

# A Comparative Analysis of the Ethiopian Legal Framework for Challenging Arbitral Awards through Appeal

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## Abstract

*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. Nevertheless, in countries having traditions of court intervention in arbitration, the laws may – in addition to the usual action to set aside – allow parties to appeal the award before the courts. Comparably, the Ethiopian arbitration law facilitates both the avenues of appeal and setting aside. However, the legal framework for challenging arbitral awards through appeal is criticised for allowing excessive intervention of courts over arbitration, mainly, over the making of the award. This aspect of judicial intervention represents the most contestable interference in arbitral procedure. Where parties are able to challenge, appeal or overturn the outcome of arbitration, the finality and currency of an award will be compromised. Hence, this work is to provide possible approach to rectify the legal problems associated in the challenge of arbitral awards. Accordingly, after addressing the general overview of commercial arbitration, this article, with a view to draw best international experiences, provides an intensive comparative analysis of the Ethiopian legal framework for challenging arbitral awards-with UNCITRAL Model Arbitration Law and England Arbitration Act.*

**Keywords:** Appeal, Arbitral awards, Challenge, Civil Procedure Code, English Arbitration Act, Merit review, Model Law, Setting aside

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## Introduction

Although the avenue of appeal from arbitral awards seems appropriate for the dissatisfied party in the arbitral decision, it does not meet with the demand of the current commercial arbitration of Ethiopia and the universal trend. In order to create a brand which appeals to parties, it is necessary to ensure that it reflects the contemporary needs of the international commercial community as well.<sup>1</sup> At present, the most pressing need appears to be that of reducing the cost of arbitral proceedings which, it is argued, will become even more acute in the present economic conditions if arbitration is to distinguish itself from litigation. Put it in other words, the more courts intervene in an approach that discredits the autonomy of the award holder, the more international parties keep away from choosing Ethiopian arbitration law and as a seat of arbitral tribunal.

The comparative analysis under this work is with the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Law on international commercial arbitration (ICA) (here after the Model Law) and the English arbitration legal regime. The justification in selecting the Model Law is mainly because it is the widely accepted standard for the modern commercial arbitration rules, where several countries including the so-called arbitration superpower countries and the developing world are harmonising their domestic laws towards these arbitration friendly rules. Hence, since Ethiopia cannot leave itself out of the global trend, it is

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<sup>1</sup>H.M. Holtzmann, *Report V: The Conduct of Arbitral Proceedings*, in P. Sanders, *UNCITRAL's Project for a Model Law on International Commercial Arbitration*, Kluwer, 1984, p.134.

indispensable to harmonise and modernise our laws in light of this trend. Principally, having harmonised and modernised or arbitration friendly legal framework will have a positive impact for the economic growth of a country. Thus, understanding the current trade and investment development and the demand of commercial communities participating in this area, it is unquestionable that Ethiopia adjusts its old and hostile arbitration rules, especially rules for the challenge of arbitral awards, in light of the Model Law.

Whereas the justification in choosing the English arbitration law for the comparison is, mainly for different purpose from that of the Model Law. That is, more to learn from the negative impacts that England is facing due to its failure to adopt arbitration friendly rules, mainly those related with the challenge of arbitral awards.

The scope of the comparative analysis is limited to the issue of challenging arbitral awards through appeal. Hence, the writer's suggestion regarding the need for adopting harmonised and modernized arbitration law is concerning the law governing challenge of arbitral awards through appeal.

To the best of the researcher's knowledge, academic works in this area of Ethiopian law is scant. Of course, some writers in a sub-section of their respective journal articles have attempted to show that the Ethiopian law for the challenge of arbitral award is knotty.<sup>2</sup> This article differs in that it is an

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<sup>2</sup> e.g. Aschalew Ashagre, Involvement of Courts in Arbitration Proceedings under Ethiopian Law, *Journal of Business and Development*, vol.2, 2007; Tewodros Meheret, በሽምግልና መዳኘት

intensive comparative analysis to identify legal problems and to draw best experiences from international principles and practices just to rectify the legal problems. More importantly, the position of those mentioned writers is directed to the need for improving appeal rules; however, this work argues for the total lift of appeal procedure.

## 1. An Overview of Commercial Arbitration

### 1.1. Commercial Arbitration and the Progress towards Harmonisation

International commercial arbitration (ICA) has enjoyed growing popularity with business and other users over the past 50 years.<sup>3</sup> There are a number of reasons that parties elect to have their international disputes resolved through arbitration. These include the desire to avoid the uncertainties and local practices associated with litigation in national courts, the desire to obtain a quicker, more efficient decisions, the relative enforceability of arbitration agreements and arbitral awards (as contrasted with forum selection clauses and national court judgments), the commercial expertise of arbitrators, the parties' freedom to select and design the arbitral procedures, confidentiality

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<sup>3</sup>Queen Mary University of London School of International Arbitration, *International Arbitration Study: Corporate Attitudes and Practices*, sponsored by Price Waterhouse Coopers, 2008, Available at <[www.pwc.co.uk/eng/publications/International\\_arbitration.html](http://www.pwc.co.uk/eng/publications/International_arbitration.html)>.

and other benefits.<sup>4</sup> Understanding those merits, different commentators and advocates have been attempting to advance the principles and practices of ICA through harmonising domestic arbitration laws.

Pressures for harmonization began to mount within ICA in the late 1970's and 1980's, given the perceived inadequacies of existing national arbitration laws and the differences and variations in legal systems.<sup>5</sup> In response to criticisms over the antiquated state of many national arbitration laws, and to serve the needs of the users of ICA, efforts towards reform of national arbitration laws commenced.<sup>6</sup> As a result, UNCITRAL began work on harmonizing national arbitration laws dealing with ICA using the New York Convention as the cornerstone.<sup>7</sup> Harmonization in the context of UNCITRAL can be defined as making regulatory requirements or government policies of different jurisdictions identical (or, at least, similar).<sup>8</sup>

UNCITRAL sought to eliminate barriers to ICA created by differing levels of state control and varying arbitration laws by drafting a model law and group of uniform rules on ICA. This harmonization approach is reflected in the

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<sup>4</sup>Jan Paulsson, *International Commercial Arbitration, Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, 4<sup>th</sup> ed, in John Tackaberry, Cambridge University Press, 2003, p.3354.

