Anomalies in the Labor Dispute Resolution Methods Under the Ethiopian Labor Proclamation

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I. Introduction

As is clear from the first two recitals in its Preamble, the primary objective of the Labor Proclamation[2] inter alia, is maintaining industrial peace to help workers and employers work in the spirit of harmony and cooperation towards the all-round development of our country. At the same time, when and if disputes are bound to arise, it claims to have laid down the procedure for their expeditious settlement.

Thoroughly conducted assessment needs to be carried out to measure the efficacy of the disputes settlement methods already in place in the Labor Proclamation. Far from it, this limited work is aimed at addressing the various Alternative Dispute Resolution (ADR) methods and their legal effects as are used in the Labor Proclamation, and, thereby, show as to how labor disputes are settled at different levels. Attempt is also made to identify the salient distinguishing hallmarks of each of the dispute settlement methods in an attempt to popularize the legal frameworks of the available dispute settlement methods in the Ethiopian laws. The author humbly submits that this limited work is by no means exhaustive; it is rather aimed at triggering for in-depth discussions and furtherance of scholarly writings on the subject matter.

II. Determination of labor disputes and their settlement

The Constitution of the Federal Democratic Republic of Ethiopia clearly puts it that the House of Peoples Representatives has the power to enact "the Labor Code"[3] Thus, it is the Federal Government that has the legislative jurisdiction over labor matters in

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[2] Labor Proclamation no. 377/2003, Fed. Neg Gaz., Year 10, no. 12, 2004 (hereinafter "The Labor Proclamation"). Also note that, unless otherwise indicated, all provisions cited hereunder refer to the Labor Proclamation

[3] The Constitution of the Federal Democratic Republic of Ethiopia,1995

Ethiopia. Nevertheless, the adjudicative jurisdiction of labor disputes[4] does not seem to squarely favor the Federal Courts. The Labor Proclamation classifies labor disputes into individual and collective labor disputes and vests all individual labor disputes in the First Instance Courts of the States.[5] Thus, without losing sight of the fact that the Federal Courts, in principle, are empowered to adjudicate over "...cases arising under" Federal laws (i.e., Federal Question Jurisdiction), adjudicative jurisdiction, under the Proclamation, over individual labor disputes is specifically vested in State Courts.

Simply put, the power to adjudicate over individual labor disputes are concurrently vested both in the Federal Courts and the State Courts. Thus, one cannot rule out the possibility that once the House of Peoples' Representatives, as empowered under Art.78 (2) of the Constitution of The Federal Democratic Republic of Ethiopia, establishes Federal First Instance Courts in one or more of the States, the aggrieved party will have the right to shopping the forum i.e., between the Federal First Instance Courts and the State First Instance Courts.

In the Federated states, therefore, the Proclamation establishes in each First Instance Courts of the States (a) labor division (s).[6] The Woreda Courts in many of the States seem to be the First Instance Courts. Labor divisions are also established in the State Appellate Courts to hear mostly appeals from decisions rendered by the First Instance Courts or by the Ministry of Labor and Social Affairs or Bureau of Labor and Social Affairs.[7] However, the power to adjudicate individual labor disputes arising in the Federal Enclave Cities- Addis Ababa and Dire Dawa – is vested in the Federal Courts.[8]

On the other hand, conciliation is made to come to the fore in settling collective labor disputes. The Conciliation proceeding could take place either with a neutral third party-conciliator- assigned by the Ministry or Bureau or appointed by the disputing parties themselves.

The Proclamation defines "Conciliation' as:

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[4] Art. 136(3): "labor dispute" means any controversy arising between a worker and an employer or trade union and employers in respect of the application of law, collective agreement, work rules, employment contract or customary rules and also any disagreement arising during collective bargaining or in connection with collective agreement.

[5] Arts.137- 138

[6] Art. 137

[7] Art.139

[8] Federal Courts Establishment Proclamation No. 25/1996, Fed. Neg. Gaz. Year 2, No.13, 1996, Art. 14.

The Conciliation proceedings will be regulated under Arts.3318-3324 of the Civil Code of Ethiopia. Thus, during the conciliation proceedings, in the event that the Conciliator draws up terms of compromise and the parties expressly undertake in writing to confirm them, it is not only binding upon the disputing parties but also having the force of *res judicata* without appeal unless it is tinged, among other things, with illicit object or induced through void or falsified documents, or that the compromise was reached without the knowledge of prior court judgment having the force of *res judicata* and without appeal. This solution that ensures both parties' satisfaction and a continued business relationship is termed as 'Compromise. A compromise is defined as:

a contract whereby the parties, through mutual concessions, terminate an existing dispute or prevent a dispute arising in the future.[17]

A compromise, having been reached through negotiation or conciliation, can easily be enforced as it is the manifestation of both parties' consensus and amicable solution.

