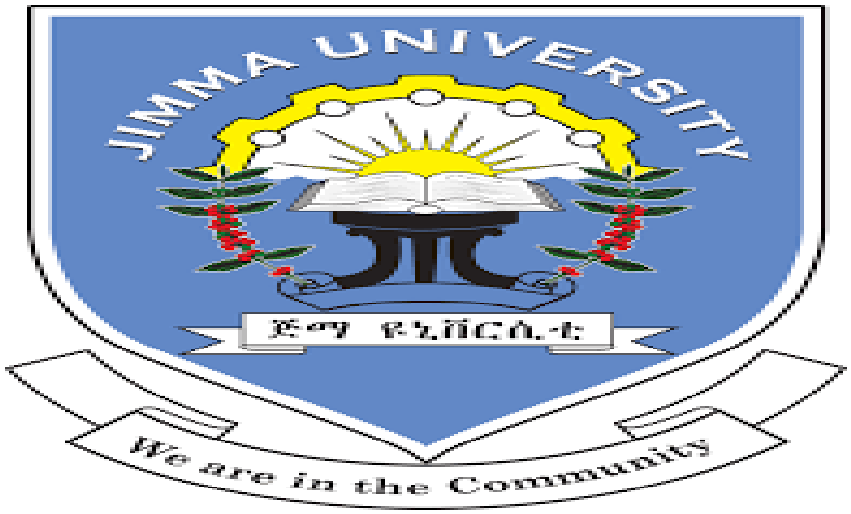

COLLEGE OF LAW AND GOVERNANCE

SCHOOL OF LAW

REVISITING THE ETHIOPIAN ARBITRATION LAW ON REFUSAL OF ENFORCEMENT OF FOREIGN ARBITRAL AWARD BASED ON PUBLIC POLICY IN LINE WITH INDIAN ARBITRATION LAW: COMPARATIVE STUDY

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Abbreviations

ADR----------Alternate Dispute Resolution

CPC---------- Civil Procedure Code

CC---------- Civil Code

FDRE----------Democratic Republic of Ethiopia

ICC ----------International Chamber for Commerce

ICA---------- International Commercial Arbitration

NYC----------New York Convention

UNCITRAL----------United Nation Commission of International trade law

PCA ----------Permanent Court of Arbitration

ICC ----------International Chamber of Commerce

ILA----------International law Association

UNC----------United Nation Commission

OHADA ----------Organization for the harmonization of Business law in Africa

Abstract

In Today's world, the adjudicatory system of arbitration is replacing the court proceeding, because of its more private, economic, rapid, certain, and enforceability of foreign arbitral award. However states for different political, social and, economic reasons enacted different ground of refusal of enforcement arbitral award by empowering national courts if such enforcement of arbitral award would be contrary to the public policy of their countries. With highly changing situation of the globalization in the area of commerce, countries are striving towards adopting arbitration law friendly with the view to accommodate the difficult that may result in commercial transaction especially on enforcement of the foreign arbitral award. However the Ethiopian arbitration law seems to be inadequate because of the current arbitration and conciliation working procedure proclamation does not have provided what should be the element of public policy for refusal enforcement of foreign arbitral award. Unlike Ethiopia commercial arbitration law, the Indian country has improved both its commercial arbitration law and court practice to provide effective dispute settlement. Thus, the criteria must be clearly promulgated and applied so that the rules can be conducive to the steadily increasing practice of modern arbitration. So in these short theses I look in Ethiopia and Indian commercial arbitration law and court practice and provided comparative analyze reference to public policy exception to enforcement of foreign arbitral award.

Chapter One

1. Introduction

1.1 Back ground of the Study.

Alternative dispute resolution (ADR) evolved to provide a solution to legal disputes and to do complete justice as voluntary process gradually getting legal recognition. The root of the arbitration has a long history of existence.[1] As it reveal from different literature it appears in the ancient Rome and Greeks.[2] Commercial arbitration is one of the branches of the arbitration that is designed to be a real alternative to court litigation as an impartial, fast, non- formalistic and cost saving of dispute resolution in international business over past decade. To simply put it is a method of dispute resolution that is binding the parties and best alternative to the court litigation. In today's world an increasing in international commercial transaction has contributed for the increase of recourse to arbitration and the law governing the commercial arbitration is equally very important issues in arbitration process and it is complex subject which arises many problems over the existence, validity and interpretation of the international agreement.[3] International commercial arbitral award like domestic commercial award has also directly binding effect on parties which is one of the reasons for resorting to arbitration.[4] However, this does not mean arbitral awards are enforced absolutely without any obstacle. The state has considerable power to intervene at enforcement stage by using domestic regulation and international convention.[5] The recourse to commercial arbitration especially raises many problems at the enforcement stage.[6] There is different ground of refusal of enforcement of foreign arbitral award that has been faced different problem in enforcement of arbitral award because of the political interference of every country in enforcement of foreign arbitral award. Though, mostly this grounds are determined by the law of the place of enforcement, the common grounds are: the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the

[1] . HRNČIŘÍKOVÁ, Miluše. The Meaning of Soft Law in International Commercial Arbitration. *International and Comparative Law Review*, vol. 16, 97 (2016),.
[2].id.p.98.

[3]. Gray B Born,The law governing international arbitration agreements: An international perspective Singapore academy of law journals,2014 (2014)
[4] . . MARK A. BUCHANAN, Public policy and international commercial arbitration,512(1988)
[5] .Ibid
[6] . Veena Anusornsena, Arbitrability and public policy in regard to the recognition and enforcement of arbitral award in international arbitration: The United States, Europe, Africa, Middle east and Asia,5 (November 16, 2012)

parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case, the situation in which the award deals with a difference 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, the composition of the arbitral authority or the arbitral procedure may not have been in accordance with the agreement of the parties, or, failing such agreement, in accordance with the law of the country where the arbitration took place, when recognition or enforcement if the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made, if the subject matter of the difference is not capable of settlement by arbitration under the law of the country where recognition or enforcement is sought, and if enforcement of the award would be contrary to the public policy of the country where it is sought. As noted by Ibrahim Idris: "Public order is a doctrine which serves as a safety valve for country to enable its courts to deny effect foreign laws and judgments which, for one reason or another, should not be enforced.'[7] In other words the public policy concept still today, remains a highly debated, controversial and complex subject because of the diverse approach taken by national courts in relation to public policy in international arbitration. To minimize the uncertainty there was no common international standard in international laws that have put limitation on national court not to interfere blindly in the process of the enforcement of the arbitral awards.[8] This seems lead to the failure of the international commercial arbitration relating to enforcement of foreign arbitral awards.[9] In the beginning of the twentieth century, when the world's economic expansion started, the demand to originate a mechanism for international enforcement of foreign arbitral awards at international level has got the attention of the world community.[10]

Indeed different international legal instrument has been established to assist and regulate the enforcement of the foreign arbitral award such as Permanent Court of Arbitration(PCA) which still exists and functions, the international Chamber of Commerce (ICC) in 1919 which enacted

[7] . Ibrahim Idris Ibrahim, Ethiopian Law of Execution of Foreign Judgments', *Journal of Ethiopian Law,* Vol. XIX, 30 (1999)
[8] Gray B Born, Supra note 3,p.6
[9] . ibid
[10]. ibid

by the world's business community[11], the Geneva Protocol of 1923 on arbitration clause that promote the execution and recognition of international foreign Awards by independent and neutral arbitration system[12], *the Geneva Convention of* 1927 that aimed to create smooth and harmonized rules for enforcement foreign arbitral award[13], New York Convention (NYC)[14] **and** UNCITRAL Model Law which is useful in harmonizing international trade rules by making independent institution for execution and enforcement of arbitral award.[15]

However the public policy concept is usually has been understood as 'public policy…unruly horse and when once you get astride it you never know where it will carry you and it may lead you from the sound law and never argued at all but when other point fails.'[16] Hence it is the most controversial exceptions to the enforcement of arbitral awards, causing judicial inconsistency and unpredictability in its application which may lead to wrong interpretations.[17] This happens among others, due to the difference in political, cultural and religious back ground which leads to understand and interpret the concept differently.

To regulate and create uniform enforcement of foreign arbitral award at international level the UN has enacted in 1958 the New York Convention (hereinafter 'convention') by providing different element of refusal of enforcement including public policy exception. Even though enactment of the convention is welcome development it did not have provided in detail the content, definition and scope of public policy exception. As Pieter Sanders who is the drafter and most authoritative commentators on the convention, noted that: 'of course the court in different countries can interpret the public policy exception differently and this presents disadvantages.'[18] This shows the mere acceptance of the convention by the state does not in itself enough to properly interpret for refusal of enforcement of foreign arbitral award based on public policy exception and there is divergence in state practice in statutory and judicial interpretation

Understanding this problem and to minimize the 'unruly horse' effect of the public policy exception, and to fill the gap of both their law and the convention the India country, have promulgated exhaustively the content of public policy exception to enforcement foreign arbitral

[11] . international Chamber of Commerce (1919)
[12] . Geneva Protocol on arbitration (September 24,1923)
[13] . Geneva convention on the execution of foreign arbitral awards (26 September, 1927)
[14] . United Nation convention on the recognition and enforcement of foreign arbitral award (1958)
[15] . UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted (2006)
[16] . Richardson vMellish , Bingham 229 , 252 (1824)
[17] . Yunus Emre: A Refusal Reason of Recognition and Enforcement of Foreign Arbitral Awards: Public...
Zbornik radova Pravnog fakulteta u Splitu, god. 505(2/2018)
[18] . Pieter Sander, The New York Convention on International commercial Arbitration, 323 (1960)

award under their domestic law (international arbitration act.). Because a clear and effective dispute resolution minimize the danger of the breach of the contract by the parties which contribute for smooth follow of business transaction

Surprisingly despite the fact that the Ethiopian has promulgated arbitration and conciliation working procedure proclamation and incorporated the concept of public policy, it did not have exhaustively listed in its provision the content of public policy exception to avoid doubt and ambiguity. It simply provided under arbitration and conciliation working procedure proclamation Article 53 (2) that the foreign arbitral award shall not enforced in Ethiopia if is contrary to the public policy, moral or security. This creates confusion and misunderstanding on the application of the law for the enforcement of arbitral award. Additionally it will lead to wrong public and international perception about the countries legal system which finally may not be selected as forum to entertain commercial arbitration dispute and finally minimize the business transaction within the countries.

So the aim of this paper is to analyze the legal gaps and difficulties in application. In order to achieve the objective the writer will attempt to make comparative analysis of Ethiopia commercial arbitration law and court practice in line with Indian commercial arbitration law and court decisions on issue of public policy exception for refusal of enforcement of foreign arbitral award.

1.2 Statement of problem

The research problem identified is the uncertainty created in the Ethiopian commercial arbitration law and reluctance of Ethiopian courts in relation public policy exceptions. This is evident from the repealed Ethiopian civil procedure code Article 461 (1) (e) and the current arbitration and conciliation working procedure proclamation Article 53 (2) (f) and previous conducted research.[19] In order to achieve the objective the writer will attempt to make comparative analysis the Ethiopian commercial arbitration law and court practice in line with India commercial arbitration law and court practice on issue of public policy exception to enforcement of foreign arbitral award.

[19] Hailegabriel G. Feyissa, 'The role of Ethiopian courts in commercial arbitration' *Mizan Law Review,* , vol. 4, No. 2, 328 (2010)

1.3 Research Objective

1.3.1 General Research Objective

The main objective of the study is to analyze the application of refusal of enforcement of foreign arbitral award on ground of public policy and the problems arising there from and the way outs under Ethiopian in line with Indian commercial arbitration legal regime and court practice by comparing and contrasting.

1.3.2 Specific Research Objective

The Specific Research Objective is provided as follows:-

- Analyzing the application of public policy as one ground of refusal of enforcement foreign arbitral award under Ethiopian commercial arbitration legal regime and court practice
- To examine the existing commercial arbitration laws and court practice of Indian reference public policy exception to the enforcement foreign arbitral award.
- Comparing and contrasting Ethiopian commercial arbitration legal regime and court practice with Indian commercial arbitration law and court practice in relation to public policy exception the enforcement foreign arbitral award..
- Suggesting possible improvement to the Ethiopian commercial arbitration laws and court practice of refusal of enforcement of foreign arbitral award in relation to public policy exception

1.4 Research Questions:

This thesis aims to answer the following basic questions:

- What are the criteria of law and judicial discretion to refuse or allow enforcement of foreign arbitral award in relation to public policy exception under Ethiopian commercial arbitration law?
- What are the criteria of law and judicial discretion to refuse or allow enforcement of foreign arbitral award in relation to public policy exception under Indian commercial arbitration law?
- What are the gaps in the in commercial arbitration law and court practice of Ethiopia for enforcement of foreign arbitral award in relation to public policy exception?

- Are there any lessons and experience that can we learn from Indian commercial arbitration law and court practice reference to concept and element of public policy exception to enforcement foreign arbitral award?

1.5 Literature Review

The issue of the enforcement of foreign arbitral award is basic point that has been inculcated under many national and internationals commercial arbitration laws. The Ethiopian repealed civil procedure code Article 461 (1) (e) and current arbitration and conciliation working procedure proclamation Article 53 (2) (f) promulgated without expressing the content of public policy exception to enforcement of foreign arbitral award. . In our country some author try to done a research and write on the relevant topic without addressing the issue of public policy exception to enforcement of foreign arbitral award. Among them: 1. **Tekle Hagos Bahta**: On recognition and enforcement of foreign arbitral awards in civil and commercial matters in Ethiopia. He has been particularly shown that the applicability of the doctrine of reciprocity as a condition for the recognition and enforcement of international commercial awards.[20] However the researcher did not seen what should be the concept and the element of public policy exception to recognition and enforcement of foreign arbitral awards under the Ethiopian commercial arbitration law.

2. **Hailegabriel G. Feyissa**: on the role of Ethiopian courts in commercial arbitration. He provided that the intervention of courts in private dispute settlement process needs to be modest and consistent with the interest of the parties to relieve themselves from prolonged and costly judicial dispute settlement and conclude the role of courts in Ethiopia appears to be more than modest and should regulated.[21] However the researcher did not seen in detail what should be the concept and the element of public policy exception to enforcement of foreign arbitral awards under Ethiopian civil procedure code.3.**Gelila Haile Diguma**: Judicial review of arbitral award by court as means of remedy: Comparative analyze of law of Ethiopia, United Kingdom and United State.[22] However the researcher did not seen in detail what should be the concept and the element of public policy exception to enforcement of foreign arbitral awards under Ethiopian civil procedure code

[20] . Tecle Hagos Bahta, 'recognition and enforcement of foreign arbitral awards in civil and commercial matters in Ethiopia, mizan law review vol. 5 no.1'..139 (2011)

[21]. Hailegabriel G. Feyissa,Subra note 19,p,333

[22]. Gelila Haile Diguma, Judicial review of arbitral award by court as means of remedy : Comparative analyze of law of Ethiopia, United Kingdom and United State.43 (2018)

Therefore as it reveals from the above literature all author even though they try to see on the issue of the commercial arbitration dispute mechanism and particularly exception to enforcement of foreign arbitral award in general they did not consider what should be the concept and content of public policy exception to enforcement of foreign arbitral award under Ethiopian civil procedure code.

