

## **VOLUNTARY INTEREST ARBITRATION IN THE ETHIOPIAN LABOR PROCLAMATION: THE PROBLEMS IN ITS DESIGN AND A WAY TO FIX THEM**

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### **ABSTRACT**

*Some of the objectives of the Ethiopian Labor Proclamation No.377/2003 are “to maintain industrial peace, to guarantee employers and workers’ right to engage in a collective bargaining and to lay down the procedure for the expeditious settlement of labor disputes, which arise between workers and employers”. These objectives can be attained if various types of labor conflicts get recognized and less costly dispute resolution methods are put in place to handle them. Recognizing interest dispute and allowing the submission of such dispute to arbitration has a benefit of avoiding costly measures such as strikes and lock-outs. Therefore, in this expository work, for any individual or policy maker’s use, it is shown how disputes of interest and interest arbitration are recognized by the Labor Proclamation No.377/2003. The work’s main thrust is actually describing the way interest arbitration is designed in the Proclamation and identifying the problems in the designs and proposing a way to fix the problems.*

**Key Terms:** *Ethiopian Labor Law; Interest Arbitration; Labor Disputes; Interest Disputes.*

### **INTRODUCTION**

The Ethiopian Labor Proclamation, enacted by the House of People’s Representative in 2003 with an official name “Labor Proclamation No. 377/2003” (henceforth shortly referred to as the Proclamation), is applicable on both the federal government and the states. Of course its applicability does not extend to all employment relations. Such employees as civil servants, policemen, judges, prosecutors and so on are excluded from its ambit.<sup>1</sup> Some of the objectives of the Proclamation are “to maintain industrial peace, to guarantee employers and workers’ right to engage in a

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<sup>1</sup> See, the Proclamation, Art. 3.

collective bargaining and to lay down the procedure for the expeditious settlement of labor disputes, which arise between workers and employers”.<sup>2</sup>

To achieve these objectives, there is a need to extend recognitions to various labor conflicts and to set-up a mechanism whereby the conflicts can be handled in a less costly way. At a work place, a dispute arises not only because an existing collective agreement or law is violated or needs interpretation, but also because there could be a desire to change the existing rules. The latter kind of dispute is known as interest dispute. A labor law which fails to recognize interest disputes cannot achieve its objective of maintaining industrial peace or others. Recognizing a dispute often leads to setting up a mechanism by which it is handled. So, is interest dispute (a dispute about changing the existing rules or creating future rights) recognized in Ethiopia?<sup>3</sup> Arbitration is considered as one of the dispute settlement mechanisms appropriate to handle labor disputes whenever there is willingness between the parties to make use of it.<sup>4</sup> Then the question is: Does the Proclamation provide voluntary arbitration to resolve interest disputes as a dispute settlement mechanism? To put it differently, does the Proclamation, in its menu of labor dispute settlement mechanisms<sup>5</sup>, provide for voluntary interest arbitration? Hence, the objective of this work is to show how interest dispute and voluntary interest arbitration are recognized in the Proclamation and how voluntary interest arbitration is designed to work and how the design needs improvement.

Voluntary interest arbitration is used when employers and employees could not reach agreement but impasse after a long *bargaining process*<sup>6</sup>. Thus, it has the benefit of avoiding *strikes*<sup>7</sup> or *lock-outs*<sup>8</sup> which are usually very costly methods to break collective agreement impasse, because it allows, in the event of the impasse, neutral third parties (arbitrators) impose a binding

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<sup>2</sup> See, the Proclamation, the preamble.

<sup>3</sup> For more on interest disputes, see *infra* section (I) and accompanying discussion in text.

<sup>4</sup> Arbitration is an alternative dispute resolution method in which disputants submit their dispute to neutral third parties (known as arbitrators) who are usually appointed by them and give a binding decision after examining disputants' arguments and evidences.

<sup>5</sup> The Proclamation provides for various dispute settlement methods such as conciliation (see, Arts, 136(1), 141-143), through courts (see, Arts.137-140) and labor relation board (see Arts.144-156).

<sup>6</sup> For the definition of collective bargaining, See, the Proclamation, Art.124 (2).

<sup>7</sup> See, the Proclamation, Art.136 (4).

<sup>8</sup> See, the Proclamation, Art.136 (5).

decision on the matter. That decision is going to be complied by both sides-employers and employees. Despite such a benefit of voluntary interest arbitration, there are no scholarly works on the Proclamation regarding voluntary interest arbitration. This work will have a significance of bringing forth voluntary interest arbitration to the attention of lawyers, employees, employers, their respective associations and to whomever interested in labor disputes and labor dispute settlement mechanisms by describing how it is recognized in the Proclamation; how it is designed to work and by proposing a way by which its design can be improved and thus made usable.

