THE SETTING ASIDE OF ARBITRAL AWARDS UNDER THE ETHIOPIAN ARBITRATION LAW: LESSONS FROM COMPARATIVE STUDIES

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Abstract

The use of arbitration as a means for amicable dispute settlement under the Ethiopian legal framework has been laid down in the 1950's and 1960's massive codifications. Currently, the major sources of Ethiopian arbitration law constitute the Civil Procedure Code, the Civil Code and Federal Supreme Court's Cassation Bench decisions. Under these legal regimes, there are three ways where courts can review arbitral awards—appeal, cassation and setting aside. Unlike appeal, setting aside is a qualified and balanced approach to sustain both the interest of the disputing parties and the demand of justice. However, despite the international best practices and the demand of modern commercial dispute settlement, challenging arbitral awards through setting aside has been given less attention in Ethiopia. Particularly, the rules governing the setting aside of arbitral awards is inadequate to suit the demands of modern commercial arbitration. Thus, improving the recourse of setting aside would be very decisive to ensure so that commercial arbitration in Ethiopia flourishes in conformity with the international arbitration practices. The purpose of this study was therefore to analyze the current status of Ethiopia's legal framework for challenging arbitral awards through setting aside in light of the international best experiences. Accordingly, a comparative study of key provisions of the English Arbitration Act 1996, the Model Law and the Ethiopian arbitration legal regime was examined with a view to reveal the optimal legislative framework for arbitration which serves as a method of settling disputes. This study sought to indicate how international best experiences should be adopted in Ethiopia to minimize the excessive approach of court intervention for challenging arbitral awards. In view of the international best practices, the study concludes that article 356 of the Ethiopian Civil Code should be amended to include the following additional grounds of setting aside of arbitral awards: (a) incapacity of one of the parties, (b) the inability of one of the parties to present his/her case due to arbitrator bias, (c) procedural defect that results from failure to hold on to the parties' arbitration agreement, (d) non-arbitrability of the matter, and (e) violation of public policy.

Keywords: Arbitration, Award, Civil Procedure Code, England, Ethiopia, Setting aside, UNCITRAL Model Law

INTRODUCTION

In the context of the global situation, alternative dispute resolution mechanisms are becoming popular for settlement of commercial disputes. Arbitration as one of Alternative Dispute Resolution (ADR) mechanisms is also getting much attention in this regard. The business community is looking towards arbitration even more favorably than litigation.[1] There are a number of reasons that parties elect to have their international disputes resolved through arbitration. These include the desire to avoid uncertainties and local practices associated with litigation in national courts, the desire to obtain a quicker, more efficient decision,[2] the relative enforceability of arbitration agreements and arbitral awards, the commercial expertise of arbitrators, the parties' freedom to select and design the arbitral procedures, confidentiality, and other benefits.[3] Looking at the increasing importance of arbitration, the world is shifting towards harmonization and modernization of domestic arbitration rules.

The harmonization policy, as implemented by United Nations Commission on International Trade Law (UNCITRAL), refers to the international unification of law to reduce or eliminate the discrepancies between national legal systems by inducing them to adopt common principles of law. UNCITRAL sought to eliminate barriers to International Commercial Arbitration (ICA) created by differing levels of state control and varying arbitration laws by drafting a Model Law and group of uniform rules on ICA.[4] Accordingly, one area of unification is on rules that govern court intervention over the arbitral proceedings such as rules for challenging arbitral awards.

Most of the modern arbitration laws, including those inspired by the Model Law, contain provisions on setting aside awards that are similar to those of the Model Law in which a dissatisfied party may challenge the award but only on limited grounds that preclude a review of

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[1] United Nations Office on Drugs and Crime, *Training Manual on Alternative Dispute Resolution and Restorative Justice*, 21 (23 October 2007).

[2] See Queen Mary University of London School of International Arbitration, *International Arbitration Study: Corporate Attitudes and Practices,* (Price Waterhouse Coopers, 2008). Available at: www.pwc.co.uk/eng/publications/International_arbitration.html (Last visited December 20, 2013).

[3] *See* JAN PAULSSON, INTERNATIONAL COMMERCIAL ARBITRATION, BERNSTEIN'S HANDBOOK OF ARBITRATION AND DISPUTE RESOLUTION PRACTICE, 335 (4th ed., Cambridge University Press, Cambridge, 2003).

[4] Harmonization in the context of UNCITRAL can be defined as making regulatory requirements or government policies of different jurisdictions identical (or, at least, similar). *See* KONRAD ZWEIGERT, *et al*., INTRODUCTION TO COMPARATIVE LAW, 23-24 (3rd ed., Oxford University Press, Oxford 1998).

the merits.[5] Under Article 34 of the Model Law, an arbitral award can only be set aside in limited circumstances. These include, among others, the incapacity of one of the parties to enter into the arbitration agreement (Article 34(2) a, i), the lack of substantive jurisdiction on the part of the arbitrators (Article 34(2) a, iii), and the infringement of the public policy of the state where the award is made (Article 34(2) b, ii).[6]

There are also countries which follow their own system, i.e. being out of the Model Law jurisdiction. England can be cited as an example in this regard. As per section 69 of the 1996 Arbitration Act of England, parties to arbitration are permitted to ask for judicial review on the legal merits of the case through appeal.[7] However, such avenue that extended up to reviewing the merit of the cases is criticized by different scholars in that it goes against the parties' wish to avoid litigation.[8]

In Ethiopia, arbitration is a widely used dispute settlement mechanism compared to the other forms of Alternative Dispute Resolution (ADR) methods.[9] The Ethiopian legal framework for modern arbitration has been laid down by the mid-20th century codifications. Before that, arbitration was known only within the context of traditional dispute resolution.[10] The major sources of Ethiopian arbitration law are generally found in the Civil Procedure Code (CPC), the Civil Code, and Federal Supreme Court's Cassation Bench decisions.[11] Hence, compared to other forms of ADR, the legal regimes governing arbitration in the Civil Code and CPC of Ethiopia are relatively better. However, "the pertinent provisions of the CPC do not make a difference, except

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5 *See* G. HERRMANN, THE ROLE OF THE COURTS UNDER THE UNCITRAL MODEL LAW SCRIPT., in J.D. LEW, CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 69 (ed., Centre for Commercial Law Studies, Queen Mary College, 1986).

6 The court at the seat of the arbitration is the proper court under the UNITED NATIONS MODEL LAW ON INTERNATIONAL ARBITRATION 1985, with amendments as adopted in 2006, 21 June 1985, UN Document A/20/17 ("THE MODEL LAW"), Article 34, [Hereinafter THE MODEL LAW]. This is because the court at the *situs* is considered to have supervisory jurisdiction over the arbitral process to ensure that it was conducted in a fair and non-corrupt manner.

7 *UK Departmental Advisory Committee on the Arbitration Bill 1996 (DAC),* Department of Trade and Industry, Annual Rep. No. 13, at 285 (1996).

8 *See* MARGARET RUTHERFORD, *et al.*, ARBITRATION ACT 1996: A PRACTICAL GUIDE 5 (Sweet and Maxwell, London, 1996).

9 Arbitration is being used in the Addis Ababa Chamber of Commerce and Sectoral Associations, in the former Ethiopian Arbitration and Conciliation Centre and in the Ethiopian Commodity Exchange (ECX) more than any other modern ADR mechanism.

