The Effects of a Vacated Arbitral Awards in a Comparative Law Perspective: A Recommendation to Ethiopia*

Abstract

Today, the adjudicatory system of arbitration is replacing the court, since it is considered to be more private, economic, rapid, certain, conducive to business relationships and in some jurisdiction finality of their decision. However, arbitration has its own limitation. For example, arbitrators may make mistakes and all advantages of arbitration may be for the "winners" of arbitration. That is why almost all countries in the globe agreed for the necessity of vacating an arbitral awards in case where the award is defective. The problem is that unlike the arbitration laws of many jurisdictions, the Ethiopian arbitration law has never said anything about the situation after vacating of an arbitral award. And, leaving the post-setting aside situation without adequate procedural rules amounts to exposing the parties for further controversy. So, the main purpose of this article is to examine and analyze the Ethiopian Arbitration Laws governing post-setting aside situation of a vacated arbitral awards. And, the article upholds qualitative legal research which is based on the identification, synthesis and analysis of the law governing vacated arbitral awards. The arbitration laws of other jurisdictions are also overviewed for better understanding of the issues and to indicate where the gap on the arbitration law of Ethiopia is. Finally, the writer recommends the Ethiopian government to refine the arbitration law governing vacating arbitral awards particularly to include a provision that dictate the effects of a vacated arbitral awards.

***Key Words**: Arbitral award, Civil Procedure Code, Court, Arbitration Tribunal, and Vacated*

1. Introduction

Now a day an international commercial transaction is booming which is followed by commercial disputes and how to solve these disputes attract the attention of the international community.[1] Traditionally, solving such kind of disputes was the role of the court. However, judicial settlement of international commercial disputes is usually unattractive to at least one of the parties who might find submitting disputes to national courts unpleasant.[2] That is why

*Mamenie Endale Messelu (LL.B, LL.M), Lecturer in Law and Legal Service Director, Bahir Dar University, School of Law. The author can be reached at mamenie82@gmail.com

[1]Stefan Kroll, the Privatization of Dispute Resolution in International Business Transactions, at dispute resolution session of IALS Conference, Law of International Business Transactions: A Global Perspective, P. 293.

[2]Satarkulova, I. (2006) International Commercial Arbitration in the Kyrgyz Republic, Vindobona Journal of International Commercial Law & Arbitration, Vol.10, PP. 319-320; Redfern, A. et al. (2005), Law and Practice of International Commercial Arbitration. London, Sweet & Maxwell, PP.1-5[Here in after called Redfern]; Garnett, R. et al. (2000), A Practical Guide to International Commercial Arbitration. New York, Oceana Publications, P. 14;

international commercial arbitration has become the norm for dispute resolution in most international business transactions.[3] The adjudicatory system of arbitration is replacing the court since it permits greater flexibility in decision making and it is considered to be more private, economic, rapid, certain, conducive to business relationships and in some cases finality of their decision.[4]An arbitration award should in principle be final and binding subject, however, to a review on restricted ground of set aside. It is indeed wastage of money, time and other valuable resources to resort to arbitration and then file a case at court all over again. It would be better for a party to start court proceeding from the very outset than disagree on the finality of an arbitration award.[5]

However, this doesn't mean arbitration is free from criticism because arbitrators may make mistakes and all the aforementioned advantages of arbitration maybe for the "winners" of arbitration.[6] This is the very justifications for vacating an arbitral awards and almost all jurisdictions agreed for the necessity of vacating an arbitral awards in case where the award is defective. The gaps here is that leaving the post-setting aside situation without adequate procedural rules that exposing the parties further controversy. Let us suppose that a party persuades the local court or appellate tribunal to vacate the arbitration award. *What would happen next*? *Be it null and void? Or enforced in a different jurisdiction? Or remitted to arbitrators? Or initiated before an appropriate court as a fresh?*

Addressing this question is a challenging task under the existing legal framework. For example, the UNCITRAL Model Law proved to be very successful and is implemented in more than 60 States and the modernization of arbitration laws in other countries is mostly in accord with the Model Law. However, the Model Law does not deal with the effect of setting an award aside. Similarly, the New York convention does not clearly deal with the effect of a vacated arbitral

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Hailegabriel G. Feyissa(2010), The role of Ethiopian courts in commercial arbitration**;** Mizan Law Review, Vol.4 No.2**,** P.304 [Here in after called Hailegabriel].