On the other hand, if the parties still cannot, partially or totally, agree on the issues of contention or that they cannot reach on a settlement agreement within the agreed time or if no time frame is agreed upon, within six months, the conciliator will be forced to draw up a 'memorandum of Non-conciliation'.[18] In a labor dispute, the Conciliator has to carry out his duty within 30 days. If, within the stated time, the conciliator fails to bring about an amicable solution, the conciliator is duty-bound to report to the Ministry or Bureau *'...with detailed reason thereof'*[19] (Emphasis added) Albeit one wonders whether and how much detailed the report should be, the Amharic version does not at all convey the same message. Furthermore, the English version should not, at least, be taken to convey the message that the report could be inclusive of all the statements of offers and admissions made, during the negotiation process either around the negotiating table or in caucuses, by the parties in their effort at reaching at a mutually agreeable settlement. It is proper, though, that the Ministry or the Bureau exercise some degree of control over the conciliator, be it paid or otherwise, to see to it that he/she is properly discharging his/her duties within the given time frame.[20] At this

[17] The Civil Code of Ethiopia, 1960, Art. 3307
[18] IBID. Arts. 3320-3321
[19] Art. 142 (3)
[20] The Civil Code of Ethiopia, 1960, Art. 3323

juncture, it is worth noting that once the conciliation proceeding is set in motion, be it compulsorily imposed or owing to the parties' agreement, then, the court or the Labor Relations Board cannot have jurisdiction to litigate the case unless, before the expiration of the 30 days, a memorandum of non-conciliation is drawn up by the conciliator or the 30 days time-limit has expired without the parties having reached a settlement.[21]

In connection to individual labor disputes, it must be noted here that, though not assisted by the Ministry or Bureau in assigning a conciliator, the parties can pick up conciliation proceedings before or during the court proceeding.[22]

I PERMANENT AND *AD HOC* LABOR RELATIONS BOARD

Once the Conciliation proceedings fail to bring forth a negotiated settlement, what would be the next step for the disputing parties to pursue?

Art. 142(3) provides thus:

...Any party involved other than those indicated under Sub-Article (1) (a) of this Article may submit the matter to Labor Relations Board. If the dispute as per Sub-Article (1) (a) of this Article concerns those undertaking described under Article 136(2) of this Proclamation, one of the disputing party may submit the case to ad hoc Board.

The following claims can be made out of the reading of the above provision. Firstly, the power to conciliate and decide over all collective labor disputes, except those on matters of wages and other benefits[23] arising in the EPSU, is vested in the Permanent

[21] IBID, Art.3321
[22] The Civil Procedure Code of Ethiopia, 1965, Arts. 274-277.

[23] Art.142(1): The conciliator appointed by the Ministry shall endeavor to bring about a settlement on the following, and other similar matters of collective labor disputes: (a) wages and other benefits; (b) establishment of new conditions of work; (c) the conclusion, amendment, duration and invalidation of collective agreements; (d) the interpretation of any provisions of this Proclamation, collective agreements or work rules; (e) procedure of employment and promotion of workers; (f) matters affecting the workers in general and the existence of the undertaking; (g) claims related to measures taken by the employer regarding promotion, transfer and training; (h) claims relating to the reduction of workers.

Labor Relations Board (hereinafter "LRB"). The omission of the word 'Permanent' from the legal provision both in the Amharic and English version is perplexing, though. Secondly, the power to decide over collective labor disputes arising particularly out of wages and other benefits in the EPSU is vested in the *Ad Hoc* LRB. This assertion, coupled with art. 144(2), seems to firmly establish the claim. However, the poor draftsmanship is apparent under arts. 147 (1)(a) and (b) that may challenge the afore-mentioned claims.

Art. 147 provides thus:

1. *The Permanent board shall have the following power:*
    a. *to hear labor disputes on matters specified in sub-article (1) of Article 142, except for (a), to conciliate the parties and to give orders and decisions*
    b. *except for sub-article 1 (a) of Article 142 to hear cases submitted to it by one of the disputing parties after the parties fail to reach an agreement in accordance with sub-article (3) of article 142.*

On the contrary, art. 147 (2) states:

The Ad hoc Board shall have the power to hear labor disputes on matters specified in sub-article 1 (a) of Article 142, to conciliate the parties and to give any orders and decisions.

Let us raise a couple of questions here: does it mean that the Permanent LRB does not have power to conciliate and give decisions over collective labor disputes relating to wages and other benefits arising both in EPSU and UOC? Or should one say that it is the jurisdiction of the *ad hoc* LRB, envisaged in the second paragraph of art.142 (3) and 144 (2), being extended to be inclusive of those collective labor disputes relating to wages and other benefits arising in the UOC?

The Author responds to both queries in the negative and humbly submits that the confusion emanates from the poor draftsmanship under Arts.147 (1) (a); (b), and (2). Thus, the Author holds that only collective labor disputes on matters of wages and

other benefits arising in the EPSU are vested in the *Ad Hoc* LRB and all other collective labor disputes are to be settled under the jurisdiction of the Permanent LRB.

