

for the review of judgments is also available as an avenue for the judicial review of awards. This work is firstly intended to Bench held that despite parties' agreement on the finality of an award, the award could be subjected to cassation review.⁴ This work also evaluates this holding in light of the findings on its first question.

This paper is divided into 5 sections. Section (1) defines what cassation review of awards means and concludes that it means reviewing arbitral awards on the merit for “basic error of law” by the highest court.⁵ Section (2) examines the Ethiopian arbitration law and the laws defining the cassation power of courts and concludes that let alone in the existence of finality agreement, cassation review is not available as a *default* avenue for judicial review of awards. The conclusion in section 2 leaves open the question “Can cassation review of awards be created by contract if it is not available as a default avenue?” In section (3), it is argued that cassation review of awards can be created by agreement. In section(4), the holding of the Federal Supreme Court's Cassation Bench in the case of *Beherawi Maeden Corporation* is critically examined in light of the analysis made and conclusions reached in sections (1) – (3). Section (5) presents the conclusions.

1. WHAT DOES CASSATION REVIEW OF AWARDS MEAN?

In Ethiopia, cassation is one of the avenues for the review of judgments. Supreme courts (state supreme courts and the Federal Supreme Court) have

judgment review mechanism called Revision (Arts, 361-370 Civ.Proc.C) which dates back to 1965.

⁴ *Beherawi Maeden Corporation vs Danee Driling* , Federal Supreme Court Cassation Bench Decisions Reporter(2011) Vol. 10, p.350

⁵ Review on the ‘merit’ must be understood to mean a review which for procedural or other errors results in the reconsideration of the merit of the case to finally conform ,modify or reverse the final decision on the case.

cassation powers, meaning the power to review judgments on the merit for ‘basic error of law’.⁶ The state supreme courts have the cassation power “over any final court decision on State matters”⁷ and the Federal Supreme Court “over any final court decision.”⁸ The cassation power is to be exercised to correct a judgment of not any error but of a “basic error of law”. There is no definite definition as to what this error means in the law. From the practice of courts exercising cassation power, however, it can be inferred that almost any material error⁹ of law can qualify as “basic error of law”¹⁰.

Applications for the cassation review of judgments are first made to go through the panel of three screening judges who determine whether the error alleged in the application has been committed in the judgment presented for a review is a “basic error of law” and whether it *prima facie* exists. If the judges determine in the positive on both issues, the application gets accepted meaning it is referred to undergo a full hearing before a panel of five judges. Then the parties present their arguments in writing and orally. The bench, then, after the scrutiny of the judgment presented for the review and the arguments of the parties, passes a decision which either confirms, modifies

⁶ In the Ethiopian judicial system, we encounter a dual court system. The first system contains the federal court system while the second one comprises state court system. Both systems, generally speaking, are made of three tiers of courts, first instance courts, high courts and a supreme court at the top.

⁷ The FDRE Constitution, Art.80(3)(b),

⁸ Id., Art.80 (3) (a). The Federal Supreme Court exercises its cassation power over any final decision even on state matters. See Murado Abdo, *Review of Decisions of State Courts over State Matters by the Federal Supreme Court*, Mizan Law Review,(2007) Vol.1,No.1,P.60

⁹ The phrase material error is used to mean errors which are harmful in the line of “the harmless error doctrine” which generally holds that any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. For more discussion see, Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?* New York University Law Review(1995),Vol.70,N0.6,p.1167

¹⁰ See Murad Abdo, *The Requirement of Basic Error of law*, Wonber,(2008) 33. Also, see *Mengistu Abate vs Ye Bahir ena Transit Derejet*, Federal Supreme Court Decision Reporter (2001), vol.4, p.18.

or reverses the judgment.¹¹ So what is from just described, cassation review is similar to appeal except that it is limited to the review of “basic errors of law” while appeal is a review on the merit for factual and legal errors, including “basic errors of law” (whatever it means). When cassation review is translated to arbitral awards, it thus means reviewing arbitral awards by a supreme court on the merit for a “basic error of law”. Note that this work deals with the direct review of awards via cassation, not such a cassation review when an appeal from an award is lodged and the decision of the appellate court on the award is reviewed by way of cassation, actually, under that situation, what is being reviewed is the decision of the appellate court (a judgment) , not the award.

2. ANY STATUTORY BASIS FOR CASSATION REVIEW OF AWARDS?

In this section, the relevant legal provisions of the arbitration law as enshrined in the Civ.C and the Civ. Proc.C, are examined to see whether cassation review of awards is provided as one of the avenues for judicial review of awards. Some lawyers¹² including the judges in the Federal Supreme Court Cassation Bench¹³ have tried to find the answer in the law defining the cassation power of supreme courts. That law too is examined to see whether it is really intended to give such power to the supreme courts.

¹¹ Of course, the bench may also give other orders like remanding the case according to Art.341, Civ.Proc.C. For example, see, *Tesfaye Molla vs Eshetu Molla*, Federal Supreme Court Cassation Bench Decisions Reporter (2003), Vol. 10, p.7(the bench remands the case.).

¹² Yohannes.Supra note 3, at p.143

¹³ *Beherawi Maeden Corporation*, supra note 4.