So the researcher will do research on the issue of public policy exception as one basic element for enforcement of foreign arbitral award under Ethiopian commercial arbitration law by comparative analyze with Indian commercial arbitration laws.

1.6 Scope of Research

The scope of the study is focused on analyzing public policy exception for refusal of the enforcement foreign arbitral award under Ethiopian commercial arbitration law and court practice reference to Indian commercial arbitration laws and court practice.

1.7 Research methodology

To attain the objectives listed above and to address the research questions, different methodologies would be used. The approach designed in this research is qualitative, that I purely compare and contrast the Ethiopian and Indian commercial arbitration law and court practice.

So comparison is a very important to easily understand the similarity and difference between the existing laws and court practice. It will provide the similarities and difference between the Ethiopian and Indian commercial arbitration laws and court practice in relation to public policy as element of refusal of enforcement foreign arbitral award.

This will help to bring the mutual understanding of foreign legal system that will reduce or avoid the bad attitude towards once countries legal system to the enforcement of foreign arbitral award. It may also enable our countries to borrow the experience of Indian that may lead to develop its laws in relation to public policy as one element for refusal of enforcement of foreign arbitral award by using primary sources of law, such as laws, treaties and court practice and secondary sources such as journal articles, books and internet website relevant to the topic.

Among the other reason the choice of the Indian is clear from the point that the Indian commercial arbitration law has a historical legal relation with Ethiopian commercial arbitration law. For example the procedural law ‘Leg. Not. No .33/1943’ which called ‘Court Procedure Rules’ that was encompassed 99 articles of both civil and criminal procedure was used as

material source of the law the Indian procedural laws.[23] Again the 1965 civil procedure code of Ethiopia is influenced, by the 1908 Indian Civil Procedure Code.[24] Additionally Historical linkages between India and Ethiopia go back about 2,000 years of recorded history. Trade between the two countries flourished during the ancient Axumite Empire (1st century AD), which is seen to be origin of modern Ethiopia

In addition India is also the country which enacted its commercial arbitration law to avoid uncertainty in relation public policy exception to enforcement of foreign arbitral award and there is high progressive to improve efficiency in commercial arbitration law both its legislative act and judicial decision to maintain social value and justice to the parties concerned and county.

Both countries also have joined the New York Convention which considered an international binding legal instrument for enforcement of foreign arbitral award even though it has problem. So it is important for Ethiopia to adopt the experience of India on how they enacted and apply to avoid uncertainty in its commercial arbitration law in relation public policy exception to enforcement of foreign arbitral award and the application of the convention its self in the countries.

To achieve the objective of this thesis it needs analysis of laws and court decision of Ethiopia and India on public policy exception for refusal of enforcement of foreign arbitral award. There is Ethiopian Supreme Court decision publication website on internet and I obtained some decision and I personally ask the judges themselves .Additionally I searched different law libraries and got some books and laws. Further I got some Ethiopian law journals and Individual legal expert views. More over there was no many ruling in Ethiopia in this area of law.

The availability and access to Indian legislation and court decisions was not more difficult and can access through internet. Many Indian court decisions were overviewed by different organ like the government of Indian law commission report, Indian journal of law and international affair, Individual legal expert and etc.

[23] . AlemAbraha and Tafesse Habte ,Law of civil procedure teaching material, 39(2009)

[24] . **J.** Vanderlinden, Civil Law And Common Law Influences On The Developing Law Of Ethiopia, .P.257

1.8 Significance of the Study

This thesis is one of the original works in the Ethiopian context. Consequently it has its own significance in that it would help new researchers and academicians to do further studies on this area. Besides, the research would also give recommendation for the legislative and policy makers. It will also minimize the ambiguity in relation to the concept and element of public policy exception to enforcement foreign arbitral award under Ethiopian commercial arbitration law.

1.9 Limitation of the study

1. The study faced limitation on accessing of literatures in respect of the Ethiopian arbitration rules especially with regards to the public policy or morality in relation to ground of enforcement of foreign arbitral award. In fact, there are a lot of materials available on matters relating to arbitration but there are scarcity of books and article in Ethiopia.

2. Time constraint in consulting the available theoretical and conceptual framework is the other limitation I may encountered in preparing the paper.

1.10 Chapter Outline

The study contains five chapters. Chapter one contain background of the study, , statement of the problem, objective of the study, research questions, literature review , scope of the study methodology, Significance of the Study , limitation of the study and chapter out line that will be used throughout this paper . The second chapter will provide General Over View of Public Policy as a ground for refusal of enforcement of the Foreign Arbitral Award, definition and concept of public policy, History and development of public policy, category of public policy, and the stages in the application of the public policy exception.

Chapter three analyze international legal frame work on Commercial Arbitration law particular emphasis in relation to the concept and element the public policy exception to enforcement of foreign arbitral. Chapter four analyses the Ethiopian Commercial Arbitration law and court practice in line with Indian commercial arbitration law and court practice on the ground of refusal of enforcement of foreign arbitral Awards based on the public policy exception. Lastly chapter five provide the conclusion and recommendation.

Chapter Two

2. General over View of Public Policy exception as a ground for refusal of enforcement of the Foreign Arbitral Award

2.1 Definition and Concept of Public Policy exception to enforcement foreign arbitral award

Providing the meaning of the term public policy with a single definition is a complex concept and impossible. [25] It means that completely limiting and avoid uncertainty is difficult. The content of the public policy is influenced and determined by each state, according to their countries policy.[26] In addition the complexity arise from the failure of the international convention to provided specific definition and was lead to the creation of more divergence of the public police exception to be varies from countries to countries and from time to time.[27]

Still no internationally recognized legal instrument that has provided common standard that can be used at international level as public policy concept.[28] In other word none of them has provided the standard that should be used as public policy defense to the enforcement of foreign arbitral award. However different countries and author try to define the concept and element of the public policy exception. Among them Mark A. Buchunan (1988) define that public policy is the last resort of restriction of law or a final parameter of the law which is often is reflected and expressed by the statutory and constitutional statements of law which permit or prohibit the enforcement of foreign arbitral award.[29] He add that 'Public policy first exists at the domestic level within each individual state that represents those local standards or rules that are not subject to alteration or derogation by the parties and stand as an outside limit to the parties' freedom to contract'.[30] Public policy may be the defined as a justification ground for denial to enforce foreign arbitral award that violate enforcing state's economic policy, professional conduct, conscionability and morality.[31] So the public policy exception is a justification standard that designed to protect the interest of the each country not easily affects the political, social and economic policy interest.

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25 . *ILA interim report on Public Policy as a Bar to Enforcement of International Arbitral Awards* held in Landon conference, 4 (2000).

26 . Emmanuel Gaillard and Domenico Di Pietro (Editors), Enforcement of Arbitration Agreements and International Arbitral Awards :The New York Convention in Practice,787(2008)

27 . *Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards*, adopted at the International Law Association's 70th Conference held in New Delhi, India,5 (2-6 April 2002).

28 . *ILA interim report, Supra* note 25, p.7.

29 . Mark A. Buchanan, Public Policy and International Commercial Arbitration, 26 Am. Bus.L.J. , 513 (1988)

30 . ibid

31 ,ibid

The International Law Association's Resolution on Public Policy as a Bar to Enforcement of International Arbitral Awards (2002) provided a narrow concept approach to the definition of the public policy exception. It explain that a refusal of enforcement of foreign arbitral award based on the public policy exception should be understood in exceptional circumstances.[32] That means the court can only refuse enforcement of foreign award on specific ground. Because the ILA Resolution seeks to facilitate the finality of arbitral awards in accordance with the New York Convention's primary goal that enforcement of foreign arbitral awards should be enforced irrespective of the place where the award is delivered.[33]

Another author (Bander Alsaif, 2018) also defined that Public policy is changeable concept that has influenced by many factors that vary from one country to other country.[34] Because the factor that one legal system need to protect may be different from other legal system.[35] Hence the public policy is highly influenced by the developments in ideology and ways of thinking of particular society.[36] That mean as the society's legal system and social development is increase the definition and concept of the public policy exception is also change.

However, it is possible to understand the concept of public policy in every legal system, to emphasize the legal issues involved in the concept and to recommend legal solutions to overcome the issue of public policy in each legal system.[37] Hence the public policy of a particular country hold different element that include the principles and rules that related to justice or morality or service that the essential political, social or economic interests of those countries.[38] In other word the concept and the element of public policy could be design in a manner that can be controlled by promulgating in each legal system of the countries. Public policy exception to enforcement of foreign arbitral award does not include all public policy. That means public policy exception to enforcement foreign award is smaller in its scopes than the public policy concept in general understandings.[39] Ma, Winnie Jo-Mei (2005) in addition it explain that scope of the public policy exception can be limited based on the nature and

32 .ibid

33 .ibid

34. Bander Alsaif, Two sides of the Saudi public policy coin: reconciling domestic and transnational values in recognition and enforcement of international commercial arbitration awards (2018).

35 . ibid.

36 . id. p 60

37 .id.p70.

38 . Ma, Winnie Jo-Mei, Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons for and from Australia,34(2005)

39 .id, p 58

characteristics of public policy that the government intended to protect the interest of the societies[40] and defined based on the following grounds:

1. Territorial relativity

The territorial relativity defines the public policy exception in relation to geographical set up and referring the public policy exception to the country where the enforcement is sought.[41] This definition is supported by the NYC under Article 2 (b) which provided that the enforcement of foreign award may be refused if it is contrary to the public policy of the country where the enforcement is sought.[42] In addition terrorility definition is also provided by the ILA committee under under recommendation 2(a) which read: 'A court verifying an arbitral award's conformity with fundamental principles, whether procedural or substantive, should do so by reference to those principles considered fundamental within its own legal system rather than in the context of the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration.'[43] So according to the territorial relativity definition public policy should be confined to the legal principle of the country where the enforcement of foreign arbitral award is sought.

2. Temporal (chronological) relativity

According to this definition the public policy exception that should applied for the refusal of enforcement of the foreign arbitral award is the public policy which applicable at the time of the enforcement proceedings.[44] That means the public policy exception whether is law or standard which is repealed at the time of the enforcement is sought, could not be used as a defense for the refusal of the foreign award. In other words the public policy exception that can be used as ground of defense for the enforcement of foreign award it should be the public policy exception that has applicability effect at the time of the enforcement is requested

3. Extra-territoriality:

Extra-territoriality definition is limiting the element of the public policy exception to the public policy that applies to the dispute involved foreign element.[45] Most of the time different countries, to regulate transaction that involve foreign element, they enact international public

40 .id, p 58
41. id,p.58
42 . United Nation convention Supra note 14, Art's (2) b (1958)
43 . *Resolution of the ILA*, Supra note 27,p. 8.
44 . Ma, Winnie Jo-Mei, Supra note 38, p.58.
45 .ibid

policy which have extra- territorial applicability in order in line with the New York Convention to regulate the enforcement of the foreign award, based on the public policy exception which has cross-border application.[46] In other word there must exists a sufficient and justifiable reason that shows there is close connection between the foreign awards sought enforcement and the country of the enforcement and it should not regulated by purely domestic public policy that applied to only national transaction.

4. Fundamentality (essentiality)

This kind of definition provided that not all the enforcement ground rules is justifiable to use as ground of the refusal of foreign arbitral award. The public policy exception that can put against enforcement of foreign arbitral award should be essential public policy which the party cannot be departing from and it must not include the public policy that if enforcement is allowed would result injustice.[47] In addition the ILA resolution (2002) under recommendation 2 (a) provided that 'A court verifying an arbitral award's conformity with fundamental principles, whether procedural or substantive, should do so by reference to those principles considered fundamental within its own legal system rather than in the context of the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration.'[48]

Other author (Louis Kossuth 2014) explains that the term public policy can be used to describe the basic or mandatory rule that any parties to the contract cannot depart from.[49] It means that violation of mandatory rules of the enforceable state's public policy exception cannot be tolerated the foreign award. Again Veena Anusornsena (2012) has also provided that to determine the scope of the public policy exception, it is the exclusive judicial power of the national court and often is used to describe the very important rules of each country.[50] It can be used as aground for the refusal of enforcement of foreign arbitral award which is against basic rules or contrary to the laws or standards of the country.[51] That means it is violation of the basic notions of morality and justice which one country is described by the rules and regulation or by judicial practice to protect.[52] It is a rules and regulation of one country which is expected to

46 .id.p.63.
47 .id.p.58.
48 . *Resolution of the ILA*, Supra note 27, p.8.
49 . Louis Kossuth, Transnational (or Truly International) Public Policy and International Arbitration, 2 (06.11.2014) available: http://www.kluwerarbitration.com/CommonUI/print.aspx?ids=ipn14788.
50. Veena Anusornsena, supra note 6,p.9
51 .ibid
52 .ibid

protect from enforcement of foreign arbitral award that is harm full to the public interest.[53] So public policy exception refers to the laws or standards which court can use to deny enforcement of the foreign arbitral award.

When we see the commercial arbitration law of Ethiopia there is no private international law that applied to the transaction that involve foreign element. In addition under Ethiopian domestic commercial arbitration law there is no definition has provided public policy exception. Under new arbitration and conciliation working procedure proclamation it has been only provided as one ground for refusal of foreign arbitral award the public policy exception.[54] No further explanation as to what situation and element amount to violation of public policy in general in Ethiopian legal system and in particular in relation to enforcement of foreign arbitral award. Such poor drafting was created confusion in implementation and enforcement of foreign arbitral award in Ethiopian and needed to be revised.

So in general it can be concluded that ''the concept of international public policy of a given community, here of a State, is made up of a series of rules or principles concerning a variety of domains, having a varying strength of intensity, which form or express a kind of 'hard core" of legal or moral values, whether in its negative or in its positive function'[55] and public policy should connected with public interest which are consistent with and promote commonly held community values.[56]

So this researcher agrees that even though that there is no agreement on the concept and definition of public policy at the international level, it is possible to understand the concept of public policy how to be safely analyzed, by adopting the experience of other countries and to recommend legal lesson to concept of public policy exception to enforcement award in Ethiopia..

2.1 History and Development of public policy as ground for defense for enforcement of foreign arbitral award

The mechanism of resolving the dispute through arbitration that arises between the nations has a long history and though still did not get recognition in many domestic legal system as the international commercial arbitration as business agreement.[57]

53 .id. p 10

54 . Civil Procedure Code of the Empire of Ethiopia, Article 461 (1) (e), (1963)

55. Veena Anusornsena, Supra note 6, p.2

56 . PAUL DE JERSEY, Public Interest and Public Policy: Unruly Horses Alike?" *Legal Ethics,* Volume **6,** No. 1, 16 (2003)

57 . Louis Kossuth , Supra note 49, p.1.

