JIMMA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE
SCHOOL OF LAW

Testing the Compatibility of the Progress of Harmonization of Ethiopian Arbitration Laws Towards International Arbitration Laws and Experiences: A Comparative Study

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Approval Sheet

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DECLARATION

I, the undersigned, declare that the thesis is my original work, has not been submitted for a degree in any other University and that all materials used have been duly acknowledged.

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Abstract

Harmonized arbitration law is often justified on the grounds that it creates stability and certainty in arbitration process and enabling parties to predict in advance the proper laws that are likely to apply to their disputes. The United Nations General Assembly recommended member states to give due consideration to the Model Law on International Commercial Arbitration and to harmonize their national arbitration legislation. Moreover, the 1958 New York Convention provides uniform principles and standards which are used to safeguard the enforcement of arbitration agreement and foreign arbitral awards. Accordingly pro-arbitration countries' modernized their arbitration laws either adopting these soft and hard laws or considering their own experiences. In order to cope with the emerging modern laws and practices in international commercial arbitration recently Ethiopia repealed its arbitration laws and enacted the new Ethiopian Arbitration law. Moreover, Ethiopian Parliament enacted proclamation to ratify New York Convention. Despite these legal reforms, these laws still have the gaps, inconsistency and differences under their salient areas. In this regard, the study comparing these laws with international arbitration laws and experience tries to point out some of the problems related with: formal requirement of arbitration agreement, the mode and procedure of appointment of arbitrator(s), the issue of the immunity of arbitrator(s), the procedures to conduct oral argument and apply for counter-claim action, recourses against arbitral award, and also the exception to refuse the recognition and enforcement of arbitral awards. Therefore, this thesis so as to rectify these problems using doctrinal research methodology will taste compatibility of Ethiopian arbitration laws in comparison with international arbitration laws and experiences and also will recommend the areas of the laws that should be harmonized towards international arbitration laws and experiences.

Key Words: Ethiopian Arbitration laws, International Laws, Model Law, New York Convention, harmonization, and Pro - arbitration Countries' laws.

List of Abbreviation

Art./Arts.	Article/Articles
cas.f.no	Cassation file number
CC	Ethiopian Civil Code
CPC	Ethiopian Civil Procedure Code
EACWPP	Ethiopian Arbitration and Conciliation Working Procedure Proclamation/ New Ethiopian Arbitration Law
FDRE	Federal Democratic Republic of Ethiopia
FFIC	Federal First Instance Court
FHC	Federal High Court
FSCCB	Federal Supreme Court Cassation Bench
FCCP	French Code of Civil Procedure
HoPR	House of Peoples Representative
ICC	International Chambers of Commerce
NACA	Nigerian Arbitration and Conciliation Act
NYC	1958 New York Convention on Recognition and Enforcement of Foreign Awards
Para/¶	Paragraph
P./PP.	Page/Pages
RLACCM	Rwanda Law on Arbitration and Conciliation in Commercial Matters
SAA	Singapore Domestic Arbitration Act
SIAA	Singapore International Arbitration Act
SPILA	Switzerland Private International Arbitration Law Act
Sect./Sects.	Section/Sections
UNCITRAL MAL	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration
UNCITRAL AR	United Nations Commission on International Trade Law Arbitration Rules

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CHAPTER ONE

INTRODUCTION

1. Background of the Study

Actors of commercial activities most of the time prefer their commercial disputes to be resolved through arbitration based on fair, adequate and predictable arbitration laws. The major reasons for actors of commercial activists for preferring arbitration are its low cost, hiding of the investigation into the disputed issue from the public view and therefore keeping of the commercial secrets of both sides, and also absence of red tape in the procedure.[1] Further pushing reasons are finality and the relative ease of enforcement of arbitral awards throughout the world.

United Nations Commission on International Trade Law (UNCITRAL) adopted Model Law on International Commercial Arbitration (MAL) on 21 June 1985 with amendments as adopted in 2006[2] to address considerable disparities in national laws on arbitration. The need for improvement and harmonization was based on findings that national laws were often particularly inappropriate for international cases.[3] The MAL constitutes a sound basis for the desired harmonization and improvement of national laws.[4] The UN General Assembly recommended that all States to give favorable consideration to the harmonized provisions of the UNCITRAL MAL[5] Accordingly harmonization has been defined as a process of achieving the compatibility of laws by reducing the differences, gaps and ambiguity, in order to achieve a level of similarity with international standards, principles and experiences, but also considering that some differences may remain.[6]

According to the official website of UNCITRAL – out of 118 jurisdiction 11 African countries including Nigeria and Rwanda either amended their previous legislation based on the MAL, or indicate legislation based on the text of the UNCITRAL MAL.[7] Nigeria and Rwanda due to their arbitration friendly laws are among the top five preferred African seat of arbitration.[8] Another Asian country-Singapore among the world's most preferred five seats for arbitration adopted or amended its previous arbitration legislation

[1] Mohammad Nevisandeh, The Nature of Arbitration Agreement, *Procedia Economics and Finance 36 (2016) 314 – 320*, SCIJOUR-Scientific Journals Publisher (2015), P.314. Available online at: www.sciencedirect.com. (red tape in the procedure- routine or excessively complex procedure which results in delay)

[2] UN General Assembly Resolution No. 40/72, 112, U.N. Doc. A/RES/40/72 (December, 11 1985) and General Assembly Resolution No.61/33 *Supplement No. 17* (A/61/17.December 2006) to adopt UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION.

[3] The UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (1985, with amendments as adopted in 2006) UNITED NATIONS PUBLICATION Sales No. E.12.V.9 ISBN 978-92-1-133793-8, English, Publishing and Library Section, United Nations Office at Vienna, P. 1. available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mal-digest-2012-e.pdf . See also the Preamble of Resolution No. 40/72

[4] Ibid.

[5] Ibid, See the Preamble of Resolution No. 40/72 and *Resolution No.61/33 and also Supra note 2.*

[6] Paisey,C. and Paisey,N.J, "Harmonisation of company law: Lessons from Scottish and English legal history", Management Decision, Vol. 42 No. 8, (2004), PP. 1037 – 1050, Emerald Group Publishing Limited, Available at: https://doi.org/ 10.1108/ 00251740410555506 P. 1037.

[7] Accessed as of 15 August 2022,from https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status

[8] 2020 Arbitration in Africa Survey Report Top African Arbitral Centers and Seats available at- https://creativecommons.org/about/cc licenses/

based on UNCITRAL MAL.[9] The leading pro-arbitration Countries such as France, UK/English and Switzerland have also developed their own home made modern arbitration laws that enable them among the world's top five preferred seat for arbitration.[10] Arbitration laws of these countries may give us good lesson to test the compatibility of the progress of harmonization of Ethiopian arbitration Laws.

Moreover, the 1958 New York Convention (NYC) on the other side established to provide common legislative standards for the enforcement and recognition of foreign and non-domestic arbitral awards. This Convention ratified by more than 171 State Parties. [11] The ancillary aim of the NYC is to give full effect to arbitration agreements by providing formal requirement of arbitration agreement and requiring courts of Contracting State to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal. Both the NYC and MAL recognize 'an arbitration agreement in writing' as valid without further requirement arbitration agreement to be attested by two witnesses. Further NYC provides narrow public policy exception to refuse recognition and enforcement of foreign arbitral awards.[12] NYC has also provided three kinds of reservations such as reciprocity, the disputes arising out of commercial relationship and the territorial reservation for the Contracting State. [13] Ethiopia ratified this Convention declaring extra *non-retroactive effect reservation* clause.[14]

As stated earlier, there is globalized obligation and responsibility up on a State to enact a clear, and effective arbitration laws that incorporate harmonized international arbitration law principles and standards. Contracting parties in arbitration agreements most of the time prefer the seat having harmonized national arbitration laws and also effective judicial system. This is another pushing reason to harmonize national arbitration law. Ethiopia has recently promulgated a new arbitration law, called Ethiopian Arbitration and Conciliation Working Procedure Proclamation (EACWPP),[15] repealing substantive and procedural arbitration laws provided under 1960 Civil Code (CC) and 1965 Civil Procedure Code (CPC).The repealed Ethiopian arbitration laws under CC and CPC were criticized with its outdated, inconsistent and inadequate provisions. As a response EACWPP is enacted to govern both national and international commercial disputes. Some of the overriding objectives of EACWPP are:[16] to adopt good international practices and principles related to arbitration and to implement international treaties acceded and ratified by Ethiopia; to provide …simple procedure which provides freedom to contracting parties; and to provide efficient resolution mechanism for investment and commercial related disputes…. Despite the

[9] *Supra note* 8. See also 2021 International Arbitration Survey: Adapting arbitration to a changing world, conducted Queen Mary University of London- school of International Arbitration, Available at: https://arbitration .qmul.ac.uk/media/ arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.
[10] Ibid.
[11] Accessed as of 30/11/2022from https://uncitral.un.org/en/texts/arbitration/conventions/foreign-arbitral_awards/status2
[12] Art.V(2/b) of the 1958 New York Convention on Enforcement and Recognition of Foreign Awards(NYC), entered into force on 7 June 1959.
[13] Arts. I/3 and X/1 of NYC
[14] Art. 3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Ratification Proclamation No.1184/2020. Federal Negarit Gazette No.21, 13th March, 2020.
[15] Ethiopian Arbitration and Conciliation Working Procedure Proclamation no.1237/2021, No. 21, 2nd April, 2021,Federal Negarit Gazette
[16] Ibid, Preamble

legal reform made by Ethiopia, however, EACWPP and NYC ratification Proclamation do not escape from inconsistency, ambiguity and loopholes in some salient areas of the law compared with harmonized international arbitration laws such as MAL and NYC and also compared with some pro-arbitration countries' laws. Even if Ethiopia as a sovereign country free to determine what its law should look like and to come up with local experience oriented law, its law should be in line with NYC, and also if it to compute with Model Law Countries like Singapore, Nigeria and Rwanda and with non-Model Law pro-arbitration countries such as France, UK/English and Switzerland and consequently to be preferred seat for arbitration, it has to harmonize some of its arbitration laws' provisions taking into consideration good experience from the international experiences.

2. Literature Review

Since the EACWPP is a newly enacted law, to the best of my knowledge no fitting study has been conducted in testing the compatibility of the progress of harmonization of this law towards soft and hard international arbitration laws and as per aforementioned pro-arbitration countries' arbitration laws. This research is intended to play a footing step role for further research. But, this does not mean that there is no any literature made in relation to this topic on repealed Ethiopian arbitration laws. The following are a few among others.

Seid Demeke Mekonnen (2014)[17] in his study concluded that the trend in legal systems around the world has been towards immunizing the award from challenge based on the merit. However, maintenance of recourse via appeal sets Ethiopia apart from this universal trend, which is being advocated by the MAL jurisdictions. Thus, he suggested that the country should follow a new and the MAL friendly approach for challenging arbitral awards, that is, avenue of setting aside. Hailegabriel G. Feyissa(2010)[18] in his article has criticized that Ethiopian courts intervention is beyond average during arbitral proceedings. And also he criticized that the formality requirement of arbitration agreement to be attested at least by two witnesses is not good incentives to arbitral settlement of disputes and suggested lawmaker to review national arbitration law provisions that are hostile to commercial arbitration.

Another writer Alemnew Gebeyehu Dessie *(*2019) in his article criticized and underlined that the cassation review of arbitral awards is also out of the purview of the Ethiopian arbitration law; there is no clear legal basis empowering cassation review of arbitral awards.[19] Alemayehu Yismaw Demamu(2015)[20] in his Article has also condemned the Country that did not brush-up or adopt arbitration laws which are comparable to UNCITRAL MAL nor ratify the NYC, ICCSD and other relevant international commercial

[17] Seid Demeke Mekonnen, A Comparative Analysis of the Ethiopian Legal Framework for Challenging Arbitral Awards through Appeal, Bahir Dar University Journal of law, Vol .5, No 1 , (2014), PP.94-127, P.126.
[18] Hailegabriel G. Feyissa, The Role of Ethiopian Courts In Commercial Arbitration, Mizan Law Review Vol. 4 No.2, Autumn 2010,PP.297-333, P.307
[19] Alemnew Gebeyehu Dessie, The Extent of Court Intervention in Arbitration Proceedings: Ethiopian Arbitration Law in Focus, Scholars International Journal of Law, Crime and Justice- (2019), PP.54-62, Available at Journal homepage: http://saudijournals.com/sijlcj/
[20] Alemayehu Yismaw Demamu ,The Need To Establish A Workable, Modern And Institutionalized Commercial Arbitration In Ethiopia, Haramaya Law Review [VOL. 4:1 2015],PP 37-57

arbitration treaties. Moreover, Birhanu Beyene Birhanu (2013)[21] in his Article concluded that unlike, other ways of court's control on arbitration such as appeal, setting aside and refusal, there is no an explicit statutory basis for court's control of arbitration by way of cassation. And condemn Cassation Bench exercising cassation power in reviewing final arbitration award.

All of the studies that mentioned above comparing with MAL, NYC and other national arbitration laws have criticized the inadequacy, inconsistences and ambiguities of salient areas of the old arbitration laws. Yet, the new EACWPP retains some of these problems criticized in those studies. Hence, this study is aimed to fill these shortcomings and try to test the compatibility of the progress of harmonization of the salient areas of Ethiopian arbitration laws (i.e., the new EACWPP and NYC ratification proclamation) comparatively analyzing international arbitration laws and the above-mentioned pro-arbitration countries' arbitration laws, and also will suggest recommendations for identified inadequacies.

3. Statement of the Problem

Even if EACWPP is enacted with the objective to consider the international practices and principles related to arbitration;[22] it does not escape from inconsistency, ambiguity and loopholes in some its salient areas compared with harmonized international arbitration laws and arbitration laws of the aforementioned pro-arbitration countries. The following particular problems are the subject of investigation in this study. First, according to the cumulative readings of Arts. 1727/2, 3326/2 and 3328 of the CC and Art. 315/1 of the CPC, arbitration agreement in order to be valid it must be in writing and attested by two witnesses. Retaining the same in more clearer terms the new EACWPP under Art. 6(1 and 2) requires the arbitration agreement to be concluded in writing, and signed by the parties and two witnesses. However, both under UNCITRAL MAL and NYC arbitration agreement shall have legal effect with no further formal requirement of attesting by two witnesses.[23] Likewise there is no such formal requirement under pro-arbitration countries' laws named above.[24] This needs comparative analysis to determine whether EACWPP has incorporated more demanding formal requirement.

Secondly, EACWPP under Art. 12/4 gives the right to the requesting party to proceed litigation;[i.e., indirectly provides the right to the requesting party unilaterally to cancel arbitration agreement] instead of enforcing arbitration agreement, in case when a party who given notification to participate in the appointment of arbitrator or co- arbitrator, fails to respond within 30 days and/or if deny the existence of arbitration agreement. Among the modes and procedures appointing by agreement of parties and by national courts are the most usual methods of designation of an arbitrator.[25] The repealed Ethiopian

[21] Birhanu Beyene Birhanu, CASSATION REVIEW OF ARBITRAL AWARDS: DOES THE LAW AUTHORIZE IT?, Oromia Law Journal,Vol. 2, No.2,(2013) PP.112-137.
[22] *Supra note* 15 - The preamble of the EACWPP
[23] Art. 7 of both Option I and II of the MAL as revised in 2006 and Art. II/1 of the NYC.
[24] For instance, Art.7/1 of MAL, Art. 2A/2 of Singapore International Commercial Arbitration Act (SICAA), Art. 6/2 of UK/English Arbitration Act of 1996 and Part I Arts.1 -5 of Arbitration and Conciliation Act Chapter 18 Laws of the Federation of Nigeria 2004(NACA)
[25] Redfern A.,Hunter M.,Blackaby N. and Partasides QC.C., International Arbitration (sixth edition),(2015),Oxford University Press, P.240

Arbitration Law provides a legal right to demand judicial enforcement of the arbitration agreement or a court to appoint arbitrator[s] on behalf of the defaulting party.[26] Similar right is given to the requesting party under MAL and arbitration laws of the aforementioned pro-arbitration countries.[27] This requires comparative investigation so as to answer whether our law in this regard is arbitration friendly or not.

Thirdly, procedures of counter-claim and the right to present oral argument are properly unsettled issue both under the old Ethiopian Arbitration law and the new EACWPP. The right to be heard is one of the cornerstones of due process. UNCITRAL MAL under Art. 2/f recognizes the counter-claim proceeding to be conducted similar in lines with `claim`. Similarly, some pro-arbitration countries named above incorporated similar provisions applicable on counter-claim proceedings.[28]Moreover, as stated under Art. 24/1 of the MAL unless the parties have agreed that no oral hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by *a party*(emphasis added). The same provision is laid down under Rwandan, Nigerian and Singaporean Arbitration laws.[29] However, EACWPP has no clear room how counter-claim proceedings conducted and does not give the same scope of the right to either of a party to present oral arguments.

Fourthly, Ethiopian Arbitration Law does not settle the issue of the immunity of arbitrator[s]. It is known that arbitrator[s] carry out a judicial function. Hence, arbitrators need some type of protection similar to that enjoyed by judges, both during and after the proceedings.[30] Since there is no an international convention that addresses this issue, an arbitrator's immunity can only be conferred by national law.[31] Unless the act or omission of arbitrators and arbitral institution is shown to have been in bad faith arbitrators and arbitral institutions in UK/English and Singapore enjoy a broad degree of immunity from suit for actions taken within their mandate or functions.[32] This study will investigate the place and significance of immunity of arbitrators in Ethiopian legal system.

In order to ensure public interest, due process and fairness of the proceedings, national law should contain a number of mandatory provisions limiting the autonomy of the parties and the discretionary powers of the arbitral tribunal. If we look at the experience of France, the decisions of the Court of Appeal passed after reviewing arbitral awards may be challenged before the French Court of Cassation on legal grounds laid

[26] The cumulative readings of Arts. 3333, 3334/1 and 3344/1 of the CC.

[27] Art.11/3 of MAL, Art.1451-1455 of France Code of Civil Procedure of 2011(FCCP), Sect. 17/3 and 18/2 of UK/English Arbitration Act of 1996, Art. 179(1 and 5) of Switzerland Private International Law Act (SPILA) of 2021, Art. 9A of Singapore International Arbitration Act(SIAA) of 2002, Sect.7/2 of Arbitration and Conciliation Act Chapter 18 Laws of the Federation of Nigeria 2004(NACA), and Art.13(1^0 and 2^0) of Rwanda Law on Arbitration and Conciliation in Commercial Matters(RLACCM) .

[28] Switzerland Arbitration Rules of 2021 under Art. 21/5 and 21/3,Sect. 2/f of the first schedule of SICAA and Art.57/6 of NACA and Art. 4 of the last para. of RLACCM

[29] Art. 36 2nd para.of RLACCM, Art.15/2 of NACA and, Art. 24/1 of last sentence of SICAA.

[30] Fouchard, Gaillard, Goldman, International Commercial Arbitration, Kluwer Law International, The Hague, The Netherlands(1999), ISBN 90-411-1025-9, P.588

[31] Ibid, P. 589

[32] Art.29 of the 1996 UK/English Arbitration Act and Art.25B of SIALA.

down under FCCP and developed by the decisions of this court.[33] The authoritative Amharic version of the FDRE Constitution imposed a mandate upon Federal Supreme Court Cassation Bench (FSCCB) to review *any final decision* containing a basic error of law (Emphasis added).[34] The Federal Courts Proclamation no. 1234/2021, considered arbitral award as a final decision and has empowered Federal Supreme Court Cassation Bench (CB) to review and to render decision correcting basic error of law if there is any in the award.[35] According to these laws reviewing final decision through Cassation is not a recourse that can be claimed as of right as that of appeal. However, EACWPP under Art.49/2 even without differentiating between domestic and international arbitration awards gives the right to the contracting parties to agree rejecting applicability of Cassation recourse. The same time in case when parties do not renounce cassation recourse the law without putting grounds by taking into account the objective of cassation allows FSCCB to review not only domestic arbitral award but also international arbitral award. Under this study as a fifth problem will investigate how EACWPP addresses constitutional objective of Cassation recourse, international experience, and the purposes of mandatory provisions employed to limit party autonomy.

Repealed Ethiopian arbitration law was criticized by its provision of unlimited power of appellate court to review the merits of the arbitral award and correct errors if any in arbitral awards. [36] As a response for this criticism, EACWPP recognized appeal as an exceptional recourse against arbitral awards.[37] But in case when parties agree to have the right to appeal, the new law except some conditions lay down under Art. 49/3 of EACWPP, it follows an open approach allowing appeal on unlimited grounds even on the merits of the disputes and also it does not differentiate between domestic and international arbitration. For example, UK in 1996 English Arbitration Act and Singapore in its Domestic Arbitration Act allow the right to appeal on the limited grounds after aggrieved parties securing leave of court. Furthermore, pro-arbitration countries such as Switzerland and France provide *Revision* as an extraordinary recourse to review arbitral award rendered based on forgery, perjury or bribery which after the exercise of due diligence, was not within party knowledge at the time of the giving that arbitral award. However, this recourse is not addressed under EACWPP. Therefore, these issues analyzed as sixth and seventh problems.

Eighth, in relation to the grounds for challenging against arbitral awards, EACWPP came up with the strange additional exceptions of *`public morality and national security`* to claim setting aside arbitral awards and to refuse recognition and enforcement of foreign awards. These terms are not familiar in MAL, NYC and also in the above mentioned pro-arbitration countries' laws. Putting these additional grounds practically might open the door widely a court to interpret these vague terms broadly and as a result create

[33] Christopher Koch, The Enforcement of Awards Annulled in their Place of Origin: the French and U.S. Experience, Journal of International Arbitration Volume 26 Number 1,(2009) PP. 267-297. P. 271, And also see DETLEV KÜHNER, Annulment and enforcement of arbitral awards in France, (2018), PP.40-41, Available online at www.kluwerlawonline.com

[34] Art.80 (3/a) of Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, Federal Negarit Gazeta - No.1 21st August 1995.

[35] Cumulative readings of Arts.4, 2/5 and 10(1/h of the Federal Courts Proclamation No. 1234/2021, Federal Negarit Gazette No. 26, 26th April, 2021,) Through this law the phrase "any final decision" which provided under Art.80(3/a) of FDRE Constitution defined including arbitral awards.

[36] Arts. 350/3 and 351 of Civil Procedure Code of the Empire of Ethiopia of 1965, Decree No. 52 Of 1965, Negarit Gazeta - Extraordinary Issue No. 3 Arts. 350-354

[37] *Supra note* 15, Art. 49

the fear that the significant numbers of foreign arbitral awards may not be recognized and enforced out of the box of NYC. Finally under the NYC ratification proclamation no.1184/2020 Ethiopia declares NYC does not apply retroactively with respect to Arbitration Agreements concluded and Arbitral Awards rendered after the date of its accession to the Convention. This reservation clause may have the potential to place the country in a position not to enforce significant numbers of arbitration agreements and Arbitral Awards that required to be enforced by the country.

4. Research Questions

4.1. General Research Question

Are Ethiopian arbitration laws compatibly harmonized towards international arbitration laws and some pro-arbitration countries' arbitration laws?

4.2. Specific Research Questions

1. Does the EACWPP's formal requirement of attesting arbitration agreements by two witnesses require further harmonization towards international arbitration laws and laws of pro-arbitration countries?
2. What are the positions of EACWPP on the procedures related to the commencement of an arbitration and conduct of proceedings such as the mode and procedure of the designation of arbitrator[s], immunity of arbitrators, the right to present oral argument, and the right to have justice applying counter-claim actions?
3. What are the positions of Ethiopian arbitration law in incorporating necessary recourses against arbitral awards and how it treats public policy exception?
4. Does Ethiopian additional reservation clause to NYC has the potential pros and cons and need to be harmonized with international practices?

5. Objectives of the Study

5.1. General Objective

The main objective of this thesis is comparatively investigating some salient areas of Ethiopian Arbitration laws (EACWPP and NYC ratification Proclamation) to test the compatibility of the progress of harmonization of Ethiopian arbitration laws towards international arbitration laws and some pro-arbitration countries' arbitration laws .

5.2. Specific Objectives

To achieve the general objective, the specific objectives of the thesis will be the following:

- To comparatively analyze the place and impacts of additional formal requirements of arbitration agreements under EACWPP.
- Comparatively to examine the position and impacts of EACWPP on the mode and procedure of appointment of arbitrator, the right to present oral argument, the right to have procedural justice

applying counter-claim actions, and the issues of immunity of arbitrators from a suit for actions taken within their mandate.

- To scrutinize the position of Ethiopian Arbitration Laws on the recourses against arbitral awards and their grounds comparing with international arbitration laws and pro-arbitration countries' laws.
- To suggest some recommendations that enable to reduce identified gaps, inadequacy and inconsistency under EACWPP and NYC ratification proclamation.

6. Research Methodology

The study will be conducted using the doctrinal legal research methodology to analyze the compatibility of the progress of harmonization of Ethiopian arbitration laws in comparison with hard and soft international arbitration laws and some pro-arbitration countries' arbitration laws with the intention to identify the continuity, inconsistency, gaps, inadequacy and uncertainty of Ethiopian arbitration laws. Comparative approaches will be also employed to show international experiences so as to answers research questions. Accordingly, arbitration laws of France, UK, Switzerland, Singapore, Nigeria and Rwanda are intentionally selected as they are the leading seat for commercial arbitration. Among these countries the first three have home growing legal and practical experiences in applying harmonized principles and standards. The next three countries on the other hand, known having UNCITRAL MAL impacted modern arbitration laws with some differences. This comparison in effect helps us to test the compatibility of the progress of a legal reform made by Ethiopia and to grasp good experiences for further reform through harmonization.

With regards to the sources, the primary sources will be FDRE constitution, arbitration related national legislations, cassation decisions as precedent and NYC. Moreover, UNCITRAL MAL and AR, other arbitration institutions' rules, named pro-arbitration countries' arbitration laws, books, articles, journals, reports, and court cases, and other unpublished materials, and internet sources will be used as the secondary sources. As far as the research design is concerned, in order to achieve the objectives of the study the qualitative method will be employed. Accordingly, in order to have reliable secondary data drafter's minutes of EACWPP, its explanatory note and reports will be utilized. The justification behind using this method is to understand why is important to harmonize Ethiopian arbitration law and what are the sources for the new Ethiopian arbitration law.

7. Significance of the Study

Most of the investors and business actors require fair and friendly arbitration law. Some literatures argue that some of the repealed Ethiopian arbitration law provisions are outdated and inconsistent compared with international arbitration laws. To reform the outdated arbitration laws and in effect to reduce the differences, inconsistency and the gaps in the existing arbitration laws, and also to place fair and effective

arbitration laws, Ethiopia enacted EACWPP and ratified NYC. Harmonized arbitration law is often justified on the ground that it creates stability and certainty in arbitration process and enabling parties to predict in advance the rules and procedures that are likely to apply to their disputes.

Therefore, this study attempts to answer research questions comparatively investigating Ethiopian Arbitration Laws towards soft and hard international arbitration laws and some pro-arbitration countries' laws. Since there were no fitting study conducted on the testing of the compatibility of the progress of harmonization of Ethiopian arbitration law towards international arbitration laws and some pro-arbitration countries' laws, this thesis intends to pave the way to academic and research communities in order to conduct further research on the issue under discussion. In addition, this study could be an important input for the forthcoming amendment of the law, and for the judicial harmonization and references.

8. Scope of the Study

The study mainly focuses on testing the compatibility of the progress of harmonization of Ethiopian Arbitration law towards international arbitration laws and some pro-arbitration countries' laws. Except some basic areas of the law, investigating all the gaps, differences and inconsistencies of the EACWPP are not within the scope of this study. With regards to the geographical scope of the study, the Ethiopian arbitration related laws and law provisions will be tested in comparison with soft and hard international arbitration laws and some pro-arbitration countries' laws. This will be done with the intention to grasp harmonized principles and standards, and some foreign good experience that help the country to be arbitration friendly.

9. Limitation of the study

As any other study this study is not free form limitations. For one thing, there are no fitting researches locally conducted or written materials that are related with the issue at hand. So the research has been influenced from the shortage of relevant reference materials. This and other limitations could therefore, have probably put negative impacts on making the research full-fledged. Expecting the existence of such limitations from the beginning, however, the researcher has made the utmost efforts in minimizing the impact of such constraints by referring to the available and accessible literatures on the issues at hand.

10. Organization of the Study

The study is organized in to four chapters. The first chapter deals with the introductory part of the study which covers the proposal of the study. The second chapter discusses harmonization of the laws and the position of contemporary arbitration laws on some salient areas of arbitration process. The third chapter is exclusively concerned with comparatively analyzing areas of Ethiopian arbitration laws that need further harmonization towards international arbitration laws and some pro-arbitration countries' arbitration laws. Finally, conclusions are drawn from the legal analyses made in the chapters of the thesis and possible recommendations are forwarded based on the research findings.

CHAPTER TWO

Harmonization of the Laws and the Position of Contemporary Arbitration Laws on some Salient Areas of Arbitration Process

2.1. Concept, Reasons and objectives of Harmonization of Laws

2.1.1. The Meaning and Concept of Harmonization of Laws

There is no clear unanimity in the legal literatures on the meaning of the term "*harmonization*". Accordingly the word *harmonization* has different meanings depending upon the situation in which it is employed. English etymology indicates that the earliest sense of harmony arises in relation to music and refers to the combination of musical notes, so as to produce a pleasing effect.[38] Martin Boodman defines the term *harmonization* as "a process in which diverse elements are combined or adapted to each other so as to form a coherent whole while retaining their individuality. In its relative sense, harmonization is the creation of a relationship between diverse things."[39] As quoted by Mohammed Muddasir Hossain, David Leebron has loosely defined *harmonization* as "making the regulatory requirement or governmental policies of different jurisdictions identical or at least more similar".[40] It is therefore, is the approximation of the law through integration with widely accepted norms, standards and principles of other international and foreign countries laws.

Harmonization is, however, distinct from 'unification', which introduces the same law into all the involved countries.[41] The unification therefore, involves towards complete unity in substance and detail replacing or transplanting the existing national laws, whereas harmonization avoids complete uniformity and is mostly concerned with approximating the fundamental standards and principles of national laws. 20th century Codification of Ethiopian laws can be taken as an example of unification of laws since Ethiopian diverse customary laws were replaced with single bodies (i.e., civil code, commercial code, Maritime code…) which were mostly from European Civil Law Countries' laws. Numerous scholarly literatures embrace the notion of harmonization being the mechanism by which unfair differences in legal regimes are eliminated, and security of transactions ensured.[42] The term "harmonization" is refers not only to these results, but also to the process of achieving greater similarity. Thus, harmonization of law relates to a process whereby

[38] Martin Boodman, The Myth of Harmonization of Laws, The American Journal of Comparative Law, Vol. 39, No. 4 (Autumn, 1991), pp. 699-724, P.701,Available at : http://www.jstor.org/stable/840738 .
[39] Ibid., P.702
[40] Mohammed Muddasir Hossain, INTERNATIONAL COMMERCIAL ARBITRATION: THE NEED FOR HARMONIZED LEGAL REGIME ON COURT-ORDERED INTERIM MEASURES OF RELIEF, University of Toronto, (2012),P.5
[41] Dennis Thompson ,Harmonization of Laws, Journal of Common Market Studies,P.304
[42] Mohammed Muddasir Hossain, *supra note* 40, PP.4-5

national laws are not totally ignored, but instead it becomes integrated with other laws within the framework of national policy and legal systems.

In general harmonization of laws can be achieved in two ways:[43] the first is active ways of harmonization through the enactment of the new legislation adopting harmonized principles and standards from international arbitration laws and grasping best experience form foreign countries. The other ways of harmonization of law is, passive harmonization which conducted by non-legislative organs mainly frequent use of harmonized principles by the judiciary.

2.1.2 Reasons and Objectives to Harmonize National Arbitration Law

There are various different pushing reasons to harmonize laws in general. Those who are in favor argue that those huge differences between legislations are actually the reason why a harmonization of law is necessary.[44] In an increasingly economically inter-reliant world, the importance of developing and maintaining a full-bodied cross-border legal framework for the facilitation of international business and investment is widely acknowledged. Internationally the binding convention such as NYC requires Contracting States to recognize and enforce foreign arbitral awards as per the standardized provisions laid down under the convention. Moreover, NYC under Art. II obliges each Contracting State to recognize and enforce an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them. In order to achieve the objectives of the NYC Contracting States shall be bound to enact modern, fair, and harmonized laws on commercial and investment related arbitration.

