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# ANALYSIS OF THE EXISISTING ETHIOPIAN ARBITRATION LAW IN LIGHT WITH THE UNCITRAL MODEL LAW ON ARBITRATION

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# ANALYSIS OF THE EXISISTING ETHIOPIAN ARBITRATION LAW IN LIGHT WITH THE UNCITRAL MODEL LAW ON ARBITRATION

A Thesis Submitted to Addis Ababa University in Partial Fulfillment of the Requirements of the LLM Degree in Business Law

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## Declaration

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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## Approval Sheet by the Board of Examiners

Analysis of the Existing Ethiopian Arbitration Law in Light with the UNCITRAL Model Law on Arbitration

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## Abbreviations and Acronyms

AACCSA_____ Addis Ababa Chamber of Commerce and Sectorial Associations

ADR_____ Alternate Dispute Resolution

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

EACC _____Ethiopian Arbitration and Conciliation Centre

FAA_____ Federal Act of Arbitration(US)

FDI_____ Foreign Direct Investment

FDRE_____ Federal Democratic Republic of Ethiopia

ICC _____International Chamber for Commerce

ICA_____ International Commercial Arbitration

ICA_____ International Court of Arbitration (ICC court of arbitration)

LCIA----------London Court of International Arbitration

ICDR _____International Center for Dispute Resolution

ICSID_____ International Center for the Settlement of Investment Dispute

UNCITRAL _____United Nation Commission of International Trade Law

UNIDROIT_____

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## Abstract

Obviously, arbitration is one of the well known amicable dispute resolution schemes recognized, virtually, in all modern polities across the globe. Currently, the power given for the arbitral tribunal started to contest the ordinary jurisdiction of regular courts especially in regard to international commercial areas because of the parties' agreement to avoid or minimize the intervention of courts in their business dealings. Accordingly, many disputantsL avoid the recourse to national courts thereby settling disputes arising in the course performance of their respective obligations. Nowadays, countries are striving towards adopting arbitration friendly legislation with the view to accommodate the highly changing situation of the globalization in the area of commerce. Patently, Ethiopia cannot be different from the rest in promulgating more comprehensive and holistic arbitral legal regime to have an enabling environment for foreign direct investment (FDI). The existing, Ethiopian arbitration law seems to be obsolete and inadequate in dealing with the highly booming situation of commercial globalization. In Ethiopia the 1960 civil code and the 1965 civil procedure are the outdated substantive and procedural laws respectively, save for AACCSA (Addis Ababa Chamber of Commerce and Sectorial Associations) institutional arbitral rules, put in place to regulate the subject matter. Unlike Ethiopia, most nations including developing countries are doing better either in amending their arbitral regime or acceding to modern arbitration conventions like the New York and Washington convention on arbitration to attract the seat and the sight of arbitral institutions and investment actors, too. Besides, the role of UNCITRAL model law in international commercial arbitration especially in harmonizing the disparate arbitration rules of nations regardless of the political and economic `ideologies in an intricate and palatable fashion cannot be neglected .The intricate nature of the model law largely lies on the constructive involvement of the regular courts in arbitration process.

# CHAPTER ONE

## 1. Introduction

### 1.1. Background of the study

Dispute settlement modalities, other than judicial litigation, are known even before the era codification[1]. They were continuously practiced as traditional form of settling grievances[2]. Among these traditional form dispute resolution arbitration is one of the most significant one. Since time immemorial arbitration played a significant role in a friendly disposal of disagreements arising in the communities. More particularly, nowadays the importance of arbitration in handling domestic and transnational commercial dispute is steadily growing in the era of globalization. Arbitration is seen here as a non-judicial dispute settlement mechanism whereby parties to a dispute resort to a third party (or parties) whose determination over the dispute is as binding as comparable to court decisions.[3] In Oxford dictionary arbitration is defined as ‘’uncontrolled decision’’ the settlement of a question at issue by one to whom the parties agree to refer their claim in order to obtain an equitable decision.[4] It is also an alternative non-judicial dispute settlement mechanism used for resolution of disputes outside regular courts by which neutral third party renders a binding judgment as between the parties.[5] It is a process whereby parties to a dispute by agreement submit their dispute to be determined by an arbitrator /arbitrators or panel arbitrators.[6]

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[1] Michael Teshome, ‘law and practices of commercial arbitration in Ethiopia: brief overview’, p 8 (unpublished on file with the author) also available at: www.abysinialaw.com [here in after referred as Michael Teshome]

[2] Ibid

[3] Hailegabriel Gaddissa Feyssa, et al, ‘The role of Ethiopian courts in commercial arbitration’ *Mizan Law Review*,Autumn 2010, vol. 4, No. 2, 297-333, p 306 (here in after referred as Hailegabriel Gaddissa.)

[4] Oxford Dictionary of English,3rd edition ,Oxford University Press,1969

[5] Michael Teshome, supra note at 1, p 8

[6] Mekbib Tsegaw et al, ‘the necessity for and extent of court intervention in the process of arbitration’ Yazachew Belew (ed), *Ethiopian business law series*, the resolution of commercial/ business disputes in Ethiopia: towards alternatives to adjudication? , vol.v. Faculty of law AAU, Addis Ababa, 2012, pp 130-156, p 131[ herein after Mekbib Tsegaw]

Mekbib Tsegaw ]

Unlike regular courts, the basis for the jurisdiction of the arbitrator/s does not emanate from his/her appointment by the sovereign as a judge but from the agreement of the parties in the dispute. [7]In this regard the Ethiopian Civil Code under article 3325 reinforces such assertion as'' [t]he arbitral submission is the contract whereby the parties to a dispute entrust its solution to a third party, the arbitrator who undertakes to settle the dispute in accordance with the principles of law''.[8] From this we can infer that the arbitral proceeding would be set in to motion as per the assents given by the disputants either after the occurrence of the dispute or in advance before the occurrence of a controversy. On the other hand the UNCITRAL Model law under article 7(1) defined arbitration agreement as an agreement by the 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".[9] Similar to the Ethiopian Civil Code the UNCITRAL Model Law vested parties in an arbitration agreement to agree in advance to settle their disputes arising from a contractual relationship or they may make an arbitral agreement after the dispute has arisen. By doing this, parties to the arbitration agreement exclude regular courts from having jurisdiction over the matters agreed upon by the parties in the arbitration agreement.[10] However, in any way parties cannot exclude regular courts from having jurisdiction on matters which are exclusively reserved for the regular courts. Countries may determine by law matters which shall not be resolved by arbitration.[11] Though regular courts are excluded from having jurisdiction over matters agreed to be resolved by arbitration, regular courts may under certain circumstance intervene in the process of arbitration.[12] That intervention of courts may be necessary for the proper functioning of the arbitrator or the arbitral tribunal as an assistant or supervisor of the arbitrator or the arbitral tribunal.[13] For the proper application of intervention of regular courts in the process of arbitration, the law governing arbitration in different jurisdictions and international conventions have put different controlling mechanisms for regular courts to intervene in arbitration processes.

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[7]Ibid

[8] Civil code of the Empire of Ethiopia, 1960, Negarit Gazeta, Extra ordinary issue, No.165, 19th year, No. 2, Art 3325(1),[here in after referred as civil code of 1960.]

[9] United Nations 1994, UNCITRAL Model Law on International Commercial Arbitration, Art 7(1), [here in after referred as UNCITRAL Model Law

[10] Mekbib Tsegaw Supra note 3
[11] Ibid
[12] Ibid
[13] Ibid

When we see the extent of court intervention in the UNCITRAL Model Law on international commercial arbitration, the Model Law has provided that the regular courts could intervene in the process of arbitration only on matters permitted by the law[14]. Therefore, in this modest paper the writer will strive to make a comparative analysis of the role of courts intervention in arbitration under Ethiopian law and UCITRAL Model Law of arbitration and the lesson that we learn from the latter and other advanced arbitration laws as the case may be.

## 1.2 Statement of the problem

The research problem identified to be dealt with revolves around the following point:-

The Ethiopian arbitration regime opens a wider room for the intervention of regular courts and sometimes the intervention might be in such a destructive manner that can obstruct the smooth functioning of arbitral proceedings. The paper attempts to answer why does the Ethiopian law of arbitration open wider rooms for intervention of regular courts in the process of arbitration?

## 1.3. The objectives of the study

The objectives of the research could be classified in to two categories namely, general objectives and specific objectives

### 1.3.1 The General objectives of the research

- The main objective of the study is to critically evaluate the degree of regular courts intervention in arbitration process under the existing Ethiopian arbitration legal regime through comparing and contrasting with the arbitration rules of the UNCITRAL Model Law so as to suggest alternative improvements on the outdated arbitral rules of the country.
- The study through comparative analysis survey on the existing Ethiopian arbitration law and through a close look in to the UNCITRAL Model Law attempt to put forward modern acceptable arbitration law accompanied by arbitration friendly healthy and supportive assistance of the regular courts .It does also try to deal with other modern arbitration laws regarded as important from a bird's eye view for modernizing the Ethiopian arbitration law as the case may be. .

### 1.3.2. Specific objectives

[14] UNCITRAL Model Law Art 11(3)

The specific objectives of the research may be put as

i. Assessing the degree of regular courts intervention in arbitration proceedings under the existing arbitration laws of Ethiopia.

ii. Examining the extent of courts intervention in arbitration under UNCITRAL Model Law.

iii Comparing and contrasting the extent of the Ethiopian courts intervention in arbitration in accordance with Ethiopian laws and that of UNCITRAL Model Law rules.

.iv. Suggesting improvements in the Ethiopian arbitration law in relation to the role of regular courts in arbitration proceedings.

## 1.4. Research Questions

The main questions of the study are;

- What is the extent of courts intervention in arbitration processes under Ethiopian arbitration law?
- What is the extent of regular courts intervention in arbitral processes under the widely accepted modern arbitration rules of UNCITRAL Model Law?
- What lessons can we learn from UNCITRAL Model Law and what improvements should be made in Ethiopian law in relation to court intervention in arbitration process?

## 1.5. Significance of the study

- It ftries to compare and contrast the Ethiopian courts intervention mechanisms with other jurisdictions, especially with the UNCITRAL Model Law rules.
- This study may also help arbitral institutions to draft arbitral rules compatible with the modern arbitral rules to limit or reduce the wider ranges of court interference in the arbitration proceedings.
- It is also important for the law makers to draft the arbitration rules based on the UNCITRAL Model Law rules by drafting laws compatible with the Model Law, by limiting the extent of courts' interventions in the existing arbitral proceedings.

## 1.6 .The scope of the study

Alternative dispute resolution (ADR) mechanisms may include "mediation, conciliation, negotiation, arbitration and so forth. ADR is a dispute settling scheme used other than the lengthy, cumbersome and formal dispute settling mechanism in regular courts. Arbitration is one

mechanism of ADR for resolving disputes outside regular courts. The study will cover only the area of arbitration and intervention regular courts in arbitral processes. The study is conducted to assess the extent of court interventions in Ethiopian arbitration processes in comparison with other jurisdiction.

## 1.7. Limitation of the study

-The study faced limitation on accessing of literatures in respect of the Ethiopian arbitration rules especially with regards to the intervention of regular courts under arbitration. In fact, there are a lot of materials available on matters relating to arbitration but there are scarcity of books and article in relation to regular courts intervention under arbitration processes in Ethiopia.

-Literatures on the extent of regular courts' interventions in the arbitration processes in other jurisdictions are not directly available.

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

## 1.8. Methodology of the study

### 1.8 .1 The research design

As the study is to be conducted by comparing and contrasting of the Ethiopian law on arbitration in relation to the intervention of regular courts with other arbitration laws, it is the doctrinal (fundamental or pure) type of research method based on qualitative analysis of conceptual underpinnings and descriptive method of elaborating the nature of various arbitrational legal regime .

To fully attain the objective of the study legal provisions of the Ethiopian Civil Code and Civil Procedure code are analyzed and other international documents and legal provisions is consulted and analyzed for comparison purpose.

### 1.8.2 Data sources

With respect to data sources of the study, secondary sources are largely to be employed. Accordingly, secondary sources such as; laws, Civil Code and Civil Procedure Code, international declarations and conventions, the Model Law Rules are being considered.

Furthermore, various kinds of published and unpublished materials on the topic, cases available in the area (if any) are to be examined.

The author of the proposal also to his maximum effort will use relevant books, journals, dissertation, Cassation decisions and other relevant materials and internet sources on the work at hand.

# CHAPTER TWO

## 2. Overview of Alternative Dispute Resolution (ADR) and arbitration

### 2.1. Alternative Dispute Resolution in General

Since the beginning of human settlement in a particular geographic area as a collective entity, it is obviously clear that dispute among individuals in societies is inevitable. If disputes between individuals are not well taken and resolved early, they will grow up and become threat to national security, peace and stability, which are the basic features on which the development of a nation are measured.[15] With the objective of settling such disputes, usually, national governments through constitutions establish institutions called judiciary organs as the main arm of the government. However, there are other dispute resolving mechanisms other than the judiciary arm of the government. Within the executive arm of the government, other than the judiciary arm, there are also quasi judicial tribunals named otherwise as administrative tribunals which are established to settle disputes.[16]Courts of law and administrative tribunals are public institutions established to resolve disputes. On the other hand, there are other private dispute resolving mechanisms by which the societies try to settle disputes before the establishment of courts and administrative tribunals, and even after the establishment of the latter. These private dispute resolving mechanisms as they are usually based on cooperative approach and win-win strategy for either party is often called Alternative Dispute Resolution (ADR) mechanisms. ADR is also known as appropriate dispute resolution or amicable dispute resolution referring to range of processes other than litigation that can be used to resolve disputes which ensure the continuation of smooth societal and commercial relationship between and among disputants. Thus, ADR can be taken as the best way of disposing grievances arising in connection with contractual and non- contractual matters in more friendly fashion.ADR, doesn‘t imply single kind of mechanism, but it is a generic name referring to dispute settlement mechanisms other than court and administrative tribunals. Under this generic name there are mechanisms such as; Arbitration, Conciliation, Mediation, Negotiation and Mini- Trial.[17] Such ADR mechanisms aim

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[15] Tefera Eshetu & Mulugeta Getu; *Alternative Dispute Resolution* teaching material, by justice and legal research institute, [unpublished], 2009, p 1[here in after referred as Tefere Eshetu and Mulugeta Getu]

[16] Ibid

[17] Ibid

to ensure that disputes are solved through effective and efficient means for the benefits of individual disputants in particular and the society in general. For the attainment of this core objective, states and the international community have been devising various mechanisms of resolving disputes than depending only on the traditional way of resolving dispute through court litigation which is mostly thought to be ineffective and inefficient. Unlike court and arbitral proceeding, ADR is not adversarial process and nor culminated in enforceable decision but yields to contractual settlement between parties or at least recommendation for settlement that makes it more economical, flexible and expedient for business communities at large. Taking this in to account, the Ethiopian polity enacted its own alternative dispute resolution legal regime in the 1960 Civil and 1965 Civil Procedure Code namely as compromise (negotiation),conciliation(mediation) and arbitration with recently installed institutional infrastructures like AACCSA for the proper implementation of the recognized the ADR mechanisms.