The development of enforcement of arbitral award particularly public policy exception as ground for defense for enforcement of foreign arbitral award has pas through different stages.[58] That means the concept of public policy did not created within one night and passmany years and reached the current stage. These are:

2.1.1 Initial Stage.

The use of arbitration as mechanism of the dispute resolution has a long history.[59] The application of using arbitration as a means to resolve the dispute first appeared in ancient Roma and Greece.[60] During the French Revolution arbitration was elevated to constitutional status in the Constitution of 1790 and the Constitution of 1795.[61] In the early time the commercial dispute that occurs between parties was resolved based the domestic rules and the institution rules chosen by parties and the proceeding highly is influenced by the presiding arbitrator which has wide power.[62] This stage lasted until the beginning of the twentieth century.[63] The decision rendered by the ad hoc arbitration highly intervenes by the national court and the national court has a full power to review the decision of the arbitrator both the substantive decisions of the arbitrators and procedural matter.[64] At this stage there was no any international law that put limitation on national court to not interfering in the process of the enforcement of the arbitral award and the interference of the national court was motivated by political system which has strong relations with issue of the country's sovereignty that seems lead to the failure of the international commercial arbitration relating to enforcement of foreign arbitral awards at initial period.[65]

2.1.2 Second Stage

This stage was make the first move in the beginning of the twentieth century, when the world's economic expansion is highly started to progress and establish the mechanism for international recognition and enforcement of both arbitration agreements and foreign awards.[66] Indeed different international legal instrument has been established to govern the international commercial arbitration including enforcement of the foreign award. They try to put public policy

58 . Veena Anusornsena, Supra note 6, p.6
59 . HRNČIŘÍKOVÁ, Miluše, Supra note 1,p.97
60. ibid
61 .id. as sited, p.98
62 .ibid
63 . Veena Anusornsena, Supra note 6, p.6
64 .ibid
65 .ibid
66 . HRNČIŘÍKOVÁ, Miluše, Supra note 1, p.98.

exception as a ground of refusal of enforcement of foreign arbitral award. But none of them harmonize concept of the international public policy exception. Among them the OHADA Uniform Act of 1993. It is the Organization harmonization of African law affairs (OHADA) that adopted to create a Uniform Arbitration Law which reads under Article 31 that, recognition and enforcement foreign award shall be refused if the 'award is manifestly contrary to a rule of international public policy of the member States'.[67] However it did not have clearly provided the element of public policy.

Other most important arbitration rules which have incorporated the issue of the public policy exception in its provisions is the New York Convention of the 1958 which is the most important international legal instrument that has got universal acceptance on the enforcement of foreign arbitral award. Under Article V.2 (b) of the New York Convention it has prescribed that foreign arbitral award that contrary to the public policy of that country should not be enforced.[68] The 1923 Geneva protocol and the 1927 Geneva Convention also has tried to include the concept of public policy exception. Especially the 1927 Geneva Convention that was the basic and true legal framework for the foundation of international commercial arbitration law has mentioned that public policy exception as one ground of defense for refusal of enforcement of foreign award under Article 1(e). It was prescribed that the State can refuse enforcement of foreign award if it is 'contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon'.[69] The 1975 Panama Convention also another regional instrument which is Inter-American Convention. It expressed under Article 5 (2) (b) that, the recognition and execution of an arbitral decision may also be refused if the competent authority found that 'the recognition or execution of the decision would be contrary to the public policy of that State'.[70] Again the Montevideo Convention of 1979 that established on 8 May 1979 and aimed to regulate extraterritorial Validity of arbitral awards that not have covered by the Panama convention of 1975. The convention under Article 2, (h) has mentioned that, the foreign judgments, awards and decisions referred to in Article 1 shall have extraterritorial validity in the States Parties if 'they are not manifestly contrary to the principles and laws of the public policy

67 . *ILA interim report* , Supra note 25,p.7.

68 . Anas Mohamed Harb , Enforcement of Arbitral Awards Under New York Convention 1958 And Washington Convention 1965 Comparative Study & Legal Analysis in the Light of Recent Realities (January 2014)

69 . Moawiah Milhem, Public policy as defense for refusing recognition and enforcement of foreign arbitral award, 16 (2012)

70 . *ILA interim report*, Supra note 25.p.8

(order public) of the State in which recognition or execution is sought'.[71] The other convention is the 1983 Riyadh Convention. It also mentioned under Article 37 that the enforcement of foreign award should be refused if it is 'contrary to the Moslem *Shari 'a,* public policy or good morals' of the signatory State where enforcement is sought'.[72] The 1987 Amman Convention, also another convention that simply prescribes if the award is violates 'public policy it should be denied enforcement.[73]

The UNCITRAL Model Law also international commercial legal instrument which provided public policy exception to enforcement under Article 36 (1) (b) (ii) which direct reflection the NYC Article V.2 (b) that foreign award may be refused if it is against the public policy of the State in which enforcement is sought.[74]

2.2 **Category of Public Policy**

Category of public policy can be divided based on different arrangement. It may be categorized as national public policy, International public policy& transnational public policy,[75] and also divided as substantive and procedural public policy.[76]

2.2.1 National (domestic) public policy

It refers to the public policy of specific countries that can be is determined and controlled by States.[77] It s a type of public policy in which it apply to a relationship or agreement that does not involve foreign element within a domestic territory. In other word it only regulate the dispute that arise in domestic country without contain the transaction between different countries.[78]

Domestic public policy it consist of the mandatory laws of the State.[79] In other word domestic public policy is a public policy of the enforcing state that regulate fundamental notions of morality and justice, which enacted by the State to be applicable to the pure domestic dispute transaction.

71 .ibid
72 .ibid
73 .id. p.9
74.ibid.
75 . *Nivedita Chandrakanth Sheno,* Public policy under Article V(2)(B) of the New York Convention: Is there a transnational Standard?, *CARDOZO J. OF CONFLICT RESOLUTION* (Vol. 20:77), 80 (2018).
76 . Ma, Winnie Jo-Mei, Supra note 38,p.69
77 . *Nivedita Chandrakanth Sheno,* Supra note 75, p.80.
78 . Ma, Winnie Jo-Mei , Supra note 38,p 77
79 . *Nivedita Chandrakanth Sheno,* Supra note 75,p.80

2.2.2 International public policy

International public policy it is a part of the domestic public policy that to be understood in a sense of field of private international law, which extended to regulate commercial transaction dispute that involve foreign and if it is violated would it prevent a party from invoking enforcement of a foreign award.[80] It is not part of the transnational public policy which is common to many States or it is not part of public international law.[81]

Every domestic rule of law does not necessarily part of International public policy and the International public policy is smaller than domestic public policy in scope.[82] In other word not all domestic public policy or domestic rule of law applies if the enforcement of the foreign arbitral award is sought. For the refusal of the enforcement of the foreign arbitral the element of rule law that the enforcing state should apply whether refuse or admit is the international public policy of that country.

2.2.3 Transnational public policy.

It is not necessarily part of any national legal system and it is independent merchant laws. It applies *lex mercatoria (trade created norms)* to solve commercial dispute. It does not subject to choice of law process (no forum).[83] However the ILA final report (2003) under recommendation 2 (b) has provided that the situation in which transnational public policy may indirectly used as defense of the enforcement when it becomes parts of the State's national public policy which reads: 'Nevertheless, in order to determine whether a principle forming part of its legal system it must be considered sufficiently fundamental to justify a refusal to recognize or enforce an award, a and court should take into account, the international nature of the case and its connection with the legal system of the forum, and, on the other hand, the existence or otherwise of a consensus within the international community as regards the principle under consideration (international conventions may evidence the existence of such a consensus). When said consensus exists, the term 'transnational public policy' may be used to describe such norms' [84]

80 . *Resolution of the ILA* , Supra note 27,p.3
81 .ibid
82 . *ILA interim report,* Supra note 25,p.7
83 . Ma, Winnie Jo-Mei, Supra note 38,.p.87.
84.PIERRE MAYE and AUDLEY SHEPPARD, Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, Vol. 19, No. 2, 259 (2003).

To properly identify the status of the transnational public policy whether it has got acceptance by international community and considered as fundamental principle, the enforcement court should observe the writings of commentators, practice of other courts, and other sources.[85]

So what can understand from the ILA Resolution (2003) is that, the enforcing State can use as ground of refusal of the public policy exception to enforcement of the foreign arbitral award, only if it is part of international public policy. Because under the above recommendation of the ILA it says 'the existence or otherwise of a consensus within the international community as regards the principle under consideration (international conventions may evidence the existence of such a consensus). When said consensus exists, the term 'transnational public policy' may be used to describe such norms'. In other word if it is proved that there exists a consensus among the community which has a connection with the subject matter the transnational public policy may be used as ground of the defense for public policy exception to enforcement of the foreign arbitral award.

So we can conclude that the state can adopt the transnational public policy as part of its public policy which has universal applicability to make the content of its domestic law.

2.2.4 Substantive and Procedural public policy

2.2.4.1 Substantive of public policy:

Substantive public policy is related with the content of the agreement of the arbitration which provide the rights and obligations of tribunal or enforcement court in connection with the enforcement the award.[86] In another word it is a part of public policy which expressly lists what is the power and duty of the tribunal and enforcement court in connection with the subject matter of the award. Yunus Emre (2018) explains that 'Substantive public policy consists of fundamental values of society, basic principles of law, mandatory rules of the state and public moral'.[87] It may be divided as follow:

1. Mandatory Public Law Rules

It is part of the Substantive public policy exception which ignorance of it is not allowed by the party's agreement.[88] In other words whether the parties like or dislike the violation of such mandatory law of enforcing country must be respected. But what should be understood that, not

85 . Ma, Winnie Jo-Mei, Supra note 38, p 87
86. *ILA interim report* , Supra note 27,p.17
87 . Yunus Emre: Supra note 17,p.505
88 . Ma, Winnie Jo-Mei, Supra note 14, p 127

all mandatory law is part public policy exception to refuse enforcement of foreign arbitral award, but all public policy exception is part of all mandatory law.[89]

So we can conclude that when the agreement or enforcement of foreign award violate all mandatory law which is part public policy exception of that country such as the 'competition laws; currency controls; environmental protection laws; measures of embargo, blockade or boycott; or laws falling in the rather different category of legislation designed to protect parties presumed to be in an inferior bargaining position, such as wage-earners or commercial agents,' enforcement of foreign award should be denied.[90] In addition crime activities which against public moral, fundamental values of society and mandatory rule of the country such as drug trafficking, smuggling, woman trafficking, or trading of organs and tissues that is contrary to substantive public policy is prohibited to be enforced even though agreed by the party.[91]

2. Fundamental principles of law

Under some jurisdiction fundamental the principles of law are considered as referring to general principles, rather than to specific legislative provisions such as uncompensated expropriation, discrimination, abuse of rights, discrimination, violation principle of god faith and pacta sunt servanda[92] and unlawful relief when the award allow punitive or exemplary damages Violation of good morals (public order).[93] In addition globally there are some activitie that are condemned and considered as illegal act which violation of such right is assumed as the world problem. For example activities such as drug trafficking, paedophilia, genocide, slavery, piracy and terrorism even though there is an agreement between the parties and require enforcement of foreign award it must be denied, hence it is against world moral.[94]

3. *Violation of the national interests or foreign relations*

Violation of the national interests is also another element of substantive public policy which provided that public policy is not equated with national policy (interest) and the enforcement of foreign award would be refused only where the performance of the contract is conflicting national policy (interest) and forbidden by national policy of that country.[95] That mean if the

89 . *ILA interim report* , Supra note 25.p 18
90 .Id,p 17
91. Yunus Emre , Supra note 17, p 506
92 . *ILA interim report* , Supra note 25,p.20
93 . id, p 21
94. *id,* p 22
95 . id, p 23

enforcement of the foreign award does not affect the interest and relation of national policy of the country, the enforcement of the foreign award it is not denied.

4. Punitive Damage

Punitive damage is a kind of the punishment against defendant.[96] The civil law and common law legal system have deferent stand in relation to recovery for victim party to restore to its previous position. Civil law legal system applied only compensation while common law legal system applies both punitive damage and compensation, but what is important is that in both legal systems punitive damage is accepted as violation of substantive public policy when it is delivered as award and should be denied enforcement.[97]

5. Excessive Interest

Basically interest payment is not prohibited act in modern legal system.[98] However, excessive interest (also excessive cost) is would amount violation public policy exception which contradicts proportionality principle of awarded damages which constitute contravention of substantive public policy and should be denied enforcement of the foreign award.[99]

2.2.4.2 Procedural public policy

The procedural public policy is referring to the process through which the dispute is entertained before arbitral tribunal or court.[100] It is generally accepted that breach of principles of due process of law, is considered as breach of the rules of natural justice such as equal treatment of the parties, fair notice to determine appointment of arbitrators and the conduct of proceedings and fair opportunity to present the case.[101] So ignorance of this activities is amount violation of the procedural public policy exception to enforcement of foreign arbitral award

In addition when the arbitrator are biased or impartial, tainted by perjury, affected by fraud or corruption it lead to refusal of enforcement of foreign award as violation of procedural public policy exception.[102] However manifest disregard of the law or the facts should not be accepted as amount to violation of the public policy exception.[103]

96. Yunus Emre , Supra note 17, 506
97 . id, p 507
98 . id,p.508
99 . id,p.508
100 . Ma, Winnie Jo-Mei , Supra note 38,p 69
101 . *Resolution of the ILA*, Supra note 27,p 31
102 . *id*, p 7
103 . id, p 7

So we can conclude that procedural public policy exception has got recognition under international commercial legal rules and overlap with the requirements of due process, mentioned in Article V.1 (b) of the New York Convention and UNCITRAL model law.

2.3 Stages in the application of the public policy exception to enforcement of foreign arbitral award

To enforce public policy exception there are three stages that to has be considered whether the enforcement sought award should permitted or not, .These are:

1st Stage

At this stage what should be considered is that whether the alleged public policy is a ground for defense of enforcement of the foreign arbitral award and fall within the public policy exception.[104] We should try to evaluate if the alleged ground fall within public policy exception or the violation of the raised ground for enforcement cannot exclude the enforcement of foreign arbitral award. In other word before proceeding to the refusal or enforcement of award the court should initially identify whether the requested award for enforcement is against public policy of the country. For example as it provided under NYC Article V (2) (b) the enforcement of foreign arbitral award only refused it is contrary to public policy of the country where the enforcement is sought. In other words to refuse enforcement the arbitral award the enforcement court cannot use the violation of public policy exception of the country where the award is delivered.

2nd Stage:

Under this stage what should be focused is that even if there is a violation of international public policy exception the degree of contravention should be evaluated.[105] That mean the mere violation of the international public policy exception it does not necessary lead to refusal of the enforcement of foreign arbitral award and the court should narrowly interpret the public policy exception.[106] For example the NYC under Article V (2) (b) has explain that to refuse the enforcement of foreign award the court should consider not the award itself rather whether the enforcement of such award in the countries is contrary to the public policy exception.

