

Ethiopian Law on Arbitral Interim Measures: Towards Dispelling the Ambivalence

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Abstract

The recognition and application interim measures amidst litigation proceedings could help the proper protection of the rights of the parties and increase the efficacy of process. This holds true for arbitration proceeding as well. Traditionally, the power to order interim and precautionary measures in arbitration proceedings have been exercised by regular courts virtually in all jurisdictions. Nowadays, that jurisprudence has changed in several jurisdictions. International institutions such as the UNCITRAL have facilitated the development of trends that vests arbitral tribunals more legitimacy, trust and power including the power to order interim measures. UNCITRAL Model Law on International Commercial Arbitration (hereinafter UNCITRAL Model Law) provides the baseline rules for arbitration in general. These rules vest arbitral tribunals the power to order interim measure. The model law has influenced several jurisdictions and it is shaping the rules regarding the power to order interim measures. The Civil Procedure Code (CPC) of Ethiopia which deals with arbitration does not seem to specifically address interim measures to be granted by tribunals. The implication of such legal silence on the exercise of the power to order interim measures by tribunals has not been researched well so far. This work examined legal stance and the practice of arbitration tribunals to order arbitral interim measures in Ethiopia. To this end, the study employed a qualitative research method focusing on reviewing documents (such as relevant laws, arbitral awards, case files, and related literature) and conducting a series of interviews. The analysis of Ethiopian law, arbitrators' practices, and decisions of courts showed that arbitrators have the power to grant interim measures but the legal discourse and the practice suffered uncertainties. This author argued for a bold step, in Ethiopia, to assure arbitral tribunals unquestionable power to order interim measures.

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Acronyms:

CPC-Civil Procedure Code

AACCSA-Addis Ababa Chamber of Commerce and Sectoral Association

ECX-Ethiopian Commodity Exchange

UNCITRAL-United Nations Commission on International Trade Law

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Introduction

The designation of interim measures in civil litigation could be related to temporary injunction and attachment before judgment. In most states' arbitration laws or tribunal rules, mention has only been made regarding the types and conditions of granting interim measures than defining what they are. Consequently, interim measures take different types, forms and names.¹ Some rules use the term interim measures², or interim measures of protection and others use the term provisional measures³ or conservatory measures.⁴ The difference in terminology may show the superseding purpose of the measures that the laws or rules want to emphasize. The purposes of interim measures include keeping parties' interests or evidence from irreparable harm, preserving affairs, and facilitating later enforcement⁵. In some cases, like the European Union Court of Justice (EUCJ), interim relief is considered to be an aspect of the right to an effective judicial remedy and a fair trial for the protection of freedoms and rights.⁶

In most instances, parties in arbitration do not deal with competence to grant interim measures in their contract. So, the determination will be left largely to the national laws and rules of the institution selected.⁷ As to the national laws, most statutes before 1985 (prior to the adoption of UNCITRAL Model Law) indicated that states were reluctant to take the power to grant interim measures

¹ Rafal Morek, *Interim Measures in Arbitration Law and Practice in Central and Eastern Europe: The Need for further Harmonization*, (2007), p.76.

² United Nations Commission on International Trade Law, *Model Law on International Commercial Arbitration (UNCITRAL Model Law)*, (1985) with amendments adopted in (2006), Article 17. However, Article 9 uses the term 'interim measure of protection'

³ International Centre for the Settlement of Investment Disputes (ICSID), *Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings*, entered into force October 14, (1966), Rule 39. It used the term "provisional measures". Swiss Private International Law Act (PILA), (18 December 1987), Article 183. It employed the terms 'provisional and conservatory measures'

⁴ London Court of International Arbitration (LCIA), (October 1, 2020), Article 25. It uses the term interim and conservatory measures. International Chamber of Commerce (ICC), (March 1, 2017), Article 28. It calls conservatory and interim measures.

⁵ Yesilirmak Ali, *Provisional Measures in Commercial Arbitration*, *Kluwer Law International*, (2005), p. 13, 20

⁶ Mohmeded Shadat, *A Critical Analysis of Provisional Measures in England and Wales*, DPHIL thesis, Brunel University Law School, (2014), p.6

⁷ Vivienne M. Ashman, *the UNCITRAL Arbitration Rules and A Review of Certain Practices and Procedures*, *International Business Litigation & Arbitration Institute*, (2001), p.765

away from courts of law.⁸ The adoption of UNCITRAL Model Law can be taken as a landmark for recognizing arbitral tribunals' power to grant interim measures that considerably help for the independent and smooth functioning of arbitral tribunals especially in international commercial arbitration.⁹ The UNCITRAL Model Law has attempted to create harmonization in the area and was eventually adopted by many states either through amendment of the old law or enactment of a new legislation.¹⁰

The UNCITRAL Model Law provisions are relatively detailed and extensive; they regulate the issuance of interim measures by an arbitral tribunal, the conditions, the recognition and the enforcement therewith.¹¹ In this work, the author uses the definition given under the UNCITRAL Model Law¹² for it encompasses the broad sense of precautionary and injunctive relief. The UNCITRAL Model Law under Article 17(2) defines interim measures as, "any temporary measure regardless of the form granted at any time prior to the issuance of the final award".¹³

Currently, many arbitration laws of states provide equal power to tribunals and courts in granting interim orders on the parties in the arbitration proceeding.¹⁴ Yet, using an arbitration tribunal as a forum for obtaining interim measures in Ethiopia is minimal. This might be attributable to the old and limited application of the laws of arbitration, and the inadequate experience. This work examines the general trend regarding arbitral tribunals' power to order interim measures and the Ethiopian legal and practical setting in particular. *The study employed a qualitative research method: Ethiopian law on the subject critically examined; relevant documents such as arbitral awards, case files, and literatures are reviewed; and series of interviews are conducted so as to fetch the best output.*

⁸ Italian Code of Civil Procedure, (1997), Book Four, Title VIII, Article 818. It provides arbitrators may not grant attachments or other interim measures of protection. Peoples Republic of China Arbitration Law, (1995), Article 46. It provides any request for interim relief must be referred to the courts. Civil Code of Ethiopia, Proclamation No. 165/1960, *Negarit Gazette*, (1960), Article 3329. It requires restrictive interpretation to powers of arbitrators. England Arbitration Act, (1889), (1934), they were characterized by prerogatives of courts.

⁹ Mohmeded, *supra* note 6, p.89.

¹⁰ Mohammed Muddasir Hossain, *International Commercial Arbitration: The Need for Harmonized Legal Regime on Court Ordered Interim Measures of Relief*, Master Thesis, University of Toronto, (2012), p.24

¹¹ UNCITRAL Model Law, *supra* note 2, Art.17–17I

¹² *Ibid.*

¹³ United Nations Commission on International Trade Law, *Digest of Case Law on the Model Law on International Commercial Arbitration*, (2012), p.85.

¹⁴ Alexander Goldstajn, *Choice of International Arbitrators, Arbitral Tribunals and Centers: Legal and Sociological Aspects*, *Essays on International Commercial Arbitration*, (1989), p. 46.

This article is organized in to six sections. Section one sets out an overview of interim measures. Section two articulates competence of courts and tribunals to grant interim measures. Section three discusses conditions to grant interim measures while section four describes enforcement of arbitral interim measures. Section five presents Ethiopian laws, cases and arbitral tribunals' practice in granting interim measures. The last section, section six, makes a summary of the whole discussions and concluding remarks.

1. Overview of Interim Measures

Proceedings usually take time and in effect evidences may be lost, and assets potentially usable in the final enforcement stage could be abused or concealed. Consequently, enforcement of the final award may become difficult. Thus, there is a need for protecting the *bona fide* party from the *mala fide* party.¹⁵ In other words, arbitration should serve the rights of the parties in a moment that demands protection of parties' rights. Provisional remedies or interim measures are one way to prevent such assail.¹⁶ Therefore, the protection of property and evidence that could be used for the satisfaction of the award would be among the main reasons that justify protective interim measures.¹⁷ If such a mechanism is not available until the final adjudication, the winning party would only obtain a pyrrhic victory.¹⁸ In judicial litigation and arbitration process,¹⁸ the availability or otherwise of provisional measures can have a substantial effect on the final result, especially when issues related to the protection of evidence and assets arise before or during the proceedings.¹⁹

In conceptualizing interim measures, it is often considered as synonymous with interlocutory orders mainly due to their temporary nature and regulatory character in a proceeding. However, more often than not, interlocutory orders are tailored in managing proceedings like rulings adjournment, party's conduct and attorney representation issues. Conversely, interim measures are of different kinds that include orders aiming at avoiding or minimizing loss, damage, or prejudice to parties (such as orders related to security of costs, preservation of

¹⁵ E. Shukeet al(ed), Interim Measures in International Commercial Arbitration by Association for International Arbitration, (2006), p.26. Also see Christoph Liebscheret al(ed), Arbitration Law and practice in Central and Eastern Europe, Huntington, New York (2006), p.77