In this work, the following questions are answered: is interest dispute recognized in the Proclamation? Is voluntary interest arbitration recognized in the Proclamation? How is it designed to work? Is there a problem in the design? How can it be fixed? Examination of the provisions of the Proclamation is not enough to get an answer for the questions, so the Ethiopian Arbitration Law, which means Arts.3325-3346, the Civil Code, 1960 (hereafter referred to as C.C); and Arts. 244(2(g)), 315-319 and 350-357, the Civil Procedure Code, 1965 (hereafter referred to as CPC.) and the design of interest arbitration in foreign jurisdiction (which are selected haphazardly) are also examined.

This work is organized into five sections. Section one shows the recognition of disputes of interest in the Proclamation. Section two deals with the recognition of voluntary interest arbitration. Section three describes the design of interest arbitration as laid down in the Proclamation and identifies the problems in the design. In section four, a way by which the problems can be fixed is suggested. Finally, there is a conclusion and recommendation in section five.

## **1. THE RECOGNITION OF DISPUTES OF INTEREST IN THE PROCLAMATION**

Labor disputes are generally categorized as “individual” and “collective”. This categorization is recognized in the Proclamation.<sup>9</sup> “[A] dispute is individual if it involves a single worker, or a number of workers as individuals (or the application of their individual employment contracts). It

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<sup>9</sup>See, the Proclamation, Art 136(3), 138(1) and 142(1).

becomes a collective dispute if it involves a number of workers collectively.”<sup>10</sup> Labor disputes are also classifiable as “disputes of right” and “disputes of interest”. A dispute of right concerns with “the violation of or interpretation of an existing right (or obligation) embodied in a law, collective agreement or individual contract of employment or custom and practice. At its core is an allegation that a worker, or group of workers, have not been afforded their proper entitlement(s).”<sup>11</sup> A dispute of interest “arises from differences over the determination of future rights and obligations, and is usually the result of a failure of collective bargaining. It does not have its origins in an existing right, but in the interest of one of the parties to create such a right through its embodiment in a collective agreement, and the opposition of the other party doing so.”<sup>12</sup> Does the Proclamation recognize this distinction and thereby disputes of interest?

The answer is “yes”. The Proclamation defines labor dispute as follows:

"[L]abor dispute" means any controversy arising between a worker and an employer or trade union and employers in respect of the application of law, collective agreement, work rules, employment contract or customary rules and *also any disagreement arising during collective bargaining or in connection with collective agreement.*<sup>13</sup> (The emphasis is mine).

This definition obviously recognizes both disputes of right and disputes of interests. As explained in the above paragraph, disputes of interest( they are also known as “economic disputes”) are not based on the rights or entitlements already recognized in the labor laws, collective agreements, contracts, or customs and practices, rather they are about creating new rights or entitlements, about trying to get them in a collective agreement. For example, during a collective bargaining<sup>14</sup>, workers (or their unions) may

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<sup>10</sup>See, International Labor Organization, Substantive Provisions of Labour Legislation: Settlement of collective Labour disputes, available at <http://www.ilo.org/legacy/english/dialogue/ifpdial/lhg/noframes/ch4.htm#3> <last visited on 9<sup>th</sup> June 2016>.

<sup>11</sup>*Ibid.*

<sup>12</sup>*Ibid.*

<sup>13</sup>The Proclamation, Art. 136(3).

<sup>14</sup> See, the Proclamation, Art. 124( 2)( "Collective Bargaining" means a negotiation made between employers and workers' organizations or their representatives concerning conditions of work or collective agreement or the renewal and modifications of the collective agreement).

negotiate with employers to have in a collective agreement a new entitlement or right to a paid leave, not provided in the Proclamation or other relevant laws. If employers refuse to agree for the inclusion of the new entitlement in the collective agreement in the face of workers' insistence on its inclusion, it means the collective bargaining is taking the employees and the workers nowhere near to a settlement agreement – that means the parties are thrown into a dispute. This dispute is going to be a dispute of interest and such a dispute is recognized in the Proclamation (please see again the italicized part of the definition of labor dispute in the Proclamation as reproduced above).

If a certain type of dispute is given recognition, then a dispute settlement mechanism which fits to handle the recognized dispute must be set-up. And arbitration is a dispute settlement mechanism. Now therefore the question is: in the menu of dispute settlement mechanisms set forth in the Proclamation, do we find arbitration among them for interest disputes? In other words, does the Proclamation recognize interest arbitration?

