitration*, (Kluwer Law International, 1999):260
[115] Ibid

> clause must be made in a restrictive way and, in doubt , the 'natural jurisdiction' of national courts must prevail over the 'special one' of the arbitral tribunal.[116]

Commentators who argue for this position say that when parties conclude arbitration agreement they are waiving their fundamental right to resort to ordinary courts to seek remedy for their grievance.[117] The far-reaching consequences of this agreement to oust ones fundamental right makes arbitration clause special in the sense that courts have to make exceptionally strict scrutiny before arriving the conclusion that the parties have the intention of dispensing their right to avail themselves of a remedy in the ordinary courts.[118]

This approach is criticized by some commentators as parochial and anachronistic in the sense that the approach does not take into account the current development of arbitration as an important means of dispute resolution mechanism.[119] Particularly international arbitration law scholars are very critical of the approach by holding that it has a disastrous effect by disrupting an arbitration process which is chosen by the parties to serve them as efficient means of dispute resolution mechanism.[120] Gaillard and Savage in arguing against the principle of strict interpretation of arbitration clause in the context of international arbitration stated:

> "this principle is generally rejected in international arbitration. It is based on the idea that an arbitration agreement constitutes an exception to the principle of the jurisdiction of the courts, and that, as laws of exception are strictly interpreted, the same should apply to arbitration agreement. This view is not consistent with the fact that arbitration is now unanimously considered to be a normal means of settling international dispute.[121]

[116] Cited in Millo Molfa supra n 106: 9
[117] See Derek n 113:5
[118] Ibid
[119] See supra Millo Molfa, supra n 106 :9
[120] Ibid
[121] See Gaillard and Savage supra n 114: 260

Despite these criticisms against the principle of restrictive interpretation of arbitration clause by commentators particularly in the field of international arbitration law, the principle is still applicable in some jurisdiction particularly in the civil law countries including Ethiopia.[122]

3.3.4 Liberal interpretation

This approach is the opposite of the restrictive approach in the sense that it provides for a more liberal interpretation of arbitration clauses than other clauses of a contact. According to this approach, when a court or arbitration tribunal faces a dispute as to the existence, validity or scope of arbitration agreement, it has to start with the presumption that there exists a valid arbitration clause (*favorem validitatis*) or the subject matter dispute falls within the scope of the arbitration clause (*favorem jurisdictionis*).[123] This means any ambiguity relating to the arbitration clause has to be resolved in favor of arbitration.

This approach of interpretation is well demonstrated by one decision of the court of appeal of England.[124] In this case the court has to settle an issue whether there is a valid and enforceable arbitration agreement. The clause which calls for the interpretation of the court provides:

> 'any dispute or difference arising hereunder between the assured and the insurers shall be referred to a Queen's Counsel of the English Bar to be mutually agreed…or in the event of disagreement by the Chairman of the Bar Council'[125]

The court of appeal, in reversing the decision of the lower court which holds against the jurisdiction of arbitration because of the absence of a word 'arbitration' or other equivalent terms, stated:

[122] See Millo Molfa, supra no 106 : 9 (citing Italy as example); see Derek supra n 113: 8 (citing Scotland and Switzerland as example) see article 3329 of the civil code of Ethiopia which provides: '*the provisions of the arbitral submission has relating to the jurisdiction of the arbitrators shall be interpreted restrictively*'
[123] See Gaillard and Savage Supra n 114: 261
[124] David Wilson Homes Ltd v Survey Services Ltd, [2001] EWCA Civ 34, CA, cited in Derek Supra n 113:12
[125] Ibid

> "the important thing is that there should be an agreement to refer disputes to a person other than the court who is to resolve the dispute in a manner binding to the parties in an agreement…In the present case the parties cannot, with respect to the judge, have intended a reference to a Queen's Council as an expert for a non-binding opinion, because in that way no finality could be achieved. They must in my judgment have wanted a binding result, and the clause thus constitutes an arbitration agreement"[126]

This decision was given based on a liberal approach by interpreting all the doubts in favor of arbitration.