2.1. NO BASIS IN THE ARBITRATION LAW

The cassation review of judgments means, as discussed above, review on the merit by the highest court for a basic error of law. If it is to be translated to arbitration, it means a review of awards on the merit for a basic error of law. The question, however, is: Does the Ethiopian arbitration law provide for such review of awards? It mentions only three avenues for judicial review of awards, namely, appeal¹⁴, setting aside¹⁵ and refusal.¹⁶ The fact that cassation review is not mentioned, one would conclude, reveals the legislature's intention of forbidding it as one of the *default* avenues of judicial review. This conclusion would not raise any eye brow if cassation review were not an avenue of judgment review incorporated into the Ethiopian legal system later than the enactment of the arbitration law. However, still, I argue that the conclusion is tenable at many levels.

The legislature of the arbitration law would not provide for cassation review of awards even if it knew that such review was there for review of judgments. The first evidence for this assertion comes from the legislature's non-incorporation of a form of judgment review, its existence it was aware of, as one avenue of judicial review of awards, on the top of appeal, setting aside and refusal. This review is of course called "revision"¹⁷, which is now scraped. The non- incorporation of revision as one of the avenues of judicial review of awards proves the fact that the existence of a certain reviewing mechanism in the realm of judgments does not mean that the same mechanism exists for the judicial review of awards. It also proves that the legislature of the arbitration law would not incorporate cassation as one form

¹⁴ Civ.Proc.C, 1965,Arts.350-354

¹⁵ Id, Arts.355-357

¹⁶ Id,Art.319(2)

¹⁷ Civ.Proc. C., 1965, Arts.361-370

of judicial review of awards even if it knew its existence as one form of judgment review since the idea of revision is thought of as a progenitor of the idea of cassation review.¹⁸ In other words, Ethiopian arbitration law does not anticipate the creation of a new avenue of judicial review of awards with the creation of new review mechanism in the realm judgment. If it anticipates anything, it cannot be cassation review of which idea can be traced in the idea of “revision”.

A reader is here reminded that what I am trying to show in this sub-section is whether or not cassation review of awards is envisaged in the domain of the Ethiopian arbitration law in any way, so I am not saying that the anticipation of a certain law cannot be changed by latter laws. The question whether or not the anticipation of the Ethiopian arbitration law, which is described in the final lines of the above paragraph, is changed in the law which has come into existence later is what is primarily addressed in the next sub-section (2.2). To give the quick answer, no change is made.

The second and very strong evidence of the Ethiopian arbitration law’s exclusion of cassation review of awards as *a default* avenue comes from Art.351, Civ.Proc.C. The grounds of appeal of awards enumerated under Art.351, Civ.Proc.C reveals the legislature’s intention of limiting appellate review of awards to a certain errors and “basic error of law” (whatever it means) is not intended to be one of those errors which prompts appellate review of awards. So, is it not circumventing what is provided under Art.351,Civ.Proc.C if it is held that cassation review (which basically will mean review of awards on the merit for “basic error of law”) is one of the avenues of judicial review of awards? The legislator is not expected to find a ground which it finds improper(as a default rule) for the review of the merit

¹⁸ See Yohannis, *supra* note 3 at p.133

of the award suddenly appropriate, just because it comes under a different name called cassation, but which actually means review on the merit? Note also that the Ethiopian arbitration law does not in any way insinuate that a birth of a new reviewing mechanism (such as cassation) in to the realm of judgement review opens the door for a new default avenue of judicial review of awards.

Of course, one here may raise an argument that even if the Ethiopian arbitration law is clear in excluding review of awards on the merit for ‘basic error of law’ (that is, cassation review) as a default rule, and in asserting new judgment reviewing mechanism does not mean new avenue for judicial review of award, the legislation which has brought the cassation review to the Ethiopian legal system must be understood to be having changed such stands in the arbitration law¹⁹. This logically leads to the examination of the laws defining cassation review in the Ethiopian legal system. The examination of those laws on cassation, however, does not in any way show the change of the positions expressed in the arbitration law. It is even; from the context they are promulgated, clear that the legislations on cassation power of courts are not intended to be a reference for the determination of the propriety or impropriety of an intervention by courts in to arbitration by way of cassation. The following section is in place to elaborate on this point.

2.2. NO BASIS IN THE LAWS ON THE CASSATION POWER OF SUPREME COURTS

Even if the Ethiopian arbitration law is clear on its exclusion of cassation (note that Art.351, Civ.Proc.C excludes review on the merit for “basic error of law” as a default rule) as a default avenue of judicial review on awards, one may try to get an answer for the basic question of this piece in the rules

¹⁹ It is based on the rule of interpretation of statutes which provides that the latter prevails over the former.

stating the cassation power of supreme courts.²⁰ This is done with a view that what is prohibited in the former law can be allowed in the latter as the latter prevails over the former. So the question is: does it happen; does the new law on cassation change what is provided in the arbitration law?

The FDRE Constitution and the Federal Court's Establishment Proclamation No.25/96 define the cassation power of the Federal Supreme Court. The relevant provisions of the respective legislations are reproduced hereunder.