10 Hailegabriel Gedecho, *The Role of Ethiopian Courts in Commercial Arbitration*, 4 MIZAN LAW REVIEW, 298, 301 (2010), [Hereinafter Hailegabriel].

11 *See* CIVIL CODE OF THE EMPIRE OF ETHIOPIA, PROC. NO.165/1960, GAZETTE EXTRAORDINARY, 19th Year, No. 2, Addis Ababa, 5th May 1960, Art. 3325-3346 [Hereinafter, CIVIL CODE]; *See* CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA, PROC. NO. 52/1965, NEGARIT GAZETTA EXTRA ORDINARY ISSUE, Addis Ababa (1995), Arts. 315-319 and 350-357 [Hereinafter the CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA]. These codes reveal that courts in Ethiopia control arbitration by such avenues as appeal, setting aside and refusal.

in cases of execution of foreign arbitral awards, between domestic and international arbitration".[12] Besides, unlike the case in some traditional civil law countries, there is no law geared to address the special nature of commercial disputes.[13] The major reason for lack of adequate legal regime governing the setting aside of arbitral awards is attributable to the fact that the arbitration legal regime is not reformed yet since its enactment in the mid-20th Century. Most countries that have comparable legal systems with that of Ethiopia were forced to adopt several provisions as part of legal reform pertinent to international arbitration to dispel uncertainties resulted from gaps in the law.[14] It is imperative that harmonization and modernization of the Ethiopian arbitration legal regime should not be underestimated, given the current global trends. Thus, the need to adopt rules that can address the gaps in the Ethiopian arbitration legal framework in general and the rules for challenging arbitral awards through setting aside in particular is desirable in view of the increasing international trade.

The purpose of the study was to analyze the current status of Ethiopia's law for challenging arbitral awards through setting aside weighing against the international best experiences. Accordingly, a comparative study of key provisions of the English Arbitration Act 1996, the Model Law and the Ethiopian arbitration legal regime was examined with a view to reveal the optimal legislative framework for challenging arbitral awards through the procedure of setting aside as a method of settling disputes. Thus, this work is limited to the critical review of the current status of Ethiopia's legal frameworks for challenging arbitral awards through setting aside in a bid to suggest the need for adopting harmonized and modernized arbitration principles and practices.

The first section of this article, provides conceptual underpinnings regarding the setting aside of arbitral awards compared to other forms of challenging awards. Particularly, this section highlights the meaning of arbitral awards and analyzes the method of challenging arbitral awards. The second section, analyzes the Ethiopian legal framework for challenging arbitral awards through setting aside in comparison with the Model Law and English Arbitration Act. Section three concludes the major points of the study and ends up with providing relevant recommendations.

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[12] Michael Teshome, *Law and Practice of Arbitration in Ethiopia: A Brief Overview*. http://www.abyssinialaw.com/blog-posts/item/1494-arbitration-in-ethiopia-law-and-practice (Last visited 01 March 2013).

[13] Hailegabriel, *Supra* note 10, at 303.

[14] For instance, Japan's new arbitration law which was entered into force on March 1, 2004, adopted several provisions regarding international commercial arbitration to eliminate uncertainty under the old law. For more information see Tewodros Meheret, *Reconnaissance of the Ethiopian Law of Arbitration: Is Reform Due?,* 5 ETHIOPIAN BUSINESS LAW SERIES, 218 (2012).

1. THE CONCEPTION OF SETTING ARBITRAL AWARDS: A GENERAL OVERVIEW

1.1. The Meaning of Arbitral Award

The widely accepted meaning of award is that it is the final decision by the arbitrators, dispositive of the issues in the case.[15] Tribunals may, however, issue partial awards or interim awards, which also may be final and binding on the parties.[16] In addition, arbitrators may issue certain directions and orders during the course of proceedings, which may be reviewable by the tribunal, and which do not constitute awards.[17] Once the parties have made their final submissions, be it at the final hearing, in post hearing briefs, or in response to the tribunal's subsequent written questions, the arbitration enters its ultimate chapter: the award phase. This comprises two or three separate stages, at least where the tribunal consists of three arbitrators. These stages are the tribunal's deliberations, the writing of the award itself, and post-award procedures within the arbitration, such as the correction or interpretation of the award.[18]

As explained above, it is generally understood that an award is a decision that finally disposes of the substantive disputed issues that it addresses. It should have the legal effect of *res judicata* as regards those issues.[19] Awards are distinct from orders issued by the tribunal, in that orders are decisions that do not finally resolve substantive issues disputed by the parties, whereas awards do–irrespective of whether the decision is granted as an order or award.[20] The effect of the award (after any correction or interpretation has been performed or the deadline for such measures has expired) is that the arbitration is at an end, and the tribunal's service is complete. In addition, the dispute between the parties that is submitted to the tribunal is finally resolved, assuming there is no action to set the award aside. The award therefore has *res judicata* effect between the disputing parties with respect to that dispute. This means that the same dispute between the same parties cannot be submitted to another court or tribunal for resolution.[21] Finally, and perhaps most importantly, the award may give the victorious party a title to enforce against its opponent, allowing it to secure effective relief.

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[15] Banco de Segurosdel Estado v. Mut. Marine Office, Inc., [2003], London High Court, UK, Case No. 234, Para. 123. (Interim order requiring posting of pre-hearing security properly confirmed by court).
[16] International Court of Arbitration (ICC), *Final Report on Interim and Partial Awards*, 26 ICC Bulletin, 21 (October 4, 1990).
[17] *Id*.
[18] *See* INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION RULES (2013), Article 29.
[19] Bernard Hanotiau, *The Res Judicata Effect of Arbitral Awards,* 30 ICC Bulletin, 47 (May 2003), [Hereinafter Bernard].
[20] *Id*.
[21] Bernard, *Supra* note 19.

The arbitrators' duty in rendering their award is to decide the dispute in accordance with the applicable rules of law and procedure, and in view of the evidences before them, but also in the words of Article 35 of the ICC Rules to "make every effort to make sure that the Award is enforceable at law".[22] Therefore, arbitrators must be conscious or be made conscious by the parties, especially the claimant[23], of the grounds on which enforcement of an award can be resisted in the countries where it is likely to be enforced, and of the grounds for setting it aside at the place of arbitration.[24]

1.2. Methods of Challenging Arbitral Awards

The purpose of challenging an award before a national court at the seat, or place, of arbitration is to have it modified in some way by the relevant court, or more usually to have that court declare that the award is to be disregarded in whole or in part.[25] Arbitral awards are challenged when a party applies for merit review through appeal or when actions are brought to set aside the arbitrators' decision in the court at the *situs* of the arbitration.[26] This is the appropriate place to challenge the award, because the court at the *situs* is considered to have supervisory jurisdiction over the arbitral process to ensure that it was conducted in a fair and non-corrupt manner. The law that governs the arbitration proceedings will be the *lex arbitri* or the curial law, which governs the arbitration proceedings at the *situs*.[27]

The grounds on which an award may be challenged under modern international arbitration laws are narrowly drawn and, in particular, do not allow a review of the merits.[28] However, some countries allow wider room for challenge. For example, section 69 of the English Arbitration Act 1996 provides for an appeal to the English courts on a point of law in certain circumstances. Comparably, article 351 of CPC of Ethiopia allows for an appeal based on error of law or fact, procedural irregularities and misconduct of arbitrator.