¹⁶ Ibid

¹⁷ Gary B. Born, Provisional Relief in International Arbitration: International Commercial Arbitration, 2nd ed. (2014), p. 2482

¹⁸ Shuke, Supra note15, p.5

¹⁹ Born, supra note 17, see also United Nations Commission on International Trade Law Working Group on Arbitration, Report of the Secretary General, 32nd Session, (1994). A report submitted by the UN Secretary General on Settlement of commercial Disputes clearly outlines the importance of interim measures and also the growing need for interim relief from the tribunals

evidence or assets, access to or use of property, cease and desist from infringement of intellectual property or other rights) and/or orders related to the continued performance of contract pending final award.²⁰ In addition, interlocutory orders are mainly used as tools that help courts to maintain the regulation of proceedings and mostly non-appealable before a final judgment is given. Moreover, decisions concerning interim measures, as opposed to the case in interlocutory order, could be appealable as stipulated in Article 320(3) of CPC, and it is also possible to take action for setting aside unreasonable grant of interim measures.²¹

The realms of interim measures also include orders given for not only ensuring the confidentiality of the information disclosed during the proceedings but also facilitating the enforcement of arbitral awards by depositing the assets that would be used to satisfy the award with a third party pending the resolution of the dispute.²² The main types of provisional measures ordered for cases under arbitration are maintaining or restoring the *status quo* pending the determination of the dispute, taking action that would prevent or refrain from an action (that is likely to cause, current or imminent harm or prejudice to the arbitral process itself), providing a means of preserving assets out of which a subsequent award may be satisfied, and preserving relevant evidence and material to the resolution of the dispute.²³

Most importantly, today, it is generally acknowledged that the legal basis for the arbitral tribunal's competence to issue 'interim orders of protection' or 'conservatory measures' lays in its competence to decide on the merits of the dispute.²⁴ In authorizing a private tribunal to decide on existing or future disputes between them, the parties have vested in the arbitrators' inherent power to issue measures of provisional relief connected to the subject matter of the dispute, which serves to safeguard the efficiency of the tribunal's decision-making.²⁵ Likewise, interim measures are central to the administration of justice by protecting parties' interest (from irreparable harm), and helping enforceability of judgments²⁶ as well as ensuring state commitment to human

²⁰ International Court of Arbitration Bulletin, Vol. 11, No.1, (2000), a range of interim awards made by arbitral tribunal under the ICC Rules.

²¹ Lawrence W. Newma Colin Ong, *Interim Measures in International Arbitration*, (2014), p.192

²² Dana Renee Bucy, *How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration under the amended UNCITRAL Model Law*, *American University Law Review*, vol. 25 issue 3, Article 5, (2010), p.9.

²³ UNCITRAL Model Law, *supra* note 2, Article 17(2).

²⁴ Mohameded, *supra* note 6, p. 78.

²⁵ *Ibid*, p.80.

²⁶ Peter Westberg, *Interim Measures and Civil Litigation*, *Scandinavian studies*, (2012), p.542

rights covenants.²⁷ Furthermore, the urgent nature of measures that do not go with the state court congestion calls for interim solutions to be given by tribunals.²⁸ Especially for developing states where there are corruption, delayed justice, and meager legal knowledge, the availability of arbitral interim relief would be a good alternative to fill these *lacunae* by using the expertise of arbitrators and conditions set in the rules to grant interim measures like *prima facie* success test. The *prima facie* success test has once been disregarded in the federal courts of Ethiopia in the case of *Defret* film.²⁹ For these reasons, the acceptance of the arbitrator's power to grant interim relief has shown change in recent times.³⁰

Provisional remedies may be needed when the tribunal has not been established. An emergency arbitration is a means used by international tribunals mainly by those established under the International Chamber of Commerce (ICC) Rules that permits provisional remedies until the formal tribunal is constituted.³¹ Nevertheless, considering the contractual nature of arbitration, a tribunal should grant a request for interim measures mainly among parties themselves.³² Asking for court assistance (such as an application to freeze the party's money in a bank or to produce documents in the hands of a third party) could be a remedy when a third party is involved. However, when parties in arbitration go to courts seeking provisional remedies, the courts should refrain from entertaining the main issue under the guise of examining conditions to grant interim measures of the case.³³

²⁷ International covenant for Civil and political rights (ICCPR), (1966), United Nations, Treaty Series, vol. 999, Article 14, General Comment 32 signifies the importance of ADR that comprise arbitration in the access to justice and impose responsibility to states to work for developing it.

²⁸ Rafal, *supra* note 1, p.77.

²⁹ *Zeresenay Berhane V. Aberash Bekele, FFIC*, (2014). *Difret* is a 2014 Ethiopian film that based on the true-life story of *Aberash Bekele*, an Ethiopian girl who in 1996 at the age of 14 was arrested and charged with murder committed in a trivial of rape. The film is produced by Angelina Jolie Pitt and written/directed by *Zeresenay Berhane*. The film was banned from screen in the pretext of claim by *Aberash Bekele* and the lawyer of the real stories with the reason that while basing their story, the film making do not obtain their consent. Later, with the claim of 'copy right' *Aberash* obtained an injunction from Federal High Court to prevent the internationally acclaimed and award-winning film from being screened in Ethiopia for a case which is outside the scope of copyright. Had it been in arbitration the *prima facie* success test ought to have prevented the injunction from being granted

³⁰ Tijana Kojovic, Court Enforcement of Arbitral Decisions on Provisional Relief, *Journal of International Arbitration*, Vol. 18, no.5 (2001), p. 118.

³¹ International Chamber of Commerce (ICC), Arbitration Rules, (2017), Article 29, Appendix V, Emergency Arbitrator Rules provides, a party that needs urgent interim measures "Emergency Measures" that cannot await the constitution of an arbitral tribunal may make an application to the Secretariat.

³² Raymond J. Werbicki, *Arbitral Interim Measures: Fact or Fiction*, AAA Handbook on International Arbitration & ADR, (2010).

³³ Alison C. Wauk, Preliminary Injunctions in Arbitrable Disputes: The Case for Limited Jurisdiction, *UCLA school of Law, Review*, Vol. 44, (1997), p.2061

2. Competence of Regular Courts and Arbitral Tribunals on Interim Measure in Arbitration Proceedings.

Arbitration is not a standalone proceeding. Indeed, there are numerous instances in which the arbitration tribunal badly needs the assistance of courts. This is well accepted and widely applied phenomenon but the question of when and to what extent the arbitration tribunal needs to rely on judicial assistance remains unsettled. Contentions regarding when and when the courts should not step in starts from the very begging of disputes. It is not uncommon to lodge objections, in judicial proceeding, alleging that courts are precluded from entertaining merit of cases owing to arbitration clause or agreement meant settle disputes via arbitration.³⁴ For instance, the Ethiopian CPC under Article 244(2) (g) recognized preliminary objection on the basis of the fact that disputes are subject to settlement by arbitration.

The point worth considering here is whether such ground of objection could be applied for interim measures. The answer goes in the negative that what is precluded from reach of the court is getting to the merit of the case which is the subject matter of arbitration agreement and interim measures are temporary in nature that do not have a determinative role on the final disposition of the cases. Thus, going to courts for interim measures does not go against the arbitration agreement rather it helps sustain the good move of the arbitral proceeding. Court involvement in the arbitration is advisable so long as it is to assist the process of arbitration. Art 17 (j) of UNCITRAL Model Law makes the power of court coextensive with the power given to arbitral tribunal.

States show their position regarding arbitral interim measures by their national legislation or court rulings. In most states, the traditional view of courts' residual power for adjudication remains intact so that clear statutory blessing is required for the option that calls arbitrators to grant such measures. Apart from the trends like the American legal and political culture of isolationism and centrism to judicial administration,³⁵ the legislations that impose prohibitions against tribunal-granted provisional measures in a number of states (including Austria, Spain and Greece³⁶) have contributed to the slow advancement of interim measures by tribunals. In countries like Ethiopia, where the development of arbitration is slow and arbitral expertise is lacking and slow progress of justice

³⁴ Gabrielle Kaufmann Kohler et al, (ed), *International Arbitration: Law and Practice in Switzerland*, (2015), p.245

³⁵ Douglas D. Reichert, *Provisional Remedies in the Context of International Commercial Arbitration*, *Berkeley Journal of International Law*, Vol. 3, No. 2, (1986)

³⁶ Born, *supra* note 17, p.2438

to respond to new systems, arbitrators' audacity to grant interim measures will be questionable.