Art.80 (3) (a) of the FDRE Constitution goes: "The Federal Supreme Court has a power of cassation over *any final court decision* containing a basic error of law. Particulars shall be determined by law." (Emphasis added)²¹

Art. 10 of the Federal Courts Establishment Proclamation No. 25/1996 reads: "In cases where they contain fundamental error of law, the Federal Supreme Court, shall have the power of cassation over: 1) final decisions of the Federal High Court rendered in its appellate jurisdiction; 2) final decisions of the regular' division of the Federal Supreme Court; 3) final decisions of the Regional Supreme Court rendered as a regular division or in its appellate jurisdiction."

²⁰ Of course only the provisions on the cassation power of the Federal Supreme Court are examined, nonetheless the conclusion with regard to them will also work for the cassation power of state supreme courts since the way cassation power of state courts is defined is similar to the way it is defined with regard to the cassation power of the federal Supreme Court except that state supreme courts have cassation power not on "any final court decision" but only on "any final court decision on *state matters*"(see, Art.80, FDRE Constitution)

²¹ The Amharic version of this provision employs the term "ማናቸውንም የመጨረሻ ውሳኔ" (meaning any final decision) . But this phrase in no way can be understood to include arbitral awards, because the provision is intended to apportion judicial power among the various tiers of the court system, not to define the power of courts in relation to alternative dispute resolution mechanisms.

Neither of the two legislations, in defining the cassation power, however hard we stretch on the meaning of the words, provides that the Federal Supreme Court has a cassation review power over arbitral awards. If that is so, can we conclusively hold that the Federal Supreme Court has no cassation power over arbitral awards? Of course, the laws reproduced above are enacted with a view to apportioning judicial power among the different tiers of courts and defining the cassation power of the Federal Supreme Court in that context. Those laws are not meant to define the involvement of courts in alternative dispute resolution mechanisms such as arbitration. So it is not a valid approach at all to look in to the above cited provisions and conclusively generalize that the Supreme Court has no cassation power over arbitral awards, just because there is no hint about that in those legislations.

Likewise, it is not a valid approach to see the purpose of vesting the Federal Supreme Court with a cassation power in those provisions and confidently leap to a conclusion that the purpose empowers it to review arbitral awards via cassation. To begin with the purpose of endowing courts with the cassation power (that is to bring uniform interpretation of laws, to bring predictability to court's actions²²) will neither be undermined nor boosted whether there is cassation review of arbitral awards or not, so long as cassation review of judgments continues. Even it can be argued that the ultimate purpose of cassation power of courts (that is, making the legal system work better) is achieved by not using this power when it comes to arbitration since arbitration calls for restraint on court's intervention.²³

In general, it is a futile act to try to find an answer for the question whether there is statutory basis for cassation review of awards in the aforementioned

²² See the reasoning of the Federal Supreme Court Cassation Bench decision in *Behereawe Maeden Corporation*, supra note 4 p.352

²³ See more discussion on this point in section (4).

legislations defining the cassation power of courts in the judicial system in general. Doing so is like trying to find an answer for the question “should courts adjudicate a dispute submitted to them though there is an agreement submitting it to arbitration?” by looking only at Art.79(1), the FDRE Constitution. Because it states that the power to adjudicate disputes is vested in courts, so are we going to say that there is no way where courts should refrain from exercising their power of adjudicating disputes and from fulfilling the purpose they are intended for and thus courts must decline from enforcing arbitration agreements? Obviously, in such situations, our attention for answer must be shifted to arbitration laws too – specifically, in this case to Art 244(2), Civ. Proc. C. a provision which assures the enforceability of arbitration agreements in Ethiopia which is found in no conflict with the FDRE Constitution.²⁴

By the same token, in searching for an answer to the question (whether there is a statutory basis for cassation review of awards), what is needed is a shift in emphasis. We need not approach the question from the angle of whether denying the cassation review of awards is usurping the cassation power of the Courts and thereby diminishing its purpose. Surely, the absence of cassation review of awards is not usurping supreme courts’ cassation power nor diminishing its purpose, rather it is being cautious of court’s intervention in to a dispute settlement mechanism which, for legitimate and fully justifiable reasons, calls for judicial exercise of restraint.

Without a clear exposition of an explicit or implicit inconsistency between the Ethiopian arbitration law and the law on cassation power of courts, the answer, on the cassation reviewability of awards, in the arbitration law

²⁴ See, *Zemze Pvt.Ltd.Co. vs Ilebabour Zone Education Department*, Federal Supreme Court Cassation Bench Decisions(2001), vol.2, p75(in this decision the bench affirms the enforceability of arbitration agreements)

(which is discussed in the above sub-section (2.1)) can hardly be brushed aside. It is not a valid approach at all to look for an answer for the question in the legislations defining the cassation power of the Federal Supreme Court in the context of allocating judicial powers among different levels of courts rather than in the arbitration law where the relationship between courts and arbitration is purposefully and with great sensitivity defined.

