

THE NEED TO ESTABLISH A WORKABLE, MODERN AND INSTITUTIONALIZED COMMERCIAL ARBITRATION IN ETHIOPIA

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Abstract

Ethiopia overhauled its arbitration laws with the enactment of the Civil Code and Civil Procedure Code as of 1960 and 1965 respectively. It also puts these laws in to practice on commercial disputes for more than half a century. However, these arbitration laws are sketchy and do not cope with the emerging modern laws and practices in international commercial arbitration. As a result, Ethiopia is not gifted with workable, modernized and institutionalized commercial arbitration. It stands to the rear of commercial arbitration which is underpinned in diverse legal systems, used widely by many participants and acknowledged as relevant dispute resolution, particularly on commercial matters in many jurisdictions. Commercial arbitration serves justice, satisfies the interest of business bodies, and more importantly, places significant impact on the economy of a country. Thus, the government and other stakeholders need to work and change the situation. This article attempts to shed lights on the contribution of effective and institutionalized commercial arbitration for the economy of Ethiopia.

Keywords: Arbitration, Commercial arbitration, Commercial dispute, Economy, Ethiopia, institutionalized

I. INTRODUCTION

In this modern world, people have their own perspectives, their own interests, their own resources, their own aspiration and their own fears. To pull off these all demands, they run in to each other. There are also times that they feel others are conniving on them or are hurting them and budge against these persons. So, disagreements and disputes are always inevitable in modern life. But, the incredible one that we see in our world is the variety of ways, experiences and approaches each of us follow to deal with disputes.

No one experiences good memory from disputes. Disputes impede eristics from works they would like to engage; twist eristics to sit with persons they hate; take eristics' money, time, energy and health; bring frustration; threat eristics's identities and emotions; and disputes may be threat for general order and welfare. They badly need resolutions - the ultimate goal of every one.

People also follow variety of approaches to deal with disputes. People wish to live in harmony with their neighbors, friends and other associates. Particularly the business communities, more than anyone else, prefer to take on their works without any interruption. Business communities want to handle their dispute quickly. They fight their disputes through different approaches which they believe is most effective. They may try to resolve their issues by themselves or if not succeeded, may call up on the powers of the state (court) as there are differences between individuals. Of these dispute resolution mechanisms, some are agreeable,

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some others are irascible, the rest may be coworker weepy or hyper rational. Besides, all of the available resolution processes neither create equality nor bring same benefit for all.¹ It is, therefore, interesting to see if commercial² arbitration, one of the settlement mechanisms, is efficient and bringing something good in Ethiopia.

Commercial arbitration³ is not studied well in Ethiopia so far. This may partly be because of few commercial disputes or may be masked by conducts within the confines of ordinary court system, informal or customary resolution mechanisms. Besides, it's strictly limited exposure to scrutiny and lack of institutionalized, modernized and strong institutions on the area heighten the intellectual problem. Lack of awareness among the business community, short of strong enterprises added to the existing legal frameworks which reflect the features of 1960's do not have fewer roles in accompanying the situation.

Now, the landscape is dramatically transformed. Commercial disputes are often of a quite different order of magnitude. Different materials, sources and information on the area can be easily accessed and have been significantly improved. The business community and scholars expanded their awareness and began to look beyond their parochial and personal experiences and analyses on how countries with different legal and cultural backgrounds perform commercial arbitration. Concerned bodies and stakeholders become ready to dissect and criticize what is going on in commercial arbitration. Different skilled arbitrators with different legal and forensic backgrounds are being created. Many business communities eye commercial arbitration institutions as potential destinations for their disputes.

More importantly, having effective, well-run and institutionalized commercial arbitration, as opposed to litigation in national courts, can contribute to the aspirations and needs of Ethiopia and its nationals, whilst at the same time satisfying the expectations of international investors and traders for profit, security and stability, and ensuring fairness and justice to both disputant parties. All these and other factors necessitate studies on commercial arbitration in Ethiopia.

Hence, the article is organized as follows. The paper, under section II, deals about the inexorableness of institutionalized commercial arbitration in Ethiopia. It, for that matter, addresses different grounds and justifications which show the essentiality of establishing commercial arbitration in the country. Section III is about the present situation of commercial arbitration in Ethiopia. It analyses the existing arbitration legal frameworks in light with the existing circumstances of the country and modern international standards in globe. Further, it considers the challenges and shortcomings that prevent the establishment of more institutionalized commercial arbitration in the country. The paper, further, under section IV

¹ MICHAEL L. MOFFIT & ROBERT C. BORDONE, *THE HANDBOOK OF DISPUTE RESOLUTION* 10 (1st ed., John Wiley & Sons Inc. 2005)

² United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration* (here after UNICTRAL model law), 21 June 1985, U.N.doc.A/40/17. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html. Accessed on July, 2015. Article 1(1) defines the term 'commercial' to include, but are not limited to, any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passenger s by air, sea, rail or road.

³ In this article 'commercial arbitration' is used to mean any institutionalized private forum which is legally established, entertains and handles disputes arise from commercial matters.

specifies the ways out from the existing problems and setting up efficient institutionalized commercial arbitration in Ethiopia. It, thus, considers the existing circumstance in the country, arbitration laws of recognized international commercial arbitration centers, the experiences under various jurisdictions and widely used standards of international instruments. Section V is reserved to the contribution of institutionalized commercial arbitration for economic development in Ethiopia. Under this part, the economic benefits that the country would gain from different perspective is addressed by considering the lessons of some countries which host reputed commercial arbitration centers. Finally, concluding remarks are made under section VI.

II. THE INEXORABLENESS OF INSTITUTIONALIZED COMMERCIAL ARBITRATION IN ETHIOPIA

Commercial arbitration is becoming increasingly important in the justice system of any country. Studies conducted in many countries have shown that, compared to formal court systems, using commercial arbitration to resolve business disputes is speedy, cost effective and widens access to justice.⁴ Nations are backing their arbitration system with proper legal framework, founding strong and institutionalized institutions and creating greater awareness of stakeholders on its advantages, disadvantages and its link with formal courts. But, this is not in Ethiopia. Above all, the business people are indebted to face ups and downs, to close their doors, to waste their resources and time running for justice. Setting up modernized and institutionalized commercial arbitration in the country is inexorable. That is because:

First, the FDRE Constitution stipulates that “everyone has the right to bring a justifiable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.”⁵ Hither, we may question whether commercial arbitration institutions do have judicial power. The relevant provisions of the Civil Code and the Civil Procedure Code indicate that commercial arbitration does receive recognition and competency to entertain justifiable matters.⁶ Moreover, Article 34(5) of the FDRE Constitution also recognizes the possibility of adjudicating disputes relating to personal matters such as commercial disputes in accordance with religious or customary laws, with the consent of the parties. Thus, religious communities in Ethiopia can set up and offer private commercial arbitration forum. Christians and Muslims communities in Ethiopia do have their own internal dispute resolution mechanisms. Christians offers commercial dispute resolution service involving thousands and millions birr following biblical principles through their individual volunteers, professional or certified Christian arbitrators. The same is true for Muslim communities. The Muslim communities do have a tradition of encouraging peaceful resolution of conflicts, particularly commercial disputes, following Islamic law, or Shari 'a. This is not unique in Ethiopia. It is

⁴ Lord Chancellor's Department (UK), Justice as the Right Price, A Consultation Paper (1998). Available at www.open.gov.uk/lcd/consult.civ-just/fast/htm. Accessed on July, 2015

⁵ FDRE CONSTITUTION, Proclamation No. 1/1995, FED. NEGARIT GAZETTE, 1st Year No.1, 1995, Art 37(1). Article 33 of the UN Charter also states disputant parties should settle any dispute which endangers international peace and order by, inter alia, arbitration. This is particularly relevant in this globalized world where an increased numbers of mega blocks and mega-markets as well as transactions between nationals and commercial entities are experienced. So, it is reasonable to predict that Ethiopia will definitely be witnessing an unprecedented explosion of gigantic proportions in commercial arbitration.

⁶ Civil Code of The Empire of Ethiopia, Proclamation No. 165/1960, NEGARIT GAZETA, 19th Year No.2 (herein after called the Civil Code) and Civil Procedure Code of The Empire of Ethiopia, Decree No. 52/1965, NEGARIT GAZETA, 25th year No.3, (herein after called Civil Procedure Code)

common for religious communities in the globe too. Judaism, Christianity, and Islam all offer institutionalized commercial arbitration service.⁷

At the same footage, in Ethiopia, customary dispute resolution which is governed by customary law is a prevailing practice. There are lots of customary laws, rules, methods and procedures which are diversified and largely unwritten, but save the life of many business communities.⁸ Customary law is the organic or living law⁹ of the indigenous business people of Ethiopia. It controls the lives and transaction of the community.¹⁰ This is also a practice exercised elsewhere. For instance, the Alternative Dispute Resolution Act of Ghana, 2010 has a provision for customary law arbitration.¹¹ So, the Ethiopian Constitution has laid down a real basis for individuals to establish institutionalized commercial arbitration which works according to religious or customary law in the country.

