

# DUTY OF CONFIDENTIALITY IN ARBITRATION PROCESS IN ETHIOPIA

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## ABSTRACT

**Purpose of the study:** the study aims to pinpoint the status of arbitration confidentiality in Ethiopia.

**Methodology:** Data were collected through document review and interviews of professionals who were selected purposively since they have a direct relation with the arbitration cases.

**Finding:** The finding of this research shows that the legal basis, scopes, application, and limitations of duty of confidentiality are full of debate.

**Application:** the Ethiopian parliament should enact new arbitration laws by taking a lesson from the New Zealand Arbitration Act and WIPO arbitration rules. Disputing parties should fill these gaps through their confidentiality contractual. The Court control and support to arbitration proceedings should be limited and confidential. Any person publication of arbitral awards should be without the identity of disputing parties.

**Novelty:** even if arbitration has many benefits, its application is low in Ethiopia. Therefore, this study may use as reference material for students', disputing parties, and also the input for police and lawmakers.

**Keywords:** Commercial Arbitration, Confidentiality, Privacy, Public Policy, Trade Secret.

## 1. INTRODUCTION

Disputing parties choose arbitration than court litigation to get the benefit of arbitration such as rapidity, choice of impartial arbitrator, flexibility procedure, privacy and confidentiality, binding and final award, shortening of court dockets (Baker & Choi, 2018; Reuben, 2005). The Common sayings about the importance of confidentiality are "If I uphold my silence about my secret, it is my detainee. But if I let it slip from my tongue, I am its prisoner. And also, "Rumor is more powerful than war." These proverbs informed us confidentiality is a corner of a person's life. For instance, every business has its secret for its success, so if its secret discloses to third parties, the business will lose its trust, goodwill, profit, reputation, customers & discourage ethical value. That is why one of attracting factor for parties opted for arbitration than court litigation to avoid adverse publicities that could force the disclosure of their trade secrets and customers, which may negatively affect the good image of businessperson established over long periods of time especially the dispute is related to non-performance, the reliability and honesty of a party (Daly, 2005; Noussia, 2010).

Parties expect the privacy of arbitration proceedings and the confidentiality of its information. However, the legal basis, scope, application, and exceptions to confidentiality in arbitration are ambiguous, which is English, French and New Zealand courts are decided the implied confidentiality of arbitration. However, Australia, Sweden and USA courts are rejected the implied duty of confidentiality and also it has unlimited exceptions (Klein, 2004). Moreover, Ethiopian arbitration law is silent regarding the legal basis, scopes, limitations and application of the duty of confidentiality in arbitration. However, based on the writer's observation, arbitration awards are published by the Ethiopian mediation and arbitration center. As far as the writer's knowledge goes good/ concerned, nobody studied it. Therefore, this uncertainty motivated the writer

## 2. LITERATURE REVIEW

Arbitration is about settling a legal dispute in which parties conclude arbitration agreement called Arbitration Clause or submission and where the parties appoint arbitrator (s), who under a private service contract render(s) judicial services by hearing and handling the case and make arbitration award, which will be recognized and enforced by the state according to the existing laws on arbitration (Buys, 2013). The advantage of arbitration over court litigation is its privacy and confidentiality. Privacy refers to the right to isolate, classified to one's personal information or the option to hide any information from others, control over others' use of information about oneself, states of privacy personhood and independence, self-identity and personal growth, protection of intimate relationships (Hwang SC & Chung, 2009). The word privacy also refers to a state of being alone or away from public attention since a person is sovereign over her/himself. Therefore, disputing parties have the

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right and privilege to exclude third parties' participation in an arbitration proceeding or conduct it in privacy, which means only parties participate in the proceeding and have access to secret information.

