JUDICIAL INTERVENTION IN COMMERCIAL ARBITRATION IN ETHIOPIA: A COMPARATIVE ANALYSIS

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Abstract

Domestic courts play an essential role in modern international commercial arbitration by ensuring the smooth process and supplementing the parties' failures to agree on various procedural points. Although the involvement of the courts in commercial arbitration is agreed in all jurisdictions, the extent of such involvement is still debatable. The proposition that the judicial role should be supportive of the arbitration rather than drifting the jurisdictions of arbitration tribunals is now accepted. Like the international experience, domestic courts of Ethiopia play a significant role in both domestic and international commercial arbitrations. This article discussed the judicial intervention in Ethiopia and the global trend on a comparative basis, the article found the judicial role in Ethiopia is more interventionist. Therefore, to create a more favorable environment for arbitration, the article argues for the revision of arbitration-related laws.

Keywords: National Court, Arbitration, Model Law, Judicial Role, Ethiopia

INTRODUCTION

International commercial arbitration is a means of resolving disputes arising under international commercial contracts and plays a fundamental role in resolving cross-border commercial disputes. Parties choose international commercial arbitration primarily because it enables the disputes to be adjudicated with ultimate procedural neutrality, without the involvement of national courts.[1] Yet, practically, the involvement of the national courtsin international

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arbitration is a common phenomenon prevalent in all jurisdictions because domestic courts have an essential role through ensuring the smooth arbitration process when the parties fail to agree on procedural points.

Each case is individual but arbitration proceeds through the following general stages: the case initiation, arbitrator invitation, arbitrator appointment, preliminary hearing and information exchange, hearing and award stages.[2] In all stages, parties may invite the intervention of national courts. National laws are also permissive and are encouraged by national courts.[3] However, to protect the autonomy of international commercial arbitration, the roles of national courts in international commercial arbitration should be identified.

Internationally, with few exceptions, the role of the courts is primarily determined by the 1958 New York Convention for Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the NYC)[4] and by national arbitration laws. The primary aim of the NYC is to require the courts of member states to give full effect to arbitration, particularly determining the conditions under which courts might intervene in commercial arbitration. Articles II, III and V of the Convention point out two crucial principles the role of courts in international commercial arbitration. The first is the requirement of the courts' intervention only to support the arbitration process and the recognition and enforcement of the subsequent agreements and awards.

In this respect, article II/1/ of the Convention specifically requires member states to recognize arbitration agreements, which could be an arbitration agreement or an arbitration clause; article III enshrines specific obligations on states to recognize and enforce arbitration awards. The second principle states the courts at the seat of the arbitration process or place of enforcement are the courts to be involved.

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[1] Sameer Sattar, *National Courts and International Arbitration A Double Edged Sword*, JOURNAL OF INTERNATIONAL ARBITRATION, 27(1) 51, (2010).

[2] The American Arbitration Association, International Center For Dispute Resolution, Stages of the Arbitration Process, (Mar 20. 2020, 10:30AM) <https://www.adr.org/sites/default/files/document_repository/AAA_Stages_of the_Arbitration_Process.pdf>.

[3] *Id.*

[4] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) **(**1958).330 United Nation Treaty Series (UNTS) 38 adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958 **(**Hereinafter the NYC.)

National laws may also determine the nature and level of judicial involvement in international commercial arbitrations. Therefore, national laws, principally those of the place of arbitration and place of enforcement have potential influence in the arbitration. Like the international experience, national courts in Ethiopia have a paramount role in international commercial arbitration their role being governed by the 1960 Civil Code (hereinafter the CC)[5] and the 1965 Civil Procedure Code (hereinafter the CPC).[6] Principally, articles 3325-3346 of the CC and articles 315-319, article 461 and articles 350-357 of the CPC are prominent as far as the Ethiopian law of arbitration is concerned.

This article aims to evaluate the Ethiopian arbitration law in terms of the role of courts in commercial arbitration in comparison with the current international context and to highlight recent developments in the area. Particularly, this article focuses on the stages of national courts` intervention and their effect. The article found the judicial role in Ethiopia is more interventionist than the global trend. In order to appreciate the practice, an attempt has been made to discuss some selected cassation cases of the Federal Supreme Court of Ethiopia.

This article unfolds in the following structure. The first part assesses the general overview of international commercial arbitration. The second part deals with the international experience in the judicial role. The third is devoted to elaborating different stages of arbitration where national courts may intervene in the arbitration process. The fourth part focuses on the role of the Ethiopian courts in international commercial arbitration. Finally, under the conclusion, the article offers possible measures to be taken in the Ethiopian arbitration law regime.