Incidentally, it is noteworthy, at this point, that reposing conciliation proceeding and decision-making of a case in the same person (s) or body, such as the LRB is entitled to, can prove itself a complete fiasco: not only does it hinder the parties from making offers and admissions during the negotiation lest it should boomerang on them but also lures them to be more focused in persuading the conciliator/decision-maker instead of pursuing a concerted problem-solving approach.

IV THE PLACE OF ARBITRATION UNDER THE LABOR PROCLAMATION

The significant role of Arbitration as an extra-judicial dispute settlement method both in the domestic and international commercial transactions cannot be overemphasized. Its wide spread use streamlined by internationally acceptable legal regime and the unwavering acceptance by the international trade actors have currently made it that one cannot think of international trade without at the same time thinking of Arbitration. The fact that Ethiopia does not yet have a coherent and modern arbitration laws, compounded by the snail's pace it is trekking to adopting the UNCITRAL Model Law on International Commercial Arbitration (1985) and to ratify the New York Convention on the Recognition and Enforcement of arbitral awards (1958) has created a cloudy picture as to whether Ethiopia is committed to promote arbitration. The concept of arbitration, as a dispute settlement method, is even confused with the concept of conciliation in various legislative enactments.[24] On the other hand, the legislator's attempt at promoting and encouraging the practice of arbitration by encompassing " inspiring clauses" in various enactments and, more importantly, by making it compulsory for the settlement of certain disputes is laudable.[25]

Let us now turn on as regards how arbitration features in the settlement of labor disputes.

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[24] The Revised Family Law of Addis Ababa and Dire Dawa Proclamation No. 1/2000, Arts.119-121. Similarly, note the use of the term 'arbitration' in stead of 'conciliation' in the Family Laws of the States of Oromiya, Amhara and Southern NNP, on matters of divorce and its effects while, at the same time, vesting exclusive jurisdiction on those matters in the courts.

[25] Federal Cooperative Societies Proclamation No. 147/1998, supra note 14, Art.47; The Revised Family Law of Addis Ababa and Dire Dawa Proclamation no. 1/2000, Art.118; Arts.129 and 133 of the Family Laws of the States of Amhara and Southern NNP respectively.

.. The activity conduced by a private person or persons appointed by the Ministry at the joint request of the parties for the purpose of bringing the parties together and seeking to arrange between them voluntary settlement of a labor dispute which their own efforts alone do not produce.[9]

At this juncture, mention of some points should be made in an attempt to dispel some confusion that may surface from the very definition itself. Firstly, the disputing parties involved in a labor dispute, as in any other dispute, will naturally try to settle their points of disagreement through a process of communication, in the absence of a third party, by mutually conceding [or 'taking and giving'] process of dispute settlement method-Negotiation. Thus, Negotiation can be defined as:

...a process leading to joint decision-making by the disputing parties themselves. It is an interactive process of information exchange and learning, leading ultimately to a decision accepted to both disputing parties.[10]

No doubt, having in mind the convenience, confidentiality, cost-effectiveness, continued business relationship, etc... for the parties, this is the most efficacious and advantageous means of settling disputes. Unfortunately, not all disputes are settled through negotiation.

Secondly, the question as to who appoints the 'private person or persons' mentioned in the definition deserves some treatment here. From the reading both of the English and Amharic versions of the provision, one can simply gather that the English version is misconceiving the message that the legislator has in mind. The correct translation of the text would, thus, read:

.. by a private person or persons appointed by both parties jointly or the Ministry at the request of either of the parties...

This translation seems to reflect the intention of the legislator more correctly than what the afore-stated provision has to offer. This is because, firstly, Art. 143(1) clearly

[9] Art. 136 (1)
[10] Amazu A. Asouzu International Commercial Arbitration and African States Practices, Participation and Institutional Development Cambridge University Press, 2001, p 18

states that the parties can resort to conciliation or arbitration of their own choice other than the Ministry; secondly, the Proclamation, under Art.141 (1), imposes the obligation upon the Ministry or Bureau to assign a conciliator once a labor dispute is reported by either of the parties.

Thirdly, one would inquire whether the legislator, by the wording used to explain the activities of the conciliator, is opting for conciliation, in the strictest sense of it, or Mediation or both, as the best method of settling labor disputes? As far as this author's knowledge goes, codes and pieces of enactments in Ethiopia have been consistently using the word 'conciliation' Thus, the use of the term 'mediation' as a dispute settlement method in the Ethiopian legislations is minimal, if not, non-existent. The wording

...Bringing the parties together and seeking to arrange between them voluntary settlement...

is precisely the wording used to define 'conciliation' in the Civil Code of Ethiopia.[11] To be sure, both terms are used in various legal documents, literatures, conventions, etc... either to mean the same thing or to convey different messages. It is true that Negotiation, Conciliation and Mediation are outside court dispute settlement methods in which an amicable settlement of dispute is sought for through compromise. Thus, compromises are made to achieve a settlement acceptable to both parties; there is no winner or loser. This process of 'giving and taking' ensures that parties are involved in jointly solving the problem for mutual gain rather than wining their positions. These processes are much opted, *inter alia*, for the 'win/win' situation rather than the 'winner-takes-all' outcome in the court of law. Both mediation and conciliation are characterized by the involvement of a neutral third party-mediator/ conciliator- who helps in facilitating the negotiation process between the disputing parties.

