

THE DEGREE OF COURT'S CONTROL ON ARBITRATION UNDER THE ETHIOPIAN LAW: IS IT TO THE RIGHT AMOUNT?

Birhanu Beyene Birhanu*

INTRODUCTION

A look at the *Ethiopian arbitration law* (Arts.3325-3346, Civil Code (herein after referred as C.C); Arts.315-319 and 350-357 Civil Procedure Code (herein after referred as Civ.Pro.C))¹ reveals that courts in Ethiopia control arbitration by such avenues as appeal, setting aside and refusal. Of the Ethiopian arbitration literatures published over the years, those related to the topic of this work are three. These works are by Aschalew², Tewodros³ and more recently by Hailegabriel⁴. None of these authors' works, directly and systematically, examines whether these avenues lead to excessive or inadequate intervention of courts into arbitration and they all overlook the avenue of refusal, particularly in terms of domestic awards. One of the authors, Tewdros even makes a mistake in his article in taking setting aside as one and the same thing as appeal.⁵

* LL.B (Addisa Ababa University), LL.M (Utrecht University), Lecturer at the Law School of Jimma University, Ethiopia. He can be reached by birejana@yahoo.com

¹ Note that Ethiopia, as a federal state, can have multiple arbitration laws enacted by individual states forming the federation. As things stand now, however, the sources of arbitration law of both the federal government and all the 9 states (forming the federation) are the C.C and the Civ.Pro.C. That is why I boldly use the phrase *Ethiopian arbitration law* to simply refer to those provisions of the C.C and Civ.Pro.C.

² Aschalew Ashagre, *Involvement of Courts in Arbitration Proceedings under Ethiopian Law*, Journal of Business and Development(2007) vol. 2, no. 2, p.1.

³ Tewodros Meheret, “*Beshemeglana medagnet hedet ye fird betoch mena*”, Wonber (July 2008), vol.1,p.1 (July 2008)

⁴ Hailegabriel G. Feyissa, *The Role of Ethiopian Courts in Commercial Arbitration*, Mizan Law Review (Autumn 2010.) vol.4, No.2, p.297.

⁵ Supra note 2, at p.24

Sadly, the Federal Supreme Court itself makes the same mistake as Tewodros in *Disaster Prevention and Preparedness Commission Vs Feleke Getahun*.⁶ In this case the court states that:

የግልግል ደኞች በሚሰጡት ውሳኔ እስማማለሁ በማለት የውል ግዴታ የገባ ተከራካሪ ወገን በውሳኔው ላይ ይግባኝ በሚያቀርብበት ጊዜ በፍ.ሥ.ሥ.ሕ.ቁ. 356 የተዘረዘሩት ምክንያቶች መኖራቸውን የማስረዳት ግዴታ አለበት።⁷

A party having given her consent on the finality of arbitrators' decision must prove the existence of the reasons listed under Art.356,Civ.Proc.C to lodge an appeal from the decision.(translation mine)

Similar confusion is also obvious in *Equatorial Business Group vs Sahem Yehizbe ena Yechenit Mamelalesha Aglgetot*.⁸ In general, of the three devices by which courts control arbitration, setting aside seems to be misunderstood and refusal overlooked. Even the idea of appeal from awards does not seem well understood .The practice in courts shows that appeal from awards is admitted on most cases on the same ground as appeal from court judgments. For example, from its judgment on *The Ethiopia Amalgamated Limited Kubanya Vs Seid Hamid* ⁹, it is discernable that the Federal Supreme Court admitted the appeal from the award on the ground that there is a need to examine whether the arbitrators erred in the interpretation of the contract between the parties which the dispute arise from, even if the

⁶ 2 Report of Arbitral Awards, 291, (Federal Supereme Court, 1999 E.C.)

⁷ Id.at 291.

⁸ 1 Report of Arbitral Awards, 272,(Federal Supreme Court,1995 E.C). In this case the court even confuses awards with compromises.

⁹ 2 Report of Arbitral Awards, 333, (Federal Supreme Court, 1993 E.C.)

arbitrator's interpretation of the contract is not "*on its face*" wrong.¹⁰ A look at Art. 351, Civ. Proc. C., however, reveals that such errors-legal or factual- which are not apparent on the face of the awards cannot be grounds of appeal.