The term confidentiality refers to the extension of the right to privacy, which means that the one who got confidential information from his client has the duty to keep his/her promise. It refers to a relationship in which one person is under a duty to act for the profit of the other on matters within the scope of the relationships (Baker & Choi, 2018; Smeureanu, 2011). Confidentiality duty arise when one person places reliance in the realistic integrity of another, who as a result gains dominance or influence over the first; when one person assumes control and responsibility over another; when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or when there is a particular bond that has traditionally been recognized as involving fiduciary duties such as a professional and a client relation.

Therefore; Confidentiality goes beyond the secrecy of arbitration proceeding; that is all persons participated in arbitration processes such as parties, arbitrators, witnesses and any other actors involved in the arbitral process would have to respect and maintain whatever they know in arbitration a secret. In addition to this, arbitration submissions, testimonies and communications would be inadmissible in court proceedings. It refers to the process of rejecting from court events evidence considered defective or unsuitable for policy reasons such as to encourage honest and free settlement negotiations and also it is unlike privilege and rights of refusal to testify; it cannot be waived by other word arbitration agreement (Moses, 2014).

## 2.1. Legal Basis of Arbitration Confidentiality

What are the legal sources of the obligation of confidentiality in the arbitration process in Ethiopia? Legal duties may arise from national law and contracts (Mulugeta, 2010). Some countries are expressly accepted the implicit duty of confidentiality in arbitration processes such as New Zealand, Norway, Spain, Romania, and Peru. Moreover, England, Singapore, and France law are silent, but their court was decided on the implied duty of confidentiality in arbitration. For instance, even if England Arbitration Act 1996 is silent concerning arbitration confidentiality, in *Dolling-Baker's case* and *Ali Shipping Corp vs. Shipyard Trogir* decided the implied duty of confidentiality in arbitration (Bahta, 2011; Laurent et al., 2011). However, Australian, Sweden and the United States courts were rejected the implicit duty of confidentiality in arbitration such as in *Esso Australia Resources Ltd vs. Plowman* the case of Australia High Court. This means the existence of a duty of confidentiality in the arbitration is debatable.

What if disputing parties chose institutional arbitration rules like United Nations Commission on International Trade Law (UNCITRAL) arbitration rule Arts 38(3), World Intellectual Property Organization (hereinafter referred as WIPO) Arbitration Rules Arts 73-76, International Chamber of Commerce (ICC) Arbitration rule Art 22(3) and the Statutes of the International Court of Arbitration of the ICC Art 6 and London Court of International Arbitration Rules (LCIA) Rules Art 30 are recognized the privacy of proceeding and confidentiality of information (Laurent et al., 2011).

Disputing parties have freedom of contract to make their arbitration process confidential as long as they got the requirements of law such as consent, capacity, lawful and moral object, and form. This confidentiality contract should contain the range of duty of confidentiality such as the definition of confidential information, duration of duty of confidentiality, identify prohibition either personal use or disclosure to third party or court; list down exceptions to duty of confidentiality and procedures of disclosure; identify persons bound by this contract and finally the consequence of non-performance of contract (Powers et al., 2018). Every person signed a confidentiality clause, has to obey it. In other words, for third parties, who did not sign the confidentiality agreement, there is no obligation of confidentiality in the arbitration process and the plaintiff unable to bring a claim against the expose. Therefore, the best measure is the parties should enter confidentiality contracts with all arbitration participating including third parties or between them stipulate that a party, who called the third party to participate in the proceedings, will be held responsible for an unauthorized disclosure committed by the third party. Therefore, if disputing parties signed a contract to refrain from calling their witness in the arbitration process to a subsequent adversarial proceeding, they have to keep their promises and the judge also should respect freedom of contract of parties.

Ethiopian arbitration law is governed by Civil Code, especially Articles 3325-3346 and Civil Procedure Code Especially Articles 315-319 and 350-357, 371-461 and also court excessive intervention in all arbitration process is one factor in disclosing arbitration process (Birhanu, 2018). Addis Ababa Chambers of Commerce and Sectoral Association arbitration institution (hereinafter referred to as AACSA AI) is also a not-for-profit, non-governmental private is established by proclamation No 341/2003.