Second, in Ethiopia, modern public courts are serving the people since 1940's. They are the main source of justice in the country for all these days. However, they are inefficient and do not perform to the level expected.¹² They are problem-fraught. The justice system in Ethiopia is girded by sundry problems. Public courts do face congestions and backlogs, are not accessible and responsive for poor, do follow strict procedures, are time consuming and costly, are unpredictable and uncertain, do conduct trial in public, are not independent, and are corrupted.¹³ Public courts do not also provide a win-win solution and obviate animosity or enmity between the parties. A study commissioned by Federal Ethics and Anti-Corruption Commission also evidenced that public courts lost the trust and confidence of the people of Ethiopia.¹⁴ So, setting up an efficient commercial arbitration, as an alternative forum to the dysfunctional public justice system is not an option. It is inevitable indeed.

Third, Ethiopia's economy is growing fast. It has scored an average of two digits growth since 2003/04 G.C.¹⁵ This has also been confirmed by international financial institutions

⁷ Caryan Litt Wolf, *Faith-Based Arbitration: Friends or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 *FORDHAM LAW REVIEW* 427, 438, 439, 440(2006).” In the United States of America there are a number of faith based commercial arbitration institutions. Judaism, for instance, has had its own system of self-government for thousands of years, across many geographic locations. Jews always had an adjudication system, based on the Bible and the Talmud, and, from the time Jews were under the control of foreign, secular leadership, they conducted their own courts. Those of the Christian faith also have private arbitration procedures. Hundreds of Christian denominations and organizations offer dispute resolution services. Although less organized and widespread than Jewish and Christian dispute resolution services, Islamic organizations also offer mediation and arbitration services.”

⁸ The World Bank, *Ethiopia: Legal and Judicial Sector Assessment*, 38 (2004). Available at <http://documents.worldbank.org/curated/en/931471468771097227/Ethiopia-legal-and-judicial-sector-assessment>

⁹ AMAZU A. ASOUZU, *INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES: PRACTICE, PARTICIPATION AND INSTITUTIONAL DEVELOPMENT*, at 117 (Cambridge University Press, 2001).

¹⁰ *Id.*

¹¹ The Alternative Dispute Resolution Act of Ghana, 2010. Available at <http://www.wipo.int/edocs/lexdocs/laws/en/gh/gh036en.pdf>. Accessed on May 9, 2016

¹² ELIAS N. STEBEK & MURADO ABDO (eds.), *LAW AND DEVELOPMENT AND LEGAL PLURALISM IN ETHIOPIA*, Proceedings of the National Conference on Law and Development: Legal Pluralism, Traditional Justice Systems and the Role of Legal Actors in Ethiopia Addis Ababa, 15-17 November 2012, (Justice and Legal System Research Institute, 2013).

¹³ *Id.* See also The World Bank, *Ethiopia: Equipping the Judicial System to Serve Justice*. World Bank Group 2009. Available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:22355015~menuPK:3266877~pagePK:51236175~piPK:437394~theSitePK:73154,00.html>. Accessed on March 4, 2016).

¹⁴ Kilimanjaro International Corporation Limited, *Ethiopia Second Perception Survey*, 50-53 (2013).

¹⁵ Mthuli Ncube, Charles Leyeka Lufumpa and Leonce Ndikumana, *Ethiopia's Economic Growth Performance: Current Situation and Challenges*, ECONOMIC BRIEF, 2010, at 1.

including IMF and World Bank.¹⁶ Following this, a number of international and multinational giant business enterprises opted Ethiopia to be their destination. The country's Foreign Direct Investment (FDI) also reached US\$ 953 million in 2014 G.C.¹⁷ It is incredible progress for the country known for drought and famine. However, this growth continues as far as the country establishes, *inter alia*, efficient, modernized and institutionalized commercial arbitration centers that complement the public justice system. Ethiopia needs to have a justice system which attracts and meets the interests of investors. It should scrutinize its laws and arbitration centers and make them compatible with the current situation of the country and the globe. An integral private justice system helps the economy of Ethiopia and institutional commercial arbitration is the ultimate beneficial.

Fourth, Ethiopia lived blanking out the world and blanked out by the world so far. However, that situation has changed now and Ethiopia opens its doors and invites investors to come and invest in the country. It enters into bilateral and multilateral investment agreements and signs other international treaties.¹⁸ These modern treaties and agreements set, as custom, arbitration as default dispute resolution mechanism.¹⁹ Besides, the state or its nationals and companies are participating in international commercial transactions in which disputes are inevitable. But, the truth is that no one is eager to appear before the jurisdiction of foreign courts. States or its agencies, nationals and companies always see arbitration centers as a breathing space to settle their disputes. Arbitration centers are frequently used and are proved to be effective in resolving investment and commercial disputes.²⁰ They do also have

¹⁶ See IMF Country Report No.14/303, The Federal Republic of Ethiopia: 2015 Article IV Consultation-press release; Staff Report; and Statement by The Executive Director for The Federal Republic of Ethiopia, September, 2015. Available at <https://www.imf.org/external/pubs/ft/scr/2015/cr15300.pdf> (Accessed on February, 2016). World Bank has also the same standing. See further information at <http://www.worldbank.org/en/country/ethiopia/publication/ethiopia-economic-update-laying-the-foundation-for-achieving-middle-income-status> (Accessed On February, 2016).

¹⁷Abdi Tsegaye, *Ethiopia: Africa's Third Largest Recipient of Foreign Direct Investment*, ADDIS FORTUNE, June, 2014, at 1.

¹⁸ Ethiopia, for instance, signed a number of bilateral agreements with countries like Algeria, Austria, china, Denmark, Egypt and other countries. In fact there are agreements signed, but not in force yet like the agreement with Equatorial Guinea, India, Nigeria, etc. see <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. (Accessed on February, 2016).

¹⁹ ALBERT K. FIADJOE, *ALTERNATIVE DISPUTE RESOLUTION: A DEVELOPING WORLD PERSPECTIVE*, preface (2004). Protocol 9 of the Caribbean Community and Common Market (CARICOM), the WTO, the Free Trade Area of the Americas (FTAA) and Law of the Sea convention also made arbitration the default system for contentious proceedings. These all treaties show us how much arbitration becomes prestigious in the eyes of the world. However, commercial arbitration is now facing different challenges. For instance, the European Commission is in its way to establish Investment Court System to settle investor-state disputes replacing the existing Investor-to-State Dispute Settlement (ISDS) mechanism which is often associated with international arbitration under the rules of ICSID. See European Commission, *Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations 1*(Brussels, 16 September 2015). Accessed on September 20, 2016. Available at http://europa.eu/rapid/press-release_IP-15-5651_en.htm. In the same form, in the past years, there was strong opposition from developing countries on using international commercial arbitration as a means of settling investment disputes. That opposition from developing countries, in fact, has shown decreased in recent years. Despite this, studies show that international commercial arbitration has still incorporated "conceptual and institutional bias against developing countries." See R. Rajesh Babu, *International Commercial Arbitration and Developing Countries*, AALCO QUARTERLY BULLETIN 4, 386-387 (2006).

²⁰ Sunday E. N. Ebye, *The Relevancy of Arbitration in International Relations*, 1 BASIC RESEARCH JOURNAL OF SOCIAL AND POLITICAL SCIENCE 51, 53 (2012).

significant role in keeping national prestige, preserving good business, inter-personal and international relations.²¹

Therefore, setting up of private institutionalized commercial arbitration in Ethiopia is inexorable. It is necessary and does not need time. It gets rid of many problems of the people of Ethiopia, particularly persons in the commerce.

III. PRESENT SITUATION OF COMMERCIAL ARBITRATION IN ETHIOPIA

In Ethiopia, there are only two institutionalized commercial arbitration centers: Addis Ababa Chamber of Commerce and Sectoral Association Arbitration Institute and Bahir Dar University Arbitration Center. As a result, the business community is facing ups and downs to settle their matters. The country could not also get benefits expected from the sector. There are several problems which can be mentioned for the service to be limited and showed not progress.