Hailegabriel, however, mistakenly holds that such appeal is authorized under Art.351(a)¹¹. Actually, Art.351(a) allows appeal from an award if the factual or the legal error is so apparent that it can easily be grasped from a glance at the award. Due attention needs to be given to the phrase "*on its face*" in the provision. This provision does not invite appeal from awards just because the line of interpretation of the laws or facts adopted by arbitrators is found to be arguable. Construing the provision as authorizing courts to review arbitral awards with an arguable holding severely undermines the legislators' intention of limiting the grounds of appeal from arbitral awards.

The discussion so far underscores the necessity of a work which accurately portrays the law on court's control on arbitration and which goes further and tests whether or not the law gets the amount of control to the right degree. This work is up to this task. To achieve the objectives of this endeavour, mainly legal rules are examined and

¹⁰ In many more cases, appeal from awards is treated like appeal from judgments: For example, see, *Woldeyohanis Woldemichael Vs Zergaw Hailemariam*, 2 Report of Arbitral Awards p.265(Federal Supreme Court,1986E.C);*Mat ye construction Srawoch vs Tambo International*, 2 Report of Arbitral Awards, p.405, (Federal Supreme Court,1997 E.C);*Ye Ethiopia Medhin Derejit vs Ye Ethiopia Chenet Mamelalesha Corporation*,1 Report of Arbitral Awards, p.114(Federal Supreme Court,1993, E.C)

¹¹ Supra note 3 at p.326

analysed in light of some standards which stand at the heart of arbitration.

This work consists of VI sections. In section I, standards by which we measure the degree of court's control is set. In section II, a general over view of the avenues by which courts control arbitration are outlined. The amount of court's intervention by way of appeal, setting aside and refusal are measured in section III, IV, and V, respectively. Finally there is the conclusion.

To avoid a possible misunderstanding, it is necessary, from the outset, to delineate the boundaries of this work. The conclusions in this work are based on the presumption that standards set in section I are basic arbitration principles. If it is possible to prove that those standards are not that much essential to hold special place in arbitration, then the conclusions arrived at in this work may not be valid. Of course moderate analysis is made to show how the standards sit at the heart of arbitrations.

The other thing that must be noted is that if there is a belief that the standards used in this work were at the forefront of the legislator's mind in drawing the rules of the arbitration law, our conclusion will be different from what we have in this work. This belief may induce us to interpret the exhaustive list of, for example, Art.356, Civ.Proc.C as including, for e.g., the setting aside of awards affected by bribery or fraud, since interpreting the provision otherwise may be held as contrary to what the legislator upholds, *that is courts must intervene, in arbitration, to correct violations of basic principles of procedural fairness*. This work, however, does not inquire whether or not the legislator had the standards in mind in drawing the legal rules on

arbitration. In this work, the standards are simply juxtaposed with what the legislator expresses itself literally in such articles as Arts. 351-354,355-357 and 319, Civ.Proc.C.

One may also wonder why this work, setting out to discuss and evaluate court's control on arbitration, is silent on cassation review of arbitral awards, which is clearly another avenue of court's control in Ethiopia.¹² Unlike, other ways of court's control on arbitration such as appeal, setting aside and refusal, there is no an explicit statutory basis for court's control of arbitration by way of cassation. What we have is the practice itself and most importantly a recent case decided by the Federal Supreme Court Cassation Bench.¹³In this case, the bench squarely addresses the issue of the propriety of cassation review of awards, even if there is an agreement between the parties on the finality of awards. And it resolves the issue in favour of cassation review of awards even in the presence of a waiver agreement. This unique position of cassation review of awards gives rise to many questions which call for an in-depth study on its own account.¹⁴ Thus, I reserve cassation review of awards for a separate work.

¹² See, *Beherawe Maedin Corporation vs Dany Drilling*, 10, Federal Supreme Court Cassation Bench Case Report, p.350 (Cassation Bench, Federal Supreme Court, 2003 E.C)

¹³ Id. Remember that the decision of this bench has a precedent value.

¹⁴ Such questions are, to name a few: what does cassation review of awards mean? Is there any compelling reason at all for reviewing awards on the merit for basic error of law? What does basic error of law mean in terms of cassation review of awards? Is it the same thing as in cassation review of judgments? Is the bench's reasoning justifiable in holding cassation review of awards even in the presence of a waiver agreement?