## 2.2. Definition of arbitration and requirements for the validity of arbitral agreement

There is a dominant view that arbitration is one kind of ADR mechanisms even though it shares some common character with court litigation. This dominant view further says that arbitration can be called as the extreme kind of ADR mechanism since it has some adjudicative character similar to that of court litigation.[18] The main role of arbitration is settling disputes which involve both national and international commercial transactions which are steadily growing in this era of globalization. International and national rules which govern various aspects of commercial arbitration have contributed to the effectiveness of arbitration as an alternative to court litigation. [19]Hence, arbitration here is seen as a non-judicial dispute settlement mechanism whereby parties to a dispute resort to a third party (or parties), (arbitrator/s) whose determination over the dispute is as binding as comparable court decisions.[20]

According to Black's Law dictionary definition, arbitration is *"a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding."*[21]The Ethiopian Civil Code under Article 3325 defines

[18] Ibid
[19] Hailegabriel Gaddissa Feyssa, Supra note 3, p 306
[20] . Ibid
[21] WEST GROUP, ST.POUL, MINN, 1999,Blacks Law Dictionary 7th Edition, Bryan A. Garner(Editor), definition given to arbitration

arbitration as; "[*t]he arbitral submission is* contract whereby the parties to a dispute entrust its solution to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the principles of law." [22] There is a distinction between various jurisdictions in using the term 'Arbitration agreement'. This term may be used by some as an arbitration clause and by others as an arbitration submission.[23] An arbitration clause is used to explain the dispute which arises in the future in performing the contractual relationship.Whereas, arbitration submission is used in relation to the existing disputes that has arisen between the parties in the arbitration agreement.[24] An arbitral submission though contract is, however, peculiar in many respects. One of its peculiarities has been put succinctly by Lord Macmilan;

'' *the other clause sets out the obligation which the parties undertake toward each other ,but the arbitration clause does not impose on the parties an obligation in favor of the other. It embodies the agreement of both parties that if any dispute arises with regard to the obligation which the one party has undertaken to the other, such dispute shall be settled by tribunal of their constitution*'' [25]

Under the Ethiopian law, arbitration agreement defined as arbitration submission which is designed to solve the existing disputes between parties in arbitration agreement. When we closely look in to the Ethiopian arbitration law, there is no any explicit prohibition for parties to agree on future disputes to resolve through their arbitration agreement. Rather, Article 3328 of the Civil Code states the possibility of future disputes to be submitted to arbitration. Hence, parties may submit their dispute to arbitration after a dispute has arisen or they may submit their agreement before the dispute arises between them by making the arbitration agreement part of their contract or by attaching a separate arbitration agreement to the main contract. Arbitration may also be defined as an alternative non-judicial dispute settlement mechanism used for resolution of disputes outside regular courts whereby parties to a dispute upon agreement submit their dispute to be determined by an arbitrator or arbitrators or an arbitral tribunal.[26] On the other hand, arbitration is usually defined in most jurisdictions in relation to an agreement. For instance, in the UNCITRAL Model Law it is defined as an

"*Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal*

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[22] Civil Code of the 1960,art.3325
[23] Hailegabriel Gaddissa Feyssa, Supra note 3, p 306
[24] Ibid
[25] Heyman and another V.Darwin Ltd.From Eric Lee ,Encyclopidia of arbitration Law ,Lloyd of London Press 1984,sec.3.1.3
[26] Mekbib Tsegaw ,supra note 6, p 106

*relationship, whether contractual or not*."[27] Arbitration agreement is also defined as "*It is the submission of a dispute between two parties to a third impartial (arbitrator) with the agreement that the decision of the arbitrator will be binding and final. It is a quasi-judicial procedure that avoids the formality, delay and expense of normal trial.*"[28]

This definition provides certain characteristics of arbitration that; it is a quasi-judicial procedure which avoids delay and expenses; it is binding and final between the parties in the agreement and the parties are in trust of an impartial third party (arbitrator) to give a final and binding decision.

According to the UNCITRAL Model Law an arbitration agreement may be made in the form of an arbitration clause within a contract or in the form of a separate agreement. The UNCITRAL Model Law requires the arbitration agreement to be made in writing.[29] An arbitration agreement in the UNCITRAL Model Law is supposed to be made in writing, where its content is made in a way to hold records in any form whether or not the arbitration agreement or the contract has been made orally (recorded agreements) or by any other means.[30] Thus, according to the Model Law, any other form of recording the contract or an arbitration agreement satisfies the form of an arbitration agreement. The requirement of an arbitration agreement to be made in writing may also be satisfied if it is made by an electronic communications These electronic communications include data messages which are sent, received or stored by electronic, magnetic, optical or other similar means like; electronic mail, telegram, telex or telecopy.[31] An arbitration agreement is also considered as being in writing if it contains in an exchange of statement of claim and defense that the existence of an arbitration agreement is not denied by both parties to the dispute.[32] Furthermore, the written arbitration agreement may be inferred from the contract containing an arbitration clause.

When we see arbitration agreements, they usually deal with a range of issues like types of arbitration, seat of arbitration, choice of law, composition of the arbitrator/s, language of the arbitration, and scope of the arbitration agreement.[33] Moreover, arbitration agreements are normally subjected to statutes that prescribe substantive and formal requirements. Compliance with the statutory requirements is crucial, for the validity of the arbitration agreement may

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[27] UNCITRAL Model Law,supranote,9,art,7
[28] Tefera Eshetu & Mulugeta Getu, supra note 15, p 105
[29] UNCITRAL Model Law,supranote,9,art,7(2)
[30] UNCITRAL Model Law,supra note 9 ,Art 7(2)
[31] Ibid
[32] Ibid
[33] Hailegabriel Gaddissa Feyssa, supra note 3, p 306 ‘

depend on it.[34] It is necessary to give due attention to these requirements while drafting arbitration agreements as this is important for the validity of the contract. Such substantive and formal requirements are also included in the Ethiopian arbitration law as discussed under Article 3326 of the Civil Code. The general substantive requirements relating to concluding contract like; consent, capacity, and offer and acceptance are also obviously relevant to arbitration agreements.[35] Besides, "arbitrability" of the subject matter of the dispute and the "capacity to arbitrate" should be fulfilled and clearly indicated in the arbitration agreement.[36] The form requirement in relation to arbitration agreement is the other important point that deserves mentioning. In this regard, especially the UNCITRAL Model Law Rule under article 7(1) requires commercial arbitration agreements to be made in written form. The UNCITRAL Model Law also recognizes arbitration agreement made orally but it requires that should be recorded electronically.[37]Ethiopian arbitration law seems to recognize arbitration agreements concluded orally. Because, the Civil Code under Article 3326(2) only requires the form to be applied in arbitration agreements is similar to the form applied in general contracts as provided under art 1678 and et.seq. The form requirement for general contract recognizes oral contracts to be acceptable where offer and acceptance is complied with as expressed under Article 1681 of the Civil Code.[38]In addition to arbitral agreement, arbitration may also emanate from law. In case of arbitration emanated from law disputants whether they like or not are bound to settle disagreements through arbitrator/s appointed by the parties or courts. For example, the new cooperative society proclamation no 985/2017 under article 64 clearly stipulates disputes among the members of society, between members and management committees and between societies to be heard and decided first through conciliation if conciliation is not effective through arbitration.

## 2.3. Arbitration versus other ADR modalities.

There is a widely controversial debate on the fact that whether arbitration is a paradigmatic alternate dispute resolution means recognized since arbitration unlike negotiation, conciliation and mediation pursues strict procedural rules through which a final binding decision is given out. Understandably, the nature of arbitration stands far from mediation and conciliation. First and foremost it aims to lead to enforceable and binding award if necessary through execution against

[34] Ibid
[35] Ibid
[36] Ibid
[37] Id, p 307
[38] Id,p 307

the assets of the losing party.[39]Arbitration has adjudicatory function, evidence gathering, absence of ordinary session and lack of win-win paradigm in relation to which the interference of regular court is quite inevitable. By contrast, conciliation and mediation does not intend to render binding decisions. Yet, this doesn't mean that a compromise doesn't give rise to legal obligation. For instance in article 3312(1) of the Civil Code one of the parties who has the benefit may demand the performance of the contract against the defaulting party in accordance with the terms of the agreement.

## 2.4. Arbitration versus litigation

Clearly, the decision to externalize some competence to make decision which will be enforced by the operation of state power must be accompanied by putting some control in place to address the ever present problem of moral hazard.[40] Obviously, arbitration, when compared with ordinary courts' litigation provides more expeditious, flexible and cost effective dispute resolution mechanism as it is performed through competent individuals/ arbitrators who may be selected for their specialized knowledge and who are conferred with the power to give a final and binding award without or with a limited recourse to the regular courts.[41] However, the process of arbitration may be interrupted by one of the parties in the agreement where both parties are not committed to resolve the dispute through the arbitration process.[42] One of the parties may delay the arbitration process by using different dilatory tactics or submitting petitions to the regular courts which is against the very purpose of the arbitration process which is to provide a quick and efficient dispute resolution mechanism.[43] Parties submit disputes to arbitration in order to avoid courts for legitimate reasons. Some of the legitimate reasons for parties resorting to arbitration are the benefits which they cannot get if the dispute is resolved through a court

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[39] Jan Paulson et al *The Freshfield Guide to arbitration and ADR clause in International contracts*,2nd edition;Hague,The Netherland;Kluwer Law International,1999,p,7

[40] W.Michel Reisman and Brian Richardson, *The present-commercial arbitration as transnational system of justice:Tribunal and Courts an Interpretation of the architecture of international commercial arbitration*; 5th edition, Abert Jan Van Den Berg ICCA Congress series, Vol 16,p,17-67,P,18

[41] Solomon Emiru, *Comparative Analysis of scope of jurisdiction of Arbitrators under the Ethiopian Civil Code of 1960,* Central European University, March 30, 2009,(unpublished on file with the author) , p 2 [here in after referred as Solomon Emiru]

2009]

[42] Ibid

[43] Ibid

process. The benefits which are supposed to be acquired from arbitration and not from court litigation are speed, cost-effectiveness, privacy, parties' control on the proceeding on evidence rules and in appointing arbitrator expertise.[44] Moreover, arbitration may also be preferred over court litigation to escape the judicial system which is filled with incompetent and corrupt judges.[45] Due to their distinct nature, arbitration and judicial litigation hold their own unique features. When we see their distinct features, in judicial litigation judges are often appointed by a political organ. Thus, in case of international contracts resorting to national courts would be unwise for a party as the judges in a given country may play a role to serve their own national interests which will be against the interest of a non-national party in the dispute. In judicial litigation judges are highly acquainted with their own legal system and are unwilling to look in to foreign laws.[46] There is also a need to have evidences translated in to the working language of judges and this inevitably create inconvenience for a foreign party to pay for translation of thousands of sheets of paper involved in litigation.[47] Language is also another barrier for a foreign party in a judicial litigation in international disputes. Whereas, in the process of arbitration, arbitrators are selected by the will of the parties in the dispute, parties are free to select the seat of arbitration, the language of arbitration, the applicable law and the procedural law to be applied etc so that they can potentially reduce the problems which may be encountered during judicial litigation.[48]

When we compare arbitration with regular court litigation, arbitration is characterized by privacy. In regular courts litigation, the proceedings are held in public which sometimes embarrasses the parties' privacy.[49]Whereas, in arbitration, the process is conducted privately that promises to protect the privacy of the parties in litigation. As arbitration is a private dispute resolution mechanism, it is characterized by high degree of confidentiality and party autonomy. In arbitration agreement parties usually enter in to separate confidential agreement.[50] During the process of arbitration parties may exchange sensitive information like customer list, sales data etc which may be very important between the parties and may cause irreversible damage if it is

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[44] Ibid

[45]Birhanu Beyene Birhanu; 'The degree of court's control on arbitration under the Ethiopian law: is it to the right amount?'(unpublished on file with the author), p 40 [here in after referred as Birhanu Beyene]

[46] Ibid

[47] Ibid

[48] Michael Teshome, supra note 1, at p 9

[49] Ibid

[50] Ibid

disclosed to third parties.[51] Thus, parties do not want their sensitive information be disclosed to third parties and they prefer arbitration to court litigation. Further, arbitration proceeding is supposed to be neutral as the institution, law and procedures to be applied are chosen not to have national character of either party.[52] In arbitration proceeding, arbitrators may be chosen for the interest of the parties and to resolve the dispute properly.

Arbitration also provides liberty for the parties to choose their own arbitrators, who are specialist in the subject matter of the dispute.[53] The arbitrators who are appointed by each party may be experts in a certain field of study who may resolve the dispute fairly and expeditiously as they are well versed with the usages and practices prevailing in the trade or industry.[54] On the other hand, judicial dispute settlement is conducted in an open trial and is open for public scrutiny.[55] As public trial is considered as one of the fundamental human rights in many constitutions, courts' proceeding are conducted publicly except in certain cases like, family matters which need privacy. In case of arbitration, the venue of arbitration may be a place convenient to both the parties.[56] It is not required to be a formal platform, only a simple office may be enough, but in regular court litigations, the venue is always required to be constant place which is established to serve the general public.[57] Likewise, in the arbitration process the parties may choose a language of their choice but it is not common in regular courts litigation, except that there may be translation service in languages which they can understand.[58]Moreover, in arbitration processes even the rules governing arbitration proceedings may be defined mutually by both parties. In arbitration process parties have chosen to arbitrate, and not to litigate. Having done so, they have the opportunity to choose the procedures laid down by the relevant legislation or institutional rules. If there are no any procedural laws or institutional rules, then the parties should have deliberately entrusted the choice of procedures to the arbitrator himself.[59] For instance, the parties may decide to let the arbitrator/s that there should not be any oral hearing, they may decide as to how and when evidences would be presented and heard.

When we compare arbitration with regular courts in respect of the cost incurred by the parties in dispute, a court case is presumed to be a costly affair as it requires the claimant to pay for the

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[51] Ibid
[52] Ibid
[53] Pawan Kr Agarwal; An overview of the law on arbitration, p 1,{here in after referred as Pawan Kr Agarwal]
[54] Ibid
[55] Michael Teshome, supra note at 1, p 10
[56] Ibid
[57] Pawan Kr Agarwal ,Supra note 53, p 3
[58] Ibid
[59] Ibid

advocates, court fees, process fees and other incidental expenses.[60] Whereas, in arbitration, the expenses are lesser and many times the parties themselves argue their cases by themselves.[61] There may not be a need to appoint an advocate since the arbitrators are appointed by the parties in dispute based on their skill, experience and specialized knowledge. It is also understood that arbitration is faster and more expeditious than any court litigation.[62] Regular courts have to follow their own system and takes abnormally longer time to dispose of the cases.[63] As to the proceedings, the judicial settlement procedure has to follow strict legal procedures which are laid down in the civil procedure code of each country.[64] But, an arbitral proceeding has to follow the principles of natural justice and it does not require a strict and complicated procedures. Parties are able to select some relevant legislations and institutional rules which are more convenient for the settlement of their disputes. As it has been seen in many jurisdictions' arbitration rules, the grounds to set an arbitral award aside by the regular courts are very limited. In most jurisdictions the award of the arbitrators is final and it is not possible for a party generally to request an appeal against an award given by arbitrators.[65] However, there are certain exceptions in some jurisdictions which allow appeal against an award. For example, the Ethiopian Civil Procedure Code under article 350(1) allows appeal against arbitral award given by the arbitrators to the regular court. Whereas, in the regular courts proceeding there are much wider grounds to reverse courts' decisions and there is an appeal against court decisions and appeal against appeal.[66] The appeal process of regular courts is also distinct. Appeal against the decisions of regular courts is lodged by an aggrieved party depends on the hierarchy of courts.[67] But in arbitration especially international multi-tiered arbitration, appeal against an award is not possible.

In arbitration proceeding, arbitrators are in lack of power of compulsion and they need the involvement of regular courts.[68] An arbitral tribunal has no power to compel third parties to join the proceeding. Besides, arbitration helps to facilitate the maintenance of continued relationship between the parties even after the settlement of their disputes which is not common in regular

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[60] Ibid,p,54
[61]Ibid
[62]Ibid
[63] Ibid
[64]Ibid
[65] Ibid
[66] Ibid
[67] Michael Teshome, supra note at 1, p 10
[68] Michael Teshome, supra note at 1, p 10

courts' settlement.[69] However, both arbitration and judicial litigation function for the attainment of justice. They require parties to present their evidential proof and arguments.[70] Both the arbitrator and the judge while hearing the case have to give due attention to the parties' arguments and the case to attain the general principle of fair-hearing. The decisions rendered by arbitrators and judges should be rational and well explained.[71] For the attainment of the principle of rule of law, both the judge and the arbitrator are required to provide a rational judgment. The degree of rationality can be derived from evidences collected and weighed, as well as arguments considered in the proceedings.[72] Similarly, the judge and the arbitrator while deciding the matter are expected to be responsive. They have to be cautious enough as to the relationship of their judgment and the case. Their decision must be based on evidences and arguments presented in the proceeding.[73]

## 2.5. The relationship of regular courts with the arbitral tribunal

Chronologically, the use of arbitration in a range of societal ties precedes court litigation since arbitration plays pivotal role in ancient society before the emergence of state authority. Arbitration as a dispute settlement device has a history dating as far back as ancient civilizations in Egypt and Greece.[74] The gradual prominence of governmental dispute settlement bodies led to a period of judicial hostility toward arbitration.[75] In what are now "arbitration friendly" jurisdictions like the USA, Great Britain and France, there was a long-standing jurisprudence against arbitration.[76]The main reason for the hostility between courts and arbitration was, *inter alia*, the belief that arbitration goes against public policy through snatching the power of the sovereign[77] .