In the United States there are court decisions particularly in the international arbitration context which indicate the prevalence of liberal interpretation. In *Moses H Cone Memorial Hospital v. Mercury Construction Corp*. the United States Supreme Court decided that ' any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether a problem at hand is one of… construction of the contract language, or a defense to arbitrability'[127] Similarly in the case of *Mitsubishi Motors corp. v. Soler Chrysler* the supreme court held that ' any doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration.'[128]

The German court practices also indicate that liberal interpretation of arbitration clause is the preferred approach of in the country. As one commentator stated:

> "In German court practice, courts tend to interpret arbitration clauses with the goal of upholding the parties' underlying intention to arbitrate; as long as this will has been clearly expressed… arbitration practitioners can rely on courts to reject the objection to an invalid arbitration clause if the clause can be interpreted to retain its validity."[129]

[126] Ibid
[127] Moses H cone Memorial Hospital v. Mercury Construction Corp. 460 US , 1, 24-25 Cited in D. Joseph, Jurisdiction and arbitration agreement and their enforcement (Sweet and Maxwell, 2005), page 111 para. 4.48 n 3
[128] Mitsubishi Motors Corp. vs. Soler Chrysler-Plymouth 473 US 614
[129] Stephan Wilske and Claudia Krapfl, "Pathological Designation of Arbitration Institutions: Two recent Decisions on a Contract Drafter's Nightmare." (2006) *International Arbitration Law Review* 9(3)(2006): 4 and 6

As far as the UNCITRAL Model law position is concerned surveys conducted on court decisions rendered in jurisdictions which enact their arbitration laws based on the model law, there is a strong tendency to follow the liberal approach of interpreting arbitration clauses.[130]Those who support this approach of interpretation, particularly in the international context, justify this approach as a reflection of pro-arbitration policy in ensuring predictability in the international commerce by enforcing the arbitration clause to the fullest possible and prevent the disruption of the process which is designed to be an effective means of dispute resolution.[131]

Despite the acceptance of the liberal approach to interpret arbitration clauses by major jurisdictions and Model law countries, the approach is vehemently criticized by some commentators.[132] First, the liberal approach starts from the assumption that there is a valid arbitration agreement or arbitration jurisdiction before making any interpretation of what the parties have actually agreed.[133] As Gaillard and Savage stated "a mere allegation that an arbitration agreement exists will not raise a presumption that the allegation is well founded by virtue of a supposed principle of *favorem validitatis*".[134] This is like putting the cart before the horse. Second, the approach also has the propensity of giving effect to inoperative clauses by creating an arbitration agreement under the guise of interpretation. Further, since the approach goes beyond what the parties actually agreed, it may cause unpredictability in contractual relationships. And it has also counterproductive effect in propagating careless drafting of arbitration clause by giving effect to the most pathological clause one can imagine.[135]

[130] See Derek supra n 113: 5
[131] Steven Friel, "Case comment: Construction and Severability of Arbitration Clause," *International Arbitration Law Review* 10(3)(2007): 3
[132] See Derek supra n 113: 25-26 and Gaillard and Savage supra n 114 : 262
[133] See Derek Supra n 113: 25
[134] See Gaillard and Savage Supra n 114: 262
[135] See Derek Supra n 113: 26

3.3.5 Neutral interpretation

The neutral interpretation approach starts with the premise that arbitration clause is like any other contractual clause in the sense that there is no reason to treat arbitration clause differently from other contractual clauses as far as the application of interpretation principles is concerned. Based on this premise those who argue for neutral approach holds that arbitration clause should be interpreted neither restrictively nor liberally but rather according to the general principles of interpretation which are applicable to any contractual clauses. This approach is well reflected in one decision in which it is stated:

> like any other convention, a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle of *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law.[136]

This approach is followed by the French legal system where it is generally accepted that judges or arbitrators have to endeavor to find out whether there is a common intention on the part of the parties to submit their dispute to arbitration using the normal principles of interpretation which are generally applicable to any contract.[137] The issue is not whether an arbitration clause is to be interpreted restrictively or broadly but rather whether there is a common intention of the parties to arbitrate or not.