1.1. SETTING THE STANDARDS

In this work, what is mainly intended to accomplish is to gauge the courts' control on arbitration and then determine whether the control is to the right degree or not. Such a work, before anything else, requires the setting of standards against which the court's control is measured. This section will just do that.

Parties submit disputes to arbitration to avoid courts for legitimate reasons. Dispute settlement via arbitration provides parties with some benefits which they cannot get when it is resolved via a court process. Speed, cost-effectiveness, privacy, parties' control on the proceeding (for example, on evidence rules) and arbitrator expertise are more often cited benefits of arbitration over litigation¹⁵. Arbitration can also be preferred to escape the judicial system filled with incompetent and corrupt judges. Therefore, the first standard against which court's control on arbitration should be measured is that *parties submit disputes to arbitration to avoid courts*. Courts' control of arbitration can be considered as it is to the right degree if it upholds, among other things, parties' wish of avoiding courts.

There are fundamental procedural principles which a society requires to be upheld under any circumstance such as the right to be heard and the right to be tried by impartial forum. Since they are so fundamental, the society presumes that individuals always want them and with their sane mind cannot agree to waive them. So the society

¹⁵ However, it is not always guaranteed that arbitration gives these benefits. Sometimes in institutional arbitration it could be found more expensive than litigation. If the award is set aside or if an appeal is initiated from the award, the arbitration may happen to be a slower mechanism than litigation for the resolution of disputes.

puts them outside of the domain of those subject-matters that can be subjected to terms of contract. With this background in mind, the second standard is set to be: *Despite parties' waiver of recourses against awards in courts, courts must intervene in arbitration to control if the award is found to be against "pubic policy."*

"Public policy", however, is a very elusive concept which opens itself for a wide-range of interpretations. That is why an English judge in 1824 described public policy as "... a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail."¹⁶ Of course, after 150 years, another English judge favoring public policy holds that "[w]ith a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice."¹⁷

In this work, anyways, the phrase is understood in the same way as it is understood in the *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006*.¹⁸ In paragraph 46 it is stated that "violation of public policy" is understood as "serious departures from fundamental notions of procedural justice". I prefer this understanding, because I believe it to be modern and widely acceptable.

¹⁶ *Richardson -v- Mellish* (1824) 2 Bing. 228; [1824-34] All ER Rep. 258.

¹⁷ *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] Ch 591, p.606-607 (Lord Denning MR).

¹⁸ It is available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARBexplanatoryNote20-9-07.pdf>

Once standards are set, the next step is the evaluation of the degree of court's control in light of the standards. However, before taking a full-swing at that task, a brief description of the avenues by which courts exercise control on arbitration makes sense.

1.2. THE AVENUES FOR COURTS' CONTROL ON ARBITRATIONS

The arbitration law now in use in both federal and state jurisdictions is found in the 1960 C.C (Arts.3325- 3346) and 1965 Civ.Pro. C (Arts 315-319; 350-357). The fundamental idea underlying this law is the creation of a legal framework in which disputes are resolved privately via arbitration which is obviously alternative to court room resolutions. Of course, the law in laying down the frame work still saves some rooms where courts can play a role in the arbitration. One of the roles, the law bestows on courts is a controlling or supervisory role¹⁹. There are three ways through which courts can exercise control on arbitration.²⁰

The first one is *appeal* (Arts. 350-354, Civ.Proc.C.). Courts can review the decisions of arbitrators (it is known as award) by way of appeal.²¹ Of course, the grounds of appeal are limited²² and the right to appeal can even be waived.²³ Courts reviewing an award by way

¹⁹ The other is assistance. Courts assist the arbitration in such ways as in the appointment of arbitrators (Arts, 3332,3334,C.C.) in ensuring the attendance of witnesses(Art.317(3),Civ.Proc.C), in granting provisional measures such as attachment.

²⁰ Note that if we go beyond legal rules and see the case law, we find the fourth avenue for court's control on arbitration that is cassation review of awards. However, as I put it in the introduction, this avenue is not examined in this work.

²¹ Ethiopian Civ.Proc.C, (1965), Art.350.

²² Ethiopian Civ.Proc.C, (1965), Art. 351.

