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Revisiting Ethiopia's Approach to International Arbitration: Latest Trends and Future Prospects

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Abstract
Nowadays, Ethiopia is actively engaging in cross boarder commercial and investment activities. As a matter of fact, commercial and investment disputes are part of the business activities necessitating effective resolution mechanisms. International arbitration plays an irreplaceable role in resolving international dispute between businesses of different nationalities, as well as foreign investors and States. This article qualitatively reappraises how arbitration is being used in international commercial and investment disputes settlement in Ethiopia. It confirms that, in spite of its flexibilities and effectiveness, Ethiopia did not accord arbitration the place it deserves. It adds that arbitration is underutilized in international commercial and investment dispute resolution and recommends that the country should rethink its legal and institutional frameworks so as to establish a well-functioning arbitration system.
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1. Introduction

In this era of globalization, it is practically impossible for a country to close its 'legal and ideological boundaries' to international trade. The conduct of international business transactions between people from diverse cultures and legal systems accompanied by the surge in the cross-border investments has necessitated the development of 'uniform' and predictable supranational legal instruments regulating them. The norms of international trade range from the non-binding model laws developed by different institutions, bodies of rules developed from the medieval commercial laws such *lex mercatoria* and *lex maritime* to relatively recent and legally binding international conventions. Nations have their own domestic laws with huge implications on international business transactions. Consequently, an investor planning to invest in a certain state or participate in international trade with foreigner businesses must inquire how the domestic laws of the host country regulate the transactions concerned-especially on the dispute settlement areas. Otherwise, the intended business transaction would result in various legal intricacies. In this aspect, the importance of national regulations and national laws in international business transactions is crucial.

Arbitration as a system of commercial dispute resolution developed by traders has existed for thousands of years. Its origin is dated back to the times of Greece and Rome.[1] It gained recognition through time in many countries in Europe such as UK and France as well as countries in Asia.[2] Countries have used arbitration parallel to the diplomatic protection, which is sometimes referred to as the gunboat diplomacy. Under Article 27 of the ICSID Convention, the right of diplomatic protection will revive in case of non-compliance with the award. Therefore, diplomatic protection is an alternative and supplement to the judicial enforcement of awards under Article 54. In particular, diplomatic protection will be available if enforcement is unsuccessful because of the award debtor State's immunity from execution. But diplomatic protection may be exercised only by the aggrieved investor's State of nationality.

Initially arbitration was considered as a rival to the courts of law. Thus, national codes and courts of law were distrustful about the standards of fairness applied in arbitration proceedings and courts maintained a scrutiny and control.[3]This view has obstructed a free flow of international trade together with the notorious obstacles of embargoes, quotas and tariff barriers.[4] As arbitration gained a wider recognition, the degree of courts intrusion and control over arbitration has significantly diminished. The 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Award (commonly called the New York Convention) and Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965, (ICSID Convention) are the prominent international conventions in the area of international commercial and investment

[1] Hefin Rees, A Seminar on International Commercial Arbitration (13 May 2010), at 3 available at http://www.39essex.com/docs/articles/internationalarbitrationseminarhr.pdf. Visited on 15th November, 2020.
[2] *Id*.
[3] *Id*.
[4] Lynden Macassey, International Commercial Arbitration,—Its Origin, Development and Importance, American Bar Association Journal (July 1938), Vol. 24, No. 7, at 518, Available at https://www.jstor.org/stable/25713701?seq=1, Visited on 9th October, 2020.

disputes settlement respectively. The United Nations Commission on International Trade Law (UNCITRAL) of the United Nations is also working to harmonize laws of the nations regulating arbitration by its different activities, like adopting model arbitration and conciliation laws.

This article acknowledges legal developments in international commercial and investment arbitration; looks at the treatment of some principles of the mainstream international commercial and investment under Ethiopian national laws. Some detour into the discussion of the introduction of modern legal codes into Ethiopia and their present status follows. This article is organized into five sections. Section two highlights the development of private laws of Ethiopia with a particular reference to the commercial laws. Section three presents a critical analysis of Ethiopia's stance in international commercial and investment arbitration. The legal and practical enforceability of foreign arbitral awards in Ethiopia is dealt with under section four. And, finally, section five draws some conclusions and recommends the way forward.

2. A Glance at Ethiopian Private Laws

The introduction of modern commercial laws in Ethiopia is a recent phenomenon. Ethiopia had witnessed a massive transplantation of European legal codes only in the 1950's and 60's.[1] It was during this wave of codification that the country obtained its first main legal codes notably Maritime Code, Commercial Code, Civil Code, Penal Code, Criminal Procedure Code and Civil Procedure Code. These codes were all 'either drafted by the foreign lawyers or inspired by foreign sources'.[2] Despite this early endeavor by the then imperial government to modernize the laws, the Ethiopian legal system has not yet achieved an adequate reputation and modernity. Different reasons account for this –notably-the country's less interaction with the west[3], its low economic development, the continuance of utilizing the customary and/traditional dispute settlement mechanism by the large section of the society including businesses. Ethiopia had the history of being among countries which have initially participated in the formation of different international, continental and regional organizations like the African Union and the League of Nations. However, it has not been active in keeping up with legal developments in commercial laws at the global level. At home Ethiopia has been rocked by changes of political systems from monarchical government, the socialist system and the more recent allegedly 'federal system with the market economy', all with their own formulas to address the country's social, political and economic problems. The socialist government that ruled the country (1974 -1991) had nearly suspended the functioning of Commercial Code as private ownership was rarely allowed.

