Judicial Review of Arbitral Awards by Courts as a means of Remedy: a Comparative Analysis of the laws of Ethiopia, the United Kingdom and the United States

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Abstract

Arbitration, which is a private adjudication modality, is one of the oldest means of dispute resolution. When selecting arbitration, parties take into consideration several of its advantages; some of which are confidentiality, analysis of the issue at hand by arbitrators who are experts in certain fields and finality of an award. By selecting arbitration, parties exclude the state's intervention in the settlement of their dispute. It can be argued that the two most important inherent features of arbitration are finality and party autonomy. That said, courts of different jurisdiction might find it upon themselves to interfere in this dispute settlement mechanism, one way or another. States put in place a review and/or appeal mechanism for different policy considerations. However, it can be agreed that the review of courts on arbitration awards should be limited and proportional to the benefit the state is seeking to achieve. It should not, in any way, frustrate the foremost benefit of arbitration, *i.e.* effective settlement of disputes. This short thesis looks into the arbitration laws of Ethiopia, United Kingdom and the United States and provides a comparative analysis on the modalities and justification of courts interference and the extent of their judicial review powers. It analyses, amongst other things, how much interference from national courts is considered reasonable.

Introduction

Arbitration is a modality of settling disputes between parties where arbitrators chosen by the parties make the final consideration. Alan Redfern and Martin Hunter define arbitration as a method of resolving disputes and 'an effective way of obtaining a final and binding decision on a dispute, or series of disputes, without reference to a court of law.'[1] It can also be defined as, 'a process in which the parties agree to refer their disputes to one or more neutral persons (arbitrators) in lieu of the court system for judicial determination with a binding effect.'[2] Arbitration is different from other common forms of dispute resolution because of the binding nature of its outcome, the award[3] which is in most instances enforceable in national courts.[4]

One of the most basic objectives of contemporary legal regimes for international arbitration is to provide for the enforceability of arbitration agreements and arbitral awards.[5] Therefore, parties take into consideration the finality trait of an award when choosing arbitration as a dispute settlement mechanism. As put by Gary Born, absence of extensive appellate review of arbitral awards is one of the salient features of international commercial arbitration. However, that does not mean that judicial review is non-existent in the realm of arbitration.

The two strings pulling on arbitration from two opposing sides are finality on the one hand and review on the other. That is because 'efficient arbitration implicates a tension between the rival goals of finality and fairness. Freeing awards from judicial challenge promotes finality, while

[1] Redfern and Hunter on International Arbitration (6th Ed., 2015), at 1, (Emphasis added).
[2] Stefan M. Kröll, ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW, at. 78, citing Lew, Mistelis and Kröll, 2003, paras 1–5 et seq.
[3] *Id*., Kroll further explains that the award is judgment-like and is thus distinguished from other forms of dispute resolution, at 78.
[4] Margaret L. Moses, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, at 1 (2nd ed., 2012).
[5] Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION, at 69 (2nd ed., 2014).

enhancing fairness calls for some measure of court supervision.'[6] Accordingly, the systems of judicial review developed by countries vary, as each country develops its own balance between finality and review.

There is a substantial debate about the wisdom of permitting judicial review on the merits of the arbitral tribunal's substantive decisions in international arbitrations. It is argued on the one hand that judicial review on merits is preferred to avoid arbitrary awards and on the other hand, it is stated that review on merits defeats the purpose of arbitration. In this context, this thesis looks into the laws of the three jurisdictions, i.e. Ethiopia, United Kingdom and United States, and provides a comparative analysis on the scope and objective of courts' judicial review powers and the modality of their review.

Ethiopia has been chosen as one jurisdiction because of the researcher's familiarity with both the law and the practice in the field. The jurisdictions of the United Kingdom and the United States were chosen because of their development in the area of arbitration and striking difference with the system in Ethiopia. Availability of resources in the English language is also taken into consideration.

The main research problem identified is the leeway created in the Ethiopian legal system where judicial appeal on the merits of arbitral awards, with complete disregard to the express agreement of the parties on the finality of the award, is allowed. This trend, together with the other forms of judicial review adopted by Ethiopian judiciary, will be studied in comparison with the system of judicial review of the United Kingdom and the United States.

[6] IAI Forum, The Review of International Arbitral Awards: iai series on international arbitration n. 6, at 18 (E. Gaillerd ed., 2010).

The means of addressing the research issue identified above will be in reference to primary and secondary sources. As the systems of laws of the jurisdictions covered in the research are of civil and common law systems, statutes, cases and international conventions will be referred.

The comparison will be focused on the scope, pros and cons, and impact of review on merits of awards. In the process of studying of Ethiopia's out of date rules on arbitration an analysis will be provided on how these old rules should be upgraded in the context of principles that have been developed internationally.

This thesis is divided into three Chapters where each chapter is devoted to analyzing one jurisdiction. The first Chapter will introduce its readers to the general jurisprudence of arbitration and will dive into the laws of the United States governing arbitration. In this Chapter, the extent of judicial review by United States courts will be analyzed. The second Chapter will introduce arbitration as applied in the United Kingdom. In this Chapter, the scope of review allowed in the legal system will be analyzed and compared with the United States system. The third and final chapter will explain the laws of Ethiopia and the scope of review implemented by the judiciary. At this juncture, a comparison will be made with the other two legal systems.

It is clear that all issues in relation to the review of arbitral awards cannot be addressed in this thesis. However, I believe that this research will enable readers to grasp the problems and loopholes that exist in the legal system of Ethiopia in comparison with the more developed legal systems. I believe that this thesis will give an insight and be a starting point for more research on the subject matter.

Chapter I - Review of Arbitral Awards in the United States

1. Brief Overview on the Development of Arbitration

As any field, arbitration has gone under different historical developments in different parts of the world. Born explains that 'The origins of international arbitration are sometimes traced, if uncertainly, to ancient mythology … where Greek god's disputes over the ownership of *Corinth* were settled through arbitration.'[7] Coming to recent ages, Won Kidane explains why international arbitration was a preferred mode of settling disputes. It was chosen *inter alia* 'for reasons of expedition and commercial expertise [and] the increasing inadequacy of local courts or other decision-makers to deal with the special jurisdictional and enforcement obstacles presented by foreign or 'international litigation'.[8]

One of the many peculiar traits of arbitration lies in the fact that, save the exceptions, the award passed by an arbitrator/tribunal is final and binding on the parties and is generally not appealable to a court. Another important virtue of arbitration is that it is based on party autonomy and enables parties to control almost all aspects of it. This is 'particularly important in international commercial arbitration because parties do not want to be subject to the jurisdiction of the other party's court system.'[9] Margret Moses explains that the strong policy for enforcing arbitral awards is seen as one of the advantages of arbitration since 'limited ability to set aside an award

[7] Born, *supra* note 5, at 6. For more see Born, at 5 and ff.
[8] Won L. Kidane, THE CULTURE OF INTERNATIONAL ARBITRATION, Oxford University Press, (2017), at 24, citing W. Blackstone, III, Commentaries on the Laws of England (1768).
[9] Moses, *Supra* note 4, at 1.

tends to make the arbitral process more efficient, and reduces the time needed to attain finality.'[10] This is in contrast with litigation where appeal is usually possible.

On the other hand, the state interferes and imposes different restrictions in the conduct of arbitration. The reason behind such interference, as explained by Redfern and Hunter, is due to the fact that no modern state would be willing to 'stand back and allow a system of private justice - depending essentially on the integrity of the arbitrators and the goodwill of the participants - to be the only method of regulating commercial activities' as 'arbitration is too important to be left to private provision.'[11]

An arbitral tribunal, while adjudicating a case, passes several decisions and award(s). Though award is a type of decision, it is different in that an award affects the rights and obligations of the parties to the dispute and is generally capable of being enforced, for instance, under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter 'New York Convention').[12] One important type of award is a final award which is a type of an award that '[s]ettle(s) certain severable parts of the dispute with a binding effect on the parties' and produces a *res judicata* effect between the parties.[13] The reference to 'award(s)' made in this thesis is a reference to such type of award(s).

Once a final award is made by the tribunal, there are only a few options a party dissatisfied with the award can make use of. These options include appealing against the award (if such is allowed under the applicable law or the arbitration rules), challenging the award in the courts where it

[10] Margret Moses, *Party Agreements to Expand Judicial Review of Arbitral Awards*, 20 J.INT'L.ARB, at. 315.
[11] Redfern and Hunter, *supra* note 1, at 3.
[12] Stefan Michael Kroll, Julian D. M. Lew and Loukas A. Mistelis, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, at 628 (Kluwer Law International, 2003). Emphasis added. The writers further expounds that awards can be classified as final, interim, partial, default and award on agreed terms.
[13] Kroll, Lew and Mistelis, *supra* note 12, at 63.

was made or resisting enforcement of the award before a court when the award creditor moves to enforce it.[14] Including an appeal mechanism in the arbitration agreement, though possible, is rare in commercial arbitrations.[15] As such, the struggle between finality and fairness becomes evident since '[r]eview of awards by the courts at the seat of arbitration promotes efficiency in international arbitration by enhancing the trust of the parties in the process.'[16]

On the other hand, as one of the most important traits of arbitration is its consensual nature, it is arguably clear that it should be free, to an extent, from judicial intervention. This is because judicial review in the presence of the parties' clear agreement for the settlement of their disputes in a private forum clashes with the legitimate expectation of the parties.[17] Nevertheless, the finality of the award calls for some degree of judicial scrutiny. This puts parties at a dilemma where on the one hand, they wish for a final award to come out of arbitration proceedings and on the other, seek an award that is *not wrong* in assessing the facts and the law.

2. Jurisprudence of Arbitration in the United States

Arbitration was practiced in the now United States as early as before European settlers arrived, though it was not until the beginning of the 20th century that the proper legal framework was put in place.[18] Born notes that arbitration was used in commercial disputes in the American colonies in the 17th and 18th century where the flexibility, practicality and speed of the process were

[14] *Id*. at 663.
[15] *Id*. at 664.
[16] *Id*. at 664-65.
[17] Hossein Abedian, *Judicial Review of Arbitral Awards in International Arbitration –A Case for an Efficient System of Judicial Review*, (Kluwer Law International 2011) at 533. Emphasis added.
[18] Emmalyn U. Ramirez, *Judicial Review of Arbitral Awards: England, United States, and Philippine Law Compared*, 54 ATENEO L.J. 406 (2009) at 423.

understood to fit *their* condition.[19] However, arbitration agreements and awards were enforced through 'non-legal or extra-legal commercial professional and other mechanisms.'[20]

After the American Revolution, the frequency of using arbitration as a dispute settlement mechanism did not diminish; to the contrary, it grew.[21] It was in 1920 that the modern arbitration law in the State of New York was enacted. This law allowed parties to agree to submit future disputes to arbitration and barred courts from entertaining the cases until after the requirement to arbitrate was complied with.[22]

Coming to international arbitration, the United States prior to the 1970s 'enforced arbitration largely based on the concept of comity, since it neither became a party to the 1923 Genera Protocol on Arbitration nor to the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.'[23] The United States Senate ratified the New York Convention in 1970 and it took effect in 1972.[24] In 1972, the Federal Arbitration Act (hereinafter 'FAA') that is Title 9 of the United State Code (hereinafter U.S.C) implemented the New York Convention and came into force. Section 201 of the U.S.C states that the 'The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with chapter [2].'[25]

[19] Gary Born, INTERNATIONAL ARBITRATION: CASES AND MATERIALS (2nd edition) at 21.
[20] *Id.* at 22.
[21] *Id.* at 21.
[22] Ramirez, *supra* note 18, at 423.
[23] *Id.* at 424.
[24] *Id.*
[25] 9 U.S.C § 201(Emphasis added).