Although historic limitations on arbitrators' power have been removed in many states, some nations continue to impose mandatory prohibitions that forbid arbitrators from ordering provisional relief. For instance, in Italy, China, Thailand and Argentina, legislations still provide that granting of provisional measures in arbitration proceeding is exclusively to local courts.³⁷ Hence, courts predominantly own the authority to grant interim measures for long a while. So, states that do not clearly define arbitral tribunals' power on interim measures under their laws could possibly fall into ambivalence. The supremacy of the courts demonstrated in the courts' decision of England can be cited by way of example.³⁸ Indeed, owing to arbitration and/or arbitrability, some areas are reserved for regular courts, due to public policy. Regular courts have also seized matters like enforcing foreign award or interim measure as checking the body of arbitration. For this reason, the scopes of the arbitral interim measures granted by arbitral tribunals mainly rely on the area of *in rem* reliefs than *in personam* remedy, like arrest.³⁹ As law enforcement is reserved for executive bodies such as police, arbitrators obviously cannot assume the power to detain or take any similar measure. Still, an arbitral tribunal may, however, order a corporate entity to direct its subsidiary to take certain steps.⁴⁰

Rena K⁴¹ was one of the first cases in which the English court addressed the availability of interim measures in arbitration.⁴² In *Rena K*, *MV Rena* was a container ship chartered by a Mauritian company ('the charterers') in 1977 under a voyage charter party to carry from Mauritius to Liverpool a cargo of sugar. *Rena K* arrived in Liverpool in July 1977 and the cargo owners applied *ex parte* for a *Mareva* injunction restraining the ship owners from dealing with the sum of money payable to their bankers in London in respect of freight due under the charter party. An interim injunction was granted. On 27 July, the *Rena K* was

³⁷ Ibid, p.2439

³⁸ Sandeep Adhipathi, *Interim Measures in International Commercial Arbitration: Past, Present and Future*, University of Madras, India, (2000), p. 17

³⁹ Tijana, *supra* note 30, p.780

⁴⁰ Douglas, *supra* note 35

⁴¹ *Rena K*. (1978) 1 Lloyd's Rep. 545; *Ca, Paczy v Haendler & Natermann*, 122 Sol Jo 315 Court: Queen's Bench Division Judgment Date: 17/02/1978

⁴² Sandeep, *supra* note 38, p.17; see also Charles N. Brower & W. Micheal Tupman, *Court-Ordered Provisional Measures under the New York Convention*, *Journal of Int'l Law*, (1986), p. 24,25

arrested. In *Rena K* case, the court decided that while staying the litigation in favor of arbitration, it had powers to attach the assets of the party.⁴³

Equally, the International Convention on the Settlement of Investment Dispute (hereinafter ICSID)⁴⁴ contains interim measures under Art 47 of the convention and Art 39(1) of ICSID Arbitration Rules.⁴⁵ Regionally, apart from the movement to harmonize business law and arbitration in Francophone nations in Africa via the Organization of Harmonization of Business Law in Africa (OHADA), there is no different practice that flourishes in the area of arbitration in general and interim measure in particular.⁴⁶

The practice still shows that the interplay between court-ordered interim measures and the tribunal's authority is unsettled. There are three options available regarding the interplay between court and tribunal regarding provisional measures. The first option portrays that granting of interim measures should exclusively be allocated to the court of law (for instance, Italy⁴⁷ and Greece).⁴⁸ According to this approach, the court would provide the same interim protection to parties in arbitration in the same way it does to parties in litigation. The second approach, which is the opposite of the former option, shifts interim measures of protection exclusively to the sphere of arbitration and leaves only the enforcement of the order of arbitrator's to the courts.⁴⁹ Despite the absence to find states that directly apply this approach; the English court-subsidiary model comes closer to it in defining preconditions for court access.⁵⁰ The last

⁴³ Ibid

⁴⁴ International Convention on Settlement of Investment Disputes between States and Nationals of Other States (ICSID), United Nations, Treaty Series, Vol. 575, (1966)

⁴⁵ Art. 47 of ICSID slightly narrow the provisional measures power of the tribunal to recommendation level

⁴⁶ Michael Ostrove *et al*, Developments in African Arbitration, (2018), available at <https://globalarbitrationreview.com/benchmarking/the-middle-eastern-and-african-arbitration-review-2018/1169293/developments-in-african-arbitration> last accessed on 29 September 2020

⁴⁷ Italy Legislative Decree no. 40 (2 February, 2006), Article 818, which amend article 806 *et seq* of the Civil Code of Italy provides "arbitrators may not grant attachment or other interim measures of protection, unless otherwise provided by law"

⁴⁸ J. K. Schaefer, New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared, Electronic Journal of Comparative Law, Vol. 2, No.2, (August 1998), p. 6 available at <http://www.ejcl.org/ejcl/22/art22-2.html> last accessed on 5 May 2019

⁴⁹ Ibid

⁵⁰ Albert J. van den Berg (ed.), New Horizons in International Commercial Arbitration and Beyond, International Council for Commercial Arbitration, Congress Series no.12, Kluwer Law International, (2005), p.213 available at <https://books.google.com.et/books?id=OGxzLa9x9fEC&pg=PA213&lpg=PA213&dq=the+English+co+urt-subsidiary+model+of+arbitration+and+court&source=bl&ots=cpTYtk7IPx&sig=ACfU3U0haAwPb0ZKJkMaYTF73T9da6A0kA&hl=en&sa=X&ved=2ahUKewiri7H7x8TpAhUBLewKHUyeCPYQ6AEw>

option is the *free-choice* model that offers free access to both the court and the arbitrator for interim relief.⁵¹

As the free choice model, the German CPC Sec. 1033 states that it is not incompatible with the arbitration agreement for the courts to order interim measures in matters involving the dispute. In accordance with section 36 and Article 9 of the Indian Arbitration and Conciliation Act, a party can request interim measures from a court before or during arbitral proceedings or at any time after the making of the arbitral award.⁵²

The free choice model propounded by UNCITRAL Model Law gives parties liberty to seek interim measures from either the tribunal or court.⁵³ Countries like Australia, Austria, Canada, Singapore, Zambia and many others' have produced arbitration codes based on the Model Law.⁵⁴ The power of the arbitral tribunal to grant interim measures is plainly addressed in the Model Law jurisdictions; such as Austria, Canada, Singapore and Australia, and non-Model Law jurisdictions, for Sweden, Belgium and Japan.⁵⁵ Besides, Kenya, Zimbabwe, India, German and New Zealand are recent examples that already have adopted the Model Law for both domestic and international arbitrations.⁵⁶ In addition, England, Croatia, Poland, Ukraine and Switzerland adopted laws that specifically address interim measures to arbitral tribunals.⁵⁷ In all cases, national arbitration statutes now rest on the premise that the arbitrators' authority to grant provisional measures will be implied and that an express agreement is required to withdraw such power.⁵⁸

Though a trend in favour of an arbitrator's competence to issue interim measure emerged under UNCITRAL Model Law,⁵⁹ writers like Alison C. Wauk, denounce arbitral interim measure for the reason that it results in unnecessary

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⁵¹ Ibid

⁵² Indian Arbitration and Conciliation Act, (1996), Article 9(1).

⁵³ Neil Andrews, the Modern Civil Process: Judicial and Alternative Forms of Dispute in England, (2008), P. 257 see also: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985_Model_arbitration.html. last accessed on 20April 2020

⁵⁴ Ibid (Laws of Croatia, Poland, Ukraine, German, Swiss, Hong Kong can be examples for adopting Free choice model)

⁵⁵ Ibid

⁵⁶ South African Law Commission, Report on the Investigation of An International Arbitration Act for South Africa, (July 1998), p.93 available at https://www.justice.gov.za/salrc/reports/r_prj94_dom2001.pdf last accessed on 25 September 2020

⁵⁷ Shuke, supra note 15

⁵⁸ Born, supra note 17, p. 2439

⁵⁹ UNCITRAL Model Law, supra note 2, Article 17.

overlapping of powers between courts and tribunals.⁶⁰ However, the author believes that giving arbitrators' the power to grant interim measures provides a chance for parties to use a forum especially where courts are not easily accessible or already congested with cases. Moreover, taking arbitral interim measures as superfluous will turn a quest back to the need for arbitration as a complimentary adjudicatory venue.

Based on Article 3344(2) of the Ethiopian Civil Code which allows parties to use the court as an alternative, Ethiopia seems to adopt the *free choice* model. Article 3344(2) reads "the fact that a party to an arbitral submission applies to the court to preserve his rights from extinction shall not entail the lapsing of the submission". In practice, in spite of the ultra-virus instances, ultra-virus, interim measures are given by arbitrators.⁶¹

The other important issue that could be raised in the relationship between court and tribunal is the concept of *res judicata*. Where an application for interim measures is denied by a court, should that be a ground to preclude parties from bringing the same before tribunals? This issue gets much more importance in situations where the concurrent jurisdiction of the courts and tribunal is available. One US court ruled that the tribunal has the authority to grant interim relief even after the denial of such relief by the court.⁶² In Ethiopia, except Article 5 of the CPC, neither the codes nor the other laws that comprise matters of arbitration address the *res judicata* issue relating to interim measures. This paper argues that parties should not be prohibited to go to a tribunal when they are dismissed by the court as the interim measures lack the character of finalizing case and do not amount *res judicata* in the strict sense. Because it is generally accepted that *res judicata* only applies to final and conclusive decisions on merit and does not apply to interim measures. With all these limitations, it would be proper to take into account new developments on a case for an application to be reconsidered by tribunals.

