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Kompetenz-kompetenz of Arbitral Tribunal: 'Legitimacy' Buries Efficacy of Arbitration in Ethiopia

by S.Y. Tesfay

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Kompetenz-kompetenz of Arbitral Tribunal: 'Legitimacy' Buries Efficacy of Arbitration in Ethiopia

*By Seyoum Yohannes Tesfay**

Summary

Two competing goals permeate international commercial arbitration - ensuring arbitration is consent-based on the one hand, and an effective alternative to litigation in courts on the other. This article evaluates the extent to which Ethiopian law balances these objectives.

To this end, it uses kompetenz-kompetenz, a doctrine deemed to hold the key to unlock the mysteries associated with striking the right balance between the two. Particularly, the basis and scope of this doctrine under Ethiopian law is compared with how the doctrine is understood and applied in selected jurisdictions of significance to international arbitration. Moreover, SALINI Costruttori S.P.A (Italy) v. Addis Ababa Water and Sewerage Authority, an international arbitral case, in which an Ethiopian Court and ICC Tribunal lock horns, is used to analyse the state of Ethiopian law.

It finds that Ethiopian law is so lopsided in favour of legitimacy of arbitration that little room is left for the arbitral tribunal to decide on challenges directed at its own jurisdiction. This, it finds, is a major impediment to the success of arbitration as an alternative dispute settlement mechanism in Ethiopia. It then comes up with options to right this imbalance between legitimacy and efficacy of arbitration.

Introduction

Two potentially conflicting goals permeate international commercial arbitration. On the one hand, there is a need to ensure the use of arbitration is based on the consent of the parties. On the other hand, there is a desire to make arbitration an effective and therefore attractive alternative to litigation.[1] In other words, since international commercial arbitration is consent-based if a party is compelled to arbitrate in the absence of an agreement to arbitrate the legitimacy of the arbitration and the resultant award is compromised. On the other hand, arbitration becomes costly and non-expeditious mechanism if a party has option to go to court, before arbitration is over, to prevent arbitration from going forward.[2]

Legal jurisdictions differ in the extent to which they appreciate the challenge of striking the right balance between the competing goals of efficacy and legitimacy of arbitration. They also vary in how they attempt to articulate a workable framework of analysis to address the problem.[3] That said, in many jurisdictions, the doctrines of *kompetenz-kompetenz* and separability are deemed to hold the keys to unlock the mysteries associated with striking the

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[1] George A. Bermann, *The 'Gateway' Problem in International Commercial Arbitration*, 37(1) YALE J. INT. LAW 1, 1-2 (2012).

[2] *Id.*, at 5

[3] *Id*., at 3

right balance between the two competing goals.[4] The two doctrines, which speak to the same question of who determines the jurisdiction of the arbitral tribunal, are thus embodied in the laws of many jurisdictions in some form.[5]

In this article, we will use the doctrine of *kompetenz-kompetenz* as the basis for the analysis of Ethiopian law. Our aim will be assessing the extent to which Ethiopian law balances concerns of legitimacy and efficacy of arbitration. To this end, we will attempt to shed light on whether or not arbitral tribunals have the power to decide on their own jurisdiction under Ethiopian law. Particularly, we will discuss the basis and scope of such powers. We will also examine whether or not Ethiopian courts are by law prohibited from entertaining the issue of arbitral jurisdiction till the arbitral tribunal decides on this matter. Furthermore, we will evaluate whether or not Ethiopian law dealing with these issues is compatible with the law and practice of international commercial arbitration. Besides, we will examine Ethiopian law governing this matter in light of public international law and international public policy. Finally, we will recommend steps which we think can help right the imbalance between concerns of legitimacy and efficacy of arbitration in Ethiopia. We start by throwing some light on the doctrine of *kompetenz-kompetenz*, itself.

Kompetenz-Kompetenz: A Chameleon-like Notion

Kompetenz-kompetenz, which literally means 'jurisdiction on jurisdiction', is a much-vexed principle than it appears at first. It has 'a chameleon-like quality that changes colour according to the national and institutional background of its application.'[6] The general understanding is that this doctrine 'permits an arbitral tribunal to determine its own jurisdiction' where that is challenged.[7] In its most basic form this doctrine is an anti-sabotage mechanism.[8] It reduces the possibility of obstruction of arbitration by simple allegation that the arbitration agreement is unenforceable. It does this by empowering the arbitral tribunal to decide on such defences and proceed with the arbitration, where it finds it has jurisdiction.[9]

This basic rule, however, tells only part of the story.[10] First, there are issues, at least in some jurisdictions, as to whether the doctrine covers cases where the very existence, validity and scope of the arbitration clause itself are at issue.[11] Second, the basic rule also says nothing about the flip side of this rule which imposes restriction on intervention by courts so the arbitral tribunal has the first opportunity to determine its own jurisdiction.[12] It does not specify the exact stage at which courts may or may not intervene.[13] Third, the doctrine remains silent about the standard of review the courts should employ where they do have to assess the arbitration agreement and its consequence.[14] For instance, in some jurisdictions

[4] *Id*., at 13
[5] O Susler, *The Jurisdiction of the Arbitral Tribunal: A Transnational Analysis of the Negative Effect of Competence*, 6 MACQUAIRE J BUS LAW 119, 119-20 (2009).
[6] WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES 232 (Oxford University Press, 2nd ed. 2012)
[7] Berman, *supra* note 1, at 14
[8] Park, *supra* note 6, at 233
[9] *Id*.
[10] *Id*.
[11] ZHENG SOPHIA TANG, JURISDICTION AND ARBITRATION AGREEMENTS IN INTERNATIONAL COMMERCIAL LAW, 75 (Routledge Taylor and Francis Group, 2014)
[12] O Susler, *supra* note 5, at 125
[13] *Id*.
[14] *Id.*, at, 120

the standard of review employed by courts will be superficial or full depending on whether the review is conducted before or after the arbitral tribunal has been constituted or rendered its award.[15] The rules on intervention by courts in this regard may also vary depending on whether the arbitration is domestic or international.[16] Fourth, in jurisdictions where parallel proceedings before court and arbitral tribunal are possible, there is issue as to the effect of such proceedings.[17] Fifth, where the law provides that the arbitral tribunal has the first word on its own jurisdiction, there are differences as to whether such word is final or subject to review by court.[18]

Overall, *kompetenz-kompetenz***,** in and of itself, says not much about the course of action a court or an arbitral tribunal confronted with the foregoing types of issues should take. As a result, there is diversity on the timing, extent and impact of intervention by courts in jurisdictional matters in the context of arbitration giving *kompetenz-kompetenz* different shades of meaning in different jurisdictions.[19] In consequence, the doctrine is understood in some jurisdictions in ways that favour efficacy of arbitration over its legitimacy while in some others the reverse is the case.[20] Many other jurisdictions provide hybrid solutions lying somewhere in the spectrum between the two extremes.[21]

A good starting point to evaluate the extent to which Ethiopian law balances concerns of legitimacy and efficacy of arbitration is to look at how the notion of *kompetenz-kompetenz* is understood and applied in selected jurisdictions of significance to international commercial arbitration. This will help us locate where in the spectrum of the different understandings, the notion as understood in Ethiopia lies. Hence, before delving into Ethiopian law on the subject, we will briefly look at how *kompetenz-kompetenz* is understood in selected foreign jurisdictions.

Kompetenz-kompetenz in Jurisdictions of Significance: A Snapshot

France

The French arbitration law, which must have informed the arbitration rules of the 1960 Civil Code of Ethiopia,[22] was fully overhauled for domestic and international arbitration in 1980 and 1981 respectively.[23] These rules have further been amended by the Decree No. 2011-48 of January 13, 2011 which introduces Articles 1442 to 1527 to the Code of the Civil Procedure.[24] This new French law aims at consolidating France's appeal as a venue for

[15] *Id*.
[16] Park, *supra* note 6, at 238.
[17] Tang, *supra* note 11, at 75
[18] *Id*., at 76
[19] Park, *supra* note 6, at 234-7
[20] *Id*.
[21] *Id.*, at 248-9
[22] René David, *A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries*, 37 TUL. L. REV., 187, 192 (1963). Unfortunately, we do not find documented preparatory works dealing with this part of the Civil Code of Ethiopia. But René David, the drafter of the Code himself tells us that by choosing continental jurists, Ethiopian authorities indirectly choose the Code to be modelled after continental civil codes, when it comes to concepts. From this, and the fact that René David was a French Jurist one may gather that the French arbitration laws of the time informed the drafting of the Ethiopian law on arbitration.
[23] Beatrice Castellane, *The New French Law on International Arbitration*, 28(4) J. INT. ARB., 371, 371(2011)
[24] *Id.*

international arbitration. Hence, it embodies the distinctively pro-efficiency stance taken by the French courts as regards *kompetenz-kompetenz*.[25]

The new law empowers an arbitral tribunal to decide on its own jurisdiction, when that is challenged before the arbitral tribunal.[26] This is a feature of many modern arbitration laws as we shall see in due course.[27] What distinguishes the French law from other laws is the prohibition it imposes on courts from entertaining challenges to the jurisdiction of arbitral tribunals save in exceptional circumstances. Article 1448 of the new law provides '. . . a court *shall refuse* to hear a dispute which is covered by an arbitration agreement unless an arbitration tribunal has not been seized of the dispute . . . and the arbitration agreement is *manifestly void or inapplicable*.'[28]

This provision ties the hands of a judge in two ways. First, it vests in the arbitral tribunal, once it has been constituted, the first opportunity to decide on its own jurisdiction. The French judge has no option but to sit on his hands and wait until the arbitral tribunal decides on its own jurisdiction.[29] Second, even where an arbitral tribunal has not yet been constituted, the new law limits the grounds on which the judge may refuse to refer disputes to arbitration to cases where the arbitration agreement is *manifestly void or inapplicable*. This allows the French judge to conduct only the most superficial review of the arbitration agreement such as whether the agreement is *clearly void* for lack of any signature.[30] He is not allowed to pose more complex questions regarding the validity of the arbitration agreement or examine its scope of coverage at the pre-award stage.[31] From this, we note that the obligation imposed by French law on a court to refer disputes to arbitration is broader than that under the New York Convention.[32]

In sum, French law not only embodies positive *kompetenz-kompetenz* but also strictly limits intervention by courts in arbitral proceedings. It is at the pro-efficiency end of the spectrum when it comes to striking balance between efficiency and legitimacy of arbitration. In fact, its emphasis on procedural efficiency is such that it embodies a provision, which is considered a

[25] Bermann, *supra* note 1, at 15-16

[26] Castellane, *supra* note 23, at 373. Article 1465 of the New Decree that embodies this rule is found in the section that deals with domestic arbitration. Yet, it applies to international arbitrations too because Article 1506 indicates it automatically applies to international arbitration unless the parties have reached agreement to the contrary.

[27] *See* for instance, The United Nations International Trade Law Commission (UNCITRAL) Model Law on International Commercial Arbitration, as Revised in 2006, Article 16(1), provides '[t]he tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.' So, in countries that follow the UNCITRAL Model Law arbitrators have positive *kompetenz-kompetenz*. U.N. Comm'n on Int'l Trade Law, Rep. on its 39th Sess., June 19-July 7, 2006, U.N. Doc. A/61/17, (July 14 2006).

[28] Castellane, *supra* note 23, at 372. For this purpose when arbitrators accept their mandate and hence the tribunal is constituted the arbitral tribunal is deemed to have been seized of the dispute pursuant to Article 1456 of the new law. From that date on wards, the courts are prohibited to entertain issues regarding jurisdiction of arbitral tribunal until the tribunal returns its own award. This new rule embodies the 2006 decision of *Cour de Cassation* in *American Bureau of shipping v. Copropriété Jules Verne*.