The United Nations Commission on International Trade Law (UNCITRAL) plays a key role in developing that framework in pursuit of its mandate to further the progressive harmonization and modernization of the law of international trade.[45] UNCITRAL does this by preparing and promoting the use and adoption of legislative and non-legislative "soft laws" instruments in a number of key areas of commercial law.[46] Accordingly, the UNCITRAL Model Law on International Commercial Arbitration (MAL) was adopted by the UNCITRAL on 21 June 1985 at the end of the eighteenth session of the Commission. It was amended by UNCITRAL on 7 July 2006, at the thirty-ninth session of the Commission.[47] The MAL is designed to assist States in reforming and modernizing (harmonizing) their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.[48] MAL reflects

[43] http://self.gutenberg.org/articles/harmonisation of law
[44] The Impact of European Commercial Law Harmonization: Is further harmonization of Commercial Law in the EU necessary? University of Oslo, Autumn 2014,P.35 – Available at https://www.duo.uio.no/bitstream/handle/10852/43059/
[45] The UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (1985, with amendments as adopted in 2006),P.1, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/ uncitral/ en/mal-digest-2012-e.pdf
[46] Accessed on July 17, 2022 from - https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration
[47] Ibid., and *supra note* 45
[48] *Supra note* 45,P.1

worldwide consensus on key aspects of international arbitration practice having been accepted by States of the different legal or economic systems of the world. The UN General Assembly, in its Resolution No.40/72, of 11 December 1985 and Resolution No. 61/33 of 4 December 2006 recommended that all States give favorable consideration to the harmonized provisions of the MAL including the revised articles of the MAL on arbitral procedure such as enforcement of arbitral awards when they enact or revise their laws.

Since its adoption by UNCITRAL MAL has come to represent the accepted international legislative standard for a modern arbitration law. UNCITRAL MAL, since it is a soft law has no binding effect upon States. MAL only serves as a guide for the national legislator in enacting a new arbitration law or amending an existing one. Accordingly, legislatures are free to vary texts of soft laws like MAL when adopting them taking into consideration to their national values and mandatory provisions in their legal systems when enacting the new arbitration law and amending the existing ones. As stated under the official website of UNCITRAL out of 118 jurisdiction 11 African countries including Nigeria and Rwanda either amend their previous legislation based on the MAL, or indicate legislation based on the text of the UNCITRAL MAL with amendments as adopted in 2006.[49] The Asia-Pacific stands out as the region of the globe with the highest concentration of MAL countries.[50] Among these Asia-Pacific Countries Singapore is among the five most preferred seats for arbitration adopted or amended its previous arbitration legislation based on UNCITRAL MAL.[51]

Harmonization drives interest groups to ask for the introduction of mandatory rules to benefit themselves, which creates inefficiencies. [52] Mandatory rules are less detrimental when there is competition among the legal orders, because subjects can evade the mandatory rules by changing legal orders (the exit strategy).[53] First of all, it would be misleading to suggest that jurisdictions that enacted the MAL have, as a result, perfectly identical arbitration laws.[54] Different countries have adopted the MAL with diverse degrees of closeness and following dissimilar approaches.[55]As stated in the above sub section since harmonization is different from uniformity: it promotes similarity and correspondence but a certain measure of disunity still remains. Second, even though it is frequently said that the MAL represents a legal standard recognized worldwide, it is not the only legal standard available or even the most efficient or sophisticated.[56] In fact, around two-thirds of arbitration proceedings take place in jurisdictions that have not enacted the

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[49] *Supra note* 7
[50] Simon Greenberg, Christopher Kee & J. Romesh Weeramantry *International Commercial Arbitration: An Asia Pacific Perspective,* Cambridge University Press, (2011) at P.36.
[51] Ibid. See also *Supra note* 9 - 2021 International Arbitration Survey.
[52] Baffi, Enrico and Santella, Paolo, THE ECONOMICS OF LEGAL HARMONIZATION,(2010),ENCYCLOPEDIA OF LAW AND ECONOMICS,SECOND EDTION,VOL.7,(2011)P.3 available online at: http://ssrn.com/abstract=1690967
[53] Ibid.
[54] Fernando Dias Simões, Harmonization of Arbitration Laws in the Asia-Pacific: Trendy or Necessary? *Chapter 11 in: Muruga Perumal Ramaswamy and Joao Ribeiro(eds.),Trade Development through Harmonization of Commercial Law, UNCITRAL Regional Center for Asia and the Pacific, New Zealand Association for Comparative Law, PP.217-231,(2015)* P.225, Available at:- https://www.academia.edu/24226323/
[55] Ibid.
[56] Ibid.

MAL.[57]Interestingly, almost all of the 'arbitration superpowers' (in terms of numbers of cases) such as England, France, Switzerland, Sweden, the United States, and China have designed their own laws.[58] Therefore, it seems that the UNCITRAL MAL may set relevant regulatory standards but it alone is not sufficient to establish a jurisdiction as a popular seat of arbitration.[59]Hence, when countries enacting a new arbitration law or amending an existing arbitration law it should carefully adopt harmonized provisions of MAL with due consideration for its mandatory legal provisions and public policy.

There should be different rules for domestic and international trade, because international transactions have different characteristics from domestic ones. [60] The harmonization of law is usually justified on the ground that it creates stability and certainty in international trade and investment by enabling parties to predict in advance the national laws that are likely to apply to them. The domestic reason to harmonize arbitration law is based on these justifications. Bearing in mind the critical consequences that derive from the *lex arbitri*, parties to an arbitration agreement should choose wisely which law to apply.[61] Failing such agreement, the arbitrators will probably decide to apply the law of the seat of arbitration. If the law of the seat is underdeveloped or raises too many difficulties the outcome of the arbitral proceedings may be affected.[62] Outdated, inadequate and unjust law and diversified law is an obstacle to engage in a commercial and investment activities between countries. The parties should therefore choose a seat equipped with domestic legislation that understands and supports the logic of international arbitration.[63]

Aware of the importance of the legal environment to the parties' choice of the place of arbitration, numerous countries have in the last years enacted or revised their arbitration laws so as to accommodate the specific demands of the international business community.[64] The quality and predictability of the legal environment is essential for a country to catch the attention of users of arbitration services. Governments strive to adjust and improve their legal frameworks aiming for simplicity, flexibility, and pragmatism. The adoption of a new arbitration law is seen as a 'marketing strategy' intended to send a signaling effect to the international arbitration community of the user-friendliness of a certain legal system.[65] Thus, harmonization also aims at avoiding the injustice stemming from disparity of treatment and the uncertainties connected with conflicts of laws arising when a transnational legal relationship is involved.[66]The challenge is to solve the clash between the two principles of certainty and diversity and also ability to maintain some significant national values and mandatory laws in domestic legal system.

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[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] DANIELE DE CAROLIS, The Process of Harmonization of The Law of International Commercial Arbitration: Drafting And Diffusion of Uniform Norms,(Unpublished Doctoral Dissertation) P.95.
[61] Fernando Dias Simões, ,*supra note* 54, P.221, Available at:- https://www.academia.edu/24226323/
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66]DANIELE DE CAROLIS, *supra note* 60**,** PP.97-98.

2.2. **Short Overview of Contemporary Legal Framework for International Commercial Arbitration**

International commercial arbitration is a method of settling disputes arising out of international commercial contracts having transcended national boundary elements. The national law of one country alone is not sufficient to deal with especially international commercial arbitration, since the jurisdiction of any given country is generally limited to its own territory. What is needed is an international treaty or convention, linking national laws together and providing (as far as possible) a system of worldwide enforcement, both of arbitration agreements and of arbitral awards.[67] In turn, an agreement to arbitrate has binding effect only by virtue of a complex framework of national and international laws, ultimately enforced via national courts.[68] In reality, the practice of resolving disputes by the essentially private process of international arbitration works effectively only because it is supported by a complex public system of national laws and international treaties.[69]

Many international conventions and soft laws facilitate arbitration process as a method for resolving commercial and investment related disputes and address the enforcement of arbitral awards. Such the most important 'landmarks treaties and conventions, and other major international instruments are:[70] The first international instrument is the Geneva Protocol on Arbitration Clause of 1923.[71] It is an international instrument was drawn up on the initiative of the ICC and under the auspices of the League of Nations, and signed at Geneva on 24 September 1923. This Protocol recognizes the validity of an agreement whether relating to existing or future differences between parties…..[72] Following this Protocol, the Geneva Convention of 1927 was signed at Geneva on 26 September 1927. The objective of this Convention is the Execution of Foreign Arbitral Awards. These two instruments [the Protocol and Convention] established basic requirements that Contracting States recognize and enforce international arbitration agreements and foreign arbitral awards, marking the beginning of contemporary international efforts comprehensively to facilitate and support the international commercial arbitration process.).[73]

The New York Convention (NYC) of 1958 was established as a result of dissatisfaction with the Geneva Protocol of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.[74] Accordingly the Geneva Protocol on Arbitration Clause of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 replaced with NYC and ceased to have effect between

[67] Redfern A., Hunter M., *supra note 25*, ¶1.08, P.6
[68] Ibid., ¶1.17, P.3
[69] *Ibid.,* ¶1.08, P.3
[70] Ibid., ¶1.18, P.6
[71] E/AC.42/2- Geneva Protocol on Arbitration Clauses Signed at a Meeting of the Assembly of the League of Nations held on, Geneva, 24 September 1923(the Geneva Protocol of 1923).
[72] Art. 1 of the Geneva Protocol of 1923
[73] Gary B. Born,(third edition) International Commercial Arbitration, (2021) Kluwer Law International BV, The Netherlands ,Three-volume set: ISBN 978-94-035-2643-0 e-ISBN: ISBN 978-94-035-2644-7,P.183 .
[74]New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) UNCITRAL secretariat, Vienna International Centre. Available at:- www.uncitral.org and https://www.newyorkconvention.org/ travaux+ preparatoires/history+1923+-+1958

Contracting States to the extent that they become bound, by the NYC.[75] NYC entered into force on 7 June 1959 to achieve two aims. Its principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal. This Convention provides two vital reservations that Contracting States may make in relation to the Convention are (1) a reservation which is known as the 'reciprocity reservation' and (2) the 'commercial relationship' reservation.[76]

There are also internationally accepted *soft laws* such as the UNCITRAL Model Law on International Commercial Arbitration(MAL), which adopted in 1985 with amendments (revisions) approved by the United Nations in December 2006.[77] It is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through its supportive and supervisory roles including the procedure of the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.[78]

Moreover, the UNCITRAL Arbitration Rules (the UNCITRAL AR or AR), adopted by Resolution 31/98 of the General Assembly of the United Nations on 15 December 1976. At present, there exist four different versions of the Arbitration Rules:[79] (i) the 1976 version; (ii) the 2010 revised version; and (iii) the 2013 version which incorporates the UNCITRAL Rules on Transparency for Treaty-based Investor-state Arbitration and (iv) the 2021 version which incorporates the UNCITRAL Expedited Arbitration Rules. The UNCITRAL AR provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations.[80]

2.3. **Short Overview of some Pro-Arbitration Countries' Modern Arbitration laws**

2.3.1. **France**

Arbitration in France was seen as a safeguard for liberty and equality, guaranteeing citizens a measure of protection from governmental oppression (particularly in the form of courts historically associated with the

[75] Art.VII/2 of NYC.
[76] Art.I/3 of NYC.
[77] *Supra note* 2
[78] Ibid., and https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration
[79] Accessed on July 18,2022 from https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration
[80] Ibid.

Monarchy).[81] In due course, arbitration was elevated to constitutional status Art. 86 of the French Constitution of Year I declared that "[t]he right of the citizens to have their disputes settled by arbitrators of their choice shall not be violated in any way whatsoever."[82] France to modernize its arbitration law ratified the 1923 Geneva Protocol, and made agreements to arbitrate future international commercial disputes became fully enforceable in French courts.[83] And then France signed the NYC on November 25, 1958 and it entered into force on September 24, 1959.[84] France is also a party to other arbitration related Conventions.[85]

The current French arbitration law was codified under FCCP which was entered into force by the decree of 2011-48 on 13 January 2011 following dualistic approach separating domestic and international arbitration. Accordingly, the FCCP distinguishes among those provisions that are applicable to international arbitration, contained in Arts. 1504 to 1527 of the FCCP (Book IV, Title V-VI), and those applicable to domestic arbitration contained in Arts. 1442 to 1503 of the FCCP (Book IV, Title I-IV). The provisions applicable to French domestic arbitration are generally not applicable to international arbitrations. However, unless the parties agree otherwise many provisions laid down under Title I apply equally to international arbitration by virtue of Article 1506 of the FCCP. Moreover, Arts. 2059 to 2061 of the French Civil Code (FCC) are also applicable in relation with arbitration agreement. According to Art. 1504 of FCCP, an arbitration is international "when international trade interests are at stake" – that is, where the economic operation at stake involves a transfer of goods, money or know-how beyond borders, irrespective of the nationality of the parties, the applicable law or the location of the seat of the arbitration. The provisions of the FCCP have produced a strongly pro-arbitration legal framework for international commercial arbitration.[86] And also French has introduced Cassation recourse in its judicial system. Under the following parts of this thesis comparative analysis will be made to grasp harmonized and pro-arbitration experiences form French Arbitration laws on the issues related to formal requirement of arbitration agreement, the procedure related to appointment of arbitral awards, on the rights related to present oral argument and counter-claim, immunity of arbitrator, kinds of recourses against arbitral awards, and grounds to refuse recognition and enforcement of arbitral awards.

2.3.2. **UK/English**

The long tradition of arbitration in England was founded on legislation that gave the English courts broad powers to intervene in the conduct of arbitration proceedings and the revision of arbitral awards.[87] Accordingly the development of English arbitration law has always been centered on the relationship

[81] Gary B. Born, *Supra note* 73, P.156
[82] French Constitution of Year I, 1793, Art. 86; French Constitution of Year III, 1795, Art. 210 ("The right to choose arbitrators in any dispute shall not be violated in any way whatsoever").
[83] Gary B. Born, *Supra note* 73, P.157
[84] *Supra* note 7.
[85] Gary B. Born, *Supra note* 73, P.157. In 1961 France adopted European Convention on International Commercial Arbitration and the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
[86] Ibid., P.205
[87] Fouchard, Gaillard, Goldman, *supra note* 30, P.71

between the court and the arbitration process. Starting from 1698 a number of Acts of Parliament have attempted to solve what was felt as one of the major drawbacks of arbitration: the non-enforceability of the arbitration agreement.[88] Under the 1698 Statute the court empowered to apply the disobedient party to an arbitration contempt penalty which could be imposed on a litigant who failed to co-operate in an order issued by the court[89]. This Act gave implied a large degree of court supervision over the arbitration process. However, the court could not be expected to enforce an award containing manifest errors of law appearing on the face of the award itself; by the same token, the court would set aside an award which was the result of procedural unfairness, since the mandate of the arbitrator, like that of the referee, was to reach a conclusion by fair means.[90] These powers of review seriously undermined the practical importance of the arbitration process; since it could frequently happen that a minor procedural error or any conflict on a question of law could result in the complete annulment of the award. [91]

Before the English Arbitration Act of 1996 came into force, English arbitration law was scattered over the Arbitration Acts 1950, 1975 and 1979.[92] The 1950 and 1975 Acts established a highly regulated legal regime for arbitration in England, with substantial scope for judicial involvement in the arbitral process and review of arbitral awards.[93] The 1979 Arbitration Act did create a right of appeal before the High Court on "any question of law arising out of an award" and allowed the parties to put a "preliminary point of law" arising during the arbitration before the courts. The issue of court intervention in the arbitration process was again the main theme of the debate which led to the latest reform of the English arbitration law in 1996. This debate was heavily influenced by the large attention the UNCITRAL MAL was paid to in many countries.[94] In the wake of this success, many commentators took the view that the Model Law offered a simpler and more updated approach to arbitration, without the delays and unnecessary court intervention mechanisms which were prevalent in many common law jurisdictions[95]. Accordingly, in response to the growing interest in the UNCITRAL MAL which the international community was acknowledging, the UK/English government decided to set up a Departmental Advisory Committee on Arbitration Law (DAC), in June 1989 chaired by Lord Justice Mustill, whose main purpose was to advice on whether England should adopt the UNCITRAL MAL.[96]

However, Lord Justice Mustill concluded and reported that England, Wales and Northern Ireland should not adopt the UNCITRAL MAL, and recommended passing a new statute codifying the whole of English arbitration law.[97] Nevertheless, DAC advised that the new Bill called Arbitration Act of 1996 should

[88] DANIELE DE CAROLIS, *supra note* 60, P. 280
[89] Ibid ,PP.280-281
[90] Ibid,P.281
[91] Ibid.
[92] Gary B. Born, *supra note* 73,P.207
[93] Ibid.
[94] Ibid.P.284
[95] Ibid.
[96] Ibid.
[97] Ibid.,PP.71-72

comply with the Model Law's logical structure and language and that at the same time it should use it as a yardstick by which to assess the quality of English arbitration law.[98]But also that consideration should be given to ensuring that any such new statute should, so far as possible, have the same structure and language as the MAL, so as to enhance its acceptability to those familiar with the MAL.[99] By contrast, following the recommendations of the Scottish Advisory Committee, set up shortly afterwards, it was considered that the UNCITRAL MAL was compatible with Scotland's interests and that it should therefore be adopted: in 1990 the MAL was therefore introduced in Scotland with only minor changes, and has been in force since January 1, 1991.[100]

Both international and domestic arbitrations seated in England, Wales, and Northern Ireland are governed by the English Arbitration Act of 1996, which provides a detailed (110 separate sections) statement of English arbitration law.[101] In response to the mentioned and other criticisms, the English Arbitration Act of 1996, was adopted, following an extensive consultation process with both English and foreign sources.[102]The Act compiled all prior English legislative provisions relating to arbitration into a single statute, based in large part on the UNCITRAL MAL, and introduced a modern "pro-arbitration" legislative regime for international arbitration in England.[103] UK ratified NYC on 24 September 1975 and the Convention entered into force starting from December 23rd of 1975[104]. In the upcoming parts of this thesis comparative analysis will be made to grasp harmonized and pro arbitration experiences form UK/English Arbitration Act of 1996 on the issues related to formal requirement of arbitration agreement, the procedure related to appointment of arbitral awards, on the rights related to present oral argument and counter-claim, immunity of arbitrator, kinds of recourses against arbitral awards, and grounds to refuse recognition and enforcement of arbitral awards.

2.3.3. **Switzerland**

Arbitration has been a preferred method of dispute resolution in Switzerland since the Middle Ages;[105]and currently it is one of the leading arbitration friendly country of the world.[106] Switzerland became a center for international dispute settlement after the Congress of Vienna in 1815 officially recognized its neutrality in international conflicts.[107] In 1869, the first commercial arbitration rules published in Switzerland by the Basel Chamber of Commerce.[108]Switzerland is a party to the NYC, which was ratified on 1 June 1965 and entered into force on 30 August 1965.[109]

[98] Ibid., P.285
[99] Ibid.
[100]Fouchard, Gaillard, Goldman, *Supra note* 30, P.72
[101] Gary B. Born, *supra note* 73,P.207
[102] Ibid.,P.208
[103] Ibid.,PP.208-209
[104] https://www.newyorkconvention.org/countries
[105] https://www.swissarbitration.org/swiss-arbitration/history/
[106] Gary B. Born, *supra note* 73,P.206 and also see *Supra note* 9
[107] Ibid.
[108] Ibid.
[109] *Supra note* 104.

Since the adoption of the Switzerland Private International Law Act (SPILA) in 1989, arbitration in Switzerland has been governed by two laws.[110] While Part II of the Swiss Civil Procedure Code (SCPC) applies to domestic arbitration, *i.e.* when all parties have their domicile or habitual residence (or seat) in Switzerland and Chapter 12 of the SPILA governs international arbitration, if at least one party is neither domiciled nor has its habitual residence in Switzerland (or seat).[111] This two-track system has historically emerged due to the federal structure of Switzerland and has traditionally been maintained since then.[112] The Swiss Constitution gives legislative jurisdiction over civil procedure to the Cantons.[113] As Switzerland considers arbitration to be of a procedural rather than a contractual nature, for many years the country had as many arbitration laws as there are cantons.[114] Moreover, domestic arbitration is governed by the Swiss Federal Code of Civil Procedure (SFCCP), in force since 1 January 2011.[115]

Chapter 12 of SPILA comprises 24 Articles from Arts. 176 to Art. 194. Its main strengths include its clarity and conciseness, making it easily accessible for (foreign) lawyers and non-lawyers alike, as well as the great importance afforded to party autonomy, meaning that the parties are free to fashion the proceedings in accordance with their specific needs.[116] As seen in France and UK (England, Wales and North Ireland) SPILA is not directly based on the UNCITRAL MAL, although it is evident that the drafters of the SPILA were aware of the ideas and concepts of the MAL, and some Swiss scholars even state that the spirit of the MAL can be recognized in many provisions of the SPILA.[117] SPILA contains liberal substantive rules governing international arbitration, particularly with respect to the arbitration agreement.[118] The arbitration agreement shall be valid if made in writing or in any other manner that can be evidenced by text.[119] And also Switzerland introduced extraordinary judicial revision recourse. As stated in the above sub sections in the upcoming parts of this thesis comparative analysis will be made to grasp harmonized and pro arbitration experiences form Switzerland Arbitration Laws on the issues related to formal requirement of arbitration agreement, the procedure related to appointment of arbitral awards, on the rights related to present oral argument and counter-claim, immunity of arbitrator, kinds of recourses against arbitral awards, and grounds to refuse recognition and enforcement of arbitral awards.

[110] Caroline Dos Santos, *Arbitration Law Reform in Switzerland: William Tell's Apple-Shot1?* Arbitragem CBAr & IOB; Kluwer Law International Volume XVI Issue 61, (2019), PP. 204 – 215,P.2.
[111] Ibid.
[112] Ibid.
[113] Fouchard, Gaillard, Goldman, *supra note* 30, P.76
[114] Ibid.
[115] Matthias Scherer, Bernd EHle,Samuel Moss, In: Manuel Arroyo(ed.) Arbitration in Switzerland- the Practitioner's Guide of Wolters Kluwer, The Hague, (2018),PP.1015-1046 P.1015
[116] Sebastien Besson, Antonio Rigozze and Silja Schaffstein of Levy Kaufmann- Kohler, Switzerland Delos Guide to Arbitration Places, DELOS DISPUTE RESOLUTION,(2018-2019),P.1
[117] https://www.gabriel-arbitration.ch/en/arbitration-in-switzerland
[118] Fouchard, Gaillard, Goldman, *Supra note 30*, P.77 and
[119] Art. 182 of Switzerland Private International Law Act Chapter 12(SPILA)of 1987 and revised and as in force from 1 January 2021.

2.3.4. **Singapore**

The Republic of Singapore is a common law country.[120] The history of arbitration in Singapore dates back to its early days as a colony of British Empire. The Singapore Arbitration Act (SAA) of 1953 was the first Singapore statute and it was largely based on the U.K. Arbitration Act of 1950.[121] There was no distinction between domestic and international arbitration until 1994.[122] In 1994 Singapore International Arbitration Act (SIAA) was enacted primarily to govern international arbitrations in Singapore and relied on the framework of the UNCITRAL MAL and came into force on 27 January 1995. Singapore Domestic Arbitration Act (SAA), however, remained untouched by the MAL, and subject to the SAA of 1953.[123] The SAA of 1953 was replaced by the SAA of 2001, which was based on the framework of the MAL and the provisions of the UK/English Arbitration Act of 1996.

Then, the SIAA of 1994 was replaced by the SIAA 2001.[124] The SIAA 2001 was amended to achieve consistency with the SAA and also in response to case law. The distinction between the two legal regimes primarily lies in the degree of court intervention in the arbitral process and respect for party autonomy. The domestic regime almost always provides for a greater degree of court supervision than the international regime.[125] If the parties to an international arbitration who wish for a greater degree of court supervision, they could "opt out" of the SIAA by stipulating in the arbitration agreement that the SAA applies. Similarly, where the parties in domestic arbitration wish to have less court supervision over the arbitration, they could "opt-in" to the SIAA regime.[126]

The SIAA incorporates and gives effect to the MAL, which aims to harmonize arbitration laws in different states. Accordingly, Singapore has emerged as one of the leading international arbitration seat not only in Asia but also in the world.[127] To keep this title, the Singapore Ministry of Law played a major role by keeping track on international and commercial legislative developments, and, adapting and framing innovative legislations to promote international arbitration.[128]Accordingly, on 1 December 2020, the International Arbitration (Amendment) Act 2020 (the Amendment Act) came into force, introducing two of the proposed amendments to the Singapore International Arbitration Act (SIAA) that had been subject to public consultation in 2019.[129] One of the amendments is the default Mode of Appointment of Arbitrators in Multi-Party Situations'[Sect. 9B – provides that if any of the relevant appointments cannot be agreed

[120] Nicole Conrad, Peter Münch and Jonathan Black-Branch, Singapore -International Commercial Arbitration: Standard Clauses and Forms Commentary,(2018) ,P.679,Available at- www.bloomsburycollections.com
[121] Ei Ei Khin, Judicial Supervision on Commercial Arbitration under the UNCITRAL Model Law and Arbitration Laws of the United Kingdom, the United States and Singapore(2007) P.240 and Mohan R. Pillay, "The Singapore Arbitration Regime and the UNCITRAL Model Law", Journal of International Arbitration, Vol.20, No.4, (2004), P. 356,
[122] Ibid,P.241.
[123] Ibid.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] http://www.kluwerarbitration.com/2020/10/18/singapores-amendment-to-its-international-arbitration-act-pledges-its-leadership-in-the-asia-pacific-region/
[128] Ibid.
[129] Ibid.

within the specified timeframe, the appointing authority (i.e., the President of the Court of Arbitration of the Singapore International Arbitration Centre (SIAC) by default) is to appoint the relevant arbitrator(s)] and Recognition that an arbitral tribunal and the High Court have powers to enforce obligations of confidentiality in an arbitration.[130]

In relation to enforcement of arbitral awards both SAA and SIAA provide provisions respectively for the enforcement of both domestic and foreign arbitral awards.[131] Moreover, Singapore signed and ratified the NYC on 21st August 1986 with the reservation of reciprocity.[132] As stated under Sect. 27/1, Part III of the SIAA, the country adopts and re-enacts the NYC in its Second Schedule. As stated in the above sub sections in the coming sections of this study comparative examination will be conducted with the intention to learn experiences from arbitration friendly Singapore arbitration laws.

2.3.5. **Rwanda**

Rwanda has made considerable efforts to improve its business environment and attract new investment. It has also introduced commercial courts (in 2008), which has resulted in a reduction of the backlog of pending litigation and reduced the time taken for the resolution of commercial disputes.[133] Despite these improvements, the backlog in the commercial courts has remained high and court processes can still be long.[134] As a result, with no alternative to the Rwandan court system available for resolving commercial disputes, developing appropriate ADR mechanisms was seen as the next logical step, by both the Government and private initiative, for Rwanda to continue to improve its reputation for and attract business and investment.[135]

More recently, Rwanda provided for the efficient enforcement of arbitral awards by acceding to the NYC on the Recognition and Enforcement of Foreign Arbitral Awards on 31st October 2008.[136] Then, in 2008, Rwanda enacted a modern arbitration law, called the law on Arbitration and Conciliation in Commercial Matters (RLACCM)[137] based on the UNCITRAL MAL[138] was proposed providing for appropriate conditions for arbitrations to be held in Rwanda. This government-led push to promote the efficient resolution of commercial disputes, both in the courts and through arbitration was coupled with an aggressive policy to build an investor friendly environment and to promote Rwanda as a place to do business in East Africa. As a result, Rwanda's ranking in the Ease of Doing Business survey moved from

[130] Sects.9B and 12 of Singapore International Arbitration(Amendment Act 2020(No. 32 of 2020)
[131] Sect. 46/1 of the SAA and Section 19 of the SIAA.
[132] *Supra note* 104
[133] Thomas Kendra, BACKGROUND TO THE KIGALI INTERNATIONAL ARBITRATION CENTRE (KIAC): A PROPOSED SOLUTION TO DISPUTE RESOLUTION IN EAST AFRICA, available at www.hoganlovells.com
[134] Ibid.
[135] Ibid.
[136] *supra note* 104
[137] Rwanda Law on Arbitration and Conciliation in Commercial Matters No. 005/2008 of 14/02/2008
[138] *Supra note* 7

158th in 2008 to 45th in 2012.[139] Rwanda recently ranked second in Africa in the World Bank's Ease of Doing Business and in the Enforcing Contracts category worldwide rankings for 2016, behind Mauritius, but ahead of South Africa.[140]

As seen any other arbitration laws the arbitration agreement is the milestone of the RLACCM. According to Art.9 of RLACCM arbitration agreement shall be in writing is an agreement by both parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Moreover, as stated under Art. 13 of RLACCM if the arbitrator[s] fails to agree on choosing the sole or third arbitrator within specified times after their appointment, the appointment shall be made, upon request of a party who sought assistance of the arbitrator, by the court specified in Arts. 7-8 of RLACCM. In order to learn good experience from the mentioned and other issues addressed by RLACCM, in the body of this thesis EACWPP will be comparatively analyzed with RLACCM.

2.3.6. **Nigeria**

The primary sources of the Nigerian Law of Arbitration are the English Common Law, the Nigerian Customary law and Nigerian statutes.[141] The first formal statute on arbitration was promulgated for the entire country on 31st December, 1914, that is, the Arbitration Ordinance 1914 based on the English Arbitration Act of 1889.[142] Subsequently, the Ordinance was re-enacted as the Arbitration Ordinance (Act), Laws of the Federation of Nigeria and Lagos, 1958. Note that the Arbitration Ordinance (Act) 1958 provided only for local or domestic arbitration.[143]

Nigerian Arbitration and Conciliation Act Chapter A18 (NACA) of 2004, was enacted to play important role in Nigerian arbitration and conciliation practice.[144] NACA is the principal federal legislation which is modeled on the UNCITRAL MAL of 1985. As stated under the preamble of NACA, it is enacted to provide a unified legal frame work for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the NYC on the Recognition and Enforcement of Arbitral Awards to any award made in Nigeria or in any contracting State arising out of international commercial arbitration. Nigeria acceded to the NYC on 17 March 1970 and it came into force in Nigeria

[139] Prof. William E. Kosar, Rwanda's Transition from Civil to Common Law, Volume 16, No. 3 –International Law Section, (July 2013), P.1, Available at: http://www.oba.org

[140] Fidèle Masengo, A REGIONAL SUCCESS STORY: THE DEVELOPMENT OF ARBITRATION IN RWANDA,(2017), available at - https://www.herbertsmithfreehills.com/latest-thinking/a-regional-success-story-the-development-of-arbitration-in-rwanda

[141] Prof. Greg. Chukwudi Nwakoby, ARBITRATION AND CONCILIATION ACT CAP A18 LAWS OF THE FEDERATION OF NIGERIA 2004 -CALL FOR AMENDMENT, JILJ (2010), P.1.

[142] http://www.oblaandco.com/wp-content/uploads/ARBITRATION-AS-A-TOOL-FOR-DISPUTE-.pdf

[143] Ibid.

[144] Muhammed Mustapha Akanbi, Lukman Adebisi Abdulrauf and Abdulrazaq Adelodun Daibu, CUSTOMARY ARBITRATION IN NIGERIA: A REVIEW OF EXTANT JUDICIAL PARAMETERS AND THE NEED FOR PARADIGM SHIFT, AFE BABALOLA UNIVERSITY: J. OF SUST. DEV. LAW & POLICY VOL. 6: 1, (2015),P.200-201,available at- doi: http://dx.doi.org/10.4314/jsdlp.v6i1.9

on 15 June 1970.[145] The Convention, however, will only apply on the basis of reciprocity to the recognition and enforcement of awards made only in the territory of a state party to the Convention and to contractual or non-contractual disputes arising from legal relationships that are considered as commercial under the laws of the Federal Republic of Nigeria.[146] According to 2020 Arbitration in Africa Survey Report Nigeria was among top five pro- arbitration African seats due to its arbitration friendly laws and jurisdiction and other factors.[147] With the intention to grasp harmonized experience from Nigeria on the subject matters related with the issues intended to address under this thesis EACWPP will be comparatively analyzed with NACA.

2.4. Short Overview of the Repealed Ethiopian Arbitration Laws

Ethiopia embarked on a politically motivated modernization of its laws with the coming to power of Emperor Haile Selassie I, and the promulgation of the first Constitution of 1931 and more emphatically as of 1955 when the Constitution was revised.[148] Accordingly, from the year of 1957-1965, Ethiopia codified six legal codes in its important codification project that aimed at modernizing its legal system. In an effort to modernize the legal system, the Emperor decided to enact different codes derived from different countries such as laws and legal principles included continental civil codes notably the French, Swiss, Italian and Greek, in addition to which Egyptian, Lebanese, and German codes, and for some provisions from Portuguese, Turkish, Iranian and Soviet codes were consulted.[149] From this fact we can observe that these codes were mostly transplanted from various foreign sources and made applicable to the country and was not the codification of the existing laws of the country, customary or otherwise.

