

Towards a Better Commercial Arbitration: Should Ethiopia Ratify the New York Convention?

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Abstract

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral awards is currently ratified by 161 states. The Convention gives a visa for arbitral awards made in a Convention state and guarantees enforcement of the award elsewhere except on few grounds. It imposes obligations on states and their courts to recognize and enforce foreign arbitral awards and arbitration agreements. It also imposes on courts the obligation to stay proceeding with a matter subject to the arbitration agreement. Ethiopia has not yet ratified the NYC. This article aims at demonstrating the challenges and prospects of ratification of the Convention by Ethiopia. I argue that by ratifying the Convention, Ethiopia would be able to, *inter alia*, increase trade and investment, get access to lower interest rates and rates of return, improve its international image, improve on competition for trade and investment, improve its arbitration system, decrease caseloads of courts and hasten its move towards the accession to WTO. These factors show that it is in the country's interest to ratify the Convention and domesticate it through the instrumentality of the UNCITRAL Model Law.

Key terms

Commercial arbitration · New York Convention · Ethiopian laws · UNCITRAL Model Law · Ethiopia

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Frequently used acronyms:

AACCSA AI	Addis Ababa Chamber of Commerce and Sectoral Associations Arbitration Institute
CPC	Civil Procedure Code
ICC	International Chamber of Commerce
NYC	New York Convention

Introduction

With the growth of cross border transaction across all nations, international commercial arbitration is becoming very essential. Since investors and traders have their interests at stake, they will invest and/or transact depending on their degree of confidence to the availability of a dependable remedy if dispute arises. It is highly probable that the parties to the transaction would select arbitration for the settlement of their dispute for the latter's advantage over court litigation owing to the participation of disputants in the appointment of arbitrators or in the choice of arbitration organs.

The benefits of arbitration cannot materialize in the absence of a mechanism by which parties can have the award enforced. The New York Convention (NYC) satisfies this need because it stretches a visa for an award to be enforced elsewhere where the award debtor has sufficient assets. The Convention imposes an obligation on member states and their courts to recognize and enforce arbitration awards and agreements. Article 5 of the Convention ensures enforcement by exhaustively listing the grounds for refusal of enforcement, and this makes it attractive to investors and business persons.

The Ethiopian government has been working on legal reform to realize the objectives of the industrial development policy that encourages export manufacturing with a view to enhancing trade and investment. However, the measures so far taken are not adequate to fully achieve the policy objective for there is a need for further FDI inflow and a great number of the youth is unemployed. Furthermore, Ethiopian business persons are under increasing pressure to enter into contracts with suppliers in faraway regions and meet the vast and increasing local demands for goods and services. This is so because traders and investors are also concerned about their contract enforcement.

Although Ethiopia was among the first signatories to the NYC, it has not yet ratified the Convention. The aim of this article is to analyze the pros and cons of ratification of NYC by Ethiopia. The first section presents an overview on the significance of primacy of international commercial arbitration. Section 2 highlights the genesis and nature of the New York Convention followed by Sections 3 and 4 that examine the advantages and disadvantages of the ratification of the Convention by Ethiopia. The last section deals with the prospects of ratification, followed by conclusion.

1. The Significance of International Commercial Arbitration

With the growth of international commercial transactions¹, disputes become inevitable because of different commercial and legal expectations, cultural approaches, political complications and geographic situations.² Differences can arise on the meaning of contract terms, the validity of the contract, and the respective rights and obligations of the parties. “Extraneous factors and human weaknesses, whether through mismanagement or over-expectation, will also interfere with contractual performance”.³ To settle all these disputes parties choose mechanisms which best fit their interest.

The advent of fast cross border transaction has necessitated a less strict dispute resolution mechanism called the Alternative Dispute Resolution (ADR)⁴. Arbitration which is at the center of ADR is “the most widely embraced process for business disputes, especially across national borders and boundaries”.⁵ This is because the process of court litigation has been “acknowledged to prove grossly inadequate and prone to more damage than the resolution of conflict by hampering positive future relations between the parties to it”.⁶ On the other hand, non-judicial mechanisms lack binding decisions and are susceptible to violation by the parties. That’s why it becomes a fact of common knowledge that most business transactions are based on contracts that include binding arbitration clauses.

The geopolitical, domestic, social, economic and other interests of nation-states usually influence their trade and investment policies and outcomes.⁷ “Governments may violate the rights of foreigners with less fear of political consequences than their own citizens, lobbyists, and contributors.”⁸ Parties thus prefer arbitration to litigation by local courts mainly because they consider

¹Julian Lew et al (2014), *Comparative Commercial International Arbitration*, Kluwer Law International, Wolters Kluwer, pp 1-15.

² Ibid

³ Ibid

⁴ Durosaro Wuraola (2014), ‘The Role of Arbitration in International Commercial Disputes’, *International Journal of Humanities Social Sciences and Education (IJHSSE)*, Volume 1, No 3, March 2014, p 2. See also United Nations Conference on Trade and Development, *International Commercial Arbitration*, United Nations, New York and Geneva 2005), p. 4.

⁵ Wuraola, Id., p. 4.

⁶ Ibid. See also Meadow et al (2005), *Dispute Resolution; Beyond the Adversarial Model*, Aspen Publishers, New York, p. 451.

⁷ Avinash Dixit (2013), ‘International Trade, Foreign Direct Investment, and Security’, Department of Economics, Princeton University, *Journal of Economic Laws*, JEL Codes; F13, F21, F23, K33, P45, P48, p. 2

⁸ Emilio Cardenas (1999), ‘Benefits of Membership’, *United Nations Publication Sales No. E99 V.2*, p. 34.

arbitration as neutral and effective. As ambassador of Argentina, Emilio J. Cardenas noted;

It is indeed difficult to be able to place one's trust blindly in local courts of law when the economic outcome of business transactions that have an international dimension is involved since there is a very real possibility of encountering local bias or partiality, which is not the exclusive preserve of any one region or system. It is a harsh reality which can sometimes appear in any area ..., regardless of the different social or cultural patterns in which it may manifest itself.⁹

Likewise, Dixit states that traders and investors consider the security of their property and transaction at stake “when enforcement is in the hands of foreign governments and courts than they would be within their own countries.”¹⁰ The added insecurity when trading with, or investing in, another country creates a concomitant need for “added ex-ante precautionary actions to mitigate some of its effects, as well as attempts to devise new institutions for ex-post remedial or enforcement measures.”¹¹

In international commercial transactions, parties are cautious while selecting a dispute settlement mechanism and the venue of proceedings. This will result in “multiple filing, as the courts of a third country may decline the invitation to devote their resources to deciding a dispute that does not involve their interest.”¹²

The second, and perhaps more significant difficulty is that judicial decisions are not very ‘portable’ as awards in that it is difficult and sometimes impossible to enforce a court decision in a country other than the court of rendition.¹³ The ability to resolve disputes in a neutral forum and the enforceability of binding decisions, through the instrumentality of NYC, are therefore the major advantages of international commercial arbitration over the resolution of disputes in domestic courts.

Generally, some of the common advantages of international arbitration are:

- its ‘predictability’ with respect to the place, governing law, procedural rules, scope, parties, language, ... and its finality without appeal;
- its being tailored to the needs of the contracting parties, including confidentiality and selection of decision makers, with special qualification and expertise, and

⁹ Id., p. 15.

¹⁰ Dixit, *supra* note 7, p. 3.

¹¹ Ibid

¹² Durosaro, *supra* note 4, p. 3.

¹³ Rajesh Babu (2006), ‘International Commercial Arbitration and the Developing Countries’, *AALCO Quarterly Bulletin* 4, p. 389.

- speed and cost-simplified procedures that are less likely to pursue rigid and highly rigid procedures.¹⁴

2. The Genesis and Nature of the New York Convention, 1958

International commercial arbitration has been largely effective in settling international commercial disputes. Despite criticisms, there are arguments that its advantages outweigh its disadvantages. However, optimizing its benefits needs a mechanism by which the award creditor can get the award enforced at the place where the debtor has sufficient assets.

During the first decades of the twentieth century, businesses and lawyers in developed states sought “reliable, effective, and fair legislation to facilitate the use of arbitration as a commercial dispute settlement and then expand international trade and investment.”¹⁵ In 1923, initially and later in 1927, under the auspices of the newly founded International Chamber of Commerce (ICC), major trading nations negotiated the Geneva protocol and Geneva Convention on arbitration clauses and execution of arbitral awards respectively.¹⁶ Regrettably, the Geneva Treaties failed to fulfil the needs of the then business interests of developed countries and their citizens because the treaties placed the burden of proof in recognition proceedings on the award creditor and embodied the so-called double *exequatur* requirement.¹⁷

These reasons necessitated further advancement in the area, and the ICC submitted the “Dutch Proposal” for discussion on 27 May 1958 which was welcomed by many of the Delegates.¹⁸ The main elements of this proposal were the elimination of the ‘double *exequatur*’ and restricting the grounds for refusal of recognition and enforcement under Article 5 of the Convention i.e. the heart of the Convention.¹⁹ Therefore, the New York Convention on the recognition and enforcement of foreign arbitral awards was adopted in 1958, by the UN General Assembly.