[29] Park, *supra* note 6, at 239

[30] *Id*.

[31] *Id.*

[32] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958), 330 U.N.T.S. 3, 21 U.S.T. 2517, T.I.A.S. 6997. According to Article II(3) the New York Convention, when seized of a matter in respect of which parties have concluded an arbitration agreement a court of Party to the Convention is required to refer the dispute to arbitration, at the request of one of the parties, unless the court 'finds that the said agreement is null and void, inoperative or incapable of being performed.'

novelty, requiring efficiency from both the arbitral tribunal and the parties to arbitration, though not directly relevant to *kompetenz-kompetenz*.[33]

The UNCITRAL Model Law

The *Model Law* which was used as the basis for the arbitration laws of over 60 countries in all the six inhabited continents within just 25 years from its adoption in 1985 is a good comparator for assessing Ethiopian law on *kompetenz-kompetenz.*[34] It vests in the arbitral tribunal the power to decide on its own jurisdiction. Particularly, it provides '[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.'[35] That means, the tribunal can rule on the 'foundation, content and extent of its mandate and power.'[36]

As regards the timing of decision, the *Model Law* confers on the arbitral tribunal discretion to decide on objection to its jurisdiction either as a preliminary question or together with the award on merits.[37] In case the tribunal decides it has jurisdiction as a preliminary matter, recourse to court is possible subject to three procedural safeguards aimed at protecting the efficacy of arbitration.[38] First, recourse to court is possible only within thirty days from receipt of notice of the ruling. Second, the decision of the court confirming arbitral jurisdiction is not appealable. Third, the arbitral tribunal is at liberty to continue with the arbitral proceeding while the recourse from its jurisdictional determination is pending before the court.[39]

Coming to the role of the court, modelled after the New York Convention, the *Model Law* imposes on the court the obligation to refer to arbitration, any dispute that is subject to arbitration agreement. This obligation does not apply if the court finds the agreement is 'null and void, inoperative or incapable of being performed.'[40] The Working Group on *Model Law* had considered including the word 'manifestly' in Article 8(1) in front of 'null and void' to produce similar effect as the French law.[41] It, however, dropped the idea in the end.[42]

Arbitration may be commenced or continued, under the *Model Law*, despite an ongoing challenge to arbitral jurisdiction before a court of law on any ground.[43] As a result, there is a real possibility of simultaneous proceedings on jurisdictional dispute before a court and an arbitral tribunal.[44] Such parallel proceedings may cause unnecessary expenses to parties, for instance, when the court finds that the arbitral tribunal lacked jurisdiction after the arbitration

[33] Nadia Darwazeh and Baptiste Rigaudeau, *Clues to Construing the New French Arbitration Law: An ICC Perspective on Procedural Efficiency, Good Faith, and Independence*, 28(4*)* J. INT. ARB. 381, 382(2011). Article 1464 of the New French law requires both parties and arbitrators to act 'diligently and in good faith in the conduct of the proceedings.'

[34] Thomas W. Walsh, *2006 UNCITRAL Model Law: Are States Adopting the Law in Letter and Spirit?*, 3 ARBITRATION & ADR REVIEW 215, 215 (2010)

[35] UNCITRAL Model Law of 2006, *supra* note 27, Article 16(1).

[36] UNCITRAL Model Law, *supra* note 27, Explanatory notes by UNCITRAL Secretariat at 30.

[37] *Id*., Article 16(3)

[38] *Id*.

[39] *Id*.

[40] *Id*., Article 8(1).

[41] O Susler, *supra* note 5, at 129

[42] *Id*.

[43] UNCITRAL Model Law, *supra* note 27, Article 8(2) provides arbitral proceedings may be commenced or continued, as the case may be, despite an ongoing challenge to arbitral jurisdiction before a court of law.

[44] Park, *supra* note 6, at 252 to 253.

had run its full course. The UN Commission on International Trade Law commented in relation to the 1985 draft that the *Model Law* provides ways of minimising this happening.[45] First, it allows the arbitral tribunal the possibility of deciding on the question of its jurisdiction as a preliminary matter.[46] Second, it vests in the arbitral tribunal the discretion of waiting for the decision of the court on jurisdiction when it has serious doubt as regards its own jurisdiction.[47]

In sum, scrutiny of the *Model Law* reveals that it takes the middle road when it comes to permitting courts to intervene in the determination of arbitral jurisdiction.[48] For instance, it leaves more room for intervention by courts in the determination of arbitral jurisdiction compared to the French and even German law we shall see below.

German Law

The German arbitration law is based on the *UNCITRAL Model Law* of 1985.[49] The arbitral tribunal may, therefore, rule on its own jurisdiction.[50] The power of the tribunal in this regard goes to the extent of ruling on whether an arbitration agreement exists and its validity according to the Civil Procedure Code ('ZPO') Section 1040(1).[51] So, German law clearly posits positive *kompetenz-kompetenz*, or the power of the arbitral tribunal to decide on its own jurisdiction as does the French law.[52] It is also similar to the French law to the extent the German 'ZPO' Section 1032(2) provides a court may decide on the jurisdiction of arbitrators only if request is made to the court before an arbitral tribunal is constituted.[53] Incidentally, Section 1032(2) of the 'ZPO' is a deliberate deviation from the *Model Law* which does not preclude application to court for determination of arbitral jurisdiction even after arbitral tribunal has been constituted.[54] Owing to this deviation one may contend that the German Law emphasises efficacy of arbitration more, as does the French law, compared to the *Model Law*.

The German law does not, however, go to the extent of the French law in its emphasis on the efficacy of arbitration. Particularly, the German law does not embrace the French approach to negative *kompetenz-kompetenz*.[55] Though cognizant of the fact that arbitration would proceed more smoothly if courts were denied any room for intervention in matters of arbitral jurisdiction until after arbitral award is given, the German law does not go down that route. It recognizes that following that approach would have inefficiency of its own in a broader sense of the word as awards might have to be vacated for lack of arbitral jurisdiction after full-

[45] The United Nations Commission on International Trade Law, YEARBOOK, Vol. XVI: 1985, Report on the work of the Commissions' eighteenth session (Vienna, 3-21 June 1985) (A/40/17), par. 92.
[46] *Id*. *See* also UNCITRAL Model Law, *supra* note 27, Article 16(3).
[47] *Id*. *See* also UNCITRAL Model Law, *supra* note 27, Article 8(2).
[48] O Susler, *supra* note 5, 128
[49] Park, *supra* note 6, at 244.
[50] Civil Procedure Code of Germany, ZPO, issued in 1998, Article 1040(1), available at: www.disarb.org/en/51/materials/german-arbitration-law-98-id3, accessed on 12 February 2016.
[51] *Id*. According to Section 1040(1) of the ZPO 'the arbitral tribunal may rule on its own jurisdiction, and in this connection, on the existence or validity of the arbitration agreement.'
[52] Bermann, *supra* note 1, at 20.
[53] John J. Barceló III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective* 36 VAND. J. TRANSNAT'L L. 115, 1131(2003)
[54] Bermann, *supra* note 1, at 20. *See* also ZPO, *supra* note 50, Section 1032(2) that reads, '*prior to the composition of the arbitral tribunal* an application may be made to the court to declare whether or not arbitration is admissible.
[55] Bermann, *supra* note 1, 20.

fledged arbitration with all the attendant costs, including time lost.[56] Hence, the ZPO provides for a possibility of lodging an application to a court seeking its determination on whether or not the dispute is subject to arbitration so long as the arbitral tribunal has not been constituted.[57] In consequence, the arbitral and judicial proceedings may have to go forward side by side.[58]

At this juncture, it must be noted that German law, expressly states its preference for arbitrators to decide on their own jurisdiction at the earliest possible time 'by means of a preliminary ruling.'[59] Such award is subject to immediate judicial recourse to set it aside.[60] In contrast, under the *UNCITRAL Model Law*, arbitrators at their own discretion, decide on their own jurisdiction as an interim award or at the very end with the award on the merits of the dispute.[61]

As regards the standard of review of the arbitration agreement, a German court will not restrict itself to a superficial evaluation unlike a French court.[62] Rather it will fully examine the agreement and deny arbitral jurisdiction if it finds the arbitration agreement is 'null and void, inoperative or incapable of being performed' according to ZPO Section 1032(1).[63] On this point, the German law is identical with the *Model Law* in which it has its roots.

Overall, though the German approach to *kompetenz-kompetenz* is close to the arbitral efficiency end of the spectrum it is more nuanced and calibrated than the French approach. It reflects relatively deeper commitment to ensuring arbitration is consent-based and seeks more the legitimacy that such consent fosters.[64]

English Law

The Arbitration Act 1996 confers on an arbitral tribunal power to rule on its own jurisdiction. The tribunal may rule on the existence of a valid arbitration agreement, proper constitution of the tribunal and the scope of coverage of the arbitration agreement.[65] However, the positive rule of *kompetenz-kompetenz* embodied under Section 30(1) of the Act is non-mandatory.

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[56] *Id*.
[57] German Civil Procedure Code, ZPO, *supra* note 50, Section 1032(2).
[58] Berman, *supra* note 1, at 21.
[59] German Civil Procedure Code, *supra* note 50, Section 1040(3)
[60] Barceló, *supra* note 53, 1131. According to Section 1040(3) of the ZPO, any party that feels aggrieved by the finding of the arbitral tribunal on its own jurisdiction may request the court, within a 'month after having received a written notice of that ruling' to decide on the question of arbitral jurisdiction. This again could result in a possibility of parallel proceedings as the foregoing application to the court does not have the effect of halting arbitration where the finding of the arbitral tribunal had been in favour of its own jurisdiction.
[61] UNCITRAL Model Law, *supra* note 27, Article 16(3). According to Article 16(3) if the arbitral tribunal chooses to rule on its own jurisdiction as a preliminary question and the decision is that it has jurisdiction any party may within a month from having come to know of the decision appeal to a court with jurisdiction. The decision of such court is not appealable.
[62] Bermann, *supra* note 1, at 19
[63] *Id.*
[64] *Id.*, at 21
[65] Arbitration Act 1996 (of England), Section 30(1). Incidentally, despite its name, the Act applies where the seat of arbitration is in England, Wales and Northern Ireland according to Section 2(1) of the Act.

Parties to arbitration agreement can in writing limit the jurisdiction of the arbitral tribunal to rule on its own jurisdiction.[66] This is in contrast with the Model Law.[67]

As regards the timing of the decision, normally the tribunal has discretion to decide on its own jurisdiction as a preliminary award or in the final award under the Arbitration Act.[68] However, the Act affords parties to arbitration the possibility of, by agreement, compelling the arbitral tribunal to decide on its jurisdiction in a preliminary award.[69] The purpose of giving this right to parties to arbitration is to minimize the possibility of arbitral tribunals abusing the discretion vested in them, and delaying decision on the tribunal's jurisdiction to the detriment of the parties.[70]

Concerning negative *kompetenz-kompetenz*, the Act entitles a party to arbitration agreement against which legal proceedings are brought in a court, to apply to the court in which such proceedings have been brought for a stay of the judicial proceedings.[71] Upon such application, the court has the obligation to grant a stay unless satisfied that 'the arbitration agreement is null and void, inoperative, or incapable of being performed.'[72] We note, in this regard, that the Act uses identical language with the New York Convention and the *Model Law*.[73]

Nevertheless, English courts have dealt with negative *kompetenz-kompetenz* in ways that do not necessarily conform to the *Model Law* rule.[74] In one case, faced with an application for stay, an English court has held various procedural options are open to the court.[75] The first is conducting a full review and finding that there is arbitration agreement. Second, conducting a full review and finding there is no arbitration agreement and dismissing the application for stay. The third avenue is simply staying the judicial proceeding pending determination on arbitral jurisdiction by the arbitral tribunal. The fourth option is for the court to refrain from making an immediate decision, rather ordering the trial of the issue.[76] In going for one or the other of these options English courts weigh, among other things, 'the interest of the parties and avoidance of unnecessary delay or expense.'[77]

Consistent with the foregoing, in a 2011 case, the English High Court declined to stay judicial proceeding before it in a matter that was at the same time pending before an ICC

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[66] BRUCE HARRIS, ET AL. THE ARBITRATION ACT 1996: A COMMENTARY 151 and 154 (Blackwell Publishing Inc. 4th ed., 2007). Note that Model Law does not indicate any possibility for parties to limit the arbitral tribunal's power to decide on its own jurisdiction. Article 16(1) of the Model Law, simply and only reads: '(t)he Arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.'