[3]International commercial arbitration can be defined as a specially established mechanism for the final and binding determination of disputes concerning a contract between two or more parties that has an international element. The disputes are determined by independent arbitrators in accordance with standards and procedures chosen by the parties involved in the dispute. See Margaret L. Moses (2008), The Principles and Practice of International Commercial Arbitration, Cambridge University Press, New York, P.1.[Here in after called Margaret]; Judd Epstein, The Enforceability of ADR clauses, at dispute resolution session of IALS Conference, Law of International Business Transactions: A Global Perspective; P. 283.

[4]Robert L. Bonn (1972), Arbitration: An Alternative System for Handling Contract Related Disputes, Sage Publications, Inc., Vol. 17, No.2, PP.254-264, P.1.

[5]Georgios I. Zekos (2008), International Commercial and Marine Arbitration, Routledge-Cavendish, Taylor & Francis e-Library, PP.490 & 526.[here in after called Georgios I. Zekos].

[6]Ibid.

award. The Ethiopian Arbitration Law is not an exception in this regard as it has never said anything in this regard. So, the main purpose of this article is to examine and analyze the Ethiopian Arbitration Laws governing post-setting aside situation of a vacated arbitral awards. And, the article upholds qualitative legal research which is based on the identification, synthesis and analysis of the law governing vacated arbitral awards. The arbitration laws of other jurisdictions are also overviewed for better understanding of the issues and to indicate where the gap on the arbitration law of Ethiopia is.

The paper has four parts. Part one is devoted for an introductory part. Part two overviews the general concept of vacating an arbitral awards. Under part three, the paper explores the possible effects of a vacated arbitral awards. This section discussed the arbitration laws of other jurisdictions and the position of Ethiopian arbitration laws on the effects of a vacated arbitral awards. Finally, in part four, the writer summarized the issues and gave a recommendation for the Ethiopian government to refine the arbitration law governing the effects of vacating an arbitral awards.

2. Vacating an Arbitral Awards: What they are and why it matters?

One of the reasons parties choose to arbitrate is that arbitration results in a final and binding award that generally cannot be appealed to a higher level court[7], and also they are considered to be more private, economic, rapid, certain, and conducive to business relationships.[8] However, the problem with arbitration is that, as in the court system, arbitral panels make mistakes, and so without appellate review mistakes are not addressed and speed and finality become advantages for the "winners" of arbitration. In such a case, an appellate review by an arbitral tribunal will contribute to a more efficient arbitration.[9] The appellate arbitral tribunal examines the legal reasons for appeal or set aside and in the case of unfair hearing, examines new evidence. In a fixed day from the date of its establishment, the appellate arbitral tribunal will issue the new and final award. As a result, even if arbitration is considered as an alternative to litigation in court, the award has been subject to some forms of judicial review.

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[7]Margaret , Supra note 3, P. 2

[8] Robert L. Bonn, supra note 4, P.1

[9]Georgios I. Zekos, Supra notes 5, PP.490 & 526. Citing Amy Schmitz, "Ending a Mud Bowl: Defining Arbitration's Finality through Functional Analysis," 37 *Ga. L. Rev.* 123 (2002) (arguing that increased judicial scrutiny has undermined the finality of arbitration, muddying the distinction between arbitration and trial-court decision-making); and Martin Hunter, "International Commercial Dispute Resolution: *The Challenge of the Twenty-first Century*," 16 *Arb. Int'l.* 379, 382 (2000).

This was the case under Roman law, in the middle Ages and under the Napoleonic Codes.[10] Review by the courts occurred mostly in enforcement proceedings and refusal by that court was the end of the story.[11] Currently, the extent of review are (i) appeal on matters related to both points of law and procedural fairness i.e. known as review via appeal; and (ii) challenging an award only for defects of procedural integrity in the arbitration i.e. known as review via set aside. The two procedures differ by the grounds and degree of interference which they authorize courts into arbitration.[12] Appeal authorizes courts to examine the merit of the arbitral award and correct the errors therein, if any. At the end of the appeal, the appellate court gives a judgment conforming, modifying or reversing the award.[13] The judgment will then bind parties as a final resolution on the dispute between them unless further appeal instituted by dissatisfied party.[14]