Some scholars argue that, despite the similarity between the two, conciliation and mediation can be treated as independent methods of dispute settlement. It is claimed that conciliation is *'... a less formal procedure than mediation or one in which the*

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[11] The Civil Code of Ethiopia, 1960, Art.3318 (1)

neutral third party is less active... will not generally make a recommendation as to the terms but a mediator will go further and formulate his or her own recommendation on settlement terms" [12]

Others would reject this assertion. In the words of Amazu A. Asouzu, a famous writer on the area:

...The making of recommendations, which is said to be a feature of active participation by the mediator, is not unique to mediation. Whether or not a third party intervener will make a recommendation depends on the circumstances and is a question of degree and form. Skillful outsiders usually make recommendations only if the likelihood of acceptance is great.[13]

One would not be able to extrapolate the distinction of the two from the definition used in the Labor Proclamation nor can we from the provisions on Conciliation in the Civil Code of Ethiopia.[14] Thus, in the absence of clear hallmarks delineating the distinction of these methods in the Ethiopian legal system, it is proper to conclude that conciliation and mediation are the same method of dispute settlement though conciliation is preferred and thus consistently used.

The crucial question here is: Should all collective labor disputes undergo a compulsory conciliation, be it conduced by a conciliator appointed by the Ministry, Bureau or the parties themselves?

The question may seem a little bit of oddity, as conciliation is a consensus-oriented joint problem-solving process and does not seem to be compulsorily imposed on the parties to conciliate. However, this imposition is not peculiar in the legislative enactments as it is, for instance, applied in settling disputes arising out of cooperative societies under Art.46 *cum* 49 of the Cooperative Societies Proclamation No. 147/98.[15] Art. 46 provides thus:

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[12] Amazu A Asouzu, Supra Note 9, pp. 19-20

[13] Ibid

[14] The Civil Code of Ethiopia, 1960, Arts. 3318- 3324

[15] Federal Cooperative Societies Proclamation No. 147/ 1998, Fed.Neg. Gaz ,Year 5, No.27, 1998.

The disputes provided under Art.49 of this Proclamation shall be heard by a third party appointed by the parties before they are referred to the arbitration.

The afore-mentioned Provision makes it imperative that the disputing parties, involved in the designated disputes under the Proclamation, try to settle their disputes through Conciliation.

Why would the legislator make it compulsory, in spite of the fact that it can never be successful shorn of the disputing parties' volition to sit together, table all the playing cards, be willing to cooperate to 'give and take' so that a mutually shared interests but differing positions end up in mutual gains? In so doing, the *raison detre* seems to be encouraging the party initiating it by saving him from being seen by the other party as a weaker party. A close scrutiny over art.136 *cum* 141, however, does not favor the conclusion that all collective labor disputes must compulsorily undergo a try under the Conciliation proceedings. On the other hand, from the reading of Art.158 (2), it is given that the disputing parties, before initiating a strike or lockout partially or wholly, "... shall make all efforts to solve and settle their labor disputes through Conciliation." By virtue of art.157(3) *cum* 136(2), neither the workers have the right to strike nor have the employers the right to lockout in the "Essential Public Service Undertakings"(hereinafter EPSU).[16] Thus, in those Undertakings that are Otherwise Categorized (hereinafter "UOC"), the right to strike and lockout are preserved and that conciliation is a *sine qua non* for it. In other words, the right to strike by Trade Unions or the right to Lockout by Employers, in the UOC, can be resorted to only if conciliation proceedings failed to bring about the desired outcome. The bottom line is, though, conciliation is offered, by the legislature, to serve as the appropriate collective labor disputes settlement method under the Labor Proclamation both in the EPSU and UOC.

In conciliation, therefore, parties will sit together, table all the playing cards, so to say, negotiate in good faith (Art.130(4)), mutually concede, and jointly expand the pie, finally leading them into a mutually agreed solution for the dispute.

[16] Art. 136 (2). "essential public service undertakings' means those services rendered by undertakings to the general public and includes the following: (a) air transport; (b) undertakings supplying electric power; (c) undertakings supplying water and carrying out city cleaning and sanitation services; (d) urban bus services; (e) hospitals, clinics, dispensaries and pharmacies; (f) fire brigade services; and, (g) telecommunication services.

In an attempt to shade some light on the legal regime on arbitration in Ethiopia, not only is the place of arbitration in labor dispute settlement discussed hereunder but also cross-references made to pertinent existing enactments.