Remember, from the discussion on interest disputes in the above paragraphs and the fact that interest disputes usually result from a failure of collective bargaining, it must be noted that *Interest arbitration is, thus, an arbitration which happens when collective bargaining yields no result leading to a collective agreement.*

## **2. THE RECOGNITION OF VOLUNTARY INTEREST ARBITRATION IN THE PROCLAMATION**

A cumulative reading of Arts.143 (1), 141(1) and 142(1) of the Proclamation leads us at the conclusion that interest arbitration (arbitration on a dispute of interest) is recognized in Ethiopia. Art.143 (1) of the Proclamation states that “Notwithstanding the provisions of Article 141 of this Proclamation parties to a dispute may agree to submit their case to *arbitrators* ... for settlement in accordance with the appropriate law”(the emphasis is mine). It means disputes referred under Art.141 (1) of the Proclamation can be submitted to arbitration if parties agree to that effect. Actually disputes referred under Art. 141(1) are those disputes enumerated under Art.142 (1) of the Proclamation and this enumeration includes disputes of interests such as disputes over “

new conditions of work”<sup>15</sup> and “ the conclusion, amendment, duration and invalidation of collective agreements”<sup>16</sup>. Therefore, disputes of interest are allowed to be submitted to arbitration upon the consent of parties – it means that interest arbitration (i.e., arbitration for the settlement of dispute of interest which usually arises from a failure of a collective bargaining) is recognized in the Proclamation.

Note that what is recognized under Art.143 (1) of the Proclamation is voluntary interest arbitration. Meaning, unless there is an agreement between employees and employers, when a collective bargaining leads to an impasse (to no mutual agreement), they are not forced to submit the interest dispute to arbitration. If they were forced, that would be compulsory interest arbitration.<sup>17</sup> And compulsory interest arbitration is usually unfavorable. To point out one crucial point why it is usually unfavorable is that it goes against the right to strike. When employees bargain with employers for a new working conditions which is going to be a right in the future by making it a part of a collective agreement, and when the bargain leads them to no agreement or to an impasse, they may go on strike to force their employer accept their demand. This right to strike, which is guaranteed in the FDRE Constitution<sup>18</sup> and in the Proclamation<sup>19</sup>, will be in jeopardy if employees are forced to submit themselves to arbitration whenever a collective bargaining breaks down (i.e. when a dispute of interest arises).

However, remember that compulsory interest arbitration is provided by laws of various countries including Ethiopia in relation to specific sectors where strikes are prohibited. The Proclamation prohibits employees of “essential

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<sup>15</sup> See, the Proclamation, Art. 142 (1) (b).

<sup>16</sup> See, the Proclamation, Art.142 (1) (c) and see how interest disputes are described in section (1).

<sup>17</sup> If the difference between voluntary and compulsory interest arbitration is not yet clear to a reader, remember that voluntary interest arbitration involves a joint agreement between the employer and the employees to submit specific collective bargaining issue on which they could not agree on to a third party (known as an arbitrator) for a binding decision. Voluntary arbitration is different from compulsory arbitration in that the respective parties are free to accept or reject this procedure as a means to resolving a collective bargaining dispute. In compulsory arbitration, when the collective bargaining fails to produce agreement on the issue, employers and employees do not have another option (such as strikes or lock-outs) but submit the issue to arbitration.

<sup>18</sup>See, the FDRE Constitution, Art.42 (1(a)).

<sup>19</sup> See, the Proclamation, Art. 157 (1).

services” from striking.<sup>20</sup> If a dispute arises in these sectors, it must be submitted to conciliation and if the conciliation is not successful, it must be submitted to an *ad hoc* board.<sup>21</sup> The *ad hoc* board cannot be understood to mean otherwise than compulsory arbitration. Since compulsory interest arbitration in the Proclamation is outside of the objective of this work, let us turn back our attention to the voluntary interest arbitration in the Proclamation.

The recognition of voluntary interest arbitration in the Proclamation is very commendable. Unlike, compulsory interest arbitration, it does not have an automatic corrosive effect on worker’s right to strike, yet it prevents employers and employees from very costly actions such as strikes and lock-outs. Because once they agree for arbitration, whenever a collective bargaining fails, they submit the issue for arbitration which is going to impose a binding decision on the issue, they will not need to resort to strike or lock-outs to resolve the issue which the collective bargaining has failed to resolve. “When both parties stand to lose too much through a strike or lock-out, they look to viable alternatives.”<sup>22</sup> “Interest arbitration thus offers an alternative mechanism to break deadlock between parties engaged in collective bargaining.”<sup>23</sup> For providing and recognizing this option, the Proclamation is commendable. But, is it designed properly to be actually utilized by employers and employees who are parties to an interest dispute?

### **3. THE DESIGN FOR VOLUNTARY INTEREST ARBITRATION IN THE PROCLAMATION AND ITS PROBLEMS**

In the Proclamation, interest arbitration is designed to work “in accordance with the appropriate law”<sup>24</sup>. The question now is “which law is being cross-referred here?” There is no arbitration law in Ethiopia specifically designed for labor disputes. So it means what is cross-referred here is the Ethiopian Arbitration Law which consists of Arts.3325-3346, the C.C; and Arts.244

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<sup>20</sup> See, the Proclamation, Art.157 (3).