1. AN OVERVIEW OF JUDICIAL INTERVENTION IN COMMERCIAL ARBITRATION

To have an effective international commercial arbitration, the entire process of the arbitration should be supported by arbitral institutions and importantly, the courts. All concerned actors

[5] Civil Code of Ethiopia Proclamation, NEG. GAZETTA EXTRAORDINARY, (No.165/1960). (Hereinafter, The CC).
[6] Civil Procedure Code of Ethiopia Decree, NEG. GAZETTA EXTRAORDINARY, (No. 52 OF 1965). (Hereinafter, The CPC).

must play their part in maintaining the quality of arbitral processes and outcomes and in reducing delay and expense.[7] Courts, whether facilitating or enforcing, are tasked with understanding and supporting arbitration in all these respects –they must be impartial, efficient and knowledgeable, and experienced about international and domestic arbitration law and practice.[8] Historically, until the late twentieth century, in many common law countries, courts were empowered by statutes and case laws to exercise general supervisory jurisdiction over commercial arbitration.[9]

However, in the contemporary understanding of international commercial arbitration, courts should not be the supervisors of arbitration tribunals – they should not be allowed to supervise every activity of the arbitrators in the arbitration process. Yet, their intervention is inevitable and relevant to the efficacy of the arbitration itself as it is essential in guaranteeing the integrity of the arbitral process. It is especially crucial for the recognition and enforcement of arbitration award.[10]

Evidenced by international treaties and domestic laws, there is a general consensus of the international community that the involvement of courts is essential to have an effective arbitration regime in international commerce. Nevertheless, the debate in international commercial arbitration concerns the scale of intervention to be allowed.[11] Thus, there is a need to maintain a balance between the degree of involvement and the smooth functioning of arbitration.[12] International agreements and domestic arbitration laws also attempt to maintain a balance by pinpointing the circumstances by which courts will intervene. Yet, the extent of intervention allowed by national legislation varies from jurisdiction to jurisdiction.

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[7] The Hon. Justice Clyde Croft, *How the Judiciary can support domestic and international Arbitration,* a paper Presented at The Arbitrators' And Mediators' Institute of New Zealand Annual Conference, (Auckland, New Zealand , 25 – 27 July 2013).

[8] *Id.*

[9] David A R Williams QC, *Defining the Role of the Courts in Modern International Commercial Arbitration"* ASIAN INTERNATIONAL ARBITRATION JOURNAL, 137-180 (2012).

[10] Rahul Ranjan &Ankita Ranawat**,***International Commercial Arbitration: The Need for National Courts in Arbitration,* INTERNATIONAL JOURNAL OF LAW AND LEGAL JURISPRUDENCE STUDIES, (2017).

[11] Mordi, C. *An Analysis of National Courts Involvement in International Commercial Arbitration; Can International Commercial Arbitration Be Effective without National Courts?* OPEN JOURNAL OF POLITICAL SCIENCE, 6, 95-104 (2016).

[12] Hailegabriel G. Feyissa, *The Role of Ethiopian Courts in Commercial Arbitration*, MIZAN LAW REVIEW, 313 (2010).

The legal regimes governing international commercial arbitration are the NYC, national laws as well as institutional and ad hoc arbitration rules. Based on the choice of the parties, national laws of arbitration may be applicable in governing the process. Likewise, ad hoc and institutional arbitration rules may also be the governing law, when all parties re in agreement. Also, as stated in subsequent topics, national laws are the major standards to determine arbitrability and other preliminary considerations of arbitration.

The United Nations Commission on International Trade Law (UNCITRAL)[13] Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 [hereinafter the Model Law][14] is enacted to assist states to modernize their arbitration laws by supporting them to develop their laws on international commercial arbitration. The Model Law contains a set of recommendations that are not mandatory created as a suggested pattern for law-makers to consider adopting as part of their domestic legislation. Therefore, countries can adopt its provisions to their domestic arbitration law. To date, domestic laws have been adopted in 46 countries, including Australia, Bahrain, Benin, Canada and Israel based on this Model Law.[15]

The international commercial arbitration legal regime and the Model Law stipulate ground rules about the role of domestic courts and the basis of intervention in matters involving commercial arbitration. In this regard, the NYC, so far ratified by 163 countries, obliges each contracting state to recognize an agreement in writing under which the parties undertake to submit to arbitration.[16] It also requires domestic courts in member states to refer the parties to arbitration at the request of one of the parties and to recognize arbitral awards as binding and

[13] The United Nations Commission on International Trade Law is the core legal body of the United Nations system in the field of international trade law. It is a legal body with universal membership specializing in commercial law reform worldwide for over 50 years, UNCITRAL's business is the modernization and harmonization of rules on international business.

[14] United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006 (Vienna: United Nations, 2008), (Apr 7, 2020, 9:30 AM), www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf. (Hereinafter: The Model Law)
The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.

[15] UNCITRAL, Status: UNCITRAL Model Law on Cross-Border Insolvency (1997), (Apr 7, 2020, 9:30 AM), https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status

[16] The NYC Article II and III.

enforce them per the rules.[17] Refusal of recognition and/or enforcement of an award should only be in specified limited circumstances.[18]

To curb an unjustified interference of domestic courts in international commercial arbitration, articles II, III and V of the NYC indicate courts that could be involved in international commercial arbitration and specify the purpose of their interventions. However, the detailed functions of these courts will be determined based on national laws and international treaties. In this respect, if we refer to the Model Law, the function of courts include the appointment of arbitrators, [19] the removal of arbitrators,[20] decisions on arbitral jurisdiction (after the tribunal has already been appointed), [21] and the setting aside of arbitral awards.[22]

