THE PLACE OF MULTIPARTY COMMERCIAL ARBITRATION UNDER ETHIOPIAN ARBITRATION LAW

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ABSTRACT

Multiparty arbitration is crafted to satisfy the interest of parties involved in circumventing complex commercial transactions resulting from interdependency of international commerce and globalization. It is all about how the issues of joinder, intervention, consolidation, and appointments of the arbitrator are managed in multiparty commercial disputes. With the primary aim of assessing the legal status, and the place of third-party participation in commercial arbitration, such as joinder, intervention, consolidation, and appointments of the arbitrator in multiparty dispute under Ethiopian arbitration law, doctrinal legal research methodology is employed. Accordingly, the finding of the paper shows that multi-party arbitration is not given proper attention. Neither the 1960 Civil Code (CC) nor the 1965 Civil Procedure Code (CPC) provides for the possibility of joinder, intervention, and consolidation of the arbitration proceeding saving for what's provided under Art.317 (1) of the CPC. The same is true for appointments of arbitrators. Again, the leading arbitration institution in the country, Addis Ababa Chamber of Commerce and Sectorial Association (AACCSA), institutional rules is silent on the issues of joinder, intervention, and consolidation of the arbitral proceeding though it regulated the appointments of arbitrators in multi party disputes.To this effect, the author argues for the proper facilitation of multi-party arbitration in our context because of various reasons. First, since the multiparty dispute is the fruits of globalization, Ethiopia cannot avoid globalization and the conundrum of multi-party disputes. Second, the construction industry in which the issues of the multi-party dispute is common is substantially increasing. Finally, the current move of the Ethiopian government towards the privatization of big companies has also a tendency to increase multi-party disputes. Accordingly, it is recommendable for Ethiopian legislators to reconsider and amend its arbitration law with proper inculcation of modern approaches and practices to multi-party arbitration.

Key Words: Multiparty arbitration, Joinder, Consolidation, Intervention

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I. INTRODUCTION

Commercial arbitration as a means for resolving international disputes has become more evident in the past several decades, as the international trade, commercial transactions and investments have experienced a boom.[1] Currently, the growing international interdependency of commerce and the globalization of the business world have led to complex contractual relations, which very often involve more than two parties bound by a multitude of contracts.[2]

Besides, we are experiencing international transactions graduating into a higher level of complexity; where often requiring the participation of several companies in the implementation of a single project. For instance, a typical construction project will usually involve the client, the main contractor, several subcontractors, an engineer or an architect, suppliers, financiers, and possibly additional commercial parties. Hence, the possibility for a dispute to arise among this multitude of parties who have built up their cooperation based on several contracts is unquestionably high. Consequently, disputes may arise between multiple parties, but also based on multiple contracts.[3] Such kinds of disputes will inevitably lead to multiparty arbitration.

Multiparty arbitration is arbitration, which deals with a dispute involving more than two parties.[4] Two types of multilateral disputes can be distinguished within this definition.[5] First, a dispute involving more than two parties can look like a pure bipolar dispute involving two parties. A bipolar multiparty dispute would be a dispute where 'the parties can normally be divided into two camps: a claimant camp and a respondent camp', where the interests of the parties within each camp are coinciding or substantially the same.[6] The second situation concerns multipolar disputes where the parties cannot be divided into two camps because of their divergent interests.[7]Accordingly, the paper will uncover the issues of joinder,

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[1] Gary B. Born, International Commercial Arbitration (Kluwer International LA, 2nd Ed., 2009), P1.See also Alan Redfern, Martin Hunter, & Nigelblackaby, Practice of International Commercial Arbitration, Sweet and Max Well, 4th ed., 2004), Pp 22-27.

[2]Dimitar Pondev, Multiparty and Multicontract Arbitration in Construction Industry (John Willey and Sons Ltd,1st ed., 2017), P 2.

3*Ibid*.

4Olivier Caprasse, *Setting up of the Arbitral Tribunal in Multi-Party Arbitration, The- La Constitution du Tribunal Arbitral en CasD'arbitrage Multipartite,* International Business Law Journal (2006), P197.

[5]*Ibid*.

[6]*Ibid.*

[7]*Ibid*.

intervention, consolidation, and appointment of arbitrators in both bipolar and multipolar disputes under the Ethiopian arbitration law.

Various conundrums are underlying multi-party arbitration. Prominently, deciding who may be a party to a multiparty dispute; the number of arbitrators; how the arbitrators are to be appointed; the administration of the proceedings to guarantee all parties involved an equal treatment while assuring speed and efficiency; the severance of cases where it turns out that there is not a sufficient nexus between the disputed contracts; the calculation and payment of an advance of fees and costs, and whether one or several awards shall be made are the major baffling issues in case of multiparty arbitration.[8]

Furthermore, in multiparty commercial arbitration, managing the issues of joinder, intervention, and consolidation of arbitral proceedings is very complex because of the consensual nature of arbitration, the law of privity of contract, and confidentiality of arbitral proceedings. In arbitration, 'joinder' is the procedural mechanism through which a 'third party' may be brought to an arbitration proceeding already commenced between other parties.[9] Such mechanism refers to two different situations: first, where a respondent files a claim against a 'third party' (or against a 'third party' and the claimant); secondly, where the claimant, at a later stage of the proceedings, files an additional claim against a 'third party'.[10] When a third party accedes to bi-party arbitration, it becomes a multi-party arbitration proceeding. On the other hand, 'intervention' is when a third party requests to join arbitration already in progress.[11] The question of joinder and intervention are the same as both deal with participation of third party to the existing arbitration proceeding. Consolidation in international commercial arbitration is known as a "procedural mechanism" of bringing two or more separate pending arbitration proceedings together into one case.[12]

[8] SigvardJarvin, *Multi-Party Arbitration: Identifying the Issues*, New York Law School Journal of International & Comparative Law (1987), Vol.8, P321.

[9]Klas Laitenen, Multi-party and Multi-contract Arbitration Mechanisms in International Commercial Arbitration;A Study on Institutional Rules of Consolidation, Joinder, and Intervention; from A Finnish Perspective (Unpublished, LL.M Thesis, University of Helsinki, 2013), P4. See also Assel Kezbekova, The Participation of Third Parties in Arbitration (Unpublished, LLM Thesis, University of Toronto, 2013), P34

[10]*Ibid*

[11]*Ibid.*

[12]Arben Isufi, Multiple Parties and Multiple Contracts in Arbitration (Unpublished, LLM Thesis, Ghent University, May 2012), P4.

Over the last several years, the world's leading arbitral institutions have adopted new rules, recognizing that the growth in international arbitration has been accompanied by the increasing complexity and sophistication of disputes.[13] The approach taken by those institutional rules is via providing a mechanism for appointment of arbitrators and addressing the issues of joinder, intervention, and consolidation of the arbitral proceeding. For instance**,** the 2017 Revised ICC Rules contain more detailed provisions on the issues of appointment of arbitrators, joinder, intervention, and consolidation of the arbitral proceeding.[14] The same is true for Hong Kong International Arbitration Center (HKIAC), Singapore International Arbitration Centre (SIAC), International Commercial Arbitration Court (ICAC), and Judicial Arbitration and Mediation Service (JAMS).[15] Such kinds of the move are still ongoing, and even in 2018, the German International Arbitral Institution (DIS) has amended its arbitral rules and successfully adopted the issues of multi-party arbitration.[16]

The same approach was taken by the national legislation of various countries. To mention some of them, Hong Kong has refined its arbitration ordinance in 2011 with special emphasis on the issues of consolidation.[17] In 2014, the Dutch Parliament has also adopted certain amendments in the Netherlands Code of Civil Procedure that was successfully refined provision governing multi-party arbitration, and the amendments were entered into force on 1 January 2015.[18] South Africa, has introduced the new Arbitration Act No 15 of 2017 with proper incorporation of a provision governing complexities of multi-party disputes.[19]

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[13] Finley T. Harckham and Peter A. Halprin, The More The Merrier? Increase in Multiparty Arbitrations Spawns New Institutional Rules, May 2015; available at http://ccbjournal.com/articles/32123/more-merrier-increase-multiparty-arbitrations-spawns%C2%A0new-institution <accessed on Feb 03, 2018>.

[14]International Chamber of Commerce Arbitral Rule, Revised in 2017 (hereafter ICC Rule), available at https:// iccwbo.org/publication/arbitration-rules-and-mediation-rules/, *Arts*.7, 10 & 12.

[15]Angela Carazo & Jamescontos, Institutional Approaches to Multi-Party and Multi-Contract Disputes in Arbitration, 2016 available at http://www.mondaq.com/x/489396/Arbitration+ Dispute +Resolution/Institutional+approaches+to+multiparty+and+ multicontract +disputes + in+arbitration <accessed on February 04, 2018>.

[16] *Ibid.*

[17]Herbert Smith Freehills, Snew Hong Kong Arbitration Ordinance,2011 available at http:// arbitrationblog.Kluwerarbitration.com/2011/06/01/new-hong-kong-arbitration-ordina nce-comes-into-effect < accessed Feb 04, 2018>.