Chapter 1 of the FAA which was enacted in 1925 governs interstate arbitration; the Revised Uniform Arbitration Act governs intrastate arbitration whereas the New York Convention, as implemented by Chapter 2 of the FAA governs international commercial arbitration.[26]

§ 202 of the U.S.C. states that 'An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention.'[27] As such, a dispute falls under the ambit of the New York Convention if it arises out of a legal relationship that is regarded *commercial*.[28]

When acceding to the New York Convention, the United States made two reservations as per Article I(3) of the said Convention. This provision presents an option for States to accept its terms with two types of reservations. The first reservation allows states to apply the New York Convention on the basis of *reciprocity*, 'so that it need only recognize awards made in another State which has ratified the Convention.'[29] The second reservation, commonly referred to as '*commercial'* reservation[30] permits signatory states to apply the Convention only to differences arising of legal relationships … which are considered as commercial under the national law of

[26] Ramirez, *supra* note 18, at 425.
[27] U.S. Code, *Supra* note 25. It further reads that an agreement or an award that arises of a relationship that is entirely between citizens of the United States will not fall under the Convention unless the relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign sates.
[28] Georgios I. Zekos, *Courts intervention in Commercial and Maritime Arbitration under U.S. Law*, J.INT'L.ARB, at 10, (1997). (Emphasis added). However, if an agreement involves only United State Citizens, it might still fall under the ambit of the Convention if there is a reasonable relation with a foreign state.
[29] Joseph T. Mclaughlin and Laurie Genevro, *Enforcement of Arbitral Awards under the New York Convention - Practice in U.S. Courts*, 3 Int'l Tax & Bus. Law, at 252 (1986).
[30] RECIPROCITY AND COMMERCIALITY RESERVATIONS UNDER 1958 NEW YORK CONVENTION, (Feb. 8, 2018), https://gccarbitration.wordpress.com/2012/08/20/reciprocity-and-commerciality-reservations-under-1958-new-york-convention/.

the State making such declaration.'[31] Parties are free to have their disputes arbitrated on the basis of their agreement and neither the FAA nor the United States Supreme Court has defined what constitutes an agreement to arbitrate.[32]

3. Ground and Scope of Review of Arbitral Awards in the United States

As briefly stated in the previous sub-section, the international arbitration law in the United States is governed, in addition to the reservations the United States has made when it adopted the New York Convention, by Chapter 2 of the FAA. Additionally, Article III of the New York Convention requires states to 'recognize arbitral awards as binding' and to enforce them in accordance with the State's rules of procedure and under the conditions put in the Convention. As such, 'a state may not impose "more onerous conditions or higher fees or charges" for the recognition or enforcement of awards under the New York Convention than it would impose for a domestic award'.[33]

The Convention under Article V enumerates seven grounds on which recognition and enforcement may be refused. Correspondingly, § 207 of the U.S.C. states that a court to whom an application for confirmation of an arbitral award is made 'shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in [the New York Convention].'[34] Therefore, it is clear that the grounds for refusing enforcement of an award under Article V of the New York Convention are considered to be exhaustive under U.S. law.[35] As such it can be concluded that '[t]he provisions of the New York Convention are generally consistent with U.S. policy regarding arbitration under both federal and

[31] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, Article I (3).
[32] Zekos, *Supra* note 28, at 101.
[33] Mclaughlin and Genevro, *supra* note 29, at 252.
[34] U.S. Code, *Supra* note 25, § 207.
[35] Mclaughlin and Genevro, *supra* note 29, at 253.

state law. Courts have frequently noted that the result of a particular case would be the same whether the New York convention or the federal arbitration act were applied. Under both regimes, the tendency of the courts is to enforce the arbitral award.'[36]

As stated above, the United States has modified its accession to the New York Convention by making use of the options put under Article I(3). However, U.S. courts have construed these reservations narrowly. Joseph Mclaughlin and Laurie Genevro exemplify the narrow interpretation adopted by U.S. courts by citing the case between *Fertilizer Corp. of India v. IDI Management, Inc* which involved a Fertilizer Corp. of India, a wholly government owned corporation which concluded a contract with IDI Management, Inc. a U.S. corporation for the construction of fertilizer plant in Bombay. A dispute arose between the parties which was settled by arbitration. The award was made in favor of Fertilizer Corp. of India who thereafter moved to enforce it in the U.S. Federal Courts. IDI Management, Inc. on the other hand 'challenged the enforcement by claiming, among other grounds, an absence of reciprocity.'[37] IDI Management, Inc. claimed that although India was a party to the New York Convention, it had used different maneuvers to avoid enforcement of awards that were adverse to Indian parties. However, the court rejected IDI Management, Inc.'s argument and held that the reciprocity requirement was met because India was a signatory of the Convention.[38]

A United States court's authority to vacate an award, where it is made in accordance with the FAA, is limited and read narrowly.[39] The United States Congress, through the FAA, has

[36] Mclaughlin and Genevro, *supra* note 29, at 254.
[37] Mclaughlin and Genevro, *supra* note 29, 256.
[38] *Id*.
[39] Zekos, *Supra* note 28, at 112.

expressed its reluctance to upset arbitrator's awards by only allowing narrow grounds of review.[40]

The New York Convention provides different grounds that can be used to refuse enforcement of arbitral awards, one of which is the defense of public policy. Though the inclusion of the 'public policy' defense to enforcement or an arbitral award might create the assumption that there is a 'loophole' in the pro-enforcement attitude of the New York Convention, U.S. courts will accept this defense only where enforcement would violate most basic notions of morality and justice.[41]

One such example *Parsons & Whittermore Overseas Co. v. Societe General de I'Industrie du Papier (Rakata)*[42] where the dispute involved an American company (the Claimant, *Parsons & Whittermore Overseas Co*.) and an Egyptian corporation (the Respondent, *Societe General de I'Industrie du Papier*) that concluded an agreement for the construction, starting up and management of a paperboard mill in Egypt. Because of the Six Day War that broke out at that time Respondent's crew left Egypt abruptly. Thereafter, the Egyptian government broke ties with American government and expelled its employees leading the Respondent to notify its Egyptian counterpart that it was facing force majeure and could no longer perform. However, the Claimant disagreed and sought damage for breach of the contract. Overseas then invoked the arbitration clause and an International Chamber of Commerce ('ICC') tribunal instituted the case and passed a preliminary award. The Tribunal passed a final award and stated that Overseas was liable for damages of breach of the contract. Plaintiff appealed from an order of a district court which granted the defendant a summary judgment confirming a foreign arbitral award.

[40] Zekos, *Supra* note 28, at 112.
[41] Mclaughlin and Genevro, *supra* note 29, 258.
[42] *Id*.

Overseas appealed and argued that the enforcement of the award would violate U.S. public policy. The Court of Appeals however rejected its argument and held that the defense of public policy should be interpreted narrowly and be used only where enforcement would violate the forum state's most basic notions of morality and justice and as such should not undermine the New York Convention's applicability.[43] It is clear from this case that U.S. courts give effect to Article V (2) (b) of the New York Convention only in exceptional cases.

As 'there are both federal and state court decisions enforcing arbitral awards even where no convention or bilateral treaty applies' it is clear that U.S. courts seem to honor and enforce foreign arbitral awards even in the absence of any specific commitment.[44] With this, writers predict that U.S. courts will continue favoring enforcing foreign arbitral awards and when in doubt about the interpretation of arbitration provision, they will favor arbitration and enforcement of awards.[45]

3.1 Manifest Disregard of the Law

Even though the extents of judicial review states decide to adopt vary, some form of judicial review is never entirely absent from the law.[46] In the United States, though there was consensus on the fact that courts should have some role in reviewing awards for procedural improprieties, disagreement arose when it came to the scope of judicial review for errors of law committed by

[43] The summary of the case can be found in INTERNATIONAL COMMERCIAL ARBITRATION, A TRANSNATIONAL PRESPECTIVE, Tibor Varady, John J. Barcelo III, Stefan Kroll & Arthur T. von Mehren, at 1081 (6th ed., 2015).
[44] Mclaughlin and Genevro, *supra* note 29, at 271. Mclaughlin and Genervo further explain that U.S. courts will enforce a foreign arbitral award if it is rendered in compliance with the law of the State awarded provided that the arbitral tribunal has personal jurisdiction over the challenging party and provide notice of the proceeding and an opportunity to be heard.
[45] *Id*., at 272.
[46] Jean-Paul Beraudo, *Egregious Error of Law as Grounds for Setting Aside an Arbitral Award,* J.INT'L.ARB, at 352 (2006).

arbitrators.[47] Some commentators argued that since arbitration is a substitute for litigation, courts should exercise some review power over substantive errors of law while others argued that the policy of efficiency in arbitration precludes courts from meddling with arbitral awards.

In the midst of this came a United States Supreme Court decision in 1953 in the case of *Wilko v. Swan.*[48] The doctrine of 'manifest disregard of the law' first appeared in a this decision following the enactment of the FAA as the court struggled to reconcile the FAA's pro-arbitration policy with federal statutory schemes apparently favoring dispute resolution in a judicial forum.[49]

This case involved the question of whether federal securities fraud claims brought under the Securities Act of 1933 could be settled by arbitration. The court refused to allow arbitration citing that public policy forbade arbitrators from deciding such claims.[50] More so, the Court in its dicta stated that 'the interpretations of the law by arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error'.[51] As per this opinion of the court, arbitral awards could not be vacated by courts for errors of law committed by arbitrators unless they showed a 'manifest disregard'.[52] Following this, courts started adopting the 'manifest disregard of law' as a narrow standard of review for errors of law in arbitral awards.[53]

[47] Kenneth R. Davis, *The End of An Error: Replacing "Manifest Disregard" With A New Framework For Reviewing Arbitration Awards*, 60 Cleveland L.R, at 88-89 (2012).
[48] *Id*., at 89.
[49] Rutledge, *On the Importance of Institutions: Review of Arbitral Awards for legal Errors,* J.INT'L.ARB, at 85 (2002).
[50] Davis, *Supra* note 47, at 89.
[51] Wilko v. Swan, 346 U.S. at 436 (1953).
[52] Davis, *Supra* note 47, at 89.
[53] *Id*.

Born explains that the domestic law of the U.S. has historically permitted annulment of arbitral awards based on certain substantive errors made by arbitrators in their decision.[54]

It should be noted that Article V of the New York Convention does not mandate courts of contracting states to refuse enforcing arbitral awards due to a manifest disregard of law; whatever the components of this standard might be. Despite the absence of a clear mandate 'both courts and parties in the United States have developed various mechanisms to expand the grounds for judicial review of arbitral awards beyond those explicitly provided for in the FAA.'[55]

The manifest disregard of law standard is applied by courts not for simple legal errors but under the fulfillment of certain elements.[56] For instance, the Second Circuit Court, in *T.Co Metals LLC v. Dempsey Pipe and Supply, Inc*., cited prior decisions establishing that the manifest disregard of the law standard is a 'heavy burden' to prove on a party seeking to vacate an arbitration award.[57] The Court added that the standard will exist only 'in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator [] is apparent' and it is interpreted to mean more than just an error or misunderstanding of the law.[58] This court recognized three components of the standard,[59] which are explained hereafter. First, the law that was allegedly ignored should be clear and explicitly applicable to the matter before the arbitration. Second, it should be established, in fact, that the law was improperly applied, leading to an erroneous outcome. Lastly, it should be established that the arbitrator knew the existence and applicability of the law but intentionally disregarded it.