The Labor Proclamation, Art.143, provides thus;

1. *Notwithstanding the provisions of article 141 of this proclamation parties to a dispute may agree to submit their case* to *arbitrators or conciliators, other than the Minister for settlement in accordance with the appropriate law.*
2. *If the disputing parties fail to reach an agreement on the case submitted to arbitration or conciliation under Sub-article (1) of this Article the party aggrieved may take the case to the Board or to the appropriate court.*

It should be underlined that, from a reading and re-reading of all the provisions in the Labor Proclamation in its entirety, nowhere is the word 'arbitration' or 'arbitrator' alluded to but in the afore-mentioned Provision!!! One would, thus, regrettably end up fishing out only the terms 'arbitrators' (Para 1) and 'arbitration' (Para II) to fully propel 'arbitration' with all its repercussions into the sphere of labor disputes. Nonetheless, despite yet the poor draftsmanship of the Provision, the recurrence of the terms indicative of arbitration in the Provision undoubtedly insulates its being a slip of a pen. At any rate, the arbitrability of labor disputes does not seem to have been challenged in the Ethiopian legal system. Therefore, paragraph (1) of the above Provision could be briefly put as enabling disputing parties to agree to submit their case to arbitrators for settlement in accordance with the appropriate law. Or simply put, parties to a collective labor dispute have the right to enter into an arbitration agreement either by inserting it in the main contract, i.e., arbitral clause (probably in the collective agreement) or concluding it as a separate agreement, i.e., arbitration submission. At this juncture, it should be born in mind that if a party relies on a valid arbitration agreement, courts will stay their proceedings in deference to it.

Arbitration differs from Negotiation, Mediation or Conciliation in that "...arbitration is a form of adjudication leading to unilateral decision-making by an authoritative third party."[26] Thus, as arbitration and conciliation are different dispute settlement methods,

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[26] Amazu A. Asouzu, supra note 9, p.18

it should be underlined that, under the afore-mentioned provision, arbitration is by no means substituting for nor is it used interchangeably with conciliation. In collective labor disputes, arbitration is rather to be resorted to only if conciliation had failed to bring about an amicable settlement or, in case conciliation is not compulsory or not agreed to by the parties, short of it. It is safe, thus, to conclude, from the reading of Art. 143 (1), that once the parties, assisted by the conciliator, have failed to reach a settlement agreement, then, the aggrieved party may take his case either to the LRB or to an arbitrator/ arbitration tribunal. Hence enabling parties to opt out of LRB (*Ad Hoc* or Permanent) to settle their disputes through arbitration in accordance with the appropriate law.

The arbitration proceedings will be governed by the mandatory rules of arbitration under the Ethiopian laws, i.e., ***lex loci arbitri*** plus parties tailored arbitration rules or any state's arbitration laws to which the parties have referred, i.e., ***lex electionis*** or the arbitration law of a permanent arbitration institution if the parties submitted their case to such an institution for settlement.

It behooves us to mention, at this point, that arbitration proceedings lead to a binding decision. In other words, an arbitral award given by the arbitrator/ arbitration tribunal is binding, if not final, and is enforceable both domestically and internationally. It should also be born in mind that the disputing parties are not expected to reach at a settlement agreement, though settlement agreements if reached in the process of arbitration may be reduced into an arbitral award by consent. Art. 143 (2), thus, can be constructed precisely to mean: firstly, failing conciliation proceedings, either party can proceed with his case in the LRB or through arbitration. Secondly, in case the award-debtor is dissatisfied with the decision of the arbitrator, he/ she may appeal to the Federal High Court or the State Supreme Court in so-far- as the parties have not waived their right to appeal.[27]

Whether individual labor disputes can be submitted to arbitration begs a question, though. The Labor Proclamation does not expressly restrict the arbitrability of

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[27] The Civil Procedure Code of Ethiopia, 1965, Art. 350(2)

individual labor disputes nor can one conclusively assert that only courts are empowered to adjudicate over these disputes. This author would like to suggest, *en passant*, that the fact that an enactment confers jurisdiction on a court or other tribunal to determine any matter should not, on that ground alone, be construed as preventing the matter from being determined by arbitration. Thus, the non-arbitrability of a subject matter should be proven by showing that a particular court has exclusive jurisdiction to adjudicate the matter or that a particular legislative enactment prohibits the submission of the disputes in connection with a particular subject matter to arbitration.