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[22] G.J. Horvath, *The Duty of the Tribunal to Render an Enforceable Award,* 18 JOURNAL OF INTERNATIONAL ARBITRATION, 135, 143 (2000).

[23] REDFERN & HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 439 (Sweet & Maxwell, London, 2005). [Hereinafter REDFERN & HUNTER].

[24] Bernard, *Supra* note 19.

[25] REDFERN & HUNTER, *supra* note 23.

[26] The court at the seat of the arbitration is the proper court under THE MODEL LAW, Art. 34.

[27] Parties are unlikely to choose a law different from the curial law of the *situs*, and it is inadvisable for them to do so, because of the unnecessary complication of having a court apply (assuming it will do so) a procedural law different from its own.

[28] *See* THE MODEL LAW, *supra* note 6. One reason for limiting the grounds on which an award can be challenged may be because westerners do not trust courts in third world countries. It is undeniable that the independence and efficiency of courts system in third world countries is less when compared with those in the developed world. So, the fear of westerners is somewhat valid. But, to the opinion of the writer, this may not be the sole reason in that, as explained earlier, ICA is becoming a preferred mode of dispute settlement because its advantages lies, for instance, on its speedy proceedings. When there are wider grounds for courts intervention, the merit of speedy proceeding may be endangered whatever the *situs* is in third world or developed States. This ultimately discourages parties or companies to choose a country, allowing wider grounds of intervention, as a *situs* or to invest capital there. Thus, the main reason for narrowly drawing the grounds of challenging arbitral awards in modern commercial arbitration can be a matter of attracting customers to choose one's country as *situs* of arbitration and investment.

As for methods of challenge, however, actions other than court challenges are available in particular kinds of arbitrations. There may be a mechanism allowing a review of the award within the system of arbitration to which the parties have referred their disputes. Perhaps the best-known example of something approaching an internal appeal procedure is in International Centre for the Settlement of Investment Disputes (ICSID) arbitration, where a party's only recourse against an award is before an ad hoc committee established by ICSID itself under Article 52 of the Washington Convention. The parties may themselves agree that an award issued by a first arbitral tribunal can be reviewed by a second arbitral tribunal, through a particular set of rules of an arbitral institution or a bespoke appeal mechanism drafted by the parties.[29]

In most commercial arbitrations arising out of an international contract, however, any challenge to an award has been directed to a court. A losing party can bring an action to set aside an award on procedural or public policy grounds. If it loses in the local court, or if it does not bring an action to set aside, the losing party has still another opportunity to resist enforcement. It can oppose the prevailing party's efforts to enforce the award in a different jurisdiction, where the losing party's assets are located. Thus, the losing party has two opportunities to challenge an award: first, in the court of the *situs* and, second, in the court where the prevailing party is attempting to enforce the award against the assets of the losing party.[30]

Generally, despite the existence of several methods of challenge, currently the most important type of challenging an arbitral award is an action to set aside what has been conducted before a court of the place of arbitration. The local arbitration law will invariably allow an action to set the award aside (also referred to as 'recourse' or 'review' of the award, or as 'an action to vacate' or 'annul the award'). Some countries consider setting aside avenue as unnecessary. For example, Belgium, Sweden and Switzerland allow parties to waive in their arbitration agreement their right to seek to set an award aside, if the parties are not nationals of or incorporated in the country in question.[31]

Under Ethiopian arbitration law, there are three ways where parties can challenge arbitral awards.[32] The first way of challenging arbitral award is the appeal procedure. A party can appeal

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[29] *See* the CPR Institute Arbitration Appeal Procedure provides an 'opt in' procedure that applies only if the parties include it in their arbitration clause, or in a submission agreement at the time the dispute arises, and provides for a second tribunal to review the award rendered by the first, available at: www.cpradr.org, (Last visited May 10, 2013).

[30] The Grain and Feed Association (GAFTA) provide for an appeal to a Board of Appeal, consisting of either three or five members of the association.

[31] BELGIAN CODE JUDICIAIRE, Art.1717 (4); SWEDISH ARBITRATION ACT, Section 51; SWISS CODE OF PRIVATE INTERNATIONAL LAW, Art. 192.

[32] THE CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA, *supra* note 11, Arts. 350-357.

from the awards of arbitrators to ordinary courts based on the grounds listed under article 351 of the CPC. The second way is setting aside. The arbitral award can be set aside if the court is convinced that the grounds enumerated under Art. 356 of the CPC are committed in the arbitration proceeding. The third one is cassation. Under the CPC, unlike appeal and setting aside, there is no legal basis for courts to challenge arbitral awards through cassation procedure. However, in its recent decisions,[33] the Federal Supreme Court Cassation Bench has paved additional way to challenge arbitral awards, that is, through power of cassation. This way is a review by the cassation bench which is always available for a party even if the arbitration agreement is provided for the finality of the arbitral award.

Unlike the Mode Law, the Ethiopian arbitration legal regime lets the avenue of appeal to be employed for challenging arbitral awards. The arbitration legal framework gives more attention to the avenue of appeal; whereas, the rules of setting aside avenue are inadequately enshrined in the CPC. Moreover, the law provides wider ranges of illustrative grounds for challenging arbitral awards than its English counterpart in that, in addition to error of law, procedural issues and error of facts are also made to be grounds of appeal in Ethiopia. Hence, one can comprehend that the Ethiopian arbitration law is in favour of courts' extreme control over the arbitration process following the making of the awards.

2. Challenging Arbitral Awards Through Setting Aside Under Ethiopian Arbitration Law: Lessons From the Unictral Model Law and England Arbitration Act

2.1. **Justifications for Selecting Comparative Legal Jurisdictions**

In this paper, the selection of the UNCITRAL Model Law for comparative legal analysis is mainly opted because it is the widely accepted standard for the modern commercial arbitration rules, where several countries including the so-called arbitration super-power countries and the developing world are harmonizing their domestic laws towards these arbitration friendly rules. Countries having relatively comparable socio-economic status like Ethiopia, Zimbabwe and Uganda have harmonized and modernized their domestic arbitration laws by adopting the UNCITRAL Model Law.[34] Hence, since Ethiopia cannot leave out itself from the global trend, it is decisive to harmonize and modernize its laws in light of this trend.

[33] *National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co*, Fed. Sup. Cassation Bench, Ct. File. No. 42239 (29 2003 E.C.), [Hereinafter *National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co*].

[34] *See generally* mandate, composition, working methods, forms of UNCITRAL texts, employment at UNCITRAL, available at: http://www.uncitral.org - technical issues, document availability (Last visited on 12 January 2014). [Hereinafter UNCITRAL].

The main focuses of UNCITRAL, when preparing the Model Law, was to harmonize and modernize the law governing the settlement of international commercial disputes, rather than the conduct of domestic arbitrations. For this reason, various developed and developing countries have adopted the Model Law to domestic arbitrations.[35] For instance, developing countries such as India, Egypt, Nigeria, Zimbabwe, Kenya and Sir Lanka can be cited as notable examples that adopted the UNCITRAL Model Law both to their domestic and international arbitration law. Moreover, countries like Germany, Canada, Mexico, Hungary and New Zealand can be mentioned as examples from the economically advanced in harmonizing the arbitration legal regimes with UNCITRAL Model law. Therefore, the point is that since the Ethiopian arbitration legal framework does not distinguish the rules governing domestic and international arbitrations, adopting the setting aside rules of the UNCITRAL Model Law will be equally imperative to govern both domestic and international commercial arbitrations in view of the increasing global economic inter-dependence through international trade.