[54] Born, *Supra* note 19, at 1165.
[55] Peter B. Rutledge, *On the Importance of Institutions: Review of Arbitral Awards for legal Errors,* Journal of International Arbitration (2002) at 85.
[56] Davis, *Supra* note 47, at 95.
[57] T.Co Metals LLC v. Dempsey Pipe and Supply, Inc., 592 F.3d 329 (2nd Cir. 2010) at 339.
[58] *Id*.
[59] *Id*.

Additionally, the parties might take it upon themselves and provide a provision in their contract empowering a court to modify or correct an award in the presence of legal error. As a result of such clauses, an increasing number of appellate courts began to consider whether parties may legally expand the grounds upon which courts shall review an arbitral award.[60] However a recent U.S. Supreme Court judgment in the case between *Hall Street Associates, L.L.C. v. Mattel, Inc.* has established that the FAA does not permit parties to contractually expand the grounds for vacating or modifying arbitral award[61] as the FAA is based upon a strong policy favoring arbitration and the finality of arbitration awards.

Hall Street brought into question whether the manifest disregard standard was abolished by implication.[62] The Supreme Court did not settle this issue and the confusion on this matter has led to several conflicting decisions where some courts held that manifest disregard survived the Hal Street, while others held that Hall Street has removed the manifest disregard standard.[63]

The case of Hall Street did not consider whether courts, as opposed to parties, could create different standards for vacating arbitration awards. The Court's clear admonishment, however, that the grounds set forth in the FAA are the exclusive bases for vacating arbitration awards would seem to leave no room for additional judicially created bases for vacating arbitration awards.[64]

[60] Rutledge, *Supra* note 49, 86-87.
[61] Gary Born, Rachael Kent and Leila Abolfazli, Manifst Disregard After Hall Street, (Apr. 1, 2018) http://arbitrationblog.kluwerarbitration.com/2009/03/09/manifest-disregard-after-hall-street/.
[62] Davis, *Supra* note 47.
[63] *Id.*
[64] Roland C. Goss, Conflict Management, Vol. 12, Issue 3, The Manifest Discard of Law Doctrine: Did it survive Hall Street Associates? (Feb. 8 2018) http://eds.b.ebscohost.com/eds/detail/detail?vid=2&sid=1f045353-56d4-43f1-911c-036a9162206b%40sessionmgr103&bdata=JnNpdGU9ZWRzLWxpdmU%3d#AN=46760232&db=a9h.

4. Conclusion

Even though it is agreeable that there should be judicial intervention in some aspects of arbitration, due regard should be paid to ensure that the arbitration process is not frustrated. Judicial review due to procedural irregularities is reasonable since 'no one could seriously quarrel with empowering courts to vacate awards issued by corrupt arbitrators or arbitrators who denied parties fair hearings.'[65] In the presence of such injustice, it is not reasonable and expected of a judicial system to sit idle, it should definitely intervene. This is exactly what the FAA has chosen to do.[66] However, when it comes to reviewing arbitral awards on the basis of error of law, a high threshold has been created within the principle of 'manifest disregard of law' doctrine.

The two prominent decisions, *Wilko v. Swan* and *Hall Street* show what is and is not tolerated by the judiciary of the United States. What is clear is that parties cannot by agreement expand the grounds for review by courts; however, whether courts could expand the grounds of review is debatable. Irrespective of the uncertainties, the United States' system clearly favors finality of awards and is willing to allow review or annulment of awards only in exceptional cases.

[65] Davis, *Supra* note 47, at 89.
[66] *See* 9 U.S. Code, *Supra* note 25, at § 10.

CHAPTER II - Judicial Review in the United Kingdom

1. Jurisprudence of Arbitration in the United Kingdom

Commercial arbitration came into existence in the 12th century in England in the mercantile activity of trade fairs where different trading communities chose special tribunals to solve their disputes.[67] Judicial intervention to arbitration appeared in the 18th century and by the end of the century, 'appellate review for mistake of law became completely established'.[68] In the 19th century, as trade disputes increased in number, 'legal institutions of commerce proliferated' and with this commercial arbitration in England was made subject to the Arbitration Act of 1889.[69]

The United Kingdom Arbitration Act 1950 consolidated the previous Acts 1889 and 1934.[70] In 1977, almost two decades following the adoption of the New York Convention, the United Kingdom acceded to it.[71] As Emmalyn Ramirez explains, 'The New York Convention led to the enactment of Arbitration Act 1975, which had a profound effect on English arbitration laws'.[72]

By 1985, the United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on International Commercial Arbitration (hereinafter 'Model Law'). The enactment of the Model Law had influenced the development of the English arbitration law; it was at that time that the Departmental Advisory Committee (hereinafter '**DAC'**) was established to consider the Model Law and to examine the operation of the Arbitration Acts 1950-1979 in light thereof.[73]

[67] Ramirez, *Supra* note 18, at 407.
[68] *Id*., at 407.
[69] *Id*.
[70] *Id*., at 409.
[71] *Id*.
[72] *Id*.
[73] *Id*., at 410.

Two years after the DAC's establishment, it forwarded a recommendation stating, inter alia, that 'the Model Law should not be adopted in England' arguing that there should be a new and improved Arbitration Act for England, Wales and Northern Ireland.[74] The DAC Report prompted the parliamentary drafting of a new Arbitration Bill which became law in 1996.[75] Additionally, the DAC passed on several recommendations such as amending the English arbitration law in certain respects to make it clearer and less ambiguous.[76] 'Since English courts use the DAC Report as a tool in interpreting the English Arbitration Act 1996 (hereinafter 'Arbitration Act'), I will refer to the Report in several parts of this Chapter to refer to the intention of the drafters of the Arbitration Act.

2. The United Kingdom Arbitration Act 1996[77]

Part I of the Arbitration Act deals with substantive matters and details the rules of arbitrations conducted pursuant to an arbitration agreement while Part II governs domestic arbitration agreements. Part III on the other hand provides rules that are applicable to 'New York Convention Awards'. These awards are defined as awards made in the territory of a state, other that the United Kingdom, that is a party to the New York Convention. As such, Part III is put in place to re-enact the substance of the provisions relating to the New York Convention and the Geneva Convention. Section 101 provides the principle that a New York Convention Award will be recognized as binding between the parties in any legal proceedings in England and Wales or

[74] Departmental Advisory Committee on Arbitration Law, 1996 Report on the Arbitration Bill, February 1996, Arbitration International Volume 13, Number 3, para. 1, at 276.
[75] Sara Lembo, *The 1996 UK Arbitration Act and the UNCITRAL Model Law, A Contemporary Analysis, Universista Luiss Guido Carli, Faculty of Law*, at 47.
[76] Ramirez, *Supra* note 18, at 410.
[77] The Arbitration Act 1996 is applicable to parts of the United Kingdom, *i.e.* England, Wales and Northern Ireland. The rules governing arbitrations in Scotland are found in the Scottish Arbitration Act of 2010. It should be noted that, in this thesis, a reference to the United Kingdom Arbitration Act or a United Kingdom Court is a reference to the Arbitration Act 1996, and the courts of England, Wales and Northern Ireland. A reference to the United Kingdom is therefore a reference to parts of the United Kingdom to which the Arbitration Act applies.

Northern Ireland. Where a party produces a duly authenticated original or duly certified award together with the original or duly certified copy of the arbitration agreement, that party can seek enforcement.

On the other hand, Section 103 of the Arbitration Act lists the grounds upon which a United Kingdom court can rely to refuse recognition or enforcement of a foreign arbitral award. This section reiterates the grounds listed under Article V of the New York Convention. Lastly, Part IV entitled 'General Provisions' contains miscellaneous provisions.

3. General Principles of the Arbitration Act 1996

Section 1 of Part I of the Arbitration Act lists the general principles on which it is based and adds that the provisions of Part I are to be construed according to three principles.[78] The first principle states that arbitration is a mechanism of obtaining a fair resolution of disputes by an impartial tribunal which should work to avoid unnecessary delay or expense.[79] The second principle reaffirms the parties' freedom to agree on the modality of solving their disputes, but still maintains that several safeguards might be put in place on such freedom where found to be necessary in the interest of the public.[80] Thirdly, and most importantly to the subject matter covered by this short thesis, the principle that courts should not intervene except as expressly provided in the Arbitration Act is put in place.[81]

Section 2 sets the scope of application of the Arbitration Act and states that Part I shall be applicable to arbitration proceedings where the seat is in England and Wales or Northern Ireland. However, in certain circumstances, the Arbitration Act will still be applicable despite the seat of

[78] Arbitration Act, 1996, c. 23, §1.
[79] *Id*., §1(a).
[80] *Id*., §1(b).
[81] *Id*., §1(c).

the arbitration being outside England and Wales or Northern Ireland or where a seat has not been designated or determined.[82]

It is important to note that certain provisions of the Arbitration Act are mandatory and cannot be derogated from.[83] Where a provision is not listed under Schedule 1 of the Arbitration Act as a mandatory provision, it becomes a non-mandatory provision and parties are allowed to agree on those subject matters. However, the non-mandatory rules will apply as set back rules in the absence of specific agreement of the parties.[84] Parties are also empowered to agree on the application of institutional rules or any other means by which a matter may be decided.[85]

Section 52 and the following of the Arbitration Act detail different aspects of an arbitration award, from the form an award can be made in - to correction and effect of an award. Importantly, Section 58 states that an award made by the tribunal is final and binding by the parties, unless otherwise agreed by the parties. Additionally Section 58(2) puts the option for a party to challenge the award 'by any available arbitral process of appeal or review or in accordance with the provisions of Part I.'[86] This Chapter will focus on the judicial review mechanism of appeal put in Section 69 of the Arbitration Act.

4. Courts' Involvement in Arbitration under the Arbitration Act

In the Arbitration Act, national courts are empowered to play different roles in arbitration proceedings. The first two instances where courts come into picture are during challenge and enforcement of an award. Additionally, national courts intersect with arbitration during appeal on

[82] *Id*., § 2 (1) - (2). For more see §2 (3) - (5).
[83] *Id*., § 4(1) states the principle and refers to Schedule 1 of the Arbitration Act where the mandatory provisions are listed.
[84] *Id*., § 4(2).
[85] *Id*., § 4(2).
[86] *Id*., §58 (2), Emphasis added.

point of law.[87] This Section of the thesis will focus on the two instances where national courts are involved in arbitration proceedings. However, the point of appeal to an arbitration award will be studied in great detail under Section 5 below.