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[69] Pawan Kr Agarwal ,Supra note 53, p 4

[70] Michael Teshome, supra note at 1, p 10

[71] Ibid

[72] Michael Teshome, supra note at 1``, p 11

[73] Ibid

[74] Martinez-Fraga, P. (2009) *The American Influence on International Commercial Arbitration*. Cambridge, Cambridge University Press, pp. 6-14[hereinafter Martinez- Fraga]

[75] Ibid

[76] Ibid

[77] Ibid

Yet when we talk about the significance of arbitration in any way this doesn't amount to the fact that arbitration is the outright substitute of formal court litigation .Obviously, arbitration needs the underlying support of regular courts which alone are capable to rescue the arbitration system when one party seeks to disregard the arbitration agreement.[78] On the one hand arbitration is taken as a consensual process undertaken without the involvement of the regular courts. On the other hand, there is a plain fact that it is only regular courts that possess coercive powers which could rescue the arbitration process where it is in danger of foundering.[79]A party who agrees to refer his disputes to be resolved through arbitration chooses a private system of justice and a party who resorts to regular courts than arbitration chooses a public system of justice. This raises issues of public policy.[80] Some say that there are limits upon this freedom of choice. For this purpose some states, for example, identified certain matters that can be regarded under their own law as 'commercial' and can be resolved through arbitration and others not to be referred to arbitration.[81] States impose certain limitations on some disputes not to be disposed of through arbitration declaring that some disputes are not arbitrable. For example,arbitrability of certain disputes especially administrative issues differs in different jurisdictions and even it differs from time to time within a country. Each country could prescribe the boundaries of arbitration and enforce these boundaries through its courts.[82] States may also determine other limitations upon the arbitral process as to the power of arbitrators to compel the attendance of witnesses, to issue warrants for the disclosure of documents. States may also determine by their laws whether an appeal to regular courts is possible or not, and if possible when, how and on what terms an appeal to regular courts is lodged.[83]

When we say the relationship of arbitrators and the regular courts is a sort of partnership, the relationship inevitably provides for each system different roles to play at different times and that relationship can be compared to a relay race.[84] Arbitration process resembles a relay race in the initial stage which the arbitrators are seized of the dispute, the baton is in the hands of the regular courts as there is no any other organ which could take steps to encourage arbitration to become

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[78] Redfurn and Hunter; Kluwer law international, *international arbitration, the role of national courts during the proceeding;* Oxford University Press, 2009 at § 7.01 , p 437 [here in after referred as Redfurn and Hunter]

[79] Ibid

[80] Ibid

[81] Ibid

[82] Ibid

[83] Ibid

[84] Redfurn and Hunter, supra note 78, at § 7.07, p 439

effective. When the arbitrators once take charge they can take over the baton of the race and retain it until they have made an award. Having reached at this point, the arbitrators have no power or function to fulfill and they should send back the racing baton to the regular courts for the sake of lending the coercive power of the courts for the enforcement of the arbitral awards.[85] Arbitration may depend upon the agreement of the parties in the dispute and is based on the agreement or will of these parties to resolve their disputes by arbitration.[86] It is also a system to regulate or resolve disputes between individuals who resort to resolve their disputes by private system of justice and it is built on law. As a result, it should rely upon that law to be effective nationally or/ and internationally. When we see the relationship between arbitration and regular courts, regular courts could exist without arbitration, but arbitration cannot exist without regular courts. Thus, the main issue is to identify the real point where arbitration relies on regular Courts and to know exactly where this reliance begins and where it ends. Nowadays, there is an increasing independence of arbitration.[87] It can be said that arbitration is a principal method of resolving international disputes and there is a common consensus among the business community about the growing role of arbitration in resolving disputes.[88] This common consensus has led the arbitral process to make away itself a high distance from the risk of domestic judicial intervention, especially where the interests subject to arbitration have connection with international trade. [89]As a result, modern international commercial arbitration has consequently achieved a considerable degree of independence from national courts intervention.[90] For example, because of the international principles of 'competence-competence' which vests power on the arbitral tribunal to rule on its own jurisdiction and any objections in relation with the validity of an arbitral agreement, and the principle of 'severability' that the arbitration clauses in an international commercial contract are generally understood as being independent agreements, which will survive from any termination of the contract in which the arbitral clauses are contained.[91] In the arbitration processes, the parties themselves are generally free to determine how their disputes are to be resolved, though they are subjected only to certain limitations which

[85] Ibid

[86] Redfurn and Hunter, supra note 78, § 7.03, p 438

[87] Ibid

[88] Ibid

[89] Redfurn and Hunter, supra note 78, at § 7.07, p 439

[90] Ibid

[91] Ibid

are considered as safeguards of public policy in cases of inarbitrability.[92] Arbitrators are also free to decide on their own jurisdiction, subject only on certain limitations of revision of their final decision by the competent national court. The parties are also free to choose the system of law to govern the dispute between them. As a result, they may even opt for general principles, such as "equity and good conscience, the UNIDROIT Principles of International Commercial Contracts."[93] In international arbitration, judicial control over arbitration proceeding on the ground of errors of law has become abandoned, and regular courts are left with the limited roles as policing procedural due process, and insisting the arbitral tribunal to give each party a fair hearing.[94]However, the process of arbitration remains subject to the laws of different countries such as those in which arbitration proceeding take place and arbitral awards are going to be enforced.[95] This tells us that the involvement of national courts in the international arbitration process is inevitable and remains essential for its effectiveness. Some States, for instance Belgium, which tries to deny any courts' involvement for the purpose of attracting international arbitrations, has found that their policy had the opposite effect.[96] And as a result they are bound to reintroduce an element of judicial supervision.[97] It is important to note that there are limitations on the independence of arbitration from the regular courts. For instance, the Model Law sets the rules to exclude the involvement of the courts as far as possible and makes the regular courts to be involved only on conditions provided by the law.[98] It states under its Article 5 that: "'in matters governed by this Law, no court shall intervene except where so provided in this Law.'" This declaration is a striking declaration of independence of arbitration from intervention of regular courts.[99] By stating such declaration, the Model Law does not exclude the participation of competent courts; that may be the court instituted by institutional arbitration centre or the regular courts of any state, to carry out some functions of arbitration as assistance or as supervision. For instance, when we examine the Model Law closely it encompasses only 10

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[92] Ibid

[93] UNIDROIT Principles of International Commercial Contracts are designed to establish a balanced set of rules for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied.

[94] Ibid

[95] Redfurn and Hunter, supra note 78, at § 7.05, p 439

[96] Ibid

[97] Ibid

[98] Id, p 439

[99] Ibid

Articles which deal with the possible role of the competent courts in arbitration proceeding on different conditions. This shows that courts are not absolutely excluded from intervening in arbitration proceedings.

Basically, if there is an arbitration agreement, regular courts or national courts have a task of enforcing the arbitration agreement when one of the parties tries to avoid the agreement. On the other hand, at the end of the arbitral process, regular or national courts have to enforce the arbitral award especially where the losing party is not willing to execute the arbitral award. But at the interim stage of arbitration or during the arbitral process, it is the arbitrators and not the courts that should take charge of the proceedings which include; setting time limits, organizing meetings and hearings, issuing procedural directions, issuing summons to witnesses, considering the arguments of fact and law which are presented by each party and giving awards. It is important and necessary to determine boundaries between the jurisdiction of regular courts and arbitral tribunals. However, as Lord Mustill argues, the position or the exact delimitation of jurisdiction between arbitration and regular courts is not clearly known.[100] Some assert that the legitimate functions of Courts should entirely cease as arbitrators receive file, while others argue courts should play complementary role for the arbitral tribunal.[101].

Looking of the matter from international perspective reveals that the involvement of regular or national court has become a fact of life and is prevalent.[102] Regular courts are involved in the process of arbitration for different reasons. Mentionable among these are the permissive nature of national laws and the willingness of parties to involve regular courts.[103] Though it is difficult to determine the exact place of regular courts' involvement in arbitration process, the nature of involvement should be complementary and courts should not impede the arbitration process.[104] To say that courts are complementary to arbitration, they should be involved to assist the arbitration process in the constitution of a tribunal by appointing an arbitrator, during the arbitration process by issuing interim measures where the tribunal lacks coercive power to do so, and at the end of the proceeding by recognizing and enforcing the award.[105] Regular courts should also respect the boundary of parties' autonomy to settle their dispute through

[100] Ibid
[101] Id, p 440
[102] Ibid
[103] Julian DM Law, et al, 'Does national courts involvement undermine the international arbitration?' *American University International Law Review;* 2009, vol. 24, No. 3 pp 490-535, p 490 [here in after referred as Julian DM law]
[104] Ibid
[105] Ibid

arbitration[106]. Though, objections against the arbitration proceedings are brought before the courts, they should not interrupt the arbitration proceeding by issuing anti-arbitration injunction orders. The arbitration proceeding should continue while objections are pending in regular courts. Thus, this type of relationship can make courts complementary to arbitration.[107] In relation to recognizing the international arbitration process, there are four common and essential characteristics which are functional internationally. These are; autonomous character of arbitration, parties' choice to be governed by arbitration, responsibility of arbitral tribunal to resolve all matters in the agreement and its relation with regular courts[108]. The first common characteristic of international arbitration is its autonomous character and that existence outside the domain of regular courts and it is a separate system from regular courts of any state with its own life[109]. Where parties agree to an international arbitration by their contract they are required or presumed to relinquish their rights to be governed by the regular courts.[110]

[106] Ibid

[107] Ibid

[108] Id,p 491

[109] Ibid

[110] Ibid

# CHAPTER THREE

## 3. Intervention of regular courts in arbitration proceedings: under the UNCITRAL Model Law (1985)

### 3.1. Basic feature of the UNCITRAL model law on arbitration

The UNCITRAL (United Nations Commission on International Trade Law) Model Law is drafted to rule on International Commercial Arbitration, by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985.[111] It is recommended by the General Assembly of the UNCITRAL, in its resolution 40/72 of 11 December 1985, that "all States should give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice".[112]It is an important step taken to bring uniformity of law of commercial arbitration in different jurisdictions.[113] It also has been contributing to the development of international commercial practices. For instance, the 1996 UK arbitration Act was remarkably influenced by the Model Law and brought a reduced judicial involvement in the arbitration process while it increased the power of an arbitral tribunal.[114] The Model Law was supposed to bring about four main important functions in relation to commercial arbitration. These are; party autonomy, reduced judicial involvement, increased powers for the arbitral tribunal and equality of treatment of parties that have to be adopted and recognized under arbitration laws.[115]

The Model Law incorporated important principles that contribute toward the harmonization and improvement of national arbitration laws. These acceptable principles and important issues address all stages of the arbitral process beginning from the arbitration agreement to the

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[111] David AR Williams QC, defining the role of in modern international commercial arbitration, Helbert Smith Freehills – SMU Asian Arbitration lecture, Singapore 2012, p 5 [here in after referred as David Williams 2012]

[112] Ibid

[113] Ibid

[114] Ibid

[115] Id, p 6

recognition and enforcement of the arbitral awards.[116] Also they suit into the situations of countries of all regions with different legal and economic system in the world. It is because of these qualities and specific characteristics that the Model law is chosen by many countries.[117]

States are advised to draft their laws with the same form as the Model Law as it helps to harmonize their law and to keep the best interests of international arbitration users, especially for foreign parties and their lawyers.[118]

The factors that inspired the development of the Model Law were the inadequacy of most domestic laws to govern international arbitration and the existence of disparate arbitration laws in different States.[119] For instance Ethiopia's arbitration law seems to be basically designed for domestic arbitration. It may appear that the Codes' provisions on arbitration do not apply to "international arbitration.[120] The adoption of the UNCITRAL Model Law can help to eliminate the frustration that mandatory provisions of national laws create on parties. National laws have limitations in relation to the parties' ability to submit disputes to arbitration, parties' power to select their arbitrator freely, and parties' interests to be governed by the agreed arbitration procedures without the involvement of regular courts.[121] The Model Law is designed to rectify these and other limitations of national laws on arbitration. It aims to bring harmonization and suitable forum and law for international arbitration.[122] As noted above one of the reasons for the development of the Model Law is the existence of disparity among arbitration laws of States.[123] Where national laws of arbitration differ widely, unnecessary consequences and problems may result from mandatory and non-mandatory provisions of national arbitration laws. This difference becomes a frequent source of concern in international arbitration; parties are confronted with foreign and unfamiliar provisions and procedures in international arbitration.[124]

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[116] UNCITRAL Model Law, supra note at 9, p 15, it is taken from the explanatory note by the UNCITRAL Secretariat on the Model law on international commercial arbitration as provided with at the last pages of the UNCITRAL Model Law rules of 1994

[117] Ibid

[118] Ibid

[119] Ibid

[120] Bezzawork Shimelash (1994) "The Formation Content and Effect of an Arbitral Submission under Ethiopian Law" *Journal of Ethiopian Law*, 17, p. 90 [hereinafter Bezzawork].

[121] Ibid

[122] Ibid

[123] Ibid

[124] Ibid

For instance, for a foreign party, the arbitration process may be too expensive, impractical or impossible to obtain the required result by resorting to arbitration. A foreign party is uncertain about the national arbitration law of the other party and this may result in frustration of the arbitral process and the selection of seat of arbitration.[125] Thus, a party may hesitate or refuse to agree to be governed by the laws of seat of arbitration, which he did not know well, due to the fact that such laws may be inappropriate for the case at hand. Hence, for the choice of places of arbitration to be widened, for the smooth functioning of the arbitral proceedings to be enhanced and for the harmonization of arbitration laws between States to be facilitated, "States should adopt and develop the Model Law which is easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard with solutions acceptable to parties from different States and legal systems".[126] There is a trend among most modern laws towards limiting the involvement of courts in international commercial arbitration. This trend emanates justified reason of the parties to the arbitration agreement opt arbitration to litigation, they are making a conscious decision to exclude regular courts from having jurisdiction. They are avoiding the battle existing in courts when they choose arbitration over litigation. Parties also prefer expediency and finality of the arbitration process.[127] The Model Law has encouraged this trend and allowed the involvement of regular courts in arbitration process in certain specified conditions.[128] The first category for the involvement of courts in arbitration proceeding includes appointment of arbitrators, challenge of arbitrators and termination of mandate of arbitrators, determining jurisdiction of the arbitral tribunal, setting aside of the arbitral award.[129] The second category for the involvement of regular courts in arbitration process comprises court assistance in taking evidences, recognition of the arbitration agreement, recognition of the compatibility of the interim orders of the arbitral tribunal with court ordered interim measures of protection, and recognition and enforcement of arbitral awards.[130]

A non-intervention principle is being taken as a fundamental theme in many jurisdictions, which states that courts shall not interfere in arbitral proceedings unless otherwise stipulated by the law

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[125]Ibid

[126] Ibid

[127]. UNCITRAL Model Law, supra note at 9, p 18

[128] Ibid

[129] Ibid

[130] Ibid

of each country.[131] Hence, the law of a country may stipulate the situations where and when regular courts may intervene in arbitral proceedings. In most jurisdictions there are three conditions due to which regular courts can interfere in the arbitral proceedings.[132] For instance, in Indian arbitration law, there are three situations for regular courts to intervene in the arbitration proceedings. These situations are; for appointment of arbitrators where one or both of the parties fail to appoint his/their arbitrators, for ruling on whether the mandate of the arbitrator is to be terminated due to inability to perform his functions or failure to proceed without undue delay; and to provide assistance in taking evidence during the arbitration proceedings.[133] By doing so, the Indian law is found to be more restrictive in allowing court intervention in arbitration proceeding than the Model Law.[134]

## 3.2. Intervention at the preliminary stage

During the preliminary stage of the arbitration process, in most jurisdictions regular courts intervene in arbitration process in three situations. These are;

-Intervention for enforcement of the arbitral agreement

-Intervention for the establishment of the tribunal

-Intervention for challenge of jurisdictions

### 3.2.1. Intervention for enforcing the arbitration agreement

Sometimes when there is an arbitration agreement between the parties, one of the parties may take the existing dispute between them to a court of law rather than to the arbitral tribunal.[135] On the other hand, the respondent may decide to proceed the action before the court of law. By concluding an arbitral agreement, however, the parties agree to submit the dispute that arose or that might arise between them, before an arbitral tribunal rather than a court of law.[136] And in most cases, the respondent wants the dispute to be decided by the arbitral tribunal. Thus, the issue where the disputes need to be resolved is to be determined at the preliminary stage of the proceeding.[137] And most courts are required by the law to decide in favor of the arbitration and

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[131] Sumeet Kachwaha, the arbitration law of India: a critical analysis, p, 6, [here in after referred as Sumeet]

[132] Ibid

[133] Ibid

[134] Ibid

[135] Redfurn and Hunter, supra note 78, at § 7.10 , p 440

[136] Ibid

[137] Ibid

refuse to accept the case for proceeding. In this regard UNCITRAL Model Law under its Article 8 stated that;

"*A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed*."[138]

This obligation of courts is also found in some other arbitration rules such as Article 25(3) of the LCIA (London Court of International Arbitration of 1998), Article 23 of the ICC rules (International Chamber of Commerce), and Article 21(3) of the ICDR rules (International Centre for Dispute Resolution) e.t.c. For instance, it is stated under Article 6(2) of the ICC rules that if the respondent does not file an answer within the specified time, or if one of the parties raises one or more question concerning the existence, validity or scope of the arbitration agreement, the court should decide on the issues raised by the parties, without prejudice to the admissibility or merits of the pleas.[139] The arbitration tribunal should also proceed if it deems that it is satisfied "prima facie" that an arbitration agreement under the rules of arbitration of the ICC exists. In cases where the arbitral tribunal deems in prima facie that an arbitration agreement exists, any decision in relation to jurisdiction of the arbitral tribunal should be made by the arbitral tribunal itself.[140] But if the arbitral tribunal does is not satisfied with the existence of a valid arbitration agreement, the parties should be notified that the arbitration cannot proceed by the tribunal and the parties retain their rights to ask any competent court to decide on whether there exists a binding arbitration agreement or not.[141]

When there is an arbitration agreement between the parties and where one of the party lodges an action before the court, the court should first send the case to the arbitral tribunal at its own motion unless it is found that the arbitration agreement is null, void, inoperative or the one which cannot be performed. The assessment to determine whether the arbitral agreement is void, null, inoperative or not, is made slightly by the courts on the face of an arbitration agreement at the preliminary stage of the proceeding.[142] The declaration that an arbitration agreement is void, null

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[138] UNCITRAL Model Law, supra note 9, Article 8

[139] International Court of Arbitration of the International Chamber of Commerce, ICC rules of Arbitration 1998, Article 6.2 [here in after referred as ICC rules 1998]

[140] Ibid

[141] Ibid

[142] Ibid

and inoperative does not prohibit the arbitral tribunal to proceed over the disputes.[143] When we see the Ethiopian law in this regard, the Civil Procedure Code under article 244(2)(g) put the obligation to raise the objection for arbitral agreement on a party seeking arbitration. Any challenge raised against the validity of the arbitral submission by either party would be referred to the court as per article 3330(3) of the Ethiopian Civil Code. But there is no any provision in the Ethiopian arbitration law preventing the tribunal from conducting the arbitral process while pending the case in the court.