<sup>5</sup>W. Laurence Craig, Some Trends and Developments in the Law and Practice of International Commercial Arbitration, *International Law Journal*, Vol. 30, No.25, 1995, p.22.

<sup>6</sup>*Ibid.*

<sup>7</sup>David W Leebron, Lying Down with the Procrustes: An Analysis of Harmonization Claims in Fair Trade and Harmonization: Pre Requisite for Free Trade? *Journal of International Business Law*, vol. 22, 1996, p.48.

<sup>8</sup>Konrad Zweigert & Hein Kotz, *Introduction to Comparative Law*, 3<sup>rd</sup> ed., Oxford University Press, 1998, p.129.

efforts of UNCITRAL in the drafting and diffusion of the Model Law on ICA.<sup>9</sup>

Harmonization of national law on ICA for creating a harmonized legal environment has become one of the most important challenges globalization posed today. A harmonized legal environment is a key to improving ICA, international commerce and hence economic growth.<sup>10</sup> The process of harmonization acknowledges the role of national laws and courts in the international arbitration process, albeit with greater recognition of party autonomy and more limited judicial intervention. Because of harmonization, the law relating to ICA is now conducted, in many respects, in a similar manner throughout the world.<sup>11</sup>

Outdated laws, inefficient regulation and malfunctioning institutions are common problems in many developing countries. By undertaking to modernise the legal framework for domestic business and following acceptable international standards, a country would signal its readiness to promote investment.<sup>12</sup> Interestingly, the past twenty years have shown that the Model Law has indeed been highly useful not only for developing countries,

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<sup>9</sup>United Nations commission on International Trade Law on the work of its 18th Session -3-21 June 1985, Rep.17, U.N.Doc.A/40/17 (August 21, 1985).

<sup>10</sup>G Hermann, The UNCITRAL Arbitration Laws: A Good Model of a Model Law, 3 *Uniform Law Review*, vol. 3, No.485, 1998, pp.466-499.

<sup>11</sup>*Ibid.*

<sup>12</sup>Kofi Annan, Help by Rewarding Good Governance, *International Herald Tribune*, March 20, 2009, at 8.

but also for many industrialized countries which have also reformed their law by adopting the Model Law.<sup>13</sup>

Within ICA, the main justifications for harmonization of national arbitral regimes and practices generally include: (a) providing a jurisdictional interface to enable parties from different systems to interact or communicate; (b) fairness in international transactions and international trade competition; (c) economies of scale, and (d) political economies of scale.<sup>14</sup>

Despite these justifications given for harmonization of national diversity within international trade and commerce, not all commentators adhere to belief in harmonization. Some commentators doubt whether elimination of legal diversity is necessary for free trade and international transactions generally.<sup>15</sup> Lord Goff, for example, states, “we should not try to insist upon uniformity or harmonization of laws which are different processes.”<sup>16</sup> Despite the theoretical debate over the inherent merits of harmonizing international trade regime, on-going practical efforts try to either unify or harmonize international trade and commercial law generally.

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<sup>13</sup>UNCITRAL, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Rep. 42, U.N. Doc. A/CN.9/264 (Mar. 25, 1985).

<sup>14</sup>Katherine Lynch, The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration, *Yale Journal of International Law*, vol., 47, No. 44, 2012, p.36.

<sup>15</sup>Since this article is not intended to analyze the merits and de-merits of the harmonization process, the researcher will not be addressing the doubts raised by various commentators about the legitimacy of the harmonization process.

<sup>16</sup>Lord Goff, *Windows on the World: International Commercial Arbitration For Today and Tomorrow*, Oxford University Press, 2011, p. 52.

When preparing the Model Law, the main focus of UNCITRAL was to harmonize and modernize the law governing the settlement of international commercial disputes, rather than the conduct of domestic arbitrations. Nevertheless, it was obvious that a State could easily adapt the Model Law to domestic arbitrations and a significant number of States have done so.<sup>17</sup>

However, there are some states which follow their own path and have insisted not to harmonise their arbitration law with the current global trend. Notably, England can be cited as an example. Before the English Arbitration Act came into force, English arbitration law was scattered over the Arbitration Acts 1950, 1975 and 1979. This legislation applied to different aspects of arbitration and was complemented by, interpreted by and built on a large body of case law.<sup>18</sup>

Historically, three broad criticisms were levelled at English arbitration: it was slow and expensive: “litigation without wigs”; the law was inaccessible to laypersons and to foreign users; and the courts were too ready to intervene in the arbitral process. As a result, arbitration became increasingly unattractive as an option for dispute resolution and London lost out to other jurisdictions as a venue for international commercial arbitrations.<sup>19</sup>

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<sup>17</sup> e.g. Bulgaria, Canada, Egypt, Germany, Hungary, India, Kenya, Lithuania, Mexico, New Zealand,

Nigeria, Oman, Sri Lanka, Zimbabwe.

<sup>18</sup> Karen Tweeddale and Andrew Tweeddale, *A Practical Approach to Arbitration Law*, Blackstone Press, 1999, p.35, [hereinafter Tweeddale, *A Practical Approach to Arbitration Law*].

<sup>19</sup> William W. Park, The Interaction of Courts and Arbitrators in England: the 1996 Act as a Model for the United States, *International Arbitration Law Review*, vol. 54, No.144, 1998, p.125.

In the 1980s, the Department of Trade and Industry of England established the Departmental Advisory Committee on Arbitration Law (hereinafter DAC). One of the key decisions for the DAC was whether to recommend the enactment of the Model Law (1985). Whilst the DAC decided against adopting the Model Law (1985) wholesale, it did recommend that the new Arbitration Act should, as far as possible, adopt the structure and language of the Model Law (1985) and be clear and accessible. Despite these aspirations, the first draft bill in February 1994 did little more than consolidating the existing statutes of 1950, 1975 and 1979.<sup>20</sup>

In case of Ethiopia, it is obvious that there has not any attempt made to harmonize and modernize the arbitration law in light of the current global trend. The major sources of Ethiopian arbitration law are the Civil Procedure Code (CPC), the Civil Code (CC) and Federal Cassation Bench decisions.<sup>21</sup> The Ethiopian legal framework for modern arbitration has been laid down by the mid-20<sup>th</sup> century codifications. Before that, arbitration was known only within the context of traditional dispute resolution.<sup>22</sup> “The pertinent provisions of the CPC do not make a difference, except in cases of execution

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<sup>20</sup>Margaret Rutherford and John Sims, *Arbitration Act 1996 of England and Wales : A Practical Guide*, Sweet and Maxwell, 1996, p. 4.; A comprehensive discussion of the Departmental Advisory Committee’s (DAC) on the draft of 1996 arbitration act, UK, May 2, 1989.