4.1 Challenge to Tribunal's Substantive Jurisdiction

Section 66 of the Arbitration Act promulgates the principle that if an award is made pursuant to an arbitration agreement and where leave to enforce is given by the court, the award can be enforced in the same manner as a judgment or order of the court to the same effect.[88] The leave to enforce an award will not be given where the party against whom the enforcement is sought 'shows to the court that the tribunal lacked substantive jurisdiction to make the award'.[89] Since Section 66 is found in Part I of the Arbitration Act which is applicable to domestic awards, the provision will not have an effect as regards recognition or enforcement of an award under the New York Convention.[90]

The second instance where courts are involved is where an application for a challenge of an award is made by a party. The challenge, based on lack of substantive jurisdiction, can be made either on the award of the tribunal as regards its substantive jurisdiction or on the award on merits.[91] However, Section 67(2) makes it clear that the tribunal may continue with the arbitration and might even make a further award irrespective of a challenge brought to a court as regards its jurisdiction. The court to which such a challenge is brought may confirm, vary or set aside the award in whole or in part.[92]

[87] Ramirez, *Supra* note 18, at 411.
[88] Arbitration Act, *Supra* note 78, §66 (1).
[89] *Id*., at § 66(3).
[90] *Id*., at § 66(4).
[91] *Id*., at § 67 (1).
[92] *Id*., at § 67(3).

4.2 Challenge based on Serious Irregularity

Another instance where challenge to an award may be entertained by a court is where a party to an arbitration challenges the award claiming serious irregularity. Section 68 of the Arbitration Act states that a party may apply to a court citing serious irregularities affecting the tribunal, the proceedings or the award.[93] A list of what serious irregularities that can consider to have caused or will cause substantial injustice are provided under Section 68(2). Such irregularities[94] include but are not limited to instances where the tribunal exceeded its power; failed to conduct the proceedings in accordance with the procedure agreed by the parties; failed to deal with all the issues presented to it and issued the award in a manner that is fraudulent or contrary to public policy. Where the court holds that serious irregularity does in fact exist, it may take three actions. The first option is remitting the whole or part of the award back to the tribunal for its reconsideration, the second option is setting aside the award in whole or in part and the last option is declaring the award to be of no effect, in whole or in part.[95]

The third instance where national courts involve in arbitration is during appeal of an award. In order to better understand the complex sets of rules included under Section 69, I believe that it is important to look into the historical development of the principle of appeal in English Arbitration law and specifically its inclusion in the Arbitration Act.

[93] *Id*., at § 68(1).
[94] *Id*, at § 68(2).
[95] Id., at § 68(3).

5. Judicial Review under Section 69

'After the 1979 legislation came into force (…) several foreign commentators (…) viewed the English courts with skepticism.'[96] The Arbitration Act 1979 abolished several procedures that were put forward by Arbitration Act 1975 which made way for court intervention in arbitration.[97] However, there was still concern expressed on whether courts would find a new loop hole and be involved in arbitration despite the fact that the 'front door' was bolted.[98] Taner Dedezade explains that the judiciary at that time was supportive of the ideology behind the notion of modern international commercial arbitration that is based on party autonomy, reduced court involvement, speed and finality in arbitration of disputes.[99]

As briefly stated in the introduction of this Chapter, the DAC took the role of producing a report, which formed the basis of the Arbitration Act.[100] The DAC received several responses on the inclusion or abolition of the right of appeal on substantive issues in arbitration.[101] The responses that supported abolishing the right of appeal were based on the proposition that by agreeing to arbitration instead of litigation, the parties were choosing to abide by the decision of the tribunal and not by a decision of a court.[102]

Even though abolishing the possibility of appeal was being adopted in many countries, especially after the adoption of the Model Law, the DAC chose to retain the possibility of appeal. It reasoned that with the safeguards it was ready to introduce, maintaining a limited right of appeal

[96] Taner Dedezade, *Are You in? Or Are You Out? An Analysis of Section 69 of the English Arbitration Act 1996: Appeals on a Question of Law*, Int.A.L.R., at 57 (2006).
[97] *Id*., at 57. The procedures found Arbitration Act 1975 included the 'special case procedure' and the 'error on the face of the award procedure' both of which were severely abused.
[98] *Id*.
[99] *Id*.
[100] Id., at 58. Dedezade further puts that the DAC report is still referred to as an indication of the intention behind the legislators of the Arbitration Act.
[101] DAC Report, *Supra* note 74, para. 284, at 414.
[102] *Id*.

would be appropriate even if the parties have chosen to arbitrate rather than litigate.[103] The DAC noted that where parties agree to arbitrate, they are agreeing that the law will be properly applied by the tribunal and where the tribunal fails to properly apply the law it would cause a result not contemplated by the arbitration agreement.

It was for these considerations that the DAC proposed retaining a limited right to appeal. It was also argued that maintaining the right to appeal would 'enable(s) courts to allow precedents to develop in the area of commercial law, particularly on matters of public importance.'[104]

However, this argument would hold water if 'English courts are applying questions of domestic law [as] it is not so persuasive when the English courts are required to interpret international law.'[105] Additionally, where an arbitrator is trained in law, courts would not necessarily be better positioned to correctly apply the law.

In any event, Dedezade opines that the main reason behind the DAC's adoption of the right to appeal was the rationale that many non-lawyers were appointed as arbitrators. These arbitrators might incorrectly apply the law and this called for maintaining an option where courts would provide remedies for such misapplication. The DAC proposed a 'limited right of appeal with safeguards' to create a scenario where the right to appeal is provided while also taking into consideration the fact that the parties have agreed to settle their dispute through arbitration as opposed to approaching courts.[106]

[103] DAC Report, *supra* note 74, para. 285, at 414.
[104] Dedezade, *supra* note 96, at 59.
[105] *Id*., at 58.
[106] DAC Report, *supra* note 74, at para. 286, at 415.

It is important to keep in mind that Section 69 of the Arbitration Act will be applicable where the seat of the arbitration is in England and Wales or Northern Ireland and where the substantive law applicable to the dispute is English law.

Section 69 of the Arbitration Act allows parties to agree and maintain an option to appeal a question of law arising out of an award made in the arbitration proceedings. Parties are also free to exclude the possibility of appeal in several ways. The first and obvious option is drafting an agreement with an express provision excluding appeal. Parties can also agree to dispense with reasons for the tribunal's award.[107] If the parties have agreed that no reason should be given by the tribunal for its decision, then there will be no question of law to be looked into and therefore 'no error of law can be identified.'[108] A third option for parties is adopting an institutional rule that makes appeal impossible. An example can be the 2017 International Chamber of Commerce (ICC) Arbitration Rules or the London Court of International Arbitration (LCIA) Rules.[109]

Yet another option to avoid appeal exists where the parties have not chosen a system of law to be applied to the dispute, in which case the tribunal is authorized to decide the dispute *ex aequo et bono* or as *amiable compositeur*.[110] Section 46 of the Arbitration Act states that the tribunal is obligated to decide the dispute in accordance with the law chosen by the parties, and where the parties so agree, in accordance with other consideration. In cases where no choice is made by the parties and where the parties agreed to have the dispute settled using 'other considerations' as put under Section 46, then 'no question of law can arise'.[111]

[107] Arbitration Act, *supra* note 78, at § 69(1).
[108] Dedezade, *supra* note 96, at 59.
[109] International Chamber of Commerce Arbitration Rules, Article 35(6) and London Court of International Arbitration Rules, Article 26.8.
[110] Dedezade, *supra* note 96 at 62.
[111] *Id*.

Dedezade explains that parties who 'opt for arbitration as a means to resolve their dispute(s) will usually have as their objective: finality…' avoiding several tiers of appeals that the judicial system provides in addition to spending more time and money for the resolution of the dispute. On the other hand, parties would opt to include an option of appeal where 'they are concerned about the arbitrator's ability to interpret the law properly.'[112] This is wide-spread in construction disputes where arbitrators are non-lawyers.[113] In cases where the parties have not clearly opted in or out of the option, the court is given the power to provide a leave to appeal upon being satisfied of certain grounds.[114] Therefore, 'parties are encouraged to exercise that choice as [failure to choose] will leave them at the mercy of the courts…'[115]

The subject matter capable of being appealed under Section 69, i.e. 'question of law', is defined under Section 82 as 'a question of the law of England and Wales for a court in England and Wales and a question of Northern Ireland for a court in Northern Ireland.'[116] Therefore, appeal on 'question of law' will be lodged only as regards English law. The DAC explained that there would be no question of appeal in respect of a matter of foreign law because English law treats foreign law as question of fact.[117]

Dedezade explains that Section 82 had been up for interpretation by different courts and 'the policy of the courts in [those] cases seems to be to delimit the questions of law which can be

[112] Dedezade, *supra* note 96 at 56.
[113] *Id*.
[114] Arbitration Act, *supra* note 78, at § 69(3).
[115] Dedezade, *supra* note 96, at 56, emphasis added.
[116] Arbitration Act, *supra* note 78, at §82.
[117] DAC Report, *supra* note 74, para. 387, at 431-432.

appealed to questions of English law (…) cases support the preposition that awards based on foreign applicable law are likely to be excluded'.[118]

Section 69 puts two major avenues for appeal on point of law. The first is the agreement of the parties and the second is through an application for leave of the court. These two possibilities will be discussed in detail in the following sub-sections.

5.1 Appeal on Question of Law by Agreement of the Parties

Section 69(2)(a) allows parties to make an agreement to allow appeal on tribunals' award. Whether this agreement is supposed to be made in the actual arbitration agreement or later in time is not dealt with in the Arbitration Act. It should be immaterial when the parties made an agreement, be it at the time of conclusion of the arbitration agreement or even after the rendition of the award since Section 69 is silent as to when an agreement on allowing appeal should be made.

However, this does not mean that there are no requirements that must be fulfilled by a party to successfully submit an application of appeal. Section 70, which governs applications of appeal made under Section 69, puts forward certain requirements. One such requirement is the obligation on the appellant to first exhaust the arbitral process of appeal or review, if available.[119] Additionally an appellant has to exhaust any available recourse to correct the award or give additional award.[120] Section 57 of the Arbitration Act allows parties to empower the tribunal to correct or make additional award. In the absence of such agreement, the tribunal is empowered, on its own motion or on the application of a party, to correct an award with the aim of correcting

[118] Dedezade, *supra* note 96, at 62. The cases of Egmatra AG v Marco Trading Corp., Sanghi Polyesters Ltd, Hussman (Europe) Ltd v Al Ameen Development & Trade Co., Reliance Industries Ltd v Enron Oil are some of the instances where the courts understood Section 82 as limiting the appealable question to questions of English law.
[119] Arbitration Act, *supra* note 78, at §70(2)(a).
[120] *Id*., at §70(2)(b).

clerical errors or issuing additional award on a claim that was presented to it but was not dealt with in the final award.[121] Additionally, the appellant has to lodge the application within 28 days following the date of the award or where there had been arbitral process of appeal or review, the date when such appellant was notified of the results.[122] Therefore, where the parties have expressly agreed for the application of Section 69, the agreement shall be given effect.

5.2 Appeal on Question of Law by leave of Court

Where there is no agreement between the parties on the possibility of appealing an arbitral award, a party can still appeal after securing a court's leave. The court, i.e. the High Court or county court in relation to England and Wales or Northern Ireland, before giving leave to a party, has to satisfy itself of four different and important considerations.[123] Firstly, the court should be satisfied that the determination of the question of law would substantially affect the rights of the parties.[124] A question of law will be said to substantially affect the rights of one or more of the parties if it affects the entire outcome of the arbitration and not just a small part of the award.[125]

English case law demonstrates that this criterion allows courts to use their discretion when deciding whether permission to appeal must be given taking into consideration what the parties wished to attain with the arbitration agreement.[126] As such, where it is clear that the parties wished for a quick arbitration the courts will not be inclined to allow appeal.[127]

[121] *Id*., at §57(3)(b).
[122] *Id*., at §70 (3).
[123] *Id*., at § 69(3).
[124] *Id.*, at §69(3)(a).
[125] Dedezade, *supra* note 96, at 63, citing President of India v. Jadranska Slobodna Plovidba (1992).
[126] Devrim Deniz Celik, *Judicial Review under the UK and US Arbitration Acts*, IALS Student Law Review, Vol. 1, Issue 1, at 22(2013),
[127] Id.