[18]Netherlands Code of Civil Procedure of 2015, Arts.1045 and 1046.

[19]Pierre Burger,The International Arbitration Act Spells Opportunity for South Africa, March 2018 available at https://www.werksmans.com/legal-briefs-view/international-arbitration-act-spells-opportunity-south-africa/ <accessed on February 12, 2018>

Coming to Ethiopia, the modern concept of commercial arbitration had, however, been alien until at least the mid-20th century, when Ethiopia developed most of its current codes on private law.[20] Some provisions were made for arbitration in the 1960 Civil Code and the 1965 Civil Procedure Code (CPC). Articles 3325 to 3346 of the 1960 Civil Code govern the enforcement of agreements to arbitrate in the form of either arbitral clauses or submissions. CPC, for its part, provides rules on some procedural aspects of arbitration. Besides, improvements concerning institutional arbitration are also indicative of the current trend toward better utilization of arbitration in commercial disputes. Two arbitral institutions, the Ethiopian Arbitration and Conciliation Centre (EACC) and the Arbitration Institute of the Addis Ababa Chamber of Commerce and Sectorial Associations (AACCSA) have been established.[21]

Being cognizant of the aforementioned points, if we go through the existing legal framework on arbitration in Ethiopia, less attention is given for multi-party disputes. Beyond the civil code and civil procedure provisions of Ethiopia, which is not clear on the issues of multiparty arbitration, the institutional rules of AACCSA have not paid sufficient attention to the issues of multi-party arbitration. The only provision that talks about the issue of multiparty arbitration is Article 10 (3) of AACCSA arbitral rule.[22]

Though the Ethiopian legal framework is not clear on the issues of joinder, intervention, and consolidation of arbitral proceedings, Sirak Akalu and Michael Teshome argued that joinder, intervention, and consolidation are allowed under the Ethiopian arbitration law.[23] Accordingly, based on Article 317(1) of Civil Procedure Code, and Article 3345(1) of Civil Code, they have been arguing that, since the Civil Procedure Code allows for joinder, intervention, and consolidation of suits, these procedural aspects would inevitably apply in case of the arbitral proceeding.[24] Yet, the question is how we compromise it with the consensual

[20]*Ibid*

[21]Hailegabriel G. Feyissa, *The Role of Ethiopian Courts in Commercial Arbitration*, Mizan Law Review (2010), Vol.4 (2), P305.

[22]Addis Ababa Chamber of Commerce and Sectorial Association, Revised Arbitral Rules of November 25, 2008, (Hereafter called AACCSA rule), Art.10 (3) available at http://www. addis chamber.com/file/ ARBITRATION/ 20131126/ Arbitration Rules%20 (English%20 Version). pdf <accessed on April 25, 2018>

[23]Sirak Akalu and Michael Teshome, "Yegelgel Dagnet be Ethiopia" (Mega Publishing and Distribution Plc, 2017), Pp 93-108

[24]*Ibid*

nature of arbitration, the law of privity of contract and confidentiality of arbitral proceeding.

Again, Alemayehu Yismaw and Haile Gabriel G. Feyisa emphasized that the existing arbitration laws are sketchy and do not cope with the emerging modern laws and practices in international commercial arbitration but without mentioning multi-party issues.[25] Though their work is not directly emphasized on the issues of multiparty arbitration, from their assertion, one can take a presumption that since multi-party arbitration is a currently circumventing practice in international commercial arbitration, the Ethiopian arbitration law is devoid of rules on multiparty disputes.

The aim of this article is, therefore, to examine and assess the place of multi-party commercial arbitration under the Ethiopian legal framework, identifying its shortcomings and exploring opportunities for proper regulation. To this end, the article investigates the pertinent provision of Civil Code and Civil Procedure Code of Ethiopia, and the institutional rules of the AACCSA. Again, since exploring all international institutional rules of arbitration is quite difficult, only ICC, UNCITRAL, and LCIA rules will be explored since they are the leading international arbitration institution where the conundrums of multi-party arbitration can be manifested. Finally, National legislation of the Netherlands, Hong Kong, and South Africa will also be explored as they are popular arbitration *fora,* and praised for having innovative legislation in the field of international commercial arbitration.

The remaining parts of this article are classified into 6 sections. The second section will uncover the approaches adopted by various institutional rules on the issues of multi-party arbitration with special emphasis on joinder, intervention, consolidation, and appointments of arbitrators. The third section presents the experiences of the Netherlands, Hong Kong, and South Africa on the issues of multi-party arbitration. The fourth section will embark on critically analyzing the place of multiparty arbitration under the existing Ethiopian arbitration law. The fifth section will present multiparty arbitration from the perspectives of AACCSA arbitral rules. The sixth section will explore the need for full implementation of

[25]AlemayehuYismawu, *The Need to Establish A Workable, Modern and Institutionalized Commercial Arbitration in Ethiopia*, Haramaya Law Review (2015),Vol.4, P 37. See also Hailegabriel G. Feyissa*, supra* note 21, P 303

multiparty arbitration in Ethiopia and the seventh section will finalize the article by a way of conclusion and recommendation.

II. MULTI-PARTY ARBITRATION FROM THE PERSPECTIVES OF INSTITUTIONAL ARBITRAL RULES

Although the solution adopted differs in some particulars, the leading institutional arbitral rules are now incorporated provisions for the proper regulation of multi-party arbitration. Hence, this section is devoted to uncovering the solution adopted under leading arbitral institutions (ICC, LCIA, and UNICITRAL arbitral rules).

2.1. INTERNATIONAL CHAMBER OF COMMERCE (ICC) RULES OF 2017

i. Joinder and Intervention

The 1998 ICC Rules of Arbitration did not contain any provision dealing exclusively with joinder of additional parties; rather it provides that the Court has to decide whether a third party may join the arbitration proceedings.[26] However, while the ICC revised its Rules of Arbitration in 2012, the joinder of additional parties was vividly incorporated[27] and the status quo was preserved by the currently working ICC rules of arbitration of 2017. Thus, Article 7(1) of the ICC rule of 2017 provides, "*A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the "Request for Joinder") to the Secretariat.*"

From this provision, we can surmise that a third party, who is not yet a part of the arbitration proceeding can join pending arbitral proceeding up on "Request for Joinder" to the Secretariat. For the joinder of third parties to realize, there should be an arbitration agreement that binds all parties to that effect.[28] The other important point is the approach taken by ICC rules in ensuring equal treatment of the parties in the appointment of arbitration in case of joinder of the parties. Concerning these issues, the joinder of parties after the appointment or

[26]International Chambers of Commerce Arbitral Rule of 1998 (hereafter called ICC rule of 1998), Art .4 (6).
[27] International Chambers of Commerce Arbitral Rule of 2012 (hereafter called ICC rule of 2012), Art.7.
[28] International Chambers of Commerce Arbitral Rule of 2017 (hereafter called ICC rule of 2017), Art.6(4) (i)

confirmation, arbitrator is not allowed under ICC rule.[29] The main reason for not to allow the joinder of additional parties after confirmation or appointment of an arbitrator is that it is impractical to allow newly joinder parties to participate in the appointment of arbitrators. So, if the request for joinder is made before the confirmation or appointment of arbitrators, the newly added parties to arbitration can participate equally with the original parties in the appointment of arbitrators.

In a nutshell, the request for joinder may be submitted at any time after the filing of the request for arbitration, but not later than the confirmation or appointment of an arbitrator and joinder request most likely will be denied, unless the parties have explicitly regulated the matter in their contracts.

ii. Consolidation

If we ponder through, the arbitral rules of ICC 2017, it conferred the ICC court with the power to consolidate two or more ICC arbitrations into a single arbitration upon the request of the party wishing to do so subject to the condition provided thereof. Thus, Article 10 of the 2017 ICC Rules provides:

The court may, at the request of a party, consolidate two or more arbitrations pending under the rules into a single arbitration, where;

a) The parties have agreed to consolidate; or

b) All of the claims in the arbitrations are made under more than one arbitration agreements, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the courts find the arbitration agreements to be compatible.

