

Alternative Dispute Resolution

Teaching Material

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Course Introduction

Dispute is indispensable part of societal interaction since the inception of human settlement. If it is not well taken and resolved early, dispute between two individuals will grow up and become treat to national security, peace and stability, which are the basic parameter to measure the development of a nation. With the objective of settling dispute in a more justifiable manner, national governments and the constitutions of most nations establish institutions; judiciary organs of the government. It is the natural mandate of courts of law to entertain disputes. Other than judiciary arm of the government, the necessity of establishing other tribunals with judicial power has been felt long ago. With in the executive arm of the government, quasi judicial tribunals named otherwise as administrative tribunals have been establish to settle disputes. Courts and administrative tribunals are public institutions established to resolve disputes.

But before the establishment of courts and administrative tribunals, and even after their establishment, there have been other private tribunals by which the society is trying to settle disputes. These are called Alternative Dispute Resolution (ADR) mechanisms. ADR doesn't refer a single kind of mechanism, but it is a generic name to refer dispute settlement mechanisms other than court and administrative tribunals. Arbitration, Conciliation, Mediation, Negotiation and Mini- Trial are some of them which are referred as ADR.

This two credit hours course will try to bring in to your attention the issues surrounding ADR. With a view of making a systematic study of the subject matter the material is divided in to four chapters. The first chapter is devoted for a general understanding of the subject ADR. In doing so, the meaning and the concept, historical developments, advantage and disadvantage of ADR and similarly court litigation will be best assessed.

Though we call generally as ADR, it contains different kinds of dispute settlement devises. The second chapter will look all the widely known ADRs. It starts by looking the basic characteristics of these different kinds and a very close discussion will be made on the three widely used ADR; Arbitration, Mediation/Conciliation and Negotiation.

The third chapter is exclusively devoted for the experience of ADR under Ethiopian legal regime. The historical background of ADR in Ethiopia and its constitutionality comes first. Under the existing Ethiopian legislations, there are different provisions put through out of its legislation regulating the matter. Compromise in general, conciliation and arbitration in general and specifically under family, labour and insurance law will be assessed. The practice of institutionalized ADR under the Ethiopian legal regime will be seen in this chapter.

Lastly, the documents which deal with ADR and institutions practicing ADR in international level will be seen. Through there are lots of such kinds of institutions and documents, only few of them will be seen as an example, like International Chamber of Commerce (ICC) and International Court of Arbitration (ICA), the 1948 New York Convention, the 1899 and the 1907 Convention that have established Permanent Court of Arbitration (PCA) and the documents under UNCITRAL will be explored. The place of ADR under regional documents of Europe, North America and Africa, and the approach taken by the Ethiopian legal system to these international and regional documents will be discussed at last.

There will be questions which the students will be expected to answer for a better understanding of the subject. We have tried to incorporate real and hypothetical cases to support the discussions made there under. Provisions related to ADR from the Constitution, Civil Code, Civil Procedure Code (Civ. Pr. C.), Family Code and Labour Proclamation No 377/2003 have been thoroughly analyzed.

As long as the objectives set in each chapter is not defeated, the instructor of the course can use any materials, cases and documents other than listed at the end of the material.

Chapter One

General Overview of ADR

1.1. Introduction

The provision of effective dispute resolution is the core concern of domestic as well as international legal system. The aim of devising mechanisms to afford effective dispute resolution is to ensure that disputes are solved through effective and efficient means for the benefits of the disputants and the society in general. So as to attain this core objective, states and the international community have been searching various ways of resolving dispute than insisting on the traditional way of resolving dispute through court litigation which is mostly ineffective and inefficient.

Now days, therefore, Alternative Dispute resolution has got wide acceptance to resolve dispute due to its perceived advantages. Needless to say, even court officials, who used to consider ADR as taking of court power, recognized the need of ADR as a choice to settle dispute. Pre-trial conference and compulsory (court ordered) arbitration might be an indication for this.

Alternative Dispute Resolution is a generic term used to describe a range of procedures designed to provide ways to resolving a dispute as an alternative to court procedures. ADR had been used by human society since ancient times though it gets wide acceptance and recognition in countries' laws recently. ADR methods, in comparison with court litigation, have various advantages though it is not free from different short comings. In this chapter issues in relation with the meaning of ADR, its historical development, its comparative advantages and disadvantages will be dealt. The short comings of court litigation also enumerated to show the rampant problems of litigation.

Chapter Objectives

At the end of this chapter students will be able to;

- Define what Alternative Dispute Resolution mean;
- Appreciate the difference between conflict and dispute;

- Know historical development of ADR;
- Identify the advantages of ADR in comparison with formal litigation;
- Realize the demerits of ADR;
- Demarcate the scope of application of ADR in Dispute settlement mechanisms.

1.2. Definition; What is Alternative Dispute Resolution?

ADR is composed of different words: Alternative, dispute and resolution. Thus to clearly understand or define the phrase it is paramount important to understand each word separately thereof. And then what 'Alternative' connotes to you? What about dispute? Is a dispute synonymous with conflict? What about resolution?

The word 'Alternative', as to the definition given in 6th edition of Oxford Advanced Learners Dictionary, refers "a thing that you can choose to or have out of two or more possibilities."

Therefore the word in this context is used as an adjective and refers to all permitted dispute resolution mechanisms other than litigation, be it in court or administrative tribunal. Whereas, the phrase dispute resolution, in the absence of alternative as prefix, is simply a collection of procedures intended to prevent, manage or resolve disputes and refers procedures ranges from self-help in the form of negotiation through to state sanctioned mechanisms called litigation. It is to mean that 'Alternative' connotes the existence of dispute settling mechanisms other than formal litigation. Though the word 'Alternative' in ADR seems to connote the normal or standard nature of dispute resolution by litigation and aberrant or deviant nature of other means of dispute resolution mechanisms, it is not really the case. ADR is not an alternative to the court system but only meant to supplement the same aiming on less lawyering.

Now days there are arguments that ADR does not include arbitration and the proponent of this position say that alternative Dispute resolution encompasses various amicable dispute resolutions other than Litigation in court and arbitration. Indeed ADR Rules of The international Chamber of Commerce follows this approach. The preamble of the same rule reads as:

Amicable settlement is a desirable solution for business disputes and differences. It can occur before or during the litigation or arbitration of a dispute and can often be facilitated through the aid of third party (the neutral) acting in accordance with these rules.

Needless to say most literatures and laws consider alternative dispute resolution as methods of dispute resolution which accommodates all the traditional dispute settling mechanisms other than court litigation. As arbitration shares many characteristics with other dispute resolution mechanisms than court litigation ADR in this material connotes all dispute resolutions out of litigation.

The other important word to define ADR is Dispute/ Conflict. There is debate about whether a conflict and a dispute are synonymous. Apart this debate psychologist, Lawyers, Diplomats, and Public Servants all deal in their work with conflict/ dispute. Concerning the distinction between Conflict and Dispute, different people suggested the difference in meaning between these words. Some people, for instance, define 'Conflict' as a form of competitive behaviour, like competition for scarce resource. Some see it as mere reflection of differences and an opportunity for personal growth. Still others only recognize conflict as armed conflict or war.

The nouns 'Conflict' and 'Dispute' are used interchangeably all time and indeed, are synonymous for each other in English Language, however. Still scholars, including Chornenki, draw slight distinction among the two words. According to the named scholar here, 'Conflict' is the parent and disputes are the children and frequently, intervention is more important at parental level. He further states that conflict is a phenomenon or condition with three aspects. It manifests it self through attitudes, behaviour and situations. This triangular image opens the prospect that conflict can be internal state of mind, an external act or an environmental situation. By contrast, Dispute is an issue – specific manifestation of conflict as to the same person. It usually has identifiable parties and articulated or defined /delineated points of difference between those parties. A dispute is the subset of conflict: conflict gives rise to and sustains dispute. This distinction, as to the above proponent, is very important because if a dispute is addressed in only superficial way without regard for the underlying conflict, it may recur or replaced by other similar or related disputes.

Similarly, Folberg and Taylor also give the same definition for dispute as of Chornenki. To them ‘a Dispute’ is an interpersonal conflict that is communicated or manifested. A conflict may not become a dispute if it is not communicated to someone in the form of perceived incompatibility or contested claim as to them.

Abebe Semagne in his unpublished senior thesis also quoted the meaning of dispute as;

“ a conflict or controversy; conflict of claims or right; an assertion of right, claim or demand on one side met by the contrary claims or allegations on the other; the subject of litigation; the matter for which a suit is brought and which issue is joined; and in relation to which jurors are called and witness examined”

Apart the above difference in meaning between two words the writers of this teaching material use the two words interchangeably for convenience sake.

The other element of ADR is Resolution. The oxford Advanced Learner’s Dictionary defines ‘Resolution’ as the act of resolving or settling a problem, dispute, etc.

Thus , even if the phrase ,i.e. ADR, defy precise definition ,as to the above illustrations and different literatures, it is a generic term used to describe rang of procedure designed to provide a way of resolving a dispute as an alternative to court or administrative Tribunal procedure. For instance, Kerley , Hames and Sukys in their book entitled ‘Civil Litigation ‘ shortly define the phrase as methods to resolve legal problems other than court judgment.

ADR is sometimes referred as Appropriate Dispute resolution as the referred option should be the process most appropriate to the case, the parties and the issue involved.

1.3. Historical Development of ADR

There is no clear information when exactly ADR had been used as means of dispute resolution but it quite possible to conclude its dating back to the history of human

society since there were no courts to resolve differences during ancient time .Different scholars have showed the long history of ADR methods in their work. Here under we incorporated the full text of an article written by Lipner, entitled ‘Methods of Dispute Resolution: TORAH TOTALMUD TO TODAY.’ The article indicates the prevalence of the idea of ADR before 2000 years ago by showing the kind of debate in Talmud.

The modern –day methods and the issues raised by the difference between litigation and arbitration, have ancient roots. As this article demonstrates, the fundamental philosophical questions we face every day in the dispute resolution field were also faced by Rabbis and Hebrew sages nearly 2,000 years ago. The debates of these sages and their opinions are reflected today in our attitudes and laws about dispute resolution.

I. The TORAH

The Bible (at this time after referred to by its Hebrew name “TORAH”) contains one of the earliest legal codes. Throughout much of the TORAH, laws are prescribed and punishments are defined. Some of the laws prescribed are simple and ...from today’s perspective...Self-evident (e.g. the Ten Commandments); others are more arcane and obscure. The Torah contains laws that are both societal (what we think of as “criminal “) and laws that are private (What we think of as “tortuous” and, in some case “commercial”).

In the final book of the torah, Deuteronomy, Moses makes two long speeches to nation of Israel . The people’s travel through the wilderness are nearing an end, and the Israelites are about to cross over the Promised Land. Moses’ speeches in Deuteronomy are basically recapitulation of the laws recited earlier in the torah combined there with ominous injections that the laws must be strictly observed.

Not only does Moses recite the substantive laws themselves, he also speaks about the nation of Israel about resolution of disputes. Speaking about creation of a leadership structure of his people, Moses says:

I charged your magistrate at that time as follows,” Hear out your fellow men, and decide justly between any man and fellow Israelite or a strange. You shall not be partial in judgment: hear out low and high

like. Fear no man, for judgment is God's. And any matter that is too difficult for you, you shall bring to me and I will hear it.