V. ARBITRATION PROCEEDING AND LRB: SOME QUERIES

In settling collective labor disputes, the pertinent organs entrusted to do the job are: conciliator, arbitrator/ LRB, and the Federal High Court. Arbitration proceeding and resorting to *ad hoc* or permanent LRB are set at the same rung of the ladder. One would but wonder whether both institutions have equal powers in handling and settling collective labor disputes. The following queries deserve some treatment here: What differences and similarities can we decipher from the two bodies in adjudicating a case? What exactly is their distinguishing hallmark? In a bid to briefly answer the queries posed, the following four items are discussed:

I. The LRB is not bound to apply the rules of evidence and procedure. Art. 149 (5) provides thus:

The permanent or the ad hoc Board shall not be bound by the rules of evidence and procedure applicable to courts of law, but ***may inform itself in such manner as it thinks fit.*** (Emphasis added)

Thus, the LRB can, within the framework of the rules of evidence and procedure issued by itself as it is empowered under art.148, proceed in handling the case in a flexible and informal manner as it thinks fit in informing itself. The apparent unfettered discretion of the LRB seems, to say the least, bizarre. Though it is a commonplace in the commercial arbitration proceedings, especially in those states that have modern commercial arbitration rules, it seems to be controversial in Ethiopia. Firstly, Art. 3345 (1) of the Civil Code of Ethiopia states:

The Procedure to be followed by the arbitration tribunal shall be as prescribed by the Code of Civil Procedure.

This, in turn, will take us into art.317 (1) of the Civil Procedure Code:

The procedure before an arbitration tribunal, including family arbitration, shall, as near as may be, be the same as in a civil court. (Emphasis added)

One can simply conclude from here that the Board may not be expected to be manned by persons who have the savvy to apply the procedural or evidence rules. On the other hand, in arbitration proceeding, that the arbitrator or arbitration tribunal must be equipped with a necessary savvy to apply the procedural and evidence rules seems to be inevitable. Interestingly, the fact that arbitrators who are appointed to settle disputes arising in cooperative societies are duty-bound to conduct their hearing and fulfill all of their duties in accordance with the Civil Procedure Code would but leave us in a quandary. The assertion that procedural rules in an arbitration proceeding should be strictly followed is well accentuated by the fact that irregularities occurring in the proceeding could be used as a valid grou or appeal against the arbitral award.[28]

The attempts made in introducing modern arbitration rules, sidelining the afore-mentioned requirement, by the arbitration institutions in Ethiopia is to be encouraged as it serves the purpose for which arbitration stands. The arbitration rules of the Ethiopian Arbitration and Conciliation Center (EACC) (2004), Ethiopian Chamber of Commerce (ECC) (1999), and Addis Ababa Chamber of Commerce (AACC) Arbitration Institute are by all standards modern arbitration rules.

In relation to the issue at hand, Art. 15 (1) of the ECC states:

... the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party has the right to be heard and is given a fair opportunity to present its case.

This clause, inserted in the arbitration rules of all the afore-mentioned arbitration institutions, renders arbitration proceedings, administered by these institutions,

[28] IBID, Art. 351(c)

insensitive to the procedural niceties put forward as a *sine qua non* for conferring arbitration proceedings and arbitral awards the status and privilege that it enjoys in the courts of law. In this author's opinion, it is high time that such arbitration institutions in Ethiopia with modern international arbitration laws emerged. It should be quickly added to it, though, that the adoption of these modern international arbitration laws by the institutions to co-exist with the out-dated arbitration rules enshrined both in the Civil Code and Civil Procedure Code is like decanting new wines in old bottles. At the same time, losing sight of the mandatory rules of the seat of arbitration, *i.e., lex loci arbitri*, could also spell disastrous both for the institutions and the parties. The case re Addis Ababa Water and Sewerage Authority V. Salini Costrutori S.P.A[29] is a case in point. In this case, AAWSA and Salini Costrutori S.P.A agreed in their contract that the seat of arbitration to be the City of Addis Ababa and the applicable procedural and substantive laws to be that of Ethiopia. Salini Costrutori S.P.A institutes an arbitration proceeding in the International Chamber of Commerce (ICC) Court of Arbitration in Paris, France. Despite AAWSA's contest over the jurisdiction of ICC, ICC Court of Arbitration, having been *prima facie* satisfied that jurisdiction could exist, decided that an arbitral tribunal should be established to determine over jurisdictional matters. The arbitral tribunal decided that jurisdictional matters would be decided as the parties go along litigating their case on the merit. Here, one cannot but wonder as to how a court or an arbitrator decides to hear the case on the merit without, from the outset, firmly establishing its jurisdiction. To complicate matters, AAWSA submitted an application to the Secretariat of the ICC Court claiming that the three arbitrators (constituting of the arbitral tribunal) are not impartial and that they should be disqualified. The Court utterly rejected the claim and decided that the parties should continue to litigate their case. The crucial point here is whether AAWSA can appeal to court against the decision and as to which court it can appeal to. In this regard, art. 7 (4) of the Rules of Arbitration of the International Chamber of Commerce (1998) is precise and clear in terms. It reads as:

The decisions of the [ICC] Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final and the reasons for such decisions shall not be communicated.

[29] Addis Ababa Water and Sewerage Authority V. Salini Costrutori SPA, Federal Supreme Court, Appeal file no 6298/93, December 15, 1994 E.C

On the other hand, the arbitration laws of Ethiopia, under art. 3342 (3) of the Civil Code of Ethiopia, is unambiguous in establishing the following:

Where the application for disqualification is dismissed, this decision may be appealed against in court within ten days.