<sup>21</sup> See, the Proclamation, Arts.144 (2), 142(3), 152.

<sup>22</sup>*The Enforceability of the No-Strike and Interest Arbitration Provisions of the Experimental Negotiating Agreement in Federal Courts*, 12 Vol. U. L. Rev. 57 (1977); available at: <http://scholar.valpo.edu/vultr/vol12/iss1/3>, P.74.

<sup>23</sup>*Ibid.*

<sup>24</sup> See, the Proclamation, Art. 143 (1).

(2(g)), 315-319 and 350-357, the CPC. However, designing interest arbitration to work on the rules of the Ethiopian Arbitration Law without being selective is a poor design since the basic rules of this law are not suitable to the unique nature of interest arbitration. It is not surprising at all that as these rules are intended for arbitration in general, not specifically designed for interest arbitration, so some of the rules of this law are found to be incompatible or falling short of giving solutions to the unique problems of interest arbitration. In this work, three significant problems are identified which one can face when rules of the Ethiopian Arbitration Law are applied to interest arbitration. Let us discuss them turn by turn.

### 3.1. WHAT IS TO BE THE BASIS OF ARBITRATORS' DECISION IN INTEREST ARBITRATION?

Interest arbitration is on interest disputes and interest disputes, unlike right disputes, are not about applying or interpreting existing rules, they are about changing existing rules or creating new rules.<sup>25</sup> It means arbitrators in interest arbitration cannot find a solution in the existing law for the interest dispute before them. However, the Ethiopian Arbitration Law dictates arbitrators to render an award based on the law.<sup>26</sup> If arbitrators render an award applying other criteria than legal rules, they may be deemed to have exercised power in excess of their mandate and the award can get set aside.<sup>27</sup> In UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (hereinafter referred to as the UNCITRAL Model Law)<sup>28</sup>, it is stated that "... The arbitral tribunal shall decide *exaequo et bono* or as *amiable compositeur* only if the parties have

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<sup>25</sup>See, the discussion on section (I).

<sup>26</sup> See, CC, Art.3325 (1) ( It reads: "The arbitral submission is the 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 principles of law*") and see, CPC, Art.317(2)(it reads: "The tribunal shall in particular hear the parties and their evidence respectively and decide *according to law* unless by the submission it has been exempted from doing so"-the emphasis is mine.)

<sup>27</sup> See, CPC, Art.356 (1).

<sup>28</sup> The UNCITRAL Model Law is "Designed to assist states in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration." For more, visit: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html).

expressly authorized it to do so.”<sup>29</sup> In Ethiopian Arbitration Law, no explicit provision like that of the UNCITRAL Model Law authorizing arbitrators to use other criteria than the law as a basis for an award. Despite the fact that Art.317 (2), CPC seems to imply it,<sup>30</sup> writers questioned if arbitrators in Ethiopia can decide as *ex aequo et bono* even if an authorization by the disputants is there.<sup>31</sup>

Therefore, it is a poor design of the Proclamation for indiscriminately cross-referring the Ethiopian Arbitration Law to be applied for interest arbitrations without being selective of unfit rules such as Art.3325(1) of the C.C. which requires arbitrators to apply “the principles of law” for their decision. Even if the rule in the Ethiopian Arbitration Law dictating arbitrators to apply the “law” for their decision is considered as a default rule which can be avoided by the agreement of parties, it still is illogical. The law still falls short of providing a meaningful solution on interest disputes.<sup>32</sup> How can we logically say that in Ethiopia, interest arbitrators are required to apply *the law* to resolve an *interest dispute* unless they are authorized by the parties to use other criteria? In general, the Ethiopian Arbitration Law, at best, does not provide the appropriate measure which arbitrators can apply for their decision; at worst it forces them to apply a wrong measure for their decision, *viz.*; the law. Either way proves the Proclamation’s indiscriminate cross-reference to the Ethiopian Arbitration Law for interest arbitration is a poor design.

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<sup>29</sup>See, UNCITRAL Model Law, Art.28 (3).

<sup>30</sup> CPC, Art.317 (2) reads: “The tribunal shall in particular hear the parties and their evidence respectively and decide according to law *unless by the submission it has been exempted from doing so*”-the emphasis is mine.)

<sup>31</sup>See Aschalew Ashagre, *Involvement of Courts in Arbitration Proceedings under Ethiopian Law*, Journal of Business and Development (2007), Vol.2, P2.

<sup>32</sup>A law could have been considered as providing a meaningful solution if it had a provision which goes like: “Unless there is an otherwise agreement, arbitrators in interest arbitration shall adopt as their decisions the final offer of one of the parties as a total package. Arbitrators, among other things, shall consider such factors as *affordability* (employer’s ability to pay), *comparability* (award is comparable to like workplaces or sectors), *replication* (award is reasonably what could have been achieved had bargaining continued until an agreement was reached) and *demonstrated need* (party has made a case for its position) to adopt a final offer of the employees over that of the employers or vice versa.”