A. Legal Framework for Commercial Arbitration is Sketchy and Non-comprehensive

Ethiopia, indeed, has laws on arbitration under the 1960 Civil Code and 1965 Civil Procedure Code. The codes, unlike compromise and conciliation, laid more provisions for arbitration. They laid foundation for arbitration to be utilized widely in the country.²² However, as discussed below, these arbitration laws are sketchy and non-comprehensive.

The Civil Code, under its Article 3325(1) states that arbitrator “undertakes to settle the dispute in accordance with the principles of law.” Although this provision does not explicitly specify, it seems indirectly that an arbitrator should settle disputes using the basic principles of natural justice. That means an arbitrator must conduct a fair and an impartial trial and afford full and equal opportunity to both parties. He/she shall hear testimonies and give equal chance for parties to produce their evidences, argue and cross-examine witnesses. But, if fairness and impartiality is required, this arbitration law should expressly state the fundamental requirements of arbitration proceedings as it is relevant to avoid any doubt on it. That does not mean that the phrase ‘natural justice’ should be written in the document as it is possible to state in a different form like the UNCITRAL model law.²³ However, when we see the Ethiopian context, one can find only few provisions which deal about arbitration proceeding. The Civil Procedure Code which deals with arbitrations proceeding requires arbitral tribunal to follow almost similar procedures what civil court would follow during its proceeding.²⁴ The Civil Procedure Code under Article 317 (2) also states arbitral tribunals to hear parties and their evidence and decide in accordance to law. But, this is a general principle as the parties can agree that arbitrator should be able to follow a proceeding different form Civil Procedure Code and able to decide on another basis.²⁵ This brings in difficulty. First, it is uncertain to determine whether an arbitrator is bound by the express terms of the parties and, if so how he/she is to be held to them. Second, it is hard to determine whether the arbitrator can simply ignore public policy and give effect to contract of parties, for instance, if the agreements

²¹ *Id.*, at 55.

²² Shipi M. Gowok, *Alternative Dispute Resolution in Ethiopia - A Legal Framework*, 2 AFRICAN RESEARCH REVIEW 265, 275 (2008).

²³ See UNCITRAL model law, Art 18 and 24.

²⁴ Civil Procedure Code, Art 317(1).

²⁵ *Id.*, Art 317(2).

involve criminal nature or against public moral. Finally, it is also a clear contradiction of the substantive law and cannot be tenable.²⁶

The Civil Code requires parties to enter into arbitration agreement either in the form of an arbitration submission (*actede compromise*)²⁷ or arbitration clause (*clause compromissoire*).²⁸ Arbitration submission thus far, does not bring any intricacy in the country. But, there are uncertainties relating to the latter one. There are qualms on whether an arbitration clause is separable from the contract in which it is placed in, whether the validity of the main contract affects the validity of an arbitration clause or whether the outcome of an arbitration clause has footing on the main contract. However, several jurisdictions do have answer for these concerns through doctrine of separability. The doctrine of separability is adopted in different jurisdictions and legal orders including in UNCITRAL model law.²⁹ The doctrine of separability avows that an arbitration clause has independent existence of the main contract in which it is placed.³⁰ It keeps an arbitration clause from being affected by the main contract and empowers arbitrators to handle any dispute that arises from the main contract. However, this doctrine is not recognized in Ethiopia. Both the 1960 Civil Code and 1965 of the Civil Procedure Code are silent on this principle. One may also argue that the doctrine of *competence-competence*³¹ is adopted in Ethiopia pursuant to Article 3330(1) & (2) of the Civil Code. But, one's impression will be blurred when reading sub (3) of the same Article that prevents the arbitrators from sitting to decide the validity of the arbitration agreement. Prof. Tilhaun Teshome also mentioned the vagueness of this sub article as compared to sub (1) and (2) and stated that it does not transmit the real intention of the legislature.³² The doctrine of *competence-competence* is not, thus, adopted in its full-fledged conception. Article 3329 of the Civil Code also requires provisions of the arbitral submission concerning the jurisdiction of arbitrators to be interpreted restrictively. However, this method of interpretation is outdated; rather, it is liberal approach which is followed in most jurisdictions and adopted under Article 16(1) of UNCITRAL model law.³³

²⁶ ALLEN ROBERT SEDLER, *ETHIOPIA CIVIL PROCEDURE*, at 387 (Oxford University Press, 1968).

²⁷ CIVIL CODE, Art.3328. In arbitration, a compromise is a separate agreement entered in to by disputant parties to submit to arbitrators with regard to a dispute already at hand at the time of concluding the contract.

²⁸ *Id.* In arbitration, *compromissoire* is a clause in a contract entered in to by disputant parties to resolve disputes which may arise in the future relating to the underlying contract containing the cause.

²⁹ UNCITRAL model law, Art 16(1).

³⁰ John Zadkovich, *Divergence and Comity Among the Doctrines of Separability and Competence-Competence*, 12 VINDOBONA JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND ARBITRATION 1, 1 (2008)

³¹ The term 'competence-competence' is taken from German word 'Kompetenz-Kompetenz' which is known in French jurisprudence as 'compétence de la compétence'. In each case the phrase refers to the tribunal's jurisdiction to decide its jurisdiction. It is a general principle in international commercial arbitration that empowers a tribunal to make a determination as to its own jurisdiction when the validity or scope of the agreement to arbitrate is in doubt. However, the fact that a tribunal can determine its own jurisdiction does not give it exclusive power to do so and certainly does not prevent an enforcing court that is not at the seat of the arbitration from re-examining the tribunal's jurisdiction.

³² Tilahun Teshome, *The Legal Regime Governing Arbitration in Ethiopia: A synopsis*, 1 ETHIOPIAN BAR REVIEW 125, 137 (2007).

³³ Solomon Emiru Gerese, *Comparative Analysis of Scope of Jurisdiction of Arbitrators under the Ethiopian Civil Code of 1960*, 55-56 (March 30, 2009) (LLM Thesis, CEU University) This Liberal approach allows arbitration agreements to be interpreted liberally. It presumes that there is a valid arbitration agreement or the arbitrators do have valid jurisdiction on the subject matter, so that it works every dispute to be resolved in favor of arbitration. See also Shagrdi Manaye, *Excess of Authority by Arbitrators as a Defense to Recognition and Enforcement of an Award under Article V(1) of the New York Convention*, March 29, 2010, LLM Thesis, CEU University.

The Civil Procedure Code on arbitration also stipulates that parties may give up their right to appeal.³⁴ However, this brings debate among scholars. Some say that the right to appeal in arbitration should not be limited contractually by the parties because: i) it is against Article 20(6) of the Constitution, Proclamation No 454/2005 and 25/96 which make out the right and ii) it is also against the public policy and confines the parties' right to due process of law.³⁵ In contrast, others argue for the validity of arbitration finality clause. They recognize the discretion of parties to exclude appeal against arbitral award because it suits party's autonomy (contractual freedom of parties).³⁶ It also seems that there is inconsistency among the decisions of the Federal Supreme Court Cassation Division. In the case between *National Motors Corporation Vs General Business Development*,³⁷ the Cassation Division held that the award of the arbitration council will not be appealed before the cassation division if the litigant parties agree to settle their disputes through arbitration and make the award final. Whereas, on the same dispute between *National Mineral Corporation Vs Danny Drilling Plc*,³⁸ the cassation division decided that the right to appeal may not be subjected to limitation by the contract and courts should entertain appeals.

The Civil Procedure Code lays down a domestic arbitration award to be enforced like any ordinary judgment after an application by the winning party for the homologation of the award and its execution.³⁹ But, the Civil Procedure Code fails to specify the form and content of the application, the meaning of homologation, the standards for homologation, and the procedures to be followed.⁴⁰ It creates mystification among lawyers, courts, arbitrators and practitioners. The Civil Procedure Code is not as clear as, for instance, Quebec Civil Procedure Code⁴¹ and the UNCITRAL model law.⁴²

The quandary is not restricted to the enforcement of domestic awards but also on execution of foreign arbitral awards. The Civil Procedure Code fails to specify the meaning as well as the methods that should be employed to distinguish foreign arbitral awards from domestic. Besides, Article 461(1) of the same code specifies the requirements for recognition and enforcement of foreign arbitral awards and it, under sub Article (2), demands to employ the standards on 'foreign judgments' to 'arbitral awards' by analogy. Of these requirements, reciprocity is conflict-ridden. It subjects foreign arbitral awards to be executed only when the award rendering country is willing to execute judgments delivered by Ethiopian courts. More to the point, reciprocity gets application barley as Ethiopian foreign policy requires prior arrangement such as judicial agreement and Ethiopia does have this agreement with only

³⁴ Civil Procedure Code, Art 350(2).