## 2.2. Scope of Confidentiality in Arbitration

Every information irrespective of the medium in which it is voiced consider as confidential when the party proof the existences of the information is in the control of the party only, the facts don't in public domain, trade secret of commercial, financial or industrial significance and treated as confidential and its disclosure incur serious harm by the party owning it or when the confidentiality advisor decided it as confidential (World Intellectual Property Organization, 1994) (hereinafter called WIPO). Confidential information refers to every information both transferred by or on behalf of the revealing party to the receiving party including but not limited to any kind of business, commercial or practical information and data in connection with the purpose, except for the information that is noticeable non-confidential in nature.

Arbitration is set in motion when the dispute has occurred between parties and a party gives its statement of claim to arbitration institutions or arbitrators. So based on the time of arbitration proceeding, it may be classified into three (Powers et al., 2018). Firstly, the existence of a dispute is confidential by most institutional arbitration rules. For instance, WIPO arbitration rule Art 73 states that as a principle, no information regarding the existence of arbitration may be alone disclosed by a party to any third party. The parties should refrain from communicating the name of their opponents, the matter in dispute, or the fact that the dispute is being arbitrated unless to the extent legally required. Secondly, the confidentiality of the substances of the arbitration process most arbitration rule recognized the privacy of arbitration hearing and confidentiality of information. The WIPO arbitration rule Article 74 provides that all new evidence is given by disputing parties or witnesses in the arbitration process shall not be used or disclosed to third parties and if the witnesses have access to confidential information, the party calling witnesses has the responsibility for ensuring that they maintain the same obligation of confidentiality imposed on the parties. If the witness is not employed by a party, this obligation will likely be implemented by signing an express engagement of confidentiality.

The processes of making any award are secret voting, but the confidentiality of the arbitration award is debatable. Utmost rules of arbitral institutions afford that arbitral awards are confidential, if not decided upon by the parties such as Art 34(5) of the UNCITRAL Arbitral Rules, Art 27 of the AAA International Rules, WIPO arbitration rule Arts 75, Swiss Rules of International Arbitration Art 43.1, LCIA Rules Art 30 (Emem, 2018).

In the case of institutional arbitration the disputing parties, the institution with its employees and the arbitrators are member of the same contractual relationship in which arbitration institution had published their arbitration rules, which contain confidentiality provisions amount to make a standing proposal to the prospective users of those particular rules, so if disputing parties accept the rules by making a reference to them in their arbitration agreement. The contractual affiliation between the parties and the institution will be recognized and also institutional arbitration employees have signed the duty of confidentiality contract within their employment contract. Secondly, the dispute parties and the arbitrator enter into a contractual services relationship when arbitrator was appointed by disputing parties. Finally, if the arbitration institution confirms the appointment of the arbitrator, a pledged relationship is created among disputing parties, arbitrator and arbitrator institutions (Kalimo & Majcher, 2017).

Most institutional arbitration rules have a provision on the obligation of confidentiality in arbitration participants. For example, the China International Economic and Trade Arbitration Commission arbitration rules Art 36 and 37 extends the obligation of confidentiality to parties themselves and their representatives, arbitrators, and third parties such as a witness, interpreters, experts and any relevant staff member of the secretariats (Loriot et al., 2013). Articles 74(b) of the WIPO Arbitration Rules delivers that the party calling a witness shall be responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party and also are not to be considered third parties. The expert witness can easily sign a confidentiality contract and have a professional duty of confidentiality under their codes of conduct. WIPO Arbitration rules Art 52 added that a confidentiality advisor is responsible for determination of confidential or non-confidential information, who is a professional used to categorize sensitive information, evaluate the measure of damage caused by potential disclosures, and decide the conditions in which exposés might be permissible as a binding decision without disclosing them to their adversaries or the arbitrators.