From the aforementioned articles, we can imagine three main scenarios where consolidation may be ordered by the ICC court upon the request of the parties willing to do so. The first scenario in which two pending arbitration proceedings may consolidate is the party's agreement. Accordingly, if there is an explicit agreement of the parties in all of the arbitrations to be consolidated, the court may order consolidation. The second phenomenon when consolidation may be ordered under ICC arbitral rule is the case in which all of the claims are made under the same arbitration agreement. Here, we have to conscious of the fact that arbitration may be consolidated even if the parties are not the same. This broader scope

[29] ICC rule of 2017, Art. 7(1)

adopted was praised when it was introduced by ICC rule of 2012 as though it is more useful and appropriate preference since there is no reason to exclude consolidation from the very beginning where all of the parties are bound by the same arbitration agreement to arbitrate albeit they may not be party to both arbitrations.[30] On the other hand, it can be the case that claims made in these arbitrations are unrelated to each other. In such cases, the court shall consider case by case basis whether to consolidate the cases that have been brought under the same arbitration agreement in the events when there are no links between the claims, then the court can refuse to consolidate the arbitrations.[31]

Again, in a case when claims in arbitration are made under more than one arbitration agreements, the court may order consolidation of parallel proceeding provided that the concerned arbitration is between the same parties, based on the same legal relationship, subject to the compatibility of the concerned arbitration agreement.[32] In such instances, arbitration agreements may be considered incompatible in cases where factors such as place of arbitration, the language of arbitration, the mechanism for selecting arbitrators or the number of arbitrators are different.[33]

Generally, irrespective of how multi-party arbitral proceedings are initiated, and the particular provision applicable to such proceedings, the consent of all parties will be necessary for the consolidation of the arbitral proceeding. That means the provisions of the ICC Rules on these matters can be applied only if the parties have given their consent to be involved in multi-party proceedings.

iii. Appointment of Arbitrators

As far as the appointments of arbitrators are concerned, under ICC rules, discretion is given to the parties to address the issues of appointment of arbitrators via agreement irrespective of the nature of multi-party arbitration. In case when the parties failed to agree on the appointment of arbitrators, ICC rules have default provisions.

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[30] Prof. Dr. H.E. Ercumenterdem, Consolidation of Arbitration in ICC Arbitration, October 2014, available at www.erdem-Erdem.av.tr/publications/law-post/consolidation-in-ICC-arbitration/ <last accessed on April 14,2018>.

[31] *Ibid*

[32] *Ibid*

[33] *Ibid*

Accordingly, if there is a multiparty dispute that is supposed to undertake by three arbitrators, a joint appointment is recognized as a remedy.[34] In line with this, regarding bipolar multiparty arbitration, a joint appointment is recognized as a basic mechanism for appointment of arbitrators since parties can normally be classified into claimant and respondent camps. Again, in case of multipolar disputes, it is elusive to think for the joint appointment of arbitrators because of the divergent interests of the parties, and in such scenarios discretion is given to the ICC court to appoint each member of the arbitral tribunal.[35]

Not only this, to solve the conundrum of appointment of arbitrators that may emanates from joinder of additional parties, ICC rules provided that, if the dispute is to be decided by three arbitrators, the additional party may nominate jointly with either the claimant(s) or with the respondent(s), as applicable. However, under Article 7(1), no party may be joined after the confirmation or appointment of an arbitrator, unless all parties, including the additional party, agree and the secretariat has the express power to set a time limit for the requesting joinder of an additional party. So presumably, a party would not be joined after an arbitrator has been appointed and thus would not be deprived of its opportunity to participate in the selection process.

Generally, under ICC arbitral rules, as far as the issues of appointment of arbitrators are concerned, the joint appointment of arbitrators is recognized, and in the absence of joint appointment, the ICC court is endowed with the discretion to appoint arbitrators.

2.2. LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA) ARBITRAL RULES OF 2014

i. Joinder and Intervention.

In similar fashion with other institutional rules, LCIA arbitral rules have provided for the joinder of third parties subject to certain conditions. Thus, according to Article 22 (1) (viii)

> The Arbitral Tribunal shall have the power, upon the application of any party only after giving the parties a reasonable opportunity to state their views…(viii) to allow one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party

[34]ICC rule of 2017, Art.12 (6).
[35]ICC rule of 2017, Art. 12(8)

have consented to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration Agreement; and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.[36]

Based on this article, if either the claimant or respondent is applied to the arbitral tribunal so that third parties be added to the arbitration at hand, the arbitral tribunal may allow joinder of such third parties if and only if any such third person and the applicant party have consented to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration Agreement. The written consent of all parties to arbitration, including the third person, is a precondition for determining the joinder of third parties. What makes things difficult is the possibility of consent after the commencement of the arbitration. Because addressing the issues of appointments of arbitrators in a way that the compromise equal participation of the parties would inevitably impractical.

If we look at the experiences of ICC, joinder of the third party is not allowed after the appointment or confirmation of arbitrators (after the commencement of arbitration). That means, under both ICC and LCIA arbitral rules, for joinder of third parties to be allowed the existence of an arbitration agreement that binds all parties is mandatory. Coming to the issues of intervention, LCIA is silent on whether third parties whose interests affected may be allowed to intervene in pending arbitration or not.That means,it is unclear as to whether a third party could intervene over the objections of all parties signatory to the arbitration or not.

Generally, under LCIA arbitral rules intervention is not regulated while joinder of the third party is allowed subject to the written consent of all parties, including the third person, though the possibility of consent after the commencement of arbitration is subject to bargaining.

ii. Consolidation

In a similar fashion with that of another arbitral institution, LCIA has also made its efforts in doing away with the complexities of consolidation of the arbitral proceeding.

Thus, Article 22.1 of LCIA 2014 provides,

[36]London Court of International Arbitration Rules of 2014 (hereafter called LCIA rule of 2014), Art.22 (1).

(1) The Arbitral Tribunal shall have the power, upon the application of any party;

ix) to order, with the approval of LCIA court, the consolidation of arbitral awards with one or more other arbitration into a single arbitration subject to the LCIA rules where all parties to the arbitration to be consolidated agrees in writing.

x) to order, with the approval of LCIA court, the consolidation of the arbitration with one or more other arbitration subject to LCIA rules commenced under the same arbitration agreement or any compatible arbitration agreements between the same disputing parties, provided that no arbitral tribunal has yet been formed by LCIA court for such other arbitrations or if already formed, that such kinds of are composed of the same arbitrators:[37]

Based on the aforementioned article, under LCIA the arbitral tribunal can consolidate arbitrations in two situations. The first scenario whereby the arbitral tribunal is empowered to consolidate two pending arbitral proceedings is where all parties to the arbitrations to be consolidated so agrees in writing, subject to the approval of the LCIA Court. The second scenario whereby the arbitral tribunal is allowed to consolidate two pending arbitrations involves a series of alternative grounds subject to the approval of the LCIA Court. Accordingly, if arbitrations to be consolidated is commenced under the same arbitration agreement provided no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such tribunal (s) is (are) composed of the same arbitrators, the arbitral tribunal can order consolidation of those arbitrations upon the approval of LCIA Court. Grounds for consolidation of arbitral proceeding under both ICC and LCIA arbitral rule are similar since the consent of all parties are mandatory.

iii. Appointment of Arbitrators

As far as the appointment of arbitrators is concerned LCIA has vividly provided the mechanisms for appointments of arbitrators. This can be identified from Article 8 of the LCIA Rules. This Article provides:

8.1 Where the Arbitration Agreement entitles each party howsoever to nominate an arbitrator, the parties to the dispute number more than two and

[37] *Ibid.*

> such parties have not all agreed in writing that the disputant parties represent collectively two separate "sides" for the formation of the Arbitral Tribunal (as claimants on one side and respondents on the other side, each side nominating a single arbitrator), the LCIA Court shall appoint the Arbitral Tribunal without regard to any party's entitlement or nomination.
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> 8.2 In such circumstances, the Arbitration Agreement shall be treated for all purposes as a written agreement by the parties for appointment of Arbitral Tribunal by the LCIA Court.[38]

From the aforementioned articles, where parties agreed in writing for the joint appointment of arbitrators whereby disputant parties represent collectively two separate sides; claimants on one side and respondents on the other side, each side nominating a single arbitrator, the appointment would be undertaken per agreement of the parties. However, in default of the written agreement of the parties to that effect, the LCIA Court is given full discretion to appoint the Arbitral Tribunal without regard to any party's entitlement or nomination.

In a nutshell, under LCIA arbitral rules, in default of the written agreements of the parties as to the appointments of arbitrators, LCIA Court is given the discretion to appoint the Arbitral Tribunal even irrespective of any party's entitlement or nomination.

