JIMMA UNIVERSITY COLLEGE OF LAW AND GOVERNANCE

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THE PLACE OF MULTIPARTY COMMERCIAL ARBITRATION UNDER ETHIOPIAN LAW

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Statement of Declaration

I hereby declare that, this paper prepared for the partial fulfillment of the requirements for LL.M Degree in Commercial and Investment Law entitled 'The place of Multiparty Arbitration under Ethiopian Law' is my own work, and that it has not previously been submitted for assessment to another University or another qualification.whenever other sources are used or quoted, they have been duly acknowledged.

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The undersigned certify that they have read and hereby recommend to the Jimma University to accept the Thesis submitted by Alemu Balcha entitled 'The Place of Multiparty Commercial Arbitration under Ethiopian law' in partial fulfillment for the award of the Master's degree in Commercial and Investment Law

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ACRONYMS OR ABBREVIATIONS

AAA	American Arbitration Association
AACC	Addis Ababa Chamber of Commerce
AACCSA	Addis Ababa Chamber of Commerce and Sectorial Associations
CPC	Civil Procedure Code
DIAC	Dubai International Arbitration Centre
DIS	German international arbitral institution
EACC	Ethiopian Arbitration and Conciliation Centre
HKIAC	Hong Kong international arbitration center
ICAC	International commercial arbitration court
ICC	International Chamber of Commerce
ICCA	International Arbitration Conference
ICDR	International Centre for Dispute Resolution
JAMS	Judicial arbitration and mediation service
LCIA	London Court of International Arbitration
OHODA	Organization for the Harmonization of Business Law in Africa
SALRC	South African Law Reform Commission
SIAC	Singapore International Arbitration Centre
UNCITRAL	United Nations Commission on International Trade Law

TABLE OF CONTENTS

ABSTRACT

Multiparty arbitration is crafted in a way that can satisfy the interest of parties that involved in currently circumventing complex commercial transactions resulting from interdependency of international commerce and globalization. From the international experiences, the arbitration community has made various efforts to cope up with the complexities of multi-party disputes. Yet, Ethiopia's arbitration law is not lucky enough to share from this chalice. From the close reading of arbitration law of Ethiopia, 1960 Civil Code (CC) and the 1965 Civil Procedure Code (CPC), it is easy to notice that multi-party arbitration is not given proper attention. Neither CC nor CPC, provides for the possibility of joinder, intervention and consolidation of arbitral proceeding. The only vacuum for the possibilities of multi-party arbitration under the Ethiopian arbitration law is via arbitration agreement. Again, the leading arbitration institution in the country, Addis Ababa Chamber of Commerce and Sectorial Association Arbitration Institution (AACCSA), institutional rules has not also paid sufficient attention to multi-party arbitration. Beyond the recognition of the possibility of multi-party arbitration via arbitral submission, and regulation of appointments of arbitrators in multi-party disputes, we could not find any other provision that regulates the issues of joinder, intervention and consolidation of arbitral proceeding.

Owing to the meager attention given by the Ethiopian arbitration law, the author argues for the proper facilitation of multi-party arbitration in our context because of various reasons. First, since multiparty dispute is the fruits of globalization, our country cannot exclude itself from globalization and the conundrum of multi-party disputes. Second, the construction industry in which the issues of multi-party dispute is common are substantially increasing. Finally, the current move of Ethiopian government towards the privatization of big companies has also a tendency to increases the possibility of multi-party disputes.

CHAPTER ONE

INTRODUCTORY MATTERS

1.1. Background of the Study

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] The perceived advantages of arbitration over litigation include the possibility to choose a neutral forum, a neutral tribunal in the constitution of which the parties may participate, the flexibility of the arbitral proceedings due to the lack of formal rigid rules of evidence, and the confidentiality of the arbitration process. Contracting parties also prefer arbitration because of the nature of the arbitral award, which are binding and not subject to court review on the merits and this in turn makes arbitration faster than court proceedings.[2]

Currently, the growing international interdependency of commerce and the globalization of business world have led to complex contractual relations, which very often involve more than two parties bound by a multitude of contracts.[3]Besides, we are experiencing the International transactions graduating into a higher level of complexity; where often requiring participation of several companies in the implementation of a single project. For instance, a typical construction project will usually involve _apart from a client and a main contractor – an engineer or an architect, several subcontractors, 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 on the basis of multiple contracts.[4]Such kinds of disputes will inevitably lead to multiparty arbitration.

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1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, KLUWER INNERNATIONAL LA, 2ND EDN, 2009, at 1.See also ALAN REDFORN, MARTIN HUNTER, & NIGEL BLACKABY, PRACTICE OF IINTERNATIONAL COMMERCIAL ARBITRATION, Sweet and Max Well, 4th edn, 2004, at 22-27.

2 DIMITAR PONDEV, MULTIPARTY AND MULTICONTRACT ARBITRATION IN CONSTRUCTION INDUSTRY, John Willey and Sons Ltd,1st edn,2017, at 1.

3*id*, at 2.

4*id.*

In general, multiparty arbitration is an arbitration which deals with a dispute involving more than two parties.[5] Two types of multilateral disputes can be distinguished within this definition.[6]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. The second situation concerns multipolar disputes where the parties cannot be divided into two camps because of their divergent interests.[7]

There are various conundrums 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 in order 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]

Irrespective of its conundrum, in the last decade, the issues of multiparty arbitration have been becoming prevalent. This can be evidenced from the ICC reports of 2012 and full 2016 ICC dispute resolution statistics published in court bulletin. Accordingly, in 2012, the ICC reported that more than a third of arbitration involved more than two parties and that the average number of parties in these cases was four.[9]Again in 2016, nearly half of all new cases filed involved three or more parties while over 20% involved more than five parties and about 70% of the arbitration cases entertained by ICC were involved more than two parties.[10]

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

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5 Olivier Caprasse, *Setting up of the Arbitral Tribunal in Multi-Party Arbitration, The - La Constitution du Tribunal Arbital en CasD'arbitrage Multipartite*, 2006, INT'L BUS. L.J. 197 (2006),at 197.

6 id.

7 *id.*

8 SigvardJarvin, *Multi-Party Arbitration: Identifying the Issues*, 8 N.Y.L. SCH. J. INT'L & COMP. L. 317 (1987),at 321.

9 International Chamber of Commerce, ICC reports,2013,available at http://library.iccwbo.org/ (accessed on Feb 03,2018).

10International Chamber of Commerce, Full Dispute Resolution Report Published in Court Bulletin, 2016 available at http://library.iccwbo.org/(accessed Feb 03,2018).

complexity and sophistication of disputes.[11] The same is true forHong Kong international arbitration center (HKIAC),Singapore International Arbitration Centre (SIAC),international commercial arbitration court (ICAC), andjudicial arbitration and mediation service (JAMS).[12] Such kinds of move are still ongoing, and even in 2018, the German international arbitral institution (DIS) have amended its arbitral rules and successfully adopted the issues of multi-party arbitration.[13]

In nutshell, many international arbitral institutions have amended their arbitral rules to cope up with the currently circumventing problem of multiparty arbitration. The approach taken by those institutional rules is via providing mechanism for appointment of arbitrators, and addressing the issues of joinder, intervention and consolidation of 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 arbitral proceeding.[14]The same approach was taken by 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.[15] 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 was entered into force on 1 January 2015.[16] South Africa, have introduced the new arbitration act no 15 of 2017 with proper incorporation of provision governing complexities of multi-party disputes.[17]

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11 Finley T. Harckham& 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 Feb 03,2018).

12Angela 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 february04/2018).

13 *id.*

14 International Chamber of Commerce Arbitral Rule, Revised on 2017(here after ICC Rule), available athttps://iccwbo.org/publication/arbitration-rules-and-mediation-rules/, Art 7, 10&12.

15 HerbertSmithFrehills,SnewHongkongArbitrationOrdinance, 2011availableat http://arbitrationblog.kluwerarbitration.com/2011/06/01/new-hong-kong-arbitration-ordinance-comes-into-effect (accessed Feb 04,2018).

16 Netherlands Code of Civil Procedure of 2015,Art.1045 and 1046.

17 PierreBurger,The International Arbitration Act Spells Opportunity For South Africa, March 2018 available athttps://www.werksmans.com/legal-briefs-view/international-arbitration-act-spells-opportunity-south-africa/(accessed february12,2018)

Coming to our country, the legal framework for modern arbitration was laid down by the codifications of the 1950s and 60s. Before that, arbitration was only known within the context of traditional dispute resolution processes.[18]For the major part of Ethiopian legal history, non-judicial dispute settlement methods played a significant role in resolving disputes in a traditional Ethiopian society. Shimguilina is one of the many traditional Ethiopian dispute settlement devices which could be approximated to what is now known as arbitration.[19] The modern concept of commercial arbitration had, however, been alien to Ethiopia until at least mid-20th century, when Ethiopia developed most of its current codes on private law.[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.

Improvements with respect to, for example, institutional arbitration are also indicative of the current trend toward a 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 though the former institution is closed up.[21] In nutshell, civil code and civil procedure code of Ethiopia that were promulgated "in the 1960s" are the prominent legal framework governing arbitration till today and even no substantial attempt was made to refine it yet.

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 are silent on the issues of multiparty arbitration, the institutional rules of Addis Ababa chambers of commerce and sectorial association is also quite ignorant of the issues of multi-party arbitration. It is only Article 10 (3) of AACCSA arbitral rules that paid a meager attention to issues of multiparty arbitration. This provision was even confined to appointment of arbitrators in case of bi polar disputes. Thus, whether Ethiopian legal

18 Hailegabriel G. Feyissa, *The Role of Ethiopian Courts in Commercial Arbitration*,4(2)MIZAN LAW REVIEW 297 (2010),at301.

19 *id.*

20 *id.*

21 *id* ,at 305.

framework on arbitration addressed currently circumventing complexities of multi-party arbitration or not clear.

1.2. Literature Review

There is a scarcity of literature on the issues of multiparty commercial arbitration under Ethiopian legal framework. In academics, this is the most neglected subject matter in Ethiopia. To the extent of my knowledge and access until the writing of this proposal, there is no research that conducted on the issues of multiparty commercial arbitration in Ethiopia.

However, there is a meager attempt that was made to deal with the issues indirectly. Prominently, SirakAkalu and Michael Teshome have tried to shade a light on the issues of intervention, joinder and consolidation of arbitral proceeding while discussing the interests of third parties in arbitration.[22] Here, though their work is not vehemently on the issues of multiparty commercial arbitration, it has something to with multiparty arbitration since joinder, intervention consolidation of arbitral suits are the widely used instruments in doing away with the complexities of multiparty disputes.

Besides, those instruments have a tendency to increase multipartism as it lets third parties to either intervene or join pending arbitral proceeding, and two separate arbitral suits to be merged together. Accordingly, though their work is not directly emphasized on the issues of multiparty arbitration, they unveiled that joinder, intervention and consolidation is allowed under Ethiopian arbitration law on basis of article 317(1) of civil procedure code and article 3345 of civil code.[23] But, their argument is quite controversial and even begs for further question since arbitration is grounded on arbitration agreement that is there to serve the best interest of contracting parties while civil litigation is there to serve the best interests of public at large. Furthermore, they advocated that any third parties who alleged to have an interest in pending arbitral proceeding have two options; to apply for intervention or setting an action into motion against parties to arbitration in a court. In relation to the first option, they argued that such kinds of application for intervention should be accepted by the arbitration tribunal since filing an application by itself

22 SIRAK AKALU AND MICHAEL TESHOME, "YEGELGEL DAGNET BE ETHIOPIA", Mega Publishing & Distribution Plc, 2017, at 93-108.

23 *id. 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).

constitutes a clear expression of consent of third parties to arbitral proceeding .[24] This argument is also quite absurd. Because what matters is not an interest of third parties that is supposed to intervene, rather the interests of contracting parties

Again, Alemayehu Yismaw in his work on "The need to establish a workable, modern and institutionalized commercial Arbitration in Ethiopia'', and Haile Gabriel G. Feyisa in his work on "The Role of Ethiopian Courts in Commercial Arbitration" 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 it.