²³ Civ.Proc..C, (1965), Art. 351(2), Reading Arts, 351(1) & (2) together, it is also possible to infer that the right to appeal can be narrowed down by agreement.

of appeal can reverse, modify, confirm or remit the award.²⁴ In other words, courts control the arbitration by reversing or modifying the award which they find disagreeable or by confirming it when they find it to their likings.

The second avenue is *setting aside* (Arts. 355-357 Civ.Proc.). This procedure gives courts to declare awards null and void if they find the procedural errors enumerated in Art.356 Civ.Proc.C are committed in the arbitration process.²⁵ Therefore, it is easy to see that courts are given the power to oversee the compliance of certain procedural principles in the arbitration process.

As shown in the above two paragraphs, setting aside is a completely different procedure from appeal, though the two procedures are confused to one another.²⁶ Besides the difference on grounds (grounds of setting aside are enumerated under Art.356,Civ.Proc.C. while that of appeal under Art.351, Civ.Proc.C), the two procedures differ by the degree of interference which they authorizes courts into arbitration. Appeal authorizes courts to examine the merit of the arbitral award and correct the errors, if any, therein. At the conclusion of the appeal, the appellate court gives a judgment conforming, modifying or reversing the award. The judgement will then bind parties as a final resolution on the dispute between the parties unless of course the circumstances allow further appeal and it is pursued by the party unhappy about the judgment. The procedure of setting aside, on the other hand, does not authorize courts to examine the

However, it does not seem that parties can expand their right to appeal by agreement.

²⁴ CV.P.C,(1965),Art.353

²⁵ CV.P.C,(1965),Art.357

²⁶ See text accompanying notes 5-8.

merit of the award. It simply authorizes them to see whether or not some procedural mistakes (enumerated under Art.356, Civ.Proc.C) are committed or not and to declare the award null and void, despite the holdings on the merit if it is given amidst of those procedural irregularities. Unlike appeal, at the end of the successful setting aside action, parties will then find themselves with an outstanding dispute to be yet resolved. If, in the setting aside action, the court finds that the procedural mistakes are not committed, parties will then find themselves that they are still bound by the award itself (unlike appeal , not by a court judgment either modifying ,reversing or confirming the award)

The third way is what is known as “*refusal*”(Art.319(2),Civ.Proc.C). Refusal refers to courts’ resistance of the enforcement of awards for some problems in it. Unlike appeal and setting aside, this procedure is not dealt in length in the law. There is even no explicit provision stating the grounds which courts rely on to refuse enforcement of domestic awards²⁷. However, a close reading of art.319 (2) Civ.Proc.C reveals that courts can refuse enforcement. This provision requires an award to be homologated before it becomes as executory as court judgement²⁸. Obviously, there must be some instances where courts can deny the homologation of awards and thus enforcement²⁹.

²⁷ Regarding the enforcement of foreign awards, we have an explicit provision, Art. 461, Civ. Proc. C.

²⁸ The Amharic version does not seem to require the homologation of awards for its enforcement.

²⁹ Expectedly, courts deny the homologation of an award if it is against public policy. For detail discussion on this point see section V. Also see the case, *Mesfin Industrial Engineering vs Tana Transport*, 2 Report of Arbitral Awards, p.234, (Federal High Court, 1999 E.C.)(the courts holds that “ይህ ፍርድ ቤት ሊያስፈፅም የሚገባው ደግሞ በፍ.ብ.ሥ.ሥ.ሕ.ቁ 319(2) መሠረት አውቅና የሰጠውን ማለት

In *Almesh vs Assefa Belete*,³⁰ the Federal Supreme Court Cassation Bench refuses the enforcement of an award for the reason of irregularity in the appointment of the sole arbitrator. So, the procedure of refusal is one of the avenues via which courts exercise control on arbitration in Ethiopia.

To conclude, in the Ethiopian arbitration law (that is in the 1960 C.C (Arts.3325- 3346) and 1965 Civ.Pro.C (Arts 315-319; 350-357)), there are three avenues (viz., appeal, setting aside and refusal) through which courts can exercise control on arbitration. The next question is: Is the degree of control by the courts via each of these avenues to the right amount, too much or too little by those standards set in section (I)? Or is it difficult to determine due to the absence of a clear formula in the legal rules? The following sections are committed for finding an answer to these questions.