Second, the question brought on appeal should be an issue that was presented to the tribunal's determination. This criterion limits the questions of law that will be appealable by precluding parties from seeking permission to appeal on a point not raised in the arbitration.[128]

Third, the court should be satisfied, on the bases of the facts included in the award, that the decision of the tribunal is obviously wrong or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt. As regards this requirement, 'it was highlighted that the test is not based on the probable conclusion of a court but on the expected ruling of a reasonable arbitrator.'[129]

The House of Lords in the case between *Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd*. ('*The Nema*' case) noted that to justify an interference with an arbitrator's award, it must be shown '(i) that the arbitrator misdirected himself in law or (ii) that the decision was such that no reasonable arbitrator could reach.'[130] In *The Nema* case, it was further stated that leave to appeal should not be given 'unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong (…) [as] the parties should be left to accept, for better or for worse, the decision of the tribunal they had chosen to decide the matter in the first instance.[131],

In *Northern Elevator Manufacturing v United Engineers (Singapore)*, the proposition was put forward that for the purposes of Section 69 of the Arbitration Act, an question of law arises where the arbitrator fails to identify the correct legal principle to be applied to the facts, but a question of law does not exist where the arbitrator identifies the correct legal principles and

[128] Dedezade, *supra* note 96, at 63.
[129] Celik, *supra* note 126, at 21, citing London Underground Ltd. v. City Link Telecommunications Ltd (2007).
[130] Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd, [1982], AC at 7.
[131] Id., at 7-8.

applies it wrongfully.[132] The Judge wrote that 'it is essential to delineate between a "question of law" and an "error of law", for the former confers jurisdiction on a court to grant leave to appeal against an award while the latter, in itself, does not.'[133] The judge noted that 'question of law' is necessarily a finding of law that the parties' dispute and which needs the court's guidance to be solved.[134] Further, a party will not be allowed to appeal where an arbitrator fails to apply a principle of law correctly, because such cases represent a mere 'error of law'.[135]

Fourth, the court has to be satisfied that it is just and proper for it to determine the question, taking into consideration the fact that the parties have actually agreed to resolve their dispute by arbitration. In order for permission to be given by the court, all of the four considerations need to be present.[136] As regards the inclusion of this sub-section, the DAC explained that the court should be satisfied that justice requires appeal and one means of determining justice is taking into consideration the fact that the parties have agreed to arbitrate rather than litigate.[137] This sub-section serves as a tool for courts to balance the state's interest on the one hand and the parties' decision to arbitrate by avoiding courts, as such, appeal should be granted only in exceptional circumstances.[138] The court to which an appeal on an arbitral award is made may confirm the award, vary the award, remit it to the tribunal for reconsideration in light of the court's determination or set it aside in whole or in part.[139]

[132] Dedezade, *supra* note 96, at 65.
[133] Northern Elevator Manufacturing v. United Engineers (Singapore), (2004), http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/court-of-appeal-judgments/22391-northernelevator-manufacturing-sdn-bhd-v-united-engineers-singapore-pte-ltd-no-2 (Mar. 27, 2018).
[134] *Id*.
[135] *Id*.
[136] Dedezade, *supra* note 96, at 63.
[137] DAC Report, *supra* note 74 para. 290, at 415-416.
[138] Dedezade, *supra* note 96, at 65.
[139] Arbitration Act, *supra* note 78, at § 69(7).

On another note, Section 69(1) states that appeal can be brought only on 'question of law' thereby excluding appeal on 'question of fact'. It might be difficult to distinguish between question of law and fact as 'parties [try] to dress up questions of fact as questions of law'.[140]

6. Comparison with the United States System of Judicial Review

From the two Chapters so far covered, I believe that the intention and objective sought by the Arbitration Act and the FAA becomes clear. Both systems of law seek to protect parties' choice to arbitrate instead of litigating. They also pledge to ensure that any form of judicial intervention should not defeat the purpose sought by parties in arbitration. However, in a distinct difference to the FAA, the Arbitration Act has chosen to, in cases where the dispute is governed by English Law, give much weight to ensuring that the awards passed by arbitrators are legally accurate as opposed to upholding the parties' choice to have a final and binding arbitral award. One such instance is the fact that the Arbitration Act allows courts to give leave to appeal even in the absence of agreement of the parties.

Looking at specific difference in the two legal systems, we find different approaches adopted by the respective laws. Under the Arbitration Act, courts interfere where challenge of an award is brought based on defects like lack of substantive jurisdiction, serious irregularity and appeal on question of law. That said, the obvious difference between the UK and US arbitration regimes as regards the possibility of judicial review of arbitral awards is the fact that the Arbitration Act allows parties to appeal on questions of law. 'In contrast to the U.S Federal Arbitration Act, which does not allow the courts to review the award on the point of law, unless there is a manifest disregard of law, the English Arbitration Act 1996 recognizes judicial review for error

[140] DAC Report, supra note 74, para. 286, at 416.

of law.'[141] On the other hand, the grounds of review enlisted in the FAA are understood to be exclusive and more importantly cannot be complemented by agreement of the parties.

In short, 'it is evident that the Federal Arbitration Act attaches more importance to ensure that route to obtain a final and binding award does not cause parties unbearable costs and delays whereas, the English Arbitration Act demonstrates sensitivity on accuracy of the awards when the dispute is governed by English law'.[142] Evidently, where parties have to face several tiers of courts to enforce an award, they will incur costs in addition to the delay they will face.

In the US, *Hall Street* has demonstrated that the grounds for vacating and modifying an arbitral award cannot be expanded by agreement of the parties to include instances that are not expressly covered by the FAA. This is in clear contradiction with Section 69 of the Arbitration Act where the parties' agreement to an appeal on question of law is recognized and given effect.

Parties to arbitration take into consideration different factors when deciding the place of arbitration. That is because the place of arbitration would have significant impact on the procedural aspects of arbitration, enforceability of an award and needless to say, costs.

The DAC in its report wrote that the general modern attitude where Courts should intervene to support arbitration rather than displace the arbitral process is favored and concluded that such an approach should be enshrined in the Arbitration Act.[143] It is argued that though the Arbitration Act has achieved its goal as stated under Section 1(a) 'the object of arbitration is to obtain fair

[141] Celik, *supra* note 126, at 21.
[142] Id., at 23.
[143] DAC Report, supra note 74, para. 22, at 280.

resolution of disputes by an impartial tribunal without unnecessary delay or expense', there are areas where the Arbitration Act is criticized on.[144]

Such instances include the avenue created in the Arbitration Act that allows too much court intervention during commencement of arbitration, after some form of decision, preliminary or otherwise, is passed and during the appeal procedure.[145] As such, it can be argued that conducting arbitration with a seat in England and having the applicable law as English law might create inconvenience for the parties. These inconveniences include, but are not limited, to incurring more cost than anticipated due to the multiple court applications that have to be filed and together with this are the hurdles a party faces to obtain a final award. If parties seek a quick arbitration, I believe that the regime adopted in the US' FAA is more attractive as compared to the approach adopted by the UK Arbitration Act. Nevertheless, the guarantees put in place by the Arbitration Act to ensure that the appeal procedure is not abused and delayed should not be overlooked. An example of such restriction is found under Section 70(2) that puts in place a time bar for the application of an appeal on point of law.

Where appeal is permitted under the Arbitration Act, the confidentiality of the dispute will be threatened, as the evidence submitted for the determination of the appeal will become public record, in principle. However, there are several recent High Court rulings that show that only a limited categories of evidence will be put before the court under an appeal and appeal will be permitted only in the clearest of cases.[146] In *Sylvia Shipping Co Limited v. Progress Bulk Carriers Limited*, the judge stated that 'As a general rule, the only documents which should be

[144] Peter J. Rees, *The Conduct of International Arbitration in England: the Challenge has Still to be Met*, 23 Arb Intl, at 505 (2007).
[145] Id.
[146] Kate Davies, *In Defence of Section 69 of the English Arbitration Act*, Kulwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2010/11/01/in-defence-of-section-69-of-the-english-arbitration-act/, (Mar. 26, 2018).

put before the Court on an arbitration appeal are the award itself and the relevant contract. Unless clearly incorporated by reference, other arbitration documents are usually irrelevant and inadmissible.'[147] In *Dolphin Tanker Srl v. Westport Petroleum Inc.*, the court reached the same conclusion, and rejected the Claimant's request to introduce new material, by stating that the general rule of putting forward to the Court only the award and the contract has not be relaxed.[148] Still, the parties might not wish for both the arbitration agreement and specially the award to become public because a tribunal that gives a reasoned decision will recount the facts presented by the parties prior to reaching a decision.

7. Conclusion

The Arbitration Act 1996 provides several instances for courts to intervene during arbitration proceedings and after the rendering of an award. The safe guards put in place by the Arbitration Act to ensure that courts' interference does not frustrate the proceedings is an important component of the law. Whether these intervention options put in place by the law would frustrate arbitration and the parties, I believe, depends on whether and to what extent courts understand and apply them. If courts choose to read these 'openings' broadly, the bricks of arbitration will be eroded block by block. Courts should be careful when empowering themselves with a review power, noting that such instances are the exceptions and not the rule.

[147] Sylvia Shipping Co Limited v. Progress Bulk Carriers Limited, [2010] EWHC 542.
[148] Dolphin Tanker Srl v. Westport Petroleum Inc, [2011], para. 23.

CHAPTER III - Judicial Review under Ethiopian Law

1. Jurisprudence of Arbitration in Ethiopia

In Ethiopia, alternative modes of dispute resolution have their root in the country's tradition. For different reasons, disputes were and still are encouraged to be settled amicably.[149] Amicable forms of dispute resolution were specially preferred in family disputes in which they played an important role.

An attempt to introduce modern arbitration and other forms dispute resolutions such as conciliation and mediation was done through the promulgation of the Ethiopian Civil Code in 1960 (hereinafter 'Civil Code'). In Ethiopian law, the modern concept of arbitration where arbitration agreements made in accordance with the law are held to be irrevocable and the decisions made by tribunals enforceable is only as old as the Civil Code.[150] Several alternative dispute resolution modes are preferred and used, especially in rural parts of Ethiopia where access to the judiciary is very much limited. One of the most preferred mode of alternative dispute resolution,'*shimgilina'*, is a hybrid of mediation, conciliation, compromise and arbitration.[151] This traditional form of dispute resolution is instituted by parties who authorize the *Shimagiles* (which roughly translates to 'elders') to consider and dispose of their disputes.[152] Even though the elders are not required or expected to adhere to rules of positive law, they try to bring the parties to terms that would be acceptable to both keeping in mind due regard to justice

[149] Shipi M. Gowok, *Alternative Dispute Resolution in Ethiopia – A Legal Framework*, at 270.
[150] Tilahun Teshome, *The Legal Regime Governing Arbitration in Ethiopia: A Synopsis,* Ethiopian Bar Review, Vol. 1, No. 2, at 117 (2007).
[151] *Id*., at 117-118.
[152] *Id*., at 118.

and fairness.[153] Elders might employ a variety of persuasive methods to ensure compliance with execution of their awards.[154]

Coming back to the modern arbitration laws of Ethiopia, we find the Civil Code which enumerates substantive provisions governing arbitration and the Ethiopian Civil Procedure Code of 1965 (hereinafter 'Civil Procedure Code') which governs procedural aspects of an arbitration proceeding.