Beyond this, to extent of my knowledge and access, there is no another writer that either directly or indirectly go through the issues of multiparty commercial arbitration in Ethiopia. Therefore, being cognizant of the lack of literature on this field of study, this thesis will put an initial inception for potential exploration by contributing its own share to fill this gap.

1.3. Statement of the Problem

Multiparty arbitration is an emerging and complex conundrum in international commercial disputes. It may be come in to an effect to resolve either multipolar or bi polar multi-party commercial disputes. In case of bi polar commercial disputes, since parties can normally divided into claimant and respondent camp,normal principles of bilateral arbitration would inevitably apply. Accordingly, the issues like deciding who may be a party to a multi-party dispute, the number of arbitrators, how the arbitrators are to be appointed, the administration of the proceedings in order to guarantee all parties involved an equal treatment while assuring speed and efficiency, the calculation and payment of an advance of fees and costs, and whether one or several awards shall be made may not be problematic. However, in case of multi polar commercial disputes, since parties could not normally classified in to the claimant and

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24*id.*

25AlemayewuYismawu Demamu,*The Need To Establish A Workable, Modern and Institutionalized Commercial Arbitration In Ethiopia*,4 Haramaya L. Rev. 37 (2015), at 37.see alsoHailegabriel G. Feyissa, *The Role of Ethiopian Courts in Commercial Arbitration*, 4(2)MIZAN LAW REVIEW 297 (2010), at 303.

respondent campbecause of their divergent interests, it is illusive to guess for the applicability of the normal principles of bilateral arbitration to determine the aforementioned complexities.

Coming back to Ethiopia, the existing arbitration law is ignorant of multi polar commercial arbitration, and the existing normal principles of bilateral arbitration that presumed to be applied in case of bi polar commercial dispute do not even cope with the emerging modern laws and practices in international commercial arbitration. Hence, ruling over the aforementioned complexities of multi-party arbitration like joinder or intervention, consolidation, appointments of arbitrators, determining whether two or single awards is ought to rendered and like would inevitably be problematic in our context.

To make the problem in relation to appointments of arbitrator clear, it is the central principles of arbitration under Ethiopian legal framework that, every party should be equally treated in appointment of arbitrators.[26]However, if there are more than two contracting parties to arbitration clause, individual selection of the arbitrators by each party becomes impractical. That is the reason why, most institutional rules held the position that the institution selects the arbitrators in multiparty disputes if either the multiple claimants acting jointly or the multiple respondents acting jointly fail to nominate their respective arbitrators for confirmation or if all the parties are unable to agree on a method of appointing arbitrators.[27]Here, the problem is how the Ethiopian arbitration tribunal ought to approach the issues of appointment of arbitrator in case when parties failed to address via arbitration agreement since no default rule is there to fill gap. What makes the scenario grave is that, when parties to arbitration were not given equal opportunities in appointment of arbitrators, it makes arbitration agreement void in our context, and grounds of refusal enforcement of arbitral awards under New York convention.[28]

Furthermore, multiparty commercial arbitration may arise in various contexts including Joinder, intervention and consolidation of arbitral proceeding. Multiparty commercial arbitration that emanates from joinder, intervention and consolidation of arbitral proceeding is very complex because of consensual nature of arbitration, law of privity of contract and confidentiality of

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26 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.3335(1).

27See ICC Rule, Art. 12(8); AAA International Rules, Article 6(5); LCIA Rules, Article 8; UNCITRAL Rule, Art 10).

28 See New York Convention, Art.v, and Civil Code, Art. 3335(2) .

arbitral proceeding. But, when we come to the context of our country, the issues whether joinder, intervention and consolidation of arbitral proceeding is allowed in case of arbitration or not is not clear, and the fate of third parties which may have financial or legal interests from the pending arbitral proceeding is resorting to civil litigation, which is not advisable avenue in commercial disputes.

Besides, though the Ethiopian legal framework is silent on the issues of Joinder, intervention and consolidation of arbitral proceedings, some individuals like SirakAkalu and Michael Teshome unveiled that joinder, intervention and consolidation are allowed under Ethiopian arbitration law, by citing article 317(1) of civil procedure code, and article 3345(1) of civil code.[29]Accordingly, on the basis of the aforementioned provisions they have been arguing that, since the civil procedure code allows for joinder, intervention and consolidation of suits, this procedural aspects would inevitably apply in case of arbitral proceeding. Here, the issue as to whether the procedural similarity extends up to joinder, intervention and consolidation is quite cumbersome.

Even once we recognize that the procedural similarity extends up to joinder, intervention and consolidation, there are various issues that left unanswered. Accordingly, how we compromise it with the issues of party autonomy, law of privity of contract, confidential and consensual nature of arbitration? Besides, the issue as to the possible ground for ordering joinder, intervention and consolidation of arbitral proceeding and determining a competent organ to order joinder, intervention and consolidation of arbitral proceeding (Court or arbitral tribunal?) is a puzzling question. Not only this, the issues as to how the equality of the parties in appointment of arbitrators be ensured is quite illusive, since the third party is supposed to either join or intervene in pending arbitral proceeding that may already undergone appointments of arbitrators.

Whatever it may be, the existing international approaches have yielded that, regulation of multi-party arbitration is of great importance, owing to its merits in avoiding peril of conflicting decision, waste of time and money. But, the issues whether the Ethiopian arbitration law as it stands now allows the business community to share from the chalice of international experience is quite cumbersome.

29SIRAK AKALU AND MICHAEL TESHOME, *supra* note 22

Thus, on the basis of the aforementioned issues, the paper will explore multiparty commercial arbitration under Ethiopian legal frame work, identifies legal shortcomings and finds the way of strengthening it.

1.4. Research Questions

- What is the legal status of multi-party commercial arbitration under Ethiopian arbitration law?
- Does the Ethiopian arbitration law make any provisions with respect to third-party participation in commercial arbitration, such as joinder or intervention and consolidation of arbitral proceeding?
- Does the Ethiopian arbitration law address the issue of appointment of arbitrators in case of multiparty arbitration?
- What necessitates the regulation of multiparty commercial arbitration in Ethiopia?
- What kinds of approach do international arbitration law adopt to regulate multiparty commercial arbitration and what are the lessons for Ethiopia?

1.5. Objective of the Study

1.5.1. General Objective

The general objective of the study is to examine and assess multi-party commercial arbitration under Ethiopian legal frame work, identifying its shortcomings and exploring opportunities for proper regulation.

1.5.2. Specific objective

To achieve the general objectives, the specific objectives of the research would the following;

- To examine the legal status of multiparty commercial arbitration under Ethiopian legal frameworks.
- To uncover whether the Ethiopian arbitration law make any provisions with respect to third-party participation in commercial arbitration, such as joinder or intervention and consolidation of arbitral proceeding or not.
- To uncover whether the Ethiopian arbitration law comprehensively addressed appointment of arbitrators in case of multiparty disputes or not.

- To analyze the reason that necessitates the regulation of multiparty arbitration in Ethiopia.
- To examine the position of international commercial arbitration law on the issues of multiparty commercial arbitration and lessons that ought to be taken thereof.
- And finally to suggest what should be done to ensure the proper regulation of multi-party arbitration in Ethiopia.

1.6. Research Methodology

The Proposed research will employ doctrinal research methodology to answer the aforementioned question. Both primary and secondary sources will be used. Legislative enactments on arbitration in Ethiopia (civil code and civil procedure code), institutional rule of Addis Ababa chamber of commerce and sectorial associations, selected institutional rules on international commercial arbitration, model law and international convention on arbitration will constitute the primary source, while textbooks, journals, magazines, articles and related reports will form the secondary sources. The research will also focus on Comparative methods to examine the experiences and the approaches of selected countries and institutional arbitral rules on the issues of multiparty arbitration, in identifying the lessons that ought to be taken from their experiences thereof.

1.7. Significance of the study

This study is considered to have its own academic and legal significance. It is hoped that it would initiate further study on the subject matter as it is unexplored area of law. Moreover, it would give lessons for the legislator to re think over the need for amendments of Ethiopian arbitration law to comprehensively address the issues of multi-party arbitration in line with the modern international legal framework and practices. The paper may also help the readers to have a clue and knowledge on the issues of multi-party arbitration, complexity and obstacles underlying multiparty arbitration, and the position of Ethiopian legal framework in addressing multi-party arbitration

1.8. Scope of the study

The research will basically limit itself to multiparty commercial arbitration under Ethiopian legal framework. Accordingly, pertinent provision of civil and civil procedure code of Ethiopia and

the institutional rules of Addis Ababa chamber of commerce and Sectorial association will be within the ambit of this study. Furthermore, the study will also extend to institutional rules of arbitration at international arena so that it worth good to suggest the possible solutions for the complexities attributes to multiparty arbitration in Ethiopia. Accordingly, since exploring all institutional rules on arbitration is quite difficult, only ICC, UNICITRAL, and LCIA rules will be explored. These institutional rules are selected purposively as they are the leading arbitral institution now days. National legislation of Netherlands, Hong Kong and South Africa will also be within the ambits of study. These countries are purposively selected and the main reason is that, they are popular arbitration *fora, and* praised for having innovative legislation in the field of international commercial arbitration (Netherlands from Europe, Hong Kong from Asia and South Africa from Africa).

1.9. Limitation of the study

Every work is not free of limitation. Accordingly, the prominent limitation of this work is absence of literatures on the issues of multiparty arbitration in Ethiopia. Besides, shortage of time to effectively deal with each and every aspect of the subject matter was also another limitation of the study.

1.10. Organization of the study

To meet the objective it has in view, this study will be organized into five chapters. The successive chapter will essentially build upon and it will be logically connected with the preceding chapter (s). Accordingly, the first chapter covers introductory matters that lay a groundwork for the continuing chapters. Chapter two will covers the general overview of multi-party commercial arbitration while Chapter three will uncovers the approaches adopted by various institutional rules and national legislation on multiparty arbitration. Finally, the fourth chapter will embark on critically analyzing the pace of multiparty arbitration under the existing Ethiopian arbitration law while the fifth chapter finalizes the study by a way of conclusion and recommendations

CHAPTER TWO

2. GENERAL OVERVIEW OF MULTIPARTY COMMERCIAL ARBITRATION

2.1. Introduction.

Though, commercial arbitration was grounded on traditional perception of arbitration as though it is two parties' set up, globalization and interdependency of international commerce have necessitates multi-party commercial arbitration. Accordingly, this chapter is devoted to unveil the general concept of multi-party commercial arbitration. In doing so, the chapters will first illuminates on commercial arbitration in general and embark on unveiling instruments of multiparty arbitration (joinder, intervention, and consolidation of arbitral proceeding), advantages and obstacles or shadow limiting utilization of multiparty arbitration. The major conundrum in multiparty arbitration will marks the final topic of discussion under this chapter.

2.2. Definition and Characteristics of International Commercial Arbitration

On the basis of the characteristics of engaging parties and merits of disputes, traditionally, international arbitration has been divided into three aspects.[30]The first scenario is where two states refer their dispute to arbitration whereby the disputes will be audited under the application of public international law. The second, called investment arbitration, occurs when a state and a foreign corporation agree to arbitrate potential or actual legal disputes arising or related to the direct investment of the foreign entity in the territory of that state. Since one of the involving parties in the dispute is a sovereign state which is normally a subject of public international law and the other a private entity, the investment arbitration is influenced by both public international law and private law. In other words, investment arbitration stands at the cutting edge of public international law and dispute resolution.

30NahalAllahhi, The Optimization of Court Involvement in International Commercial Arbitration,[unpublished, thesis for doctor of philosophy, university of Manchester, 2016],at24.

Finally, the last situation pertains to arbitration being selected as a mechanism for resolving the commercial disputes between private persons.[31] Such kind of arbitration is called international commercial arbitration. Currently, in international trade and commerce, arbitration has become exceptionally strong and widely accepted as a means of resolving disputes. Exactly how widely accepted is probably impossible to know, but some commentators have suggested that a figure as high as 90% of all international contracts are governed by an arbitration clause.[32]

Furthermore, Rapid globalization has meant a corresponding growth in the volume of international contracts with clauses providing for international arbitration. In turn, the availability and effectiveness of international arbitration has been seen by many as a spur to cross border commerce and investment.[33] Business needs will always vary depending on the context, but some general guidance can be drawn from an analysis of those aspects of international arbitration which have typically been seen as most advantageous for international parties while minimizing perceived disadvantages of international arbitration. Accordingly, the main advantages of commercial arbitration which can be also taken as basic features of international commercial arbitration can be summarized as follows; first, International arbitration is seen as a way of securing a high degree of neutrality in the dispute resolution process. Arbitrators can, if the parties so wish be chosen so that they are of different nationalities from any of the parties, or they can be chosen in a way that gives a balance between the nationalities of the parties. Likewise, the legal seat of the arbitration can be chosen, if the parties require, so that it is in a neutral location.

