According to the 1960 Civil Code, an arbitrator can be disqualified based on these grounds:

- Age,
- Criminal conviction,
- Unsound mind,
- Illness,
- Absence, or
- Any other reason which bars him from discharging his or her duty within a reasonable time.

However, a party may seek disqualification of the arbitrator appointed by him "… only for a reason arising subsequently to such appointment, or for one of which he can show that he had knowledge only after the appointment", according to article 3341 of the Civil Code.

The general rule that is used to disqualify an arbitrator is found under article 3340/2/ of the Civil Code: "…any circumstances casting doubt upon his impartiality or independence." This rule corresponds with article 10 of the UNCITRAL model law which says: "an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence or if he does not possess qualifications agreed to by the parties…"

Yet, the Ethiopian Civil Code fails to define this phrase: "any circumstance casting doubt upon his impartiality or independence." This might leave much room for parties to submit an application to disqualify an arbitrator; and case law has a lot to show.

…as per article 3340/2/ of the Civil Code to disqualify an arbitrator it is not necessary to prove that a close connection between an arbitrator and a party. It is enough if there are any circumstances casting doubt upon his impartiality or independence… In the case at hand,

Removal of an Arbitrator under the Civil Code of Ethiopia

Disqualification of an arbitrator is a wider concept than removal. The Civil Code only gives one article to removal and seems to leave the rest under the umbrella of disqualification. It is unclear why the legislature chose to deal with removal and disqualification in this way. Even if we say their effect is the same, there lies no reason as to why the legislature needed to differentiate between disqualification and removal.

According to Article 3343, after accepting his or her appointment, if an arbitrator unduly delays the discharge of his duties the authority agreed upon by the parties, or in the absence of such agreement, the court, can remove him from his position.

A reasonable question would be what the difference between article is 3343 and 3340/1/. According to article 3340/1/, an arbitrator can be disqualified "… for any other reason unable to discharge his function properly or within a reasonable time." Thus, one may ask the relevance of article 3343 which says that an arbitrator can be removed if he delays the discharge of his duties.

In fact, there is no difference between the two articles. In fact, the criterion in article 3340/1/ can be broadly interpreted to mean the condition laid down in article 3343.

Conclusion and Recommendation

The Ethiopian arbitration law needs to be amended when it comes to disqualification and removal of arbitrators – it can learn a lot from the IBA Guidelines on Conflict of Interests in International Arbitration. The grounds laid down under article 3340 and 3343 seem to be redundant, and no clear interpretation of the law in relation to article 3343 has been given by the Federal Supreme Court Cassation division.
Especially, the interpretation given by the Cassation bench is so wide that an arbitrator who argues against a party who brought a claim for his or her disqualification has to be disqualified. This has a lot of practical ramification.

The Civil Code of Ethiopia defines arbitration as a contract whereby the parties to a dispute entrust its solution to a third party, the arbitrator who undertakes, to settle the dispute in accordance with the law. These provisions will come into effect if arbitration is required by law; the persons have entered into a written agreement to submit their disputes.

In the sphere of Ethiopian arbitration law, special form can be prescribed for arbitration. Art 3326/2/ of the Civil Code urges the disputants to take the form prescribed by law whenever they sign an agreement. For example, if a party signs an arbitral submission agreement with administrative agents, the agreement has to be in writing and registered in a public notary.

Under the auspices of Art 3340, the parties can authorize the arbitrator to decide difficulties arising out of the interpretation of the submission itself. Also, the second sub-article stipulates that the arbitrator can be empowered to decide disputes relating to his own jurisdiction. The wordings of the code go in line with the widely accepted principle of competence-competence.

The doctrine of competence-competence allows the arbitral tribunal to decide on its own competence. Since speedy trial became the necessity of business, acknowledging the principle of competence-competence has become fundamental. The power of judicial body to determine its own competence is an accepted principle and a common feature of instruments governing international and judicial procedures.

By the same token, arbitration tribunals are allowed to decide on their own competence

On the contrary, what the Civil Code is silent is about the principle of separability. Generally, it is presumed that arbitration clauses are separate from the general contractual provisions. The traditional approach disallows arbitration to take place if the arbitral panel finds out that it has to decline jurisdiction.

The modern approach speaks differently: the immediate effect of the separation would be that the arbitration agreement would not be affected by the termination of the contract. The reason behind recognizing such possibility is that the parties agree on the institution of adjudication process, where third party arbitrators will be conferred with jurisdictional power to evaluate all aspects of the contract's existence including its validity.

The doctrine of separability is absent from Ethiopian Civil Code. Art 3330/3/ says: "the arbitrator may in no case be required to decide whether the arbitral submission is or is not valid." The kind of legislative restriction is unclear and makes the independence of the tribunal vaguer.