Title XX, Chapter 1 and the following of the Civil Code put forward the rules on alternative modes of dispute settlement. Under this title the forms of dispute settlement regulated are compromise, conciliation and arbitration. The Civil Code regulates different aspects of arbitration, including but not limited, the form of an arbitral submission; appointment of arbitrators; duties of arbitrators and arbitrable subject matter under Ethiopian law.

On the other hand, the Civil Procedure Code promulgates rules on the procedure of appointing an arbitrator, making of an award, execution, setting aside and appeal of an arbitral award. In addition to these two Codes, the Federal Supreme Court Cassation Bench (hereinafter 'Cassation') whose judgment has precedence power over federal and state courts[155] has become a more recent source of arbitration rules in Ethiopia. The Cassation has passed several decisions in recent years touching upon, *inter alia*, appeal from an arbitral award and the matter of finality of arbitral awards. The relevant decisions of the Cassation will be discussed throughout this Chapter.

[153] *Id*.
[154] *Id*.
[155] Federal Courts Proclamation Re-amendment Proclamation, Proclamation No. 454/2005, Article 2(4).

It is said that commercial arbitration is not well studied nor developed in Ethiopia,[156] may be because ordinary commercial disputes are being confined to the ordinary court system of litigation or they are dealt with other forms of dispute resolution mechanism.[157] Additionally, the lack of awareness among the business community coupled with the fact that the legal regime reflects the features of the 1960's worsens the problem.[158]

However, some recent developments show that Ethiopia's interest in arbitration is gradually increasing and arbitration is becoming a popular dispute settlement modality among businesses.[159] Reflective of this fact, two institutions were established in Ethiopia to provide institutional arbitrations. The Ethiopian Arbitration and Conciliation Center (EACC) and the Arbitration Institute of the Addis Ababa Chamber of Commerce and Sectorial Associations Arbitration Institute (AACCSAAI) were created with the aim of providing rapid and cost effective systems of dispute resolution to the business community. Additionally, the AACCSAAI has created modern institutional rules for conciliation, mediation and arbitration that can be incorporated by the parties, thereby providing guidance and predictability.

However, as will be discussed in the coming Sections, the system of arbitration in Ethiopia is still at a grass root level. To better understand the concept of arbitration within the Ethiopian context, the following Section will introduce its readers with the basic arbitration rules and principles enshrined in the Civil Code and Civil Procedure Code.

[156] Alemayew Yismaw Demamu, *The Need to Establish a Workable, Modern and Institutionalized Commercial Arbitration in Ethiopia*, Haramaya Law Review, Vol. 4, No. 1, at 38 (2015).
[157] *Id*.
[158] *Id*.
[159] Hailegabriel G. Feyissa, *The Role of Ethiopian Courts in Commercial Arbitration*, Mizan Law Review, Vol. 4, No. 2, at 304 (2010).

2. The Principles of Arbitration under Ethiopian Law

The Civil Code defines an arbitral submission as a contract where the parties agree to entrust a third party for the resolution of their disputes in accordance with the principles of law.[160] The parties can appoint an arbitrator to determine a point of fact without deciding on the legal consequences flowing therefrom.[161] Though there is no required form on the basis of which an arbitral submission should be made, Article 3326 of the Civil Code makes it clear that an arbitral submission should be made in the form required by law for disposing without consideration of the right to which it relates.

As per Article 3328 of the Civil Code, parties are allowed to submit an existing or future dispute to arbitration. However, an arbitral clause should include a dispute that flows from either a contract or other specific legal obligation, on pain of being held invalid.

By the operation of the principle of party autonomy, parties are free to decide which aspect of their dispute they wish to submit to arbitration, be it contractual or otherwise.[162] Be that as it may, the extent to which parties may submit their dispute to arbitration is determined by the applicable national law; and this juncture marks the end of party autonomy and the beginning of public policy.[163] Under Ethiopian law, there are disputes that are prohibited from being submitted to arbitration. One such example is a dispute in relation to administrative contracts.[164] It is said that the rules on arbitrability are important because they save parties and arbitrators

[160] Civil Code of the Empire of Ethiopia, Proclamation No. 165 of 1960, Article 3325(1).
[161] Id., Article 3325(2).
[162] Teshome, *supra* note 159, at 123.
[163] *Id*.
[164] The Civil Procedure Code Decree, Decree No. 52 of 1965, Civil Procedure Code of the Empire of Ethiopia, Article 315 (2).

from conducting an arbitration proceeding, which would produce an award that is not enforceable at law.[165]

Under the Civil Code, parties are free to determine their arbitrators or stipulate the modality of appointment of their arbitrators. Where the parties have not determined both, then each party is empowered to appoint one arbitrator.[166] The Civil Procedure Code puts an obligation on arbitrators to follow, as near as possible, the procedure adopted in a civil court.[167] Additionally, the tribunal is obligated to hear the parties and their evidence and finally pass a decision according to law, unless agreed otherwise by the parties.[168]

Both the Civil Code and Civil Procedure Code provide several guarantees to ensure equality of the parties in arbitration proceedings. One such example is found under Article 3335 of the Civil Code where an arbitral submission is held invalid in the event that it privileges one party, at the expense of another, regarding the appointment of an arbitrator. As regards the making of an award, the Civil Procedure Code requires that awards be made in the same form as judgments; amongst other things, it should also deal with costs and specify the party who bears such costs.

2.1 Foreign and Domestic Arbitration

Ethiopian law does not provide a clear definition of domestic and foreign arbitration or awards and the two Codes fail to specify the meaning as well as the methods that should be employed to distinguish foreign and domestic arbitral awards. The only distinction created under the law is within the context of execution of foreign arbitral awards and domestic awards.[169] As such, the law distinguishes domestic and foreign awards by assimilating foreign awards to foreign

[165] Teshome, *supra* note 150, at 124.
[166] Civil Code, *supra* note 160, at Article 3331(3).
[167] Civil Procedure Code, *supra* note 164, at Article 317(1).
[168] *Id*.
[169] Feyissa, *supra* note 159, at 302.

judgments and applying the requirements put in place for recognition and enforcement of foreign judgments, by analogy, to foreign awards.[170]

Looking at international conventions in the international arbitration arena, we find that Ethiopia is a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), however, this Convention has not been ratified yet. More so, Ethiopian has not signed the New York Convention. As a result, the Civil Procedure Code and the Civil Code, both of which predate the Model Law, are the two legislations that govern the enforcement and recognition of foreign awards.

On the enforcement of domestic arbitral awards, Article 319 of the Civil Procedure Code puts the principle that after an award is made, it can be executed in the same form as an ordinary judgment, where the party applies for the homologation and execution of the award.[171] It is not clear whether the application for homologation and execution are two different applications and due to this there is confusion among lawyers and courts. It is argued that the application for homologation and execution of awards are two different sets, as the law would not require a party to apply for homologation in addition to the application of execution in vain.[172] No definition is given as to what homologation is, nor is there a guidance on the procedure to be followed to homologate an award. The Civil Procedure Code does not go further, unfortunately, to explain whether and on what grounds a court would refuse homologation.

[170] Demamu, *supra* note 156, at 44.
[171] Civil Procedure Code, *supra* note 164, at Article 319(2).
[172] Birhanu Beyene Birhanu, *The Homologation of Domestic Arbitral Awards in Ethiopia*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191500, (Mar. 31, 2018) at 4.

The role of national courts in arbitration, be it domestic or international, is crucial for its overall efficacy.[173] The need for court intervention might come in different forms at different stages of the arbitral proceeding.[174] Ethiopian courts involve in different parts of an arbitration proceedings, beginning from the appointment of an arbitrator to entertaining enforcement, challenge and appeal requests. In the following Sections, courts' role under Ethiopian law as regards setting aside, challenge and enforcement applications will be studied briefly. I believe that the courts' involvement during these three applications should be pointed out, as it gives a fuller picture of the laws' and courts' attitude towards arbitration in Ethiopia. The other forms of judicial review, i.e. appeal and Cassation review, will be studied under Section 3 below.

2.2 Setting aside an Arbitral Award

Article 355 of the Civil Procedure Code sets the principle that a party can apply to set aside an arbitral award. This is a mandatory provision and is applicable even where the parties have agreed otherwise. The application to set aside an award must be made within 30 days following the making of an award and will only be allowed to be entertained if the conditions provided under Article 356 are present.[175]

As such, the application to set aside an award will be allowed if 'the arbitrator decided matters not referred to him or made his award pursuant to a submission which was invalid or has lapsed'.[176] As per this requirement, a ground to set aside an award exists where a tribunal exceeds the power conferred to it and decides on a matter not referred to arbitration.[177] This is

[173] Feyissa, *supra* note 159, at 313.
[174] Id.
[175] Civil Procedure Code, *supra* note 164, at Article 355 (1) and (2).
[176] *Id*., at Article 356(a).
[177] An arbitrator/tribunal is said to have exceeded its power either where it decides on matters not referred for arbitration or fails to decide on matters referred for arbitration. Ethiopian law provides different remedies for these two instances. One aspect of excess of power, deciding on matters not referred for arbitration, will allow a party to

similar with Section 68 of the Arbitration Act where a challenge (based on seriously irregularity) can be made on an award if the tribunal exceeds its power.

A party can successfully lodge an application to set aside the award where an arbitrator passes an award on the basis of an arbitral submission that was invalid or has lapsed. It should be noted that Ethiopian law does not allow arbitrators to decide on the validity of an arbitral submission. Article 3330(2) of the Civil Code states that 'An arbitrator may in no case be required to decide whether the arbitral submission is or is not valid.'

Due to this prohibition, any jurisdictional objection raised on the validity of an arbitral submission will need to be decided not by the tribunal but by a court.[178] The policy reason behind this restriction seem to be based on the fear that an arbitrator(s) would assume jurisdiction, even based on an invalid arbitral submission, with the objective of seeking arbitrators' fees.[179] This provision, which is a contrast to Section 30(1)(a) of the Arbitration Act and Article 16(3) of the Model Law, severely limit the power of a tribunal since one of the components of a tribunal's jurisdictional power is deciding on the validity of an arbitral submission, as validity of the submission confers jurisdiction. More so, this frustrates the arbitration proceeding even before it has begun since parties are forced to seek court intervention where the validity of the arbitral submission is disputed.

The second ground on which an application for setting aside can be made is where the arbitrators 'did not act together' in the event that there are two or more arbitrators.[180] However, the Civil

apply to have the award set aside. On the other hand, where an arbitrator omits to decide matters referred to arbitration, a party is allowed to lodge an appeal. The procedure and grounds of appeal are discussed under Section 3 of this Chapter.

[178] Bezawork Shimelash, *The Formation, Content and Effect of an Arbitral Submission under Ethiopian Law*, Journal of Ethiopian Law, Vol. XVII (1994).

[179] *Id*.

[180] Civil Procedure Code, *supra* note 164, at Article 356(b).