2.3. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) ARBITRAL RULES OF 2010

i. Joinder and Intervention

In a similar fashion with other arbitral rules, UNCITRAL rules have also clearly incorporated the issue of the addition of parties under its ambit. Thus, Article 17(5) of the 2010 UNCITRAL Arbitration Rules provides;

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

[38]LCIA rule of 2014, Art 8.

award or several awards in respect of all parties so involved in the arbitration".[39]

Based on this article, the arbitral tribunal may at the request of any party allow joinder of a third party, provided that the concerned third party is a party to the arbitration agreement, and only after giving all parties, including the person or persons to be joined, the opportunity to be heard. Here, in the first instance, the third parties should be a party to the arbitration agreement, and all parties should be allowed to have their say on joinder of third parties and consented to it. Indeed, if the concerned third party is a party to the arbitration agreement and all parties to the arbitration have no objection to the addition of third parties, the arbitral tribunal can validly order joinder of third parties. But, the tribunal may not permit joinder, if it is prejudicial to other parties. When we come to the issues of intervention, UNCITRAL arbitral rule is silent.That means, the issue as to whether the third parties whose interest affected are allowed to intervene in pending arbitration or not is left unanswered.

ii. Consolidation

In recent years, because of the challenges associated with consolidating two pending arbitrations most of the arbitration institutions have sought to remedy the situation by introducing procedures for consolidation. The ICC and LCIA arbitral rules that allow consolidation of the arbitral proceeding subject to the consent of all parties to arbitration can be mentioned as an example. Compared to ICC and LCIA arbitral rules, UNCITRAL arbitral rules do not contain any provisions on the consolidation of multiple arbitrations with or without the consent of the parties. Accordingly, under the UNCITRAL Arbitration Rules, consolidation without the consent of the parties is a challenge.

iii. Appointment of Arbitrators

With the revision of its arbitration rules in 2010, UNCITRAL has answered the question as to the appointment of arbitrators in multi-party disputes. Thus, Article 10 (1) UNCITRAL rules of 2010 provides that*" where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent unless the*

[39]United Nations Commission on International Trade Law Rule of 2010 (hereafter called UNCITRAL rule of 2010), Art.17 (5).

parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator".[40]

From this Article, one can easily surmise that saving for otherwise agreement of the parties on appointment of arbitrators, in a case where parties can normally be classified into claimants' side or respondents' side, the multiple parties as claimant or as respondent will jointly appoint an arbitrator. This could be a proper solution for the issues of appointment of arbitrators in case of bipolar multi-party arbitration. Again, the UNCITRAL rule of 2010 was incorporated mechanism for appointment of arbitrators in case of multipolar multi-party arbitration. Thus, Article 10(3) of the UNCITRAL rules provides as follows:

> In the event of any failure to constitute the arbitral tribunal under these rules, the appointing authority shall, at the request of any party, constitute the arbitral tribunal and in doing so may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.

From the aforementioned articles, in situations where parties failed to agree on the joint appointment of arbitrators, implied mechanism for appointment of arbitrator (s) is provided. Accordingly, when the parties may not be classified into defendant and claimant camps, the appointing authority is empowered to constitute arbitral and it may even revoke an appointment already made.

III. EXPERIENCES OF SOME NATIONAL JURISDICTIONS ON MULTI-PARTY ARBITRATION

Owing to the central principles of arbitration like the party's autonomy and consensual nature of arbitration, national laws have been refrained from addressing multi-party disputes. Yet, some states have introduced statutory multi-party arbitration provisions allowing for consolidation of parallel arbitrations, and intervention or joinder of third parties into pending arbitration under certain conditions.[41] Accordingly, the solutions that forwarded to multi-party arbitration under the Netherlands, Hong Kong and South Africa will be explored below.

[40]UNCITRAL rule of 2010, Art. 10.

[41]Dimitar Pondev, *supra* note 2, P121.

3.1. NETHERLAND

i. Consolidation

Alike that of the international arbitral rules, the complexities of multiparty arbitration were also the concerns of national legislation to which the Netherlands is not an exception. In the Netherlands, from the elements of multiparty arbitration, consolidation of parallel arbitral proceedings was first introduced in 1986 with the adoption of Article 1046 of the Netherlands Code of Civil Procedure. This Article was included, as a result of lobbying exerted by the domestic construction industry, and it was envisaged that arbitral proceedings on related issues, which were pending before different tribunals in the Netherlands, could be consolidated under an order issued by the President of the Amsterdam District Court following a party's request.[42]

On May 27, 2014, the Dutch Parliament was adopted certain amendments in the Netherlands Code of Civil Procedure whereby Article 1046 was also refined.[43] These amendments were entered into force on 1 January 2015. Thus, the new Article 1046 provides:

> (1) In respect of arbitral proceedings pending in the Netherlands, a party may request that a third person designated to that end by the parties order consolidation with other arbitral proceedings pending within or outside the Netherlands, unless the parties have agreed otherwise. In the absence of a third person designated to that end by the parties, the provisional relief judge of the district court of Amsterdam may be requested to order consolidation of arbitral proceedings pending in the Netherlands with other arbitral proceedings pending in the Netherlands, unless the parties have agreed otherwise.
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> (2) Consolidation may be ordered insofar as it does not cause unreasonable delay in the pending proceedings, also because of the stage they have reached, and the two arbitral proceedings are so closely connected that good administration of justice renders it expedient to hear and determine

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42 Jacomijn Van Haersolte-Van Hof, *Consolidation under the English Arbitration Act 1996: A View from the Netherlands, Arbitration International* (1997), Vol.13 (4), P 427.

43 For an English Translation of the Netherlands Code of Civil Procedure in its part concerning Arbitration,See http://www.nai-nl.org/downloads/Text%20Dutch%20Code%20Civil%20Procedure.pdf <Accessed on April 27, 2018>.

them together to avoid the risk of irreconcilable decisions resulting from separate proceeding.

From this provision, one can easily summarize that consolidation under Netherlands law has opt-out character, and provision on the consolidation will apply by default unless the parties agree to exclude its application. That means, unless the parties to arbitration envisaged or agreed to exclude the power of the court or third parties to order multi-party arbitration, the courts have the discretion to order multi-party arbitration. The courts may even order compulsory multi-party arbitration. Such kinds of the order tend to undermine the central principles like party autonomy and consensual nature of the arbitration. Not only this, the arbitral awards that rendered through such avenues are susceptible to the refusal of recognition and enforcement of arbitral awards based on Article V (1) (d) of the New York Convention. What makes such kinds of phenomena worse is that those parties who are not cognizant of the existing rules of multiparty arbitration would inevitably take a risk of compulsory consolidation.

ii. Joinder, Intervention, and Appointments of Arbitrators.

Unlike consolidation, the position taken by the Netherlands Code of Civil Procedure on joinder and intervention is subjected to the opt-in requirement for its implementation.

Thus, Article 1045, effective as of 1 January 2015 provides:

(1) Unless the parties have agreed otherwise, at the written request of a third person who has an interest in the arbitral proceedings, the arbitral tribunal may allow that person to join or intervene in the proceedings, provided that the same arbitration agreement as between the original parties applies or enters into force between the parties and the third person.

From this provision, one can easily surmise that the implementation of the power of the arbitral tribunal to order joinder and intervention of the third party is subject to the existence of an arbitration agreement that binds all parties. That means, though the arbitral tribunal is conferred the power to order joinder and intervention by law, this provision can only be effective if multiparty disputes are previously envisaged by the parties, by the same arbitration agreements that bind all parties. However, the final discretion to allow joinder lies with the arbitral tribunal

irrespective of whether all concerned parties have consented. Unlike that of other elements of multiparty arbitration, the Netherlands Code of Civil Procedure as amended in 2014, has no separate provision for appointment of arbitrators in case of multiparty disputes.

Generally, the position of Netherlands law concerning multi-party arbitration is a hybrid of opted out and opted in approaches. 'opt-in' approach is adopted in relation to joinder and intervention by making multi-party arbitration contingent on the existence of a single arbitration agreement binding all parties while 'opt-out' approach, which applies by default, unless the parties agree otherwise was adopted in a case of consolidation *albeit* its consonance with the consensual nature of arbitration is subject of bargaining.

3.2. HONG KONG

i. Consolidation

Though its primary objective is not for regulating multi-party arbitration, Hong Kong was one of the first countries that introduced a consolidation provision in its arbitration act.[44] Consolidation was first dealt with under the 1982 Arbitration Ordinance, which gave courts a wide discretion to issue regulatory orders concerning related arbitrations, including consolidation orders.[45]Under that clause, the consent of the parties did not explicitly be considered, and therefore it was possible to apply that clause to multi-party disputes stemming from contracts containing arbitration agreements is silent on consolidation.[46] Furthermore, the then-effective legislation did not explicitly regulate whether the parties had the right to opt-out of the consolidation clause or it is silent whether parties are competent to exclude the tribunals from ordering consolidation via arbitration agreement. The application of this clause was considered in the well-known *Shuion* cases[47]. The cases were concerned with a domestic project for the construction of two 34-store buildings. *Shuion* was the main contractor on the site who had entered into numerous subcontracts. One of them was with Schindler

[44]Hong Kong Arbitration Ordinance 1982 of, available http://oelawhk.lib.hku.hk/items/ show/3286, at Chapter 341, Section 6B <accessed on April 28, 2018>.
[45]*Ibid*
[46]Geoffrey MA and Neil Kaplan, Arbitration in Hong Kong: A Practical Guide (SWEET & MAXWELL ASIA, 2003), Pp 259–260.
[47] Re *Shuion* Construction C. Ltd. v. Schindler Lifts (HK) Ltd. [1986], Hong Kong Law Report 1177.

Lifts. It concerned the supply and installation of lifts and escalators for the project. The subcontract contained a pay-when-paid clause, which allowed progress payments to the subcontractor once the main contractor had been paid by the employer. There were no major differences between the main contract and the subcontract as they were drafted with reference to each other. Both contracts contained arbitration clauses.