The modern effort at introducing arbitration into the Ethiopian legal system started with the promulgation of the Civil Code (CC) of 1960[150] and the Civil Procedure Code (CPC) of 1965[151]. Accordingly, Arts.3325-3346 of CC and Arts.315-319 and 350-357 and also Art. 461 of CPC were major substantive and procedural law provisions of Ethiopian arbitration laws without differentiating between domestic and international arbitrations. As stated under Art, 3328 of the CC parties can enter into arbitration agreement either in the form of an arbitration submission (*actede compromise - a clause to resolve future dispute* which may arise out of the contract in the future) or arbitration clause (*clause compromissoire - a clause to*

[145] https://www.newyorkconvention.org/countries
[146] Ibid.
[147] 2020 ARBITRATION IN AFRICA SURVEY REPORT: Top African Arbitral Centers and Seats, Available at:- https://creativecommons.org/ about/ cclicenses/
[148] Tsegai Berhane Ghebretekle and Macdonald Rammala, Traditional African Conflict Resolution: The Case of South Africa and Ethiopia, MIZAN LAW REVIEW, Vol. 12, No.2 (2018), P. 340, Available at- http://dx.doi.org/ 10. 4314 /mlr.v12i2.4.
[149] Ibid,P.341
[150] The Civil Code of 1960, as published in a separate volume appearing as Extraordinary Issue No.2 of 1960 of the Negarit Gazeta, shall come into force on the 11th day of September, 1960, Arts. 3325-3346.
[151] Civil Procedure Code of the Empire of Ethiopia of 1965, Decree No. 52 Of 1965, Negarit Gazeta - Extraordinary Issue No. 3 Arts.315-319 and 350-357 and also Art. 461.

settle existing dispute). The provisions laid down under both Codes require arbitration agreement to be concluded in written form and demand to be attested by two witnesses.[152]

Art. 3325/1 of CC states that arbitrator undertakes to settle the dispute in accordance with the principles of law. That means an arbitrator must conduct a fair and an impartial trial and afford full and equal opportunity to both parties.[153] The CPC under Art.317/1 requires arbitral tribunal to conduct arbitration proceeding following almost similar procedures what civil court would follow during its proceeding. The CPC under Art. 317/2 has also stated arbitral tribunals to hear parties and their evidence and decide in accordance to law. With regards to appointment of arbitrator parties are free to decide in their arbitration agreement the way arbitrator to be appointed.[154]Where the other party or the person required appointing an arbitrator fails to appoint his part arbitrator within thirty days from the day when the notice provided as per arbitration agreement the court shall appoint such an arbitrator.[155]

Both the CC and CPC were criticized by their permission courts to interfere in commercial arbitration more than the modest.[156] In fact, public courts should encourage and provide support to commercial arbitration in some crucial matters since there are times where courts involvement is vital.[157] Concerning finality of arbitral awards, Article 350 of the CPC provides that an arbitration award is not final or it can be appealable unless parties agree to waive it. Further, provisions under these codes are non-comprehensive. They did not properly address the issues of arbitrablity, issues of public policy, principles of separability and competence-competence, the cassation and set aside recourses against arbitral awards…etc. They do not go with the pace of today's more complex domestic as well as international commercial transaction dispute settlement mechanisms.[158] As a result, they failed to become the choice of the business community.[159] Moreover, Federal Supreme Court Cassation Bench using its mandate that is provided under Art.80(3/a) of the FDRE Constitution rendered binding rulings on the issue that even if an arbitral award is binding and final so long as whose seat is in Ethiopia and contain basic error of law shall be subjected to Cassation recourse in order to correct basic error of law.[160] Hence, arbitration laws under these codes by aforesaid and other reasons were criticized by their outdated, inconsistent and inadequate provisions compared with harmonized principles and standards under hard and soft international arbitration laws, and some modern pro-arbitration countries' laws. In order to solve these problems Ethiopia enacted EACWPP and ratified NYC with the intention to harmonize and reform arbitration legal

[152] Cumulative readings of Arts. 1727/2, 3326/2 and 3328 of the CC and Art. 315/1 of the CPC
[153] Alemayehu Yismaw D., *supra note 28, P.42*
[154] Art. 3333 of CC
[155] Art.3334 of CC
[156] *Supra note 26*- see the Conclusion of that Article.
[157] Alemayehu Yismaw D., *supra note* 20, P.45
[158] Ibid.
[159] Ibid.
[160] Binding precedence rendered by Federal Supreme Court Cassation Bench on File No.42239 on 8th November 2020 GC, and on File No. 155880 on 5th July 2019.

framework were in force. The purpose of this thesis is investigate the compatibility of and enacted the new laws on arbitration

2.5. Arbitration Agreement

2.5.1. Definition and types of Arbitration Agreements

The milestone of modern national and international arbitration is an agreement by the parties to submit any existing and future potential disputes or differences between them to arbitration. Before there can be a valid arbitration, there must first be a valid agreement to arbitrate.[161] This is recognized both by national laws and by International Convention such as NYC and soft laws such as UNCITRAL MAL. Accordingly under Art. V of NYC and under Art.35 of the UNCITRAL MAL recognition and enforcement of an arbitral award may be refused if the parties to the arbitration agreement were under some incapacity or if the agreement was not valid under its own governing law.

As stated under Art. II/1 of NYC an arbitration agreement defined as *agreement … under which the parties are committed to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.* NYC not only defines arbitration agreement it also obliges the Contracting States to recognize an arbitration agreement in writing. Similar definition lied down under option I Art.7/1 of UNCITRAL MAL. Pro- arbitration countries such as UK/English, France and Switzerland put similar definitions.[162] If we look at the definition provided under Art.2/1 of EACWPP – it defines the phrase 'arbitration agreement' in similar wordings as an agreement to be implemented in order to partly or wholly settle future or existing dispute that may arise form contractual or non-contractual legal relationship. Thus, in generic term, the arbitration agreement can be defined as an agreement to submit present or future disputes to arbitration.

An arbitration agreement is usually categorized into two types- namely *arbitration clause* and *submission agreement*. Arbitration clauses are an agreement that the parties have agreed as part of their contract that any dispute that arises out of, or in connection with, the contract will be referred to arbitration and not to the courts. [163]Arbitration clauses are drawn up and agreed as part of the main contract *before* any dispute has arisen, and so they necessarily look to the future. The parties naturally hope that no dispute will arise, but agree that if it does, it will be resolved by arbitration, and not by the courts of law.[164]

There is a second type is 'submission agreement', which is less common, type of agreement to arbitrate and made *once* a dispute has arisen. This type of arbitration agreement can include an accurate description of the subject matters to be arbitrated. It is generally much more complex than an arbitration clause

[161] Redfern A., Hunter M., *supra note 25*,¶ 1.40 ,P.12
[162] See for instance, Sect. 6/1 of the English Arbitration Act of 1996 and French CCP under Art. 1442/2.
[163] Redfern A. and Hunter M, *Supra note* 25, ¶ 1.41
[164] Ibid. ¶ 1.42

because, once a dispute has arisen; it is possible to nominate a tribunal, and to spell out what the dispute is and how the parties propose to deal with it.[165] As indicated in the above section both types of arbitration agreements are recognized under NYC, UNCITRAL MAL and also EACWPP.

These two types of arbitration agreement have been joined by a third—namely, the arbitration agreement incorporated by reference, is common to be found in construction contracts, where the contract may make reference to standard of the International Federation of Consulting Engineers (*Federation International Des Ingenieus –Conseils* - FIDIC) conditions and/or in Ethiopia the Standard Conditions of Contract for Construction of Civil Work Project which prepared in 1994 by Ministry of Works and Urban Development which contain standard arbitration agreement. This type of arbitration agreement is thus not contained in the main agreement directly, but indirectly through the documents to which it is referred. Pursuant to option I of Art. 7/6 of MAL the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract. May be the fourth 'agreement to arbitrate' is deemed to arise under international instruments, such as a Bilateral Investment Treaties (BITs) entered into by one state with another. [166] In the BITs each state party to the treaty agrees to submit to international arbitration any dispute that *might* arise in the future between itself and an 'investor'. However, the 'investor' is *not* a party to the treaty and his/her or its identity will be unknown at the time when the treaty is made. Hence this 'agreement to arbitrate' in effect constitutes a 'standing offer' by the state concerned to resolve any 'investment' disputes by arbitration. It is an offer of which many 'investors' have been quick to take advantage.[167]

2.5.2. Formal Requirement of Arbitration Agreements

Arbitration agreement reflects the party autonomy to resolve their disputes through arbitration rather than the court litigation. The essential rule of the principle of arbitration is that where two parties freely enter into an arbitration agreement, there are few restrictions on their freedom to formulate their own terms of the agreement or to design a process, which caters precisely to their needs.[168] Both national and international laws put formal requirements to some types of contracts, likewise both national and international arbitration agreements are also subject to form requirements. The most significant and universally-accepted of these is the "writing" or "written form" requirement, together with related requirements for a "signature" and/or an "exchange" of written communications.[169] Some form requirements are relevant to the validity of an arbitration agreement: if these requirements are not satisfied, then the agreement to arbitrate is invalid or null and void.[170]

[165] Ibid.
[166] Ibid, ¶1.43
[167] Ibid
[168] Sunday A. Fagbemi, THE DOCTRINE OF PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION: MYTH OR REALITY?, AFE BABALOLA UNIVERSITY: J. OF SUST. DEV. LAW & POLICY VOL. 6: 1,(2015),P.226
[169] Gary B. Born, *supra note* 73,P.1062
[170] Ibid. P.1063

According to Art. 7/2 UNCITRAL MAL, 2nd para of Art.9 of RLACCM, Art.1/1 of NACA and Art. 178/1 of SLPIL failure to fulfill with written form requirements will make the arbitration agreement invalid. Moreover, NYC under Art. II/1, and Art. 25/1 of the ICSID Convention in one way or another imposed writing requirements for arbitration agreements. For instance, NYC requires that to obtain enforcement of an arbitral award the winning party must produce the written agreement to arbitrate or a duly certified copy.[171]

Where the law incorporates any requirement for the form of juridical act, this should always presuppose a particular goal. Accordingly the major reasons behind written form requirement of arbitration agreements are: (1) "warning" parties in order to ensure that they are adequately aware of their waiver of otherwise-available access to national courts and judicial remedies, and of the gravity of their commitment, when agreeing to arbitrate.[172] This rationale is sometimes supported by arguments that waiver of access to judicial remedies should require special formalities to ensure due notice and reflection: the "protection of the parties concerned from entering into ill thought out commitments involving the renunciation of the right of access to normal courts and judges. (2) though it is a weak justification the other reason is evidentiary function of form requirements.[173]

The NYC's written form requirement was adopted in order to provide a uniform international standard for form requirements. Art. II's general "writing" requirement should be interpreted in light of the Convention's text, object and purposes. One of the basic the Convention's pro-arbitration objectives is to facilitate the enforcement of international arbitration agreements.[174]Accordingly, Art. II of NYC should be interpreted as it requires only a writing that provides evidence of an agreement to arbitrate, in other words it requires an agreement that has been recorded in some fashion, providing a definite and verifiable text whose meaning can be adjudicated.[175] It is universally agreed that the NYC is meant to have a harmonizing effect on national legislation and judicial pronouncements so as to facilitate international commercial arbitration and thereby promote international trade.[176]

Moreover, the original 1985 version of the UNCITRAL MAL provision on the definition and form of arbitration agreement under Art.7 closely followed Art. II/2 of the NYC which requires that an arbitration agreement be in writing and be signed by the parties.[177] However, Art.7 was amended in 2006 to better

[171] See readings of Art. II together with Art. IV(1/b) of NYC.
[172] Gary B. Born, *supra note* 73, P.1065
[173] Ibid.
[174] Ibid.P.1091
[175] Ibid.
[176] S.I. Strong, What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflicts between the New York Convention and the Federal Arbitration Act, 48 Stan. J. Int'l L. 47 (2012), P.71.
[177] Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 note was prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) appears in document A/CN.9/264 (reproduced in UNCITRAL Yearbook, vol. XVI — 1985, United Nations publication, Sales No. E.87.V.4).P.28.

conform to international contract practices and adopted two options. The first approach follows the detailed structure of the original 1985 text.[178] It follows the NYC in requiring the written form of the arbitration agreement but recognizes a record of the "contents" of the agreement "in any form" as equivalent to traditional "writing".[179] Accordingly the agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. One of the principal revisions made under 2006 amendment of UNCITRAL MAL was substantially liberalized and modernized languages. Accordingly, option I nominally preserves a writing requirement, but essentially by redefining "written" to include "oral" or "tacit."[180] On other hand, option 2 under Art. 7 except providing the content of such an arbitration agreement it does not set any form requirement as a result adopt liberal approach. However, UNCITRAL MAL under both options provided under Art. 7 no longer requires signatures of the parties or an exchange of messages between the parties.

It is necessary here to question what is meant under in written form. In general, a juridical act in terms of written form can be classified and made between simple and so-called qualified (strict) written form. The simple form applies to private documents and the strict form to public documents such as notarial deed.[181] However, literatures show that only under certain conditions may satisfy the requirement of a written form of arbitration agreement.[182] These are: one approach- arbitration agreement as a document manually (hand written) signed by the parties. [183] It is because of that handwritten signature is the most typical expression of consent to an arbitration agreement.[184] However, some pro-arbitration countries' laws of arbitration do not consider the signature as a validity requirement. For example, the English Arbitration Act of 1996 under sect. 5(2/a) states that there is an agreement in writing if the agreement is made in writing, whether or not it is signed by the parties. Without the signature, however, it may be more difficult to prove that the party against whom it is invoked consented to it.

The second approach is that arbitration agreement contained in letters, telegrams and electronic communication.[185] - In addition to the above-mentioned traditional way of conclusion of arbitration agreements signed by both parties, NYC under Art. II/2 thus allows an arbitration agreement contained in an exchange of letters or telegrams. Exchanging "letters or telegrams," were dominant methods of international business communications when the Convention was drafted in 1958.[186] Art. II/2's signature requirement applies to "contracts" containing arbitral clauses and "arbitration agreements," and not to

[178] Ibid.
[179] Ibid.
[180] Ibid.
[181] RYŠAVÝ, Lukáš. The Form of Arbitration Agreement in a Comparative Perspective, International and Comparative Law Review, vol. 20, no. 2, (2020),P.46.
[182] Ibid.P.47-48
[183] Ibid
[184] Ibid.,P.48
[185] Ibid.,P.49
[186] Ibid.

"letters or telegrams," which are instead an alternative means of satisfying Art. II.[187] The critical element of an "exchange" is an exchange of offer and acceptance or the mutual or reciprocal expression of consent, in written communications sent from each party to an agreement to every other party to the agreement, and then confirmed or accepted in similar writings, evidencing that agreement: "both parties must have dispatched a letter or a telegram, not just one of them.[188] And also there should be a written record confirming the terms of the arbitration agreement"[189] The requirement for an "exchange" of letters or telegrams was intended to exclude oral or tacit acceptances.

A few national arbitration regimes have abandoned any written form requirement. France, for example, in the 1981 Decree abolished all form requirements for international arbitration agreements.[190] The current 2011 revised FCCP under Art.1507 confirmed that the arbitration agreement shall not be subject to any requirement as to its form. On the contrary, the English Arbitration Act of 1996, under sect. 5 imposes formal requirement that an arbitration agreement must be in writing though it does not require to be signed by the parties.[191] Finally, as a last resort, section 81(1/b) of the English Arbitration Act provides that even if an arbitration agreement is not made in writing, it will still be binding and enforceable at common law. Thus, under English Arbitration Act of 1996 the requirement of writing is not the must requirement at all.

Switzerland under Art.358/1 of Swiss Domestic Arbitration Law which is placed under the Swiss Code of Civil Procedure (SCCP) of 2008 arbitration agreement shall be valid if made in writing or in any other manner that can be evidenced by text. However, Swiss International Arbitration Law under SPILA does not expressly require written formal requirement for arbitration agreement.[192] On other hand, Nigeria under Sect.1 of NACA and Singapore under Sect. 4 of SAA of 2001 adopt formality requirements from option 1 of UNCITRAL MAL. Likewise, Rwanda, under Art. 9 of RLACCM provides that an arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means.

The other issue has to be addressed here is that Art. II/1 of NYC clearly imposes a "maximum" form requirement forbidding Contracting States from imposing stricter writing requirements than those under the Convention.[193] Permitting Contracting States to impose stricter or more demanding formal requirements would effectively undo the Convention's definition, while simultaneously frustrating the Convention's objective of enhancing the enforceability of agreements to arbitrate.[194] Therefore, a

[187] Gary B. Born, *supra note* 73,P.1083
[188] Ibid., P.1084
[189] Ibid.P.1084
[190] Ibid.1104
[191] Sect.5 of English Arbitration Act of 1996.
[192] Art. 7 under VI Arbitration Agreement of Chapter 1 of SPILA.
[193] Gary B. Born, *supra note* 73, P.1102
[194] Ibid.P.1073

Contracting State may not set stricter requirements as to form, nor can it accept less far-reaching formal requirements.[195]This can observed from Art. II/2 of NYC. Because it provides that "the term 'agreement in writing' shall *include* …," which means a less-exclusive definition that would admit of supplementation (*e.g.* , it does not say "shall only include" or "shall be limited to").[196]

However**,** Contracting States may not derogate by adopting more lenient form requirements and giving effect to international arbitration agreements that do not satisfy Art. II's form requirements. Rather, if a State chooses to enforce, for example, oral arbitration agreements or unsigned arbitration agreements, it is free to do so – in such cases, however, the Convention will simply not apply and the validity of the arbitration agreement (and any award) will be governed solely by national law.[197] Since NYC Art. II's form requirement applies at the stage of enforcement of the arbitration agreement, when a party requests a national court to refer a dispute to arbitration and when a party challenges the validity of an arbitration agreement before an arbitral tribunal, the court and arbitral tribunal after proving the satisfaction of writing requirement of arbitration agreement respectively should enforce arbitration agreement by permitting the dispute to be resolved by arbitration.

According to the cumulative readings of Arts.3326/2 and 3328 of the CC and Art. 315/1 of the CPC and Art.1727/2 of the CC arbitration agreements in order to be valid agreement it must be concluded in written form, signed by the parties, and attested by capable witnesses. On the other hand, an arbitration agreement with a certain administrative body need to be (1) in writing, (2) attested at least by two witnesses, and (3) registered with a court or notary. [198] Understandably, such formality requirements are not good incentives to arbitral settlement of disputes involving administrative bodies. [199] Written arbitration agreements which may be valid for the purpose of the UNCITRAL MAL or the NYC may not necessarily be valid under Ethiopian law. As Ethiopian law requires written agreements to be attested by two witnesses under the pain of invalidity, arbitration agreements contained in telex or other means of communication which provide a record of the agreement are most likely to be invalid unless they relate to transactions which are not under the law required to be in writing.[200]

2.6. The Law Governing Commercial Arbitration

Parties to international commercial arbitration are free to choose the law applicable to the substance of their dispute arising out of main contract or disputes connected with arbitration agreement. Principle of Separability traditionally gives the autonomy of the arbitration agreement from the main contract. As a consequence, it is theoretically possible (and common in practice) for the parties' arbitration agreement to

[195] Ibid. P.1074
[196] Ibid.P.1076
[197] Ibid.
[198] Hailegabriel G. Feyissa, *Supra note* 18, P.307
[199] Ibid.
[200] Ibid, PP.307-308

be governed by a different law than the one governing their underlying contract.[201] Since it is commonly accepted norm that arbitrators get their power almost entirely from the consent of the parties, and also since choosing applicable law is the right of the parties, arbitrators have an obligation to respect that choice of the parties, and to base their decisions on the chosen applicable law. Such an express choice of governing law by the parties will avoid spending of time and resources in searching for relevant applicable law by arbitral tribunals or Courts.

However, if the parties in dispute are from the same country, they do not have the right to choose the applicable law since most of the national laws do not allow its citizen to avoid the law of their state. The major problem will arise in case when the parties in international commercial arbitration fail to choose governing law by agreement. International arbitration conventions partially address the question of what law governed the commercial arbitration conflict of law issues, but leaving substantial scope for interpretation.[202]In the absence of chosen applicable law by the parties the arbitral tribunals and courts try to determine the applicable laws, on the basis of various laws, rules and globally accepted practice and approaches. According to Professor Redfern and Professor Hunter there are five different choice-of-law issues in international arbitration as mentioned in their book:[203] (1) determination of the law governing the arbitration agreement; (2) determination of the law governing the arbitral proceedings of the tribunal (the *lex arbitiri*); (3) determination of the substantive law applicable to the merits of the case; (4) determination of the other applicable law and non-binding guidelines and recommendations (i.e. the procedural 'soft law' of international arbitration); and (5) the determination of the law governing recognition and enforcement of the awards.

2.6.1. The Law Governing Arbitration Agreement

It is proper, first to consider how the law governing arbitration agreements determined. One of the approaches or practices suggest that since the arbitration clause is only one of many clauses in a contract, it might seem reasonable to assume that the law chosen by the parties to govern the contract will also govern the arbitration clause.[204] This is because the principle of separability does not mean that an arbitration agreement will necessarily be governed by a different law from the law governing the main contract. The principle of separability merely calls for the arbitration agreement to be treated as a separate and distinct agreement from the main contract.[205]If the parties expressly choose a particular law to govern their agreement, why should some other law—which the parties have not chosen—be applied to only one of the clauses in the agreement, simply because it happens to be the arbitration clause? There is a very strong presumption in favor of the law governing the main contract which contains the arbitration clause also

[201] Gary B. Born, *supra note* 73,PP.738-739
[202] Ibid., P.742
[203] Redfern A. and Hunter M, *Supra note* 25, ¶ 3.07, P.157
[204] Ibid, ¶ 3.12, P.158
[205] Gary B. Born, *supra note* 73, P.741

governing the arbitration agreement.[206] This principle has been followed in many cases.[207] Similarly, on 9 October 2020, the UK/English Supreme Court in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb*[208] clarified the applicable principles for determining the proper law of an arbitration agreement and held that: where the arbitration agreement is silent on the law governing it, but the main contract contains a governing law clause this will generally apply by extension to the arbitration agreement and that governing law will apply to the arbitration. This supports the approach that the arbitration clause is generally governed by the same law chosen to govern the main contract.

The other approach is based on the principle of separability. According to this approach the arbitration agreement is separable from the underlying contract, and it is this separability of an arbitration clause that opens the way for the possibility that it may be governed by a different law from that which governs the main agreement.[209] This means that, in the absence of a choice by the parties, the law applicable to the arbitration agreement need not necessarily be the law governing the main contract, rather it is the law of the seat that govern arbitration clause. As Redfern and Hunter stated that the NYC points towards this conclusion.[210] In the provisions relating to enforcement, the NYC stipulates that the agreement under which the award is made must be 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' (which will be the law of the seat of the arbitration).[211]

Moreover, NYC under Art. V(1/a) provides that an arbitral award may be refused recognition where "the said arbitration 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." Similar approach is followed under Art. 34(2/a/i) of UNCITRAL MAL. Accordingly, in the absence of a parties' express or implied choice of governing law of arbitration agreement, both NYC and UNCITRAL MAL favor the law of the seat as a default option. Similarly, Switzerland followed this approach providing that as regards its substance, the arbitration agreement shall be valid if it conforms to the law chosen by the parties, or to the law applicable to the dispute, in particular the law governing the main contract, or to Swiss law.[212] As explained by the Swiss Federal Tribunal, "the principle of the autonomy of the arbitral clause … means, *inter alia*, that, in international commerce, the arbitration agreement and the main contract can be subject to different laws."[213]

[206] Redfern A. and Hunter M, *Supra note* 25, ¶ 3.12, P.158
[207] Ibid.
[208] UK Supreme Court JUDGMENT given on 9 October 2020 on Enka Insaat Ve Sanayi AS (Respondent) v OOO Insurance Company Chubb (Appellant)Case ID:UKSC 2020/0091
[209] Redfern A. and Hunter M, *Supra note 25,* ¶ 3.13, P.159
[210] Ibid., ¶ 3.14, P.159
[211] Ibid.
[212] Art.78/2 of SPILA
[213] Gary B. Born, *supra note 73,* P.746

On the other hand, French law also emphatically recognizes that a separable international arbitration agreement can be – and indeed must be – governed by a different law from that governing the underlying contract, and prescribes a specialized choice-of-law rule with regard to the substantive validity of such agreements.[214] Thus, the French Cour de Cassation's landmark decision in *Municipalité de Khoms El Mergeb v. Société Dalico* held that: by virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law."[215] Accordingly, The French courts developed third ways called `*parties' common intention*` adopting a different method whereby the existence and scope of the arbitration agreement is determined exclusively by reference to the parties' discernible common intentions.[216]

Notwithstanding the choice of law issue mentioned above the potential issues that are governed by the law (or laws) applicable to an arbitration agreement include:[217] (1) formal validity of an arbitration agreement; (2) capacity of parties to conclude an arbitration agreement; (3) authority of parties' representatives to conclude an arbitration agreement; (4) formation and existence of an arbitration agreement; (5) substantive validity and legality of an arbitration agreement; (6) "non-arbitrability" or "objective arbitrability"; and (7) identities of the parties to an arbitration agreement; and other related issues.

2.6.2. The Law Applicable in Arbitration Proceedings

Parties in the arbitration agreement are free to choose or refrain from choosing the law governing the arbitral procedure. An international arbitration usually takes place in a country that is 'neutral', in the sense that none of the parties to the arbitration has a place of business or residence there.[218] When parties choose neutral country as a seat of arbitration, their intention partially is choosing neutral procedural law that governs the arbitral proceedings. *Lex arbitiri,*[219] is the law that regulate the internal procedural processes of the arbitration, and also the external supportive and supervisory relationship between the arbitration and the courts. Parties choose a particular seat of arbitration precisely because its *lex arbitri* is one that they find attractive.[220]Nevertheless, once a seat of arbitration has been chosen, it brings with it its own law. If that law contains provisions that are mandatory as far as arbitrations are concerned, those provisions must be obeyed.[221]

[214] Ibid,P.747
[215] Ibid.
[216] Redfern A. and Hunter M, *Supra note 25,* ¶ 3.33-3.34, P.164
[217] Gary B. Born, *supra note 73*, PP. 753-754 §4.03
[218] Redfern A. and Hunter M, *Supra note 25*, ¶ 3.37, P.166
[219] The *lex arbitiri-* is the Latin phrase meaning the law of the arbitration and it is used to indicate the law of the seat of the arbitration.
[220] Redfern A. and Hunter M, *Supra note 25*, ¶ 3.64, P.176
[221] Ibid.

Even if the scope of *Lex arbitiri* vary from country to country most of the time it governs all the issues relating to the arbitration proceeding, such as: the composition and appointment of arbitrators, the removal of arbitrator[s]; due process procedure such as statements of claim and defense, hearings, default proceedings; the issue of provisional relief; the external relationship between the arbitration and the courts for instance in relation with grant of interim relief; assistance in collecting evidence from third parties and securing the attendance of witnesses; the procedural timetable and provisions related to the award, the form and validity of the arbitration award; and the finality of the award, the setting aside of awards including any right to challenge it in the courts of the place of arbitration; recognition and enforcement of arbitral awards; regulates the relationship between arbitration and the public policies; and arbitrability and mandatory laws of that country used as the seat of arbitration. In most jurisdictions, *lex arbitri* provides significant freedom to parties and arbitrators to choose rules of procedure in relation to the conduct of the proceedings, as long as due process is respected.

If we look at international view, the Geneva Protocol on Arbitration clause under Art. 2 provides that the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place. Similarly, UNCITRAL MAL states that without prejudicing the provisions of this Law [MAL], the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings; however, when parties failed to choose applicable procedural law in their arbitration agreement, the arbitral tribunal may, subject to the provisions of this Law[i.e.,the arbitration law of the seat], conduct the arbitration in such manner as it considers appropriate.[222] Singapore applies verbatim what is laid down under UNCITRAL MAL regarding the applicable law on arbitration proceedings.[223] Rwanda,[224] Nigeria,[225] France[226] and Switzerland[227] similarly provides that without prejudicing mandatory provisions and public policies of each country allow parties to an arbitration seated locally to agree choosing a foreign procedural law, which will then replace or supplement most aspects of the arbitration law of the seat. All the laws reviewed here in similar languages impose obligation upon arbitral tribunal that it regardless of the chosen procedure to safeguard the parties' equal treatment as well as their right to be heard in proceedings.[228]

However, the repealed Ethiopian arbitration law which placed under CPC incorporated only one article which deals about the law applicable in arbitration proceeding. This law requires arbitral tribunal to follow almost similar procedures what civil court would follow during its proceeding.[229] But, under Art. 317/2 the law tacitly allows the parties can agree that arbitrator should be able to follow a proceeding different form

[222] Art.19 of UNCITRAL MAL
[223] See Arts. 19 of Singapore IAA of CHAPTER 143A
[224] Art. 31of RLACCM
[225] Art.15(2 and 3) of NACA
[226] Arts. 1509 and 1510 of the FCCP
[227] Arts. 182 to 185a of the SPILA
[228] See for instance, Art.28 of EACWPP, Art.182/3 of SIPLA, Art. 30 of RLACCM, Art. 14 of NACA and also Art. 1510 of FCCP.
[229] Art. 317/1 of Ethiopian CPC

CPC and able to hear parties and their evidence and decide cases on another agreed legal basis. This makes this law inadequate and uncertain to determine whether an arbitrator is bound by the express terms of the parties and also whether the arbitrator can simply ignore public policy and morality in order to give effect to the arbitration law chosen by an agreement of parties. To eliminate these difficulties and in order to address the issue of applicable law on domestic arbitration and on the international arbitration whose seat in Ethiopia and abroad the new EACWPP repealed the aforementioned outdated and inadequate article and adopted the detailed pro-arbitration choice of law provisions which are similar with UNCITRAL MAL.[230]

2.6.3. The Law Applicable on the Recognition and Enforcement of the Foreign Arbitral Awards

NYC is the main international source for recognition and enforcement of foreign arbitral awards. It under Art. III provides the base for the free spread of arbitral awards. Accordingly, arbitral awards more frequently than foreign court judgments may be claimed to be recognized and enforced in almost any Contracting States where the losing party has assets after the procedure of their recognition and enforcement. Moreover, all Contracting States of NYC bound to accept binding nature of arbitral awards and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.[231] The NYC laid down only the general framework and providing minimum conditions for recognition and enforcement foreign awards.

Art. VII/1 of the NYC provides a saving clause that allows parties to rely on (and Contracting States to apply) national law rules that are more favorable to recognition than the Convention itself. Thus, Contracting States are free, by virtue of both Art. VII and the general structure and purpose of the Convention, to accept proof of an award that does not satisfy Art. IV's literal requirements, and less demanding requirements of local law regarding proof of an award.[232] Hence, its recognition and enforcement is subject to the national rules of procedure, which may be different for domestic and foreign awards, but only so long as the latter are not subjected to 'substantially more burdensome conditions'. Even if the uniformity is not absolute, the rules of the NYC provide a very efficient and largely uncontested global uniform regime for the recognition and enforcement of foreign arbitral awards. Art.VII/1 NYC contains a 'most favorable treatment' clause which allows the contracting states to adopt more enforcement-friendly solutions in their national arbitration laws.[233] Similarly, UNCITRAL MAL under Arts. 35 and 36 incorporated nearly verbatim provisions with Art V of the NYC, with only slight drafting changes for the recognition and enforcement of foreign awards.

[230] Arts. 3, 29 and 41 of EACWPP.
[231] Art.III of NYC
[232] Gary B. Born, *supra note 73*, P. 7594.
[233] *Jan Kleinheisterkamp*,recognition and enforcement of arbitral award, available at- https://max-eup2012.mpipriv.de/ index. php/ Recognition_and_Enforcement_of_Arbitral_Awards

UK/English and Switzerland provide that recognition and enforcement of foreign arbitral awards are ruled by the 1958 NYC.[234] French awards rendered in domestic arbitration, foreign awards rendered in international arbitration and awards rendered in France in international arbitration must be first recognized as effective in the French legal order in order to be enforced.[235] France even though it is the Contracting Party to the NYC since 24 September 1959, it shall not apply the Convention when the French legislation for the recognition or enforcement of the award is sought is more favorable to recognition and enforcement than the New York Convention.[236]

Before Ethiopia ratified the NYC it is Art. 461 of CPC which dealt with enforcement of foreign arbitral awards. However, there is on provision under CPC that applicable on the recognition of foreign arbitral awards. EACWPP repealed Art. 461 of CPC and under section eight contains provisions for the recognition and enforcement of foreign arbitral awards closely paralleling those of the NYC and UNCITRAL MAL. In Ethiopia as a principle it is the NYC that governs the recognition and enforcement foreign commercial arbitral awards. However, whenever the foreign arbitral award creditor believes that provisions incorporated under EACWPP are more advantageous to him/her than the NYC, EACWPP will be applied[237]. Provided that ongoing execution of awards while EACWPP is in the enactment process, shall be governed by the law Art.461 of CPC.[238]

2.7. Procedure for Appointment of Arbitrator[s] and immunity of Arbitrators

2.7.1. Mode and Procedure for Appointment of Arbitrator[s]

Once the decision to start arbitration has been taken and the appropriate form of notice or request for arbitration has been delivered, the next step is to establish the arbitral tribunal.[239] In both national and international arbitration, the appointment of arbitrators may be the most important task and the decision to be made by parties and/or anybody empowered to with this responsibility. The appointment of the arbitrator is one of the rights that exercised by the parties under the principle of party autonomy. In principle, the parties should be free to choose their own arbitrators, so that the dispute may be resolved by 'judges of their own choice'.[240] Once a decision to refer a dispute to arbitration has been made, choosing the right arbitral tribunal is critical to the success of the arbitral process.[241] It is an important choice not only for the parties to the particular dispute, but also for the reputation and standing of the process itself.[242] As identified by Redfern and Hunter among several different methods of appointing an arbitrator[s], the

[234] Sects 101/2 and 103 of the English Arbitration Act of 1996 and Art. 194 of SPILA
[235] Marie Danis and Karol Bucki, France-JURISDICTION DETAILED ANALYSIS,(2021), P.20, available at - https://delosdr.org/ see also Arts. 1514 - 1517 of 2011 FCCP are applicable for recognition and enforcement of foreign arbitral awards in France.
[236]Barbara Levy, Alison Vogt and Paul Talbourdet, Enforcement of judgment:France law and practice (2019), available at- https://www.de-pardieu.com/
[237] Art.3/2 and 53/1 of EACWPP.
[238] Arts.77/2 and 78/2 of EACWPP.
[239] Redfern A. and Hunter M, *Supra note 25*, ¶4.01,P. 229
[240] Ibid, ¶4.16,P. 234
[241] Ibid, ¶4.13,P. 233
[242] Ibid.

most usual are: [243] by agreement of the parties; by an arbitral institution; by means of a list system; by means of the co-arbitrators appointing a presiding arbitrator; by a professional institution; or by a national court.