### **2.3. Limitation of Confidentiality of Arbitration**

Human is a social animal, so most rights is not absolute to protect the right and interest of others. The New Zealand Arbitration Act 1996 Sections 14A to 14I provisions provide a point explanation about the limitation of duty of confidentiality (Loriot et al., 2013). The WIPO arbitration rule Arts 73- 75 offers that award may disclose when parties consent to in linking with a court challenge to the arbitration or an action for enforcement of an award; the information fall into the public domain, to legitimate authority the party may feel obliged to disclose the existence of the arbitration to its parent company as a preventive measure and to maintain good relations in the corporate group in case of suit for annulment and also the licensor may disclose confidential information for the fiduciary obligations owed to its shareholders, or as part of its reporting duties

to bankers and insurers, satisfying any obligation of good faith or candor owed to them; to establish or protect parties' legal right against third parties such as to protect its rights in parallel proceedings in order to avoid conflicting determinations or the prospect of lengthy proceedings. However; these disclosure should be no more than what is legally required and be done with notice to the Tribunal and to the other party if the release takes place during the arbitration, or to the other party alone, if the disclosure takes place after the termination of the arbitration, specifics of the disclosure and a clarification of the reason for it.

### **3. METHODOLOGY**

This study is employed as a qualitative research approach and a descriptive research design. In exploring and describing laws, institutional frameworks and practices in Ethiopia, this study follows the qualitative phenomenological approach. This research approach helps to discover and define the lived experiences of human beings within a particular context and a particular time (Creswell, Hanson, Clark Plano, & Morales, 2007). The target populations are arbitration institutions, court judges and registrar, arbitrators in Ethiopia. Among these populations' participants of the study for key informant interviews were a federal first instance judge, three federal high court judges and a registrar, three federal Supreme Court judges, an arbitrator and ahead of the arbitration tribunal were selected purposively since they have a direct connection with arbitration case. Tools of data collection were document review and key informants' interviews. Sources of data are primary & secondary sources. The scope of this study is the Ethiopian arbitration system in 2016-2019. The collected data were analyzed thematically. There is a proper citation, respect consent, and identity of informants for ethical consideration.

### **4. RESULT AND ANALYSIS**

Ethiopian arbitration law is silent. However, the Federal Democratic Republic of Ethiopia Constitution (hereinafter referred to as FDRE Constitution) Article 24 recognized the right to honor and reputation for everybody and also Article 26(1 and 2) recognize the right to privacy of every person. Similarly, FDRE constitution Article 20 (1) states that alleged persons have the right to a closed session by the conventional court of law. FDRE constitution Article 29 (6) also added that rights of view and manifestation could be limited only through specific laws in order to protect the honor and reputation of individuals. For instances; the Freedom of the Mass media and Access to information proclamation No 590/2008 (hereinafter referred as access to information law), which recognize the right of every citizen to have access to information seized by public bodies except confidential information pursuant Articles 2(8), 16(1) and 17 are personal and commercial information's.

Ethiopian Civil code Articles 2032, 2044, and 2047(2) also states that everybody has the right of expression unless the purpose of this expression to make another living person vile, shameful, or ridiculous and to jeopardize its credit, reputation or future even when these are true is defamation. Ethiopian criminal procedure code proclamation No 185/1961 Article 33 also supports the right to privacy of any person unless there is reasonable suspicion for the existence of fruit of crime in his/her premises and the court gives specific search warrant for the police to search it by only police with an independent witness.

#### **4.1. Who has a duty of confidentiality in arbitration?**

Ethiopian federal court advocates' code of conduct regulations No. 57/1999 Article 10 provides that advocate shall have a professional obligation to keep in secret in his lifetime the personal or organizational information of his client or any other information he obtained in the course of his professional service. Moreover, Article 24 of the civil code also recognized the professional obligation of confidentiality. The reading of the above provisions shows that the duty of confidentiality is to extend to professionals. However, do arbitrators are professionals in Ethiopia? Ethiopia hasn't yet had governmental department and modern arbitration law responsible for training and gives license to arbitrator except for AACSA AI, which have a list of professional arbitrators. Therefore, among participants in the arbitration process duty of confidentiality has a legal basis only to lawyers and institutional arbitration arbitrators.