Thus, AAWSA appealed against the decision to the Federal Supreme Court stating mainly that the arbitration rules of Ethiopia is to govern their arbitration proceedings and that the seat of arbitration is in Ethiopia, and therefore, that an appeal lies against the decision. Thus, the Federal Supreme Court entertained the appeal. The Federal Supreme Court decided not only to disqualify the arbitrators but also severely censured the Arbitration Tribunal for what it called an "erroneous stance" in continuing to hear the parties on the merit without deciding on its jurisdiction over the case.

From the Federal Supreme Court's decision over the case, it seems clear that courts would not compromise the strict applicability of the Ethiopian Arbitration laws. Thus, Arbitration institutions in Ethiopia may find it difficult to operate until the existing laws are updated to suit the laws and practices of modern commercial arbitration.

II. Another peculiarity that is embedded in the Labor Proclamation with regards to the LRB seems to be what is stated under Art. 150 (3):

in reaching its decision, the Board shall take into account the substantial merits of the case, and need not follow strictly the principles of substantive law followed by civil courts

In effect, the provision empowers the LRB to act as *amiables compositeurs* or in accordance with *ex aequo et bono*. The following statement can give a succinct explanation on the concept of ***Compositori amichevoli*** or power to act as ***amiables compositeurs*** :

...enabling the arbitrator, when applying a specific law, to derogate from a strict application of the law, if it considers that such strict application would lead to an unjust result.[30]

The distinction should also be noted that the power to act *ex aequo et bono* also authorizes the arbitrator to decide according to equity and good conscience without the need to determine the applicable law.[31] In both instances, the bottom line is that the arbitrator cannot disregard the public policy rules of the seat of arbitration

Can an arbitrator sitting to settle a collective labor dispute be granted the same right to disregard the principles of law and decide according to what is fair and good conscience?

The Civil Code defines arbitration as a contract in which parties entrust the solution of their existing and future disputes to a third party, arbitrator, who decides in accordance with the principles of law.[32] This legal definition does not favor the role of an arbitrator as *amiables compositeur*.

On the other hand, the Civil Procedure Code states as:

The tribunal shall ...decide according to law unless by the submission it has been exempted from doing so.[33]

This idea of amiable composition, which was absent in the Civil Code in 1960, was introduced to the Ethiopian legal system five years later by the Civil Procedure Code of 1965. Whether this was a deliberate legislative move to fill the gap in the Civil Code of 1960 leaves us in limbo. However, similar legislative move, with the intent to fill similar legal lacunae, is worth mentioning here. In re High Way Authority V. Solel Boneh Ltd., May 14, 1965, the Court held:

Although by Art 3194 (1) of the Civil Code, a court may not order administrative authorities to specifically perform their obligation, a court is not thereby precluded from ordering specific performance of an agreement to submit disputes to arbitration.

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[30] International Trade Center (ITC)-UNCTAD/WTO, Arbitration and Alternative Dispute Resolution: How to Settle International Business Disputes (2001), XVII, 266, Geneva: ITC, 2001, P.33

[31] IBID

[32] The Civil Code of Ethiopia, 1960, Art. 3325

[33] The Civil Procedure Code of Ethiopia, 1965, Art.317 (2)

To avoid similar court decisions, the need for a clear prohibitive clause was apparent and Art. 315 (2) of the Civil Procedure Code was inserted; thereby, rendering disputes arising from administrative contracts non-arbitrable. Juxtaposing Art.317 (2) of the Civil Procedure Code to Art.3325 (1) of the Civil Code, thus, would enable us to conclude that an arbitrator can act as an *amiables compositeurs*. Obvious as it may seem, though, the answer to the question at hand may not be a conclusive 'yes' Some legal scholars argue that Art.317 (2) should not be given effect as it is inconsistent and contradictory with the definition of arbitration in the Civil Code, stating mainly that procedural laws should neither limit nor extend substantive rights that are definitively dealt with in the substantive laws, in this case, the Civil Code.[34] This limited work may not dwell on arguing in favor or against this claim. The author would like to note in passing, though, that this way of interpreting the Ethiopian arbitration laws would not only nullify Art.317(2) but also render ineffective those similar clauses embedded in the arbitration rules of the arbitration institutions, i.e., AACC, ICC, and EACC to which many of the legal scholars subscribed to their being modern arbitration rules. Mention can also be made here of Art.209 of the Maritime Code of Ethiopia of 1960, where, under a contract of carriage of goods by sea, the carrier cannot issue a Bill of Lading that, in its arbitration clause, entitles (an) arbitrator(s) to act as (an) *amiables compositeur(s)*.[35] This is no doubt indicative of the fact that the legislator would single out specific legal relationships whose dispute settlement via arbitration ousts the arbitrator of the power to act as *amiables compositeur* or according to *ex aequo et bono*!!!!

