LAWS AND PRACTICE OF COMMERCIAL ARBITRATION IN ETHIOPIA: BRIEF OVERVIEW

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INTRODUCTION

The establishment of business relationship, together with their legal effect, is based on a contract. The contract will be signed by parties with sane mind, full informed consent and proper capacity. Due to the transaction’s behavior, the involvement various parties, at the different stage of a contract may eventually create disputes. When contracts are signed, parties insert amicable dispute settlement clauses. But if amicable dispute settlement fails or either one of them is discontented, they decide to resort to courts or arbitration.

The dynamic nature of world economy has forced business men to seek for a different way of dispute settlement method. Arbitration explores the settlement regulation of various contracts and its consequences. International arbitration exists to serve the international business community. The introduction of commercial arbitration has been a driving force in the development of international trade.

It is imprudent for a foreign investor to choose national court to settle disputes. Primarily, because judges favor to apply their national law, together with its conflict of law rules, which the foreign party is alien. Moreover, foreign parties want to reduce their legal cost.

Arbitration is deemed to avoid these inherent risks. It is often regarded as unorthodox way of settling disputes. It also underscores the various controversies surrounding the execution of international contracts. These controversies may be related to jurisdiction, applicable law, etc. Before the commencement of the proceeding, parties enjoy broad freedom to construct a dispute resolution system of their choice.

They can apply any substantive and procedural law; they make the arbitration either institutional or ad-hoc. The parties have discretion in deciding the final outcome of the proceeding- whether or not the arbitration is binding.

International arbitral tribunals are not bound by any particular rules of private international law or conflict of law rules. On the contrary, a primary norm of that private international law does

not give authority to international arbitral panels to determine themselves the connecting factors that are relevant in respect of particular contract.

The case may be a bit different with domestic arbitration- it does not give broad range of freedom to the litigants. For example, domestic procedural laws prevail over procedural law chosen by the parties. It cannot distance itself from local procedures and perceptions- it cannot choose another legal system and construct the applicable private international law regime by assembling the fundamental rules of law.

It will not apply different substantive law by using factors, like closet connection rule, subjective approach. The recognition and enforcement of an award differs from international arbitration. Its accountability is not only for fair, reasonable and legitimate expectation of the parties. The domestic arbitration proceeding will hardly follow different public policy principles. Case law tells us that Ethiopian practice of commercial arbitration often advocates the role of courts in various proceedings.

This short essay will try to look into the practice of commercial arbitration in Ethiopia. It is about the current perception of commercial arbitration in the country governed by the Civil Code and Civil Procedure Code. The essay will take case law from Cassation Court, US Supreme Court, ICC, which is often considered to be authoritative. Also, conventions that are used for modern arbitration will be referred to. The first topic will briefly discuss alternative dispute resolution. Its advantages and differences with arbitration and judicial litigation will be mentioned.

The second topic is devoted to explaining arbitration. It tries to define what arbitration is, give a perspective to the reader into the issues considered, and the approach chosen by the writer. After putting arbitration into perspective, we will discuss about the difference between judicial litigation and arbitration.

Commercial arbitration in Ethiopia is based on the Civil and Civil Procedure Code. Art 3325-3346 of the Civil Code, Art 315-319, Art 461, Art 350-357 of the Civil Procedure Code aspire to govern the procedural and substantive aspect of commercial arbitration in Ethiopia. Unfortunately, Ethiopia is not a party to New York Convention for Recognition and Enforcement of Foreign Arbitral Awards. It has also excluded itself from acceding into International
Convention for Settlement of Investment Disputes. This is why many of the decisions from arbitral panels as well as courts solely depend on the Civil Code and Civil Procedure Code.

Arbitration in Ethiopia is not widely recognized as court litigation. Although it contributes to the economic prosperity and development of a nation, since such processes attract foreign investment, develop an efficient legal system, and produce trained professionals, there have been inconsistencies in the Ethiopian practice. Many legal practitioners are not aware or have ignored how arbitration is conducted.

Finally, a concluding remark will be given as to why Ethiopia needs to have arbitration friendly law.

BRIEF OVERVIEW OF ALTERNATIVE DISPUTE RESOLUTION

The application of any dispute settlement method depends on the legal and economic goals the parties, firms are trying to achieve. These legal goals may be presenting one’s case before impartial tribunal, where the law works for its advantage, reducing legal cost, etc (enumerating the economic goals is not the aim of this essay). Based on the goals they are pursuing, parties choose either court litigation or Alternative Dispute Resolution (ADR).

ADR\(^2\) is a spectrum of processes, other than litigation, that can be used to resolve disputes.\(^3\) Contracts often provide for a cooling off period where the parties agree to solve their grievances by other means than arbitration or judicial litigation. This allows for the continuation of smooth business relationship among them. ADR is a commonly used term for settling both contractual and non-contractual disputes.

ADR can be any method used for resolving disputes by agreement.\(^4\) ADR processes include mediation, conciliation, mini-trial, negotiation, non-binding arbitration, etc. Here the logical

\(^2\)Other than the traditional Alternate Dispute Resolution nomenclature, ADR is also known as “Appropriate Dispute Resolution” and “Amicable Dispute Resolution.” It is called appropriate because the appropriate process has to be used for a certain type of conflict; whereas, it is called Amicable for the mere fact that it seeks to achieve amicable and sustainable solution between the disputants.


\(^4\)One author argues that agreement can also be understood as contract, which can also be another part of dispute resolution institution. The freedom to consent exercised in the process of negotiation is what constitutes the essence of the dispute resolution dimension of the contract. See Fekadu Petros,
question that will ensue is the status of arbitration. ADR in its wider sense includes arbitration, mediation and conciliation, however, in its narrow sense it is construed to include only mediation and conciliation.  

The aforementioned dispute avoidance/settlement methods vary in the time they take, the cost they require, the degree of neutrality they demand and the involvement of third party. Litigants in any legal system prefer amicable settlement because they perceive the major drawbacks of court litigation.