Moses' words seem basic laws were announced; judges were appointed. The judges' function was to decide dispute fairly through application of law. Complex cases can be brought before Moses himself, who would sit as a sort of Supreme Court. Correctness of the magistrates' rulings would be ensured through divine inspiration. Justice, impartiality and access to court are offered as guiding precepts but no alternative of the "Magistrates" is offered.

II. THE TALMUD

The Talmud (the word means "learning") was compiled between 1,600 and 2,000 years ago by rabbis in Jerusalem and Babylonia. Recorded over a period of four centuries, and combined with later-written commentary, the Talmud consists, in large part, of the studies and debates of Israel's leading scholars, predecessors of today's rabbis. The Talmud explores in a variety of ways the meaning of the Torah's ancient laws. Yet the Talmud was compiled many years after the Torah; the rabbis and the compilers of the Talmud were recording further details about the meaning of the Torah's laws.

In studying and expounding on the Torah and its laws, the rabbis in the Talmud also debated methods of dispute resolution. Just like courts and arbitrators today the rabbis of the Talmud were faced with the question whether the "laws" were to be applied strictly or whether a broader sense of "Justice" and "equity" should prevail.

Their answer is strikingly similar to our own modern attitudes about adjudication and arbitration.

*[*317] In the Tractate of the Talmud called "Sanhedrin," the rabbis discuss different approaches to dispute resolution. Which is more appropriate, they ask-- "Judgment" based on the strict law, or the "arbitration" of a "compromise". It was taught...." once a case has been brought to court, it is forbidden to arbitrate a compromise. Not only is compromise forbidden, but whoever arbitrates a compromise is regarded as a sinner, for compromise necessarily involves a deviation from Torah law to*

the disadvantage of one of the litigants. And whoever praises one who arbitrates a compromise blasphemes God”.

Rabbi Eliezer... explains: Rather than compromise, “let the law cut through the mountain. Let even the most difficult case be decided according to the strict letter of the law, as it is said in Deuteronomy 1:17:Do not be afraid of any man, for the judgment is God’s . And similarly Moses, who was the first to judge Israel according to the Torahlaw, would Say: “let the law cut through the mountain”.

But his brother Aaron, who was not a judge, loved peace and caused peace to reign between a man and his fellow man...

Woven into this Talmudic discussion is a fundamental premise that remains with us today-- that arbitration involves the surrender of rights; it thus must be the product of consent.

Inherent in the “surrender” premise is that there is a difference between the strict application of law in the courts and the less-strict approach used in arbitration. Put differently, “rights” are at issue because of the substantive differences between the two approaches-differences that can act to the detriment of one of the parties.

*[*318] The wisdom of applying the letter of the law-and the divine interlocution that is assured in the Bible—is then cast into doubt by the reference to the contradictory philosophy of Moses’ brother, Aaron. Aaron ,the Talmud tells us , had a different attitude toward the resolution of disputes.*

While the details of Aaron’s approach are not revealed in Torah or Talmud, the reference to Aaron appears to signal biblical legitimacy for an alternative approach to the resolution of disputes outside of the judicial system. As the High priest of Israel, Aaron knew the laws well, and he could have applied them as did Moses, but we are told that he chose not to do so.

It will not go un-noticed to those experienced in arbitration that Moses’ brother Aaron is specifically identified as not being a judge. More important, however, is the fact that

this Talmudic passage ends with the incursion of a new but logical goal for dispute resolution—the promotion of “peace”

Leaving for another day the question whether arbitration is in fact more likely (than is litigation) to promote peace, it must still be observed that the colloquy leaves the ultimate question unanswered—which approach is superior, that of Moses or that Aaron?

The Talmud next records a ruling on the desirability of an arbitrated compromise versus a litigated judgment, and ends with a not-unusual conundrum meant to inspire further thought: Rav said: the law is in accordance with the view of Rabbi Yehoshua ben Korhah, that it is a mitzvah [a meritorious deed] for a court to impose a compromise....

[But] is it really so that Rav rules that a compromise is a mitzvah? Surely Rav Huna, who was a disciple of Rav, accepted his master’s rulings, and whenever two people came before Rav Huna to have him adjudicate a dispute, he would ask them: “ Do you want me to adjudicate the case and tender a judgment or do you want me to arbitrate a compromise?” Now if Rav ruled that a compromise is a mitzvah, why did his pupil Rav Huna offer the litigants a choice between judgment and compromise?

The question the Talmud asks here lies at the heart of the debate over the benefits and drawbacks of alternative dispute resolution (“ADR”)- which method is preferable? The Talmud’s answer is that “choice” is to be promoted, but that neither arbitration nor letter-of –the law judgment is so superior as to be preferred to the exclusion of the other.

*[*319] The next question might be: but why should the law promote a choice between a divinely-directed system and one that may act contrary to God’s law? ADR “believers” may be content to rest their case with the citation to Aaron, though they are sure to add certain disbelief about the divine inspiration of judges.*

A principal goal of dispute resolution, the Talmud explains, is creating peace (“shalom”) between the disputants:

... surely where there is judgment and adherence to the law, there is no peace between the two litigants. And where the litigation ends with

peace reigning between the two parties, there is no true judgment for to arrive at absolute justice, we must strictly follow the letter of the law, which is usually only in one party's favor. How then can there be a judgment which attains peace? You must say that this verse refers to compromise. And similarly, regarding King David, the verse states: "And David executed judgment and charity to all his people." But surely where there is judgment and strict adherence to the law, parties, there is charity, or consideration given to the financial circumstances the two parties. And where there is charity, there is no judgment, for the law is one and the same for rich and poor. How then can there be a judgment which involves charity? You must say that this verse refers to compromise.

King David is venerated in Jewish lore as being unerring; the reference to verse from David, with its linkage of "judgment" and "charity," provides the biblical (albeit post-mosaic) basis for promoting an arbitrated rather than strict legal resolution of disputes.

Those seeking rabbinic authority for a preference for arbitration can, however turn to another scholarly and authoritative work about the meaning of the Torah and Talmud. The "Shulchan Oruch" (literally the "prepared table") is a more-straightforward recapitulation of the Talmud. By the time of Shulchan Oruch (early 16th Century), the Talmudi "laws" and debates had become so complex that people Yearned for a simpler version to which they could turn for answers. The Shulchan Oruch thus tries to answer, in four well-organized volumes, the questions the Talmud asks.

The Shulchan Oruch, written by Rabbi Joseph caro, settles the judgment/ arbitration issue as follows: It is a meritorious deed to compromise. "It is a mitzvah for the judge to ask the parties at the outset whether they want their dispute resolved according to the law or by the means of a compromise ..."

*[*320] There can be no doubt that, again, the main emphasis is on honoring choice. But now, the thrust is not simply about honoring the parties' choice—arbitration and compromise have not just been elevated to equal status with a court's strict judgment, arbitration is in a sense preferred. The judge must offer the parties a choice.*

The statement that the judge himself does a meritorious act by offering arbitration at the outset ¹² is intended as a clear expression to the parties that the use of the arbitration alternative is sanctioned/encouraged. This passage from the Shulchan Oruch displays a certain judicial reluctance on the part of rabbis to apply the strict law.

Other rabbinic interpretations support the concept of preferring arbitration. For example, an older piece of writing from the 12th century—that of Rabbi Moses ben Maimon (Maimonides or RAMBAM) interprets the Talmud as favoring arbitration. The promotion of “peace” is the principal rationale offered. Like Rabbi Caro and the Shulchan Oruch, Maimonides preferred arbitration to letter-of-the-law litigation.

But it can also be observed that the Mosaci preference for judgment according to the strict letter of law was derived from a sense that both the law and the decision-maker are divinely directed. But a corollary of that “faith” is that unlike God (and perhaps Moses), humans are fallible, and that God does not necessarily intervene to assure the correctness of every judicial act.

The rabbis thus favor arbitration/compromise because it reduces the potential for grievous error. Put differently, a middle-ground solution reduces the adverse consequences of the judge being totally wrong; the potential for injustice is there by reduced-and justice is the first and foremost goal.

These biblical and rabbinic texts throughout stress the theme that all dispute resolution systems be fair and impartial, and driven by the need to do “justice.” Whether in litigation or arbitration, the decision-maker must do “justice.”

*But the Talmud teaches that there is no presumption that strict application of law is necessarily more “just” than an arbitrated, less-legal solution. Indeed, in the later [*321] writings, there is, surprisingly, a preference for the looser approach characterized by what we think of today as ADR.*

Next we will see how that preference continues, in remarkably similar form, in our (secular) law today. But before doing so, it important to note that the Talmud cautions that” the power of compromise is greater than the power of judgment, perhaps intended

as a warning to arbitrators that they must always act with utmost discretion and thoughtfulness, rather than cavalierly or capriciously.

III. TODAY

Arbitration law today very much reflects the Rabbinic and Talmudic views on dispute resolution. Any individual who is aggrieved has ready access to the courts, and a right to strict application of the law—including resort in complex cases to appellate authority. The courts, we know, will not modify or ignore legal rules in the name of compromise or peace, letting the proverbial chips fall where they may.

But our law also recognizes that if an agreement to arbitrate exists, the right to go to court and insist on strict application is surrendered. The Federal Arbitration Act (“FAA”) Section 2, provides:

Validity, Irrevocability, and Enforcement of Agreements to Arbitrate: A written provision in any... contract... to settle by arbitration a controversy thereafter arising out of such contract... shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract.

Every state has a similar, if not identical, statute. There are, as well international treaties to the same effect.

And as was the case with the Talmud, once in arbitration, the parties have no right to insist on strict application of law.

Absent provision in the arbitration clause itself, and arbitrator is not bound by principles of substantive law or by rules of evidence. He may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement, even though the award exceeds the remedy requested by the parties. His award will not be vacated even though the court concludes that its interpretation of the agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law, unless it is violative of a strong public policy or is totally irrational, or exceeds a specific enumerated limitation on his power.¹⁷

[*322] comparing the FAA and the Silverman case with the Rabbinic discussion, one sees a modern judicial attitude identical to that of the Talmud. The agreement, i.e. “choice,” is the main element. 18 once the choice is made to arbitrate, the parties enter into a different system and there is no turning back.

The system described by the New York court of Appeals in Silverman is just like the one the rabbis described in the Talmud. The arbitrator has discretion to fashion a solution that the strict law might not support. The comparison of the cases and the centuries-old discussion by the sages reveals that the commonly-recited benefits of arbitration—an emphasis on equity over law, greater flexibility, virtual finality and, yes, the promotion of “peace,” go back a long, long way.

The Silverman case’s famous dicta, however, stands in contrast of sorts to the dicta of the United States Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.* In that case (involving international arbitration of issues arising under U.S. antitrust law) the court stated that by agreeing to arbitrate a... claim, a party does not forego the substantive rights afforded by [law]; it only submits to their resolution in an arbitral rather than a judicial, forum. “In a sense the Court is reminding arbitrators what the Talmud warned two millennia ago—that the “power of compromise is greater than the power of law” that power must be exercised with the same degree of justice as is mandated by the law itself.