<sup>21</sup>Civil Code of the Empire of Ethiopia, *Negarit Gazzeta*, 1960, Arts.3325-3346, [hereinafter *Civil Code of Ethiopia*]; Civil Procedure Code of the Empire of Ethiopia, *Negarit Gazzeta*, Arts.315-319 and 350-357, 1965 [hereinafter *Civil Procedure Code of Ethiopia*]. These codes reveal that courts in Ethiopia control arbitration by avenues of appeal, setting aside and refusal.

<sup>22</sup> Hailegabriel, *The Role of Ethiopian Courts in Commercial Arbitration*, *Supra note 2*, p. 301.

of foreign arbitral awards, between domestic and international arbitration.”<sup>23</sup> Besides, there is no law geared to only commercial disputes as is the case in some traditional civil law countries.<sup>24</sup>

Like that of its English counterpart, the approach of Ethiopian arbitration law, especially that related with the challenge of arbitral awards, has been criticised for allowing courts maximum intervention over the arbitration process. This old approach of the law is in opposition to the current global trend, where several countries are shifting towards minimising courts control over the arbitration process.

## 1.2. Court Intervention in Arbitral Proceedings

As in all relationships, the appropriate balance must be found between the rights of the courts to supervise arbitrations and the rights of parties to ask for the court's assistance in times of need. As Lord Mustill, a former senior English judge, has stated:

*[T]here is plainly a tension here. On the one hand the concept of arbitration as a consensual process reinforced by the ideas of transnationalism leans against the involvement of the mechanisms of state through the medium of a municipal court. On the other side there is the plain fact, palatable or not, that it is only a Court possessing coercive powers which could rescue the arbitration if it is in danger of foundering.*<sup>25</sup>

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<sup>23</sup>Michael, *Law and Practice of Arbitration in Ethiopia: A Brief Overview*, supra note 2, p. 11.

<sup>24</sup>Hailegabriel, *The Role of Ethiopian Courts in Commercial Arbitration*, supra note 2, p. 303.

<sup>25</sup>Lord Mustill in *Coppée Levalin NV v Ken-Ren Fertilisers and Chemicals*, Newcastle Hight Court, England, case No. 109, para. 116, 2006.

As is evident from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (hereinafter ‘the New York Convention’) and the Model Law, there are four stages when courts are most likely to become involved with the arbitration process: (1) prior to the establishment of a tribunal; (2) at the commencement of the arbitration; (3) during the arbitration process; and (4) during the enforcement stage.<sup>26</sup>

With regard to the Ethiopian arbitration law, it seems to approve elevated role of the courts rather than arbitration tribunals. Before the arbitral proceeding, during and after the making of the award, there is ignominious intervention of state courts.<sup>27</sup> The legal framework is being criticised for allowing courts to follow a hostile approach over the arbitral proceedings.

Overall, national courts have vested interest in arbitration because it is a private quasi-judicial dispute settlement method. National procedural law exercises authority over contractually constituted arbitration panels for fear that it may be abused, and become a way to escape the law.<sup>28</sup> However, the current global approach advocates this role of national courts to be arbitration friendly.

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<sup>26</sup>Julian D.M. Lew *et al.*, *Comparative International Commercial Arbitration*, Oxford University Press, 2003, p. 367.

<sup>27</sup>For instance, Civil Code of Ethiopia, Arts. 3330(3) (1) and 3330(1)-(2); Civil Procedure Code of Ethiopia, Arts. 317(3),317(3) , 351, 356 and 461.

<sup>28</sup>Redfern, A & Henter, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, 2005, p. 439 [hereinafter Redfern, *Law and Practice of International Commercial Arbitration*].

### 1.3. The Arbitral Award

Parties generally expect an arbitration to result in an award that will be final and binding. The widely accepted meaning of award is that it is the final decision by the arbitrators, dispositive of the issues in the case.<sup>29</sup> Tribunals may, however, issue partial awards or interim awards, which also may be final and binding on the parties.<sup>30</sup> In addition, arbitrators may issue certain directions and orders during the course of the proceedings, which may be reviewable by the tribunal, and which do not constitute awards.<sup>31</sup>

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.<sup>32</sup>

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

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<sup>29</sup>*Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, London High Court, England, case No. 234, Para. 123, 2003 (Interim order requiring posting of pre-hearing security properly confirmed by court).

<sup>30</sup>International Court of Arbitration (ICC), Final Report on Interim and Partial Awards, *ICC Bulletin*, Oct. 4, 1990, p. 7.

<sup>31</sup>*Ibid.*

<sup>32</sup> e.g., ICC Rules, Art. 29.

have the legal effect of *res judicata* as regards those issues.<sup>33</sup> 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 entitled order or award.<sup>34</sup>

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.<sup>35</sup> 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.

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 evidence 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 by law.”<sup>36</sup> Arbitrators must therefore be conscious – or be made conscious by the parties,

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<sup>33</sup>Bernard Hanotiau, *The Res Judicata Effect of Arbitral Awards*, *ICC Bulletin: Complex Arbitrations – Special Supplement*, May 7, 2003, at 47, [ hereinafter Bernard, *The Res Judicata Effect of Arbitral Awards*].

