Immediate Appealability of A Court Order against Arbitration: It Should Be Allowed and Even Made Compulsory

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Abstract

If we look at Article 320 of the Civil Procedure Code, it reveals the non-immediate appealability of a court order against arbitration agreement. In this work, I argue that the provision must be amended and immediate appeal from a court order declining the enforcement of arbitration agreement must be allowed and even made compulsory.

Introduction

One of the preliminary objections a party can invoke to discontinue litigation is the existence of an agreement to arbitrate over the dispute submitted to the court. [1] The opponent party seeking the litigation over arbitration may challenge the defendant's objection by claiming one or more of such grounds as : there is no arbitration agreement at all, the arbitration agreement does not cover the subject matter of the dispute submitted to the court, the subject – matter of the dispute is *not arbitrable*[2] or the arbitration agreement is *invalid*[3]

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[1] See Civ.Proc.C,1965, Art.244(2)(g).

[2] For example, a party, on the basis of Art. 315(2),Civ.Proc.C, may argue that the dispute, as it emanates from administrative contract, is not arbitrable.

[3] Arbitration agreement can be challenged as invalid for, for instance, non-fulfillment of the formality requirements or lack of parties' consent or its bias in favoring one party over the other in the appointment of arbitrators (Art. 3335, Civ. C).

or thus not enforceable or *has lapsed,*[4] or some preconditions such as a time–limit on initiating arbitration are not fulfilled.

The court which is supposed to give an order on preliminary objection before it goes into hearings on the merit of the case[5] evaluates the claims of the parties and may give an order in favor of the party favoring litigation, that is, against the arbitration.[6] A look at Art.320(3),Civ.Proc.C, reveals that an immediate appeal of this order about which the pro arbitration party believes erroneous is not allowed. The party needs to defer her appeal on the order until the courts look into the merit and give final judgment over the dispute which she really wanted to be kept out of the court and resolved via arbitration. So the question is; should an immediate appeal against a court order which is against arbitration be allowed and even made compulsory? This work is up to addressing this question. In this work, it is argued that it should be allowed and made even compulsory for such reasons that sticking

[4] To see circumstances where arbitration agreements lapse, see Civ.C. Arts. 3337, 3344(1) .
[5] Civ.Proc.C,1965, Art.245
[6] In France, where negative kompetenze-kompetenz is at work, courts, at this stage, may not look themselves at such jurisdictional challenges based on the scope, validity or existence of the arbitration agreement. They simply refer the questions to arbitrators unless the arbitration agreement is manifestly null. They examine the questions of validity, existence or scope of the arbitration agreement after an award is given and a claim for setting aside or refusal of enforcement arise. In this regard Art. 1448 of the French Code of Civ.Proc.C. goes:

> *When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.*
>
> *A court may not decline jurisdiction on its own motion.*
>
> *Any stipulation contrary to the present article shall be deemed not written.*

However in Ethiopia let alone the negative Kompetenze –kompetenze, even the positive concept of Kompetenze –kompetenze is not fully adopted as arbitrators cannot decide on the validity of the arbitration agreement (see Art 3330(3), CV.C). So Ethiopian courts are not expected to refer such issues to arbitrators rather they need to handle it themselves and give a ruling over them.

to the final judgment rule with regard to courts order against arbitration contradicts the premise of the rule itself; it leads to absurd solutions, it defeats arbitration's role of easing court's congestion and it opens a room for abuse.

This paper is divided in to VI sections. Section I exposes the law at force with regard to the appealability of court order against arbitration. In sections II, III, IV, and V four reasons which show the need to drop the final judgment rule regarding the appealability of court order against arbitration are forwarded and explained. The last section concludes the discussion with a recommendation to amend the Civ. Proc. Code.

I. The Current Appealability Rule on Court Order against Arbitration-The Final Judgment Rule (FJR)

The Ethiopian arbitration laws (Arts.3325-3346 Civ. C.; Arts.315-319;350-357 and Art.244(2)(g) Civ.Proc.C)[7] does not consist of a rule on the appealability of court orders against arbitration. Thus, the applicable rule is what is provided under Art.320(3),Civ.P.C. This article reads:

> No appeal shall lie from any decision or order of any court on interlocutory matters, such as a decision or order on adjournments, *preliminary objections*, the admissibility or inadmissibility of oral or documentary evidence or permission to sue as a pauper, but any such decision or order may be raised as a ground of appeal when an appeal is made against the final judgment. (emphasis added)