On the other hand, the procedure of setting aside does not authorize the court to examine the merit of the award.[15] It simply authorizes the court to see whether some procedural mistakes[16] are committed or not and to declare the award null and void, despite the holdings on the merit if it is given amidst of those procedural irregularities. Unlike appeal, at the end of the successful setting aside action, parties will then find themselves with an outstanding dispute to be yet resolved. If, in the setting aside action, the court finds that the procedural mistakes are not committed, parties will then find themselves that they are still bound by the award itself i.e. unlike appeal , they are not bound by a court judgment either modifying ,reversing or confirming the award.[17] And, at this time, the most common methods of challenging an arbitral awards is bringing an action to annul, set aside, or vacate the award (the terms differ in different jurisdictions) in the court at the *situs* of the arbitration.[18] The problem is that unlike the arbitration laws of many jurisdictions, the Ethiopian arbitration law has never said anything about the situation after vacating of an arbitral award. The experience of several countries and

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[10]Albert Jan van den Berg(2014), Should the Setting Aside of the Arbitral Award be Abolished? *ICSID Review, Oxford University Press,* April 14, pp. 1–26, 3

[11] Ibid

[12] Birhanu Beyene, The Degree of Court's Control on Arbitration under the Ethiopian Law: is it to the right amount? *Oromia Law Journal [Vol 2, No.2],* P. 43.

[13]*Seid Demeke(2015), Court Review of Arbitral Awards through the Power of Cassation: A Case Comment on National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co, Mekelle University Law Journal Vol.3 No. 1, PP.124-125.*

[14]Birhanu Beyene, Supra note12, P. 44

[15]Ibid.

[16] See the grounds of set aside enumerated under Art.356, Civ. Proc. C for the experience of Ethiopia

[17]Birhanu Beyene, supra note 12, P. 44

[18]Seid Demeke, Supra notes 13, PP. 120 &121.

different scholarly articles point out that the fate of a vacated arbitral awards is determined, among other things, by party autonomy and the grounds of a vacated arbitral awards. Accordingly, here as follows this paper discussed the grounds of vacating arbitral awards and the fate of a vacated arbitral awards in other jurisdictions; and proposed recommendations for Ethiopia.

3. The Grounds of Vacating Arbitral Awards

One of the factors affecting the effect of a vacated arbitral award is *"**the reasons, for which the award is vacated"**,*[19] as a result here as follows this paper overview some potential grounds of vacating an arbitral awards.

3.1. Lack of a Valid Arbitration Agreement

An arbitration agreement refers to an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them "in respect of a defined legal relationship, whether contractual or not...."[20]. To be valid, the agreement should be based on free consent; in required format, if any; express the scope and content of the agreement. The absence of one of such elements will be a ground for vacating an arbitral award on the basis of lack of a valid arbitration agreement. As a result, many countries recognized lack of a valid arbitration agreement as a ground for vacating an arbitral awards and Ethiopia is not also an exception.[21]

3.2. Violation of Due Process or Unfair Hearing

It is the rule that each party must be treated fairly; given a full or reasonable opportunity of presenting his/her case; and entitled to fair hearing. It requires that the party against whom the award is invoked was properly notified of the appointment of the arbitrator and of the arbitral

[19] See, for example, Margaret, P.199- 201; see also Seid Demeke (2015), The Setting Aside of Arbitral Awards under the Ethiopian Arbitration Law, JELS, Vol. 1, No. 1, P. 54 & 55.

[20] New York Convention, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 - Article II (1) [here in after called "New York Convention"]. Art. 7(1) of the UNCITRAL Model Law is also used a similar term.

[21] Model law - Art. 34(2) (a, i); New York Convention- Art. V (1); the 1961 European Convention- Art. IX (a); English Arbitration Act of 1996 - Art. 67(1); Russian Arbitration Act, Art.34(2)(1); Italian Code of civil procedure, Art.829(1); and France New Code of Civil Procedure- Art.1502(1). See also the Civil Procedure Code of Ethiopia (1965), Federal Negarit Gazette, 25th Year No. 3, October 1995, Art. 356(a) [Here in after called CPC].

proceedings.[22] Violation of due process or unfair hearing means the absence of equal treatment and the ability of a party to present his/her case. The Model law, New York Convention and the European Convention makes violation of due process as a ground of set aside.[23] It is also a ground of set aside by several countries.[24] For example, under the Italian code of civil procedure[25], the following could be a ground of vacating an arbitral award due to violation of due process or unfair hearing: (1) if the arbitrator, or any entity in which s/he is a director has an interest in the dispute; (2) if the arbitrator is a relative, lives with, or has a close relation with one of the parties, or with their legal representatives or attorneys; (3) if the arbitrator has a professional relationship with one of the parties; (4) if the arbitrator has a legal proceeding pending with one of the parties or a serious antagonism with one of them or with his legal representative or his attorney; and (5) if the arbitrator has acted as a counsel or attorney of one of the parties in a previous phase of the dispute etc. However, the Ethiopian civil procedure code makes violation of due process as a ground of appeal which allows the court to review the merit of the case.[26] Here one may raise a question as to whether ***"Is it a good thing to make these things ground of appeal?"*** The writer argues that violation of due process or unfair hearing should be a ground of set aside for the purpose of making compatible (or harmonization) the Ethiopian arbitration laws with the foreign jurisdictions and to allow the parties to exercise their party autonomy. In the latter case, unlike appeal, at the end of the successful setting aside action, parties will then find themselves with an outstanding dispute to be yet resolved which allows the parties the discretion to submit the case for a newly appointed arbitrator or for a court.