Does a confidentiality and finality award contract between the parties enable legal privilege to arbitrator and inadmissibility of arbitration information in subsequent court proceedings? Do courts recognize it as valid? How the court power to call a person for examination and everybody duty to be a witness reconcile with professional privilege? These questions divided the informants of the research into two groups. Interviewees from arbitration institution and arbitrators argue for parties freedom of contract include arbitrators privilege and inadmissibility of arbitration information before subsequent court proceeding because there an implicit obligation of confidentiality in the arbitration process and contract is a law for contracting parties and also the meaning of justice for disputing parties is the enforcement of their contract. They added that if parties selected the

AACCSA AI with its arbitration rules, which were enacted in line with the country laws based on the Chambers of Commerce and Sectoral Association Establishment Proclamation no 341/2003 Article 8(1) (e) and it has provisions governing confidentiality in the arbitration process. So, the court should respect the contract of parties and the law enacted by parliament in line with the FDRE constitution.

On the other hand, most Judges Informants argue against it. They said that Ethiopia had not codified evidence law but there are legal principles in support of privilege and inadmissibility such as prohibition against self-incrimination and inadmissibility of any evidence found through coercion pursuant to Article 19(5) of FDRE constitution. However; If a party needs to offer evidence on his/her behalf, it shall do so before calling his witnesses after he/she take an oath and it is subject to the rule of cross-examination pursuant to Article 261(2) of Ethiopian civil procedure code and also Article 142(1) (3) Ethiopian criminal procedure code states that once the witnesses for the victim party have been heard, the court shall inform the accused that he may make statement in answer to the charge without oath and cross-examination and may request witnesses in his defense. These provisions inform us only the right of the disputing part to be a witness for their case but not for arbitrators and third parties. Every person has a duty to be a witness before a court unless it is liable for failure to aid justices pursuant to FDRE criminal code Article 448. Interviewee judge added his experiences, which is a lawyer had attempted to mediate disputing parties, then became a witness for one of the disputing parties for that case before court proceeding and the other party raised objection against this lawyer duty of confidentiality. Finally, the court decided that this lawyer violated his professional obligation of confidentiality to his client and became liable for it. They also added that the practice of courts annexed mediation in Ethiopia Federal court, which is usually the mediator of the dispute are assistance judges, so if the mediation outcome is unsuccessful, those assistant judges acted as a mediator will be prohibited to participate in subsequent court proceeding as a witness or an assistant judge. They concluded that ban a third party as a witness in a subsequent court proceeding is applicable only for a mediator-client and lawyer-client relation since there is a fiduciary relationship between them. However; in the case of the arbitrator to client relation, the possibility of exchange of confidential information between them is low and also arbitration proceeding is conducted based on Ethiopian Civil proceeding like any civil court. Therefore, the court does not have the duty to support and control arbitral tribunal in closed sessions.

AACCSA AI procedural rule Articles 16 and 17 and also its revised Arbitration Rule Articles 21.7, 22.3, and 26.5 recognize the standard of privacy and confidentiality of all information, and all information and documents disclose only to their members, authorized persons and finally, all arbitration information except award should be destroyed at the end of the proceeding. And also, its arbitration rules have annex about the statement of acceptance and declaration of independence form of arbitrator states that arbitrator has to keep confidential all information coming to his awareness as a result of his participation in this proceeding as well as the contents of any award made by the Tribunal. Here the arbitration institution rules recognized the privacy of arbitration proceedings and confidentiality of the information and also arbitrator signed a confidentiality contract. However, this confidentiality contract is uncertain on the scope of a duty of confidentiality, when disclosure of this information allowed, the meaning of confidential information, to whom this obligation extends and the consequence of non-performance of this confidentiality clause and its remedies. Therefore, if the legal source of duty of confidentiality contracts, contractual liability will be followed in case of breach or if the source of duty is the law, tort law may be applicable. However, whether tort or contract law will be applicable in case of employee disclose confidential information of employer after termination of employment contract pursuant to Article 2533? The answer is either of them. Either if the employment contract has been already completed, the law levies a duty of confidentiality pursuant to Article 2035 or even if the employment contract was terminated, the duty of confidentiality may continue pursuant to Art 2037 of the civil code.