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

As provided under Art.244(2)(g), Civ.Proc. C. a challenge against court's jurisdiction based on the existence of an arbitration agreement is a preliminary objection and court's order on this challenge is an order on preliminary objections and thus not immediately appealable. A party feeling aggrieved by erroneous court order against arbitration must defer her appeal until the final judgment.[8]

The final judgment rule as embodied in Art.320(3), Civ.Proc.C must have been adopted by the legislator for its far-reaching importance. To see the rationale of the rule which the legislator must have noted in adopting it, let us borrow a couple of paragraphs on the importance of the rule from one writer:

> One of the basic rationales behind the rule … is the conservation of judicial resources. Repeated interruption of trial court proceedings to review every contested ruling would consume vast amounts of court time and needlessly delay trials. Moreover, the finality requirement avoids unnecessary appeals from rulings that ultimately become moot, either because the party who lost the ruling prevails on the merits, or because the disputed ruling fails to affect the final result in a manner requiring reversal.
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> Of even greater concern … is the danger excessive interlocutory appeals pose to the relationship between appellate and trial courts. Appellate court intrusion into the jurisdiction and discretionary decision-making of the district courts arguably weakens both the

[8] Note that there are exceptions to the final judgment rule for those matters enumerated under Art.320(4),Civ.Proc.C. According to this provision, an immediate appeal is allowed only on such orders directing the arrest or detention of any person, the transfer of property from the hands of one party into the hands of the other or refusing to grant an application for habeas corpus.

> authority of the trial judge and the efficient operation of the judicial system.... Repeated appeals also would permit relatively wealthy parties to harass or financially exhaust their opponents. Moreover, the greater the opportunity for delay in trial, the greater the likelihood that crucial evidence will grow stale or vanish altogether, or that the trial court's familiarity with the facts of the case will weaken. Finally, the final judgment rule forces consolidation of all potential appeal issues into one appeal. As a result, the rule minimizes the burden on the appellate courts and enables the reviewing court to consider the trial court's action in light of the entire proceedings below.[9]

However, despite the above policy goals behind the rule in Art.320(3),Civ.Proc.C, it does not make sense to apply it to court orders against arbitration. Because sticking to FJR regarding such orders is nonsense for various reasons such as: it contradicts the underlying premise of FJR; it leads to absurd solutions, it defeats arbitration's role of easing court's congestion and it opens a room for abuse.

II. The Immediate Non-Appealability of the Court Order against Arbitration Contradicts the underlying Premise of FJR- Reparability

We need to insist upon the FJR as long as it serves its purpose or is compatible with its underlying premise or does not cause injustice to the parties. The rule is on the premise that the damage done by an erroneous order on interlocutory matters must be reparable even if the appeal is lodged

[9] Randall J. Turk, Toward a More Rational Final Judgment Rule: A Proposal to Amend 28 U.S.C. § 1292, 67 *Georgetown. Law Journal,* 1025 (1978-1979).

not immediately after the order but upon a final judgment. Of course, the correction of the damage could come, in individual cases, at a higher cost than it could if an immediate appeal was allowed. However, since the potential policy consideration behind FJR outweighs the potential damage a party could suffer from an order, the rule is upheld. For example, if a court orders that the action is not barred by period of a limitation and proceeds to trial and later an appellate court, which reviews the court order upon final judgment, finds the order erroneous (that is, if it finds that the action is actually barred by a period of limitation), the trial held in the lower court will become simply a wastage.[10] This means, the party is made to go through unnecessary trial just because he has to wait until final judgment is given to get the order corrected. However, this possible ordeal of the party, as it is by the time the order is given, does not outweigh the possibility that the order may not be found erroneous by the appellate court, the party can use immediate appeal to harass the opponent or he may prevail in the merit and thus he may not need the appeal ultimately, to name a few.[11] So, the FJR is on the premise that the cost to fix the damage of an erroneous order could be higher whenever the erroneous order is corrected upon final judgment than immediately after it is given, but still the damage by the order must still be reparable to make it appealable only upon final judgment. In other words, the rule applies only if the damage by an erroneous order is reparable by appeal upon final judgment.

The above analysis, *a contrario* reading, states that if the damage by an erroneous order is not reparable by appeal upon final judgment, then the order should not be subjected to FJR. It does not make sense to stick to FJR

[10] Note that trial is in most cases the most expensive part of a proceeding as, for example, a party must bear the cost of transportation and other expenses of her witnesses.
11 See supra note 9 and the accompanying text.

and extend its applicability to any case which does not even fit into its underlying premise, which is damages caused by erroneous orders are reparable even though appeal from the order is allowed only upon final judgment. Accordingly, the adherence to the rule does not make sense regarding the appealability of a court order which goes against the referral of the dispute to arbitration because the damage from an erroneous order against arbitration is irreparable unless immediate appeal is allowed.