### 3.2. WHAT IS TO BE THE PROCEDURE OF INTEREST ARBITRATION?

Again the Proclamation prescribes for interest arbitration a procedure which is prescribed in the Ethiopian Arbitration Law. A rule in the Ethiopian Arbitration Law provides the procedure of arbitration to be the same as that of the civil court.<sup>33</sup> The rule is such a default one that parties, through agreement, can set a different procedure so long as basic principles of procedure like fairness are not violated.<sup>34</sup> Obviously, the stance of the Ethiopian Arbitration Law on the procedure for arbitrations in general does not squarely fit for interest arbitration. Interest arbitration is on disputes of interest and such disputes are on issues not covered by existing labor laws, contracts and rules, and thus inappropriate to be handled by courts which are supposed to resolve disputes by applying existing legal rules. Therefore, a typical procedure for civil courts cannot be a typical one for interest arbitration. In other words, it is illogical to prescribe as a default rule a court procedure for a dispute which is not suitable for a court process.

Note that courts, which are supposed to apply existing legal rules for their decision, are not appropriate forums of handling *interest disputes*,<sup>35</sup> which are not about the interpretation of existing rules rather about changing them. But, as discussed above under section (2), such disputes are made arbitrable by the Proclamation. This situation gives the Proclamation a special place for introducing to the Ethiopian legal system such an arbitration called interest arbitration.

### 3.3. WHAT IS TO BE COURT'S CONTROL ON INTEREST ARBITRATION?

In the Ethiopia Arbitration Law, there are four avenues by which courts can exercise control on arbitration; viz, appeal, cassation, setting aside and refusal. Of these avenues, appeal and cassation authorize courts to review an award on the merits and both are held to be too much intervention of the

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<sup>33</sup>See, CPC, Art.317 (1).

<sup>34</sup>See, *Gebru Korre vs Amdeyo Fidreche* (Decisions of the Federal Supreme Court, Cassation Division, Vol.12, Federal Supreme Court, 303-305, 2011).

<sup>35</sup> See Section (1) for the description of interest disputes.

courts into arbitration.<sup>36</sup> Obviously for interest arbitrations, these avenues are not only too much but also bizarre. Regular courts can review and pass down decisions doing what they are good at- by interpreting the law, but interest arbitrations are not about interpreting existing rules rather creating a new one which are going to be the part of a collective agreement. Therefore, it is a poor design that the Proclamation, by its indiscriminate cross-referring of the Ethiopian Arbitration Law for interest arbitration, is allowing regular courts to review interest arbitrators decision on the merit by way of appeal (unless it is waived by agreement) and cassation.

#### 4. A WAY TO FIX THE PROBLEM

In section three, it is shown that the Proclamation does indiscriminate cross-referencing to the Ethiopian Arbitration Law to be applied on interest arbitration- meaning interest arbitration is designed to operate only on the rules of the Ethiopian Arbitration Law. However, this design is flawed as discussed in section three. In three crucial areas, the rules of the Ethiopian Arbitration Law are found either providing a wrong solution or even forcing the wrong solution for interest arbitration. Therefore, to fix the problem in the design, what is needed is, not to indiscriminately cross- refer the Ethiopian Arbitration Law, rather to be selective and to weed out the unfit rules and substitute them with the appropriate ones for interest arbitration.

The first unfit rule identified in section (3.1) is the rule which requires arbitrators to apply the law for their decision. This rule is fit for what is called conventional arbitration (which on whether an existing right is violated or not), not for interest arbitration, which is on a dispute for creating a future right. This rule of the Ethiopia Arbitration Law is arguably not escapable even through the agreement of disputants.<sup>37</sup> Meaning arbitrators can not give a decision based on other consideration than the law whether or not the parties authorize them to do so. Thus arbitrator's decision which is based on other considerations than the law can be invalidated for the reason

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<sup>36</sup>Birhanu Beyene, *The Degree of Court's Control on Arbitration under the Ethiopian Law: Is It to the Right Amount?* Oromia Law Journal (2012), Vol.1, No.1 and Birhanu Beyene, *Cassation Review of Arbitral Awards: Does the Law Authorize It?* Oromia Law Journal (2013), Vol.2, No.1.

<sup>37</sup> See, Aschalew, *supra* note 31.

that arbitrators have exercised in excess of their power.<sup>38</sup>In interest disputes, the law does not have any solution-one example of interest dispute could be employee's demand for a higher salary and requiring arbitrators in interest arbitration to apply only the law for their decision is like forcing them to use a wrong apparatus which is incapable of solving the problem at hand. Therefore, this rule must be substituted by another one which is fit for interest arbitration.