The government which took power since 1991 has reinstated the Commercial Code augmented by other proclamations, regulations and directives. The new Criminal Code, the Revised Family Code of the Federal government and Family Codes of the regional states have been promulgated. Nevertheless, the substantial revision and modernization of the Commercial laws and private laws seem to attract a lesser attention of the lawmakers to date-higher priority has been given to the regulation of economic sectors that the government prioritizes. This is evidenced by the number of legislations enacted to retain a firm control over financial companies. Recently, there have been reports of a comprehensive revision and modernization of the Commercial Code by the government. But the speculated 'new' Commercial Code has not been finalized and enacted as of this date of writing. Despite the unstudied effects of the recent political instabilities in the country since 2014, Ethiopia has successfully attracted foreign investors.[4]

3. International Commercial and Investment Arbitration in Ethiopia

Literatures on arbitration show that arbitration has recently proved to be the prominent means of resolving international commercial and investment disputes. Today international commercial arbitration constitutes by far the most popular method for settlement of International commercial and investment disputes.[5] Ethiopia is a member to the New York Convention but not to the ICSID Convention. The relevant Ethiopian national laws were not adopted based on the New York Convention, the UNCITRAL Model Laws on International Commercial Arbitration (1985) with amendments as adopted in 2006 (also called UNCITRAL Arbitration Rules[6] and the ICSID Convention.

Ethiopia has sketchy and non-comprehensive arbitration laws chiefly meant for the regulation of domestic

[1] John H. Beckstrom, Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia,The American Journal of Comparative Law (1973),Vol. 21, No. 3, at 557.
[2] J Vanderlinden, Civil law and Common Law Influences on the Developing Law of Ethiopia, Buffalo Law Review (1996), at 257.
[3] Compared to many African countries Ethiopia had not been 'properly' colonized. It was only for the duration of 1939-1945 that the country was subjected to the colonial subjugation by Italy. This period of time was too short to result in the conqueror's chance of installing the new legal codes and legal systems.
[4] Abdi Tsegaye, Ethiopia: Africa's Third Largest Recipient of Foreign Direct Investment, Addis Fortune(June. 2014), at 1.
[5] Husain M. Al-Baharn, International Commercial Arbitration in A Changing World, Arab Law Quarterly(1994), Vol. 9, No-2, at 144.
[6] UNCITRAL Model Law on International Commercial Arbitration 1985 With Amendments as Adopted in 2006, available at https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf. Accessed on 13th October, 2020.

arbitration. Arts. 3325-3346, of the Civil Code[1] and Arts-315-319, 350-357 of the Civil Procedure Code[2] govern both substantive and procedural aspects of arbitration in the Ethiopian legal system.[3] A careful reading of these rules reveals that they fall below the internationally accepted best arbitration laws.

The conduct of international commercial arbitration in Ethiopia is not fully governed by the scanty domestic rules.[4] Unlike domestic arbitrations, international commercial arbitrations are regulated by the variety of laws: national laws, comparative law, international conventions, and even usages of international trade.[5] As Ethiopia is not yet a party to the New York Convention or adopted domestic arbitration based on the convention or on the UNCITRAL Arbitration Rules, the conduct of international arbitration is mostly left at the mercy of regular courts. The New York Convention which has the largest number of signatories both from the developing and developed countries,[6] facilitates the conduct and the enforcement of the awards thereafter.

Ethiopia has ratified the New York Convention on the following *reservation and declarations:*

1. In accordance with Article 1 (3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Government of the Federal Democratic Republic of Ethiopia declares that it will apply the Convention for Recognition and Enforcement of Arbitral Awards made only in the Territory of another contracting State.
2. In accordance with Article 1 (3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Government of the Federal Democratic Republic of Ethiopia declares that it will apply the convention on differences arising out of legal relationships, whether contractual or not, which are considered commercial under the National Law of Ethiopia.
3. The Convention only applies in the Federal Democratic Republic of Ethiopia with respect to Arbitration Agreements concluded and Arbitral Awards rendered after the date of its accession to the Convention.[7]

Ratifying the convention guarantees the enforcement of arbitral awards rendered in Ethiopia in other member states and vice versa. The same goes for the ICSID convention that Ethiopia has signed on 21 September 1965 but has never ratified.[8] This trend means there is a high chance of enforcement for foreign investors who secure arbitral awards against Ethiopian businesses with no assets abroad with regard to the signed instrument whereas the enforcement is difficult with respect to the instrument which Ethiopia did not ratify.

The following paragraphs highlight several principles of the mainstream international commercial arbitration that are either totally missing or inadequately/vaguely regulated under Ethiopian laws. The position of Ethiopian laws will be analyzed against the principles established under UNCITRAL Arbitration Rules, the New York Convention and ICSID Convention ways of resolving the problems under Ethiopian laws will be offered.

3.1. The Form of Arbitral Submission

The Ethiopian Civil Code defines arbitration as '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.'[9] Like any other contracts, the validity requirements of a contract such as consent, capacity, object and form need to be complied with.[10]

When it comes to the form of an arbitral submission, the Civil Code under its Art-3326(2) requires the arbitral submission to be made in the form 'required by law to dispose without consideration of the right to which it relates.' So, if the arbitral submission relates to the contracts of guarantee, insurance contracts, contracts relating to immovable properties or contracts with a public administration, arbitral submissions relating to these transactions should be made in written form and be registered in case of contracts with public administration and contracts relating to immovables.[11] These stringent requirements have an effect of invalidating arbitral submission not prepared in line with the prescribed formal requirements. Moreover, the legal system has to keep pace with the developments in the information communication technology by recognizing electronic communications as a valid tool of consenting to arbitration. It is hence necessary to adopt pro-arbitration laws incorporating more accommodative formal requirements such as the ones under UNCITRAL Arbitration Rules