As stated here in above a major attraction of arbitration is that it allows parties to submit a dispute to judges of their own choice rather than requiring that choice to be exercised by a third party on their behalf. [244]Empirical findings confirm that the parties' opportunity to participate in the appointment or selection of the arbitrators remains a key attraction of international arbitration for users today.[245] In addition, national courts and substantive standards of national law may also play a role in the appointment … in arbitrations.[246]

Sometimes, a party seeking to undermine an arbitration will refuse to appoint an arbitrator, or refuse to agree on a third arbitrator appointed by two arbitrator.[247] This situation can best be avoided by a provision in the arbitration agreement, or in the applicable arbitration law of the seat and procedural rules, that allows an experienced institution to intervene and make the appointment in the event of default.[248] If the parties are unable to reach agreement upon the appointment of an arbitrator[s] and where no one is expressly empowered to make the appointment, it is usually the court of the seat that has the power to nominate any remaining members of the tribunal….[249]Accordingly, national courts are usually empowered to appoint arbitrators in circumstances in which it becomes necessary for one of the parties to a dispute to request them to do so.[250]

If we look at the position of some of International legal frameworks and some pro-arbitration countries' arbitration laws, the Geneva Protocol under Art.2 and the Geneva Convention under Art. 1(2/d) provided that the appointment of the arbitrator[s] shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place or in conformity with the law governing the arbitration procedure. NYC under Art. V(1/d) provides that recognition of an award may be refused if: "the composition of the arbitral authority … 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."

UNCITRAL MAL on the other side, under Art. 11(2 and 3) recognizes that the parties are free to agree upon a procedure of appointing the arbitrator[s], and also if the parties are unable to agree in an arbitration with a sole arbitrator and if the two delegated arbitrators fail to appoint the third arbitrator within specified time of their appointment, the appointment shall be made, upon request of a party, by the court or other

[243] Ibid, ¶4.33,P. 240
[244] Ibid, ¶4.34
[245] Gary B. Born, *supra note 73*, P. 2757
[246] Ibid, P.2758
[247] Redfern A. and Hunter M, *supra note 25*, ¶4.35,P. 240
[248] Ibid.
[249] Ibid, ¶4.42,P.243
[250]Ibid, ¶4.45,P.244

authority specified in Art. 6. Similar approaches have been followed by French, Singapore, Nigeria, Rwanda, Switzerland and UK arbitration laws.[251] Likewise, pursuant to the repealed Arts. 3333, 3334/1 and 3344/1 of the CC, a party to arbitration agreement after giving necessary notice to the other party has a legal right to demand judicial enforcement of the arbitration agreement if the other party refuses to appoint his part arbitrator; and in effect a court that is asked to enforce arbitration agreement shall appoint arbitrators on behalf of the defaulting party. EACWPP under section three provides some uncommon provisions applicable in determining when one party fails to appoint his part arbitrator or refuse to accept arbitrator appointed as a presiding arbitrator.

2.7.2. Immunity of Arbitrators

There are two main schools of thought with regards to the nature of the relationship between the arbitrator and the parties.[252] The first school considers that this relationship is established by contract.[253] The second school may be identified as the "status" school, which considers that the judicial nature of the arbitrator's function results in a treatment assimilated to that of a judge.[254] The contractual school sustains that an arbitrator is appointed by the parties to an arbitration to perform a service consisting in resolving a dispute between the parties for a fee. [255] The contractual approach finds favor in most civil law jurisdictions.[256] The "status" school is based on the performance by arbitrators of a judicial or quasi-judicial function, which grants an element of "status" entitling them to treatment similar to that of a judge. This approach is acceptable in most common law jurisdictions.[257] Accordingly, some countries assess arbitral immunity on the basis of contractual obligations, others define the scope of arbitral immunity by gaging an arbitrator's similarity in status to judges.

Unfortunately, arbitrators do not regularly enter into a separate contract with the parties for the provision of arbitral services, a different method is necessary to determine the terms and conditions of the *receptum arbitri*.[258] On the other hand, by consenting to act as an arbitrator, an individual impliedly becomes a third party to the parties' original arbitration agreement.[259] On appointment the arbitrator becomes a third party to the arbitration agreement which becomes a trilateral contract.[260] Accordingly, the group of countries followed contract school of thought base their determination on the arguments that the relationship between arbitrator and parties is contractual; arbitrator is employed by the parties in seeking to resolve

[251] See Arts. 1451-1456 of the FCCP, Arts. 11 of the SIAA, sect. 7 of the NACA, Art. 13 of the RLACCM, Art. 179 of SPILA and Sects..16 -18 and 26-27 of UK/English Arbitration Act of 1996.
[252] Ramón Mullerat, The liability of Arbitrators: a survey of current practice, International Bar Association Commission on Arbitration Chicago, (21 September 2006), P. 2
[253] Ibid.
[254] Redfern A. and Hunter M, *Supra note 25,* ¶5.50,P. 321
[255] Ramón Mullerat, *supra note 252*
[256] Ibid.
[257] Ibid.
[258] Franck, Susan, "The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity" (2000). Articles in Law Reviews & Other Academic Journals. 1581. P.6, Available at: https://digitalcommons.wcl.american.edu/facsch_lawrev/1581 *Receptum arbitri* is an arbitrator's agreement to serve as an arbitrator.
[259] Ibid.
[260] Ibid.

their dispute and for this he is paid a remuneration. And if there is a contract between the arbitrator and the parties, such contract expected to contain both explicit and implicit – obligations that are negotiated with the parties, but it also includes certain mandatory terms, for instance, the obligation to perform in good faith and to apply mandatory rules in the performance of the arbitration. [261] In many civil law jurisdictions, arbitrators are merely professionals whose liability is determined by the general principles of contractual liability contained within the civil code.[262] This school of thought usually bases liability on the terms of appointment rather than the functions an arbitrator performs.[263] These factors potentially produce contractual liability on the arbitrator for a breach of this contract.

On the other side, the status school determines the scope of arbitral immunity by evaluating an arbitrator's similarity in status to judges. As stated in one UN Resolution without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.[264] Despite this broad immunity, there are areas of liability. Specifically, judges are not immune from criminal prosecutions and impeachment from office.[265]The rationales behind judges' immunity are that judges' immunity is founded upon the need to protect their independence and impartiality and freedom from undue influence. The immunity of arbitrators from suit is partly based upon the doctrine of judicial immunity and often depends on whether an arbitrator's responsibilities are functionally comparable to those of a judge.[266]

It is common law jurisdictions that generally have supported this exclusion of liability for the arbitrators.[267] They have traditionally based the justification for it on the ground that arbitrators should be treated akin to judges. However, there are a number of differences between judges and arbitrators:[268] a) a judge's power derives directly from the state and the general law of the nation; while an arbitrator's jurisdiction derives directly from the agreement of the parties; b) a judge is neither nominated nor remunerated by the parties; while an arbitrator is; c) a judge is only accountable to the state, while arbitrators are accountable to the parties and the arbitral institution; and d) the judge's decision can be revised or rectified upon appeal, while the arbitrator's award cannot. However, since the arbitrator has an adjudicatory function and has the same obligation of independence and impartiality like a judge, and the judge in doing so should be immune of liability, commentators assimilate the two and conclude that, an arbitrator should be immune as well.[269] However, the arguments are not all one-way. There are a number of policy arguments against immunity:

[261] Ramón Mullerat, *supra note 252,* P.3
[262] Franck, Susan, *supra note 258*,P.7
[263] Ibid.
[264] Basic Principles on the Independence of the Judiciary, General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985
[265] Franck, Susan, *supra note 258*,P.17
[266] Ibid.,P.15
[267] Ramón Mullerat, *supra note 252,* P.9
[268] Ibid.,PP.9-10
[269] Ibid., P.10

immunity may encourage carelessness; the finality of the decision is given priority over individual justice; disciplinary remedies are generally unavailable against arbitrators; and alternative remedies, such as *vacatur(set aside)* of the award and withholding of fees, may be inadequate.[270]

When come to investigate legal bases of arbitrator immunity, when UNCITRAL was preparing the Model Law, to search for a satisfactory uniform solution on the issue a survey was made covering thirteen countries, and the summary prepared by its editor, suggest that the United States is the only country in favor of full immunity.[271] Of the other countries, some granted limited immunity (Austria, England, Germany and Norway), others did not preclude liability (France, Spain and Sweden), while the remainder had yet to express a clear position.[272]As a result UNCITRAL left the issue unsettled.

However, the ICSID Convention under Arts. 21-22 provides arbitrators in ICSID arbitrations (as well as witnesses, experts and counsel) with a very broad grant of absolute immunity from national court jurisdiction or civil liability. Arbitration institution such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the American Arbitration Association(AAA) have adopted the common law approach excluding liability from arbitrators.[273] For instance, the ICC Rules of Arbitration, in Art. 34, establishes a total exclusion of liability for arbitrators and related institutions. Therefore, for those parties who include reference to the ICC Rules in their arbitration clause in theory, they would grant total immunity to the arbitrator and related institutions and thus relinquish their right to subsequently make a claim if dissatisfied.[274] LCIA Rules of Arbitration, under Art. 31.1, also exclude liability for all acts and omission connected to the arbitration. Different from the ICC though, the LCIA allows for liability for any deliberate wrongdoing.[275]

Singapore, which is one of UNCITRAL MAL country, under its International Arbitration Act (SIAA) provides that an arbitrator shall not be liable for - negligence in respect of anything done or omitted to be done in the capacity of arbitrator; and in respect of any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award.[276] If we look at French arbitration law there is no legal provision concerning the liability of the arbitrators in France. In more recent French decisions appear to hold that, in order to safeguard the arbitrator's independence, only claims for gross fault or fraud can be asserted.[277] The French courts have been more restrictive and in different decision held that "civil liability can only be incurred [by the arbitrators] ... where it is established that they have

[270] Redfern A. and Hunter M, *Supra note 25,* ¶5.58,P. 325
[271] Ibid., ¶ 1085,P.592
[272] Ibid.
[273] Ramón Mullerat,supra *supra note 252*, P.12
[274] Ibid.,P.13
[275] Matthew Rasmussen, Overextending Immunity: Arbitral Institutional Liability in the United States, England, and France, *FORDHAM INTERNATIONAL IA WJOURNAL* Volume 26, Issue 6,(2002),P.1837
[276] Art. 25 of the SIAA
[277] Gary B. Born, *supra note 73*, P. 3078

committed fraud, misrepresentation, or gross fault.[278] Therefore, an arbitrator may be fully immune from civil liability unless he is liable committing fraud, misrepresentation, or gross fault for his acts based on the contractual relationship with the parties. Similarly in Switzerland there is no law that deals with liability of arbitrators in a direct sense.[279] The relationship between the arbitrator and the parties shall be governed based on their contract. Importantly, under Swiss law, gross negligence cannot be excluded from a contract, whereas simple negligence can be so.[280]

On the other hand, as stated under sect. 24 of the 1996 UK/English Arbitration Act an arbitrator is not liable for anything done or omitted to do in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith. Moreover, UK/English Arbitration Act of 1996 under sect. 74 extends immunity to arbitral institutions to protect institutions against legal actions brought by dissatisfied parties. Immunity in the United Kingdom (i.e., England, Wales and North Ireland) is therefore total except when the arbitrator acts in bad faith.[281]As laid down under schedule one of 1996 Arbitration Act this is a mandatory provision which the parties cannot derogate.

Almost all contemporary national arbitration regimes provide international arbitrators with expansive statutory or common law immunities from civil claims based on the performance of their adjudicative functions.[282] Many contemporary arbitration statutes provide legislative grants of either absolute or qualified immunity, or where no such statutory provision exists; national court decisions typically recognize either absolute or broad qualified arbitrator immunity.[283] Accordingly as stated above in some countries legal regime, arbitrators are granted absolute immunity from any civil liability for actions or omissions in the course of their adjudicative functions (even includes a failure to disclose.)[284]. In others, arbitrators are given qualified immunity for actions not involving fraud, intentional misconduct, or comparable actions or omissions.[285]

2.8. Conduct of Arbitral Proceedings

2.8.1. Oral Hearings as one of the Element of Due Process

Universal Declaration of Human Rights stated that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations...".[286] Due process of law requirements are also recognized and protected under our constitution.[287] Usually due

[278] Fouchard, *supra note 30,* ¶ 1098,P.598
[279] Ibid. P.20
[280] Ibid.
[281] Ramón Mullerat, *supra note 252*, PP.14 -17
[282] Gary B. Born, *supra note 73*, P.3073
[283] Ibid.
[284] Ramón Mullerat, *supra note 252*, P.11
[285] Gary B. Born, *supra note 73,* P.3076
[286] Universal Declaration on Human Rights, United Nations General Assembly, Paris, December 10, 1948 Art. 10.
[287] Cumulative readings of Arts.13/2,20,25,37/1 of Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, Federal Negarit Gazeta - No.1 21st August 1995.

process is seen as a set of criteria that protect a private person in relation to the State and authorities.[288] Since arbitration is a private mechanism for dispute resolution, the competence of the arbitral tribunal is not based on the power of the State within its jurisdiction, but rather it is based on the parties' own arbitration agreement. But, a basic distinctive character of arbitration is that the arbitral award is a final and binding determination of the parties' rights and obligations. This feature gives an opportunity to the arbitral awards to be enforced even in international level. Making enforceable award is one of the most central duties of the arbitral tribunal. If the arbitral tribunal wants to issue an enforceable award, the process has to meet certain procedural quality standards.[289] These minimum quality standards can be called due process requirements just like the minimum standards in ordinary court procedure.[290]

All people are eligible to have a fair trial in determination of their civil rights and obligations. Despite arbitration is a substitute for a court trial in state court, it is not exempted from applying this procedural safeguards. The core of fair arbitration is the fairness of the procedure itself, including equality of arms (i.e., no party should be at a disadvantage vis-à-vis the other[s]), reasonable opportunity to present one's case, and the principle and rule of *audiatur altera pars.*[291]This is the principle that no person should be judged without a fair hearing and each party shall be given a full opportunity to present his case at all stages of the proceedings. Accordingly if this principle properly implemented and the arbitral procedure is fair, substantive rights of the parties are more likely to be enforced.

The right to be heard is considered as one of the foundations of due process in international arbitration law instruments and in national laws. As stated under Art. V(1/b) of the NYC recognition and enforcement of an arbitral award may be refused if a party "was otherwise unable to present his case". If arbitral tribunal wants its arbitral award to be recognized and enforced should provide each party a reasonable opportunity to present its case. Moreover, UNCITRAL MAL under Art. 18 provides safeguard to the parties' basic procedural right of equal treatment and their right to be heard as the essential principles of arbitral due process. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials. As stated more clearly under Art.24/1 of MAL, unless the parties have agreed that no hearings shall be held, as a rule the arbitral tribunal shall hold such oral hearings especially for presentation of oral arguments at an appropriate stage of the proceedings, if so requested by *a party* (emphases added).[292] Accordingly, unless the parties' arbitration agreement waives or excludes the possibility of an oral hearing arbitral tribunal should conduct oral hearings if requested by *any* party. As the language of Art. 24 of MAL makes clear, an

[288] Matti s. Kurkela, Santtu Turunen, Due Process in International Commercial Arbitration, Conflict Management Institute(COMI), second Edition,Oxford University Press, Inc.(2010),P.1
[289] Ibid,P.2
[290] Ibid.
[291] Ibid,P.185
[292] In relation to conducting the oral hearing UNCITRAL Arbitration Rules of 2013 under Art. 17/3 provides that- "if at an appropriate stage of the proceedings *any party* so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses… or for oral argument."

arbitral tribunal is not required to hold an oral hearing unless such a request is made.[293] Likewise, MAL countries such as Singapore, Nigeria and Rwanda provide the same protection for these basic procedural rights.[294] Similarly, UK as stated under sect. 33/1 of Arbitration Act of 1996 imposes duty upon the arbitral tribunal to conduct hearings fairly and impartially, and to give each party the right to be heard….

Accordingly, when those laws say *"a party or any party or each party or one of the parties"* they are allowing either of the party to require arbitral tribunal that it to facilitate the time and place on which oral hearings will be conducted. Hence, arbitral tribunal without demanding both parties request and consensus on oral hearings should decide whether to hold oral hearings for the presentation of oral argument, or whether the proceedings shall be conducted on the basis of written pleadings (statements of claim and defense) and other materials. However, if the tribunal accepts one party request and decides to conduct oral hearings it has to inform the schedule and hear other party's oral argument.

2.8.2. The Procedure for the Counter-Claim in Arbitral Proceedings

To begin with literal meaning Black's Law Dictionary defined counter-claim as:" A claim presented by a defendant in opposition to or deduction from the claim of the plaintiff." [295] According to this meaning counter-claim is a claim for relief either arising out of the same transaction cause of action or based on a distinct cause of action asserted by defendant against a plaintiff following the latter's original action. In domestic litigation the defendant may submit three types of counter-claims: (1) connected (to the main claim of the claimant), (2) compensatory (designed to compensate mutual obligations), and (3) incidental (requesting that the judgment address a certain preliminary (incidental) issue).[296]On the other hand, when facing a claim before an arbitral tribunal, the defendant has three options at his disposal. These are: one is, naturally, to deny the claimant's allegations; the other, a more 'offensive' tactic, would be to submit a counter-claim; and the third, a 'defensive' option, to raise a set-off defense.[297]

The basic principle that arbitral jurisdiction is founded on the will of the parties and that the arbitral tribunal may decide only on the issues that fall within the scope of the arbitration agreement. It is now definitely well-known that parties are obliged to submit disputes covered by an arbitration agreement to arbitration. The obligation to submit disputes covered by an arbitration agreement to arbitration tribunal results from a straightforward application of the principle that parties are bound by their contracts.[298] This principle, which is often expressed as the maxim *pacta sunt servanda*, is probably the most widely

[293] Gary B. Born, *supra note 73*, P. 3422
[294] Art.25/2 of SAA, Art. 20(1/c) of NACA and Art. 36 2nd para.of RLACCM.
[295] Black's Law Dictionary 4th Edition(1968),P.420
[296] Pavic, Vladimir, Counterclaim and Set-Off in International Commercial Arbitration. Annals International Edition, (2006), P.103. Available at SSRN: https://ssrn.com/abstract=1015713
[297] Ibid,P.102
[298] Fouchard, Gaillard, Goldman, *Supra note 30*,¶ 627,P.382

recognized rule of international contract law.[299] Therefore, counter-claim may be sought in the course of arbitration only if it emanated from the main contract or legal relationship that connected with arbitration agreement of the parties. A significant number of institutional rules provide that jurisdiction over counterclaim exists whenever a counterclaim is based 'on the same agreement to arbitrate', or on the 'same relationship'.[300]

According to Bradley Larschan & Guive Mirfendereski, counterclaims must conform to two broad criteria. First, counterclaims must relate to the original claim. Thus, without a claim there can be no counterclaim. Second, the amount of the counterclaim cannot exceed the amount of the original claim.[301] However, in my view the latter criterion may not be used for counter-claim since as long as counter-claim is based on the issue which emanated from arbitration agreement there is no logic to forbid respondent from submitting the claim which exceeds the amount of the original claim. Rather this criterion may be used for the defense of set off.

If we come to investigate international legal instruments the 1965 ICSID Convention, under Art. 46 specifies that… counter-claims, must arise "directly out of the subject-matter of the dispute" in order for the arbitral tribunal to be required to hear them. However, this Convention does not specify the time limit within which a counterclaim must be filed. Similarly, the UNCITRAL MAL under Art. 2/f recognizes the counter-claim similar in lines with the title 'claim'. Similarly, countries such as Nigeria, Rwanda, Switzerland and Singapore recognize counter-claim proceedings by giving the same status with the original claim.[302] However, UNCITRAL MAL does not provide detailed provision that show particularly when and how counter-claim submitted to arbitral tribunal. This procedural issue is expected to be addressed under arbitration rules and countries *lex arbitri*. For instance, UNCITRAL AR under Art. 21(3 and 4) and Nigerian Arbitration Rule under schedule one Art. 19(3 and 4) answer the when and how question stating that – the respondent in his statement of defense, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off. Moreover, under Art.5/5 of International Chamber of Commerce (ICC) Arbitration Rule of 2021, there are limits as to when a counterclaim can be submitted. Accordingly counterclaim must be filed at the same time as the answer to the request for arbitration. This rule may seem harsh, but it is designed to speed up the proceedings.303 On the other side, the London Court of International Arbitration

[299] Ibid.
[300] Vladimir Pavić , Supra note 293, P.105. See also Art. 21(3 and 4) of UNCITRAL MAR of 2013, and Art.19(3 and 4) of Nigerian Arbitration Rule and also ICC Arbitration Rules of 2021 under Art. 23 ("The parties may make new claims or counter-claims before the arbitrator on condition that these remain within the limits stated by the Terms of Reference or that they are specified in a rider to that document, signed by the parties and communicated to the Court").
[301] Bradley Larschan & Guive Mirfendereski, The Status of Counterclaims in International Law, with Particular Reference to International Arbitration Involving a Private Party and a Foreign State, 15 Denv. J. Int'l L. & Pol'y 11 (1986),P.13
[302] Art.57/6 of NACA, Art, 2/f of the first schedule of SICAA, Switzerland Arbitration Rules of 2021 under Art. 21/3, and Art. 4 of the last para. of RLACCM.
[303] Fouchard, Gaillard, Goldman, *Supra note 30,¶* 1222,P.661

(LCIA) Rules of 2014 under Art. 15.3 allows a party to wait until it submits its statement of defense to file any counter-claim.

2.9. Recourses Against Arbitral Awards

Arbitration is a decision making process as that of court litigation and its award is a final settlement on all issues submitted and arising out of legal relationship between parties. International arbitration policies are founded upon two basic interests: preserving the finality of arbitral awards and maintaining a just system.[304] The very reasons parties enter into international arbitration agreements-to increase speed, neutrality, efficiency, privacy, and finality, and to reduce costs of dispute resolution'-are rendered void if a national court is permitted to reexamine the decision of an arbitral panel.[305] On the other hand, there are dangers in the complete independence of arbitral forums and a forum with no system of review is more susceptible to abuse.[306] However, in both national and international level arbitration there are varieties of methods available to challenge against arbitral awards on certain limited grounds. In this regard judicial supervision systems are designed to protect the accuracy of an arbitration award and ensure justice and fairness of the system balancing the conflicting interest between justice and finality in arbitration. With this objective an award shall be challenged before a competent national court at the seat of arbitration and before the court the recognition and enforcement of award is sought to have that court declare all, or part, of the award null and void and also unenforceable. In this regard there are different types of methods of recourse against awards under national and international commercial arbitration laws such as internal method, setting aside an award, appeal, refusing enforcement and recognition of foreign award and other methods such as cassation and revision of arbitral awards. Analyzing all named methods of challenging arbitral award is not in the scope of this thesis; therefore it is limited in analyzing remedies of setting aside, refusing enforcement and recognition of foreign awards, and recourse against arbitral awards by cassation and revision.

2.9.1. Setting Award Aside and Refusing Recognition and Enforcement of Foreign Award

Even if arbitration is a private form of dispute resolution mechanism and its award is final and binding, arbitral award has been subject to some form of judicial review. The most frequently used methods for the loser party in the arbitration are – one is to challenge the validity of the award initiating setting aside application at the competent court where the award is made; and the other option is resisting winners claim recognition and enforcement of foreign award requesting the refusal of recognition and enforcement of that award. Even though the parties can contract to waive any right of appeal, they cannot avoid setting aside

[304] Jessica L. Gelander, Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations, 80 Marq. L. Rev. 625 (1997), P.626. Available at: http://scholarship.law.marquette.edu/mulr/vol80/iss2/4
[305] Ibid.
[306] Ibid.

and refusal of recognition and enforcement of foreign award recourses;[307] since which are designed to preserve mandatory issues [such as public policy, non-arbitrability and grounds based on fraud or similar issues] and basic principles of fairness. If losing party is successful by his application and if a court decides the arbitral award to be set aside wholly or partly the award shall be null and void and also accordingly a court may refer the case to the tribunal for retrial. On the contrary if the application for set the award aside is dismissed by the competent court the award, or any part of the award which has not been held void, and also if court where recognition or enforcement is sought rejected the request made by losing party an award becomes immediately enforceable. On the other hand, if losing party successfully resists the recognition and enforcement of the award, before the courts of that country the award shall not be enforced. But this does not mean that in any other country in which the loser has an asset.

Once an award is set aside by the court of the country of the award origin, it ceases to legally exist, or treated as invalid, and accordingly unenforceable, not only by the courts of the seat of arbitration, but also by national courts elsewhere. As a principle, as stated under Art. V(1/e) of NYC and Art. 36(1/a/v) of UNCITRAL MAL a court sought may refuse to grant recognition and enforcement of an award that has been set aside by a court of the seat of arbitration. However, France is one of the more liberal jurisdictions in this regard, famously granting recognition to a Swiss-seated award that had been set aside by Swiss courts.[308] It is vital to note that the setting aside of arbitral award by a court no longer include a review of the merits of an arbitral award. This feature has become a generally accepted principle as well.[309]

Until the 1980s, arbitration laws around the world contained divergent grounds for setting aside an award.[310] That has changed with the UNCITRAL MAL of 1985[311] accordingly many countries of the world modernize their arbitration laws by direct incorporation and taking into account the grounds listed out in Model Law. The grounds on which an action to set aside can be brought against an international award are the same as those which can be raised to set aside against the domestic arbitral awards. Art, 34 of the MAL provides a comprehensive list of grounds. UNCITRAL MAL's language expressly provides, that Art. 34's lists of grounds for setting an award aside are exclusive and exhaustive.[312] These grounds are divided into two categories such as: the first category is lied down under Art. 34(2/a) by the application of a party, and also the second category is provided under Art. 34(2/b) for a court to set aside an arbitral award. In other words, the first five of these grounds must be raised by the party opposing recognition and enforcement of

[307] However, in France as stated under Art.1522 of FCCP parties can agree expressly to waive their right to bring an action to set aside. Moreover, in Switzerland as lied down under Art. 192 of SPILA except the right to revision under Art.190a(1/b)the same Act if none of the parties has its domicile, habitual residence, or seat in Switzerland, the parties may, either in the arbitration agreement or in a subsequent agreement, exclude in whole or in part recourse against arbitral awards.
[308] Redfern A. and Hunter M, *Supra note 25,* ¶10.06,P.570 foot note
[309] Albert Jan van den Berg, Should the Setting Aside of the Arbitral Award be Abolished? ICSID Review, Vol. 29, No. 2, Oxford University Press, (2014),PP. 263–288 doi:10.1093/icsidreview/sit053,P.268
[310] Ibid*,* P. 267
[311] Ibid.
[312] Gary B. Born, *supra note 73,*P.5269

an award; the last two can be raised *sua sponte*[313] by a court. One of the grounds for a court to set award aside is the ground of "*Public policy*". The former category imposes the burden of proof on the party making the application to setting aside arbitral awards. The latter category essentially relates to the seat State's most basic philosophies of morality and justice. Therefore, for the purpose of protecting the interests of the third parties or of the public in general, depending on local law, different allocations of the burden of proof may be applicable. Despite the fact that, Art. V(1/e) and VI of the NYC indicates the possibility of setting aside an award, it does not provide any grounds that may be relied upon to setting aside an international award in the arbitral seat.

Similarly, both NYC and UNCITRAL MAL provide nearly the same grounds for refusal of recognition and enforcement of foreign awards. [314] These grounds are an exclusive list of substantive grounds which may be relied upon in refusing "recognition or enforcement" of foreign and non-domestic awards.[315] Among these grounds which may be used to refuse recognition and enforcement of foreign award, one of the grounds is the violation of *public policy* of the country where recognition and enforcement of the award is sought. Similar grounds are placed under the arbitration laws of UNCITRAL MAL countries such as Nigeria and Singapore.[316]Likewise, UK as stated under sect. 100 of 1996 English Arbitration Act, applies NYC in the recognition and enforcement of "New York Convention award" means an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom)which is a party to the NYC. On the other side, in France an arbitral award shall be recognized or enforced if the party relying on it can prove its existence and if such recognition or enforcement is not manifestly contrary to international public policy. [317]

It is also clear as a general matter that Art.34's grounds for setting aside arbitral awards[318] and grounds stated At. 36 of MAL and Art. V of NYC for refusal of recognition and enforcement of foreign arbitral award are to be construed in a restrictive manner or these grounds should be construed narrowly. However, both the repealed and the new Ethiopian arbitration laws used different broad terminology instead of using the terms *public policy.* As stated in the repealed Ethiopian Arbitration law, enforcement of foreign arbitral award will be refused if it is contrary to public order or morals.[319] Further, EACWPP under Art.50(4/b), 51(3/b) and 53(2/f) provides the terms *public policy, morality or/and national security* instead of *public policy*. Moreover, the message provided under Arts. 50(4/b) of EACWPP is not clear when seen in light of the basic objective to claim setting aside of arbitral award.

[313]Ibid,P.5835 - a court has taken notice of an issue on its own motion without prompting or suggestion from either party.
[314] Art. V of NYC, Art.36 of UNCITRAL MAL and for instance, Art.194 of SPILA.
[315] Gary B. Born, *supra note 73,* P.5259
[316] Sect.48(b/ii) of NACA and Sect. 48(b/ii) of SAA of 2001
[317] Art. 1514 of FCCP.
[318] Gary B. Born, *supra note 73*, P.5272
[319] Art.461/e of CPC.