The author summarized his conclusion as follows;

These passages, now and old offer “Sages’” advice for the arbitration community today

1. Arbitrators are not judges, and arbitration is not meant to be a court of law;
2. Arbitrators should not apply the law in the same strict way that a judge does that goes for procedures and the rules of evidence as well; and
3. Arbitrators must never lose sight of the principle that their overriding obligation is to provide access to all who are aggrieved, to act impartially, and most of all—to do justice.

According to Reddy, also, informal dispute resolution has long tradition in many of the World societies dating back to the 12th century in China, England and America.

However, 1970s law reform movement in USA had played a great role for the further development of the same. In USA in the middle of the 20th century, legal and academic communities began to have serious concerns about the pitfalls of increased litigations because, even though legislations of the time granted a broad range of rights and individual protection, the search for redress of those rights while they are infringed through legal system was becoming a complex exercise. Adjudication of disputes was characterized by the court congestion, high legal cost and waiting for long hours in courts. The emphasis of the court and other traditional forum was pronouncing rights and wrong. And naming winner and loser destroy almost any pre-existing relationships between the people involved.

The cost, the stresses and inaccessibility of ways to resolve conflict other than through the popular alternative of fight and flight caused people to drop out or to seek extreme techniques to make their points. There for against back drop of formal litigation, new methods of settling disputes had been emerging both in and out of the court.

The Roscoe Pound Conference in Saint Raul, Minnesota, (1976) is well known phenomenon in the history of growth of alternative dispute settlement mechanisms. The conference was summoned by a person named Warren Burger, a former Chief Justice of USA. It was a conference to discuss the causes of popular dissatisfaction with the administration of Justice at the time and to find new and better ways of dealing with disputes. In this conference academics, members of the judiciary and lawyers participated.

The Pound Conference served to spark the interest of legal establishment in alternative ways of dispute settlement. And a lot of changes had taken place on aftermath of the Pound Conference: rapid growth of techniques of settling disputes and emergency of new institution and professionals to use them.

After the Pound conference, the American Bar Association established a special committee on minor dispute, which has now become the special committee on dispute

resolution. Law schools and schools of business offered some alternative dispute resolution courses as part of their curriculum. Insurance companies used ADR to handle claims with the growing demands of clients to resolve disputes through ADR mechanisms, law firms appointed ADR coordinators as a response. Troubled families who used to go to the court began to mediation. And following this trend a number of jurisdictions required divorcing couples to try mediation before the courts would resolve their dispute for them.

States began to treat ADR in their law. The American Congress in the late 1990 passed the Administrative Dispute Resolution Act, which requires the Federal Agencies to develop policies on the use of ADR, appoint ADR specialists and provide appropriate employees with training in ADR. In USA, the Civil Justice Reform Act was passed in 1990. It required all Federal district Court to create advisory Committees to consider ways of reducing the cost and delay of civil litigation, and directed these committees to consider the use of ADR to reduce cost and delay.

As ADR mechanisms are disseminated in many countries; countries developed innovative conflict management programs specific to their own cultures.

Apart domestic effort by each state to use ADR, the International Community also resolved to use ADR on the same fashion. The international community, for example, use Arbitration clauses in International Trade contracts so as to reduce the back drop of litigation in court. International Arbitrations may be either ad hoc, specified by parties in their contracts and administered and conducted in a manner defined by them or institutional incorporating rules, procedures and administration of Arbitration Institutions. Such Arbitration Institutions include the International Chamber of Commerce (ICC), head quarter in Paris, London Court International Arbitration (LCIA), The American Arbitration (A.A.A) and the International Center for Settlement of Dispute (ICSID), established by the World Bank in Washington, D.C. The other Arbitration centres have been developed by the United Nations Commission on International Trade laws (UNCITRAL) of uniform set of culturally neutral Arbitral Rules for use of on world basis. The UNCITRAL rules have achieved wide acceptance for private as well as quasi-public International Disputes. In chapter three and four you will see the historical development of ADR in Ethiopia and in the international sphere in detail.

1.4. Purpose of ADR

What are the advantages of ADR?

The age-old complaints lodged against lawyers and the legal process has gained an amplified resonance in the cotemporary world community. The common conception is that judges and lawyers, the procedural rigor of justice and substantive incantation of legality, lay Jury and technical experts hurt more than they help. The recourse to legal actors and proceedings is cost , emotionally debilitating, and potentially counterproductive .It is to meant that now it is a common knowledge that existing justice system is not able to cope up with the ever increasing burden of civil and criminal litigation . The problem is not of a load alone. The deficiency lies in the adversarial nature of judicial process which is time consuming and more often procedure oriented. There is growing awareness that in the bulk of cases court action is not appropriate recourse for seeking justice.

Judicial process is set in motion by the action of an aggrieved party. Each party's case is presented before the judge by the advocators, who are expert in court craft, in straight jacket of rules of procedure and substantive law. The Judge perceived the dispute (or the issue involved) in the backdrop of known legal concepts , sifts evidence to arrive at the truth, hears arguments to determine as to how logically the parties stand in terms of applicable legal concepts and pronounce his verdict accordingly. The parties are bound by the verdict, at the peril of legal sanctions, if disobeyed. Represented by lawyers (especially in developed countries) the parties are kept at a distance not only from the judge but also) from each other. The end result is a win-lose litigation .Thus, the dispute is liquidated and justice done or that is what is professed. But the difference between the parties continue to subsist, the competing interest of the parties remain unsolved, inter-personal relationship of the parties becomes more hardened. The adversarial court does not aim at resolution of competing claims of member of the society. It aims at upholding the one and rejecting the other , leaving the conflict between the parties un solved .Thus, apart from the fact that recourse to justice through the court system is time consuming and inaccessible due to mounting arrears, the judicial process itself is not oriented for the adjudicating upon rights -liability relationships created under legal regimes pertaining to

modern science and high technology because the subjective matter of the disputes arising from such relationship can be better understood in terms of scientific and technological concepts though disputes are stated in terms of usual legal concepts.

In its philosophical perception, ADR process is considered to be model in which the dispute resolution process is qualitatively distinct from judicial process. It is a process where disputes are settled with the assistance of a neutral third party generally of parties own choice: where the neutral is generally familiar with the nature of the dispute and the context in which such a dispute normally arise; where the proceeding are informal, devoid of procedural technicalities and are conducted, by and large, in the manner agreed by the parties; where the dispute is resolved expeditiously and with less expenses: where a decision making process aims at substantial justice, keeping in view the interests involved and the contextual realities. In substance the ADR process aims at rendering justice in the form and content which not only resolves the dispute but tends to resolve the conflict in relationship of the parties which has given rise to that dispute.

Having stating the above general description about the purposes of ADR in general, here under are specific purposes of ADR with their justifications.

A. Reduction of Cost and Time

One of motivations for ADR system is to reduce the cost and time involved in solving disputes. If a new dispute resolution system can reduce costs and achieve out comes that are just as good as those under previous system, it make the new system desirable. Law suits are expensive, some times the cost goes even the extent of making the victory of a party insignificant or exceeding of the amount of judgment .There are court fees, filling fees, lawyers' fees, and other costs. There would also be loses to be incurred by both litigants because of spending longer time in litigation that may not be covered by the courts awards. On the other hand, an ADR system can make it possible to use process that cost small fraction of the litigation, and yet produce as good or even better results. Mediation is usually designed to start and finish in one day. The disputants usually share the cost of the mediator. In this circumstance, therefore, the total cost of mediation is minimal as compared to the cost of litigation.

B. Improve or Maintain the Relationship

In situations where the disputants have an ongoing relation , ADR system allows them to work through their difficulties in a productive way that does not destroy their relationship. After acrimonious litigation, disputants rarely want to put the past behind them and work cooperatively. The dispute resolution system may provide process that will not leave people to work together angry and frustrated with either the result or the process itself. In the ADR process the disputants could rather learn information that will allow them to work more effectively in the future.

C. Satisfactory Outcome

Regardless of the process used, the solution must solve the problem that exists. ADR procedures tend involve the parties with the view to achieving settlement. ADR procedures create a formal setting to bring parties together for serious attempt at resolving a problem .A dispute resolution process must move parties towards workable, durable and easily implement able out come. ADR procedures help to afford chance that the parties can make real progress on the case and that the parties can communicate more fully and frankly through a third party.

D. Deal with Emotion

The ADR process will give disputants an out let to discuss their frustrations. They will get the chance of venting emotions in non-threatening environment. This will help the disputants be satisfied with the outcome. ADR provides for effective and neutral methods or factors for achieving maximum impact on the process, strategy, and tactics to words resolution. A disputant will be ready to deal with the issues when he or she is satisfied that other person has listened to his or her point of view.

E. Avoid Future Disputes

An ADR system can yield us techniques that can resolve disputes effectively and wit out damaging relationships. The process used for a dispute at hand can provide a frame work

to deal with anticipated disputes .In the future or recurring disputes, the system may help to take advantage of the resolution in the past to avoid guidance for the future, and to learn from experience.

1.5. Demerits (Shortcomings) of Litigation

As traditional approach to resolve disputes, the major draw backs may be analyzed in various aspects. The following are the major ones:

A) Cost of Litigation

Law suits are expensive. There are legal fees, filling fees and cost that can be imposed against the losing disputant. There are costs for being away from daily work to attend court hearing and at this moment the employer increase cost. In some cases, too, the cost of trying the case may exceed the amount of the judgment.

B)Time

It takes time from the commencement of the law suit until a judgment at the trail. Even after the trial, the loosing disputant may appeal and it may take a good deal of time before final decision is rendered. The is also time that is needed for the implementation of the judgment

C) Emotional Cost

Litigation is an emotional process. It increases tension between the parties. Litigants consider, while they are out of court, what they have said; what they should have said; what they will say; how unfair the process; what they may come out under cross – examination; and the consequence of loosing.

D) Litigation is Public

The public has the right to attend court proceeding but in few confidential cases. The press report and comment on the proceeding might be dispersed through different

Medias. On the other hand, the issues in the dispute may be confidential ones that the disputants do not want to share with others. Litigants may be embarrassed about the allegations made against them and may be made public regardless of whether they are true or not.

E) Absence of creative solutions

Judges are empowered to decide the issue before them according to the law, even if the solution to the issue is best fit to the other issue. Judges interpret the law relevant to the case and determine the case based on the legal rights of the parties. They are not permitted to expand the list of possible options to see if the particular case would be best served by a solution that was not argued and that application of the law would not allow.

F) Little Opportunity for the Parties to Vent Frustration

In court litigation the opportunity for the parties to say what is in their minds and to express their views to each other is very little. Litigants can answer questions when the rules allow them to answer. There is no opportunity for them to talk about how the litigation has affected them, or to vent about what has occurred. Although there is discovery, indirect and cross- examination, there is no opportunity to ask the questions that the parties want to ask each other and to say what the parties want to say.

G) Unpredictability

In litigation, both sides argue the facts that they believe apply to the issue to support their positions. However, at the end, the judges will decide on the issue each side usually believed that his arguments and analysis is better than the other side's. However, the issue is unpredictable and is necessary for the judge to make a decision, which is binding. As a result a risk in going to trial and putting the decision in the hands of the judge. Besides there is no guarantee that the judge will always find the truth.