1.3. CONTROL VIA APPEAL

Appeal from awards, as mentioned above, is one of the procedures which give courts an avenue to exercise control on arbitrations. This control is thought as too much of a compromise on the finality of the

የአንገሊዝኛው ትርጉም እንደሚያመለክተው (up on the application for the homologation of the award) በመሆኑ ሕጋዊነቱን ይህ ፍርድ ቤት ያላመነበትን የግልግል ዳኝነቱን ውሳኔ ማስፈጸም ስለማይገባው አመልካች ያቀረቡትን የአፈጻጸም ጥያቄ ፍርድ ቤቱ አልተቀበለውም:: As the clause in the English version of Art.319 (2),Civ.Proc.C. “upon the application for the homologation of the award” illustrates ,this court needs to enforce the award it confirms. As this court does not need to enforce the award its legality it does not believe in, the applicant’s application for the enforcement of the award is denied. [The translation is mine]

³⁰ 2 Report of Arbitral Awards, p.186, (Federal Supreme Court, Cassation Bench,)

arbitration and thus excluded in many countries' arbitration laws.³¹ It is argued that parties submit a dispute to arbitration to escape courts. Bringing in courts to arbitration by way of appeal, which means reviewing the merit of the dispute, is compelling parties to stay sticking to the very thing which they exactly need to free themselves from. Of course, on the other side of the spectrum, there are countries with an arbitration law providing the avenue of appeal from awards on limited grounds.³² The Ethiopian arbitration law is to be categorized with these countries.³³ It is not the ambition, in this work, of the writer, to argue and show that the legislator of the Ethiopia arbitration law is right or not in including the avenue of appeal.

This work (for the sake of convenience) starts concurring with the presumably legislator's general position that appeal from awards on selected limited grounds is compatible with the essence of arbitration. This work rather probes into these selected limited grounds that the legislator singled out as warranting courts' control on arbitration via appeal. Before we embark on that business, let us see the enumeration of the grounds under Art 351, Civ.Proc.C. This provision reads that no appeal shall lie from an award except where:

- (a) the award is inconsistent, uncertain or ambiguous or is on its face wrong in matter of law or fact;
- (b) the arbitrator omitted to decide matters referred to him;

³¹ The UNCITRAL Model Law, which is intended to be a model for countries desiring to modernize their arbitration laws, does not include the avenue of appeal.

³² For e.g., The English Arbitration Act, (1996), Section, 67- 69.

³³ Civ.Proc.C, Arts. 350 & 351

(c) irregularities have occurred in the proceedings, in particular where the arbitrator (i) failed to inform the parties or one of them of the time or place of the hearing or to comply with the terms of the submission regarding admissibility of evidence; or (ii) refused to hear the evidence of material witness or took evidence in the absence of the parties or of one of them; or

(d) the arbitrator has been guilty of misconduct, in particular where: (i) he heard one of the parties and not the other; (ii) he was unduly influenced by one party, whether by bribes or otherwise; or (iii) he acquired an interest in the subject-matter of dispute referred to him.

As the first standard we set in section [I] has it, court's control must not defeat the very essence of referring disputes to arbitration, that is avoiding courts. Appeal on the grounds listed above, however, defeats the very essence of party's reference of their case to arbitration. Appeal, as a procedure where decisions are *reviewed on the merit, is not a retrial of a case*. Grounds of appeal given under c-d above are actually grounds entailing retrial³⁴. For example, take a look at d (i), the appellate court, under that circumstance, needs to set aside the award and hear both parties. If the courts need to receive and hear the evidence and the arguments of both parties anew, that means the appellate court is really acting like a trial court. So since the so-called grounds of appeal listed under Art.351(c-d) Civ.Proc.C actually turns the appellate court in to a trial court, parties' wish of avoiding court trial is to be defeated

³⁴ By "retrial" I mean that receiving and hearing of evidences and arguments afresh. Retrial refers to the full-blown involvement of the court in to the case. Appellate courts are not supposed to do this in normal circumstances even in appeals from judgments and for the stronger reason in appeals from awards.

completely. This lead to the conclusion that courts control on arbitration via appeal based on the grounds listed under Art.351(c-d) is too much , too inconsiderate to parties' wish of avoiding court for legitimate reasons such as speed, secrecy and others mentioned somewhere else in section I.