Unlike ordinary court proceedings and arbitration, ADR is not a judicial process and does not culminate in a final and enforceable decision, but yields to a contractual settlement between the parties, or at least a recommendation for settlement. Some peculiarities of ADR make it favorable to lawyers and business people: It is more flexible, practical, and business oriented.

ADR is based on cooperative spirit. It seeks to get a win-win situation; therefore, it offers a non-binding decision, has advisory function, and recommends than rendering final decision. When contrasted to court procedure and arbitration, only key evidences that help the mediator to reach a just decision must be filed. The discovery element in court litigation obliges the parties to present all of their evidences.

Also, unlike the traditional dispute settlement method, it has both joint and caucus sessions. ADR also tends to be cheaper than arbitration or court litigation. Mediation and conciliation save time- it takes much less than arbitration and court proceeding.

Litigation increases tensions between disputants, however, ADR processes need not be stressful and produce tensions. Moreover, trials provide little opportunities for parties to vent frustration, i.e., to express their views directly to one another.


6 Ibid.

7 Caucus session is a private meeting between the mediator and one of the parties only, during which the mediator is given confidential information by the party which cannot, as such, be disclosed to the other side without its express consent.

8 Allan, *supra Note* 3, 5.

9 Ibid.
Despite being mentioned with meditation and conciliation, there is an argument that arbitration is
should not be enlisted as part of ADR. From the dimension of dispute resolution, what makes
these institutions different from each other is the particular way in which the disputing parties
participate in the process, that is, the particular way the institution offers an outcome. The
nature of arbitration stands far from mediation or conciliation. First and foremost, it aims to lead
to enforceable and binding award. It has adjudicatory function, evidence gathering, absence of
caucus sessions, and the lack of win-win paradigm.

Arbitration is intended to lead to a binding determination of a dispute, enforceable if necessary
through execution against the assets of the losing party. The award is final, not merely a
preparatory step to a serious litigation. Arbitration may entail intervention from national courts
if they feel like the tribunal has done injustice to either of the parties- such as unequal treatment
of the parties.

By contrast, mediation and conciliation does not intend to render binding decisions. Consequently, national courts will not get involved to protect procedural rights. What the
displeased party can ultimately do is reject the outcome of the proceeding or halt its involvement.

ARBITRATION: CONTEXT AND ISSUES CONSIDERED

The easy movement of capital, labor, and information has assisted the increment of inter and
intra state commerce. Business men invest huge amounts of money excepting to generate profits
and operate in the business world for years to come.

Nevertheless, such an interaction brings social, political, economical, and legal issues. Governments have established institutions to solve these multi-faceted problems arising out of
trade transactions.

The formation of business relationships is founded on an instrument called contract. Until the
execution of their obligation, the contract remains a binding instrument that is enforceable before

10 Fekadu, supra Note 4, 106.
11 The readers should be aware that there exists a non-binding arbitration. Parties may stipulate the effect
of the award in their contract during the stage of drafting a dispute settlement clause.
12 Jan Paulsson et al, The Freshfields Guide to Arbitration and ADR Clauses in International Contracts,
the law. This contract will be signed by parties who are with sane mind and who are able to give their properly informed consent.

In the mean time, there may appear different parties at each stage of execution of the contract. Each contractant party brings its own interest that demands practical application of the relevant law. It is truism that any party to a contract does not want hostility during its performance. However, sometimes conflicts become unavoidable.

This may be due to change in circumstances of each party, government regulations, unforeseen circumstances, and imminent danger. International commercial arbitration highlights the existence of many controversies in international commercial transactions. The diversity of the parties in international commercial transaction is reflected in their conflicting goals, point of views, making disputes inevitable.

In such cases, the agitated party has two options: alternative dispute resolution or Court. In broad terms, contract disputes may be resolved by: direct negotiation, one of the many forms of ADR, arbitration, or litigation before national courts. It has become common to resort to arbitration in case of hostility among the parties. In the traditional dispute resolution, courts always prefer to apply their rigid national law. They evaluate the merit of the claim against the background of their legal system. The parties are hardly involved in choosing procedural law, electing a judge.

For the sake of convenience, expediency, confidentiality, parties often resort to arbitration. The arbitral tribunal allows the parties to agree on each and every topic before commencing the litigation. In this way it tries to offset the freedom the parties enjoy with rule of law. It also makes sure that neither the claimant nor the respondent has unfair advantage over the proceeding.

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15Ibid.
16Jan Paulsson et al., supra Note 12, 1.
17This short essay focuses only on commercial arbitration. The writer has decided to work on commercial arbitration because of availability of case law, literatures. Nonetheless, the reader has to be aware that Maritime and Investment Arbitration constitute part of arbitration, each with its own governing law, procedure and body. For example, ICSID, a World Bank Convention on the Settlement of Investment Disputes between States and private investors, has its own method of establishing jurisdiction, set up a competent tribunal. It is also a widely used convention for settling disputes.
So many reasons can be enumerated as to why arbitration is preferred as the best way to settle and avoid disputes. These rationales converge to create a coherent justification for the validity of arbitration and its existence:

1. Major multi lateral treaties make arbitral awards rendered in one country enforceable in another;
2. Established institutions exist to administer arbitration in an expeditious, economical and neutral fashion;
3. Official rules of procedure have been developed for the conduct of arbitral proceedings that parties can adopt or will be applicable through simple designation by the parties of an administering institution.  

JUDICIAL LITIGATION AND ARBITRATION COMPARED

Prior to discussing the differences, one must keep in mind that arbitration and court litigation are inseparable. Clearly, the decision to externalize some competences to make decisions which will be enforced by the operation of state power must be accompanied by putting some controls in place to address the ever present problem of moral hazard.

Thus the relationship between private commercial arbitration and national courts tasked with the responsibility of enforcement must seek, in the most general terms, to accommodate two sometimes-competing interests: fairness and finality. Tribunals need courts to execute an award, order compliance if one party violates the agreement.