2. JUDICIAL ROLE IN INTERNATIONAL COMMERCIAL ARBITRATION: THE GLOBAL TREND

The promulgation of the Model Law is an important milestone in the development of a supportive approach by national courts towards arbitration.[23] The Model Law under article 5 declares that "in matters governed by this law, no court shall intervene except where so provided in this law.''[24] From the reading of this provision and its *Travauxpré paratoires* (preparatory works),[25] it can be inferred that this Model Lawsignificantly limits the opportunities for court intervention in arbitral matters. Yet, the Model Law cannot exclude and does not seek to exclude

[17] *Id.*
[18] *Id.*
[19] The Model Law, Articles 11(3) & (4).
[20] *Id*,. At Article 13(3) and (14).
[21] *Id.*, at Article 16(3).
[22] *Id*., at Articles 34(2).
[23] *Supra* note 13, at 4.
[24] The Model Law, Article 5.
[25] As to Article 5, the UNCITRAL Analytical Commentary on the Draft Model Law provides – "Although the provision, due to its categorical wording, may create the impression that court intervention is something negative and to be limited to the utmost, it does not itself take a stand on what is the proper role of the courts. It merely requires that any instance of court involvement be listed in the Model Law. Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the Model Law. The resulting certainty of the parties and the arbitrators about the instances in which court supervision is to be expected seems beneficial to international commercial arbitration."

the participation of what it calls the '*competent court'* in carrying out certain functions of arbitration assistance and supervision.[26]

The Model Law contemplates court involvement in different matters including the appointment of arbitrators, the enforcement of interim measures, the assistance in taking evidence, setting aside an award and the recognition and enforcement of awards.[27] It also gives courts the power to revisit issues concerning the jurisdiction of the tribunal in light of the terms of the arbitration agreement.[28] Post-arbitration, the Model Law allows parties to challenge the award and enables courts to set it aside based on limited grounds.[29]

An arbitral award may be set aside by the court if and only if, the party making the application furnishes proof about the following: first, when a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law; second, when the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings was otherwise unable to present his case;third, when 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.[30] Nevertheless, no provision enables national courts to review the merits of the tribunals' decisions.

London, New York, Paris, Hong Kong and Singapore are the top arbitration-friendly seats in the world.[31] The national laws where they are operating are supportive of arbitration and the domestic courts' interference in the arbitral process is limited to providing support.[32] To grasp how supportive the judicial role is conducive to the arbitration, it is necessary to see how these

[26] NIGEL BLACKABY, CONSTANTINE PARTASIDES, "THE ROLE OF NATIONAL COURTS DURING THE PROCEEDINGS" 439-464 (Oxford: Oxford University Press, 2009).
[27] Lew Julian D M., *Does National Court Involvement Undermine the International Arbitration Processes?* AMERICAN UNIVERSITYINTERNATIONAL LAW REVIEW, 24, / 3/ ,489-537 (2009)498.
[28] *Id,* at 496. In principle, it is the tribunal itself that can determine its own jurisdiction-the doctrine of Kompetenz-Kompetenz. But in some exceptional circumstances, courts may be entitled to revisit issues concerning the tribunals jurisdiction in lights of the terms of the arbitration as stated under article 16.3 of the UNCITRAL model law.
[29] The Model Law, Article 34.
[30] *Id.*
[31] Latham & Watkins, Guid to international arbitration, (Apr 10,2020,10:30), https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017.
[32] *Id.*

friendly arbitration centers are operating and have a view of the role of the courts in their respective countries. Hong Kongadopted the Model Law in its arbitration ordinance,[33] specifically, part 2 section 12 explicitly adopted article 5 of the Model Law that propagates a supportive judicial role. In one Hong Kong case, it was shown that a party had refused to disclose its place of business to avoid posting security for costs of arbitration and where the arbitral tribunal lacked the power to grant such orders; the court assisted the tribunal by making appropriate orders.[34]

In a Singapore[35] case, a party applied for issuance of a subpoena to compel the named person to disclose documents or answer questions regarding the documents, whereas the arbitral tribunal had earlier rejected such a request.[36] The application was rejected and the applicant was considered as having abused the process.[37] Singapore courts have affirmed that court intervention would only be appropriate to the extent such intervention is expressly sanctioned by the Model Law itself.[38] A good example of the beneficial application of article 5 in Singapore is found in *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush.*[39]

The French arbitration law, propagating a minimal role of courts, provide a broader mandate to arbitration tribunals. Other than to assist in the constitution of the arbitral tribunal or in evidentiary matters, French courts will not interfere in the conduct of the arbitral process. Prioritizing arbitration, per article 1448 of the French Code of Civil Procedure (FCCP)[40] when a dispute subject to an arbitration agreement is brought before a court, such a court shall decline

[33] Hong Kong Arbitration Ordinance, [1 June 2011] L.N. 38 of 2011(Apr 10,2020,10:35), https://www.elegislation.gov.hk/hk/cap609?xpid=ID_1438403520884_005

[34] CLOUT case No. 601 [China Ocean Shipping Co., Owners of the M/V. Fu Ning Hai v. Whistler International Ltd., Charters of the M/V. Fu Ning Hai, High Court—Court of First Instance, Hong Kong Special Administrative Region of China, 24 May 1999], [1999] HKCFI 693, (Mar 10, 2020, 11:40AM), http://www.hklii.hk/eng/hk/cases/hkcfi/1999/655.html.