Therefore the attention must be given to the alleged public policy exception whether it is contrary to fundamental public policy of enforcing country that cannot be an intolerable or

104 . Ma, Winnie Jo-Mei , Supra note 38, p 52
105 . Id, p 53
106 . Id, p 53

manifestly or sufficiently serious in order to justify non-enforcement, though Art V(2)(b) of NYC does not clearly provided the public policy violation to be manifest, clear or obvious.[107]

3rd Stage:

Under this stage it believes that the court has discretion power to refuse enforcement of foreign arbitral award and supported by NYC. It provided that even if the alleged ground of refusal is breach the international public policy the court has discretion to enforce it.[108] Because as it provided under NYC Article V the court may refuse enforcement. Hence the word ‘’May ‘’ it is permissive and discretionary of the court to allow enforcement if it found that the alleged ground of refusal of enforcement constitutes public policy exception and enforcing the award couldn’t lead to injustice or if it considers that the degree or the consequences of the public policy violation do not justify non-enforcement of foreign award.[109] In addition the court can enforce the award if the party to agreement especially the defendant has waived, or forfeited, from invoking the public policy exception.[110]

Therefore in order to encourage the enforcement of foreign arbitral award the enforcement court is should understand and conclude that, just as enforcement may be refused under the public policy exception, enforcement may also be allowed despite the establishment of the public policy exception. Hence the public policy exception should be applied in exceptional circumstance.

107 . Id, ,p 54
108 . Id, p 55
109 . Id,p.55
110 . Ibid

Chapter Three

3. International Commercial Arbitration Legal Framework on public policy exception to enforcement of foreign arbitral award

At the present time the enforcement of foreign arbitral awards is one of the most debatable issues that create a problem to the efficiency of the international arbitration law.[111] Especially public policy exception is one important element that used as a defense for the refusal of the enforcement of the foreign award[112] that face a challenge and debate in international commercial arbitration since public policy is used as defense ground of enforcement not only for foreign court decision but also foreign arbitral awards that has provided under deferent international, regional and national legal frame work.[113]That means different commercial arbitration laws have enacted to smoothly run economic transaction at international, regional and national level.

However the true international commercial arbitration law was started by the enactment of the Geneva protocol of 1923 and the Geneva Convention of 1927 that aimed to promote the execution and recognition of international foreign Awards by independent and neutral arbitration system and that should be recognized as binding and is to be enforced in accordance with the procedure of the territory where the award is relied upon.[114]

By using as a base these international commercial legal instruments in the second half of the twentieth century many international and regional commercial convention was established to regulate international commercial arbitrations including enforcement of foreign arbitral award by putting public policy exception as one ground of refusal to enforcement of award.[115]

Thus, in this chapter three I will discuss the notion of public policy exception that provided under different international and regional commercial arbitration in the field of international commercial arbitration in relation to public policy exception to enforcement of foreign arbitral award.

111. Yunus Emre, supra note 17,p.504

112. May Lu The New York Convention on the recognition and enforcement of foreign arbitral awards: analysis of the seven defenses to oppose enforcement in the United States and England , Arizona Journal of International & Comparative Law Vol. 23, No. 3, 771 (2006)

113 . Yunus Emre, Supra note 17, p. 505

114 . Moawiah Milhem, Supra note 69,p.15

115 .id.p.16

3.1 The Public policy exception and 1927 Geneva Convention

It is cornerstone convention[116] that tries to sets uniform criteria regarding enforcement of foreign arbitral awards and entered into effect in 1929.[117] It put a bases for establishment of many international commercial arbitration and provided different ground for refusal enforcement of foreign arbitral award..The criteria set by the convention in relation to enforcement of foreign arbitral awards are vague and restrictive. It provide that the foreign award should be only have governed by the domestic law and enforced by courts of host countries if the award is final in the country where it was delivered.[118]

The Convention obliged the State to recognize and enforce any arbitral award as binding pursuant to an arbitration agreement covered by the 1923 Protocol on Arbitration Clauses.[119] To enforce any arbitral award the Convention of 1927 has provided different condition and element: To obtain such recognition or enforcement, it shall, further, be necessary:

(a) 'That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto.'[120]

(b) 'That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon.'[121]

(c) 'That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure.'[122]

(d) 'That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition, appeal* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending.'[123]

116 . Moawiah Milhem, Supra note 69,p.15

117 . Emmanuel Gaillard and Domenico Di Pietros, suprs note 26,p.7

118 . Yunus Emre, Supra note 17,p.504

119 . Emmanuel Gaillard and Domenico Di Pietro, Supra note 26,,p.7

120 . Convention for the Execution of Foreign Arbitral Awards, League of Nations, *Treaty Series*, vol. XCII, Article 1 (a) (1929-1930)

121 .id, Article 1 (b)

122 .id, Article 1 (c)

123 .id, Article 1 (d)

(e) 'That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.'[124]

Although the 1927 Geneva Convention have provided different condition under Article 1 including public policy exception to recognition and enforcement of foreign award, the convention had several shortcomings and contains provisions that are sometimes vague, doubtless due to the political circumstances.[125] As a result 1927 Geneva Convention was amended by NEW York Convention[126] and delete Article 1(e)) of the convention which prescribe that the State can refuse enforcement of foreign award if it is' contrary to the principles of the law of the country in which it is sought to be relied upon which has used as ground of public policy exception to refusal of enforcement of foreign arbitral award.'[127] In other words if any award violated the country's any principle of law the enforcing country can refuses enforcement of foreign arbitral award without analyzing whether such violation is mere violation of law or violate fundamental law of country. So it gave a wide jurisdiction for the enforcement sought country to easily refuse enforcement of arbitral award.

3.2 Public policy exception and New York Convention

To properly regulate enforcement of foreign arbitral award at international the New York Convention was enacted and has got international recognition. In May 1958, the New York Convention proposal is drafted by the Professor Pieter Sanders, who is the scholar from the Netherlands.[128] He drafts the proposal within weekend and presented to the United Nations Conference on International Commercial Arbitration and the draft approved and signed by many nation and the convention at present considered to be a genuine constitutional charter for international arbitration and is the most important international legal instrument in its field.[129] The New York Convention is put public policy exception as one basic element for denial of

124 .id, Article 1 (e)

125 . Emmanuel Gaillard and Domenico Di Pietro Supra note 26,p.7

126 .United Nation Convention, Supra note 14,Article VII (2)

127 . *ILA interim report*, Supra note 25,p.8

128. Robert C. Bird, *Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention*, 37 N.C. J. Int'l L. & Com. Reg. 1014 (2011). Available at http://scholarshiop.law.une.edu/neilj/vol37/iss4/1

129 .ibid

recognition and enforcement of foreign award when it violates the public policy of the country where enforcement is sought.[130]

At present it is one of the widely ratified and used treaties in relation to regulating the enforcement of the foreign arbitral award which is described as one of the cornerstones of international arbitration that aimed to prove the fundamental international arbitral legal system and certain that arbitral awards are readily recognizable and enforceable in States other than the State in which they are rendered.[131] The country that ratifies or accedes to the New York Convention has an obligation to recognize and enforce arbitral awards entered in foreign territories or those not considered as domestic, in the State where their enforcement are sought.[132]

However it does not mean that court of enforcing state should enforce all foreign awards without screening it. Because under Article V of New York Convention Article V it has provided different grounds for refusal of the foreign award including public policy exception which read as:

1. Art. V(1)(a) the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.[133]
2. Article V (1) (b) provides the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.[134]
3. Article V(1)(c) addresses the situation in which the award deals with a difference 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.[135]

130 . George A. Bermann, Recognition and enforcement of foreign arbitral awards: The application of the new York convention by national courts,70 [July 2, 2014]

131 .id 8, p.2

132 . Krishnee A Appadoo , Reinforcement of international commercial arbitral awards: redress mechanisms in the event of non-compliance, SSRN Journal,9(April 2013):

133 .United Nation Convention , Supra note 14, Article V (1)(a) (1958)

134 .id Article , V (1)(b)

135 . id Article , V (1)(c)

4. Article V(1)(d) contemplates that the composition of the arbitral authority or the arbitral procedure may not have been in accordance with the agreement of the parties, or, failing such agreement, in accordance with the law of the country where the arbitration took place.[136]
5. According to Article V(1)(e), a court may deny recognition or enforcement if the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.[137]
6. Article V (2)(a) invites non-recognition and non-enforcement if the subject matter of the difference is not capable of settlement by arbitration under the law of the country where recognition or enforcement is sought.138
7. Article V(2)(b) is the so-called public policy question, justifying non-recognition or non-enforcement of a foreign award in recognition or enforcement of the award would be contrary to the public policy of the country where it is sought. [139]

Even though drafter committee of convention of 1955 intended to clearly define and limited the scope the public policy exception, the public policy exception under Article V (2) b of the New York Convention finally enacted in open ended language which simply prescribe contrary to public policy.[140] This shows that the wording of the public policy exception under Article V (2) b of the New York Convention broadly provided than initially have proposed.[141]

As clearly stipulated under the NYC the standard provided for measure of violation of public policy exception to the recognition and enforcement foreign award does not exhaustively have provided.[142] Though the convention under Article V (2) (b) have provided public policy exception content non exhaustively it should be interpreted using the rules of interpretation provided by the Vienna Convention on the Law of treaties and in good faith in accordance with

136 . id Article , V (1)(d)

137 . id Article , V (1)(e)

138 . id Article , V (2)(a)

139 . id Article , V (2)(b)

140 .Szabolcs Steiner, public policy as ground for refusal of recognition of foreign arbitral with especial focus on Austria and Hungary,13 (March 30,2012)

141 .id, p 12

142 . *Nivedita Chandrakanth Sheno, ,* Supra note 75,p. 82

the ordinary meaning to be given to its terms, in their context, and in the light of its object and purpose.[143]

However a State cannot impose substantially more onerous obligations for enforcement of awards under the Convention than those imposed for domestic awards. Hence Article III of the Convention contains an affirmative obligation to recognize and enforce an award in accordance with the Convention. Thus we can conclude safely that the grounds in Article V are exceptions to the general obligation in Article III. So the subject matter of the Article (V)(2)(b) of the new York convention that sought enforcement , is the award and not the award itself and the Article V must be understood narrowly.[144]

Because the convention has put a limitation on the member to be well-matched in line with it and state that national courts under obligation to recognize the validity of arbitration agreements and referring parties to arbitration when they have entered into a valid agreement to arbitrate and enforce foreign arbitral awards according to the rules of procedure in the territory in which the award is sought to be enforced.[145]

In addition Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards, that adopted at the International Law Association's 70th Conference held in New Delhi, India, (2002) under recommendation 1 (a) provided that 'an enforcement court must carry out a balancing exercise between finality and justice'' and ''enforcement should be refused only in exceptional circumstances'[146] and pro-enforcement bias should be adopted by national courts.[147]

So in general the court should avoided a nationalist reading of the conceptual understanding by adopting a restrictive conception of public policy or pro-enforcement bias by New York convention. I.e. interpreting public policy exception only focusing on fundamental principles of morality and justice by aligned with the philosophy of the New York Convention.[148] So in general we can conclude that the New York Convention itself drafted the concept of public policy in open ended situation.

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143 .id, p 81

144 .id, p 83

145 . George A. Bermann, Supra note 130,p 9.

146 . *Resolution of the ILA ,supra note27,p*.2

147 .id, p 4

148 . Movsesian, Mark L., International Commercial Arbitration and International Courts,425 (2008).,available, at https://scholarship.law.stjohns.edu/faculty_publications/98

3.3 The public policy exception and European Convention of 1961

United Nations Economic Commission has supported for the conclusion of the European Convention on International Commercial Arbitration for Europe in Geneva on 21 April 1961 that aspire to remove certain obstacle that may impede the organization and operation of international commercial arbitration in relations between physical or legal persons of different European countries which promote the development of European trade.[149]

However the European Convention on International Commercial Arbitration does not provided the issue of the public policy whether it can be used as ground for refusal of enforcement of foreign arbitral award. Though the European Convention on International Commercial Arbitration is silent in relation to recognition and enforcement of foreign awards, it is articulated to as complementary of the New York Convention, essentially to regulate only with the effects of a judicial decision annulling an award in the arbitral seat in other jurisdictions and it is apparent complementary nature of the European Convention to the New York Convention by the absence of provisions governing the enforcement of the award.[150]

Therefore it can be worth noting that the countries that member of the European Convention on International Commercial Arbitration of 1961 should use the ground of public policy exception to enforcement of foreign arbitral awards that has provided under the New York Convention.

3.4 The Public policy exception and 1975 Panama Convention

It is the Inter-American Convention which concluded in Panama on 30 January 1975, at the First Specialized Conference on Private Inter-national Law within the framework of the Organization of American States on International Commercial Arbitration[151] and it is signaled a step towards the acceptance of international commercial arbitration in Latin America.[152] Since the Montevideo instrument is basically concluded to regulate judgments of civil court, commercial and labor issues, the Panama Convention focuses specifically on enforcement of arbitral awards, and prevail over the Montevideo convention with respect to the enforcement of enforcement of arbitral awards,

The Panama Convention under Article 5 (2) (b) has prescribed that the recognition and execution of an arbitral decision may also be refused if the competent authority found that 'the execution of

149 . Pedro De Andrade Lima Arcoverde, Public Policy And The Recognition And Enforcement Of Foreign Arbitral Awards In Brazil And In France :An Analysis Against The Backdrop Of Global Governance,25 (2013)

150 .id,p.26

151 .JONATHAN C.HAMILTON, Three decades of Latin American commercial arbitration, 11oo(2014)

152 .id,p.1101

the decision would be contrary to the public policy of that State'. So the Panama Convention also did not come up with unique standard for the proper regulation of the public policy exception to enforcement of foreign arbitral award within Inter-American Countries, hence it make open like New York Convention without exhaustively list the content of the public policy exception to enforcement of foreign award.[153]

3.5 The Public policy exception and Montevideo Convention of 1979

The Montevideo Convention was established and signed on 8 May 1979 at the meeting of Second Specialized Conference on Private International Law of the organization of American state and it is other Inter-American Convention on Extraterritorial Validity of Judgments and arbitral awards.[154] As it provided under Article 1, second paragraph of the convention the objective of the convention is to support and apply to arbitral awards in all matters not covered by the Panama convention on of 1975.[155] The convention under Article 2, (h) has mentioned that, the foreign judgments, awards and decisions referred to in Article 1 shall have extraterritorial validity in the States parties if 'they are not manifestly contrary to the principles and laws of the public policy *(ordre public)* of the State in which recognition or execution is sought'[156]

Different legal instrument like Montevideo Convention of 1979 Article 2, (h) such as the, the 2001 EC Regulation, and draft Hague Convention provided that the award "manifestly" contrary to public policy or international public policy could be a ground for denial recognition and enforcement foreign arbitral award. However the ILA final report (2002) recommended that it is traditional to provided the requirement for refusal of foreign arbitral award a "manifest" violation public policy exception because the violation must be obvious or clear. [157]

3.6 The Public policy exception and OHADA Uniform Act of 1999

The Organization for the harmonization of Business law in Africa (OHADA) was created by the treaty relating to the Harmonization of Laws in Africa's, which was signed on 17 October 1993 and, the Council of Ministers of OHADA adopted a uniform Arbitration Law in11 March 1999 with objective to harmonization of Business law in Africa.[158] The Organization for the harmonization of Business law in Africa provided that the arbitration agreement is independent

153 . *ILA interim report,* Supra note 25,p.8

154 . Ralf Michael, Recognition and enforcement of foreign judgment, 4 (2009)

155 . JONATHAN C.HAMILTON Supra note 151,p.1104

156. Montevideo Convention of 1979, Article 2, (h)

157 . *Resolution of the ILA Supra note 27,* p. 4

158 *ILA interim report*., Supra note 25,p.9

of the main contract which its validity shall not be affected by the nullity of the contract and shall be interpreted in accordance with common intention of the party without necessarily referring to national law.[159] The organization under Article 31 has provided that recognition and enforcement of arbitral award shall be refused if the 'award is manifestly contrary to a rule of international public policy of the member States'[160] However the requirement for denial of recognition and enforcement foreign arbitral award which says 'the award must manifestly contrary' to a rule of international public policy of the member States couldn't get supportive currently. The international law association committee (2002) have agreed and recommended that the public policy violation must usually be relatively obvious or clear, but it would not be appropriate to include "manifestly" violation public policy exception to enforcement of foreign arbitral award.[161] That is the court should undertake a reassessment of the facts only when there is a strong *prima facie* argument of violation of international public policy. It means that no need of review of reasoning and facts if no strong evidence. But what is important in this legal instrument is that it tries differentiating between purely domestic public policy and international public policy. According to Article 31 of the act the manifestly violation public policy exception to enforcement of foreign arbitral award must be contrary to international public policy of the member States rather than domestic public policy that regulate the dispute that does not contain foreign element.