The promotion of arbitration as a dispute settlement mechanism is the purpose of the arbitration laws, in particular and the legal system, in general; isn't the cassation review the part of the legal system? So the relevant question deserving attention is: is it pro arbitration or anti-arbitration to have cassation review of awards? The position upheld in the arbitration law (that is, no cassation review of awards as a default rule) is pro-arbitration especially when it is seen in light of the fluidity of the meaning of "basic error of law" which in turn leads to pervasive intervention of the cassation benches into arbitration.²⁵ Such pervasive intervention sacrifices the finality benefit of arbitration; one of the pillars of arbitration, one of the benefits inducing disputants to go for arbitration rather than litigation in the first place. Note also that one can speculate cassation review of cases to take years before they are disposed.²⁶

In seeing the whole matter through a "pro-arbitration vs anti-arbitration" lens, a reasonable question to arise here could be, finality of arbitration is a good thing but how much sacrifice (in terms of justice) should be paid to ensure the finality of arbitration? Is not cassation review of awards a pro-arbitration stance which balances the finality benefit of arbitration with its

²⁵ See note 8, from the practice of cassation benches, we can infer that almost any error of law can qualify as "basic error of law".

²⁶ For example, in *Beherawee Maden Corporation* (cited supra note 4) the Federal Supreme Court Cassation bench took almost two years to finally dispose the case.

result needs to be just too? This argument may sound very sensible especially when it is seen that cassation review of awards will be limited to reviewing basic errors of law in the awards (assuming “basic error of law” is interpreted very strictly) and that no higher judicial body than cassation benches, unlike appeal from awards which allows the appellate court’s decision reversing the award could be subjected to further review by the next higher court.²⁷.

However, this realization does not still shake us from embracing the position of Ethiopian arbitration law exposed in the above sub-section (2.1) [which goes: no cassation review of awards as a default rule], because we need to pay attention, in addition to the text of the law excluding cassation review, to modern arbitration concepts which tend to avoid altogether any kind of judicial review of awards on the merit since the review on the merit is deemed to be too much of intervention compromising benefits of arbitration such as finality, privacy. So what is needed is to examine the remaining possibility: can the parties create cassation review of awards by contract?

3. CAN PARTIES CONTRACTUALLY CREATE CASSATION REVIEW OF AWARDS?

The examination of the Ethiopian arbitration law, as is done in the above section, reveals that cassation review of awards (which means review of awards on the merit for a basic error of law by the highest judicial body) is not provided as one of the default avenues of judicial review of awards. This is position of the arbitration law is not changed by the legislation on

²⁷ For example, if the Federal high court reverses the awards of the arbitrators for the reason that it is wrong on its face on the matter of law (see Art.351 (a), Civ.Proc. C), a further appeal could be lodged to the Federal Supreme Court. However, it is also worthy of mentioning that an award reviewed by the cassation bench of a state supreme courts could be further reviewed by the cassation bench of the Federal Supreme Court if a party shows the state supreme court’s cassation bench commits basic error of law in reviewing the award. (See, Murado, supra note 7)

cassation powers of the supreme courts. The question is then: can parties create cassation review of awards by agreement? In other words, if they agree to submit the award for cassation review only when it contains basic error of law, is this agreement enforceable?

The issue of contractual expansion of judicial review of awards, in general is a matter to which Ethiopian arbitration law does not give away an easy answer, for example, it is not clear whether parties can expand the grounds of setting aside provided under Art.356, Civ.Proc.C.²⁸ The enforceability of such contracts expanding judicial review of awards had been the subject of numerous academic writings in USA²⁹ and court's ruling on the issue was also diverse until the USA Supreme Court ruled in 2008 that such agreements are not enforceable. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*,³⁰ the Supreme Court held that arbitration agreements subject to the Federal Arbitration Act (FAA) cannot contractually provide for additional judicial review to correct findings of fact unsupported by the evidence, or erroneous conclusions of law.³¹ It asserts that the FAA's statutory grounds

²⁸ If parties, for example, agree to add "a manifest disregard of the law" as a ground of setting aside under Art.356, Civ.Proc.C, is this agreement enforceable? What if parties agree to expand the grounds of appeal under Art.351,Civ.Proc.C? But one writer states, in a matter -of -fact - tone, that "[a]dditional conditions and grounds of appeal may also be laid down contractually. As a result, broad judicial review of arbitral awards is possible" (Hailegabriel G. Feyissa, *The Role of Ethiopian Courts in Commercial Arbitration*, Mizan Law Review (Autumn 2010.), Vol.4, No.2, P.325

²⁹ For example see, Eric van Ginkel, *Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal vs. Vacatur*, Pepperdine Dispute Resolution Law Journal, (2003) Vol. 3,No. 2, p.157; Cynthia A. Murray, *Contractual Expansion of the Scope of Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, St. Jhon's Law Review (2002), Vol.76,No.3, p.633 ; Karon A.Sasser, *Freedom of Contract for Expanded Judicial Review in Arbitration Agreements*, Cumberland Law Review(2000), Vol.31,p.337.

³⁰ 128 S.Ct.1396(2008).

³¹ Note that the ruling is confined to parties' agreement expanding judicial review of awards under the federal arbitration act. This ruling does not govern parties' agreement expanding judicial review under state arbitration laws.

for “vacatur”³² and modification of an award are exclusive and cannot be supplemented by contract.