#### **4.2. Scope of arbitration confidentiality**

As far as the researcher knowledge concerned, no legal definition for the phrase ‘confidential information,’ but indirect definition as personal information” pursuant to Article 2(8), 16(1) and “commercial information of the third party” pursuant to Article 17 of access to information law. The definition of confidential information was divided the informants of this research into two. A Interviewees from arbitration institution and arbitrator said that all new information acquired before, during and after arbitration process are confidential since the purpose of duty of confidentiality is to maintain the goodwill, profit and reputation of the parties, and it may also be determined by criminal law, intellectual property laws of the country and parties contract. However; Arbitration participants may use Arbitration information for non-commercial purposes like for the purpose of research and teaching without disclosing the identity of disputing parties only upon the approval of Arbitration institutions and disputing parties.

Whereas; the interviewed judge said that confidential information refers to any new information acquired during arbitration proceeding only, it doesn’t include written statements of claim and defenses even evidences

for the Arbitration process and Arbitration award. An interviewee also added that in case of crimes committed against women and corruption case the pleading doesn't annex evidence list, the trial conduct in close session and documentation of the oral litigation process prohibited and also the judgment was given without the identity of plaintiffs' and witness for the purpose of witness and victim security and privacy. They also added that it is arbitrators' responsibility to take necessary measures such as ensuring privacy, preventing any documentation of the oral discussion between parties if any at the end of the process destroy it especially the identity of disputing parties.

Generally, all informants and review documents recognized the privacy of arbitration proceedings and confidentiality of information, but the difference is on its scope. The researcher supports a broad definition for confidentiality information because in this age of technology medium of communication is complex and also similar to the definition of personal and business information given by the access to information law. It is a pro-arbitration process.

#### **4.3. Who is bound by it?**

The AACSA AI Article 21.7 of the revised arbitration provides that the arbitral tribunal not only respects the confidentiality of arbitration information but also take actions for defending trade secrets and confidential information. Ethiopian criminal code Article 399 entitled 'Breaches of Professional Secrecy' also provided that advocates, legal advisors, attorneys, arbitrators, experts, jurors, translators and interpreters, notaries, directors, managers, Students, probationers, inspectors or employees of private companies and who disclose a secret which has come to their knowledge in the course of their professional duties is a criminal act. And also Article 401 of the criminal code added that anybody in violation of his legal, contractual or occupational obligation, reveals an economic, scientific or technological development of information, industrial or trade or scientific secret or scientific method of its application, to a person to whom he is not expected so to do, with intent to cause bigotry to its owner or the possessor or to derive again from it for himself or another is punishable with simple imprisonment not exceeding one year fine not exceeding ten thousand Birr.

From the reading of these criminal law provisions, the obligation of confidentiality may be arising from law or contract. This provision also extends the obligation of confidentiality in arbitration process even to third parties such as translators, interpreters, witnesses. Most of the informants also support the obligation of confidentiality of arbitration participants comprising third parties if there is proper notice or confidentiality contract between disputing parties with persons who know confidential information.