Accordingly, the issues of consolidation came into an effect concerning the arbitration between *Shuion* and the employer on one hand, and arbitration between *Shuion* and Dah Chong Hong Limited – one of its other subcontractors, on the other hand. An architect was appointed as the sole arbitrator in both proceedings. *Shuion* once again requested consolidation, and the Supreme Court finally allowed the formal consolidation of the proceedings.[48] From this, we can easily understand that there was no common consent from all parties to consolidation, and the opposition of the parties to consolidation did not even preclude the Supreme Court from granting the regulatory orders under the then-effective Hong Kong legislation.

The legislative approach to consolidation in Hong Kong was changed; when a new Arbitration Ordinance came into force on 1 June 2011.[49] One of the purposes of the new Act was to diminish the powers of state courts to intervene in the proceedings.[50] Accordingly, the previous approach to the issues of consolidation was also changed. Thus, the new Ordinance under Article 2 of Schedule 2 provides;

> (1) If, concerning 2 or more arbitral proceedings, it appears to the Court –
> (a) that a common question of law or fact arises in both or all of them;
>
> (b) that the rights to the relief claimed in those arbitral proceedings are in respect of or arise out of the same transaction or series of transactions; or
>
> (c) that for any other reason it is desirable to make an order under this section, the Court may, on the application of any party to those arbitral proceedings

[48] Dimitar Pondev, *supra* note 2, P135
[49] *Ibid.*
[50] Kun Fan, The *New Arbitration Ordinance in Hong Kong,* Journal of International Arbitration (2012), Vol. 29, No.6, Pp.715–717.

(d) order those arbitral proceedings – (i) to be consolidated on such terms as it thinks just; or (ii) to be heard at the same time or one immediately after another; or

(e) Order any of those arbitral proceedings to be stayed until after the determination of any of them.

Although this article almost literally repeats the wording of the clause under the previous Ordinance, substantial changes of approach to consolidation were undertaken. Under the previous Ordinance, the courts were given absolute discretion to order consolidation and even parties were not blessed to exclude the power of the court by opting out via arbitration agreement. However, under the new Ordinance, unlike the previous clause that applied by default, the new clause can come into play only if the parties opt for its application. Hence, under the current arbitration law of Hong Kong, the courts are allowed to order multiparty arbitration (consolidation) subject to the opt-in requirement. That means, the power of the court to order consolidation has come into effect only where parties opt for its application under the arbitration agreement.

ii. Joinder, Intervention, and Appointments of Arbitrators.

Hong Kong indeed was one of the first countries that introduced a consolidation provision in its arbitration act.[51] Consolidation was first dealt with under the 1982 Arbitration Ordinance, which gave courts a wide discretion to issue regulatory orders concerning related arbitrations, including consolidation orders.[52] Yet, incorporation of consolidation to the arbitration ordinance of 1985 has been incidental as its primary objective was not regulating multiparty disputes. Accordingly, the other elements of multiparty arbitration like joinder, intervention, and appointments of arbitrators are not regulated under Hong Kong national legislation. That means, the question as to whether the third parties whose interest affected is allowed to join or intervene in pending arbitration, and the conundrums underlying appointments of arbitrators are left unanswered.Though an arbitral tribunal does not have the power to make an order against someone who is not a party to the arbitration agreement a third party can intervene or join arbitration by

[51]Hong Kong Arbitration Ordinance of 1982, available http://oelawhk.lib.hku.hk/items/ show/3286, at Chapter 341, Section 6B <accessed on April 28, 2018>.
[52]*Ibid*

consent when all parties to an arbitration agreed to that effectsince arbitration is a product of agreement.

3.3. SOUTH AFRICA

i. Consolidation

Arbitration proceedings in South Africa are relatively flexible, and a procedural framework is usually agreed upon between the parties with the Act underpinning and supporting the agreed-upon arbitration process.[53]With the coming into operation of the International Arbitration Act ("Act") on 20 December 2017, South Africa was dedicated to the statute governing international arbitration for the first time.[54]The Act has brought South Africa into line with international best practice on international arbitration.[55] One of the best practices that is incorporated by the new Arbitration Act No 15 of 2017 is the issues of multiparty arbitration. Accordingly, the new arbitration act No 15 of 2017 has incorporated provisions for the regulation of the complexities of multi-party disputes. Thus, article 10 of Arbitration Act 15 of 2017 provides;

> (1) The parties to an arbitration agreement may agree that—
>
> (a) The arbitral proceedings may be consolidated with other
>
> arbitral proceedings; or
>
> (b) Concurrent hearings are held, on such terms as may be agreed.
>
> (2) The arbitral tribunal may not order the consolidation of the arbitral proceedings or concurrent hearings unless the parties agree.

Based on this provision, consolidation is not possible unless the agreement provides for it. This is because the power to consolidate, either by the arbitrator or court, would frustrate the parties' choice or agreement to arbitrate their matter with their chosen arbitrator or tribunal. In circumstances where related contracts between different parties give rise to similar issues, consolidation of arbitral proceedings can be agreed to.[56]

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[53]Gerhard Rudolph and Michelle Wright, Global Arbitration Review, May 2017, available at https: // globalarbitration review.com/jurisdiction/1000205/south-africa<accessed on May 28, 2018>

[54] Pierre Burger, *supra* note 19.

[55] *Ibid.*

[56] P.Ramsden,*The Law of Arbitration, South African and International Arbitration* (1st ed, 2009), P 124.

ii. Joinder, Intervention, and Appointments of the Arbitrator

Concerning the joinder or intervention and appointments of arbitration in multiparty disputes, both the South African new Arbitration Act No 15 of 2017 and the UNCITRAL model law that is incorporated by the new Arbitration Act to South Africa's arbitration regime is silent. That means, South Africa's national legislation has not made any provision concerning the participation of third parties in pending arbitration through joinder and intervention. However, nothing precludes the extension of the arbitration agreement to third parties if the remaining party to the arbitration agreement consent and the third party submits to the jurisdiction of the arbitration tribunal.

In other words, concerning joinder or intervention, a third party will be bound by an arbitration agreement and becomes an additional party to the arbitration agreement, where it seeks to participate and submits to the arbitral process, and all parties to the agreement have consented in other words or in circumstances where a third party replaces a party to the arbitration agreement.[57] In circumstances where there is a failure on all parties to agree to third party involvement, there can be no joinder or binding effect on a third party as this frustrates the consensual nature of an arbitration agreement. Moreover, a court may allow a third party to intervene, on good cause shown, and order that the dispute that is the subject of the arbitration proceedings be determined by way of interpleader proceedings in civil court.[58]

Generally, as far as the issues of multiparty arbitration are concerned, when we compare the position of the national legislation that covered within the ambits of this paper, the Netherland national legislation is comprehensive enough in coping up with the complexities of multiparty arbitration. Accordingly, the 'opt-in' approach is adopted in relation to joinder and intervention by making multi-party arbitration contingent on the existence of a single arbitration agreement binding all parties while the 'opt-out' approach, which applies by default, unless the parties agree otherwise was adopted in the case of consolidation. Contrary to this, Hong Kong national legislation has not regulated the issues of joinder and intervention of third parties. The only element of multiparty arbitration that regulated by Hong Kong national legislation is consolidation. The same is true for South Africa.

57 Gerhard Rudolph and Michelle Wright, *supra* note 53

58 *Ibid.*

Whatever it may be, their experiences show how much the world communities are tilting towards the regulation of multiparty arbitration.

IV. THE PLACE OF MULTIPARTY COMMERCIAL ARBITRATION UNDER ETHIOPIAN ARBITRATION LAW

Multiparty arbitration is the arbitration of any disputes that involve several parties. In doing away with the complexities of multi-party arbitration instruments like joinder, intervention, and consolidation of parallel proceedings have been widely recognized under the international legal framework. Those widely used instruments may also lead to multi-party issues or increase multipartism since third parties are allowed to either join or intervene or two parallel proceedings are to be merged.

Until recently, international commercial arbitration has typically been a bilateral process involving two parties, claimant, and respondent, who had submitted their disputes to arbitration in the context of bilateral transactions, such as sales of goods or transport contracts.[59] However, the development of modern international trade has led to complex transactions, involving multi-party contracts or several interlinked contracts. That is often the case in construction contracts, banking transactions, or reinsurance contracts.[60] A logical consequence of the increase of complex commercial relationships is that disputes have also become complex and multi-party.[61] This is not an exception for Ethiopia. The issues of joinder, intervention, and consolidation of parallel proceedings are not guests for Ethiopia. The Ethiopian courts are authorized to order joinder, intervention, and consolidation of parallel proceedings subject to the condition provided thereof.[62] Yet, since arbitration emanates from arbitration agreement that makes it consensual, law of privity of contract, and confidentiality of arbitral proceeding, courts are at the liberty to order courts are not at liberty to joinder, intervention, and consolidation of arbitral proceeding though Article 317 (1) of Ethiopian Civil Procedure Code provides for the similarity of procedures in civil litigation and arbitration.

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[59]Carrion, Manuel Gomez, *Joinder of Third Parties; New Institutional Development*, Arbitration International (2015), Vol. 31, No.3, Pp 479-506.