The holding of the Supreme Court is by no means automatically acceptable. Even if the holding is claimed to be important to ensure the finality of awards by restricting court’s intervention grounds into arbitration, it, however, ignores other equally important feature of arbitration, party autonomy (contractual freedom). Here the reader can easily see how the Federal Supreme Court cassation bench in its holding in *Beherawwi Maeden Corporation* case (this case is discussed in section (4), below) that awards can be reviewed on the merit for basic error of law by the highest court (that means cassation review of award) despite the existence of the finality agreement is neither for “finality” of arbitral awards nor for “party’s freedom of contract, the two basic essences of arbitration.)

One criticism against the holding of the US Supreme Court’s for giving finality or efficiency precedence over parties’ autonomy in arbitration goes:

[M]andating efficiency over freedom in arbitration makes no sense; by allowing the parties freedom, they may pursue efficiency to the extent they desire—if they do not want it, they can move forward without it. While the court has an interest in efficient litigation, it has no cognizable judicial interest or claim to such efficiency in arbitration because arbitration is a dispute resolution avenue solely constituted by the choice and definition of the parties.³³

³² The term used in the Ethiopian arbitration law for the same thing which ‘vacatur’ refers is *setting aside*, Arts.354-357,Civ.Proc.C

³³ Matthew M. Mitzner, *Snatching Arbitral Freedom From Hall Street’s Clenched Fist*, The Review of Litigation(2009), Vol. 29, No.1 p.190

In general, the divide between proponents and opponents of the holding of the court in the *Hall Street* are the two competing interests of arbitration. In the words of a writer “Whether the Court rightly decided the question in *Hall Street* depends on one’s view of what is more valuable in arbitration—the freedom of the parties to choose for themselves how their disputes will be resolved, or the efficiency that results from binding awards.”³⁴

The text of Ethiopian arbitration law does not prohibit (at least in explicit terms) parties agreement for judicial review of arbitral awards for “basic error of law” and thus arbitration principle of party’s autonomy (parties freedom to control the arbitration) dictates honoring such agreement. The fear reflected in US’s Supreme Court decision that the efficiency of arbitration could be damaged if parties are entitled to contractually expand cannot become so big to induce an Ethiopian court forego one of arbitration’s honorable principle - parties’ autonomy, because agreement for cassation review of awards is limited to legal errors and which are basic (basic error of law)³⁵ especially if the term basic error of law is defined narrowly. If a party calculates the benefits of finality of the arbitration against the risk of an award with “basic error of law” (given the phrase is strictly understood) enters into agreement for a cassation review of awards, such agreement must be honored in Ethiopia. In doing so, we can strike the right balance between the two competing policy objectives of Ethiopian arbitration law (finality and party autonomy). So long as the text of the law is not that much clear on the matter, reasons based on policy objectives are the best we can do.

³⁴ Id. at P.188

³⁵ Not factual or other errors. Actually if parties agreed for cassation review of awards for factual errors, their agreement would not be enforceable, because parties are creating a new jurisdiction for cassation benches which is not vested on them by any law in the first place.

The important factor in the disputant's decision of preferring arbitration over litigation is its efficiency with its potential of producing a fairly just result. To reflect this factor which moves disputants away from litigation, an award need to be final (i.e., not open to further challenge in the court) unless there is a mistake in it which goes beyond the risk assumed in preferring arbitration in the first place.³⁶ These ideal qualities of an award can best be attained when parties are allowed to calculate and balance the efficiency of an arbitration process with the risk of ending up with an award of a certain error and consciously agree for a judicial review on the ground of that error. Not by the wholesale assumption of the precedence of the cleanness of an award from an error of some sort called "basic error of law" over party's want of the finality of the award and subjecting the award automatically to a judicial review on that ground. This just captures the point that the conclusion reached in section 3 that 'no cassation review of awards as a default rule'.³⁷ and the conclusion reached in this section that 'the avenue of cassation review of awards can be created by a contract' are far from being contradictory, but very much reinforce each other to reflect parties wish of having arbitration which balances efficiency with an eye for correcting errors.³⁸

³⁶ Note that when disputants submit a dispute to arbitration, they are assuming a possible risk of ending with an award with a certain error which they may not get it corrected by courts in exchange for its immunity from being an object of prolonged proceeding.

³⁷ 'No cassation as a default rule' means if parties' arbitration agreement is silent about judicial review of awards, then there is no cassation review, the law does not provide this avenue of judicial review.

³⁸ Note that creating cassation review by contract is not like creating jurisdiction of a court which is not already there. Because the cassation reviews of awards is not available as a default does not mean it is prohibited all in all. And a dispute is escaping cassation review just because arbitration is preferred, not because it is not reviewable by way of cassation. Thus if it is the preference of the party to get it back to the cassation bench, no reason to prevent him from doing so as long as he feels that the finality benefit of arbitration will not be that much compromised.