#### **4.4. An exception to the confidentiality of the arbitration**

FDRE Constitution Article 20 states that the standard for determining either a public or closed session of court is to hold regarding a given is the privacy right of disputing parties. Additionally, FDRE constitution Article 26(3) states that the right to privacy limited when there is legality, necessity, proportionality and adequate legal remedy. For the reading of these Articles, privacy and confidentiality of arbitration proceeding is a principle unless it violates the right of other persons and public interest. For the purpose of this paper exception to the duty of confidentiality are classified into three as follows:

##### **4.4.1. Limitation Imposed by Law**

FDRE criminal code Article 400 list down limitation to arbitration confidentiality such as consensus of the party, special provisions of the law permit or impose the obligation in the interests of public to provide evidence before a Court of justice or to notify public authority and where revelation is explicitly ordered by law, by a Court of justice or by the competent authority, the owner of the secret cannot invoke his professional obligation to maintain secrecy. The proclamation for prevention and overthrow of money laundering and the financing of terrorism proclamation no 590/2008 Articles 4-7 and Ethiopian anti-terrorism proclamation No 652/2009 Article 22 states that any person including those who have duty of confidentiality shall disclose confidential information such as information on customers when requested by the competent authorities for examination or suit of crime concerning money laundering or financing of terrorism or for taking regulatory measures. However, in Ethiopia predicate offenses defined broadly, which refers to any offense capable of generating proceeds of crime and punishable at least with imprisonment for one year. So, the arbitrator shall disclose arbitration proceeding, even crime punishable upon compliant to the crime investigation department.

Similarly Federal court advocates' code of conduct law regulation Article 10 list down a number of grounds in which the advocator disclosed the secret of their client when the information he obtained from the

client is necessary for the task he is represented; to defend himself or claim his interests in a controversy with the client; when a controversy arises concerning his power of representation; or to perform his obligations as expressly provided otherwise by law and consent of his/her client. Government records are generally made available to the public for inspection on matters of public interest and general concern unless it affects national security, public order and morality can be offended or harmed and to protect trade secrets and to prevent unfair competition. So if one of the parties in the arbitration process is the governmental department, citizens have the right to access information pursuant FDRE constitution Article 12 and access to information law 590/2008.

#### **4.5. Limitation Arising from Court Decision**

State national courts may also decide disclosure of confidential information to avoiding contradictory evidence, such as when witnesses appear to give materially different testimony in court than they did in prior arbitration proceedings, to prevent inconsistent expert evidence, or to escape foreign courts being deceived where the same or similar claims were raised in various proceedings, it is compulsory on the courts to decide each application based on the circumstances of each case and also to protect a party's rights contrary to a third party largely depends on the facts of each case and the legal recognition of the rights sought to be protected by the applicable law (Michael, 2018). One informant from the arbitration tribunal added that arbitration information is disclosed only by legitimate reason to legitimate person by an authorized person such as tax authority, a notary public. For instance, if the arbitration is managed by the Arbitration Institute of AACCSA, an award may be only disclosed to the legitimate persons upon the on-paper consent of both parties and the approval of the arbitration institution and also court control and support to arbitration should be confidential. Whereas; most informants of this research said that the court has been supporting and controlling arbitration case in the same as any ordinary civil case based on civil procedure code of Ethiopia from filing of pleading up to enforcement of arbitration awards, which is open to the public to attend the proceeding and every information is consider as public document and also yet nobody has asked the court to make arbitration process confidential before the court. Therefore, in Ethiopia asking for court assistance amount to consent to public disclosure because the issue of confidentiality in arbitration process limited within the arbitration institution.

#### **4.6. Limitation Imposed by Public Policy Considerations**

The concept of public policy is a very challenging term to define due to its different meaning from country to country and it has been named as a very uncontrollable horse and once one catches it, he never knows where it will carry him. It refers to the principles and rules relating to justice or morality or attending the essential political, social or economic interests of that place such as absence of due process and equality between the parties, bias of the arbitrators, usurious interest, vending and inducements are universal act in commercial arbitration contrary to international public policy (Teclé, 2011).