A further strength of commercial arbitration is that of confidentiality and privacy. In many countries, court proceedings are in public to some extent and they can, particularly in high profile cases, result in a distracting "trial by media", with parties contacting the press, or unwelcome attention being attracted to the case by pressure groups or even competitors.[34]
Again, to a much greater extent than litigation in the courts, international arbitration provides finality in the decision-making process. One of the disadvantages of the court process is that

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31 *id.*

32 Maurice Kenton & Peter Hirst, Advantages of Commercial Arbitration, July 28,2015, available at https://www.clydeco.com/insight/article/advantages-of-international-commercial-arbitration,at 20(accessed on March 02, 2018).

33 *id.*

34 *id*, at 21.

judgments can sometimes be subject to one or more appeals, and these can take years to be resolved. This delay and potential diversion towards scrutiny of legal principle is largely avoided in the arbitral process, where the arbitral tribunal's decision is final other than usually limited grounds of challenge in the courts.[35] Besides, arbitrations can bring benefits in terms of costs and speed, and certainly the procedure can be tailored to save time and money.[36] To some extent, the parties are able to decide the approach which they would like the arbitral tribunal to take and the consequences in terms of costs and speed. Ultimately, it is difficult to make a comparison at a very general level between the costs and speed of arbitrations, as opposed to the costs and speed of litigation in the court.

Another notable advantage of international arbitration is the ability to enforce international arbitration awards through the New York Convention. Most countries in the world are now signatories to this Convention and the number of countries which have joined continues to grow.[37] Although it is often possible to enforce the court judgments of one jurisdiction in another jurisdiction, the ability to do this is by no means guaranteed and the procedures for doing so are often complex and slow. Yet, enforcement of court judgments in other jurisdictions has no equivalency to the New York Convention.[38]

Finally, one of the areas where international arbitration will always have an advantage over any court system is in the extent of party control, and this is reflected most strongly in the ability in many cases for parties to select arbitrators through a mechanism of their choice.[39]

2.3. Definition and Justification for Multi-Party Commercial Arbitration

Multi-party arbitration is 'an arbitration which deals with a dispute involving more than two parties.[40]Disputes that involve several parties may either look like pure bipolar disputes

35Maurice Kenton & Peter Hirst,*supra*note 32, at 22.

36*id.*

37*id.*

38*id.*

39id, at 21.

40 Olivier Caprasse, *supra*note 5.

involving two parties or multi polar disputes where parties cannot be divided into two camps because of their divergent interests.[41]

Whatever the scenario may be, in recent years, thanks to the growing interdependency of commerce and globalization, commercial transactions are becoming complex.[42]Such complexities of transactions would inevitably leads to complex multi-party disputes. In civil court litigation, Multi party disputes may not be as such difficult since courts are empowered to exclude separate proceeding by ordering joinder, intervention or consolidation of parallel suits. However, when it comes to arbitration, things become more difficult since the arbitral process is consensual in nature.[43]

Albeit its complexities, the world community have been geared towards multi-party arbitration and the justification of interest in it and its ever-growing significance could be boiled-down to three fundamental reasons: legal-political, normative, and practical.[44]The legal-political importance is in its ever-growing impact in 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.[45]Arbitration is suddenly everywhere. A veritable surrogate for the public justice system, it touches the lives of many persons who, because of their status as investors, employees, franchisees, consumers of medical care, homeowners, and signatories to standardized contracts, are bound to private processes traditionally employed by commercial parties" [46]

On the other hand, the normative significance of the subject-matter stems from the fact 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; most of these issues may be addressed only indirectly, through the extensive

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41*id.*

42 Ferdinandoemanuele&Milo Molfa,Multiparty Arbitrations: The Italian Perspective, 2012 available athttps://globalarbitrationreview.com/insight/the-european-middle-eastern-arbitration-review-2012/1036692/recent-developments-i,at 64(accessed on April 22nd 2018).

43 *id.*

44 D. Janićijević,*Multiparty Arbitration: Problems And Latest Developments*,*13*(1) LAW AND POLITICS,33(2015) ,at 34

45 Buckner, C,*Toward a Pure Arbitral Paradigm of Class Wide Arbitration: Arbitral Power and Federal Preemption,* 82 DENV. U.L. REV. 301(2004), at 301-303 As Cited In D.Janićijević, *Multiparty Arbitration: Problems and Latest Developments*, 13(1) LAW AND POLITICS,33(2015), at34.

46 D.Janićijević, *supra* note 44.

interpretation or the accordant application of the provisions, tailored exclusively for the ordinary, bipolar, two-party procedural scheme of the arbitration proceedings.[47]In the international arbitration practice, there is no common standpoint on these issues and there are no universal principles that would govern the process of creating acceptable solutions for emerging problems. The practical importance of the subject-matter may be seen in the need to identify and analyze problems which have emerged, or may surface, in the course of the practical application of particular solutions contained in national, foreign, autonomous or international arbitration sources, as well as in the necessity to anticipate potential complications which may occur, should some of the solutions originating from the arbitration jurisprudence or judicature be accepted on the broader level. Likewise, of the upmost importance is the application of the academic research results for the purpose of pointing to possible pathways for overcoming both theoretical and practical difficulties related to the participation of multiple subjects with party capacity in arbitral proceedings.[48]

Today, the arbitration rules of the most prominent institutions set forth specific provisions on multiparty arbitrations, and many countries, have enacted legislation addressing the problems that typically arise in these proceedings.[49]This set of rules and statutory provisions are intended to ensure the operation of multiparty arbitrations, and a degree of certainty and predictability in the parties' respective procedural positions, while still preserving the fundamental principle that arbitration is a consensual process.[50]

2.3.1. Types of Multiparty Arbitration

There are two main types of multi-party arbitration: bi-polar and multipolar.[51] Understanding the difference between two has something to do with searching for the solutions underlying multiparty arbitration.

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47 *id*.

48 *id.*

49 FerdinandoEmanuele and Milo MolfaCleary, supra note 41

50 *id.*

51 KlasLaitenen, 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),at 10.

2.3.1.1. Bi-polar multi-party arbitration

A bipolar multi-party dispute is a dispute where 'the parties can normally be divided into a Claimant and Respondent Camp', where the interests of the parties within each camp are coinciding or substantially the same.[52]Bi-polar multi-party arbitration is similar to normal bilateral arbitration, since parties can organized into a claimant camp and a respondent camp.[53]Here, each camp may have claims and counter-claims towards the other camp, but within the each camp, all parties have the same interests. For example: in the construction industry, bi-polar multi-party arbitrations are normal, as guarantors and primary contractors are often in one camp while the owner is in the other. Accordingly, as far as such kinds of multiparty commercial arbitration concerned, the issue as to appointment of arbitrators, administration of proceeding in line with the principles of equal treatment of parties, whether single or several award shall be made and like is not as such issues of great concern. This would attributes of the applicability of normal legal framework of bilateral arbitration to it. The position taken by various institutional rules of arbitration is also in line with the aforementioned line of argument. Prominently the new ICC rules of arbitration entirely emphasized on the issues of multi polar multiparty disputes by setting aside the issues of bipolar multiparty disputes as a defacto rule of normal bilateral arbitration inevitably applied to it.[54]

2.3.1.2. Multi-polar multi-party arbitration

Unlike that of bi polar disputes, in case of Multi-polar disputes, parties cannot be divided into claimant and respondent camps because of their divergent interests.[55] Here, the traditional approach of arbitration as though arbitration is merely two parties set up May makes Multi-polar multi-party arbitration problematic since arbitration was conceived as a dispute resolution mechanism between *two* parties. Due to this scenario, historically arbitration institutions have been very reluctant to entertain multi-party arbitrations. Red fern& Hunter among others have noted that, it is generally desirable to deal with all issues in a singular proceeding, rather than in a series of separate proceedings, as this saves time and money.

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52 Olivier Caprasse,*supra* note 5.

53 KlasLaitenen, supra note 51.

54 DimitarPondev,*supra* note 2, at 12.

55 *id.*

Here, as far as the issues of multi polar multiparty arbitration concerned, it is illusive to guess for the applicability of normal principles of bilateral arbitration to it since parties cannot normally classified into claimant and respondent camp due to their divergent interests. Accordingly ,the issue as to appointment of arbitrators, administration of proceeding in line with the principles of equal treatment of parties, the issues as to whether a single or several awards are ought to made, calculation of costs and advance fees and the like would inevitably problematic. From the aforementioned facts one can easily surmise that, multi polar multi-party arbitration requires separate legal framework from normal principles of bilateral arbitration.

2.4. Multiparty Mechanism

2.4.1. Joinder and Intervention

In arbitration, 'Joinder' is the procedural mechanism by means of which a 'third party' may be brought to an arbitration proceeding already commenced between other parties. 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'.[56]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.[57] In fact, the question of joinder and intervention are the same as both deal with the participation of the third party to the existing arbitration proceeding. However, they are opposite sides of one coin. Joinder refers to a situation when one of the parties to the arbitration proceeding seeks to add a third party, whereas intervention is when a third party wants to become a party to the existing arbitration proceeding.[58] These two mechanisms relate fundamentally to the consent of the parties, and the arbitral tribunal consent - as the consent of all parties is compulsory due to the contractual nature of the arbitration proceeding and its confidentiality.[59]If all parties to an existing arbitration proceeding, including a third party, agrees to joinder and intervention, there should be no concerns. Instead, when at least one party – either a party-signatory of the

56 Klaslaitenen,*supra* note 51, at 4.

57 *id.*

58 AsselKezbekova, The Participation of Third Parties In Arbitration,[unpublished, LLM thesis, university of Toronto, 2013],at 34.

59 *id.*

arbitration agreement or a third party – does not agree, and then the arbitration court or the arbitration institution must consider whether the parties have previously provided for their consent, and whether that is sufficient. Given that, the most of the arbitration agreements and arbitral rules do not contemplate joinder and intervention issues, the arbitration court may decides these issues on the basis of the doctrine of "competence –competence".[60]

2.4.2. Consolidation

Consolidation in international commercial arbitration is known as a "procedural mechanism" of bringing two or more separate pending arbitration proceedings together into one case.[61]The initiation of several parallel arbitration proceedings derived from several contracts will likely lead to duplication of proceedings, usually results in the increase of costs and inevitably contradicting decisions rendered by arbitral tribunals.[62]Dispute resolution today employs various tools to decide collectively, rather than in parallel on claims arising out several contracts or different commercial relationships related to a project with the purpose of reducing legal representation costs, avoiding contradictory nature of several decisions rendered for the same commercial relationship dispute and allow these separate claims to be handled jointly.[63]

Albeit the positive approaches of world community towards consolidation, the application of consolidation as a process of "uniting several arbitration proceedings" into one case does not always go smoothly and obstacles may come up starting from the clause of the arbitration agreement.[64]Accordingly, those not in favor of the consolidation support their view by putting arguments relying on the contractual nature of arbitration, claiming that this would not be in compliance with the principle of contractual nature of arbitration. The other argument put forward is the significance of confidentiality in arbitration, which would be compromised by multi-party proceedings.[65]In line with this, the number of authors who think that the arbitration agreement should not be extended to non-signatory parties is high and the participation of the

60 *id.*

61ArbenIsufi ,Multiple Parties and Multiple Contracts in Arbitration,[unpublished, LLM thesis, Ghent university, may 2012],a ,at 4

62 *id.*

63 *id.*

64 *id.*

65 *id* ,at 5

third party is heavily opposed, insisting that arbitration can be initiated only by parties who directly or impliedly agreed to it.[66]

2.5. Advantages of Multiparty Arbitration

The resolution of all major disputes arising in connection with a single project in a comprehensive arbitration proceeding presents several advantages.