### 3.2.2. Intervention for establishing the arbitral tribunal

Where arbitrators are not appointed or if the parties failed to appoint their own arbitrator or if there is no applicable institutional rule for the appointment of arbitrators, regular courts are required to make such appointment of arbitrators on behalf of the defaulting party in appointing his arbitrator.[144] Basically, parties in the arbitration agreement do have the right to appoint their own arbitrators. In case of three arbitrators each party can appoint one arbitrator and the two appointed arbitrators, by agreement, may appoint the third arbitrator.[145] But where parties fail to agree on the appointment of an arbitrator or where the two arbitrators fail to agree to appoint the third arbitrator within the specified time, the appointment of an arbitrator/s shall be made by the court. When the arbitration is conducted by a sole arbitrator and parties fail to agree on appointing of the sole arbitrator, the appointment of such arbitrator is made by the court.[146] Besides, when parties agree on the appointment procedure and fail to act under the agreed procedure, or where the parties or the arbitrators or any third party or an institution entrusted to define the procedures, are unable to reach to an agreement concerning the procedures to be applied on arbitration, any party can request the court for the establishment of such procedures or for the agreement of the parties on certain procedures.[147]

On the other hand, the LCIA (London Court of International Arbitration) rules empower the court alone to appoint arbitrators. The LCIA court is empowered to appoint arbitrators based on the criteria of selection of arbitrators agreed by the parties in an arbitration agreement. For instance, the court while selecting arbitrators should consider the nature of the transaction, the nature of the circumstances of the dispute, the nationality, location and languages of the parties

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[143] Ibid

[144] Redfurn and Hunter, supra note 78 at § 7.11 , p 441

[145] UNCITRAL Model Law, supra note 9, Article 11.3

[146] Ibid

[147] Id ,Article 11.4

in the dispute.[148] In the case of three arbitrators, the chairman or the one who is not nominated by either party is required to be appointed by the court.[149] Hence, in appointment of arbitrators, regular courts' or (any other entrusted body or court of arbitral institutions) intervention is inevitable and the involvement of regular courts is necessary. Besides, when an appointment of an arbitrator/s is challenged or if there is no rule to administer this challenge, it is the regular courts to decide on the matter.[150]

In the UNCITRAL Model Law, when the parties fail to agree on the arbitrators, they can challenge the arbitrators based on certain grounds as impartiality or independence of an arbitrator.[151] If either party wishes to challenge an arbitrator, first he can send his objection with circumstantial grounds and reasons to the constituted arbitral tribunal. Where the challenge requested by the either parties is justified one, arbitrator is required to withdraw himself from his office. Otherwise, party agrees on the challenge of the arbitrator the arbitral tribunal should decide on the challenge.[152] However, if the challenge of an arbitrator is not successful by an arbitrator himself or by the tribunal, the challenging party, within the time specified (thirty days) of receiving the decision rejecting the challenge, can request the court for challenge of the arbitrator. The decision of the court on the challenge of an arbitrator is final and is not subject to appeal.[153] Since, the principle of competence-competence is recognized by the UNCITRAL Model Law the arbitral tribunal including the challenged arbitrator can continue with the proceeding and can render an award even though a challenge to an arbitrator is pending before the court.[154] On the other hand, where an arbitrator becomes *"de jure* or *de facto"* incapable to perform his functions as an arbitrator or for any other reasons fails to perform his functions without undue delay, the mandate given to him terminates or if the arbitrator withdraws himself from his office or if the parties agree for the arbitrator to terminate his mandate, any party may request the court for the termination of the mandate of an arbitrator.[155] The decision of the court,

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[148] United Kingdom Organization, London Court of International Arbitration, LCIA Arbitration rules 1998, Article5.5 [here in after referred as LCIA rules 1998]

[149] Id, Article 5.6

[150] LCIA rules 1998, supra note 148, Article 5.6

[151] UNCITRAL Model Law, supra note 6, Article 13.3

[152] Ibid

[153] Ibid

[154] Ibid

[155] UNCITRAL Model Law, supra note 9, Article 14

here, is not subject to appeal. This intervention of regular courts is a must and necessary for the establishment of the arbitral tribunal and to give effect for the arbitration agreements.[156] Thus, pursuant to article 13(2) UNCITRAL Model Law parties can first request to the arbitral tribunal for the challenge of the arbitrator and where the request is not successful he can proceed to court against the challenged arbitrator.

### 3.2.3. Intervention for challenging jurisdiction

One of the challenges that may be made most of the time at the beginning of an arbitration proceeding is a challenge against the jurisdiction of the arbitral tribunal.[157] If the objection against the jurisdiction of the arbitral tribunal is acceptable, the arbitration process will be terminated and the dispute will be transferred to regular courts.[158] The relationship of regular courts and the arbitral tribunal in determining jurisdiction of the arbitral tribunal, recognized in the Model Law and in many national laws that the challenge to jurisdiction of an arbitral tribunal is determined by the arbitral tribunal itself.[159] However, the final decision on jurisdiction rests on regular courts. [160]The decision of an arbitral tribunal on jurisdiction will be reviewed by courts of the state in which enforcement and recognition of award is sought.[161] When an arbitral tribunal decides that it has jurisdiction on the dispute presented before it, the party aggrieved by the decision given can request the court to rule on the matter within the specified time limit which is thirty days in case of UNCITRAL Model law. The decision of the court on a tribunal's jurisdiction is final and not subject to appeal.[162] However, while such request is pending the arbitral tribunal can proceed with the arbitration and can make an award unless the court made decision on jurisdiction and order the tribunal to halt the proceeding.[163] Regular courts will have the opportunity to intervene in the arbitration process in cases of determining of the jurisdiction of an arbitral tribunal after the arbitral tribunal has ruled on its jurisdiction.[164] Because, the principle of competence-competence provides the arbitral tribunal to rule on its jurisdiction,

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[156] Ibid

[157] Redfurn and Hunter, supra note 78, at § 7.12, p 441

[158] Ibid

[159] UNCITRAL Model Law, supra note 9, Article 16.3

[160] Ibid

[161] Ibid

[162] Ibid

[163] Ibid

[164] Redfurn and Hunter, supra note 78, at § 7.12, p 441

regular courts could not interfere to decide on jurisdiction before the arbitral tribunal gives its decision.[165]

## 3.3. Intervention during the arbitration process

Most arbitration proceedings are conducted without the involvement of regular courts though sometimes these may necessary. In certain cases, one of the parties may fail or refuse to participate in the proceeding. [166]There are times that require the involvement of national courts to ensure the proper conduct of the arbitration.[167] The involvement of regular courts in arbitration is necessary, for instance, to assist the arbitral tribunal in taking evidences, to give an order for the preservation of properties which are subject to the dispute or to make some other interim measures of protection.[168] The question that arises here is how far this kind of involvement of regular courts should extend? There is a need to determine the extent of involvement of regular courts in arbitration. Though, it is not an easy task, it is important to assess whether the involvement of courts is necessary or is it undue interference in the arbitral process.[169]

### 3.3.1. Intervention to enforce orders for interim measures

In the course of arbitration proceeding, there may be a need for the arbitral tribunal or regular courts to issue orders intended to preserve evidence, to protect properties subject to the dispute, and those orders made for the purpose of maintaining the status quo pending the outcome of the arbitration proceedings themselves.[170] These interim measures are intended to give orders to preserve evidences for the proceeding of arbitration and to preserve the outcome of the arbitration.[171] Where there is a need to issue these interim measures, the arbitral tribunal has the power to give these orders by itself.[172] In relation to this, Article 17 of UNCITRAL Model Law states “unless otherwise the parties agreed that the tribunal should not issue interim measures, the arbitral tribunal may, at the request of one of the parties, order any party to take interim measures

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[165] Ibid

[166] Redfurn and Hunter, supra note 78, at § 7.13, p 441

[167] Ibid

[168] Ibid

[169] Id,442

[170] Ibid

[171] Ibid

[172] Ibid

of protection if the arbitral tribunal considers that such interim measure is necessary in respect of the subject matter of the dispute."[173] Pursuant to this provision, the arbitral tribunal may also require any party to provide appropriate security in connection with such measures. Similarly, the ICC rules as to conservatory and interim measures states "Unless the parties have agreed in the opposite, and where the file has been transmitted to the arbitral tribunal, and if one of the parties so requests, it may order any interim or conservatory measure that the tribunal considers as appropriate."[174] While ordering such interim measures, the Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. The interim measures which are ordered by the tribunal, in case of the ICC rules, are required to be in the form of an order, shall be based on reasons, or in the form of an award, if the tribunal deems it appropriate.[175] The ICSID rules (International Centre for Settlement of Investment Disputes) also state that unless the parties agreed otherwise, and if the tribunal considers that it is necessary, the tribunal can issue any interim measures or other orders at any stage of the proceeding.[176] These orders may include requesting parties to produce documents and/or other evidences, visiting the scene connected with the dispute and conducting inquiries that may be appropriate to settle the dispute between the parties.[177] However, the power of the arbitral tribunal to issue these interim measures may become insufficient in certain situations and needs regular courts' assistance.[178] Thus, there is a need for help or intervention of regular courts to issue such interim measures. Under Article 27 of the UNCITRAL Model law the competent regular court can provide assistance to the arbitral tribunal in taking evidences. The request to the competent court for assistance in taking of evidences is made through the arbitral tribunal.[179] A party wishing court assistance should first approach the tribunal and get the application approved by the tribunal to request the competent court for help in taking evidences.[180] And the court is empowered to execute the request based on its competence and rules of taking evidences as in its

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[173]UNCITRAL Model Law, supra note 9, Article 17

[174] ICC rules 1998, supra note 139, Article 23.1

[175]Ibid

[176] International Centre for settlement of Investment Disputes, ICSID convention, regulation and rules, ICSID April 2006, 1818 H street, N.W Washington D.C. 20433, USA, Article 43 [here in after referred as ICSID rules 2006]

[177] Ibid

[178] UNCITRAL Model Law, supra note 9, Article 27

[179] Ibid

[180] Ibid

normal proceedings.[181] There are certain situations for which the assistance of regular courts is required in the process of arbitration.[182] Some of these situations are; the arbitral tribunal may not have the necessary power to issue such interim measures in cases where some domestic legislation prohibit arbitral tribunal to issue interim measures though they are very rare in practice.[183] The Greek Code of Civil Procedure can be cited in this respect. Similarly, the Italian Civil Procedure Code prohibits the arbitral tribunal to issue an order of protection or any interim measures of attachments under Article 818.[184]Some arbitration laws may specifically provide powers for regular courts to support the arbitral process by granting interim injunctions to preserve evidence.[185] For instance, the English Arbitration Act of 1996 provide such powers to courts to order the preservation of evidences, inspection of properties, photographing or preservation of properties in the arbitral process in the same way as court proceedings.[186] The power to order taking and preservation of evidences in arbitration process is the main concern during interim measures. It is necessary to grant such powers to the regular courts as the arbitral tribunal does not possess the necessary power to compel the attendance of relevant witnesses and collection of evidences in the hands of third parties.[187] If the witness required by the parties refuses to be present before the arbitral tribunal, and if parties can not present the witness by themselves, the arbitral tribunal cannot compel such witnesses to appear before the proceeding.[188] Hence, lending coercion power from regular courts is necessary and such powers of courts' are recognized as assistance to arbitration by the Model law. Thus, for example, in international arbitration, the arbitral tribunal or a party with the approval of the arbitral tribunal may require the regular courts' power of a State in taking any necessary evidences. The court

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[181] Ibid

[182] Tewodros Meheret, et al, 'Renaissance of the Ethiopian law of arbitration: is reform due? ' Yazachew Belew (ed), *Ethiopian business law series,* the resolution of commercial/ business disputes in Ethiopia: towards alternatives to adjudication? , vol.v. Faculty of law AAU, Addis Ababa, 2012, pp 200-247, p 243 [herein after referred as Tewodros Mehret]

[183] Ibid

[184] Ibid

[185] Redfurn and Hunter, supra note 78, at § 7.39, 449

[186] Ibid

[187] Id,447

[188] Ibid

may thus execute the request based on its power of taking evidences and within its competence.[189]

Besides, some national arbitration laws, for instance that of, Switzerland, though has not adopted the Model Law, but use similar procedure very closely in providing power for regular courts to order interim measures.[190] Furthermore, the English Arbitration Act 1996 use the wording of the Model Law in conferring powers on regular courts and it provides; "A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence".[191]

The other situation where an arbitral tribunal is unable to issue interim measures is in conditions where the arbitral tribunal is incapable to issue any interim measure until its formation.[192]

A definite time is needed to form an arbitral tribunal and before the formation of the tribunal some necessary evidences or properties subject to the dispute may be made to disappear by one of the parties in the dispute. Since, the arbitral tribunal is not yet established, it is important that regular courts intervene and deal with such interim measures and fill the gap in preserving evidences and properties from destructive action of one of the parties.[193] Under the LCIA rules it is stated that the power of the Arbitral Tribunal to issue an interim and conservatory measures should not prohibit one of the parties to apply to the regular courts or to other judicial authority. The law allows parties to apply to courts for interim or conservatory measures before the formation of the tribunal, and in exceptional cases, after its formation.[194] Applications to the regular courts or to any judicial authority and any orders for such measures by the regular courts and judicial authorities made after the formation of the Arbitral Tribunal are required to be communicated by the applicant to the Arbitral Tribunal and to all other parties in the dispute.[195] However, when parties agree to arbitration in the LCIA rules, the parties are presumed to have

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[189] Ibid

[190] Ibid

[191] Ibid

[192] Id,442

[193] Ibid

[194] LCIA rules 1998, supra note 148 , Article 25.3

[195] Ibid

agreed not to apply to any state court or to any other judicial authority for orders in relation to security, legal or other costs available from the Arbitral Tribunal's power.[196]

In addition to the above discussed situations, an arbitral tribunal may require the assistance of regular courts to take interim measures as its power is limited to the parties in the arbitration agreement.[197] An order of an arbitral tribunal can only affect or oblige the parties in the arbitration agreement.[198] As a result, the arbitral tribunal can issue interim orders only on the parties in the agreement. Orders issued to a third party; such as, orders addressed to Banks holding deposits of a party, and multi-contract disputes may create problem to enforce orders issued by the tribunal.[199] Some relevant documents may be found in the hands of a third party.