H) Expertise of Decision Maker

In trial, the court selects the judge. Moreover, the judge may or may not understand the unique attributes of the dispute. Judges may work hard to learn the law relevant to the case before them and do their best to make informed and reasoned decision. Nevertheless, they may lack the expertise in all area to properly address the merits of the claim being made.

G) Control over the Process

In litigation, the process is determined by procedural laws and by the judge, the disputants have no control over it. They are told when to sit, when to stand, when to speak, etc. they have no control who presents first and who follows, when the process at a day will finish.

H) Win/Lose

In court litigation, a judge must, determine the winner and the loser. There must be a loser in particular litigation. Therefore, litigation ends up in determining the winner and the loser; not in an agreement or will full disagreement.

I) Decisions are Imposed

Court decision is imposed on the loser against his /her expectation. People rarely like to have decision imposed on them. Most of the judgment debtors of the court judgments perceive it as extremely imposed and unjust. They consider themselves as loser. And even though judicial enforcement mechanisms can be used, mostly they attempt to avoid enforcement of this decision. on the other hand ,ADR mechanisms provides with process and procedures that would help disputing parties to fix the outcome before the end of the process or to be convinced with whatever outcome there may be no need of enforcing settlement agreements in negotiation and mediation.

J) Damage to Relation

Usually the end of litigation leads disputants to hate each other and their relationship is destroyed. The disputants may face difficulty to amend their relationship to the point where they can do business together and enter into future negotiation –they will take it not worth to enter in to contact with their former adversary.

1.6. Demerits of ADR

Of course, together with many advantages, ADR has been also criticized for some disadvantages. In order to get the out most advantages of the ADR, everybody needs to know the pitfalls of ADR so as to use court litigation if the latter would bring best result than the former in specific case.

Do you know the disadvantages of ADR? Can you mention them?

Different scholars approached the pitfalls of ADR from different ways: some of them specify common pitfalls of ADR methods and others on the other hand illustrate the short comings of each ADR methods. Here under are the common shortcomings of ADR methods and under chapter two there will be the discussion on the disadvantages of at least on each common ADR methods.

A) In balance of power

The benefit of voluntary negotiating agreement may be undermined where there is a serious imbalance of power between the parties –in effect , one party is acting less voluntarily than the other.

B) Lack of legal expertise

Where a dispute hinges a difficult point of law, an arbitrator may not have the required legal expertise to judge.

C) No system of precedent

There is no doctrine of precedent, and each case is judge on its merits, providing no real guidelines for future cases.

D) Enforcement

The decision not made by the court may be difficult to enforcement. Don't forget that other ADR scholars take easily enforcement of compromise in ADR process as one of the advantages of the system.

Review Questions

- 1) Show the contribution of Islamic Law for the development of ADR
- 2) How could ADR promote “ access to justice”
- 3) Give brief explanation on the scope of applicability of ADR: can we apply it to resolve dispute which involves crime?
- 4) States promote the use of ADR in their Legal System. State the possible reasons.

1.7. Summary

Alternative Dispute Resolution is a generic term used to describe a range of procedures designed to provide a way to resolving as alternative to court procedure. The historical development of ADR dates back to the history of human society but the rampant short comings of court litigation necessitated the use of alternative dispute resolution in wider and formalized manner both in court and out of court. The Roscoe pound Conference in saint Raul , Minnesota,(1976) was the well know phenomenon in the history of the growth of alternative dispute settlement mechanisms . The Conference was held to find alternatives for serious problems which came to existence due to the pitfalls of acrimonious court litigation in dispute settlement. The advantages of ADR, as compared to court litigation, are various , such as;

- A) reduction of cost and time during the process of dispute settlement;

- B) relatively satisfactory outcome among the conflicting parties after dispute settlement process ;
- C) maintaining prior relationship between disputing parties at the end of dispute settlement ;and
- D) Avoiding potential disputes are the main factors that enhance the prevalence of ADR in countries' legal systems and in international arena as well.

Though the merits of ADR are many in numbers, it is not devoid of any demerits. Imbalance of power between disputing parties during dispute resolving proceeding, lack of legal expertise of third party who involves himself to resolve dispute between parties, absence of precedent to base one's decision by the arbitrator and the problem related with the enforcement of judgment (compromise) are examples of draw backs of ADR methods.

CHAPTER TWO
TYPES OF ADR AND THEIR PROCEEDING WITH SPECIAL
EMPHASIS ON COMMON ADR MECHANISMS: NEGOTIATION,
MEDIATION (CONCILIATION) AND ARBITRATION

2.1. Introduction

Under chapter one points related with definition, purposes, historical development and pitfalls of ADR and demerits of court litigation have been discussed thoroughly.

As clearly stated in chapter one alternative dispute resolution represents a variety of processes through which potential litigants may resolve disputes. This chapter is designed to illustrate ADR continuum ranging from the simple self-help to formal and binding arbitration used as an alternative to litigation. As the types of ADR methods are many in number to discuss them all in detail, special emphasis is given for the widely applicable ones: negotiation, mediation /conciliation and arbitration. Thus, the chapter thoroughly discusses the meaning of negotiation, mediation and arbitration and their respective advantages, disadvantages and proceedings followed thereof. Unique features, some concepts including historical background related with each common ADR mechanisms and the role of lawyers and arbitrator also will be discussed where it is deemed appropriate.

Objectives

At the end of this chapter, students will be able to;

- Understand ADR continuum;
- Realize meaning of Negotiation, mediation, and Mediation ;
- Identify factors which affect bargaining power in negotiation process;
- Know legal effects of Negotiation, Mediation and Arbitration;
- Conduct effective Mediation;
- Appreciate Perceived Advantages and Disadvantages of Negotiation, Mediation and Arbitration;
- Enumerate the similarities and differences between Litigation and Arbitration;

- Know the role of Arbitrator;
- Identify the procedures for appointment of Arbitrator;
- Conduct Arbitration proceeding;
- Draft arbitration submission;
- Settle dispute by Negotiation, Mediation and Arbitration where it is appropriate.

2.2 Types of ADR

What types of ADR methods do you know? Can you mention them?

Types of ADR list cannot be exhaustive or final as there are various dispute resolution mechanisms other than court litigation and it is still evolving.

The types of Alternative Dispute Resolution, however, can be categorized in to three categories based on the procedures we follow in each dispute resolution mechanisms. These categories are formed by considering the kind of work product resulting from ADR and how the parties participate. The categories of ADR procedures are agreement, decision and advice.

Procedure of agreement- negotiation, mediation, facilitation and mini-trials are all procedures of agreement. The work product or result from these procedures is based on the agreement of those who take part. If there is no agreement, there is no outcome. Participants in ADR process of agreement are actively involved in working together to create an outcome that is superior to any outcome that they could individually create. Specific procedures of agreement includes; negotiation, mediation, facilitation, partnering and mini-trial.

Procedure of decision –Arbitration is dominant procedure of decision. The work product or result from this procedure is based on the decision of an outsider about how the dispute is to be resolved. The outsider’s job is specifically to render that decision. Participants in this process may be collaboratively involved to design the process or to ensure its efficiency. However, when it comes to taking in the ultimate decision process,

the participants' roles are not collaborative but competitive and limited to putting forward facts and argument.

Procedure of Advice –neutral case evaluation or early neutral evaluation , non-binding arbitration , fact finding or investigation , and expert opinion are all procedures of advice; the work product or result from these procedures is intended to inform or advice the participants .

Apart from the above general classifications of ADR methods the following methods are widely known mechanisms in the spectrum. These are:

A) Self-help- Disputants may take matters in to their hands and attempt to resolve the situation themselves when they convince themselves that there is no other appropriate method to resolve it. This could involve physical confrontation or a strike.

B) Partnering -This is a conflict prevention mechanism rather than a remedial process. It is typically encountered in construction industry. In construction project the contractor, sub-contractor, architect, and other stake holders, agree that construction project will not stop during dispute resolution, regardless of the methods of dispute resolution they choose.

C) Hilo- Arbitration-Here the parties agree, before arbitration, on the minimum and maximum award. The arbitrators' award must fall with in these figures or it will be adjusted to fall with in the figures. Arbitrator may or may not know the limits, before he render the award.

D) Mini-trial-It is fact finding form of ADR. It involves conducting a trial –like hearing in advance of actual trial , usually in informal setting with a private presiding officer , privately retained ‘Jurors ‘ and some one role-playing the representative for the other side.

E) Early neutral evaluation-Where an independent third party evaluates the claims made by each side and issues an opinion –either on the likely out come or on a particular point of law.

- F) Ombudsmen**-Are impartial referees who adjudicate on complaints about public and private organization. Generally ombudsmen serve as a last resort when complaints can not be or are not resolved through the internal complaints procedure of the organization complained about.
- G) Arb-Med** –a sequence in which the parties first submit their case to arbitration . In this approach, the arbitrator makes and seals the arbitration decision before under taking mediatory efforts or before turning the dispute over to another impartial person who will mediate. If mediation fails, the parties will be bound by the then revealed arbitration award. The purported relative strengths and weakness of their case played out in the arbitration stage of the procedure, the parties will have a more realistic understanding of what would constitute a reasonable accommodation positions. Accordingly, they should be better able to reach a mediated settlement. That is why it is called Arb-Med .
- H) MED-ARB**- refers to the situation in which, by agreement or by law, negotiating parties submit to the intervention of mediation which will be followed by arbitration if an agreement is not reached. If parties do not reach a negotiated resolution of their difference, the issues can be submitted to arbitration for an imposed resolution. The assumption is that this will force each side to present a reasonable, attractive last offer – one that will be more attractive to arbitrator and, for that same reason, will be more likely to gain the other side’s acceptance.
- I) Negotiation** - is a consensual bargaining process in which parties attempt to reach agreement on a disputed or potentially disputed matter.
- J) Mediation** –is a method of non-binding dispute resolution mechanism involving a neutral third party who tries to help the disputing parties reach agreeable solution.
- K) Arbitration** – means a process by which a tribunal other than a court decides a dispute between two or more parties under authority granted by the parties under an arbitration agreement. There might be also compulsory arbitration- with out the consent of disputing parties.

When ADR is thought there are most commonly known and applicable methods in the system. In the following sub-topics major ADR methods will be discussed with their respective peculiarities and their clear cut demarcation which makes them different from one to another.

2.3 Negotiation

Settlement is the primary way people adjust dispute, alter ownership, and rearrange their relationships. Because we reach settlements by negotiating, bargaining pervades personal, commercial, social and political life.

But what is negotiation?

Is there any difference between negotiation and bargaining?

Even though some writers try to distinguish negotiation from bargaining, in popular usage the terms are interchangeable. Hence, the terms are used interchangeably in this material and as defined here, negotiating or ` bargaining`, as to Chorniki, means “the method by which two or more parties communicate in an effort to agree to change or refrain from changing: their relationship with each other; their relationship with others; their relationship with respect to an object or object. “

Negotiation can also be defined as: a non-binding procedure involving direct interaction of the disputing parties where in a party approaches the other with the offer of a negotiated settlement based on an objective assessment of each others position.

2.3.1 Primary Consideration of Negotiation

Selection is at the heart of ADR use. Whether your client or yourself are making an ad-hoc decision to use ADR for current controversy or are designing a systematic ADR program, it is vital to make appropriate choice for appropriate case. It is blunt fact that the one who makes the choice has to know the features of each ADR mechanisms. Here under are some primary concepts of negotiation.