³⁵ Michael Teshome, Appeal and Arbitration under Ethiopian Arbitration Law. Available at <http://www.abysinialaw.com/blog-posts/item/1536-appeal-and-arbitration-under-ethiopian-arbitration-law>. Accessed on June, 2015.

³⁶ *Id.*

³⁷ *National Motors Corporation Vs General Business Development*, FEDERAL SUPREME COURT, File No 21849 (unpublished).

³⁸ *National Mineral Corporation plc Vs Danny Drilling plc*, FED. SUPREME COURT, CASSATION DIV., File No 42239 (the case was decided on November 09, 2010 GC or on Tikimt 29, 2003 EC).

³⁹ Civil Procedure Code, Art 319(2). The word Homologation is taken from the verb *homologate*, meaning to approve or confirm officially. Homologation is the process of approving an arbitral award by the concerned body for it meets the necessary requirements.

⁴⁰ Birhanu Beyene, The Homologation of Domestic Arbitral Awards in Ethiopia, at 1. Available at <http://ssrn.com/abstract=2191500>. Accessed on July, 2015.

⁴¹ Quebec Code of Civil Procedure, Art 946.

⁴² UNCITRAL Model Law, Art 35 and 36.

limited countries.⁴³ This situation places the interests of Ethiopian business community in grave and victimizes innocent individuals as it narrows the enforcement of foreign arbitral awards to which Ethiopians are party within the country. Unlikely, there are many bilateral, multilateral and international agreements which relax or reject the doctrine of reciprocity.⁴⁴ The New York Convention (1958) and the UNCITRAL model law also do not recognize reciprocity.⁴⁵

Both the Civil Code and Civil Procedure Code also permit courts to interfere in commercial arbitration more than the modest. In fact, public courts should encourage and provide support to commercial arbitration in some crucial matters since there are times where courts involvement is vital. But, the intervention should be healthy, and respect the autonomy of commercial arbitration and the consent of parties. It shall be modest and minimal⁴⁶ as those adopted in most jurisdictions and UNCITRAL model law. However, in Ethiopia, public courts interfere early in the arbitration proceedings, exercise wider judicial review power on awards and apply firm requirements in recognition and execution of foreign arbitral awards.⁴⁷ As a result, they are cramping our nationals, foreign nationals and our economy too.

Moreover, in Ethiopia, arbitration laws have no doctrines and standards comparable with modern international commercial practice. They are non-comprehensive. They do not go with the pace of today's more complex domestic as well as international commercial transactions, disputes and settlement mechanisms. As a result, they failed to become the choice of the business community.⁴⁸ In fact, an attempt to modernize it was made with the enactment of the 1960 Civil Code and 1965 Civil Procedure Code. However, the laws have not been revised since its enactment; and are expressed and shine the spirit of 1960s. They are not, for instance, comparable with arbitration rules and practice of known international and regional commercial arbitration institutions such as International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), American Arbitration Association (AAA), and Cairo Regional Center for International Commercial Arbitration (CRCICA).⁴⁹ They also

⁴³ Available at www.mfa.gov.et/pressMore.php?pg=56. Visited on Friday, September 25, 2015. Both Ethiopia and Djibouti consented to cooperate on judicial matters in 2013. See also <http://hornaffairs.com/en/2012/05/26/ethiopia-and-sudans-extradition-treaty/> Visited on Friday, September 25, 2015. The Ministry of Justice of Ethiopia and the Republic of the Sudan's Minister of Justice signed an Extradition Treaty and an Agreed Minute on their Joint Legal Affairs on May 16th, 2012 in Addis Ababa.

⁴⁴ Tecele Hagose, *Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia*, 5 MIZAN LAW REVIEW 105, 122 (2011).

⁴⁵ United Nations, United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (here after the New York Convention), 1958.

⁴⁶ Weixia Gu, *Judicial Review Over Arbitration in China: Assessing the Extent of the Latest Pro Arbitration Move by the Supreme People's Court in the People's Republic of China*, 27 WISCONSIN INTERNATIONAL LAW JOURNAL 221, 225-231 (2009).

⁴⁷ Hailegabriel G. Feyissa, *The Role of Ethiopian Courts in Commercial Arbitration*, 4 MIZAN LAW REVIEW 297, 333 (2010).

⁴⁸ Bezzawog Shimelash, *The Formation, Content and Effect of an Arbitral Submission under Ethiopian Law*, 17 JOURNAL OF ETHIOPIAN LAW 69, 69 (1194).

⁴⁹ The arbitration laws enshrined in the 1960 Civil Code Ethiopia leaves much to be desired with respect to the doctrine of separability, the doctrine of competence-competence, and the rule of interpretation of doubtful and unclear arbitration clauses. Whereas, the institutional arbitration rules of International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), American Arbitration Association (AAA) and Cairo Regional Center for International Commercial Arbitration (CRCICA) recognize these all doctrines and liberal rule of interpretation. For instance, the arbitration rules of ICC under Article 6, LCIA under Article (2), AAA under Article 7 (b) and the CRCICA under Article 23(1) recognize the doctrine of separability. All these institutional rules also grant arbitrators broad power to consider and decide challenges to their own jurisdiction

lag behind when compared with Germany, England, Netherlands and France systems which have modernized arbitration laws.⁵⁰ On top of all, Ethiopian arbitration laws do not fit with UNCITRAL model law which has international legal texts that address international commercial dispute resolution; non-legislative texts that include rules for conduct of arbitration proceedings; and notes on organizing and conducting arbitral proceedings. As a result, Ethiopia is facing difficulty in international commercial practice. UNCITRAL Model Law has principles and standards which are acceptable to nations having different legal systems and levels of economic and social development. It is a model law which tries to harmonize and modernize domestic and international law to enhance predictability in cross-border commercial transactions.⁵¹ Ethiopia also failed to ratify the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), and the International Center for the Settlement of Investment Disputes (ICSID).⁵² This creates fear for foreign nationals to come and invest in the country as they may not want to give their hand for local courts. It brings difficulty into the field. As a result, the country's overall transactions, particularly its international business transactions are affected.⁵³

B. Commercial Arbitration is not Institutionalized

In Ethiopia, Commercial arbitration is not institutionalized too.⁵⁴ Several *raison d'être* can be mentioned for this problem. First, the past as well as the existing governments are very reluctant in encouraging private bodies to work on institutional alternative dispute resolution

(do recognize the doctrine of competence- competence) as we can see from Article 6 of ICC, Article 23 (1) OF LCIA, Article 7(a) AAA and Article 23(1) of CRCICA. These institutional rules also recognize liberal rule of interpretation.

⁵⁰ Germany, England, Netherlands and France have their own specific arbitration law which is different from Ethiopia where arbitration statues scattered here and there under the civil code and civil procedure code. Moreover, these countries do have legislations which formalized the authority and jurisdiction of private arbitration mechanisms which is not the case in Ethiopia. They signed the New York Convention and easy to recognize and enforce foreign arbitral awards within their country. They do also have arbitration laws which are comparable to UNCITRAL model law and as a result, updated concepts like the doctrine of competence-competence, separability, and homologation are incorporated in their arbitration statues. Their courts also give wide respect for arbitral tribunal and may not intervene frequently. When we the situation in Ethiopia, it is not, in any case, comparable with arbitration laws of these countries. There are lots of issues which are not settled yet and need more work to reach that level of modernized arbitration system. See, for instance, England Arbitration Act s.31; Germany ZPO S 1040(2); Netherlands CCP Article 1052(2).

⁵¹ Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html. Accessed on July, 2015.

⁵² The main purpose of New York Convention is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries. It guarantees the enforcement of an award given in Ethiopian to be enforced elsewhere in other member states and vice versa. The convention, for that matter, specifies grounds for enforcing foreign arbitral awards in the country. Unfortunately, Ethiopia did not ratify this convention. Further, the grounds which are specified in the domestic laws on same issue are obsolete. For instance, the requirement of reciprocity, which has a political motive than arbitration purpose, requires prior judicial agreement and Ethiopia has few so far. Moreover, the relevance of the New York Convention is demonstrated as more than 149 countries have adopted it.

⁵³ Booz Allen Hamilton, *Reinforcing Ethiopia's International Trade Law Framework for a Stronger Business Environment: A Case for the Ratification of the New York Convention and The Convention on International Sale Goods*, 18 (United States Agency for International Development (USAID), 2008).