However, due to their nature of dispute resolution, judicial litigation and arbitral decision making hold their own distinct feature. By arbitral decision making we mean the set of conscious and

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18 Richard, *Supra Note* 13, 325.
20 *Id.*, 18.
unconscious ideas, rules, and patterns of behavior and social conditions that structure the arbitral mission of deciding business dispute.\textsuperscript{22}

To begin with, judges are often appointed by a political organ. The parties in a particular case have no role in electing a judge. In international contracts, choosing national court for resolving disputes may be unwise, because, most often, the judges have no role other than serving their own national interest.

The judge is deeply acquainted with his own national legal system. In many occasions, he is unwilling look into a foreign law that seems to override the national substantive and procedural laws. Furthermore, evidences have to be translated into the working language of the judge. This might be an expensive venture in cases where thousands of sheets of paper are involved. The other disadvantage of the language barrier is the parties may not understand what is being said-or may not make themselves understood.

Arbitration is a quasi-judicial dispute settlement method. Arbitration works on a less formal procedure when compared to judicial litigation. Arbitrators are chosen by the parties- the two arbitrators choose the chairman of the tribunal. However, if they fail to reach on a consensus, the arbitral institution will be in charge of selecting a chair person. Furthermore, arbitration offers a chance for the parties to challenge an arbitrator based on legitimate grounds, like previous business, family relationship with the other party.

There is high degree of confidentiality in arbitration. Parties to a dispute usually enter into separate agreement about confidentiality. During the course of the proceeding, the parties may exchange sensitive business information, like customer list, sales data, which, if disclosed to third parties, may have a dire consequence. The concept of confidentiality flows from the private character of arbitration and from the role of party autonomy in arbitration.\textsuperscript{23}

The proceeding of arbitration is neutral. The institution, law and procedures can be chosen not to have national character, which is pertinent to the parties. In the interest of the parties, the expert arbitrators can be chosen in order to resolve the case properly. Arbitration avoids in unfriendly


foreign court.\textsuperscript{24} Further, it provides for flexibility of procedure. This can result in \textit{compromissory} clause itself, from the procedures prescribed by arbitral institutions, and from the decisions given by the arbitrators make within their ample scope of authority.\textsuperscript{25}

Nonetheless, judicial dispute settlement presupposes public trial- it is open for public scrutiny. In fact, it is among the fundamental human rights enshrined in many constitutions. Except in cases where the court finds privacy and confidentiality prevailing over public trial, like family matters, all cases are open for any interested person.

The appeal process of national court and international arbitration is also distinct. A person dissatisfied by a judgment has to go through the ordinary hierarchy of courts. However, appeal does not exist in international arbitration. An option available to an award debtor is to set aside an award at the stage of enforcement. Arbitration awards are final and are not binding on third parties, who have not participated in the proceeding.

International arbitrators do not necessarily apply the law chosen by the parties. Neither will they apply the law of the seat of the tribunal. There can be instances where mandatory laws of a foreign country demand application. In judicial litigation, the judge does not have an option but to apply the law specified in the legislation. Nor is he authorized to consider conflict of law rule to determine the application of foreign law.

Internationally, the enforcement of an award is much simpler than court decisions. The refusal to enforce an award is based on the New York Convention of 1958. The exceptions for refusing an execution of an award are unequivocally enumerated. This means that an arbitral award can be enforced in 120 countries that are signatory parties to the Convention.

Arbitrators lack full power of compulsion. In certain cases, it may be necessary for the parties to seek the involvement of national courts. An arbitration tribunal has no power to join third parties against their will. Both arbitration and adjudication allow the parties to present their proof and argument. The arbitrator and the judge must pay attention to the parties’ cases, which may form part of due process hearing-fair hearing.

\textsuperscript{24} Richard, \textit{supra} Note 13, 324.
\textsuperscript{25} \textit{Ibid.}
Arbitration and court litigation have to be rational- render a decision that is well explained. The judge and the arbitrator are required to be rational in the outcome of the case. The degree of the rationality is measured by the evidences, arguments considered during litigation. Rendering rationalized award or decision is the main ingredient of rule of law.

Similarly, the judge and the arbiter are expected to be responsive. Responsive in the sense that the person entrusted in deciding the matter before him has to be cautious about the relation between the award/decision and the case. Decisions have to be related to the evidences and arguments. If there is huge digression from the facts, then all of the parties’ argument has, unfortunately, become irrelevant.

In *Salini Costruttori S.p.A v. The Federal Democratic Republic of Ethiopia Addis Ababa Water and Sewage Authority*, the Ethiopian court tried gave anti-arbitration injunction to the international arbitral panel that seated in Paris. There is a growing tendency to avoid premature and unnecessary involvement of national courts in arbitration proceedings. This motive comes from the intention to ensure the independence of tribunal, to protect it from avoidable delays. International arbitral tribunals normally expect to have jurisdiction on interim measures, to have say on their competence-competence, limited judicial control.

**DOMESTIC AND INTERNATIONAL ARBITRATION CONTRASTED**

Both international and domestic arbitration grant discretion to the litigating parties. The establishment of an arbitral tribunal is based on the parties’ consent, which is found in the contract. Based on the nature of the transaction and the parties involved, arbitration can be categorized under domestic or international. In international arbitration there are lesser

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27 The Ethiopian Supreme Court (Civil Appeal File 06298/1993) tried to give anti-arbitration injunction to the international arbitral panel seated in Paris, with the agreement of both parties, because the Ethiopian party claimed to the Supreme Court that it would not get justice from the appointed arbitrators in Paris. Consequently, the Court said that the tribunal needs to cease entertaining the case until the appointment of arbitrators is verified. But the international tribunal retained its position of independence and the duty owed to the parties and to render enforceable award-para. 121 *et seq.*
restrictions when contrasted to domestic arbitration. For example, the parties are free to choose their own *lex arbitri*.