1. ***Removal***

***Though it doesn't address "replacement" and the procedure to be followed in replacing arbitrators whose impartiality and independence has been successfully challenged, the Civil Code, however, addresses removal of arbitrators. The Civil Code in Article 3343 prescribes removal as a remedy in the event that an arbitrator who had accepted his or her appointment unduly delays the discharge of his/her duty. An interesting point worth noting in the provisions of Article 3343 is that the power to remove an arbitrator who unduly delays the discharge of his/her duties is primary given to the authority designated by the parties. Article 3343 of the Civil Code doesn't leave any clue as to whether the authority envisages therein is the one entrusted by the parties to appoint arbitrators; or a separate one with a special power to remove an arbitrator who unduly delays the discharge of his/her duties.***

***Article 3343 of the Civil Code also addresses the question: "who may apply to have an arbitrator who unduly delays the discharge of his/her duties removed"? Article 3343 does not provide that request of removal must be submitted by the "party availing himself of the arbitral submission." Neither does the article provide that the right to have an arbitrator who unduly delays the discharge of his/her duties must be given to the party that appointed the concerned arbitrator. Quite logically, and with the view to assist the constitution of the arbitral tribunal, the lawmaker has given the right to apply to have an arbitrator removed to either one of the arties.***

Print to PDF without this message by purchasing novaPDF (http://www.novapdf.com/)In addition to the grounds for replacement of an arbitrator for his default, !his is as used in Anicle 3336 of the Civil Code, which may ethic be voluntary or involuntary as the case may be, there an: oth~lrcasons for which an arbitrator may either be disqualified or removed. As has already been discussed, oy virtue of the provisions of Article 3336(1) of the Civil Code, there is a procedure for the replacement of an arbitrator who refuses to accept his appointment, who dies after having accepted his appointment, becomes incapable after his appointment or resigns after having accepted his appointment. Anic1es 3340-43 on the other hand, provide for the grounds that may cause the disqualification and removal of an arbitrator and the procedure to be followed in putting into effect removals and disqualifications. As has already been hinted, there is much in common between what Article 3336 provides by way of the grounds and the replacement procedure of an arbitrator in case of his default on the one hand and what Articles 3340 et seq. on the other pro\1de OII the disqualification and removal of an arbitrator. Despite the similarities between the provisions of Article 3336 and those of Articles3340 et seq., yet there are observable differences between replacement for default and

disqualification and removal, which merits 10 be di&C~ herein below

## Principle of Separability

In most disputes, the validity of the agreement is in question. For instance, if a party claims non-performance of the agreement by the other party, the latter will claim that the agreement is invalid, if possible. However, in order to conduct arbitration proceedings, the arbitration clause should remain unaffected by the claim of invalidity. In this context, the doctrine of separability has been introduced and accepted in the practice of international commercial arbitration. The separability of the arbitration clause from the underlying agreement has been accepted as a principle which allows for arbitration proceedings related to an agreement whose validity is put into question.

According to the separability principle, the invalidity of the underlying agreement will not have an impact on the arbitration clause; likewise, the invalidity of the arbitration clause will not render the underlying agreement invalid. In other words, the requirements for validity of the arbitration agreement may differ from those sought for the validity of the underlying agreement

Consequently, even if the underlying agreement is pronounced invalid for any reason, the arbitration clause will remain valid; on the other hand, if the arbitration clause is invalid, the underlying contract will remain valid and the dispute arising from the underlying agreement will be resolved before national courts.

Indeed, the arbitration clause and the underlying agreement are two different agreements despite the fact that both exist within the same text. While the underlying agreement creates a relationship of obligation between the parties, the arbitration agreement solely addresses the settlement of disputes between the parties.

Due to aforementioned reasons, the principle of separability establishes that the arbitration agreement and the underlying agreement have different qualities; the arbitration agreement is juridically autonomous and shall not be affected when the main contract is rendered invalid.

According to the *Competence-Competence* doctrine, an arbitral tribunal has jurisdiction to consider and decide any disputes regarding its own jurisdiction, subject to, in certain circumstances, subsequent judicial

review. In the context of investor-State disputes, an arbitral tribunal's authority to rule on its own jurisdiction may be subject to the review of national courts with respect to *ad hoc* arbitrations; or the review of an *ad hoc* committee with respect to ICSID arbitrations.[6]

5.

It is well established that international tribunals may, and should rule on their jurisdiction *proprio motu*, even in the absence of a jurisdictional challenge.[7] The corollary of this principle is that a tribunal is not bound by the parties' legal positions on jurisdiction.[8]

6.

The *Competence-Competence* doctrine is rooted in the arbitration agreement itself.[9] In application of the *separability* doctrine, the arbitral tribunal's authority to decide on its own jurisdiction therefore exists irrespective of whether the legal instrument containing the arbitration agreement has been terminated.[10]

[t]he principle is that the judge hearing a dispute has jurisdiction to determine his own jurisdiction. This necessarily implies that when that judge is an arbitrator, whose powers derive from the agreement of the parties, he has jurisdiction to examine the existence and validity of such agreement."

It is a general principle of international commercial arbitration that a tribunal is empowered to make a determination as to its own jurisdiction to deal with the substantive claims in dispute. This is known as the "*competence-competence*" doctrine. However, the fact that a tribunal can determine its own jurisdiction does not give it exclusive power to do so and certainly does not prevent an enforcing court that is not at the seat of the arbitration from re-examining the tribunal's jurisdiction. As a leading textbook on international arbitration states:

> "*[arbitrators cannot be] sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, the real purpose of the [competence-competence] rule is in no way to leave the question of the arbitrators' jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award.*"2

If a national court later determines that the tribunal lacked competent jurisdiction, then it may, as discussed further below in the context of the English courts' re-examination of the tribunal's jurisdiction in the *Dallah* case, deem the award to be invalid and therefore unenforceable.