¹⁴ Ibid. See also Meadow et al, *supra* note 6, p. 450.

¹⁵ Won Kidane (2014), *Dispute Resolution: an International Perspective*, BDU law module, 2014, pp 36, (unpublished); See also Babu, *supra* note 13, p. 391.

¹⁶ Ibid

¹⁷ The convention for the protocol focuses on arbitration agreements only, and it does not discuss enforcement of awards. See also Won Kidane, , *supra* note 15, p. 37.

¹⁸ It was believed logical to require an *exequatur* in the country where enforcement is sought and not in the country where award was rendered but enforcement was not sought. And it was also believed logical that the grounds for refusal should be exceptions raised by the award debtor. Pieter Sanders (1999), the History of the Convention, *ICCA Congress Series* No. 9 (Paris), Kluwer Law International, pp. 11-14.

¹⁹ See *Ibid*

According to Albert Jan Van den Berg, two basic actions are contemplated by the Convention; the recognition and enforcement of foreign arbitral awards and the referral by a court of a dispute subject to the arbitration agreement (stay of proceedings).²⁰ The first action is that any NYC state is under an obligation to recognize and enforce foreign arbitral award²¹ subject to the limited grounds for refusal stipulated under Article 5. The second action contemplated by the Convention is the referral by a court to arbitration.²² Article 2(3) provides that “a court of a Contracting State, when seized of a matter in respect of which the parties have made an arbitration agreement, must, at the request of one of the parties, refer them to arbitration.” This is called a stay of proceeding. This is where the heart of arbitration ensures party autonomy. Accordingly, courts allow the parties to have their own private justice system as long as they have agreed to do so under their contract.

These actions (i.e., the recognition and enforcement of foreign arbitral awards and the referral to arbitration by a court based on the arbitration agreement) require the fulfillment of the elements embodied in Article 2(1) and (2) which include in particular that the agreement be in writing and the matter should be *arbitrable*. The *arbitrability* of the subject matter requires that the arbitration agreement shall refer to a matter capable of being settled by arbitration.

The agreement to arbitration could be arbitral clause to settle future disputes or an arbitral submission after the dispute arises. The validity or otherwise of the main contract does not affect the arbitration agreement. According to the *separability* or *severability* doctrine, the arbitration agreement and the main contract have an independent existence. This doctrine allows the arbitral determination of the validity of the underlying contract to go forward, and it also empowers the tribunal to rule on its own jurisdiction (*Competence-Competence*).²³ The arbitral tribunal is competent to rule on the existence or nonexistence, validity or invalidity of the arbitration agreement.²⁴ With all these pro arbitration and pro enforcement features of the Convention, it has won appreciation from countries with regard to its role in facilitating and enhancing trade and investment development.

²⁰ Won Kidane, *supra* note 15, p. 3.

²¹ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Art 1.

²² See Article 2 of the NYC.

²³ Won Kidane (2012), *China Africa Dispute Settlement; The Law, Economics and Culture of Arbitration*, Kluwer Law International, Netherlands, pp 225-290.

²⁴ Allen Redfern and Martin Hunter (2009), *On International Arbitration*, 5th ed., Oxford University Press, Kluwer Law International, p. 69.

3. Advantages of Ratification of the Convention to Ethiopia

Globalization has created economic interdependence among countries. To stay strong in this interconnectedness, however, difficult it may be, nations aspire to boost their economic activities by, *inter alia*, enhancing their international trade and investment²⁵ which, *inter alia*, requires strengthening the legal system. Ethiopia's pursuits to implement the Agricultural Development Led Industrialization (ADLI) gave due attention to agriculture centred development and the Industrial Development strategy with special emphasis to export manufacturing.²⁶ The Federal government is currently encouraging the establishment of manufacturing industries by establishing industrial development zones in various regions.²⁷ The ambitious plans of the government as inferred from the first and second growth and transformation plans (GTPs), i.e. GTP I and GTP II, focus on Ethiopia's vision towards becoming lower-middle income by 2025, and it aspires to achieve annual growth rate above 11%.²⁸

During the preceding years, Ethiopia's economy was claimed to be one of the fastest economies in the world and particularly second in Africa.²⁹ In effect, the country's export was increasing.³⁰ Where there is trade, trade disputes are inevitable because there is a direct relationship between economic growth and commercial disputes.³¹ This will undoubtedly stimulate interest in commercial arbitration for dispute settlement.³² Since investors and traders have their own

²⁵ Yohannes Woldegebriel (2015), *Toward the Ratification of the New York Convention: Reasons and Justifications*, AACCSA AI, p. 2 (unpublished).

²⁶ *The Agricultural Led Development Strategy of Federal Democratic Republic of Ethiopia*, March, 2007 and *Urban and Industrial Development Strategy of Federal Democratic Republic of Ethiopia*, March 2007.

²⁷ Investment Proclamation No. 769/2012, preamble.

²⁸ The key policy goal during the first GTP period was to increase the share of export (both goods and non-factor services) in GDP to 22.5 percent by the end of the plan period. However, the share of export in GDP reached 12.4 percent by the end of 2013/14 which was far below the target.²⁸ The ratio of export of goods and non-factor services to GDP is projected to increase to 20.6 percent in 2019/20 from 12.8 percent in 2014/15. Federal Democratic Republic of Ethiopia, *The Second Growth and Transformation Plan (GTP II)*, (2015/16-2019/20), *National Planning Commission*, September, 2015, Addis Ababa

²⁹ See, for example, Wondiferaw *et al* (2015), *Ethiopia, African Economic Outlook*, AfDB, OECD, UNDP, p. 1.

³⁰ *Id.*, p 2.

³¹ Albert Fiadjoe (2004), *Alternative Dispute Resolution; A Developing World Perspective*, Cavendish Publishing Ltd, Wharton street, London, UK, pp 77-96.

³² See advantages of Arbitration in the discussion above.

economic interests at stake, they will invest and/or transact depending on their degree of confidence to the availability of a remedy in case dispute arises.³³

One of the most important reasons as to why parties to international commerce choose arbitration is the likelihood of obtaining enforcement by virtue of the New York Convention.³⁴ The Convention gives parties (to an international commercial arbitration) the confidence that arbitral awards will be enforceable in a member country where the award debtor has sufficient assets. There are around 160 countries which are members of this Convention, in spite of their economic, political and geographical differences.³⁵

An award rendered in one of these states will be recognized and enforced in all member states, save certain exceptions stated under Article 5 of the Convention. The major trading partners of Ethiopia are members to the Convention.³⁶ Although Ethiopia was among the first signatories, it has not yet become a member of the Convention. The delay and hesitation of Ethiopia in ratifying the 1958 Convention evokes interest to inquire into the challenges and prospects of ratifying the Convention.

3.1. Increase Foreign Direct Investment (FDI)

Ethiopia encourages investment in the manufacturing sector so as to strengthen the domestic production capacity and thereby accelerate the economic development and improve the living standards of the people.³⁷ The government, in particular, believes that increasing FDI is necessary to speed up the transfer of technology, the inflow of capital and employment opportunity to the country.³⁸ Currently, enhancing the role of the private sector in the country's economic development is given emphasis among the major goals of the government.³⁹

To achieve these objectives, the government should have investor-friendly laws since foreign investors make decisions to invest partly based on the legal or regulatory environment of a state.⁴⁰ To promote FDI and reap its advantages, the

³³ Asouzu Amazu (2001), *International Commercial Arbitration and African States*, 1st ed., Cambridge University press, Cambridge, pp 27-50.

³⁴ Moses, Margaret, *The Principles And Practices of International Commercial Arbitration*, 1st ed., Cambridge University Press, New York, 2008, pp 200-219.

³⁵ Available @ newyorkconvention1958.org

Last accessed on March 21, 2016 on the list of contracting states.

³⁶ See Worku Kassaw (2015), *The Benefits of Adoption of CISG in Ethiopia*, Bahir Dar University (Thesis), 2015, p.45 (unpublished).

³⁷ See Preamble Ethiopian Investment Proclamation No 769/2012.

³⁸ Id., see also Article 5(6) &7 of the Proclamation.