As has been explained earlier, principally, having harmonized and modernized or arbitration friendly legal framework will have a positive impact for the economic growth of a country. Thus, understanding the current trade and investment dynamics and generally the demand of both domestic and international commercial transactions, it is unquestionable for Ethiopia to adjust its old and hostile arbitration rules, especially rules for the challenge of arbitral awards in light of the Model Law. Whereas, the justification for choosing the English arbitration law for the comparison is mainly different from that of the Model Law. It is intended to learn from the negative effects facing England due to its failure to follow arbitration friendly approach and harmonize with the global trend—the Model Law.[36]

2.2. **Comparative Analysis of the Legal Frameworks for Setting Aside Arbitral Awards**

2.2.1. *General Overview*

Though there are different methods of challenging the arbitral awards, the most important type of challenge of an arbitral award by far is an action to set aside before a court in the place of arbitration.[37] However, there are contrary opinions regarding the setting aside of arbitral awards as a procedure. Some scholars argue that eliminating this procedure would improve the efficacy

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[35] *Id.*

[36] The English arbitration regime can be considered as a representative of countries which are out of the Model Law system and having a developed legal regime. Hence, some best experiences of England will also be suggested for Ethiopia especially the ones that fills the gap of the Model Law.

[37] L. Sohn, *Uniform Laws require uniform interpretation: proposals for an international tribunal to interpret uniform legal texts*, in UNCITRAL, UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY, 50-54 (ed. United Nations Publication, 1995).

of international arbitration.[38] This opinion is based on the perspective that all arbitrations work in a satisfactory way. However, eliminating the setting aside procedure is not an option today, nor a persuasive idea. Though no arbitration procedure guarantees due process and justice in every instance, the procedure for setting aside could provide the aggrieved party with the opportunity to challenge arbitral awards under the pain of losing rights.

In arbitration procedure where arbitral awards are under the judicial control, the interpretation of setting aside within whatever appropriate application is beginning to obtain consensus. Due to the lack of treaties harmonizing commercial arbitration rules, the Model Law is obtaining recognition around the world, even in countries which have not adhered to the rules of the Model Law. Sohn aptly explains the intention of the drafters of the Model Law at the time they drafted the setting aside clause: The explanatory note to the Model Law states that the Model Law contains an "exclusive list" of "limited grounds" to set an award aside.[39] As has been explained, the Model Law does not provide an appeal or judicial review of the merits.

The seven grounds enunciated under Article 34 of the Model Law for setting aside arbitral awards can be grouped into: (1) those stemming from a defect in the arbitral agreement itself, (2) grounds implying fundamental procedural deficiencies, and (3) grounds including fundamental mistakes concerning the merits of the case.[40]

In England, the Arbitration Act of 1996 envisages the grounds on which an award may be challenged in two separate provisions. Section 67 deals with the lack of substantive jurisdiction of the arbitral tribunal; and section 68 deals with serious procedural irregularity affecting the tribunal. The reason for this distinction is that a challenge on grounds of lack of jurisdiction involves no issue of 'substantial justice.' An award made by a tribunal which lacks jurisdiction simply cannot stand, whereas procedural irregularity may be relied upon as a ground for challenging an award only where it is proved that it has caused or will cause substantial injustice to the applicant.[41] The first provision is spelt out in much the same way as articles 16 and 34(3) of the Model Law.

Under the Ethiopian arbitration law, in addition to appeal and cassation, the other procedural way to challenge arbitral awards is setting aside. As provided under article 357 of CPC, where an

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[38] T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE LAW JOURNAL, 1279, 1288 (2000); *see also* DEZALAY Y., *et al*., DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER, 342 (Chicago: University of Chicago Press, 1996).

[39] Vindobona D., *The ICSID Grounds for Annulment in a Comparative Perspective: Analysis*, 10 JOURNAL OF INTERNATIONAL COMMERCIAL LAW & ARBITRATION, 231, 244 (2009).

[40] *Id.*

[41] TWEEDDALE A. *et al*., ARBITRATION OF COMMERCIAL DISPUTES: INTERNATIONAL AND ENGLISH LAW AND PRACTICE, 59 (Oxford University Press, Oxford, 2007), [Hereinafter TWEEDDALE].

application to set aside an award is dismissed, the award shall be deemed to be valid and enforceable. However, this procedure will have the effect to null and void the award if the court is convinced that one or more of the grounds enumerated under article 356 of the CPC are committed in the arbitration proceeding. The grounds are: i) when the arbitrator decided matters not referred to him or made his award pursuant to a submission which was invalid or had lapsed; ii) when the reference being to two or more arbitrators, they did not act together; or iii) when the arbitrator delegated any part of his authority, whether to a stranger, to one of the parties or to a co-arbitrator.[42] Moreover, as per article 355(2) of CPC, the application to set aside an award shall be made to the concerned court within thirty days of the making of the award.

2.2.2. **The Grounds of Setting Aside of Arbitral Awards**

2.2.2.1. *Incapacity and Invalid Arbitration Agreement*

The Model Law under article 34(2) (*a,* i) clearly stipulates lack of capacity and invalid arbitration agreement as a basis for setting aside. As per this provision, such grounds may be invoked where "a party to the arbitration agreement (...) was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon (...)".[43] In England, under section 67(1) of the 1996 Act, invalid arbitration agreement is provided as one ground of setting aside.[44] Lack of capacity is not expressly stated both under section 67 and 68. However, since the lists under the latter provision are non-exhaustive, it could be interpreted to include incapacity.

Compared to the legal framework of England, under the Ethiopian CPC, incapacity as a ground for setting an award aside is not mentioned under the exhaustive lists of article 356, neither as an appeal ground in article 351. On the other hand, similar to the Arbitration Act of England, the Model Law's lack of a valid arbitration agreement is mentioned as one basis of

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[42] THE CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA, *Supra* note 11, art. 356.

[43] THE MODEL LAW, *Supra* note 15, Article 34(2) (a)(i). A party may be under some incapacity if, for example, he is a natural person and not of the age required to enter into a binding contract or, if it is a juridical person (such as a company), its representatives acted ultra vires when entering into the arbitration agreement. Capacity issues may also arise where a state or a state entity agrees to arbitrate, although it is widely acknowledged that a state may not rely on its own law to escape from its agreement to arbitrate. The arbitration agreement may be invalid for whatever reasons are specified in the applicable law. A common example is if it does not comply with the formalities of the applicable law – if, for example, it is not in writing, as required by Article 7(2) of THE MODEL LAW. *See also* LOOKOFSKY M., TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION 123 (Transnational *Juris* Publications 1992). [Hereinafter, LOOKOFSKY].

[44] ENGLISH ARBITRATION ACT OF 1996, Section 67(1). [Hereinafter ENGLISH ARBITRATION ACT].

setting aside under article 356(1) of the Ethiopian CPC.[45] It could be noted that the Model Law's experience concerning incapacity is preferable for Ethiopia to strengthen the rules of incapacity as a ground of setting aside arbitral awards.