2.5.1. Avoids risk of inconsistent findings and decision

Multi-party arbitration has a numbers of advantages. One of the prominent advantages of multi-party arbitration is that it avoids the risk of having inconsistent or conflicting arbitral awards in cases that face the same or similar points of law and / or fact.[67]This increases the efficiency of the dispute resolution process as a whole. In any proceeding efficiency worth more than anything and this can be easily substantiated with the concerns in case of recourse claims. Prominently, a respondent in a pending arbitration might want to file a recourse claim against a third party that is not participating in the arbitration. In principle, the respondent will not be able to pursue this claim in the same arbitration if the third party does not have direct contractual relations with the claimant. Therefore, the respondent will have to introduce his claim against the third party in a separate arbitration, which will be conducted without the participation of the claimant in the first arbitration. However, the new arbitral tribunal dealing with this second arbitration will not be bound by the findings of the first tribunal as regards the facts of the case and the scope of liability of the respondent. As a result, the recourse claim may be dismissed in the second arbitration despite the fact that the claimant's identical claim against the respondent was successful in the first arbitration.[68]

2.5.2. Save Time and Costs

Advantages of multi-party arbitration are not limited to avoidance of inconsistent findings and decisions. Prominently, an advantage in relation to time and cost is another concern. From an overall perspective, the conduct of a single arbitration instead of separate parallel proceedings

66 *id*.

67 SigvardJarvin, *supra* note 8, at 318

68 DimitarPondev, supra note 2, at 19

dealing with identical or similar points of law and / or fact saves costs and time.[69]As stated by Martin Platte: 'One of the main advantages joinder and consolidation provide is that they reduce the administrative and legal effort and thereby reduce cost, increase speed and – from a general point of view – make proceedings more efficient'.[70] That means multi-party arbitration has something to do with saving time and cost that could in turn ensure the overall efficiency of arbitral proceeding.

2.5.3. Less Factual Errors

The other important advantages underlying multi-party arbitration is related to factual errors. It is often argued that multi-party arbitration decreases the risk of factual errors in arbitral awards.[71] The arbitrators have to take into account the submissions and pleas made by multiple parties. This facilitates the understanding of the tribunal of the mutual rights and obligations under the related bilateral contracts. They are able to acquire a more complete and detailed picture of all the facts of the case because of the participation of all the parties in the dispute which may decrease the risk of factual error.[72]In other words, since multi-party arbitration allows arbitrators get a more complete picture of a transaction and the party's obligations towards each other, it is illusive to guess for the peril of factual errors.

2.6. The Shadow Limiting Full Implementation of Multiparty Arbitration

2.6.1. Consensual Nature of Arbitration

International arbitration has a fundamentally consensual nature; moreover, the cornerstone of the international arbitration is a party autonomy: only those parties – who have clearly agreed to arbitrate their dispute by means of an express consent - may participate in the arbitration proceedings.[73] Indeed, autonomy of the parties is the first and most important principle of arbitration. The principle of the party's autonomy provides parties with freedom to contractually

69 SigvardJarvin,*supra* note 8, at 318

70 Martin Platte , Multi-Party Arbitration: Legal Issues Arising Out of Joinder and Consolidation, 2008 as cited in DIMITARPONDEV, MULTI-PARTY AND MULTI-CONTRACT ARBITRATION IN THE CONSTRUCTION INDUSTRY, John Wiley & Sons ltd, 1stedn, 2017, at 19

71 DimitarPondev, *supra* note 2, at 20

72 Irene M. Ten Cate ,*Multi-Party and Multi-Contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreements under US Law,Am.Rev.Int'LArb.*15(2004), at 137–138.

73 Stavros Brekoulakis, *The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room*, 113(4) PENN STATE LAW REVIEW, 1165(2009), at 1166.

determine the circle of persons entitled to participate in the arbitration proceedings.[74]The main obstacle to conduct multiparty arbitration is the consensual nature of arbitration.[75]Unlike state courts, which derive their jurisdiction from the state and the state legislation, the jurisdiction of arbitral tribunal is based on agreement of the parties. Furthermore, arbitral tribunal do not have the wide ranging power of state judges to consolidate parallel proceeding or order joinder of third parties in to existing proceeding.[76]

2.6.2.Arbitration as a Two Party Set Up

Originally arbitration was predominantly dealing with resolution of bipolar disputes.[77] Therefore, arbitration had a two party set up and this did not suit complexities of multipolar arbitration disputes in cases where parties pursued their own specific interests, which were different from and sometimes contrary to the interests of other parties.[78]This perception of arbitration for resolution of bipolar disputes has not been completely eradicated yet. In recent years we are witnessing overhauls of most popular set of arbitration rule with the purpose of adapting them to multiparty disputes. These revisions have introduced specific provision with different legal technique through which multiparty arbitration may take place. Therefore the traditional two party set up of arbitral proceeding as an obstacles to multiparty arbitration is gradually fading away.[79]

2.6.3. Arbitration as a Confidential Process

Confidential nature of arbitration is another prominent advantage of arbitration. Most of the time arbitral awards are not published and even proceeding is organized in the way that does not expose the business secrets of the parties to the outsiders or third parties.[80] Taking that into consideration, it is doubtful whether third parties should be allowed to participate in arbitral

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74 *id.*

75 Kristina Mariasiig, *Multiparty Arbitration in International trade: Problems and Solution*, 1(2)INTERNATIONAL JOURNAL OF LIABILITY AND SCIENTIFIC ENQUIRY, 2007, at 73.

76 DimitarPondev, *supra* note 2, at 21.

77 *id*, at 23.

78 *id.*

79 *id.*

80 *id.*

proceeding pending between two other parties.[81] The general understanding is that all parties that may directly or indirectly participated in arbitration including arbitrators, witnesses, experts or any supporting personnel, and contracting parties to arbitration are not allowed to reveal anything about the arbitration to the outsiders or third parties.

2.6.4. Recognition and Enforcements of Arbitral Awards

It is truism that arbitration is consensual in its nature, and everything in relation to arbitration should be undertaken in line with an arbitration agreement. Coming to multi party arbitration especially in case of joinder or intervention , third parties are supposed to join or intervene in pending arbitral proceeding and this could in turn undermines the consensual nature of arbitration. To this effect, on the basis of newyork convention, it would inevitably be grounds for refusal of recognition and enforcements of arbitral awards.[82] Not only this, it is also quite difficult to ensure equal treatment of the parties in the appointment of arbitrators**.** This could similarly be taken as grounds for refusal of recognition and enforcement of arbitral awards.

2.7. Major Conundrum (Problems) In Multi-Party Arbitration

While arbitration in international commercial transactions has come of age, the resolution of multiparty disputes continues to present problems for both domestic and international practitioners alike. Multi-party arbitration is the complex phenomena in international commercial transactions, and it involves a number of implementation difficulties. This can be easily surmised from ICC experiences.[83]Accordingly, On the basis of the ICC Court's experience, the first problem is in relation to administering requests for Multi-Party Arbitration[84].One issue for any authority administering arbitrations in a multiparty context will be to determine how multi-party cases will be identified. Further, the authority must decide the degree of initiative it should exercise where an opportunity for multi-party arbitration exists, especially where there is no evidence of a binding multi-party agreement. When a request for arbitration is submitted to the authority, a study of the arbitration clause involved can make it clear that multiparty arbitration has been provided for. The authority must then apply routines not normally found in a normal

81*id.*

82 NewyorkConvention , Art. V(1)(d)

83 SigvardJarvin, *supra* note 8, at 322.

84 *id.*

bilateral case. For instance, the procedure for the appointment of arbitrators may be different, or the place of arbitration might be fixed after only hearing the opinions of all the parties to the multi-party proceedings. These considerations will lead to longer delays before the arbitration proceeding may commence.

The second problem is in relation to deciding parties to multiparty arbitration.[85]In a large project, there are often more than three parties involved in one capacity or another. Where a consensus suggests the possibility of multi-party arbitration, one issue becomes defining and limiting the number of contracting parties involved in order to avoid cumbersome and impracticable multi-party arbitration that will not serve its purpose[86].

The third conundrum is related to equal treatment of all parties. Each of the parties with a separate interest in the case must be entitled to participate personally and to be represented in the proceedings.[87] However, due to the tremendous number of the parties, it is quite cumbersome to ensure equal participation of all parties.

The fourth delicate issue in case of multiparty arbitration is appointment of arbitrators.[88]Most of the time in case of transactions which involve only two parties, the arbitration agreement (so called bipolar)provides for the mechanism whereby each party appoints one member of the arbitral tribunal and the two party nominated arbitrators (or the institution) design the third arbitrator. This mechanism would be impractical in case of multiparty situations as it is not always possible for each party to appoint its own arbitrator.[89]

As far as the issues of appointment of arbitrators concerned, *Dutcocase* of 1992,[90]is the prominent case that put an initial inception in alerting the world community to give a due

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85*id.*

86 *id*, at 323.

87*id.*

88 Michelangelo Cicogna, Appointment of the Arbitrators in Multiparty Arbitrations, 2014, Available at http://www.ispramed.it/root/wp-content/uploads/2014/09/Appointment-of-the-arbitrators-in-multiparty-arbitrations_M.-Cicogna.pdf(accessed On April 27, 2018)

89*id.*

90 The Dutco case – Siemens AG and BKMI Industrieanlagen GmbH v Dutco Construction Co (Dubai) –French Cour de Cassation decision of January 7, 1992, Revue de l' arbitrage 470 (1992). In this case, the dispute was arisen out of a consortium agreement made by Dutco, Siemens and BKMI for construction of a plant. In their agreement there was an arbitration clause for ICC arbitration by three arbitrators. Dutco brought a claim against Siemens and BKMI. Dutco was appointed one arbitrator while Siemens and BKMI were asked by ICC to jointly appoint one arbitrator. They were insisted on not to jointly appoint arbitrators by raising their

attention for appointment of arbitrators in case of multiparty arbitration. The problem in relation to appointment of arbitrators is not limited to the aforementioned issues. Another delicate issue is in case of joinder, intervention and consolidation of arbitral proceeding.[91] As far as the issues of joinder, intervention, and consolidation concerned, either third party is allowed to join pending arbitral proceeding or two pending arbitral proceeding is allowed to merge together. Accordingly, what would be the fate of newly joined parties in appointing arbitrators of their own? If the joinder/intervention/consolidation comes before the confirmation of the arbitrators the situation is simplified since, the newly added can participate in the constitution of arbitral awards. But, such possibility is quite difficult if joinder, intervention or consolidation is required after confirmation or appointments of arbitrators.

divergent interest and equalities of parties in appointment of arbitrator .however, they were finally appointed jointly by reserving their rights to challenge appointment procedure. Then they were moved on challenges of appointment where by the highest court of France indeed annulled the ICC award holding that in multiparty proceedings each of the several co-respondents had the right to appoint its own arbitrator. The justification of the court was that if the principles of equality of the parties violated, an award will be open to annulment.

91*id.*

CHAPTER THREE

UNCOVERING THE CURRENT MOVE TOWARDS MULTI-PARTY ARBITRATION: SOLUTIONS FOR MULTIPARTY ARBITRATION UNDER INSTITUTIONAL ARBITRAL RULES AND NATIONAL LEGISLATION

3.1. Introduction

The French Cour de cassation of 1992 Dutco decision is a turning point in the historical move of the world communities towards the regulation of multi-party arbitration. Although, solution adopted differs in some particulars, the leading institutional arbitral rules, and national legislation are now incorporated provisions for proper regulation of multi-party arbitration. Hence, this chapter is devoted to vividly uncover the current move of the world communities towards the regulation of multiparty arbitration. In line with this, the major reforms made under international legal framework in favor of multi-party arbitration from Dutco case of 1992 up to 2018 will be summarized. It also goes to illuminate on the solution adopted under leading arbitral institution (ICC, LCIA and UNICITRAL arbitral rules), and arbitration law of Netherlands, Hong Kong, and South Africa.