2.9.2. Challenging Awards through Revision, Appeal and Cassation

2.9.2.1. Appeal

As clearly provided under Art. 34/1 of the UNCITRAL MAL recourse to a court against an arbitral award may be made only by an application for setting aside. Likewise in France Domestic Arbitration law an arbitral award shall not be subject to appeal, unless otherwise agreed by the parties.[320] If parties agreed to exercise the right of appeal on their domestic arbitration the court of appeal will have the power to hear an appeal on domestic arbitral award and shall rule in accordance with the law or as *amiable compositeur*, within the limits of the arbitral tribunal's mandate.[321] In principle, the only means of recourse against an international arbitration award made in France is an action to set aside.[322] Accordingly, unlike a court judgment that can be appealable in question of fact and law, it is generally accepted that a commercial arbitration award is final and binding. Pursuant to Art. 1522 of FCCP the parties in international arbitration sat in France by way of a specific agreement, at any time, expressly waives their right to bring an action to set aside. If the parties have waived their right to challenge the award, the FCCP provides the alternative right for the parties to appeal the order granting recognition or enforcement of the award in France.[323] Since such an appeal can only be brought in cases where parties have waived their right to apply for an annulment of the award, as described in article 1522 of the FCCP, this alternative right of appeal cannot be waived.[324]

Moreover, French courts are extremely favorable to the recognition of foreign awards as they consider that a foreign award, which was annulled at the seat of arbitration, may still be enforced in France, provided that such enforcement is not contrary to the French definition of international public policy.[325] In France foreign awards [awards made abroad] cannot be subject to an action to set aside, therefore, the only recourse available to parties who wish to resist enforcement of such awards is to appeal the order granting enforcement.[326] Such an appeal must be brought before the *Cour d'appel* of Paris within one month of service of the enforcement order.[327] In such cases, the *Cour d'appel* can only deny recognition on the same grounds as those listed in Article 1520 of the FCCP[328], which are applicable to an action to set aside

[320] Art. 1489 of FCCP
[321] Art.1490 of FCCP
[322] Art. 1518 of FCCP.
[323] Art. 1522 of FCCP
[324] Jean Fabrice Brun and Gauthier Poulin, International Arbitration law and rules in France, available at: https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/france
[325] Marie Danis and Karol Bucki, GUIDE TO ARBITRATION PLACES (GAP) France(2022)P.22 - This rule was first recognized in the OTV *v* Hilmarton case (Cour de cassation, 1st civil Division, 23 March 1994, n°92-15.137) and confirmed in the Putrabali case(Cour de cassation, 1st civil Division, 29 June 2007, n°05-18.053). Both rulings considered that an international arbitral award was independent from any national legal system and held that its validity should only be assessed with regards to the rules applicable within the country where enforcement is sought. Available at-https://delosdr.org/wp-content/uploads/2018/06/Delos-GAP-2nd-edn-France.pdf
[326] Art. 1525 of FCCP
[327] Ibid.
[328] These grounds are:- the arbitral tribunal wrongly upheld or declined jurisdiction;or the arbitral tribunal was not properly constituted; or the arbitral tribunal ruled without complying with the mandate conferred upon it; or due process was violated; or recognition or enforcement of the award is contrary to international public policy.

an international award made in France. The appeal is filed, heard and decided in accordance with the procedural rules governing ordinary litigation before the Court of Appeals.[329]

On the other side, in UK - the English Arbitration Act of 1996 which is applicable on both international and domestic arbitrations seated in England, Wales, or Northern Ireland, provides that, unless otherwise agreed by the parties in a limited category of cases, an award may be subject to appellate review by the English courts for substantive errors of law.[330] Even when the parties have not excluded its application either expressly or impliedly, sect.69 applies only to questions of English (not non-English) law (not facts), and then only to issues of English law that are of broad public significance or where the award was obviously wrong.[331] An appeal under sect.69 can only be initiated with either the agreement of all the parties to the proceedings or with the permission of the court (such permission only being granted if specific statutory conditions in sect.69/3 are satisfied). According to sect. 69 of the Act the law only permits an award to be annulled if the reviewing court concludes that it is "just and proper" to do so.[332]

In Singapore appeals on a question of law arising out of an award made in the proceedings is permissible only under the Domestic Arbitration Act (SAA) of 2001, subject to various conditions.[333] However, no appeal is allowed on international commercial arbitration where its seat is in Singapore.[334] As stated under sect.49/2 of SAA the right of appeal can be excluded by agreement; an agreement to dispense with reasons for the tribunal's award is deemed as an agreement to exclude the right to appeal. As per sect. 50/3 of SAA an appeal may be brought only if all the parties consent or with leave of the High Court and must be made within twenty eight days after the award has been made. As stated under sect. 49/5 of SAA before granting leave to appeal, the court must be satisfied that: a)the determination of the question will substantially affect the rights of one or more of the parties; b)the question is one which the arbitral tribunal was asked to determine; c) on the basis of findings of fact in the award: (i) the decision of the arbitral tribunal on the question is obviously wrong; or (ii) the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and d) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question. On appeal, the court may confirm, vary or remit the award to the tribunal in whole or in part, for reconsideration in light of the court's determination, or set aside the award in whole or in part.[335] The decision of the Court on an appeal under this section is to be treated as a judgment of the Court for the purposes of an appeal to the appellate court.[336]

[329] Fouchard, Gaillard, Goldman,, *supra note 30,* ¶ 1584,P.901.
[330] Sect. 69 of the 1996 UK/English Arbitration Act.
[331] Gary B. Born, *supra note 73,* P.5410
[332] Ibid.
[333] Sect. 49 of SAA of 2001.
[334] Sect. 24 of SIAA.
[335]Sect.49/8 of SAA of 2001
[336] Sect. 49/10 of SAA of 2001

In the repealed Ethiopian Arbitration law, appeal was one of the main recourses against arbitral awards on the grounds listed under Art.351 of the CPC and based on the conditions provided under their arbitration agreements.[337] Parties to an arbitration agreement could only waive their right of appeal with full knowledge of the circumstances.[338] Accordingly, in order to make valid waiver of a right to appeal, the parties to arbitration agreement should exclude the right to appeal in clear and express words. That means it is not enough mentioning that the award shall be "final and binding"; rather parties must use explicit exclusions. This indicates that recourse against arbitral award through appeal is a rule until expressly waived by parties in arbitration agreement.

Sedler in his *Ethiopian Civil Procedure* suggests that arbitral awards may not be reviewed as widely as judgments inconsistent with the jurisprudence elsewhere[339]; and recommend courts to apply these grounds narrowly. Yet, the practice in Ethiopian courts does not support such a view. Inconsistent with what Sedler holds, courts have shown their willingness in practice to review awards on the merits when they are appealed.[340] Moreover, courts do not have difficulties in proceeding to review the merits of arbitral awards as Art 351/a of CPC clearly allows judicial review of awards which are wrong in matters of law and fact.[341] Whereas, under EACWPP provides that an arbitral award shall not be subject to appeal, unless otherwise agreed by the parties.

2.9.2.2. Cassation

Cassation comes from the French verb casser and its literal meaning is to "quash the force and validity of a judgment.[342] In France the *Cour de Cassation (Court of Cassation* sometimes called *Cour de Supreme)* was created in 1790 as part of the reorganization of the French judicial system initiated during the early days of the Revolution.[343] Its main function is to review question of law on decisions of the *cours d' appel* and certain other decisions that are not subject to any further *appeal.*[344] There is also a Court of Cassation (*Corte di cassazione*) in Italy, and in Italy a Court of a Cassation according to Art. 111 of the Constitution provides that review of judgments based on errors of law is always permitted.[345] This provision, however, must be read in connection with the Code of Civil Procedure which provides that only appellate judgments and non-appealable judgments of courts of first instance may be reviewed by Cassation.[346]

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[337] Art. 350/1 of CPC.
[338] Art. 350/2 of CPC.
[339] Sedler, R. *Ethiopian Civil Procedure.* Addis Ababa, Haile Selassie I University Press, (1968) P.390, in Hailegabriel G. Feyissa *supra note 261*, PP. 325-326.
[340] Hailegabriel G. Feyissa *supra note 18*, P.326.
[341] Ibid. This conclusion works only if appeal is applied and entertained in accordance with CPC.
[342] B*lack's Law Dictionary 5th Edition P.197*
[343] Peter Herzos and Martha Weser, CIVIL PROCEDURE IN FRANCE, *(*1967) *Martinus Nijhoff,* The Hague, Netherlands, P.158
[344] Ibid.
[345] *Mauro Cappelletti and Joseph* M. *Perillo,* CIVIL PROCEDURE IN ITALY**,** *Columbia University School of Law Project on International Procedure*, Springer-Science+Business Media, B.V 1965,P. 270
[346] Ibid. PP.270-271

As a general rule, all judicial decisions that are not subject to other methods of review, if they are "judgments" as that term is understood in French law, may be brought before the *Cour de Cassation.*[347] Pursuant to the French international private law tradition, issues not specifically addressed in the FCCP provisions are often addressed in French court decisions most commonly rendered by the Court of Appeal of Paris or by the French Supreme Court (Cour de Cassation).[348] As provided under Art. 1518 FCCP international awards rendered in France may be subject to an action to set aside. All kind of awards, *i.e.* interim awards, partial awards etc., can be subject to an action to set aside immediately after having been rendered. The action to set aside has to be filed with the Court of Appeal of the place of arbitration within one month after notification of the award, in accordance with Article 1519 FCCP. Though it is not clearly provided under French arbitration the decision of the Court of Appeals can itself be brought before the *Cour de Cassation*, in accordance with the ordinary rules of French law on legal grounds.[349] If the Court of Appeals rejected the action to set aside, the award must be enforced before a party can seek to have that decision overturned before the *Cour de Cassation*, under Article 1009-1 of the 2011 FCCP.[350]

In France since 2011, parties pursuant to Art. 1502 of FCCP, may apply for revision of an arbitral award that is either domestic or international. This is an exceptional procedure which seeks to review the merits of the case when one of the parties discovers an award obtained by corruption, bribery or fraud after the rendering of the award. In domestic arbitration, such challenge shall be brought before the arbitral tribunal or before the relevant Court of Appeal if the tribunal cannot be reunited. In international arbitration, it is only in the event that the arbitral tribunal cannot be reconvened that the French Court of Appeal would have jurisdiction to hear the matter. After court of Appeal rendered a decision French Court of Cassation would entertain a case on point of law when a party aggrieved by appellate court decision applied to the court.[351]

According to Alemnew Gebeyehu Dessie, reviewing of arbitral awards through Cassation under the Ethiopian laws defining the cassation power of Supreme Courts are not aimed to give answers as to out of court dispute resolution mechanism.[352] Plus, whether cassation review is a non-waivable avenue unlike the avenue of setting aside, and as a default avenue unlike an appeal, is not also provided under Ethiopian arbitration laws.[353] The amount of time consumed at a cassation bench and the plasticity of the meaning of the term basic error of law justify that the avenue of cassation is not provided under the Ethiopian arbitration law either as a non-waivable avenue of judicial review of awards or as a default avenue. Similarly, another writer on Ethiopian Cassation recourse concluded that the answer as to the propriety of cassation review of award lies within the arbitration law and the close examination of this law reveals that

[347] Ibid. P.422
[348] Loukas A. Mistelis,(second edition),Concise International Arbitration, Kluwer Law International,(2015),P.1133
[349] Fouchard, Gaillard, Goldman,, *supra note 30*, ¶ 1591,P.907
[350] Ibid.
[351] Revision of Arbitration Awards under French Law(2021) Mr. Bernard Tapie's Cass, 30 juin 2016, Arrêt n° 932available at: https://www.acerislaw.com/author/aceris
[352] Alemnew Gebeyehu Dessie, *Supra note 19*, P.60
[353] Ibid.

the review is not available as a non-waivable avenue (unlike the avenue of setting aside) and as default avenue, either (unlike appeal).[354] What the arbitration law (especially such principles as parties autonomy, finality and privacy together) warrants that cassation review of awards is proper only when parties agree to that effect, which means when they create it by contract calculating the risk of ending up with an award with a basic error of law against their wish of, for example, bringing it to final as quickly as possible.[355]

2.9.2.3. Revision

As stated in previous sub section the most significant international legal instruments governing arbitral awards such as NYC and UNCITRAL MAL limit the extent to which courts are able to review arbitral awards. These legal frameworks introduced only the two methods for challenging against arbitral awards such as setting award aside and refusal of recognition and enforcement of foreign award. Judicial revision of arbitral award is an extraordinary means of recourse that aims at correcting an arbitral award that is already final and binding. [356] Reopening awards could seriously compromise legal certainty and increasingly expend parties' additional time and money. Thus, judicial intervention by revision of awards should only available in exceptional circumstances where justice and equity command a revision because the factual premise on which the award is based is fundamentally defective.

Accordingly, adopting additional grounds for setting aside (annulment) and introducing additional methods of challenging against arbitral award are the matter of national law, and the issues that subjected to this additional recourse against arbitral award are principally issues of national law. But when countries introduce judicial revision as an additional methods of challenging against arbitral awards they should provide due consideration to their international obligation and basic features of international commercial arbitration. In view of that even some pro-arbitration countries through their legal and judicial system have developed judicial revision as an additional mechanism to challenge against arbitral awards on limited grounds.

In France actions in revision were allowed before the reform in the event that, after the award had been made, fraud, falsification of documents or the concealment of decisive evidence came to light.[357] the French *Cour de Cassation* in its decision in the *Fougerolle* v. *Procofrance* case, relaxed the rule prohibiting actions in revision and it held that: the revision of an award made in France concerning international arbitration is, by way of exception, to be admitted in the case of fraud, as long as the arbitral tribunal remains constituted after the making of the award (or can be reconstituted).[358] Since 2011, parties either in domestic or international arbitration pursuant to Art. 1502 of FCCP may apply for revision of an

[354] Birhanu Beyene Birhanu, *Supra note 21*, PP. 136.
[355] Ibid, P.137.
[356] Catherine Anne Kunz, Revision of Arbitral Awards in Switzerland: An Extraordinary Tool or Simply a Popular Chimera? 38 ASA BULLETIN 1/2020, P.6
[357] Fouchard, Gaillard, Goldman, *supra note 30,* ¶ 1599,P.919
[358] Ibid.

arbitral award. This is an exceptional procedure which seeks to review the merits of the case when one of the parties discovers after the rendering of the award that (i) the arbitral tribunal was misled by fraud, or (ii) that the other party produced forged witness statements or documents, or (iii) that such party retained some key documents- decisive evidence that had been withheld by another party is recovered after the award was rendered. In domestic arbitration, such challenge shall be brought before the arbitral tribunal or before the relevant Court of Appeal if the tribunal cannot be reunited. In international arbitration, it can only be brought before the arbitral tribunal. It is only in the event that the arbitral tribunal cannot be reconvened that the French Court of Appeal would have jurisdiction to hear the matter.

Switzerland, on the other hand, under its revised Private International Law Act (SPILA) of 1987 [that entered into force from January 2021]; adopted method of revision against international arbitral awards based on previous case law from the Federal Supreme Court.[359] As stated under this Act the revision of an award can be applied based on three grounds: (a) when a party after notification of the award discovers material facts or conclusive evidence that it could not submit in the arbitration proceedings despite applying the required due diligence; (b) in the event that criminal proceedings have established that the arbitral award was influenced to the detriment of the challenging party, by a crime or misdemeanor, even in the absence of any conviction; and (c) despite having exercised due diligence, a ground for challenge an arbitrator under Art.180(1/c) (i.e., the circumstance of justifiable doubts as to that arbitrator's independence or impartiality) is discovered only after the award is rendered and if no other recourse against the award is available.

As lied down under Art. 190a/2 of SPILA the party seeking a revision of an award must file its application with the Swiss Federal Supreme Court within 90 days of becoming aware of the ground for the revision and, in any event, within the absolute deadline of 10 years from the date on which the award was notified, except if a criminal offence is the ground for revision, in which case the absolute deadline of 10 years does not apply. The revision procedure is governed by Articles 77(2bis) and 126 of Chapter 5a of the Swiss Federal Supreme Court Act. Unless the Federal Supreme Court determines the request for revision to be manifestly inadmissible or unfounded, it shall notify it to the opposing party and the arbitral tribunal for comment.[360] On the other hand when the Swiss Federal Supreme Court grants an application for revision, it annuls the award and remand the case to the arbitral tribunal for a new decision or make the necessary findings or if the arbitral tribunal no longer comprises the required number of arbitrators, as per Art.179 to a newly constituted tribunal.[361] This remedy of revision is of extraordinary nature and rarely successful.[362]

[359] Art. 119a of Chapter 5a of the Swiss Federal Supreme Court Act and Art. 190a of the SPILA
[360] Art.119a/2 of Chapter 5a of the Swiss Federal Supreme Court Act
[361] Ibid, Art.119a(3 and 4)
[362] Franz Stirnimann Fuentes, Jean Marguerat, and others, The Guide to Challenging and Enforcing Arbitration Awards - Second Edition Switzerland,(2021) available at: https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/switzerl

CHAPTER THREE

The Areas of Ethiopian Arbitration Laws Need Further Harmonization

3.1. Short overview of Ethiopian Arbitration Legal Framework

In Ethiopian history before the establishment of a formal judiciary (i.e., before the 1931 constitution) the dominant way of resolving disputes was the traditional dispute resolution mechanism that was exercised in every locality.[363] This was practiced in different forms and manners because of the diversity of cultures and traditions of the society.[364] Accordingly, arbitration as one of dispute settlement method had existed in the various indigenous communities in Ethiopia long before the beginning of formal court litigation. The traditional arbitration tribunals derive their authority from the custom and tradition of each community. Ethiopia embarked on a politically motivated modernization of its laws with the coming to power of Emperor Haile Selassie I, and the promulgation of the first Constitution of 1931 and more emphatically as of 1955 when the Constitution was revised.[365] Ethiopia, from the year of 1957-1965, codified six legal codes in its important codification project that aimed at modernizing its legal system. [366] In the effort to modernize the legal system, the Emperor decided to enact different codes derived from different countries such as laws and legal principles included in continental civil codes notably the French, Swiss, Italian and Greek, in addition to which Egyptian, Lebanese, and German codes, and for some provisions from Portuguese, Turkish, Iranian and Soviet codes were consulted.[367] This fact indicates that those codes were mostly transplanted from various foreign sources and made applicable to the country and was not the codification of the existing laws of the country, customary or otherwise. From this we can conclude that adopting foreign law provisions and legal experience into Ethiopian legal system is not the new phenomenon.

The modern effort at introducing arbitration into the Ethiopian legal system started with the promulgation of the Civil Code (CC) of 1960 and the Civil Procedure Code (CPC) of 1965. Accordingly, Arts. 3325-3346 of CC and Arts.315-319 and 350-357 and also Art. 461 of CPC were major substantive and procedural law provisions of Ethiopian arbitration laws. Over the past 50 years, virtually every major developed country has substantially revised or entirely replaced its international arbitration legislation, in every case, to facilitate the arbitral process and promote the use of international arbitration.[368] These laws mostly govern domestic arbitration issues without limiting themselves on commercial matters. These main

[363]HAILE ABRAHA MEHARI,THE WORKING OF THE ETHIOPIAN FEDERAL JUDICIARY, TUSCALOOSA, ALABAMA, (2019),P.26
[364] Ibid.
[365] Tsegai Berhane Ghebretekle and Macdonald Rammala, Traditional African Conflict Resolution: The Case of South Africa and Ethiopia, MIZAN LAW REVIEW, Vol. 12, No.2 (2018), P.340, Available at- http://dx.doi.org/ 10. 4314 /mlr.v12i2.4.
[366] Funke Adekoya, SAN and Prince-Alex Iwu,(Article), Arbitration procedures and practice in Nigeria: overview,(2021), P.353, Available online at- https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/nigeria
[367] Muradu Abdo and Gebreyesus Abegaz, Customary law,(Justice and Legal System Research Institute), Teaching Material(2009) Unpublished. P.114.
[368] Gary B. Born, *supra note 73*, P.199 - This includes legislation in France, Switzerland, UK/England and Singapore.

bodies of Ethiopian arbitration laws were repealed starting from April 2 of 2021 by the Ethiopian Arbitration and Conciliation Working Procedure Proclamation (EACWPP).[369]

As stated in previous part of this thesis UNCITRAL MAL produced with the aim of harmonizing national arbitration laws. Many countries have adopted the MAL, either entirely or in part.[370] As stated under the Parliament minute recorded during the discussion made on the draft EACWPP, drafter of this Proclamation were mainly inspired by the UNCITRAL MAL, NYC, Germany and Swiss Arbitration Laws.[371] Accordingly EACWPP drafted mainly following the drafting styles and containing provisions from MAL, but EACWPP has not adopted the entirety of the MAL.[372] Moreover, drafter of this law has tried to include the best experiences and practices from various countries' arbitration laws.[373] According to Art.77 of EACWPP, any arbitration agreement signed and arbitral proceedings initiated before the coming into force of this proclamation or cases of arbitration pending before courts, ongoing proceedings and execution of decisions [awards] shall be governed by the law that had been in force before the coming into force of this Proclamation. However, contracting parties who already concluded the arbitration agreement or arbitration agreement being concluded before the coming into force of this proclamation may agree to be governed by this law.[374]

EACWPP is enacted to govern both domestic and international commercial arbitration whose seat is in Ethiopia.[375] In addition to this it contains a few provisions that govern international arbitrations situated outside Ethiopia.[376]As stated under Art.4 of EACWPP an arbitration shall have international arbitration status if the principal business place of the parties are in two countries at the time of conclusion of the arbitration agreement; where the legal place of the arbitration chosen in accordance with the arbitration agreement or the place of the principal business where the substantial part of the obligations of the commercial or contractual relationship is to be performed or the place of business with which the subject-matter of the dispute is arisen and most closely connected is located in a foreign country; and where the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country. Even if there is no internationally agreed definition of the term 'international', what is meant by 'international arbitration' under EACWPP is verbatim copy of Art.1 (3 and 4) of the UNCITRAL MAL.

[369] Ethiopian Arbitration and Conciliation Working Procedure Proclamation no.1237/2021, No. 21, 2nd April, 2021,Federal Negarit Gazette
[370] Accessed on 24/11/2022 from https://www.uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status
[371] See FDRE House of Peoples Representative's (HoPR) Minutes recorded in writing on the Meeting held on 14th and 18th November 2020 when the House had been conducting discussion on the draft Proclamation of Ethiopian Arbitration and Conciliation Working Procedure. Available at: HoPR library. And also P. 2 of Final Explanatory Note prepared by Ministry of Justice for the draft of EACWPP.
[372] Ibid.
[373] Ibid.
[374] Art.77/3 of the EACWPP.
[375] Ibid. Art.3/1
[376] Ibid.Art.3/2

Following the enactment of this new law even if Ethiopia yet has not expressly registered among lists of countries which have enacted national arbitration laws adopting UNCITRAL MAL,[377] this law incorporated most of harmonized principles and standards provided under MAL. To mention some of harmonized basic principles and standards which are included under this law are: formal and substantive validity of arbitration agreement, principle of separablity; principle of competence-competence; principle of non- arbitrability, provisions designed to give supportive power to the court and to limit court intervention; provision that govern conduct of proceedings, forms, contents and also finality of arbitral awards; in relation to supervisory power of the court this law introduces setting aside arbitral award recourse as a default recourse[by making cassation and appeal as an optional recourses] against arbitral award and incorporate standardized grounds for setting award aside and also for refusal of recognition and enforcement of foreign arbitral awards.

The other legal measure taken by Ethiopia is the ratification of NYC of 1958. It is ratified by HoPR through proclamation no. 1184/2020.[378] Under this ratification proclamation Ethiopia puts one additional reservation in addition to the two common reservation provided under the NYC. The additional reservation provided under Art.3 of the proclamation is that the convention will be applicable in Ethiopia only to arbitration agreements concluded after the date of ratification and arbitral awards rendered after that date. Even if Ethiopia is signatory to the International Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention); as distinct from many of its sub-Saharan counterparts, Ethiopia has not yet ratified the 1965 Convention to which it was one of the first signatories.[379] Moreover, until recently Ethiopia has entered into more than 35 bilateral treaties dealing principally with commercial and investment relations.[380] Under these treaties Ethiopia agreed with its counter-parties disputes between a contracting party and an investor of the other contracting parties and also disputes between the contracting parties to be resolved by institutional and ad hoc arbitral tribunals. In the following sub sections some salient areas of EACWPP that might need further harmonization towards hard and soft international laws and some pro-arbitration countries' arbitration laws will be comparatively analyzed.

3.2. Formal Requirement of Attesting Arbitration Agreement by Two Witnesses

In both domestic and international commercial arbitration an arbitration agreement is one of the fundamental pillar and pre-condition of arbitration, without it arbitration cannot take place. Compared with the repealed Ethiopian arbitration law, EACWPP under Art.2/1 defined arbitration agreement more clearly

[377] *Supra note* 370
[378] *Supra note* 14
[379] Hailegabriel G. Feyissa *supra note* 18*,* P.302
[380] https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia

as 'an agreement to be implemented in order to partly or wholly settle future or existing dispute that may arise from contractual or non-contractual legal relationship'. In this regard EACWPP adopted option II of Art. 7 of UNCITRAL MAL as adopted by the Commission at its thirty-ninth session, in 2006. This definition is also similar with Art. II/1 of NYC. Even if the EACWPP does not clearly state from the wordings of Art.2/1 we can observe that this law recognizes both arbitration clause in the main contract and submission agreements in separate documents made to settle respectively future dispute and the dispute which has already arisen from contractual or non-contractual legal relationship. Moreover, EACWPP in similar fashion with UNCITRAL MAL, recognizes principle of separability. Accordingly, now arbitration clause which is included in an agreement shall be deemed to be a separate and independent agreement.[381] Due to this, now in Ethiopian arbitration legal system the fact that the principal agreement becomes null and void shall not make the arbitration clause null and void.

However, EACWPP formal requirement of attesting arbitration agreement by two witnesses is one of the issues to be analyzed in this study. In general, a legal act can be concluded either following special form (written) or orally or by a conduct. It is necessary to question what is meant under in written form. When come to the formal requirement of arbitration agreement, Art. II /2 of the NYC requires that an arbitration agreement in order to be valid agreement shall be in writing and be signed by the parties. Moreover, Art. 25/1 of the ICSID Convention and option I of Art. 7/2 of UNCITRAL MAL require that an arbitration agreement to be concluded in writing.

The general provisions of Contract Law under CC exceptionally require the fulfillment of special form taking into account the volume of transaction in a contract, the nature of the bargain, the duration in which the contract is supposed to last, issues of public interest that is likely to be involved in the contract and similar other reasons.[382] Once a contract is made in a specified form (i.e., in writing), the law further require such a contract to have the signatures of parties and to be attested by witnesses and requirement of authentication.[383]According to Art.1728 of the CC the signature of the parties must generally be hand written and if one of the parties do not know how to write or are unable to put their signature they have to affix their fingerprint. If the law or an agreement of the parties provides that the contract must be concluded in a particular form, the failure to observe that form results in the invalidity of the contract.[384] However, Arts. 1719 and the following of the CC under the Ethiopian Law of Contract does not put the written formality for arbitration agreement.

On the other hand, one of the basic purposes the law to require written formality is evidentiary purpose. Pursuant to Article 2005/1 of the CC, a written instrument constitutes conclusive evidence, as between those who signed it, of the agreement therein and of the date it bears. The effect of this is that as stated

[381] Art.19/1 of EACWPP
[382] Arts. 1723 – 1725 of CC
[383] Art.1727 of CC
[384] Rene David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), P. 33.

under Art. 2006/2 courts shall not admit witnesses or presumptions against the statements (the agreement and the date) contained in the written instrument. Those who signed it, only by tendering an oath to the party who avails him - or herself of such written instrument, could challenge such statements embodied in the writing.[385] Further where the law requires written form for the completion of a contract, such contract may not be proved by witnesses or presumptions unless it is established that the document evidencing the contract has been destroyed, stolen or lost.[386]

UNCITRAL MAL proposes to a States Legislatures to harmonize their national arbitration law adopting the standard provision lied down in either of the two options provided under Art.7 in relation to formal requirement of an arbitration agreement. Under option I Art. 7/3 of MAL an arbitration agreement shall be considered as made in writing and valid *"…if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means."* In this standard provision as long as arbitration agreement is *recorded in any written form* there is no requirement of signing by the parties and their witnesses. Further, an arbitration agreement concluded using electronic communication if it is recorded in wring, an arbitration agreement is considered as in writing if it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other.[387] Furthermore, the reference in a contract to any document containing an arbitration clause without further requiring to be signed by parties and witnesses constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.[388] Thus, fail to record arbitration agreement in writing in any form as stated under Art. 7/2 of UNCITRAL MAL shall make the arbitration agreement invalid.

NYC which is one of the significant international arbitration legal frameworks requires the *writing* formal requirement for arbitration agreement. According to Arts. II(1 and 2) of NYC an arbitration agreement which is not concluded in writing and signed by parties shall not be recognized as valid agreement. The commercial arbitration laws of Rwanda, Nigeria, Singapore and Switzerland have followed the same approach.[389] More liberal French international arbitration law makes clear that an arbitration agreement shall not be subject to any requirements as to its form.[390] Further, the English Arbitration Act of 1996 under sect. 5.2.a states that the agreement whether or not it is signed by the parties deemed to be in writing if the agreement is made in writing. From this we can observe that UNCITRAL MAL and the named pro-arbitration countries' arbitration laws do not oblige an arbitration agreement to be signed by the parties and also to be attested by two witnesses in order to qualify the writing formal requirement.

[385] Art.2006/1 of CC
[386] Art. 2003 of CC
[387] Art.7(4 and 5) under option I of UNCITRAL MAL of 2006
[388] Art.7/6 under option I of INCITRAL MAL of 2006
[389] For example, see Art.9 2nd para. of RLACCM, Art.1/1 of NACA and Art. 178/1 of SLPIL
[390] Art. 1507 of FCCP

Whereas both EACWPP and the repealed Ethiopian Arbitration Law in principle require arbitration agreement in order to have legal effect it shall be concluded in writing. [391] More clearly EACWPP requires arbitration agreement to be concluded in writing where its content is recorded, signed by all parties and two witnesses even where it was originally made orally, by conduct or any other means.[392] This formal condition specially attesting arbitration agreement by two witnesses is one of the mandatory provisions of EACWPP. Therefore, under EACWPP if an arbitration agreement does not satisfy a formal requirement of attesting by two witnesses may not be enforced in Ethiopia. On the other hand, with regards to arbitration agreement concluded using electronic communication EACWPP adopted similar provision from UNCITRAL MAL without expressly requiring the fulfillment of the signature of parties and two witnesses. In this regard, an arbitration agreement entered through electronic media as long as the offeree gives his consent to the agreement and where it is accessible for use when the information is needed. [393]

NYC under Art. II/1 clearly imposes a "maximum" form requirement forbidding Contracting States from imposing stricter writing requirements than those under the Convention.[394] In other words it is not the intention of NYC to oblige Contracting States to impose stricter or more demanding formal requirements of arbitration agreement. [395] One of the objectives of NYC is enhancing the enforceability of agreements to arbitrate. Imposing stricter and more demanding formal requirement will affect negatively the Convention's objective of enhancing the enforceability of agreements to arbitrate. Accordingly under the NYC, an arbitration agreement in order to be valid it is enough to furnish an arbitration agreement made in writing and signed by parties.

It is understood that EACWPP presupposes a particular goal when it incorporates additional formal requirement of attesting arbitration agreement by two witnesses. The presumed rational behind for this formal requirement may be to ensure that parties in arbitration agreement are adequately aware of their waiver of otherwise-available access to national courts and judicial remedies, and of the gravity of their commitment, when agreeing to arbitrate and to achieve evidentiary function. The harmonized international legal frameworks and named pro-arbitration law countries have also the intention to achieve this particular goal through formal requirement of arbitration agreement. This formal requirement, they believe is that- if an arbitration agreement concluded in writing [and as demanded by NYC signed by parties] complete and enough to achieve the goals of formal requirement without imposing such stricter or more demanding formal requirement of attesting arbitration agreement by two witnesses.

[391] Art. 6/1 of EACWPP and according to the cumulative readings of Arts.3326/2 and 3328 of the CC and Art. 315/1 of the CPC and Art.1727/2 of the CC arbitration agreement is required to be concluded in written form to submit present and future contractual and legal obligation differences to arbitration; and also such a written agreement in order to be valid before the law it must be attested by two witnesses.
[392] Art. 6/2 of EACWPP
[393] Art.6(3 and 4) and Art.7/4 of option I of UNCITRAL MAL of 2006.
[394] Gary B. Born, *supra note 73,* P.1102
[395] Ibid,P.1073

In general as provided under the preamble of EACWPP one of the objectives to enact this law is to adopt international practices and principles related to arbitration … [including formal requirement of arbitration agreement] and to use this law as tool to implement international treaties ratified by Ethiopia. It is universally agreed that the NYC is meant to have a harmonizing effect on national legislation and judicial pronouncements so as to facilitate international commercial arbitration and thereby promote international trade.[396] Accordingly the NYC's formal requirement of arbitration agreement is widely adopted standard in order to provide a uniform international standard for form requirements. Moreover, UNCITRAL MAL as well as pro - arbitration countries' laws mentioned above, came up with a uniform internationally recognized formal requirement for commercial arbitration agreement. Ethiopian arbitration legal system environment is not the exception from these legal frameworks. Accordingly, EACWPP's formal requirement of attesting arbitration agreement by two witnesses is the more stricter and demanding or burdensome requirement compared with the formal requirement of arbitration agreement of NYC, UNCITRAL MAL and pro-arbitration countries' arbitration laws. Hence, written arbitration agreements which is signed by parties but not by two witnesses may be valid for the purpose of the UNCITRAL MAL or NYC may not necessarily be valid under the new Ethiopian Arbitration Law.

3.3. Problems Related to Designation of Arbitrator[s] and Immunity of Arbitrator

3.3.1. Constraint for Designation of Arbitrator[s]

In public litigation system there is a standing body or judge who is ready to handle a dispute within his jurisdiction; however, there is no permanent standing body of arbitrators. It is one of the unique distinguishing elements of private form of dispute resolution mechanism such as arbitration as opposed to state lead judicial proceedings. Once parties agreed to resolve their dispute through arbitration appointing the right arbitrator[s] or organizing the right arbitral tribunal is critical to the success of arbitral process.