3. Conditions for Granting Arbitral Interim Measures

Needless to say, arbitrators should consider the interests of both parties in granting interim measures. Setting clear pre-conditions and requiring securities

⁶⁰ Wauk, *supra* note 33.

⁶¹ Interview with Seyoum Bogale and Meseret Ayalew (arbitrators, Addis Ababa, 02/11/2007 E.C), and Zufan W/Gebriel, (deputy registrar, Federal First Instance Court (Ledeta), Addis Ababa, 25/10/2007 E.C).

⁶² *Sperry Int'l Trade, Inc. v Government of Israel*, US District Court for the Southern District of New York, 532 F. Supp. 901, 2d Cir. (1982).

could help the justice system to balance parties' interests that will be used as instruments for procuring justice and efficiency. Equipping even-handed standards would place arbitration to be the most trusted and justly means of dispute resolution mechanism. Similarly, to avoid the use of interim measures as dilatory tactics in the process of arbitration, clear conditions are supposed to be devised for granting the measures. The examination of laws of countries regarding conditions to grant interim measures by tribunals demonstrates that they most frequently use generic phrases like "such provisional relief that it deems necessary or appropriate". Such standards are, however, dubious and open-ended that they may be exposed for abuse, and it needs to be filled by consistent practice or set clear conditions by statutes. In this regard, the 2010 UNCITRAL Arbitration Rules⁶³ require a demonstration of some clear standards. But there remains a difference in the conditions included for granting provisional measures among national laws and institutional rules.

The conditions for granting interim measures can be of procedural or general standards.⁶⁴ The general conditions are attributable to weighing the threat involved; whereas the procedural aspect of the requirement concerns the procedure that needs to be followed prior to examining the exigencies and conditions of the general requirement.⁶⁵ The procedural requirements include being an acceptable venue in the jurisdiction, application by parties to arbitrators, and decision on *ex parte*. General standards, on the other hand, consist of requirements relating to the imminence of the threat, the balance of party's interest, the proportionality of the order and the like.⁶⁶

4. Enforcement of Interim Measures

The variation on enforcement of arbitral interim measures in practice hinges on the understanding and position of interim reliefs as an award. In states like the Netherlands that acknowledge interim measures as awards, the enforcement of interim measures follows the same procedure as that of enforcement of a final award.⁶⁷ Conceivably, the enforcement of an arbitrator's order as an award is a lengthy process in the domestic context for the reason that it may pass through

⁶³ United Nations Commission on International Trade Law Arbitration Rules, General Assembly Resolution 65/22, A/65/465, (as revised in 2010).

⁶⁴ Ian A. Laird *et al* (ed.), *Interim and Emergency Relief in International Arbitration*, International Law Institute Series on International Law, Arbitration & Practice, (2015), p.244.

⁶⁵ *Interim Measures in International Commercial Arbitration*, by Association for International Arbitration, (2007), p.45.

⁶⁶ Yesilirmak, *supra* note 5, p.34.

⁶⁷ Dutch civil procedure code, (1986), Article 1049 but the 2015 arbitration act demands the form of interim measure to be akin to award.

the administrative confirmation of enforcement or application of setting-aside⁶⁸ that defeats the urgent character and role of provisional measures. States like Switzerland and Germany on the other hand, follow an approach that does not consider interim measures as an award and uses court support that makes the enforcement process more suitable.⁶⁹ In states where such enforcement issues are not settled, the practice developed in domestic tribunals and court standards as well as customary practice encircling enforcement of awards will govern.⁷⁰

Interim measures can be executed both voluntarily by parties and by assistance from the court. Voluntary compliance is the most cost-effective means of executing an order. Perhaps, the degree of submission under an emergency arbitrator's decision seems to require a kind of commitment beyond voluntary compliance. If parties fail to voluntarily comply, the award creditor can use the court enforcement mechanism.

Concerning transnational applicability of arbitral interim measures, enforcement of measures given abroad is minimal in the absence of international treaty agreements, reciprocity or unilateral prescription of state laws. The predominant international convention on the area, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the New York Convention) is silent on the issue of interim relief. So, different positions have been held regarding the interpretation as to whether the New York Convention includes enforcement of interim measures or not. According to the USA and Australian courts, the reference to arbitral awards in the Convention does not include such interim measures made by an arbitral tribunal, but it is only an award that finally determines the rights of the parties.⁷¹ Conversely, the English courts have not considered Article II (3) of the New York Convention as an obstacle to exercise their jurisdiction to order interim relief.⁷² Currently, it is generally held that the New York Convention does not cover the enforcement of interim measures. For this reason, the renowned arbitrator, Mr. V Veeder, at the UN's 40th anniversary of the New York Convention complained that, 'for too long, there have been difficulties in enforcing an arbitrator's order for interim measures', noting that 'application excludes any provisional order from

⁶⁸ Shuke, *supra* note 15, p.31

⁶⁹ *Ibid*

⁷⁰ Mohmeded, *supra* note 6, p. 206

⁷¹ *Resort Condominiums International, Inc v. Ray Bowl well*, (1995), The Supreme Court of Queensland, Com Arb. p. 628

⁷² *Kastner v. Jason*, EWCA Civ. (2004) where a defendant breached the arbitral sanction and disposed of property to a third party without the consent from the tribunal and escaped to the USA with the proceeds of sale, thereby evading enforcement in England of the eventual final award. The provisional award was enforced under the New York Convention

enforcement abroad as a Convention.⁷³ At present, bilateral and multilateral accords and reciprocity principles would work as a source for executing arbitral interim measures against property found outside the seat of arbitration.⁷⁴ A unilateral prescription is a state declaration under its statutes to enforce arbitral interim measures in its soil regardless of the seat of arbitration. To date, a unilateral prescription is only found in German law.⁷⁵

Enforcement problem in general could be corrected by imposing a fine on the failing party as punishment for costs incurred because of non-execution, or in matters relating to evidence, the tribunal may take negative inference if a party refuses to produce evidence before the tribunal.⁷⁶ Also, where the enforcement is carried out by asking court assistance failing to obey either order of interim measure by court seal or direct order of a court, it will entail contempt of court and penalty thereby.⁷⁷ Recourse against interim orders could be a remedy if procedural irregularity, *ultra-virus* or public policy concerns are proven by the alleging party.⁷⁸

5. Arbitral Interim Measures in Ethiopia

In Ethiopia, the conundrum of arbitrators' power to order interim measures is reflected by the absence of clear permission in the laws i.e. the Civil Code whilst arbitration institution's rules such as that of AACCSA provides for that.⁷⁹ The possibility of granting interim orders by arbitrators is stipulated in the section of the Civil Code that governs mortgage (article 3044) and in other laws like the Cooperative Society Proclamation and the Labor Law.⁸⁰ The silence in the sections of the Civil Code and CPC that deals with arbitration leads to ambivalence on the part of arbitrators leading to failure to exercise this power in some cases and *ultra-virus* scenarios in others.

⁷³ V VVeeder, Provisional and Conservatory Measures in Enforcing Arbitration Awards under the New York Convention: Experience and Prospects, UN Publication.V.2, (1999), p. 21

⁷⁴ Ethiopian Mutual Legal Assistance in Civil and Commercial Matter with China, Ethio-china MLA agreement ratified on 2 May 2017(unpublished, attorney general international cooperative on legal affairs department)

⁷⁵ German Arbitration Act, (1998), Section 1062(2), tenth book of the Code of Civil Procedure

⁷⁶ Yesilirmak, *supra* note 5, p.28

⁷⁷ The Criminal Code of FDRE, proclamation no. 414/2004, Federal Negarit Gazette, (2004), Article 448(1) (c). It provides criminal liability for contempt of court

⁷⁸ UNCITRAL Model Law, *supra* note 2, Article 17(I) deals about grounds of refusing execution and enforcement of interim measures

⁷⁹ Addis Ababa Chamber of Commerce and Sectoral Association (AACCSA), Arbitration Rules for AACCSA, (2008)

⁸⁰ Cooperative Societies Proclamation, Proclamation No. 985/2016, Federal Negarit Gazette, (2016), Article 65 and Labor Law Proclamation, Proclamation No. 1156/2019, Federal Negarit Gazette, (2019), Article 144

Whenever there is no clear agreement between parties about interim measures, the determination will be left to *lex arbitri*. The absence of clear law would frustrate especially *ad hoc* tribunals not to grant interim orders because their decisions highly rely on the clear determination of state laws, as they do not have procedural rules like institutional arbitration. Institutional arbitrations do not also dare to grant interim measures as institutional rules remain unwarranted in areas where the position of *lex arbitri* is not clear. Besides, the absence of clear permissive regulation by a law enacted by the government entails volatile move by tribunals in using such power by their own directives or rules in the absence of parties' agreement.