3.2.Major Reforms Undergone to Manage Complexities of Multi-Party Arbitration under Institutional Arbitral Rules and National Legislation since Dutco Case of 1992 up to 2018

For arbitration to exist and succeed there must be a regulatory framework which controls the legal status and effectiveness of arbitration in a national and international legal environment.[92] Hence, approaching the issues of multi-party arbitration with the normal principles of bilateral arbitration process was impractical. This can be easily surmised from Dutco case of 1992 whereby the ICC arbitral tribunal was feeling just like the fish out of water in addressing the issue of appointment arbitrators in multi-party arbitration by normal principles of bilateral arbitration.[93]Owing to the problem encountered by the ICC tribunal on Dutco case, in 2012 ICC have amended its arbitral rules with proper inculcation of provision governing Multiparty

92 JULIAND.MLEW,LOUKASA.MISTELIS, &STEFAN M.KROLL:COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law ,2003, at 17.

93 Dutco case, *supra* note 90.

Arbitration. Even, in 2017 ICC were come up with new amendments by inculcating provision of an expedited procedure for lower-value cases. Taken as a whole, the 2017 revisions to the ICC Rules represent an impressive effort by one of the world's leading arbitral institutions to further promote efficiency, cost savings and transparency in international arbitration.[94]

Another important reform that worth discussion is the amendments made to UNICITRAL arbitral rules. The UNCITRAL Arbitration Rules were initially adopted in 1976 and have been used for the settlement of a broad range of disputes, including disputes between private commercial parties where no arbitral institution is involved, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions.[95]The UNCITRAL Arbitration Rules (as revised in 2010) have been effective since 15 August 2010 and the major reforms were inculcation of provisions dealing with, amongst others, multiple-party arbitration and joinder, liability, and a procedure to object to experts appointed by the arbitral tribunal.[96]

International arbitral rules is not limited to ICC and UNICITRAL arbitral rules and various arbitral institutions have also amended their arbitral rules in coping up with the currently circumventing complexities of multi-party arbitration. In line with this, London court of international arbitration was amended its rules in 2014 by inculcating the issues of joinder, consolidation and multiparty contract.[97] In the same year ICDR has also amended its international dispute resolution procedures and inculcated provision governing multi-party arbitration.[98] Furthermore, in 2016, Singapore International Arbitration Centre (SIAC) was released its new arbitration rules with proper inculcations of provisions regulating multi-contract and multi-party arbitrations, joinder and consolidation.[99] In the same year, JAMS international arbitration rules were also amended with successful inculcation of provision for multiparty

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94International Arbitration Update: Revised ICC Arbitration Rules and Note Take Effect, march 31,2017(here after called ICC rule)available athttps://www.sidley.com/en/insights/newsupdates/2017/03/revised-icc-arbitration-rules-and-note-take-effectaccessed on march 7,2018)

95 United Nations Commission On International Trade, Arbitral Rules As Revised in 2010(hereafter UNICITRAL rule) available at www.unicitral.org/unicitral/en/unicitral-texts/arbitration/2010,(accessed on march 11,2018).

96 UNICITRAL rule, art 17(5)

97London Court Of International Arbitration Arbitral Rules, effective 1 on October 2014(here after LCIA rule) available at www.lcia.org/dispute_resolution_services/lcia-arbitration-rules2014.aspx, Art.8,&22(1) (accessed on march 11,2018).

98International Center For Dispute Resolution Arbitral Rules,(here after called ICDR rule) available at internationalarbitrationlaw.com/...arbitration/international-arbitration-rules/icdr-arbitra.art 7,8 and 12 (accessed on march 11,2018)

99Angela Carazo Gormley, Institutional Approaches to Multi-Party and Multi-Contract Disputes in Arbitration, May 3, 2016 available at https://www.clydeco.com/insight/article/institutional-approaches-to-multi-party-and-multi-contract-disputes-in-arbi(Accessed on May 30,2018).

arbitration whereby the issues of joinder, intervention and consolidation of arbitral proceeding, and appointments of arbitration were properly addressed.[100]Again, in 2017 ICAC international arbitration rules were amended with successful incorporation of provisions for multiparty arbitration.[101]

Even there are some arbitral institutions that have vividly commenced their move for updating their arbitral rules for the sake of expanding the scope of multiparty arbitration. Prominently, in late 2017, the HKIAC Rules Revision Committee announced that it was considering amendments and released a list of potential updates for interested parties to provide their views. Notably, with respect to the potential new "trend," the updates presently under consideration include expanding the grounds for Joinder.[102] Besides, in November 2017, the DIAC announced that it would be introducing a new set of rules in 2018, replacing its current 2007 rules and it has published the proposed rules whereby the ability to seek consolidation of proceedings is one among them.[103]

Even, in this year or in 2018, some arbitral institutions have amended their arbitral rules with the primary objectives of inculcating provision for multiparty arbitration. Prominently, German arbitral institution has amended its rules by comprehensively incorporating the issues of multi-party arbitration. Prominently, the 2018 DIS Arbitration Rules include new provisions on Multi-Party Arbitration (Art. 18), Consolidation of Arbitrations (Art. 8), and on arbitrations arising from multiple contracts (Multi-Contract Arbitration, Art. 17).[104]

OnMarch5, 2018OHODA has amended its uniform act on arbitration by incorporating provision for multiple parties and parallel arbitration proceedings.[105]In fact, the reforms made to cope up with the complexities of multiparty arbitration was not limited to the reforms made by the

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100 Judicial Arbitration and Mediation Service, International Arbitral Rules ,effective September 1,2016(here after called JAMS rule) available athttps://www.jamsadr.com/international-arbitration-rules/, art.7&8 (accessed on march 27, 2018)

101RustemKarimullin,' ICAC International Arbitration Rules Released(here after ICAC rule)', Kluwer Arbitration Blog, February 13 2017, http://arbitrationblog.kluwerarbitration.com/2017/02/13/reserved-for-13-january-2017-antitrust-arbitration/.accessed on march 27.2018

102Angela Carazo Gormley, *supra* note 99.

103 *id.*

104 *id.*

105Roland Ziadé, Clément Fouchard, New OHADA Arbitration Text Enters Into Force, Kluwer Arbitration Blog,2018, available http://arbitrationblog.kluwerarbitration.com/2018/03/30/new-ohada-arbitration-text-enters-intoforce(accessed on May 29,2018).

aforementioned arbitral institution and there are also another institution that have already undergone the same step. Accordingly, the aforementioned major amendments are randomly taken to show how much the world community is geared towards the regulation of multi-party arbitration.

In similar fashion with institutional arbitral rules, various countries have amended their national legislation with the primary objective of coping up with the complexities of multi-party arbitration. In 2006,Italy was introduced a statutory multi-party arbitration provision that allowed joinder, and consolidation of arbitral proceeding subject to the consent of all parties including arbitrators (if they have already been appointed).[106]Hong Kong was also refined its arbitration ordinance in 2011 with special emphasis on the issues of consolidation.[107]Again, the new Belgian arbitration law that was entered into force on 1 September 2013 has a clause dealing with both joinder and intervention.[108] Furthermore, on 27 May 2014, the Dutch Parliament was adopted certain amendments in the Netherlands Code of Civil Procedure and refined provision governing multi-party arbitration.[109]In 2017, South Africa was also come up with the new arbitration act no 15 of 2017 with a successful incorporation of provision for regulation of the complexities of multi-party disputes.[110] The reforms made to national legislation for the sake of regulating multiparty arbitration is not limited to the aforementioned countries and I have purposively taken some of the reforms that was made after 2010 so as to unveil how the communities of the world is inclined towards the regulation of the complexities that entrenched within multi-party issues.

In nut shell, though their approaches are differing, various arbitral institution and countries have amended their arbitral rules to cope up with the complexities of multiparty arbitration.

106Italian Civil Procedure Code. Art. 816.

107Hong Kong Arbitration Ordinance of 2011,(Chapter 609), http://www.legislation.gov.hk/blis_pdfnsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/$FILE/CAP_609_e_b5.pdf(accessed on april,28,2018).

108New Belgium Code of 2013,Art.1079.AnEnglish translation is available at http://www.cepani.be/en/arbitration/belgian-judicial-codeprovisions , (accessed on April 28,2018)

109Netherlands Code of Civil Procedure of 2015, Art.1045 and 1046.

110Gerhard Rudolph And Michelle Wright ,Global Arbitration Review, May 2017,available at https://globalarbitrationreview.com/jurisdiction/1000205/south-africa(accessed on May 28,2018)

Accordingly, since exploring the approaches taken by all arbitral rules and national legislation is frivolous, the solutions adopted by some leading arbitral institution and selected national legislation will be explored later on.

3.3.Multi-Party Arbitration from the Perspectives of Institutional Arbitral Rules

3.3.1. ICC Rules Of 2017

3.3.1.1. Joinder and Intervention

The 1998 ICC Rules of Arbitration did not contain any provision dealing exclusively with a joinder of additional parties; rather it provides that the Court has to decide whether a third party may join the arbitration proceedings.[111] However, while the ICC revised its Rules of Arbitration in 2012, the Joinder of additional parties was vividly incorporated[112] and the status quo was preserved by the currently working ICC rules of arbitration of 2017.Thus, article 7(1) of 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 party of the arbitration proceeding can join pending arbitral proceeding up on "Request for Joinder" to the Secretariat. Joinder of third parties does not however allow arbitrarily. There should be an arbitration agreement that binds all parties on the issues of joinder of third parties.[113] The other important point is the approach taken by ICC rules in ensuring equal treatment of the parties in appointment of arbitration in case of Joinder of the parties. In relation to these issues, joinder of parties after appointment or confirmation arbitrator is not allowed under ICC rule.[114]The main reason for not allow joinder of additional parties after confirmation or appointment of arbitrator is that it is impractical to give an opportunity for newly joinder parties to participate in appointment of arbitrators. So, if the request for joinder is made before the confirmation or

111 ICC rule of 1998, art .4 (6).

112 ICC rule of 2012, art.7.

113 ICC rule of 2012,article 6(4)(i)

114 ICC rule, Art. 7(1)

appointment of arbitrators, the newly added parties to arbitration can possibly participate equally with the original parties in appointment of arbitrators.

In 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.

3.3.1.2. Consolidation

If we ponder through, the arbitral rues 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 ICC 2017 provides: Thus, article 10 of 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 consolidation; or
>
> b)all of the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the courts finds the arbitration agreements to be compatible.

From the aforementioned articles, we can imagine of three main scenarios where consolidation may be ordered by ICC court upon the request of the parties willing to do so. The first scenario in which two pending arbitration proceeding may consolidated is parties agreement. Accordingly, if there is explicit agreement of the parties in all of arbitrations to be consolidated, the court may order consolidation. The second phenomena when consolidation may be ordered under ICC arbitral rule is when 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 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 sane arbitration

agreement to arbitrate albeit they may not parties to both arbitration.[115] On the other hand, it can be the case that claims made in these arbitrations are totally 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 is no links between the claims, then the court can refuse to consolidate the arbitrations.[116]

Again, in case when claims in arbitration are made under more than one arbitration agreement, the court may order consolidation of parallel proceeding provided that the concerned arbitration is between the same parties, on the basis of the same legal relationship, subject to the compatibility of the concerned arbitration agreement. In such instances arbitration agreements may considered incompatible in cases where factors such as place of arbitration, language of arbitration, the mechanism for selecting arbitrators or number of arbitrators are different.[117]

Generally, irrespective of the way in which 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 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.

3.3.1.3. Appointment of Arbitrators

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

Accordingly, if there is multiparty dispute that is supposed to undertake by three arbitrators, joint appointment is recognized as a remedy.[118] In line with this, in case of bipolar multiparty arbitration joint appointment is recognized as a basic mechanism for appointment of arbitrators since parties can normally classified into claimant and respondent camps. Again in case of multi

115 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-arbitratio/(last accessed on April 14,2018).

116 *id.*

117 *id.*

118 ICC rule,Art. 12(6) .

polar disputes, it is illusive to think for joint appointment of arbitrators because of divergent interests of the parties, and in such scenarios discretion is given for ICC court to appoint each member of arbitral tribunal.[119]

Not only this, so as 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, pursuant to Article 7(1), no party may be joined after the confirmation or appointment of any 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 concerned, joint appointment of arbitrators is recognized, and in absence of joint appointment, the ICC court is endowed with the discretion to appoint arbitrators.

3.3.2. LCIA

3.3.2.1. Joinder

In similar fashion with other institutional rules, LCIA arbitral rules have clearly 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 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.