[67] UNCITRAL Model Law, *supra* note 27, Article 16

[68] Barceló, *supra* note 53, at 1130

[69] *Id.*

[70] *Id.* The party opposing arbitration naturally prefers an early decision on arbitral jurisdiction. Even the party favouring arbitration may want early ruling on this. That party may worry that a belated decision might result in waste of time and resource if a court reverses the finding by the arbitral tribunal in favour of arbitration.

[71] The Arbitration Act of England and Wales of 1996, *supra* note 65, Section 9(1)

[72] *Id*., Section 9(4)

[73] New York Convention of 1958, *supra* note 32, Article II(3) and UNCITRAL Model Law *supra* note 27, Article 8(1).

[74] Harris, *et al*., *supra* note 66, at 64-65

[75] *Id.*, at 63 to 64. In *Birse Construction Ltd v. St. David Ltd*, the issue was whether a contract incorporating arbitration was entered into.

[76] *Id.*

[77] *Id*., at 64

tribunal in New York. In fact, in *Excalibur Ventures LLC v. Texas Keystone Inc & Ors* the court went to the extent of issuing anti-arbitration injunction despite not even having supervisory role on the foreign arbitration.[78] In that case, 'the Gulf Defendants' claimed that they were not actually party to the arbitration agreement. The English Court was convinced that indeed the 'Gulf Defendants' were not party to the arbitration agreement and had objected to the jurisdiction of the arbitrators in a timely manner though the objection was rejected.[79] Given this state of affairs the High Court felt continuation of the arbitration would be 'unconscionable,' 'oppressive' and 'vexatious' and hence issued injunction against the arbitration relying on Section 37 of the 1981 Senior Courts Act, a law that predates the 1996 Arbitration Act.[80] Similarly, in *Albon v. Naza Motor Trading*, the English Court took jurisdiction to decide the competence or otherwise of an arbitral tribunal seating in Malaysia because the claimant convincingly argued that the signature on the arbitration agreement was forged.[81] In yet another case, *Claxton Engineering v. TXM*, the English Court took jurisdiction where the applicant disputed the very existence of the arbitration agreement that allegedly mandated arbitration abroad.[82]

In *Excalibur Ventures*, Globster J said section 30 of the Act does not require the arbitral tribunal to decide on its own jurisdiction. It only allows it to determine its own jurisdiction.[83] Besides, he maintained that the Act does not impose obligation on a person who contends he is not a party to arbitration agreement to have this question determined by the arbitral tribunal whose authority is being disputed.[84] Hence, a person who disputes the arbitral jurisdiction can apply to a court to determine whether the arbitral tribunal has jurisdiction, so long as that person has not participated in the arbitration itself. Such court can give injunction against the other party from starting the arbitration or to discontinue the same.[85]

Another noteworthy feature of the English law is that once both sides have commenced participation in the arbitration the arbitral tribunal may itself request the court to determine the arbitral jurisdiction. The court will accept the request if it is satisfied that the court taking jurisdiction is likely to save cost of adjudication and the application is made promptly enough.[86]

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[78] John Gaffney, *Non-Party Autonomy: Displacing the Negative Effect of the Principle of 'Competence-Competence' in England? A Comment on Excalibur Ventures LLC v. Texas Keystone Inc & Ors*, 29(1) J. INT. ARB. 107, 113-114 (2012)

[79] *Id.*

[80] *Id.*, at 111 and 115. Gaffney contends though this decision infringes upon competence-competence, too much should not be read into it. Rather he maintains the case should be understood in its context and the unique situation under which it arose. From the facts of the case one gathers that the party that started arbitration in New York, *Excalibur* started the court proceeding in England in order to get some technical advantage which it could not get in New York. Once it failed to get the tactical benefits it sought in UK it applied for the discontinuation of the court case it started. The author says the court found this behaviour of Excalibur 'unconscionable' 'oppressive' and 'vexatious'. So, Gaffney holds this decision of the English Court should be seen in this special context. Secondly, the English court was relying on 'Senior Court's Act' rather than the 1996 Act for its conclusion according to him. I do not think the latter argument of Gaffney carries much water. The court did what it did despite the 1996 Arbitration Act which as a latter law should have prevailed over the Senor Courts Act in case of inconsistency between the two. It rather seems that this is how English courts understand the negative effect of *kompetenz-kompetenz*.

[81] TANG, *supra* note 11, at 86

[82] *Id.*

[83] *Id.* at 84 to 85

[84] *Id.* at 84

[85] *Id.*

[86] *Id.*

The foregoing shows that English courts are inclined to intervene in matters of arbitral jurisdiction despite the 1996 Arbitration Act embodying the *kompetenz-kompetenz* rule both in the positive and negative sense of the rule. Hence, we can conclude, compared to the French, German and even *Model Law* jurisdictions there is more emphasis on the legitimacy of arbitration under English law.

Kompetenz-kompetenz under the US Law

The development of the *kompetenz-kompetenz* doctrine has been a very slow process in the United States. In fact, we do not come across this term as such.[87] The Federal Arbitration Act (FAA) that governs international commercial arbitration does not embody this doctrine.[88] On the contrary, Section 4 of the FAA assigns to courts determination of whether parties agreed to arbitrate.[89] So, this doctrine owes its existence to the jurisprudence of the courts of the United States.

In *First Options, Inc. v. Kaplan*, the US Supreme Court held that the right starting point is a presumption that a court must decide 'arbitrability', which in the parlance of US courts includes determination of 'existence, validity and scope of any arbitration agreement.'[90] However, in a *dicta* of this same case, the Court said the presumption that courts, and not arbitral tribunals, decide 'arbitrability' can be overcome by adducing 'clear and unmistakable' evidence that shows parties wished to delegate to the arbitral tribunal the power to decide on its own jurisdiction.[91] What was raised as a hypothetical situation in *First Options* was presented before the Court as a real situation in *Rent-A-Center, West, Inc. v. Jackson*. In *Rent-A-Center*, the arbitration agreement contained an actual 'delegation' of jurisdictional issue to arbitrators. Hence, faced with the choice between confirming its *dicta* from *First Options* and explaining it away, the Supreme Court by a majority vote confirmed the possibility of contractually empowering arbitrators to decide on their own jurisdiction.[92] The Supreme Court reasoned that subjecting jurisdictional dispute to arbitration is not any different from subjecting any other contractual dispute to arbitration grounding its conclusion on FAA Section 2.[93]

That means in contrast to what we saw above regarding other countries, positive *kompetenz-kompetenz*, emanates from contract rather than the law itself in the USA.[94] As a result, arbitrators in the US have no jurisdiction to decide on a challenge directed at the very

[87] Jack M. Graves and Yelena Davydan, ''Competence-Competence and Separability American Style'' in STEFAN KRöLL, ET AL (eds.), INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION 158 (Kluwer Law International, 2011)

[88] Janet A. Rosen, Arbitration *under Private International Law: the Doctrines of Separability and Compétence de la Compétence*, 17(3) FORDHAM INT'L LAW J. 619, 599 (1993).

[89] United States Federal Arbitration Act, enacted on February 12, 1925. Section 4 reads in relevant part '(a) party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district Court which, save for such agreement, would have jurisdiction . . . .'

[90] Jack Graves and Yelena Davydan, *supra* note 87, at 161

[91] *Id*. While the US Supreme Court has not yet dwelt on what exactly constitutes 'clear and unmistakable' evidence for the purpose the vast majority of lower courts have found, for instance, incorporation of arbitration rules that provide for *kompetenz-kompetenz* is sufficient. See page 162 of the same

[92] *Id*., at 165

[93] *Id*., at 161 to 162

[94] *Id*., at 162

existence of the agreement giving them such powers. In such a case, a court and sometimes a jury will have to decide whether the agreement exists at all.[95]

As regards the negative effect of *kompetenz-kompetenz* the Federal Arbitration Act Section 201 incorporates the New York Convention Article II(3)[96] when the arbitration in question is international.[97] According to this provision, the court of a Contracting State that is seized of a matter covered by an arbitration agreement is under obligation to 'refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative, or incapable of being performed.'[98] The review at this stage is not *prima facie* in the US though some have contended the language of Article II(3) of the Convention calls for superficial review at this stage.[99]

Overall, the foregoing shows that the US law emphasises legitimacy of arbitration more than any of the major jurisdictions of significance to international commercial arbitration discussed above.

Kompetenz-kompetenz under Ethiopian Law

Now that we have had a bird's-eye view of *kompetenz-kompetenz* in jurisdictions of significance to international arbitration we will look at its status under Ethiopian law. We will start with the power of the arbitral tribunal to determine its own jurisdiction, positive *kompetenz-kompetenz*, and then proceed to the role of courts in the determination of arbitral jurisdiction.

Positive Kompetnz-kompetenz: Its Basis and Scope

The provisions of relevance to positive *kompetenz-kompetenz* in Ethiopia are Civil Code Articles 3330 and 3329. The former is titled 'scope of jurisdiction' and reads,[100]

> (1) [t]he arbitral submission may authorize the arbitrator to decide difficulties arising out of the interpretation of the submission itself.
> (2) It may in particular authorize the arbitrator to decide disputes relating to his own jurisdiction.
> (3) The arbitrator may in no case be required to decide whether the arbitral submission is or is not valid.

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[95] Park, *supra* note 6, at 246.
[96] Barceló, *supra* note 53, at 1135. Section 208 of the FAA clearly stipulates that Chapter 1 of the FAA applies in so far as it does not contravene with the New York Convention.
[97] *Id. supra* note 53, at 1135. For this purpose arbitration is international if the arbitration agreement contemplates the issuance of an award in a country, other than the United States, that is a party to the New York Convention or though the seat of arbitration is the US, if the US does not all the same consider the arbitration as domestic arbitration. The latter of these possibilities raises complex questions which we need not dwell on for our purpose.
[98] The New York Convention, *supra* note 32, Article II(3).
[99] O Susler, *supra* note 5, at 138. Note that it makes sense for the judicial review at the outset to be rigorous given that the review of arbitral tribunal on its own jurisdiction is not subject to review by courts as a result of the Supreme Court's decision in *Hall Street*. As seen already post award review is limited to the grounds under section 10 of the FAA under which review of the arbitrators' decision on their own jurisdiction does not appear.
[100] CIVIL CODE OF THE EMPIRE OF ETHIOPIA, PROCLAMATION NO. 165/1960, Negarit Gazeta, 19th Year, No. 2 (1960), Article 3330

Particularly, reading Article 3330(2) and (1) of the Civil Code together we understand that the arbitrator will have authority to decide on 'disputes relating to his own jurisdiction' or 'difficulties arising out of the interpretation of the submission itself' only where the arbitral submission authorises him to do so. We gather from these provisions that positive *kompetenz-kompetenz,* to the extent it does exist under Ethiopian law, emanates from contract rather than the law itself. Hence, where the contract is silent on the subject the arbitral tribunal will have no power at all to decide on any type of challenge directed at its own jurisdiction. So, the law in Ethiopia is similar to the US law discussed above on this point.[101] In contrast, positive *kompetenz-kompetenz* emanates from the law itself, rather than contract in the more arbitration friendly jurisdictions like France, England, Germany and *Model Law* based jurisdictions.[102]

Another noteworthy point is that under Ethiopian law even the parties themselves cannot vest in the arbitral tribunal power to decide on the very existence or validity of contract giving it jurisdiction.[103] The law provides, particularly, the 'arbitrator may in no case be required to decide whether the arbitral submission is or is not valid.'[104] The maximum parties to an arbitration agreement can do is authorising the arbitrator to decide on the 'scope' of his own 'jurisdiction.'