[60] *Ibid.*

[61] *Ibid.*

[62]Civil Procedure Code of the Empire of Ethiopia, Decree No. 52/1965, NEGARIT GAZETA, 25th Year, No.3 (hereafter called Civil Procedure Code), Arts.11, 41,& 43

The Ethiopian arbitration law is not clear on the issues of multi-party arbitration. Though the Ethiopian arbitration law is not clear on the issues of multi-party arbitration; we cannot escape the conundrums of multi-party arbitration. This attributes to the fact that multi-party arbitration is not something that merely confined to the existence of governing legal framework; rather it is a result of the interdependency of business transaction and globalization whereby the involvement of several parties in a single project is becoming mandatory. Accordingly, multiparty disputes would inevitably come into an effect as Ethiopia may not be excluded from globalization.

Having this in mind, let me get down to the place of multi-party arbitration under Ethiopian arbitration. Accordingly, if we ponder through the existing legal framework for commercial arbitration in Ethiopia, the issues of multi-party arbitration have not given enough attention. The main governing regime on the substantive issues concerning commercial arbitration, Ethiopian civil code, is ignorant of multi-party disputes. Accordingly, the complex issues underlying multi-party disputes like the appointment of arbitrators and jurisdictional dilemma are left unanswered.

What makes the Ethiopian Civil Code unique is its failure to address the issues of appointments of arbitrators in case of bipolar multi-party disputes which were not even paid attention under the international legal framework as though it is a conundrum in multi-party disputes. If we look at the experiences of other countries and institutional arbitral rules, the issues of a bipolar multi-party dispute are supposed to be solved by the normal principles of bilateral arbitration as parties can normally be divided into claimant and respondent camp, and it was not even the concern of the world community. The concern of the world community is more of multipolar multiparty disputes than bipolar multiparty disputes. This can be easily understood from international experiences on multiparty disputes. Accordingly, where parties to the arbitration have no opposing interests or the parties within each camp have identical interests, it will *de facto* constitute a normal bilateral arbitration.[63]

Coming back to Ethiopia, since the existing arbitration law is not comprehensive enough on the issues of bilateral arbitration the presumption that the normal principles of bilateral arbitration solve the issue of bipolar multiparty dispute is

[63] Olivier Caprasse, *supra* note 4.

quite cumbersome. For instance, the Ethiopian arbitration law has not recognized the issues of joint appointment of arbitrators, which was supposed to be used in bipolar disputes. This may attribute to the fact that the existing arbitration law of Ethiopia is grounded on the traditional perception of arbitration, as though it is two parties set up. Hence, the issues of appointments of arbitrators in both multipolar and bipolar multiparty disputes are left unanswered under the Ethiopian Civil Code. To this effect, in a case when parties to arbitration failed to address the problem of appointment of arbitrators parties in their arbitration agreement, we have no default rules that fill the gap that left by the parties.

Another problem is related to the issues of jurisdictional dilemma. The issue as to whether or not the Court or arbitral tribunal is a competent organ to order joinder, intervention, and consolidation of arbitral proceedings is a puzzling question. One may be argued as though an arbitral tribunal is competent to order multi-party arbitration based on the principles of "competency competency" as enshrined under Article 3330(2) of the Civil Code. The doctrine of competency allows the arbitral tribunal to decide its competence. The principle of competency is an accepted principle and a common feature of the international legal framework. It authorizes the arbitral tribunal to determine their jurisdiction even in default of authorization of the parties.[64] In Ethiopia, the arbitral tribunal is allowed to determine its jurisdiction, subject to the authorization of the parties. Hence, unless the parties to arbitration authorize the arbitral tribunal to determine their competency, the issues of the jurisdictional dilemma would remain intact.

Yet, Ethiopian Civil Code may be praised for recognizing the principles of party autonomy.[65]Once arbitration agreement is made by fulfilling all validity requirements of general contract and any special requirements provided under the special provision governing arbitration, it has a binding effect since the contract is a law for the contracting parties.[66] In line with this, parties are at liberty to determine the nature of arbitration, the seat of arbitration, the procedure to be used in disposing of the issues and the like via arbitration agreement. So, nothing prohibits contracting parties to provide for multi-party arbitration through their arbitration agreement. Accordingly, in case of complex commercial transactions,

[64] See UNCITRAL model law, art.16 (1), UNCITRAL rules, Art.21 (2), ICC rule, Art. 6(2), UK Arbitration Act of 1996, section 30 (1), etc.

[65]Civil Code of the Empire of Ethiopia, Proclamation No 165/1960, NEGARIT GAZETA, 19th Year No. 2, 5th May 1960, Addis Ababa (here after Civil Code), Art.3331.

[66]Civil Code, Proc. No.165/1960, P. 1731.

to escape the peril of parallel proceeding like the conflicting decision, high cost and time, the parties are at liberty to provide for the possibility of joinder, intervention, and consolidation of parallel proceeding via arbitration agreement.

However, the problem is what would be the fate of such kinds of multi-party arbitration where the contracting parties failed to address every issue by an arbitration agreement? If the contracting parties addressed every complexity of multi-party arbitration via arbitration agreement, everything would be undertaken in line with their agreement. To this effect, since Ethiopian arbitration law is not clear on the issues of multi-party arbitration, the default rule which ought to fill the gaps when the contracting parties failed to address certain issues via arbitration agreement is quite absurd.

The other important legal framework that governs commercial arbitration in Ethiopia is the Civil Procedure Code.[67] Unlike the Civil Code that governs the substantive issues of arbitration; civil procedure code is there to govern the procedural aspects of commercial arbitration. As far as the issues of multi-party arbitration are concerned, no provision answers whether multi-party arbitration is allowed or not. Accordingly, the complex issues underlying multi-party disputes like whether the third party or non-signatories allowed to join or intervene in the pending arbitral proceeding, consolidation of parallel proceeding, and the issues of a jurisdictional dilemma as to the competent authority that orders multi-party arbitration are not clear.

However, some writers have been trying to answer the question of multi-party arbitration via interpretation of Article 3345 (1) of the Civil Code and 317 (1) Civil Procedure Code. Prominently, if we go through the works of Sirak Akalu and Michael Teshome on the issues of arbitration in Ethiopia, they argued that joinder, intervention, and consolidation of parallel arbitral proceedings are allowed under the Ethiopian arbitration law.[68] They argued that, since the first paragraph of Art 317 of CPC requires a degree of similarity between the procedure in arbitration and court proceedings, the arbitral tribunal should bound by the procedures in civil litigation. Accordingly, since joinder, intervention, and the consolidation of parallel proceedings are allowed in civil litigation, the same should be held in the

[67] Civil Procedure Code, Arts.315-319, 244(2) (g), 350-357 & 456-461.

[68] Sirak Akalu and Michael Teshome, *Supra* note 23. *See* also Michael Teshome, Arbitration, and Interests of Third Parties, available at http://www.abyssinialaw.com/blog-posts/ itemlist/ category /1156-arbitration <accessed on Feb 12, 2018>.

case of arbitration proceedings.[69] The provision of the Civil Procedure Code that talks about the similarity of procedure in civil litigation and arbitration is amenable to interpretation. But, it is worth plausible to strictly interpret that concerned provision, in a way that compromises procedural fairness and the very purpose of the arbitration.

It is a truism that the main reason that makes arbitration preferable over litigation is the informality of the proceeding that in turn makes it less costly and time-saving. Hence, it is paradoxical to claim for the strict adherence of the arbitral tribunal to the procedure of civil litigation and extends procedural similarity up to joinder, intervention, and consolidation of the arbitral proceeding. Besides, the decision of the cassation courts in the case between Mr.Gebru Kore v.Mr. Amadeyiu Federeche can also be taken as a ground stone in testing the validity of the aforementioned argument. In its ruling, the Federal Supreme Court Cassation Division affirmed that the arbitral tribunal does not need to follow a rigid court procedure or nonflexible litigation style.[70] Not only this, mindful of the merits of avoiding any interpretation that would disturb the relative informality of the arbitral proceedings, scholars have long considered Art 317 as imposing a soft requirement of similarity designed only to ensure procedural fairness in arbitration.[71] Under the Ethiopian legal system, the interpretation of a law by the Federal Supreme Court rendered by the Cassation Division with not less than five judges shall be binding on federal as well as the regional council at all levels.[72] Accordingly, from the decision of the cassation courts in the case between Mr.Gebru Kore Vs. Mr. Amadeyiu, it is clear that the similarity of procedures in civil litigation and arbitration as envisaged under Article 317(1) of the Civil Procedure Code is only to ensure fairness in arbitration. To this effect, it is difficult to conclude that joinder, intervention, and consolidation of parallel proceeding is allowed in the arbitration.

Furthermore, even once we recognize that the procedural similarity extends up to joinder, intervention, and consolidation; various issues may be left unanswered. In the first instance, arbitration is born out of arbitration agreements that bound only

[69]See Civil Procedure Code, Art.41, 43, &11. These provisions vehemently provide for the issues of joinder, intervention, and consolidation of suits in civil litigation, respectively.