A party enters into an arbitration agreement as a preference to litigation to prevent herself from delay, high cost and publicity which is usually associated with court trial. If immediate appeal is not allowed from an erroneous court order against arbitration and if the pro arbitration party is compelled to wait until the court goes into the merit and finally gives judgment, then she will be exposed to the very features associated with trials and which she wants to shield herself from by entering into the arbitration agreement in the first place. This damage can never be made good thereafter.[12] Therefore, the FJR extending to orders against arbitration as provided in Art.320(3) Civ. Proc. C. must not be left to stand as it is because that goes contrary to the underlying premise of FJR- erroneous court orders are reparable upon final judgment- as the damage from an erroneous court orders against arbitration can never be made good without an immediate appeal.

[12] For example, how can a party recover from the publicity the dispute causes if it once undergoes a court trial which is held publicly? The very purpose of referring disputes to arbitration will be lost for good if the dispute is once made to undergo a public trial.

III. The Immediate Non- Appeal ability of Court Orders against Arbitration Leads to Absurdity

The first absurdity is that if an erroneous court order against arbitration is to be corrected after the lower court gives final judgment, the only way it can be done is by the nullification of the lower court's judgment and mandating the parties to submit the outstanding dispute to arbitration.[13] However, appellate courts need not nullify the judgment unless the lower court is inherently incompetent to handle the dispute but gives judgment on it[14] or the judgment is deeply flawed.[15] In other situations, appellate courts are supposed not to nullify the judgment rather to scrutinize it and either to confirm, or modify or reverse it.[16]

So the question is: Is a court, which erroneously ignores the arbitration agreement and entertains the dispute and gives a judgment inherently incompetent or is its judgment deeply flawed? A court can never be considered inherently incompetent (naturally unfit) to handle a dispute which it would competently handle in normal circumstances, just because it handles it despite the presence of arbitration agreement. Despite the court's error in ignoring or wrong understanding of the arbitration agreement over the dispute, the judgment given on the merit of the dispute cannot be taken as

[13] Note that, in section II, it was shown that referring a dispute to arbitration after a judgment on the merit is given by the lower court achieves nothing of the very objective of parties referring of disputes to arbitration that is to save themselves from costly, time-taking and public trial. Even if we hold that it achieves something, as we will see in this section, it still leads to absurdity.

[14] For example, if the court lacks material jurisdiction to handle a dispute, then it can be taken as inherently incompetent regarding it. See ,Civ.Proc.C,Arts.9,211,

[15] If a judgment is given without observing fundamental principles of justice and procedures such as the right to be heard, the right to be tried by an impartial forum, then it can be taken as fundamentally flawed.

[16] Courts need to do this because the objectives of procedural laws such as fostering the judicial economy and efficiency dictate this, because the nullification of judgments and then ordering of fresh proceeding for every kind of error is very costly and illogical.

deeply flawed, either. In other words, a judgment by such a court on the merit of the dispute can never be taken as deeply lacking the observance of fundamental principles which are designed to ensure that the judgment-givers arrive at fair and just result, just because it is on the dispute subjected to arbitration. Therefore, it is absurd to stick to FJR regarding court orders against arbitration as it compels appellate courts to an absurd solution of nullifying first the lower court's judgment which is neither inherently flawed nor given by an inherently incompetent body. If the judgment is not to be nullified and simply the parties are referred to arbitration, then the defense of *res judicata* can be invoked to bar the arbitration.[17] So, a court order against arbitration should not be subjected to the FJR to avoid such absurdity.

The second absurdity is that nullifying the lower court's judgment and referring the outstanding dispute, as the result of the nullification, to arbitration sends philosophically unpalatable message that disputes submitted to arbitration are only arbitrable, no more in any way suitable for court litigation. The fact that a dispute is referred to arbitration does not imply that it is naturally unfit to be handled by courts. If that was the case, courts would not be given the role to exercise some degree of control over arbitration.[18] Rather, submission of disputes to arbitration implies that parties want the dispute to be resolved quickly, less costly and privately than it would be if litigation were preferred. Therefore, nullifying a court's judgment so as to refer the outstanding dispute to arbitration, despite the fact that the arbitration no more benefits the parties in terms of time, money and

[17] Note also that a judgment given by a lower court in the presence of a valid judgment cannot be held void.