This time, as the power of the tribunal is limited to parties, the arbitral tribunal needs assistance from regular courts.[200] There is also a need for regular courts where a third party witness and evidences remain outside its jurisdiction.[201] For instance, the US Federal Rules of Civil Procedure under section 1782 permits a district court to order a person who resides or is found in the district to give testimony or produce documents for use in a foreign or international tribunal upon the application of any interested person.[202] However, some authors have argued that the possibility of seeking judicial assistance for documentary disclosure from non-parties runs against the consensual nature of arbitration.[203] The arbitration agreement is made between the parties in an agreement. The agreement is binding only on the parties. Third parties who have no interest in the agreement should not be bound by this agreement. Thus, courts should not bind third parties who are outside of the domain of arbitration.

The other situation which requires a call for assistance of regular courts in relation to interim measures is the enforcement difficulties that arbitral tribunals encounter. Ordering an interim measure by itself could not settle the dispute ultimately. An order issued by an arbitral tribunal may be unenforceable internationally. As a result, parties should apply for such interim measures to be ordered by regular courts of place of execution, provided that seeking courts' assistance for

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[196]Ibid

[197] Redfurn and Hunter, supra note 78, at § 7.19, p 443

[198] Ibid

[199] Ibid

[200] Id,p 449

[201] Ibid

[202] Id,p 449

[203]Id,p 450

interim measures is not incompatible with the arbitration agreement.[204] Courts' assistance in relation to interim measures may be sought in cases where there is a need for ex-parte application of interim measures. The power of an arbitral tribunal to issue ex-parte interim measures is limited in most jurisdictions and the Model Law is also in favor of this limited power.[205] Where there is a risk of dissipation of properties, destroy of evidences and so on, ex-parte relief may become necessary and the regular courts are the only option for the parties to preserve these properties and evidences through the issuance of interim measures. In the ICC rules it is stated that, "The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement".[206] Similarly, the UNCITRAL Model Law stated that: "*A request for interim* measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement".[207] The Model Law also stated the possibility of court's involvement in arbitration proceedings categorically. It is not incompatible for a party to request the regular courts before or during arbitral proceedings for an interim measure of protection. It is not incompatible for courts to grant such measures too.[208] Thus, we can understand that, there is a need for the competent court to have power to issue interim measures in support of the arbitral tribunal. For instance, the involvement of regular courts may be necessary in situations of extreme urgency as; where third parties need to be involved, where there is a possibility that a party is unwilling to execute the tribunal's orders, and the regular courts may grant the injunction for preserving the status quo of the arbitration agreement or they may order measures to prevent the disappearance of assets, avoidance of evidences from witnesses, or for the preservation of assets and evidences.[209]

## 3.4. Intervention after arbitral award

At the end of an arbitration process, judicial control on the proceedings of arbitration is inevitable to give effect to the finality of award. At this stage, there remains a final aspect of

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[204] Ibid

[205] Ibid

[206] Id,p 444

[207] Ibid

[208] *Ibid*

[209] Id,p,445

relationship between regular courts and arbitral tribunals. [210]This is also the stage of intervention for regular courts to exercise their judicial control over the conduct of international commercial arbitration and over the award rendered by the tribunal.[211] The extent of involvement of regular courts in arbitration proceedings at this final stage over the conduct of arbitration and the resulting award is a matter of controversy between commentators and between states.[212] There are two extreme positions as to the intervention of regular courts in arbitration proceedings at the final stage. One extreme position is stated by an English judge that; if parties agree to resolve their dispute by arbitration, which is a private tribunal, rather than the public tribunal (or regular courts), the public tribunal (courts) should not take part at all to resolve such disputes intended to be resolved by the private system.[213] However, this position put exceptions for regular courts to be involved in cases of enforcing awards. He argued that courts can enforce arbitral awards similarly with the way they enforce other rights and obligations of the parties in regular court litigation.[214] The other opposite extreme position dictates that arbitration and the court system do have common characteristic in resolving disputes. Both systems are intended to deliver justice.[215] This justice delivered by both systems requires certain rules to be applied in resolving of disputes. As justice is an integral part of the civilized and democratic society and the state is the overall discharger of justice, the regular courts should intervene when it is necessary, and the intervention should be made to ensure the attainment of justice and this justice should be done both by private and public tribunals.[216]

### 3.4.1. Setting aside of the arbitral awards

Arbitration is characterized by its features of flexibility and freedom of parties and it is distinct from the rigid procedures of courts' litigation.[217] However, Courts must finally maintain a residual supervisory jurisdiction to ensure that the fundamental principles of due process and natural justice are to be respected. [218]To this effect, Article 34 of the UNCITRAL Model law

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[210]Id,p,456

[211] Ibid

[212] Ibid

[213] Ibid

[214] Ibid

[215] Ibid

[216] Ibid

[217] David Williams,supra note 111, p 19

[218] Ibid

authorizes national Courts to intervene by setting aside awards in certain situations like; where basic rights of parties have been vitiated or where an arbitral tribunal has acted beyond its jurisdiction or power.[219] It is stated under Article 34 of the UNCITRAL Model law that "An arbitral award may be set aside by the court" on fulfillment of certain conditions specified under the law.[220] The grounds to set an arbitral award aside are specifically given under Article 34(2) of the UNCITRAL Model law as follows;

*" (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or*

*(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*

*(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or*

*(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or*

*(b) the court finds that:*

*(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or*

*(ii) the award is in conflict with the public policy of this State."*[221]

In different legal systems, national laws on arbitration consider and treat awards as courts' decisions and provide different means of recourse against an arbitral award.[222] The means of recourse, the period of time for the recourse, lists of grounds for recourse vary between nations with different legal system and different arbitration laws.[223] Hence, the Model Law attempts to

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[219] Ibid

[220] UNCITRAL Model Law, supra note 9, Article 34(2)

[221] UNCITRAL Model Law, supra note 9, Article 34(2)

[222] UNCITRAL Model Law, supra note 9 p 23

[223] Ibid

modify this situation and recommends that courts have high concern and to be involved, especially, in cases of international commercial arbitration. According to the Model Law, the first measure of improvement for recourses to the regular courts is providing only one type of recourse, by excluding other means of recourses which are enshrined in many procedural laws of nations.[224] This one type of recourse permitted by the UNCITRAL Model Law recommend, to be applied internationally, is an application for setting aside of an arbitral award as provided under Article 34 of the Model Law.[225] Though the grounds for setting aside of an arbitral award are different in different arbitration laws, the UNCITRAL Model Law has specified certain limited grounds to be applicable internationally under Article 34(2).[226] As dealing with grounds for setting aside of an arbitral award is not the concern of this study, we will not proceed to analyze these grounds in different legal systems. Since the recourse to the regular courts is desired to be very limited, courts should not intervene outside these specific areas otherwise the advantages of arbitration may be lost for the massive intervention of courts in arbitration proceedings.[227] Even in cases of setting aside of an arbitral award, where the courts are strictly evaluating the award, parties are forced to comply with the rigid court procedures rather than flexible arbitral procedures.[228] Since, parties in arbitration agreement have agreed to accept the decisions of the arbitral tribunal, courts should respect the ruling of the tribunal and should not intervene beyond the specified situations and grounds enshrined under Article 34 of the Model Law. Courts should also interpret these grounds narrowly to give effect to the parties' agreement on arbitration and to respect the tribunal's ruling.[229]

### 3.4.2. Recognition and enforcement of awards

In most jurisdictions intervention of courts in the form of recognition and enforcement of award is widely accepted and important. It can also be taken as the final stage of regular courts involvement in the arbitral process. This intervention mechanism is for recognition and

[224] Ibid

[225] Ibid

[226] UNCITRAL Model Law, supra note 9, p 20

[227] Ibid

[228] Ibid

[229] Ibid

enforcement of arbitral awards.[230] At this stage the breadth of judicial involvement in arbitration is naturally different in different states based on the grounds available to challenge enforcement of an award or to nullify the award.[231] Where objections on enforcement of an arbitral award is brought before the courts, the interpretation of the grounds for challenge should be construed restrictively to give effect to the finding of the tribunal and to enforce the award without unjustified delay.[232] Otherwise, if the grounds available for challenge of enforcement of an award are extended, judicial intervention will increase and courts' scrutiny in arbitration including its findings will be very high.[233] The UNCITRAL Model Law under article 35(1) stipulates that "any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to certain grounds on which recognition or enforcement may be refused".[234] The Model Law has set certain conditions for obtaining enforcement like: application in writing, an authenticated original copy of an award, accompanied by the arbitration agreement. Thus, the regular courts are empowered to recognize and enforce arbitral awards on fulfillment of the conditions specified under Article 35(2) that the arbitral award applied to be enforced is duly written and authenticated by original award, and the award should comply with the grounds under Article 36 that there should not be any grounds which bar enforcement of an award.[235] The grounds for refusing enforcement of an award under the UNCITRAL Model Law are;

*"(i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*

*(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*

*(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission*

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[230] Moin Ghani, court assistance interim measures and public policy; Indian perspective on international commercial arbitration, arbitration brief, American University Washington college of law vol-2, no. 1,2012, p 25 [here in after referred as Moin Ghani ]

[231] Ibid

[232] Ibid

[233] Moin Ghani , supra note 230, p 26

[234] UNCITRAL Model Law, supra note 9, p 24

[235] UNCITRAL Model Law, supra note 9, Article 35

*to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or*

*(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or*

*(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or*

*(b) if the court finds that:*

*(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or*

*(ii) the recognition or enforcement of the award would be contrary to the public policy of this State".*[236]

Therefore, the UNCITRAL Model Law has recognized the intervention of regular courts in arbitration process for the enforcement of an award. The finding of an arbitral tribunal is recognized and considered as binding as court decisions are to be enforced as court decisions. The regular courts could only refuse to enforce awards subject to legal grounds which are specifically provided by the law of each country.

[236] Ibid

# CHAPTER FOUR

## 4. Role of regular courts in arbitration proceedings: under the Ethiopian law

Regular courts are restricted from assuming jurisdiction over matters agreed upon by the parties to be settled by arbitration. However, the assistance and intervention of courts may be required at every stage of arbitration starting from the commencement of the proceeding to all the way the award is executed. In Ethiopian arbitration law, the roles regular courts play during the three stages of arbitral proceeding are recognized. They do have role to play before the commencement of the proceeding, during the proceeding and after an award is rendered. Some of the problems that parties encounter in the arbitration agreement before the commencement of arbitration process are: in relation to determining of the validity or not of an arbitration agreement, determining the capacity of parties in the agreement and refusal or failure of one of the parties to select his own arbitrator or failure to participate in the formation of an arbitral tribunal.[237] But in case of an institutional arbitration,[238] in which all of these situations are to be determined by the rules of that institutional tribunal most of the problems that arise may be resolved by the tribunal itself. Since the Ethiopian arbitration system is formed as an ad-hoc tribunal, arbitration proceeding is administered by parties themselves. In this case the arbitrators are chosen by parties' agreement. The applicable laws, place and language of arbitration, number and qualification of arbitrators are determined by parties involved.[239]Thus, in cases of the usual

[237] Mekbib Tsegaw , supra note 6, p 137

[238] Solomon Emiru, supra note 41, p 13

[239] Ibid

Ethiopia ad-hoc arbitral tribunal proceeding, resorting to regular courts to resolve the above mentioned preliminary problems is inevitable.

## 4.1. Intervention at the preliminary stage

At the preliminary stage of arbitration, intervention of regular courts may be required when the jurisdiction of an arbitral tribunal is challenged in order to determine the validity of an arbitration agreement, and in relation to the appointment of arbitrators or the constitution of a tribunal.

### 4.1.1. Determining jurisdiction of the tribunal

The common area for regular courts to intervene in arbitration is determining the jurisdiction of an arbitral tribunal. Courts may intervene to decide whether the tribunal has jurisdiction or not, on matters intended to be resolved by arbitration.[240] Though parties can define the power and authority of arbitrators in the arbitration agreement, jurisdictional issues may arise from the scope and validity of an arbitration agreement. Usually, one of the parties may try to delay or avoid arbitral proceeding in challenging the validity or scope of the arbitration clause before regular courts.[241] When one of the parties wants to proceed with arbitration, the other party may refuse to resolve the dispute through arbitration by alleging that the arbitration agreement is invalid and the tribunal has no jurisdiction. The questions that can be raised in relation to this is where should this disagreement be resolved and which forum will have competence to decide on the validity of an arbitration agreement.[242] Most countries having modern arbitration laws prefer the arbitral tribunal to decide on the validity of an arbitration agreement than regular courts. For instance, the UNCITRAL Model Law provides under Article 16 that the arbitral tribunal is competent to rule on its own jurisdiction including objection in relation to the existence of an arbitral agreement or its validity.[243]

On the other hand, when we examine the Ethiopian arbitration law in this respect, article 3330(1) and (2) of the Civil Code stated that the arbitral submission may authorize the arbitrators to

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[240] Giulian Carbone, et al, 'The interference of the court of the seat with International Arbitration, the symposium journal of dispute resolution', , vol.1, No. 1, 2012, pp217-244, p 217 [here in after referred as Giulian Carbone ]

[241] Ibid

[242] Ibid

[243] Ibid

decide on difficulties arising out of the interpretation of the agreement.[244] Parties to the arbitral agreement may particularly authorize the arbitrators to decide on their own jurisdiction. From this we can also understand that the Ethiopian law authorizes the arbitrators to decide on their jurisdiction only when the parties have agreed to authorize the arbitrators to rule on their own jurisdiction in their agreement. Otherwise, if parties did not agree on the power of arbitrators to rule on their own jurisdiction, the arbitrators are not empowered by the law to do so.[245] The law simply left the parties to authorize, in the agreement, the arbitrators to decide on their own jurisdiction. Under article 3330 of the Ethiopian Civil Code question like what if parties, fail to authorize arbitrators to decide on jurisdiction and what will be its effects may be raised. The law does not settle these issues and it is open for courts to intervene in such circumstances. As to the reading of Article

3330(1) of the Civil Code, when the parties failed to authorize, the inherent power of the tribunal to decide on its own jurisdiction is not recognized. Hence, Ethiopian courts can simply intervene in the proceeding to decide on jurisdiction when one of the parties takes the case to regular courts. It is also stated under Article 3330(3) of the civil code that the arbitrators/ the tribunal "may in no case be required to decide whether the arbitral submission is or is not valid".[246] By putting such expression in the law, Ethiopian arbitration law ousts the arbitral tribunal from having jurisdiction over deciding on the validity of the arbitration agreement. If arbitrators or the tribunal is not allowed to rule on such preliminary cases as determining the validity of an arbitral agreement, the intervention of regular courts into arbitration process will be inevitable.[247] In order to prevent parties' destruction of the effectiveness of arbitration proceedings by invoking lack of jurisdiction of arbitrators, a number of states have adopted and recognized the principle of competence-competence in to their arbitration laws.[248] The principle of competence-competence helps the arbitral tribunal to rule on its own jurisdiction. The international experience tells that national and international legislations favor the principle of competence-competence. However, its application varies from country to country as regards the timing and extent of tribunal's power to decide on its jurisdiction.[249] For instance, the Ethiopian arbitration

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[244] Mekbib Tsegaw , supra note 3, p 138

[245] Ibid

[246] Mekbib Tsegaw , supra note 6, p 139

[247] Ibid

[248] Guilian Carbone , supra note 240, p 221

[249] Ibid

law has recognized this principle under Article 3330(2) that the arbitrators may be authorized particularly to decide disputes in relation to the jurisdiction of the tribunal. The Ethiopian law authorizes arbitrators, based on parties' agreement, to decide on the jurisdiction of the arbitral tribunal and they are not authorized to decide the validity of an arbitration clause.[250] On the other hand, the UNCITRAL Model Law, the ICC rules, the ICDR rules, the ICSID rules, authorized the arbitrators fully to decide on the jurisdiction and validity of the arbitral clause.[251] The United States Arbitration Act (FAA) under its title 9**,** chapter 1, and section 3 authorizes the regular courts to intervene at any time to decide on the validity of the arbitration clause before an award is rendered.[252] On the other hand, the French Civil Procedure Code under article 1458 authorizes regular courts to rule on jurisdictional issues after the final award is rendered by the tribunal.[253] For instance, Article 16 of the UNCITRAL Model Law significantly empowered an arbitral tribunal to rule on its own jurisdiction. The law explicitly provides power to rule on its jurisdiction both as a preliminary question and during rendering an award.[254]Under Article 16(3) UNCITRAL Model Law it is provided that if a question as to jurisdiction is raised preliminarily, and the tribunal determines that it has jurisdiction, one of the aggrieved parties may within 30 days, apply to the court of law, its objection on jurisdiction while the arbitral tribunal is pending its proceeding on the merit of dispute.[255] The decision of the court in relation to jurisdiction is not subject to any appeal. This decision of the court does not even affect the continuation of arbitration process and the arbitral tribunal can render its final award without interruption.[256] The powers of the court on jurisdictional issues are subject to two limitations.