<sup>34</sup>*Ibid.*

<sup>35</sup>*Ibid.*

<sup>36</sup>G.J. Horvath, *The Duty of the Tribunal to Render an Enforceable Award*, *Journal of International Arbitration*, vol. 18, No.143, 2001, p.158.

especially the claimant – 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.<sup>37</sup>

## **2. Challenging Arbitral Awards through Appeal**

### **2.1. Legal Frameworks**

As Redfern and Hunter note, the degree of court involvement that is allowed by different states may be observed as a spectrum.<sup>38</sup> At one end of the spectrum are: for instance, countries like France, which apply a minimum intervention over international arbitral awards, and Switzerland, which permits non-Swiss parties to waive controls all in all. In the centre of the spectrum are grouped a considerable number of states that have adopted the grounds of challenge listed in the Model Law. At the other end of the spectrum are countries like England, which operate a spectrum of controls, including a limited right of appeal on error of law that the parties may agree to put aside.<sup>39</sup> In the opinion of the writer, the Ethiopian arbitration law may be categorized in a different spectrum which can be regarded as a kind of extreme control of courts, where the grounds of appeal includes not only error of law (like England), but also extends to error of fact and procedural issues.

Most or all modern arbitration laws, including those inspired by the Model Law, contain provisions on setting aside international awards that are similar to those of the Model Law: a dissatisfied party may challenge the award, but

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<sup>37</sup>Bernard, *The Res Judicata Effect of Arbitral Awards*, supra note 33.

<sup>38</sup>Redfern, *Law and Practice of International Commercial Arbitration*, supra note 28, p. 607.

<sup>39</sup>Ibid ; A. Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, Oxford University Press, 2007, p.59, [hereinafter Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*]

only in an action to set aside, and only on limited grounds that preclude a review of the merits.<sup>40</sup> Under Article 34 of the Model Law, an arbitral award can only be set aside in limited circumstances. These include 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)).<sup>41</sup> The scope of the set aside action covers the procedural defect, but not its substance.<sup>42</sup> There is no appeal under the Model Law on the facts or judicial review on the merits.<sup>43</sup> In a setting aside

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<sup>40</sup>G. Herrmann, *The Role of the Courts under the UNCITRAL Model Law Script*, in J.D. Lew, *Contemporary Problems in International Arbitration*, Queen Mary College, 1986, p.169.

<sup>41</sup> These grounds are taken from Article V of the New York Convention. There is a pleasing symmetry here. The New York Convention, in Article V, sets out the grounds on which recognition and enforcement of an international award may be refused. Article 34 of the Model Law sets out the same grounds (with slight differences of language) as the grounds on which such an award may be set aside. These grounds are as follows:

lack of capacity to conclude an arbitration agreement, or lack of a valid arbitration agreement; where the aggrieved party was not given proper notice of the appointment of the arbitral tribunal or the arbitral proceedings or was otherwise unable to present its case; where the award deals with matters not contemplated by, or falling within, the arbitration clause or submission agreement, or goes beyond the scope of what was submitted; where the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or with the mandatory provisions of the Model Law itself; where the subject-matter of the dispute is not capable of settlement by arbitration under the law of the State where the arbitration takes place; where the award (or any decision in it) is in conflict with the public policy of the State where the arbitration takes place. An application under the Model Law for setting aside an award must be made within three months from the date on which the aggrieved party receives the award (subject to any extended time limit that may be appropriate where corrections, interpretations, or additional awards have been issued under Article 33).

<sup>42</sup>The Model Law regarding the Law's scope of application, article 1(2).

<sup>43</sup>A.S. Reid, *The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: Are the Two Systems Poles Apart?* *Journal of International Arbitration*, vol. 21, No.237, 2004, p. 227.

action, courts are restricted to the reasons offered by Article 34(2), mainly to procedural issues. The court may not review the merits of the award.<sup>44</sup>

In describing the nature of setting aside proceedings, a court from a Model Law country held that the ‘applicable review in annulment proceedings is that of an external trial, (...) in such a way that the competent court examining the case solely decides on the formal guarantees of the proceedings and the arbitral award, but cannot review the merits of the matter.’<sup>45</sup> Moreover, courts of Model Law countries have regularly emphasized the exceptional character of the remedy as courts should in principle not interfere with the decision of the arbitral tribunal.<sup>46</sup>

There are exceptions to the general rule in arbitration that the only grounds for challenging an award are based upon jurisdiction, procedural irregularities, arbitrability, or public policy. These exceptions are found generally in common law legal systems. In England, for example, a party may appeal from an arbitral award on a point of law, unless the parties have agreed otherwise.<sup>47</sup> This right of appeal, however, is subject to substantial limitations. The appeal cannot be brought unless all the parties agree, or unless the court grants leave to appeal.<sup>48</sup> The court should grant leave if the

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<sup>44</sup>R. B. Lillich and C.N. Brower, *International Arbitration in the 21st Century: Towards ‘Judicialization’ and Uniformity?* Transnational Publishers, 1994,78.

<sup>45</sup>*Sofía v. Tintorería Paris, Sofía*, Madrid Court of Appeal, Spain case No. 19, Para. 23, 20 January 2006.

<sup>46</sup>*e. g., Quintette Coal Limited v. Nippon Steel Corp. et al.*, Court of Appeal for British Columbia, Canada, 24 October 1990, Case No. 16, Para. 54.

<sup>47</sup>English Arbitration Act of 1996 [hereinafter *English Arbitration Act*, § 69(1)].

<sup>48</sup>*Id.*, § 69(2).

tribunal was obviously wrong on the point of law.<sup>49</sup> Moreover, case law has established that only a point of English law can be appealed.<sup>50</sup>

On an appeal under the English Arbitration Act, the court may either confirm, vary or remit the disputing case to the arbitral tribunal for reconsideration in whole or in part or set the award aside in whole or in part. The court will generally remit the matters in question to the arbitral tribunal for reconsideration unless it is satisfied that this would be inappropriate under the circumstances.<sup>51</sup>

Coming to the arbitration law of Ethiopia, unlike the approach of the Model Law, a party can appeal from the awards of arbitrators to ordinary courts-based on error of law or fact, or procedural irregularity grounds, article 351 of Civil Procedure Code ( hereinafter CPC). Moreover, since the lists under the above provision are not exhaustive, parties can also put additional grounds of appeal in their arbitration agreement. However, as provided under Article

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<sup>49</sup>*Id.*, § 69(3). In England awards can be appealed on points of law only. An award may only be appealed after permission has been granted by the court or by the agreement of the parties. The grounds on which such permission to appeal will be granted derive from the pre-English Arbitration Act common law guidelines. Leave to appeal shall be given only if the court is satisfied that: the determination of the question will substantially affect the rights of one or more of the parties; the question is one which the arbitral tribunal was asked to determine; on the basis of the findings of fact in the award, the decision of the arbitral tribunal on the question is obviously wrong; n the basis of the findings of fact in the award, the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

<sup>50</sup>*Reliance Industries Ltd. v. Enron Oil & Gas India Ltd.*, London High Court, England, Case No. 143, Para. 312, 2002 (Appeal not granted because issues related to Indian law, not English law.).