[1] The Federal Negarit Gazette, Civil Code of the Empire of Ethiopia, 161/1960.
[2] The Federal Negarit Gazette, Civil Procedure of the Empire of Ethiopia, 163/1965.
[3] Ethiopia has no codified rules of Arbitration as such. The law of arbitration regarding the process of formation of arbitration agreement, the process of appointment of arbitrators and the role of courts in the process is governed by the 1960 Civil Code. The country has no refined and separate arbitration acts, which is the practice in many countries. Looking through the provisions of the Civil Code it is apparent that the provisions are largely meant to govern the domestic arbitrations.
[4] The reference to international commercial arbitration is made only in the law of the Civil Procedure of the country only in relation to the recognition and enforcement of the foreign arbitral awards.(Art-461(1) of the Ethiopian Civil Procedure).
[5] Al-Baharn, *supra* note 10.
[6] See http://www.newyorkconvention.org/countries. Accessed on 2nd September, 2020.
[7] Available at http://www.newyorkconvention.org/countries. Visited on 29th November, 2020.
[8] Available at https://icsid.worldbank.org/about/member-states/database-of-member-states. Visited on 29th November, 2020.
[9] Art-3325(1) of the Civil Code.
[10] *Id*. Art-1678.
[11] *Id*. Arts, 1723, 1724, 1725 and 3326(2).

and the New York Convention.

The New York Convention requires agreements in writing to settle 'a subject matter capable of settlement by arbitration' but extends the scope of 'agreements in writing' to accommodate 'arbitral clauses in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams'.[1] UNICTRAL has also recommended that 'the New York Convention be interpreted broadly so that arbitration agreements entered into by electronic means of communication may be considered to comply with the writing requirement'.[2] In a similar fashion with the New York Convention, UNCITRAL Arbitration Rules also require an arbitration agreement to be made in a written form.[3] Yet with the objective of giving a maximum validity and to catch up with the technological developments in communication technology it allows 'exchange of letters, telex, telegrams or other means of electronic communication which provide a record of an agreement' that are readable and accessible for further references to serving as a valid arbitral submission.[4] It is also possible to accommodate an arbitral submission in the statement of claim and defense 'in which an existence of an agreement is alleged by one party and denied by another.'[5]

3.2. Arbitral Procedure

One apparent advantage of arbitration is its flexibility and/or informality compared to the rigid procedures of court litigation. Nevertheless, Art-3345 of the Ethiopian Civil Code states that 'the procedure to be followed by an arbitral tribunal shall be as prescribed by the Code of Civil Procedure'. The provision under the Civil Procedure Code cross-referred to by the Civil Code; Art-317(1) dictates that the procedure to be followed by the arbitral tribunals is the same as that of court litigation. This contravenes the very notion of arbitration. It is often submitted that these rules are meant only for domestic arbitrations. But there is no logical reason in subjecting the domestic arbitrations to the same procedure of the court litigation. A strange provision of this kind can potentially discourage parties from choosing arbitration to settle their disputes. The Federal Supreme Court Cassation Bench seems to have given a binding interpretation of the law on the case of *Gebru Kore vs Amadio Fredirich*[6] in which it ruled that the arbitral proceeding does not need to strictly follow the rules of Civil Procedure as stated under Art-317(1). The Federal Supreme Court (Cassation Bench) is mandated under Proclamation No. 454/2005 to render a binding interpretation of laws that should be followed by other courts. So, legally speaking the requirement that arbitration proceeding should resemble a court litigation as far as possible is amended. Even if the Supreme Court has given a desirable interpretation of law in line with the very essence of arbitration, it is wise to amend these provisions in the Civil Code and Civil Procedure Code in line with the best arbitration practices in many arbitration friendly countries' legislations and international legal instruments. Particularly it can be fixed via adopting arbitration laws based on the UNCITRAL Arbitration Rules, the New York Convention or the ICSID Convention. For instance, Art. 19 of the UNCITRAL Arbitration Rules states:

1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.(Emphasis added). (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

3.3. The Doctrine of Separability

Arbitrators get their power from arbitration agreements concluded by parties in accordance with laws. This agreement can be made in a separate agreement to submit to arbitrators a dispute at hand at the time of formation of the contract or contained in the main contract as a clause to resolve disputes which may arise in the future (*clause compromissoire*).[7] The Ethiopian Civil Code recognizes both forms of arbitral submission under Art-3328. The doctrine of separability states that the invalidity of the main (underlying contract) does not invalidate the *clause compromissoire* as the clause is deemed to have an independent existence from the container contract.[8] The clause is rescued from invalidation with the main contract means; arbitrator/s can hear any dispute in relation to the contract including disputes concerning the existence, validity and termination of the main contract without losing their jurisdiction. This doctrine is currently accepted by arbitrators, most legal systems

[1] Art- II of the New York Convention.
[2] Giuditta Cordero-Moss, International Commercial La, Institutt for privatrett Skritserie 185 (2010), at 380.
[3] Art.7(2) of UNCITRAL Arbitration Rules.
[4] *Id*. Art.7(4).
[5] *Id*. Art.7(5).
[6] Federal Supreme Court Cassation Decisions Reporter (2013), Vol.12, File No 52942, at 303-305.
[7] Tibor Varady, John J. Barcelo and Arthur T. Von Mehren, International Commercial Arbitration: A Transnational Perspective, 3rd ed. (United States of America, Thomson/West, 2006), at 85.
[8] John Zadkovich, Divergence and Comity among the Doctrines of Separability and Competence Competence, Vindebona Journal of Commercial Law and Arbitration (2008),Vol-12, No-1, at 1.