Though it could be argued that the issue of incapacity can be governed by the general contract law of Ethiopia[46], it may not be sufficient particularly when the legal capacity of an artificial person is involved. Thus, providing a specific reference adjusted with the nature of arbitration agreement is important, especially for a foreign party in ICA who may not be familiar with the general contract rule governing incapacity. It is vital not to lose sight that the existence of incapacity of a party to the arbitration agreement must be assessed when the parties entered into the arbitration agreement. This is why incapacity of a party that will happen during the arbitral proceedings does not provide a ground for setting aside the award under paragraph (2)*(a)*(i) of the Model Law jurisdiction.[47] This should also be considered as an important lesson for Ethiopia.

2.2.2.2. *The Party was Unable to Present Its Case*

The Model Law under article 34(2)(ii) provides that the party may apply for the setting aside of arbitral awards provided that he furnishes a proof that he was "unable to present his case," for instance, owing to absence of prior notice regarding the arbitral proceedings.[48] Similarly, the English Arbitration Act under section 68 (a) provides failure by the tribunal to comply with the general duty of acting fairly and impartially between the parties and giving each party a reasonable opportunity of putting his case, However, under the Ethiopian legal framework, unlike the previous two legal provisions of the Model Law and English Law, a party who was unable to present his case before the arbitral proceeding may not apply for setting aside arbitral awards since such ground is not provided under article 356 of the CPC. Rather, such ground is mentioned as a ground for appeal under article 351(c) (i and ii) of the CPC. According to this provision, an award may be challenged where the arbitrators:

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[45] THE CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA, *Supra* note 11, Art. 356(1).
[46] *Id*. at Art. 356 (1).
[47] SDV Transami Ltd. v. Agrimag Limited *et al.,* [2008] Kampala High Court, Commercial Division, Uganda, case No. 345, para. 1319; *See also* BONELL M.J., NON-LEGISLATIVE MEANS OF HARMONISATION, UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY 33-41(United Nations Publications, 1995).
[48] THE MODEL LAW, *Supra* note 10, Art. 34(2) (ii). The ground of the party was inability to present his case and is based on the principles of natural justice or due process, and is found in most jurisdictions. The difficulty lies in establishing exactly when a party is unable to present his case. The standards here vary from country to country, but it is probably sufficient if the tribunal gives the parties a fair hearing by allowing each of them a reasonable and roughly equal opportunity at every stage of the arbitration to present its case. *See* MOSES M. L., THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 212 (Cambridge University Press, 2008). [Hereinafter MOSES].

> "failed to inform the parties or one of them of the time or place of the hearing or to comply with the terms of the submission regarding admissibility of evidence or refused to hear the evidence of material witness or took evidence in the absence of the parties or of one of them."

Moreover, Article 351(d, i) of CPC states that it is a misconduct of arbitrator where "he heard one of the parties and not the other".[49] If such kind of misconduct occurs, a dissatisfied party may challenge the award through the avenue of appeal. It should be noted that the existence of bias between the disputing parties in the production of evidences is substantial injustice. Hence, it is unquestionable to include such a serious irregularity under the lists of setting aside grounds. Accordingly, the suggestion is that the existing grounds of setting aside should be improved by adopting a unified ground from article 34(2) (ii) of the Model Law, section 68(a) of England Arbitration Act and article 351(c) (i and ii) and (d) (i) of Ethiopian CPC.

2.2.2.3. *Matters Outside the Scope of Arbitral Submission*

Under the Model Law, as mentioned in article 34(2) (a) (iii), one of the procedural grounds for setting an award aside is the case "where the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration (...)".[50] Similarly, section 82 of the Arbitration Act 1996 of England provides that arbitrators may lack substantive jurisdiction if matters submitted to arbitration did not fall within the scope of application of the arbitration agreement.

The Ethiopian CPC under article 356(a) also provides that "where arbitrator decided matters not referred to him"[51], the awards may be set aside. Similar to the Model Law and English Arbitration Act, this clause refers to irregularity which arises from terms of the arbitration agreement or scope of submission. However, to prevent different interpretations that may occur

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[49] THE CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA, *Supra* note 11, Article 351(d) (i).

[50] THE MODEL LAW, *Supra* note 15, article 34(2) (a) (iii). The issue of scope of submission covers awards where the tribunal addresses issues that were not submitted to it by the parties for decision. This will include, arguably, claims that are outside the jurisdiction of the tribunal. If the issues outside the scope of the parties' agreement can be separated from those within the scope of the agreement, the court will only set aside the part of the award that was outside that scope. The scope of submission to arbitration, also referred to as the scope of the mandate of the arbitral tribunal, is primarily determined by the parties. In principle, they have an unfettered discretion as to the disputes submitted to arbitration, subject to the very few restrictions imposed by statute, in particular, the non-arbitrability of certain disputes. *See* LOOKOFSKY, *Supra* note 43.

[51] THE CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA, *Supra* note 11, Art. 356 (a).

due to its narrowness and to make it inclusive of other parallel irregularities, the provision needs some further elaboration like its Model Law counterpart-article 34(2) (a) (iii).

2.2.2.4. *Incorrect Composition of the Arbitral Tribunal*

The Model Law under article 34(2) (a) (iv)) expressly provides incorrect composition of arbitral tribunal as one ground of setting aside. As per this provision, an award may be set aside where "the composition of the arbitral tribunal (...) was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provision of this Law [The Model Law] from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law".[52]

Under English Arbitration Act, the issue of composition is mentioned in section 82(2). The provision lists specific circumstances in which arbitrators may lack substantive jurisdiction including—"where the tribunal was not properly constituted".[53] In Ethiopian CPC, article 356(b) & (c) mentions some aspects of incorrect composition of arbitrators providing that "the reference being to two or more arbitrators, they did not act together; or the arbitrator delegated any part of his authority whether to a stranger, to one of the parties or to a co-arbitrator".[54] When compared with its English and Model Law counterparts, article 356(b) & (c) of CPC has some weaknesses in that it exhaustively lists only two elements that may be considered as issues of incorrect composition. While under section 82(2) of English Arbitration Act, incorrect composition is referred in a general clause which may include several issues to fall under it. The Model Law lets parties' agreement determine incorrect composition. Hence, taking the Model Law and the English experiences, instead of providing exhaustive lists, Ethiopian arbitration law should leave it to parties' agreement so as to determine what incorrect composition constitutes as far as their agreement is not contrary to the mandatory laws of the country. This is the best arbitration friendly rule that gives a priority to the supremacy of parties' agreement. Accordingly, if the arbitrators do not possess the attributes specified in the parties' agreement and a tribunal that does not comprise the full complement of arbitrators agreed by the parties may be a ground for setting an award aside.

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[52] THE MODEL LAW, *Supra* note 6, art. 34(2) (a)) iv), If the arbitrators do not possess the attributes specified in the parties' agreement, the award may be set aside. The rendering of an award by a truncated tribunal (a tribunal that does not comprise the full complement of arbitrators agreed by the parties) may also be a ground for setting an award aside. *See* MOSES, *Supra* note 48.

[53] ENGLISH ARBITRATION ACT, *Supra* note 44, Section 82(2).

[54] THE CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA, *Supra* note 11, Art. 356(b)&(c).