[35] Singapore adopted the model law by legislation in the international arbitration act 1994(No 23 of 1994).See Part II, Article 3 and the following of the act.

[36] *ALC v. ALF*, High Court, Singapore, [2010] SGHC 231.

[37] *Id.*

[38] Mitsui Engineering and Shipbuilding Co Ltd v Rush Easton Graham & Anor (2004) SGHC 26 (Woo J, Singapore High Court, (Apr 7, 2020, 9:30 AM), https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/2004-sghc-26.pdf.

[39] *Supra note* 11.

[40] French Code of Civil Procedure, Decree n°98-1231 of 28, *1998*.

jurisdiction.[41] Therefore, French domestic courts play a crucial role in reinforcing party autonomy by requesting parties to refer disputes to arbitration where they have a valid arbitration agreement that has not been mutually abandoned.

Once the arbitration is started, arbitrators have the power of ordering the parties to produce evidence and impose penalties if they fail to do so.[42] Pursuant to article 1468, tribunals have the mandate of taking conservatory or provisional measures during the arbitration process.[43] Post-arbitration, French arbitration law is known to be highly favourable to the enforcement of arbitral awards. The country is a member of NYC. So, except for limited grounds of article 1520 of the FCCP, the enforcement of arbitration awards cannot be challenged.[44]

In the UK, arbitration is governed by the Arbitration Act of 1996[45] which propagates assistive-intervention of courts. At the beginning of the arbitration, parties are mandated to decide how to appoint arbitrators, if there is any default the law enshrined procedures as to how the appointment of arbitrators should be implemented.[46] It recognizes the principle of Competence-Competence,[47] so arbitrators are mandated to decide on their substantive jurisdiction. During the arbitration process, the tribunal has the power to decide all procedural and evidential matters as well as a range of general powers.[48] Most importantly, it can order the attendance of witnesses and disclosure of documents.[49] When necessary, parties can request courts to order the appearance of witnesses and production of evidence.[50] Courts also assist the arbitration by ordering parties to comply with the orders of the tribunal.[51]

[41] *Id.* at Article 1448.
[42] *Id.*atArticle 1467.
[43] *Id.*, Article 1468.
[44] *Id.*, Article 1520.
[45] Arbitration Act 1996, UK Public General Acts, c-23. (Hereinafter UK Arbitration Act)
[46] *Id.*,sections16-18.
[47] *Id.*,sections 30 *and* 31.
[48] *Id.*,section 34.
[49] *Id.*, sections 34, 43&44.
[50] *Id.*, section 43(1).
[51] *Id.*, section 42.

In post-arbitration, UK is a member state to the NYC, Geneva Convention 1927,[52] the Arbitration (International Investment Disputes) Act 1966 (which provides for the recognition and enforcement of International Center For settlement of Investment Disputes (ICSID) awards,[53] and the Foreign Judgments (Reciprocal Enforcement) Act 1933[54] (which provides for the enforcement of judgments and arbitral awards from specified former Commonwealth countries).[55] Therefore, there is a high rate of enforcement and recognition of arbitration awards.

In the United States, courts follow a supportive approach towards arbitration. The US Federal Arbitration Act (FAA)[56] declares that arbitration agreements are enforceable like any contract and courts can stay judicial proceedings and order arbitration.[57] If there is a doubt concerning the scope of arbitration, the law requires resolving in favour of arbitration, the court should enforce arbitration agreements and compel arbitration. During the arbitration process, the law enabled parties to request any court order concerning evidence.[58] In post-arbitration, the US incorporates the NYC in its FAA, therefore, enforcement and recognition of awards is regulated by the highest standards of the NYC.

In general, as inference can be taken from the experience of the above-mentioned countries and the readings of international and national commercial arbitration laws, it can be said that almost all jurisdictions have adopted the supportive approach of courts to international commercial arbitrations. This is justified because the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction preferring the finality and expediency of the arbitral process.[59]

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[52] *Convention On The Execution of Foreign Arbitral Awards*, No. 2096 (Apr 9, 2020, 12:20 AM), https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-7.en.pdf.

[53] Arbitration (International Investment Disputes) Act 1966, (Apr 9, 2020, 12:20 AM), http://www.legislation.gov.uk/ukpga/1966/41/contents.

[54] Foreign Judgments (Reciprocal Enforcement) Act 1933 (Apr 9, 2020, 12:20 AM), http://www.legislation.gov.uk/ukpga/Geo5/23-24/13/contents.

[55] Justin Williams,*Arbitration procedures and practice in the UK (England and Wales): Overview*, THOMSON REUTERS PRACTICAL LAW (Apr 9, 2020, 12:20 AM), https://uk.practicallaw.thomsonreuters.com/.

[56] The US Federal Arbitration Act (FAA), July 30, 1947, Pub.L. 68–401, 43 Stat. 883

[57] *Id.*, Article 9.

[58] *Infra* note 60, Article 7.

[59] Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, (Mar 7, 2020, 9:30 AM), https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf.

3. STAGES OF JUDICIAL INTERVENTION IN COMMERCIAL ARBITRATION

Courts may intervene in international commercial arbitrations at any stage.This may include, at the start of the arbitration, during and at the end of the process. However, the level and modality of intervention vary based on the different stages of arbitration.