and international arbitration laws and rules.[1]

Nothing is said about the principle of the doctrine of separability under the Ethiopian Civil Code. This principle is important to be ignored at it saves an arbitration clause from being annulled together with the container contract. When the Code is silent about the principle, the question whether an arbitration clause has an independent existence from the arbitral submission will be left to interpretation by a judge or determination by the parties in their original arbitral submission. Art. 3329 of the Civil Code requires the courts to interpret arbitration clauses restrictively. This certainly poses a challenge to a judge not to save an arbitration clause from invalidity when the main contract is found to be invalid. Nonetheless, some argue that the silence of the Code on the recognition of the principle of separability does not mean that the legal system totally rejects it.[2] Of course, the parties can incorporate this principle explicitly in their submission agreement or the arbitral rules of arbitral institutions may recognize it as the recognition is not expressly prohibited by the law.[3] While this kind of position is acceptable, it is desirable to have the national arbitration rules based either on the UNCITRAL Arbitration Rules[4] or the New York Convention.

3.4. Kompetenz-kompetenz

Kompetenz-kompetenz is the ability of an arbitrator to decide on the question of whether he/she has jurisdiction before intervention by regular courts. This is a well-known principle of arbitration that enables an arbitrator to decide on his own jurisdiction. It is not a power of regular courts to decide on the competence of an arbitrator or arbitral institution. Additionally, this doctrine extends an authority to decide on the validity of an arbitration clause, the scope of an arbitration agreement, whether an applicant is estopped from initiating arbitration, if the precondition for the initiation of an arbitral proceeding such as time limit is met and whether the tribunal is properly constituted pursuant to the parties' agreement.[5] *Kompetenz-kompetenz* is widely recognized as 'it serves to protect an arbitration derailed before it begins'.[6] Without *Kompetenz-kompetenz*, a party with a bad faith of unreasonably delaying the arbitration proceeding will object to the jurisdiction of an arbitrator/arbitral tribunal. If the objection is not to be decided on the spot by the arbitrator and has to go to the regular court it will slow down the arbitration proceeding. *Kompetenz-kompetenz* is linked to the principle of separability in a way that unless the arbitration clause survives invalidity, arbitrators will not have a chance to examine their jurisdiction.[7]

In most investor-state dispute, arbitrators tend to favor investors. Needless to mention, arbitral tribunals are pro-jurisdiction in the sense that they incline to rule towards having jurisdiction. This is made under the pretext of the doctrine of *kompetenz-kompetenz,* which states that arbitral tribunals have the mandate to decide on their jurisdiction. Once they assume jurisdiction, they proceed with a pro-investment interpretation of investment treaties. The substantive treaty provisions tend to extend more protection to investors. IIAs favor foreign investors *vis-à-vis* domestic companies.

The relevant provision on *kompetenz-kompetenz* under the Civil Code is Art-Art-3330 that states:

1) The arbitral submission may authorize the arbitrator to decide difficulties arising out of the interpretation of the submission itself.
2) It may, in particular, authorize the arbitrator to decide disputes relating to his own jurisdiction.
3) The arbitrator may in no case be required to decide whether the arbitral submission is or is not valid.

Art. 3330 of the Ethiopian Civil Code allows the parties to authorize an arbitrator' to decide difficulties arising from the interpretation of the submission itself'. Under its sub (2) the same provision states parties can authorize the arbitrators to 'decide disputes relating to his own jurisdiction' (positive *kompetenz-kompetenz*). From the literal readings of these provisions, one may tend to think that the principle is fully recognized under the Civil Code, yet only with the clear authorization of parties. Consequently, in the absence of parties' authorization the arbitrators would be forced to stop the proceeding and revere the jurisdictional objections to a court.

The shadow of doubt casts when one moves on to Art. 3330 (3) of the Ethiopian Civil Code, which strangely states that the arbitrator may in no case, be required to decide whether the arbitral submission is valid

[1] Alan Uzelac, Jurisdiction of the Arbitral Tribunal: Current Jurisprudence and Problem Areas under UNCITRAL Model Law, International Arbitration Law (2005), Vol-8, No-3, at 2.
[2] Solomon Gerese, Comparative Analysis of Scope of Jurisdiction of Arbitrators under the Ethiopian Civil Code of 1960, (2009), Unpublished, at 16.
[3] For instance Art.19 (2) of the 2005 the Ethiopian Arbitration and Conciliation Centre Rules of Arbitration states: |a provision in a contract that provides for an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not imply the invalidity of the arbitration clause."
[4] Art-16 (1) of the UNCITRAL Model Laws states that: The arbitral tribunal may rule on its own jurisdiction including any objections with respect to the existence or the validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the main contract, a decision by an arbitral tribunal that the contract is null or void shall not entail ibso jure the invalidity of an arbitral clause.
[5] William W. Park, Determining An Arbitrator's Jurisdiction: Timing and Finality in American Law,Nevada Law Journal (2007),Vol- 18, at 4.
[6] *Id*.
[7] Solomon, *supra* note 32, at 25.

or otherwise. The prohibition regarding the power to decide the validity/invalidity of arbitral submissions under this provision is absolute and even parties cannot give authorization. In this respect, a notable Ethiopian law professor observed that 'this provision is not clear enough to convey the intention of the legislature through, especially when it is considered in conjunction with the other stipulations made in that same article under sub articles one and two.'[1] So when an arbitrator/s face a jurisdictional challenge based on invalidity of an arbitration clause under Art-3330 (3) has to stop the proceeding and refer to the courts to decide on the jurisdiction of arbitrators. The court that is required to rule on the validity of an arbitration clause is engaged in a full investigation of the case and will refer back the case to arbitrators only after verifying that there is a valid arbitration agreement.[2] This undoubtedly delays the process of arbitration and is undesirable. Contrast to the Civil Code's approach, Art.16 (1) of the UNCITRAL Arbitration Rules recognizes an arbitrator's power to rule on his or her own jurisdiction[3] and Ethiopia needs to adopt a clear provision equivalent with the one under the Model Law or make legislative amendments to Art.3330 (3) of the Civil Code to eliminate an obscure formulation of law that hampers the parties' autonomy and efficacy of the arbitration process.