III. Art. 147 (4) provides as:

Orders and decisions of the Board shall be considered as those decided by civil courts of law.

From a reading of this Provision it appears that the Board's decision or order is considered to be at par with any court's decision. Thus, there is no need for the judgment creditor to have it homologized (entered into a court judgment) as is expected of the award-creditor in an arbitration proceeding by virtue of Art.319 (2) of the Civil Procedure Code. Art.319 (2) thus states:

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[34] Bezzawork Shimelash, "The Formation, Content and Effect of an arbitral submission under Ethiopian law" Journal of Ethiopian Laws, Vol. XVII (1994), p. 83.

[35] Art.209 provides: "An arbitration clause inserted in bill of lading may in no event grant to the arbitrators the power to settle a difference by way of composition"

An award may be executed in the same form as an ordinary judgment upon the application of the successful party for the homologation of the award and its execution.

In other words, in case the award-debtor is not willing to discharge his obligations under the award, the award-creditor may not be able to have it executed unless the award is entered into a court judgment, i.e., order of ***exequatur*** (let it be executed order) is granted by the court.

IV. Finally, in the LRB, all hearings are public, unless decided otherwise by the Board Chairman to make it *in camera.*[36] In contradistinction to this, arbitration proceedings are at all times confidential, i.e., both the parties and the arbitrator cannot disclose to an outsider about the existence of the dispute itself and the matters discussed during the proceeding. However, with the consent of the disputing parties, the arbitral award may be made public. Thus, the parties are ensured that confidentiality will be maintained in an arbitration proceeding. It should be pointed out, though, that the sanctity of confidentiality in arbitration proceedings taken into account, the role of the Government as ***amicus curiae*** in ensuring, in appropriate cases, that arbitrators '...consider not only the interest of the parties immediately concerned but also the interest of the community of which they are a part...', as envisaged under Art.150 (2), may be put in a precarious position.

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[36] Art.149 (4)

CONCLUSION

It has been tried to show that ADR methods feature in settling labor disputes: individual labor disputes, though vested in the First Instance Courts of the States, can be submitted to conciliation and/or arbitration. In the settlement of collective labor disputes, Conciliation is used both in the Essential Public Service Undertakings (EPSU) and in those Undertakings that are otherwise categorized (UOC). While it seems to have been left for the discretion of the parties whether to resort to conciliation or not in the EPSU, it is compulsorily imposed on the UOC. In the event that conciliation does not bear fruits, parties may resort to LRB (*ad hoc* or permanent). *Ad Hoc* LRB seems to have been devised for settlement of disputes arising from wages and other benefits in the EPSU. The judgment-debtor has the right to appeal against the decision of LRB to the Federal High Court or State Supreme Court. Disputing parties may opt out of LRB, though. They may agree to submit their disputes for settlement to arbitration. The award-debtor may similarly appeal against the arbitral award, provided that, under their submission, the parties have not waived their right of appeal. The award-debtor may also resort, under certain circumstances, to the setting aside procedure[37] Here, it is good to note that arbitral awards are final i.e., no appeal to court lies against the award, under the arbitration rules of arbitration centers, if the parties submitted their disputes to the institutions so-far established and operating in Ethiopia.

[37] The Civil Procedure Code of Ethiopia, 1965, Arts 355-357

Finally, in Ethiopia, the use of ADR methods in the commercial dispute settlement is yet at its infantile stage. The low profile that ADR methods suffer from, amongst the business community, needs to be quickly addressed so that the emerging conciliation and arbitration centers in Ethiopia play their role in effectively settling disputes arising both from domestic and international trade and investment.

In this author's opinion, it is imperative for the efficacy of conciliation proceedings that statements, offers, admissions, suggestions made during the conciliation proceedings should not be adduced as evidence in court against the party making them. Today, short of legal provisions to this effect, parties may find it difficult to be transparent in the conciliation proceedings.

The arbitration laws in force are far from being modern, too. The fact that Ethiopia has recently ratified the Hague Convention on the Pacific Settlement of International Disputes (1899)[38] and its commitment under the COMESA Treaty[39] to accede to multilateral agreements on investment dispute resolution, this author hopes, may serve as a catalyst in the process of ratifying the NYC and the International Convention on Settlement of Investment Disputes Between States and Nationals of Other States (ICSID), otherwise known as "The Washington Convention of 1965" [40]

[38] Convention for the Pacific Settlement of International Disputes (1899) Ratification Proclamation no 348/2003, Fed.Neg. Gaz. Year 9, No. 68, 2003

[39] The COMESA Treaty, Art.162

[40] Note that Ethiopia signed the ICSID Convention on September 21, 1967 but has not yet ratified it. On the impact and relevance of the ICSID Convention on the Ethiopian legal system, see Feele Hagos Bahta, the Enforcement of Foreign Commercial Arbitral Awards in Ethiopia, Senior Thesis, AAU, Faculty of Law, 2002 (Unpublished)