3.3. Excess of the Arbitral Tribunal's Authority

It is concerned with the award which contains decisions in excess of the arbitral tribunal's authority. This category includes an award in excess of or different from what is claimed. It requires a determination of what constitutes the scope of the arbitration clause and what are matters that the parties have submitted to the resolution by the arbitral tribunal in question. Sometimes, the matters submitted by the parties to the arbitral tribunal may be narrower or

[22]Albert Jan van den Berg(2003), The New York Convention of 1958: An Overview, *Yearbook* Vol. XXVIII, P. 15[Here in after called Albert Jan van den Berg].
[23]Model Law- Art. 34(2) (ii); New York Convention- Art.V(2); the 1961 European Convention- Art. IX(b).
[24]English Arbitration Act- Section 68(a); Russian Arbitration Act, Art.34(2)(1); Italian Code of civil procedure- Art.829(9); USA- section 10(a(2&3)) of the FAA(2003); French New Code of Civil Procedure- Art.1502(4).
[25]Italian Code of Civil Procedure- Art. 815.
[26]Ethiopia Civil Procedure Code- Art 351(d, i).

broaden than the scope of the arbitration clause (not submission agreement).[27] The Model law, New York Convention, the European Convention as well as several countries arbitration laws recognizes it as a ground of vacating an arbitral award.[28] Similarly, the Ethiopian civil procedure code makes excess of the arbitral tribunal authority as a ground of set aside.[29]

3.4. Problems in the composition of an Arbitral Tribunal and Proceeding

It includes a constitution of the tribunal in violation of the applicable arbitration rules or arbitration law; lack of impartiality and independence of the arbitrator.[30] It lays down the rule that set aside of the award can be made if an applicant (usually losing party) can prove that the composition of the arbitral tribunal was not in accordance with the agreement of the parties or in the absence of an agreement on these matters, was not in accordance with the law of the country where the arbitration took place. The Ethiopian Civil Procedure Code recognizes and makes such type of errors as a ground of set aside.[31]

3.5. Non-arbitrability of the Subject Matter

Non- arbitrability of the subject matter means the subject matter of the dispute is not capable of settlement by arbitration. Party autonomy and the specific rights of the parties derived there from to choose arbitration instead of national courts to settle their commercial disputes, are the well-known fundamental conditions for international commercial arbitration. If, therefore, the jurisdiction of the arbitrators can only go as far as the parties by agreement have authorized them, one has to add immediately, that this jurisdiction can also go only as far as the parties can authorize them. Limits of party autonomy thereby become limits for the jurisdiction of the arbitrators. Non- arbitrability of the subject matter is recognized as a ground of vacating an arbitral award under the Model Law, New York Convention and several countries national

[27] Albert Jan van den Berg, supra note 22, P.15
[28] See for example, the Model Law- Art.34 (2) (iii); New York Convention- Art.V(3); The 1961 European Convention- Art. IX(c); English Arbitration Act- Section 82; French New Code of Civil Procedure- Art. 1502(3); Russian Arbitration Act, Art.34 (2)(1); Italian Code of civil procedure, Art.829(4); USA- section 10(a(4)) of the FAA(2003).
[29] The Ethiopian Civil Procedure Code, Art.356 (a).
[30] See for example, the Model Law- Art.34 (2)(a)(iv); New York Convention- Art. V (4); the 1961 European Convention- Art. IX (d); English Arbitration Act- Section 82(2) & Section 68(c, d ,h); French New Code of Civil Procedure- Art. 1502(2); Russian Arbitration Act, Art.34 (2)(1);and Italian Code of civil procedure, Art.829(3).
[31] See Ethiopian Civil procedure code- Art. 356 (b) & (c).