³⁹ Ibid, Article 5(6) of the Proclamation. See also Privatization of Public Enterprises Proclamation, 1998, *Federal Negarit Gazette*, 5th year, No 26.

⁴⁰ Since Ethiopia has reformed its national policy framework to an investor-friendly environment and is endowed with fertile land, it has attracted FDI from different

government provides investment incentives and guarantees through its investment laws.⁴¹ Ethiopia needs further inflow of capital through incoming foreign investment and a great deal of the youth is unemployed.⁴² This is attributable to various factors which, *inter alia*, include the level of Ethiopia's attractiveness for foreign direct investment.

Investment decisions are dependent upon preconditions such as the ability of investors to enforce contracts to protect their investments.⁴³ Ratification can thus contribute to the encouragement of FDI inflow to Ethiopia because investors are highly concerned with their contract enforcement, in addition to which various measures that can promote investment are not yet enough. Ratification of the NYC would send a signal to foreign investors that Ethiopia is committed to protecting the interests of investors with due fairness. As respondent (practitioner and expert) said; "investors are suspicious of the internal political and legal system of a country because of lack of knowledge of the system or lack of independence of it from political influence, including arbitration laws"⁴⁴

Investors will be unwilling to invest in Ethiopia or they will do it at a greater cost for Ethiopia than they do it in any other member state. This is because the NYC ensures "efficient, predictable and uniform enforcement of awards elsewhere."⁴⁵ It is efficient in the sense that arbitral awards are enforceable at the place where relevant assets of the award debtor are located save the few exceptions listed under Article 5 of the Convention.

countries. See Joseph Lowther (2007), *Analysis of the Effect of Tajikistan's Future Ratification of the New York Convention*, USAID Report, July 2007, p. 4. See also, UNCTAD, *World Investment Report*, 2008, p 16

⁴¹ Articles 23 and 25 of the Investment Proclamation No. 769/2012, entitle investors remittances out of Ethiopia in convertible foreign currency: profits and dividends accruing from investment; principal and interest payment on external loans; payments related to a technology transfer agreement; proceeds from the sale or liquidation of an enterprise; proceeds from the transfer of shares or of partial ownership of an enterprise to a domestic investor; expatriate employees may remit, in convertible foreign currency, unspent salaries and other payments accruing from their employment in hard currency.

⁴² See Growth and Transformation Plan I (GTP I), 2014, Annual Report, p. 7.

⁴³ Demekas Dimitri *et al* (2005), Foreign Direct Investment in South Eastern Europe: How (and How Much) Can Policies Help?, *International Monetary Fund Working Paper/05/110*, June, 2005, pp. 1-32 at p 5; see also UNCTAD, *World Investment Report*, *supra* note 40, p. 16.

⁴⁴ Interview with Professor Tilahun Teshome, April 6, 2016 (author's translation).

⁴⁵ Allen Hamilton (2005), *Reinforcing Ethiopia's International Trade Law Framework for Stronger Business Environment; A case for the ratification of the New York Convention and CISG*, USAID WTO Plus Project, Task Order No. 6 Ethiopia WTO Accession Plus, 2009 at pp. 7.

Uniformity relieves investors from “becoming specialists in the domestic arbitrations laws of each country with which they plan to invest.”⁴⁶ This, in turn, avoids transaction cost. The lack of knowledge in the internal legal and/or political system of Ethiopia will not hinder investors from investing in the country for two reasons. Firstly, arbitration is a private system of justice which is tailored to the needs of the parties to the agreement including the applicable law. And secondly, NYC overrides the internal legal system except in the cases where the Convention refers to the internal legal system of Ethiopia.

There are, however, disagreements with some persons who assert that becoming a member to the Convention does not have any nexus with FDI, and it does not contribute to its enhancement. For example a key informant in an interview believes “that ratification of the Convention does not have any direct relationship with FDI on two grounds. First, the Convention is applicable to commercial transactions and foreign awards only; and second, there is still high flow of investment to Ethiopia.”⁴⁷ [Translation mine]

This author disagrees with this argument. The *first* gap in the argument relates to the unduly narrow definition of ‘commercial transactions’. The word ‘commercial’ under Article 1 of the UNCITRAL Model law is meant to implement the Convention broadly which includes investment.⁴⁸ Although any member state may put the Commercial reservation clause when it ratifies accedes to or signs the Convention, it can, according to Article 1(3) of the Convention define the term ‘commercial’ according to its own law, the international practice seems to interpret it broadly.⁴⁹

Second, it is to be noted that an award considered as non-domestic in the enforcement state can be recognized and enforced there. According to Berg, a non-domestic award can include, “an award made in the enforcement State under the arbitration law of another State; and an award made in the enforcement State under the arbitration law of that State involving a foreign (or international) element”.⁵⁰ Therefore, an investor even with permanent establishment here, in Ethiopia may get its award enforced wherever the arbitral seat might have been, including Ethiopia.

⁴⁶ Ibid

⁴⁷ Interview with an expert in the AACCSA AI (anonymous), expert in the Institute, April 3, 2016 (author’s translation).

⁴⁸ See the UNCITRAL Model Law on International Commercial Arbitration, Article 1. See also, Albert Berg (2003), The New York Arbitration Convention of 1958: An Overview, *Journal of Year Book*, Volume 28, No 7, 2003, p. 2.

⁴⁹ UNCITRAL, Digest of Case Law on the Model Law on International Commercial Arbitration, 2012, under the scope of application on the definition of ‘Commercial’, p. 1

⁵⁰ Berg, *supra* note 48, p. 3.

Third, the investor whose award was rendered in Ethiopia will be able to get the enforcement of the award in another NYC state because the Convention imposes an obligation on member states to recognize and enforce arbitration agreements and awards.⁵¹ Therefore, the fact that awards rendered in Ethiopia will be enforced elsewhere will enhance the confidence of investors. And the *fourth*, perhaps the most important reason is that becoming a member of the Convention sends a signal to a foreigner that the country is committed to enforcing contracts. This means that the country will build an international image.⁵²

Finally, the mere fact that there is a high flow of investment to the country does not disprove the significance of the 1958 New York the Convention in the attraction of FDI. Notwithstanding the importance of other measures that can be taken by the government, they can have greater effect if they are accompanied by the ratification of the NYC. Moreover, we are not sure of the opportunity cost of failing to ratify the Convention, i.e., the different guarantees and incentives that are provided by the government might have been replaced by ratifying the Convention, and we “we have to see the unseen.”⁵³

FDI can enhance the export supply capacity of the country, because it is an important factor which positively affects export.⁵⁴ As Yishak Tekalign states;

There is a consensus among development economists that FDI inflows are likely to play an important role in explaining the growth of recipient countries. By increasing capital stock, FDI can contribute to a more efficient use of existing resources and absorb unemployed resources and thus increase a country's output and productivity.⁵⁵

3.2. Enhancing trade (export and import)

Ethiopia's foreign trade has greatly expanded over the past decades and will remain so thus creating greater interdependence with the world economy.⁵⁶ Ethiopian business persons are under increasing pressure to enter into contracts with suppliers in distant regions and meet “the vast and increasing local demands for goods and services and desperately growing need to raise as much

⁵¹ This applies to would be enforcing states that do not put reciprocity reservation. *See* Articles 1, 2, and 3 of the Convention.

⁵² See the detailed discussion made below.

⁵³ Interview with Teclé Hagos, Associate professor, Mekelle University, April 28, 2016

⁵⁴ Yishak Tekaligne (2009, Determinants of Ethiopia's Export Performance: A Gravity Model Analysis, *Trade and Development Discussion Paper* No 1/2009, Tbkp Development Research & Consulting, Munich, June 2009, p. 4.ade

⁵⁵ *Ibid.*

⁵⁶ Yohannes Woldegeriel, *supra* note 25, p. 2.

foreign currency as possible to help the development of the country.”⁵⁷ Moreover, currently, Ethiopian government has recognized the private sector as the engine of economic development in its industrial development policy/strategy and has been promoting privatization.⁵⁸ It is obvious that with privatizing more public enterprises, increasing number of commercial disputes will be submitted to arbitration. In this regard, the ratification of NYC becomes necessary because the Convention gives a visa for awards to be enforceable elsewhere.