One possible counter argument is that the appeal procedure from awards does uphold parties' wish as they can avoid appeal on those grounds listed under Art 351,Civ.Proc.C by agreement.³⁵. This argument takes us to the second standard which is set in section I. Grounds listed under Art.351(c-d),Civ. Proc .C are gross violations of procedural rights such as fairness and justice. So court's intervention to correct such violations should not be restricted by parties' waiver agreement. It does not even make sense to hold that a party validly agrees to be bound by a decision given against him, for e.g., without her being heard. That is why it is argued, based on Art.350(2), Civ.Proc.C. that a waiver agreement must not be upheld as valid under such circumstances as it is considered as having been entered without " full knowledge of the circumstances."³⁶

To conclude, court's intervention to correct an award spoiled by one or more of those matters listed under (c-d) must not be restricted by parties' agreement as public interest requires it (as they have everything to do with fundamental principles of justice). However, that intervention should not take the form of appeal as it defeats

³⁵ See, Civ.Proc.C, Art. 350(2)

³⁶ See also, *Dragados J & P Joint Venture vs Saba Construction* , 8 Federal Supreme Court Cassation Bench Case Report 23(Cassation Bench, Federal Supreme Court, 2001 E.C)

parties' wish of avoiding trial. So court's control via appeal on those grounds listed under *c-d* is not to the right degree when evaluated by both standards set in section I.

As it might already be noticed here, it is not yet said anything as to court's control over arbitration via appeal based on grounds enumerated under Art.351 (1)(a) and(b) Civ.Proc.C. It may not be possible to say that these grounds will turn an appellate court in to a trial court and that they are such mistakes which go against the very fundamental notions of procedural justice. So, appeal on those grounds is to the right degree when evaluated by those two standards set in section I. However, it may not be right to have them as grounds of appeal when seen in light of efficiency. It is more efficient if it is left to arbitrators to correct the mistakes mentioned under 351(1) (a) and (b), Civ.Proc.C. Arbitrators are much better positioned than appellate courts, for example, to clarify ambiguous matters in the award. Mistakes too, which are apparent on the face of the award; need to be corrected by arbitrators themselves.³⁷ This idea crossed

³⁷ This is the case for litigations. So for the stronger reason the same must be the case for arbitral awards. In litigation, the very court rendering the judgment, not appellate courts, corrects such obvious mistakes that can be detected from a glance at the judgment itself. On this point see Order XLVII of the Indian Code of Civil Procedure, 1908, which reads: "Any person considering himself aggrieved And who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was of within his knowledge or could not be produced by him at the time when the decree was passed or order made, *or on account of some mistake or error apparent on the face of the record*, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.(the emphasis is mine).Art.6 of the Civ.Proc.C is the counter- part of Order XLVII of the Indian Code of Civil Procedure, 1908, but it fails to give the court rendering a judgment or an order the power to correct its judgment or order

even the legislator's mind. That is why remission is allowed in such cases singled out under Art.350 (1)(a) and (b), Civ.Proc.C. ³⁸

1.4. CONTROL VIA SETTING ASIDE

By the avenue of setting aside, courts are able to declare awards as null and void if they find them affected by one or more of procedural irregularities mentioned under Art.356, Civ. Proc. C.³⁹ Unlike appeal, in the procedure of setting aside, courts do not review the merits of the dispute and the right to bring an action for the setting aside of awards is not waiveable by agreement, either. Art. 356, Civ.Proc.C lays down the exhaustive list of grounds of setting aside. According to this provision, the procedures are available if and only if one or more of the following irregularities occur in the arbitration: a) where the arbitrator decided matters not referred to him or made his award pursuant to a submission which was invalid or had lapsed; b) where the reference being to two or more arbitrators and where they did not act together; or c) where the arbitrator delegated any part of his authority whether to a stranger, to one of the parties or to a co-arbitrator.

No body can validly oppose the intervention of courts in arbitration when these irregularities occur in the process. The fundamental thing underlying arbitration is the *arbitration agreement*.⁴⁰ The power of

for its error which is apparent on the face of the record. As known to many, many provisions of the Civ.Proc.C, are copied from the Indian Code of Civil Procedure, 1908 but with many ridiculous omissions.