arbitration laws.[32] The Ethiopian CPC as perArt.315(2) provided that "*No arbitration may take place in relation to administrative contract as defined in Article 3132 of the civil code or in any other case where it is prohibited by law*". By virtue of this provision, administrative contract is not within the ambit of arbitration and it is non- arbitrable. The Ethiopian Civil Procedure Code does not clearly indicate as to whether non-arbitrability of the subject matter is a ground of set aside. However, one may refer Art. 461(1) (e) of CPC and used it as a guidelines. Art. 461(1)(e) of CPC provided that "*Foreign arbitral awards may not be enforced in Ethiopia unless …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*…".[33] This means that one of the grounds of refusal of enforcement of a foreign arbitral awards is that non- arbitrability of the subject matter. So, if non- arbitrability of the subject matter is a ground of refusal of enforcement, it can also be a ground of vacating an arbitral awards.

3.6. Violation of Public Policy

The concept of public policy has by no means become easier and clear. What is considered to be part of public policy in one state may not be seen as a fundamental standard in another state with a different economic, political, religious, social, and legal system.[34]It is essentially relates to the Forum State's most basic notions of morality and justice. The public policy exception is limited to instances 'where the contract as interpreted [by the arbitrator] would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.[35] Violation of public policy is a ground of vacating an arbitral award under the Model Law, New York Convention and several countries national arbitration laws.[36]

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[32]See for example, the Model Law- Art. 34(2) (b) (i); New York Convention- Art. V(6); Russian Arbitration Act, Art.34(2)(1); Italian Code of civil procedure, Art.806

[33]Ethiopian Civil Procedure Code: Art. 461(1) (e).

[34]Karl-Heinz Bockstiegel: Party Autonomy and Case Management- Experiences and Suggestions of an Arbitrator, Address at the Conference of the German Institution of Arbitration (DIS) "Organising Arbitral Proceedings Regulations, Options and Recommendations", Berlin 24/25 October 2012, PP. 123 seq [here in after called Karl-Heinz Böckstiegel] .

[35]Stanley P. Sklar, Esq (2006), BEYOND "NO": APPEALING THE ARBITRATION AWARD, ABA FORUM ON THE CONSTRUCTION INDUSTRY ANNUAL MEETING, May 18-19, P. 21.

[36]See for example, the Model Law- Art. 34(2) (b)(ii); New York Convention- Art. V(7); England Arbitration Act- section 68(g); Russian Arbitration Act, Art.34(2)(1); Italian Code of civil procedure, Art.829; USA- section 10(a(1&2)) of the FAA(2003); French New Code of Civil Procedure- Art. 1502 (5).

In Ethiopia, there is no clear provision as to whether public policy is a ground of vacating an arbitral awards. However, we can say that if the aforementioned matters are the grounds for vacating an arbitral awards for stronger reason public policy is that a ground of vacating an arbitral awards. Besides, we can argue that due process generally is conceived as pertaining to public policy and a court may also on its own motion refuse enforcement of an award for violation of due process.[37] As a result violation of due process or unfair hearing as per art 351(d) of CPC may be considered as a violation of public policy and be considered as a ground of vacating an arbitral awards. Art 351(d) makes it as a ground of appeal instead of a ground of set aside and the court is allowed to review the merit of the case.

4. The Potential Effects of A Vacated Arbitral Awards

4.1. Party Autonomy Determine the Fate of a Vacated Arbitral Award

There are several major aspects of party autonomy which are fundamental for arbitration: ***Firstly***, there is no arbitration without the consent of the parties to submit to arbitration. ***Secondly***, if there is such consent, party autonomy provides the parties the right to appoint an arbitrator and select the procedure under which their dispute is to be settled, subject only to certain limitations of mandatory law. Party autonomy to submit to arbitration will primarily be exercised by the parties jointly deciding on whether to go to ad-hoc arbitration or what is mostly happening choose institutional arbitration.[38] In principle, arbitrators have to remember from the very beginning and throughout the arbitration procedure that the very basis of arbitration is party autonomy, and the arbitrators have to pay as much respect as possible to any agreement regarding the arbitration procedure between the parties. Without the agreement of the parties to submit to arbitration, there is no arbitration procedure. It is useful and important for arbitrators not to forget these basics though they are asked and authorized to issue a decision which is binding on the parties.[39] Leaving aside the special case of arbitrations mandated by treaty or legislation, it is a trite principle that arbitration is dependent on the existence of an agreement