2.3.1.1` when is negotiation appropriate Dispute resolution?

Selection is a challenging in ADR. Confusion about what choice to make is one reason that ADR sometimes generates resistance. According to Chorniki, there are criteria either to use one type of ADR or not. As to him negotiation remedy is appropriate when:

- 1) Collaboration among parties is probable with respect to subject –matter of the dispute.
- 2) Collaboration among parties is probable with respect to the process ;
- 3) There is no desire or need to resolve contested evidence ;
- 4) There is no desire or need to resolve contested legal issues;
- 5) There are some concerns about the cost and negative consequences of failing to achieve out come –cost may relate to relationships , reputation ,probable damage awards , transaction or opportunity costs;
- 6) The parties are able to and willing to make responsibility for the out come (since negotiation is highly participatory)
- 7) There is no need for involvement from an outsider because the necessary skills and wisdom (to manage the discussion to analyze the conflict etc.) reside with the parties ; and
- 8) There are no public interest concerns that would demand public attention and scrutiny.

The above measurements are best ways of identifying the situations when negotiation would be preferred dispute resolution mechanism.

2.3.1.2 Nature of bargaining power

The other crucial factor in negotiation and the negotiator need to know is the nature of bargaining power as no negotiation with out bargaining power.

How can you explain bargaining power?

Is /are there any condition(s) which affect(s) bargaining powers of parties?

In general terms, power is the capacity to exert influence .It is the ability of a person or a group to cause change,” to over come resistance in achieving desired objectives or results.” It is also defined as the probability that one actor within a social relationship

will be in a position to impose his will despite resistance. Implemented in negotiating relationship, bargaining power is party's capacity in influencing the outcomes of negotiation towards its own goals. Chamberlain explained, therefore, that bargaining power is the ability to secure another agreement on one's own terms.

Bargaining power must exist for there be bargaining. If one party has no power over the other, there is no bargaining relationship. Rather, either it is relationship involving a different type of power such as hierarchical power or a relationship equal with common goals seeking to discover through discussion the means for maximum achievement of those goals. Essential elements of bargaining are lacking in situations in which one party has total control over the other. For instance, master-slaves, or lord serf relationships are not bargaining relationships if the slave or serf is totally devoid of power to affect the interest of the lord or master. In contrast, where the parties have something to exchange and have alternative to submitting to the other's will, they have bargaining power.

When we speak of 'Bargaining power', we must also remember that, as others have noted, it is not an attribute that exists by itself. It is not a quantity that an individual can own, hoard or stockpile for future use against any other party. Bargaining power does not exist independently of bargaining relationship with a particular party or parties and with respect to particular or potential transaction.

The cost benefit model helps to understand the nature of bargaining power that analyzes the elements of bargaining power shows the relationship among those elements and reveals the dynamics of their transactions.

2.3.1.2.1 Element affecting of bargaining power;

Perception (P), offers to meet the other's needs (OMON), Best Alternative to proposed agreement (BAPA), Accrued cost (AC), cost of impending negotiation (COIN), probability of performance, and Predictive accuracy (PA), among other things are factors which affects bargaining power as illustrated by Goldman and Rojot in their book. Here are the excerpts taken from their book to show these elements.

A) Perception (p). One of the elements of bargaining power is perception. Much of what we believe is based on inadequate or inaccurate data. Yet, those shortcomings rarely detract from our confidence in those beliefs. Every skilled negotiator understands that what counts in bargaining is not the reality; what counts are the parties' perceptions of reality. The element of bargaining power exists only to the extent that they are perceived as existing in the minds of the transaction participants. The situation, the environment and the context may contain abundant resources and formidable opportunities to build up the bargaining power of one or both parties. However, if parties are not aware of these opportunities or neglect them, they are unlikely to affect the bargaining outcome.

Thus, a significant factor in developing bargaining power requires:

- 1) Bring your perception in line with the reality;
- 2) Ascertain the other side's perceptions of the proposed transaction and available alternatives and
- 3) Finding ways to favourably alter the other side's perception.

Perception, therefore, is an element that has direct impact upon all other elements of bargaining power.

When negotiating, each party's bargaining power is based on his opponent's perception of the cost of agreeing and the cost of disagreeing with other's proposals. Therefore, in large measure our bargaining power is a function of the way the bargaining situation is perceived by our opponent not by ourselves. Accordingly parties aiming at increasing their own bargaining power must influence the other side's perception.

B) Offer to Meet the others needs (OMON)

People enter negotiation to achieve particular objectives. Bargaining objectives can be analyzed as a range between two salient points which constitute the limits of the parties' objectives; an ideal goal and a resistance point. That is the most preferred result (the goal) and the least acceptable result (the resistant point.) In negotiation each party is looking to obtain something from the other side that he does not think he can obtain more easily in some other manner.

A party will stay in negotiating relationship given what the other party expects of him and settle on the other's terms if he wants badly enough what other party has to offer. The

more one side depends on other to satisfy his needs, the more he will be inclined to settle on the terms proposed by the other side. Thus, a core element of bargaining power is the offer to meet the other's needs. The perceived needs of negotiating parties are related to each other in one of four ways. They may be perceived to be: common, compatible, conflicting or incompatible. Common needs exist when opposing parties stand to mutually benefit from a particular resolution or facet of the resolution of the conflict. Compatible needs are found when one side, though not gaining any particular benefit for itself, can accommodate the other's special need without sacrificing anything that it needs. Needs conflict when one side's gain is the other side's loss, with respect to particular need. A negotiated resolution represents only a partial accommodation of this aspect of each side's needs. Incompatible needs are involved in a transaction if one side's needs could be met only at the expense of not meeting some need of the other side. For example, if A's packing machines are designed to package parts in sets of 10 but B's manufacturing process uses 12 of these parts at a time, then the contractual terms respecting the packaging of shipments involves incompatible needs.

When a negotiation involves only common or compatible needs it can be called an integrative or problem solving transaction. In many negotiating situations the parties' needs are wholly conflicting or incompatible. If this is the case, the bargaining is distributive. In purely distributive situation, sometimes called an exchange transaction, each side has the ability to accommodate some or all of the other's needs but only by failing to meet part or all of its own needs.

C) Best Alternative to the proposed Agreement(BAPA)

Sound guidance for effective negotiating of integrative (problem solving) transaction is identifying the best alternative to searching a settlement agreement known as best alternative to negotiating agreement(BATNA). The Authors of the book entitled 'Negotiation: theory and practice' uses another phrase, Best Alternative to Proposed Agreement (BAPA). According to these author's the phrase, Best Alternative to negotiated Agreement is misleading to the extent that it indicates that the negotiator's bargaining power depends only on available alternative form of conflict resolution (that is, something other than a negotiated agreement). Often, however, the best alternative for a negotiator is to reach a negotiated agreement with some other party—for example, one

who perceives his or her needs in a way that more compatible with the moving party's to satisfy those needs. Otherwise, the best alternative may be to seek other conflict resolution methods for accomplishing one's goals. As to the scholars on negotiation, a skilled negotiator should be innovative as well as rigorous in exploring what is best alternative as to the proposed agreement.

D) Accrued cost

Whether successful or not, bargaining has its costs. These costs always include time and effort, and often include out of pocket expenditure for research, personal, consultants, presentation materials, telecommunications, and the like. Research shows that typically the more people invest in project, the more willing to put their money on it. It follows that the more that is invested in a conflict resolution transaction, the greater will be the desire to resolve the conflict through that transactions rather than incur a whole new set of transaction costs in different efforts that might not produce a more favourable result. Indeed, at some point the budget resources available for the transaction might preclude opening negotiating with others.

E) Costs of impending negotiation(COIN)

The greater the cost a negotiator expects will be required to continue the negotiations, the greater is the bargainer's motivation to abandons that transaction and seeks the best alternative to the proposed agreement (BAPA).

F) Probability of performance (POP)

Another element affecting negotiating power is each side's perception of the likelihood that the opponents will in fact do what it promises. That is, each side's perception of other's offer to meet its needs is discounted by the extent to which it anticipates that in fact the other may fail to do what it promises. Another way to put this is that the perceived probability of other's performance alters the net value placed in the other side's offer to meet one's needs (OMON).

g) Predictive Accuracy

One lesson taught by the concept of bounded rationality is that one can rarely assess with 100 percent reliability the true net either of what is proposed or the alternatives to that proposal. Unforeseeable events, lapses in logical analysis, and gaps and mistaken information, all detract from the predictive Accuracy (PA) of the BAPA or COIN. Therefore, in weighing whether to turn to the alternative to the proposed agreement, a negotiation should discount the attractiveness of that alternative to the extent that he or she has a high or low level of confidence in the accuracy with which that alternative has been assessed. And, not surprisingly, research confirms that greater the uncertainty respecting the value of the alternatives to the proposed bargaining proposal, the greater is the prospect that a negotiator will accept a proposed settlement.

2.3.2 Perceived advantages of negotiation

One special attribute of negotiation as a method of resolving difference is flexibility, both with regard to the manner in which the parties proceed and with respect to the ultimate accommodation reached. It allows difference to be adjusted in a way that either maximum mutual gains or meets at least some needs of all parties to settlement. A third attribute is that it implicitly recognizes the dignity and worth of all participants since negotiated resolution requires the parties assent. Finally, unlike some other methods of resolving difference, negotiation takes in to account unofficial as well as official values – that is, it can reflect values that are important to the parties even though these values not have legal status.

2.3.3 Perceived disadvantages of negotiations

The following points might be taken as the disadvantages of negotiation. Firstly, as negotiation is all about bargaining, the parties have no assurance that they will reach a settlement. Nevertheless, the process requires an investment of time, effort, and often other expenses. Secondly, the soundness of the resolution may be impaired if the parties miss present their goal or the back ground information or if, after agreement is reached, circumstances change from what one or more parties anticipated during bargaining. Thirdly, some times negotiated settlement does not satisfy community mores or relevant and lawful interest of third parties and thus, may be unenforceable or subject to one or

more participants to criminal penalties. Accordingly, it is not always the most desirable means of resolving conflict.

2.3.4 Legal effects of negotiation agreement.

What do you think the effect of a duly concluded negotiation?

Negotiation settlement is a daily practice in any society. After back and forth communication between disputing parties on their disagreement, they will reach an agreement and their agreement also has legal effect provided that parties respect what the law prescribed as requirements. The law not only imposes limits that shape both the procedure and substance of negotiation, but also its effects among the negotiating parties. In some situations the law prohibits negotiated settlement. The most obvious example is where the agreement requires one or more parties to engage in unlawful conduct such as a non complete agreement or other agreement which might constitute a restraint of trade. If the parties conclude negotiation in line with the law, this agreement will have effect on the agreed parties. Currently, the general policy of the law favours negotiated settlement of current and future disputes for the obvious benefit that which settlement brings- less litigation and cost in terms of time and money for the parties and the courts. Settlement agreement is, therefore, considered as contracts between negotiating parties.