In other jurisdictions, arbitrators in interest arbitration may decide the dispute at hand following either of such approaches as "final offer" or "the arbitrators own formulation" or "hybrid". In "final offer" interest arbitration, the arbitrators are required to adopt the final offer of one of the parties for their decision. The arbitrators have no any other discretion than that. In "the arbitrators own formulation" interest arbitration, arbitrators are required to evaluate the parties' proposals and render an award which they deem appropriate. In a "hybrid" approach, "depending on the characterization of a proposal or contract term as 'economic' or 'non-economic,' the above approaches can be combined and modified to create a 'hybrid' approach. For instance, final offer interest arbitration may be adopted for all economic items, while "the arbitrators own formulation" may be used for all non-economic items."<sup>39</sup>

"Final offer" approach can also be further divided and in one document the sub-divisions of this approach are described as follows:<sup>40</sup>

Final Offer – Issue By Issue: Allows the arbitrator the freedom to find in favor of one party on some of the issues and for the other party on the remaining issues. It may encourage parties to keep all issues on the table – even fairly nominal contractual terms – under the realization that they have nothing really to lose. This tends to keep the issues broad in number and may lead to costly and time consuming proceedings.

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<sup>38</sup> See, CPC, Art.357.

<sup>39</sup>Amy Moor Gaylord, *Interest Arbitration –Pros, Cons and How Tos*, available at [http://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2010/am/gaylord.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/am/gaylord.authcheckdam.pdf) <last visited June 8, 2016>

<sup>40</sup>*Ibid.*

Final Offer – Total Package: The true “winner-take-all” approach to interest arbitration. Each party submits as a complete package its final offer on all issues in dispute, and the arbitrator must adopt one or the other package in its entirety. It may encourage parties to narrow the issues considerably and lead to shorter, more efficient proceedings.

“Nighttime Baseball”: A variation on final offer interest arbitration, in this type of proceeding, the arbitrator does not know the parties’ final offers. The arbitrator’s post-hearing decision that is closest to the undisclosed (to the arbitrator) party’s last offer will result in that offer being deemed the award of the arbitration.

Now the question is which approach will be appropriate to be adopted by the Proclamation to fix the unfit rule?<sup>41</sup> When employer and employees want to create a new working condition or salary adjustment or something like that, they hold negotiation (collective bargaining). If the collective bargaining ends up in a deadlock, rather than a settlement agreement, each side may engage in an economic warfare such as strike or lock-out. This option is costly, though. The less costly option is to put the matter to arbitrators who are going to give binding decisions on them. Here it must be noted that the ideal method of dealing with labor conflicts is settling them through a collective bargaining proceedings, because it allows employees and employers to look at issues in depth and to have a full rounded understanding of them and to reach a mutually acceptable solution- there is no a stranger third party imposing his will on them. Thus interest arbitration must not have a “chilling” effect on collective bargaining. It must work as an extension of the collective bargaining process.<sup>42</sup>

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<sup>41</sup> See, *supra* section 3.1 about the unfit rule.

<sup>42</sup>If you wonder what I mean by “It must work as a part of the collective bargaining process”, see Fisher, R., Ury, W. and Patton, B. *Getting to Yes: Negotiating an Agreement without Giving in*, London: Century Business (2<sup>nd</sup> edition, 1991), Pp.45-46.

However, what we have called “the arbitrators own formulation” approach has the potential of creating a “chilling” effect on collective bargaining. If employer and employees agree to submit a matter to interest arbitration at the event of impasse in a collective bargaining and if they know that arbitrators are required to give a decision using whatever criteria which they deem appropriate, the employers and employees, at the bargaining table, are going to offer each other extreme claims in the hope that arbitrators will finally simply split the differences of their respective offers. It means, rather than trying hard to search for a mutually acceptable agreement in the collective bargaining, both sides will simply hang on irrational position expecting that the bargaining will end in a deadlock and then the matter will be submitted to arbitration in which differences are to be split –up.

“Final offer” interest arbitration has, nonetheless, the potential to induce the two sides take a rational position, because they know that at the end of the day arbitrators will adopt as their decision the final offer of the party which is rational and reasonable, not the one with extreme offers. When each side tries hard to come up with a rational offer, then they may get closer and closer over the issues and then arrive at a mutually acceptable solution and thereby they may avoid the interest arbitration. Thus “final offer” approach is an incentive for honest bargaining and must be adopted by the Proclamation. It is also argued that “[t]he final offer approach seeks to increase the cost to the parties of failing to reach agreement by eliminating the arbitrator's ability to compromise issues, and substituting a winner-take-all outcome.”<sup>43</sup>

As discussed above “final offer” interest arbitration has its own varieties and each variety has its own benefits and weaknesses. For this writer, “final offer- total package” is better as it relatively saves time.<sup>44</sup> But, parties may find the other varieties more fit to their particular situation, so the rule we need to adopt must be a default one. In other words, the way to fix the unfit rule of the Ethiopian Arbitration Law and make it suitable for interest arbitration, the Proclamation should include a provision which goes like

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<sup>43</sup>Richard W. Laner & Julia W. Manning, *Interest Arbitration: A New Terminal Impasse Resolution Procedure for Illinois Public Sector Employees*, 60 Chi.-Kent. L. Rev. 839, P.843 (1984). Available at: <http://scholarship.kentlaw.iit.edu/cklawreview/vol60/iss4/4> <last visited 8<sup>th</sup> June 2016>.