On the other hand, Article 3344(2) of the Civil Code stipulates that there is no lapse of arbitral submission even if parties apply to a court to preserve their rights that allow courts to order interim measures for the case under arbitration. Nonetheless, interview with Federal First Instance Court registrar⁸¹ and commercial bench judges⁸² reveals that the acceptance of petitions by Federal Courts that seek interim measures from parties in the arbitration after the institution of the tribunal is minimal.

5.1. Assessment of Ethiopian Laws on Arbitral Interim Measures

The Ethiopian Civil Code and CPC, which deals with arbitration, do not specifically address interim measures by tribunals. Article 3345(1) of the Civil Code⁸³ and 317(1) of the CPC⁸⁴ only address the issue of procedure applied by arbitrators and do not clearly specify power on interim measures. Article 3345 of the Civil Code directs arbitrators to follow *procedures* prescribed by the CPC. Article 317 (1) CPC provides application of procedural rules, '*as near as may be, be the same as in civil court*'. Furthermore, Article 3044(1) authorizes arbitrators to grant safety measures to secure the execution of its judgments, and orders or awards by way of granting a mortgage on the immovable property of the other party. Though not comprehensive, such provisions can be used as a step forward to dispel the doubts regarding the appropriateness of the power to order interim measures by arbitrators. In addition, the provisions in the CPC dealing with interim measures give a clue that they are authoritative. So, one may interpret the combined readings of Article 317 of the CPC in tandem with

⁸¹ Interview with Zufan W/Gebriel, deputy registrar, Federal First Instance Court (Ledeta), Addis Ababa, 25/10/2007 E.C

⁸² Interview with Beresa Berhanu and Sentayehu Zeleke, judges, Federal First Instance Court, Ledeta 4th commerce bench, Addis Ababa, 25/10/2007 E.C

⁸³ Civil Code of Ethiopia, Proclamation No. 165/1960, Negarit Gazette, (1960), Article 3345(1)

⁸⁴ Civil procedure Code of Ethiopia, Decree No. 52/1965, Negarit Gazette, (1965), Article 317(1)

147-200 of the same as affirmation power of arbitral tribunals regarding interim measures.

Moreover, Article 65 of the Cooperative Society's Proclamation⁸⁵ gives wider power for arbitrators in this area. This law confers arbitrators the same power as civil court judges, among others, regarding the issuing of orders. As interim measures are procedural orders that are used by judges, this law in effect confers arbitrators the power to grant interim measures. However, this power should still be understood together with the limits stipulated under Article 66 that arbitrators, unlike judges, cannot oblige third parties. The ECX Revised Rules⁸⁶ vest the power to grant interim measures on arbitrators under Article 16.1.12. The section reads as follows:

16.1.12 *Discretion to pass interim orders*

*The arbitrator(s) may issue such orders or directions as may be deemed necessary including orders or directions for safeguarding, interim custody, preservation, protection, storage, sale or disposal of the whole or part of the subject matter of the dispute or for its inspection or sampling without prejudice to the rights of the parties or the final determination of the dispute.*⁸⁷

As observed from the rubric of the above provision, discretion is given to arbitrators with the ambit of caring not only for the final determination of the dispute but also for parties' rights. Generally, Ethiopian laws enacted after the codes manifested a desire for giving power to arbitrators to grant interim measures.

The point that is worth considering is whether the restrictive interpretations of the power of arbitrators promoted by the Civil Code⁸⁸ throws a shadow on the application of the Civil Procedure section that deals with interim measures⁸⁹ on arbitral tribunals. Answering the question of whether granting interim measures are considered as a jurisdictional matter to tribunals in the meaning of Article

⁸⁵ Cooperative Societies Proclamation, Proclamation No. 985/2016, Federal Negarit Gazette, (2016), Article 65

⁸⁶ Ethiopian Commodity Exchange Proclamation, Proclamation No. 550/1999 Federal Negarit Gazette, (1999), and Ethiopian Commodity Exchange Revised Rules, no. 5/2003, (2003), Article 16.1.12

⁸⁷ Ethiopian Commodity Exchange Revised Rules, no. 5/2003(bylaw, accessed from ECX office)

⁸⁸ Civil Code of Ethiopia, Proclamation No. 165/1960, *Negarit Gazette*, (1960), Article 3329 which read "The provisions of the arbitral submission relating to the jurisdiction of the arbitrators shall be interpreted restrictively"

⁸⁹ Civil procedure Code of Ethiopia, Decree No. 52/1965, *Negarit Gazette*, (1965), Article 147 *et seq* to 179 & 200 Civil Procedure Code deals with different interim measures

3329 of Civil Code could be a way out to reach a solution. This provision deals with restrictions concerning the jurisdiction of tribunals. Article 3330 of the Civil Code would be of great help for interpreting the jurisdiction. Under this article, mention was made to the scope of jurisdiction that enumerates interpretation of submission, disputes regarding the ‘jurisdiction of tribunal’ and tests of the validity of the arbitral submission as areas constrained from the touch of the tribunal. Hence, one needs to check whether interim measures fall under this interpretation.

The author contends that interim measures are of different character than issues of competence stipulated under Art 3330 of the Civil Code. Because while the lists under Art 3330 of the Civil Code have the nature of preliminary matters of jurisdiction and validity of claims that have the effect of closing the files before entering into the merit, interim measures are about temporary remedies that aim to save parties’ right or interest from loss and help the efficacy of the future award. So, it would be logical to hold that the restriction held under the Civil Code of Ethiopia regarding the tribunal’s power does not stretch to interim measures. If the submission does not provide the jurisdiction of the tribunal, the tribunal will only be prohibited to rule on its competence of jurisdiction i.e. this provision is limiting *competence-competence* rule. As the exercise of granting of interim measures comes aftermath of determination of the competence of the arbitrator’s jurisdiction, the tribunal power bestowed to grant interim measures remains intact. Accordingly, this construction can be taken as a safe way to conclude that the Civil Code does not prohibit arbitrators from freely ordering interim measures. Likewise, the regulation of water resource management that makes reference to the Civil Code and CPC for matters of arbitration not covered by the regulation could benefit from the above interpretations in granting interim measures.⁹⁰

In conclusion, from the review of Ethiopian laws, it can be said that only interpretation of the Civil Code and CPC gives power to arbitral tribunals to grant interim measures. Indeed, the omissions in the codes have been taken over by wordings of later statutes that depict a shift to clear legal permission of arbitral tribunal in granting interim measures. The practices that reveal the arbitrators’ tendency of granting interim measures in the country also points to the same trajectory.

⁹⁰ Ethiopian Water Resources Management Regulation, Regulation No 115/2005, Federal Negarit Gazette, (2005), Article 36

The draft arbitration and conciliation law of Ethiopia attempted to exhaustively deal with issues of interim measures.⁹¹ It devotes one chapter to interim measures that manifested its base is on the UNCITRAL MODEL law. The chapter addresses, among others, the power of the arbitral tribunal to order interim measures, the conditions for granting interim measures, the grant of court-ordered interim measures as well as the recognition and enforcement of interim measures and set clear grounds thereof. The draft law also deals with modification, suspension and termination, as well as provision of security, disclosure and allocation costs related to interim measures.

5.2 The Practice of Institutional and ad hoc Tribunals

Little has been mentioned about the formation and function of institutional arbitration in Ethiopian laws. For this reason, only a few working institutions are available. To this end, works of arbitral institutions are neither boldly displayed nor able to contribute, as expected, to the development of ADR and arbitration. Undeniably, however, the existing institutions attempted to design their working rules of procedure with modern practices. Especially, Addis Ababa Chamber of Commerce and Sectoral Association (AACCSA), which provide arbitral service for members of the Chamber, assiduously engage in introducing trends of international chamber and studies related to arbitration.⁹²

Under Article 3346 of the Civil Code, institutional rules constitute arbitral code making part of the arbitration agreement. For this reason, these institutional rules are helping as gap-filling rules in the area of laws that are not covered by state ordinance. Hence, when parties submit their cases to this institutional arbitration, the rules of the institutions will apply to parties unless the parties explicitly negate the rules under their contract. Thus, if the institutional rules included interim measures, no express agreement of the parties is needed for the tribunal to be ruled under it.