4.BEHERAWE MAEDEN CORPORATION VS DANEE DRILLING, CRITICAL EXAMINATION

In *Beherawi Maden Corporation vs Danee Drilling*³⁹ the Federal Supreme Court Cassation Bench holds that cassation review of awards is proper even if parties agree the arbitral award to be final. In this case, the bench overruled its holding in the case of *National Motors Corporation*.⁴⁰ To quote, the bench’s reasoning:

ኖ. . . የአንድ ጉዳይ ለሰበር የመቅረብ ሁኔታ በሕገ - መንግስቱ ለፌዴራል ጠቅላይ ፍርድ ቤት የተሰጠ በመሆኑ ሥርዓቱ ሊጫወተው ከተፈለገው አቢይ አላማ አንጻር ሲታይ ጉዳዮቸው በግልግል ዳኝነት እንዲታይላቸው የተስማሙበት ወገኖች የግልግል ዳኝነቱ የሚሰጠው ውሳኔ የመጨረሻ ነው በማለት ስለተስማሙ ብቻ ጉዳዩ በሰበር ሥርዓቱ እንዳይታይ ፍላጎት አሳይተዋል ተብሎ መሠረታዊውን የሕግ ስህተት ላለማረም ምክንያት ሊሆን የሚችል አይደለም፡፡⁴¹

When the question whether or not a case is reviewable by way of cassation is evaluated in light of the role cassation review is intended to play, parties to arbitration agreement that the decision of arbitrators is final and their wish of avoiding cassation review of the

³⁹ Federal Supreme Court Cassation Decisions Reporter(2011) Vol.10, p.350
⁴⁰ *National Motors Corporation vs General Business Development, Federal Supreme Court, Cassation Bench, File No.21849* (in this case the court held that a finality agreement avoids the cassation review of awards) .It is interesting to note that in the time between this case and that of the case of *Behereawe Maeden Corporation* , an article, criticising the bench’s reasoning and its holding on the *National Motors Corporation* case appeared on Ethiopian Bar Review (the article is cited supra at note 3)and the arguments by the author in the article are repeated in the bench’s decision on the case of *Behereawe Maeden Corporation* . It is also interesting to note that the *National Motors Corporation* case is not reported in the reporter of the Federal Supreme Court Cassation Bench Decisions; I have gone through all the volumes I could not find it but the case is reported in the Ethiopian Bar Review (2009) Vol.3,No.1 , p.149 and in the Report of Arbitral Awards vol. 1, p.367
⁴¹ *Behereawe Maeden Corporation*, supra note 4 p.352

case cannot be a reason not to correct a basic error of law in the case by way of cassation. [Translation is mine]

As elaborated in section (2), the courts' reasoning is not valid as it shifts its emphasis from how expansive or limited judicial review should be of arbitral awards to the general discussion of the power of cassation of Supreme Courts. When put syllogistically, the bench's reasoning will look like:

- Cassation power of the Federal Supreme Court is to ensure uniformity in the interpretation of laws in the legal system.
- Arbitration is the part of the legal system.
- Therefore, an arbitration process must be subjected to the cassation power of the Court.

However, is it not arbitration the part of the legal system where court's interference (especially on the merit of the dispute) is intended to be very limited?⁴² Is it not arbitration the part of legal system where parties' wish of avoiding courts is honored even if that may lead to the situation that some mistakes of arbitrators cannot be scrutinized and corrected before courts at all? So it is uncanny to use the wholesale purpose of subjecting judgments to cassation review to draw a conclusion that arbitral awards must also be subjected to the same review.

⁴² See, Birhanu Beyene Birhanu, *The Degree of Court's Control on Arbitration under the Ethiopian Law: Is It to the Right Amount?* Oromia Law Journal (2012) Vol. 1No,1 , p.37 (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.

It is like saying that:

- Courts are vested with the power to adjudicate disputes.(Art.79(1),FDRE Constitution)
- A dispute submitted to arbitration is one of those disputes.
- So they must be subjected to the adjudicative power of courts (but look at Art.244, Civ.Proc.C which prescribes courts to decline from entertaining disputes submitted to arbitration, no one how ever questions the unconstitutionality of this provision.⁴³

Therefore, the cassation bench, in *Beherawe Maeden Corporation* case, make a mistake of implying that it is like usurping the cassation power of supreme courts just because awards are made not reviewable by way of cassation. However it must be noted that avoiding cassation review of awards is limiting court's interference into arbitration and thereby upholding parties' wish of avoiding courts which is manifested by opting for arbitration over litigation. As shown below, it can even be argued that the purpose of vesting supreme courts with the cassation power is achieved when this power is not exercised with regard to arbitration. So the benches assertion that the purpose of cassation power of courts automatically entails (even in the existence of a finality agreement) judicial review of arbitral awards on the merit for basic error of law is wrong.

The bench's assertion in the case that cassation review is needed for the creation of a better working legal system, not just to correct mistakes in an individual case, is fair and acceptable, but its inference from such a premise that 'so it cannot be avoided by a contract' is quite unwarranted, at least in a

⁴³ See, *Zemzem* supra note 25

situation where parties to arbitration agree not to subject arbitral awards to cassation review. Just not honoring such agreements may be damaging, let alone facilitating, to the proper functioning of the legal system, which is the ultimate goal of the cassation review.