2.2.2.5. *Incorrect Procedure*

The Model Law provides incorrect procedure as one ground for setting an award aside.[55] According to article 34(2) (a) (iv), an arbitral award may be set aside by the court if "...the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law [Model Law] from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law [Model Law]".[56] Under English Arbitration Act, the irregularities listed in section 68(c) (failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties); section 68 (d) (failure by the tribunal to deal with all the issues that were put to it); and section 68(h) (failure to comply with the requirements as to the form of the award)[57] correspond to article 34(iv) of the Model Law, i.e. the arbitral procedure was not in accordance with the agreement of the parties.

The issue of incorrect procedure, as understood in the Model Law and English Arbitration Act, is not provided under the lists of grounds of setting aside mentioned under article 356 of the Ethiopian CPC. Instead, such ground is provided as a basis for appeal as indicated under article 351(b) of CPC. Accordingly, where "the arbitrator omitted to decide matters referred to him'', it can be considered as irregularities in the proceedings.[58] When evaluated from the perspective of the two comparative jurisdictions, it could be argued that article 356 of CPC can be considered as inadequate since it fails to provide procedural defects as a crucial ground for setting arbitral awards aside. Therefore, the lesson that could be learned from the comparative legal provision is the need to add procedural defects as grounds for setting arbitral awards aside under the list of Article 356 and 351(b) &(c) of the Ethiopian CPC.

It should be noted however that emphasis should be given to incorrect procedures due to failure to adhere to parties' agreement similar to the approach taken in the Model Law. This approach is more appropriate to ensure the supremacy of parties' autonomy in a given contract as far as the contract is not contrary to mandatory provisions. Hence, this approach provides freedom for the parties to determine what constitutes incorrect procedure under their arbitration agreement rather than exhaustively listing such grounds in the procedural law.

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[55] Awards are most often challenged on procedural grounds. Most arbitration laws provide that certain standards of due process must be met. Under the party can base a challenge, all of which relate to some aspect of due process. They may include non-compliance with the formal requirements for an award; failure to give sufficient reasons; failure to render preliminary ruling on jurisdiction; failure to apply the law applicable to the substance of the dispute; and failure to adhere to parties' agreement. *See* LOOKOFSKY, *Supra* note 43.

[56] THE MODEL LAW, *Supra* note 6, Art. 34(2) (a) (iv).

[57] ENGLISH ARBITRATION ACT, *Supra* note 44, Section 68(c, d &h).

[58] THE CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA, *Supra* note 11, Art. 351 (b & c).

2.2.2.6. *Non-Arbitrability of the Matter*

The Model Law expressly provides the issue of arbitrability as one ground of setting an award aside. Accordingly, article 34 (2) (b) (i) provides that where the court finds "the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State—the *situs,*"[59] the arbitral awards shall be set aside. The Model Law however does not provide for any definition of which disputes are arbitrable. During the deliberations on the Model Law, it became clear that agreement would not be reached on such a definition.[60] Unlike the model law, the Arbitration Act 1996 of England does not expressly cover matters of arbitrability. English courts have also not paid much attention to the arbitrability topic. The main reason is that they have more frequently dealt with issues of interpretation that relate to arbitration agreement in order to define its scope of application.[61] However, some limited principles may be extracted from the case law regarding matters of arbitrability in the United Kingdom. These include a civil dispute exists between parties, which is capable of legal determination, and prior consent that the dispute be referred to arbitration is relevant to establishing the jurisdiction of the arbitral procedure.[62] It may be asserted, nevertheless, that the precise scope of arbitrability is still far from clear.

In Ethiopia, the CPC does not clearly mention the issue of arbitrability and as to whether or not it can be a ground of setting aside.[63] Nonetheless, the CPC provides the issue of arbitrability as one ground for recognition and enforcement of foreign arbitral awards. According to article 461(1)(e) of CPC, in order for a foreign arbitral award to be recognized and enforced in Ethiopia, the award must relate to matters that, under the provisions of Ethiopian laws, can be submitted to

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[59] THE MODEL LAW, *Supra* note 6, art. 34 (2) (b) (i).

[60] UNCITRAL MODEL LAW neither provides any definition of which disputes are arbitrable. This is largely due to the chasm of difference that exists between each state's perceptions of what issues are of such public importance to be left to the public judicature. In fact, Article 1(5) provides that it is not intended to affect other laws of the state that preclude certain disputes being referred to arbitration. Thus, where the Model Law is implemented in a domestic legal system, it is left to the legislature to decide those issues which are arbitrable and those which are not. For more information *See generally* HOWARD HOLTZMANN, A GUIDE TO THE UNCITRAL MODEL LAW, 135 (Kluwer Law International, London, 1989). [Hereinafter, HOWARD].

[61] TWEEDDALE, *Supra* note 41.

[62] *O'Callaghan v Coral Racing Ltd, London Court of Appeal,* London, appeal No. 342/12, para. 312 (1998).

[63] To critically examine whether or not setting aside of arbitral awards is possible on the basis of non-arbitrability ground, the writer of this article has made interview with Associate professor Zekarias Keneaa and Mr. Aschalew Ashagre at their office. The responses of these two scholars are that: non-arbitrability could not be taken as a ground for setting an award aside under Ethiopian arbitration legal regime. Zekarias asserted that since the CPC does not mention the issue of arbitrability as a ground to set aside an award, courts cannot make it as a basis to challenge awards considering it as public policy matter. To be applied by courts, the law has to explicitly provide the scope/definition of arbitrability matters. For him, since the law has omitted the issue of arbitrability while exhaustively listing the grounds of setting aside in article 356 of CPC, it implies that such a ground is not considered by the law maker at all. The position of Aschalew is also similar. Telephone interview with Zekarias Keneaa & Aschalew Ashagre, Addis Ababa University, (Addis Ababa, Ethiopia, June 4, 2014).

arbitration.[64] When one looks at the substantive law, the issue of arbitrability is not properly addressed under the Civil Code. For instance, the issue of arbitrability of administrative contracts is not solved in the Ethiopian arbitration legal framework- it is open for interpretation.[65]

The failure of Ethiopian arbitration law in providing a clear provision regarding arbitrability issue as a ground of setting aside of arbitral awards may cause some difficulties for the courts in carving out the precise scope of arbitration. It is particularly difficult to delineate the role of arbitral tribunals given their present status as a more favorable method of dispute settlement as compared to litigation. This conception of arbitration is in contradistinction to the classical notion of arbitration in which it existed as a subset of litigation. The English experience could not be a lesson because its arbitration act does not provide arbitrability issue as a ground of setting aside. What exist under English legal framework are some developments of case laws indicating generally about matters of arbitrability.

The Model Law experience is better in that it clearly provides non-arbitrability of the matter under dispute can be a ground of setting aside. However, the absence of definition of arbitrability in the Model Law is problematic and is likely to become more so with the increasingly autonomous status that arbitration is gaining.[66] Thus, for Ethiopia, along with adopting the Model Law experience, it will be important to determine those issues which are non-arbitrable and arbitrable to ensure that arbitrators are clear on the sphere of their jurisdiction. Two issues have to be balanced in this regard. These are: that issue of public interest remains subject to the public administration of justice through the courts, and that the notion of private dispute settlement in accordance with party autonomy is upheld.

2.2.2.7.*Violation of Public Policy*

The public policy ground is clearly mentioned under the Model Law jurisdiction. As per article 34 (2) (b)(ii), an arbitral award may be set aside by the court if it finds that "the award is in conflict with the public policy of this State[the *situs*]".[67] Public policy is the most troublesome

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[64] THE CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA, *Supra* note 11, Art. 461(1) (e).