3.5. Finality

One ostensible advantage of arbitration is the finality of awards. The principle of party autonomy in arbitration makes the obligatory appealability with a full review of the merits of the case undesirable. Yet, despite the recognition of parties' freedom to choose the binding and final alternative to the regular courts, national laws should make sure that these alternative dispute settlement forums respect the fundamental principles of justice. In many jurisdictions, courts may evacuate decisions of obstinate arbitrators that violate mandatory laws, ignore 'basic procedural fairness, as well as those of alleged arbitrators who have attempted to resolve matters never properly submitted to their jurisdiction'.[4]

The rival concerns in arbitration have always been balancing arbitral autonomy manifested through finality with fairness that supports the judicial review. Finality ensures the swift and less costly resolution of disputes. Allowing a full review of the merits of the case by the ordinary courts would make the arbitral tribunal just one more step within the hierarchy of regular courts.[5] Thus, in many legal systems and rules of arbitral institutions, arbitral awards are either immune to appeal before the ordinary courts of law or the grounds for judicial review are very constricted. The same approach is reflected under the New York Convention, UNCITRAL Arbitration Rules and ICSID. It is also widely accepted in many European jurisdictions,[6] UNCITRAL Arbitration Rules and the New York Convention do not recognize appeal as a mode of judicial scrutiny.

The concept of finality is not well settled under the Ethiopian legal system. The Existing laws recognize three modes of court's control over arbitration.[7] When it comes to appealing as a mode of judicial control, the laws allow parties to conclude the recognizable 'exclusion agreement' in their arbitral submission to opt out an appeal on the substantive merits of the case to ordinary courts.[8] Otherwise, the default rule is arbitral awards are appealable to the ordinary courts of law that will review awards on the merits.[9] There are even critics against the possibility of restricting appeal by some writers arguing that:

The right to appeal in arbitration should not be limited contractually by the parties because:- i) it is against Article 20(6) of the Constitution, Proclamation No 454/2005 and Proclamation No 25/96 which make out the right and ii) it is also against the public policy and confines the parties' right to due process of law.[10]

Even a finality clause excluding appealability of an arbitral award to a regular court is declared by the

[1] Tilahun Teshome, The Legal Regime Governing Arbitration in Ethiopia: A Synopsis,Ethiopian Bar Review (2007) , Vol-2, at 140.
[2] Solomon, *supra* note, no. 32, at 45.
[3] See *supra* note 33. Note that owing to the interaction between the two, separability and Kompetenz Kompetenz are put under the same provision.
[4] William W Park, Why Courts Review Arbitral Awards,Festschrift fur Karl-Heinz Bockstiegel (2001), at 1.
[5] Eric A. Posner and Nathalie Voser, Should International Arbitration Awards Be Reviewable?, American Society of International Law (2000), Vol. 94, at 129.
[6] *Id*.
[7] Refusal (Art. 319(2) of the Civil Procedure Code), setting aside (Arts. 355-357 of the Civil Procedure Code) and appeal (Arts. 350-354 of the Civil Procedure Code). For further analysis on these modes of control see: Birhanu Beyene Birhanu, 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, at 35-57.
[8] Art.350(2) of Civil Procedure Code.
[9] Art. 351 of the Civil Procedure Code states: No appeal shall lie from an award except where: a. the award is inconsistent, uncertain or ambiguous or is on its face wrong in matter of law or fact; b. the arbitrator omitted to decide matters referred to him; c. irregularities have occurred in the proceedings, in particular where the arbitrator (i)failed to .inform the parties or one of them of .the time or place of the hearing or to comply with the terms of the submission regarding admissibility of evidence; or (ii) refused to bear the evidence of material witness or took evidence in the absence of the parties or one of them: or the arbitrator bas been guilty of misconduct, in particular where: (i) he beard one of the parties and not the other; (ii) he was unduly influenced by one party, whether by bribes or otherwise; or (iii) he acquired an interest in the subject-matter of dispute referred to him.
[10] Alemayehu Yismaw Demamu, The Need To Establish A Workable, Modern And Institutionalized Commercial Arbitration In Ethiopia, Haramaya Law Review (2015), Vol-4, No-1, at 44.

Federal Supreme Court Cassation Bench as unconstitutional in the case of Danni Drilling and National Mineral Corporation Pvt. Ltd Co.[1] Writing an online critic of this judgment one author accurately suggested that:

The parties have prerogatives to make an arbitral award final. The intentional waiver of appeal means that the parties have given up their right and opted for setting aside procedure (Art 356). It will be against both parties' freedom to contract and the policy reasons behind protecting freedom of contract.[2]

Although Ethiopia does not seem to be the only country that allows appealability of arbitral awards to the regular courts[3] the problem is the formula adopted under the Ethiopian Civil Procedure Code that encompasses broad grounds of appeal that when seen in light of the mainstream commercial arbitration destroys the very essence of arbitration as a means of resolving commercial disputes. It is too much compromise on the finality of arbitral awards and must be excluded. Some writers on Ethiopian arbitration correctly suggest that some of the grounds enumerated under Art-351 of the Civil Procedure Code as grounds of appeal (items b and c)[4] to be preferably put under another mode of court intervention notably the setting aside procedure for the procedural irregularities under Art-356.[5] The difference between setting aside and appeal is that under setting aside procedure the court does not review the substantive merits of the case. In my view, it is not desirable to keep appeal as a mode of judicial review under Ethiopian laws in the face of the global trend in commercial arbitration excluding appeal. Ethiopia can possibly remove appeal as a mode judicial control by enacting arbitration laws based on UNCITRAL Model Law which is often hailed as successful all over the world and cover one-quarter of the world territory.[6] This model law as stated above does not recognize appeal as an instrument of judicial review of arbitral awards.