Until NYC’s ratification, Ethiopia’s business firms will be “at a competitive disadvantage when they do business on an international scale for they will be vulnerable if they are unable to ensure the effectiveness and efficiency of arbitration agreements in the case of transactions having an international dimension.”⁵⁹ This is because a foreign trader which has a stake in its business will hardly choose Ethiopian trader; or if it does so, it would be on much higher cost as compared to its contractual relations with a trading partner from a contracting state. Ethiopia is, therefore, required to play a proactive role in providing its private sector with the necessary instrumental framework to enable it to compete with its foreign counterparts.⁶⁰

Ratification of the Convention leads to an increase in Ethiopia’s exports of locally manufactured goods. In countries that have ratified the NYC, the quality of domestic institutions is somewhat less important for complex goods exports than for countries that have not yet signed the Convention.⁶¹ This is because ratification of the Convention shows the country’s willingness to enforce contracts impartially. This changes trade partners’ perception of a country and its level of risk. Indonesia, for example, witnessed over 43% increase of export of complex goods in 9 years; the share of manufactured exports (i.e. complex goods) increased from only seven percent of total exports in 1983 to over fifty percent by 1992 because of legal reform measures including the ratification of the NYC.⁶²

⁵⁷ Ibid.

⁵⁸ To implement this policy the government has enacted laws on privatization of public enterprises and establishment of the supervising authority. *See* the Industrial Development strategy, p. 1. *See* also Proclamation No. 146/1998 and Proclamation No. 412/2004 for privatization of public enterprises and establishment of privatization and public enterprise supervising authority respectively.

⁵⁹ Cardenas, Benefits of Membership, *supra* note 8, p. 16.

⁶⁰ Ibid.

⁶¹ Daniel Berkowitz et al (2004), ‘Legal Institutions and International Trade Flows’, *Michigan Journal of International Law*, Vol. 26:000, August 2004, p. 14.

⁶² *Id.*, p. 20.

The ratification of the Convention in LDC countries like Ethiopia, as Amazu stated, is an ‘option of necessity’ for foreign traders do not trust the internal legal system.⁶³ As Ambassador Michael B.G. Froman, Office of the United States Trade Representative noted:

Companies that operate businesses in Ethiopia assert that its judicial system remains inadequately staffed and inexperienced, particularly with respect to commercial disputes. While property and contractual rights are recognized, and [even though] there are commercial and bankruptcy laws, judges often lack understanding of commercial matters and the scheduling of cases often suffers from extended delays. Contract enforcement remains weak.⁶⁴

In such settings, foreign parties to commercial contracts rely on arbitration and its subsequent enforcement. Inability to use such an opportunity will result in trade diversion towards other Convention states or the transaction will be made at a higher cost to Ethiopian traders.

3.3. Lower credit interest rates and better rates of return

Since investors and traders have their economic interest at stake, they will invest or transact based on their degree of confidence in case disputes arise.⁶⁵ “The interest rates demanded by lenders and rates of return demanded by investors are directly correlated to the level of real and perceived risk in a country.”⁶⁶ Investors, lenders and export credit insurers are likely to regard non-payment risk as lower in a country that has ratified the NYC.⁶⁷ These risks are more complicated when they involve African countries, including Ethiopia, in which states as economic agents want to sustain a supervisory role in their economic performances.⁶⁸

According to Anderson and Van Wincoop, as cited by Aljaz Kuncic, trade costs/aggregate transaction costs arise from institutional factors such as law enforcement (contract enforcement costs and legal and regulatory costs), property rights and informal institutions.⁶⁹ These costs are taken into account in economic analysis in a systematic way as ‘rules of the game’ with any kind of

⁶³ Amazu, *supra* note 34, pp. 27-50.

⁶⁴ Michael Froman (2015), National Trade Estimate Report on *Foreign Trade Barriers*, 2015, p. 19.

⁶⁵ Amazu, *International Commercial Arbitration and African states*, *supra* note 33, pp. 28-50

⁶⁶ Lowther, *supra* note 40, p. 4.

⁶⁷ See also Pranab, *Institutions, Trade and Development*, *infra* note 72.

⁶⁸ Amazu, *supra* note 33, pp. 30-50.

⁶⁹ Aljaz Kuncic (2013), Trade and Institutions: do not forget institutional distance, *CERGE-EI Foundation, Global Development Network*, pp. 4, 6.

externalities always present in the market.⁷⁰ As Coase stated, "... institutional setting within which the trading takes place affects the incentives to produce and the costs of transacting."⁷¹

Therefore, moral hazard considerations in the international credit market under sovereign risk and differences between countries in the domestic institutions/laws of credit contract enforcement under incomplete information may lead to a higher interest rate or rationed credit.⁷² In such situations, the non-ratifying state and its businesses may face a comparative disadvantage because the possibility of non-enforcement of contracts maximizes distortions and erodes competitiveness.⁷³ Ratifying the Convention has a measurable impact on a country's trading patterns and it affects the perception of a country's institutional quality independent of tangible legal reforms.⁷⁴

In Ethiopia, many of the commercial transactions are made by public enterprises which stir up fear (for foreign traders and investors) that the involvement of government interest may complicate the matter.⁷⁵ These perceived and real risks may then have a negative effect on the interest rates and rates of return. This might have been the reason why challenges in timely securing of foreign finances in addition to underperformance of exports were identified as challenges to the smooth implementation of development projects in GTP I.⁷⁶ Therefore, Ethiopia's membership to the Convention can enhance the opportunity of the business sector in Ethiopia to easily get loans at lower interest rates and more beneficial rates of return from foreign investors, lenders and export credit insurers. This, in turn, will have a positive influence on financing development projects thereby enhancing the development of the country as a whole.

⁷⁰ Positive and negative externalities are taken in to account in making exchanges/transaction. *See Ibid.*

⁷¹ Cited at Kuncic, *supra* note 69, p. 6.

⁷² Bardhan Pranab (2008), *Institutions, Trade and Development*, p. 11 (unpublished).

⁷³ Dimitri et al, *supra* note 43, p. 5.

⁷⁴ Berkowitz, et al, Legal Institutions and International Trade Flows, *supra* note 61, p. 14. *See also* Becky Carter (2013), The influence of international commercial and investment law and procedure on foreign investment and economic development/ growth, Helpdesk Research Report, *Governance and Social Development Research Center (GSDRC)*, p. 6.

⁷⁵ Yohannes Woldegebriel (2016), *The Ratification of the New York Convention: Potential Judicial and Legislative Impediments*, AACCSA AI, Director, Arbitration Institute, p. 10. (unpublished).

⁷⁶ Although there may be other reasons that lenders rely on to extend loans to states, the probability of repayment/credit default risk affects their decision. *See GTP II, supra* note 28, p. 14. Other factors including the level of development of financial markets and institutions such as coordination failures may affect this. *See Pranab, Institutions, Trade and Development, supra* note 72, p. 11.

3.4. Improve international reputation

Ratification of the Convention shows that a country is open to participation in the global economy. This is particularly important in developing countries like Ethiopia with low levels of reputation for courts.⁷⁷ Statements that a state is business friendly and open to doing business with foreign companies are much less effective than concrete actions such as ratifying an international convention.⁷⁸

Ratifying an international treaty is a more sincere signal than unilateral declaration because deviations will be noticed not only as “domestic aberrations but as violations of the international legal order as well.”⁷⁹ Hence, investors and traders will be more persuaded by the fact that a state is a member of an international convention than its statements and internal legal system which might be perceived as biased or problematic. Therefore, failing to ratify the Convention, as one key informant expressed, “taints the image of Ethiopia as many very essential international forums are conducted, here, in the country.”⁸⁰

3.5. Improve arbitration system

Ethiopian judicial system is criticized for being poorly staffed particularly with respect to commercial disputes.⁸¹ Furthermore, parties to cross-border transactions lack confidence on the arbitration system of the country.⁸² These negative attitudes towards the country’s commercial law system have been affecting its trade and investment. Ratifying the Convention will contribute to the development of Ethiopia’s legal and institutional capacity since the Convention is appreciated for its contribution to the development of international commercial law. “Accession to the Convention can boost local arbitration capacity and often spurs and is part of domestic legal reform in the area of arbitration.”⁸³

Ratification will expose courts and arbitration institutions to the provisions of the Convention and of course to its domestic version, the UNCITRAL Model Law’s provisions. This can contribute to the development of the domestic

⁷⁷ Froman, *supra* note 64, p. 19.

⁷⁸ Berkowitz et al, *supra* note 61, p. 14.

⁷⁹ *Id.*, p. 16.

⁸⁰ Interview, April 28, 2016, Author’s translation.

⁸¹ Froman, *supra* note 64, p. 20.