[65] The wording of articles 3325—3346 of the Civil Code is silent as to whether or not disputes involving administrative contracts are arbitrable. Regarding court practices, Ethiopian courts play a positive role in enforcing valid arbitration agreements. Yet, their role in setting precedent over the controversial matter of regarding arbitrability of administrative contractual matters has been elusive. See Hailegabriel, supra note 10, at 331—333.

[66] HOWARD, *Supra* note 61, at 135.

[67] THE MODEL LAW, *Supra* note 6, art. 34 (2) (b) (ii).

ground in article 34 because there is no uniform definition for it.[68] However, it is possible to find guidance in the Report of the Commission in discussing the term 'public policy':

> [i]t was understood that it was not equivalent to the political stance or international policies of a State but comprised the fundamental notions and principles of justice. It was noted, however, that in some common law jurisdictions that term might be interpreted as not covering notions of procedural justice while in legal systems of civil law tradition, inspired by the French concept of '*ordre public*', principles of procedural justice were regarded as being included (…).[69]

Under section 68(g) of the English Arbitration Act, an award is said to be contrary to public policy if it was being obtained by fraud or the way in which it was procured being contrary to public policy.[70] This provision can be considered as a specification of the public policy infringement under England Arbitration Act that corresponds to article 34(2) (b (ii) of the Model Law.

With regard to Ethiopian arbitration law, article 356 of CPC does not provide violation of public policy as a ground of setting aside. Rather, the Code provides such ground as a basis of appeal. As per article 351(d) of CPC, the situation that amount to violation of public policy is where "the arbitrator has been guilty of misconduct, in particular" such as partiality and bribery.[71] Providing violation of public policy as a basis for appeal is inappropriate because it opens the door for courts excessive intervention over the making of the awards. Specifically, such court intervention on the basis of merit review damages the parties' wish to avoid court litigation which ultimately paralyses the purpose of arbitration. Thus, in order to solve such problem, the violation of public policy should be made as a basis for setting aside instead of appeal. Firstly, since the award is easily rendered null and void, parties will have further remedies to challenge awards made in the violation of public policy. Secondly, since setting aside procedure is not a kind of merit review, the very interest of the parties to escape from prolonged, costly and unfriendly court litigation will be achieved. Therefore, it is important for Ethiopia to adopt the Model Law and

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[68] Public policy is defined differently in different jurisdictions, but in most, an award could be vacated if it was not consistent with fundamental notions of justice, honesty, and fairness. For example, Albert Jan van den Berg has said that public policy "refers to a particular country's subjective concept of what all civilized nations conceived international policy to be. Widely recognized examples of violations of international public policy include biased arbitrators, lack of reasons in the award, serious irregularities in the arbitration procedure, allegations of illegality, corruption or fraud, the award of punitive damages and the breach of competition law." *See* JULIAN LEW, *et al.,* COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 18 (Kluwer Law International 2003).

[69] The Secretariat of UNCITRAL: *Promoting Wider Awareness and Acceptance of Uniform Law Texts*, in UNCITRAL UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY 252-259 (United Nations Publication, 1995).

[70] ENGLISH ARBITRATION ACT, *Supra* note 44, section 68(g).

[71] THE CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA, *Supra* note 11, Art. 351(d).

English experiences with a slight adjustment by including a clear definition of public policy just to determine what it constitutes in order to avoid inconsistent court interpretations.

2.3. Limitative Challenges and Post Setting Aside Issues of Arbitral Awards

2.3.1. *Time Limits*

Article 34 (3) of the Model Law requires an action for setting aside to be brought within three months of the date on which the party making the application received the award (or from the date any application in the arbitration for correction or interpretation was disposed of by the tribunal).[72] In England, an action for setting aside must be brought within twenty-eight days of the date of the award or of the date of notification to the applicant of the outcome of any arbitral process of review (or of the completion of any internal review of it.[73]

Under Ethiopian CPC, article 355(2) states that "the application shall be made to court (...) within thirty days of the making of the award".[74] This time limit is very short. Though one reason for such time limitation could be to make the overall arbitration process and the final award quicker, the law should strike a balance between speedy process and the demand for justice. This is because some critical and complex misconduct that may have a devastating effect could demand longer time for investigation. For instance, the award that is set aside due to the discovery of violation of public policy after one month following the receipt of the award, will have a devastating effect on the winning party and the interest of justice when the remedy of setting aside was bared due to the shorter deadline. Hence, to strike the balance between the private interest of the parties for speedy process and the demand for justice, it will be reasonable to take the experience of the Model Law jurisdiction that provides three months from the date the party received the award or of the completion of any internal review of it.

2.3.2. *The Post-Setting aside Situation*

The Model Law does not contain a provision on the consequences when the application to set aside the award has been successful. In other words, it does not deal with the effect of setting an

[72] Note that, under Art. 16(3) of THE MODEL LAW, an application to the court regarding a tribunal's preliminary ruling retaining jurisdiction must be made within thirty days of receipt of notice of the ruling.
[73] ENGLISH ARBITRATION ACT, *Supra* note 44, Section 70(3)
[74] THE CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA, *Supra* note 11, Art. 355 (2).

award aside.[75] What is provided under the Model Law is generally about suspending the setting aside period just to give the Arbitral Tribunal the opportunity to eliminate the grounds for setting the award aside.[76] Accordingly, article 34(4) of the Model Law stipulated "where appropriate and so requested by a party (…).", a court may suspend the proceeding and give it to the arbitral tribunal to eliminate the grounds for setting aside.[77] The English Arbitration Act specifically provides that a court shall not set aside or 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.[78] For instance, if an award is successfully challenged on grounds of serious irregularity under Section 68(3) (c) of the English Arbitration Act, the court may either remit the award in whole or in part to the arbitral tribunal for reconsideration, set the award aside or declare it to be of no effect.

Coming to the Ethiopian arbitration law, like the Model Law, the CPC inadequately addresses the post-setting aside issues. Article 357 of CPC simply provides that *"*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".[79] While commenting on article 357 of CPC, Aschalew, asserted that:

> Unlike the laws of many jurisdictions, the Ethiopian Civil Procedure Code has 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.[80]

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[75] Obviously, THE MODEL LAW does not deal with the effect of setting an award aside. However, after the award is set aside, the arbitration agreement may still operative. Few Model Law countries have so far regulated the post-setting aside situation. For example, German law provides that a court may "where appropriate, set aside the award and remit the case to the arbitral tribunal. 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." Therefore, German Law renders the arbitration agreement operative again. Hence, the dispute should be submitted to a newly established arbitral tribunal. *See* German Arbitration Act, Section 1059(4&5).

[76] PIETER SANDERS, THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION 128 (New York: United Nation publication, 2004).

[77] The procedure described in section 4 of article 34 is not detailed, but it is presumed that the court will hear both parties. After that, the court can suspend the setting aside period, during which the Arbitral Tribunal has the opportunity to eliminate the grounds for setting the award aside. It is possible to infer from the article that the remission procedure may be in whole or in part. Therefore, the new award after the remission has to contain both parts–the remitted and the non-remitted part. See *Id*.

[78] ENGLISH ARBITRATION ACT, *Supra* note 54, Section 68(3) (c).