They can change the seat of the arbitral tribunal as they please, in order to escape scrutiny from law of the forum; there are few laws that override the litigation process, like *jus cogens*, UN Security Council sanctions; the arbitrators are not answerable to any state, but only to the queries of the parties- this is why the application of transnational public policies28 and the *res judicata*29 have not been decided yet.

Any arbitration of mandatory national law implicates domestic, international, or transnational public policy30. In a purely domestic arbitration, a tribunal needs to recognize domestic policy. The standard of review for refusing enforcement is either an arbitral agreement or an award is whether enforcement would violate local standards of morality and justice.31

International public policy allows a forum to choose not to enforce a foreign law when it would offend the most basic principles of the forum.32 The French Civil Procedure Code recognizes the

28Transnational public policies include prohibition against slave trade, drug trafficking, human right violations, and bribery. However, bribery remains controversial. For example, in a landmark ICC case law ICC 1110 of 1963, *Argentine Engineer v. British Company*, the single arbitrator decided that since the agreement between the parties involves corruption, the tribunal is not competent to entertain the case based on some transnational public policies that all civilized nations should commit themselves. On the contrary, recent case law development suggests that bribery has become arbitrable. The arbitrability of disputes involving bribery began to gain acceptance after Swiss Federal Tribunal’s decision in *National Power Corp. v. Westinghouse*, BGE 119 II 380. This prevailing view relies upon the doctrine of separability and competence-competence. The doctrine of separability is based on the assumption that arbitration agreement is not rendered void if the main contract is tainted by allegation of corruption. By the same token, the principle of competence-competence allows the arbitral tribunal to decide its own competence than awaiting a decision from judicial body.

29The application of *res judicata* is still unresolved. It is among the things that are decided on case-by-case basis. For further discussion see Mark Beeley and Hakeem Seriki, “Res Judicata: Recent developments in arbitration,” *Int. A.L.R.* 8, 4 (2005), 111-116.

30Public Policy can also be regional. Regional policies by the European Union are the best example. All areas of competence of the EU: management of custom union, economic and monetary policy, competition laws, international trade policy, common fisheries policy, and concluding some international agreements. see Gui J Conde e Silva, “Transnational Public Policy” (PhD diss., Queen Mary College, University of London, 2007).


role of international public policy as an enforcement and recognition ground and as a ground to challenge an award.\textsuperscript{33}

The international nature of the transaction and the place of arbitration are the factors taken into account to determine whether or not arbitration is domestic. Of course, some characters of domestic arbitration remain the same with international arbitration: the parties choose their own arbitrators, they can constitute any place as the seat of the tribunal. Nevertheless, mandatory laws of law of the forum overrule the litigation process. Whenever a party feels like the mandatory law of the seat of the tribunal is trespassed, it can refer the case to court and demand an injunction. It is often likely that courts will issue such an order. Both kinds of arbitrations can be either institutional or \textit{ad-hoc}.

Institutional arbitration is where the parties have chosen an institution to administer their arbitration proceeding. The well-organized rules of the institution will be gap filling provisions; the parties can choose from the arbitrators the institution has to offer. \textit{Ad-hoc} arbitration on the other hand is administered by the parties themselves. They constitute their own tribunal, choose their own procedural law. Discussing the advantages or disadvantages of institutional and \textit{ad-hoc} arbitration is out of the scope of this essay.

Domestic arbitration’s award is not executed in a foreign jurisdiction. In matters of award execution international arbitration differs from its domestic counterpart. In renowned case law\textsuperscript{34} the US Supreme Court gave an order to a tribunal sitting in Japan. It held that claims arising out of US Anti-trust laws are arbitrable\textsuperscript{35}.

In another case law\textsuperscript{36} the U.S Supreme Court reaffirmed that Federal Arbitration Act prevails over the domestic US Securities law.\textsuperscript{37} On the contrary, domestic arbitrators owe prior allegiance

\begin{thebibliography}{9}
\bibitem{33} Art 1498/1 and Art 1502/5/ of French Civil Procedure Code.
\bibitem{34} Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S 614 (1985).
\bibitem{35} Id., 624-628 “Respondent’s antitrust claims are arbitrable pursuant to the Arbitration Act. Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes, all require enforcement of arbitration clause in question even assuming that a contrary result would be forthcoming in a domestic context.”
\bibitem{37} Id., 519 “The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise, but would, as well, reflect a parochial concept that all disputes must be resolved under our laws and in our courts... We cannot have trade and commerce in
\end{thebibliography}
Domestic arbitration is not preceded by such kinds of conventions. Once an award is given, the award debtor can go to court to demand execution. The competent judge will not verify the objective arbitrability against the background of its own public policy. In case of refusal of execution leaves no option for the award-creditor.

In international arbitration, once the tribunal is constituted, it will not have lex fori. The parties except the tribunal the substantive and procedural laws chosen by them. In the absence of such an agreement, the determination and application of any law will depend on the relevant conflict of law rules. International arbitrators can adopt any conflict of law rule and abandon all competing laws.

Domestic arbitration lacks such kind of feature: The lex fori is already decided; the tribunal is not expected to study conflict of law rules; arbitrators do not have to deal with mandatory laws of foreign state.

**ARBITRATION IN ETHIOPIA: LAW AND PRACTICE**

Dispute settlement modalities, other than judicial litigation, were known even before the era of codification. They were continuously practiced as a traditional form of settling grievances. It had world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."

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38 Marc, *supra* Note 5, 122. This scholar believes that it still remains unsatisfactory the fact that the exequatur judge examines questions of objective arbitrability of the foreign arbitral award with public policy according to the benchmark of his own national law.

39 *Id.*, 121.
different names, like *shimgelina*, *gilgil*. Irrespective of the nomenclature, each of these institutions sought to reach at amicable solution between the disputants.