This is a logical consequence of positive *kompetenz-kompetenz* grounded on contract rather than the law itself. It would be a contradiction in terms to maintain the basis of *kompetenz-kompetenz* is contract, on the one hand, and allow arbitrators to sit in judgment on challenges directed at the very existence or validity of the contract that allegedly 'establishes' their own very authority, on the other hand. Therefore, the inclusion of the prohibition under Article 3330(3) in the Civil Code gives internal logical coherence to the law.

Its logical consistency aside, this rule makes obstructing arbitration a walk in a park. All the party that wants to impede arbitration has to do is just make an allegation, even a patently false one, challenging the validity or existence of the arbitration agreement. Since, arbitral tribunals cannot decide on such challenges, the arbitration will have to stop until a court finds the allegation is unfounded and orders resumption of arbitration. At this juncture we recall that in the US, where *kompetenz-kompetenz* is similarly grounded on contract, challenges to the very existence or validity of the arbitration clause itself are decided on by court or even by jury in certain cases rather than by arbitrators themselves.[105] So, the Ethiopian law and the US law on international arbitration are once more similar.

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[101] Graves and Davydan, *supra* note 87, at 165. In Rent-A-Centre, West, Inc. v. Jackson, the Supreme Court confirmed by a majority vote the possibility of contractually empowering arbitrators to decide on their own jurisdiction.

[102] *See* the French Decree No. 2011-48, Article 1465, the Arbitration Act of England and Wales of 1996, Section 30, German Civil Procedure Code (ZPO) of 1998, Section 1040(1), UNCITRAL Model Law of 2006, Article 16(1) discussed already.

[103] This is in contrast with French law according to which the parties cannot even by explicit deny arbitrators to decide on their own jurisdiction by ruling on challenges to the validity of the arbitration agreement, if that is questioned. The principle of *kompetenz-kompetenz* cannot be overridden by the parties even if they so wish according to Castellane. *See* Castellane, *supra* note 23, at 373.

[104] Civil Code of Ethiopia, *supra* note 100., Article 3330(3)

[105] The Federal Arbitration Act provides in relevant part of Section 4 '[i]f the making of the arbitration agreement or . . . be in issue, the court shall proceed summarily to the trial thereof.' The party alleged to be in default of the arbitration agreement may within a legally specified period also demand a jury trial of the issue.

Yet another noteworthy point about Ethiopian law is that even in cases where the arbitration agreement confers on the arbitrator authority to decide disputes regarding the 'scope' of his own jurisdiction the arbitrator is required to interpret powers vested in him 'restrictively.' The Civil Code provides, '[t]he provisions of the arbitral submission relating to the jurisdiction of the arbitrators shall be interpreted restrictively.'[106] We do not come across similarly restrictive rule of interpretation in other jurisdictions of significance discussed already.

Negative Kompetenz-Kompetenz and Judicial Intervention in Ethiopia

The laws of jurisdictions that are known to be significant players in the field of international arbitration explicitly embody the negative *kompetenz-kompetenz* rule tying the hands of courts to prevent intervention in matters of arbitral jurisdiction once arbitral tribunal has been constituted, save on narrowly defined grounds.[107] Ethiopian law imposes no comparable restrictions on courts. What follows demonstrates this.

Judicial Intervention Possible at Any Stage of Arbitration

Ethiopian law does not prohibit courts from entertaining challenge to arbitral jurisdiction at any stage of the arbitral proceeding so long as the objection had been made to the arbitral tribunal itself in a timely manner. Objection to a court's jurisdiction must be raised in the statement of defence.[108] Since the procedural aspect of arbitration must '. . . as near as may be, be the same as in a civil court,' jurisdictional objection to arbitration too must be made in the statement of defence in principle.[109] The outcome of delay, in our view, should be refusal by courts to entertain the belated objection to arbitration. Unfortunately, we could not find any court case that either affirms or negates this viewpoint as regards arbitration.

Interestingly, an arbitral tribunal was confronted with a belated challenge to its jurisdiction in *Chanyalew Yilma v. Flora Eco Power (Ethiopia) PLC.*[110] After the parties exchanged statements of claim and defence, the Respondent applied to the Tribunal seeking leave to amend its statement of defence. The petition was granted. The Respondent introduced preliminary objections, among others, an allegation that there was no valid arbitration

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[106] Civil Code of Ethiopia, *supra* note 100, Article 3329. Incidentally, this provision applies to courts too. Hence, whoever is called upon to interpret arbitral submission regarding the jurisdiction of arbitrators is required to interpret the agreement restrictively. This provision is underscoring the fact that the law presumes judicial jurisdiction. In other words, the law is not pro-arbitral jurisdiction.

[107] Park, *supra* note 6, at 235, 239 and 242. As discussed in the foregoing part French courts will entertain disputes on the validity of arbitration agreement only so long as arbitral tribunal has not been constituted and even then in the most superficial manner such as when the clause is clearly void for lack of the requisite signatures of parties. In England, the situation is slightly different from France. Litigants have right to seek declaratory decision by court on arbitral jurisdiction only if they did not start taking part in the arbitration. In Switzerland, even a court asked to appoint arbitrators cannot engage in full examination of arbitral agreement. Full review of the agreement has to wait till after arbitration has taken its course.

[108] THE CIVIL PROCEDURE CODE OF ETHIOPIA, DECREE No. 52/1965, Negarit Gazeta, 25th Year, No. 3, Article 234(1)(C). As a matter of exception objections that pertain to substantive jurisdiction of a court may be raised at any time according to Article 9(2) of the Same Code. We will discuss that at a more appropriate point below.

[109] *Id.*, Article 317(1)

[110] *Chanyalew Yilma v. Flora Eco Power (Ethiopia) PLC*, an arbitration conducted under the auspices of the Arbitration Institute of Addis Ababa Chamber of Commerce and Sectorial Associations, (2013).

agreement and hence the Tribunal lacked jurisdiction in the amended statement of defence.[111] It seems the Sole Arbitrator, Mr. Yazachew Belew, was of the view that this was a calculated move to stall the arbitration by relying on the Civil Code rule denying arbitrators jurisdiction to even consider challenges directed at the validity of arbitration agreement.[112] To avert this, the Tribunal first established that leave to plead preliminary objections was neither requested by the Respondent nor granted by the Tribunal when it permitted amendment of the statement of defence. Then it ruled the challenge to the Tribunal's jurisdiction was inadmissible. It reasoned,[113]

> [t]he law [Article 244(3) of the Civil Procedure Code] on the consequence of failure to plead preliminary objections, if any, at the 'earliest possible opportunity' is crystal clear: such objections are deemed waived and hence cannot be raised at any later stages of a proceeding. The party who benefits from these objections simply loses the benefits if it fails to invoke the objections at the earliest possible opportunity. And that 'earliest possible opportunity' is at the time of filing a statement of defence [Article 234(1) (c)]. Thus, the defence of preliminary objection is time-bounded and stage-precluded. Belated preliminary objections are simply inadmissible and shall not be considered. This is the principle under Ethiopian law.

Under arbitration laws of jurisdictions like Germany, England and many other jurisdictions that followed the *UNCITRAL Model Law*, jurisdictional objections are deemed waived unless raised at an appropriate time.[114] The conclusion reached by the sole arbitrator in *Chanyalew Yilma v. Flora Eco Power (Ethiopia) PLC* is of similar effect though he had to rely on general rules for making preliminary objections for lack of provisions specifically dealing with arbitral proceedings in such context.

The outcome is totally different when objection to the jurisdiction of an arbitral tribunal is made in a timely manner. The party that had made a timely objection reserves its right of recourse to court at any stage of the arbitral proceeding. For instance, the Federal First Instance Court of Ethiopia did entertain jurisdictional objections while arbitration was going on before an ICC Tribunal in *Addis Ababa Water and Sewerage Authority v. SALINI Costruttori S.P.A* as the jurisdictional objection had been made right from the outset of the arbitration.[115] We will discuss this case in detail later on. Suffice it, for now, to note that ordinarily Ethiopian courts will entertain recourse to them made by a party to arbitration where such party had objected to the jurisdiction of the arbitral tribunal in a timely manner.

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[111] The Respondent invoked, in the amended statement of defence, various grounds to call into question the validity and existence of the arbitration agreement. Among others, it alleged that the contract was not signed by Mr. François Achour, the General Manager of Flora Eco Power (Ethiopia) PLC, that the General Manager had no special power of attorney necessary to consent to arbitrate, and no attempt to solve the dispute amicably was made though that is a precondition to arbitration in the agreement.

[112] Civil Code of Ethiopia, Article 3330(3) provides arbitral tribunals may not decide on challenges directed at the validity of the arbitral submission, even if parties to arbitration agreement expressly authorise them to do so.

[113] *Chanyalew Yilma v. Flora Eco Power*, *supra* note110.

[114] German Civil Procedure Code, ZPO, Section 1040(2), English Arbitration Act of 1996, Section 31(1) and UNCITRAL Model Law of 2006, Article 16(2). The *Model Law* allows the arbitral tribunal to as a matter of exception admit a delayed objection to its jurisdiction where the tribunal finds the delay is justified according to Article 16(3).

[115] *Addis Ababa Water and Sewerage Authority v. SALINI Costruttori S.P.A*, Federal First Instance Court of Ethiopia, Case No. 1510/93, ruling rendered on May 14, 2001.

As a matter of exception, recourse to court is also possible even where objection to the jurisdiction of an arbitral tribunal had not been made in a timely manner, if the ground for objection is inarbitrability of the matter in dispute. The defence of lack of jurisdiction owing to inarbitrability is never waived.[116] This is because this limit to the jurisdiction of the arbitral tribunal arises from the law itself. Parties cannot by their consent or failure to object in a timely manner confer jurisdiction on an arbitral tribunal where the subject matter of the dispute is not arbitrable under the law. A party can raise this kind of objection at any time and stage of the arbitration arguably without the need for even amending its statement of defence.[117]

So, if a party to arbitration makes a belated objection alleging the dispute is not arbitrable, for instance, the arbitral tribunal in Ethiopia will be compelled to stop the arbitration pending determination of the issue by a competent court. This is the case, because unlike in most other jurisdictions, in Ethiopia an arbitral tribunal has no jurisdiction to decide on challenges directed at the validity or existence of the arbitration agreement.[118] The law denies effect to even an express agreement conferring on an arbitral tribunal jurisdiction to decide disputes affecting the validity of the arbitration agreement.[119] Hence, a party that feels the case is beginning to go against it can easily stall an ongoing arbitration at any stage of the proceeding by just alleging that the dispute is not arbitrable.