Arbitration process will generally be begun by a request for arbitration, which is delivered by one party to the other, is to inform the other party (its co-contractor) his intention to resort to arbitration, and to give notice to the other party to appoint its arbitrator. With regards to the content of the notice a requesting party must unequivocally notify that the other party to participate in the appointment of arbitrator. Any conditions of form agreed by the parties, directly or by reference to institutional arbitration rules, depending on the types of arbitration (i.e., ad hoc or institutional) must be enforced by the parties or arbitrators. But EACWPP requires that the notice given requiring the commencement of arbitration must be made in writing.[397] Since the stage of appointment of arbitrator is one of the early parts of commencement of arbitration, from the readings of Art.12 (3/b) and Art. 31(5/a and b) the intention of the law as to the form of notice which provided by a party to the other party requiring the latter to appoint

[396] S.I. Strong, What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflicts between the New York Convention and the Federal Arbitration Act, 48 Stan. J. Int'l L. 47 (2012), P.71.
[397] Art.31(5/a and b) specially Amharic version requires the notice given requiring the commencement of arbitration must be in writing.

arbitrator should be made in writing form. If we look at the position of other countries in this regard, for instance, UK/English under Art. 14(3 - 5) of 1996 English Arbitration Act and Rwanda under Art. $13/1^0$ of RLACCM require the written request to be given to the other party to appoint his part arbitrator. However, French and Switzerland arbitration laws as well as UNCITRAL MAL contain no mandatory requirements as to the form of the request.[398]

Once a party gave a notice following the proper form of notice requesting the other party to appoint his part arbitrator, the next step is to establish the arbitral tribunal following the appropriate mode and procedure. In principle, the parties should be free to choose their own arbitrators, so that the dispute may be resolved by 'judges of their own choice'.[399] NYC under Art. V(1/d) provides that recognition of an award may be refused if: the composition of the arbitral authority … was not in accordance with the agreement of the parties…. Moreover, subject to the situation on which the arbitrator[s] shall be appointed by a court as provided by sub Arts. (4) and (5) of Art. 11 of the UNCITRAL MAL, the parties are free to agree on a procedure of appointing the arbitrator[s].[400] Similarly Pro-arbitration countries' arbitration laws investigated under this thesis have also recognized parties' autonomy on the appointment of arbitrator[s] and on the procedure for their appointment.[401] In this regard Ethiopia under Art. 12/2 EACWPP provides that unless provided otherwise in this proclamation, contracting parties shall be free to agree on the procedure of appointment of arbitrators. Except some drafting style and content wise difference this provision is similar with Art. 11/2 of UNCITRAL MAL.

Sometimes a party refuses to appoint a sole arbitrator, or refuses to appoint or accept a party-appointed third (presiding) arbitrator with the intention to undermine arbitration. As analyzed on the previous chapter Redfern and Hunter identified among several different methods of appointing an arbitrators, the most usual are: [402] by agreement of the parties; by an arbitral institution; by means of a list system; by means of the co-arbitrators appointing a presiding arbitrator; by a professional institution or a trade association; or by a national court. Similar procedural methods of appointing an arbitrator[s] are provided under UNCITRAL MAL. Accordingly, if the parties or two arbitrators, or a third party, including an institution, unable to appoint arbitrator in the agreed procedure or fails to perform any function entrusted to it [them] in relation to the appointment of a sole arbitrator or the third arbitrator within specified time for their appointment, the appointment shall be made, upon the request of a party, by the court or other authority specified in Art. 6 of MAL.[403] Similar approaches have been followed by French, Singapore, Nigeria, Rwanda, Switzerland and UK/English arbitration laws.[404] Ethiopia also provides the same procedural method of appointment of

[398] Art.1452 of FCCP, Art. 179 of SPILA and Arts. 3 and 11 of UNCITRAL MAL
[399] Redfern A. and Hunter M, *Supra note 25,* ¶4.16,P. 234
[400] Art. 11/2 of UNCITRAL MAL
[401] Art.13 second Para. of RLACCM,Atr. 7/1 of NACA,Art. 1508 of FCCP,Art.179/1 of SPILA and Arts.14/1 and 16 of UK/English Arbitration Act.
[402] Redfern A. and Hunter M, *Supra note 25,* ¶4.33,P. 240
[403] Art. 11(3 and 4) of UNCITRAL MAL
[404] See Arts. 1451-1456 of the FCCP, Arts. 11 of the SIAA, Art. 7 of the NACA, Art. 13 of the RLACCM,Art. 179 of SPILA and Arts.16 -18 and 26-27 of UK Arbitration Act.

arbitrator[s] under Art.12 (3/b) which reads: *Notwithstanding paragraph(a) of sub Art. 3 of this Art., where one of the contracting parties fail to appoint the co-arbitrator… from the date receipt of the notice by the other party, or where the two arbitrators fail to agree on the appointment of the third arbitrator…from the date of their appointment or where the contracting parties fail to agree, in the case of a sole arbitrator, the First Instance Court shall appoint such arbitrator upon the request of one of the parties.* According to this provision if the requested party or the two arbitrators unwilling to appoint sole or presiding (third) arbitrator Federal First Instance Court is empowered to appoint required arbitrator. Thus, there is no problem with this provision.

However, the problem is associated with the provision incorporated following the aforementioned provision. These provisions are lied down under sub Arts.12/4 and 31/3. These provisions read as follows:

> Art.12/4 - *"Where the contracting party who has initiated the arbitration has notified the other party to participate in the appointment of arbitrator or properly notified to designate a co-arbitrator from his side and if he fail to reply within 30 days or deny the existence of an arbitration agreement, the requesting party shall have the right to cancel the agreement in his own time and submit his suit to the court."*
>
> Art.31/3 - "*The requesting party shall have the right to apply to a court where the party to whom a request has been made denies the existence of an arbitration agreement or expresses no interest in continuing with the arbitration or has not replied within the time limit specified in Sub-Article (2) of this Article[within 30 consecutive days]."*

There is no doubt that national law can play a great role in the appointment and removal of arbitrators in arbitration process. When national law plays such role it should not undermine parties' wish to resolve their dispute through private litigation or arbitration. In this regard countries with developed systems of arbitration laws recognize the role … to be played by their … courts in assisting the arbitral process including empowering national courts to appoint arbitrators in the request of one of the party to a dispute[405] in case when the other party (or its delegate) refuses to appoint his part arbitrator[s]. In this situation UNCITRAL MAL under Art.11 (3 and 4) recognizes judicial intervention in the appointment of arbitrator[s]. Similarly Pro-arbitration countries such as France, Switzerland and UK and also UNCITRAL MAL countries such as Nigeria and Rwanda in their current arbitration laws allowed judicial intervention in the appointment of arbitrators as a last resort or default mechanism.[406] In SIAA it is the president of the Court of Arbitration of the Singapore International Arbitration Centre is to be taken to have been specified as the authority competent to perform the functions under Article 11(3 and 4) of the MAL.[407]

[405]Redfern A. and Hunter M, *Supra note 25*, ¶4.45,P.244
[406] See Arts. 1451-1456 of the FCCP, Sect. 7 of the NACA, Art. 13 of the RLACCM, Art. 179 of SPILA and Sects.16 -18 and 26-27 of UK Arbitration Act.
[407] Sect.8/2 of SIAA

However, EACWPP by putting the quoted provisions instead of empowering a court to appoint arbitrator on behalf of requested party by the mere existence of the failure to reply for the notice given requesting party to appoint the required arbitrator in the agreed mode for appointing the arbitrator(s) within specified time or if he denies the existence of an arbitration agreement this law considers requested party as he has no interest to continue in arbitration and consequently provide the right to the requesting party unilaterally to cancel arbitration agreement and make him free to institute a court action or begin judicial litigation.

As stated in the previous chapter, an ancillary aim of the NYC is to enforce arbitration agreement. To achieve this objective NYC requires courts of Contracting States to give full effect to arbitration agreements denying the parties access to court in contravention of their agreement and to refer the matter to an arbitral tribunal. As the Contracting State to NYC, Ethiopia has international obligation to give full effect to arbitration agreement denying judicial litigation for the parties who agreed to resolve their dispute through arbitration. But incorporating the above stated two provisions will make Ethiopia properly not to discharge this international obligation. Moreover, these quoted EACWPP provisions have the potential to encourage non-compliance or deliberate obstruction of the contractual appointment mechanism and in effect undermine enforcement of contractual obligation.

Further, NYC under Art. II/3 imposes a requirement, mandating that courts in Contracting States, including the arbitral seat, recognize and give effect to the parties' agreed means for appointing the arbitrator[s]. Ethiopia expresses its commitment of avoiding unnecessary court intervention under Art.8 (1 and 2) of EACWPP. Accordingly, Ethiopian Court shall not hear the case that falling under an arbitration agreement when the defendant raises preliminary objection indicating the existence of arbitration agreement so long as that arbitration agreement is valid and becomes effective. Through this way Ethiopian court expected to enforce valid arbitration agreement and to play supportive role assisting parties to resolve their dispute through arbitration process. However, the provisions provided under Arts. 12/4 and 31/3 of EACWPP might be an obstacle a court not to play such supportive role. Moreover, once parties prefer to resolve their dispute through arbitration the conditions specified under Art.12/4 and 31/3 of EACWPP should not be taken as a proper ground to affect the validity of the agreement to arbitrate or to make arbitration agreement inoperative or incapable of being performed or unilateral to cancel arbitration agreement.

There also clearly manifest contradiction between Art. 8(1 and 2) in one hand, and Arts.12/4 and 31/3 of EACWPP on the other. Because the former aimed to avoid court intervention and the latter give the power the court to entertain a dispute emanated from an arbitration agreement. The conditions provided under Arts.12/4 and 31/3 of EACWPP do not indicate that the agreed arbitral procedures were fundamentally unfair or unconscionable. The rationale behind for the existence of these provisions I think is to protect the right of access to justice for requesting parties through judicial litigation. Right of access to justice is a

constitutionally recognized right granted to everybody. However, the problem arises when unbalanced action made between in the enforcement of arbitration agreements and taking measure to protect the right of access to justice through court litigation. According to Art. 37/1 of FDRE Constitution the right of access to justice may not only be secured through judiciary, but also through other competent body with judicial power including arbitration. Therefore, to avoid such imbalance, it is better to empower the court to decide forced performance of arbitration agreement coercing defaulting party to appoint his part arbitrator.

3.3.2. Position of the Law on Immunity of Arbitrator[s]

As analyzed in previous chapter there are two main schools of thought – namely the contract school and the status school. The contractual school of thought is followed in most civil law legal system jurisdictions and usually based on the contractual terms concluded between arbitrator and parties in relation to liability when arbitrator[s] appointed rather than making its base on the functions an arbitrator performs.[408] Accordingly if arbitrator accomplish his responsibility based on his contract and related laws he will be immune from contractual liability. Hence, in a civil law system the immunity from prosecution traditionally enjoyed by judges, may or may not be extended to arbitrators.[409] On the other hand, the status school of thought, which is followed by most of the common law system jurisdictions, is based on the assimilation of arbitrator's function with judicial function.[410] This school states that since arbitrator's responsibilities are functionally comparable to those of a judge, this judicial nature of the arbitrator's function results in a treatment assimilated to that of a judge.[411] Judge in order to discharge his judicial function independently and impartially is granted immunity that exempts him from civil claims based on the performance of their adjudicative functions.[412] According to this school since the arbitrator has an adjudicatory function and has the same obligation of independence and impartiality like a judge, an arbitrator should be immune as well.

On the other side, as shown in previous chapter arbitral immunity is also standardized into absolute and qualified immunity. Accordingly in some countries legal regime, arbitrators are granted absolute immunity from any civil liability for actions or omissions in the course of their adjudicative functions including a failure to disclose. In others, arbitrators are given qualified immunity for actions not involving fraud, intentional misconduct, or comparable actions or omissions.

Literature conducted on Ethiopian Legal system shows that Ethiopian substantive law is Romano-Germanic while adjective law (procedural laws) is nearer to the Common Law tradition [mainly from

[408] Ramón Mullerat *supra note* 252, P. 7.
[409] Fouchard, Gaillard, Goldman,*supra note 30*, ¶ 1077,P.589
[410] Redfern A. and Hunter M, *Supra note 25*, ¶5.50, 5.54-5.55 P.321-324
[411] Ibid
[412] Ibid

Indian Civil Procedure Code of 1908] and including some inquisitorial provisions from civil law legal system.[413] Thus, Ethiopian legal system is under the influence of both Civil and Common Law Legal Systems. In the best of my knowledge there is no express provision in relation to arbitrator immunity under the Ethiopian laws. And also yet no Federal Supreme Court Cassation Bench precedent has provided to govern issue of arbitrator immunity. On the other side, Arts. 2138/c and 2139 of the CC provided that judges of Ethiopian courts are free from action for liability may be brought as the result of an act connected with their functions except where judges have been sentenced by a criminal court for acts pertaining to their office and invoked by the plaintiff. Moreover, as expressly stated under the Federal Judicial Administration Proclamation, federal judges are immune from civil liability for actions taken in their official capacity.[414]

On the other hand, with regards to arbitrator liability EACWPP provides provisions that applicable to govern contractual relationship between parties and arbitrator and also enumerate rights and obligations of arbitrator.[415] An arbitrator shall be removed from his position if he is unable to properly perform his function or causes delay in performance without legal ground or good cause. Accordingly under EACWPP arbitrator would be liable for his function based on the contract he appointed by the party.[416] This liability is limited in removing arbitrator from his appointment. Despite these provisions, both the repealed Ethiopian Arbitration Law placed under CC and CPC, and the newly enacted EACWPP do not directly provide provisions that applicable to govern the issue of immunity of arbitrators.

Understandably the parties will incur costs and other losses, and will spend considerable time in the process due to arbitrator[s] non-disclosure of facts and circumstances raising doubts as to their independence and impartiality, or where they have knowingly violated their contractual and legal duties, it is reasonable to have the arbitrators bear any losses caused through their fault. On the contrary, so as to preserve arbitral independence and impartiality in arbitration process there should be some type of arbitral immunity. However, apart from redress provided under EACWPP in respect of challenging to remove and replace the arbitrator[s] or bringing an action to set aside the award or any other measures may be taken to challenge arbitral awards; there should be relevant law provision that would be applicable either to make arbitrator absolutely or partially immune, or liable for any losses happened on parties due to the faults of arbitrator. As indicated in the above paragraph Ethiopian legal system is hybrid from common law and civil law legal systems. Therefore, in determining suitable school of thought for Ethiopia that shall be employed to govern the issues of immunity of arbitrator, its mixed legal system should be taken into consideration.

[413] . Vanderlinden, Civil Law and Common Law Influences on the Developing Law of Ethiopia, 16 Buff. L. Rev. 250 (1966). P. 257,Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol16/iss1/14
[414] Art. 34 of Federal Judicial Administration Proclamation No.1233/2021, Federal Negarit Gazette No. 18, 20th May, 2021
[415] Art. 13 and 14 of the EACWPP
[416] Arts. 13/2 -1 6 of the EACWPP

On the other hand, from the provisions lied down under Art. 13(1 and 2) of EACWPP we can say that the relationship established between arbitrator and parties is contractual. Arbitrator is also appointed (employed) by the parties to resolve their dispute having paid remuneration.[417] Accordingly, if an arbitrator during the arbitration process fails to accomplish or to perform in good faith his contractual and legal obligation, he shall be liable by operation of contract and proper law.[418] In this scenario unless otherwise provided that an arbitrator intentionally breaching his contractual and legal obligation, using *contract school of thought* or taking into account the contractual relationship established between arbitrator[s] and parties, Ethiopia can make arbitrator to be immune from civil liability claimed based on the breach of his contractual obligation.

3.4. Treatment of Due Process of Law under EACWPP

3.4.1. The Legal base to Present Oral Argument if Requested by a Party

The due process of law in both domestic and international arbitration requires that both parties should be treated equally and given opportunity to be heard. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations….[419] Due process of law requirements are also recognized and protected under our constitution.[420] Making enforceable award is one of the most central duties of the arbitral tribunal. If the arbitral tribunal wants to issue an enforceable award, the process has to meet certain procedural quality standards.[421] The core of fair arbitration is the fairness of the procedure itself, including equality of arms, reasonable opportunity to present one's case. The right to be heard or to present oral argument is personal right of parties in dispute. This means unless the disputing parties agree in advance that they will not conduct oral arguments, the other disputing party should not be prevented from exercising his right to be heard just because one of the disputing parties does not want to exercise this right. Using this procedural right and to make procedure more flexible without prejudicing mandatory laws parties in both domestic and international commercial arbitration may expressly agree to waive their right of oral hearings. Thus, each party to be given a full opportunity to present his case at proper stages of the proceedings and also no person in arbitration should be judged without a fair hearing. If this principle properly implemented and the arbitral procedure is fair, substantive rights of the parties more likely to be enforced.

An oral hearing (argument) is mandatory in the vast majority of international arbitrations, save where the parties agree otherwise.[422]The procedural freedom and flexibility is one of the essential foundations of the

[417] Art. 13/3 of the EACWPP
[418] Art.13(1,4-7) of the EACWPP
[419] Universal Declaration on Human Rights, United Nations General Assembly, Paris, December 10, 1948 Art. 10.
[420] Cumulative readings of Arts.13/2,20,25,37/1 of the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, Federal Negarit Gazeta - No.1 21st August 1995.
[421] Matti s.Kurkela, Santtu Turunen,Due Process in International Commercial Arbitration, Conflict Management Institute(COMI), second Edition,Oxford University Press, Inc.(2010),P.2
[422] Gary B. Born, *supra note* 73, P. 3421

arbitral process. As analyzed in previous chapter in more detail one the grounds used to refuse recognition and enforcement of arbitral award, is *"the ground of unable to present once case"*[423]. Therefore, if arbitral tribunal wants its arbitral award to be recognized and enforced as per NYC, it should provide each party a reasonable opportunity to present its case.

As stated in more clear terms under UNCITRAL MAL and AR the right to an oral hearing must be granted by arbitral tribunal when requested by *one of the party (*emphasis added*).*[424] And also in order to make arbitral proceedings more economical or to reduce costs and save time there are suggestions that in case when oral hearing does not requested by a party an arbitral tribunal should have to make procedural decision on the relevancy of oral hearings. Accordingly, a tribunal taking due care not to violate parties' right to be heard, may refuse to hear oral argument if it believes that conducting oral hearing is irrelevant or duplicative.

Having in mind the above, if we look at the EACWPP position on the right of presenting oral hearings (arguments) under Art. 28 it recognizes equal treatment of parties principle. This provision is similar with what is lied down under Art.18 of UNCITRAL MAL and AR, and also with the arbitration laws of countries such as Singapore, Nigeria and Rwanda, with pro-arbitration countries such as Switzerland and France.[425] Hence, with regards to recognizing the principle of equal treatment of the parties, EACWPP needs no further harmonization as per international arbitration law instruments such as UNCITRAL MAL and AR, and also in light of aforementioned pro-arbitration countries' national arbitration laws.

However, in order properly to implement the principle of equal treatment and to protect parties' right to be heard there should be additional provision under national arbitration laws. In this regard for instance, UNCITRAL MAL under Art.24 and UNCITRAL AR under Art. 17 provide procedure that determines how oral hearings can be initiated and conducted in arbitral tribunal. According to these UNCITRAL MAL and AR *any party* in arbitration in an appropriate stage of the proceedings can request the arbitral tribunal to hold oral hearings. Adopting similar approach Model Law countries such as Singapore, Nigeria and Rwanda provide that unless otherwise agreed by the parties that no hearings shall be held, the arbitral tribunal duty bound to facilitate to conduct hearings at an appropriate stage of the proceedings, if so requested by *one of the parties*.[426]Likewise, as stated under Art.34/2 of EACWPP unless the parties in dispute agree to abandon oral litigation, as a rule arbitral tribunal should conduct an oral hearing in arbitration proceeding. However, the last sentence of Art. 34/2, EACWPP puts the requirement which reads: "If *they* request for oral argument, the tribunal shall conduct the same within reasonable period of time." Under this provision the presence of the pronoun "*they*" indicate that in order an arbitral tribunal to

[423] Art. V(1/b) of the NYC
[424] Art.24/1 of UNCITRAL MAL and Art. 17/3 of 2013 UNCITRAL AR
[425] Art.18 of SICAA, Art. 14 of NACA ,Art.30 of RLACCM, Art. 1510 of FCCP and Art.182/3 of SPILA
[426] Sect.24 of SICAA, Sect.. 20(1/c) of NACA and Art. 36 of RLACCM

conduct oral argument there should be the request from both parties. Thus, if *only one of the parties requests* to present an oral argument, EACWPP will not oblige the arbitral tribunal to conduct oral hearings. Whereas, the above mentioned UNCITRAL MAL and AR and Model Law pro-arbitration countries' such as Singapore, Nigeria and Rwanda in their national arbitration laws instead of using the pronoun "they" incorporate the terms - *"a party, one of the parties or any party in arbitration proceeding to request"*. From this terminology simply observe that *unlike* Art. 34/2 of *EACWPP;* MAL and AR, and named Model Law Pro-arbitration countries' arbitration laws provide the right to present oral argument by the request of either of the party and if arbitral tribunal believes that conducting oral arguments is essential for proper disposal of the case after communicating this to the other party; and these laws impose duty on arbitral tribunal to facilitate the time and place on which oral hearings (arguments) should be conducted after giving sufficient time for preparation to the parties.

3.4.2. Failing to Include Proper Procedure for the Counter-Claim Arbitral Proceedings

As we have seen in the previous chapter a respondent in arbitration process has three options; the first and the most common is to deny the claimant's allegations; the other, a more 'offensive' tactic, would be to submit a counter-claim; and the third, a 'defensive' option, to raise a set-off defense.[427] Counter-claim in general is not simply a defense; it leads to a separate judgment which may be in excess of the judgment under the primary claim.[428] Moreover, even if the principal (initial) claim is withdrawn, the counter-claim may remain alive and arbitral tribunal shall be bound to render award on it.[429] Furthermore, it is generally known that the foundation for arbitral tribunal jurisdiction is an arbitration agreement, and so that the arbitral tribunal may decide only on the issues that fall within the scope of the arbitration agreement. Because of these reasons counter-claim should be emanated from the arbitration agreement itself, either directly or through to *a lex arbitri* that expressly allows for counter-claims.[430] A significant number of institutional rules provide that jurisdiction over counter-claim exists whenever a counter-claim is based 'on the same agreement to arbitrate', or on the 'same relationship'.[431]

Without specifically incorporating provisions that applicable on counter-claim provision UNCITRAL MAL under Art. 2/f provides that the counter-claim proceeding conducted in similar lines with the title 'claim'. Similarly, under arbitration laws of countries such as Nigeria, Rwanda, Switzerland and Singapore counter-claim proceeding has been entertained following similar procedure used to entertain primary claim.[432] Further, Switzerland under its domestic arbitration law provides that if a party raises a set-off defense, the arbitral tribunal may assess the defense regardless of whether the claim that is being set-off is

[427] Vladimir Pavić, *Counterclaim and Set-off in International Commercial Arbitration*, Annals, International Edition,P.102.
[428] Michael Pryles and Jeffrey Waincymer, Multiple Claims in Arbitrations Between the Same Parties, P.12, available at: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/
[429] Ibid., P.12
[430] Ibid.,P.13
[431] See Vladimir Pavić , *Supra notes* 427, P.105
[432] Sect.57/6 of NACA, Sect. 2/f of the first schedule of SICAA, Switzerland Arbitration Rules of 2021 under Art. 21/3, and Art. 4 of the last Para. of RLACCM.

covered by the arbitration agreement, or whether it is covered by another arbitration agreement or a forum-selection clause; and a counter-claim is admissible if it concerns a dispute covered by a compatible arbitration agreement between the parties.[433] Accordingly counter-claim is permissible based on some of condition[s] under the mentioned national arbitration laws and UNCITRAL MAL. On the other hand, where counter-claim is left unmentioned in arbitral agreements, it would be allowed by tribunals as a matter of general international jurisprudence.[434]

Likewise, UNCITRAL AR under Art. 21(3 and 4) and Nigerian Arbitration Rule under schedule one Art. 19(3 and 4) provide the procedure when and how counter-claim submitted to and entertained by arbitral tribunal. Accordingly, a respondent in his statement of defense, or if the arbitral tribunal decides that the delay was justified under the circumstances at a later stage in the arbitral proceedings, may make a counter-claim arising out of the same contract. Moreover, ICC Arbitration Rule of 2021, under Art.5/5 provides that counter-claim must be filed at the same time as the answer to the request for arbitration. Whereas, LCIA under Art. 15.3 of its Rules of 2014 allows a respondent to file counter-claim when submits its statement of defense.

When come to our legal system there is a legal base under the CPC when and how counter-claim can be submitted and conducted in court litigation.[435] However, under the current EACWPP there is no clear provision that govern when and how counter-claim proceedings can be conducted in arbitration process. However, practically there are cases respondent in domestic arbitration brought counter-claim and arbitral tribunal delivered an award on counter-claim. In such a case arbitral tribunal entertain a counter-claim action analogically using the procedure provided under the CPC for the purpose to precede counter-claim in court litigation in line with initial claim using repealed CPC.[436]

3.5. Recourses against Arbitral Award

3.5.1. Gaps and Inconsistency related to Recourse of Appeal

As stated in the previous chapter in the repealed Ethiopian Arbitration law, appeal was one of the main recourses against arbitral awards. Because of this, parties to an arbitration agreement could only waive their right of appeal with full knowledge of the circumstances;[437] and in clear and express words. That means it is not enough mentioning that the award shall be "final and binding"; rather parties must use explicit exclusions. Accordingly if parties did not waive the right to appeal, relaying on Art 351/a of CPC

[433] Art. 377 of Swiss Code of Civil Procedure (CCP) of 19 December 2008 as in force from 1 January 2021.
[434] Bradley Larschan & Guive Mirfendereski, *supra note* 301,PP.32-33
[435] See Art. 234(1/f) CPC.
[436] See for instance, Federal Supreme Court Cassation Bench - case.file.no. 194975 Yuel Mesi Contractor *vs*. DMC Construction, in this case the latter submitted counter-claim emanated from arbitration agreement which referred on the main construction agreement.
[437] Art. 350/2 of CPC.

a court would review the merits of arbitral awards if it believes that awards are wrong in matters of law and fact.[438]

The most cited advantages of commercial arbitration which supported by the most influential legal instruments such as NYC and UNCITRAL MAL is finality of arbitral tribunal's award. To safeguard this benefit of arbitration the only recourses recognized under Art. V(1/e) of the NYC, and Art. 34 of UNCITRAL MAL to challenge arbitral awards apart from refusing recognition and enforcement of foreign arbitral award, is setting aside of arbitral awards. Both NYC and UNCITRAL MAL do not recognize appeal as one of the recourses that parties may be used as a default recourse or through incorporation under their arbitration agreement.

However, with different policy reasons some pro-arbitration countries allow the right to appeal as a default recourse. To mention some of them under English Arbitration Act of 1996, appellate review recourse serves as a default rule on a question of law arising out of an award made on both domestic and international commercial arbitration proceedings rather than a mandatory one, which allows parties to contract out of it.[439] In similar with English Arbitration Act of 1996, under Singapore Domestic Arbitration Act of 2001 unless otherwise the right to appeal is excluded by agreement, subject to various conditions, appeal on a question of law arising out of an award is permitted.[440] But, in Singapore no appeal is allowed on international commercial arbitration where its seat is in Singapore.[441] Moreover, as stated under Art. 77/1 of Chapter 3 of Switzerland Federal Supreme Court Act - appeal in civil matters is admissible, regardless of the amount in dispute, against the decisions of arbitral Tribunals in international arbitrations, under the conditions set out in Articles 190-192 of the Private International Law Act of 18 December 1987; in domestic arbitrations, under the conditions set out in Articles 389 to 395 of the Code of Civil Procedure of 19 December 2008. However, in Switzerland as per Art. 192/1 of SPILA by an express declaration in the arbitration agreement or in a subsequent written agreement, exclude all appeals against the award of the arbitral tribunal. They may also exclude an appeal only on one or several of the grounds enumerated in Article 190, paragraph 2 of SPILA.

Unlike the repealed Arbitration Law of Ethiopia which placed under CPC, EACWPP does not recognize judicial revision through appeal as default recourse. Accordingly, unless the contracting parties agree otherwise in their arbitration agreement, in Ethiopia no appeal shall lie to the court from an arbitral award rendered both on domestic and international arbitration. Therefore, under EACWPP the right to appeal is the optional right that can be exercised only when parties expressly agreed in their arbitration agreement as

[438] Ibid. This conclusion works only if appeal is applied and entertained in accordance with CPC.
[439] Sect.69 of English Arbitration Act of 1996
[440] Sect. 49 of SAA of 2001.
[441] Sect. 24 of SIAA.

one of the recourse.[442] Since UNCITRAL MAL does not allow parties to elect the right to appeal by agreement; in this regard EACWPP does not follow MAL approach.

Ethiopia by reforming its old arbitration law, under EACWPP makes the right to appeal as a waivable right under the umbrella of parties' autonomy. Accordingly parties are free to decide on the fate of their right to appeal. However, if parties prefer to exercise the right to appeal and agreed accordingly in their arbitration agreement EACWPP puts no mandatory conditions to limit the scope of appeal recourse or exception by which parties cannot exercise appeal recourse. Whereas, countries such as Singapore in domestic Arbitration Act of 2001 and UK/English under 1996 Arbitration Act which have had great success with respect to international arbitration and is presently recognized as a leading and very attractive seat for international commercial arbitration[443] have listed down some conditions that must be satisfied in order to exercise the right to appeal. This indicates that right to appeal on a question of law both under UK/English and Singapore is not automatically exercised right. Similarly, Switzerland allows appeal recourse in civil matters only on the grounds listed down under Art. 190(2 and 3) of SPILA.[444]

According to the English and Singapore Arbitration the permission of the court or leave for appeal shall be given only if the court is satisfied: [445] — a) that the determination of the question will substantially affect the rights of one or more of the parties, b) that the question is one which the tribunal was asked to determine, c) that, on the basis of the findings of fact in the award— i) the decision of the tribunal on the question is obviously wrong, or ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question. An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.[446] The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.[447]

Similarly in Switzerland an award rendered on civil matter can be challenged through appeal recourse only:[448] a)If a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly; b) If the arbitral tribunal erroneously held that it had or did not have jurisdiction; c) If the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims; d) If the equality of the parties or their right to be heard in an adversarial proceeding was not respected; and e) If

[442] Art. 49/1 of EACWPP
[443] White & Case LLP & the School of International Arbitration, Queen Mary University of London, 2021 International Arbitration Survey: Adapting Arbitration to a Changing World.
[444] See Art.77 under Chapter 3 of the Switzerland Federal Supreme Court Act.
[445] Sect. 69(2 and 3) of English Arbitration Act and Art. 49(3 and 5) of SAA
[446] Sect. 69/4 of English Arbitration Act and sect. 49/6 of SAA.
[447] Sect. 69/5 of English Arbitration Act.
[448] See the cumulative readings of Art.77 of Switzerland Federal Supreme Court Act and Art. 190(2 and 3) of SPILA

the award is incompatible with Swiss public policy (*ordre public*). Those conditions are provided with the intention to limit judicial involvement and for the proper administration of justice.

As we have seen in previous chapter, in France the only means of recourse against an award made in France in an international arbitration is an action to set aside.[449] It may not be subject to appeal, even if the parties have otherwise agreed. In contrary to the international arbitration, in domestic arbitration an arbitral award shall be subject to appeal, if parties agreed by to exercise the right to appeal.[450] On the other side, as stated under Art.1522 of FCCP the parties in international arbitration sat in France by way of a specific agreement, at any time, expressly waives their right to bring an action to set aside. If the parties waived their right to challenge the award, they can exercise the right to appeal an enforcement order on one of the grounds set forth in Article 1520(i.e., grounds provided to claim setting aside of arbitral awards).[451] Moreover, even if in France foreign awards [awards made abroad] cannot be subject to an action to set aside, parties who wish to resist enforcement of such awards is to appeal the order granting enforcement.[452] In such cases, the Cour d'appel can only deny recognition on the same grounds as those listed in Article 1520 of the FCCP[453], which are applicable to an action to set aside an international award made in France.

The aforementioned pro-arbitration countries' national arbitration laws under the umbrella of party autonomy have allowed the right to appeal on limited conditions. On the other hand, even if EACWPP has allowed the right to appeal as optional right under the party autonomy, however, it as such does not list down any substantive and procedural conditions. Accordingly, if parties agreed to exercise the right to appeal on arbitration whose seat is in Ethiopia, EACWPP allows the right to appeal on unlimited grounds both on questions of fact and law except some un-appealable grounds provided under Art. 49/3 of EACWPP.[454] And also when EACWPP allows optional recourse of appeal, it does not differentiate both between domestic and international arbitration seat in Ethiopia. EACWPP has also does not provide screening mechanism introducing leave to appeal procedure to secure court permission before appeal heard before appellate court. Lack of procedural and substantive conditions under EACWPP with on doubt will create very high case load on appellate court and also will give green light to the unlimited judicial revision on both question of fact and law and in effect affect basic objective of finality of arbitral awards.

In general this Thesis argues that a limiting the right to appeal will make the country arbitration friendly if the law able to balance between upholding finality of awards safeguarding parties autonomy and allowing

[449] Art. 1518 of FCCP of 2011

[450] Art. 1489 of FCCP of 2011

[451] Art. 1522 of FCCP of 2011

[452] Art. 1525 of FCCP of 2011

[453] These grounds are:- the arbitral tribunal wrongly upheld or declined jurisdiction; or the arbitral tribunal was not properly constituted; or the arbitral tribunal ruled without complying with the mandate conferred upon it; or due process was violated; or recognition or enforcement of the award is contrary to international public policy.