In Ethiopia, the term public policy hasn't yet been defined clearly, especially the issue of non-arbitrability, which means what is the limit of jurisdiction of the arbitration tribunal or not and also parties' freedom of contract for the finality of the arbitration award. For instance, Arts 315 of Ethiopian civil procedure code states that disputes related to administrative contracts are subject to the arbitrator but in the case of Zem Zem PLC Vs. Illubabur Education Department, the federal supreme court cassation division, considers it arbitrarily. And also in the case of Beherawi Maden Corporation vs. Daneé Drilling, the Federal Supreme Court Cassation Division adjudicates the case against freedom of contract, which states that cassation review of awards always exist as long as there is basic error of law in arbitration award and court judgment even if the parties agreed to the finality of arbitration award. It also added that the objective of the cassation bench is constant explanation and application of laws in Ethiopia. Therefore, the parties' contract does not limit the cassation power of the federal Supreme Court. This is one limitation of the autonomy and freedom of the parties to determine how their disputes should be resolved.

In Ethiopia, as far as the researcher knowledge concerned, arbitral awards contents have been published by federal supreme courts cassation division and Ethiopian arbitration and conciliation center. For instances; the Ethiopian arbitration and conciliation center is published arbitral awards in 2008, volume one by the book entitled "report of the arbitral award" and in its preamble states as:

Ethiopian arbitration hasn't a legal framework to govern the confidentiality of the arbitration process. The *lex mercatoria* recognized the confidentiality of the arbitral process due to its benefits. Therefore, the editorial board of this published report was published 21 arbitration Awards, which were collected from court documentation, some awards from parties' consent and some awards from somewhere. Its reason for publication is for educational purposes like the federal Supreme Court cassation division publication.

From the reading of the preamble of this report of the arbitral award, the following points are an important input for this paper. First, Ethiopia hasn't had a law to govern obligation of confidentiality in Arbitration process but the nature of arbitration recognized implied duty of confidentiality unless disputing parties consent its disclosure, which is the reason for most arbitration rules inserted the phrase "...unless parties agree other ways" arbitration process is confidential. Therefore, parties' consent to disclose is one of the exceptions of duty of confidentiality in the arbitration process. Finally, as inferred from the preamble of the published report of the arbitral award, the justification of Ethiopian arbitration and conciliation center to get published these arbitral awards is for educational purpose and also explain the similarity between arbitration proceeding with a court proceeding. But it ignores the reason for disputing parties' opted arbitration over court litigation because in case of court, the parties' expectation is public trial and transparency or public document. In addition to this, the Federal Supreme Court cassation bench judgment has been published for legal awareness and their binding effect in a subsequent legal proceeding as precedent. Whereas, the publication of arbitral awards without removing the identity of disputing parties also has legal awareness to the public but the privacy of disputing parties violated. So, if the only purpose of publication of arbitral award is legal awareness, it's better to publish arbitral awards without the identity of disputing parties.

## 5. CONCUSSION AND POLICY IMPLICATION

Among arbitration laws (states & tribunal), court judgment, and contract, the best legal source of obligation of confidentiality in the arbitration is the parliament should enact new arbitration law. In some countries, arbitration laws like WIPO, the obligation of confidentiality in arbitration process extends even to third parties but not clear in Ethiopian arbitration laws. The New Zealand arbitration law list the exception of arbitration confidentiality, but Ethiopian arbitration laws is silent and there is excessive court control over the arbitration.

One reason for disputing parties' opted arbitration over court litigation is the privacy of arbitration proceedings and confidentiality of arbitration process information. However, the source, the meaning of confidential information, by whom and how to identify it, the duration of the duty confidentiality, to whom such duty of confidentiality extends is not clear and also it is difficult to get a comprehensive list of limitations to the obligation of confidentiality.

## 6. LIMITATION OF THE STUDY

In the course of this study, some of the limitations were lack of prior study in Ethiopia to be used as a springboard, lack of organized secondary data due to the absence of documentation and organized database system in Ethiopia and also lack of informants willingness to give information. However, the utmost effort is made to minimize it.

## 7. RECOMMENDATION FOR FURTHER STUDY

This is the springboard for further study on the impact of disclosure of arbitration information on trade secret

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