On the basis of 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

119ICC rule,Art. 12(8)

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. In fact, the written consent of all parties to arbitration including third person is a precondition for in determining the Joinder of third parties. What makes things difficult is the possibility of the consent after the commencement of arbitration. Because, addressing the issues of appointments of arbitrators in a way that compromise equal participation of the parties would inevitably impractical. If we look at experiences of ICC, Joinder of third party is not allowed after the appointment or confirmation of arbitrators (after commencement of arbitration).

Generally, under LCIA arbitral rules, Joinder of third party is allowed subject to the written consent of all parties including third person, though possibility of consent after commencement of arbitration is subject of bargaining.

3.3.2.1. Consolidation

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

Thus, Article 22.1 of LCIA 2014 provides,

> (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:

On the basis of 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 proceeding 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 approval of the LCIA court. First, 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 up on the approval of LCIA court.

Secondly, though arbitrations to be consolidated may not commenced under the same arbitration agreement, if arbitrations to be consolidated is commenced under any compatible arbitration agreement(s) between the same disputing parties, provided that 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, arbitral tribunal has a power to order consolidation of those arbitrations subject to approval of LCIA court.

3.3.2.2. Appointment of arbitrators

The process of appointment of arbitrators in case of multi-party constellation under LCIA arbitral rule is fragile and often leading to unpleasant situations for participating parties in arbitration and arbitration institutions itself, particularly in the scenario when the arbitration clause does not have clear enough roadmap for the modality to be followed by the disputing parties in order to reach on consensus that needed to have arbitrators appointed arbitral tribunal collectively as foreseen by the LCIA arbitration rules.[120]In the absence of a collective agreement among parties, notwithstanding any potential nomination made by the individual party, the LCIA Rules provide for the appointment of the entire arbitral tribunal by the institution itself.[121] 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 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.

120 Stefania Bondurant, *A Practitioner's Guide: An Overview Of The Major International Arbitration Tribunals*, 3 S.C. J. INT'L L. & BUS. 21 (2006),at 216.

121*id.*

> 8.2 In such circumstances, the Arbitration Agreement shall be treated for all purposes as a written agreement by the parties for the appointment of the Arbitral Tribunal by the LCIA Court.

From the aforementioned articles, in case where parties agreed in writing for 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, appointment would be undertaken per agreement of the parties. However, in default of 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. Accordingly, as far as the issues of bi polar multi-party arbitration concerned, for joint appointment to come into an effect, there should be written agreement to that effect. Things may even worse in case of multi polar multi-party arbitration. Because of the divergent interests of the parties, it is illusive to guess for the existence of the written agreement among the parties for the appointment of arbitrators. Hence, in case of multi polar disputes, the LCIA court is always blessed to appoint arbitrators on its own discretion.

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

3.3.3. UNICITRAL arbitral rules

3.3.3.1. Joinder

In similar fashion with another arbitral rules, UNICITRAL rules have also clearly incorporates the issue of 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 award or several awards in respect of all parties so involved in the arbitration".[122]

On the basis of 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 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, at the first instance, the third parties should be party to arbitration agreement, and all parties should be given an opportunity to have their own say on joinder of third parties and consented to it. Indeed, if the concerned third party is party to arbitration agreement and all parties to arbitration have no objection on 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.

3.3.3.2. Appointment of arbitrators

With the revision of its arbitral rules in 2010, UNCITRAL was answered the question as to the appointment of arbitrators in multi-party disputes. Thus, Article 10(1) UNICITRAL rules of 2010 provides that*" where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator".*[123]

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

> 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,

122 UNICITRAL rule, Art.17(5).

123 UNICITRALrule, Art. 10.

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 joint appointment of arbitrators, implied mechanism for appointment arbitrator(s) is provided. Accordingly, when the parties may not classified into defendant and claimant camps, the appointing authority is empowered to constitute arbitral, and it may even revoke an appointment already made.

3.4. Experiences of Some National Jurisdictions on Multi-Party Arbitration

Owing to the central principles of arbitration like parties autonomy and consensual nature of arbitration, institutional arbitral rules and national laws has been refrained from addressing multi-party disputes. The UNCITRAL Model Law is also silent on the matter. However, a few states have introduced statutory multi-party arbitration provisions allowing for consolidation of parallel arbitrations and / or joinder of third parties into pending arbitration under certain conditions.[124]

Arbitration legislation of many countries did not address the issues of consolidation, joinder or intervention expressly.[125] Since national legislations still have a major impact on international arbitration, the content of different national laws and practices is of great importance as a source of international arbitration law, primarily of those countries that are traditionally viewed as popular arbitration *fora* or those with innovative legislation in this field (USA, England, Hong Kong, Netherlands, Australia, Canada and France) understandably, being on the provisions and decisions pertaining to consolidation, joinder and intervention.[126] Accordingly, the solutions that forwarded to multi-party arbitration under Netherlands, Hong Kong and South Africa will be explored below.

3.4.1. Netherland

Alike that of the international arbitral rules, the complexities of multiparty arbitration was also the concerns of national legislation to which Netherlands is not an exception. In Netherlands, from the elements of multiparty arbitration, consolidation of parallel arbitral proceedings was

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124DimitarPondev, *supra note* 2, at 121

125GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, Vol 1 (Kluwer 2009), at 2067-2104

126D.Janićijević, supra note 44 ,at 38

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 by virtue of an order issued by the President of the Amsterdam District Court following a party's request.[127]

On May 27, 2014, the Dutch Parliament was adopted certain amendments in the Netherlands Code of Civil Procedure whereby Article 1046 was also refined.[128]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.
>
> (2)Consolidation may be ordered insofar as it does not cause unreasonable delay in the pending proceedings, also in view 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 them together to avoid the risk of irreconcilable decisions resulting from separate proceeding.

From this provision, one can easily surmise that consolidation under Netherlands law has opt-out character, and the consolidation provision 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 discretion to order multi-party arbitration. The courts may even order compulsory multi-party arbitration. Such kinds of order have a tendency to totally undermine the central principles like

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127 Jacomijn Van Haersolte-Van Hof, *Consolidation under the English Arbitration Act 1996: A View from the Netherlands,13(4) ARBITRATION INTERNATIONAL* (1997), at 427.

128For 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).

party autonomy and consensual nature of arbitration. Not only this, the arbitral awards that rendered through such avenues is susceptible to refusal of recognition and enforcement of arbitral awards on the basis of article V (1) (d) of New York convention. What makes such kinds of phenomena worse is that those parties who are not cognizant of the existing rules on multiparty arbitration would inevitably take a risk of compulsory consolidation

Unlike consolidation, the position taken by Netherlands code of civil procedure on joinder and intervention is subjected to opt in requirement for its implementation.

Thus, Article 1045, effective as from 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 power of the arbitral tribunal to order joinder and intervention of third party is subjected 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 binds all parties. However, the final discretion to allow joinder lies with the arbitral tribunal irrespective of whether all concerned parties have consented.

Generally, the position of Netherlands law in relation to multi-party arbitration is a hybrid of opted out and opted in approaches. ‘opt-in’ approach is adopted in relation 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 case of consolidation albeit its consonance with consensual nature of arbitration is subject of bargaining.

3.4.2. Hong Kong

Hong Kong’s arbitration legislation is based on the UNCITRAL Model Law which was devoid of the provision governing multi-party arbitration. 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.[129] 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.[130]Under that clause, the consent of the parties did not explicitly considered, and therefore it was possible to apply that clause to multi-party disputes stemming from contracts containing arbitration agreements silent on consolidation.[131] 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.[132]The cases were concerned a domestic project for the construction of two 34-storey buildings. Shui On was the main contractor on the site who had entered into numerous subcontracts. One of them was with Schindler 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 because they were drafted with reference to each other. Both contracts contained arbitration clauses. Accordingly, the issues of consolidation were come in to an effect in relation to the arbitration between Shui On and the employer on one hand and arbitration between Shui On 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. Shui On, once again requested consolidation, and the Supreme Court were finally allowed the formal Consolidation of the proceedings.[133] 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.

129Hong Kong Arbitration Ordinance 1982 of, available http://oelawhk.lib.hku.hk/items/ show/3286, at Chapter 341, Section 6B (accessed on April 28, 2018).

130*id*

131GEOFFREY MA AND NEIL KAPLAN ,ARBITRATION IN HONG KONG: A PRACTICAL GUIDE, SWEET & MAXWELL ASIA, (2003),at 259–260.

132Re Shui On Construction C. Ltd .v. Schindler Lifts (HK) Ltd. [1986] ,Hong Kong law Report 1177.

133DimitarPondev, *supr*a note 2, at 135

The legislative approach to consolidation in Hong Kong was changed; when a new Arbitration Ordinance came into force on 1 June 2011.[134]One of the purposes of the new Act was to diminish the powers of state courts to intervene in the proceedings.[135] Accordingly, the previous approach on the issues of consolidation was also changed. Thus, the new ordinance under Article 2 of Schedule 2 provides;

> (1) If, in relation to 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 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 – (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 was 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 opt in requirement. That means, the power of the court to order consolidation is come into effect only where parties opt for its application under arbitration agreement.

3.4.3. South Africa

The Arbitration Act No. 42 of 1965, which has been governing both domestic and international arbitration proceedings in South Africa, is not based on the UNCITRAL Model Law. Arbitration proceedings in South Africa are relatively flexible, and a procedural framework is usually agreed

134*id.*

135 Kun Fan, The *New Arbitration Ordinance in Hong Kong,29(*6) *JOURNAL OF INTERNATIONAL ARBITRATION*, (2012), at, 715–717.

upon between the parties with the Act underpinning and supporting the agreed upon arbitration process.[136] However, the arbitration Act has been criticized for its failures to put a line of demarcation or distinction between domestic and international arbitration, and deviation from UNCITRAL Model Law. Accordingly, in order to create certainty and align South Africa with international best practice, the SALRC recommended the adoption of a draft bill closely aligned with the UNCITRAL Model Law, and proposal for reform was approved by the South African government on 1 March 2017, and came into effect on 20 december2017. [137]With the coming into operation of the International Arbitration Act ("Act") on 20 December 2017, South Africa was dedicated to statute governing international arbitration for the first time. The Act has brought South Africa into line with international best practice on international arbitration via the incorporation of UNCITRAL Model Law.[138]The new international arbitration act of no 15of 2017 applied only to international arbitration and Arbitration Act No. 42 of 1965 was continued to regulate domestic arbitrations. Coming back to the issues of multiparty arbitration, the new arbitration act no 15 of 2017 has incorporated provision for regulation of the complexities of multi-party disputes. Thus, article of 10 of arbitration act 15 of 2017 provides;

(1) The parties to an arbitration agreement may agree that—

(a) The arbitral proceedings 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 consolidation of arbitral proceedings or concurrent hearings unless the parties agree.

On the basis of 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 own matter with their chosen arbitrator or tribunal. In circumstances where related contracts between different parties give rise to similar issues, a consolidation of arbitral proceedings can be agreed to.[139]

Furthermore, in relation to 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

136Gerhard Rudolphand Michelle Wright, *supra* note 110.

137 PierreBurger, *supra* note 17.

138*id.*

139P.RAMSDEN, THE LAW OF ARBITRATION, SOUTH AFRICAN AND INTERNATIONAL ARBITRATION,(1st edn,2009) ,at 124

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.[140]In circumstances where there is 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.[141]

The approach of South Africa in relation to the solution for the complexities of multi-party arbitration can be taken as exemplary for striking a balance between the central principles of arbitration like party autonomy, confidentiality and consensual nature on one hand and necessity of multiparty arbitration on the other hand

3.5. Concluding remarks

Since the Dutco case of 1992, the world communities have totally inclined towards the regulation of multiparty disputes. The complexities of multiparty disputes, specifically appointments of arbitrators that were encountered by ICC court on Dutco case on one hand, and advantages of multiparty arbitration in saving cost and time, as well as avoiding the peril of conflicting decision which in turn contributes for international trade were inspiring factors for the world communities to do so. Prominently, the efforts undergone and the approaches the world community have been avail of themselves in compromising the merits of multi-party arbitration on hand, and peril underlying it like party autonomy, confidentiality and consensual nature of arbitration on the other hand is of great importance. Accordingly, if we look at the experiences of arbitral rules, the dominant position is that multi-party arbitration is ordered provided that all parties to arbitration is consented to it. The position of ICC arbitral rules, and UNCITRAL arbitral rules in its part concerning consolidation, can be mentioned as an example.