In general, terms of agreement lawfully concluded by the negotiating parties shall be binding on them as though they were law. This is to mean that though the requirements for valid negotiation agreement differ from country to country , an agreement which is established with the free consent of the parties in dispute and as to the specific requirement specified by the law at hand , the agreement will be binding upon the parties. In the next chapter you will look at legal effect of negotiating agreement in Ethiopia

2.4 Mediation /Conciliation

In the preceding sub-sections you have dealt with about negotiation and its features. In this part you will get answers for the questions:

What is mediation /Conciliation? And their difference from negotiation?

Are mediation and conciliation the same?

What merits and demerits does mediation have?

What are the roles of mediator?

What would be the legal effect of mediated agreement? And so forth.

2.4.1 Meaning of mediation /Conciliation

The history of mediation only begins to define what it is. Many questions about mediation are answered by understanding what mediation is and what it is not. The practice falls along a spectrum that defies a strict definition. The specifics of mediation depend on what is being mediated, the parties in a dispute, who is doing the mediating and the setting in which mediation is offered.

Mediation / conciliation is an alternative to violence, self –help or litigation that differs from the process of counselling, negotiation, and arbitration. It can be defined as the processes by which the participants, together with the assistance of neutral person or persons, systematically isolate disputed issues in order to develop optional alternatives and reach a consensual settlement that will accommodate their needs. Mediation/conciliation is a process that emphasizes the participants' own responsibility for making decisions that affects their lives. It is therefore a self-empowering process. Thus , it is purely different from negotiation so long as there exist a third party involvement.

The more useful way of looking at mediation / conciliation is to see it as a goal –directed, problem –solving intervention. It is intended to resolve disputes and reduce conflict as well as provide a forum for decision making. Even if all elements of the dispute may not be resolved, the underlying conflict can be understood by the participants and reduced to manageable level.

Though some people mention the difference in meaning between mediation and conciliation, others unlike argue that both words are to mean the same thing. And the argument which supports the interchangeability of the two words prevails. In both

procedures a successful completion of the proceedings results in a mutually agreed settlement of disputes between the parties though, in some jurisdiction, mediation is treated as distinct from conciliation in as much as in mediation the emphasis is the more positive role of the neutral third party than conciliation. Still others say that conciliation is “non-binding arbitration” whereas mediation is merely “assisted negotiation.” As already said, these factors where the role that the neutral third party can play depend on the nature of the disputes, the degree of the willingness of the parties and the skill of the individual neutral. In this teaching material mediation and conciliation are as synonymous. In Ethiopia the word conciliation is used.

2.4.2 Features of Mediation /Conciliation

Mediation, differ from arbitration where the outsider decides for the parties (their behalf) how the matter is to be resolved. Although a mediator may recommend or try to influence a party, he or she has no comparable decision making powers and practical or legal ability to compel any party to do or refrain from doing any thing. This is to mean that mediation is not binding.

Practical purpose of mediation is settlement. To facilitate the settlement, parties normally insert “with out prejudice clause” in their discussion. A “with out prejudice” process does not alter a party’s legal right. No admission or inferences are drawn from the fact of participation. A” with out prejudice “communication is a protected one that shelters under the confide settlement attempts and can not latter be used to harm the communicator. Admissions against interests made during the course of with out prejudice discussion are not be used against the admitting party to its detriment, such as to prove facts or issues in a law suit.

Mediation could be annexed to the court system, so as to become a judgment of the court if the agreement is reached. The parties may define the issues to be settled by themselves or the mediator may assist them in this regard. The extent to which the mediator interferes in the negotiation process can vary widely , on a continuum ranging from mere as chairperson , to very structured process in which the mediator go so far as to suggest settlements to the parties.

2.4.3 Perceived advantages of mediation

When used in the contested of on going relation ships, mediation allows underlying issues and emotion to be addressed and resolved , and so allows the relation ship to be continued in the future . Thus, mediation is commonly used in the area of family law. As the decision is reached by the parties to the dispute instead of being imposed on them, there is a great satisfaction with the dispute resolution process and out come, and consequently, greater compliance with the result. The process is less confrontational than adjudication and so reduces the likely hood of win or loss mentality and provides a frame work for the future dispute between the parties. As opposed to adjudication, mediation process is faster, cheaper and less formalized, both in terms of process and in tailoring results. This increased flexibility allows the needs of particular parties to be addressed.

2.4.4 Perceived disadvantages of mediation

As of the perceived advantages, there are also short comings of mediation: it is inappropriate where parties to a dispute are at an imbalance of power, or where there is a history of physical violence, as one intimidate the other; it also increase cost if mediation fails and arbitration follows; unrepresented party by a lawyer may be disadvantaged than the presented one. It is also questionable whether the perceived advantages of mediation are possible if the process is involuntary. There are concerns regarding the ability and qualification of mediators, and whether they should be subject to professional standards. Finally, the use of mediator as alternative to court adjudication may result in second class justice for low –income and disadvantaged peoples.

2.4.5 Mediation proceedings and the roles of mediator(s)

Mediation involves an impartial, independent third party, mediator, helping disputing parties to reach a voluntary, mutually agreed solution. The disputant, not the mediator decides the terms of the agreement. The only function of mediator is to assist the disputants to over come any obstacles during their negotiation, to determine the dispute in

the hope that disputants and mediator will develop creative solutions that satisfy their interest.

To achieve this purpose there are various stages in mediation with their own characteristics which demand different skills of arbitrator. Writers divided these steps in to different stages: some of them make the steps ten and others make it seven.

Here under you will see various stages of mediation (mediation proceeding) and the function of mediator in each stage.

A) Introduction and setting frame work

The mediator is responsible for the condition which prevails at the mediation. After the mediator welcome the disputing parties, he will explain the process and his/her approach to the disputants and try to make them at ease with the process. The mediator at this stage should inform the disputants that he his impartial and neutral. Further more, apart fro his impartiality and neutrality, he should tell the parties that he does not have the role of judge or arbitrator since he is there just to facilitate the negotiation process between the parties. At the same time mediator set ground rules /rules of courtesy and introduces the same to the disputants so as to attain full cooperation of parties to listening each other, to be open for the persuasion and to have a forward looking to avoid their difference through smooth dialogue.

The rules of courtesy may include the following contents and others depending on the nature of dispute or issues involved thereof.

- 1) Disputants should respect the view of the other party.
- 2) Disputants can leave the mediation at any time and they will not be coerced in the solution.
- 3) Mediation could be taken place with the presence of mediator and parties in the same ceiling or private meeting with the mediator.
- 4) Information discussed in mediation is confidential: issues revealed during mediation process remain secret.
- 5) A mediator can not be called as a witness at the future proceedings and that the mediator notes can not be cited.

B) Statement taking

After the ground rules have been set and accepted by the parties, each party in a dispute explains the dispute from his perspectives. Depending on the case or the emotion of the parties involved, the process may or may not take longer period. At this juncture, the mediator makes sure that there is no interruption while one of the parties expresses his feeling. In addition he would take note concerning the interest of disputing parties and the preliminary ideas for settlement. In this regard, for instance, Art. 3320 Civil Code of Ethiopia imposes duty upon conciliator (mediator) to ensure that parties in mediation process express their view. Other important functions of mediator at this stage of proceeding is summarizing and checking the accuracy of the arguments of parties.

C) List /agenda construction

This stage is for the mediator to conduct open sessions to ask the disputants questions, to clarify perceptions and underlying interests. Parties suggest topics, agree on the list of the issues, and agree on the priority of agenda to be discussed. While the parties forward their opinion on the matter, there might be words which offend the other party and the mediator need to substitute these words with positive language. Generally the mediator here attempts to identify agreed upon facts and issues.

D) Exploration

Following determination of the agendum, parties will discuss the lists. The mediator here encourages parties to talk each other directly as far as the dispute or the issue is their. The mediator directs parties move from blame to understand each other's position. At the point where parties face difficult items, mediator assists them on resolving the issue.

E) Separate meeting(caucuses)

A separate meeting (caucuses) is one of the techniques used by the mediator in conducting the meditation process. At the open session of mediator and disputants, real intention and interest of the latter may not be revealed and to get the real intention of parties mediator can arrange separate meeting with each of the disputants. Such meetings

are an opportunity for the mediator and each party to explore frankly and in confidence the issue in the case and option for settlement. The benefits of having caucuses by neutral party include;

- i. It enables mediator to build closer relationship with parties
- ii. It avoids firm position of disputing parties that they hold as the time of joint session.
- iii. Allow for deeper and sustainable discussion on the issue without argument or interruption

F) Option generation, negotiation

There are several ways of generating options. These ways include: writing, interview, survey, benchmarking and brainstorming session. One of the main ways to generate option is brainstorming. It is conducted by outlining the aims of the session by mediator. It is conducted to identify problems to generate feasible ideas as a solution to the problem identified by drawing on people's own experience and to the problems, and to help the participants to develop a new skill that they could use themselves in the future.

After generating all possible ideas or options, it is useful for an efficient brainstorming that the facilitator looks for common theme or categories and grouping the problems and ideas.

F. Selecting an option.

At this stage of mediation process, the mediator will allow the disputants to assess the options generated and comment on options that may be feasible or that may be impractical. The mediator may afford objective criteria or benchmarks to help disputants in choosing a best option and the ones which is conceived as fair by both parties. Mediation would be much more effective if the participants do have standards by which they rely on their proposed solution for amicable solution. The criteria may include market value, depreciation cost, etc.

G. Closure

As discussed in the previous sub-sections parties in a dispute often put the BATNA while they negotiate to end their dispute amicably. Based on the BATNA they evaluate the proposed solution suggested by the other party and accept the proposal if it is better than their BATNA. If the disputants reach an agreement, they can put their agreement in writing. The parties can then determine with the assistance of the mediator, what steps they need to take to implement the agreement. Such as when, where and how the agreement has to implement will be determined.

If there is no agreement, the mediator can assist the disputants to determine whether there are any issues that they can agree on.

2.4.6 The roles of lawyers in mediation

Lawyers may assume different participatory roles in mediation. A lawyer may represent his client and negotiate on his behalf. In case of court annexed mediation particularly, clients would favour if their lawyers involved in that process.

Lawyers would enable their clients to assess litigation consequences if the latter take their dispute to courts, and also disputants would get sufficient information about the working atmosphere in court.

Lawyers should be able to inform disputants of the relevant law and suggest possible court out come. However, the extent of his help should be limited to general information, to the extent of defining the legal issues. Lawyers should not serve as legal advisors or should not direct the decision of the clients in line with their interpretation of the law as applied to the fact of the situation. Even after agreement of disputing parties is reached, lawyers can play great role to draft the agreement of their clients through mediation process.

Indeed, there are various arguments about the appropriate roles of lawyers who serve as mediators. The first line of argument is the one which equates mediation with presentation and raises ethical values that prohibits the practice of attorney mediation. Second argument on the opposite supports the role of lawyer as mediator in carefully prescribed conditions.

2.4.7 Legal effects of mediated agreement.

The purpose of mediation is to enable the parties to arrive at a mutually acceptable resolution of the dispute in a cooperative and informal manner. If the matter is settled at mediation, the mediation agreement, as observed from practice and contents of laws on this regard, is considered to be a contract and is enforced under the general principle of contract law. The Ethiopian law, for instance, has the similar position. Art. 3320 of the civil code requires conciliator to draw up the terms of compromise when the parties settled their dispute amicably, i.e. through mediation. Art. 3307 C.C also defined compromise as one forms of contract. The provision reads as “A compromise is a contract whereby the parties, through mutual concession, terminate an existing dispute or prevent a dispute arising in the future.” If one of parties in their compromise renounced all of his rights ,actions and claims , he will loose such rights , actions and claims for good. We can also understand from art.1731 of the C.C that contractual agreement is a law between contracting parties and parties are duty bound to respect their promise.