3.1. Judicial Role at the Beginning of the Arbitration

It is possible to identify at least three situations in which the intervention of courts may be necessary at the beginning of the arbitral process: enforcement of the arbitration agreement, challenges to jurisdiction and the establishment of the tribunal.[60] The first involvement of national courts starts with determining the validity or otherwise of the arbitration agreement. As indicated by both the Model Law[61] and the NYC,[62] arbitration agreements should be in written form and based on Article 2 of the NYC. It is a requirement that they are signed by both parties.

The Convention enshrines that "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams."[63] The original 1985 version of the Model Law was the same with article II/2/ of the NYC, which requires an arbitration agreement to be in writing. However, the broader depiction of a "written agreement" is provided under the amended 2006 Model Law. Article 7/2/ declares the following;

> An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause

[60] See the UNCITRAL Analytical Commentary on the Draft Model Law, at 4. (Apr 7, 2020, 9:30 AM), https://www.mcgill.ca/arbitration/files/arbitration/Commentaireanalytique-en.pdf
[61] The Model Law, Article 7/2/.
[62] The NYC, Article 2/1/&/2/.
[63] The NYC, Article 2/2/.

> constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.[64]

As inference can be made from the above provision; the Model Law also requires an arbitration agreement to be in written[65] but broadens the definition of what writing means. It recognizes a record of the "contents" of the agreement "in any form" as equivalent to traditional "writing".[66] Hence, the agreement to arbitrate may be entered into in any form (including orally) as long as the content of the agreement is recorded.[67] Therefore, the Model Law does not necessarily require parties to exchange written messages. It modernizes the language referring to the use of electronic commerce by adopting wording inspired from the 1996 UNCITRAL Model Law on Electronic Commerce and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts.[68]

The second paragraph of the article states "the reference in a contract to a document" containing an arbitration clause constitutes an arbitration agreement in writing.[69] Therefore, if the agreement fulfils the requirements of the law, at the request of one of the parties, the court is obliged to determine whether the agreement is valid and then whether to enforce it or not. In this regard, we can see the *Arab African Energy Corp. Ltd v. Olieprodukten Nederl and BV. 2 Lloyd's Rep* case.[70]

The second situation shows that in countries where the Model Law is adopted,the arbitral tribunal's decision as to its jurisdiction is subject to control by the courts.[71] The principle of '*competence competence*'[72] is an important and widely accepted feature of modern arbitration law that entitles arbitration tribunals to determine their jurisdictions including the validity or

[64] The Model Law, Article 7/2/.
[65] *Id.*
[66] *Supra* note 61, at 5.
[67] *Id.*
[68] *Id.*
[69] The Model Law, Article 7/2/. See paragraph two.
[70] *Arab African Energy Corp. Ltd. V. Olieprodukten Nederland* B.Vv. [1983] 2 Lloyd's rep. 419, Queen's Bench division (commercial court).
[71] The Model Law, Article 16.
[72] Per this doctrine arbitrators are competent to rule on their competency to adjudicate on their jurisdiction. When dispute happens on the validity of the arbitration agreement and their jurisdiction, the tribunal will continue the arbitration and decide whether it has jurisdiction or not.

otherwise of arbitration agreements.[73] This principle is enshrined under article 16 of the Model Law.[74] Courts will control this power upon the request of the parties,[75] for example, at the beginning of the arbitral process, anunwilling respondent might wish to challenge the jurisdiction of the arbitral tribunal and seek to do so by recourse to the competent court (which would usually be the court of the place of arbitration).[76] The respondent would ask, in effect, for an order to stop the arbitration going ahead, andthe court can render a final decision that will not be subject to appeal.[77]

The third scenario that invites judicial intervention to the arbitration at the beginning is if the parties have failed to make adequate provision for the constitution of an arbitral tribunal and if there are no applicable institutional or other rules, the intervention of a national court may be required to appoint the chairperson or the respondent's arbitrator.[78] In the absence of any such rules, national courts should also intervene to decide any challenge to the independence or impartiality of an arbitrator.[79]

3.2. Judicial Role during the Arbitral Proceeding

The courts' role should be limited when the case is in the hands of the arbitrators since the purpose of arbitration is to provide an alternative to the court.[80] But, in certain circumstances, the tribunal may need some supports from the court during the arbitral proceeding.[81] The involvement of courts in this stage may be expressed by the following: their assistance in evidence taking, making an order for the preservation of property and to take some other interim measures. In evidence taking, since the power of arbitrators emanates from contract, their power is limited. They cannot render decisions that orders third parties to bring evidence and even their

[73] Jack Tsen-Ta Lee, Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore, 7 SAcLJ 421 (1995).
[74] The Model Law, Art.16.
[75] The Model law Art.16/3/ and Article 6.
[76] Aiste Sklenyte, "*International Arbitration: The Doctrine of Separability and Competence-Competence Principle"*, SEDA ÖZMUMCU ANNALES XLV, 62, 263-276, (2013).
[77] The Model Law, Article 16/3/.
[78] S*upra* note 62, at.5.
[79] *Id.*
[80] AymenMasadeh, "*The Court's Supportive Role in Arbitration Under the Law of United Arab Emirates*", INTERNATIONAL JOURNAL OF HUMANITIES AND MANAGEMENT SCIENCES (IJHMS), 1, 130 (2013).
[81] *Id*.

order directing the parties is not self-enforcing which will affect the arbitration process. Against this gap, many countries allow courts to assist arbitration tribunals in evidence taking.