<sup>44</sup>*Id.*, Pp 843 -844.

“unless otherwise provided in parties’ agreement, arbitrators shall adopt the final offer of one of the parties as a total package for their decision.”

One important point that needs to be added here is that the Proclamation should also give instruction to arbitrators as to the factors that they need to take in to account to adopt a final offer of the employees over that of the employers or vice versa. Therefore, the Proclamation should explicitly provide that in addition to any other relevant factors, arbitrators must consider the following factors:

- Past collective agreement between the parties including the bargaining that led up to such collective agreements.
- Comparison of wages, hours and conditions of employment of the involved employees with those of other employees doing comparable work, giving consideration to factors peculiar to the area and the classifications involved.
- The ability of the employer to finance economic adjustments and the effect of such adjustments on the consumers.
- The cost of living.<sup>45</sup>

In other words, arbitrators must apply the criteria of *affordability* (employer’s ability to pay), *comparability* (award is comparable to like workplaces or sectors), *replication* (award is reasonably what could have been achieved had bargaining continued until an agreement was reached) and *demonstrated need* (party has made a case for its position).

The second unfit rule of the Ethiopian Arbitration Law identified in section (3.2) is the one on procedure. Unlike the rule for arbitration decisions, this rule can be fixed by parties’ agreement.<sup>46</sup> But an optimal rule of arbitration law would ensure parties’ autonomy and provides an optimal solution whenever parties’ agreement is silent on the issue. The rule of the Ethiopian Arbitration Law on procedure is good that it ensures parties’ autonomy by

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<sup>45</sup>This list is adapted from the "Public Employment Relations Act" of Iowa which is available: [https:// coolice.legis.iowa.gov/cool-ice/default.asp?category= billinfo&service=iowacode& ga= 83&input=20#20.22](https://coolice.legis.iowa.gov/cool-ice/default.asp?category= billinfo&service=iowacode& ga= 83&input=20#20.22)<last visited 8<sup>th</sup> June, 2016>.

<sup>46</sup>A look at Art.317(1), CPC and *GebruKorre vs Amdeyo Fidreche* (Decisions of the Federal Supreme Court Cassation Division, Vol.12, Federal Supreme Court, 303-305, 2011) make this point clear.

allowing them to come up with their own if they want.<sup>47</sup> Unfortunately, the solution it provides when there is no agreement between the parties on the procedure is not optimal for interest arbitration. Thus to fix this problem, the Proclamation should provide an optimal solution for the procedure for interest arbitration maintaining parties' autonomy. The Proclamation should have a provision on the procedure of voluntary interest arbitration which goes like the following:

- The conduct of the arbitration proceeding shall be under the exclusive jurisdiction and control of the arbitrator.
- The appointed arbitrator may mediate or assist the parties in reaching a mutually agreeable settlement at any time throughout formal arbitration proceedings. However, mediation efforts shall not stay or extend the deadlines for issuance of an award.
- The arbitrator may administer oaths, conduct hearings, and require the attendance of such witnesses and the production of such books, papers, contracts, agreements, and documents as the arbitrator may deem material to a just determination of the issues in dispute, and for such purpose may issue summons. Any hearings conducted shall not be public unless all parties agree to have them public.
- The arbitrator, after appointment, shall communicate with the parties to arrange for a date, time, and place for hearing. In the absence of an agreement, the arbitrator shall have the authority to set the date, time, and place for hearing. The arbitrator shall submit a written notice containing arrangements for hearing within a reasonable time period before hearing. At least two days before the hearing, the parties shall submit to the arbitrator and to each other their final offers on each economic and non-economic issue in dispute. .... The arbitrator may accept a revision of such offer at any time before the arbitrator takes testimony or evidence or, if the parties agree to permit revisions and the arbitrator approves such an agreement, before the close of the hearing. Upon taking testimony or evidence, the arbitrator shall notify the parties that their offers shall be deemed final, binding and irreversible unless the arbitrator approves an agreement between the parties to permit revisions before the close of the hearing.

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<sup>47</sup>*Ibid.*

- The arbitrator, after duly scheduling the hearing, shall have the authority to proceed in the absence of any party who, having failed to obtain an adjournment does not appear at the hearing. Such party shall be deemed to have waived its opportunity to provide argument and evidence.
- The parties, at the discretion of the arbitrator, may file post-hearing briefs. The parties shall not be permitted to introduce any new factual material in the post-hearing briefs, except upon special permission of the arbitrator.
- An arbitrator must issue an award within.... days from appointment or within such other period of time that may be set by agreement between parties.