[79] THE CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA, *Supra* note 11, Article 357.

[80] Aschalew, Ashagre, *Involvement of Courts in Arbitration Proceedings under Ethiopian Law*, 2 JOURNAL OF BUSINESS AND DEVELOPMENT, 19 (2007).

Concerning effects of appeal, the CPC addresses it in a better way than that of setting aside. 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 appeal successful.[81] It could be argued that leaving the post-setting aside situation without adequate procedural rules under the Ethiopian CPC amounts to exposing the parties for further controversy. 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 relevant question is therefore, what would happen next once the award was vacated because the court held that the arbitration agreement that was the basis for the arbitral award was made invalid. Furthermore, there are some other issues that could be raised. That is, would the jurisdiction of the court revive after the award has been set aside? Or would the arbitration agreement still be operative so that the dispute could be submitted to arbitration with the appointment of new arbitrators? Thus, addressing these questions could be a challenging task under the existing legal framework of Ethiopia. In this regard, though the experience of Model Law jurisdiction could be of no help, the approach of English Arbitration Act can be adopted by providing detailed rules depending on the grounds that made the challenge successful.

Generally, it could be argued that the award that was 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. In case the award is set aside for procedural reasons, such as lack of due process or failure to comply with the parties' arbitration agreement, the arbitration can effectively be reheard before the arbitrator who made the award or the arbitrator's successor. Here, it is more appropriate if the parties by agreement could be allowed to help determine whether the prior tribunal or a newly constituted one would conduct the rehearing. However, the challenging issue comes when the award is set aside on the basis of invalid arbitration agreement. If the court holds the arbitration agreement to be invalid, a fresh arbitration will not be possible, at least on the basis of that same arbitration agreement. In these cases, in the absence of another arbitration agreement covering the same disputes as that of the original agreement, the party seeking resolution of the dispute will need to pursue his/her claim before the appropriate courts, as if the parties' contract had never contained an arbitration clause. But, court litigation may not be the only remedy for parties who wish and still insist to avoid such avenue. For instance, the parties may agree to resolve their dispute by means of mediation. In any case, it could be more reasonable if the decision to employ any alternative remedies would be left to the parties' agreement. However, like the case in the effect of appeal, courts should not

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[81] THE CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA, *Supra* note 11, Arts. 353 & 354.

intervene in such decision to review the merit of the case invoking the mere fact that the opportunity of arbitration is null due to invalid agreement.

CONCLUDING REMARKS

As has been discussed, under Ethiopian arbitration legal framework, in addition to appeal and cassation, the other procedural way to challenge arbitral awards is setting aside. When evaluated from the perspective of international best practices and purpose of modern commercial arbitration, the avenue of setting aside is neglected in Ethiopia. Contrary to the global trend, the Ethiopian arbitration legal framework has given more attention to the avenue of appeal than setting aside in that most of the grounds for challenging arbitral awards are made to be the grounds for appeal and cassation. From the standpoint of modern commercial arbitration, this is not a plausible approach because it paves excessive rooms for courts' intervention over the arbitral proceeding-after the making of the award. In actual fact, this has been observed from the current decision trends of Ethiopian courts.[82] Since such intervention is on the basis of merit review, it will be inimical to the very purpose of arbitration, that is, the supremacy of parties' autonomy.

It is suggested that the most commonly perceived disadvantage of arbitration is cost if the proceeding has been prolonged due to excessive courts' intervention. This may be lower under the Model Law where there is likely to be less judicial intervention. With the principled skeletal framework that Model Law provides, jurisdictions may adopt it and tailor its provisions to suit the needs of the parties they are seeking to attract. Generally, having said that courts' intervention on the basis of review of merit is unnecessary from the standpoint of modern arbitration, the subsequent suggestion is the need to improve/strengthen the rules of setting aside procedure by taking the global best experiences adjusted in the context of Ethiopian legal system. Accordingly, the following propositions should be added to improve the setting aside of arbitral awards under the Ethiopian arbitration law.

(1). ***Incapacity of one of the parties***—in the Ethiopian CPC, the issue of incapacity as one important ground of setting aside is not mentioned under the exhaustive lists of article 356. Hence, the law should provide a specific reference of incapacity adjusted with the nature of arbitration agreement

[82] Despite the existence of parties' autonomy in providing arbitration finality clause, a recent decision by cassation bench struck down waiver agreement that prohibited the parties from appealing their case. The case is between *National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co, supra* note19. The cassation bench referred to article 80(3) the FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA CONSTITUTION; Proclamation No. 454/1997 and the purpose of arbitration to strike down the arbitration finality clause justifying that the decision of the arbitration tribunal contains error of law.

(2). ***That the party was unable to present its case***—under Article 356 of CPC, such a ground is not readily available. If the party was unable to present his/her case due to an arbitrator bias, it results in a substantial injustice and there should be a remedy. Thus, it is undeniable to include such a serious irregularity under the lists of setting aside grounds.

(3). ***Incorrect Procedure***—the issue of incorrect procedure, as understood from the international best experiences, is not provided under the lists of grounds of setting aside. The occurrence of this ground is a serious procedural defect; hence, it should be added in the lists of grounds of setting aside. Here, emphasis should be given to occurrences of incorrect procedure due to failure to hold on to parties' arbitration agreement. Put it precisely, the law should leave it to parties' agreement in determining incorrect procedure.

(4). ***Non-arbitrability of the matter***—the CPC does not mention arbitrability issues as to, for example, whether it can be a ground of setting aside or not. Thus, to ensure that arbitrators are clear with the sphere of their jurisdiction, along with defining in the substantive law, the procedural law for setting aside should be strengthened thereby to incorporate such a ground.

(5). ***Violation of public policy***—Article 356 of CPC does not provide violation of public policy as a ground of setting aside. Obviously, the occurrence of such irregularity is so devastating both to the interest of the public and the losing party; therefore, as the case to arbitrability, a clear definition of the law should made an express reference concerning violation of public policy.

(6). ***Matters outside the scope of submission***—the CPC narrowly provides such a ground. However, to prevent different interpretations that may occur due to its narrowness and to make it all encompass other related procedural defects, the provision containing this ground should be highly structured. (II) Incorrect composition of the arbitral tribunal- the CPC has some weaknesses in providing such ground of setting aside in that it exhaustively lists only two elements. Here, the suggestion is that instead of listing exhaustively, the law should let the parties' agreement in determining what incorrect composition constitutes.

(7). ***Time for challenge***—Under Ethiopian arbitration law, the duration of application time for setting an award aside is limited, that is, thirty days after the making of the award. This deadline may not be sufficient to assess and challenge complex misconducts like corruption. Therefore, to balance the private interest of the parties for speedy process and the demand of justice, the law should be revised taking the experience of the Model Law jurisdiction, that is, three months from the date the party received the award or of the completion of any internal review of it.

(8). ***The Post-setting aside issues***—the Ethiopian arbitration law insufficiently addresses the post-setting aside issues. Unless the effect of setting aside is adequately regulated by law, the situation may lead the disputing parties for further controversy. Thus, to settle the post-setting aside situation effectively, the law should provide detailed and various rules depending on the grounds that made the challenge successful. However, if there is an agreement made by the parties to address the issues/effects of setting aside, the law should give priority to this agreement as far as it is not contrary to the mandatory laws of the country.