[37]Albert Jan van den Berg , supra note 22, P. 15; available on-line at: http://www.kluwerarbitration.com .
[38]Karl-Heinz Böckstiegel, Supra Notes 34,P.1.;Michael Hwang S.C(*.2006)*, WHY IS THERE STILL RESISTANCE TO ARBITRATION IN ASIA? *The International Arbitration Club, Revised version 22*, P. 3[Here in after called Michael Hwang S.C].
[39]Karl-Heinz Bockstiegel(1999), Major Criteria for International Arbitrators in Shaping an Efficient Procedure, Arbitration in the Next Decade- Special Supplement, ICC International Court of Arbitration Bulletin, P. 49.

between the disputant parties, and that the terms of the arbitration agreement be defined and limit arbitral jurisdiction.[40]

So, once an arbitral award is vacated by the court or appellate tribunal, parties can further agree to submit their case before arbitrator (previous or a new one) or to initiate a court action. However, the principle of party autonomy would not be successful for various reasons. There are parties who are not interested in playing the game by the rules, usually because they have a bad case. These might be parties who were trying and exploit the procedural rules for their own advantage, seeking to delay the hearing and ultimately get the decision of set aside.[41] Besides, there are local lawyers who do not wish to fight foreign lawyers before a foreign tribunal. They are not out to sabotage the arbitration because their clients have no defense, but they sincerely believe that their clients will get a better deal before a local court for the following reasons: (1) they are inexperienced in international arbitration and do not know how the game is played; (2) they feel that their clients may be at greater risk of liability because they are less capable of predicting the outcome; and they believe that their client's witnesses may be better believed by a local court rather than a Tribunal composed of at least a majority of foreigners. So, they will apply to their local courts for an anti-arbitration injunction regardless of the seat of the arbitration; and they will not further agree to submit the case to arbitration.[42] In such kind of scenario's the other factors may determine the fate of a vacated arbitral awards.

4.2. The Applicable Law Determine the Fate of a Vacated Arbitral Award

International commercial arbitration will involve more than one systems of law or of legal rules governing: (a) the parties' capacity to enter into an arbitration agreement; (b) the arbitration agreement and the performance of the agreement; (c) the existence and proceedings of the arbitral tribunal; (d) the substantive issues in dispute (applicable law); and (e) the recognition and enforcement of the award.[43] The applicable law will be expressly or impliedly chosen by the parties. Absent a choice, one looks to the law most closely associated with the arbitration agreement, generally that of the arbitral seat. A second limb of the rule addresses arbitral proceedings, which are said to be governed "in general" by the law of the seat of arbitration. A third leg makes reference to the substance of the dispute (the "merits" of the controversy) as

[40] Michael, Supra note 38, P. 3
[41] Ibid. PP. 4-8.
[42] Ibid. PP. 8 & 9.
[43] Georgios I. Zekos, supra note 5, P. 122

governed by the law chosen by the parties, in some cases supplemented by considerations determined by the arbitral tribunal. [44] Concerning the effects of vacated arbitral awards, let us see the experience of different jurisdiction.

4.2.1. English Arbitration Act

Article 68(3) of the English Arbitration Act of 1996 states under the caption "Challenging the award "if there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may: (a) remit the award to the tribunal, in whole or in part, for reconsideration, (b) set the award aside in whole or in part, or (c) declare the award to be of no effect, in whole or in part.[45] It imposed limitation on the discretion of court via stated "the court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration".[46]

4.2.2. German Arbitration Act

German law provides that a court may "where appropriate, set aside the award and remit the case to the arbitral tribunal."[47] German law also provides that absent any indication to the contrary, the setting aside of the award will "result in the arbitration agreement becoming operative again in respect of the subject-matter of the dispute."[48] This suggests the possibility that if the court does not specifically remit to the prior tribunal, the parties could start over again with a new tribunal and the dispute can be submitted to a newly established arbitral tribunal.

4.2.3. USA- Uniform Arbitration Act

The Uniform Arbitration Act in the United States, which has been adopted in 49 U.S. jurisdictions, was revised in 2000 to spell out more clearly what should happen after a court vacates an arbitral award.[49] Under the Revised Uniform Arbitration Act (RUAA), if the court

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[44]WILLIAM W. PARK (*2007)*, Rules and Standards in Private International Law, Review Articles, *Sweet & Maxwell Limited*, , PP.441-445, P. 444.
[45]English Arbitration Act of 1996, Art. 68 (2).
[46] Ibid. Art. 68(3).
[47]German Arbitration Act, § 1059(4).
[48]Ibid. § 1059(5).
[49]Approximately 12 states have amended their statutes to include the changes of the Revised Uniform Arbitration Act. *See* website of National Conference of Commissioners of Uniform State Laws, at http://www.nccusl.org/Update/ uniformact factsheets/uniformacts-fs-aa.asp. Although this revised version of the

vacates an award other than on the ground that the arbitration agreement was invalid, "it may order a rehearing."[50] However, if the award was vacated on grounds of corruption, fraud, or arbitrator misconduct or partiality, "the rehearing must be before a new arbitrator."[51] If the ground concerned a failure of procedure, or an arbitrator acting in excess of her powers, then the rehearing "may be before the arbitrator who made the award or the arbitrator's successor."[52] Presumably, in this latter case, the parties themselves, if they agreed, could have some ability to help determine whether the prior tribunal or a newly constituted one would conduct the rehearing.