In addition, when we look at national legislation of the countries that was within the ambits of this paper, the dominant approach taken in almost all cases is that consolidation and joinder/intervention may be ordered by an arbitral tribunal or a national court, subject to the

140Gerhard Rudolphand Michelle Wright,*supra* note 110

141*id.*

disputants (unanimous) agreement. In the absence of such unanimous agreement, both the tribunal and local courts will not be authorized to order consolidation or joinder/ intervention.

In nutshell, from the experiences of both arbitral rules and national legislations, what one can reasonably surmise is that, multi-party arbitration is possible, but subject to the consent of all parties to arbitration. This approach is in conformity with what prescribed by the New York Convention and more generally with respect to the parties' procedural autonomy in international arbitration.

CHAPTER FOUR

MULTIPARTY COMMERCIAL ARBITRATION UNDER ETHIOPIAN LAW

4.1. Introduction

Many countries have arbitration laws so as to facilitate the settlement of commercial disputes in an efficient and amicable manner. Ethiopia is not an exception, and it has laws that allow and, in some cases, promote disputes to be settled by arbitration. Accordingly, the main sources of Ethiopian arbitration law which are of generally applied to both commercial and non-commercial disputes are the 1960 Civil Code and the 1965 Civil Procedure Code. Civil code of Ethiopia governs the substantive aspects while civil procedure code is there to govern the procedural aspects.[142] To this effect, the place of multi-party commercial arbitration under the Ethiopian arbitration law is the concern of this chapter. The place of multi-party commercial arbitration under institutional arbitral rules of AACCSA and the need for multiparty arbitration in Ethiopia will marks the final topic of discussion under this chapter.

4.2. The Place of Multiparty Commercial Arbitration under Ethiopian Arbitration Law

Multiparty arbitration is arbitration of any disputes that involves 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 international legal framework. In fact, those widely used instruments may also leads to multi-party issues or increases multipartism since third parties are allowed to either join or intervene, or two parallel proceeding are to be merged together. Frankly speaking, the issues of joinder, intervention and consolidation of parallel proceeding are not guest for Ethiopia. In relation to ordinary court

[142] Article 3325-3346 of civil code governs substantive aspects like arbitration agreement, appointments, removal or disqualification of arbitrators, and etc. The substantive provision of the civil code will come into effect if arbitration is required by law or the persons have entered into a written agreement to submit their disputes to arbitration. It provides for default rule on substantive issues of arbitration, and its applicability comes into an effect, up on the failure of the parties to address certain substantial issues via arbitration agreement. Article 315-319 ,244(2)(g), 350-357 & 456-461 of Civil Procedure Code on its parts deals with the procedures to be observed during arbitration proceedings, making of awards, review of awards, and the requirements and procedures for the enforcement of foreign awards.

litigation, the Ethiopian court are authorized to order joinder, intervention and consolidation of parallel proceeding subject to the condition provided thereof.[143] But, the same may not be true in case of arbitration. 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.[144] However, the development of modern international trade has led to complex transactions, involving several parties.[145] A logical consequence of the increase of complex commercial relationships is that, disputes have also become complex and multi-party.[146] This is not an exception for Ethiopia, and whether we like or not, the issues of multi-party arbitration would inevitably come into an effect.

Being cognizant of the aforementioned facts, it is the right time to move on the legal status or place of multiparty arbitration under the Ethiopian arbitration law. To begin with, the Ethiopian arbitration law did not clearly recognize nor prohibit the issues of multi-party arbitration, rather remain silent. But, one may wonder as to whether the silence of Ethiopian arbitration law tantamount to prohibition, or the assertion "something that is not prohibited is allowed" is ought to be taken. Here, we have to be conscious of the fact that, arbitration is grounded on arbitration agreement, and even in default of consensual arrangement of the parties, we cannot imagine of the possibility of arbitration saving for mandatory arbitration by the law. Besides, arbitration law is default rules and its applicability is only to fill the gap that may left by the parties while they provided for arbitration via arbitration agreement. Hence, the aforementioned assertion may not be a stepping stone to determine whether multi-party arbitration is allowed or prohibited in Ethiopia.

But, we can resort to other alternatives to determine the legal status of multi-party arbitration under Ethiopian law. It is truism that, the Ethiopian arbitration law is clearly recognized parties

143 Civil Procedure Code, art.11, 41,& 43

144 Carrion, Manuel Gomez, *Joinder of Third Parties; New Institutional Development*, 31(3) ARB. INT'L 479 (2015), at 479-506

145 *id.*

146 *id.*

autonomy.[147]Accordingly, Parties are at liberty to determine the nature of arbitration, seat of arbitration, procedure to be used in disposing the issues and the like via arbitration agreement. So nothing prohibits contracting parties to provide for multi-party arbitration through their arbitration agreement. They may even provide for joinder or intervention of third parties and consolidation of arbitral proceeding. Besides, the only arbitral institution in Ethiopia, AACCSA has vividly recognized the possibility of multiparty arbitration.[148] Had the issues of multi-party arbitration prohibited in Ethiopia, AACCSA would never provide for the possibility of multiparty arbitration. Hence, Multi-party arbitration is not prohibited under Ethiopian arbitration law.

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, it is devoid of the issues of multi-party arbitration. The main governing regime on the substantive issues in relation to commercial arbitration, Ethiopian civil code, is ignorant of multi-party disputes. Accordingly, the complex issues underlying multi-party disputes like whether the third party or non-signatories allowed join or intervene in pending arbitral proceeding or not, consolidation of parallel proceeding, appointment of arbitrators, and the issues of jurisdictional dilemma as to the competent authority that orders multi-party arbitration are left unanswered.

What makes the Ethiopian arbitration law unique is its failure to address the issues of appointments of arbitrators in case of bi polar multi-party dispute which were not even ,the concerns of the world communities as though it is a conundrum in multi-party disputes. If we look at the experiences of another countries and institutional arbitral rules, the issues of bipolar multi-party dispute is supposed to be solved by the normal principles of bilateral arbitration as parties can normally divided into claimant and respondent camp, and it was not even the concern of world community. This can easily be surmised from the way ICC approaches the issues of multiparty disputes. Thus, multi-party arbitration is defined by the ICC as an ‘arbitration involving a confrontation between more than two parties with opposing interests, thereby implying that cases where the parties within each camp have identical interests (such as those in

147 See civil code, Arts.3325 (1) and 3331.parties are at liberty to determine everything while they submit their issues to arbitration. Again, the discretion that given for the parties in appointment of arbitrators, under article 3331 is also another reflection of the recognition of principles of party’s autonomy.

148 AACCSA rule, art.10(3)

the first situation described above) will defacto constitute a normal bilateral arbitration.[149] Coming back to Ethiopia, even the existing arbitration law is not comprehensive enough on the issues of bilateral arbitration, and the presumption that the normal principles of bilateral arbitration solves the issue of bipolar multiparty dispute is quite cumbersome. For instances, Ethiopian arbitration law has not recognized the issues of joint appointment of arbitrators which was supposed to be used in bipolar disputes. In our context, Parties have the discretion to appoint an arbitrator in accordance with the arbitral submission, and if parties to arbitration failed to address the issues of appointment of arbitrators via their arbitral submission, each party shall appoint one arbitrator.[150] This is the default rules provided under Ethiopian arbitration law, and the possibility for joint appointment of arbitrator is not recognized. This may attributes to the fact that the existing arbitration law of Ethiopia is grounded on the traditional perception of arbitration, as though it is a two party set up.

However, Ethiopian arbitration law may be praised for recognizing the principles of party autonomy.[151] Because, the only vacuum that left by the civil code for the possibility of multi-party arbitration is via arbitration agreement. 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 have binding effect since contract is a law for the contracting parties.[152] In line with this, Parties are at liberty to determine the nature of arbitration, seat of arbitration, procedure to be used in disposing 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, so as to escape the peril of parallel proceeding like conflicting decision, high cost and time, parties are at liberty to provides 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 complexities of multi-party arbitration via arbitration

149 Olivier Caprasse, supra note 5.

150 Civil code,Art.3331(2)

151 *supra* note 147.

152 Civil code, art. 1731.

agreement, everything would be undertaken in line with their agreement. To this effect, since Ethiopian arbitration law is silent 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 civil procedure code.[153]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 concerned, there is no any provision that clearly answers whether multi-party arbitration is allowed or not. However, there are some writers that have been trying to answer the question of multi-party arbitration via interpretation of article 3345(1) of 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 Ethiopian arbitration law.[154] The base for their argument is the first paragraph of Art 317 of CPC that requires a degree of similarity between the procedure in arbitration and court proceedings. They claimed that, since joinder, intervention and consolidation of parallel proceeding are allowed in civil litigation, the same should held true in case of arbitral proceeding, and the arbitral tribunal should bound by the procedures in civil litigation.[155]

In fact, the provision of civil procedure code that talks about the similarity of procedure in civil litigation and arbitration is amenable to interpretation. But, it worth plausible to strictly interpret that concerned provision, in a way that compromises procedural fairness and the very purpose of arbitration. It is truism that the main reason that makes arbitration preferable over litigation is 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 procedure of civil litigation and extends procedural similarity up to joinder, intervention and consolidation of arbitral proceeding.

153Civil procedure code, Arts.315-319, 244(2) (g), 350-357 &456-461.

154SIRAKAKALU AND MICHAEL TESHOME, *Supra* note 22.

155 See Civil Procedure Code, Art.41, 43, &11. These provisionsvehemently providesfor the issues of joinder, intervention, and consolidation of suits, in civil litigation respectively.

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.[156] Again, the decision of the cassation courts on the case between *Mr.GebruKorev.Mr. AmadeyiuFedereche*, can also be taken as ground stone in testing the validity of the aforementioned argument. In its ruling, federal cassation courts affirmed that the arbitral tribunal does not needs to follow rigid court procedure or nonflexible litigation style.[157] Hence, it is illusive to extend the procedural similarity of civil litigation and arbitration up to joinder, intervention and consolidation of parallel proceeding. Hence, though procedures in case of arbitration is claimed to be similar with procedures in civil litigation, the arbitral tribunal is not expected to follow rigid court procedure. Rather priority should be given for ensuring procedural fairness than strict adherence to the procedures of civil litigation. For instances, in similar fashion with ordinary court litigation, parties should be given equal chance to present their case, defense, evidence and the like

Furthermore, if we take the position of the aforementioned authors, and recognize that the procedural similarity extends up to joinder, intervention, and consolidation of arbitral proceeding, there are various issues that may left unanswered. At the first instance, arbitration is born out of arbitration agreement that bounds only 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 proceeding have a tendency to undermine the aforementioned central principles of arbitration. Hence, compromising the issues of 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.

Not only this, the issue as to the possible ground for ordering joinder, intervention and consolidation of arbitral proceeding is also another baffling question. Because, it is illusive to resort to the grounds of joinder, intervention and consolidation of parallel proceeding under the Ethiopian civil procedure code as civil procedure is there to assure the public interest at large

156 Haile Gabriel, *supra* note 18, at 305

157 Mr.Gebrukorev.Mr.AmadeyiuFedereche , Federal Supreme Court, Cassation Bench, Files No 52942/2003

while arbitration is there to serve the best interests of private parties that envisaged to be bound by it via arbitration agreement.

Furthermore, the issues of jurisdictional dilemma may even be another concern. Determining whether the Court or arbitral tribunal is competent organ to order joinder, intervention and consolidation of arbitral proceeding is puzzling question. In fact one may argued as though arbitral tribunal is competent to order multi party arbitration on the basis of the principles of "competency competency" as enshrined under article 3330(2) of civil code. However, this article did not incorporate the competency competency in full-fledged manner.[158] This could attribute to the fact that, the arbitral tribunal cannot determine on their own jurisdiction, unless the parties to arbitration authorized them to do so. Hence, unless parties to arbitration authorize the arbitral tribunal to determine their own competency, the issues of jurisdictional dilemma would remain intact.