The third flaw identified in the Labor Law's design of interest arbitration is that because of its indiscriminate cross-reference to the Ethiopia Arbitration Law, it allows courts' control on interest arbitration via the avenue of appeal and cassation- these avenues allow review of the award on the merit. Here, it must be noted that there is no an explicit rule allowing cassation review of award in the Ethiopia Arbitration Law- this review has come into existence by the decision of the Federal Supreme Court Cassation Division.<sup>48</sup> The writer hopes that the precedent set by the decision will be overruled by the Cassation division.<sup>49</sup> Obviously, it is absurd to authorize courts to review the merits of the awards of interest arbitration via appeal or *cassation*<sup>50</sup>. Therefore, the Labor Law should fix this problem by clearly prohibiting the involvement of courts in reviewing the merits of awards and by minimizing their control to procedural matters.

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<sup>48</sup> See, *National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co.* (Decisions of the Federal Supreme Court Cassation Division, Vol.10, Federal Supreme Court, 350-354, 2010).

<sup>49</sup> For the arguments against the decision see, Birhanu Beyene, *Cassation Review of Arbitral Awards: Does the Law Authorize It?* Oromia Law Journal (2013), Vol. 2, No.1.

<sup>50</sup> It is also possible to argue that the rules on cassation have already excluded cassation review of awards of interest arbitration. Since these rules authorize review for fundamental mistakes of law and awards of interest arbitration are not about interpreting the existing law, thus no way the cassation bench can review awards of interest arbitration on the merit.

Therefore, the Proclamation should limit court's involvement only to the avenues of setting aside (Arts 3555-357, CPC) and refusal (Art.319, CPC).<sup>51</sup> It must state that the awards by arbitrators of interest arbitration must be final without prejudice to Arts 355-357, CPC and Art.319 (2), CPC. It must also state that the grounds of setting aside enumerated under Art.356, CPC should be deemed to have included "the absence of proper notice of the appointment of an arbitrator or of the arbitral proceedings; a party is not given a chance to present her case; and the award is in conflict with the public policy of State."<sup>52</sup>

## 5. CONCLUSIONS AND RECOMMENDATIONS

Due to its highest cost, employees and employers may like to use other method than economic warfare such as strikes and lock-out to deal with collective bargaining impasse. The Proclamation is commendable for recognizing voluntary interest arbitration as a method in which a 3<sup>rd</sup> party gives a binding decision in the event of collective bargaining impasse. However, the Proclamation's design for the voluntary interest arbitration is so poor that it is almost impossible to put it into use. It is designed to work on the rules of the Ethiopian Arbitration Law, but in three important areas the rules provide either a wrong solution or non-optimal solution. Therefore, the design must be fixed in a meaningful way so that it can be put into use and its advantages reaped.

The Proclamation should not have simply cross-referenced "the appropriate law" (i.e, the Ethiopian Arbitration Law) indiscriminately to be applicable on interest arbitration. It should have identified the unfit rules and provided instead rules suitable for interest arbitration. The Proclamation, therefore, should state that the rules of the Ethiopian Arbitration Law shall be applicable to voluntary interest arbitration without prejudice to such rules that:

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<sup>51</sup>On the grounds of refusal and the relationship between setting aside and refusal, see, Birhanu Beyene, *Homologation of Arbitral Awards in Ethiopia: Refining the Law*, Ethiopian Bar Review (2012), Vol.5, No 1.

<sup>52</sup>To see why those grounds must be added under Art.356, CPC, see, Birhanu, *supra* note 36, Pp.52-53.

- Unless there is an otherwise agreement, arbitrators in interest arbitration shall adopt as their decisions the final offer of one of the parties as a total package. Arbitrators, among other things, shall consider such factors as *affordability* (employer's ability to pay), *comparability* (award is comparable to like workplaces or sectors), *replication* (award is reasonably what could have been achieved had bargaining continued until an agreement was reached) and *demonstrated need* (party has made a case for its positron) to adopt a final offer of the employees over that of the employers or vice versa.
- Unless there is an otherwise agreement, the conduct of the arbitration proceeding shall be under the exclusive jurisdiction and control of the arbitrator. When it comes to issuing summons, calling and hearing witnesses, fixing hearing dates and places, they are deemed to have a power of a civil court judge.
- The awards of voluntary interest arbitration shall be final without prejudice to Arts 355-357, CPC and Art. 319(2), CPC. And Art.356 shall be deemed to include in its list of grounds of setting aside such ones as the absence of proper notice of the appointment of an arbitrator or of the arbitral proceedings or a party is not given a chance to present his/her case; and the award's conflict with the public policy of the State.