<sup>51</sup>*English arbitration act, supra note 47, § 69.*

350(2) of CPC, parties can waive this right of appeal provided that they are with full knowledge of the circumstance.

The grounds of appeal which can be categorised as procedural matters are: inconsistency, uncertainty or ambiguity of the award, or the arbitrator omitted to decide matters referred to him. In such cases, by the cumulative reading of Articles 353 and 354 of CPC, the appellate court may confirm, vary or remit the disputing case to the arbitrator for reconsideration. Whereas, as per Article 353 of CPC, in case of the remaining grounds, i.e. irregularities of proceeding and misconduct of arbitrator, courts may confirm or vary the decision of arbitrators, but remit is not facilitated in the procedural rules. Besides, in case of error of law or fact, as provided under Article 354 of CPC, “arbitrators may be ordered to correct the mistakes mentioned under Articles 351(1) (a) and (b)” of CPC that include error of law or fact.

From the above explanations, one can easily understand that, on one hand, unlike the Model Law, the Ethiopian arbitration law has made the avenue of appeal to be employed for challenging arbitral awards. On the other hand, 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, as it will be further elucidated herein under, one can comprehend that the Ethiopian arbitration law is in favour of courts extreme control over the arbitration process-after the making of the awards.

## 2.2. Grounds of Appeal

### 2.2.1. Error of Law

It should be noted that since the avenue of appeal is totally lifted in the Model Law jurisdiction, there shall not be a comparison concerning grounds of appeal with this jurisdiction, unless to analyse the general approach.

As explained herein above, under English arbitration law, the way in which the merit of an award may be challenged is on a point of law provided that the parties did not contract out their right of appeal.<sup>52</sup> This is facilitated under section 69 of the 1996 Act. The reasoning for including a restricted right of appeal was provided by the 1996 DAC's Report:

*It seems to us, that with the safeguards we propose, a limited right of appeal is consistent with the fact that the parties have chosen to arbitrate rather than litigate. For example, many arbitration agreements contain an express choice of law clause to govern the rights and obligations arising out of the bargain made subject to that agreement. It can be said with force that in such circumstances, the*

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<sup>52</sup>Unlike challenges under Sections 67 and 68 of the English Arbitration Act, the parties' right to appeal on points of law can be excluded by agreement between the parties, either in the arbitration agreement or at a later stage. Where the parties choose to arbitrate under the ICC Rules or the LCIA Rules, the parties' right to appeal under Section 69 of the English Arbitration Act is waived automatically. Where the parties opt for ad hoc arbitration or institutional rules which do not contain waiver language akin to the ICC Rules and LCIA, the parties can exclude the application of Section 69 by stating so expressly in the arbitration agreement. Pursuant to Section 69(1) of the English Arbitration Act, the parties' agreement to dispense with the requirement that the arbitral tribunal give reasons for its award will be considered an agreement to exclude the right of appeal. Sections 70 – 73 of the English Arbitration Act contain supplementary provisions and restrictions in relation to the challenge or appeal of awards. See ICC Rules, article 28(6) and LCIA Rules, article 26(9).

*parties have agreed that the law will be properly applied by the arbitral tribunal, with the consequence that if the tribunal fails to do this, it is not reaching the result contemplated by the arbitration agreement.*<sup>53</sup>

It is submitted that the remit of section 69 would appear to represent an area where judicial intervention is justified given that it concerns an aspect upon which judges are pre-eminently qualified and are likely to offer more expertise than an arbitrator. As the DAC emphasise in their reasoning, “...the parties have agreed that the law will be properly applied by the arbitral tribunal and where this does not occur, it is for a court to resolve the issue and restore justice in the case.”<sup>54</sup>

During its involvement in the drafting of the Model Law, the United Kingdom expressed reservations concerning the scope of the grounds upon which an award could be challenged.<sup>55</sup> The UK argued that the Model Law should set a minimum level of judicial control in the arbitral process, but this does not necessarily entail “...that the Model Law must set a maximum, eliminating even those means of judicial control which the parties themselves desire to retain.”<sup>56</sup>

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<sup>53</sup>The Departmental Advisory Committee on the Arbitration Bill 1996, Annual Rep. Department of Trade and industry, London, 1996, p.285.

<sup>54</sup>*Ibid.*

<sup>55</sup> Lord Mustill, A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law, *Arbitration International Journal*, vol. 6, No. 27, 1990, p.25.

<sup>56</sup>Fraser Davidson, The New Arbitration Act – A Model Law? *Journal of Business Law*, Vol, 101, No.125, 1997,122.

Although the approach of England may seem appropriate, it has not been met with universal acceptance. Holmes and O'Reilly question the value of section 69, noting that it “adds little to the cause of justice or the development of the law. As well as being contrary to the spirit of party autonomy (...) it is a source of cost and inefficiency.”<sup>57</sup> Those writers have also asserted that hostile rules like section 69 of English arbitration act have been the main reasons for parties not to select London as a seat of arbitration tribunal.<sup>58</sup>

The right to appeal on a question of law under section 69 is indeed broad in scope and it may be viewed as a key disincentive for arbitration in England. Tuckey J in *Egmatra AG v Macro Trading Corporation* recognised that Article 69 is broad and warned that the courts should exercise it sparingly so as to “respect the decision of the tribunal of the parties’ choice.”<sup>59</sup> The underlying principle which should be applied in respect of this provision was articulated by the Court of Appeal in *BMBF (No 12) Ltd v Harland v Wolff Shipbuilding and Heavy Industry*: “it is not for the courts to substitute its own view for that of experienced arbitrators.”<sup>60</sup> Although these comments of the judiciary represent a sensible approach as regards the application of section

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<sup>57</sup>R Holmes and M O'Reilly, Appeals from Arbitral Awards: Should Section 69 be Repealed? *Journal of Arbitration*, vol., 23, No.145, 2003, p.127.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Egmatra AG v Macro Trading Corporation*, London High Court, England, Case No. 342, Para. 213, 1999.