⁸² “No international commercial arbitration has been arbitrated under the AACCSA AI as a dispute settlement body to the best of my knowledge” said one of the experts in the institute. Excerpted from the interview with a legal expert in the AACCSA AI

⁸³ Hodges et al (2018) “60 years of the New York Convention: a triumph of trans national legal cooperation, or a product of its time and needed a revision?”, *Herbert Smith Free Hills, Inside Arbitration*, Issue 6, p. 6.

arbitration system. Ethiopia will be required to enact legislation because the Convention is not self executing (unlike the Convention on the International Sale of Goods). In countries where there is outdated arbitration system/law, setting the provisions of the Convention and the Model Law in an independent legislation is advisable and it minimizes interpretation problems during recognition or enforcement. This is because courts will more likely refer to international rules of interpretation for international treaties if they have to directly interpret the Convention. Secondly, training (which is mandatory) to judges or arbitrators on the nature and applicability of the Convention will enhance the knowledge of these parties who will finally influence government for domestic legal reform.

Thirdly, domestic arbitration system will benefit from experience sharing because a multitude of cases can be arbitrated in Ethiopia once the country becomes a member. This may happen in two ways. *First*, Ethiopia can be chosen as an arbitral seat by disputing parties and the award rendered will be recognized and/or enforced elsewhere. *Second*, awards made in another country can seek recognition and enforcement in Ethiopia thereby exposing Ethiopian courts to decisions rendered in other countries. These parties to the arbitration (especially if they are big companies) and arbitrators may compel or encourage countries to conduct legal reform so as to protect their property rights.⁸⁴

Ratifying the Convention enhances institutionalization. This is because the Convention's provisions are discussed in numerous articles by prominent professors in the area.⁸⁵ This coupled by the UNCITRAL Model Law (the domestic version of NYC) indeed enhances knowledge of international and national arbitration law. As a key informant noted:

Ratifying the Convention will strengthen the Ethiopian arbitration system: ratification makes the domestic arbitration to have a better exposure towards modern arbitration system. Many arbitration disputes involving international and national traders will be settled in Ethiopia.⁸⁶

He further relates ratification of the Convention with its positive contribution toward the development of the Addis Ababa Chamber of Commerce & Sectoral Associations Arbitration Institute (AACCSA AI) by stating that "ratifying the Convention can pave the way for AACCSA AI to be a regional centre of arbitration."⁸⁷ According to Redfern, "[a]rbitration centres represent a potential

⁸⁴ See Scott Wilson (2008), Law, Guanxi: MNCs, state actors, and legal reform in China, *Journal of Contemporary China*, Routledge, 17; 54, pp 25-51 (available @ <https://doi.org/10.1080/10670560701693062>)

⁸⁵ See New York Convention Bibliography available at: newyorkconvention.org

⁸⁶ Interview with a respondent, April 5/2016, professor and arbitration expert (Author's translation).

⁸⁷ *Ibid.*

source of revenue or (perhaps of prestige) to the host country.”⁸⁸ That’s why national governments sought to gain economic advantage by promoting local arbitration backed by the establishment of centres for dispute resolution.⁸⁹

As Bronwen Kausch pointed out AACCSA AI can play a role in increasing networking to bring companies together and settle disputes.⁹⁰ By creating contact between big businesses looking for small businesses to trade with, the institute can play an important role in harmonizing the experiences of all members so that efficiency will be achieved. The institute can also play a role through training in building the capacity of arbitrators, judges and practitioners.⁹¹ Increasing the number of skilled professionals with knowledge of international arbitration will in turn help to promote Ethiopia's ratification of the NYC.⁹² Moreover, the fact that Addis Ababa is the seat of the African Union and many other international organizations can make the AACCSA AI a regional centre for dispute settlement.

It is believed that “developing the arbitration environment can improve the economic growth in Africa”.⁹³ This is because commerce needs trust which in turn needs firm pillars of law to rest on. This would pave the way for the certainty of enforcement of commercial contracts.⁹⁴

3.6. Increase capacity for investment and trade competition

When foreign investors are considering large investment or trade deal, they often consider more than one country. To the extent that these investors consider dispute resolution as a factor in their investment and trade decisions, a non-ratifying state will be at a disadvantage.⁹⁵ According to an interviewee, there are various factors for parties to choose Ethiopia as a seat for arbitration, and there is the need to “to take advantage” of this.⁹⁶ However, without ratification of the Convention Ethiopia will be at a disadvantage unlike its neighbouring member

⁸⁸ Redfern and Hunter (2009), *supra* note 24, p. 69.

⁸⁹ *Ibid.*

⁹⁰ Bronwen, Kausch, *The Role of Chambers in Developing Capacity for Arbitration*, Summary Report of the International Conference on Alternative Dispute Resolution, Addis Ababa, Nov 11-12, 2014, p. 30.

⁹¹ *Ibid.*

⁹² Elodie Dulac (2013), Addis Ababa: Time to sign up to the New York Convention?, Conference Report, *Global Arbitration Review*, p. 3.

⁹³ Willie Adv (2014), *The Role of ADR in African Regional Integration*, Summary Report of the International Conference on Alternative Dispute Resolution, Addis Ababa, Nov 11-12, p. 30.

⁹⁴ *Ibid.*

⁹⁵ Lowther, *supra* note 40, p. 5.

⁹⁶ Interview with a respondent, professor ad arbitration expert.

states, as long as investors and traders consider dispute resolution as a factor.⁹⁷ The late Prime Minister of Ethiopia had said:

We do not think foreign companies are angels. They seek profit and there is nothing wrong with that. I don't think Ethiopia is an island and we won't survive as an islandbut we can't expect foreigners to do everything for us. We have to make sure it is a win-win solution.⁹⁸

Currently, many African states –especially Common Market for Eastern and Southern Africa (COMESA) member states– have ratified the Convention considering their obligation under the treaty. Ethiopia ought to, as a COMESA member state, review its position towards the ratification of the Convention.⁹⁹ By becoming a member to the Convention, Ethiopia can increase competition for trade and investment.

3.7. Decrease Court Congestion

Arbitration will take some cases from the already “full state court dockets.”¹⁰⁰ This frees the state courts to more quickly resolve other cases. This particularly will help Ethiopian courts since they are greatly congested with cases. A key informant stated the significance of arbitration in the context of the challenge in Ethiopian courts.¹⁰¹

Arbitration also helps to prevent lengthy disputes about the proper forum for resolving an international commercial dispute and the enforcement of any resulting judgment.¹⁰² Moreover, the fact that most of the arbitral awards are voluntarily complied with by the parties decreases case loads in Ethiopian courts. For instance, over 90% of the International Chamber of Commerce Arbitration Court (ICCAC) awards are complied with and do not need to go to state courts for enforcement.¹⁰³ This contributes to the efficient and speedy settlement of disputes.

⁹⁷ All East African states except Ethiopia and Eritrea are members to the NYC, see newyorkconvention.org

⁹⁸ Taken from Investment in Ethiopia, Government Communication Affairs Office (GCAO), June, 2016, pp 45.

⁹⁹ Under Article 162 of the COMESA treaty, the States concerned agreed to take the necessary measures to accede to multilateral agreements on investment dispute resolution and guarantee arrangements as a means of creating a conducive climate for investment promotion. See Amazu, *supra* note 34, p. 337.

¹⁰⁰ Lowther, *supra* note 40, p. 5.

¹⁰¹ Interview with a key informant, AACCSA AI, April 3, 2016.

¹⁰² Lowther, *supra* note 40, p. 6.

¹⁰³ Albert Jan Van Den Berg (2003), The New York Arbitration Convention of 1958: An Overview, *Journal of Year Book*, Volume 28, No 7, p. 2.

3.8. Advantages in Relation to WTO Accession

Ethiopia is on the move to accede to the World Trade Organization (WTO). “Effective integration into the multilateral trading system requires more than simply earning of mere membership to the WTO.”¹⁰⁴ Ethiopia’s intention to be an active player in the global economy as evidenced through its pursuits to accede to the WTO needs comprehensive reform measures: including strengthening the commercial law framework.¹⁰⁵ The adoption of the NYC is a step forward to protect local business persons, enhance the confidence and trust of the foreign business partners, and promote the importance and use of arbitration institutions in providing their services at an international level.¹⁰⁶ Ratification of the Convention and commitment to honour its provisions strengthens Ethiopia’s likelihood of accession to the WTO.¹⁰⁷

4. Challenges of Ratification to the Country

Some of the criticisms against Ethiopia’s immediate ratification of the NYC emanate from the nature and purpose of the Convention and its effect to states and their business persons. There are also criticisms relating to the uncertain benefits of arbitration. We can classify the problems of the Convention into three broad categories; problems relating to (i) the Convention, (ii) the country that intends to ratify it, and (iii) the uncertain benefits of arbitration.