Under the US law that comes closest to Ethiopian law courts may at any stage of arbitration order a full examination of the validity of the arbitration clause to determine whether the parties did in fact agree to arbitrate.[120] That said, even in the US one comes across pale hints of negative *kompetenz-kompetenz*. For instance, in *Pacificare v. Book*, the US Supreme Court takes a 'wait and see' approach with respect to public policy questions relating to arbitration of treble damages claim.[121]

Parallel Proceedings Not Guaranteed

Ethiopian law does not guarantee the possibility of even parallel proceedings before an arbitral tribunal and court on the issue of arbitral jurisdiction, unlike German law, for example.[122] In Germany, once initiated, arbitration is allowed to run its course even where a party has sought judicial declaration on the issue of arbitral jurisdiction pursuant to Section 1032(2) of the ZPO. In fact, even where a court has first started considering the issue of arbitral jurisdiction the party seeking arbitration is at liberty to initiate arbitral proceeding.[123] In other words, even though German law does not embody negative *kompetenz-kompetenz* in

[116] Civil Procedure Code of Ethiopia, *supra* note 108, Article 9(2) provides that '[w]hen and as soon as a court is aware that it has no material jurisdiction to try a suit, it shall proceed in accordance with Art.245, notwithstanding that no objection is taken under Art. 244 to its material jurisdiction.' That means even where the parties do not raise objection to the jurisdiction of a court pursuant to Article 244 the court is required to strike out the suit where it lacks material jurisdiction under Article 245.

[117] A court may allow amendment of pleading by either party under Ethiopian law '. . . at any time before judgment' according to Article 91(1) of the Civil Procedure Code.

[118] Civil Code of Ethiopia, *supra* note 100, Article 3330(3).

[119] *Id.*

[120] Park, *supra* note 6, at 235.

[121] *Id*., at 242

[122] Bermann, *supra* note 1 at 21. *See* also UNCITRAL Model *supra* note 27, Article 8(2).

[123] German Civil Procedure Code, *supra* note 50, Section 1032(3) provides arbitral proceeding may 'be commenced or continued' even where the issue of arbitral jurisdiction is already pending before a court either because that was raised by a party that wants the dispute to be referred to arbitration or just because an application was lodged to a court to determine whether or not arbitration is admissible.

the manner the French law does, it does not lend a free hand to a party that wants to disrupt arbitral proceedings.[124] The two proceedings are allowed to go ahead concurrently.

Similarly, the *UNCITRAL Model Law* envisages the possibility of simultaneous proceedings on arbitral jurisdiction before a court and arbitral tribunal. It does not give the Court the right to give injunction against arbitration going forward pending its own determination of the issue of arbitral jurisdiction.[125] Ethiopian law does not embody similar prohibition against the court. So, the court can issue injunctive order against the arbitral proceeding pending settlement of the dispute on jurisdiction before it.[126] This is yet another testament to primacy accorded to legitimacy of arbitration over its efficacy in Ethiopia.

Appeal to a Higher Court: Another Avenue to Prolong Disruption of Arbitration

Under Ethiopian law the plaintiff or the defendant may 'appeal against *any final judgment* of a civil court.'[127] As a an exception to this rule, the law provides, no appeal may be lodged, even when an appeal lies from a judgment or order, if under the Civil Procedure Code 'a remedy is available in the court which gave such judgment or made such order' without first exhausting the available remedy.[128] The decision of a court finding a dispute is subject to arbitration and declining to entertain the dispute any further is a 'final judgment' within the meaning of Article 320(1) of the Civil Procedure Code. This is so because no remedy is available in the same court from this decision. So, appeal is not barred on the ground of availability of remedy within the same court from decision finding arbitral jurisdiction.

Another rule in the Civil Procedure Code that precludes appeal from a court decision is that which deals with decisions on 'interlocutory matter.'[129] By way of exemplification, the Civil Procedure Code lists as interlocutory matters, '. . . decision or order on adjournments, preliminary objections, the admissibility or inadmissibility of oral or documentary evidence and permission to sue as a pauper.'[130] A decision or order on an interlocutory matter may be raised as a ground for appeal when ultimately the court makes a final judgment and when appeal is lodged against the latter.[131] As we can gather from the examples, interlocutory decisions or orders are decisions made by a court pending final disposition of the dispute. In other words, a party against whom an interlocutory order or decision is given still has the chance of winning the case in the same court. In contrast, there is no possibility of ultimately winning before the same court, if a court makes a determination that it has no jurisdiction because the dispute is subject to arbitration. That means the law prohibiting appeal from a court decision on interlocutory matters does not cover a court decision finding in favour of arbitral jurisdiction.

In sum, there is no prohibition, express or otherwise, in the Civil Procedure Code against lodging an appeal from a court decision finding a dispute is subject to arbitration. That means, a court ruling in favour of arbitral jurisdiction can be regarded as a 'final decision'

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[124] Bermann, *supra* note 1, at 20
[125] Park, *supra* note 6, at 252 to 253
[126] Civil Procedure Code of Ethiopia, *supra* note 108, Article 155 and Civil Code of Ethiopia, *supra* note 100 Article 2121. These provisions will be reproduced and discussed in relation to the SALINI case below.
[127] Civil Procedure Code of Ethiopia, *supra* note 108, Article 320(1).
[128] *Id.*, Article 320(2)
[129] *Id.*, Article 320(3)
[130] *Id.*
[131] *Id.*

from which appeal can be lodged within the meaning of Article 320(1) of the Civil Procedure Code. As a result, arbitration can be stalled for years till the parties exhaust all 'remedies' in appellate courts. This is in sharp contrast with the *Model Law* approach which prohibits appeal from a court's decision finding in favour of arbitral jurisdiction.[132]

Jurisdictional Battle between an Ethiopian Court and ICC Tribunal: Lessons from the *SALINI* Case

The fact that Ethiopian law is so lopsided in favour of legitimacy of arbitration does not necessarily preclude the possibility of jurisdictional battles between Ethiopian courts and arbitral tribunals. In fact, that Ethiopian law does not contain provisions aimed at limiting involvement of courts in jurisdictional disputes to ensure efficacy of arbitration creates a fertile ground for jurisdictional disputes. For example, Ethiopian courts have felt at liberty to interfere in arbitration even where neither the validity of the arbitration agreement nor its scope was disputed as will be discussed below.

In *Addis Ababa Water and Sewerage Authority (AAWSA) v. SALINI Costruttori S.P.A.*[133] the parties were in disagreement as to whether what was agreed upon was institutional arbitration under the auspices of the International Chamber of Commerce, ICC or *ad hoc* arbitration under the arbitration rules of the Civil Code of Ethiopia, Articles 3325 to 3346. Yet, the Federal First Instance Court of Ethiopia felt compelled to give temporary injunction against the ICC arbitral proceeding pending ruling by the First Instance Court on the type of arbitration agreed upon by the parties.[134]

The contract that gave rise to this dispute had two parts. Part I contained 'general conditions of contract' while part II contained 'special conditions of particular application.' Article 67.3 in the general conditions of contract, Part I, on the one hand, provided, in relevant part, '[a]ny dispute . . . shall be finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrator/s appointed under such rules . . . .'[135]

On the other hand, the Special Conditions of Particular Application, in Part II of the Contract, state in relevant part,[136]

> [c]lause 67- Settlement of Dispute-Arbitration
> Add the following new sub clauses to Clause 67.3 of Part I.
> 67.3.1 The place of arbitration shall be Addis Ababa, Ethiopia
> 67.3.2 The language of arbitration shall be English
> 67.3.3 The substantive law(s) applicable shall be the Ethiopian law
> 67.3.4 The rules for arbitration shall be the Civil Code of Ethiopia
> under Articles 3325.

On the basis of certain alleged breaches, *SALINI*, the Italian Company, made request for arbitration pursuant to Article 4 of the ICC Rules. *AAWSA* objected to ICC arbitration

[132] UNCITRAL Model Law, *supra* note 27, Article 16(3).
[133] *Addis Ababa Water and Sewerage Authority v. SALINI Construttori S.P.A.*, *supra* note 115.
[134] *Id.*
[135] *SALINI Costruttori S.P.A v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority*, ICC case No. 10623/AER/ACS, Par. 11 (December 7, 2001).
[136] *Id*., at Par. 12

alleging that the parties had rather agreed to an *ad hoc* arbitration under Articles 3325 *et seq* of the Civil Code of Ethiopia. *SALINI*'s position was that the Civil Code provisions on arbitral submission were 'added' to supplement, if need be, the ICC Rules already referred to in the Arbitration clause in Part I of the Contract.

The ICC Tribunal was formed despite this disagreement on jurisdiction. *AAWSA* did not, however, drop its objection. In fact, it insisted that the question of jurisdiction be settled as a preliminary matter. However, *AAWSA*'s request for early decision on jurisdiction was denied. The Tribunal ruled that it would decide on the jurisdictional objection together with the merits. Yet, *AAWSA* continued participation in the ICC Arbitration.[137] In yet another procedural order, Procedural Order II, the ICC Tribunal rejected the request by *AAWSA* that the venue for the first hearing be Addis Ababa, the place of Arbitration. The Tribunal decided it would be more convenient for the Tribunal and even the parties if the first hearing took place in Paris without prejudice to Addis Ababa being the place of arbitration.[138] This triggered challenge to the arbitrators by *AAWSA* under the ICC rules. The ICC Court rejected the challenge.[139]

When the challenge to arbitrators before the ICC Court failed, *AAWSA* initiated action in the Federal First Instance Court of Ethiopia. It sought a declaration that the ICC Arbitral Tribunal lacked jurisdiction in this matter and that what was agreed upon was an *ad hoc* arbitration.[140] Moreover, *AAWSA* submitted affidavit seeking temporary injunction against *SALINI*, to stop breach of the arbitration clause and desist from participation in the arbitration before the ICC Tribunal. The injunction sought under Article 155 and 165 of the Civil Procedure Code was temporary pending decision on the issue of arbitral jurisdiction before the First Instance Court.[141]

The Civil Procedure Code provision on which *AAWSA* relied to request issuance of injunction by the Ethiopian Court is titled '[i]njunction to [r]estrain [r]epetition or [c]ontinuance of [b]reach.'[142] It provides,[143]

> (1) [i]n any suit for restraining the defendant from committing a breach of contract or other act prejudicial to the plaintiff, whether compensation is claimed in the suit or not, the plaintiff, may at any time after the institution of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or act complained of, or any breach of contract or act of like kind arising out of the same contract or relating to the same property or right.
> (2) The court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as it thinks fit.
> (3) Nothing in this Article shall affect the provisions of Article 2121of the Civil Code.

[137] *Id.*
[138] *Id*., at Par. 60
[139] *Id*., at Par. 74
[140] *Addis Ababa Water and Sewerage Authority v. SALINI Construttori S.P.A.*, *supra* note 115.
[141] *Id.*
[142] Civil Procedure Code of Ethiopia of 1965, *supra* note 108, Article 155
[143] *Id*.