[70]Mr.Gebrukore Vs. Mr.Amadeyiu Federeche, Federal Supreme Court, Cassation Bench, Files No 52942/2003

[71] Hailegabriel G. Feyissa, s*upra* note 21, P 305

[72]Federal Courts Proclamation Reamendment Proclamation, Proclamation No. 454/2005, Fed. Negarit Gazeta 11thYear No. 42, Addis Abab 14th June.2005, Art.2 (4).

the contracting parties. Accordingly, the central principles of arbitration like party autonomy, confidentiality, and consensual nature should not be undermined. In line with this, allowing third parties to join, or intervene in the bilateral arbitration between two parties, and consolidation of two parallel proceedings tends to undermine the aforementioned central principles of arbitration.Yet if the parties to arbitration have known that there might be concerned parties that would likely to intervene or join the arbitration in the future and then provide arbitration clause that also accommodates the potential interests of third party or agree mutually on arbitration rules by recognizing third parties whose legal or contractual interests may be substantially affected and inserted the same to arbitration agreement, the question of multiparty disputes may not be an issue. The problem is what if parties to arbitration failed to so? In such cases default rules that fill the gaps that may be left by the parties are mandatory. Hence, compromising the issues of the advantages of multi-party arbitration on one hand, and central principles of arbitration, on the other hand, is quite problematic in default of specific legal rules.

The other problem is related to how the issues of appointment of the arbitrator are to be addressed, especially when consolidation, joinder, or intervention is allowed after the confirmation or appointment of an arbitrator. It is the central principles of Ethiopian arbitration law that all parties should be given equal opportunities in the appointment of arbitrators, and failures to do so will inevitably affect the very essence of arbitration.[73] Besides, the appointment of the arbitrator made without due consideration to what is provided under an arbitration agreement is one of the grounds for refusal of recognition and enforcement of an arbitral award under Ethiopian law.[74] If we allowed the third parties to intervene or join the pending arbitral proceeding that is already commenced upon the appointment of arbitrators by the original parties to arbitration, what would be the fate of the new third parties that allowed to intervene or join to enjoy equal opportunities in appointments of arbitrators? Here, if all parties to arbitration are not given equal opportunities in appointments of arbitration, it will affect the very essence of arbitration. On the other hand, if we allow third parties who are not parties to arbitration to appoint arbitrators, the appointment of the arbitrator that is made without due consideration to what is provided under an arbitration agreement would lead to refusal of recognition and enforcement of an arbitral award. Hence, default rules that compromise the aforementioned dilemma are mandatory.

[73]Civil Procedure Code, Art.356(a)
[74] *Ibid*.

However, though the Ethiopian Civil Procedure Code is not comprehensive and clear enough on the issues of multiparty arbitration, the decision of the arbitral tribunal that may be rendered based on multi-party arbitration, provided by the parties via arbitration agreement would inevitably be recognized and enforced based on the provision of the Civil Procedure Code.

V. MULTIPARTY COMMERCIAL ARBITRATION FROM THE PERSPECTIVE OF ADDIS ABABA CHAMBER OF COMMERCE AND SECTORIAL ASSOCIATIONS ARBITRAL RULES

Addis Ababa Chamber of Commerce and Sectorial Association has been established, by the General Notice Number 90/1947, in April 1947 as an autonomous, non-governmental, non-political and non-profit organization to act on behalf of its members.[75] The Chamber Re-establishment Proclamation No. 341/2003 further provides the legal framework for the establishment of Chambers of Commerce and Sectoral Associations.[76]Since its establishment, it has served its members in promoting socio-economic development and commercial relations with the rest of the world. Its major objective is to promote the establishment of conditions in which business in general and in Addis Ababa, in particular can prosper.

Today, Addis Ababa Chamber of Commerce and Sectorial Associations is one of the most dynamic civil society organizations representing business in Ethiopia and is active in matters of importance extending beyond its regional geographic base.[77] AACCSA has its own arbitration rules.[78] The rule has got articles that are put into different categories. Accordingly, the components of the subject matter that is regulated by the arbitral rule are comprised of initiation of the proceeding,

[75] Addis Ababa Chamber of Commerce and Sectorial Association, Brief Profile, 2016 available at http://addis cham ber. com/wp-content/uploads/2016/08/AACCSA-Profile.pdf <accessed on April 18/2018>

[76]*Ibid*

[77]Tefera Eshetu and Mulugeta Getu, Addis Ababa Chamber of Commerce and Sectorial Association Arbitration Center, February 2012 available at https://www. abyssinialaw. com/study-on-line/item/339-addis-ababa-chamber-commerce-and-sectorial-association-arbitration-center, <accessed on April 19, 2018>

[78] AACCSA, Revised arbitral rules of November 25, 2008, available at http://www. addischamber. com/ file/ARBITRATION /20131126/ ArbitrationRules %20(English%20 Version).pdf <accessed on April 25, 2018>.

composition of the tribunal, the arbitral proceeding, nature of the award, and the cost of arbitration.

Compared to international arbitral rules, AACCSA's institutional rule has not paid enough attention to the issues of multi-party arbitration. In coping up with the emerging conundrum of multi-party arbitration, various international institutional rules have been amended their arbitral rules and incorporated the issues of multi-party arbitration. We may not compare AACCSA with international arbitral rules like ICC, LCIA and UNCITRAL arbitral institutions that have currently amended their arbitral rules and comprehensively incorporated the issues of multi-party arbitration since AACCSA has not made substantial amendments yet. However, this does not mean that AACCSA is ignorant of the issues of multi-party arbitration. Accordingly, if we ponder through the arbitral rules of AACCSA, certain provisions affirm the recognition of multi-party arbitration by AACCSA arbitral rules. Prominently, Art. 10(3) of AACCSA arbitral rules that provide the issues of appointment of arbitrators in the case of multi-party arbitration can be mentioned as an example. Thus, Art.10 (3) of AACCSA arbitral rules provides,

> Where there are multiple parties on either side, conversely the dispute is to be decided by more than one arbitrator, the multiple claimants, jointly, and the multiple respondents jointly shall nominate an equal number of arbitrators. If either side fails to make such a joint nomination, the Institute shall make the nomination for that side. If the circumstances so warrant, the Institute may nominate the entire arbitral tribunal, unless otherwise agreed by the parties.

From this provision, one can easily surmise that the applicability of this provision is confined to bipolar multi-party disputes whereby parties can normally be classified into claimant and respondent camps. Accordingly, in a case where the disputes that submitted to the arbitral tribunal involves several parties and the dispute is to be decided by more than one arbitrator, the claimant camps jointly, and the respondent camps jointly, will nominate an equal number of arbitrators provided that those parties normally classified into claimant and respondent side. Here, one may wonder as to how the umpire arbitrators may be appointed if the dispute is supposed to be decided by three arbitrators or the number of arbitrators required is odd. The remedy is provided by Article 10(5) of arbitral rules. Thus, Art. 10(5) provides,

> Where the dispute is to be decided by three or more arbitrators, the even number of arbitrators shall nominate the presiding arbitrator within 20 days of their appointment. If the Arbitrators failed, the Institute shall nominate the presiding arbitrator…

From this provision, we can easily understand that co-arbitrators jointly appointed have given the discretion to appoint the presiding arbitrators. If the co-arbitrators failed to do so within the time limit, the power will swiftly shift to the Institute itself. Though the arbitral rules of AACCSA try to address the issues of appointment of arbitrators in case of bipolar multi-party disputes, no attention is given for the appointment of arbitrators in a case of multipolar disputes where the parties to arbitration cannot normally be classified into claimant and respondent sides because of their divergent interest

The other point that is worth discussion under AACCSA arbitral rule is whether joinder, intervention and consolidation of arbitral proceedings are allowed or not in case of a multiparty dispute. As far as the issues of joinder, intervention, and consolidation of arbitral proceedings are concerned, the arbitral rule is silent. It is a truism that AACCSA was launched to promote the establishment of conditions in which business in general, and in Addis Ababa in particular, can prosper.[79] However, the failures of AACCSA to inculcate the currently emerging complexities of international commercial transactions would inevitably defeat its objective. The experiences of the world community assure that multiparty arbitration has a lot of contribution in facilitating international commercial transactions as it provides an avenue for resolving currently emerging multiparty disputes that emanate from the complexities of business transactions that attributes to globalization.

VI. THE NEED TO FACILITATE FULL IMPLEMENTATION OF MULTI-PARTY ARBITRATION IN ETHIOPIA

Currently, the importance of multi-party arbitration in international trade is substantially increasing. The justification of interest in it and its ever-growing significance is grounded on legal-political, normative, and practical reasons.[80]The

[79] AACCSA, Brief Profile,2016, *supra* note 75.

[80]D. Janićijević, *Multiparty Arbitration: Problems and Latest Developments,* Law and Politics (2015), Vol.13, No.1, P 34

legal-political reasons are attributed to the impact of the realm of the modern legal communication, which becomes more intense and more complex, with more transactions involving multiple participants, from which disputes eligible for resolution by the means of arbitration may derive.[81]The complexity of commercial transactions that emanates from the interdependency of international commerce and globalization is becoming the norm of international trade. Hence, to facilitate international trade, multiparty arbitration is of the essence.