3.7 Public policy exception and UNCITRAL model law

In 1977 Asian-African Legal Consultative Committee has made request for the revision of the operation of the New York Convention which finally enacted the 1985 UNCITRAL Model Law.[162] It is international commercial legal instrument that designed to be used as model by country with objective to make arbitration that is acceptable to States with different legal, social and economic systems that contributes to the development of harmonious international economic relations which significantly assist to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.[163] In addition as it described by the UNCITRAL secretariat Model Law in the Explanatory note, 'the Model Law constitutes a sound and promising basis for the desired harmonization and improvement of

159 . OHADA Uniform Act of 1999 Article 4

160 .id Article 31

161 . *Resolution of the ILA,* Supra note 27,p.4

162 . *ILA interim report ,supra note 25,p.*9

163 . UNCITRLA model law ,supra note 15 ,preamble

national laws.' When the NU commission adopts the 1985 UNCITRAL Model Law and 2006 revision, under Article 36 of the convention there was no overt attempt to harmonize the definition or the scope of the application of public policy exception.[164] Because the UNCITRAL Model Law likes New York convention under Art 36 it provided that: enforcement of an arbitral award, irrespective of the Country in which it was made, may be refused only: *(a)* at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: ' (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;'[165] or (ii) 'the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case '[166] or (iii) ' the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;'[167]or (iv) 'the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place '[168], (v) 'the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made;[169] or *(b)* if the court finds that , (i) 'the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State'[170] or(ii) 'the recognition or enforcement of the award would be contrary to the public policy of this State.'[171]

164 *Nivedita Chandrakanth Sheno*, Supra note 75, p 83

165 . UNCITRLA model law, Supra note 15, Article 36 (1)(a) (i)

166 .id, Article 36 (1)(a) (ii)

167. id, Article 36 (1)(a) (iii)

168 . id, Article 36 (1)(a) (vi)

169 . id, Article 36 (1)(a) (v)

170 . id, Article 36 (1)(b) (i)

171 . id, Article 36 (1)(b) (ii)

When we see the UNCITRAL Model Law Article 36 (2) (b) in spite of its wide adoption and its broad coverage, like convention New York convention, it does not clearly provided what standard should be used by the countries to refuse enforcement of foreign arbitral award. It is non self executive laws and depends for its success on the behavior of national actors. In another word the Convention's effectiveness regardless of their general views of international law for its implementation, it highly depends on national laws.[172] It is an accepted norm that within its jurisdiction state has the ultimate right to refuse an arbitral award based on the public policy ground. That means there is no international organ and international legal instrument that enforces the countries to strictly follow and the country can use the element they established to refuse enforce of an arbitral award.[173] However what should be understood is that the enforcing court of the foreign arbitral award should balance between finality and justice.[174]

To determine and limiting the scope of the public policy exception, not to interpreted widely to affect the enforcement of foreign award it imperative to use the pro-enforcement bias.[175] Hence providing as standard the manifest violation of public policy exception, empower the judge to decide and addressed to carry out a superficial examination of the decision without providing relatively obvious or clear reasoning.[176]

The UNCITRAL Model Law can be used as a guide for developing domestic legislation on dispute resolution even though it openly drafted the element of public policy.[177] Hence it incorporates globally accepted principles that are relevant to the control and support of arbitration by domestic courts[178] and at present many countries are consulting the model law provision while they are desired to enact commercial arbitration law.[179] Some countries do not adopt the Model Law provisions in their entirety and such nations adopt a framework that is based on the Model Law as this offers better access and transparency to non-domestic entities.[180] The Model Law can be said to be best suited to the requirements of international commercial

172 . id, Article 36 (1)(b) (ii)

173 . *Resolution of the ILA* ,Supra note 27,p.2

174 .id,p.4

175.ibid

176 .ibid

177 . Saad Badah, Recognition and enforcement of foreign arbitral awards in Kuwait,72 (2016)

178 .ibid

179 .ibid

180 .ibid

arbitration and enjoys considerable popularity even if it openly drafted the public policy exception to the refusal of enforcement arbitral award.[181]

181 .ibid

Chapter Four

4. Comparative analysis of Ethiopian and Indian commercial arbitration laws and court practice based on public policy exception to the enforcement of foreign arbitral award.

4.1 General approach on the scope of public policy exception to enforcement of arbitral award

Public policy exception to enforcement is often invoked by a losing party in an attempt to manipulate an enforcing court into re-opening matters which have determined or is thereby raised to frustrate or delay the winning party from enjoying the fruits of a victory by widely defining public policy element.[182]

The element of public policy exception may be drafted both in exhaustive and non-exhaustive manner. The scope of the public policy exception is exhaustively listed, when its scope is defined, Where the element of public policy is exhaustively listed the alleged contraventions of public policy falling outside such defined scope cannot justify non-enforcement. However when the scope of the public policy exception is non-exhaustive that public policy exception may lead to include many ground which enable the court to easily refuse enforcement of the foreign arbitral award. Hence to decide what should be the element of public policy exception, it falls under discretion of the court.[183]

At international level the absence of any guidance in the New York Convention on the scope and element the public policy exception open the door for the enforcement of foreign arbitral award in unmanageable situation so it agree that any expansion of the scope of the public policy exception should only be made in the interests of justice.[184]

Though exactly providing the formula and standards for the governing the issue of public policy exception is difficult, every country should understood that the public policy exception co-exists

[182] .Thomson Reuters, international arbitration law review: Foreign arbitral awards enforcement and the public policy exception - India's move towards becoming an arbitration-friendly jurisdiction,3 (2014)
[183] . Ma, Winnie Jo-Mei, supra note 38,p.161
[184] .ibid

and overlaps with other refusal of ground to enforcement of foreign arbitral award listed under NYC Art V. [185]

So in order to minimize the broad interpretation of the term not to affect the general economic transaction and interest of the parties to the agreement, different countries have exhaustively listed different element to avoid the doubt about the concept and element of public policy exception to enforcement foreign arbitral award whereas other try to establish the standard based on case laws. Even though there is no cross cut understanding among different legal system, many countries have been try to establish justifiable standard that should be accepted as public policy exception to enforcement of foreign arbitral award. Still Ethiopian does not modernize its commercial arbitration law by taking the experience of other countries. So I will analyze the Ethiopian arbitration and conciliation working procedure proclamation reference to public policy exception in line with Indian public policy exception to the enforcement of foreign arbitral award.

4.2 General over view of development of arbitration law in India

In India there is high progressive in commercial arbitration law both in improving its legislative act and supporting pro-enforcement of foreign arbitral award through judicial decision to maintain social value and justice to the parties concerned**.** It has made legal reform in different time to modernize its arbitration law for the recognition and enforcement of foreign arbitral awards[186] and adopted International Trade Law which enacted by the United Nations Commission.

The first Arbitration Act of India was enacted in 1899. Consequently the Arbitration (Protocol and Convention) Act was promulgated in 1937. Again the Indian Arbitration Act was in acted in 1940 which under section 30 of the act had provided broad categories of grounds for setting aside an award given by an arbitral tribunal. Then the Recognition and Enforcement Foreign Awards Act of 1961 was enacted and finally the Arbitration and Conciliation Act, 1996 was enacted by the Indian Parliament, to restrict the grounds for setting aside an arbitral award.

[185] .id,p.152
[186] . Indian the Arbitration (Protocol and Convention) Act of 1937 ,Arbitration act of 1940, the Recognition and Enforcement of Foreign Awards Act of 1961,Arbitration and conciliation act of 1996 and The 2015 Indian Arbitration and conciliation amendment act

The Arbitration and Conciliation Act of 1996 gives a new dimension for the enforcement of the foreign awards and repealed the old acts and answered the question of enforcing the foreign award which was unclear and vague in relation to the *International Arbitration* which was arbitrated and awarded outside India. The Arbitration and conciliation act of 1996 is designed to regulate the domestic and international commercial arbitration which under part II of the Act, it gives effect to the enforcement of foreign awards in line with the New York Convention under section 48 and the Geneva Convention under section 57. Both section 48 and 57 of Indian Arbitration and conciliation act of 1996 has exhaustively provided the element of public policy exception to enforcement of foreign arbitral award. The 2015 Indian Arbitration and conciliation amendment act try amend a few point of section 48 and 57 of the Indian Arbitration and conciliation act of 1996 on the issue of public policy exception to enforcement of foreign arbitral award which prevent parties and courts from misusing the public policy argument to reopen the merits of a foreign arbitral award in an enforcement proceeding. [187]

So the Indian Arbitration and conciliation act of 1996 has provided different element that could be amount to violation of public policy exception for refusal of enforcement of foreign arbitral. Hence the international arbitration law such as NYC and UNCITRAL model leave open ended the element of the public policy exception to enforcement of foreign arbitral award, the Indian county has established their owns element to properly regulate it.

4.3 The ground of Indian commercial arbitration law reference to public policy exception to the Enforcement of foreign arbitral Awards

The issues of public policy in Indian law are not a recent phenomenon. Under Indian Contract Act, of 1872 it provided about the relevance of public policy. The provision states that, 'if the object or consideration of the contract is not lawful, that is, if it is barred by law, or the nature of the contract is such that if it is made permissible, it will defeat the provision of law, or it involves fraud or injury to person or property of the person; or the court considers it opposed to public policy or immoral, the object or consideration of the agreement is considered to be unlawful'.[188] In addition the Act, of 1937 on arbitration (Protocol and Convention) was deals with domestic arbitration. The Arbitration Act of 1940 made no reference to public policy. The Act, 1961 has incorporated the concept of public policy exception to the enforcement foreign Award. It stated

[187] . Tejas Shiroor, **The Arbitration And Conciliation (Amendment) Act: A Magic Wand for Arbitration in India?** Associate, Lazareff Le Bars,3(2015)

[188]. Indian Contract Act, of 1872, section 23

that 'An award given by International Arbitral Tribunal may not be given enforcement under this act if the court dealing with enforcement of award is of view that it is contrary to public policy of the country.' [189] The same idea was followed in Arbitration and Conciliation Act, 1996 which consists of two parts. Part I of Arbitration and Conciliation Act, 1996 covers within its ambit all arbitration cases taking place in India which specifies that an award can be set aside if it comes in conflict with public policy of India where as part II under section 48 of the Arbitration and Conciliation Act, of 1996 mentions that an award if conflict with the public policy of India can be set aside by an international arbitral tribunal. So under the Arbitration and Conciliation Act of 1996 it has exhaustively provided different ground refusal of enforcement foreign award based on public policy exception. These are:

4.3.1 Award affected by Fraud

Fraud is the act of preparing false information or changing or modifying the content of the subject matter of the contract in a manner that cannot be noticeable by ordinary observation and making things or document to give wrong information.[190] The Indian Arbitration and conciliation act has also provided that if the award is made by fraud, such award does not enforce in Indian country. Hence act of the fraud included as one basic element for public policy exception to enforcement of foreign arbitral award.[191] In other word the Indian Arbitration and conciliation act of 1996, section 48 (2) (b) (Explanation 1) (i) and section 57 (1) (e) (Explanation 1) (i) have clearly provided that when the court finds that the making of award is affected by fraud it could be a ground refusal of public policy exception to enforcement foreign arbitral award. So under Indian commercial arbitration law the enforcement of arbitral award can be refused by the court if the contract was concluded based on false information or changing or modifying the content of the subject matter of the contract in a manner that cannot be noticeable by ordinary observation and making things or document to give wrong information.

4.3.2 Award affected by Inducement

At the time of delivering the award the party may knowingly (intentionally) induce the other party to mislead the conduct of the object and get profit unfairly. So the Indian Arbitration and conciliation act of 1996 has provided that if the award is affected by inducement, such award does not enforced in Indian country and the act of the inducement must be considered as a

[189] .Indian Arbitration Act, 1961, Section 7(1)(b)(ii)
[190] . *ILA interim report supra note 25,p.* 25
[191] . Indian Arbitration and conciliation act of 1996, section 48 (2) (b) (Explanation 1) (i) and 57 (1) (e) (Explanation 1) (i)

ground for public policy exception to enforcement of foreign arbitral award.[192] In other word the Indian Arbitration and conciliation act of 1996, under section 48 (2) (b) (Explanation 1) (i) and section 57 (1) (e) (Explanation 1) (i) clearly provided that the ward which is affected by act of the inducement it could be a ground for public policy exception to enforcement of foreign arbitral award. So if other party to mislead the conduct of the object and get profit unfairly such award could be violation of Indian public policy and must be refused by Indian court.

4.3.3 Admissibility of evidence in other proceeding

The power to determine admissibility of evidence is internationally accepted concept under some commercial arbitration rules. For example it mentions that 'the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered'.[193] It means if the arbitral tribunal uses inaddimisable evidence in the proceeding and deliver the ward, it amount to failing his duties. Indian Arbitration and conciliation act of 1996 section 48 (2) (b) (Explanation 1) (i) and 57 (1) (e) (Explanation 1) (i) which refer to section 81 act of 1996 has mention that the use of similar evidence which has used in other proceeding could lead to violation of the public policy exception to enforcement of foreign arbitral award.[194] It provided that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the arbitration proceedings if 'views expressed or suggestions made by the other party in respect of a possible settlement of the dispute, admissions made by the other party in the course of the arbitration proceedings, proposals made by the arbitrator, the fact that the other party had'[195] should be understood as inaddimisable evidence. So we can concluded that the Indian Arbitration and conciliation act of 1996, under section 81 clearly provided that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings, which :-

(a) 'Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) Admissions made by the other party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

[192] .ibid
[193] UNCITRAL Arbitration rule 2010, Article 27 (4)
[194] . Indian Arbitration and conciliation act ,Supra note 191,section 81
[195] .ibid

(d), the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator,'[196]

So we can conclude that under Indian commercial arbitration law using the same evidence that has been directly or in indirectly used in other proceeding could be a ground refusal of enforcement of foreign arbitral award based on Public Policy County.