<sup>60</sup> *BMBF Ltd and Harland v Wolff Shipbuilding and Heavy Industry*, London High Court, England, Case No. 221, Para. 231, 2001.

69, they also serve to indicate the potential that the provision has for undermining the decisions and awards of arbitrators.<sup>61</sup>

Some further critiques have also been offered by different scholars. An appeal under section 69 of the Arbitration Act 1996 may be challenged on a question of law as distinguished from a question of fact. Taner Dedezade posits that “[t]his distinction is notoriously difficult to draw and arises in almost all areas of law when it comes to a question of appeal.”<sup>62</sup> Similarly, Shackleton has emphasised the controversy which surrounded the enactment of this particular provision at the time of the drafting of the 1996 Act and highlights that the appeal regime is fraught with tension. He asserted that:

*Confusion surrounds the demarcation of a question of law for the purposes of appeal. Implementation continues to be problematic. The legislative objective of reducing appeals from arbitrators’ awards has not been met; the largest single category of arbitration-related litigation continues to involve appeals on the legal merits of arbitral awards.*<sup>63</sup>

Like its English counterpart, under the Ethiopian arbitration law, one prominent example of a ground for challenge that departs substantially from the Model Law is the availability of an appeal on a point of law, discussed earlier. Article 351(a) of CPC allows a party to appeal an award before courts on the basis of error of law.

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<sup>61</sup>Stewart Shackleton, Challenging Arbitration Awards: Part 3, *New Law Journal*, vol. 152, No. 22,2002, p 23, [ hereinafter Stewart, *Challenging Arbitration Awards: Part 3* ]

<sup>62</sup>Taner Dedezade, Are You In? Or Are You Out? An Analysis of Section 69 of the English Arbitration Act 1996: Appeals on a Question of Law, *International Arbitration Law Review*, vol.34 No.56, 2007, p.34.

<sup>63</sup>Stewart, *Challenging Arbitration Awards: Part 3*, *supra* note 61.

Critically, the Model Law does not contain any general right to appeal an arbitral award for substantive error of law. This is to be contrasted with the respective legal frameworks of both the English (Arbitration Act 1996 and Case Decisions) and the Ethiopian (the Civil Procedure Code and Cassation Decisions). Put precisely, the two countries' legal regimes provide strong support for the notion of an appeal on a point of law.

Furthermore, in England, it is open to the parties to exclude the right of appeal in any category of dispute and at any time, that is to say before or after the commencement of the arbitration.<sup>64</sup> Comparably, under article 350(2) of CPC, the Ethiopian arbitration law has also facilitated to the parties just to contract out their right of appeal provided that they are with full knowledge of the circumstance.

While fully understanding the point of view that the parties should not be compelled to submit an appeal on question of law, it may be suggested that the logical consequence of party autonomy is that the parties should be allowed to have recourse, if that is what they have agreed.<sup>65</sup> Holding such a position, one may pose an interesting issue of what is the problem of the existence of appeal procedure and why is it criticised in the condition where the law allows parties to waive this avenue if they wish to avoid it.

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<sup>64</sup> B. Harris & R. Plant, *The Arbitration Act 1996: A Commentary*, Blackwell Publishing, 2000, p.310.

<sup>65</sup>UNCITRAL, Preliminary discussion on the draft of the Model Law, UN Doc A/CN9/263/Addendum, paras. 37-38(1984)

The existence of appeal procedure for challenging arbitral award may be tolerated when the arbitration finality clause made in the parties' agreement is always respected by the enforcer, that is, the court. However, it should be noted that the situation of judicial intervention is largely depend on the approach courts will adopt in interpreting the arbitration finality clause. This concerns both England and Ethiopia. In England, given the strict limitations envisaged by the 1996 Act, one may expect that waiver of an appeal right will be hardly successful in English courts. Even if the Act under section 69 facilitates waiver agreement, English courts have not so far followed a clear-cut approach while enforcing arbitration finality clause. For example in *Gbangola v. Smith & Sheriff Ltd*<sup>66</sup>, invoking fundamental error of law, the court has intervened to challenge the arbitral awards although arbitration finality clause was made by the parties. By contrast, in *India Steamship Co. Ltd v. Arab Potash Co Ltd*<sup>67</sup>, the court rejected appeal justifying that the parties have agreed to waive their right of appeal.

By the same token, such dilemma of courts approach has been observed in Ethiopian courts. The conclusiveness of an arbitration clause was regarded as parties' autonomous right in the previous decision of FDRE Supreme Cassation Bench. In the case between *National Motors Corp. v. General Business Development*,<sup>68</sup> the cassation bench defended the finality of the arbitration clause. The court asserted that in the existence of a valid

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<sup>66</sup> *Gbangola v. Smith & Sheriff Ltd*, London High Court, England, Case No. 12, Para. 22, 2004.

<sup>67</sup> *India Steamship Co. Ltd v. Arab Potash Co Ltd*, London High Court, England, Case No.32, Para. 32, 2007.

<sup>68</sup> *National Motor Corp. v. General Business Development*, Federal Supreme Court Cassation Bench, Addis Ababa, 1997, Case No. 21849, 1997 E.C.

arbitration finality clause, the appellant cannot challenge the awards before courts. Appreciating this position of the bench, Hailegabriel Gedich hypothesizes that: “... the precedent set in *National Motors Corporation v General Business Development* may take Ethiopian law to the level of modern arbitration legislations which permit arbitrators to act as *amiable compositeur* with the agreement of the parties.”<sup>69</sup>

However, this previous approach of the court has changed recently and the optimistic posits of Hailegabriel is not realised. In the case between *National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co.*,<sup>70</sup> the cassation bench was struck down arbitration finality clause. The cassation bench invoked article 80 (3) of the FDRE Constitution, Proclamation No.454/1997, article 356 of CPC and the purpose of arbitration to strike down the arbitration finality clause justifying that the mere existence of waiver agreement cannot preclude a dissatisfied party from appeal, where the decision of the arbitral tribunal contains basic error of law.