3.4 The Ethiopian legal system

We have seen that despite criticisms from some leading commentators, liberal interpretation is still applicable in major jurisdictions and in most UNCITRAL Model law countries. It is also true that neutral approach has strong support from arbitration law scholars

[136] See Gaillard and savage supra n 114 p 261 para 480
[137] Id :476

and some important arbitration law jurisdictions like France a country which is know for its pro-arbitration attitude. On the other hand there seems to be a general consensus among scholars and commentators that restrictive interpretation is outdated and undesirable approach which is currently followed by only a handful of countries.

3.4.1 The civil code

Unfortunately Ethiopia is on of those few jurisdictions which still maintain restrictive interpretation approach, which is a reflection of mistrust and unfriendly attitude towards arbitration. This restrictive approach of interpreting arbitration clause is clearly endorsed by article 3329 of the civil code of Ethiopia which provides:

> 3329.__*Interpretation*
>
> *The provisions of the arbitral submission relating to the jurisdictions of the arbitrators shall be interpreted restrictively.*

This provision is another aspect of the Ethiopian civil code, in addition to its silence on separability as discussed in chapter one and its emphatic exclusion of the doctrine of competence-competence particularly in relation to the power of deciding the validity and existence of arbitration agreement which is addressed in chapter two, that makes the code out of touch with the universal development of modern arbitration law. Unlike other contractual provisions where courts are only required to look for the common intention of the parties in case of ambiguity,[138] article 3329 of the civil code requires restrictive interpretation of arbitration

[138] Article 1734 of the civil code of Ethiopia which is one of those provisions dealing with interpretation of contracts in general provides:

> Article 1734_ common intention of the parties
>
> (1) Where the provisions of a contract are ambiguous, the common intention of the parties shall be sought.
> (2) The general conduct of the parties before and after the making of the contract shall be taken into consideration to this effect.

clauses in the sense that courts facing with ambiguous clause on jurisdiction of arbitrators have to resolve the ambiguity against the jurisdiction of arbitrators.

This position is strongly criticized by scholars and commentators. For example one author commenting on a decision of the supreme court of Italy (a country which follows the same restrictive approach like the civil code of Ethiopia) rejecting an arbitration clause which provides for a resort either to court or arbitration stated:

> The position expressed by Italian authorities originates in the historic (and, nowadays, anachronistic) mistrust of arbitration, which purports to confirm the state judge's natural jurisdiction each time the parties have failed to confer jurisdiction on a private party unambiguously. However one intends it, the Italian way constitutes a good example of how a parochial approach in interpreting arbitration clauses could disrupt international arbitration and the effective resolution of disputes.[139]

3.4.2 The Federal Cassation Court's Departure from Restrictive Interpretation

The cassation court of Ethiopia recently gave a decision relating to the interpretation of arbitration clause.[140] In this case the arbitration clause (clause 24 of the contract) which called for the interpretation of the court provided:

> "If the parties can not settle their dispute through negotiation, one of the parties can resort to legal remedy or arbitration."

When a dispute arose between the parties the respondent *(Education Department of Hiilibabor Zone*), which is a government office, brought a suite in the lower court. The now applicant (*Zemzem Private Limited Company*) objected the jurisdiction of the court alleging the existence of a valid arbitration clause. The court assumed jurisdiction on the subject matter of the dispute holding that there is no clear agreement to submit to arbitration. The intermediate appellate courts also agreed with the lower court and affirmed the decision. The federal cassation

[139] See Milo Molfa supra 106: 9

[140] Zemzem Private Limited Company V. Education Department Of Hilibabor Zone, Federal Supreme Court Of Ethiopia, Cassation File No. 16896 (2005)

court which has the power to review any final decision of a court on the question of fundamental error of law reversed the decisions of the lower courts and held for the existence of a valid and enforceable arbitration agreement. The cassation court holding for the existence of a valid arbitration agreement stated:

> The reason given by the lower courts to reject the objection of the applicant was the absence of a mandatory requirement to submit a dispute to arbitration under clause 24 of the contract which only provides for the option to resort to court or arbitration. However from a close examination of the content of clause 24 of the contract this court was able to properly understand the existence of clear agreement to resort to arbitration when the parties are unable to settle their dispute through mutual discussion.[141]