The first limitation is the decision of the court on jurisdiction is not appealable. This prevents the parties from a long process of court litigation. The second limitation is courts' review on jurisdictional issues does not interrupt the arbitral tribunal's proceeding. The tribunal can continue its proceeding until it renders final award on the matter.[257]

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[250] Ibid

[251]It is provided under Article 16 of the UNCITRAL Model law, Article 6 of the ICC rules, Article 15 of the ICDR, Article 41 of the ICSID

[252] Guilian Carbone , supra note 240, p 221

[253] Id, p 223

[254] Ibid

[255] Id ,p ,224

[256]Ibid

[257] Ibid

Allowing and disallowing of the intervention of regular courts to decide on jurisdictional issues and on the validity of arbitration clause have advantages and disadvantages.[258] Allowing courts' intervention to decide on jurisdiction may have an advantage for the parties to save their time and money if the arbitral tribunal decides incorrectly that it had jurisdiction.[259] Similarly it prevents parties from dilatory tactics in arbitration process, as it enables parties to continue on arbitration while the litigation on jurisdiction before the court is pending.[260] On the other hand, submitting the jurisdictional issues to be determined by the court at the preliminary stage of the arbitration proceeding may be taken as delaying tactic and hindrance to the immediate effectiveness of arbitration. It may be advantageous for parties to bring these issues available before the regular courts only after the final award has been given. Because, this helps the parties to avoid the unwanted interference of courts in to arbitration proceeding.[261] Hence, the scope and extent of application of the principle of competence- competence varies from country to country and from legislation to legislation.

### 4.1.2. Decisions related to validity of Arbitral Agreement

Among the issues demanding the involvement of regular courts is the issue related with the enforcement of an arbitration agreement.[262] When one of the parties brings dispute before an arbitrator or an arbitral tribunal and the other party refuses to resolve the dispute by arbitration, the court is the proper organ to determine and to set the arbitration in to motion. However, one of the parties in arbitration agreement may challenge the validity of the arbitration agreement on the ground of inarbitrability of the subject matter of the dispute.[263] It is a plain fact that there are certain disputes which need not be resolved by an arbitral tribunal for certain reason, though such restrictions widely differ from country to country.[264] Under Ethiopian law there is a limitation to this rule that the Ethiopian Civil Procedure Code under article 315(2) explicitly prohibit administrative matters to be seen via arbitration by stipulating as "no arbitration may take place in relation to administrative contracts as defined under Article 3132 of the Civil Code of Ethiopia

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[258] Ibid

[259] Ibid

[260] Ibid

[261] Ibid

[262] Hailegabriel G. Feyssa, supra note 3, p 313

[263] Mekbib Tsegaw, supra note 6, p 142

[264] Ibid

or in any case where it is prohibited by law."[265] Hence, government agencies, which are supposed to conclude administrative contracts, are now provided with an alternative statutory provision to enable them to avoid arbitration. The inarbitrability of administrative contracts as provided by the law enables government agencies to challenge the arbitration agreement and it has successfully been invoked by government agencies even to challenge awards.[266] Thus, if one of the parties in arbitration agreement submits an action before the arbitration tribunal, the other party may refuse or fail to proceed with arbitration for the mere fact that the agreement is administrative one and could not be resolved by the arbitrators/ the tribunal.[267] In this regard whether the agreement is administrative or not is the main issue and need to be determined first. In relation to this issue of arbitrability of the subject matter of the dispute is to be determined. This also poses a question that is it the court or the tribunal that decides on the issue of arbitrability of the subject matter of the dispute. The general trend in the world particularly the modern arbitration laws like UNCITRAL Model Law under Article 16 indicates that the arbitrability of the subject matter of the dispute should be settled by the tribunal and not by the regular courts.[268] However, the Ethiopian law of arbitration is silent on this issue.[269] Thus, if the law is silent as to the determination of the arbitrability of the subject matter of the dispute and the arbitral tribunal is not allowed by the law explicitly, it is clear that one of the parties will take the case to the regular courts.[270] Hence, it is another room for Ethiopian courts to intervene in arbitration proceeding. The validity of an arbitration agreement may also be challenged on the ground of capacity of the parties in the arbitration agreement.[271] The capacity of parties to the arbitration agreement to submit their dispute to the arbitrators/ the tribunal may be taken as necessary to determine on the validity of the arbitration agreement. Thus, if the dispute arises as to the capacity of parties in the agreement, according to the Ethiopian law of arbitration, it is the power of the court to determine whether a party in the agreement is capable or not.[272] As a result, regular courts can determine on the validity of an arbitration agreement.[273] This situation opens a room for Ethiopian courts to intervene in arbitration process at the preliminary stage of

[265] Ibid

[266] Ibid

[267] Mekbib Tsegaw, supra note 6, p 143

[268] Ibid

[269] Ibid

[270] Id,p,140

[271] Ibid

[272] Ibid

[273]Ibid

proceeding. But the position of most modern arbitration laws is that the capacity of parties as it relates with the validity of the arbitral agreement should be decided by the arbitral tribunal itself.[274]

### 4.1.3. Appointment of arbitrators

At early stage of an arbitration proceeding, the involvement of regular courts may be required for the appointment of arbitrators.[275] As it is stated under Art 3344(1) of the Civil Code, a party to an arbitration agreement may demand the court to set the arbitration in to motion. The court may be required to set the arbitration in to motion by appointing an arbitrator on behalf of the defaulting party when that party refuses to perform acts in accordance with the arbitration agreement.[276]

The power of the court here is to appoint an arbitrator on behalf of defaulting party and it can be taken as an administrative function of a court and not a judicial function.[277] One of the parties in the arbitration proceeding may refuse to appoint his own arbitrator or may fail to participate in the formation or constitution of an arbitral tribunal. If one of the parties refuses to appoint his own arbitrator, it is an instance for regular courts to intervene and assist in the formation of an arbitral tribunal by appointing an arbitrator on behalf of defaulting party.[278]

One of the parties in the arbitration agreement usually the defendant may refuse to appoint his own arbitrator in cases of three-member arbitral tribunals. A party may also refuse to participate in the selection of a sole arbitrator.[279] The other party (the claimant) needs assistance from regular courts for an appointment of an arbitrator for the proper formation of an arbitral tribunal.[280] Under the Ethiopian law as stated under Article 3332 of the Civil Code, regular courts' intervention in assisting a party for appointment of an arbitrator may be sought in two situations: Such as when one of the parties fails or refuses to appoint his arbitrator, and when the two party appointed arbitrators fail to agree on appointing a presiding arbitrator.[281] The

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[274] Ibid

[275] Hailegabriel Gaddissa. Feyssa, supra note 3, p 317

[276] Ibid

[277] Ibid

[278] Mekbib Tsegaw, supra note 6, p 143

[279] Ibid

[280] Id ,p,144

[281] Ibid

Ethiopian Civil Procedure Code under Article 316(1) also states as to the court's power of appointing an arbitrator. The law stated that the court can appoint an arbitrator including family arbitrator if such appointment is required to be made by the court. The applicability of appointing an arbitrator on behalf of a defaulting party differs from jurisdiction to jurisdiction. For instance, the Federal Arbitration Act (FAA) of the Unite States of America declares that:

> *A party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.*[282]

According to this, the court of law may compel defaulting party to appoint or participate in appointment of an arbitrator in accordance with the terms of arbitration agreement. On the other hand, the Ethiopian law under article 3333(1) (2) requires regular courts to give defaulting party in arbitration agreement to appoint his own arbitrator or to participate in appointing sole arbitrator. The courts are required to appoint an arbitrator on behalf of the defaulting party when one of the parties fails to do so. The UNCITRAL Model Law is in a similar position as the Ethiopian law. It required the court simply to appoint an arbitrator, and not to compel a party to appoint an arbitrator, on behalf defaulting party.

## 4.2. Intervention during arbitration process

Another area for regular courts to intervene in the arbitration process is in taking interim or conservatory measures. Taking interim measures may be sought either before the commencement of an arbitration proceeding or during the process of an arbitration.[283] Seeking the assistance of regular courts before or during the arbitration proceeding may be a practical necessity for one of the parties in arbitration agreement. A party who refuses to appoint his arbitrator or fails to participate in the constitution of an arbitral tribunal may attempt to dispose of the properties which may be the subject matter of the dispute. These properties may be necessary for the enforcement of the arbitral award.[284] The arbitral tribunal does not have a

[282] Id p,145

[283] Id p,146

[284] Ibid

coercive power to order such interim measures to preserve these properties. Thus, the other party wishing to havec the arbitral proceeding has the only option to seek for the intervention of regular courts to give a temporary order or injunction for the preservation of these properties.[285] The assistance of regular courts to issue such interim and conservatory measures or injunctions is necessary even if the arbitral tribunal is in progress of its proceeding.[286] Intervention of regular courts may also be necessary for the enforcement of orders issued by the arbitral tribunal during its proceeding.[287] Interim measures ordered by arbitral tribunal will be powerful if assisted by the courts. For instance, a witness ordered to appear before the tribunal may fail to appear. He/she may also refuse to produce documents in his possession. This time, the coercive power of the court will be required to give effect for the arbitration proceeding or to preserve the required properties which are the subject matter of the dispute.[288] Thus, we can realize that the intervention of regular courts during arbitration process can be seen through two mechanisms such as; challenging (disqualification of) arbitrators and ordering of interim measures.

### 4.2.1. Challenging Arbitrators

In most national arbitration laws there exists a provision dealing with removal of arbitrators. These laws require the arbitrators to abide by certain minimum standards of conduct which may be considered by the parties as fundamental for the integrity of the arbitration proceeding.[289] Challenging of arbitrators by parties, when an arbitrator fails to comply with these fundamental standards of behaviors is related with the confidence of the parties in the arbitration and in the outcome of the arbitration.[290] However, applying for challenging of an arbitrator in most jurisdictions indicates that it may be taken as a dilatory tactic rather than the real concern in relation with the behavior and independence of arbitrators.[291] It is stated that the rules that vest power to the arbitral tribunal to decide on challenge of arbitrators, at preliminary stage, will reduce the intervention of courts at a later stage of arbitral proceeding.[292] During arbitration

[285] Ibid

[286] Ibid

[287] Ibid

[288] Ibid

[289] Guilian Carbone ,supra note 222, p 227

[290] Ibid

[291] Ibid

[292] Ibid

proceedings, there are certain limitations on national courts to be involved in arbitration.[293] However, international experience and some cases have indicated that there is still intervention of national courts in international arbitration during the arbitration proceeding.[294] A typical example in the ICC Case is *Salini Costruttori S.p.A. v. Ethiopia* case which can be analyzed in relation to intervention of national courts in international arbitration during the arbitration process.[295] The arbitral tribunal's proceeding was subject to different challenges. The challenge against all the three arbitrators was raised by the respondent, Ethiopian party, pursuant to Article 11 of the ICC rules. The respondent alleged that the tribunal had improperly choose its own convenience and to the convenience of Salini and its witnesses in respect with the distance of the venue of arbitration. The respondent also alleged that the tribunal made inconvenience to the respondent and its witnesses.[296] The challenge had been rejected by the ICC court and the Ethiopian party brought the case to the appellate court through appeal pursuant to Article 3342(3) of the civil code[297] The Ethiopian court of appeal had issued the suspension order of the arbitral proceeding until it decides on the challenge brought before it. The court threatened that any person breaching the injunction order would be subjected to attachment of its/his properties, or would be subject to sentence for contempt of court.[298] However, the arbitral tribunal disregarded the suspension order and in its final award it stated that it was not duty bound by injunctions issued by Ethiopian courts for certain reasons. The reasons stated by the tribunal were its duty to respect parties' rights to arbitration, its duty to make an enforceable award e.t.c.[299]This intervention of national courts is called anti-arbitration injunction and is taken as the most powerful and effective instrument by national courts to intervene in the arbitration process.[300] However, these anti-arbitration injunctions may remain a serious concern in cases "where arbitration is seated in a jurisdiction which is hostile to arbitration."[301] These jurisdictions which are hostile to arbitration are most of the time developing countries with undeveloped arbitration laws. In most international arbitration cases including the *Salini*

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[293] Ibid
[294] Ibid
[295] Ibid
[296]Giulian Carbone ,supra note 240, p 227
[297] Ibid
[298] Ibid
[299] Ibid
[300] Ibid
[301] Ibid

*Costruttori S.p.A. v. Ethiopia,* the arbitral tribunals reacted to the actions of the national courts by considering courts' actions as anti-arbitration injunction.[302] They reacted by disregarding courts' orders and continuing with the arbitral proceedings until they render a final award.[303] The question may be raised as whether arbitrators/ arbitral tribunal should comply with the orders of the regular courts of the seat or should they are entitled to disregard courts' orders.[304] According to arbitrators'/tribunals' view, arbitrators have a primary duty towards the parties in the agreement to ensure their dispute settled by arbitration. Parties' agreements should not be frustrated by regular courts' actions. Thus, arbitrators, for the interest of the parties in the agreement, can disregard arbitration injunction orders if these orders are aimed to "suspend and disrupt" the arbitration process.[305] Most international arbitration laws and institutions have vested the power, to rule on issues in relation to the challenge of arbitrators, on the arbitral tribunal.[306] This approach helps the arbitration proceeding from being halt because of challenges of arbitrators brought before regular courts.[307] Different writers show that its applicability varies in different jurisdictions.[308] In some States' arbitration laws, arbitrators or the tribunal is not compelled to suspend the proceeding. Whereas, in most other jurisdictions the arbitrators or the tribunal are obliged to suspend the arbitration process until the court has decided on the application for disqualification of an arbitrator.[309] For instance, the well known jurist, René David, underlines the merits of the continuation of an arbitration proceeding when the challenge against an arbitrator is pending before the court, especially, in case of international arbitration.[310] He recommended for allowing the arbitral tribunal to continue the proceeding and allowing the regular courts to intervene only after the award is made.[311] Under Article 3342(3) of Ethiopian Civil Code it is stated that an application for disqualification of an arbitrator is appealable before the court of law. However, there is no provision that authorizes the court to suspend the arbitral

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[302] Ibid
[303]Id , p 234
[304] Ibid
[305] Ibid
[306] Id, p,225
[307] Ibid
[308] Hailegabriel Gaddissa Feyssa, supra note 3, p 320
[309] Ibid
[310] Ibid
[311] Ibid

proceeding until the court gives final decision on the matter.[312] But practically, Ethiopian courts are found ordering the suspension of an arbitral proceeding when an application for disqualification is brought before the court. Such suspension orders are recognized and taken by the concerned arbitrators and by some scholars, as "anti-arbitration injunctions".[313] Accordingly, though Ethiopian courts play a positive role and are supportive in enforcing valid arbitration agreements, they fail to set a precedent on certain controversial matters such as; determining the arbitrability of administrative contracts. Under Ethiopian arbitration law there is also judicial restraint in relation to interlocutory matters as challenges to jurisdiction, challenges to arbitrators.[314] The international experience that provides power for the tribunal to rule on these issues, have allowed the national courts to revise the issue at the final stage. According to such laws challenges to arbitrators may be revised together with the challenged award.[315] For instance, Rules of Arbitration of Article 11 of the International Chamber of Commerce permits the parties to challenge an arbitrator, on certain grounds as for alleged lack of independence of an arbitrator through an application submitted to the Secretariat within 30 days. The specified time may be the notification of the appointment of an arbitrator or confirmation of the arbitrator or from the day of the party making the challenge was informed of the facts or conditions on which the challenge is based.[316]

Regular courts in Ethiopian can also involve in arbitration proceeding to decide on the preliminary challenges when application for disqualification of arbitrators is rejected.[317] The Ethiopian arbitration law has also provided the right of appeal before the court of law for an unsuccessful challenge for disqualification of an arbitrator within ten days.[318] Though the ten days period of appeal is short, the existence of the right of appeal at this stage of arbitration can be taken as a dilatory tactic and affects the merit of arbitration through allowing the disappointed party to bring the case to the regular court before the final disposition of the dispute. It is undesirable tactic in international commercial arbitration and should be avoided from arbitration laws. Under Art 3342 (3) of the Ethiopian Civil Code it is provided that where the application for

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[312] Ibid

[313] Id p,321

[314] Ibid

[315] Ibid

[316] Ibid

[317] Id, p 319

[318] Civil code of 1960,supranote 8 art,3342(3)

disqualification is dismissed, the decision is appealable before the court of law. We can understand that the law allows the involvement of the judiciary when the arbitral tribunal has rejected an application for disqualification of an arbitrator.[319] Under Article 3340 of the Civil Code of Ethiopia, an arbitrator including the presiding arbitrator may be challenged where he is found not of age, convicted by the court, unsound mind, ill, or if he is absent, or where he is found incapable to discharge his functions properly within a reasonable time.[320] An arbitrator may also be challenged on the grounds of impartiality and independence. The application for challenge of an arbitrator is brought before an arbitral tribunal in the form of application for disqualification of an arbitrator and it is subject to an appeal to the court pursuant to Article 3342(3) of the civil code.