In this respect, article 27 of the Model Law states "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this state assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence." According to this provision, either the arbitration tribunal itself or the parties with the approval of the tribunal can request the assistance of courts in evidence taking. This type of intervention is generally unobjectionable and appropriate in circumstances where the tribunal cannot take the measures sought and where such intervention has the agreement of the tribunal.[82]

3.3. Judicial Role in Post-Arbitration

National courts have a significant role to play in post-arbitration. Their role involves essentially setting aside, appeal, recognition and/ or the enforcement of awards. The end of the arbitration process and the receipt of an arbitration award does not end the journey of parties to the arbitration. Particularly, the award could be meaningless if the award debtor failed to comply with the terms and conditions of the award. Hence, a court`s assistive-intervention is important. In post-arbitration courts of two different countries will be involved; (1) Courts at the place of arbitration, that is, when a party challenges and seeks to set aside the award, or lodges an appeal against the award under the applicable arbitral law; or (2) Courts at the place of enforcement, where the award creditor seeks the recognition and enforcement of the award.[83]

Per the Model Law, set aside recourse application can be lodged to national courts at the seat of arbitration when one or more of the following grounds are fulfilled: when the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; when the party was unable to present his case; when the award concerns matters

[82] *Supra* note 29.
Court involvement during the arbitration process comes in many forms and is rarely dealt with in arbitration statutes. Properly exercised, this involves courts' making procedural orders that cannot be ordered or enforced by arbitrators, or orders for maintaining the status quo. These measures are generally helpful.
[83] *Id.*

which are not covered by the arbitration agreement; when the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties and when the subject matter of the dispute is not arbitrable due to public policy reasons.[84]

Generally, assistive-intervention of national courts is important to enforce the terms of the award. The distinction between recognition and enforcement of decisions has little practical relevance.[85] There is no special recognition procedure required under the NYC.

4. THE ROLE OF ETHIOPIAN COURTS IN INTERNATIONAL COMMERCIAL ARBITRATION

Today, the rise of international commerce and globalization has prompted countries of the world to find an efficient dispute settlement mechanism[86] leading to the acceptance of arbitration as an ideal avenue for dispute settlement.[87] Ethiopia is not an exception to this reality of the world. It does not have an independent arbitration law and its national arbitration law seems to be designed for domestic arbitration.[88]

The pertinent provisions in its CC and the CPC do not make a distinction, except in the context of the execution of foreign arbitral awards, between domestic and international arbitration.[89] Both domestic and international arbitrations are governed by the provisions of the CC and the CPC. Notwithstanding the non-existence of a specialized arbitration code, Ethiopian Courts are playing a significant role in all stages of international commercial arbitration.

4.1. Enforcement of the Arbitration Agreement

At the beginning of arbitration, the Ethiopian court`s supportive role starts with the enforcement of the arbitral agreement or a submission agreement. In this respect, based on article 3325 of the

[84] The Model Law, Article 34
[85] Bungenberg M., Reinisch A. (2020) Recognition and Enforcement of Decisions. In: From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court. European Yearbook of International Economic Law. Springer, Berlin, Heidelber, 155.
[86] *Id.*
[87] *Id.*
[88] Bezzawork Shimelash, "*The Formation, Content and Effect of an Arbitral Submission under Ethiopian Law"*, 17 JOURNAL OF ETHIOPIAN LAW, 90. (1994).
[89] *Supra* note 14, at 302.

CC, arbitral submission is recognized as a contract by which its performance is backed by court assistance. Further, the same code reaffirms the rights of one of the parties to demand enforcement of the arbitral submission in case the other party refuses to be bound by the submission agreement.[90] In this stage, the role of Ethiopian Courts can also be manifested through their role in the appointment of arbitrators. As enshrined under article 3334(1) and 3332(1) of the CC -where the parties fail to appoint their arbitrators either in the agreement to arbitrate or subsequently, the mandate to appoint arbitrators will shift to courts.

4.2. The Autonomy of the Arbitral Tribunal and Judicial Role during the Arbitration Process

During the arbitration proceeding, the arbitration law of Ethiopia allows a fair degree of arbitral autonomy. For instance, it empowers arbitrators to initially decide on their jurisdiction, to grant orders concerning interim measures of protection and measures relating to the attendance of witnesses. Compared with the international standard there is some degree of restriction on the powers of the arbitrators. Internationally, per article 16 of the model law, arbitral tribunals are competent to decide on their jurisdiction, what we call the *competence-competence principle.* In this respect under article 3330 of the CC, arbitrators will have the mandate of deciding on their jurisdiction if and only if, they are entitled by the arbitral agreement or submission.[91] In no case, can arbitrators decide over the validity or otherwise of the arbitration agreement.[92] Therefore, from the perspective of the *competence-competence principle,* unlike the international experience, the power of the arbitrators is somehow limited in Ethiopia.