The growing interdependence of intra and interstate trade in Ethiopia, the need to modernize the legal system demanded an institutionalized dispute settlement method. People were already aware that the judiciary is entrusted in resolving disputes, but they did not want to bear the costs, wait for a long time, frustrate in the process of execution. The expedition to modernity, the necessity to save time and money, the intention to preserve future business relationships brought arbitration into the picture.

The enactment of the Civil Code and Civil Procedure Code /CPC/ of Ethiopia had a significant impact in the introduction and development of modern arbitration. The Civil Code, which was enacted in 1960 govern the substantive aspect of arbitration; whereas, the Civil Procedure Code of 1965 contained provisions regarding procedural part of the process.

In the case of Ethiopia, arbitration proceedings resemble to regular court litigation. In a case between *Mr. Gebru Kore v. Mr. Amadeyiu Federeche* the court articulated that according to Art 3345 of the Civil Code and 317/1/ of CPC, the procedure to be followed by arbitration tribunals is the same as ordinary court litigation. It went on to add: “but this does not mean that arbitration /ye gilgil dagnenet/ needs to follow rigid court procedure or nonflexible litigation style.

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40 Note that much of the discussion will be confined to domestic commercial arbitration. Though there are many international arbitration cases that Ethiopia is a party, many of them remain inaccessible or under-reported.

41 Art 3325-3346 govern the overall proceeding of the arbitration: appointment, removal, disqualification of arbitrators, nature of arbitration clause. On the other hand, Art 350-357 lay down principles of appeal, setting aside an award. It is useful to bear in mind that Art 315-319 also refer to arbitration.

42 *Mr. Gebru Kore v. Mr. Amadeyiu Federeche*, Federal Supreme Court Cassation File 52942/2003. This case was about deciding the costs of arbitration according to Art 317/5/. The respondent declared that the costs of arbitration were high; therefore, he wanted another arbitration panel to be constituted to entertain his case- he appealed to the Federal High Court. However, the claimant defended that the request of the respondent inherently negates the principle of arbitration. Also, the High Court articulated that the arbitrator can use any kind of procedure he considers fit and is not bound by strict and unyielding procedures like formal trial. The Federal Supreme Court Cassation Bench upheld the High Court’s decision.
Ethiopia’s arbitration law seems to be designed for domestic arbitration.\(^{43}\) This can be attributed to the fact that Ethiopia has not yet ratified New York Convention and International Convention for Settlement of Investment Disputes, commonly known as Washington Convention; the arbitration law is not drafted in accordance with UNICTRAL Model Law. The pertinent provisions of the CPC do not make a difference, except in cases of execution of foreign arbitral awards, between domestic and international arbitration.\(^{44}\)

The Civil Code of Ethiopia defines arbitration as a contract whereby the parties to a dispute entrust its solution to a third party, the arbitrator who undertakes, to settle the dispute in accordance with the law.\(^{45}\) These provisions will come into effect if arbitration is required by law; the persons have entered into a written agreement to submit their disputes.\(^{46}\)

In the sphere of Ethiopian arbitration law, special form can be prescribed for arbitration. Art 3326/2/ of the Civil Code urges the disputants to take the form prescribed by law whenever they sign an agreement.\(^{47}\) For example, if a party signs an arbitral submission agreement with administrative agents, the agreement has to be in writing and registered in a public notary.\(^{48}\)

Art 7/4/ of UNICTRAL Model Law says that electronic communication is allowed if it is readable and accessible for subsequent references. Art 7/5/ of the Model Law says that an arbitration agreement can be contained in writing in a statement of claim and defense “in which the existence of an agreement is alleged by one party and not denied by the other.”

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\(^{44}\) *Id.*, 302. Haliegabriel posits that there needs to be a distinction between foreign and international arbitral award. For the purpose of exertion, international arbitral award can be considered as domestic, if the seat of the tribunal was the jurisdiction where enforcement is sought. The logical question that will arise is, if a state is not party to New York Convention, what grounds will it use to enforce judgments? Would those grounds be a closed list of parameters to check the award against the public policy principles of that nation?

\(^{45}\) Art 3325/1/, Civil Code of Ethiopia. In the same manner, Art 7/1/ of UNICTRAL Model Law defines arbitration agreement as an agreement to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not.

\(^{46}\) Art 315/1/, CPC of Ethiopia. Art 49 of Proclamation No. 47/1998 on Cooperative Societies compels arbitration to be the dispute settlement mechanism in case the enumerated conflicts arise.

\(^{47}\) Art 3326/2/ says that the arbitral submission shall be drawn up in the form required by law for disposing without consideration of the right to which it relates.

\(^{48}\) Art 1724 together with Art 3326/2/.
One can be prompted to ask: does this mean that arbitration agreements that are not registered in a public notary that are found in letter exchanges, fax, which are valid under the New York Convention, UNICTRAL Model Law, void? If so, why is the point of putting such a huge barrier?

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

The doctrine of competence-competence allows the arbitral tribunal to decide on its own competence. Since speedy trial became the necessity of business, acknowledging the principle of competence-competence has become fundamental. The power of judicial body to determine its own competence is an accepted principle and a common feature of instruments governing international and judicial procedures.\(^\text{49}\) By the same token, arbitration tribunals are allowed to decide on their own competence.\(^\text{50}\)

On the contrary, what the Civil Code is silent is about the principle of separability. Generally, it is presumed that arbitration clauses are separate from the general contractual provisions. The traditional approach disallows arbitration to take place if the arbitral panel finds out that it has to decline jurisdiction.\(^\text{51}\)

The modern approach speaks differently: the immediate effect of the separation would be that the arbitration agreement would not be affected by the termination of the contract. The reason behind recognizing such possibility is that the parties agree on the institution of adjudication


\(^{51}\)ICC Case 1110 is the best and most cited example. The single arbitrator declined to entertain the case, because he claimed that the whole contract was tainted by briery, which he deemed contrary to all civilized nations and generally accepted *bonos mores*. 

process, where third party arbitrators will be conferred with jurisdictional power to evaluate all aspects of the contract’s existence including its validity.\textsuperscript{52}

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

Arbitrability of administrative contracts is another unresolved issue in Ethiopian context. Inarbitrability of administrative contracts serves as exception to the rule.\textsuperscript{53} According to Art 3132 of the Civil Code, administrative contracts are those that serve the general interest of the public or are clearly qualified as such by the contracting parties or could only have been inspired by urgent considerations of general interest extraneous to relations between private individuals.