Is this a restrictive interpretation of arbitration clause which is required by article 3329 of the civil code? Obviously, it is not. It is rather to the minimum a neutral or to the maximum a liberal interpretation. To the minimum it is a neutral interpretation, because the court resorted to the general principle of contract interpretation to give effect to the intention of the parties. To the maximum it is a liberal interpretation, because despite the clear content of the clause that the parties have the option to go to court or arbitration, the court decided for the jurisdiction of arbitration. Had the court followed the restrictive approach as required by article 3329, it should have decided for the jurisdiction of the court rather than to the jurisdiction of the arbitration tribunal.

This decision of the federal cassation court which has a binding effect on the lower courts is evidence of a clear departure from the restrictive approach as provided in the civil code article 3329 to at least a neutral or at most to a liberal approach of interpreting arbitration clause. Even though this arbitration friendly move by the cassation court is desirable from the perspective of the current development of modern arbitration law, it is arguable whether the cassation court can

[141] Translation is mine

depart from clear provision of a law under the guise of exercising its power to give a binding interpretation of the law under proclamation number 454/2005.

Conclusion and Recommendation

Nowadays the advantage of arbitration over litigation in providing a neutral, efficient and effective dispute settlement mechanism is uncontroversial. Particularly in the sphere of international transaction, where certainty and predictability are very important in ensuring confidence in the business relationship, arbitration plays a central role by providing independent, competent, impartial, effective and efficient dispute settlement mechanism, which is neutral from the national jurisdiction of any specific country. This clear advantage of arbitration over litigation, not only in providing efficient means of dispute resolution but also serving as " a rescuer who will assume part of the increasingly heavy load of crowded court dockets",[142] leads to a worldwide move towards pro-arbitration policy. The acceptance of the doctrine of separabitlity, competence-competence and arbitration friendly attitude in interpreting doubtful and unclear arbitration clauses as opposed to restrictive interpretation by major jurisdictions and the UNCITRAL Model law are some of the developments which exemplify a worldwide pro-arbitration attitude.

As it was elaborated in the three chapters above, the arbitration law as enshrined in the 1960 civil code of Ethiopia leaves much to be desired with respect to the doctrine of separabiltiy, the doctrine of competence-competence, and the rule of interpretation of doubtful and unclear arbitration clauses. The code, which was adopted almost half a century ago seems to be out of touch with the current and modern developments of arbitration law.

Firstly, the civil code of Ethiopia is silent about the doctrine of separability. This makes the application of the doctrine dependent on the interpretation of the judiciary and the agreement of the parties to the effect that the arbitration clause has separate existence. Despite the silence of

[142] Professor Varady, On the Option Of A Contractual Extension Of Judicial Review Of Arbitral Awards Or: What Is Actually Pro-Arbitration? Zbornik PFZ, 56(2-3) (2006):456

the code, there is a possibility that the courts of Ethiopia endorse the doctrine either through interpretation based on the structure of the code or interpreting broadly phrased arbitration clauses. Based on the structure of the code, since both forms of arbitration agreements i.e. a *compromise* and *clause compromissoire* are treated as special contracts independent of the general contract provisions, through interpretation courts may arrive at the conclusion that arbitration clause is a separate contract, which has independent existence from the main contract containing it. Or the court can apply the doctrine by interpreting broadly phrased arbitration clause to empower the arbitrator to rule on the validity of the main contract without compromising their jurisdiction and the validity of their award.