Despite the limitation on their jurisdiction, in general terms, it seems there is some degree of freedom during the process, as long as the arbitrators can guarantee procedural fairness. From reading article 317(3) of the CPC and article 3344(2) of the CC, it can be inferred that Ethiopian laws of arbitration also recognizes the importance of the right of parties to an arbitration to apply for court assistance whenever appropriate.

[90] The CC, Article 3344.
[91] *Id*. at Article 3330/2/.
[92] *Id*, at Article 3330/3/.

Another judicial role during the arbitration process in Ethiopia is the involvement of courts in the disqualification of arbitrators. Per article 3340 and 3342 of the CC, courts are allowed to intervene in the arbitration process when there is misconduct of arbitrators. Based on these articles, an application for the disqualification of arbitrators shall be made to the arbitration tribunals. However, an appeal can be lodged to the courts against the decision of the tribunal.[93] In this regard, the case between *SaliniCostruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority (AAWSA)* can be cited.[94]

In this case the respondent, AAWSA submitted to the ICC a challenge of all three members of the Arbitral Tribunal, pursuant to article 11 of the ICC Rules and the arbitral tribunal decided that the respondent's challenge was unjustified.[95] Accordingly, the respondent appealed to the Federal Supreme Court against the decision of the ICC based on article 3342 of the CC.[96] The court issued an injunction ordering the suspension of the arbitration.[97] Also, the AAWSA had commenced a separate action before the Federal First Instance Court for obtaining a judgment that the tribunal lacks jurisdiction for pending arbitration.[98] By this case, national court of Ethiopia tried to give ananti-arbitration injection order to international commercial arbitration. However, the ICC retained its position and passed a final award.

4.3. The Role of Ethiopian Courts in Post-Arbitration

4.3.1. Recourses on Arbitration Award

At the end of the arbitration procedure, the most important supportive role of national courts is expressed in two ways: recognition and enforcement of awards and response for set aside recourses. Regarding recognition and enforcement of foreign awards, a few days ago the Ethiopian parliament approved the ratification proclamation of the NYC.[99] This could be

[93] The CC, Article 3342/3/
[94] *Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia,* Addis Ababa Water and Sewerage Authority. ICC Case No. 10623/AER/ACS (hereinafter; Saline case)
[95] *Id.* at para.3-5.
[96] *Id.* at para.78.
[97] Salini Case, Award, para.77
[98] Saline Case, Award , para.26
[99] Ethiopia's Ratification of the New York Convention, AFRICA LEGAL NETWORK, (Apr 7, 2020, 9:30 AM), <https://www.africalegalnetwork.com/ethiopias-ratification-new-york-convention/>.

considered as an important milestone in the Ethiopian arbitration law regime, as it will bring revision of laws and ultimately attract investors by branding the country.

Then ational arbitration laws of Ethiopia, which govern both domestic and international commercial arbitrations, accepted the setting aside of awards as a major recourse under article 355 of the CPC. It governs the recognition and enforcement of foreign arbitral awards under article 431 and the following of the same code. In this respect, Ethiopia`s arbitration law is compatible with international experience. However, unlike that of the international experience, Ethiopia entitled national courts to review final awards of arbitral tribunals through appeal.[100] This includes international commercial arbitrations by which Ethiopia will have connections. But, parties can waive their right to appeal with full knowledge of the circumstances as stated under article 350(2) of the same code.

In this respect, the Ethiopian Federal Supreme Court`s Cassation Bench in the case between *Dragados J & P JV v. Saba Construction PLC* can be cited.[101] In this case, the bench passed a controversial interpretation of article 350/2/ arguing that even if the parties agreed on the finality clause, it is not assumed they fully understood the circumstances of the case, so, they can still use their appeal right. This means, unless parties enter an agreement to arbitrate and accordingly waive their appeal right after the dispute occurred, they cannot waive their appeal right. Accordingly, there is no possibility of waiving their appeal right in arbitration agreements to solve future disputes. This judgment of the bench widened the court`s intervention by narrowing the parties` right of waiving their appeal right.

Further, according to article 80 of the FDRE Constitution, Ethiopia allowed the cassation bench of the Federal Supreme Court to review any final decisions.[102] In this regard, there is an apparent contradiction between the Amharic and the English version of article 80/3//A/.The English version reads as: "The Federal Supreme Court has a power of cassation over any final

[100] The CPC, Article 350.
[101] Dragados J & P JV v. Saba Construction PLC ('Decisions of the Federal Supreme Court Cassation Division', CFN 37678, 2009).
[102] THE CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, Art.80, FED. NEG. GAZETTA (NO.1/1995). (Hereinafter THE FDRE CONSTITUTION).

court decision containing a basic error of law. Particulars shall be determined by law." Whereas the Amharic version reads;

> **"የፌድራሉ ጠቅላይ ፍርድ ቤት መስረታዊ የሆነ የህግ ስህተት ያለበትን ማናቸውንም የመጨረሻ ውሳኔ ለማረም በሰበር ችሎት የማየት ስልጣን ይኖረዋል። ዝርዝሩ በህግ ይወሰናል።"**[103]

Unlike the English version which states "*any final court decision*", the Amharic version refers "*any final decision*". Provided that the Amharic version shall have final authority in the case of contradiction based on article 106 of the constitution, the cassation bench of the Federal Supreme Court has the jurisdiction to entertain arbitration awards, as they are included under any final decision phrase of the constitution. This is what is practically happening in Ethiopia. In this respect, we can see the case between *National Mining Corporation v. Danni Drilling PLC*, by which the Federal Supreme Court of Ethiopia established its jurisdiction to review a final arbitration award in its cassation power.[104] Among other things, this recognition of appeal and cassation as recourse might be considered as one of the downsides of the legal regime of Ethiopia at odds with the global trend. Today, internationally, the only acceptable recourse is set aside recourse.