Coming to Ethiopia, whether we like or not, the complexities of commercial transactions that necessitate multi-party arbitration would inevitably come into an effect. In the first instance, since Ethiopia cannot exclude itself from globalization, the possibility of complex commercial transactions is high. Because, globalization brings arbitration to countries and regions of the world where it was previously unknown and which are often ill-prepared for its arrival, causing gaps that urgently need filling.

Furthermore, the construction industry in which the complexities of commercial transaction is common, are substantially increasing in Ethiopia. Ethiopia's formal construction sector comprises indigenous and indigenized firms, as well as numerous major foreign civil engineering and construction companies.[82] Hence, in addition to the complex nature of construction project where, apart from a client and a main contractor—an engineer and/or an architect, several subcontractors, suppliers, financiers, and possibly additional commercial parties are involved, the participation of major foreign civil engineering and construction companies in construction industry of Ethiopia would inevitably increases the possibility of multiparty disputes. Construction is a huge part of Ethiopia's economic recovery and the building sector has seen double-digit growth, expanding by 37% annually, and is ushering in a new phase of development for the country.[83] Besides, according to the 2017 edition of African Economic Outlook, construction activities in Ethiopia accounted for 15.9% of GDP at current prices during the 2015/16 fiscal year.[84] Hence, facilitating the full implementation of multiparty arbitration in the

[81]*Ibid*

[82]The Construction Industry in Ethiopia 2018;available at https://www.businesswire.com/ news /home/ 20180222 006605/ en/ Construction-Industry- Ethiopia-2018 Key Drivers, < accessed on June 8, 2018>

[83]Ethiopian Construction Industry Update 2016, available at http://www. buildingshows .com/ market-insights/ Insights/Ethiopia-construction-industry-update/801816843 <accessed on June 8, 2018>

[84]The Construction Industry in Ethiopia, *Supra* note 82.

construction industry has something to do with the overall development of the count

Again, Ethiopia is just on the eve of privatizing some big companies that were initially dominated by the government as a short term solution to the country's economic challenges. The privatization of those big companies would inevitably increase the possibility of multi-party disputes. Hence, in default of a dispute settlement mechanism that best fits the currently circumventing the complexities of a commercial transaction, it is elusive to guess for the participation of both private domestic and foreign companies.

The other reason for ever-growing interest and justification of multi-party arbitration is that arbitration procedural rules, contained in national regulations, international conventions or autonomous arbitral sources, in most cases do not provide directly applicable solutions for majority of problems, which may occur in the course of resolving complex or multiparty disputes (normative reasons); most of the issues addressed only indirectly, through the extensive interpretation or the accordant application of the provisions, tailored exclusively for the ordinary, bipolar, two-party procedural scheme of the arbitration proceedings.[85] The same holds for Ethiopia since the Ethiopian arbitration law and arbitral rule of AACCSA are silent on this concern. What makes things worse is that, unlike other jurisdiction where the extensive interpretation or the accordant application of the provisions, tailored exclusively for the ordinary, bipolar, two-party procedural scheme of the arbitration proceeding was plausible, in our context the existing arbitration law is not even comprehensive enough and it is quite cumbersome to extend its applicability to multi-party arbitration via interpretation.

In a nutshell, owing to the aforementioned reasons, facilitating the proper implementation of multi patty arbitration has something to do with ensuring certainty and predictability underlying international trade.

VII. CONCLUSION AND RECOMMENDATION

7.1. CONCLUSION

Due to the complexities as well as the advantages attached to it, the issues of multi-party arbitration have been attracting the attention of world communities.

[85]. D. Janićijević, *supra* note 80

Since, the Dutco case of 1992, the world communities are geared towards the regulation of multi-party arbitration via amendments of institutional arbitral rules and national arbitration laws. The dominant approach taken in almost all cases is that multi-party arbitration is subjected to the consent of all parties, and in the absence of unanimous agreement of the parties, both the tribunal and local courts will not be authorized to order consolidation or joinder or intervention. This approach conforms to what is prescribed by the New York Convention and more generally for the parties' procedural autonomy in international arbitration.

When we come to the context of Ethiopia, the current legal regulation of commercial arbitrations, as contained in the Civil Code and Civil Procedure Code is not clear on the issues of appointments of arbitrators, joinder, intervention, and consolidation of arbitral proceeding in multiparty disputes. Though the Ethiopian arbitration law is not clear on the issues of multiparty arbitration some scholars have been arguing as though multi-party arbitration is allowed under the Civil Procedure Code, citing the procedural similarity in case of arbitration and civil litigation as enshrined under Article 317(1) of the Civil Procedure Code. The procedural similarity in case of civil litigation and arbitration could by no means extend up to joinder, intervention, and consolidation of arbitral proceedings. First, from the cassation decision on the case between Mr. Gebru Kore vs. Mr. Amadeyiu, it is clear that the similarity of procedures in civil litigation and arbitration as envisaged under Article 317 (1) of the CPC is only to ensure fairness in arbitration.

Furthermore, even once we recognize that the procedural similarity extends up to joinder, intervention, and consolidation of arbitral proceedings, how we compromise the central principles of arbitration like party autonomy, confidentiality, and consensual nature of arbitration in default of clear laws? Again, it is the central principles of Ethiopian arbitration law that all parties should be given equal opportunities in the appointment of arbitrators, and failures to do so will inevitably affect the very essence of arbitration. If we allowed the third parties to intervene or join the pending arbitral proceeding that already commenced upon the appointment of arbitrators by the original parties to arbitration, what would be the fate of the new third parties that allowed to intervene or join to enjoy equal opportunities in appointments of arbitrators? Here, if all parties to arbitration are not given equal opportunities in appointments of arbitration, it will affect the very essence of arbitration. On the other hand, if we allow third parties who are not parties to arbitration to appoint arbitrators, the appointment of the arbitrator that

made without due consideration to what is provided under an arbitration agreement would lead to refusal of recognition and enforcement of an arbitral award. Hence, the default rules that compromise the aforementioned dilemma are mandatory.

In a similar fashion with the arbitration law of Ethiopia, AACCSA arbitral rules have not paid proper attention to the issues of multi-party arbitration. There is no clear provision that talks about the issues of joinder, intervention, and consolidation of the arbitral proceeding. The only provision that is directly related to multi-party arbitration is Article 10 (3) of AACCSA arbitral rule that vehemently provides for the appointments of arbitrators in multi-party arbitration. The inculcation of this provision could be taken as an indication of the possibility of multi-party arbitration under arbitral rules. Not only this, the Institute had its guidelines on how arbitral submission of multiparty arbitration ought to make. Hence, though AACCSA has recognized the possibilities for multiparty arbitration, it has not paid proper attention to regulating the same.

In a nutshell, despite the substantial importance of multi-party arbitration in international trade and inclination of the world communities towards its regulation, multi-party arbitration has not given necessary space in our context.

7.2. RECOMMENDATION

Based on the aforementioned analysis and conclusion, the following are my recommendation for Ethiopian legislator, AACCSA, and business communities respectively:

- **For Ethiopian government and AACCSA**

- It is recommendable for the Ethiopian legislator and AACCSA to rethink and amends its arbitration rules and incorporate provision for multi-party arbitration subject to the consent of all concerned parties in arbitration. Accordingly, the following provision should be added to the Ethiopian arbitration regime either via inculcation to the existing arbitration law or separate legislation, and AACSA arbitration rules

i. Joinder and intervention of third parties

Unless the parties have agreed otherwise, at the written request of a third person who has an interest in the arbitral proceedings, the arbitral tribunal may allow that person to join or intervene in the proceedings, provided that the same arbitration agreement as between the original parties apply or enters into force between the parties and the third person provided that the request for joinder or intervention is made before the confirmation or appointment of arbitrators.

ii. Consolidation.

The arbitral tribunal may, at the request of a party, consolidate two or more arbitrations pending under the rules into a single arbitration, where;
a) The parties have agreed to consolidate; or
b) All of the claims in the arbitrations are made under more than one arbitration agreements, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the courts find the arbitration agreements to be compatible.

iii. Appointment of arbitrators

a) Where there are multiple parties as a claimant or as respondent unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or respondent, shall appoint an arbitrator.

b) In events of any failure to constitute an arbitral tribunal, the court or the appointing shall at the request of any party, constitute and arbitral tribunal and, in doing so may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.

- **For the business community**

- Until the Ethiopian government amended its arbitration law with proper inculcation of multi-party issues, my recommendation for the business community is to get their arbitration agreement right. Because, though it may not be a panacea, it is of great help.
- Finally, since the business community may not have any information as to the possibility of joinder, intervention, and consolidation arbitral proceeding via

arbitration agreement, I recommend for any concerned stakeholders to work on awareness creation so that the business community resorts to an arbitration agreement to share from the chalice of multiparty arbitration.