[454] Notwithstanding any agreement to the contrary, no appeal shall lie from arbitral award rendered in accordance Arts. 41/5,43 and 44/2 of EACWPP

defective awards to be challenged on the grounds of limited serious question of Ethiopian law having general public importance and also before hearing conducted requiring appellant to secure leave of court.

3.5.2. Problem of Making Cassation as an Renounceable Recourse

As stated in previous chapter French *Cour de Cassation* (Court of Cassation) reviews arbitral award on limited grounds related to error of law after the award reviewed by Court of Appeal. Though it is not clearly provided under French arbitration law the decision of the Court of Appeal rendered reviewing arbitral award can be brought before the Court of Cassation, in accordance with the ordinary rules of French law on legal grounds.[455] In Ethiopia, as stated under the FDRE Constitution Federal Supreme Court Cassation Bench (FSCCB) as the final resort empowered to review and quash any final decision containing basic error of law.[456] According to Art.80 (3/a) of the authoritative Amharic Version of FDRE Constitution FSCCB has given the power of cassation to correct a basic error of law not only on *any final court decision on federal matters but also on any final decision rendered on justiciable matter.* As recorded in the Minutes of Constitutional Assembly one of the justifications behind introducing the system of Cassation is to have a uniform interpretation and application of the law throughout the country.[457] From the minutes of the Constitution we can observe that one of the objectives intended by Farmers of the Constitution to achieve through uniform interpretation and application of laws using Cassation recourse is to realize the enforcement of a constitutional right of every person [parties to a case] to be treated equally before the law,[458] predictability and certainty of law in the Country.

Moreover, maintaining a final decision containing basic error of law will undermine public confidence in the justice system. Therefore, Cassation recourse serves as the system by quashing final decision containing basic error of law and in effect will make the administration of justice more credible and respected in the societies. Constitution requires the Cassation recourse to be carried out not only on the final decision rendered on public issues but also on the final decision rendered on private matter as long as that decision contains basic error of law. The justification behind this conclusion is inherent judicial power of administering justice and preserving rule of law. According to the FDRE Constitution everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment not only to a court of law but also to any other competent body with judicial power.[459] This constitutionally granted right of access to justice is also extended to those who choose alternative dispute resolution mechanism especially arbitration method. Therefore, faithfulness to the Constitutional mandate upon FSCCB tends not only to guarantee for equality in administration of justice but also it creates public impression that the judiciary,

[455] Fouchard, *supra note* 30, ¶ 1591,P.907.
[456] Art.80(3/a) of the FDRE Constitution. Under Art. 80(3/b) of the Constitution the same power is given in state matter to the Regional Supreme Court.
[457] The Minutes of Constitutional Assembly, Discussions and Debates on the Making of the FDRE Constitution, Vol. 5, (Unpublished), Addis Ababa, Ethiopia, (1994) P.32 and Vol.2, P.000154
[458] Art.25 of FDRE Constitution.
[459] Art. 37 of FDRE Constitution.

quasi-judicial organs, and other ad hoc and institutional arbitration tribunal do administer justice equally applying laws uniformly so that the public trust on the legal and dispute resolution systems will be improved.

All persons under FDRE Constitution granted the right of appeal to the competent court against an order or a judgment of the court which first heard the case.[460] This constitutionally recognized right to appeal is incorporated under Chapter Three which is the assigned place for fundamental rights and freedoms. However, FDRE Constitution does not provide Cassation recourse as fundamental right of disputant as that of appeal right which provided under Chapter Three. Rather Cassation recourse is provided under Chapter Nine as a power or mandate of Federal Supreme Court. Therefore, reviewing final decision through cassation recourse is established under Art. 80(3/a) FDRE Constitution not as of right rather it is constitutional mandate imposed on FSCCB to correct basic error of law in *any final decision* rendered on justiciable matter. Thus, reviewing and correcting basic error of law on final decision by Cassation Bench (CB) is not a mere right that simply waived or renounceable by parties involved and going to be involved in a legal dispute. Therefore, I do not agree with the argument made by Alemnew Gebeyehu Dessie and Birhanu Beyene Birhanu that they concluded that, there is no an explicit statutory basis for court's control of arbitration by way of cassation and what the arbitration law warrants that cassation review of awards is proper only when parties agree to that effect, which means when they create it by contract calculating the risk of ending up with an award with a basic error of law against their wish of, for example, bringing it to final as quickly as possible.

In order to practically realize the above mentioned Constitutional objectives at the first time HoPR enacted Federal Courts Proclamation No. 25/1996 (this Proclamation now replaced by Proclamation No. 1234/2021)and created not less than five Supreme Court judges seated CB and has given legally binding force on the decisions rendered by the CB.[461] The CB presided by not less than seven judges some other time on the same issue may however render a different binding legal interpretation.[462] Through the introduction of binding precedence of the rulings of CB, the lower courts[463]obliged to bind themselves to interpret and apply the law uniformly by taking into consideration the interpretation and application of the law provided under binding precedent. Accordingly, the mandate of Cassation will be fully implemented and the litigants would be treated similarly and their constitutional right to equal protection before the law which is recognized under Art. 25 of the FDRE Constitution would be enforced. If ordinary courts and arbitration tribunal interpret the law differently and without considering binding rulings of CB, the litigants

[460] Art.20/6 of the FDRE Constitution.
[461] Art. 21(2/c) of Proc.No 25/1996 and Art.10/4 as amended by Proc. No. 454/2005. These Articles repealed and replaced by Arts. 25/2 and 26/3 of Federal Courts Proc. No. 1234/2021.
[462] Art.26/4 of Proclamation No.1234/2021
[463] If we read the phrase 'Lower courts at Federal and Regional level' which stated under Art. 10/4 of Proc. No.454/2005 and Art. 10/2 of Proc. No. 1234/2021 in conjunction with Arts. 37/1 and 80(3/a) of FDRE Constitution it includes not only ordinary courts but also quasi- judicial organs and arbitration tribunals.

could be treated unequally; and they will be subjected to needless loss of time and other resources and also inconvenience.

In relation to reviewing final arbitral awards through Cassation recourse there is already established judicial jurisprudence in many decisions of FSCCB on various cases both on domestic and international commercial arbitrations. To mention some of the CB decisions:- in the decision rendered in the domestic arbitration case between *National Mining Corporation PLC(NMC) and Dani Drilling PLC(DD)*;[464] the parties inserted the clauses in their agreement, which indicated that `the arbitration tribunal's decision is final and binding and hence, no appeal is allowed`. The arbitral tribunal rendered a final award in favor of DD ordering NMC to pay 579,450.35 Ethiopian Birr. NMC filed the appeal in accordance with Art. 351 of CPC at the Federal Supreme Court Appellate Division but the Division cancelled its memorandum of appeal as per Art. 337 of CPC[465] without calling DD. After then NMC applied to the FSCCB claiming that arbitral award contained basic error of law. DD responded arguing that the arbitral award is final, non-appealable so that the CB has no jurisdiction to review arbitral award and no basic error of law was committed. The CB presided by seven judges decided that: reversing its former rulings rendered on Cassation File No. 21849[466] and decided that even if the parties agreed not to appeal in their arbitration agreement and agreed the award to be binding and final does not prevent the CB from reviewing basic error of law; and accordingly reviewed the question of the law and corrected basic of law on that particular arbitral award.

CB rendered another similar rulings on international commercial arbitration seated in Ethiopia on the case *Consta Joint Venture(Consta) V. Ethio-Djibouti Rail Way Corporation (EDC)*[467]. As stated in that Cassation decision, Consta is Italian Joint Venture and the EDC is a joint corporation (enterprise) of the governments of Ethiopia and Djibouti. The case was administered by the Permanent Court of Arbitration (PCA) but the seat of arbitration was in Addis Ababa, Ethiopia. The governing substantive law was the Ethiopian laws and the applicable arbitration rule was the European Development Fund Rules (EDF Rules). The tribunal decided in favor of the Consta, the EDC aggrieved with the decision and brought cassation application at FSCCB claiming for alleged basic error of law. The Bench after analyzing the international experience and previous rulings of the Bench, even if there was a clear finality clause under arbitration agreement, so long as the seat of arbitration is Addis Ababa and the lex arbitri is Ethiopian law the Bench concluded that it has jurisdiction to review basic error of law if any in that arbitral awards. Finally the CB reversed the decision of the tribunal stating basic error of law committed by the tribunal while applying and interpreting Ethiopian Law of Contract.

[464] Federal Supreme Court Cassation Bench File No.42239 decided on 8th November 2020.
[465] Art. 337 of CPC allows appellate court to dismiss such appeal without calling on the respondent to appear, if it thinks tit and agrees with the judgment appealed from.
[466] The Federal Supreme Court Cassation Bench decision rendered 25th January 2006 on a case between parties - *National Motors Corporation V. General Business Development*
[467] The Federal Supreme Court Cassation Bench decision rendered on Cassation File No. 128086 on 24th May 2018.

In another case between *Agricom International SA (Agricom) and Ethiopian Trading Business Corporation(ETBC)*[468] the CB declined jurisdiction on the basis that the seat of arbitration was not in Ethiopia. As stated in the decision Agricom a Canadian company concluded a contract to sale 200,000 metric tons wheat to the government owned Ethiopian Trading Business Corporation. In their arbitration agreement they agreed to resolve their contractual dispute through arbitration tribunal seated in London, England and an award subject to English Procedural Law and Ethiopian substantive law. Further they agreed that the Rules of Arbitration is the Grain Feeds Trading Association Rules Number 125 and also NYC to be applicable for the purposes of recognition and enforcement an English Award. ETBC according to their arbitration agreement brought the case to the arbitral tribunal claiming US$ 11,549,000.00 damage caused due to non-performance of contract by Agricom. Agricom argued denying the alleged non-performance. The arbitral tribunal proving the Agricom's breach of contractual obligation rendered the award Agricom to pay US$11,549,000.00 to ETBC. Then Agricom lodged its application of appeal at London High Court but the Court dismissed it's two times appeal. Following this Agricom brought application of cassation to the FSCCB claiming the arbitral tribunal committed basic error of law while applying Ethiopian law of Contract. The CB decided that it is only the English courts that have the jurisdiction to review the award since the seat of the arbitration is in England subject to English Arbitration Act or procedural law. And the Bench rejected the Agricom's application that the Bench has no power to review any basic error of Ethiopian law be it substantive or procedural if the seat of arbitration is outside Ethiopia.

All of the aforementioned rulings of FSCCB were rendered before the enactment of both EACWPP and Federal Courts Proclamation No.1234/2021. EACWPP introduced new approach in relation to Cassation recourse. EACWPP in its Art. 49/2 provides that *unless there is agreement to the contrary, an application for Cassation can be submitted where there is a fundamental or basic error of law*. Pursuant to this Article, as a principle arbitral awards are subject to review by the FSCCB. However, this law gives the rights to the parties to agree to the contrary their arbitral award shall not subject to Cassation recourse. As stated in the above paragraphs FDRE Constitution establishes Cassation recourse to achieve uniform application and interpretation of laws across the Country. The lawmaker under EACWPP provides the exception parties in arbitration agreement to waive Cassation recourse or by giving freedom to contracting parties to abandon constitutionally mandated power of the Federal Supreme Court to review any final decision containing basic error of law even without differentiating between domestic and international arbitration. Obviously, in relation to Cassation recourse the HoPR as the law maker has a power to enact a law, for instance, defining the terms of final decision and a basic error of law and what these terms include and do not include; HoPR, however, has no Constitutional Power to dismiss totally or partly constitutionally granted

[468] The Federal Supreme Court Cassation Bench decision rendered on Cassation File No. 155880 on 5th July 2019.

Cassation power of the Federal Supreme Court or to give the right to the parties in arbitration agreement to denounce Cassation recourse. But the HoPR under Art. 49/2 of EACWPP provides the right to the parties in arbitration agreement to denounce Cassation recourse.

But, the intention of the HoPR is different from what is lied down under Art. 49/2 of the EACWPP. This can be observed from the minutes prepared when members of the HoPR had been discussing on the draft law of EACWPP. Drafters of the law answered the following for the question forwarded by members of HoPR in relation with the right to appeal:- [469]

> " ... ተዋዋዮች ከፈለጉ ደግሞ የግልግል ዳኝነቱ በሚወስነዉ ጉዳይ ወደ ይግባኝ መሄድ ይቻላላ ብለዉ ሊዋዋሉ እንደሚችሉ፤ በዚህ አግባብ ከተዋዋሉና ስምምነታቸዉ ላይ ካስቀመጡ ወደ ይግባኝ መሄድ እንደሚችሉ፤ .... በስምምነታቸዉ ላይ ካላስቀመጡ ግን በግልግል ማዕከላት በሚሰጡ ዉሳኔዎች ላይ ወደ ይግባኝ መሄድ እንደማይቻል፤ ... *ሆኖም መሠረታዊ የሕግ ስህተት ሲኖር ወደ ሰበር መሄድ የሚቻል መሆኑን...መሠረታዊ የሕግ ስህተት የማረም ጉዳይ ደግሞ የብዙ አካላት ፍላጎትና አጠቃላይ አንድ ፖለቲካዊ ኢኮኖሚ ለማምጣት የሚጠቅሙ ብዙ ነገሮችን የሚነካ ስለሆነ ወደ ሰበር መሄድ ግን ስለሚቻል በዚህ ቢታይ።*" This can be translated as: " If parties in arbitration agreement agree to exercise the right to appeal on arbitral award they can exercise such right and accordingly can submit their memorandum of appeal [to a court]; If they did not agree to exercise the right to appeal they cannot appeal; *However, if there is basic error of law they can apply to Cassation. Since correcting basic error of law through Cassation on arbitral award has an impact on the interests of the public in general and fundamental tool to build one political economy, therefore, parties can lodge their application to Cassation."*

As stated in *italic* in the above quoted part of the minute the drafters explained that they had no intention to give right to renounce Cassation recourse to the parties' in arbitration agreement. However, Art.49/2 EACWPP is drafted contrary to what is expressed in the minute. Accordingly EACWPP as an exception gave the right to the parties in arbitration agreement to abandon the power of Federal Supreme Court to review basic error of law through Cassation recourse. EACWPP starting from the heading or the title given to Art.49 treats Cassation recourse as that of the appeal recourse. In effect this provision grants the right to the parties in arbitration agreement decide on the applicability [fate] of the Art. 80(3/a) of FDRE Constitution. Hence, adopting Art. 49/2 will undermine the Constitutional purpose for the establishment of Cassation system.

[469] FDRE House of Peoples Representative's Minutes recorded in writing on the Meeting held on 14th and 18th November 2020 when the House had been discussing the draft proclamation of Ethiopian Arbitration and Conciliation Working Procedure.

On the other side, Federal Courts Proclamation obliges FSCCB before exercising the power of Cassation reviewing final arbitral award to check whether there is any contrary provisions in appropriate law that take away its Cassation power.[470] This means if there is a law in federal level that prohibits reviewing arbitral award through Cassation; FSCCB shall not exercise its Cassation power. Federal Courts Proclamation which was enacted before EACWPP came into force presupposes what is lied down under Art. 49/2 of EACWPP. Accordingly, FSCCB cannot exercise its Cassation power in case when parties in arbitration agreement agreed to avoid Cassation recourse. One of the basic elements of public policy of a State is the principles or rules admitted by the legal system of that State. Cassation recourse is introduced in Ethiopia to achieve the domestic public policy objectives of creating uniform application and interpretation [especially] of federal laws throughout the Country and equal application of the law among citizens. In this context it is mandatory provision of law of the land and should not be allowed to be renounced by parties in arbitration agreement. But both Art. 10(1/h) of Federal Courts Proclamation and Art.49/2 of EACWPP clearly violates this constitutionally granted mandatory provision of Art. 80(3/a) of FDRE Constitution.

Notwithstanding the above contested provisions, FSCCB still has Cassation power over a final arbitral award containing basic error of law while parties in arbitration agreement agree to waive Cassation recourse. Before Federal Courts Proclamation No. 1234/2021 came into force there was no legal provision that defines the phrase `basic error of law`. However, Federal Courts Proclamation provides indicative definition for the phrase *basic error of law*. As stated under Art.2/4 of Federal Courts Proclamation 'basic or fundamental error of law' is an error exist in final judgment, ruling, order or decree which may be filed in FSCCB pursuant to Article 10 of this Proclamation and/or contains either one or similar of the following basic errors and grossly distresses justice: i) in violation of the constitution; ii) by misinterpreting a legal provision or by applying an irrelevant law to the case; iii) by not framing the appropriate issue or by framing an issue irrelevant to the litigation; iv) by denying to an award judgment to a justiciable matter; v) by giving an order in execution proceedings unwarranted by the main decision; vi) in the absence of jurisdiction over the subject matter in dispute; vii) an administrative act or decision rendered in contradiction with the law; viii) in contravention to binding decision of the FSCCB. Under the same proclamation the phrase *'final decision'* is also defined at the first time as: a *final decision* is a decision that shall include judgment, ruling, order or decree that finally disposes the case and/or decision, ruling, order or judgment that has completed the possible appeal mechanisms and rendered by courts, organ vested with judicial power, by institutions or an alternative dispute resolution mechanism.[471]

Accordingly if an arbitral award contains one or more the aforementioned grounds of basic error of law and if aggrieved party exhausted other available recourse[s], that award shall be subject to Cassation recourse. There are different scenarios available by which Federal Supreme Court will exercise its Cassation power. One scenario FSCCB to exercise Cassation power is on judgment made by Federal High

[470] Art.10(1/h) of Federal Courts Proclamation No.1234/2021.
[471] Art. 2/5 of Federal Courts Proclamation No. 1234/2021.

Court rendered in relation to recognition and enforcement of a foreign arbitral award.[472] Accordingly as per Art. 53 after the aggrieved party exhaust appeal recourse he/she can apply to FSCCB if such appellate court judgment contains basic error of law as per Federal Courts Proclamation and on the grounds laid down under Art.V of NYC and Art. 53/2 of EACWPP.

Moreover, as stated under Art.52 of EACWPP the award debtor may apply an objection to the competent Federal Court on the grounds listed under this article objecting an arbitral award not to be enforced. The decision rendered by a Court on that objection is non-appealable.[473] This makes an appellate court's decision final decision as per Art. 2/5 of Proclamation No. 1234/2021. Thus, if that decision contains basic error of law as defined under Art. 2/4 of the Proclamation No. 1234/2021 and satisfies one of the grounds lied down under Art. 52(1-3) of EACWPP any party in arbitral award can lodge its application to the FSCCB. In such a case as the other scenario FSCCB shall exercise its Cassation power to review that decision.

Furthermore, according to Art. 12/7 of EACWPP the parties in arbitration agreement has no right to appeal on the decision rendered by the Federal First Instance Court in relation to appointment arbitrator[s].This decision as per to Art. 2/5 of the Federal Courts Proclamation shall be final decision. Therefore, if the aggrieved party believes that the decision rendered by the Court in relation to the appointment of arbitration contains basic error of law it can lodge application of Cassation to the FSCCB and the Bench shall correct the basic error of law if any after investigating in terms of Art.2/4 of Federal Courts Proclamation.[474]

On the other hand, even if EACWPP makes the recourse of appeal as an optional right, this law does not allow parties in arbitration agreement to waive the recourse of setting arbitral award aside. Therefore, notwithstanding any agreement to the contrary contracting parties based on the grounds listed under the EACWPP can apply to the competent court[to the court that has jurisdiction over the case had the case not been submitted to arbitration to have the arbitral award set aside] to have the arbitral award set aside.[475] The judgment rendered on the application of setting aside of arbitral award is non-appealable.[476] According to Art. 2/5 of the Federal Courts Proclamation, the judgment rendered on the application of setting aside of arbitral award shall be considered as a final decision. If an application lodged to FSCCB against such judgment rendered through setting aside recourse on both domestic and international arbitral awards,

[472] Art. 53 of EACWPP

[473] Art 52/5 of EACWPP.

[474] Further Parties who believe that the decision of Federal First Instance Court rendered on the procedure of appointment and in relation to discharging arbitrators' function since such decision as per Arts.15 and 16 of EACWPP is non-appealable decision parties can apply to FSCCB. Furthermore, according to Art. 46 of EACWPP unless the contracting parties agree otherwise, if Federal First Instance Court rendered the decision on the appeal brought on decision made by arbitral tribunal on the modes of payment of costs necessary for the arbitration and service fees of arbitrators if there is basic error of law on Court's decision still parties can apply to the FSCCB.

[475] Art. 50 of EACWPP.

[476] Art. 50/8 of EACWPP.

FSCCB can exercise its Cassation power on the grounds listed as basic error of law under Art.2/4 of Federal Courts Proclamation and on the grounds stated under Art.50 (2 and 4) of EACWPP.

On the other hand, EACWPP is failing expressly to differentiate whether the scope of application of Art. 49/2 is limited to domestic arbitral award or includes international arbitral award. However, since FDRE Constitution is part of the domestic law, as principle FSCCB shall have no Cassation power to review international arbitral award by the arbitral tribunal whose seat in Ethiopia, if that award rendered based on foreign substantive and procedural laws and rules of arbitration. In this case no Cassation shall lie to the FSCCB against international arbitral award. However, FSCCB shall have Cassation power against arbitral award rendered in the international arbitration whose seat is in Ethiopia if that arbitration proceeding conducted using Ethiopian arbitration law and also if Ethiopian Substantive law applied in the merits of the case.

If we look at French experience there is no provision like Art.49/2 of EACWPP under French domestic and International Arbitration Laws. In other words French Arbitration Law does not provide any provision to make Cassation recourse as one of optional recourse or as a waivable right in its laws. As analyzed in the previous chapter in France even if it is not allowed directly to lodge application (*pourvoi*) to the Court of Cassation against the decision of arbitral tribunal, as a general rule if there is no any available recourse to challenge such decision - may be brought before the *Court of Cassation.*[477] Accordingly, even though no clear provision under French Arbitration Law that empowers French court of Cassation directly to review arbitral decision, it is already developed judicial jurisprudence once arbitral award is reviewed by French Court of Appeal *such judgment* rendered by the Court of Appeal can be subject to revision by *Court of Cassation.*[478]

As stated in previous chapter since harmonization is different from uniformity and rather it promotes similarity and correspondence but a certain measure of disunity still remains. Moreover, even if the MAL represents harmonized legal standard recognized worldwide, it is not the only legal standard available or even the most efficient. MAL may help as relevant harmonized standards but it alone is not sufficient to establish a country as a popular seat of arbitration. Hence, when Ethiopia adopts harmonized MAL standards and incorporate them in EACWPP it should be with due consideration for its mandatory legal provisions and public policy. We can learn this from French experience. Accordingly French as an internationally known pro-arbitration country, without expressly granting in its constitution the Cassation power to its Court of Cassation to review arbitral award, if it has developed and exercising Cassation recourse to review arbitral award in limited grounds, by strong reason Ethiopian Federal Supreme Court having constitutionally recognized power to review and correct basic error of law in any final decision

[477] Peter Herzos and Martha Weser, *Supra note* 343, PP.421-422
[478] Fouchard, supra note 30, ¶ 1591,P.907.

including final arbitral award, no sufficient grounds that forbid Ethiopia from exercising such a Cassation recourse to challenge arbitral awards.

3.5.3. Lack of Revision Procedure as a Recourse Against Arbitral Award

As analyzed in previous chapter the other extraordinary recourse implemented in some pro-arbitration countries such as Switzerland and France is *Revision* against arbitral award. In Switzerland *revision* of International Arbitral Award can be possible if one of the grounds and time limit stated under Art. 190a of SPILA are satisfied. These grounds are: 1) when a party after notification of the award discovers material facts or conclusive evidence that it could not submit in the arbitration proceedings despite applying the required due diligence; 2) in the event that criminal proceedings have established that the arbitral award was influenced to the detriment of the challenging party, by a crime or misdemeanor, even in the absence of any conviction; and 3) despite having exercised due diligence, a ground for challenge an arbitrator under Art.180(1/c) (i.e., the circumstance of justifiable doubts as to that arbitrator's independence or impartiality) is discovered only after the award is rendered and if no other recourse against the award is available. Accordingly, if a party in arbitration agreement satisfies one of the grounds listed above he/she can file the application for revision against international arbitral award at the Swiss Federal Supreme Court.[479] The time limit given for this is 90 days of becoming aware of the ground for the revision and, in any event, within the absolute deadline of 10 years from the date on which the award was notified, except if a criminal offence is the ground for revision, in which case the absolute deadline of 10 years does not apply.[480] If the Swiss Federal Supreme Court grants the request for revision of international arbitral award, it shall set the award aside and remand the case to the arbitral tribunal for a new decision or make the necessary findings.[481]

Similar grounds lay down under Art.396 of the Swiss Civil Procedure Code. Accordingly, parties in domestic arbitration award can request revision on domestic arbitral award filing their application on competent state court pursuant to Art. 356/1 of the same Code[482] With regards to revision of domestic arbitral award if the court grants the request for revision, it shall set the award aside and remand the case to the arbitral tribunal for a new decision.[483]

In similar fashion French Code of Civil Procedure of 2011 as an exceptional recourse permitted parties in arbitration to request revision against both domestic and international award on limited grounds. This recourse allows French Court of Appeal to review the merits of the case if one of the parties applied

[479] Art. 119a of Chapter 5a of the Swiss Federal Supreme Court Act- The Federal Supreme Court decides on requests for revision of international arbitral awards.
[480] Art. 190a/2 of SPILA.
[481] Art. 190a/3 of SPILA.
[482] Art. 396 of the Swiss Code of Civil Procedure of 19 December 2008 as in force from 1 January 2021
[483] Art. 399/1 of the Swiss Code of Civil Procedure of 19 December 2008 as in force from 1 January 2021.

discovering such grounds after the tribunal rendered the award. These grounds are:[484] a) if the arbitral tribunal was misled by fraud, or b) if one of the party produced forged witness statements or documents, or c) that such party retained some key documents- decisive evidence that had been withheld by another party is recovered after the award was rendered. Application for revision shall be brought before the arbitral tribunal or before the relevant Court of Appeal if the tribunal cannot be reunited.[485] It is only in the event that the arbitral tribunal cannot be reconvened that the French Court of Appeal would have jurisdiction to hear the matter. After court of Appeal rendered a decision French Court of Cassation would entertain a case on point of law when a party aggrieved by appellate court decision applied to the court.[486]

However, EACWPP as that of UNCITRAL MAL does not expressly provide *revision recourse* as one of the method to challenge against arbitral awards when an award has the defects mentioned above as grounds for revision under both Swiss and French arbitration laws. But this does not mean that we have no laws at all. In the civil justice administration we have the procedural remedy namely review of judgment procedure under Art. 6 of CPC in case when such kind of defect committed in judgment made in civil litigation. But this procedure has no direct application to review arbitral award. On the other hand, allowing such fraudulently made arbitral award to remain in force undermines confidence in the justice system. Arts. 78/3 and 79 of EACWPP allow application of the provisions of the CPC on the issues that have not been covered by EACWPP. Hence, until EACWPP would be amended taking into consideration the *revision recourse* experiences from both Swiss and French legal framework, it is advisable analogical to apply Art. 6 of CPC to review international arbitral awards whose seat is in Ethiopia and domestic arbitral awards.

3.6. Problems related to the Public Policy Exception to Refuse Recognition and Enforcement of [Foreign] Arbitral Award

Ethiopia through the Proclamation No.1184/2020 ratified the 1958 NYC. After the ratification of NYC Ethiopia enacted EACWPP incorporating provisions applicable on matters related to recognition and enforcement of arbitral awards. Accordingly, basic legal framework on the recognition and enforcement of foreign arbitral award in Ethiopia is mainly found in EACWPP and NYC together with latter's ratification Proclamation. An arbitral award rendered in Ethiopia or in a foreign country as long as it had not been set aside as stated under Art. 50 and 52 of EACWPP shall be deemed to be binding and shall be executed pursuant to CPC by applying to a court that is empowered to execute the award had the case been heard by a court.[487] The EACWPP sets out under Arts 52(2 and 3) and 53/2 the grounds respectively for objection of enforcement of arbitral awards and refusing recognition or enforcement of foreign arbitral awards.

[484] Art. 1502 of FCCP
[485] Ibid.
[486] Revision of Arbitration Awards under French Law(2021) Mr. Bernard Tapie's Cass, 30 juin 2016, Arrêt n° 932 available at: https://www.acerislaw.com/author/aceris
[487] Art.51/1 of EACWPP.

Grounds (Exceptions) provided under these articles are almost identical with those provided under Art. V of NYC and Art.36/1 of UNCITRAL MAL for refusing recognition and enforcement of foreign arbitral awards. As stated under Art. V(2/b) of the NYC and Art. 36(1/b.ii) of UNCITRAL MAL, foreign arbitral award which contradicts the public policy of the host country shall not be recognized and enforced. However, both NYC and UNCITRAL MAL have not defined what "*public policy*" is. Likewise, EACWPP has not defined and indicated what public policy and its content is. This may be a common problem. Beyond that, EACWPP provides strange grounds such as *`public morality and national security`* as an exception or a ground to object recognition and enforcement of arbitral award,[488]and for refusal of recognition and enforcement of foreign arbitral awards. Further, Ethiopia under its Art. 3 of the NYC ratification proclamation puts an additional reservation clause of non- retroactivity of NYC.

3.6.1. Impacts of Ethiopian Approach of Public Policy Exception

The fundamental objective of the NYC is to facilitate enforcement of foreign arbitral awards by subjecting the enforcement to a limited number of conditions. Similarly, UNCITRAL through MAL provided standardized conditions applicable to refuse recognition and enforcement of foreign arbitral awards with the objective to assist countries to harmonize their national arbitration laws. Among these grounds provided under NYC and UNCITRAL MAL one condition used to refuse recognition and enforcement of foreign arbitral awards is the violation of public policy of host country in which enforcement is sought.[489] The concept of public policy exists in almost all legal systems.[490]As stated in the previous chapter, however, the phrase of *public policy* was not defined both under the NYC[491] and UNCITRAL MAL and as a result its meaning varies between the Contracting States of NYC.

Security related terms of public order, public morals, public health, public security and national security are commonly found in multilateral and bilateral treaties and in other international law texts, and vary from agreement to agreement, and their meanings may overlap.[492] The terms *public order* widely used in and well established within national legal settings in civil law legal system countries like France, Germany, Italy, and Switzerland.[493] Public Order has a statutory source.[494] On the other hand, the term public policy in general is the term used in common law countries;[495] and it has been an intuitive concept developed by

[488] Arts.52(3/b) and 53(2/f) of EACWPP.
[489] Art. V of NYC, and Art.36 of UNCITRAL MAL.
[490] Farshad Ghodoosi, The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements, 94 Neb. L. Rev. 685 (2015) ,P.687, Available at: https://digitalcommons.unl.edu/nlr/vol94/iss3/5
[491] IBA SUBCOMMITTEE ON RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS Report on the Public Policy Exception in the New York Convention October 2015 , Accessed on 29/08/2022 from https://www.newyorkconvention.org
[492] *April Tash Kathryn Gordon and Joachim Pohl,* The report *published under the Organization for Economic Co-operation and Development(OECD) Secretariat‟s responsibility on* SECURITY-RELATED TERMS IN INTERNATIONAL INVESTMENT LAW AND IN NATIONAL SECURITY STRATEGIES,(2009),P.6
[493] Ibid.,P.8 – see also, French international Arbitration Law under Arts. 1514 and 1520 of the original French version Code of Civil procedure.
[494] Kent Murphy, *The Traditional View of Public Policy and Ordre Public in Private International Law*, 11 GA. J. INT'L & COMP. L. 591 (1981). Available at: https://digitalcommons.law.uga.edu/gjicl/vol11/iss3/9
[495] Ibid.

the courts.[496] The principles surrounding the violation of public policy have been differently expressed by courts depending on whether they are in civil law or common law jurisdictions.[497] In the former, the definition of public policy generally refers to the basic principles or values upon which the foundation of society rests, without precisely naming them.[498] In common law jurisdictions, on the other hand, the definition often refers to more precisely identified, yet very broad values, such as justice, fairness or morality.[499]

A French legal dictionary describes *ordre public (public order)* as ―a vast conception of communal life in the political and administrative spheres.[500] The concept helps to define the set of collective concerns that might justify restrictions on individual liberties, especially ―liberty of movement, the inviolability of the home, liberty of thought and of expression.[501] In relation to civil law, the dictionary defines "*ordre public* as ―the rules that are imposed for reasons of morality or security and that are needed for the conduct of social relations. Parties may not derogate the rules of *ordre public"*.[502] Black's Law Dictionary provides broad and narrow definition for the term *public policy* as:[503] "1) *Broadly*, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society. Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is "contrary to public policy. And 2) *More narrowly*, the principle that a person should not be allowed to do anything that would tend to injure the public at large." From the given *definitions* we can observe that the phrase *public policy (public order)* has no clear cut meanings and rather its source and scope depend on country's legal system, and also determinant values and principles.