4.3.4 Award affected by corruption

Corruption is a universal problem and condemned act that affect people's quest for development, peace, democracy and human rights though its degree of severity varies from country to country. There is global campaign against corruption and resulted in an international regime of laws,[197] in addition to other different domestic countries laws.

The Indian Arbitration and conciliation act of 1996 also included the act of corruption as element of the public policy exception to enforcement of foreign arbitral award.[198] Under section 48 (1) (e) (Explanation 1) (i) and section 57 (1) (e) (Explanation 1) (i) it provided that if the decision of the award is affected by taking corruption against one party, it must be ground of refusal for enforcement of the foreign arbitral award.

4.3.5 Confidentiality

The confidentiality of the all document that over handed to the arbitral tribunals such as arbitration pleadings, submissions, transcripts and documents disclosed by the parties are expected to be protected.[199] In other word the arbitral tribunal is under obligation to keep secrets of document that extended before them as evidence and should not disclose without permission for the parties.[200] The confidentiality of the all document that over handed to the arbitral tribunals exceptionally may be disclosed for public interest by the consent of the parties, by compulsion of the law, and with leave of the court based on circumstance of the case.[201]

The Indian commercial arbitration laws also have provided the coverage for the protection of confidentiality of the all document presented to arbitral tribunals.[202] As it provided under section 75 of Indian Arbitration and conciliation act of 196 both the arbitrator and parties to agreement has the obligation the keep all secrete that has relation with arbitration proceeding. They can

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[196] .ibid
[197] . International anti-corruption conventions under the United Nations (2003) and African Union (2003)
[198] . Indian Arbitration and conciliation act Supra note 193, section 48 (1) (e) (Explanation 1) (i) and 57 (1) (e) (Explanation 1) (i)
[199] .Sai Ramani Garimella, Revisiting Arbitration's confidentiality Feature ,102(2017)
[200] .id.p.103
[201] .id.p.116
[202] . Indian Arbitration and conciliation act , Supra note 191,section 75

only disclose if it is required by other laws of the country which in force and when it is necessary for purposes of implementation and enforcement.[203] So the disclosure of any material that related to arbitration notwithstanding anything contained in any other law for the time being in force and its disclosure is necessary for purposes of implementation and enforcement, it would be amount violation of public policy exception to enforcement of foreign arbitral award.[204] So disclosure is only permitted if it provided in any other law for the time being in force and its disclosure is necessary for purposes of implementation and enforcement otherwise it amount violation public policy exception

4.3.6 The award contrary to fundamental policy of Indian law

Under Indian Arbitration and conciliation act of 1996, not all violations of Indian law amount to contravention of the public policy exception to enforcement of foreign arbitral award.[205] To be used as ground for refusal of enforcement of foreign arbitral award based on public policy the award must be violate fundamental policy of Indian law even though definition of fundamental public policy of Indian law is not provided in their Indian Arbitration and conciliation act of 1996 under section 48 and 57. However as Law association of Indian report, the expression 'fundamental public policy of Indian law' it may be used for providing basis for administration of justices and enforcement of law of the country.[206] It may refer three important elements:[207]

1. Every decision of court or authority that affects citizen or individual right must be bound by the jargon called 'judicial approach'. That means the arbitral tribunal while entertain the dispute of subject matter must be shows fidelity to judicial approach which insure that they act in a fair manner. In other word the decision of the tribunal must be impartial and reasonable without arbitrary acting that can render and open the decision of the tribunal for criticism and challenge.[208]
2. The 'fundamental policy of Indian law'' must be include natural justice. The arbitral tribunal at time of delivering award should decide in manner that supports natural justice. In doing that they must apply its mind and disclose its intention by recording its reasoning for support of the decision that embedded in their in jurisprudence.[209]

[203] .ibid
[204] .ibid
[205] . Indian Arbitration and conciliation act, Supra note 193, section 48(2) (Explanation 1) (ii), and 57 (1) (e) (Explanation 1) (ii),
[206] .Law association of India, supplementary to report no 246 on amendments to arbitration and conciliation act of 1996,'public policy' developments post- report no 246,15(2015)
[207] .ibid
[208] .id.p.16
[209] .id.p.17

3. Reasonable person standard. According to this principle the ’fundamental policy of Indian law’’ should be measured through evaluating whether the reasonable person would arrive the same decision. In other word the decision of the tribunal must be tested whether the tribunal fails to draw inference which ought to have seen diligently.[210]

The arbitration and conciliation (amendment) bill no, 252 of 2015 of India under provided that for the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.[211] That mean the court it only should consider the procedural matters and legality of the decision.

4.3.7 The award conflict with the most basic notions of morality or justice

The award that conflict with the most basic notions of morality or justice as it provided under Indian Arbitration and conciliation act it amount to contravention of the public policy exception to enforcement of foreign arbitral award.[212] What is interesting as we understand from the Article itself the most basic notions of morality or justice to be used as ground for refusal of enforcement of foreign arbitral award under Indian commercial arbitration law it seems not only limited the Indian the most basic notions of morality or justice. Because the element drafted by saying that, ‘award conflict with the most basic notions of morality or justice’. It does not say Indian most basic notions of morality or justice.

4.4 Indian Court Practice

The Indian court decision has showed improvement from time to time in its decision even though there were some critics. Among them I have selected some cases that face criticism and get supportive which I believe it could be example for our country. These are

1. **Oil and Natural Gas Corporation Ltd vs. SAW Pipes Ltd case (2003)[213]**

   This decision was rendered in 2003 by Honorable high court on domestic award. Under this decision the court expanded the concept of public policy by adding that the award would be contrary to public policy if it is ‘patently illegal’. Hear the issue is whether an award could be set aside on the ground that arbitral tribunal had applied incorrect law to liquated damage and the validity of the arbitral award was challenged. The Court accepted the argument that the

[210] ibid
[211] . Indian arbitration and conciliation (amendment) bill no, 252, section 22 (2015)
[212] . Indian arbitration and conciliation act, Supra note 191, section 48(2) (Explanation 1) (iii), and 57 (1) (e) (Explanation 1) (iii),
[213] Oil and Natural Gas Corporation Ltd vs. SAW Pipes Ltd ,Indian high court, Civil Appeal No.7419/2003,available at Indiankanoon.org/doc/919241/

award given by a foreign arbitral tribunal could be set aside by competent authority under relevant law, where it was enforced. It was also held that the Indian courts being the primary court, would supervise domestic awards. In addition, the Court also held that if the expression "Public policy" is given a narrow meaning, then some of the sections mentioned in Arbitration Act, 1996 would become unusable. Accordingly the court interpreted patent illegality as any *violation of the substantive law in force in India, or as an award opposing the terms of the contract*. In other words it shows that an award could be challenged on the merit of contract and the tribunal ha obligation to respect and followed the mandatory provisions of the Act. If not it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be *set aside under Section 34 of the Act. So the Saw Pipe case expand and invited the judicial review judgment by using any reason available to refuse enforcement of arbitral award*

2. Bhatia international vs. Bulk Trading S.A (2004)[214]

This was decision delivered in 2004 which widely interpreted. According to the contract of the parties they choose to settle their dispute according to the rule of International Chamber of commerce and the seat of the arbitration should be in Paris. The foreign party filed an application to Indian high court to take interim measure against the property situated in India for the enforceability award that not recognized under the part II of the act. The Indian party filed an objection to the application by raising the following point. 1. According to the contract the seat of arbitration in Paris, 2, Under the NYC there was no provision of law that allow interim measure, The high court rejected the Indian party objection. Then Indian party appealed to Indian Supreme Court Supreme Court also confirm the high court decision and provided that despite the arbitration was held outside India, part I of the Arbitration and Conciliation Act, 1996, which gives effect to the UNCITRAL Model Law by conferring power on an Indian court to grant interim measures. The court specifically deleted the difference between Part I & Part II of the Arbitration and Conciliation Act,1996 expressing that the sections of Part I would apply uniformly to every arbitration proceeding. If arbitration takes place in India, the sections of Part I would be mandatorily applicable. However, in the cases of international commercial arbitrations that take place outside India, Part I sections would apply automatically, unless the parties to arbitration implicitly or explicitly, omit any or all of its provisions. So this judgment creates the

[214] Bhatia international vs. Bulk Trading S.A, Indian supreme court, civil appeal no. 6527 /2002, available at Indiankanoon.org/doc/110552/

new dimension in the International Arbitration i.e., Section 9 (Interim Measures) and Section 34 (Set Aside the award) of the Arbitration and Conciliation Act, 1996 (Part I) will apply to the foreign Awards. That mean the Indian court can use Section 34 (Set Aside the award) as ground of refusal of public policy exception to the enforcement of foreign arbitral award. This decision shows that the Indian court under this case was widely interpreted and the propensity of Indian court to interfere with domestic as well as foreign award.

3. Venture Global Engineering vs. Satyam Computer Services Ltd[215]

This case was also another case in which the supreme court of India provided a wide meaning to the public policy concept to the refusal of enforcement foreign arbitral award. The Satyam Computer Services Limited Company is a US company, created a joint venture known as Satyam Venture Engineering Services by entering into contract with Venture Global Engineering Ltd of Indian company. A separate contract which was a shareholder agreement was formed between the parties to the main agreement, which consisted of an arbitration clause. The arbitration clause in the shareholder agreement stated that the contract would be governed by State law of Michigan District of US country. Satyam Computer Services Limited (SCS) alleged that Venture Global Engineering Ltd (VGE) had perpetrated an event of default and thus breached a condition under the share holder agreement. Therefore, they executed its option of buying Venture Global Engineering Ltd‟s joint venture shares at its original value. After the process of arbitration was concluded, the arbitrator ordered Venture Global Engineering Ltd to transfer the shares in favor of Satyam Computer Services. Then Satyam Computer Services Limited Company filed before US District Court, in Michigan for enforcement of award given by arbitrator. The Venture Global Engineering Ltd Company on its side opposes the enforcement by argued that the award given by Arbitrator is not enforceable because it violates the public policy of Act of) India. Then the Indian Supreme Court entertain the case and explains that even though the award which was in question was not a domestic award, part I, Section 34 of the Arbitration and Conciliation Act, 1996 was applicable to the every arbitrations proceeding in India including international commercial arbitrations award held out of India unless the parties by agreement, express or implies, exclude all or any of its provision the award and refuse enforcement. So this was also

[215].Venture Global Engineering vs. Satyam Computer Services Ltd, India supreme court, civil appeal No.9238/2010, available at Indiankanoon.org/doc/867675

another case in which the supreme court of India provided a wide meaning to the public policy concept to the refusal of enforcement foreign arbitral award.

4. Renusagar Power Co. Ltd vs. General Electric Co Case.(1994)[216]

The Renusagar Power Co. Ltd vs. General Electric Co Case was the first case that the Indian supreme court provided narrow meaning the concept of public policy in 1994 before the enact of Arbitration and conciliation act of 1996. This case is the starting point on the ground of public policy for the Indian court intervention which dealt with the enforcement of ICC award and it was decided under Arbitration act of 1961. The Supreme Court provides that the scope public policy exception to the enforcement of award which provided under Section 7(1)(b)(ii) of the Arbitration Act,1961 refers to the matter which involves public good and interest and in order to invoke exception of public policy, the award should be more than just violation of laws and must confine to the 'public policy of India' and does not include public policy of any other country. It explain that to refuse the enforcement of foreign arbitral on the ground of public policy the enforcement of award must be contrary to Fundamental Policy of Indian law, the Interest of India and Justice and Morality. So the court concludes that mere violation of Indian Law would not amount to a transgression of Public Policy.

5. Shri Lal Mahal v Progetto Grana SpA Case[217]

Under this case, the parties agree to solve dispute according to the Grain and Feed Trade Association Rules and the seat of arbitral tribunal was in United Kingdom. Then after the dispute arise the plaintive brought the suit to the arbitral tribunal which passed an award passed under Grain and Feed Trade Association Rules, which was also upheld by U.K. courts. Consequently plaintive sought enforcement of award in India. On its side the defendants came up with defensive argument before Indian courts on the ground that the award is patently illegal and in violation of the country's public policy, and therefore the award should not be enforced. Then the Indian Supreme Court has provided narrow meaning to concept of public policy exception to refuse enforcement of foreign arbitral award. The Indian court Supreme explain that the term 'public policy' which provided under section 48 of Arbitration and Conciliation Act, 1996 does not specify the ground of patent illegality for refuse enforcement of foreign arbitral award . In

[216] Renusagar Power Co. Ltd vs. General Electric Co, Indian supreme court (1993), available, at Indiankanoon.org/doc/86594

[217] . Shri Lal Mahal v Progetto Grana SpA , Indian Supreme Court, Civil Appeal No. 5085 /2013 available at Indiankanoon.org/doc/15591279

addition, section 34 of Arbitration and Conciliation Act, 1996 is mainly deals with setting aside of an order not refusal of enforcement of award. Further, the Indian Supreme Court stated that Section 48 of Arbitration and Conciliation Act, 1996 does not cover reviewing the award for merits at the enforcement stage. Finally under this case , the Indian Supreme Court held that to refuse enforcement of foreign arbitral award in India, the arbitral award should be contrary to the fundamental policy of India, justice and morality which such ground has got recognition in most developed country like US and France on enforcement of foreign award .

6. Penn Racquet Sports v Mayor International Ltd case[218]

This was the most recent case which decided in 2011 by the Delhi High Court of India and brought a welcome change in the attitude of the Indian courts dealing with public policy and enforcement of arbitral awards, This decision along with the Government of India's recent initiatives highlight and shows the willingness of the Indian courts to tackle the problems of the past and bring the Indian arbitration law back in line with the approach taken in the *Renusagar* case, which is similar to the prevailing view in the most developed arbitral jurisdictions such as the US and France. Under *Penn Racquet Sports v Mayor International Ltd case* , the Delhi High Court in its decision, held that the ground of public policy for the purposes of enforcement of foreign awards should be interpreted narrowly. To refuse the enforcement of foreign arbitral award based on public policy exception the applicant must show some cause which is more than a mere violation of Indian law and the award must contrary to the public policy of India and thus why the Delhi High Court rejected a challenge to the enforcement of International Chamber of commerce (ICC) award, holding that the award was not contrary to the public policy of India. To successfully invoke this ground the arbitral award must violate the fundamental policy of Indian law or be contrary to the interests of India, justice or morality. In relation to public policy, this decision is considered to the most recent contribution by the Indian courts to help India regain the confidence of the international arbitration community.