4. Enforceability of Foreign Arbitral Awards in Ethiopia

An arbitration award rendered in any country party to the New York Convention is effectively enforceable in every other county signatory to the Convention and where the award debtor has some assets.[7] The New York Convention 'seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and nondomestic arbitral awards' to resolve international commercial disputes.[8] In order to ease the process of enforcement, the court at the country of enforcement, in principle, has no power to review the award on the merits.[9] Under the New York Convention, Art. V grants other States the power to enforce an arbitral award without the need to acquire confirmation, which, however, could be done permissively. The Convention employed the term 'binding' instead of 'finality.' It allows any country to enforce an award even if the award was never reviewed in the country of origin. And, under the ICSID investment arbitration, the awards are designed to be automatically enforceable in the member countries to the convention. With the objective of facilitating the enforcement of awards, the ICSID Convention reduces the requirements for securing enforcement to the minimum. Pursuant to Art. 54(2) of the Convention a party seeking enforcement of an award needs to provide only a copy of the award duly certified by the secretary of ICSID. As a party to the New York Convention, Ethiopia is required to apply the aforementioned provisions. On the other hand, there is no guarantee that the award of an international arbitral tribunal under ICSID will be fully accepted and implemented by Ethiopian authorities creating high chances of the risks of enforcement of investment awards.[10] This trend could evidently affect the international transactions and investments involving Ethiopian state and Ethiopian businesses.

Principally, the enforcement of foreign arbitral awards in Ethiopia is governed by national laws (the rules of its Civil Procedure) and Bilateral Investment Treaties (BITs) signed between foreign countries and Ethiopia (if any). The New York Convention under its art-V authorizes the court at the country of enforcement to refuse to enforce a foreign arbitral award if the award has some 'serious faults of a procedural or fundamental character'.[11] The cumulative readings of Art. 458 (a) and Art-461(1) of the Civil Procedure Code of Ethiopia also reveals that

[1] Federal Supreme Court Cassation File No:42239/2003.
[2] Michael Teshome, Cassation Case No.42239/2003 and Party Autonomy in Ethiopian Arbitration Law (17 June 2016).
[3] See for instance The English Arbitration Act, (1996), Section 67-69.
[4] Besides it is doubtable if these two grounds can be opted out (waived) as grounds of appeal as they affect the procedural fairness and justice. That is why setting aside procedure seems a proper place for these two items.
[5] Birhanu Beyene Birhanu, 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, at 57.
[6] Gerold Hermann, Does the World Need Additional Uniform Legislation on Arbitration?, 15 ARB.INT. (1999), p.212
[7] Cordero-Moss, *supra* note 24, at 370.
[8] Available at https://uncitral.un.org/. Visited on 29th November, 2020.
[9] Cordero-Moss, *supra* note 24, at 370.
[10] Office of the United States Trade Representatives, National Trade Estimate Reports (2009).
[11] a)if the arbitral submission is not valid, signed under incapacity; b) the 'party against the award is invoked was not given prior notice and was not heard'; c) the award contains decisions beyond the scope of the submission to arbitration; d) the composition of the arbitral tribunal was not in accordance with the parties' agreement; e) the award is not yet binding on the parties or has been set aside by a compete authority; f) the subject matter of the dispute is incapable of being submitted to arbitration under the law at the country of enforcement ; and, g) the recognition and enforcement of the award is contrary to public policy.

some of the grounds to refuse the enforcement of foreign arbitral awards under art-V of the New York Convention are incorporated.[1] It is not clear whether the drafters of the Code has adopted those grounds from the convention or transplanted it from foreign national jurisdictions. Difficulties, however, arise in the practical implementation of some of those grounds of refusal listed under Art-461(1) of the Ethiopian Civil Procedure.

In the first place, there are no statutory provisions to distinguish between domestic and foreign arbitral awards.[2] For an award debtor, to invoke those grounds of refusal, the concerned arbitral award should be 'foreign'. Contrary to Art-3 of Ethiopian Civil Procedure Code that determines a foreign court judgment by stating a 'foreign court' means a court situated outside Ethiopia, there is no equivalent legal provision defining 'a foreign arbitral award' leaving the determination of the nationality of awards to the discretion of regular courts. Under the New York Convention, an award is deemed as foreign if it is 'made in the territory of a state other than the state where the recognition and enforcement of such awards are sought'.[3] Besides, an award not considered domestic by the application of the country of enforcement are foreign. The second category covers awards made in the country of enforcement but by the application of another country's arbitration laws, those made in the country of enforcement under its private International laws, those not governed by any arbitration law.[4] Absent any governing legal provisions it remains uncertain how courts in Ethiopia decide the nationality of an arbitral award. Perhaps by analogy to the court judgments, it can be said that Ethiopian courts might consider awards rendered outside Ethiopian territory as 'foreign'. But this assumption is not conclusive as there may be circumstances where awards rendered inside Ethiopian territory can be considered as foreign. Hence, difficulties of these sort of can better be avoided by subscribing to the New York Convention and promulgating national implementing legislations.