On the other hand, there are three classes of public policy:[504] (a) 'domestic public policy', i.e., those principles of morality and justice which a State sets into its domestic laws; - Domestic public policy is a principle of law which holds that 'no subject can lawfully do that which [is] injurious to the public or against the public good'; And for enforcement to be refused, it must be shown that the award violates 'the State's most basic notions of morality and justice. (b) 'international public policy', i.e., those principles of a State's domestic public policy that a State insists should apply in an international relationship; - International public policy is narrower in scope; not every rule that belongs to a State's internal public

[496] Lawarée Valentin,(Thesis), Public Policy in English and American Law,(2014),P.8
[497] Vyapak Desai, Moazzam Khan and Payel Chatterjee, Public Policy and Arbitrability Challenges to the Enforcement of Goreign Awards in India, P.203
[498] Ibid.
[499] Ibid.
[500] Ibid.,P.9 –Moreover, Public order (*öffentliche Ordnung*) occupies an important place in German law, but it is almost always used in conjunction with a related term: - public security/safety (*öffentliche Sicherheit*). ―Public security/safety is defined as the ―inviolability of the rule of law, of subjective rights and legal positions of the individual as well as the existence, the institutions and manifestations of the State or other bearers of sovereign power ; public order in turn constitutes the ―entirety of those unwritten rules of the behavior of the individual in the public sphere the respect of which is considered – in light of the general perception at a given point in time – indispensible for an orderly life of the people in a community. *Ibid.*, *P.8*
[501] Ibid.
[502] Ibid.
[503] Bryan A. Garner, Black's Law Dictionary, (Ninth Edition), P. 1351
[504] LUKE VILLIERS, Breaking in the 'Unruly Horse': The Status of Mandatory Rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards, AUSTRALIAN INTERNATIONAL LAW JOURNAL,P.161

policy is necessarily part of the international order; For instance, public policy is international because it is defined by international instruments and the state bears a responsibility to "respect its obligations toward other States and international organizations," such as U.N. resolutions imposing sanctions.[505] Accordingly, international public policy is a policy viewed through the lens of the state's own laws or standards for dealing with a foreign arbitral award. Thus, matters that are considered as public policy issue in domestic context, is different from public policy in international context. And finally, (c) 'transnational public policy', i.e., those principles of universal justice and morality accepted by civilized nations. Transnational public policy is not the public policy of any one state, but rather involves public policy that transcends state boundaries.[506] Such public policy is defined as arising out of an international consensus regarding universal standards as to norms of conduct that are generally recognized and agreed upon as unacceptable in most civilized countries, such as slavery, bribery, piracy, murder, terrorism, and corruption.[507]The purpose of making such a distinction is always to narrow down the scope of the public policy which must be considered for assessing whether the enforcement of a foreign award is compatible or not.[508]

As stated above the terms and the concept of public policy is debatable, because of the fact that there is no universally accepted identical definition of the terms. NYC under Art. V(2/b) puts a situation where the recognition and enforcement of the award shall be refused on the ground if it is contrary to the public policy of *the country* where recognition and enforcement is sought. Similar provision is laid down under Art. 36(1/b.ii) of UNCITRAL MAL. Different Countries provide different terminology or expression for the subject of '*public policy'* under their arbitration legislations. Pursuant to French Domestic Arbitration Law no enforcement order may be granted where an award is manifestly contrary to public policy [public order in its French version].[509] On the other hand France under its international Arbitration Law refers to 'the principles of international public policy [public order].[510] Others such as Singapore, Nigeria, Rwanda, Switzerland and UK/English in their Arbitration Laws provide that enforcement of arbitral award would be refused if enforcement of that award respectively contrary to each Countries' public policy without referring to domestic and international.[511]

Whereas, Ethiopia under Art.53(2/f) of EACWPP, provides that a foreign arbitral award shall not be recognized or enforced if the arbitral award contravenes public policy, moral and security.[512] The EACWPP mentions the terms of *public policy, morality and security* as a ground to refuse recognition and

[505] Huseyin Alper Tosun, Public Policy Concepts in International ArbitrationUniversity of California , Berkeley,(2019), P.40

[506] Margaret Moses, Public Policy: National, International and Transnational, Institute for Transnational Arbitration(ITA), Available at: https://www.kluwerarbitration.com/2018/11/12/public-policy-national-international-and-transnational/

[507] Ibid.

[508] Vyapak Desai, Moazzam Khan and Payel Chatterjee, *Supra note* 497, P. 202

[509] Art. 1488 of FCCP

[510] Art.1514 of FCCP.

[511] Sect.31(4/b) of SIAA, Sect. 52(2/b.ii) of NACA , Art. 51(2^0/b) of RLACCM, Art.190(2/e) of SIPLA and Sect.103/3 of 1996 English Arbitration Act.

[512] Art. 53(2/f) of EACWPP

enforcement of foreign arbitral awards, without expressly providing the meanings or contents which indicate what those terms are. According to Art. 3 in principle EACWPP shall be applicable to commercial related domestic arbitration and international arbitration whose seat is in Ethiopia. However, as an exception Art. 53 and Articles mentioned under Art.3/2 of EACWPP shall be applicable to international Arbitration situated outside of Ethiopia. Accordingly, when we read Arts. 52(3/b) and 53(2/f) in conjunction with Art. 3/2 of the EACWPP the *public policy, moral and security* exception will be extended to challenge international arbitral award. On the other hand, since this issue was not raised and discussed during the discussion conducted on the draft EACWPP in the House of Peoples Representative, there is no clue laid down under the minute that indicates what the drafter's intention was when the terms public policy, moral and security incorporated together in. Moreover, in the best of my knowledge yet there is no ruling (precedent) provided by FSCCB interpreting these terms. Furthermore, none of the pro-arbitration countries' arbitration laws which are comparatively investigated under this thesis have mentioned the terms of '*public moral and security'* together *with public policy*.

As stated earlier Ethiopia ratified NYC on the recognition and enforcement of foreign arbitral awards. Accordingly, where a foreign arbitral award falls under NYC and if its recognition and enforcement sought in Ethiopia, it may be recognized or enforced in accordance with such treaty.[513] NYC by qualifying the word 'may' with the word 'only' under Art.V/1 makes the exceptions listed under Art. V exhaustive list. This means that the enforcement court cannot refuse enforcement on grounds other than those enumerated in Art V of the NYC.[514] This is another pro-enforcement feature of the NYC, albeit somewhat controversial.[515] A broad interpretation of the public policy defense in some cases undermines the strength and the effectiveness of the NYC,[516] and in turn creates a sense of uncertainty on the convention's effectiveness. Accordingly, the terms of *'public moral and security'* incorporated under Art.53(2/f) together with *public policy* shall not be applied or interpreted broadly to refuse recognition and enforcement of foreign award. Therefore, Art. 53(2/f) of EACWPP should be applied and interpreted by taking into consideration the general objective of NYC. If Ethiopia applies these terms broadly and consequently if large numbers of foreign arbitral awards could not be recognized and enforced; Ethiopia will violate basic objective of NYC and self-defeat its objective of legal reform to have the status of pro-arbitration country and preferred seat for international arbitration.

Further, as stated earlier under this study the concept of public policy may differ from state to state and from time to time, reflecting the changing values of society. EACWPP under Art. 53 or elsewhere never expressly define these terms and indicate whether such exception *of public policy, public moral and*

[513] Art. 53/1 of EACWPP
[514] Ma, Winnie Jo-Mei,(DOCTORAL THESIS),Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons for and from Australia, (2005),P.145.
[515] Ibid
[516]Richard A. Cole, The public policy exception to the New York convention on the recognition and enforcement of arbitral award. Journal on Dispute Resolution[Vol. 1:2 1985-1986] P.366.

security are limited to Ethiopian context and/or extended to international and transnational public policy, public moral and security. To arrive at the intention of the law it is important to look at the preamble of EACWPP. The objectives to enact EACWPP as indicated under the preamble are: to provide protection to the right to justice and freedom to contracting parties; to create efficient alternative dispute resolution mechanism which conducted using simple procedure for the investment and commercial related disputes; to provide working procedure for the enforcement of arbitral award which takes into account the objective condition prevailing in the Country; and to implement international treaties ratified by Ethiopia and to adopt international practices and principles related to arbitration. Accordingly Ethiopian court may refuse to recognize and enforce the arbitral awards if doing so contradicts the objectives of EACWPP; if recognizing and enforcing arbitral award will not compatible with the mandatory principles of national laws which designed to serve the essential political, social or economic interests of the country; or that undermines public interests such as sovereignty, justice, integrity, or trust in arbitration; or breaches the high and valuable morality of the Ethiopian Peoples, if the subject of the award is drug smuggling and trafficking, or involves bribery or corruption and money laundering. The nature of these grounds not only connected with the interests of Ethiopia but also have the potential to affect international and transnational interest.

Hence, Ethiopian court has an obligation not only to maintain domestic public policy, moral and security but also to uphold international and transnational public policy, moral and security when arbitral award creditor claims the recognition and enforcement of awards. The same time Ethiopian court should be careful not broadly to interpret these terms in a way undermining the objective and effectiveness of the NYC. The NYC seeks to encourage recognition and enforcement of awards in the greatest number of cases as possible. That purpose is achieved through article VII/1 of the Convention by removing conditions for recognition and enforcement in national laws that are more stringent than the conditions in the Convention, while allowing the continued application of any national provisions that give special or more favorable rights to a party seeking to enforce an award.[517] Putting such broad terms practically might open the door widely for the court to interpret these vague terms broadly out of the box of NYC and in effect a court may quash or refuse the recognition and enforcement significant numbers of foreign awards using this exception. In order to balance competing interest the terms of public moral and security should be taken as the components of dominantly known exception called public policy.

3.6.2. Impacts of Ethiopian Additional Reservation Clause to NYC

Until a recent legal reform made on Country's arbitration law and before the ratification of the NYC, the enforcement of foreign arbitral awards in Ethiopia was governed by Art.461 of the 1965 CPC. As stated elsewhere in this thesis the HoPR has ratified the 1958 NYC through proclamation No 1184/2020.

[517] See *supra note* 84, the purpose of Key provisions of NYC.

Ratifying the NYC is a major step forward for Ethiopia and strengthens the country's continuing determinations to attract greater foreign investment and to place effective facility for the enforcement of commercial transactions. Moreover, the adoption of this uniform and prominent legal framework for the recognition and enforcement of arbitral awards will certainly help to improve the country's profile as a pro- arbitration and business-friendly jurisdiction. The decision to adopt the NYC therefore provides international parties with greater certainty and brings the Ethiopian arbitration ecosystem into line with international standards.[518]

The NYC under Art. I/3 provides two common reservation namely reservations that: i) limits the application of the Convention to foreign awards made in the territory of another Contracting State, on the basis of reciprocity; and ii) narrows the scope of the Convention even further by restricting its application to matters "considered as commercial under the national law of the State making such declaration. Ethiopia under Art.2 of proclamation No 1184/2020 declared its reciprocity and commercial disputes reservations. In addition to these common reservations Ethiopia made the third reservation that makes the Convention only applies with respect to Arbitration Agreements concluded and Arbitral Awards rendered after the date of its accession to the Convention. The proclamation that enacted to ratify the NYC indicates that the Convention was ratified on 13/02/2020 and came into force upon the publication in the Federal Negarit Gazette on 13/03/2020.[519] Whereas as stated under the official website of UNCITRAL Ethiopia ratified the Convention on 24/08/2020 and the Convention came onto force on 22/11/2020.These days are somehow confusing. To eliminate such confusion it is advisable to follow Art. XII/2 of the NYC. Pursuant to this sub-Article … the Convention shall enter into force on the 90th day after deposit by such State of its instrument of ratification or accession. Accordingly, Ethiopia after ratification published proclamation in the Federal Negarit Gazeta after 1 month and for unknown bureaucratic or other reasons it spent more than 5 months to deposit its instrument of ratification [ratification proclamation]. Hence, according to Art. XII/2 of NYC in Ethiopia the Convention shall not be applicable with respect to Arbitration Agreements concluded and Arbitral Awards rendered before 22nd day of November 2020.

As publicized under the UNCITRAL official website out of 170 Contracting States of the NYC only 7 countries namely Ethiopia, Iraq**,** Malawi**,** Belize**,** Malta, Serbia (successor of former Federal Republic of Yugoslavia) and Sierra Leone that have adopted or ratified the Convention putting non-retroactivity effect reservation.[520] Malawi and Sierra Leone declared this reservation putting non- retroactive effect of the convention on arbitration agreements concluded, or arbitral awards rendered, after the date they accede to the Convention and not those before that date. These countries approach is similar with Ethiopian reservation. Whereas, Iraq, Serbia and Belize made this reservation to apply the Convention with respect to

[518] Africa Arbitration Review, Ethiopia ratifies the New York Convention, OCTOBER 2020, P.4, Available at:- WWW.DLAPIPER.COM
[519] Preamble and Art.6 of the NYC ratification Proclamation No.1184/2020.
[520] Accessed on 29/08/2022 from https://uncitral.un.org/en/texts/arbitration/conventions/ foreign arbitral awards/status2 and from https://www.newyorkconvention.org/countries

arbitral awards rendered either after the publication of the Convention ratification law in the official gazette or after the date of its accession/adoption to the Convention. Malta on the other hand, has declared only to apply the Convention with respect to arbitration agreements concluded after the date of Malta's accession to the Convention. These countries that adopt non-retroactive reservation are not among top pro-arbitration countries of the world. Or they are not among the five most preferred seats for arbitration such as UK-London, Singapore, China-Hong Kong, France- Paris and Switzerland-Geneva.[521]

Non-retroactivity of treaties is well-established principle in international law. The Vienna Convention on the Law of Treaties under Art. 28 provides that, unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.[522] According to this Convention unless otherwise expressly agreed, international treaties do not apply to juridical acts which occurred before the treaty entered into force with respect to that party. Some states have taken the view that their regulatory autonomy is more important than the certainty provided for by the rule of non-retroactivity and have drafted treaties which explicitly carve-out areas where retroactive measures are permitted.[523] For example, the Sweden-Russia BIT allows the state parties to retroactively apply exceptions to the national treatment obligations when this would be for the purpose of maintaining defense, protecting national security and public order, the environment, morality and public health.[524] European Union law also allows departure from the principle of non-retroactive application 'where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected.'[525] The EU's highest court has engaged in a cost-benefit analysis to determine whether the benefits of the 'general interest' outweigh the costs of retroactive administrative regulations. [526] Therefore, in situations where the retroactive effect brought only benefits and no costs for those affected, the general principle of non-retroactive application of law did not apply.

One of the expected benefits when Ethiopia ratified the NYC is to show Ethiopian commitment for Foreign Direct Investors that it is committed to enforce arbitration agreement and foreign arbitral award in accordance with NYC's uniform principles and standards, and also to place favorable legal and judicial environment for the recognition and enforcement of foreign arbitral award. Letting parties to agree on a neutral playing field and enforcing the outcome of their contractual and legal dispute promotes investment and commercial activities. However, by the mere existence of the additional reservation made by Ethiopia, long terms contracts will therefore not benefit from the Ethiopian ratification of NYC unless an

[521] 2021 International Arbitration Survey: Adapting arbitration to a changing world available at: https://arbitration .qmul.ac.uk/media/ arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.
[522] Vienna Convention on the Law of Treaties, opened for Signature on23rd May 1969 entered into force on 27th January 1980, United Nations, Treaty Series, Vol. 1155,P.331.
[523] Yarik Kryvoi and Shaun Matos, 'Non-Retroactivity as a General Principle of Law' (2021) 17(1) Utrecht Law Review PP. 46–58, P.53. DOI: https://doi.org/10.36633/ulr.604
[524] Ibid.
[525] Ibid.
[526] Ibid.

amendment or restatement of the arbitration agreement is made after Ethiopian ratification come into force. If it is seen in legal and practical point of view amending or making restatement on existing arbitration agreement is not easy task. Consequently, parties in long term existing arbitration agreement may not consider Ethiopia as pro-arbitration agreement enforcement State.

Further, due to this reservation clause foreign arbitral award creditor who has arbitral award rendered before Ethiopia ratified NYC will not be benefited from Ethiopian ratification of NYC. As we have seen elsewhere in this thesis one of the basic objectives of NYC is allowing free movement and enforcing of foreign arbitral award with limited exceptions. Even though when seen in terms of Art. 28 of Vienna Convention on the Law of Treaties putting additional non- retroactive reservation clause in the ratification instrument of treaties is universally accepted principle, if Ethiopian additional reservation clause seen in light of effective enforcement of NYC, putting such reservation has the potential negatively to affect NYC's pro-enforcement basic objective.

On the other hand, before the ratification of the NYC Ethiopia is believed to have entered several international commercial and investment contracts that contain arbitration agreements, either at state level or through its development enterprises. And also before the ratification of NYC there may be significant number of commercial cases in arbitration processes in which Ethiopia involved or a foreign arbitral awards made by which Ethiopia became award debtor. Ethiopia before ratifies the NYC it should conduct audit to check the benefits and costs of these situations on the economy and public policy of the country. Since Ethiopia needs the time to conduct such an audit and to have such time the situation may oblige it to declare non-retroactive reservation on the application of NYC. Therefore, this Ethiopian additional reservation or declaration clause must be denounced as per Art. XIII/2 of the NYC immediately after Ethiopia accomplishes conducting the audit and based on the findings of that audit.

CHAPTER FOUR

Conclusion and Recommendations

4.1. Conclusion

This thesis has aimed at comparatively analyzing the compatibility of the progress of harmonization Ethiopian arbitration laws towards international arbitration laws and arbitration of laws of some pro-arbitration countries. The purpose for harmonizing arbitration law is creating stability and certainty in international trade and investment disputes by enabling parties to predict in advance the national laws that are likely to apply to them. Parties especially in commercial arbitration most of the time choose harmonized *lex arbitri*, or a seat which is equipped with domestic legislation that understands and supports the logic of international arbitration.

Moreover, UN General Assembly through its Resolution No. 40/72 and 61/33 recommended that all States to give favorable consideration to the harmonized provisions of the MAL when they enact or revise their laws. Further, Contracting States of the NYC are obliged to recognize and enforce foreign arbitral awards as per the standardized provisions laid down under the Convention. Ethiopia as a member State of UN and as Contacting State of NYC has international responsibility and obligation to harmonize its arbitration laws adopting internationally accepted standards and principles incorporated in UNCITRAL MAL and NYC. Furthermore, Ethiopia in order to be preferred seat for international arbitration competing specially with pro-arbitration countries such as France, UK/English, Switzerland, Singapore, Nigeria, Rwanda and others, at least it has to have comparable arbitration law with those countries.

As part of the recent legal reform Ethiopia enacted EACWPP No.1237/2021.The EACWPP repealed and replaced Arts. 3325 to 3346 of the CC, and the provisions of the CPC from Arts. 315 to 319 and Arts 350, 352, 355-357 and 461, which deal with substantive and procedural aspect of arbitration. The country enacted this law among others with the purpose of complementing the right to justice and to contribute to the resolution of investment and commercial disputes and to the development of the sector; to amend the existing laws in line with the international principles and practice and support the implementation of international treaties. Accordingly EACWPP is drafted adopting the logical language and the drafting styles UNCITRAL MAL. Moreover, its most salient areas drafted taking into account of the harmonized principles and standards of commercial arbitration provided under UNCITRAL MAL and NYC. Further, under the legal reforms aimed at boosting the economy by encouraging foreign direct investment (FDI), on the 13th day of February 2020 the Ethiopian HoPR through the ratification Proclamation No.1184/2020 approved the ratification of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC). Ratifying the NYC is a vital step forward for Ethiopia and strengthens the country's ongoing efforts to attract greater foreign investment and certainly help to improve the country's profile as a business-friendly legal framework.

Even if Ethiopia reformed arbitration legal framework enacting EACWPP and ratifying NYC, these legal frameworks do not escape from inconsistency, ambiguity and loopholes in some its salient areas compared with harmonized international arbitration laws and arbitration laws of the pro-arbitration countries such as France, UK/English, Switzerland, Singapore, Rwanda and Nigeria. In this study the following particular salient areas of Ethiopian arbitration laws are identified as incompatible.

One inconsistency seen under EACWPP is related with formal requirement of arbitration agreement. Under this law arbitration agreement in order to have legal effect in addition to recording in writing it should be signed by all parties and attested by two witnesses even where it was originally made orally, by conduct or any other means. The formal requirement of attesting arbitration agreement by two witnesses is beyond maximum formal requirement of NYC and MAL. Upholding such strict and high far-reaching formal requirement will frustrate the NYC's and UNCITRAL MAL's objective of enhancing the enforceability of agreements to arbitrate and will make the country less advantaged compared towards with pro-arbitration countries' arbitration laws.

The other discrepancy and ambiguity identified in EACWPP is related with the mode and procedure for appointment of arbitrator[s]. As the Contracting State to NYC, Ethiopia has international obligation to give full effect to arbitration agreement denying judicial litigation for the parties who agreed to resolve their dispute through arbitration. Moreover, according to Art.11/4 of MAL if the parties or two arbitrators, or a third party, including an institution, unable to appoint arbitrator in the agreed procedure or fail[s] to perform any function entrusted to them [it] in relation to the appointment of a sole arbitrator or the third arbitrator within specified time for their appointment, the appointment shall be made, upon the request of a party, by the court or other authority specified in Art. 6. Similar approaches have been followed by French, Singapore, Nigeria, Rwanda, Switzerland and UK/English arbitration laws. However, EACWPP through Arts.12/4 and 31/3, instead of enforcing arbitration agreement empowering a court to appoint arbitrator on behalf of requested party provides the right to the requesting party unilaterally to cancel arbitration agreement and make him free to institute a court action creating unnecessary court intervention in contradiction with Art.8 (1 and 2) of EACWPP.

The third loophole under EACWPP is related with the issues of arbitrator immunity. It is clear that arbitrator's responsibilities are functionally comparable to those of a judge. CC under Arts. 2138/c and 2139 provides that judges of Ethiopian courts are free from action for liability may be brought as the result of an act connected with their functions. Moreover, under the Federal Judicial Administration Proclamation No.1233/2021 federal judges are expressly immune from civil liability for actions taken in their official capacity. Unlike pro-arbitration countries such as UK/English, Singapore and France; however, apart from redress provided under EACWPP in respect of challenging to remove and replace the arbitrator[s] or bringing an action to set aside the award or any other measures may be taken to challenge

arbitral awards; there is no clear provision that addresses the issue of immunity of arbitrator. And also yet no FSCCB precedent has provided to govern issues of arbitrator immunity.

Fourth and fifth problems seen under EACWPP are related with the equal treatment of parties and giving opportunity to present oral argument and also proceedings of counter-claim action. UNCITRAL MAL under Art.24/1 and pro- arbitration countries' arbitration laws set the standard provisions applicable to grant the right to present oral hearing (argument) in the request of one of the party. However, EACWPP under Art. 34/2 provides that the arbitral tribunal in order to conduct oral argument there should be the request from both parties. Moreover, UNCITRAL MAL under Art. 2/f and pro-arbitration countries in their respective arbitration laws allow arbitral tribunal to entertain counter claim in similar with primary claim. Even if there is a legal base under the CPC how and when counter-claim can be submitted and conducted in civil court litigation; however, there is no clear provision under EACWPP that governs when and how counter-claim proceedings can be conducted in arbitration process.

The intervention of courts in arbitration is important for the smooth functioning of the arbitration in so far as the involvement of the courts goes in supportive and supervisory manner in the extent and on matters permitted by legal system. The most cited advantages of commercial arbitration which supported by the most influential legal instruments such as NYC and UNCITRAL MAL is finality of arbitral tribunal's award. Both NYC and UNCITRAL MAL except setting arbitral award aside and refusing recognition and enforcement of arbitral award do not recognize appeal, cassation and revision as the recourses that parties may be used as a default recourses or through incorporation under their arbitration agreement to challenge against arbitral awards. However, with different policy reasons Countries recognize additional different recourses in their national arbitration laws. Some pro-arbitration countries such as France, Switzerland, Singapore and UK/English in addition to supportive role of their courts recognize additional recourses such as cassation, revision and limited right to appeal. However, EACWPP instead of putting Cassation recourse as it is provided under FDRE Constitution, by making it as a renounceable recourse under Art. 49/2 provides freedom to the parties in arbitration agreement to agree avoiding Cassation recourse. This position of the law is beyond harmonization and violates mandatory law provision and also negatively affects equality in administration of justice. By doing so Ethiopia in order to harmonize its arbitration laws in line with MAL and NYC it disregards the nature and objectives; and also reduces the scope of Constitutionally recognized Cassation Recourse.

EACWPP by making appeal recourse as an optional right made good measure to uphold finality of awards safeguarding parties' autonomy. However, in case when parties agree to exercise appeal right, EACWPP allows the right to appeal on unlimited grounds both on questions of fact and law except some un-appealable grounds provided under Art. 49/3 of EACWPP. Lack of such procedural and substantive conditions to limit the appealable grounds under EACWPP, with on doubt will create very high case load on appellate court.

The eighth problem identified from EACWPP in this study is lack of *revision recourse* procedure as one of the method to challenge against arbitral awards. Under French and Switzerland arbitration laws both international and domestic arbitral awards rendered based on forgery, perjury or bribery which after the exercise of due diligence, was not within party knowledge at the time of the giving that arbitral award can be challenged through *revision recourse*. Even if we do have civil judgment revision recourse under Art. 6 of CPC; EACWPP has not recognized such a revision recourse as a method to review fraudulently made arbitral award.

One of the exceptions used to refuse recognition and enforcement of foreign arbitral award under both NYC and MAL is the violation of *public policy* of host country in which enforcement is sought. NYC by qualifying the word 'may' with the word 'only' makes the exhaustive list exceptions under Art. V to refuse recognition and enforcement of foreign arbitral award. By doing so the NYC seeks to encourage recognition and enforcement of awards in the greatest number of cases as possible. EACWPP under Arts.52 (3/b) and 53(2/f) provides broad and strange grounds such as *`public morality and national security`* as an exception or a ground to object recognition and enforcement of arbitral award, and for refusal of recognition and enforcement of foreign arbitral awards. However, incorporating broad terms of *`public morality and national security`* as an exception under EACWPP may create a sense of uncertainty on the convention's effectiveness and also if such terms broadly interpreted large numbers of arbitral awards sought to be recognized and enforced in Ethiopia may be refused recognition and enforcement.

The other less important provision seen under the NYC ratification proclamation is the existence of non-retroactive clause as additional reservation. This reservation clause of Ethiopia limits the application of NYC only with respect to arbitration agreements concluded and arbitral awards rendered after the effective date of its ratification. If this additional reservation clause for NYC exist for unreasonable time may affect free movement and enforcement of foreign arbitral award in Ethiopia; has the potential negatively to affect NYC's pro-enforcement basic objective, and Country's path towards a more arbitration friendly environment and countries desire to use NYC as a tool to attract foreign investment.

In general, this thesis concluded that even if the Ethiopian Arbitration laws [EACWPP and NYC ratification Proclamation] incorporate harmonized legal principles and standard recognized worldwide; they incorporate at least the above mentioned incompatible provisions and loopholes in some its salient areas compared with FDRE Constitution, UNCITRAL MAL, NYC and pro-arbitration countries' arbitration laws such as France, UK/English, Switzerland, Singapore, Nigeria and Rwanda.

4.2. Recommendations

Based on the findings of the research, the researcher recommends the following to be considered making further harmonization through active and passive harmonization.

1. EACWPP's more demanding and stricter formal requirement of attesting arbitration agreement by two witnesses should be repealed taking into account NYC's , UNCITRAL MAL's and pro-arbitration countries arbitration laws' formal requirement of arbitration agreement. Accordingly EACWPP should recognize arbitration agreement that is recorded in writing and signed by the parties. In addition to this I recommend that Ethiopia to adopt standards provided under option I Art. 7(5 and 6) of UNCITRAL MAL and it should recognize arbitration agreement as a valid agreement if it contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other and the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract. Until that amendment of the law would be made and Ethiopia in order to confirm international obligation imposed by NYC and to achieve the convention's objective; Ethiopian courts should interpret in a way giving legal effect to arbitration agreement which is concluded in writing or recorded in a certain document and signed by parties though it does not fulfill the requirement of attesting by two witnesses.

2. Arts.12/4 and 31/3 of EACWPP have the potential to change parties' preferred dispute resolution mechanism (i.e. arbitration) to litigation. Ethiopia should repeal these provisions in a way to respect party autonomy to resolve differences through arbitration and enforce arbitration agreement allowing judicial appointment of arbitrator[s]]. In this regard EACWPP needs further harmonization towards MAL and pro-arbitration countries' arbitration laws empowering national courts to appoint arbitrator[s]in the request of one of the party to a dispute in case when the other party (or its delegate) refuses to appoint his part arbitrator[s]. And also the conditions lied down under Arts.12/4 and 31/3 should be replaced to enable the requesting party to claim forced performance of arbitration agreement before a competent court or a court to appoint arbitrator[s].

3. EACWPP in order to balance the needs of arbitrators to function independently and to benefit arbitration system in general and the same time to place the system that discourage carelessness of arbitrator by making him liable in case when he breaches his obligation or performs his duty in bad faith and intentionally doing wrong; taking into consideration our hybrid legal system and learning from France, Singapore and English legal experiences should incorporate provisions that reflect hybrid school of thought (i.e. mixing both contractual and status school of thoughts) and adopt a qualified immunity of arbitrator.

4. EACWPP in order to provide full protection to the equal treatment of parties and opportunity to present oral argument and also to provide procedure for a counter-claim action need further harmonization. Accordingly Art. 34/2 of EACWPP should be harmonized (amended and interpreted) towards MAL and pro-arbitration countries' laws to give opportunity to hear oral argument if it is essential for proper disposal of the case in the request of a [one] party after giving sufficient time for preparation. In addition to this in order to have manageable, consistent and predictable counter-claim proceedings in arbitration process, Ethiopia should have adequate legal provisions that govern how and when counter-claim action entertained either by incorporating it in EACWPP or enacting arbitration rules of procedure as per Art. 80 of EACWPP.

5. Ethiopia when adopting harmonized international arbitration laws principles and standards it should pay due consideration for its mandatory constitutional provisions and public policy. Cassation recourse in Ethiopia is introduced through Constitution to achieve the domestic public policy objectives of creating uniform application and interpretation of especially federal laws throughout the Country and equal application of laws among citizens. It is a constitutional mandate upon FSCCB and mandatory provision of law of the land and therefore should not be allowed to be renounced by parties in arbitration agreement. Therefore, Art.49/2 of EACWPP that provides the right parties to renounce Cassation recourse should be amended in a way not applicable on cassation application to challenge against domestic arbitration award, international arbitral award rendered in Ethiopia applying Ethiopian arbitration and substantive laws, international arbitration award containing basic error of law in relation to international and transnational public policy and also international obligation of the country even though that error has no direct connection with Ethiopian law. Moreover, Constitutionality of Art. 49/2 of EACWPP should be contested as per Arts. 62/1 and 84(2 and 3) of the FDRE Constitution.

6. In order to make more effective the reform made by EACWPP on appeal recourse and also to benefit both private litigants and the justice system as a whole from this recourse, it should be amended Art. 49/1 of EACWPP taking into account the experience from Art.69 of English Arbitration Act of 1996 and Art.49 of Singapore domestic Arbitration Act of 2001. Accordingly, Ethiopia, in order to have more attractive legal environment that makes it more attractive seat for international commercial arbitration, it has to limit the grounds of appeal allowing the right to appeal only on serious general public importance question of law and on some other specific grounds with additional requirement appellant to secure leave of a court.

7. Ethiopia taking into consideration the experiences from Switzerland and French legal framework should amend EACWPP to incorporate the extra-ordinary recourse to review fraudulently rendered

arbitral awards. Until then based on Arts. 78/3 and 79 of EACWPP it is advisable analogical to apply Art. 6 of CPC to review fraudulently rendered arbitral awards.

8. One of the basic objectives of NYC is encouraging the recognition and enforcement of awards in the greatest number of cases as possible. In order to achieve this objective EACWPP's *public policy, moral and security* exception provided to claim set aside of arbitral award and to refuse the recognition and enforcement of foreign arbitral award should be amended reducing such terms into *public policy*. Until this amendment is made Ethiopian court should be careful not broadly to interpret *public policy, moral and security* exception in a way undermining the objective and effectiveness of the NYC. In order to do this Ethiopian court should balance competing interests of enforcing NYC and protecting public moral and security by taking these terms as the components of dominantly known exception called public policy.

9. Ethiopian in order to facilitate free movement and enforcement of international arbitration agreement and foreign arbitral award, and Country's path towards a more arbitration friendly environment and countries desire to use NYC as a tool to attract foreign investment; should make necessary assessment or audit within reasonable time to check costs and benefits from additional non-retroactive reservation and must denounce it based on the findings within the framework of Art. XIII/2 of the NYC.

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