### 4.2.2. Ordering interim measures

The intervention of regular courts during the process of arbitration is widely understood as frustrating and disrupting the alternate dispute resolution mechanism.[321] Many States try to avoid this intervention by changing the role of courts to be supportive one to ensure the procedural autonomy of parties and their arbitrators.[322] As a result, arbitrators are empowered by the law to issue interim measures and relief, interim relief in respect of parallel proceedings. They do not demand the support of regular courts.[323]. There are some mandatory rules such as impartiality and independence of arbitrators and party equality which may demand the involvement of national courts.[324] For instance, courts may be empowered to rule on the challenges of arbitrators' jurisdiction before an award has been rendered. This helps the parties not to go through the whole arbitration process which would be finally nullified if the arbitral tribunal had no jurisdiction.

The Ethiopian arbitration law contains a provision as to the autonomy of the arbitration process. For example, the Ethiopian Civil Code under article 3330 empowers arbitrators to decide on their jurisdiction where the parties agree so, to issue interim measures of protection and to issue orders for the attendance of witnesses according to article317 of the Ethiopian Civil Procedure Code. Ethiopian law has also recognized the right of parties to apply for court assistance when it is

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[319] Ibid

[320] Civil code of 1960,supra note 8, Art.3340 & 3342(3)

[321] Hailegabriel Gaaddissa. Feyssa, supra note 3, p 321

[322] Ibid

[323] Ibid

[324] Id,p 322

deemed to be necessary. This application for court assistance during arbitration process may not be considered as infringement of the agreement and waiver of the right to arbitrate. Parties are free to follow their own procedure unless and until they comply with the procedural fairness. They may be flexible in applying the procedures they agree, subject to respecting the procedural fairness and parties' equality.[325] On the other hand, pending the arbitral proceeding, the parties are not prohibited from applying to the regular courts seeking the coercive power of courts. This helps arbitrators to compel parties to attend the proceeding, to give testimony, to issue summons for witnesses to appear and give evidences before the tribunal[326]. The arbitral tribunal lacks actual power to compel such parties involved in arbitration to determine the matter. For instance, a witness who fails to appear by summon issued by the tribunal can be obliged by a court's summon to appear before the arbitral tribunal to give his testimony or to provide any evidence under his possession.[327] Parties in arbitration agreement may approach courts seeking for ordering interim measures and relief. When courts grant such measures it may interrupt the arbitral proceedings. Some courts in developing arbitration laws exercise such power by "self-restraint" on the application seeking relief against a pending arbitration, and it can be taken as "anti- arbitration injunction".[328]The Ethiopian Federal Supreme Court has accepted an application to restrain an international arbitration proceeding until the court decides on an objection brought before it challenging the jurisdiction of arbitrators.[329] The application was taken to the court based on Art 3342 (3) of the Civil Code which allows appeal against the decision of the tribunal on disqualification of an arbitrator. Though it is not clearly declared by the Civil Code and Civil Procedure Code of Ethiopia that courts could issue suspension orders on arbitration proceedings, Ethiopian courts have practically ordered suspension measures by using Article 154 of the Civil Procedure Code.[330] This provision allows temporary injunction and stay of proceedings in cases of regular courts proceeding.[331]. Such injunction measures are required to be dismissed as they may avoid the overall efficiency of arbitration. Most of the time arbitral tribunals, whose proceeding is suspended by such anti-arbitration injunction orders, refuse to

[325] Ibid

[326] Ibid see Article 317(3) (4) of Civil Procedure Code 1965

[327] Hailegabriel Gaddissa. Feyssa, supra note 3, p 322

[328] Id, p,323

[329] Ibid

[330] Ibid

[331] Ibid

suspend their proceeding and left the injunction orders ineffective.[332] In *Salini* vs *Ethiopia* (*Addis Ababa Water sewerage Authority*) case, for instance, the ICC Arbitral Tribunal has refused the suspension order issued by the Federal Supreme Court to suspend the arbitration[333]. In refusing the suspension orders, the ICC arbitral tribunal reasoned out that the tribunal has a duty to comply with parties' agreement, its duty to make its effort to render enforceable award, and that the state entity should not resort to states' court to interrupt arbitration process.[334] Hence, the action of Ethiopian Courts is against arbitrational autonomy and parties' agreement for arbitration which is undesirable in modern international commercial arbitration.

## 4.3. Intervention after arbitral awards

### 4.3.1. Homologation

The decision finally rendered by arbitrators or an arbitral tribunal which settles all issues raised by the parties in an arbitration agreement is called an award.[335] After a final award is rendered, it is binding and enforceable between the parties in the agreement. However, sometimes there may be a situation where an award has to be confirmed or homologated by a court of law so as to make it binding and enforceable between the parties.[336] This confirmation or homologation of an award will easily enforce an award against the losing party. Most countries require by their laws that an arbitral award should be confirmed by regular courts to make it capable of enforcement. For instance, the Federal Arbitration Act (FAA) of United State states that the award must be confirmed by the court within one year. This confirmation of an award is made by courts when parties have agreed that the decision of the court should be entered upon the award made.[337] Thus, the U.S FAA law makes the agreement of parties a precondition for filing an application by either party for regular courts' order for confirmation of the award. But no application for confirmation of an award by either party is provided for in the UNCITRAL Model Law. The Ethiopian Civil Code on arbitration does not explicitly require confirmation of an award by regular courts to make the award capable of enforcement. But, the Civil Procedure Code of

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[332] Ibid

[333] Salini Costruttori Spa v the Federal Democratic Republic of Ethiopia, Addis Ababa Water & Sewerage Authority, ICC Arbitration Case No.10623/AER/ACS (2001)

[334] Id p,324

[335] Ibid

[336] Mekbib Tsegaw , supra note 3, p 148

[337] Ibid

Ethiopian under Article 319(2) indicates the way for confirmation of a final award before a court, though it is not mandatorily provided. It is stated under article 319(2) that "an award may be executed in the same form as an ordinary judgment upon the application of the successful party for the homologation of an award and its execution."[338] We can understand from this that homologation is or confirmation shall be by a court of law. Besides, the term homologation under Ethiopian Civil Procedure Code has been missed in the Amharic version which is the working language of courts.[339] Even in the English version of the Ethiopian Civil Procedure Code homologation is not prescribed as mandatory requirement. Such situations may lead regular courts to refuse applications for confirmation or homologation of an arbitral award.[340] Since, it is not clearly described and the conditions required for homologation are not prescribed, the Ethiopian law on homologation left regular courts confused to accept or reject an application for homologation of an award.[341] Even though, there is such a confusion to accept or reject an application for homologation under Ethiopian law, Robert Allen Sedler has commented that "the successful party should obtain homologation of an arbitral award".[342] This helps the successful party to pave the way for enforceability of an award. Sedler held the view that though there is no legal basis under Ethiopian law which asserts that an award must be homologated, applying for homologation of an arbitral award before the court of law and getting confirmation helps to settle issues in relation to the validity or enforceability of an award.[343]

Thus, Ethiopian law opens a way for regular courts to intervene in arbitration through homologation of an arbitral award where a successful party applies for homologation. Courts may intervene at least by way of confirming the validity or enforceability of an arbitral award.[344] The involvement of regular courts in arbitration outcome is recognized universally. This involvement of courts may be applied in a varying degree. Courts involvement may also be applied in international or domestic awards.[345] As part of the universe the Ethiopian law has also recognized three avenues for regular courts to entertain some functions in the outcome of

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[338] The Civil Procedure Code of the Empire of Ethiopia,1965,Negarit Gazeta,No 58/1965,Art.319(2)

[339] Mekbib Tsegaw , supra note 6, p 149

[340] Ibid

[341] Ibid

[342] Ibid

[343] Ibid

[344] Ibid

[345] Hailegabriel Gaddissa. Feyssa, supra note 3, p 324

arbitration. These are; revising an award through appeal, setting aside of an award and refuse to enforce awards.

### 4.3.2. Appeal against an award

Most of the time, a losing party or an award debtor has two options against an award if the award debtor is not satisfied with the award rendered.[346] The award debtor can lodge an appeal against the award or he can apply for an order to set the award aside. For instance, under Ethiopian law when the award debtor believed that the award is defective as per Article 351 of the Civil Procedure Code, he can approach the court through an appeal lodged against the award. On the other hand, when the award debtor believed that the award is with defects specified under Article 356 of the CPC, he can apply to the court for an order to set aside the award pursuant to Article 355 of the CPC.[347] Under Ethiopian law of arbitration, regular courts are allowed to review arbitral awards through appeal procedure specified under Articles 350-354 of the CPC. According to the appeal procedures the grounds of appeal against an award are limited and the right to appeal is waivable by the parties' agreement.[348]

The four grounds for appeal are specified under Article 351of the CPC as where:

*"(1) the award is inconsistent, uncertain or ambiguous or is on its face wrong in matter of law or fact;*

*(2) the arbitrator omitted to decide matters referred to him;*

*(3) irregularities have occurred in the proceedings; or*

*(4) the arbitrator has been guilty of misconduct*."[349]

Pursuant to Article 351(2) of the CPC parties to arbitration agreement may waive their right of appeal. But this waiver will be valid only when the parties waive their appeal right with "full knowledge of the circumstances."[350] . Once an appeal is lodged against the award, courts can review the award. As a result, regular courts can reverse, modify, confirm or remit the award.[351] Hence, Ethiopian courts can control the arbitration proceeding even at its final stage by revising, modifying or confirming the arbitral award as any other court decisions.

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[346] Tekle Hagos Bahta, recognition and enforcement of foreign arbitral awards in civil and commercial matters in Ethiopia, p 108, [herein after referred as Tekle]

[347] Ibid

[348] Hailegabriel Gaddissa Feyssa, supra note 3, p 325

[349] Ibid

[350]Id, p, 326

[351] Birhanu Beyene, supra note 45, p 9

### 4.3.3. Set aside of an award

Under Ethiopian arbitration law appeal is not the only means for the judiciary to revise an award. There is another way for the parties to approach the court through application for annulment or setting aside of an award based on some procedural irregularities.[352] The second avenue for regular courts to intervene in arbitration is setting aside of an award as provided under Articles 355 - 357 of CPC. When certain procedural errors which are enumerated under Article 356 of CPC are committed by arbitrators, courts are empowered to declare null and void the award.[353]The grounds for setting aside an award are; "*the arbitrator decided matters not* referred to him or made his award pursuant to a submission which was invalid or had lapsed; the reference being to two or more arbitrators, they did not act together; or the arbitrator delegated any part of his authority whether to a stranger, to one of the parties or to a co -arbitrator."[354] By putting such declaration the law has given power for regular courts to review the arbitration proceeding. Whether the arbitral tribunal has complied with such procedural principles, are subject to courts' revision.[355] After an award has been rendered, it may be challenged by the losing party before regular courts by instituting an action for setting aside of an award.[356] Under the UNCITRAL Model law, an arbitral award may be challenged before regular courts only by instituting action for setting aside of an award.[357] There are certain grounds specified by the law justifying for setting aside of an award. However, the grounds justifying setting aside of an award may differ in different jurisdictions.[358] The Ethiopian Civil Procedure Code of 1965 provides for application to be submitted for setting aside of an award as one mechanism of challenging an award. Under Article 352 of the Civil Procedure Code, a party may apply before regular courts for setting aside of an award within 30 days from the day of making an award.[359] The law has also provided the grounds for an application for setting aside of an award. The law has also empowered regular courts to dismiss an application for setting aside of an award in case where the award is valid and enforceable, and to set aside the award in case where the award is

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[352] Hailegabriel Gaddissa. Feyssa, supra note 3, p 327

[353] Birhanu Beyene, supra note 45, p 9

[354] Civil Procedure Code of the Empire of Ethiopia, supranote 338,art.356

[355] Birhanu Beyene, supra note 37, p 9

[356] Mekbib Tsegaw , supra note 3 p 150

[357] [357] UNCITRAL Model Law, supra note 9, art,34(2)

[358] Ibid

[359] Mekbib Tsegaw , supra note 3, p 151

found null and void.[360] When we compare the two avenues of the court involvement in to an arbitral award as can be seen above, setting aside of an award and appeal against an award are completely different procedures.[361]

Firstly, they are different on their grounds; the grounds for appeal that are enumerated in Article 351 of the CPC are different from the grounds for setting aside which are enumerated under article 356 of CPC. On the other hand, the degree of interference by courts is different on these two different procedures.[362] The appeal procedure authorizes the courts to review all the merits of the award and empowered the courts to reverse, modify or affirm the award if the specified errors are found. Whereas, the procedure for setting aside of an award authorizes courts to examine whether there were some procedural mistakes committed or not and to declare that an award is null and void.[363] Under the procedure of setting aside of an award courts are not allowed to examine the merit of the award and could not modify, reverse or confirm the award.

### 4.3.4. Enforcement and Recognition Awards (Foreign Awards)

It is normal that regular courts assist or intervene in arbitration process to execute or enforce an arbitral award. The Ethiopian Civil Procedure Code provides under Article 319(2) that "An award may be executed in the same form as an ordinary judgment upon the application of the successful party for the homologation" of the award and its execution.[364] The law considers an arbitral award as judgment of regular courts and declares that it can be executed in the same form as an ordinary judgment. There should be an application for enforcement of an award by a successful party before courts.[365] Once an arbitration award is rendered, the award debtor may comply with the award or may refuse to comply with the decision. When the award debtor refuses to comply with the award, the award-creditor is left with the option to pursue legal action for the enforcement of an award.[366] States are willing to recognize arbitral awards rendered in foreign countries with the common objective of lessening of the harassment incurred by the defendant, to lessen waste of time, money and effort and to increase the relationship of states in

[360] Ibid

[361] Birhanu Beyene, supra note 37, p 9

[362] Ibid

[363] Ibid

[364] Mekbib Tsegaw , supra note 3, p 152

[365] Ibid

[366] Tekle, supra note 334, p 106

international investment and trade.[367] Hence, national courts are expected to ascertain the fulfillment of certain substantial requirements of law to make foreign arbitral award and to ascertain that foreign arbitral award is free of defects which may hinder its enforcement in the place where it is sought to be enforced.[368] Thus, when a foreign arbitral award is brought before Ethiopian courts they have to satisfying the requirements provided under Article 461(1) & (2) of the CPC for recognition and enforcement. Ethiopian law recognizes the arbitral award and enforces it as judgment of courts'. This foreign arbitral award recognized can have a "res judicata" effect like any other judgments given by Ethiopian courts.[369] Once recognized, the foreign arbitral award will have a legal and binding force in Ethiopia and will not be subject to further litigation.[370] Then regular courts are required only to enable the award debtor to ascertain that another court is holding the case to enforce the foreign arbitral award. The court may also hold hearing on application presented to it on certain doubtful points. These may include points such as decisions on costs incurred to enforce an award.[371] In relation to recognition and enforcement of an award, regular courts can also exercise their power over an arbitral tribunal by refusing enforcement of an arbitral awards.[372] This avenue of intervention is called "refusal" as it is provided under Article 319(2) of C.P.C. This refusal of enforcement of an arbitral award by courts refers to "courts' resistance of the enforcement of awards for certain problems found in the award".[373] A close reading of Article 319(2) of the C.P.C indicates that courts can refuse enforcement of an domestic award. This provision requires the homologation of an award before executed as a court judgment. The homologation of an award is required to be made by the courts. Thus, where the application for homologation is brought before the court and if the court denies homologation of an award on certain grounds, it is obvious that the court denies enforcement of the same.[374]Thus, apart from recognition and enforcement of arbitral awards, regular courts have a role in arbitration process by refusing the enforcement of an arbitral award

[367] Ibid

[368] Id,p,108

[369] Ibid

[370]Ibid

[371] Tekle Hagos, supra note 346, p 113

[372] Birhanu Beyene, supra note 45, p 10

[373] Ibid

[374] Ibid

for certain reasonable grounds missed in the award. However, there are no specified grounds required by the law for courts to refuse enforcement of an award.[375]