Secondly, an Ethiopian judge before whom the case for enforcement of a foreign arbitral award is presented should make sure that the country of origin has a reciprocity agreement with Ethiopia.[5] By this formula, a foreign award creditor whose country has no reciprocity agreement with Ethiopia would be denied enforcement. The concept of reciprocity would likely work for the judgments of international civil litigations. However, trying to rely on reciprocity to recognize an award by an arbitrator or arbitral institution that has nothing to do with the formal judicial system instead of acceding to the New York Convention and ICSID arbitration is simply absurd. Besides, 'reciprocity gets application barley as Ethiopian foreign policy requires prior arrangement such as judicial agreement and Ethiopia does have this agreement with only limited countries.[6] The New York Convention and UNCITRAL Arbitration Rules do not recognize reciprocity.

The practice in Ethiopian courts regarding the recognition of foreign arbitral awards and court judgments have also proved to be unpredictable. In the case of *Paulos Papasssinous*,[7] who requested for enforcement of a judgment rendered in Greece, the Federal Supreme Court argued that the only means to prove whether the country of judgment or arbitral award enforce the Ethiopian judgments/arbitral awards is by the production of a treaty of judicial assistance signed between Ethiopia and the country of origin. No such treaty means there is no reciprocity and the arbitral award cannot be enforced in Ethiopia. In the other case of *GohTsibah Menkreselassie v. Bereket Habtesellasie*[8] the Federal High Court took a contrary position by stating that absence of the treaty of judicial assistance between the country of origin and Ethiopia should not restrict the rights of citizens to get a judgment/an award enforced. Denying enforcement for the reason of the absence of treaty of judicial assistance is inappropriate. This tendency on way gives national courts to be biased in favor of Ethiopian nationals or Ethiopian state by allowing the recognition and enforcement of foreign arbitral awards but refuse when the award debtor is especially the Ethiopian state resulting in a judicial abuse. Scrapping the outdated and scattered laws of arbitration and signing up for the New York Convention or adopting domestic arbitration laws based on the UNCITRAL Arbitration Rules on International Commercial arbitration can undoubtedly eliminate these problems. Of course, even member states can put reciprocity reservation while remaining a member of the New

[1] Art-461(1) of the Ethiopian Civil Procedure states foreign arbitral awards may not be enforced in Ethiopia unless: a) Reciprocity is ensured as provided for by Art. 458 (a); b) the award has been made following a regular arbitration agreement or other legal act in the country where it was made; c) the parties have had equal rights in appointing the arbitrators and they have been summoned to attend the proceedings; d) the arbitration tribunal was regularly constituted; e) the award does not relate to matters which under the provisions of Ethiopian laws could not be submitted to arbitration or is not contrary to public order or morals; and f) The award is of such nature as to be enforceable on the condition laid down in Ethiopian laws

[2] There are few provisions in the Civil Code about the formation, validity and effects of the arbitration agreements. However, the scope of the rules is aimed purely for the domestic arbitrations. There is no separate statute for arbitration and there are no criteria of distinguishing foreign awards from the domestic awards.

[3] Art.1(1) of the New York Convention states that: This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought […]. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

[4] Albert Jan van den Berg, The New York Convention of the 1958:An Overview, available at https://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf. Visited on 29th November, 2020.

[5] Art-461 (1) (a) of the Civil Procedure Code.

[6] Alemayehu Yismaw Demamu, *supra* note 47, at 45.

[7] Federal Supreme Court of Ethiopia , Civil File no. 1769/88, 1996 (unpublished).

[8] Federal High Court of Ethiopia, Civil File No:29/90, 1999(unpublished).

York Convention and Ethiopia at least has the right to consider this possibility upon its accession to the New York Convention. After becoming a member state with reciprocity reservation, the Ethiopian court seized with the power to enforce a foreign arbitral award should verify that the country of origin of an award is a convention country or otherwise. This is better than the cumbersome and inconstant standards as the relevant Ethiopian laws stand as of today. Article I paragraph (3) of the New York Convention allows states to make reservations by stating:

> When acceding to this Convention [...] any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration. (Emphasis added)

Ethiopia has signed the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965, (ICSID Convention on Sep 21, 1965) but has never ratified it. As per Art- 9 (4) of the FDRE Constitution, international agreements become an integral part of law of the land of Ethiopia only if they are ratified. The problems addressed in relation to the enforcement of arbitral awards and the cynicism of the government against international commercial arbitration expressed above is also true for investment arbitration. ICSID Convention creates a framework under which arbitration could be conducted between host states and nationals of other states. Moreover, the ICSID arbitration has its own enforcement procedure different from the New York Convention. Compared to the New York Convention awards under ICSID arbitration are 'automatic' as the grounds to challenge the enforcement before ordinary courts are eliminated.[1] This is evident from Art-54(1) that requires member states to recognize and enforce awards rendered under this convention as binding[2] save under the exceptional ground of the member states laws governing the sovereign immunity from execution under Art55 of the Convention. The process of securing enforcement is simplified as enforcement could be obtained from the court of contracting states upon delivering a copy of an award certified by the secretary general of the center.[3] This instrument is a very important 'risk management tool' to investors planning to invest in Ethiopia.