In sum, in the opinion of the writer, the regime of appeal on the legal merit of arbitral awards is under pressure in Ethiopia because the legal theory that sustained it under the Civil Procedure Code has all but disappeared. This is on the one hand, due to procedural confusion made by courts just to assume

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<sup>69</sup>Hailegabriel, *The Role of Ethiopian Courts in Commercial Arbitration* supra note 2, pp. 328-329.

<sup>70</sup> *National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co.*, Federal Supreme Court Cassation Bench, Addis Ababa, Civil Case No. 42239, Tikimt 29 2003 E.C., in የፌዴራል ጠቅላይ ፍርድቤት ሰበር ሰሚ ፕሎት ወሳኔዎች፣ ቅጽ 2፣ የኢ.ፌ.ዲ.ሪ ጠቅላይ ፍርድ ቤት፣ አዲስ አበባ፣ 2003 E.C. ፣ ገጽ 346-351::

power in unjustified manner; and on the other hand, due to hostile approaches of the courts that extends up to paralysing arbitration finality clause, which was formerly considered as a manifestation for the supremacy of parties' autonomy. Hence, in this condition, advocating for the existence of appeal procedure may endanger the merit and purpose of arbitration.

### **2.2.2. Error of Fact**

As has been seen, there is no provision in the Model Law for challenging an award on the basis of mistake of fact or law. In England, except error of law, any other ground including error of fact is not provided under section 69 of the 1996 Act. Conversely, the Ethiopian arbitration law, under article 351(a) of CPC, has made error of fact to be a ground of appeal equally with error of law, procedural irregularity and misconduct of arbitrator.

In the case of England, the circumstances in which section 69 is invoked extend to where the proper law of the contract is a foreign law, where the parties have chosen a foreign law as the procedural law and where there arises a question of fact. In respect to the first circumstance, Tweeddale and Tweeddale note that a question of law under a foreign law is a question of fact under the law of England and Wales and cannot be the subject of an appeal under section 69 of the Arbitration Act 1996.<sup>71</sup>

Whether an event has occurred or not, or whether an allegation is proven or not, is a question of fact and is considered having regard to the evidence

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<sup>71</sup>Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, supra note 39, p. 877.

presented in a case.<sup>72</sup> Tweeddale and Tweeddale use the example of a situation in which it is to be determined whether there has been a breach of contract and whether a loss has been incurred due to the breach of contract.<sup>73</sup> As is evident from the cases of *Fence Gate Ltd v NEL Construction Ltd*<sup>74</sup> and *Hallamshire Construction plc v South Holland DC*,<sup>75</sup> an arbitral tribunal's award cannot be challenged under section 69 of the Arbitration Act 1996 on the basis that it has made an error of fact.

Of course it has been criticised much, that the main reason for allowing an appeal from the arbitral awards on error of law is that it is in the general public interest, i.e., the law should be certain. There can be no such interest in the findings of fact of a certain tribunal in exacting case. In view of that, almost all states with developed laws of arbitration decline to allow appeals from arbitral tribunals on the basis of error of fact.<sup>76</sup>

Most states are broadly content to restrict the challenge of arbitral awards to excess of jurisdiction and lack of due process. These grounds for challenge are either adopted directly from the Model Law, or at any rate reflect the policy behind those grounds. Other states are prepared to offer a limited measure of judicial review on questions of law, if this is what the parties

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<sup>72</sup>Ibid.

<sup>73</sup>Ibid.

<sup>74</sup>*Fence Gate Ltd v NEL Construction Ltd*, London High Court, England, Case No. 2431, para. 124, 2001.

<sup>75</sup>*Hallamshire Construction plc v South Holland DC*, London High Court, England, Case No. 134, Para. 214, 2009.

<sup>76</sup>Redfern, *Law and Practice of International Commercial Arbitration*, supra note, 27, p. 612.

wish; but the possibility of the review of an award on the basis of error of fact is really odd.<sup>77</sup>

Moreover, remarks made by Steyn LJ in *Geogas SA v Tammo Gas Ltd*<sup>237</sup> are testament to the above assertions:

*It is irrelevant whether the court considers the findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be.*<sup>78</sup>

Concurrent with the above assertions, the writer of this article also believes that arbitrators are the masters of the facts than judges in a particular dispute submitted to arbitrators. Neither the English arbitration Act nor the Model Law (even for setting aside) made error of fact as an element for challenging arbitral awards. Hence, challenging/appealing on the basis of error of fact is not the practice around the globe in general, rather it is the experience of Ethiopia and oddly of some other jurisdictions.

### **2.2.3. Procedural Grounds**

As provided under Article 34(2) of the Model Law, procedural issues are exclusively ready to be grounds for the avenue of setting aside. Comparably, in England, under section 67 and 68 of the 1996 Act, procedural irregularities are also made grounds for setting aside, rather than for merit review. Whereas

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<sup>77</sup> B Dasser, International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis, ASA Bulletin, Jun. 22, 2007, p. 18.

<sup>78</sup> *Geogas SA v Tammo Gas Ltd*, London High Court, England, Case No. 2341, Para. 124, 1993.

in Ethiopia, we find a different approach, that is, as per Article 351 of CPC, procedural matters are listed to be used as grounds of appeal. These grounds are: (i) inconsistency, uncertainty or ambiguity of the award or when the award is wrong in matters of law or fact; (ii) the arbitrator omitted to decide matters referred to him; or (iii) lack of due process-irregularities of proceeding and misconduct of arbitrator.

Like error of law or fact, those grounds confer power to courts to review the merit of the case, where like ordinary judgments retrial is conducted, i.e. evidence is re-evaluated and the correctness of the arbitral tribunal's decision on the merits is examined. This situation has several problems. Principally, it leads to very excessive intervention of courts over each irregularity of the arbitral proceedings which ultimately endanger the merit of choosing arbitration than litigation as a dispute settlement mode. Among others, quicker, more efficient decision and confidentiality elements of arbitration will be affected.