The Civil Code provision to which sub-article 3 above makes cross-reference lays down basic considerations for granting injunctive order. It first provides that a court may issue injunctive order to restrain defendant from committing acts prejudicial to the plaintiff. It then goes on to qualify that under sub-article 2 by providing, '[a]n injunction shall be granted only where there are good reasons to believe that the act prejudicial to the plaintiff is likely to be carried out and where the injury with which he is threatened is such that it cannot be redressed by an award of damages.'[144]

The Federal First Instance Court considered the request for a temporary injunction against *SALINI*'s participation in the ICC arbitration in Paris. The Court issued a cease and desist ordered against *SALINI* pending its final decision on what type of arbitration Clause 67 of the Contract provided for. The Court also indicated that it might issue a different order reversing the temporary injunction even before finally deciding on the jurisdictional dispute. It reasoned:[145]

> Article 67 of the Contract between the parties submitted as evidence by the current petitioner clearly indicates that in the event of dispute between the parties the venue of arbitration is to be Addis Ababa and the applicable laws Articles 3325 et seq of the Civil Code of Ethiopia, arbitral submission. This being the case, the Court is satisfied that the continued conduct of arbitration in Paris exposes the current petitioner to the kind of damage . . . that cannot be made good by monetary compensation. Therefore, pending final resolution of the matter before this Court or issuance of an order reversing the current one, the Court orders the Respondent [*SALINI*], pursuant to Article 155 of the Civil Procedure Code, to cease and desist from breach of obligations it assumed under Clause 67 of the Contract between the parties. (Translation from Amharic Mine)

The logical effect of this order is halting the arbitration before the ICC Tribunal as no party would participate. The ICC Arbitral Tribunal rightly understood the effect of the injunction that way.[146] Further the ICC Tribunal observed the injunction given by the Federal First Instance Court of Ethiopia was given on the ground that the Court has power to decide on the issue of the Arbitral Tribunal's competence to the exclusion of the Arbitral Tribunal itself.[147]

Injunctive Order Issued by the Ethiopian Court Rejected

Confronted with the injunction order issued by the Federal First Instance Court, the ICC Tribunal felt the need to consider whether or not it was under legal obligation to defer to the judicial order and halt the arbitral proceedings. Serious consideration of this issue was deemed necessary given the fact that the order was issued by a court of the country where the arbitration had its legal seat.[148] The ICC Tribunal held, after a thorough consideration, that an arbitral tribunal that faces such an order has discretion as to whether or not it should comply with such order.[149] The Tribunal put forward three major arguments, which it developed to

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[144] Civil Code of Ethiopia, *supra* note 100, Article 2121(2).
[145] *Addis Ababa Water and Sewerage Authority v. SALINI Construttori S.P.A*, *supra* note 115.
[146] *SALINI Costruttori S.P.A v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority*, *supra* note 135, Par. 121-4.
[147] *Id*., at Par. 151
[148] *Id*., Par. 126
[149] *Id*., Par. 127

varying degrees, to justify its decision to disregard the injunctive order by the Ethiopian Court. They focus on: a) giving effect to the agreement of the parties to 'arbitrate', b) duty of state courts under the New York Convention and c) international public policy against a state entity frustrating an agreement to arbitrate.

In what follows, we will briefly dwell on the merits of each of the foregoing arguments raised by the ICC Tribunal. From the outset, we need to emphasize that our primary goal here is not really making authoritative assessment of whether or not the ICC Tribunal was right in this particular case. Our aim is rather limited to demonstrating anything short of legal reform, including all sorts of arguments by arbitral tribunals, is unlikely to prevent obstruction of arbitration.

a) Upholding Agreement of the Parties 'to Arbitrate' as A Ground for Disregarding Injunctive Order of the Court

The Tribunal found compliance with the injunctive order issued by the Federal First Instance Court of Ethiopia would result in denial of justice and convert the agreement to arbitrate into a 'dead letter.'[150] That being the case, the Tribunal continued, it is not bound by the injunctive order of the court of the seat of arbitration.[151] It reasoned,[152]

> '. . . [a]n international arbitral tribunal is not an organ of the state in which it has its seat in the same way as the court of the seat would be. The primary source of the Tribunal's powers is the parties' agreement to arbitrate. An important consequence of this is that the Tribunal has a duty vis-à-vis the parties to ensure that their arbitration agreement is not frustrated. In certain circumstances, it may be necessary to decline to comply with an order issued by a court of the seat, in the fulfilment of the Tribunal's larger duty to parties.

The Tribunal underscored that it was within its power to go beyond the domestic legal system of Ethiopia to lend efficacy to the agreement of the parties to arbitrate. It reasoned, though one cannot maintain a contract is binding in and of itself without support from any legal system, nor can it be contended that a contract to submit a dispute to arbitration derives its validity exclusively from the legal system of the seat of arbitration**.**[153]
This finding of the ICC Tribunal has garnered support from some authorities in the field of arbitration. Professor Bachand, for example, finds the Tribunal's position tenable.[154] He sets out by acknowledging that opinion is divided regarding the effect of injunction issued by courts of the seat of arbitration on the jurisdiction of the arbitral tribunal. He then argues in support of the viewpoint which treats an international commercial arbitration agreement like any other contract containing a foreign element.[155] The implication of this perspective is that the efficacy of the agreement does not necessarily depend on the rules of a specific legal order. Rather the effects of the international agreement should be assessed like any contract that raises conflict of laws issues.[156] That being the case, ' . . . the effects of an international

[150] *Id*., Par. 140 and 142.
[151] *Id.,* Par. 128
[152] *Id*.
[153] *Id*., at 129
[154] Frédéric Bachand, '*Must An ICC Tribunal Comply With An Anti-Suit Injunction Issued By The Courts Of The Seat of Arbitration?*', *(Comment on Salini Costruttori S.p.a. v. Ethiopia, December 7, 2001),* 20(3) MEALEY'S INTERNATIONAL ARBITRATION REPORT 2 (2005).
[155] *Id*.
[156] *Id*.

commercial arbitral agreement depend on the rules in force in each legal order to which it is connected as well as on the treatment afforded under these rules to the parties' desire to resort to arbitration.'[157] Therefore, he concludes, the legal order that gives effect to the agreement to arbitrate should be chosen over the laws of the seat that frustrate the agreement to arbitrate.[158] The implication of this viewpoint is that the international arbitral tribunal is not bound by injunctive order of the seat of arbitration, even where such order is perfectly legal under the laws of the seat of arbitration, if the court order frustrates the agreement of the parties to arbitrate.[159] According to this view, the application of a rule that frustrates the agreement to arbitrate can be deemed appropriate only where the arbitral tribunal finds that the said rule is in force in each and every legal order to which the agreement to arbitrate has connection.[160] Even then, Prof. Bachand opines, the better approach may be for the arbitrators to 'carry on and make an award, because there will always exist the possibility that the tribunal's assessment of the law in force in those legal orders was mistaken.'[161]

The foregoing suggests that Prof. Bachand subscribes to the delocalization by contract theory. According to this strand of delocalization of arbitration the validity or regularity of an award is tested when enforcement is sought; and since enforcement may be sought in a number of countries there should never be a single state with power to determine the validity of an award once and for all.[162] The proponents of this view challenge the importance of the seat of arbitration on various grounds. They hold that the choice of seat is a matter of convenience and in some other cases motivated only by the desire for neutrality. Further, they maintain that the seat is not determined by the parties very often. It is rather determined by the arbitration institution chosen by the parties. Besides, they contend, since the arbitration tribunal is only transitory, the seat of the arbitration has no connection with the dispute. Hence, they conclude, the seat of arbitration has no particular significance to international arbitration.[163] In sum, the gist of the contention of the proponents of this view is that the validity of an international arbitration is derived from a legal order from which recognition is sought, also called *juridiction de réception*, rather than the court of the seat of arbitration.[164]

This approach would, however, have the undesirable, and yet inevitable effect of 'multi-localization' of arbitral awards.[165] In other words, it would oblige the award creditor to defend recognition and enforcement potentially all over the world as the award debtor would be able to challenge the award in every jurisdiction where recognition and enforcement is sought. Even from the perspective of the award debtor there would be unwelcome consequences. The aggrieved party would have to follow the award creditor since it will have no right to initiate the process of challenging the award.[166] In some other scenarios, such as when an arbitral tribunal rejects a case alleging it has no jurisdiction, this approach would result in outright denial of justice, if the court of the seat of arbitration has no say in the

[157] *Id*.
[158] *Id.*
[159] *Id*.
[160] *Id*., at 3
[161] *Id.*
[162] GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 39 (Oxford University Press Inc., New York, 2004)
[163] JULIAN D M LEW, ET AL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 64 (Kluwer Law International, The Hague 2003)
[164] PETROCHILOS, s*upra* note 162, at 40
[165] *Id.*
[166] *Id*.

matter. The proponents of delocalization do not seem to fully envisage such adverse consequences of their views on arbitration itself.[167]

That said, we admit that the question of the relationship between the laws of the seat, *lex arbitri*, and arbitration is one of the most debated issues in international commercial arbitration.[168] However, we underscore that the debate between 'territorialises' and 'transnationalists' has been, by and large, settled by the arbitration laws and conventions over the years. The prevailing reality is that 'delocalization' of arbitration is possible only when and to the extent the *lex arbitri* allows it.[169] Widely adopted laws such as the *UNCITRAL Model Law* and the New York Convention have strong territorialist tendency. Hence, the dominant opinion today is that, except in rare cases where laws other than that of the seat have been validly chosen by the parties, international arbitral proceedings must be conducted in compliance with the mandatory rules in force at the seat of arbitration.[170] Hence, the arbitration laws of the seat, Ethiopian law in this case, cannot be disregarded. Therefore, reliance on theories such as delocalization should not in any manner diminish the need for creating a legal framework that is conducive to arbitration with foreign element.

Another failing of the *SALINI* Tribunal in disregarding the injunctive order of the Ethiopian court is that the Tribunal was somehow 'selective' in its focus of what was really agreed upon by the parties.[171] Party autonomy on which the Tribunal relies to justify its decision to disregard the injunction by the Ethiopian Court requires that the Tribunal gives effect to the agreement of the parties in its entirety. This, of course, includes the *lex arbitri* as chosen by the parties.[172] By choosing to arbitrate in Ethiopia, it can be cogently contended, the parties agreed to make the arbitration subject to the supervisory jurisdiction of Ethiopian courts to the extent that is permissible under Ethiopian law.[173] The ICC Tribunal did not find that as a matter of Ethiopian law the Ethiopian court had no power to give injunctive order. In fact, the Tribunal did not attempt at all to consider Ethiopian law on the subject.[174] By failing to even consider the rules of the *lex-arbitri* the Tribunal denied effect to the agreement of the parties to arbitrate in Ethiopia, thus, itself frustrating the legitimate expectation of the parties.[175]

At this juncture, it should be noted that even Professor Bachand concedes adherence to the theory that a tribunal's authority ultimately emanates from the agreement of the parties is not sufficient to conclude that an arbitral tribunal can disregard injunctive order of a court of the seat. He maintains such conclusion is tenable only where the injunction is contrary to the

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[167] *Id.*, at 41
[168] Eric A. Schwartz, 'Do International Arbitrators Have a Duty to Obey the Orders of Courts at the Place of Arbitration? Reflections on the Role of the *Lex Loci Arbitri* in the Light of a Recent ICC Award,' in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION 795 (GERALD ASKEN, ET AL, eds., International Chamber of Commerce 2005)
[169] *Id.*
[170] *Id.*, at 796
[171] Reza Mohtashami, '*In Defense Of Injunctions Issued By The Courts Of The Place Of Arbitration: A Brief Reply To Professor Bachand's Commentary On Salini Costruttori S.P.A v. Ethiopia*' 20(5) MEALEY'S INTERNATIONAL ARBITRATION REPORT 4 (2005).
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*

intention of the parties.[176] He concludes the decision of the ICC Tribunal disregarding the injunctive order in the *SALINI* case meets this requirement too.[177]

The reality, however, is that Clause 67 of the contract makes mention of both ICC rules and Civil Code provisions on *ad hoc* arbitration. As a result, whether the parties agreed to institutional arbitration or *ad hoc* arbitration is a matter over which reasonable persons with no self interest in the dispute could disagree.[178] Holding the parties contemplated the possibility of issuance of an injunctive order by an Ethiopian court and agreed that such order be denied effect is really a long stretch, in any case. Professor Bachand does not proffer reason why he reached this conclusion about the intention of the parties.

Given the ambiguity regarding the type of arbitration agreed upon and the fact that *kompetenz-kompetenz* can only result from contract under the Civil Code of Ethiopia the court was within its powers to give temporary injunction pending determination of the type of arbitral procedure agreed on.[179] At this juncture, we need to underscore that *kompetenz-kompetenz* does not flow from the law itself in Ethiopia. It is only the ICC Tribunal's own determination that what was agreed upon was ICC arbitration as supplemented by the Civil Code provisions under Article 3324 *et seq.* that 'entitled' the Tribunal to *kompetenz-kompetenz*.