4.5 General over view of development of arbitration law in Ethiopia

In the early time the Ethiopian customary law did not have developed as body of defined law and it was existed vary from place to place and from group to group.[219] The beginning of the modern

[218].*Penn Racquet Sports v Mayor International Ltd*, Delhi High Court of India, case no. 14582/JHN/2011,available at Indiankanoon.org/doc/17246778

[219] . Robert Allen Sedler, *The Development of Legal Systems: The Ethiopian Experience*, Law Rev.53, 595 (1967). Available at: https://digitalcommons.wayne.edu/lawfrp/236

Ethiopian arbitration and other form of dispute resolution goes back to Emperor Haile Silase regime. In 1943 procedural law 'Leg. Not. No .33/1943' which called 'Court Procedure Rules' that have encompassed 99 articles of both civil and criminal procedure was promulgated.[220] The true Ethiopian arbitration law which contain substantive provision which govern arbitration matters started with promulgation of 1960 civil code of Ethiopia and the 1965 civil procedure code of Ethiopia which govern procedural aspect all civil matter including both domestic and foreign arbitration dispute is another law. In addition the Ethiopian federal Supreme Court cassation bench whose decision has a precedence effect both on federal and state court is a recent source of arbitration rules. Recently Ethiopia has showed the interest to develop its commercial arbitration law and has ratified the New York convention by percolation number 1184/2020 which has got international recognition on enforcement of foreign arbitration award though it has defect in its provision to avoid doubt as to the ground of refusal of enforcement of foreign arbitral award based on public policy. Following the ratification New York convention Ethiopia has promulgated new arbitration and conciliation working procedure.[221] The new Proclamation was repealed both civil code and civil procedure code of Ethiopia except few civil procedure code provisions that may support the implementation of the proclamation. Under both Ethiopian civil code[222] and new proclamation[223] it provided that the party has a right to submit its existing or future dispute to arbitration. This allowed the operation the principle party autonomy which enable the party to decide which type of dispute they wish to submit before the arbitration whether it contractual or otherwise. However mostly the extent of dispute that may the party submit to the arbitration is determined by the national laws of the country. Generally this point demarcates the end of the party autonomy and the beginning of public policy principle. According to the principle public policy exception, the arbitral award that violates some country's rules could not be enforced. It save that arbitrator not conduct a proceeding that produce the award that could not be enforced or it limit the court not to enforce the award that against the country's public policy. In addition the repealed Ethiopian civil procedural code also included the concept without detail explanation of the element of public policy exception[224]. Unfortunately the new arbitration and conciliation working procedure of Ethiopia enacted the

[220] Alem Abraha and Tafesse Habte ,supra note 23,p.39
[221] . Ethiopian arbitration and conciliation working procedure proclamation number 1237/2021
[222] . . Civil Code of the Empire of Ethiopia, ,Article 3328 (1960)
[223] . Arbitration and conciliation working procedure Supra note 221, Article 2 (1)
[224] .Ethiopian civil procedure code, supra note 54, Article 461 (1) (e)

concept of public policy like civil procedure code of Ethiopian without avoiding the existing problem.

4.6 The ground of Ethiopian commercial arbitration law reference to public policy exception to the Enforcement of foreign arbitral Awards

The repealed Ethiopian commercial arbitration laws do not have provided clear definition of the both domestic and foreign arbitral award. It only try to distinguish between domestic and foreign arbitral award when enforcement required which it provided the requirement for enforcement of foreign judgment by analogy should be applied to the enforcement of foreign arbitral award.[225] Recently Ethiopia has enacted a new Proclamation number 1237/2013 which is called arbitration and conciliation working procedure that is applicable to commerce-related domestic arbitrations, and international arbitrations whose seat is in Ethiopia. But, it also contains a few provisions that govern international arbitrations whose seat is outside Ethiopia.

The new proclamation has provided clear definition for the concept of foreign arbitral award. It provided that 'foreign arbitral award mean an arbitral award which is deemed to have been rendered in a foreign country in accordance with international treaties acceded and ratified by Ethiopia or a decision in which the seat of arbitration is mentioned to be outside of the Ethiopian territory.'[226] So once the awards is delivered whether it is domestic or intentional arbitral award the winning party may require enforcement of award and at the same time the losing party may apply for the challenging of arbitral award and appealed before the national court. The enforcement sought court's role is very important at this stage. Because based on the country's existing law and by interpretation of law they should give the solution to the party without delay of time. To do this and support international commercial transaction the judge as much as possible it need clear laws.

However the repealed Ethiopian civil procedure code has provided different six grounds of refusal of enforcement of foreign arbitral award.[227] These are mandatory principle and if it did not have satisfied the foreign arbitral award did not enforced in Ethiopia. In addition Ethiopia has recently ratified the New York Convention which has international recognition on enforcement

[225]. Ethiopian Civil Code , supra 222, Article 3331 (3)
[226] .Arbitration and conciliation working procedure Supra note 221 , Article 2 (8)
[227] .Ethiopian civil procedure code, supra note 54,Article 461

of foreign award even though it does not list what should be the content of public policy exception to the of foreign award. Following the ratification of New York Convention, Ethiopia has enacted new arbitration and conciliation proclamation. Surprisingly Ethiopia has copied repealed Ethiopian civil procedure code provision with six grounds of refusal of enforcement of foreign arbitral award which provided under Article 461 including public policy exception with minor deference.

The six grounds which provided both under Article 461 of Ethiopia civil procedure code and arbitration and conciliation proclamation that could the condition for refusal of enforcement of foreign award are the following. Under Ethiopia repealed civil procedure code the fist element is reciprocity. This element is requiring samaltinous enforcement of foreign arbitral award. If the enforcement sought country where the award was delivered, enforces the Ethiopian arbitral award, the Ethiopia also obliged to enforce foreign arbitral award.[228]The second ground is whether the award is made 'following regular arbitration agreement or other legal acts in the countries where it was made.'[229] It analyzing the arbitration agreement whether at the time of entertaining the case by the arbitrator, they act against the party's agreement. So if the arbitrator decided not following regular arbitration agreement the Ethiopian court should refuse enforcement of foreign award. The third element is the principle of equality of parties. This element requires equal participation of party on appointment arbitrators and the right to be summoned to attend the case.[230] The fourth ground is whether the tribunal regularly constituted.[231] The fifth ground is related with nature of the award. It provided that the award to be enforced in Ethiopia it should be full fill the condition laid down under Ethiopian law.[232] The final element which is also the objective of this thesis is public policy exception.[233]

Ethiopian repealed Civil Procedure Code explains that foreign arbitral award may not be enforced in Ethiopian unless: 'The award does not relate to matters which under the provisions of Ethiopian laws could not be submitted to arbitration or is not contrary to public order or morals.'[234] So the repealed Ethiopian civil procedure code does not have exhaustively listed in

[228] . id. Article 461 (1) (a)
[229] .id. Article 461 (1) (b)
[230] . id. Article 461 (1) (c)
[231] . id. Article 461 (1) (d)
[232] . id. Article 461 (1) (f)
[233] . id. Article 461 (1) (e)
[234] . ibid

their provision what should be the content of public policy exception to refuse enforcement foreign arbitral award.

Again the six grounds of refusal of enforcement of foreign arbitral award under arbitration and conciliation working procedure proclamation are the following: Under Article 53 (2) it read that the foreign arbitral award shall not be recognized or enforced only on the following ground:

a) 'where it is not based on reciprocity;'[235]

b) 'Where arbitral award is based on invalid arbitration agreement or rendered by a tribunal which is not established in accordance with the laws of the country in which such award is rendered;'[236]

c) 'The arbitral award rendered cannot be enforced in accordance with Ethiopian law;'[237]

d) 'Where the parties have not had equal right in appointing the arbitrators or had presenting their evidence and getting heard in course of proceedings;'[238]

e) 'Where the matter on which the award is rendered is not arbitrable under Ethiopian law;'[239]

f) 'Where arbitral award contravenes public policy, moral and security;'[240]

In addition Ethiopian has ratified the 1958 New York Convention which has got international recognition on enforcement of foreign arbitral award. Even though the New York Convention like Ethiopian arbitration and conciliation working procedure is openly drafted without explain the content of public policy exception, the Ethiopian arbitration and conciliation working procedure did not have supported pro-enforcement when comparable with the 1958 New York Convention on the enforcement of foreign arbitral awards particularly, on the grounds of refusal to enforce award. Because the phrase used under repealed CPC of Ethiopia Art 461 which provides that 'foreign arbitral awards may not be enforced in Ethiopia unless:'[241] is deliver the message which is anti-enforcement in the sense that it makes enforcement conditional on the fulfillment (and most probably on the production of evidence to that effect) of all the conditions laid down in the law. In addition the current proclamation also drafted as anti-enforcement situation which read that 'foreign arbitral award shall not or only enforced on the following condition;'[242] It has used the mandatory phrases that avoid the flexibility of court not to analysis

[235] . Arbitration and conciliation working procedure supra note 221 ,Article 53 (2)(a)
[236] .Id, Article 53 (2) (b)
[237] . Id, Article 53 (2) (c)
[238] . Id, Article 53 (2) d)
[239] . Id, Article 53 (2) (e)
[240] . Id, Article 53 (2) (f)
[241] . Ethiopian civil procedure code, supra note 54,Article 461 (1) (e)
[242] . Arbitration and conciliation working procedure supra note 221 ,Article 53 (2)

up on its own motion whether the foreign arbitral award violate the public policy of Ethiopia. In other words, the Ethiopian commercial arbitration law, unlike in most modern arbitration legislations, it seems that foreign arbitral awards are enforceable not as a rule but only exceptional circumstance. That means the pro-enforcement provision would be drafted which, read: 'foreign arbitral awards are enforced in Ethiopia unless...' or, like New York Convention, 'enforcement foreign arbitral awards may be refused only if...'[243]

4.7 Ethiopian court practice

Ethiopian court practice before and after the ratification of the New York Convention in 2020, it seems that foreign arbitral awards were not readily enforceable in Ethiopia for two reasons. The first one is that Ethiopia commercial arbitration laws that are the repealed CPC and current proclamation did not have exhaustively provided the element of public policy exception to the refusal enforcement of foreign decision and arbitral awards. Second the requirement of reciprocity element under both the repealed CPC and current proclamation. Under repealed CPC conditions for the enforcement of foreign arbitral awards are provided for under Article 461. Apart from that, however, Art. 461(2) of the Code Procedure Code make a reference to the applicability of the provisions pertaining to the enforcement of foreign judgments. Hence the provisions governing the enforcement of foreign judgments also apply by analogy when the enforcement of a foreign award is sought. In other words, in order for a party to enforce a foreign arbitral award in Ethiopia, the party would have to show that the State where the arbitral award was made would recognize and enforce an arbitral award made in Ethiopia on the basis of reciprocity. Ethiopian courts interpret the 'reciprocity' requirement to mean the existence of a judicial assistance treaty between the two countries. However, Ethiopia has a judicial assistance treaty only with China and Uganda-which therefore means that only awards from these two countries are enforceable in Ethiopia. The current arbitration and conciliation working procedure again make the reciprocity element as ground of refusal of enforcement of foreign arbitral award. So it is default to enforce foreign arbitral award in Ethiopian current situation. When we see the Indian commercial arbitration law experience it did not have made the reciprocity element as ground of refusal of enforcement of foreign arbitral award. In addition the NYC that Ethiopia recently ratified has omitted the reciprocity element. The problem will arise with member countries to NYC that did not have judicial assistance treaty with Ethiopia, Hence member

[243] United Nation Convention, supra note 14, Article V

countries to NYC may need the enforcement of foreign arbitral award without requiring reciprocity element where as Ethiopian country based on its current proclamation may used as defense the reciprocity element for refusal enforcement of foreign arbitral award. When we consider the some decision of the Ethiopian court in relation to the enforcement of foreign decision and arbitral award it seems aggressive toward enforcement of foreign decision and arbitral award and reluctant to analyze the issue of the dispute whether it is potentially affect the Ethiopian public policy from point of the political, social and economic value of the country. For example:

1. **Greek Vs Ethiopian Case**

When we see the dispute arose between Greek and Ethiopia under *Paulos Papassinus* case[244], the Federal Supreme Court denied an application for enforcement of a Greek judgment because the applicant failed to prove reciprocity. The Supreme Court have decided that the parties must proof the existence of a judicial assistance treaty signed between Ethiopia and Greek. Hence the provisions governing the enforcement of foreign judgments also apply by analogy when the enforcement of a foreign award is sought; the Ethiopian courts would reach a similar conclusion regarding the enforcement of foreign arbitral awards. In other word enforcement of foreign arbitral awards in Ethiopian context is not easily performed.

In addition as Hailegabrei Gaddissa provide in his study[245], the Ethiopian courts are moving towards enforcing arbitration award, at the expense of some public policy exception. The Ethiopia court seams to reluctant to analyze the issue of public policy or how the issues of public policy should be considered or it seems they wait all cases the request and invoke of the relevant party and upon party's proof. When we read throughout the decision between Greek and Ethiopian under *Paulos Papassinus* case the Ethiopian Supreme Court did not have discussed the issue of public policy up on its own motion as generally accepted principle of application of public policy. In other word in addition to reciprocity element Ethiopian Supreme Court did not have considered whether the enforcement of Greek decision would amount violation of the Ethiopian public policy on its own motion. Because as *Winnie (Jo-Mei) Ma* under his thesis has provided in relation to the application of public policy principle, Article V of the New York

[244] . PaulosPapassinus case, Federal Supreme Court, Civil Appeal Case No.1769/88
[245] . Hailegabriel Gaddissa Feyssa, 'supra note 19, p. 328.

Convention comprises seven exceptions to enforcement and divided them into two groups.[246] The first group that can only invoked at the request of the relevant party and upon party's proof which are listed under Article V (1) of the NYC. These are:

1. Parties' incapacity or invalid arbitration agreement;
2. Lack of notice or fairness concerning the arbitral process;
3. Arbitral award exceeding the scope of the parties' submission to arbitration;
4. Invalid composition of the arbitral tribunal; and
5. Non-binding annulled or suspended arbitral awards.

The second group is Article V (2) of NYC that the court on its own motion can raise the exceptions, if it finds that the relevant grounds exist and justify refusal of enforcement arbitral award. These are:

1. Non-arbitrable subject matter under the law of the place of enforcement; and
2. Contravention of the public policy of the place of enforcement.

So using the above principle, on how the issue of public policy exception is interfered and entertained by the court, the Ethiopian court practice seems reluctant to or unwilling to proceed the whether the dispute arise is amount violation of public policy Ethiopia.

2. Federal Democratic Republic of Ethiopian Vs Republic of Djibouti case

Under Consta joint venture v Chemin de Fer (Ethiopia.- Djibouti rail way) case [247] the parties agreed for rehabilitation of historic railway line which stretched from Ethiopia to Djibouti. According to the contract the dispute should be solved according to the Ethiopian law and the seat of arbitration was Addis Ababa. The dispute arose on the work done by the Consta joint venture both in relation quality and quantity of the railway line. Then the Chemin de Fer terminates the contract and continuously claims before arbitral tribunal the payment of damage. Then the arbitral tribunal by majority vote awarded that claimant damages in excess of 20 million euro. The arbitral tribunal reason out that the termination of contract was unlawful termination the contract. Then the Consta joint venture (respondent) did not satisfied with decision of arbitrators and appealed before the cassation bench by claiming that the

[246]. *Winnie (Jo-Mei) Ma,* supra note 38,p.143

[247] . Consta joint venture v Chemin de Fer Djibouto -Ethiopien, case no.2013-32 (2016), available at, http:// .jusmundi.com/fr/document/decision/ en-Consta- joint- venture v Chemin –de- Fer -Djibouto –Ethiopien, the- Djibouto –Ethiopien-rail-way-representing-the -federal-democratic-republic- of-Ethiopia-and republic-of-djibout—final-award—Friday-6th-may-2016

tribunal committed fundamental error of law. The cassation court finally founded and decided that arbitral tribunal has committed fundamental error of law. Under modern commercial laws including commercial laws and court practice of India as I have discussed above not all violation of laws is amount ignorance of public policy. In other words mere violation of law does not amount violation of public policy. The problem of cassation bench of Ethiopia is that after finally founded and decided that arbitral tribunal has committed fundamental error of law it did not have proceeded to analyze whether violation of fundamental law of Ethiopia is considered as violation of public policy of Ethiopia or mere violation of Ethiopian law. Since the public policy concern the public in general, whether the parties rise as defense or not, the court by its motion must be consider whether the violation of fundamental law of Ethiopia is amount violation public policy arbitral award. Especially Ethiopian arbitration and conciliation working procedure proclamation have widely drafted without listing the element of public policy exception to the enforcement of foreign arbitral award, to fill the gap of the law and also to develop commercial arbitration law of the country, Ethiopian supreme cassation bench without waiting the disputant parties to claim or rose as defense, should consider and rule the point of dispute whether it falls under the Ethiopian public policy exception to the enforcement of foreign arbitral award. So this is the case how the Ethiopian court over look the issue of public policy.