4.2.4. The Netherlands Arbitration Law

Dutch law explicitly states that when a decision setting aside an award becomes final, the jurisdiction of the court shall revive.[53] If the award was vacated because the court held that the arbitration agreement itself was invalid, then, assuming there is no time bar, the prevailing party should be able to initiate a court action. The same should also be done in case of violation of public policy i.e. especially in case when the subject matter of the dispute is not subject to arbitration.[54]

5. The Effects of A Vacated Arbitral Awards in Ethiopia: A Recommendation

The Ethiopian arbitration law inadequately addresses the post-setting aside issues. Article 357 of CPC simply provides:

> *"where an application (...) is dismissed, the award shall be deemed to be valid and enforceable; [and] where the application is granted, the award shall be deemed to be null and void and shall be set aside"*.[55]

In relation to the effects of appeal, the cumulative reading of articles 353 and 354 of CPC states that the court may confirm, vary or remit the award depending on the grounds that make the

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Uniform Arbitration Act has not yet been adopted in many states, it provides reasonable guidelines for how remissions or remands should be handled, See Margaret, supra note 38, P. 201.

[50]RUAA, § 23(c).

[51]*RUAA, § 23(c).*

[52]*RUAA, § 23(c).*

[53]Netherlands Arbitration Law, art. 1067.

[54] Margaret, supra note 3, P. 199.

[55]CPC, Art. 357.

appeal successful.[56] However, the Ethiopian arbitration laws do not clearly stipulated the effects of set aside. While commenting on article 357 of CPC, Aschalew, asserted that:

> *"[U]nlike the laws of many jurisdictions, the Ethiopian Civil Procedure Code have never said anything in this regard [the situation after setting aside]. It simply says that once it is set aside, an arbitral award is null and void. It does not go further and say anything whether the jurisdiction of the courts will revive or whether the arbitral tribunal rehears the case".*[57]

Leaving the post-setting aside situation without adequate procedural rules amounts to exposing the parties for further controversy. By taking in to consider the aforementioned foreign experience, views of scholars and to make compatible and harmonize the Ethiopian arbitration laws with an international legal community, the writer recommends the Ethiopian government as follows.

5.1. Remitted to the Arbitrators Passed the Arbitral Award

The Ethiopian Arbitration laws should include a clear provisions that provides the court/or appellate tribunals should remit the case to the arbitrators who made the award in case where the award needs to be corrected or interpreted; and in case when the award is vacated on the ground that the arbitrators exceed authority. Courts/or appellate tribunals are likely to favor some kind of remission, so that the parties will not have wasted the entire arbitration effort. A substantial duplication of effort, time, and resources would not benefit either party. If an award needs to be corrected or interpreted, the court will generally remit the case to the same tribunal. For example, the ***English Arbitration act*** imposed limitation on the discretion of the court via provided that "*the court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration*".[58] Similarly, in USA, under the Revised Uniform Arbitration Act (RUAA), if the court vacates an award other than on the ground that the arbitration agreement was invalid, "***it may order a rehearing***".[59] In USA, if the ground concerned a failure of procedure, or an arbitrator acting in excess of his/her powers, the rehearing "may be before the arbitrator who made the award or the arbitrator's successor."[60] The

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[56]Ibid. Arts. 353 & 354.
[57]Aschalew Ashagre(2007), Involvement of Courts in Arbitration Proceedings under Ethiopian Law, 2 Journal of Business and Development, 19.
[58]See the English Arbitration Act of 1996, Art. 68 (3).
[59]USA Revised Uniform Arbitration Act, (2000), § 23(c).
[60]Ibid.

same is true in Germany, the German law provides that a court may "where appropriate, set aside the award and remit the case to the arbitral tribunal.[61] In Germany, absent any indication to the contrary, the setting aside of the award will "result in the arbitration agreement becoming operative again in respect of the subject-matter of the dispute."[62] Therefore, the Ethiopian arbitration law should include a provision that proposes if an award needs to be corrected or interpreted, the court/or appellate tribunals shall remit the case to the same tribunal.