Overall, arguments based on party autonomy are no guarantee for the effective conduct of international commercial arbitration in Ethiopia. Particularly, the 'battle' between the Ethiopian court and the ICC tribunal in the *SALINI* case demonstrates the fact that Ethiopian law does not embody *kompetenz-kompetenz* can result in the obstruction of international arbitration even where it is conducted under the auspices of eminent international institutions such as the ICC.

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[176] Bachand, *supra* note 154, at 4.

[177] *Id*. Prof. Bachand contends the injunctive order in the Salini case frustrates the agreement of the parties to arbitrate because once parties agree to arbitrate under the ICC rules, the Tribunal has *kompetenz-kompetenz* per Article 6(2) of the ICC rules in force at the time. This, according to him excludes the possibility of injunctive order by a court that frustrates the ICC tribunal's power to determine its own jurisdiction. The problem with Prof. Bachand' s reasoning is that he assumes the parties agreed to arbitrate under ICC rules when this was in fact at the heart of the dispute. The first instance court gave the injunctive order because it was clearly faced with an ambiguous arbitration clause that indicates both ICC and ad hoc arbitration. Two reasonable people could disagree as to what was agreed upon. Hence, the court gave an injunctive order pending its ruling on this matter or earlier reversal of the injunction.

[178] *SALINI Costruttori S.P.A v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority*, *supra* note 135, Par. 211 to 2013. Even the ICC Tribunal acknowledged that there was an ambiguity that required interpretation. The Tribunal, thus, employed various techniques of interpretation. It relied on everything ranging from the text of the agreement to the negotiating history and exchange of documents immediately preceding the signing of the contract. It concluded, on the basis of such analysis, that what was agreed upon was ICC arbitration as supplemented by the Civil Code of Ethiopia provisions providing for *ad hoc* arbitration. The conclusion was a compromise at face value, as both apply. In essence, however, the tribunal ruled in favour of ICC arbitration as it found ICC rules prevail in case of conflict with Civil Code of Ethiopia rules on arbitration.

[179] Under Article 155 of the Civil Procedure Code and Article 2121 of the Civil Code of Ethiopia, a court may give temporary injunction where it has good reason to believe that damage that cannot be redressed by award of compensation is likely to result unless it issues an injunctive order.

b) 'Duty' of Ethiopian Court Under the New York Convention to Refer Dispute on Jurisdiction of Arbitral Tribunal to the ICC Tribunal

Another argument that the ICC Tribunal relied on pertains to the duty of national courts under the New York Convention. Contracts to arbitrate international disputes are, according to the ICC tribunal, 'validated by a range of international sources and norms extending beyond the domestic seat itself.'[180] In particular, the Tribunal maintained the New York Convention is relevant in this case, though Ethiopia is not a party to it. Specifically, it relied on Article II(1) of the Convention that obligates each contracting state to 'recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences . . . .' The Tribunal found Article II(3) of the New York Convention as particularly relevant. The Tribunal cited the said provision which reads,[181]

> [t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, in operative or incapable of being performed.

The Tribunal then underscored that an overwhelming majority of states have ratified or acceded to the New York Convention. Hence, it concluded, it 'is clear *the duty of the Arbitral Tribunal* in this respect is not founded exclusively in the Ethiopian Legal order.'[182] At this juncture one notes that the Convention addresses itself to the courts of contracting states, and not to arbitral tribunals. Given this fact, we are left wondering why the Tribunal felt legally obliged to place itself in the shoes of the courts of the contracting states. In any event, the gist of the Tribunal's line of reasoning is that the New York Convention confers on it authority even though Ethiopia is not a party to the Convention.

Though without spelling that out, the Tribunal seems to be implying the New York Convention has been so widely accepted that it has now acquired the status of customary international law binding non-signatory states too. This is a very interesting argument though unfortunately the Tribunal did not fully and clearly develop it. Indeed, 'rules set forth in a treaty' may sometimes attain the status of customary international law and thus become binding on third states.[183] Not to be bound, a non-signatory state will have to show that it persistently objected to the crystallization of the norms embodied in the treaty. In other words, the state will have to show that it 'protested loud and often' to avoid being bound by an emerging global custom.[184]

That said the Tribunal's position that the New York Convention vests in it immunity from injunctive orders by the courts of the seat is less than convincing. First, the basic rule as embodied in the Vienna Convention on the Law of Treaties is that '(a) treaty does not create either obligations or rights for a third State without its consent.'[185] This principle was underscored by the International Law Commission during its deliberations prior to the

[180] SALINI Costruttori, *supra* note 135, par. 129
[181] *Id*., at par. 130-131
[182] *Id*., at par.134
[183] ANTHONY AUST, MODERN TREATY LAW AND PRACTICE, 210 (Cambridge University Press 2000)
[184] DAVID J. BEDERMAN, THE SPIRIT OF INTERNATIONAL LAW, 37 (the University of Georgia Press 2002)
[185] VIENNA CONVENTION ON THE LAW OF TREATIES Concluded at Vienna on 23 May 1969, Article 34.

adoption of the Vienna Convention on the Law of Treaties.[186] Given this basic rule and the fact that Ethiopia by a clear statute has expressly prohibited *kompetenz-kompetenz* unless embodied in an arbitration agreement itself since 1960, the Tribunal did not discharge its burden of proof to show Ethiopian courts are bound by the New York Convention.[187]

Second, as noted, the provisions of Article II(3) of the New York Convention are addressed at the courts of States Parties to the Convention while the Arbitral Tribunal takes them as if they were addressed to itself when it says the tribunal's 'duty' is not exclusively based on the Ethiopian legal order.[188] It did not establish why it is under legal obligation to place itself in the shoes of the courts of contracting states.

Third, even assuming the New York Convention has attained customary international law status thus binding Ethiopia, and that obligations imposed on courts by the Convention bind arbitral tribunals, it does not necessarily follow that the ICC Tribunal is free from injunctive orders by the courts of the seat. Nothing in the Convention would really prohibit the Ethiopian courts from doing what the First Instance Court did. The Convention only requires the courts of contracting states to enforce agreement to 'arbitrate.' The Ethiopian party was not resisting arbitration. Nor was the Ethiopian court refusing to refer the matter to arbitration. The court was rather faced with an arbitration agreement that raises a *bona fide* issue of contract interpretation. Particularly, whether what was agreed upon was an *ad hoc* arbitration or ICC arbitration was not clear given that reference was made to both in the arbitration clause.

Given the foregoing and the fact that *kompetenz-kompetenz* does not arise from the law itself under Ethiopian law the court had no legal basis to deny a day in court to the party that disputed the jurisdiction of the ICC Tribunal.

c). Use of Domestic Courts to Frustrate Arbitration Contrary to International Public Policy

The ICC Tribunal also made international public policy based argument to justify its disregard of the injunction issued by the Ethiopian court. It developed this argument as follows.

The Tribunal started out by noting the essence of what *AAWSA* sought from the First Instance Court of Ethiopia was a ruling on the ICC Tribunal's jurisdiction. It further observed the Court issued the injunctive order pending its decision on the jurisdiction of the ICC Tribunal.[189] This was, according to the Tribunal, a clear breach of the principle of *kompetenz-kompetenz*. The Tribunal reasoned, the parties may in the arbitration agreement 'authorize the

[186] MALCOLM N. SHAW, INTERNATIONAL LAW, 835 (Cambridge University Press, 5th ed.,2003)

[187] Note that the provisions of the Civil Code that limit the competence of arbitral tribunal to decide on its jurisdiction, and Civil Code Article 2121 that allows courts to give injunctive order on which the Ethiopian court relied was issued in 1960, just two years after the adoption of the New York Convention on Recognition and Enforcement of Arbitral Awards which the Tribunal seems to imply has attained the status of customary international law. So, arguably, Ethiopia's adoption of those laws shows it did not acquiesce into the development of customary international law in the matter covered by these provisions of Ethiopian law. In other words, it may be held that Ethiopia has 'objected' to the elevation of norms embodied in the New York Convention to the status of customary international law binding on it. Without further ado, we believe at least, the Tribunal did not sufficiently show that Ethiopia is bound by the norms of the New York Convention despite being a non-party.

[188] SALINI Costruttori, *supra* note 135, at par. 134

[189] *Id*., at, par. 152

arbitrator to decide the disputes relating to his jurisdiction' pursuant to Article 3330(2) of the Civil Code of Ethiopia. It then stated its conclusion that what the parties agreed to was arbitration under the ICC Rules. That being the case, it continued, the parties have conferred on the Tribunal the power to decide on its own jurisdiction because Article 6(2) of the ICC Rules embody the principle of *kompetenz-kompetenz*.[190] Therefore, the Tribunal underscored, the right time for the Ethiopian Court to consider whether or not the Arbitral Tribunal had jurisdiction would be in the context of an action to set aside the award, after the Arbitral Tribunal has had the chance to decide on its own jurisdiction. The Court, the ICC Tribunal underlined 'has no power to pre-empt the Arbitral Tribunal from deciding on its own jurisdiction.'[191] Hence, it concluded making its own determination on the issue of its jurisdiction was perfectly legal**.**[192]

Since the Tribunal could lawfully decide on its own jurisdiction, the injunction by the Ethiopian court was contrary to international public policy, according to the ICC Tribunal. Particularly, the Arbitral Tribunal stated 'a state or state entity cannot resort to the state's courts to frustrate an arbitration agreement.'[193] This, it said, is a principle of international law which the Respondent, a state entity, is attempting to defy by making use of its own courts.[194] The Arbitral Tribunal cited, in support of this position, various authorities. Interestingly, one of the authorities relied upon was a previous ICC case between *SALINI* (Claimant) and the Predecessor of *AAWSA*, the Respondent. The Arbitral Tribunal quoted its own translation from French of the previous *SALINI* tribunal's ruling as follows,[195]

> [i]nternational public policy would be strongly opposed to the idea that a public entity, when dealing with foreign parties, could openly, knowingly, and willingly, enter into an arbitration agreement, on which its contractor would rely, only to claim subsequently, whether during the arbitration proceedings or on enforcement of the award, that its own undertaking was void.

In the case quoted the predecessor of *AAWSA* does not seem to be relying on Ethiopian courts to frustrate arbitration. Rather it is challenging the validity of the arbitration agreement alleging its 'undertaking was void.'[196] Besides, the Tribunal quotes rulings in other arbitral cases to make the point that a state cannot rely on its own laws to deny effect to an international arbitration agreement.[197]

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[190] *Id*.
[191] *Id*., at par. 153
[192] *Id*.
[193] *Id*., at par. 156
[194] *Id*.
[195] *Id*., at par. 161 The previous Case that the Tribunal cites from *Le Statut des usages du commerce international devant les jurisdictions arbitrales*, 1973 Rev. Arb. 122, 145 and 109 J.D.I 971, 977 (1982) is an ICC Case No. 1939 with commentary by Yves Derains.
[196] *Id*. Most probably the Ethiopian entity is relying on Civil Procedure Code Article 315(2) which states '(n)o arbitration may take place in relation to administrative contracts as defined in Article 3132 of the Civil Code or in any other case where it is prohibited by law.'
[197] *Id*. paragraph 162 and 163. One of the cases the Tribunal quoted to this end is *Framatome v. Atomic Energy Organization of Iran* in which Iran had maintained the relevant arbitration agreement was void because the approval by the Council of Ministers required by Article 139 of the Iranian Constitution was not complied with, which made the submission to arbitration of disputes concerning state property conditional upon the approval the Council of Ministers and notification to Parliament was not complied with. It similarly quoted award in the 1982 case between Elf Aquataine Iran v. NIOC.