⁵⁴ In this submission, the term 'institutionalized' is used to mean an entity which has a character of institution or is incorporated into a structured and usually well-established system. In Ethiopia, thus, commercial arbitration is not institutionalized. It is not established as normal practice. Commercial arbitration has not become an established custom or an accepted part of the structure of a large organization or society because of having existed for so long.

(ADR). They do not establish appropriate institutional and legal frameworks to properly establish and regulate the conduct of institutions administering commercial arbitration. In fact, there are laws which encourage private bodies to work on this area. The imperial order No 90/1947 provided for private bodies to put into effect arbitration institutions on commercial and industrial disputes.⁵⁵ The existing Civil Code and Civil Procedure Code also lay down commercial disputes to be entertained on institutional or ad-hoc basis. The Chamber of Commerce and Sectoral Association Establishment Proclamation No 341/2003, as well, mandated all the Chambers of Commerce and Sectoral Associations of the country to carry out arbitration on commercial disputes. However, none of these chambers except Addis Ababa Chamber of Commerce and Sectoral Association (AACCSA) through its Arbitration Institute entertain commercial disputes.⁵⁶

This may be attributed to various factors. Chamber/business associations do lack business association mentality or culture, expertise and resources.⁵⁷ The business community is no longer interested to form or be a membership of associations; Chamber/business associations are not self-initiated and demand driven; do serve government policies and ideologies rather than representing the real interests and views of members, do not have effective communication and internal engagement with their members; and their governance system is not transparent.⁵⁸ The government also does not provide necessary support. It does not enact comprehensive and inclusive laws which do not put others in legal limbo, acknowledge the right of associations to advocate on the behalf of their members, and keep business associations engage in the policy debate.⁵⁹

In addition to Addis Ababa Chamber of Commerce and Sectoral Association Arbitration Institute, recently, Bahir Dar University through its Arbitration Center starts providing arbitration service. Besides, these two centers, there is no any other commercial arbitration institution in Ethiopia. Indeed, there had been Ethiopian Arbitration and Conciliation Center (EACC) established by group of Ethiopian lawyers. But it dissolved since the enactment of the Charities and Societies Proclamation.⁶⁰ This all have showed that the state and its institutions

⁵⁵ Yohannis Woldegebriel, *Current Status of Alternative Dispute Resolution in Ethiopia*, at 3. Available at <http://www.addischamber.com/file/ICT/20140812/Current%20Status%20of%20Alternative%20Dispute%20Resolutions.docx/> Accessed on May 11, 2016.

⁵⁶ AACCSA Arbitration Institute was established in 2002 as an autonomous organ but part of the AACCSA with the support of Netherlands embassy in Ethiopia and it is the only institution which provides arbitration service on commercial disputes to the vast of the business community of Ethiopia. AACCSA was initially established by imperial order No 90/1947. This order mandated a private body to exercise institutional arbitration on commercial and industrial disputes and as a result, AACCSA AI was established. This order was also enacted at the time when there was no arbitration law and hence, disputed and legal gaps for conduct were settled through customary practices. The Civil Code, Civil Procedure Code and other legislation enacted later do have the same position on relevancy of institutionalized commercial arbitration in resolving commercial disputes.

⁵⁷ Bacry Yusuf, *Admit Zerihun & Shumet Chanie, Situation Analysis of Business and Sectoral Associations in Ethiopia*, 89-91 (Addis Ababa Chamber of Commerce and Sectoral Association, 2009).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ The Charities and Societies Proclamation No.621/2009 requires organizations to register in one of these three categories: Ethiopian Charities or Societies, Ethiopian Resident Charities or Societies, or Foreign Charities. The proclamation under its Article 14(2) (m) and (n) allows Ethiopian Charities or Societies to engage in the promotion of conflict resolution or reconciliation and the efficiency of the justice and law enforcement activities. However, the proclamation under its Article 2(2) defines as Charities or Societies that are formed under the laws of Ethiopia, all of whose members are Ethiopians, wholly controlled by Ethiopians and generate income from Ethiopia or they are Ethiopian charities or societies if they use not more than ten percent of their funds which is

are not committed to take pro commercial dispute resolution measures. Their role, thus far, to establish a formal commercial arbitration system is minimal.

Second, economic constraints are also a problem in setting up institutional commercial arbitration in Ethiopia. Institutionalized commercial arbitration needs sustainable financial source from members, business community and its services in the country. Thus, it is challenging in Ethiopia where one third of its people are not able to meet their basic needs. Moreover, private individuals who have the capacity are not committed to establish and engage in institutionalized commercial arbitration as they do have little awareness and fear to succeed. It is also hard to find individuals who are eager to be a member and support commercial arbitration centers paying membership fee. Commercial arbitration institutions are also prohibited from receiving foreign aid which is the case of Ethiopian Arbitration and Conciliation Center (EACC). The business community does not have also any trend to take disputes before commercial arbitrators and thereby be a permanent source of income for commercial arbitration institutions in the country.⁶¹

Third, in Ethiopia, the business community does have lower level awareness of codified laws. As a result, they are prone for informal, customary and traditional dispute resolution mechanisms. They are settling their commercial disputes informally in church or mosque compounds, in homes of respected persons or arbitrators or disputant parties, in hotels and hotels rooms, in court rooms and under trees where it is hard to conduct hearing, take testimony of experts or lay witnesses, record sounds, keep the confidentiality of the matter and perform other proceedings easily.⁶² This informal trend, thus, tied the people from seeing and establishing institutionalized commercial arbitration as sound alternative in the country.

Fourth, the legal framework of arbitration is not helpful to establish institutional commercial arbitration too. Indeed, Ethiopia does have arbitration laws which lay solid foundation for commercial dispute resolution since 1960s. However, these arbitration laws are scattered here and there in the Civil Code and Civil Procedure Code, are sketchy and non-comprehensive. They are quiescent for several decades. Moreover, the country does not have any specific arbitration law yet. It does not have comprehensive legislation which formalizes the authority and jurisdiction of private commercial arbitration institutions as well as address ambiguous and controversial issues like the arbitrability of administrative contracts and appealability (enforceability) of arbitral awards. Besides, the country does not sign the New York Convention. So, the legal environment is not promising and attractive for private individuals to do business on commercial dispute. We also know that the government or its own entities as well as the business community have moved out to foreign private arbitration forums fearing the unsoundness of the system in the country.⁶³

Fifth, institutionalized commercial arbitration indeed requires skilled human resource. However, staffing commercial arbitration centers with educated and qualified arbitrators would not be easy in Ethiopia so far. Lawyers lack commercial acumen to better understand commercial transaction; do not have full-fledged knowledge on updated techniques and

received from foreign sources. However, Ethiopian Arbitration and Conciliation Center (EACC) received most of its budgets from foreign sources and as a result, could not satisfy the required standards and stopped working.

⁶¹ Booz Allen Hamilton, *Ethiopia Commercial Law & Institutional Reform and Trade Diagnostic*, at 70 (United States Agency for International Development (USAID), 2007).

⁶² Yohannis, *supra* note 55, at 4-5

⁶³ Bezzawork, *supra* note 48, at 69

principles of commercial arbitration; and be short of foreign experience to accurately understand the system and settle commercial disputes.⁶⁴ There is no practical training which aims to increase professionalism and create best commercial lawyer.

Finally, in Ethiopia, public courts are empowered to enforce valid arbitral awards. However, there are tangible deficiencies in executing arbitral awards as there are congestions, long delays, lack of understandings on facts of commercial disputes, corruptions, lack of resources and others in public courts.⁶⁵ As a result, public courts do not guarantee quick review, recognition and enforcement of arbitral awards. Moreover, they do not give necessary legitimacy for arbitral tribunals and intervene more than necessary. So, the business community may not get any benefit of taking disputes before institutional commercial arbitration; rather than paying service fee and incurring other expenditures. That situation retards institutionalized commercial arbitration from being established in the country.

IV. SETTING UP INSTITUTIONALIZED COMMERCIAL ARBITRATION IN ETHIOPIA

In the preceding section, I mentioned that the existing commercial arbitration system in Ethiopia is less capable to work efficaciously on commercial disputes to meet the interests of the business community. It is not institutional and then not a patronage of feasible and comprehensive legal frameworks, the government and its institutions. However, it is ineluctable to setting up private institutional commercial arbitration in the country as private individuals have simple and straightforward approach to resolve disputes. In today's globalized world, the business communities, along with legal experts and visionaries across the world, have started changing the dispute resolution landscape to accommodate these growing needs by introducing less formal procedures for dispute resolution.⁶⁶ This adept practice should effulgence in Ethiopia outright. But, it needs the encouragement and support of different stakeholders.