To add an insult to the injury, how the issues of appointment of arbitrator are ought to be addressed, especially when consolidation, joinder, or intervention is allowed after the confirmation or appointment of arbitrator is quite cumbersome. The central principles under Ethiopian arbitration law is that, all parties should be given equal opportunities in appointment of arbitrators, and failures to do so will inevitably affect the very essence of arbitration.[159] Besides, the arbitral awards that rendered against arbitration agreement are one ground for refusal of recognition and enforcement of arbitral award under Ethiopian law.[160] Hence, since third parties are supposed to join or intervene in an arbitral tribunal where appointments of arbitrator are already made by the original parties to arbitration, it is impractical to allow that concerned third parties to participate in appointment of arbitrator. This would inevitably undermine the principles of equality of the parties in appointments of arbitrator which may even affect the very existence of arbitration.

158 The doctrine of competency allows the arbitral tribunal to decide its competence. Unlike the case in Ethiopia where the arbitral tribunal is allowed to determine on its own jurisdiction subject to the authorization of the parties, the principles of competency is an accepted principles and common features of international legal framework. It authorizes the arbitral tribunal to determine on their own jurisdiction even in default of authorization of the parties. See UNICITRAL model law, art.16 (1), UNICITRAL rules, art.21 (2), ICC rule, art. 6(2), UK arbitration act of 19996, section 30(1 and etc.

159 Civil procedure code,art.356(a)

160 *id.*

However, though civil procedure code have no any vacuum for the possibility of multi-party arbitration, it does not mean that civil procedure code have no any relevance in multi-party arbitration at all. Prominently, the decision of arbitral tribunal that may rendered on the basis of multi-party arbitration that provided by the parties via arbitration agreement would inevitably recognized and enforced on the basis of provision of civil procedure code.

4.3. Multiparty Commercial Arbitration from the Perspective of Addis Ababa Chamber of Commerce and Sectorial Associations Arbitral Rules

Addis Ababa Chambers of Commerce and Sectorial Association (AACCSA) 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.[161] The chamber re-establishment with the Proclamation Number 341/2003 further provides the legal framework for the establishment of Chambers of Commerce and Sectoral Associations.[162]Since its establishment, it has served its members in promoting socio-economic development and commercial relations with the rest of the world, and its major objective is to promote the establishment of conditions in which business in general and in Addis Ababa in particular can prosper.

The AACCSA is today 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.[163]Addis Ababa chamber of commerce and sectorial association has its own arbitration rules.[164] The rule has got articles which are put into different categories. Accordingly, the components of the subject matter that regulated by the arbitral rule is comprised of initiation of proceeding, composition of the tribunal, the arbitral proceeding, nature of the award, and the cost of arbitration.

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161 Addis Ababa Chamber of Commerce and Sectorial Association, Briefprofile,2016 availableathttp://addischamber.com/wp-content/uploads/2016/08/AACCSA-Profile.pdf (accessed on April 18/2018)

162 *id*

163 TeferaEshetuAnd MulugetaGetu,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)

164 Addis Ababa chamber of commerce and sectorial association, Revised arbitral rules of November 25, 2008, (Here after called AACCSA rule) available at http://www.addischamber.com/file/ARBITRATION/20131126/ArbitrationRules%20(English%20Version).pdf(accessed on April 25, 2018).

Coming to the place of multiparty arbitration, Unlike the Ethiopian arbitration law which is ignorant of the issues of multi-party arbitration, Addis Ababa chamber of commerce and sectorial association's institutional rule has paid a meager attention to the issues of multi-party arbitration. In coping up with the currently 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 UNICITRAL arbitral institution 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 totally ignorant of the issues of multi-party arbitration. Accordingly, if we ponder through the arbitral rules of AACCSA, there are certain provisions that affirm the recognition of multi-party arbitration by AACCSA arbitral rules. Prominently, article 10(3) of AACCSA arbitral rules that provides the issues of appointment of arbitrators in the case of multi-party arbitration, can be mentioned as an example. Thus, article 10(3) of AACCSA arbitral rules provides,

> Where there are multiple parties on either side or 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 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 classified into claimant and respondent camps. Accordingly, in 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 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 article 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 understood that co arbitrators jointly appointed have given discretion to appoint the presiding arbitrators. If the co arbitrators failed to do so within the time limit, the power will swiftly shifts to the institute itself. Though, the arbitral rules of AACCSA tries to address the issues of appointment arbitrators in case of bi polar multi-party disputes, no attention is given for appointment of arbitrators in case of multi polar disputes where the parties' to arbitration cannot normally classified into claimant and respondent sides because of their divergent interest

The other point that worth discussion under AACCSA arbitral rule is whether joinder, intervention, and consolidation of arbitral proceeding is allowed or not in case of multiparty dispute. As far as the issues of joinder, intervention and consolidation of arbitral proceeding is concerned, the arbitral rule is silent. It is truism that AACCSA is launched with an objective to promote the establishment of conditions in which business in general, and in Addis Ababa in particular, can prosper.[165] However, the failures of AACCSA to inculcate the currently emerging complexities of international commercial transactions would inevitably defeat its objective. The experiences of world community assure that multiparty arbitration have a lot of contribution in facilitating international commercial transactions as it provides an avenue for resolving currently emerging multiparty disputes, that emanates from the complexities of business transaction that attributes to globalization.

In nutshell AACCSA has recognized the possibility of multi-party arbitration via arbitral submission, and even provides for mechanism for appointment of arbitrators in bi polar multiparty disputes. But, owing to the currently emerging complexities of commercial transaction, unless AACCSA comprehensively address the issues of both multipolar and bi polar disputes, its arbitral rules as it stands now, would inevitably be a stumbling block in achieving its primary objective of ensuring economic prosper.

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165 Addis Ababa chamber of commerce and sectorial association, brief profile, available at http://addischamber.com/wp-content/uploads/2016/08/AACCSA-Profile.pdf (accessed on May 28, 2018)

165 *id.*

4.4. The Need to Facilitate 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.[166]The legal political reasons is attributed to the impact of 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.[167]The complexity of commercial transactions that emanates from interdependency of international commerce, and globalization is becoming the norms of international trade. Hence, so as to facilitate international trade, multiparty arbitration is of 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. At the first instance, since our country cannot exclude itself from globalization, the possibility for the complex commercial transaction is high. Because, globalization brings multi-party arbitration to countries and regions of the world where it was previously unknown and which are often ill prepared for its arrival and causing gaps which urgently need filling.

Furthermore, the construction industry in which the complexities of commercial transaction is common, are substantially increasing in Ethiopia. The Ethiopia's formal construction sector comprises indigenous and indigenized firms, as well as numerous major foreign civil engineering and construction companies.[168]Hence, in addition to the complex nature of construction project where several parties like a client, main contractor ,an engineer 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

166 D. Janićijević, *supra* note 44

167 *id.*

168 The Construction Industry in Ethiopia 2018 available at https://www.businesswire.com/news/home/20180222006605/en/Construction-Industry-Ethiopia-2018---Key-Drivers,(accessed on June 8,2018)

for the country.[169] Besides, According to the2017 edition of African Economic Outlook, construction activities in Ethiopia accounted for 15.9% of GDP at current prices during the 2015/16 fiscal year.[170] Hence, facilitating full implementation of multiparty arbitration in construction industry has something do with the overall development of the country.

Again, Ethiopia is just on the eve of privatizing some big companies that were initially dominated by the government as a short term solutions 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 dispute settlement mechanism that best fits the currently circumventing complexities of commercial transaction, it is illusive 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.[171]The same holds true 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 nutshell, owing to the aforementioned reasons, facilitating proper implementation of multi patty arbitration has something to do with ensuring certainty and predictability underlying international trade that could in turn promotes economic prosper of Ethiopia.

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169 Ethiopian construction industry update 2016, available at http://www.buildingshows.com/market-insights/Insights/Ethiopia-construction-industry-update/801816843(accessed on June 8,2018)

170 *supra* note 165.

171.D. Janićijević, *supra* note 44

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.1. 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. Prominently, the efforts undergone and the approaches the world community have been avail of themselves in compromising the merits of multi-party arbitration on hand, and peril underlying it like party autonomy, confidentiality and consensual nature of arbitration on the other hand is of great importance. Since the Dutco case of 1992, the world communities are totally 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/ intervention. This approach is in conformity with what prescribed by the New York Convention and more generally with respect to the parties' procedural autonomy in international arbitration.

When we come to the context of our country, the current legal regulation of commercial arbitrations, as contained in civil code and civil procedure code as well as arbitration rules of AACCSA, have not paid proper attention to the issues of multi-party arbitration. The Ethiopian arbitration law did not clearly recognize nor prohibit the issues of multi-party arbitration, rather remain silent. This may pose a question as to the legal status of multi-party arbitration in Ethiopia. Despite the silence of Ethiopian arbitration law, since the principles of parties' autonomy is vividly recognized, nothing forbids the parties to provide for multi-party arbitration through arbitration agreement. Hence, the silence of the Ethiopian arbitration law does not presuppose prohibition of multi-party arbitration.

Again, Though, some scholars have been arguing as though multi-party arbitration is allowed under civil procedure code, citing the procedural similarity in case of arbitration and civil litigation as enshrined under article 317(1) of civil procedure code, it could by no means extends up to joinder, intervention and consolidation of arbitral proceeding. The similarity of procedure

can only be claimed to ensure procedural fairness, and the ruling of federal cassation court in a casebetween *Mr.GebruKore v. Mr. AmadeyiuFedereche*, has also affirmed this understanding.

The main delicate issue in case of multi-party arbitration, appointment of arbitrators, has not given any attention in our context. Let alone the perplexities in relation to appointments of arbitrators in multi polar disputes where the interest of parties are divergent, the issues of joint appointment which is supposed to solve the complexities of appointments of arbitrators in bipolar dispute is not recognized.

Furthermore, in similar fashion with 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 arbitral proceeding. The only provision that 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 is a clear indication for the possibility of multi-party arbitration under arbitral rules. Not only this, the institute had its own guide lines on how arbitral submission of multiparty arbitration is ought to undertake. Hence, AACCSA have not paid proper attention than mere recognition of possibilities for multi-party arbitration via arbitral submission.

In nutshell, despite the substantial importance of multi-party arbitration in international trade, and the inclination of the world communities towards it's the regulation, multi-party arbitration have not given necessary space in our context. Despite this, the substantially increasing of construction industry, globalization and the current move of Ethiopian government towards privatization of big companies can mentioned among inspiring reasons for multi-party arbitration.

5.2. Recommendation

On the basis of the aforementioned analysis and conclusion, the following are my recommendation for Ethiopian Legislator, AACCSA, and business communities respectively:

For Ethiopian legislator or government

- The absence of legal framework can by no means exclude the complexities of multi-party disputes. The substantial increasing of construction industry in which the issues of multi-party arbitration is common, the current move of our government in favor of privatization of big companies, and globalization would inevitably increases the possibilities of multi-party disputes. Accordingly, it is recommendable for the Ethiopian legislator to re think and amends the arbitration law with proper inculcation of modern approaches and practices in relation to multi-party arbitration. More importantly, I recommend for Ethiopia to amend its arbitration law and incorporate provision for multi-party arbitration subject to the consent of all concerned parties in arbitration.
- Again since appointments of arbitrators is the major baffling issues in multiparty disputes, I recommend for our country to incorporate the mechanism for appointment of arbitrators in multi-party arbitration, specifically by ousting the power of appointment to neutral institution or arbitral tribunal itself, which is maneuvering practices under international legal framework

FOR AACCSA

- It is truism that AACCSA is launched with an objective to promote the establishment of conditions in which business in general, and in Addis Ababa in particular, can prosper. However, the failures of AACCSA to inculcate the currently emerging complexities of international commercial transactions would inevitably defeat its objective. Accordingly, I recommend AACSA to amend its arbitral rules in a way that answers the question of multi-party disputes. More importantly I recommend for AACCSA to follow the foot print of ICC arbitral rules with proper inculcation of its approach thereof.

For 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 maybe not a panacea, it is of great help.to this effect, I recommend for the parties more routinely to use their arbitration agreements to address the issues of joinder, intervention and consolidation of arbitral proceeding and

empower the respected arbitration institute's to appoint the entire tribunal either in all cases or the up on the appearance of disagreements as to a designation among multiple parties on either side

- 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 arbitration agreement to share from chalice of multiparty arbitration.

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