The Tribunal drew analogy between the foregoing and a situation in which a state makes use of its own courts rather than its own laws to deny effect to an international arbitration agreement. It noted first that the question of whether a state can resort to its own courts, as opposed to its own law, to renege on an arbitration agreement had not given rise to a similarly well established body of case law. Yet, it concluded, there is no significant difference between a state changing its law to deny effect to an international agreement to arbitrate on the one hand and making use of its courts 'to have the arbitral agreement suspended or terminated' be that on the grounds of alleged nullity of the agreement or some other ground on the other hand.[198] Both amount to nothing but reneging on its own agreement to submit to an international arbitration.[199] In the present case, the Tribunal concluded, *AAWSA*, a state entity, was resorting to the State's own courts to renege upon the arbitration agreement. This, according to the Tribunal, was illegitimate.[200]

This international public policy based argument by the ICC Tribunal against temporary injunction issued by the Ethiopian Court pending determination of whether the agreed upon arbitration was *ad hoc* or ICC arbitration is misplaced, in our opinion. The First Instance Court was faced with an arbitration clause that was clearly ambiguous and hence required interpretation.[201] It gave injunctive order only pending determination of what exactly was agreed on, an *ad hoc* or ICC arbitration. Though the First Instance Court could not make a final determination on this issue because it was overtaken by developments at the ICC Tribunal and appeal to the Supreme Court, it could, in theory, have decided that what was agreed upon was ICC arbitration. In that event, the ICC Tribunal would have jurisdiction to decide its jurisdiction since the validity of the arbitration agreement was not at issue in this case.[202] That said, one could not rule out a contrary finding by the Ethiopian Court given the ambiguity of the arbitration clause of the contract. In other words, the possibility of the court finding what was agreed on was an *ad hoc* arbitration under the Civil Code of Ethiopia was still open at the time it issued the injunctive order. The effect of this latter finding would be absence of *kompetenz-kompetenz* since under Ethiopian law such power of an arbitral tribunal arises only from a contract. So, pending determination of the type of arbitration agreed on, the Court had no basis to leave the issue of jurisdiction for determination by the ICC Tribunal.

We need to underscore that it is only the ICC Tribunal's own finding that what was agreed on was ICC arbitration.[203] The First Instance Court had not resolved the problem resulting from

[198] *Id*., at par. 166
[199] *Id*.
[200] *Id.*, at par. 176
[201] It should be noted that the predecessor of the Ethiopian party (AAWSA) and SALINI had been involved in a dispute that ended in ICC arbitration in 1970s. This fact is indicated in this very arbitration. So, both sides must have thought there was a distinct possibility of dispute at the time of the conclusion of the arbitration clause. Clearly, the Ethiopian party did not want an ICC Arbitration. SALINI on the other hand insisted on ICC arbitration. The outcome of the negotiation on this point was an arbitration clause that mentioned both ICC arbitration and the rules of the Ethiopian Civil Code that provide for *ad hoc* arbitration. May be each side hoped the resultant ambiguity would be resolved in its favour. In any case, both the ICC Tribunal and the Ethiopian courts were confronted with the ambiguity resulting from this bad compromise. And the problem was exacerbated by the fact that under Ethiopian law *kompetenz-kompetenz* results only from contract, rather than the law itself. It is in this light that the SALINI-AAWSA saga and the battle between the ICC Tribunal and Ethiopian courts should be seen.
[202] Pursuant to Civil Code of Ethiopia, Article 3330(3), parties cannot even by an express agreement authorise the arbitral tribunal to decide 'whether the arbitral submission is or is not valid.'
[203] The contract between the parties under Sub-Clause 67.3 mentions ICC arbitration while Under Sub-Clause 67.3.4 it indicates Civil Code of Ethiopia rules on arbitration that provide for *ad hoc* arbitration. Given this

the ambiguity of the arbitration clause at the time it issued the injunctive order. Hence, the First Instance Court was within its power, under Ethiopian law to give the temporary injunction against the ICC arbitration. In any case, the dictates of international public policy are highly subjective. Hence, they cannot be beyond contention.

At this juncture, we need to underline that we are not contending a state entity can lawfully frustrate an agreement to arbitrate by resorting to its own national courts. Whether or not this international public policy based argument of the ICC Tribunal is valid, is beyond our contention.[204] All we are saying is that the factual basis for the application of this rule was not met at the time the First Instance Court issued an injunctive order. The court order was beyond reproach at the time because, unlike in most other jurisdictions, *kompetenz-kompetenz* arises only from contract under Ethiopian law. And whether or not the parties had agreed to confer *kompetenz-kompetenz* on the arbitral tribunal was not settled at the time the temporary injunction was sought from the First Instance Court. That is why it seems the Court felt compelled to issue the temporary injunction. In short, it is the state of Ethiopian law that resulted in the denial of *kompetenz-kompetenz* to the ICC Tribunal. The Federal First Instance Court is not to blame.

In sum, under Ethiopian law an arbitral tribunal has no competence to decide on whether what was agreed upon was *ad hoc* or institutional arbitration let alone decide on challenges directed at the very existence or validity of arbitration agreement or even scope of the powers of the tribunal. Ethiopian law compels arbitral tribunals to sit on their hands and wait for courts to determine almost any type of challenge directed at the jurisdiction of the tribunal.[205] This can effectively defeat the whole purpose of agreement to arbitrate as ultimately happened in the *SALINI* Case. *SALINI* had no option but to withdraw the arbitral claim and settle for a third of its global claims besides covering all its costs of the arbitration and foregoing any interest for delayed payments.[206]

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apparent contradiction in the agreement itself the ICC Tribunal had to engage in extensive interpretation to reach the conclusion that what was agreed on was ICC arbitration as complemented by the Civil Code of Ethiopia provisions, if need be. *See, SALINI Costruttori S.P.A, supra note 135,* at par. 211.

[204] Applying public international law rules to a dispute in a commercial arbitration raises a number of interesting issues. At least traditionally that is not the sphere of public international law. Hence, a number of challenges could be raised against the approach of the Tribunal. Questions that may be raised include: Are companies that are parties to business transactions subjects of international law entitled to rights directly under international law? Does international law create rights for such entities as such or only as between states? Even if it does create rights for private entities how are such rights vindicated, through a system of espousal in which the relevant states become parties or in an arbitration to which a private entity is a party? Is there a wide and representative practice accompanied by *opinio juris* that supports the position of the arbitral tribunal on this point? That said, these and similar public international law questions are beyond the scope of this work.

[205] At the risk of speculating, one could conclude from the Salini case that Ethiopian courts would intervene whenever arbitral jurisdiction is disputed no matter what the ground for that. If, for example, the arbitration clause provides for good faith attempt at amicable settlement prior to employing arbitration and one of the parties contests arbitral jurisdiction alleging that such attempt was not made, it seems Ethiopian courts would intervene. This is a likely result because the law simply does not give arbitrators jurisdiction to decide on their own jurisdiction no matter the ground on which that is called into question. Would the courts also intervene into other contentions targeting the arbitration agreement such as the agreed language of arbitration and the place of arbitration? We do not have authoritative answer since but ruling out court intervention even in such cases is not possible. That the law itself does not vest in arbitral tribunals jurisdiction to decide on their own jurisdiction invites a party that wants to obstruct arbitration to resort to courts.

[206] Compromise Agreement between Addis *Ababa Water and Sewerage Authority and SALINI Costruttori S.P.A*, dated 17 July 2002, Articles 1, 4 and 5. Though the global compensation sought by *SALINI* was US

Conclusions and Recommendations

In Ethiopia, the legitimacy of arbitration trounces its efficacy completely. Any claim, even a patently false one, that the arbitration agreement is invalid or non-existent has to be settled by a court. Parties cannot even by an express agreement authorise the arbitral tribunal to decide on such challenges. Moreover, the tribunal does not have jurisdiction to decide on challenges directed even only at the scope of its powers unless the parties vest in it such powers, which is the case only in very rare cases when parties are so meticulous in planning the dispute settlement.

Since Ethiopian law does not itself give arbitrators jurisdiction to decide on their own jurisdiction we could, at the risk of speculating conclude, Ethiopian courts will intervene whenever arbitral jurisdiction is disputed no matter what the ground for that. The way Ethiopian courts handled the *SALINI* case gives credence to this conclusion as neither the validity and existence of the arbitration agreement nor the scope of powers it conferred on arbitrators was at issue in that case.

As if readily available recourse to courts from arbitration were not bad enough, the law does not guarantee even parallel proceedings before courts and arbitral tribunals. Ethiopian courts may give injunctive orders to halt arbitral proceedings pending decision on issues of arbitral jurisdiction. In fact, they do give such orders as seen in the *SALINI* case. Moreover, even where a court finds there is obligation to arbitrate, nothing in Ethiopian law prevents the party that lost the case from lodging appeal on the jurisdictional matter to a higher court. The appellate court may in turn give injunctive order against the resumption of the arbitration pending its decision on the appeal. What makes things even worse is that the party who wants to obstruct arbitration can, even after exhausting appellate remedies, seek review on cassation on grounds of basic error of law before the Cassation Bench of the Federal Supreme Court.[207] The Cassation Bench too can give injunction against continuation of arbitration pending its decision on the application for review on Cassation.

In sum, 'legitimacy' of arbitration is ensured at unacceptably high cost to its 'efficiency' in Ethiopia. In consequence, it is hard to maintain that arbitration exists as an alternative to litigation in courts**.** This state of affairs is a major impediment to the success of arbitration as an alternative dispute settlement mechanism in Ethiopia.

To right this imbalance between legitimacy and efficacy of arbitration we recommend a number of steps be taken. The most arbitration friendly step is to confer on arbitrators full powers to decide on their own jurisdiction even when the very existence and validity of the arbitration agreement is disputed subject to post-award review by courts. This is the approach taken in many jurisdictions of significance to international commerce. This approach ensures efficacy of arbitration and hence will enhance, the chances of Ethiopia becoming a venue of choice for international arbitration, in the Greater Horn of Africa Region. At least, this will make it easier for Ethiopian parties to international business transactions to convince their foreign counterparts to agree to arbitration in Ethiopia.

$26,700,000 it had to settle for US $9,510,000 payable in several instalments without interest. It had to also shoulder its costs of litigation.

[207] Federal Courts Proclamation No 25/1996, FEDERAL NEGARIT GAZETA, 2nd Year No. 13 (1996), Article 10(1)&(3)

If the above approach is found to be too lopsided in favour of the efficacy of arbitration Ethiopia should limit recourse to court available to a party resisting arbitration to a period before commencement of arbitration. Under this approach if the party that resists arbitration had not already commenced legal action before a court of law it would be entitled to invoke a court's jurisdiction anytime between receipt of the notice of arbitration and the constitution of the arbitral tribunal. If the party resisting arbitration fails to seek judicial intervention within this window of time it will still have the chance of raising its objections to the arbitral tribunal.

At the very least, Ethiopia should adopt a number of streamlined mechanisms to create some semblance of balance between legitimacy and efficacy of arbitration. First and foremost, Ethiopian law should confer on arbitral tribunals jurisdiction to decide on any questions of relevance to arbitral jurisdiction subject to parallel proceedings before courts on the same issues. Particularly, courts should not have power to issue injunctive orders against the continued conduct of arbitration. Second, the right to appeal from a determination by a court in favour of arbitral jurisdiction should be abolished. Third, review on Cassation should be barred on issues of arbitral jurisdiction. These measures will be disincentives to an unscrupulous party contemplating to seek judicial intervention with the purpose of obstructing arbitration.