³⁸ Civ. Proc. C. Art, 354(1)

³⁹ Id, Art. 357

⁴⁰ Arbitration agreement (the terminology used to denote arbitration agreement in the Ethiopian arbitration law is "arbitral submission) is an agreement to arbitrate.

arbitrators arises from and is defined by this agreement. This agreement can also set the identity and number of arbitrators. So it is reasonable to seek the intervention of the court when arbitrators brush aside the wishes of the parties as expressed in the arbitration agreement on such matters and conduct the arbitration differently. In brief, since Art.356 of the Civ.Proc.C warrants the intervention of the court only when arbitrators act outside of the wishes of the parties, it has nothing wrong in it in this regard.

The procedure of setting aside (Arts.355-357, Civ.Pro.C.) allows courts intervention to the extent of setting aside the award; it does not go beyond that and give them the power to look into the merit of the dispute. It means through the procedure of setting aside, arbitrators can be kept in –check not to go beyond the wishes of the parties and at the same time parties’ wish of resolving the dispute via arbitration remains in tact. Once courts set aside awards, then parties can start arbitration process afresh.

So far, it is shown that the grounds listed down under Art.356 Civ.Proc.C justifiably warrant the intervention of courts in arbitrations. It is also shown that since the intervention of courts on those grounds does not go beyond setting aside of awards(or does not go to looking into the merit of the case), the procedure of setting aside does not go contrary to parties’ original wish of resolving the dispute through arbitration. Now the question is: does all this mean that court’s control of arbitrations via the procedure of setting aside

Arbitration agreement governs the number of arbitrators, the manner of their appointment, the procedure to be applied, among other things.

(as it is laid down under Arts.355-357, Civ.Proc.C) is to the right amount? (This is the question this paper mainly sets out to answer).

In section II, it is concluded that the irregularities listed under Art.351 (1)(b-d), Civ.Proc.C are serious enough to warrant courts' persistent intervention as these irregularities totally go against parties' expectation of arbitration, and fairness and justice. However, it is also concluded that intervention should not take the form of appeal in such circumstances as the appeal avenue defeats parties' wish of keeping themselves out of court trial for the resolution of disputes via arbitration. The avenue of setting aside is well poised to maintain the balance between the two concerns. If the irregularities were made the grounds of setting aside, then courts could control the arbitrators not to commit those irregularities by declaring awards tainted with the irregularities null and void, with out affecting parties' wish of resolving the dispute via arbitration. Once parties get the tainted award null and void, they could submit the dispute to arbitration again. However, such irregularities are not explicitly made grounds of setting aside under Art.356 , Civ.Proc.C.

Therefore, one may conclude that since Art.356, Civ.Proc.C gives the exhaustive list of ground of setting aside and since the matters listed under Art.351 (1)(c-d) , Civ.Proc.C. are not included in the list while they should have been, the avenue of setting aside does not give courts the right amount of intervention. This may be best illustrated by invoking a scenario where parties waive their appeal right through agreement⁴¹. In this scenario, a party waiving his appeal right through an agreement at the beginning of the arbitration process will not have

⁴¹ Civ.Proc.C ,(1965),Art.350(2), appeal right can be waived.

any remedy against an award which is entered, say for e.g. without her being heard. So, one may argue that the court's power of controlling arbitration via the setting aside procedures is so insufficient that it allows such deeply flawed awards to stand.

1.5. CONTROL VIA REFUSAL

Art. 319(2) reads that “an award may be executed in the same form as an ordinary judgment *upon the application of the successful party for the homologation of the award* and its execution”. (Emphasis added). This provision does not in any way suggest that courts must always enforce awards whatever they are.⁴² Rather it prescribes the need of a motion for homologation of awards before they are executed as judgments.⁴³ The very requirement of the homologation process in the enforcement of awards implies that courts can deny the homologation of an award that will result in making the award not-enforceable. However, the law is not explicit when courts deny or

⁴² For example, courts may not enforce an award on non-arbitrable matter.