4.1. Inherent problems of the convention

The disadvantages that are often raised in relation with the Convention are erosion of sovereignty, advantages to foreign firms, lack of uniform interpretation of the Convention, inability of domestic firms to avoid debts, and time and expense required to implement legislation.¹⁰⁸

4.1.1 Erosion of Sovereignty

The Convention takes away the Government of Ethiopia’s ability to resolve disputes with foreign investors or traders or to interfere in projects or transactions after contracts (containing arbitration clauses) are signed.¹⁰⁹ It also takes away some powers of the courts such as the power to interfere in the

¹⁰⁴ Hamilton, *supra* note 45, p. 1.

¹⁰⁵ *Ibid.*

¹⁰⁶ Yohannes Woldegebriel, *Towards the Ratification of the New York Convention*, *supra* note 25, p. 4.

¹⁰⁷ On views with regard to linking compliance with the New York Convention to accession to the WTO, see, for example, Wilson, Law, *Guanxi: MNCs, state actors, and legal reform in China*, *supra* note 84, pp. 25-51.

¹⁰⁸ Lowther, *supra* note 40, p. 6.

¹⁰⁹ *Ibid.*

validity of arbitration agreement, arbitral proceedings and/or recognition and enforcement of awards. Although they are still able to review arbitration awards prior to issuing a writ of execution upon the initiation of the award debtor or on their own initiation, such flexibility of courts is to a larger extent limited such as the circumstances stated under Article 5 of the Convention.

For example, the writing requirement under Article 2 of the Convention includes the exchange of letters or telegrams, and is inconsistent with Ethiopian law which requires certain forms of contracts to be attested by two witnesses.¹¹⁰ An arbitration agreement to submit a dispute arising from the contract of insurance or guarantee shall be made in writing and be attested by two witnesses¹¹¹ which are stricter than the requirements under Article 2 of the Convention. With respect to refusal of recognition and enforcement, while the Convention limits itself to Article 5 (mainly due to procedural irregularity, the conduct of arbitrators, the problem on the arbitration agreement etc to be raised by the award debtor), the Article 461 of the Ethiopian Civil Procedure Code recognizes enforcement as an exception than a rule.¹¹² These requirements may have their own policy reasons which Ethiopia will subordinate to the Convention. Moreover, the power of the courts to review on the merits of arbitral decisions will no longer exist in Ethiopia as far as foreign awards are concerned.

This challenge is, however, common to all international treaties which states forgo for a better interest common to all. Since the Convention is concerned only with procedures of arbitration agreements and awards, it submits itself to national substantive legislation; and no serious harm may be caused to Ethiopia's interest.

4.1.2 Advantages to foreign firms

Another problem of the Convention is that upon ratification, foreign firms would have the ability to resolve disputes with Ethiopian firms in foreign arbitration tribunals, while Ethiopian firms with purely domestic disputes would not, and would be forced to use the Ethiopian courts/arbitration centres. Moreover, since the Convention is applicable to foreign awards or non-domestic awards, recognition and enforcement of awards which are purely domestic will rely on the Ethiopian Civil Procedure Code which may be detrimental to the

¹¹⁰ Cumulative reading of 3326(2) and Articles 1723-1726 of the Civil Code of Ethiopia

¹¹¹ *Id.*, see articles 1725 cum 1727(2).

¹¹² The negative statement under Article 461 which provides that "foreign arbitral awards may not be enforced in Ethiopia unless..." sounds anti-enforcement in the sense that it makes enforcement conditional on the fulfillment of all the conditions laid down in the law. See also Hailegabriel G. Feyissa, *The Role of Ethiopian Courts in Commercial Arbitration*, *Mizan Law Review*, Vol. 8, No. 2, 2010, p. 329.

award creditor. This is because awards are subject to review on their merits¹¹³, unlike foreign awards which are presumptively enforceable under the Convention subject to, however, Article 5 of the Convention. Moreover, if the decision of the arbitrators is problematic and in case the Ethiopian award debtor fails to apply for annulment in the relevant foreign arbitral seat, this will create a problem for Ethiopia to the advantage of foreign firms.

Such problems may be, however, common occurrences to courts' decisions too and are not unique to arbitral decisions. In fact, commercial arbitration is chosen by parties for its advantages such as expertise and effectiveness even far better than courts. Furthermore, failing to ratify the Convention may be against the interest of Ethiopian firms with awards made in Ethiopia while foreign firms with awards made in a Convention state may settle their claims against the assets of the former in another Convention state. Moreover, the likelihood of enforcing arbitral awards to the disadvantage of Ethiopian firms who settled their dispute abroad is not as worse as court decisions. Domestic firms with domestic claims can rather benefit from ratification because the Convention improves domestic alternative dispute resolution (ADR) opportunities.

4.1.3 Inability of domestic firms to escape enforcement through merit review

If Ethiopia becomes a member of the NYC, some Ethiopian-based companies with most of their assets in Ethiopia would not be able to avoid payment in international disputes, since arbitration awards obtained in international arbitration courts could be enforced in Ethiopian courts.¹¹⁴ In other words, Ethiopian companies cannot utilize state courts to delay or avoid payment of a debt to foreign companies. Although this might not be a plausible argument, this will be against Ethiopia and its firms where there is a problem in the decision of the arbitrators. This is because the NYC does not allow merit review of arbitration awards in the enforcement state; and the Ethiopian award debtor might not have the award annulled in the arbitral seat.

To escape from enforcement of foreign awards especially from Eritrean government's claims has been the reason, as some say, that Ethiopia remains reluctant to ratify the Convention.¹¹⁵ This fear, however, is unfounded for

¹¹³ See Article 351 of the Civil Procedure Code.

¹¹⁴ Fekadu, Petros (2014), The Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Advantages, Disadvantages and Some Remarks on Ethiopia's Course of Action Ahead, comment, *Mizan Law Review*, Vol. 8, No.2, p. 473.

¹¹⁵ Hamilton, *supra* note 45, p. 16.

different reasons.¹¹⁶ Firstly, mere accession to this instrument would not be the same as forfeiting the immunity a state is internationally endowed.¹¹⁷ Secondly, when acceding to the Convention, Ethiopia may on the basis of reciprocity (Article 1/3 of the NYC) declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Party to the Convention. Thirdly, it may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of Ethiopia. Fourthly, it may declare that it will apply the Convention only to those arbitral awards which were adopted after the entry into effect of the Convention.¹¹⁸

The desire to protect Ethiopian firms from the enforcement of awards against them is not good enough reason for not being a party to the Convention. First, since arbitration is a result of the parties' agreement, an award cannot be enforced against a party that did not give his consent to resort to arbitration in the first place. When an agreement has been willingly entered into, it is only natural that the parties should and would honour the terms of their agreement.¹¹⁹ Second, whereas foreign parties (from NYC states) can often enforce arbitration awards made in their own country against the assets of Ethiopian parties held in any other NYC state, an Ethiopian party that obtains an award in Ethiopia might find it difficult to enforce that award against the foreign party's assets located in many NYC states since Ethiopia did not ratify the Convention.¹²⁰

4.1.4 Time needed to develop and implement legislation and lack of uniformity

The New York Convention sets minimum requirements for enforcement of awards and agreements which may be contrary to the existing Ethiopian laws. In such situations, enactment of legislation may be required. This involves time and the adoption of the Convention will require judicial training on enforcement of foreign arbitration awards. This cannot be impediment to the ratification of the NYC because "...capacity building is a process."¹²¹

An important aim of the Convention was uniformity, and the fulfilment of that aim is dependent upon the willingness of national legislatures and courts in

¹¹⁶ "... the possibility of how Eritrean government can claim against the assets of Ethiopia is null for it has been settled" Interview with key informant.

¹¹⁷ *Supra* note 45, p. 16.

¹¹⁸ *Ibid.*

¹¹⁹ *Id.*, p. 20.

¹²⁰ *Ibid.*

¹²¹ Interview with a respondent (April 5 /2016) professor and arbitration expert (author's translation).

different contracting states to adopt uniform interpretations of the Convention.¹²² There are national courts that challenge the uniform interpretations of the Convention.¹²³ Therefore, the statement that the Convention promotes uniformity in interpretation and application and avoids uncertainties, as some say¹²⁴ is unwarranted. These uncertainties can create transaction costs and are detrimental to trade and investment. In fact if uniformity in interpretation is not ensured, ratification of the Convention becomes superfluous. Contrary to the arguments against uniform interpretation of the NYC, the adoption of the UNCITRAL Model Law is meant to implement the Convention by many states, thereby contributing to the uniform application and interpretation of the Convention by national legislators and courts.¹²⁵

4.2. Country Specific Problems

4.2.1 Legal Problems

To date, the Convention is praised for its pro arbitration nature by limiting the arbitrary flexibility of domestic countries to impose their own requirements thereby guarding their particular political and economic interests. However, the diverse application of the Convention has made it weak to overcome, as Robert Briner said, “the obvious lack of an efficient universal enforcement procedure.”¹²⁶ There is no central jurisdiction for the enforcement of the Convention awards, the main reason being state sovereignty, as suggested by several authors.¹²⁷ In other words the Convention does not fully attain the purpose it meant to achieve; and as Pieter Sanders stated, “the Convention was drafted in an imperfect world” to show that state sovereignty is a major barrier to the development of the Convention.¹²⁸ Because of domestic legal and

¹²² Won Kidane, *supra* note 15, p. 36.