The government should take the front in enhancing the existing situation. It should let its previous tralatitious scheme to go and set out a new era with pro private commercial arbitration stance. It needs to sweep up comprehensive plans, policies and legislation which encourage its agencies and the people to use private justice system. It should develop an atmosphere which is feasible for private bodies to engage in an institutional commercial arbitration. Above all, the government should update its arbitration laws and put them at the same level of the globalized world.

In today's world, the UNCITRAL model law and the New York Convention on Recognition and Enforcement of Foreign Arbitral Award (1958) are pillars in commercial arbitration.⁶⁷ The UNCITRAL model law is a law for harmonization of arbitral proceedings. As a result, the UN General Assembly recommended member states to give due consideration to the model law and come up with their own comparable legislation.⁶⁸ Many countries and

⁶⁴ Hamilton, *supra* note 53, at 66.

⁶⁵ ELIAS & MURADO, *supra* note 12.

⁶⁶ The World Bank Group, *Alternative Dispute Resolution Center Manual: A Guide for Practitioners on Establishing and Managing ADR Centers*, at 1 (2011)

⁶⁷ Adedoyin Rhodes-Vivour, Arbitration and Alternative Dispute Resolution as Instruments for Economic Reform, at 6. Available at <http://www.nigerianlawguru.com/articles/arbitration/ARBITRATION%20%26%20A.D.R.pdf>. Accessed on July, 2015.

⁶⁸ UN General Assembly Resolution 40/72, 112, U.N. Doc. A/RES/40/72 (December, 11 1985).

most arbitration institutions also adopted their own legislation on the basis of UNCITRAL model law.⁶⁹ The New York Convention also makes the recognition and enforcement of foreign arbitral awards easy by obliging member states to execute it without revision subject to limited exceptions.⁷⁰ There are also other international conventions which are pertinent to commercial arbitration.⁷¹ Likewise, there are various international institutions⁷² which administer arbitration proceedings, offer training or support in some or the other way, and do have their own institutional rules to guide and assist parties in the conduct of the proceedings. So, the government of Ethiopia should enact laws comparable to the UNCITRAL model law, sign and ratify the New York and other relevant international commercial conventions, and learn the arbitration rules and best decisions of known international arbitration institutions. It should revise its arbitration laws and come up with legislations which help to meet the vision of becoming lower middle income country by 2025.⁷³ However, the laws should not pass the limits of the basic principles enshrined in the constitution and laws of the country and should reflect the values, customs and beliefs of the people of the country.⁷⁴

The government should strain the setting up of institutional commercial arbitration more understandable and simple in the country. It needs to enunciate, *inter alia*, the manner that institutional commercial arbitration should be formed, registered,⁷⁵ administered,⁷⁶ or supervised and the subject matters it should deal with.⁷⁷ The government should also build

⁶⁹ R. Rajesh Babu, *International Commercial Arbitration and the Developing Countries*, 4 AALCO BULLETIN 385, 389 (2006).

⁷⁰ New York Convention, Arts 2 & 5.

⁷¹ There are international treaties which make commercial arbitration workable and effective. For instance, the European Convention on International Commercial Arbitration (1961), the Washington (ICSID) convention (1965), Moscow Convention (1972), the Panama convention (1975), the OHADA Treaty (1993) and the North American Free Trade Agreement of 1994 (NAFTA) enhance the practicability of commercial arbitration across the globe.

⁷² Likewise, there are also famous international, regional and national commercial arbitration centers such as Lagos Regional Centre for International Commercial Arbitration, International Court of Arbitration, International Chamber of Commerce (ICC), the International Centre of Dispute Resolution (ICDR), the American Arbitrators Association (AAA), the Chinese International Economic and Trade Arbitration Commission (CIETAC), the Chartered Institute of Arbitrators (CIArb) and the Centre for Effective Dispute Resolution (CEDR). The statutes, practices and decisions of these institutions heighten the quality and prestige of commercial arbitration across the globe.

⁷³ National Planning Commission, *The Federal Democratic Republic of Ethiopia The Second Growth and Transformation Plan (GTP-II) 2015/16-2019/20* 16 (2015, Addis Ababa).

⁷⁴ Maazhymanot Worku, *Key Points on International and National Alternative Dispute Resolution Mechanisms*. Available at <http://www.abysinnialaw.com/root/our-blog/entry/70-adr>. visited on March 29, 2013.

⁷⁵ There are two arguments in Ethiopia whether private institutional commercial arbitration should establish under the name of business organizations or charities and societies. If commercial arbitration is made to register as business organization, it needs to follow all the elements and procedures of business organization specified under the 1960 Commercial Code. On the other hand, the Charities and Societies Proclamation No.621/2009 allow Ethiopian charities and societies to engage in advocacy activities in the country. Thus, institutional commercial arbitration may have the possibility to be registered as charities and societies. The government, thus, shall make it clear in its arbitration laws.

⁷⁶ There are nations which do have clear stance on the issue and establish a separate body responsible for supervisions of commercial arbitration centers. For instance, china arbitration law requires that all arbitrations in the country to be administered by people republic of china arbitration institution. See also Mayer Brown, *international arbitration perspectives* 12 (Winter 2009/2010).

⁷⁷ China makes some of its commercial arbitration institutions to work on commercial disputes which involve domestic element and foreign element. According to china, there is foreign element where one or both parties in the dispute are foreign persons or a company or organization domiciled in a foreign country, where the subject matter of the dispute is located in a foreign country or where the facts that establish, change or terminate the

structural frameworks that enable private commercial arbitration institutions to be molded up to local level, organize forums that facilitate training, discussion, experience sharing and set up networks that provides a platform for commercial arbitration centers to work together on their common interests.

Finally, the government should maintain the sustainability of institutional commercial arbitration centers. It should produce sufficient human resources and keep up their capacity. It needs to prepare conferences, workshops, and trainings on updated versions of commercial arbitration for arbitrators, lawyers, practitioners and the general public with its own budget or with the support of international institutions, universities or NGOs. Likewise, the government should support private commercial arbitration institutions, for instance, by funding them till they are good enough to support themselves.⁷⁸

The judicial system do have also solid role in setting up workable, modernized and institutionalized private commercial arbitration in the country. Disputes themselves may not originate in courts. However, they may make their way to courts for different reasons⁷⁹ and at different level of proceedings⁸⁰ either as matter of statutory or inherent powers of courts. Thus, courts' intervention in commercial arbitration is inevitable and is "a fact of life as prevalent as the weather."⁸¹ This is indeed beneficial and crucial for overall efficacy of the process as well. But, courts should keep their intervention modest and consistent with the interests of the parties. They should restrict their extended roles and assume only minimum intervention which is a norm in various national, international and institutional commercial arbitration laws.⁸²

Courts should also ease the execution of awards through empowering the successful party to bring enforcement action and prohibiting the loser to challenge the award except in limited conditions and within a limited period of time.⁸³ They need to set up frameworks which dissect malevolent parties who utilize court intervention to delay or frustrate arbitral

contract between the parties occur outside of the country. See also Mayer Brown, international arbitration perspectives 12 (Winter 2009/2010).

⁷⁸ There nations which support private commercial arbitration centers. For instance, Singapore's arbitration community has received government support since the mid-2000s. See the Singapore International Arbitration Centre (<http://www.siac.org.sg/>), a non-profit dedicated to the growth of international arbitration activity in Singapore initially funded at its inception in 1991 and continually supported by the government. Sydney's arbitration community also receives government support. See the Australian International Disputes Centre (<http://www.sydneyarbitration.com/>), which was founded in 2010 with the assistance of the Australian government and the state of New South Wales.

⁷⁹ Disputes may make their way to courts for resolution for different reasons. Most of the time, it happens in the appointment process of arbitrators or the arbitration award involves illegality, fraud, incapacity or is against public interest.

⁸⁰ It is inevitable that courts should intervene in different stages of commercial arbitration proceedings. Basically, there are four stages: (1) prior to the establishment of a tribunal; (2) at the commencement of the arbitration; (3) during the arbitration process; and (4) during the enforcement stage. However, the intervention should be minimal and in accordance with law. Besides, it should be supportive and make commercial arbitration more effective.

⁸¹ Julian D. M. Lew, *Does National Court Involvement Undermine the International Arbitration Process?* 24 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW, at 490.

⁸² Unlike Ethiopian arbitration laws which require extensive court involvement in commercial arbitration proceedings, relevant international commercial instruments state the role of courts to be restrictive. The New York Convention under its Articles II, III and V specify the role of courts to be in support for the arbitral process and recognition and enforcement of arbitration agreements and awards but nothing else. Article 5 of the UNCITRAL Model Law also provides courts to intervene as provided in this law only.