2.5 Arbitration

Before looking the discussion made here under, what do you think is arbitration process? Is there any difference in the above two ADR mechanisms?

Arbitration is typically an out- of- court method for resolving a dispute in which a party submits a disputed matter to impartial person (the arbitrator) for decision. The arbitrator controls the process; listen to both sides and make a decision. Like a court trial only one side will prevail, but unlike court litigation appeal on the merit of the case is limited.

In a more formal setting the arbitrator will conduct hearing where all of the parities present evidence through documents, exhibits and testimony. The parties may agree, in some instances, to establish their own procedure or administrating organization may provide procedures.

2.5.1 What is Arbitration?

Until now you are familiar with the meaning of two major alternative dispute resolution mechanisms, i.e. negotiation and conciliation /mediation and now you will be acquainted with the concept of arbitration. Though most of the definition given upon the word arbitration do have similar gist (theme), there are various definitions as the persons who define the word are different.

As of Byrne's law dictionary, quoted in the book entitled 'Law Regulating to arbitration and conciliation arbitration', 'Arbitration' means "the determination of disputes by the decision of one or more persons called arbitrators." As to the same source, every dispute, which might be determined by civil action, may be submitted to arbitration. The author of the same book also specified the following meaning;

'Arbitration' is the substitution by the consent of the parties of another tribunal for the tribunal provided by ordinary process of law, a domestic tribunal as distinct from regularly organized court, proceeding according to the course of the common law depending upon the voluntary acts of the parties, disputants, on the selection of judges of their choice.

Arbitration is a settlement of conflict by the decision of not of regular and ordinary court of law but of one or more persons who are called arbitrators.

But all the definition above connote that arbitration presupposes binding decision from the arbitrators. Whereas some writers use the word arbitration irrespective of the decision that appointed arbitrators would give: whether it is binding decision or non binding decision. In binding arbitration, the arbitrator has the power to render a decision that decides (concludes) the dispute in a legally binding way by issuing an award. The award can be enforced against a party in the same way that a court judgment can be enforced, such as by seizer and sale of property. If arbitration is not "binding", then it is "advisory." In advisory arbitration, the parties can choose whether or not to abide by the arbitrator(s) decision.

Some proponents on arbitration, apart two kinds of arbitrations: as binding and non-binding, refuse the applicability of the word arbitration for non- binding decision of arbitrator(s). As to these people, the word arbitration is used only to show a process in which an arbitrator would give an award which is binding upon the conflicting parties.

Agreement of the disputing parties to submit their dispute to third party and the latter to give his opinion (non-binding decision) upon dispute could not be called as arbitration as to the above opinion. The most widely applicable meaning of arbitration is the former.

2.5.2 Early History of Arbitration

So as to grasp some of the incidents on the progress of arbitration as one of dominant alternative dispute resolution, we consider worth mentioning its historical development in India and England as one can appreciate different content of arbitration law in both countries at different time.

A) In india

To begin with, while every arbitration is the result of consent of the parties in each case, but there was no such element of individual consent in 'panchayat' proceeding in India. The jurisdiction of the village panchayat seems to be custom.

Though panchayat system of arbitration was not abrogated totally, the advent of British rule in India resulted in the coming in to existence of the Bengal Regulation of 1772. This regulation came up with a provision which recommends parties in a dispute to submit their dispute to arbitrator and considers arbitration award as if it were given by the court. Following Bengal Regulation of 1772, there were consecutive regulations 1780 and 1781 to provide further facilities for arbitration. Regulation of 1781 affirms the finality of arbitration award made by the arbitrator except the corruption or impartiality of arbitrators, on the case arbitrated, is proved by oath of two witnesses.

The original Hindu idea of panchayati arbitration provided for appeal to higher tribunals, but the regulation of 1781 imported the idea that as the arbitration tribunal was of the parties own choice, the parties must be held bound by its decision, except in the case of misconduct of the arbitrator.

The Bengal Regulation of 1993, on the other hand, came up with additional concepts: it empowered the court to refer certain suits to arbitration with the consent of parties where the value of the suit did not go beyond sicca' Rs 200 and the suits were for counts,

partner ship debts, non performance of contracts etc . Apart this substantive issue to refer case to arbitration by court, where parties in a dispute agree, 1793 Regulation specifies procedures to be followed during arbitration.

The first civil procedure (C.P.C) was placed on the statute book in 1959 and the law relating to arbitration was incorporated in chapter six of the same code. Even the procedure code enacted 1908 incorporated provision regarding arbitration in the second schedule and section 89 and clauses (a-f) of subsection (1) of section 104. Parallel to these provisions were the provisions contained in the Indian arbitration Act. Act of 1899, which apply to cases where, if the matters submitted to arbitration were subject of a suit, the suit could, whether with the leave or otherwise, be institute in a presidency town.

Then came the Arbitration Act of 1940 which repealed and replaced the arbitration Act of 1899 and also the second schedule of the code of civil procedure of 1908 and section 89 and clauses (a) to (f) of subsection(1) of section 104.

As to Sujan, in India, “The practice obtained in the beginning was that each party appoints his own arbitrator usually his advocate engaged for the case, who while sitting as arbitrator, normally advocates the cause of his client.” Since arbitrators advocate the interest of their client, it was hardly possible to reach in agreement and they were forced to refer the case to a single arbitrator, umpire. This was found to be time consuming and it was realized that if ultimately the dispute had to be determined by the decision of a single person, umpire, why go through the process of dual arbitration? Why not appoint a sole arbitrator to begin with. Then the question of selection a sole arbitrator had to be settled either named in the agreement itself or left to be appointed the designated authority or institution.

It was also progressively realized that the selection of arbitrator had to be tailored to the dispute as the real advantage of arbitration over court litigation was that the parties could select a specialist in the line in tune with the nature of the dispute while parties in court could not. This advantage would be lost to the parties if the arbitrator was named in the agreement in advance as the nature of the dispute could not be predicted at that time. Again it was realized that empowerment of designated authority had also its own minus- the named arbitrators, most often, favor to one disputing parties with some relation.

Latter on government to reduce corruption and subtle act of arbitrator who is appointed by government, introduce a term in the arbitration clause that arbitrator must give reasons for award he/she made on a claim quantified for more than Rs 50,000.

In order to avoid corruption, curb it and control the same government of India gave emphasis for the establishment of arbitral tribunal. As of the 1940 Indian Arbitration act, the award of on arbitrator will not have a legal effect unless it get the blessing of the court. As to this arbitration act, the court can: (1) remit the award back to the arbitrator (2) set it aside (3) Pass a decree in terms thereof. Final supervisory power was rested in the court of law.

The 1996 Arbitration and conciliation Act substituted the arbitration act of 1940 and curtailed the power of court and the arbitration award is given teeth.

B) In England

Arbitration has an ancient origin in England, namely in the practice adopted by merchants and traders by which they referred disputes arising from matters of accounts or other trading for settlement to persons specially selected for the same purpose. Initially only disputes related with personal chattels or personal wrong could be submitted to arbitrator, however, later on dispute on other matters including dispute related on real state also were referred. But the practice was governed by the common law.

The English courts started with violent prejudice against arbitrations as attempts at ousting the jurisdiction of the king's court, and at common law the authority of an arbitrator, at any time before the award, could be revoked at the pleasure of any of the parties to the agreement for arbitration even where the submission was in writing, by bond or deed, or by the judge's order or rule the court.

It was identified that the common law applicable to arbitration was not satisfactory and demanded more clarification and as the result Arbitration Act of 1697 was enacted. And farther amendment was made by Procedure Act 1854. The main purpose of this Act, as Sujana, was to make arbitration submission more binding on the parties ; to make decision

of arbitrators more easily enforceable; and to remedy other defects which were brought in to light as the importance of arbitration increased.

From the above description about the development of arbitration rules in England and India, one can easily understand the contents of arbitration rules in each era and what its development looks. This in turn would enhance the understanding of the subject matter, i.e arbitration, by the reader of this material.

2.5.3 Preliminary Considerations of Arbitration

There are issues which have to be considered in arbitration in order to further understand the applicability of the system.

2.5.3.1 Arbitrability

What do you think is Arbitrability?

In order to talk about arbitration in arm length, first we have to know issues which are arbitrable and which are not. To state otherwise, some disputes are not subject to arbitration due to different reasons, for instance, public policy might be one reason to exclude an issue from arbitrability. The issue of arbitrability, therefore, concerns whether a particular dispute is properly the subject of arbitration.

Zekarias kenea quoted the proposition of Redfem and Hunter on the idea of arbitrability as follows:

‘The concept of arbitrability is in effect a public policy limitation upon the scope of arbitration as method of settling disputes. Each state may decide, in accordance with its own public policy considerations, which matters may be settled by arbitration and which may not. If the arbitration agreement covers matters incapable of being settled by arbitration, under the law of the agreement or under the law of the place of arbitration, the agreement is ineffective since it will be an unenforceable. Moreover, recognition and enforcement of an award may be refused if the subject matter of the difference is not arbitrable under the law of the country where enforcement is sought.’

Disputing parties, thus, have to first determine whether their dispute is arbitrable or not before they referred their case for a arbitrator who is appointed to give decision or opinion on the case. States, as to their real conditions, determine which matters are arbitrable or which are non arbitrable. Under chapter three you will be familiarized the issue of arbitrability in Ethiopia.

2.5.3.2 Arbitration agreement.

- Other important concept in arbitration is arbitration agreement. If so, What is arbitration agreement?
- Is there any difference b/n arbitration submission and arbitration clause?
- Can you mention the requirements of arbitration agreement?

Arbitration, as one of out of court dispute settlement device, most of the time if not completely, depends on the agreement of the disputing parties to resolve their difference through it. To state otherwise, arbitration is hardly possible without the consensus of the conflicting parties to submit their difference to third party, arbitrator and thereby to be bind by the award given thereof. There fore, parties who intend to resolve their current or potential dispute by arbitration have to express their consent by agreement, mostly known as arbitration agreement.

The word arbitration agreement as defined in Indian arbitration and conciliation Act of 1996, specifically in section 7 thereof is stated as follows.

Arbitration agreement

1. In this part ‘arbitration agreement’ means an agreement by the parties to submit to arbitration, all or certain dispute which have arisen or which may arise b/n them in respect of a define legal relation ship , weather contractual or not
2. An arbitration agreement may be in the form of arbitration clause in a contract or in the form of a separate agreement.

In arbitration agreement parties need to have a willingness to abide by the decision of the arbitrator(s). Essentials of arbitration agreement providing for arbitration are that there

must be an agreement b/n the parties and the parties must be ‘adidem’ and that there is intention of the parties to have their dispute or differences referred and decided through arbitration.