However, these two ways of endorsing the doctrine of separability through interpretation are just possibilities which do not guarantee the application of the doctrine in the country. This is further compounded by the fact that it is very unlikely for courts to endorse the doctrine by following the above pro-arbitration method of interpretation because of the provision of article 3329 of the code which imposes a duty on courts to interpret arbitration clauses restrictively. Therefore, it is necessary and high time that the law making body should step in to provide a clear endorsement of the doctrine of separabitly as an important element of modern arbitration law. Until this legislative measure is taken, parties to a contract are advised to clearly provide for the doctrine of separability either through their own agreement, or by the incorporation of arbitration rules like the one adopted by *The Ethiopian Arbitration and Conciliation Centre.*

Secondly, as far as the doctrine of competence-competence is concerned, the problem is much more acute. According to the formulation of article 3330 of the civil code, the arbitrators have no authority to rule on their own jurisdiction, unless (1) the jurisdictional challenges are those which do not relate to the validity and existence of the arbitration clause and (2) the parties

have agreed to authorize the arbitrator to rule on these challenges which do not affect the validity and existence of the arbitration agreement. But if the jurisdictional challenges relate to the validity or existence of the arbitration clause, the prohibition is so absolute that the arbitrators can not rule on the challenges even in the existence of clear authorization by the parties to do so. Therefore, because of a very slim possibility of contractual competence-competence on challenges other than the validity of the arbitration agreement and absolute exclusion of competence-competence with respect to challenges based on the validity and existence of the arbitration clause, one can say that, practically both the positive and negative aspects of competence-competence are non-existent under the Ethiopian legal system. This opens the way for court intervention in the arbitration process for the purpose of deciding whether the arbitrators have jurisdiction to hear the matter or not. This in turn causes delay and cost, which is against the all purpose of the arbitration process to provide speedy, neutral and less costly means of dispute resolution mechanism.

The other inimical attitude of the civil code towards arbitration is glaringly reflected in article 2229, which requires restrictive interpretation of arbitration clauses. According to this provision, when a court is faced with unclear, ambiguous or imperfectly drafted arbitration clauses, it has to resolve the ambiguities against the jurisdiction of the arbitrators. Having regard to the current modern development of arbitration law endorsing pro-arbitration approaches to interpretation, this stance of the code is anachronistic in the sense that it is based on a long-forgotten hostility towards arbitration based on a wrong assumption that arbitration is an enemy or rival to the jurisdiction of courts rather than a partner who can share the work load of the courts. The recent decision of the Federal Cassation Court of Ethiopia in the *Zemzem case* interpreting an arbitration clause, which provides for option between arbitration and court

jurisdiction, in favor of the jurisdiction of arbitration deserves credit in reversing the hostile attitude of the code towards arbitration. But it is still questionable whether the Cassation Court can depart from the clear provision of the code which requires restrictive interpretation in the exercise of its power to give binding interpretation of the law of the country. Because of this reservation on the decision of the court the intervention of the legislature to reverse this hostile attitude of the code is a necessity.

Finally, emphasizing the worldwide recognition of the doctrines of separability and competence-competence as well as arbitration friendly interpretation of defective arbitration clauses as the reflections of the culmination of the old and diehard hostility towards arbitration, Professor Tibor Varady once said that the war for pro-arbitration policy is all over and has been won by partisans of pro-arbitration stance[143]. It is time for Ethiopia to share the spoils of this hard-fought war by adopting arbitration law endorsing these modern conceptions of arbitration law, which are necessary for an effective, efficient, neutral and autonomous arbitration process.

[143] Ibid

Bibliography

Articles

Auchie, Derek P. "The liberal interpretation of defective arbitration clauses in international commercial contracts: a sensible approach," *International Arbitration Law Review* 10(6) (2007)

Bachand, Frederic, "Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?" *Arbitration International* 22(3) (2006)

Barceló, John J. "Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective," *Vanderbilt Journal of International Law 36(2003)*

Carbonneau, Thomas E., "The Elaboration of a French Court Doctrine on the International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity," *Tulane Law Review* 55 (1980)

Davis, Benjamin G. "Pathological Clauses: Frédéric Eisemann's Still Vital Criteria" (1991) *Arbitration International* 7(4) (1991)

Friel, Steven, "Case comment: Construction and Severability of Arbitration Clause," International Arbitration Law Review 10(3) (2007)

Gaillard, E., 'Prima Facie Review of Existence, Validity of Arbitration Agreement' New York Law Journal 225 (105), available at: http://www.nylj.com

Horn, Norbert, "The Arbitration Agreement in Light of Case Law of the UNCITRAL Model Law (ARTS. 7AND 8)," *International Arbitration Law Review* 8(5) (2005)