Perhaps an investor's country might have a Bilateral Investment Treaty (BIT) that provides for investment treaty arbitration such as ICSID arbitration in case of investment disputes. For instance, the BIT between Ethiopia and China states that whenever the investment dispute between an investor and any of the contracting state arises a priority should be given to negotiation.[4] When negotiation fails,' either party to the dispute shall be entitled to submit the dispute to the competent court of the contracting party accepting the investment.'[5] This BIT obliges that the disputes be submitted to the 'competent court' of the contracting party which could be an administrative tribunal or a regular court of law than to arbitration. There is this trend of many African states' reluctance to submit to international arbitration and insist for settlement by their national courts when investment disputes arise under investment contracts.[6] A similar approach is reflected under Ethio-China BIT. It is only for 'dispute involving the amount of compensation for expropriation' that the option of resorting to an ad hoc arbitration or ICSID is prescribed under this BIT. The relevant provision states:

> If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified […] it may be submitted at the request of either party to an ad hoc arbitral tribunal or arbitration under the auspices of ICSID established by the Convention on the settlement of investment disputes between states and nationals of other states opened for signature in Washington in March 18, 1965 once both contracting parties become member thereof.[7] (Emphasis mine).

The reading between the lines of this provision reveals that resorting to arbitration (either *adhoc* or ICSID) is allowed for 'disputes involving the amount of compensation for expropriation'. Besides, it subjects submission to ICSID arbitration on the condition that both contracting parties become members to the Convention. Thus, as long as Ethiopia remains non-member to ICSID arbitration this BIT does not allow ICSID arbitration. Comparable provisions in BITs Ethiopia has signed with other countries have the effect of limiting the ICSID arbitration. The problems of enforcement of foreign arbitral awards discussed above also arise for ad hoc investment arbitration awards that are to be enforced in Ethiopia. Even when ICSID arbitration is successfully

[1] Dany Khayat, Enforcement of Awards in ICSID Arbitration (19 Dec 2011), Available at https://www.mayerbrown.com/en/perspectives-events/publications/2011/12/enforcement-of-awards-in-icsid-arbitration. Visited on 29th November, 2020.
[2] Art.54(1) states: each contracting state shall recognize an award rendered pursuant to this convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state….'
[3] Art.54(2) of the ICSID Convention.
[4] Art.9(1) of Agreement Between the Government of The Federal Democratic Republic of Ethiopia and The Government of The People's Republic of China Concerning The Encouragement and Reciprocal Protection Of Investments (1998) , (shortly referred to as 'the Agreement' hereafter).
[5] Art.9(2) of the Agreement.
[6] Augustus A. Agyemang, African Courts, The Settlement of Investment Disputes and the Enforcement of Awards, Journal of African Laws (1989) at 31.
[7] Art-9(3) of the Agreement.

conducted, the enforcement of its awards could face resistance as Ethiopia has no obligation to 'recognize and enforce an award as it were a final judgment of its own court' under ICSID convention. Thus, securing a parliamentary ratification of the ICSID Convention by Ethiopia gives an assurance for foreign investors investing in Ethiopia that the arbitral awards would be recognized and enforced in Ethiopia.

5. Conclusion and the Way Forward

Whilst the fact that commercial arbitration has become the main alternative to resolve international business disputes has attracted and indeed prompted competition sprit on the national legislatures to have an advanced and arbitration friendly national rules, the law maker in Ethiopia seems to be occupied by other priorities. Ethiopia has preserved laws governing commercial arbitration found in the Empire-era Codes that are neither comprehensive nor in line with contemporary developments at the global level. International commercial arbitration is now a huge business. Countries vie for the greater share of fee paid to arbitrators and attorneys particularly at the seat of arbitration by reforming their arbitration laws especially based on UNCITRAL Model Laws (UNCITRAL Arbitration Rules) which has international legal rules that deal with international commercial dispute resolution; non-binding texts that include rules for conduct of arbitration proceedings; and rules on organizing and conducting arbitral proceedings. Undoubtedly, the country will benefit from being the seat of arbitration tribunals and building an effective and independent judiciary confident in enforcing the foreign arbitral awards gives foreign businesses an assurance to deal with Ethiopian based businesses engaged in international transactions and investments.

There is a huge participation of government and government affiliated companies in business in Ethiopia today. Still, the country is witnessing the transnational transactions and cross-border investments involving both the government and businesses sufficient to call for the adoption of the major international commercial and investment arbitration treaties and implementing them in national legislations. Ethiopia's persistent absence from the mainstream international arbitration in the 21st century is not a desirable trend and has to end. The country exports mainly agricultural products and imports a huge variety of finished products from abroad and above all the country has witnessed the influx of foreign direct investment despite the late political tensions at home. The government can better protect the Ethiopian interests by promoting and implementing the modern international trade laws and dispute resolution mechanisms. Litigation in Ethiopia is a slow and cumbersome process with low reputation judicial system. Having arbitration friendly laws and the legal system creates confidence in parties to international business transactions involving Ethiopian businesses to possibly choose Ethiopian law as an applicable law and Ethiopia as a seat of their arbitration. The arbitration laws of the country as they stand at the present might discourage foreign investors from coming to Ethiopia as they fear to submit to the jurisdiction of local courts.

There are various legislative and diplomatic measures Ethiopia should take in order to save its legal system from remaining unfriendly to international commercial and investment arbitrations. As the legal regimes governing arbitration in Ethiopia stands now, arbitrations involving foreign parties would less likely consider Ethiopian law an applicable law. This hinders professional Ethiopians' access to the practice of international commercial arbitration; affect international business transactions involving Ethiopian businesses, affect the expectations and confidence of foreign investors in the judicial system of the country as well. The article suggests that the government must adopt modern commercial laws and commercial dispute settlement laws in order to keep pace with developments in other jurisdictions as well as developments at the international level. Further, the government should strive to build a strong, reliable and independent judicial system accommodative of the alternative dispute resolution methods by adopting the modernist approach. When it comes to investment arbitration, a similar development is desired in Ethiopia as arbitration has become a prominent means of settling investment disputes.

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