This fact makes the country arbitration unfriendly because if arbitration awards are exposed to court reviews to this level, traders dealing with Ethiopians and/or in Ethiopia, will be discouraged to go to arbitration. As international commercial relations are highly reliant on arbitration, the problem in the arbitration will have a negative impact on the country`s international trade engagement. Likewise, in the existence of such recourse, traders will not make arrangements that makes Ethiopia the seat of arbitration. The combined effect of this will probably affect the country's economy.

[103] *Id.* Article 80 /3/ /A/.
[104] National Mining Corporation and Danni Drilling PLC ('Decisions of the Federal Supreme Court Cassation Division', CFN 42239, 2011).

4.3.2. Enforcement and Recognition

Concerning enforcement and recognition, globally the NYC stipulated conditions for the recognition and enforcement of foreign arbitral awards before the competent national court of its choice[105] Article IV reads as follows:

> 1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) the duly authenticated original award or a duly certified copy thereof; (b) the original agreement referred to in article II or a duly certified copy thereof. 2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.[106]

If the above requirements are fulfilled, no other requirement can be requested by the recognition and enforcing court, as members have a general obligation of not imposing substantially more onerous conditions than those stipulated under the convention.[107] So far, in Ethiopia, the recognition and enforcement of arbitration awards is governed by the CPC and identified under Article 461 and 458 as the grounds to be fulfilled for the recognition and enforcement of foreign arbitration awards. Most of these conditions are similar to the NYC standards enshrined under article IV and V. Accordingly, a foreign arbitral award that satisfies the five requirements relating to reciprocity, arbitrability, public policy, procedural fairness and valid arbitration agreement would be enforced.

However, there is no case law to test these standards. Compared with the NYC, what is problematic in the Ethiopian legal system in recognition and enforcement of foreign awards is the reciprocity requirement. The problem is how can the proof of reciprocity be made? There is no black and white standard in this regard. Yet, we have an important case in the enforcement of

[105] The NYC, Articles IV-VI.
[106] The NYC, Art IV.
[107] The NYC, Art III.

foreign judgments, *'Paulos Papassinus'* case by which the Federal High Court and in appeal the Federal Supreme Court refused enforcement of judgment of a Greece Court arguing that Ethiopia has no judicial assistance treaty with Greece, hence, no reciprocity.[108] In this case, the court argued that the only way of establishing reciprocity is by producing a judicial assistance treaty.[109]

This standard makes enforcement difficult as Ethiopia has judicial assistance treaties with a limited number of countries. Though, this case is in the enforcement of foreign judgments, practically it is an important precedent even for the enforcement of arbitration awards. Yet, as Ethiopia ratified the NYC recently, it is required to amend the provisions of the CPC and make them compatible with the Convention, particularly by avoiding the reciprocity requirement. So, recognition and enforcement would no more be a problem in Ethiopia. This reform, with other reforms, would enable the country to attract investors and make it the best seat of international arbitrations.

CONCLUSION

Consensus is reached on the supportive role of courts in international commercial arbitration. The issue is on the extent of their involvement. A judicial role can occur in all stages of the arbitration. At the beginning of the arbitration it happens through the enforcement of the arbitration agreement, during the arbitration proceeding it includes court intervention through assistance in evidence taking, through making an order for the preservation of property and by taking some other interim measures. In post-arbitration, courts assist the arbitration through recognition, enforcement and set aside recourse. The article has found that- Ethiopia`s national courts have a high-level of involvement in arbitration. However, unlike many countries in the world, the country does not have a special arbitration law. The provisions under its CC and CPC governs both domestic and international commercial arbitrations.

Concerning recourses on international arbitration awards, against the international experience by which set aside is the only acceptable recourse in post-arbitration, Ethiopian arbitration law

[108] In the Matters of *Paulos Papassinus*, Federal High Court, Civil Case No.1623/1980; and in the Matters of *Paulos Papassinus*, Federal Supreme Court, Civil Appeal Case No.1769/88.
[109] *Id.*

entitles national courts a broader mandate of reviewing arbitration awards through appeal and cassation. Even though the country adopted most of the standards of the NYC in its domestic law, Ethiopia put a strict reciprocity requirement for the recognition and enforcement of foreign awards. The combination of these facts makes the country an arbitration unfriendly state and ultimately curtails the benefits of commercial arbitration by discouraging the international business community. Yet, as the country recently ratified the NYC, hopefully, this will be changed.

In closing, to cope with the current international developments and reap the benefits of international commercial arbitration, Ethiopia needs to restructure its arbitration rules by avoiding appeal and cassation as recourses for international commercial arbitration and enact an independent arbitration law through the lens of the UNCITRAL model arbitration law.