A dispute is arbitrable if it concerns a subject matter capable of settlement by arbitration.\textsuperscript{54} Such kind of arbitrability precludes subjective arbitrability, the capacity of the parties to submit their dispute to a panel; but objective arbitrability that implies the capacity of the subject matter to be settled by arbitration (the case of arbitrability of administrative contracts is objective arbitrability).

The issue of arbitrability in international commercial arbitration is governed by both national law and transnational public policies. Under the Swiss Private International Law, for example, a dispute would be capable of being resolved by arbitration if involves property.\textsuperscript{55} Note that the role of national law in determining the jurisdiction of international arbitral tribunals remains significant. Yet, in international commercial arbitration, agreements to infringe certain basic rights, bribe public officials to secure investment projects remain inarbitrable.

\textsuperscript{52}Abdulhay, supra Note 22, 45.
\textsuperscript{53}Art 315/2/ of CPC. The rule being the parties can submit any matter to arbitration.
\textsuperscript{55}Art 177/1/, Swiss Private International Law read as: “any dispute involving property can be the subject matter of arbitration.”
Though arbitrability is often considered to be a requirement for the validity of the arbitration agreement, it is primarily a question of jurisdiction.\textsuperscript{56} The arbitration panel will lose competence if the national law says the dispute is not arbitrable, but the parties did otherwise. Consequently, any award given will not be enforced by national courts.

The case of arbitrability of administrative contracts. Art. 315/4 of the Civil Code. On the contrary, the provisions of the Civil Code are silent regarding the arbitrability of administrative contracts, although reference to CPC is made that needs to be followed by arbitration.\textsuperscript{57} It is vital to keep in mind that the Civil Code does not unequivocally prohibit the arbitrability of administrative contracts. Hence, we ought to relay on case law to determine the arbitrability of administrative contracts.

In a case law from Cassation Bench\textsuperscript{58}, the Supreme Court set a precedent in the matter of arbitrability of administrative contracts. The Cassation Bench ignored the application of Art 315/2 of CPC, which exonerated government agencies from arbitration, and interpreted the silence of the Civil Code as a positive sign of arbitrability. The failure of the court to deal with Art 315/2 and the final decision given as to the arbitrability of the subject matter depicted the enforceability of arbitration agreements over administrative contracts.\textsuperscript{59}

The other point worth mentioning is appointment arbitrators by the parties. The parties have the discretion to appoint an arbitrator in accordance with the arbitral submission. Yet, if they fail to


\textsuperscript{57}Art 3345/1, Civil Code of Ethiopia.

\textsuperscript{58}ZemZem Plc v. Illhabor Zone Education Department, Cassation File 16896/1998. The parties had an agreement to build primary schools. In this case the appellant filed a law suit claiming the payment of Br. 184,559.26. The respondent argued that the Federal High Court had already rejected the appellant’s claim. The cassation bench said: “art 24, which is the dispute settlement clause of the contract, needs further interpretation.” The court framed the issue: whether or not the parties can resort to arbitration in case one of parties is a government agent. The court held that as there is a rule that parties can sign an agreement on anything they please, and since this agreement enforced as if it was law, the decision of the High Court must be reversed. See Tecle Hagos Bahta, “Adjudication and Arbitrability of Government Construction Disputes,” Mizan Law Rev. 3 No.1 (2009): 1-32.

\textsuperscript{59}Hailegabriel, supra note 43, 316.
do so, within the time limit given\textsuperscript{60}, courts will be in charge of appointing members of the arbitral tribunal.

The cumulative reading of Art 3332/3/ with 3334/1/ and 3343 will lead to the conclusion that courts are empowered to keep an eye on arbitration proceedings. Art 316/1/ of the CPC says that such kind of appointment can be made by any court, i.e. any court is competent to appoint arbitrator when seized. One author argues that it neither imprecise nor clear if the power of courts is administrative matter.\textsuperscript{61}

The author claims that when courts are asked to appoint arbitrators, in practice, they check the underlying arbitration agreement.\textsuperscript{62} In a Cassation court decision,\textsuperscript{63} the court decided was silent regarding the appointment of arbitrators, but held that the appellant is not allowed to submit its case to arbitration and reversed the decision of lower courts.

The other issue worth considering is disqualification of arbitrators. The grounds for disqualification as stated in Art 3340 are, \textit{inter alia}, age, criminal conviction, impartiality and independence, illness and unsound mind. Art 13/3/ of the Addis Ababa Chamber of Commerce and Sectoral Association Arbitration Institute Arbitration Rules /AACCSA/, among the legally mandated arbitration institutes in Ethiopia, orders the arbitrator to notify the parties if he became aware any kind of circumstance that may disqualify him.

Art 15/2/ of AACCSA rules allow the arbitrator to be replaced upon his death, acceptance by the institute of Arbitrator’s resignation, upon acceptance of by the institute of a challenge or upon the request of all parties. Art 12 of UNICTRAL Model Law puts justifiable doubt as prerequisite before asking for disqualification.\textsuperscript{64}

\textsuperscript{60} Art 3334/1/ prescribes 30 days as the time limit for the party to appoint arbitrator, otherwise the court will appoint such arbitrator.

\textsuperscript{61} Hailegabriel, \textit{supra note 43}, 318.

\textsuperscript{62} \textit{Ibid}.