Despite the unevenness of the statutory declarations regarding the power of tribunals for interim measures, arbitral institutions have given the power to tribunals under their rules of arbitration. The leading arbitration institution, AACCSA rules (under Article 16 of the Revised Rule) and Article 29 of Ethiopian Arbitration and Conciliation Center rule portray the same. Likewise, ECX revised rule Article 16.1.12 provides arbitrator's authority to grant interim

⁹¹ The new draft Arbitration and Conciliation Law of Ethiopia prepared in 2012 E.C and approved by council of ministers in 2013 E.C

⁹² Interview with Ato Yohanes Woldegebriel, AACCSA director, Addis Ababa,08/10/2007 E.C

measures. Equally, Bahir Dar University Center of Arbitration Rules of arbitration, mediation and conciliation under Art 27 clearly declares interim measures.⁹³ In practice, both *ad hoc* and institutional arbitrators in Ethiopia work mostly with their power of interim measures.⁹⁴

In the institutional arbitration of AACCSA) arbitrators grant interim measures, and when the requests come before the formation of the tribunal, AACCSA institution advises parties to go to court.⁹⁵ The other institutional tribunal currently functioning is the Ethiopian Commodity Exchange (ECX) Tribunal.⁹⁶ ECX Tribunal does not conduct more cases due to parties' tendency to settle differences by negotiation and conciliation. Future relationship of parties in ECX will matter a lot. Consequently, they prefer to settle cases amicably to be tried by arbitrators, in effect, the flow of cases to arbitration and the request of interim measures become minimal.⁹⁷

Apart from institutional rules, tribunals in their decision reason out that Article 317 of the CPC gives equal power to arbitral tribunals as courts have to apply civil procedure rules that include provisional measures. For instance, in the case between *Yetegel Fere Home and Office Furniture Productions Union v Ethiopian Insurance Company*⁹⁸, the tribunal held that any power given to state courts could also work to tribunals. The resolution of the tribunal and its basis is explained as follows:

Parties once agreed to settle their dispute by arbitration, such contract is assumed the status of a binding law. So, the tribunal is deemed to be constituted by law.

⁹³ Bahir Dar University Center of Arbitration Rules of arbitration, mediation and conciliation, (2011 E.C), Article 27(1) which reads 'ተከራካሪ ወገኖች ጥያቄ ሲያቀርቡ ጉባኤው ጉዳዩን በተመለከተ ተገቢ ነው ብሎ ያሰበውን ጊዜያዊ አገልግሎት ያለውን ትእዛዝ መስጠት ይችላል'

⁹⁴ Interview with Seyoum Bogale and Meseret Ayalew (arbitrators, Addis Ababa, 02/11/2007 E.C) reveal that *ad hoc* tribunals grant interim measures as any judges in court do. According to them, this is the understanding held by most ad hoc arbitrators. Tribunal order of the TV series *sews lesew drama and Nabkom energy plc (plaintiff) vs. Biruk films plc (defendant)*, unpublished, manifest that tribunal directly order third parties.

⁹⁵ Interview with Ato Yohanes Woldegebriel, AACCSA director, Addis Ababa, 08/10/2007 E.C

⁹⁶ Ethiopian Commodity Exchange Revised Rules, supra note 87.

⁹⁷ Interview with Ato Mulu Wordoffa, ECX lawyer, Addis Ababa, 27/10/2007 E.C

⁹⁸ Report of arbitral awards by Ethiopian Arbitration Conciliation Center vol. 1, (August 2000 E.C), p. 55-59 in the given case the plaintiff instituted a case with pauper. Defendant claimed security for costs from plaintiff with a fear that damages may not be reimbursed if rendered to its side for plaintiff fully lost its property due to accident. The tribunal finally accepted the case with pauper and denies the claim of guarantee for security of costs with a reason that the application in pauper indicate they will have no money even pledging for security.

This tribunal refers Art 317 of CPC.⁹⁹ Any decision, order or decree given by court also could be rendered by tribunals. (Translation by the Author)

Practical instances of *Ad hoc* tribunal cases also manifest granting of interim measures even if parties in the arbitration do not give such power explicitly to such tribunals. For instance, the interim orders granted by the *ad hoc* tribunals of *Ethiopia Investment group PLC v. Desalegn Andualem*¹⁰⁰, ‘*sew lesew*’ *Sewlesew drama, Bisrat Gemechu (plaintiff) v. Nebyu Tekalegn, Solomon Alemu, Mesfin Getachew, & Daniel Haile (defendants)*¹⁰¹ and *KLR Ethio- water drilling Plc.v Matoli joint venture* (respondent). In the first case, the *ad hoc* tribunal accepted the plaintiff’s application for attachment of the defendants’ building and ordered Addis Ababa ‘Gulele sub city ‘Wereda’ 09 to attach house no. 786. On the other hand, the Tribunal seized for the ‘Sewlesew’ Drama and ordered Ethiopian Radio and Television Organization not to pay the income derived from the drama at its hand to a third party, to preserve 16.5% of its afterward income, and to be paid the remaining sum to spark film production and the respondents. The tribunal also ordered Buna International Bank (Addis Ababa *hayahulet* branch) to secure 16.5 % of the bank deposit in the name of *Sew lesew* until another order is issued by the tribunal.¹⁰² In the KLR case, the applicant, KLR Ethio-water drilling Plc. requested payment for construction and together apply for the injunction of money payable to Matoli joint venture found at hands of the Ministry of Water works. And the tribunal ordered the Ministry of Water works to temporarily withhold money payable to the Matoli joint venture.

From the arbitral cases reported by the Ethiopian Arbitration and Conciliation Center (EACC)¹⁰³ and observing the *ad hoc* tribunal cases, the types of interim measure that parties require and the tribunals provide include conservation of property, securing costs, freezing accounts, and preserving status quo.

The crucial issue that demands an inquiry under this part is whether the arbitral tribunal can later review provisional orders granted by the court. The answer to such question depends on the state position on the purpose of giving power to

⁹⁹ Art 317(1) Civil Procedure Code declares that the procedure before an arbitral tribunal shall as near as may be as in civil court

¹⁰⁰ *Ethiopia Investment group P.L.C (plaintiff)v. Desalegn Andualem(defendant)*, 29/8/2007 E.C ad hoc tribunal accepted plaintiff’s application for attachment of defendants building and ordered Addis Ababa Gulele sub city Wereda 09 to attach house no. 786, unpublished

¹⁰¹ *Sewlesew drama, Bisrat Gemechu (plaintif) v Nebyu Tekalegn, Solomon Alemu, Mesfin Getachew, & Daniel Haile (defendants)*, 25/09/2006 E.C, arbitration tribunal held at Addis Ababa, unpublished

¹⁰² Supra note 100

¹⁰³ Report of arbitral awards by Ethiopian Arbitration Conciliation Center vol.1 (August 2000 E.C), and Vol. 3, (November 2004 E.C)

courts to grant interim measures for cases under arbitration.¹⁰⁴ Ethiopian laws do not have clear provision on this issue. In a copyright infringement case that involves *Nabkom energy plc* (plaintiff) *v Biruk films plc* (defendant)¹⁰⁵, the claimant asked the tribunal to set aside the injunction order given by regular court for the film not to be seen in cinema.¹⁰⁶ In the Case, the tribunal left the question without determining and rendering a final award. The author suggests that it has no problem if the court order is later tried by an arbitral tribunal, as an interim measure is of temporary nature no *res judicata* issue would be raised. Also, as the main tribunal has the power to revise orders given by the emergency arbitrator, by considering the situation, there is no reason why it does not revise the courts interim measure. Because parties in signing arbitration contract give better power and position than arbitrators.

To wrap up, the practices of tribunals show that arbitrators grant interim measures in Ethiopia. In some cases, tribunals order third parties directly other than using courts.

5.3 Emergency Arbitrators and Court-Ordered Interim Measures in Ethiopia

As mentioned, the greatest need for interim measures arises often when the arbitral tribunal has not yet been established. This is so for it can take a longer period for a tribunal to fully constitute. For such critical time, institutional arbitration gives solutions by developing optional rules for emergency protection like the American Arbitration Association (AAA)¹⁰⁷ or implementing pre-arbitral referee procedure like the International Chamber of Commerce (ICC).¹⁰⁸ As a result, parties could obtain special arbitrator for the urgent situation. However, it is more baffling for *ad hoc* tribunals as they do not have an administrative body that could help the justice system provide immediate emergency protective and preservative orders of protection. In such cases, a court remedy would be the only solution left for parties. Generally, there are two options for parties to ask assistance for interim measures before the establishment of a tribunal. These are seeking an order from a state court or

¹⁰⁴ UNCITRAL Digest, *supra* note 13, p.95

¹⁰⁵ *Nabkom energy p.l.c v Biruk films p.l.c* published at Arbitral award report EACC vol.3, (November 2004 E.C), p. 397-402

¹⁰⁶ Arbitral award report EACC vol.3, (November 2004 E.C), p. 397-402

¹⁰⁷ The American Arbitration Association (*AAA*), Rules of arbitration, (October 1, 2013), Rule 38(a) and (b) provide “Optional Rules for Emergency Measures of Protection”

¹⁰⁸ International Chamber of Commerce (ICC), Rules of arbitration, (March 1, 2017), Article 29, provides a Pre-Arbitral Referee Procedure, parties to obtain urgent measures when difficulties arise in contractual relationships, prior to referral to arbitration.

using emergency arbitrators given that institutional arbitral tribunals have such options.

Concerning emergency arbitrator in Ethiopia, rules of arbitral institutions such as AACCSA and tribunal of ECX including Ethiopian Arbitration and Conciliation Center do not have provisions regarding emergency arbitrators. These tribunal procedural rules simply provide the fact that quest of party of such orders from the court is not incompatible with an arbitration agreement. Therefore, it seems possible to conclude that the function of emergency arbitrators is not regulated sufficiently and effectively in Ethiopia.