¹²³ *Ibid.*

¹²⁴ Robert Briner (1998), *Philosophy and objectives of the convention*, in Conference at New York Convention day, New York, 10 June 1998, p. 9.

¹²⁵ UNCITRAL Digest, UNCITRAL, Digest of Case Law on the Model Law on International Commercial Arbitration, 2012, under the scope of application on the definition of ‘Commercial’, p. 2

¹²⁶ available @ newyorkconvention1958.org

¹²⁷ See for example, Briner, *supra* note 124, p. 9.

¹²⁸ Pieter Sanders (2015), the History of the New York Convention, available @ <http://www.kluwerarbitration.com/arbitration/arb/home/ipn/print.asp?print=1&ipn,p2>. See also Fali Nariman (1998), *The Convention’s contribution to the globalization of the international commercial arbitration*, at New York Convention day, New York on 10 June, p. 1.

institutional differences, which in turn result in legal uncertainties, states do not give to the Convention a life that it deserves.¹²⁹

The Convention requires any member state to recognize and enforce arbitration agreements with arbitrable subject matter.¹³⁰ But arbitrability differs from state to state according to its own political, social, and economic policy.¹³¹ In Ethiopia, administrative contracts are not arbitrable according to Article 315(2) of the Civil Procedure Code. Therefore, an award rendered in a foreign country may be refused in Ethiopia if the dispute which led to the award falls under Article 315(2). However, the current practice of submitting administrative contracts to arbitration coupled with the cassation decision on the issue can mitigate this challenge.¹³²

Moreover, the Convention imposes an obligation on state parties that their courts should recognize and enforce arbitration agreements made in written form as binding.¹³³ The writing requirement includes telegrams and exchange of letters. The Convention further obliges state courts to recognize and enforce arbitration agreements unless the agreements are null or void, in operative or incapable of being performed.¹³⁴ Nullity or invalidity of arbitration agreements will be decided depending on national laws of each member country.

Therefore, any arbitration agreement made based on exchange of letters or telegrams will be null according to Ethiopian laws. This is because, for example, contracts with administrative bodies or insurance contracts shall be made in written form and be attested by two witnesses.¹³⁵ Therefore, an arbitration agreement which is valid according to the NYC may be invalid under Ethiopian laws. As the Convention's requirements are considered as minimum requirements in the international commercial arbitration,¹³⁶ the strict formal requirements under the Ethiopian Civil Code can be a challenge. Moreover, these formal requirements in Ethiopia can be considered as parts of public policy of the country, thereby creating difficulties in the enforcement of awards.

¹²⁹ Faria Estrella (2003), 'Legal harmonization of through model laws; the experience of UNCITRAL', Legal Officer United Nations Office of Legal Affairs Secretary of the UNCITRAL, *Working Group on Electronic Commerce*, p. 2.

¹³⁰ See Article 2 (1) of NYC.

¹³¹ Redfern and Hunter, *supra* note 24, pp 91-102.

¹³² Yohannes Woldegebriel, *supra* note 25, p. 10. See also a case, *Zemzem PLC versus Illubabor Zone Education Bureau*, Federal Supreme Court Cassation Division, File No 16896.

¹³³ Article 2 (2) of NYC.

¹³⁴ *Id.*, Article 2 (3)

¹³⁵ See Articles 1724, 1726 cum 3326/2 of Ethiopia's 1960 Civil Code.

¹³⁶ Moss Giuditta (2003), *Risk of Conflict Between the New York Convention and Newer Arbitration-friendly National Legislation?*, Juris Publishing Inc., Rome, p. 3.

There is also a mismatch between Article 461 of the CPC and Article 5 of the Convention. Unlike the Convention and the Model Law, the Ethiopian law on enforcement of foreign arbitral awards starts with a negative statement.¹³⁷ The phrase in Art 461 of the CPC which provides that “*foreign arbitral awards may not be enforced in Ethiopia unless...*” sounds anti-enforcement in the sense that it makes enforcement conditional on the fulfillment of all the conditions laid down in the law.¹³⁸ In other words, foreign awards are not enforceable as a rule but exceptionally when proof to that effect is achieved by the award creditor. This statement and the procedures of Article 459 of the CPC¹³⁹ may create rooms for the award debtor to escape enforcement.¹⁴⁰ This problem, however, can be mitigated by the application of Article 456(1) of CPC which gives due attention to international conventions.¹⁴¹

4.2.2 Practical Problems

Some judges and practitioners in national courts may be unfamiliar with the details of the Convention or they may be divided on its practical utility or extent of applicability in the domestic sphere.¹⁴² This can be particularly severe in the Africa, including Ethiopia.¹⁴³ This is a real problem in Ethiopia for its courts/judges and practitioners are criticized.¹⁴⁴ According to Ambassador Michael, as stated above in this chapter, “Ethiopia's judicial system is poorly staffed ..., particularly with respect to commercial disputes.”¹⁴⁵

The problems relating to perceptions of arbitration in Ethiopia can, according to a key informant, be attributed to unfavorable treatment “particularly in the arbitration of international business transactions.”¹⁴⁶ Another challenge in Ethiopia’s ratification is the lack of institutional (basically judicial) capacity to recognize and enforce awards. With the ratification of the Convention by

¹³⁷ See Article 5 of the Convention and Articles 35 & 36 of the Model Law.

¹³⁸ Hailegabriel G. Feyissa, *supra* note 112, p. 329.

¹³⁹ Sub 1 and 2 of this article empowers the court to summon the award debtor for reflections. Read this article with Article 461 (2) of the CPC.

¹⁴⁰ Hailegabriel G. Feyissa, *supra* note 112, p. 330.

¹⁴¹ Article 456(1) states that, “[u]nless otherwise expressly provided for by international conventions, foreign judgments may not be executed in Ethiopia except in accordance with the provisions of this Chapter.”

¹⁴² Amazu, *supra* note 33, pp. 186-210.

¹⁴³ Judges, academics and research institutions might generally lack critical information and materials pertinent to the Convention.

¹⁴⁴ See, for example, File No 37678 which involves a construction dispute between parties who designated the AACCSA AI as a dispute settlement body.

¹⁴⁵ Froman, *supra* note 64, p. 19.

¹⁴⁶ Interview held with a key informant from AACCSA AI (April 3, 2016). Author’s translation.

Ethiopia, it is obvious that the number of arbitration cases will increase and many foreign award creditors will submit recognition and enforcement requests to Ethiopian courts. This coupled with the tradition of Ethiopian courts in delaying cases will pose serious problems. “But this problem is temporary for capacity building is a process and cannot be attained immediately.”¹⁴⁷ This problem can further be mitigated by the fact that many arbitral awards are voluntarily complied.¹⁴⁸

4.3. Problems in relation to the uncertain benefits of arbitration

Currently there are criticisms against international arbitration. There is the criticism that commercial arbitration was configured to favour the economic interest of the developed world and the applicable law under the disputes i.e., the doctrinal configuration of international law is working against the interest of the third world. Developing countries contend that there exists institutional and doctrinal bias in international commercial arbitration.¹⁴⁹

Babu states that the often cited “technocratic advantages of arbitration” such as speed, less cost, informal and cordial nature of dispute settlement mechanism, confidentiality, expert involvement etc are only pretext to promote the western business interests.¹⁵⁰ Gaps relating to qualified personnel in developing countries have also compelled the parties to hire western lawyers by putting up heavy costs. According to Gary Born, international arbitration can involve significant expense and delay, and it is unwise to make sweeping generalizations that international arbitration is quicker or cheaper.¹⁵¹ Moreover, the claim that international arbitration is settled by arbitrators who are sufficiently familiar with technical and commercial background is not also true, and the majority of arbitrators are chosen from lawyers, law professors and judges.¹⁵² Most of the

¹⁴⁷ Interview with a key informant professor and arbitration expert (April 5, 2016). Author’s translation.

¹⁴⁸ More than 90% of arbitration awards rendered by the ICC are reported as voluntarily complied by the award debtor.

¹⁴⁹ Babu, *supra* note 13. In 1997, less than 60 per cent of the parties to ICC arbitrations came from Western Europe and North America. More than 85 percent of the arbitrators nominated were domiciled in these regions and in almost 90 percent of the cases the seat of the arbitration was chosen in the western part of the world. See Robert, *supra* note 116, p. 10.