\textsuperscript{63} \textit{Ethiopian Mineral Development Share Company v. JTT Trading}, Cassation File No. 30727/2000. The cassation bench said that the arbitration agreement is invalid and unenforceable, because the manager of the share company is not allowed by law and by collective agreement to sign an arbitration agreement. The lower courts were originally asked to appoint arbitrators. Likewise, the Cassation Bench was seized to appoint arbitrators, but it went to look into the validity of the arbitration agreement.

\textsuperscript{64} Art 12, UNICTRAL Model Law on International Commercial Arbitration.
In a case between *Harar Trading Co. v. Gelateli Hankina & Co*\(^{65}\) the court tried to explain the elements that constitute independence. According to Art 3340/2/, if a party wants an arbitrator to be removed/replaced, then he has to furnish persuasive evidence to the tribunal, i.e. the appellate court said that enough and persuasive evidence was not presented as to the partiality and dependence of the arbitrator due to their previous relationship; therefore, he must stay on the proceeding.\(^{66}\)

Thus far, we have been looking into Ethiopian arbitration law before and during the arbitration proceeding. In any jurisdiction, the application of national law will not cease until the award is executed or set aside. Similarly, Ethiopian arbitration law governs arbitration, even after an award is given, by the CPC.\(^{67}\) Art 318/2/ of CPC enjoins arbitral awards to be made in the same form as judgments. The award will be signed and will be handed out to the litigating parties.

If any party is dissatisfied with the award, Ethiopian law allows for it to appeal to higher court. However, either of the parties can waive their right to appeal, if it is made with full knowledge of the circumstances.\(^{68}\) This means, the parties can grant the finality of the arbitration clause.

Finality of an arbitration clause was deemed to be the freedom of the parties to agree upon. In the case between *National Motors Corp. v. General Business Development*\(^{69}\), the court upheld the finality of the arbitration clause. Irrespective of the nature of the agreement, if such an agreement is made with full fledged consent, the parties are prohibited from appealing to a higher court. If such an agreement exists, the only choice is available to the displeased party is setting aside the award. In another decision, the Supreme Court affirmed finality clause.\(^{70}\)

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\(^{66}\) The respondent’s attorney argued that the arbitrator has to be replaced because he has sufficient reason to believe that the arbitrator will be prejudiced against him due to their previous relationship. Conversely, the arbitrator counter-argued that the claim is baseless and the attorney failed to corroborate evidence as to his partiality.

\(^{67}\) Arts 350-357 govern appeal from and setting aside of arbitral award.

\(^{68}\) Art 350/2/, Civil Code of Ethiopia.


The court said that after entering into valid arbitration finality clause, the appellant cannot ask for the judgment to be reviewed, or the grounds for setting aside the award are not fulfilled.\footnote{It would go contrary to their agreement if the court allows appeal or set aside the award, even though Art 41/4/ of their contract contained arbitration final clause. When reading the case, you can notice appeal and set aside being used interchangeably. Though these two procedures are completely different, the court preferred to use them as if they are the same. A party cannot appeal based on Art 356.}{\textsuperscript{71}}

Hailegabriel posits that this decision may take Ethiopian arbitration law to new modern arbitration legislation.\footnote{Hailegabriel, \textit{supra note} 43, 328.}{\textsuperscript{72}}

Nevertheless, the essence of this \textit{thought} was challenged and seems to be changed by fairly recent Cassation Bench decision. In the case between \textit{National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co.}\footnote{\textit{National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co.} Cassation File 42239/2003}{\textsuperscript{73}}, the Cassation Court allowed appeal despite the existence of arbitration finality clause. The court asked itself if it will be viable to review awards, even after arbitration finality clause. It answered in the affirmative. It said that this has to be evaluated against the background of 454/1997, Ethiopian Constitution that gives mandate the Cassation Bench formal interpretation of law throughout the country.\footnote{The court went on to say that the “mere fact that the parties assent to give finality of the arbitration does not necessarily imply their intention to avoid appeal. For this reason, the judgment given in Cassation File No. 21849 is reversed against the background of Proc. No. 454/1997 Art 2/4/” [Translation Mine]. The approach taken by the court clearly disregards party autonomy that permits the parties to agree on anything they please, on the condition that it is legal. Moreover, it aims to protect the superiority of national courts over arbitral tribunals, and affirms their involvement despite the parties’ agreement.}{\textsuperscript{74}}

Art 351\textit{of CPC approve of appeal}

i. If the award is inconsistent, uncertain or ambiguous;

ii. The arbitrator omitted to decide matters referred to him;

iii. If the arbitrator, failed to inform the parties of the time or place of hearing, refused to hear evidence, acquired interest in the subject matter.

An appeal from an arbitral award is only authorized on these grounds, and the award is not subject to review to the same extent as a judgment.\footnote{Robert Allen Sedler, \textit{Ethiopian Civil Procedure}, (Addis Ababa, Ethiopia: HaileSellassie I University, 1968), 390.}{\textsuperscript{75}} It is only reviewed if the decision is
patently incorrect, where he enforced an oral contract, where the law requires it to be in writing that it is subject to writing.\textsuperscript{76}

The arbitral submission must be consulted to determine what matters so referred, and if he has failed to decide one of matters referred; the award is subject to appeal.\textsuperscript{77} The practice of national courts tells differently. Courts are tempted to review arbitral awards as if they were judgments.\textsuperscript{78} After careful examination of the merit, the appeal from both parties, the court reached the conclusion that the respondent should pay Br. 493,468.35.

Art 355 of CPC contains permits any award to be set aside, if the conditions on Art 356 are fulfilled:

i. The arbitrator decided matters not referred to him, made an award pursuant to an invalid submission;

ii. The arbitrators did not act together;

iii. The arbitrator delegated part of his authority to one of the parties as co-arbitrator. The immediate effect of setting aside is nullity of the award based on Art 357/2/ of CPC.

Ethiopian arbitration law allows foreign arbitral awards to be recognized in Ethiopia. The title of Book IV Chapter 2 omits recognition, but only sticks to enforcement of foreign judgments. Though a rarity, certainly a person may only seek recognition of a judgment. It is unclear why the legislature wants to concentrate only on execution of foreign judgments.