Procedure Code does not define or provide an illustrative list of scenarios where arbitrators are said not to act together. The third and final ground for setting aside an award is present where the arbitrator 'delegated any part of his authority, whether to a stranger, to one of the parties or to a co-arbitrator.'[181]

2.3 Challenge and Enforcement of Foreign Arbitral Awards

Article 461 of the Civil Procedure Code sets the principle that foreign arbitral awards will not be enforced in Ethiopia unless certain mandatory requirements are met. These mandatory requirements are contained under the rules that are applicable to recognition and enforcement of foreign judgments and are incorporated to recognition and enforcement of foreign awards by analogy. The jurisdiction to entertain applications regarding the enforcement of foreign judgments or decisions lies with the Federal High Court.[182] Since Ethiopia is not a signatory to the New York Convention, the rules discussed below will be applicable on foreign awards. In this Chapter, awards with seat outside of Ethiopia will be referred as 'foreign award(s)'.

Article 461 of the Civil Procedure Code provides six conditions/requirements that would prevent the enforcement of an arbitral award. Reciprocity is the first requirement that has to be fulfilled to execute a foreign award in Ethiopia. The requirement of reciprocity will be met only where the 'execution of Ethiopian [awards] is allowed in the country in which the [award] to be executed was given'.[183] It is clear that this requirement severely limits the number of awards that can be enforced in Ethiopia.

[181] *Id*, at Article 356(c).
[182] Federal Courts Proclamation, Proclamation No. 25/1996, Article 11(2)(c).
[183] Civil Procedure Code, *supra* note 164, at Article 458(a), Emphasis added.

The second requirement that will be studied by the court for enforcing a foreign award is assessing whether the award was made 'following a regular arbitration agreement or other legal act in the country where it was made.'[184] The third item that will be taken into consideration is the procedural aspect of the arbitral proceeding. The court will study whether the parties had equal rights in appointing arbitrators and check if they had been summoned to attend the proceedings.[185]

The court will also look into the constitution of the tribunal and ensure that it was regularly constituted.[186] The Code fails to define what a regularly constituted tribunal should look like. It seems like judges, on a cases by case basis, will determine this factor. The court will additionally check whether the award relates to issues that are inarbitrable[187] under Ethiopian law, and if award is contrary public order or moral. A similar approach is taken by the New York Convention where an application for the enforcement of an award might be refused where the subject matter of the dispute is not capable of being settled by arbitration in the place where enforcement is sought or where the recognition or enforcement would be contrary to public policy.[188] Last but not least, the court is obligated to ensure that the award sought to be enforced in Ethiopia 'is of such nature as to be enforceable on the conditions laid down in Ethiopian laws.'[189]

[184] *Id*., at Article 461(1)(b).
[185] *Id*., at Article 461(1)(c).
[186] *Id*., at Article 461(1)(d).
[187] *Id*., at Article 315(2).
[188] New York Convention, *supra* note 31, at Article V(2)(a) - (b).
[189] Civil Procedure Code, *supra* note 164, at Article 461(1)(f).

3. Judicial Review of Arbitral Awards

An arbitral tribunal, after hearing the parties, will pass a decision and issue an award, to the exclusion of courts. An agreement made between parties to submit their dispute to arbitration is binding on them and will be enforced as though it was law.[190] The binding nature of an arbitral agreement will become clear where a party, who has given consent to submit a dispute to arbitration, seeks court intervention.[191] Article 3344 of the Civil Code, entitled 'Penalty for non-performance', provides that in such cases the other party can demand the performance of the arbitral submission or consider to have the arbitral submission lapsed in respect to the dispute in question.

3.1 Appeal from an Arbitral Award

As stated above, the Civil Procedure Code requires that awards should be made in the same form as a judgment. The Code, under Article 182 provides the contents a judgment should contain, one of which is reasons. From the cumulative reading of these two provisions, it can be concluded that that arbitrators must always give reasons in their awards, even where the parties have agreed otherwise.[192] Article 350 of the Civil Procedure Code sets the rule that a party can appeal from an arbitral award in accordance with the arbitral submission and on the conditions laid down under Article 351. More so, additional conditions of appeal may be agreed by the parties.[193]

[190] Shimelash, *supra* note 178.
[191] *Id*.
[192] Feyissa, *supra* note 159, at 311.
[193] *Id*., at 325.

The Civil Procedure Code allows parties to waive their right of appeal, however such waiver should be made with 'full knowledge of the circumstances' or otherwise will be of no effect.[194] Here also, the Civil Procedure Code borrows the provisions in the Code for appeal of a judgment, to apply by analogy, to cases of appeal from an arbitral award. The court to which an appeal from an arbitral award is made may confirm, vary or reverse the award.[195]

The Civil Procedure Code lists four grounds of appeal. As will be made clearer the following paragraphs, the grounds listed under Article 351 of the Civil Procedure Code include both substantive errors and procedural irregularities.

The first ground on which a party can rely on is where 'the award is inconsistent, uncertain or ambiguous or is on its face wrong in matter of law or fact'.[196] There is nothing in the Civil Procedure Code that would guide arbitrators, judges or parties in determining what an 'inconsistent, uncertain or ambiguous' award would look like. More so, an apparent mistake not just on a matter of law but fact will enable a party to lodge an appeal. This is in clear contrast with the system of appeal put in the Arbitration Act. As discussed under Section 5 of Chapter II, the Arbitration Act allows appeal, either through the agreement of the parties or through leave of court, only on question of law and not on question of fact. The Ethiopian arbitration law however allows courts to entertain appeal on arbitral awards on 'matters of fact' which are on their face wrong.

The second ground on which an appeal lies is where 'the arbitrator omitted to decide matters referred to him'.[197] Conversely, where an arbitrator decides matters not referred in the arbitral

[194] Civil Procedure Code, *supra* note 164, at Article 350(1).
[195] *Id*., at Article 348(1).
[196] *Id*., at Article 351(a).
[197] *Id*., at Article 351(b).

submission, it will be a ground for setting aside. Whereas under the New York Convention, if an arbitrator decided on matters that were beyond the scope of the submission, then the party to against whom recognition and enforcement is sought is empowered to apply to a court where enforcement is sought with the aim of avoiding the enforcement.[198] Under the Arbitration Act, where an arbitrator passes an award while failing to deal with the issues presented to it, the parties to the arbitration are allowed to apply for setting aside the award.[199] Under the Arbitration Act, the first option is remitting the award, in whole or in part, to the tribunal for its reconsideration, and the court will set aside an award as a last resort.[200] The Civil Procedure Code adopts a similar approach by allowing the appellate court to remit the award where an appeal is made on this ground.

The third ground that can be used to appeal an arbitral award is where irregularities have occurred in the proceedings.[201] The irregularities are grounds to appeal are twofold. The first types of irregularities occur where an arbitrator fails to inform the parties or one of them the place of hearing or fails to inform the parties to comply with the terms of the submission regarding admissibility of evidence. The second form of irregularity has to do with the arbitrator's refusal to hear the evidence of material witness or where the arbitrator took evidence in the absence of the parties or one of them.

The misconduct of an arbitrator makes way for the fourth ground of appeal under the Civil Procedure Code.[202] Article 351 of the Civil Procedure Code provides illustrative list of behaviors that are said to be misconducts in arbitration. These misconducts exist where an arbitrator heard

[198] New York Convention, *supra* note 31, at Article V (1)(c).
[199] *See* Arbitration Act, supra note 78, at §68(2).
[200] *Id*, at §68(3).
[201] Civil Procedure Code, *supra* note 164, at Article 351(C).
[202] *Id*, at Article 351(d).

only one of the parties and not the other or where the arbitrator was unduly influenced by one party, in the form of bribes or otherwise. Another form of misconduct that would trigger appeal is where an arbitrator acquired interest in the subject matter of the dispute referred to determination. The court that will hear the appeal is the court that would have had the appellate jurisdiction had the dispute not been referred to arbitration.[203]

The grounds of appeal, as explained above are very broad compared to the appeal mechanism provided in the Arbitration Act. The grounds of appeal to an award are vital because it authorizes courts to examine the merit of the award, and correct them if they see fit.[204] The extent to which an appellate court will review the merits of an arbitral award differs depending on which ground of appeal is raised. If an appeal is brought because a tribunal omitted to decide issues referred to it then expectedly the court will require evidence and hear the parties on the omitted issue only. On the other hand, where an appeal is brought due to an irregularity in the proceedings, then the court might need to gather evidence and hear the parties. In such cases, the appellate court turns into a trial court and parties wish of avoiding litigation is completely defeated.[205] Where parties sought confidentiality in arbitration, the appeal will override that desire.

If an award is inconsistent, uncertain or ambiguous, then it would be efficient and reasonable to refer the award back to the tribunal, where possible, instead of allowing appeal on those grounds.[206] It is clear that tribunals are better positioned and well informed on the disputed matter as compared to judges. I do not believe it is wise to allow appeal on the ground that an award is inconsistent, uncertain or ambiguous without allowing the tribunal to correct the award

[203] *Id*., at Article 352.
[204] Birhanu, *supra* note 172, at 43.
[205] *Id*., at 47.
[206] *Id*., at 49.

first, where possible. If every uncertainty and inconsistency would be a ground for appeal, then arbitration would be despised by the parties.

3.2 Review by Cassation

The Federal Supreme Court Cassation Bench is empowered by the Constitution to have a 'power of cassation' over any final court decision containing a basic error of law.[207] The interpretation given by Cassation with not less than five judges is binding on federal and regional court.[208] The Cassation has been instrumental in providing guidance on arbitration through its decisions. The decision of Cassation that will be studied in this Section represents the most recent trend adopted by the court, especially on judicial review of arbitral awards where parties have specifically agreed on the finality of an award.

In the case between *National Mineral Corporation PLC v. Danny Drilling PLC*[209], the Cassation identified two points of contention. The two parties had an agreement for the drilling and exploration of gold and when dispute arose, they referred their case to an arbitral tribunal, as was agreed. The tribunal thus established heard both parties and issued an award to the benefit of the Respondent, *Danny Drilling PLC*. *National Mineral Corporation PLC*, the Appellant, first approached the Federal Supreme Court to appeal the award but its application was denied. It then went to the Cassation and claimed that the arbitral tribunal made an error of law by, *inter alia*, failing to adapt a similar procedure put in the Civil Procedure Code when conducting the arbitration; failing to apply the contract interpretation rules put in the Civil Code and by failing to give weight to the evidence presented. The Appellant cited that it was wrong for the tribunal to

[207] The Constitution of the FDRE, Proclamation no. 1/1995, Article 80(3)(a).
[208] Proclamation No. 454/2005, *supra* note 155, at Article 2(4).
[209] National Mineral Corporation PLC v. Danny Drilling PLC, Volume 10, Cassation File No. 42239, 2011 (Unofficial translation).

award the Respondent damages, since it was responsible for the unlawful cancellation of the contract. The Respondent, on the other hand, argued that the parties have agreed on the finality of the arbitral award and requested the court to dismiss the application on that basis.

The first issue identified by the Cassation[210] was whether the agreement of parties on the finality of an arbitral award would preclude the Cassation from entertaining questions of error of law. In order to ascertain this point, the Cassation referred to the purpose for which alternative forms of dispute settlement are created and noted that parties seek arbitration to avoid the cost and undue delay experienced in courts. It then went on to say acknowledge that parties are empowered to agree on the finality of an arbitral award as per Article 350(2) of the Civil Procedure Code.

Following that, the Cassation explained the purpose for which it was put in place, which include but are not limited to, ensuring the uniform interpretation and application of laws throughout the judiciary and correcting errors of law. It noted that keeping idle while arbitral awards tainted with errors of law remained would erode the trust of the judiciary. It finally, and importantly, stated that the review of cassation was different from the ordinary appeal conducted in courts. Looking at Ethiopia's arbitration laws, Cassation noted that though the judiciary in most instances is supportive of alternative modes of dispute settlement, there are instances in the Civil and Civil Procedure Code where the judiciary is empowered to take the controlling position.