4.8 Comparison of Ethiopian refusal of enforcement of foreign arbitral awards on public policy in line with Indian legal system.

In the above section the two countries commercial arbitration laws reference to public policy exception of has been discussed. All of them in their commercial arbitration law they have been included the concept of public exception.

However both of them have a difference on the approach they have drafted their laws in relation to public policy exception to the enforcement of arbitral award.

When we compare the Ethiopian commercial arbitration law reference to public policy exception to the Enforcement of foreign arbitral Awards in line with the Indian legal system they completely different. The Indian commercial arbitration law under Arbitration and Conciliation Act, 1996 has exhaustively list the element of public policy exception. Under part II of the Arbitration and Conciliation Act of 1996 which is largely restricted to enforcement of foreign awards governed by the New York Convention or the Geneva Convention deal with the

enforcement of award, which is given by International arbitral tribunals. Under section 48 of the Arbitration and Conciliation Act, of 1996 it mentions that to avoid doubt it provided different ground refusal of enforcement foreign award to be used as public policy reasons. It read that under section 48(*2*) (*b*) Enforcement of an arbitral award may also be refused if the Court finds that the enforcement of the award would be contrary to the public policy of India. Under Explanation 1, for the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if: - For example where the making of the award was induced Indian Arbitration and conciliation act of 1996 has provided that such award does not enforced in Indian country and the act of the inducement must be considered as a ground for public policy exception to enforcement of foreign arbitral award. In other word the Indian Arbitration and conciliation act of 1996, under section 48 (2) (b) (Explanation 1) (i) and section 57 (1) (e) (Explanation 1) (i) clearly provided that the ward which is affected by act of the inducement it could be a ground for public policy exception to enforcement of foreign arbitral award. So if other party to mislead the conduct of the object and get profit unfairly such award could be violation of Indian public policy and must be refused by Indian court.

In addition Indian Arbitration and conciliation act has also provided if the award affected by fraud, that such award does not enforced in India. Hence act of the fraud included as one basic element for public policy exception to enforcement of foreign arbitral award. In other word the Indian Arbitration and conciliation act of 1996, section 48 (2) (b) (Explanation 1) (i) and section 57 (1) (e) (Explanation 1) (i) have clearly provided that when the court finds that the making of award is affected by fraud it could be a ground refusal of public policy exception to enforcement foreign arbitral award.

Another ground is corruption. The Indian Arbitration and conciliation act of 1996 also included the act of corruption as element of the public policy exception to enforcement of foreign arbitral award. Under section 48 (1) (e) (Explanation 1) (i) and section 57 (1) (e) (Explanation 1) (i) it provided that if the decision of the award is affected by taking corruption against one party, it must be ground of refusal for enforcement of the foreign arbitral award based on public policy.

Again under section 75 the element that considered as violation public policy is confidentiality issue. The Indian commercial arbitration laws also have provided the coverage for the protection of confidentiality of the all document presented to arbitral tribunal. It provided both the arbitrator and parties to agreement has the obligation to kept all secrete that has relation with

arbitration proceeding. They can only disclose if it is required by other laws of the country which in force and when it is necessary for purposes of implementation and enforcement. So disclosure is only permitted if it provided in any other law for the time being in force and its disclosure is necessary for purposes of implementation and enforcement otherwise it amount violation public policy exception

Section 81 of Indian Arbitration and conciliation act of 1996 has also mention that the use of similar evidence which has used in other proceeding could lead to violation of the public policy exception to enforcement of foreign arbitral award. It provided that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the arbitration proceedings if views expressed or suggestions made by the other party in respect of a possible settlement of the dispute, admissions made by the other party in the course of the arbitration proceedings, proposals made by the arbitrator, the fact that the other party had been understood as inaddimisable evidence.

Further the Indian arbitration and conciliation act make the contravention of the fundamental policy of Indian law; or if it is in conflict with the most basic notions of morality or justice as another basic public policy exception to refuse enforcement of foreign arbitral award.

On the other hand the repealed Ethiopian civil code Article 461 (1) (f) explain that foreign arbitral award may not be enforced in Ethiopian unless: 'The award does not relate to matters which under the provisions of Ethiopian laws could not be submitted to arbitration or is not contrary to public order or morals.' Again the current arbitration and conciliation working procedure proclamation Article 53 (2)(f) has openly drafted the concept public policy which read that foreign arbitral award shall not enforced in Ethiopia where arbitral award contravenes public policy, moral and security. So both the repealed Ethiopian civil procedure code and current arbitration and conciliation working procedure proclamation does not have exhaustively listed in their provision what should be the content of public policy exception to refuse enforcement of foreign arbitral award like Indian commercial arbitration laws..

In addition Though Ethiopian has recently ratified the 1958 New York Convention which has got international recognition on enforcement of foreign arbitral award the Ethiopian arbitration and conciliation working procedure proclamation is openly drafted without explain the content of public policy exception. So even if the New York Convention openly drafted if we compare the Ethiopian arbitration and conciliation working procedure proclamation with the New York

Convention it does not support pro-enforcement of foreign arbitral awards particularly, on the grounds of refusal to enforce award. Because the phrase in Article 53 (2) of the proclamation use the phrases which read: 'the foreign arbitral awards 'shall not or only in the following condition' which deliver the message that is anti-enforcement in the sense that it makes enforcement conditional on the fulfillment (and most probably on the production of evidence to that effect) of all the conditions laid down in the law. In other words, the Ethiopian commercial arbitration law, unlike in most modern arbitration legislations, it seems that foreign arbitral awards are enforceable not as a rule but only exceptional circumstance. That means the pro-enforcement provision would be drafted which, read: 'foreign arbitral awards are enforced in Ethiopia unless...' or, like the New York Convention, 'enforcement may be refused only if. So The Indian commercial arbitration act drafted like modern arbitration law using the pro-enforcement terms where as the Ethiopian commercial arbitration law did not use such ,.

Coming to the Indian court practice it shows improvement and more developed than Ethiopian court practice. In the early time the Indian court has widely interpreted the concept of public policy exception. For example Indian supreme court under *Saw Pipes case*, set aside awards because of the mere arbitrator's error of law amount violation public policy exception, The Court held that such an error was contrary to both Indian law and the parties' agreement, which constituted 'patent illegality' and therefore fell within the public policy ground for annulment under the Indian equivalent of Model Law Art 34

However the Indian court gradually shows development and have been narrowly interpreted the concept of public policy exception. For example under the Renusagar Power Co. Ltd vs. General Electric Co Case the Supreme Court provides that the scope public policy exception to the enforcement of award which provided under Section 7(1)(b)(ii) of the Arbitration Act,1961 refers to the matter which involves public good and interest" and in order to invoke exception of public policy, the award should be more than just violation of laws and must confine to the 'public policy of India' and does not include public policy of any other country. It explain that to refuse the enforcement of foreign arbitral on the ground of public policy the enforcement of award must be contrary to Fundamental Policy of Indian law, the Interest of India and Justice and Morality. So the court concludes that mere violation of Indian Law would not amount to a transgression of Public Policy. In addition under the Shri Lal Mahal v Progetto Grana SpA Case the Indian Supreme Court held that to refuse enforcement of foreign arbitral award in India, the

arbitral award should be contrary to the fundamental policy of India, justice and morality which such ground has got recognition in most developed on enforcement of foreign award. Again under the *Penn Racquet Sports v Mayor International Ltd case* the Delhi High Court rejected a challenge to the enforcement of International Chamber of commerce (ICC) award, holding that the award was not contrary to the public policy of India. It reason out that to refuse the enforcement of foreign arbitral award based on public policy exception the applicant must show some cause which is more than a mere violation of Indian law and the arbitral award must violate the fundamental policy of Indian law or be contrary to the interests of India, justice or morality. So this decision is considered to the most recent contribution by the Indian courts to help India regain the confidence of the international arbitration community.

Coming to the Ethiopian court practice it exists at starting stage. For instance under Consta joint venture vs Chemin de Fer case the cassation court finally founded and decided that arbitral tribunal has committed fundamental error of law. The very important point that should be considered is that the Ethiopian court seems completely reluctant to proceed to analyze the issue of public policy exception. Hence the public policy concerns the public in general whether the parties rise as defense or not, the court by its motion should consider whether the fundamental error of law of Ethiopia is amount violation public policy exception to the enforcement of foreign arbitral award. Because the decision delivered by Ethiopian supreme cassation bench used as precedence decision throughout the country. The commercial arbitration law of Ethiopian both the repealed civil procedure code and the current arbitration and conciliation working procedure proclamation are widely drafted without listing the element of public policy exception to the enforcement of foreign arbitral award. So to fill the gap of the law and also to develop commercial arbitration law of the country Ethiopian supreme cassation bench without waiting the disputant parties to claim or rose as defense the issue of public policy should consider and rule the point of dispute on its own motion, whether it falls under the Ethiopian public policy exception to the enforcement of foreign arbitral award. So this is the case how the Ethiopian court over look the issue of public policy exception to refuse enforcement of foreign arbitral award.

Again When we read throughout the decision between Greek and Ethiopian under *Paulos Papassinus* case the Ethiopian Supreme Court did not have discussed the issue of public policy up on its own motion as generally accepted principle of application of public policy. In other

word in addition to reciprocity element Ethiopian Supreme Court did not have considered whether the enforcement of Greek decision would amount violation of the Ethiopian public policy on its own motion.

So we can conclude that the Indian commercial arbitration law and court practice shows improvement especially on minimizing the doubt reference to public policy exception to the enforcement of arbitral award whereas the Ethiopian commercial arbitration law including the current proclamation remain outdated and also court practice shows a weakness to develop the concept of public policy exception to enforcement of arbitral award and they reluctant to analyze the issue of the public policy exception. Therefore the Ethiopian court should understood that public policy exception is not a vacuum and there is a situation in which the court by its own motion analyze of public policy exception and also there is a situation in which public policy exception overlaps with other ground of refusal of enforcement of arbitral award when the award violates the country's political, social and economic interest.

Chapter Five-

5. Conclusion and Recommendation

5.1 Conclusion

Arbitration is a dispute settlement mechanism that is used instead of court litigation. It is a system that has been used for long century. However to reach the current stage it evolved over a time and influence by change in the world because of the commercial interaction at international level. This is lead to arise of a number of the commercial disputes. Since the arbitration is cost saving and faster than ligation to resolve dispute different countries have enacted their own commercial arbitration law according to their own political, social and economical status to make their country the center of investment and economic transaction place. Especially in modern commercial arbitration system different countries have modified both their commercial arbitration laws and court practice that avoid doubt and support pro enforcement reference to public policy exception. For instance we can look the Indian commercial arbitration law and court practice.

Unfortunately despite the fact that the Ethiopian commercial arbitration law has incorporated the concept of public policy as one basic element for refusal of enforcement of arbitral award it neither exhaustively list the element of public policy exception nor adopts the experience of the other countries to fill the gap of law on the concept of the public policy exception enforcement of foreign arbitral award. So the repealed Ethiopian civil procedure code and new arbitration and conciliation working proclamation opens wider room for the regular courts to create confusion. As a result the Ethiopian courts are reluctant to analyze the issue of the public policy exception to the enforcement of arbitral award. This is by far different from the modern arbitration rules and practice of Indian. So this will affects the parties' right, investment and economic traction of the country.

5.2 Recommendation

1. Surprisingly Ethiopian has recently promulgated its commercial arbitration law that directly deals with enforcement of foreign arbitral award like Indian commercial arbitration law. However the Ethiopian arbitration and conciliation working procedure proclamation to avoid doubt it did not have exhaustively listed what should be the content of public policy exception like Indian commercial arbitration law to the refusal of enforcement of foreign arbitral award. So Ethiopian government to avoid doubt shall revise its arbitration and conciliation working procedure proclamation Article 53 and list as ground of violation of public policy exception elements such as fraud, inducement, admissibility of evidence in other proceeding, corruption, confidentiality of evidence, the award contrary to fundamental policy of Ethiopian law, and the award conflict with the most basic notions of morality or justice.

2. In addition even though Ethiopia has ratified the NYC, the current arbitration and conciliation working procedure proclamation did not have used permissive phrases in its provision such as 'may' like Indian commercial arbitration law and NYC that support pro-enforcement. Ethiopian current proclamation uses mandatory phrases that is 'shall not enforced' which is deliver anti-enforcement message in the sense that it makes enforcement conditional (most probably on the production of evidence to that effect). So Ethiopia government should revised its new arbitration and conciliation working procedure by using the phrases 'may enforced in Ethiopia unless...'or 'may be refused only if... ', like Indian commercial arbitration law and NYC.

3. The Ethiopian arbitration and conciliation working procedure like its repealed CPC again has included the reciprocity element as ground of refusal of enforcement of foreign arbitral award. So it is default to enforce foreign arbitral award in Ethiopian current situation. When we see the Indian commercial arbitration law experience it did not have made the reciprocity element as ground of refusal of enforcement of foreign arbitral award. In addition the NYC that Ethiopia recently ratified has omitted the reciprocity element. The problem will arise with member countries to NYC that did not have judicial assistance treaty with Ethiopia, Hence member countries to NYC may need the enforcement of foreign arbitral award without requiring

reciprocity element where as Ethiopian country based on its current proclamation may used as defense the reciprocity element for refusal enforcement of foreign arbitral award. So the Ethiopian government shall revise its current proclamation in relation to reciprocity element in order to achieve the objective of the proclamation and to make in line with the NYC

4. Coming court practice the Indian courts have developed the attractive reasoning and standard. Under different cases they have provided that to refuse enforcement, the arbitral award must violate the fundamental policy of Indian law or be contrary to the interests of India, justice or moral. However the Ethiopian court practice seems reluctant to analyze the case from the angle of the public policy exception. I believe that the Ethiopian courts do not have an awareness of the principle or how the issue of public policy interfered by the court. So the Ethiopian courts should understand that issue of public policy may be interfered up on party's defense or by court motion. I believe that public policy exception is not a vacuum and the Ethiopian court should strictly analyze whether ground of refusal of enforcement of arbitral award interact with public policy exception from point of political, social and economic values of the Ethiopia.

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