Inspite of the fact that recognition and enforcement are often read together, they have different legal effect, both domestically and internationally. The difference between recognition and enforcement is that an award may be recognized, without being enforced; but if it is enforced, then it is necessarily recognized by the court which orders enforcement.\textsuperscript{79}

As Ethiopia is not part of the New York Convention, we have to rely solely on the law and decisions from national courts. Basically, New York Convention contained provisions for

\textsuperscript{76}Ibid.
\textsuperscript{77}Ibid.
recognizing and enforcing international awards. Due process and public policy grounds can be used as a refusal for recognizing and enforcing judgments. There are various grounds for refusing to recognize and enforce a foreign arbitral award.

ArtV/1/ of the NY Convention puts 5 conditions as a ground for refusing recognition and enforcement of arbitral awards: if the parties were incapable to submit their case to arbitration; the defendant was not given proper notice; the award deals with a different matter than the arbitral submission; the composition of the arbitral tribunal was not in accordance with the agreement of the parties; and, the award has not yet become binding on the parties. In the same way, Art V/2/ of the convention lay down arbitrability and public policy requirements as a ground for declining recognition and enforcement.

The Federal High Court is legally mandated to appraise the application of recognition and enforcement of foreign arbitral award in accordance with Art 11/2/c/ of proc. 25/1996. If the foreign arbitral award for which recognition and enforcement is sought satisfies the requirement under the law, it will have legal force and binding effect in Ethiopia, i.e. res judicata effect.80

There are 6 conditions laid down for refusal of recognition and enforcement of foreign judgments under Art 461 of CPC: a) reciprocity; b) the award was not made following a regular arbitration agreement; c) the parties did not have equal rights in appointing arbitrators; d) the arbitration tribunal was not duly constituted; e) the award relates to inarbitrable matters under Ethiopian law; f) the award is of such a nature that it cannot be enforced under Ethiopian law.

The reciprocity criterion of the law is among the first listed. Reciprocity has a retaliation effect, i.e. if Ethiopian judgments are not recognized elsewhere, why Ethiopia should recognize other country’s judgment. This parameter has a political effect. In order to show courtesy, countries recognize each other’s judgments. A US court noted that, “no nation is under unremitting obligation to enforce foreign interests that are prejudicial to those of domestic forum. Comity never obligates a national forum to ignore the rights of its own citizens or of other persons who are under the protection of its laws.”81

80 Tecle, supra note 79,108.
81 ChromalloyAeroservices, A division of Chromalloy Gas Turbine Corp. v. The Arab Republic of Egypt, 939 F. Supp. 907, para 4. This case shows the controversy surrounding the application of comity internationally, because the district court, District of Columbia, concluded that the award of the arbitral
There is also the requirement of equal treatment of the parties, which can also be the base for rejecting an international award in ArtV/1/b/ of the NY Convention. This norm obliges the international tribunal to grant fair hearing to both parties- fair hearing is further qualified by giving timely and proper summon, notifying appointment dates or availing him during the trial day. It is quintessential for the tribunal to enable both parties to participate in the arbitral proceeding. The court is required to examine that:

i. The award debtor had been properly represented in the arbitral proceeding;

ii. The right of defense is complied with that the award debtor was enabled to submit his defense and had access to the opponent’s documents;

iii. All the claims in respect of which the foreign award was passed had been properly notified to the party against whom a decision was given.82

The arbitral tribunal is said to be duly constituted if, according to Art 3332/1/, the arbitrators appointed a presiding arbitrator where their number is even. When a party wants to obtain recognition and enforcement, he must bring duly authenticated original award and the original arbitration agreement.83 Too, Art 457 of CPC tells the person petitioning for recognition and enforcement of a foreign judgment to bring a certified copy of the judgment and a certificate that confirms the finality and enforceability of the judgment.

CONCLUDING REMARKS

Eventually, states will benefit from an efficient arbitration regime. Ethiopian arbitration law seems to approve the role of courts higher than arbitral panels. Before the arbitral proceeding, during and after the trial, there is notorious involvement of state courts.

Ethiopia needs to become an arbitration friendly country. Ethiopia has to usher into the era of modern arbitration law and its application assisted by various conventions. There exists a highly panel, though it is properly set aside in Egypt, it is still valid in the US. The court further concluded that it need not grant res judicata effect to the decision of the Egyptian court of appeal in Cairo. Accordingly, it granted claimant’s question for the recognition and enforcement of the award rendered in Egypt, and dismissed the respondent’s motion to dismiss the motion.

82 Tecle, supra note 79, 117.
83 Art IV/1/, NY Convention.

Arbitration is a potential income generating regime. Friendly private international law, arbitration rules means that many international companies will look towards Ethiopia. Secondly, there will be a lot of trained professionals specializing in the field of arbitration. Arbitration can be a promising means of employment. The qualified and trained professionals will support the legal system’s development.

Friendly arbitration rule means attracting foreign investment. Investors will be assured that they property will not be confiscated, though this happens, they may have a recourse to fair arbitration, which they can enforce anywhere.

Ethiopia cannot exclude itself from globalization. The more the arbitration law becomes obsolete, the more courts intervene in a manner that discredits the independence of the award creditor, the more international parties avoid Ethiopia as a seat of arbitral tribunal. From *Salini Costruttori S.p.A v. The Federal Democratic Republic of Ethiopia Addis Ababa Water and Sewage Authority*, we can infer the trend of international arbitral panels.

Arbitration does not go counter national interest, undermine judicial sovereignty, and does not generate expenses. An arbitration friendly environment presupposes a modern arbitration act, i.e. a trustworthy court system, judicial support in taking evidence, pronouncing interim measures, granting full substantive and procedural law autonomy of the arbitral tribunal, if there is a gap in choosing a law, interpreted in the context of international criteria. The parties expect cost-effective procedures to be underway and enforceable awards to be rendered.
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