As there is no arrangement for emergency arbitration in Ethiopia, parties forced to resort to court¹⁰⁹ when urgency arises before establishing the arbitral tribunal. In such cases of pre-establishment of the arbitral tribunal (appointment of arbitrator/s), courts accept applications and grant the necessary interim orders. Article 3344(2) of the Ethiopian Civil Code envisages that filing for regular courts to preserve parties right shall not constitute a lapse of arbitration. Though Article 3344(2) of the Civil Code entitled parties to obtain interim measures from courts for the preservation of their rights, the Civil Code lacks specificity about what the phrase “preserving rights from extinction” includes. The author considers this phrase as wider in range that could be understood to include any interim measures of protection without being specified to any list. Because the heart of the *raison d'être* espoused by this law is the preservation of right. In practice, the nature of the measure does not matter for issuing interim measures by courts and regular courts grant any measure they deem appropriate for the circumstance.

Pragmatically, in most instances, parties bring the request of interim measure to courts together with the application for appointment of arbitrator/s.¹¹⁰ In some cases, interim orders are also claimed in courts separately from the request of the appointment of arbitrators. The case involving *Dr. Yalem Ambaye v. Yemeskel Minch*¹¹¹ showed that the regular court granted interim relief for the application of interim measure sought without request for the appointment of an

¹⁰⁹ Interview with Ato Yohanes Woldegebriel, AACCSA director, tells to author that even his tribunal gives advice to parties to go to court when interim measure issue arises before the formation of tribunal

¹¹⁰ *Yonas Bekele v Trans Africa resource co*, Federal First Instance Court, Civil File no. 218133, 16/4/07 E.C, unpublished. Also verified by Interview with Beresa Berhanu, judge, Federal First Instance Court, Ledeta 4th commerce bench, Addis Ababa, 25/10/2007 E.C

¹¹¹ *Dr. Yalem Ambaye* (plaintiff) *v Yemeskel minch*(defendant), Federal First Instance Court, civil file no. 217459, 30/12/06 E.C. Interim order granted *ex parte* then notice about the order send to defendant

arbitrator.¹¹² In addition, even if the request was denied in the case *Zelalem Merkeb v Mesraktsehay Cooperative Union & Ato Haylu Sahilu*,¹¹³ the injunction application was separately brought. In all decisions, courts reason out that the acceptability of interim measures before the constitution of the tribunal is attributed to the urgent nature of the order and preservation of parties' rights. However, courts are not welcoming requests of the interim measure after the institution of the tribunal. In the Federal First Instance Court in the case between *Faders biloyed Co. limited v. EEPKO*¹¹⁴ and in the case between *Zelalem Merkeb v Mesraktsehay Cooperative Union & Ato Haylu Sahilu*,¹¹⁵ the court in its order held that interim measures claimed after the constitution of the tribunal have to be asked from such tribunal and not from the court.

The trend in the practice (the priority to tribunal whenever constituted) shows that the courts' role to grant interim measures in Ethiopia is sparingly applied whilst such priority is not advocated under Article 3344 of the Civil Code. Moreover, interviews with AACCSA tribunal reinforce such position; in a sense that tribunal priority is advocated so much so that if the tribunal is constituted interim order, is granted by such tribunal. Nevertheless, courts have to give interim measures even after the constitution of the tribunal as they are authorized by Art 3344(2) CC and failure to exercise this power may affect the party's right.

Regarding jurisdiction of courts where an application for an interim measure is instituted, the Federal Courts Establishment Proclamation No. 25/96 (as amended) under Article 14 gives the jurisdiction to First Instance Court to pursue the nature of application not computed by money.¹¹⁶ Pursuant to this proclamation, jurisdiction to entertain interim measures falls under Federal First Instance Court. The practice goes in congruence with the fact that parties go to Federal First Instance Courts for obtaining an order of interim measures. However, in applying for temporary injunction Article 154 of the CPC of Ethiopia requires institution of a petition before a court as a precondition to granting the orders. This institution of a statement of claim before the court could later raise an issue of negating the submissions to arbitration tribunal. The

¹¹² Ibid

¹¹³ *Zelalem Merkeb v Mesraktsehay Cooperative Union & Ato Haylu Sahilu*, Federal First Instance Court, civil file no.218945, 01/04/07 E.C

¹¹⁴ *Faders biloyed Co. limited v. EEPKO*, Federal First Instance Court, file no. 216730, 29/11/2006 E.C

¹¹⁵ *Zelalem Merkeb v Mesraktsehay Cooperative Union & Ato Haylu Sahilu*, Federal First Instance Court, civil file no.218945, 01/04/07 E.C

¹¹⁶ Federal Courts Proclamation, Proclamation No. 25/1996, Federal Negarit Gazette, (1996), Article 14 Also, Civil procedure Code of Ethiopia, Decree No. 52/1965, Negarit Gazette, (1965), Article 18

practice, however, remedies this conundrum by arranging a separate filing system called *order files* that are tailored to serve orders of such kind. Thus, filing to state courts for interim measures even if corroborative with the petition do not constitute as inconsistent with arbitration agreements.

The laws governing arbitration in Ethiopia do not specifically lay down conditions to grant arbitral interim measures. Taking provisions of Article 147, 154 to 179 and 200 of the CPC that regulate the general section of litigation would help the justice system ensures a fair hearing and balancing parties' interest. This is because Article 317 of the CPC and Article 3345 of the Civil Code allow using these provisions as they state that arbitrators need to follow as nearly as possible to the procedure of court litigation. The Federal Supreme Court Cassation decision in *Gebrukore v. Amadeyiu Federech* case also reaffirms a position that arbitrators should use the CPC in their arbitral proceeding.¹¹⁷ Furthermore, arbitral institutions' practice manifests that the conditions set in the CPC apply for granting or denying interim measures for parties in arbitration.¹¹⁸

In addition, granting interim measures upon the request of one party without hearing the other is exceptionally allowed. While examining *ex parte* application of interim measures, Article 157 of the CPC requires that notice to be given to the opposite party. To this end, Art 157 of the CPC provides order to be given without notice where it is persuaded that the object of granting an injunction would be defeated by delay. As to arbitral tribunal, the same principle is required to be applied by using Article 17 of the CPC and 3345 of the Civil Code that seeks arbitrators to follow as nearly as possible to the procedure of court litigation. Practically, whenever an interim measure application is instituted, the other party will be summoned and required to come up with a reason why such order should not be granted. In the case that involved *Ethiopia Investment group P.L.C (plaintiff) vs. Desalegn Andualem(defendant)*, arbitrators ordered the defendant to know and attend the case with himself or via his attorney.¹¹⁹ If, however, the order is given *ex parte*, article 158 of CPC

¹¹⁷ *Gebrukore v. Amadeyiu Federech*, Federal Supreme Court, Cassation Division, File No 52942, 2003 E.C. By virtue of federal courts amendment proclamation no. 454/2005 Art 2(1) oblige Interpretation of a law by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on federal as well as regional council at all levels.

¹¹⁸ Interview with Ato Mulu Wordoffa, ECX lawyer, Addis Ababa, and Ato Yohanes Woldegebriel, Director of AACCSA, Addis Ababa, 27/10/2007 E.C confirm that arbitrators use conditions of Civil Procedure Code in granting interim measures

¹¹⁹ *Ethiopia Investment group P.L.C (plaintiff) V Desalegn Andualem(defendant)*, 29/8/2007 E.C also see, supra note 114, *Dr. Yalem Ambayev Yemeskelminch*, Federal First Instance Court granted *ex parte* order

confers the other party a chance to apply for setting aside of the order and the court may vary, discharge or set aside the order accordingly.

5.4. Enforcement of Arbitral Interim Measures in Ethiopia

In Ethiopia, there is no clear legal stipulation about enforcing arbitral interim measures though the AACCSA has no enforcement problem for parties that are willing in executing orders.¹²⁰ In other areas, indeed, arbitrators do have certain ways of enforcing their orders in practice. For example, in matters related to evidence, the tribunal may presume negative inference if a party refuses to produce evidence before the tribunal.¹²¹

It is generally admitted that arbitrators have no coercive power to enforce their orders. Thus, arbitrators need to ask court assistance for coercing especially third parties that are not a party to the arbitration agreement. Both the Civil Code and the CPC are silent on the enforcement of interim measures. However, the Cooperative Society's Proclamation comes up with rules of execution of orders amidst providing execution of arbitral dispositions in general. Under this law, arbitrators have been given equal power as civil judges. This seems to provide arbitrators with the power of granting any order including orders against third parties.¹²² However, if there are such bodies that are required to comply, and failed to put the order into effect (by their own free will), the instance of requiring court assistance for enforcing arbitral rulings is provided under Art 66 of the same proclamation.¹²³ The wordings of Art 65 and 66 of the Cooperative Societies Proclamation reads as:

“Any decision, order or award made under [the] Proclamation shall be taken as though made by a civil court, and, where appropriate, the courts shall have jurisdiction to order the enforcement of any such decision, order or award. The Arbitrators shall have the same power, with regard to the cases provided under Article 65 of this Proclamation, as a Civil Court for the summoning of witnesses, production of evidence, the issuing of orders or the taking of any legal measures.” (Italics supplied)

¹²⁰ Interview with Ato Yohannes Woldegebriel, Director of Arbitration Institute of AACCSA, Addis Ababa, He explained that parties in arbitration at the institute executes because of good relation, with consent and with full believe in the institution service.