This is because disputants may not prefer arbitration as a dispute settlement mechanism if it is unavoidably followed by review of awards on the merit for “basic error of law”. That in turn means many cases, which would have been resolved via arbitration, will end up in courts and courts, overloaded with cases, will become less efficient. Arbitration, however, would be employed and court’s congestion could be eased if its finality is guaranteed (if parties know that they can escape cassation review.) So how come the bench holds the position that the purpose of cassation review (that is, for a better functioning of the legal system) warrants it not to honour parties agreement to escape the review? Its general purpose should have made it go the other way around.

In the decision, the cassation bench also makes a mistake of drawing unwarranted conclusion from that fact that Ethiopian arbitration law allows judicial review of awards under Arts.350-354 and 355 -357, Civ.Proc.C. It states:

አማራጭ የሙግት መፍቻ ዘዴዎች በኢትዮጵያ የህግ ስርዓት ውስጥ ተካተው የሚገኙ ሲሆን እነዚህን የሙግት መፍቻ ዘዴዎች ፍርድ ቤቶች የሚያበረታቱበት ሁኔታ እንዳለ ሁሉ የሚቆጣጠሩበት አጋጣሚም ያለ መሆኑን ከላይ የተመለከቱት የፍትህ ብሄር ህጉም ሆነ የፍትህ ብሄር ሥነ-ሥርዓት ህግ ድንጋጌዎች ይዘትና መንፈስ ያሳያል።⁴⁴

Alternative dispute resolution mechanisms are made the part of Ethiopian legal system. The contents and spirits of the provisions of

⁴⁴ *Behereawe Maeden Corporation*, supra note 4 p.352

the civil code and the civil procedure code, which are cited above, shows that there is as much a room for court's control of these mechanisms as there is for court's encouragement of their use. (Translation is mine)

The question is how far courts are allowed to exercise control on alternative dispute resolution mechanisms. Conciliation is, for example, a method of alternative dispute resolution and the result of a successful conciliation, which is compromise⁴⁵, is not reviewable at all by way of appeal⁴⁶. In arbitration too, courts have a supervisory role, but does this role warrant courts to review awards on the merit for "basic error of law"? (Especially given that "basic error of law" means in practice any error of law). For example, in UNCITRAL Model Law review on the merit is altogether avoided⁴⁷ as it is considered too much of an intervention by courts.

In the above paragraphs, it is shown how the bench draws a wrong conclusion about the reviewability of awards by way of cassation depending on the role of cassation as defined in litigation, not on a different role it would have in arbitration. It is also shown how it overextends the theory that courts should exercise control over arbitration to the point they can review of awards on the merit for basic error of law. Now let us see how it

⁴⁵ C.C,1960, Art.3324

⁴⁶ C.C, 1960, Art. 3312(1).

⁴⁷ See paragraph 15 of the explanatory notes on UNCITRAL Arbitration Model Law. It goes "... the Model Law envisages court involvement in the following instances. A first group comprises appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions which should be entrusted, for the sake of centralization, specialization and acceleration, to a specially designated court or, as regards articles 11, 13 and 14, possibly to another authority (e.g. arbitral institution, chamber of commerce). A second group comprises court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court ordered interim measures of protection (articles 8 and 9), and recognition and enforcement of arbitral awards (articles 35 and 36.)"

misunderstands the rules of the Ethiopian arbitration law and misapplies the interpretation rule “the latter prevails over the latter”. It states:

የፌ/ብ/ሥ/ሥ/ሐ/ቁጥር 351"ም" ሆነ 356 ድንጋጌዎች ይዘትና መንፈስ ሲታይ መሰረታዊ የህግ ስህተት ያለው የግልግል ጉባኤ ውሳኔ በሰበር ስርዓት የሚታይበት አግባብ ስለመኖሩ አይጠቁምም። በሌላ አገላለፅ ድንጋጌዎች የሚያወሱት በግልግል ታይቶ የተወሰነ ጉዳይ በይግባኝ የሚታይበትን ሥርዓት ብቻ ነው።⁴⁸

When the content and the spirit of the provisions, Art,351 and 356,Civ.Proc.C are examined, they do not indicate it is not clear as to the reviewability of arbitral awards containing basic error of law by way of cassation. In other words, the provisions stipulate only about review of arbitral awards by way of appeal. [Translation is mine]

The quoted statements proves that not only the cassation bench fails to distinguish “appeal” (Arts. 350- 354, Civ.Proc.C) and “Setting aside” (Arts, 3555-357, Civ.Proc.C)⁴⁹ but also fail to grasp the spirit of Art.351, Civ.Proc.C, which clearly prohibits (at least as a default rule) review of

⁴⁸ *Behereawe Maeden Corporation*, supra note 4 at p.352

⁴⁹ 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 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 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 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)

awards on the merit for “basic error of law”⁵⁰, because “basic error of law” is not among the grounds enumerated therein. So the bench made an error of taking the provision as if it had nothing to say about review of awards on the merit for “basic error of law”, or namely cassation review.