5.2. Remitted to Newly Appointed Arbitrators

The Ethiopian Arbitration laws should include a clear provision that provides in case when the award is vacated on grounds of problems of composition of arbitral tribunal and proceeding, due process, unfair hearing, and violation of public policy due to fraud, corruption and so on committed by arbitrator, a newly constituted tribunal should be appointed. For example, in USA, under the Revised Uniform Arbitration Act (RUAA), if the award was vacated on grounds of corruption, fraud, or arbitrator misconduct or partiality, "***the rehearing must be before a new arbitrator***."[63] This means that in case when the award is vacated on grounds of violation of public policy such as corruption, fraud, partiality or any other misconduct of arbitrator, the court can order the rehearing of the matter before a new arbitrator. If the problem with the award is related to the integrity of the process such as bias by the arbitrator or some kind of misconduct, the court would not remit the case to the same tribunal. This is for the purpose of maintaining impartiality, quality of justice and forum neutrality.

5.3. Initiate a Court Action

When the award is vacated on grounds of lack of a valid arbitration agreement, non- arbitrability and violation of public policy (save fraud, and corruption committed by arbitrators), it is better to initiate court action. In USA, if the violation of public policy is due to non-arbitrability and lack of a valid arbitration agreement, the party seeking resolution of the dispute can pursue his/her claim before the appropriate court, as if the parties' contract had never contained an arbitration clause.[64] Here, unlike USA which takes into consider the grounds of vacating an arbitral awards, the Netherlands arbitration laws provides that the power of the court will revive automatically once an arbitration award is vacated on whatsoever reason. The Dutch law explicitly states that

[61]See German Arbitration Act, Section 1059(4&5).
[62]Ibid.
[63]USA Revised Uniform Arbitration Act, (2000), § 23(c).
[64] Ibid.

when a decision setting aside an award becomes final, the jurisdiction of the court shall revive.[65] Here, the writer recommends for Ethiopia to adopt the approach of USA as the most prevailing international trend confines judicial intervention to a minimum that allows the parties to enjoy the benefit of arbitration.

6. Concluding Remarks

Ethiopia's arbitration law is currently regulated by the 1960 civil code and the 1965's civil procedure code. That is why most of the provisions enshrined under the civil code and civil procedure code do not go along with the modern approach towards arbitration. Particularly, the issue of vacating an arbitral award is governed by the civil procedure code which is lagging behind and it is fail to cope with the emerging modern laws and practices in international commercial arbitration. For instance, unlike the arbitration laws of several countries, the Ethiopian Civil Procedure Code has never said anything about the situation after setting aside of an arbitral awards. This is particularly the case where a party persuades the local court to vacate the arbitration award thereby making the award having no further legal effect. The CPC simply says that once it is set aside, an arbitral award is null and void. It does not go further and say anything as to whether an arbitral awards can be remitted to arbitrators or referring to newly appointed arbitrators or initiated before an appropriate court as a fresh. And, leaving the post-setting aside situation without adequate procedural rules amounts to exposing the parties for further controversy. As a result, this writer recommends the Ethiopian government to refine an existing arbitration laws or enacting a new and modern arbitration legislation that could takes in to consider the gaps identified in this paper. Particularly, the experience the other countries and the scholarly articles on the field indicated that the fate of a vacated arbitral awards is determined, for example, by party autonomy and grounds of vacating arbitral awards. Accordingly, the Ethiopian arbitration laws should include provisions that could determine the fate of a vacated arbitral awards. The provisions shall give room for the parties to agree on the fate of vacated arbitral award. This doesn't mean parties shall be free riders to decide the fate of the case by themselves why because their decision is required to be backed by the grounds of vacated arbitral awards. So, the law should offer: (1) remit the vacated arbitral award to arbitrators who made the award in case where the award needs to be corrected or interpreted or in case when the award is vacated on the ground that the arbitrators exceed authority; (2) Remit

[65]Netherlands Arbitration Law, Art. 1067.

to newly appointed arbitrators in case where the award is vacated on grounds of problems of composition of arbitral tribunal and proceeding, due process, unfair hearing, and violation of public policy due to fraud, corruption and so on committed by arbitrator; and (3) Initiate a court action in case where the award is vacated on grounds of lack of a valid arbitration agreement, non- arbitrability and violation of public policy (save fraud, and corruption committed by arbitrators).