¹²¹ Yesilirmark, supra note 5, p.28

¹²² Cognizance is however required that, Arbitration, as private forum, demands voluntarily compliance of orders

¹²³ Cooperative Societies Proclamation, Proclamation No. 985/2016, Federal Negarit Gazette, (2016), Article 65,66

Generally, as it is done in other jurisdictions, voluntary compliance with arbitral interim measures or execution via the assistance courts are the two means of enforcing arbitral interim measures applicable in Ethiopia. Mr. Yohanis, the director of the AACCSA Arbitration Institute complains about the refusal of executive bodies to recognize arbitral interim measures directly.¹²⁴

The director of arbitration institute of AACCSA explained that majority of their interim measures are enforced voluntarily.¹²⁵ Under the ECX tribunal also, almost in all instances, parties comply with orders for they do not want to lose a single day of a transaction by an injunction of their seat under ECX or trading under this body.¹²⁶ The reasons for the increase in adherence of orders of institutional tribunals could be parties' commitment to membership of tribunals' and honor of these institutional arbitrations.¹²⁷ The voluntary compliance is not limited to parties but, in some cases, third parties also demonstrate their will to accept interim orders that come from *ad hoc* arbitrators. For instance, in the case of *Ethiopia Investment Group Plc. (plaintiff) v Desalegn Andualem*(defendant), the *ad hoc* tribunal ordered Gulele Sub city Woreda 09 to halt the transfer of a building belonging to the defendant.¹²⁸ The order was complied. The cases submitted to institutional arbitration mainly request informative data like asking banks whether a party does have an account and orders to enforce only when they instantly believe that the institution voluntarily executes it.¹²⁹ This implies that institutional arbitration could give interim measures that involve third parties less often than *ad hoc* tribunals.

If parties to the arbitration agreement or third parties refuse or fail to implement the interim orders of arbitrators, seeking execution via state court is the remedy. In practice, there are two kinds of court-based execution of arbitral interim measures in Ethiopia. The first is by fixing the stamp or seal of the court on the paper that holds orders of arbitrators upon the judge's approval. For instance, in the case of *Cyber soft plc v Hansa luft bild (defendant)*¹³⁰ the arbitral tribunal

¹²⁴ Interview with Yohanis W/Gebriel, Director of AACCSA, Arbitration Institute, 08/10/2007 E.C

¹²⁵ Ibid

¹²⁶ Interview with Ato Mulu Wordoffa, ECX lawyer who work in the division of organizing arbitration panel, 29/12/2007 E.C in his word 'enforcement is automatic'

¹²⁷ Interview with Yohanis W/Gebriel, director of AACCSA arbitration institute, 08/10/2007 E.C (he pointed out that for his knowledge the number of cases that go to court for assistance of execution is not beyond four files. Also Interview with Meseret Ayalew and Zufan W/Gebriel, Federal First Instance Court (Ledeta) deputy registrar, 25/10/2007 E.C confirmed that its *ad hoc* arbitrators that mainly ask for court seal to be stamped on the leaf of interim orders and they do not remember questions from institutional arbitration

¹²⁸ *Ethiopia Investment group P.L.Cv Desalegn Andualem*(defendant), 29/8/2007 E.C, unpublished

¹²⁹ Interview with Yohanis W/Gebriel, director of AACCSA Arbitration Institute, 08/10/2007 E.C

¹³⁰ *Cyber soft plc v Hansa luft bild (defendant)*, order granted on 27/10/2007 E.C, unpublished

granted interim order to be performed by Addis Ababa City Administration for payment due to the defendant under its hand. In the meantime, for effective execution, Cyber soft demanded seal of the court appearance on the order, by referring it to the Federal First Instance Court and the Court allowed the same to be done.¹³¹ The main office of the registrar of the Federal First Instance Court (Ledeta) experiences such a process. When a request for a stamp on the leaf of arbitral interim order comes from parties, the registrar will open a file in what they call *order files* (files that simply demand orders and their relief is not computed in terms of money), then it will be brought to the concerned bench (mostly commerce bench). If the judge accepts the application, he/she will order the stamp to be sealed and the registrar will seal the stamp. Failing to obey either order of interim measure by the court seal or direct order by court will constitute contempt of court.¹³²

The other way of executing arbitral orders via court is by direct order from the court. In this case, the court will order the interim measures mentioned in arbitral orders by *de novo* (afresh) basis, stating the ground that such order is an application by a party in the arbitration. Comparing to institutional tribunal, the question of court assistance mainly comes from parties under ad hoc tribunals.¹³³ The reason for such preponderance might be attributed to the membership dedication of parties to an institutional arbitration, stated above.

In all cases of court assistance in enforcing interim measures, judges invoke Art 154 of the CPC as a source of ruling and this does not apply the general provisions of enforcement of an award. The reason might be the cognizance of the temporary nature of the orders. This submission is indeed in consonance with the nature of interim measures. Even if one opts to apply the provisions of execution of award for enforcing interim measures, he/she cannot meet the imminent need of the execution that the interim measure demands.

Mention has already been made above that cross-border enforcement of arbitrator-granted interim measure is not easy. It is the bilateral and multilateral agreements and reciprocity principle that would give effect to the execution of provisional measures granted by arbitrators. Though Ethiopia currently ratified the New York Convention, the extra-territorial enforcement of arbitral interim measures in Ethiopia remains to be carried out via either reciprocity or by

¹³¹ Federal First Instance Court, file no. 221839, the court ordered seal stamped to the arbitral interim orders of Cyber soft plc on 27/10/2007 E.C

¹³² The Criminal Code of FDRE, supra note 77.

¹³³ Interview with Zufan W/Gabriel, deputy registrar of Federal First Instance Court, (Ledeta branch)25/10/2007 E.C

agreements with states. Because this Convention does not stipulate the enforcement of interim measure. An agreement like the Ethio-China Mutual Legal Assistance in Civil and Commercial Matter agreement (ratified on 2 May 2017) stated above can be used as a means of enforcement. Regarding an application procedure submitted to courts to execute foreign arbitral interim measures, parties might undergo the procedure of execution of the foreign award, in Ethiopian case Federal High Court.¹³⁴

Conclusion

Parties to an arbitration agreement may demand justice for the protection of rights whose existence might be jeopardized otherwise. There seem to be, indeed, conflicting interests in the process of ordering interim measures. Those parties whose rights are at peril and due process right of the other party against whom the order is given must be balanced. Setting clear conditions by law for granting interim measures could help maintain a balance between such interests. The current practice in international arbitration, the institutional rules of various arbitration institutions and UNICITRAL Model Law show that the power to order interim measures is given to tribunals and courts alike.

In Ethiopia, nevertheless, there is no clear provision regarding the arbitral power, the type, the condition and enforcement of interim measures in the Civil Code and CPC sections that deal with arbitration. Of course, in other parts of the Civil Code and other statutes, there is a blessing of tribunals' authority to grant interim measures. In particular, Art 3344(2) of the Civil Code states that petitioning to the court to seek interim orders does not affect the right to bring the case for arbitration. However, courts tend to be reluctant to order interim measures after the formation of tribunal. Thus, arbitration tribunals may take this opportunity to install the practice and jurisprudence of tribunal's power to issue interim measures. Institutional arbitration rules in Ethiopia could be the pioneers to endorse the power of tribunals to grant interim measures.

Concerning the enforcement of arbitral interim measures, the practice of arbitration institute of AACCSA shows that members' cooperation could help them experience a trouble-free execution. Otherwise, enforcement of provisional measures in Ethiopia is also conducted via court either by affixing a seal on the arbitral relief or by directly giving orders. However, except under cooperative society proclamation which is limited to members of the cooperatives, court

¹³⁴ Federal Courts Proclamation, Proclamation No. 25/1996, Federal Negarit Gazette, (1996), Article 11(2)(c)

assistance in enforcing arbitral interim measures is not addressed precisely. Moreover, the statutes do not seem to set standards for the refusal of executing interim measures. The draft arbitration and conciliation law may, of course, give opportunity to address the problem. Until this law is put into practice, parties should be meticulous to specifically address the matter during the making of an arbitration agreement. In any case, the arbitral practice in granting interim measures needs to be encouraged and continue contributing its effort until the required change is made in the state's law. Last, but not least, in light of the benefits of arbitral interim measures, the interpretation of provisions of the Civil Code and the CPC should be used to make use of arbitral interim measures.