The bench also misapplies the interpretation rule; the latter prevails over the former, when it says:

የሰበር ሥርዓት ዓላማ ወጥ ለሆነ የህግ ትርጉም እና አፈፃፀም ከፍተኛ ሚና መጫወት ሲሆን ይህንንም በ1987ቱ ህገ-መንግስትም ሆነ ይህንኑ ተከትለው ከወጡ አዋጆች(25/1988 እና 454/97) የምንገነዘበው ነጥብ ነው። እነዚህ አዋጆች ከ1958ቱ የፍትህ ብሄር ሥነ-ሥርዓት ህግ በሁዋላ የወጡ ሲሆን ተቀባይነት ባለው የህግ አተረጎጥንም ደንብ መሰረትም ከ1958ቱ የሥነ-ሥርዓት ህግ ቅድሚያ ተፈጻሚነት ያላቸው ናቸው።⁵¹

The objective of cassation is to play a role for uniform interpretation and application of laws. This point is recognizable from the 1995 Constitution and those proclamations issued following it (proc.25/96 and Proc.454/2005). Since these legislations came latter than the 1965 Civil Procedure Code, they prevail over it according to an acceptable rule of interpretation.[Translation is mine]

The bench to resort to that kind of rule of interpretation should first have shown the legislations defining the cassation power of the supreme courts go against what is provided under Ethiopian arbitration laws. And as discussed in section (2.2) above, the laws defining the cassation power are enacted exclusively with litigations in mind , not alternative dispute resolution to litigation such as arbitration, so difficult to see any inconsistency between the laws defining cassation power of supreme courts and the arbitration

⁵⁰Of course, it is unless we count errors enumerated under Art. 351,Civ.Proc.C as “ basic errors of law”. However, from the practice of cassation benches, we know that errors which goes beyond those enumerated under Art351, Civ. Proc,C may be qualified as “basic errors of law”.

⁵¹ *Behereawe Maeden Corporation*, supra note 4 at p.352.

laws defining, purposefully and with a sensitivity, judicial interventions into arbitration. The cassation power of courts as defined in those laws remains unfettered even if courts restrain from exercising such power on arbitral awards. So the bench has made a mistake in applying the interpretation rule as if there was inconsistency there; in other words as if the cassation laws had impliedly repealed certain arbitration law provisions such as Art.351,Civ.Proc.C.which prohibits review of awards on the merit for “basic error of law”

To summarize, in the case of *National Motors Corporation* (overruled), the bench emphasized on the similar nature of review of awards by way of appeal and by way of cassation as both means review on the merit and correctly looked for an answer in the Ethiopian arbitration law for the issue of propriety of cassation review of awards in the presence of a finality agreement. In its reasoning, the bench states that if review by way of appeal is not available due to a waiver agreement, it is meaningless to allow cassation review in the presence of the waiver agreement as it means the same thing as appeal,⁵² meaning review on the merit.

However, the bench in overruling its holding in *National Motors Corporation* case, which it has done it in deciding the *Beherawee Maeden Corporation* case, shifts its emphasis to the difference in the role the two reviews are primarily intended to play in the realm of review of judgments, that is, appeal is primarily intended to correct mistakes which can affect individual interest while cassation is to correct mistakes of wider impact on the legal system(in short appeal is primarily for individual while cassation

⁵² Of course actually it would mean more pervasive intervention by court than appeal as the term basic error of law is defined very loosely.(See, Murado, supra note 7)

is for the system). Then the bench conclude that what is intended for the system must not be made amenable to individual's wish.

Nonetheless, it is flawed to hold that the purpose of cassation, which is facilitating the proper functioning of the system, can be achieved by doing the same thing to arbitration as to litigation. Because arbitration is a dispute settlement mechanism which generally calls for caution to court's interference into its realm. Of course, the purpose of granting supreme courts with a cassation power is achieved with regard to litigation by reviewing judgments for basic error of law but with regard to arbitral awards by not using that power (meaning by not reviewing awards on the merit for basic error of law). The cassation bench in holding that awards can be reviewed on the merit for basic error of law by the highest court despite the existence of the finality agreement is neither for "finality" of arbitral awards nor for "party's freedom of contract, the two pillars of arbitration, and thus its holding is against arbitration, that in turn means against the legal system which promotes arbitration as a dispute settlement mechanism.

5. CONCLUSION

The laws defining the cassation power of supreme courts are not intended to give away answers as to courts' use of the power apropos arbitrations (which is out of court dispute resolution mechanism). The answer as to the propriety of cassation review of award lies within the arbitration law and the close examination of this law reveals that the review is not available as a "non-waivable avenue"(unlike the avenue of setting aside) and as default avenue, either(unlike appeal). The amount of time cases take before they are disposed at a cassation bench and the plasticity of the meaning of the term "basic error of law" which would be a ground calling forth cassation review of awards for all kinds of error of laws justifies why the avenue of cassation

is not provided in the Ethiopian arbitration law either as a “non-waivable avenue” of judicial review of awards or as a default avenue. What the arbitration law (especially such principles as parties autonomy, finality and privacy together) warrants that cassation review of awards is proper only when parties agree to that effect, which means when they create it by contract calculating the risk of ending up with an award with a “basic error of law” against their wish of, for example, bringing it to final as quickly as possible.