The Cassation added that the cumulative readings of Articles 351 and 356 of the Civil Procedure, which lists grounds on which appeal lies, do not seem to include the Cassation, as they only speak of appeal. The Cassation explained that parties to arbitration can waive their right of

[210] The Cassation identified two issues to determine the case. The first issue, as stated above, was whether the Cassation would be able to entertain the appeal in the presence of a finality clause. The second issue Cassation set to determine was weather the tribunal ascertained the non-performance of the appellant, prior to issuing award.

appeal; however this will not stop either of the parties to seek appeal on the bases of the grounds listed under Article 356 of the Civil Procedure Code.[211]

It concluded that the parties' agreement on the finality of an arbitral agreement cannot be understood to preclude the Cassation from its review power and admitted the request of the appellant. In doing so, the Cassation reversed its prior holding in a different case, in which it rejected a party's application for review by citing the finality of an arbitral award.

After admitting to review the case, the Cassation went on and studied the contract that was the basis of the dispute between the parties. It established the obligation of the parties and analyzed the facts of the case. It finally reversed the decision of the arbitral tribunal which awarded the respondent damages and held that the respondent is not responsible for the payment of damages.

In its dicta,[212] the Cassation disassociated cassation review from appeal and stated that the parties can agree to have the award reviewed under appeal, but only where the grounds listed under Article 351 of the Civil Procedure Code are present.

Based on this decision, an application for review of an arbitral award was lodged at the Cassation recently. In the arbitration between *Consta Joint Venture v. Chemin de Fer Djibouto-Ethiopien (the Ethiopian-Djibouti Railway)*[213] that was arbitrated under the Procedural Rules on Conciliation and Arbitration of Contracts Financed by the European Development Fund (EDF) at the Permanent Court of Justice. The parties had concluded agreement for the rehabilitation of a historic railway line which stretched from Ethiopia to Djibouti. Dispute arose as to the quality and quantity of works done by the *Consta Joint Venture* , the contractor, (hereinafter 'Claimant')

[211] National Mineral Corporation PLC v. Danny Drilling PLC, *supra* note 209.
[212] *Id*., at 352.
[213] A brief summary of the parties and the arbitration proceeding is found on the website of the Permanent Court of Justice, https://pca-cpa.org/en/cases/40/.

which led to the termination of the contract, by *Chemin de Fer Djibouto-Ethiopien* (hereinafter 'Respondent').

In the parties' agreement, the applicable law was chosen to be Ethiopian law and Addis Ababa was the chosen as the seat. Importantly, as per Article 33(1) of EDF Rules which was applicable to the parties, the award passed by the tribunal was final and binding on the parties. After the conclusion of the arbitral procedure, the Tribunal, with a majority vote, awarded the Claimant damages in excess of 20 million euros citing the Respondent's unlawful termination of the contract, among others. Following the announcement of the award, *Chemin de Fer Djibouto-Ethiopien* (hereinafter 'Respondent') appealed before the Cassation claiming that the tribunal committed fundamental error of law.

As per Federal Courts Proclamation, an application of Cassation does not automatically guarantee an audience. Prior to that, a panel of three judges of the Federal Supreme Court assume the role of screening the cases to check for an existence of fundamental error of law qualifying it for Cassation.[214] Upon the existence of fundamental error of law, the Federal Supreme Court will entertain the case in Cassation. The Respondent's appeal has been heard by the three judges of the Federal Supreme Court and the case has since passed on to the Cassation as fundamental error of law was found. The Cassation has admitted the case and has ordered a stay of execution on the award, and is currently in the process of receiving written pleading of the parties.[215]

This case is an example of how the leeway created by Cassation will continue to be used to undermine the parties' agreement on finality of awards.

[214] Proclamation No. 25/1996 supra note 182, at. 22(1).
[215] https://www.iarbafrica.com/en/news-list/17-news/192-ethiopian-court-orders-stay-of-execution-on-consta-jv-v-chemin-de-fer-djibouto-ethiopien-award, (Apr. 3, 2018).

4. Comparison of Ethiopian Judicial Review mechanism with the system of the United States and the United Kingdom

In the first two Chapters, the approach adopted by the two jurisdictions has been discussed. Coming to Ethiopia's system on the other hand, the approach adopted by the law and the judiciary is completely different. What is consistently adopted in all the three jurisdictions is the fact that irregularity (procedural or otherwise) is a reasonable and effective ground that allows courts' intervention in arbitration. As such, all the three jurisdictions have empowered their judiciary to have a vacating or reviewing power. For instance, the FAA under Section 10 puts that an award that was procured by corruption, fraud or undue means or in cases where the arbitrators was guilty of misconduct in refusing to postpone a hearing, or refusing to hear evidence of the parties that is material to the dispute, will be vacated by the court upon the application of any party to the arbitration.

The Arbitration Act on the other hand states that where a tribunal fails to conduct the proceeding in accordance with the procedure agreed by the parties, the award can be challenged on the ground of serious irregularity. The Ethiopian Civil Procedure Code takes a similar stance but instead of providing setting aside as a recourse against irregularities, it introduces an appeal option for parties. Article 351 of the Civil Procedure Code enumerates several irregularities like refusal of arbitrators to hear the evidence of the parties and failure of arbitrators to inform parties of the place of the hearing as a possible ground for an appeal.

What is common in the three jurisdictions regarding irregularities in the arbitration proceedings is that some court intervention is provided. This is appropriate in my opinion since the judiciary has to ensure that justice is served, even where parties have agreed to arbitrate.

On the other hand, the three systems depict a completely different approach from one another when it comes to judicial review of awards on their merits. In United States, the doctrine of 'manifest disregard of the law' was/is being used as a ground for vacating an arbitral award. As stated in Section 3 of Chapter One, though there is no clear guidance given by the Supreme Court of the United States on whether courts can introduce grounds of review of arbitral awards, as done in *Wilko v. Swan*, parties are not allowed to agree and include a new ground of review as held in *Hall Street*, in addition to the list provided in the FAA.

Where it is argued that *Hall Street* not only admonished parties' right to include an additional ground for review, but also courts' then the grounds of review diminish even more to exclude 'manifest disregard of the law'. It can also be argued that *Hall Street* only specifically addressed whether parties' can add a ground of review in addition to those listed in the FAA, thereby leaving 'manifest disregard of law' ground intact. Even in such cases, the 'manifest disregard of the law' standard as understood and applied by courts is a very strict doctrine to fulfill. The elements of the doctrine might be difficult to prove thereby making it difficult for courts to review awards. This shows that both instances create a very limited review power to courts, thereby enhancing finality of arbitral awards.

Comparing the judicial review ground in the FAA with the laws of Ethiopia, we find a converse difference on the scope of review. The Civil Procedure Code allows appeal of awards in several grounds. Where an award is wrong 'in a matter of law or fact', the Civil Procedure Code empowers a party to appeal. Errors of fact are not grounds to review an award in the FAA. For that matter, errors of law are also not a ground of review in the FAA. The manifest disregard doctrine does not empower courts to review awards because of errors. It requires a high threshold of 'manifest disregard' on the side of the arbitrator. Where an arbitrator did not know the law, or

applied it incorrectly, the manifest disregard ground cannot be used to attack an award because it is understood and interpreted to be 'more than just an error or misunderstanding of the law'.[216] The difference is clear in the approach taken, while United States courts are required to refrain from indulging in review of awards; Ethiopian courts are empowered to do so.

Coming to the system of judicial review in the United Kingdom, the option of appealing arbitral awards is recognized in both the United Kingdom and Ethiopia. However, the scope and grounds of appeal greatly differ. While the Civil Procedure Code provides 'error on facts' as a ground of appeal, the Arbitration Act excludes appeals on 'questions of fact'. A slight similarity between the Ethiopian system of appeal on an award on 'matter of law' and the United Kingdom's approach is that both systems allow appeal, on 'matter of law' and 'question of law' respectively, where the 'matter' or 'question' is apparent. A judge in both systems should not go to the details and analyses the correctness of the matter of law in the case of Ethiopia or the question of law in the case of the United Kingdom. However, Ethiopian courts seem to confuse the grounds of appeal from court judgments and from the grounds of appeal in arbitral awards.[217]

In *Ethiopia Amalgamated Limited Co. v. Seid Hamid*, the Federal Supreme Court admitted an application for appeal from an arbitral award stating that there was a need to determine if the arbitrators erred in interpreting the contract from which the dispute arose.[218] This approach is not desirable and in contradiction with Article 351(i) of the Civil Procedure Code which requires that matters of law should 'on their face' be wrong. While the Arbitration Act allows parties to contract out a review of appeal, the system in Ethiopia will provide appeal even where the parties

[216] T.Co Metals LLC v. Dempsey Pipe and Supply, Inc., *supra* note 57, at 339.
[217] Birhanu, *supra* note 172, at 36.
[218] *Id.*

have agreed on the finality of an award. The leeway created by the Ethiopian Cassation has given courts power to encroach upon the agreement of parties on the finality of the award.

5. Conclusion

As was studied in this chapter, Ethiopia's rules on arbitration are outdated and in need of review. The laws and judicial practice as they stand are not arbitration friendly. Courts interference in arbitration is mandated beginning early in the arbitration proceedings, as arbitrators are not empowered to decide on the validity of the arbitral submission. Parties' autonomy is severely limited since their agreement on the finality of arbitral awards is no longer given effect. The Cassation has broadened the judicial review power of courts and severely limited parties' autonomy. On the other hand, the laws applicable on the enforcement and recognition of awards in Ethiopia are those promulgated for ordinary judgments. I believe this creates confusion and problems because the uniqueness of arbitration and arbitral awards is being brushed off and assimilated to ordinary court judgments. It has also endangered the finality of awards making arbitration less attractive.

Conclusion

Arbitration, as a dispute settlement modality, is chosen by parties for its various advantages. Parties consider, amongst other things, the confidentiality of arbitration proceedings, the speed and cost associated with arbitration. Equally, parties take into account the finality and enforceability of arbitral awards when deciding to arbitrate their disputes. The state on the other hand is responsible to ensure that laws are being applied and justice served; despite the fact that parties choose to settle their dispute outside courts. In such cases, we find two competing interests, finality of arbitral awards and judicial review.

States adopt different regimes to reconcile these two interests; some states like the United States and the United Kingdom choose to give much space for finality of arbitral awards while others like Ethiopia seems to give much weight judicial review.

Where awards are held to be final and judicial interference held to the minimum, the arbitration proceeding will be efficient. Otherwise, arbitration as a dispute settlement mechanism will not thrive.

Ethiopia's law on arbitration are in need of review and should be made arbitration friendly. The courts on the other hand should adopt a restrictive approach and give way for arbitral tribunals. Now more than ever, as Ethiopia is opening its doors to investment and businesses, the arbitration rules of the country should also be revisited.

Ethiopian courts should assume a supporting and not a leading role when it comes to arbitration. As such, the Cassation should reconsider its approach.

In my opinion, research in the field of arbitration in Ethiopia is very difficult due to the lack of research materials, books and journal articles. Arbitration is not a field that is studied to the

extent necessary. Scholars and members of the academia should thus push forward to a contemporary arbitration regime in Ethiopia.

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