### 4.3.4. Intervention at cassation division

The involvement or control of regular courts in arbitration process may be observed before the beginning of constituting the tribunal to enforcement of an arbitral award. The involvement of courts in arbitral process may happen in the form of appeal, setting aside and refusal of enforcement an award.[376] Beside these forms of court involvement, there is cassation intervention of courts in the final arbitral awards given in Ethiopia. Unlike these ways of court control, there is no any explicit provision which empowers regular courts to control arbitration by way of cassation. No international experience, including the UNCITRAL Model Law, indicates the existence of power of cassation of courts over arbitration. But, the practice and most recently decided cases in Ethiopia show the existence of other way of intervention for regular courts to control arbitration through cassation. As defined in Black's Law Dictionary, Cassation means "*quashing and cassation court (bench) is the power of the court to quash the decrees of the inferior/ the lower courts.*" [377] Cassation is not defined under Ethiopian laws. The FDRE constitution under article 80 has provided for cassation power to the Federal and States Supreme Courts.[378] The constitution under Article 80 (3) (a) states that the Federal Supreme Court has a cassation power over any final court decisions containing basic error of law. Hence, the Ethiopian courts through the Federal and State Supreme Courts can also intervene in the arbitration process through cassation bench. Pursuant to Art 80(3) of the FDRE constitution the Federal Supreme Court, through its cassation over any court decisions, can give a binding decision on any court decisions which contain basic error of law. The constitution provided power of cassation for the Federal Supreme Court on any court decisions. Hence, as to the declaration of English version of Article 80 (3) (a) of the constitution, arbitral awards are not subjected to cassation division unless they are revised by any other courts.[379] Application for cassation division on arbitral awards is possible only if that arbitral award is revised or assessed

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[375] Ibid

[376] Birhanu Beyene, supra note 45, p 40

[377] WEST GROUP, ST.POUL, MINN, 1999, Blacks Law Dictionary 7th Edition, Bryan A. Garner(Editor), p 363

[378] Proclamation of the constitution of the Federal Democratic Republic of Ethiopia, 1995, Federal Negarit Gazeta, 1/1995, 1st year, No.1, Art 80(3) [here in after referred as FDRE constitution]

[379] Ibid

by other courts through different mechanisms provided for by the law. Thus, once the arbitral award is subjected to the revision of courts either through an appeal or through setting aside of an award, the decisions of the appellate court will be subjected to cassation. The Federal or States' Supreme Courts, through their cassation division will intervene in final arbitral award on conditions of error of law or fundamental mistake of law. However, the Amharic version of the same provision states as to the cassation power of the Supreme Courts that the Supreme Courts have power of cassation over any final decisions containing basic error of law. As to this declaration any final decisions including arbitral awards are subject to cassation review. The English version of the same provision made any final court decisions to be subjected to cassation review. But, the Amharic version, the working language, under article 80(3)(a) made any final decisions, whether rendered by courts or any other judicial or quasi-judicial bodies, to be reviewed by the cassation bench. Thus, it opens a room for the Cassation Bench to intervene in the arbitration process at its final stage. The Federal Supreme Court Cassation Bench in the case, *National Mineral pvt. Ltd Corporation vs Danni Drilling pvt. Ltd Company,* stated the objective and purpose of cassation that it is a system to ensure the uniform interpretation and application of the law within a country.[380] The cassation bench stated that cassation helps to ensure the applicability of rule of law within a country. For the proper application of rule of law, the decisions rendered by any judicial or quasi-judicial bodies should be subjected to judicial control and hence, one of the mechanisms of judicial control is the Cassation Bench. The Federal Supreme Court Cassation bench, as it is the supreme of all the judicial bodies, enables laws, proclamations, regulations and policies and strategies to be applied uniformly within the country in similar conditions. The Cassation Bench also stated that cassation is a mechanism of controlling the responsibilities of the judicial bodies in respecting the fundamental rights of citizens. . The Cassation Bench in the case between *National Mineral pvt. Ltd Corporation vs Danni Drilling pvt. Ltd Company,*went on stating that cassation helps to quash the decisions containing basic error of law as these decisions are not required to last long. Thus, Cassation bench is established to ensure the proper functioning of the legal system, the judicial body and to ensure the applicability of rule of law within the country. As a result, the intervention of

[380]National Mineral pvt Ltd corporation vs Danni Drilling pvt Ltd, Federal Supreme Court, cassation File no. 42239/2003, Federal Supreme Court Cassation decisions, volume 10, p 365-368; a decision rendered by the cassation bench containing seven judges to reverse the previous decision given by the cassation bench containing five judges.

Ethiopian courts in arbitration proceedings through Cassation Division can be seen as peculiar from UNCITRAL Model Law and world experience.

The Cassation Court of the Federal Supreme Court of Ethiopia recently a gave a decision relating to the interpretation of an arbitration clause in the case of *Education Department of Hilibabor Zone vs Zemzem Private Limited Company.* As a respondent, Education Department of Hilibabor Zone objected the jurisdiction of the court alleging that there exists a valid arbitration agreement and the jurisdiction to try the case is for the arbitral tribunal. The appellate courts had also affirmed the lower court's decision holding that there is no clear agreement to submit the dispute to arbitration. However, the dispute went on and reached to the Federal Supreme Court cassation bench. The Cassation Bench reversed the decisions of the lower courts and held that there exists a valid and enforceable arbitration agreement between the disputants. The Federal Supreme Court of Ethiopia on its cassation bench on this case has settled the issue of arbitrability of administrative contracts. The cassation bench ignored the application of Article 315(2) of CPC which excludes administrative contracts provided under article 3131 from arbitrablity. The cassation bench interpreted the silence of the Civil Code on arbitrability of administrative contracts as a sign of arbitrability and seems to set a precedent on arbitrability of administrative contracts. It can also be seen in the case of *Ethiopian Mineral Development Share Company vs JTT Trading cassation File no. 30727/2000,* which is brought before the court regarding the appointment of arbitrators. The cassation division decided that the appellant should not be allowed to submit the dispute to arbitration and reversed the decisions of the lower courts, though it decided nothing regarding to the appointment of arbitrators.

The Cassation Bench has also rendered a binding decision on a case containing finality clause in an arbitration agreement. In the *National Mineral Corporation Pvt Ltd vs Danni Driling Pvt Ltd Company case, File No. 42239/2003,* the cassation bench held the view that though parties in the arbitration agreement agreed for the finality clause, instituting cassation action against an award is possible as the parties' intent in putting finality clause does not necessarily infer that their intention is to avoid cassation against an arbitral award. The Cassation Bench, based on the expression of the Amharic version of Article 80 (3) of the FDRE constitution, stated that the cassation bench has a power of cassation over any final decisions containing basic error of law. And the cassation bench concluded that it can review the decisions rendered by a tribunal/ arbitrators, though parties agreed against review by courts.

Finally, the cassation bench stated and put a precedent that agreement on finality clause cannot prohibit the aggrieved party from instituting an action to the cassation bench if the arbitral award

contains basic error of law. Thus, we can realize that arbitral awards are subject to review by the cassation bench though parties agreed on the finality clause that the arbitral award is not subject to court review. The Federal Supreme Court of Ethiopia under its Cassation Division has also involved and decided the case on cassation between *Saba Construction PLC vs Dragados J and P Avaz.S.A joint venture* on the issue of finality clause agreed by the parties in the arbitration agreement.[381] The Cassation Division has ruled on Article 350 (2) of CPC that though parties agree on the finality clause, they are not thought to understand fully the circumstances of the case at the stage of submission of an arbitral agreement. The cassation bench has ruled against the finality clause based on the mere reason that at the stage of submission, parties could not understand the circumstance of the case fully. The Federal Supreme Court Cassation Bench in the case: *Assefa Belete General Contractor vs Almesh PLC* also involved and gave a decision on appointment of an arbitrator and refused enforcement of an award rendered by an arbitrator. The cassation bench refused enforcement on grounds of some irregularities in appointment of an arbitrator.[382] All these cases indicated that the Federal Supreme Court has intervened into arbitration proceeding at an arbitral award through the mechanism of cassation division disregarding the parties' agreement for the exclusion of regular courts including the Federal and state Cassation Division.

[381] *Saba Construction PLC vs Dragados J and P Avaz.S.A joint venture,Federal Supreme Court,Cassation File No.13234/1997.*

[381] *Assefa Belete General Contractor vs Almesh PLC,Federal Supreme Court,cassation file No 13983* /1997.

# CHAPTER FIVE

## Conclusion and Recommendation

### Conclusion

Arbitration one of the most typical alternate dispute resolution scheme outside regular judiciary through which parties to a dispute entrust neutral third party to settle the existing and the future contractual and non contractual controversies arising between the parties. There is of course a lasting debate on the fact that whether arbitration stands as alternate dispute resolution mechanism like negotiation and mediation (conciliation). Yet, there is wide consensus on the notion of regarding arbitration as a means of ADR. Usually (not always) the basis for the jurisdiction of arbitration, unlike regular court, emanates not from the law but from the agreement of the parties. In the contemporary world, especially on international commercial area, the role of arbitration in resolving disputes expediently ,economically and neutrally with the help of highly specialized arbitrators make it more preferable than regular courts. In arbitration since parties' recourse to national courts is very limited, the role of arbitrators as a private justice dispenser is not questionable. However, parties are not at liberty to take all matters to be determined through arbitration as the law of the state may prescribe matters that should not be seen by arbitration depending on the public policy of the nation. For instance, though still controversial, the Ethiopian Civil Procedure law under article 315(2) prohibits the arbitrablity of

administrative matters. When parties are agreed to resolve the existing disagreement arising in the course of performance of contracts, except those exclusively reserved for regular courts, they are bound to abide by clause through settling dispute by arbitration with no or limited recourse to regular courts. Nowadays, indeed, it is little possible or impossible to avoid the hands of regular courts in arbitration. Hence, 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 manner. When we look into the extent of court intervention in the process of arbitration under the UNCITRAL Model Law, the law has provides the regular courts to intervene in the process of arbitration only on matters permitted by the law. As per the UNCITRAL Model Law the intervention of courts may be exercised in three different stages. At the preliminary stage in case where one of the parties in the arbitration agreement fails to appoint an arbitrator of his own or the two arbitrators fail to agree on the third arbitrator within thirty days after the notice of a ruling, on the application of a party aggrieved. The arbitral tribunal rules preliminarily that it has jurisdiction and that any party displeased with the decision may demand the court to decide on the matter. During arbitration process, regular courts may intervene to order interim measures as in cases where a party under agreement fails to act as required from them under the agreed procedure or a third party or an institution fails to perform its function entrusted to and upon request by any party. Besides, a party challenges an arbitrator and the arbitral tribunal does not resolve the challenge successfully, the challenging party may request for the challenge of an arbitrator within thirty days to the authority agreed or to the court without interruption of the arbitral process. The parties can request for challenge of arbitrator in case where the arbitrator fails to perform his function or become de jure or de facto impossible to perform his function or unable to perform within a reasonable time or an arbitrator withdraws from his office or parties agree to the termination of the mandate. Finally, regular courts may intervene in arbitration process at an arbitral award where there is an application for setting aside of an arbitral award only on specific conditions provided under article 34 of the UNCITRAL Model Law.

When we go through the intervention of courts under Ethiopian law it seems, the intervention of courts in this private dispute settlement process is quiet wide. Similar to the UNCITRAL Model Law, the intervention of courts can appear in three different stages. The courts may intervene at the commencement of the arbitration through appointment of arbitrator. Unlike the Model Law, in the Ethiopian law the court is exclusively entrusted to rule upon the validity of the arbitration submission. During the arbitration process the courts may interfere to grant provisional and interim measures including serving summon, production of evidence in case it is necessary.

Regular courts may intervene on challenges of arbitrator and removal of a defaulting arbitrator who failed to discharge his function timely upon the application of displeased pary .Finally, the court under the Ethiopian law may involve through set aside, appeal and recognition and enforcement of awards. One point worth mentioning in relation to appeal is that the Ethiopian law put various grounds of appeal under article 351, some of the grounds seems to be included as ground for set aside like misconduct of the arbitrator and questions of procedural fairness .The Ethiopian law also open wider room for the regular courts to interfere through the means of appeal despite the parties agreement for the finality of the award in so far as the party is not having a full knowledge of the circumstance. This is by far different from the modern arbitration rules of UNCITRAL Model Law; prohibiting the right to appeal in case where parties agree on the finality of the arbitral. Hence, in the Ethiopian scenario the intervention of courts in arbitral process from the earlier stage of commencement of the arbitral process to the final stage of the arbitral award, the role of courts in Ethiopia could be regarded as wider in comparison with UNCITRAL Model Law and other international modern arbitration friendly laws

## Recommendation

As concluded above the role of courts in arbitration under Ethiopian law is obviously wider. Taking this in to account the writer recommends the following; as said earlier the Ethiopian arbitration entirely denying the tribunal to determine on the validity of the arbitral submission which is against the competence- competence principle accepted even in arbitration law of UNCITRAL Model Law. It is well recommended that the Ethiopian arbitration law in this regard need to be designed in such a way granting the arbitral tribunal to hear and decide on the validity of the submission so as to avoid frustrating and undesirable intervention of courts that delays the arbitral process from the very start. So, it is important for the arbitral tribunal to be permitted to fully exercise the competence-competence principle to resolve dispute in speedy and efficient manner. In the course of the arbitration process, the Ethiopian law authorizes the involvement of the regular courts to grant interim measures and to rule on challenge of the arbitrator. But the Ethiopian courts when they exercise power on challenge of arbitrator by the parties, order suspension of the arbitral proceeding which is against the very purpose of arbitration. There are no any substantive or procedural laws which empowered the courts to order suspension of arbitral proceeding in Ethiopian arbitration regime. Besides, under UNCITRAL Model Law there is no provision empowering the regular courts to offer suspension order, too. Thus, Ethiopian courts do not have any domestic or international legal rationale to order stay of

proceeding. Taking this in to account courts supposed to refrain from such act of dilatory order of the whole process of the arbitration without having a valid legal ground for doing so. In addition, unlike modern arbitration laws, the Ethiopian arbitration law opens a room for second appeal against the rulings of the court as it lacks precluding provision of further appeal. .In this regard the UNCITRAL Model Law under article 13(3) explicitly made appeal against challenge of arbitrator to regular court one and final. So, in this regard, the Ethiopian arbitration law needs to be redrafted in such a way prohibiting second appeal against court decision to prevent the intentional dilatory tactic by the parties.

Nowadays, modern arbitral friendly laws including the UNICITRAL Model Law recognize one means of objecting the award i.e set aside. But the Ethiopian law includes both set aside and appeals as a ground of objecting arbitral award. In case of set aside as has been said earlier the arbitral award is challenged based on grounds permitted by law. What is worse in the Ethiopian scenario seems to be a visible confusion between the grounds for appeal and set aside. For instance, procedural irregularities and misconduct of the arbitrator in the course of the arbitral proceeding may be the reasons for filing appeal against the award. But when we see this in light with the UNCITRAL Model Law they are regarded as the ground for the set aside of the award since the grounds are largely related with the procedural equality of the party in the process. Thus, the Ethiopian law is recommended to be considered in such a way clearly including such grounds of appeal justified to be reasons for set aside in exclusion of appeal rights so as to achieve the aim of arbitration in compliance with advanced arbitral jurisprudence of the UNCITRAL Model Law. Furthermore, the Ethiopian law of arbitration is drafted by enumerating numerous grounds virtually includes every legal and factual errors occurred in the arbitral award corresponding to grounds of appeal listed for ordinary judicial judgment. The problem does not only lies on the widening of the grounds of appeal but also the appeal right for the parties have no end point at a particular level of court since it permits appeal over appeal . This in turn inevitably contributes delays in the arbitration process in violation of the parties agreement for the finality of the arbitral award. Hence, the Ethiopian arbitration law needs to be drafted in such a way restricting the right to appeal where the parties agreed for the finality of the award and the grounds of set aside need to be retained in compliance with the procedural equality and fairness to the parties.

Under the Ethiopian arbitration law unlike the UNCITRAL Model Law and other advanced jurisdiction, the regular courts may intervene in the arbitral award in the form of cassation. Nowadays, there is no international experience including the UNCITRAL Model Law

authorizing the judiciary to involve in the arbitral process through cassation disregarding the parties agreement for the exclusion of the regular courts within the arbitral proceeding. So, it is well recommended to establish explicit legal framework (possibly another cassation decision warranting the non intervention of Cassation at arbitral award) avoiding the intervention of the Cassation Bench over the arbitration process in contravention with parties agreement to exclude regular courts. Thus, to resolve disputes in a speedy, flexible and economical manner the role of courts in arbitration need to be at optimal level for a timely and friendly resolution of the disputes.

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