⁸³ See UNCITRAL Model Law- Art 35 and 36.

proceedings and other activities watering down the advantages of commercial arbitration. They should disentangle themselves from erroneous interpretations and applications and enable local as well as foreign investors to settle their commercial disputes in Ethiopia.

There are also functions expected from the institutions themselves. Commercial arbitration centers should work to keep themselves strong, modernized and institutionalized. They need to ensure their sustainability which is the most difficult but an indispensable aspect in terms of both human and financial resources. Commercial arbitration institutions need to build themselves with arbitrators who do have adequate knowledge and skill of the contemporary commercial dispute resolution mechanisms. They need also to prepare trainings, workshops and other experience sharing forums timely for arbitrators. They need, as well, to stage up their image by appointing arbitrators who are confidential, act impartially and comply with other required ethical standards.

Commercial arbitration institutions, likewise, should have their own sustainable financial resources. This is crucial, particularly in Ethiopia where private commercial arbitration centers are not funded by the government and may not receive any foreign aid exceeding ten percent of their budget. They should determine and work on areas which are their sources of income. They should prepare a schedule of fees on the basis of the fee payable to arbitrators, cost of venue, overhead, and services they render. Importantly, the cost should be substantially less than the costs that would be incurred in following the normal route of litigation to resolve the dispute. Besides, commercial arbitration institutions may secure additional revenue by offering training courses⁸⁴ or collecting fees from its members where an association of third party neutrals administers the proceedings.⁸⁵ They may also boost their earnings by creating public awareness, particularly for commercial parties. Public awareness campaign encourages the demands for commercial arbitration. For instance, the Cairo Regional Center for International Commercial Arbitration (CRCICA) employs this approach.⁸⁶

Commercial arbitration institutions, aside from building their sustainability, should bring the optimum efficiency and effectiveness of their operation by monitoring and evaluating their performance through gathering feedback from clients or third party neutrals and implementing data management system. Commercial arbitration institutions should be grateful also for women both in including them in the arbitration staff and addressing their problems.⁸⁷

Finally, there are also stakeholders whose contributions are not undermined in establishing strong and institutionalized commercial arbitration. Arbitrators should undertake

⁸⁴ Institutional commercial arbitration may secure its revenue by offering training courses to judges, practitioners, business forums, and the like. However, appropriate care should be taken with regard to courses given to professional trainees and to laymen as part of an awareness campaign and/or general skills development for members of the public. This is because the trainee may choose to attend the entire course or only part of that. For instance, in Morocco, CIMAT offers 10-day training courses. Then, it charges 10,000 dirhams for the entire course from each trainee. In Pakistan, KCDR also charges between 10,000 and 12,000 rupees per day of training provided. It charges 15,000 to 20,000 rupees for a two-day training hours.

⁸⁵ The fees which are collected from members may be utilized to cover part of costs of running the institution. For example, in Morocco, CIMAT charges an annual fee of approximately \$125 from its members and, in Pakistan, KCDR charges its annual members 50,000 rupees and its life members 300,000 rupees.

⁸⁶ The Cairo Regional Center for International Commercial Arbitration (CRCICA) increases its revenue by creating public awareness about the benefits of arbitration. For that matter, in collaboration with different bodies, it prepares conferences, seminars and other training programs and issues journals.

⁸⁷ Deborah Rothman, Gender Diversity in Arbitrator Selection, DISPUTE RESOLUTION MAGAZINE, Vol 18, No 3, 25 (2012).

an ongoing process of continuous professional development. They should attend training workshops, conduct self-assessments and record successful and unsuccessful ADR processes in learning journals. The business community should also create awareness of the benefits of arbitration throughout the business community, sponsor different activities of the institutions and create other viable atmosphere.

Law schools of the country should also work more to produce good arbitrators.⁸⁸ Indeed, all law schools incorporated an ADR course in their curriculum. But, it is hard to say it is enough. Rather, they should give considerable attention to ADR courses as the existing trend is more prone to court litigation and courses which are related to ADR are neglected. They have to expand the depth and breadth of courses to prepare graduates for practice in international commercial arbitration forums. They have to establish business networks with the business community, arbitration centers and the government and thereby enable students gain additional experience.

V. THE CONTRIBUTION OF INSTITUTIONALIZED COMMERCIAL ARBITRATION FOR ECONOMIC DEVELOPMENT OF ETHIOPIA

A well-run and functional commercial arbitration brings progresses on diverse perspectives, particularly on the economic sector. Different jurisdictions of this ever globalized world are the prime witnesses as they made, with commercial arbitration, their economy to shine and progress further. There are also wide potentials that effective, well-run and institutionalized commercial arbitration system may benefit the economy in Ethiopia too. These are vindicated below:

First, institutionalized commercial arbitration shall promote investment in Ethiopia.⁸⁹ Institutionalized commercial arbitration attracts foreign direct investment and encourages high level of participation of local investors in the country. It is a preferred option to assure for foreign and local investors of their investment in the country.⁹⁰ Besides, institutionalized commercial arbitration system forms healthy working environment, builds competitive environment and enhances the confidence of investors in the country's system. It draws invisible earnings that are quite valuable and establishes a new economic order, i.e. an improved investment climate which is essential to the economic growth of Ethiopia and eradication of poverty in the country.⁹¹

⁸⁸ Gowok, *supra* note 22, at 280.

⁸⁹ The World Bank Group, *Investing across Borders: Indicators of Foreign Direct Investment Regulation in 87 Economies*, 54-65(200), in 2010, the World Bank's investing across Borders (IAB) works and reports on indicators enhancing foreign direct investment (FDI) in 87 countries. Of these indicators, commercial arbitration mentioned as vital which ease investing in foreign country. Commercial arbitration reflects the strength of local legal frameworks for the rules of arbitration, ease of process and the extent of judicial assistance of arbitration which again determine the strength of commercial arbitration in the country and indirectly support foreign direct investment.

⁹⁰ See Richard E. Messick, *Judicial Reform and Economic Developments: A survey of the Issues*, 14 THE WORLD BANK RESEARCH OBSERVER 117, (February 1999). Like Ethiopia, the judiciary branch of the government becomes the problem of many nations of the globe, particularly for the business community. In a survey conducted in 69 countries and 3,600 firms, more than 70 percent of the respondents mentioned unpredictable judiciary as a major problem in their business operations. The report also showed that the overall confidence the business community does have on the institutions of government, including the judicial system, correlated with the level of investment and measures of economic performance.

⁹¹ Institutional commercial arbitration enhances the confidence of investors in the country's system. It brings new investment climate and economic order. For instance, the World Bank Development in 2005 mentioned

Second, institutionalized commercial arbitration, if properly conducted and managed, shall facilitate the smooth functioning of international commercial relations of Ethiopia.⁹² In the international trade, the state or its agencies and nationals enter into contractual agreement with foreign nationals and governments. However, most foreign business partners enter into international commercial transactions with Ethiopian correspondents only when they are convinced that there is effective, impartial and predictable commercial dispute resolution system in the country. If there is not, they lack confidence to transact and deal out agreements which involve huge capital.⁹³ Particularly, foreign business correspondents are not fascinated to appear before courts because of “national ideologies, systems of thinking, and methods of conducting business or partiality of judges.”⁹⁴ This intricacy reaches soaring when the transaction is between state or its agencies and private parties.⁹⁵ But, workable and institutionalized commercial arbitration has an answer. It brings all business bodies⁹⁶ to the same footing and boost confidence to transact, deal and work together. It, thus, will straighten international trade and investment in Ethiopia, thereby resulting in an efficient exploitation and allocation of global resources.

Third, institutionalized commercial arbitration will move up the wellbeing of disputant parties and the welfare of the society of Ethiopia.⁹⁷ In commerce, disputes are inevitable. But, parties should deal with them appositely and boost their businesses feasibility and profitability. Workable, modern and institutionalized commercial arbitration provides a proper forum for parties to manage their disputes. Its proceedings are held in a private and confidential atmosphere.⁹⁸ Its outcome is satisfactory and makes commercial disputant parties to maintain their business relationship.⁹⁹ Furthermore, effective and institutionalized commercial arbitration involves simple and flexible procedures, employs laws different from courts, assesses performances with high quality, and avoids further ligations.¹⁰⁰ It, thus, helps disputant parties to incur lower resolution cost, to lower their risk of attending further disputes on the same matter and to change their behavior and work for mutual benefits.¹⁰¹ Likewise, it helps disputant parties to foretell the outcome of their case at court trial and thereby reduces the number of disputes which could appear before courts and saves resources.¹⁰² It makes the

China’s experience on commercial arbitration as fascinating. China worked on four key areas in its bid to bring its legal system in line with world standards and attract investment. And dispute resolution is one of the key areas.