¹⁵⁰ *Ibid.*

¹⁵¹ For instance, the cost involved in arbitration is quite shocking when compared to cost of legal proceedings in developing countries. See Won Kidane (2014), The China-Africa factor in the Contemporary ICSID Legitimacy debate, Seattle University School of Law Legal Paper Series, *University of Pennsylvania Journal of International Law*, Vol. 35:3, 2014, pp. 559-673.

¹⁵² See Babu, *supra* note 13, p. 390.

experts are summoned as expert witness, just as they would be in national court proceedings.¹⁵³

There are also criticisms against the peculiar institutional set up of international commercial arbitration. In light of these criticisms, one may argue that if the advantage of international commercial arbitration is uncertain, it will be meaningless for Ethiopia to ratify the Convention. However, in the contemporary world, Ethiopia's interest to promote international trade and investment cannot set aside international commercial arbitration because, as Briner noted, international commercial arbitration is the servant of international business and trade.¹⁵⁴

5. Prospects of Ratification and the Way Forward

This author argues that ratification is on balance beneficial to Ethiopia. There are problems (discussed above) that are caused by the failure to ratify the Convention; and some of the problems that are regarded as adverse effects of ratification are either unwarranted or outweighed by the greater interest in encouraging trade and investment. The presence of the Addis Ababa Chamber of Commerce & Sectoral Associations Arbitration Institute (AACCSA AI), the comparative benefit of Addis Ababa as the seat of AU and many international organizations, and the pursuits towards encouraging the private sector could be factors that enhance the benefits of ratification.

5.1. Aspects of Ratification and Domestication of the Convention

The current local laws and practices as discussed above are not conducive to commercial arbitration, and will be setbacks to the implementation of the Convention. Harmonizing local laws and practices with international principles is thus necessary to give outstanding effect to the Convention. Various provisions of the Civil Procedure Code and the Civil Code that are incongruent with the Convention should be substituted by specific provisions in a legislation that deals with arbitration.

5.1.1 Reservations upon accession

The first major question that relates to ratification of the NYC is how Ethiopia should accede to the Convention. There are two types of reservations. *The First Reservation* involves reciprocity regarding the scope of the Convention's application. The NYC provides that:

¹⁵³ Ibid.

¹⁵⁴ Briner, *supra* note 124, p. 9.

When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.¹⁵⁵

This reservation has the effect of tightening the scope of application of the Convention only to states which recognize the member state's arbitration award by virtue of being a Contracting State to NYC. However, as the number of state parties to the Convention is growing year by year, the *reciprocity reservation* is becoming a relic.¹⁵⁶ The Model law, for example, recognizes awards irrespective of their place of rendition, and with its adoption by many states the reciprocity reservation is becoming less significant.¹⁵⁷ In fact, the major trading partners of the country with whom Ethiopian traders may agree to resolve their disputes through arbitration are members of the Convention which will likely render the reciprocity reservation superfluous.¹⁵⁸ Moreover, ratifying the Convention without reciprocity reservation will build international image.¹⁵⁹

The Second Reservation relates to the definition of commercial arbitration. This reservation entitles a state to apply the Convention to disputes arising "... out of legal relationship whether contractual or not, which are considered as commercial under the national law of the state making this declaration."¹⁶⁰ This reservation has the effect of delimiting the application of the Convention; and it creates difficulties in the interpretation of the Convention because what is regarded commercial in one state may not be considered as such in another.¹⁶¹ Commercial reservation was believed to be necessary for some Civil Law countries which distinguish between commercial and non-commercial transactions.¹⁶² More than one-third of the Contracting States use the commercial reservation.¹⁶³

The commercial reservation generally has not caused problems as the courts tend to interpret the coverage of "commercial" broadly, relying on the definition

¹⁵⁵ Article 1 (3) of the NYC.

¹⁵⁶ "The purpose of reciprocity is to revenge countries which do not recognize and enforce Ethiopian awards. But this is not as such important and many African Countries (more than 16 countries) do not follow reciprocity reservation." Interview with key informant. See also Redfern and Hunter, *On International Arbitration*, *supra* note 24, p. 635.

¹⁵⁷ Article 35 and 36 of the Model Law.

¹⁵⁸ Interview with key informant (April 28, 2016); author's translation.

¹⁵⁹ "... ratifying the NYC may not be sufficient to convey a signal to foreign parties, but ratifying it without a reservation almost always does." Berkowitz *et al*, *supra* note 61.

¹⁶⁰ See Article 1 (3) of the Convention.

¹⁶¹ Redfern and Hunter, *On International Arbitration*, *supra* note 24, p. 636.

¹⁶² Berg, *supra* note 48, p. 5.

¹⁶³ *Ibid*.

of the Model Law.¹⁶⁴ Nonetheless, each national State should decide for itself, under the provisions of the NYC, what relationships it considers to be ‘commercial’ for the purposes of the commercial reservation.¹⁶⁵ Therefore, this author argues that Ethiopia should put the commercial reservation. This is because Ethiopia is dominantly a Civil Law country, and its legal system shares various characteristics with most of the countries that have opted to use the commercial reservation upon ratification of the NYC. This would have a positive impact on the problems with regard to the interpretation of arbitrability and non-arbitrability of subject matters of a dispute. Ethiopia’s failure to have a commercial reservation can affect the Ethiopia’s civil jurisdiction in various issues such as family issues, adoption and other non-commercial spheres.¹⁶⁶

5.1.2 Domestication of the NYC upon accession

The second important issue is the manner of incorporation of the Convention into the domestic legislation of Ethiopia, i.e. domestication. The Convention may be incorporated into a country’s national law by direct reference to the Convention or the provisions of the Convention may be embodied in a statute.¹⁶⁷ Where the NYC is incorporated into the state’s domestic law by direct reference, all the terms of the Convention will be incorporated into domestic law.¹⁶⁸ The Convention can only be implemented through domestic legislation,¹⁶⁹ and it is the implementing legislation which must be considered when looking at issues of enforcement.¹⁷⁰

In countries that have enacted the UNCITRAL Model Law, the relevant provisions allowing the recognition and enforcement of foreign arbitral awards are found in Articles 35 and 36.¹⁷¹ This author argues that Ethiopia should incorporate the Convention by setting out the provisions of the Convention on its domestic legislation rather than adoption of by reference to the Convention. To this end, the legislation should be crafted in a manner that encourages

¹⁶⁴ Ibid.

¹⁶⁵ Redfern and Hunter, *supra* note 24, p. 637.

¹⁶⁶ Interview with a key informant (April 28, 2016), Author’s translation.

¹⁶⁷ Andrew Tweeddale & Keren Tweeddale (2007), *Arbitration of Commercial Disputes; International and English Law and Practice*, Oxford University Press, Oxford, pp 412-436.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid. Tweeddale & Tweeddale argued that the implementing legislation could amend the Convention. For example in Australia and England the relevant arbitration legislation implementing the NYC has changed the wording of the Convention in some significant ways.

¹⁷⁰ Id., p. 413.

¹⁷¹ Ibid.

international commercial arbitration by, for example, following some Model Laws including the UNCITRAL Model Law.

Mere reference to the provisions of the Convention by Ethiopia in the absence of comprehensive reform measures will not give effect to the very purpose of the Convention, i.e. pro-enforcement bias of the NYC to both arbitration agreements and awards. It is to be noted that the UNCITRAL Model Law contributes to the Convention's pro-enforcement bias.¹⁷² Furthermore, since the Convention is of a procedural nature and because it leaves many issues to the power of state legislation and courts, a comprehensive reform measure through the instrumentality of the UNCITRAL Model Law in the area of arbitration is necessary for Ethiopia. This can make Ethiopia not only a state with a reputation of recognition and enforcement of foreign arbitral awards, but also enables it to institutionalize sound arbitration practices. To use the words of Pieter Sanders, upon ratification, "states give to the Convention the life it deserves."

Conclusion

Despite criticisms, the Convention is on balance, advantageous to ratifying states. Ethiopia is not, however, a party to the Convention ratified by around 158 states. Ratifying the Convention can positively contribute to Ethiopia's pursuits toward enhancing trade and investment. Ratification could increase FDI, enhance trade, improve arbitration system, build an international image, increase competition for trade and investment, decrease court loads, enhance access to lower interest rates and facilitate accession to WTO. To this end, Ethiopia should incorporate the Convention's provisions in an independent legislation and domesticate it through the instrumentality of the Model Law. ──────────■

¹⁷² Article 7 of the Convention, 'the most favorable right' provision strengthens its pro enforcement bias.