⁴³ But in the Amharic version of the provision the requirement of the application for homologation is omitted. However, the English version requiring the application for homologation of awards is obviously more rational than the Amharic one which omits it. To entrust only courts with the enforcement of awards, but to give no power whatsoever to refuse enforcement does not make any sense. To require courts to blindly enforce awards (which are for example, outrageously against public policy) is absurd. So courts must be given the power to refuse the enforcement of awards of some sort. As homologation procedure is there to enable courts exercise this power, so the English version is sounder than the Amharic one, which seems to require the blind execution of awards if it is followed strictly. And note that *homologation of awards*, as used in Art.319 (2), can simply be understood to mean *confirmation, by court, of the validity and thus enforceability of awards*.

grant homologation of awards and in effect refuse or grant the enforcement of awards.⁴⁴

In evaluating the degree of court's control via appeal and setting aside procedures, grounds of appeal as provided in the law are taken and seen in light of the standards set in section I. The same approach would be expected here. The problem, however, is the law does not, as explained above, state the grounds up on which homologation (of awards) is refused or granted. If we, for example, look at the Civil Procedure of Quebec, it reads that “[a]n arbitration award cannot be put into compulsory execution until it has been homologated”⁴⁵. In another place it states that:

The court cannot refuse homologation except on proof that

- 1) one of the parties was not qualified to enter into the arbitration agreement;
- 2) the arbitration agreement is invalid under the law elected by the parties or, failing any indication in that regard, under the laws of Québec;
- 3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

⁴⁴ Of course, the law is much clearer when the enforcement of foreign awards is granted or refused (See, Art.461,Civ.Proc.C.)

⁴⁵ Quebec Civil Procedure Code, Art. 946.

4) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement; or

5) the mode of appointment of arbitrators or the applicable arbitration procedure was not observed. In the case of subparagraph 4 of the first paragraph, the only provision not homologated is the irregular provision described in that paragraph, if it can be dissociated from the rest⁴⁶.

Art. 946.5 and 946.6 of Quebec Civil Procedure also respectively state that the court cannot refuse homologation of its own motion unless it finds that the matter in dispute cannot be settled by arbitration in Québec or that the award is contrary to public order and that the arbitration award as homologated is executory as a judgment of the court.

In comparing, the 1965 Civ.Pro.C of Ethiopia with that of Quebec Civ.Pro.C, one cannot help noticing that there is a similarity in both codes as both require an award to be homologated before becoming executory as a judgment. The difference is that the Civil Procedure of Quebec lays down the grounds of refusal of homologation, but Ethiopian Civ.Pro.C does not. Therefore, in evaluating the degree of court's control on arbitration via refusal, it is not possible to say that the control via refusal is either too much or too little or to the right degree. All we can conclude is that the law does not provide us with

⁴⁶ Quebec Civil Procedure Code, Art. 946.4

any explicit formula in this regard which can be subjected to evaluation by those standards set in section I.

1.6. CONCLUSIONS AND RECOMMENDATIONS

The Ethiopian arbitration law provides three avenues for courts' control on arbitration, namely, appeal, setting aside and refusal. When each avenue is gauged by such standards as "parties' wish of avoiding courts" and "the necessity of courts' intervention to rectify an award against public policy", at best it is without a clear formula to lend itself for evaluation by the standards and at worst it does not lead to optimal amount of intervention. The avenue of appeal, based on those grounds (listed under Art.351(b-c), Civ.Proc.C), opens the door for too much intervention defeating parties' wish of avoiding courts simultaneously restricting court's intervention to rectify awards against public policy, upholding waiver agreement of appeal. In other words, the avenue of appeal is so unbalanced that it consists of grounds which always warrant court's intervention though that intervention must take another form than itself. The avenue providing optimal intervention on those grounds (listed under Art.351(b-c), Civ.Proc.C) would be setting aside. However, the law falls short of providing those grounds as warranting intervention via the avenue of setting aside leaving courts with no sufficient power to rectify awards against public policy. The avenue of refusal is not made (in the Ethiopian arbitration law) clear enough even to see how it looks in light of the standards.

On the basis of the conclusions here, the following modest recommendations are made to the legislator:

- It should discard those matters enumerated, as grounds of appeal, under Art.351(b-c),Civ.Proc.C.
- The grounds of setting aside enumerated under Art.356, Civ.Proc.C should be expanded to include those matters enumerated under Art.351(b-c),Civ.Proc.C.
- It should provide a formula where the application for the homologation of awards (and consequently enforcement of awards) must be refused and/or not.