⁹² MOHAMMED BEDJAOUI, *EURO ARAB ARBITRATION CONGRESS*, at 217 (Kemicha ed., Lloyd’s Press of London, 1991).

⁹³ William W. Park, *Private Adjudication and the Public Interests*, BROOKLYN JIL, (1986), at 629 & 640.

⁹⁴ ASOUZU, *supra* note 9, at 33-34.

⁹⁵ *Id.*, at 34.

⁹⁶ Ordinary people often think commercial arbitration is a private process and meant to serve private parties. However, that is not true. In fact, commercial arbitration is a private process, but it is not meant only for private parties. It deals with an ever-growing degree and intensity with disputes between private parties, between private and state parties, and in some instances with disputes between state parties.

⁹⁷ Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 THE JOURNAL OF LEGAL STUDIES 1, 8 (1995).

⁹⁸ CLIVE M. SCHMITTHOFF & KENNETH R. SIMNONDO, *INTERNATIONAL ECONOMICS AND TRADE LAW*, at 171 (Leyden, A.W. Sijthoff, 1976).

⁹⁹ Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation* 144 (2010)

¹⁰⁰ Nikolay Natov, *Effectiveness of International Commercial Arbitration*, at 8-12. Available at www.ksu.lt/.../Effectiveness-of-International-Commercial-Arbitration.pdf. Accessed on July, 2015.

¹⁰¹ Shavell, *supra* note 97, at 5-6.

¹⁰² *Id.*, at 7.

enforcement of foreign arbitral awards, apart from foreign judgments, internationally easier.¹⁰³ Therefore, institutionalized commercial arbitration shall makes possible for commercial disputant parties “to consider and resolve all dimension of the dispute, including legal, financial and emotional aspects.”¹⁰⁴

Fourth, institutionalized commercial arbitration shall contribute in the transformation of Ethiopian economy. It generates income for the professionals and brings benefits for the community.¹⁰⁵ As a process, its services and facilities require the participation of experienced resident and member arbitrators; the attendance of diverse national and international companies, governments and business individuals or their counsels; and the support of a number of human personnel. It creates job for arbitrators and other supportive staffs as well as for legal counsels, expert witness and others.¹⁰⁶ Furthermore, all the individuals who come to use or visit the center spend their money to hotels, restaurants, shops and other services or facilities.¹⁰⁷

Five, institutionalized commercial arbitration shall enhance the profile and reputation of Ethiopia in the eyes of the world, particularly among the business community.¹⁰⁸ Well-run and institutionalized commercial arbitration open an option for the country to become an international commercial arbitration center. This opportunity beefs up the country’s cause to become the seat of African Union (AU) and the host of many diplomats, international and regional institutions. The country’s economy is also growing fast and attracts giant enterprises. These all shall improve the economy of Ethiopia either directly or indirectly.

Finally, institutionalized commercial arbitration shall relieve the government of Ethiopia from incurring much expenditure. Institutionalized commercial arbitration is privately funded organization. Hence, it shall relieve the government from establishing, opening, and staffing new additional courts. It shall also open an opportunity for the government or its agencies to resolve their commercial disputes locally; rather than traveling overseas and incurring further expenses. This would be noteworthy particularly in investment disputes as the government of Ethiopia has increasingly entered in bilateral investment agreements which give foreign investors a choice to submit disputes before international arbitration forums.¹⁰⁹ The recent

¹⁰³ Gavan Griffith and Andrew D Mitchell, Contractual Dispute Resolution in International Trade: The UNCITRAL Arbitration rules (1976) and the UNCITRAL Conciliation rules (1980), 3 MELBOURNE JOURNAL OF INTERNATIONAL LAW 184, 186 (2002).

¹⁰⁴ Law Reform Commission, *supra* note 99, at 143-144.

¹⁰⁵ See Charles River Associates, Arbitration in Toronto, 10 (2012). Institutionalized commercial arbitration transforms the economy of a country. For instance, Charles River Associates conducted a study on the economic impact of commercial arbitration on the City of Toronto economy in 2012. The associates used survey and secondary sources to assess and estimate the impact. Accordingly, the Charles River Associates estimated the total impact of arbitration on the economy of the City of Toronto to be \$256.3 million in 2012, growing to \$273.3 million in 2013 and \$240.8 million in 2012, growing to \$256.8 million in 2013 using its survey and secondary sources respectively. In fact, the results are confirmatory and show commercial arbitration does have significant impact on the economy of Toronto city.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Khong Mei-Yan and Sim Chin Yee, how far is the practice of international commercial arbitration independent in Malaysia, at 2. Available at https://www.academia.edu/10349802/Independence_of_International_Commercial_Arbitration_in_Malaysia. Accessed on July, 2015. See Charles River Associates, Arbitration in Toronto 3 (2012).

¹⁰⁹ Ethiopia entered into a number of bilateral investment agreements with different countries. In most of these agreements the government of Ethiopian has consented any investment dispute would arise to be submitted by foreign investors’ choice before any international arbitration for resolution. For instance, the bilateral

investment dispute between the Ministry of Mines of Government of Ethiopia Vs Chinese Petro Trans Gas and Oil Company which was settled before the Geneva based arbitration tribunal—operating under the auspices of International Court of Arbitration of the International Chamber of Commerce also substantiate the allegation.¹¹⁰ However, if the country is able to establish efficient arbitration legal framework and institutionalized commercial arbitration, it would succeed in convincing foreign investors to settle their dispute within the country and thereby generate income as well as save itself from going out and incur more expenditures.

VI. CONCLUSIONS

Ethiopia has enacted the Civil Code, Civil Procedure Code and Chamber of Commerce and Sectoral Association Establishment Proclamation No 341/2003 that urge private individuals to set up institutionalized commercial arbitration in the country. However, these laws do not bring any considerable success in the country so far. There are only AACCSA Arbitration Institute and Bahir Dar University Arbitration Center which provide arbitration service to the large business community. This may be attributed to different factors. The arbitration laws are not comprehensive, and are sketchy and inconsistent with the modern laws and practices of international commercial arbitration. They are capable of neither organizing nor backing commercial arbitration centers to provide efficient service and address the interest of the business community. Likewise, the government does not blank out its old-fashioned system and encourage business bodies to establish institutional commercial arbitration. It does not brush-up or adopt arbitration laws which are comparable to UNCITRAL model law nor ratify the New York Convention, ICCSD and other relevant international commercial arbitration treaties. The judicial organ also intervenes in the arbitration proceedings beyond the modest. Public courts are intervening early in the arbitration proceedings, exercising wider judicial review power on awards and applying firm requirements in recognition and execution of foreign arbitral awards. They do not give the required legitimacy for arbitral tribunals and awards. Other stakeholders like law schools, lawyers, bar associations and business communities do not also show up their effort to set up modern and institutionalized commercial arbitration in the country to the level expected.

As a result, Ethiopia does not have effective, well-run and institutionalized commercial arbitration which receives increased attention in international commerce. Institutionalized commercial arbitration promotes investment, facilitates international commercial transactions, and enhances the profile, reputation and ultimately foster transformation of the country's economy. Thus, it is suggested that the Ethiopian government should extricate itself from the existing conundrum (especially on problems linked to legal frameworks) and cheer up the business bodies to engage in institutional commercial arbitration. The judicial system should also endorse commercial arbitration in the manner that meets international norm. Other

investment agreement between Ethiopia and Great Britain and Northern Ireland under Article 8, Ethiopia and Turkey under Article 7, Ethiopia and Tunisia under Article 7 and Ethiopia and Sweden under Article 8 specify this fact.

¹¹⁰ *Ethiopia Defeats Petro Trans in USD 1.4bln Arbitration*, THE REPORTER, January 19, 2016. In this dispute Petro Trans claims that the Ministry of Mines of Government of Ethiopia unlawfully terminated the Calub and Hilala gas field's appraisal and development agreement as well as four other exploration agreements signed in July 2011. In this claim Petro Trans claimed the Ministry of Mine to reinstate it or to award it a compensation of 1.4 billion dollars. However, the Geneva-based Arbitration Tribunal, after three years of proceeding, unanimously gave total victory to Ethiopia by rejecting Petro Trans' legal claim.

stakeholders should follow the same footsteps and contribute to the development of the system. In that case Ethiopia will have arbitration laws which organize efficient commercial arbitration that address the needs of the Ethiopian business community, and facilitate trade, attract investment and generally contribute to the overall economic development of the country.

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