Overall, the parties plan to avoid courts litigation will be smashed up. This can further be explained by the following Redfern and Hunters' assertion:

*... there are serious disadvantages in having a system of arbitration that gives an unrestricted right of appeal from arbitral awards. First, the decisions of national judges may be substituted for the decisions of an arbitral tribunal specifically selected by or on behalf of the parties. Secondly, a party that agreed to arbitration as a private method of resolving disputes may find itself brought unwillingly before*

*national courts that hold their hearings in public. Thirdly, the appeal process may be used simply to postpone the day on which payment is due, so that one of the main purposes of international commercial arbitration—the speedy resolution of disputes—is defeated.<sup>79</sup>*

Therefore, the above assertions lead us to criticise the Ethiopian arbitration law in providing procedural matters to be grounds of appeal (merit review), in the situation where the universal trend is towards making those grounds for the avenue of setting aside. Hence, the writer is in the opinion that the law should be revised to lift the appeal avenue at all and make those grounds of appeal (procedural matters) to be grounds of setting aside- as is the case in the Model Law jurisdiction and England.

Generally speaking, it should be renown again and again that a review through appeal has no place in a modern transnational environment where the parties' objective in agreeing to arbitration is usually to get away from the courts of whatever country and entrust the resolution of their disputes – and especially of the merits of their disputes – to international arbitrators. Some countries regard even low level of control as unnecessary and are content to leave matters within the hands of the arbitrators. For instance, Belgium, Sweden and Switzerland permit parties to waive in their arbitration agreement their right to seek to set an award aside provided that the parties are not nationals of or incorporated in the country in question.<sup>80</sup>

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<sup>79</sup>Redfern, Law and Practice of International Commercial Arbitration, supra note 27, p. 607.

<sup>80</sup>Belgian Code Judiciaire, Article 1717(4), allows a waiver where none of the parties is either an individual of Belgian nationality or residing in Belgium, or a legal person having its head office or a branch there'; the Swedish Arbitration Act, section 51, allows a waiver where

Of course, it is not easy to strike a balance between the need for finality in the arbitral process and the wider public interest in some measures of judicial control, if only to ensure consistency of decisions and predictability of the operation of the law. However, universally, the balance has come down overwhelmingly in favour of finality, and against judicial review, except in very limited circumstances. A great number of cases underline that the Model Law does not permit review of the merits of an arbitral award.<sup>81</sup> This has been found to apply in principle to issues of law,<sup>82</sup> as well as to issues of fact.<sup>83</sup>

Moreover, different courts from the Model Law countries have regularly emphasized the exceptional character of the remedy as courts should in principle not interfere with the decision of the arbitral tribunal.<sup>84</sup> For instance, the reason given by a court in Singapore for this minimal court intervention which respects the finality of the arbitral process is that it “acknowledges the

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none of the parties is domiciled or has its place of business in Sweden; and the Swiss PILA, article 192, allows a waiver of an action to set aside if none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland. Belgium previously experimented with a law that removed entirely the parties’ right to recourse against the award (rather than making it subject to the agreement of the parties) where none of the parties was a national of or incorporated in Belgium.

<sup>81</sup>e.g., *Alibas Ltd. v Kalidon Share Company*, Cairo Court of Appeal, Egypt, case No. 112, Para. May 12, 2009; *Sendrofan Karia v LBC Shariml Ltd.*, Amman Court of Appeal, Jordan, No. 206, Para. 25, 10 June 2008; *Karlsruhe Ltd. v LCF food Ltd*, Frankfurt Supreme Court, Germany, case No. 321, Para. 10, 14 Sep. 2001, available at <http://www.dis-arb.de/de/47/datenbanken/rsprt/olg-karlsruhe-az-10-sch-04-01-datum-2001-09-14-id1268>

<sup>82</sup>*Navigation Sonamar Inc. v. Algoma Steamships Limited and others*, Superior Court of Quebec, Canada, 1987, Case No. 10, Para. 16, Apr. 1987.

<sup>83</sup>*Ibid.*

<sup>84</sup>*Quintette Coal Limited v. Nippon Steel Corp. et al.*, Court of Appeal for British Columbia, Canada, Case No. 16, Para. 2241, 24 October 1990.

primacy which ought to be given to the dispute resolution mechanism that the parties have expressly chosen.”<sup>85</sup>

In sum, the extreme approach of Ethiopian law for challenging arbitral awards is; therefore, does not go with the current global trend, where several countries are shifting towards minimising courts control over the arbitration process. Ethiopia cannot exclude itself from globalization.

### Conclusion

*Arbitration, unlike national court systems, is a commercially orientated product that flourishes on the basis of market forces. To avoid fading away, the popularity of this product depends on whether the demands of customers are satisfied. However, excessive interference exercised by state courts can result in the dissatisfaction of the customers.*<sup>86</sup>

The availability of an appeal from arbitral awards in Ethiopia is a trap for unwary parties who might expect a recent Ethiopian arbitration law and court practice to be consistent with recent arbitration laws elsewhere in the world (especially with the Model Law), and not therefore permit an appeal of the merits of an award. This is one reason parties may prefer to have the place of their international arbitration outside Ethiopia.

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<sup>85</sup>CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK, Court of Appeal, Singapore, Case No. 1443, Para. 223, 13 July 2011.

<sup>86</sup>Hong-Lin Yu, Five Years On: A Review of the English Arbitration Act 1996, *Journal of International Arbitration*, vol. 19, No. 209, 2002, pp. 200-232.

The trend in legal systems around the world has been towards immunising the award from challenge based on the merit. Maintenance of recourse via appeal sets Ethiopia apart from this universal trend, which is being advocated by the Model Law jurisdictions. Of course, in Ethiopia, the adverse effect of extreme courts intervention via appeal has not observed as much as what is facing England. This may be due to less practice of commercial arbitration in Ethiopia, especially disputes involving a foreign party. However, it should be anticipated that discontent by the commercial communities will face the country while trade and investment develops more and more. Anyhow, the critics forwarded against the approach of England arbitration regime and the adverse effects facing the country due to its approach of wider courts intervention should be an alarming lesson for Ethiopia. The country should follow a new and modern approach for challenging arbitral awards, that is, the Model Law arbitration friendly approach.

Generally, the suggestion is that the avenue of appeal has nothing to do with parties' interest in modern commercial arbitration. Therefore, it should be totally lifted from the arbitration legal framework of Ethiopia. Hence, it is enough to have a modernised avenue of setting aside geared in light of the universal best principles and the demand of current commercial arbitration.