[18] Note that courts have the power to supervise arbitration by such procedures as appeal (Arts. 350-354, Civ. Proc. C.), setting aside (Arts.355-357, Civ. Proc.C) and refusal (Art.319(2)), Civ. Proc. C, the court can refuse the enforcement of arbitral awards).

confidentiality sends a wrong message that disputes submitted to arbitration are naturally unsuitable for litigation.[19]

IV. The Immediate Non-Appealability of Court Orders against Arbitration Defeats Arbitration's Role of Reducing Court's Caseloads

Ethiopian arbitration law is the part the Civil Code and Civil Procedure Code.[20] And it is possible to assume that Ethiopian arbitration law has the objectives of ensuring the enforceability of arbitration agreements[21] and bringing efficiency in the resolution of disputes which include by easing courts' congestion. In Ethiopia, there is no way that the arbitration law cannot be not intended, among other things, to ease court congestion as courts in Ethiopia are overcrowded with cases.[22] However, if a court's erroneous order against arbitration is to be corrected after the court goes to trial and finally gives judgment on the merit of the dispute, arbitration's purpose of easing court congestion can never be achieved. The purpose can be achieved if the court order which erroneously keeps the dispute in the court gets corrected in time and the dispute is referred to arbitration before it undergoes a trial and judgment stages. This is made possible when an immediate appeal from a court order against arbitration is allowed.

[19] Note that parties may prefer arbitration to be arbitrated by a person of high expertise on the subject matter of the dispute. But this is not the essential reason for a legal system to design a legal framework for arbitration alongside litigation

[20] See note 7 and the accompanying text

[21] See,Art.Civ.Proc.C, Art.244(2)(g).

[22] But remember that the nullification itself is an absurd solution as discussed in section III.

V. The Immediate Non- Appealability of Court Orders against Arbitration Could Lead to Abuse by a Party with a Bad Faith

If an immediate appeal of a court order against arbitration is not allowed or even made compulsory, then the losing party can exploit the FJR to prolong the settlement of the dispute to the point of frustrating the other party. A party whose case is weak may not want to take an immediate appeal from erroneous court order against arbitration as the appellate court may refer the dispute to arbitration and it may get decided by arbitrators more quickly than it does in the court. Rather, such a party wants to take her time until the lower court goes to trial and gives judgment. If her fear realizes and the court's judgment goes against her favor, then she files an appeal from the order against arbitration to get the whole proceeding in the lower court nullified and then the resulting outstanding dispute referred to arbitration.[23] To avoid such possible abuse by a party with a weak case and in bad faith, an immediate appeal from court orders against arbitration must be allowed and even made compulsory.

VI. Conclusion and Recommendation

A glance at Art.320(3), Civ. Proc. C. reveals that a court order against an objection for the termination of litigation which rests on the ground of the existence of arbitration agreement over the dispute is not appealable until final judgment is obtained. However, there are plenty of reasons to hold that the rule in the article is not suitable for the appelability of such order. The rule in the article makes sense if the court order fits into its premise that the damages the order causes are reparable even if the appeal lies from it upon final judgment; if it does not lead to absurd solutions such as nullifying

[23] But remember that the nullification itself is an absurd solution as discussed in section III.

lower court's judgment for no fundamental problem; if it does not send a wrong message that only arbitration is the inherent mechanism for the resolution of a dispute subjected to an arbitration agreement; if it creates a judicial economy by not keeping erroneously in the court disputes that must be kept outside the court for settlement via arbitration and if it forecloses the possible room for abuse by a party in bad faith.

As sticking to the FJR with regard to a court order against arbitration leads to the irreparability of the damage arising from the order, absurd results, defeating the arbitration's role of easing court's caseload, and opening a room for abuse by a party in bad faith, there is no reason to maintain Art.320(2),Civ. Proc. C as it is. It must be amended to exclude its FJR from being applicable to orders against arbitration and an immediate appeal from the order must be made compulsory, meaning, if a party fails to take an appeal immediately, then she cannot do it later. That can be done by inserting a provision in the Ethiopian arbitration law a provision which is similar to the following one:

> A court order against the preliminary objection challenging its jurisdiction, on the basis of the existence of a valid arbitration agreement, of handling the dispute submitted to it shall be appealable immediately after it is issued. The appeal shall be lodged within ---- days of the issuance of the order. If the appeal is lodged in bad faith, the appellate court may award damage for the other party.