Molfa, Milo, "Pathological Arbitration Clauses and the Conflicts of Laws," *Hong Kong Law Journal* 37 (2007)

Park, William W. "Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law," *Nevada Law Journal* 8(135) (2007)

Park, William W. "Determining Arbitral Jurisdiction: Allocation of Tasks between Courts and Arbitrators," *The American Review of International Arbitration* 8(133) (1997)

Petrus, Christian Herrera, "Spanish Perspectives on the Doctrines of Kompetenz-Kompetenze and Separability: A Comparative Analysis of Spain's 1988 Arbitration Act," *The American Review of International Arbitration* 11 (2000)

Philipp, Shirin, "Is The Supreme Court Bucking The Trend? First Options V. Kaplan In Light Of European Reform Initiative in Arbitration Law," *Boston University International Law Journal* 14(119) (1996)

Poznanski, G., "The Nature and Extent of an Arbitrator's Powers in International Commercial Arbitration," *International Arbitration* 4(3) (1987)

Rosen, Janet A. "Arbitration under Private International Law: The Doctrine of Separability and Competence De La Competence," *Fordham International Law Journal* 17 (1994)

Schlosser, Peter, "The Competence of Arbitrators and of Courts," *Arbitration International* 8 (1992)

Smit, Robert H. "Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or can Something Indeed Come from Nothing?" *the American review of international arbitration* 13(19) (2002)

Tilahun Teshome, "The Legal Regime Governing Arbitration in Ethiopia: A Synopsis," *Ethiopian bar review*1 (2) (2007):117-140

Tsen-Ta, Jack Lee, "Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore," Singapore *Academy of Law Journal* 7 (1995)

Uzelac, Alan, "Jurisdiction of the Arbitral Tribunal: Current Jurisprudence and Problem Areas under the UNCITRAL Model Law," *International Arbitration Law* 8(5) (2005)

Varady, Tibor, "On the Appointing Authorities in International Commercial Arbitration," *Emory Journal of International Dispute Resolution* 2 (1987):311-357

Varady, Tibor, "On the Option of a Contractual Extension of Judicial Review of Arbitral Awards or: What Is Actually Pro-Arbitration?" Zbornik PFZ, 56(2-3) (2006)

Von Mehren, Arthur Taylor, "International Commercial Arbitration: The Contribution of the French Jurisprudence," *Louisiana Law Review* 46 (1986):1045-1059

Wilske, Stephan, **"**Pathological Designation of Arbitration Institutions - Two Recent Decisions on a Contract Drafter's Nightmare," *International Arbitration Law Review*, 9(3) (2006)

Wyss, Natasha, "First Options of Chicago, Inc. v. Kaplan: A perilous approach to Kompetenz-Kompetenz," *Tulane Law Review* 72(351) (1997)

Zadkovich, John, "Divergence and Comity among the Doctrines of Separability and Competence-Competence" *Vindobona Journal of International Commercial Law and Arbitration* 12(1) (2008)

Books

Gaillard, E., and J. savage (eds.), Fouchard, Gillard and Goldman on International Commercial Arbitration. Kluwer Law International, 1999

Redfern, A., M. Hunter, N. Blackaby and C.Partasides, *Law and Practice of International Commercial Arbitration*, 4th edn. Kluwer Law International, 2004

Varady, Tibor, John J. Barceló and Arthur T. Von Mehren, *International Commercial Arbitration: A Transnational Perspective*, 3rd ed. United States of America: Thomson/West, 2006

Cases

First options of Chicago v. Kaplan, 514 U.S 938 (1995)

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002)

Mitsubishi Motors Corp. vs. Soler Chrysler-Plymouth 473 US 614

Moses H cone Memorial Hospital v. Mercury Construction Corp. 460 US, 1, 24-25

Prima paint Corp. v. Flood and Conklin MFG CO., 388 U.S 395 (1967)

Zemzem Private Limited Company V. Education Department of Hilibabor Zone, Federal Supreme Court of Ethiopia, Cassation File No. 16896 (2005)