In Ethiopian words arbitration agreement, submission and arbitration clause, which connote the same thing, are used in the Civil Code and Civil procedure Code and refer negotiated agreement of disputing parties to resolve their dispute by arbitration. The only difference, if it is considered as a difference at all, b/n arbitration clause and arbitration submission is that in case of arbitration clause the agreement of the parties to arbitrate their difference by arbitrator is inserted as a clause in the main contract which is made by the parties. Whereas in arbitration submission their agreement exists independently of main agreement-contract (there is separate agreement).

That is to mean that while persons enter in to legally binding transaction or relationship with other individuals, they may, apart their main obligations they assume for each other, include in their agreement a clause to settle dispute arise out of the contract or legal relation by arbitration. This is known as arbitration clause. Arbitration agreement in a contract called arbitration clause is fully distinct from contract in which it is included.

Unlike arbitration clause, arbitration submission is an agreement of conflicting parties usually to settle their current difference through private judge(s). Phrases ‘submission agreement’ and “arbitration clause” are enshrined under art 3325 and 3328 of the civil code Ethiopia respectively.

Art 3325, thus, defines arbitration submission as “contract where by the parties to a dispute entrust its solution to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the principle of Law.” Sub article 2 of the same article stipulates further that arbitrator may be ordered by the disputing parties to establish a point of fact with out making decision on the legal consequences following there from.

Art 3328 of the civil code, on the other hand, talks about ‘arbitration Clause’ though the sub article of this article uses the ‘arbitration submission’ instead of arbitration clause as of the topic article.

As arbitration submission and clause are contracts, the requirements for valid contract in the general part of law of contract should be full filled for their validity.

Different scholars, nevertheless, share the distinct nature of arbitral clause (submission) than other ordinary contracts though it is contract by itself.

Ato Bezza work shimelash, for instance, directly cited the work of Lord Macmillan to show the peculiarities of arbitration submission unlike other types of contracts. To re-cite the paragraph on this matter it reads as:

...The other clauses set out the obligations which the parties undertake towards each other, 'Hincinde', but arbitration clause does not impose on one of the parties an obligation in favor of the other: It embodies the agreement of both parties that if any dispute arises with regard to the obligation of which the one party has to undertake to the other, such dispute shall be settled by a tribunal of their own constitution.

Then, in arbitration clause, as stated above, the obligations that the parties undertake are not towards each other but rather they both undertake to submit the resolution of their dispute to a person or person(s) called arbitration(s).

The other feature of arbitration clause is that it creates of kind of obligation b/n the disputing parties to submit their conflict to third party for resolution and the other is b/n disputing parties and arbitrators. To state other wise, arbitration clause (submission) not only imposes obligation on the disputing parties to submit their dispute for arbitrator (s) for resolution, but also on the arbitrator, he/she is willing to arbitrate the case, to give arbitral award (opinion)

The fact that parties are able, through arbitral clause, to create their own private regime of administrative of justice is another peculiarity. By this mechanism parties can have their own private judges out side the court system and if they both continue subjecting themselves to this system through out, there is a possibility to settle their difference up to the end with out the intervention of government's justice machinery, court or administrative tribunal.

B) Validity requirements for arbitration agreement

As far as arbitration agreement is a contract the requirements for the validity of contract have to be ensured. In deed these requirements may differ from one state to the other. In Ethiopian to establish lawfully sustainable agreement, there are requirements which have to be respected by the contracting parties. Art 1678 of the civil code enumerates requirements of valid contract in their generality. The article reads;

Art 1678 Elements of contract.

No valid contract shall exist unless.

- a. The parties are capable of contracting and give their consent sustainable at law.
- b. The object of the contract is sufficiently defined and possible and lawful.
- c. The contract is made in the form prescribed by law, if any.

Therefore, parties in arbitration agreement should follow the above general requirements apart specific requirement(s) that apply(s) to arbitration agreement. In addition to general requirements mentioned under art 1678 above parties in arbitration agreement are expected to conclude their agreement based on special requirements for the same. In Art 3326(1) Civil code for example states that “The capacity to dispose a right with out consideration shall be required for the submission to arbitration of a dispute concerning such rights”

When parties need to submit their dispute to be resolved by arbitrator, the first requirement that parties have to ascertained is that whether they do have the right to dispose a right on which they try to submit to arbitration freely (with out price) or not. Nevertheless, the person should not always be an owner of a thing (right) to have the right to dispose a right with out consideration. The right might emanate either from agency relationship by agreement of agent and principal or by the dictates of the law as witnessed in art 2179 of the Ethiopian Civil code. Even if the right to dispose a right with out consideration mainly attached with being an owner of the right, this right might be acquired by being an agent some one who is the owner of the right.

2.5.4 Varieties of Arbitration

Q13. What sorts of arbitration varieties do you know?

Arbitration might be divided having in to consideration different measurements. Accordingly arbitration may be: Ad-hoc arbitration, contractual in built arbitration, institutional arbitration and statutory arbitration. Let us look briefly each of them.

- 1) *Ad-hoc arbitration* is form of arbitration where the procedure of arbitration, an most of the time, set by the disputing parties them selves. Parties in a dispute need not stick on the institutional procedure. The national law of the place of arbitration avoids any problem arise of ad-hoc arbitration.
- 2) *Contractual in built arbitration* came to juncture due to increasing of business transaction with complex phenomenon. While business relation increased, presumably clashes b/n parties in the transaction is natural, and this scene called for regular machinery in the shape of in built arbitration clause, an integral part of the contract covering present or future disputes and the system devised was reference to named arbitrator or on arbitrator to be appointed by a designated authority.
- 3) *Institutional arbitration*- this is another form of arbitration and probably most conducive for the parties' as the parties agree in advance that in the advent of future disputes they will be settled by arbitration by the named institute of which one or more of them were members. In institutional arbitration parties' dispute is arbitrated according to pre- establish rules of the institution, which most of the times known to disputing parties. The Arbitrators mostly, are among named specialists.
- 4) *Statutory arbitration*:- the above three kinds of arbitrations are constituted by the consent of the disputing parties. Where as Statutory arbitration is an imposition by law which governs the parties in dispute- parties should submit the case to specified person or institutions for arbitration to resolve their case irrespective of their consent.

2.5.5 Arbitration and litigation

“Some times critics of arbitration complain that it is ‘really just court’ ” Do you agree with this statement? If so please state your reason(s). If not, what is your ground to have such position?

Even though there are common features of arbitration and litigation, there are also grounds which differentiate both of them. It is to mean that there are features which intersect arbitration and court adjudication. Chornenki summarized the similarity and difference among the two dispute resolving mechanisms. Here under we present the comparison made by this author in his book entitled 'The corporate counsel guide to dispute resolution'.

Comparing civil arbitration and litigation

Arbitration-resembles litigation

Adversarial process- parties bring contending positions and try to convince decision-maker to rule in their favour.

- ✓ Rule of natural justice apply (i.e. notice, fairness, impartiality)
- ✓ Decision is made according to the law (unless parties agreed to use
- ✓ Obligations of disclosure to opposite party (although may be streamlined and focused) apply
- ✓ Principle of res judicata and issue estoppel apply.
- ✓ Appeal is possible unless expressly excluded

Arbitration awards like court judgments are enforceable at law.

Arbitration- differs from litigation

- ✓ Disputing parties incur costs accommodation (facilities) (e.g. room rental fees, court reporters)
- ✓ Parties pay the decision makers fee
- ✓ Hearing and other procedures are flexible and informal
- ✓ Arbitration decision is not precedential; stare decisis does not apply.
- ✓ Process in both private and confidential.
- ✓ Process can not be initiated with out the consent of all parties either by way of arbitration clause or an agreement to arbitrate

- ✓ A third party claim by a defendant does not exist unless the plaintiff and the third party both agree
- ✓ Parties select the decision maker.
- ✓ parties choose the decision- maker

2.5.6. Perceived Advantages

Bearing in mind the above comparison, try to list out those main merit and demerit of Arbitration.

Arbitration may allow a dispute to remain private, and the publicity inevitably associated with litigation may be avoided. The public interest is also served because the parties bear the costs of arbitration themselves. Arbitration is more flexible than litigation. The parties have control over their own dispute, the procedures followed and the principles applied to resolve it. This increases the satisfaction of the disputants with the process and the outcome. Arbitration is also faster, and consequently, less expensive, than litigation. There is no precedent value in the decision reached, so a concern for future cases will not impact on the decision. As the procedure can be designed to be far less formal and intimidating than court, the confrontational atmosphere of the dispute is diminished. This is especially important in maintaining ongoing business relationships. If experts are used as arbitrators, the process should be more efficient, and results maybe more in accord (or perceived to be more in accord) with the expectations of the parties, when they are in the same field as the expert.

2.5.7 Perceived disadvantages

Arbitration may not always be faster, less expensive, and less formal. It may be more expensive and time-consuming than litigation if the arbitration agreement, choice or conduct of arbitrators, procedure, or award is challenged. In addition, there are concerns regarding ability and qualifications of arbitrators, and whether they should be subject to professional standards. Generally, arbitral decisions are not reviewable for errors of fact of law, which may lead to unfair results.

2.5.8 The Role of Arbitrator

Arbitration, as already stated, is a procedure of settling disputes in which both disputing parties, except in case of non-binding arbitration, agree to accept the decision of the arbitrator as legally binding. Therefore, the role of arbitrator is more or less similar to the role of judge. But still there are some ambiguities on the role of arbitrator because arbitrators, particularly party appointed arbitrators, consider themselves as advocates of disputing parties than their being a judge. Even practices and the laws of countries on arbitration except the role of arbitrator as judge and allow them to serve disputing parties as an advocator in some conditions.

Having this clue in mind,

- What is (are) the role(s) of arbitrator to you?
- Should arbitrator as a general rule be required to be impartial and or independent of the parties?
- If so, is there any exception to this?
- Is party appointed arbitrator required to be impartial towards the party who appointed him?
- Do parties have the right avoid rule which prohibit partiality and/ or dependency of arbitrators?

Even if the role of arbitrator may differ from one country to another, analyzing the above questions and resolving the same based on the law in a country at hand would give better understanding on the role of arbitrator.

2.5.8.1 Impartiality of arbitrator

The issue of partiality or impartiality has something to do with the role of arbitrator. Most of the time arbitrator has the role of a judge though he/ she is privately appointed unlike government appointed judges. When ever judges render decision they have to be impartial to the parties at a dispute so as to maintain ‘justice.’ similarly the rule of impartiality should apply in arbitration process as to different scholars. Scholars express their view as “ partiality is by far the most ground for which an arbitrator be disqualified since Justice must be beyond all suspicion as to the independence and impartiality of the

judges, and this basic principle of justice in the court is no less fundamental in the case of justice administered by an arbitral tribunal”

As to the above expression, impartiality of arbitrator has paramount importance as of what judge is expected.

Arbitrator, as a principle at least, should conduct in an impartial way: his conduct should not indicate any sort of biasness. Moreover, arbitrator need to avoid circumstances which lead to ‘reasonable apprehension of bias’ , that is a scenario which gives a fair- minded person reason to doubt arbitrator impartiality. Conditions which create reasonable suspicion on the impartiality of arbitrator are infinite: relation ship b/n arbitrator and one of the disputing party; arbitrator’s loss or gain out of the award and other similar cases might be possible examples.

Concerning impartiality of arbitrator scholars dared to conclude as “It is difficult to find an argument against the preposition that each party to arbitration is entitled to be treated fairly and impartially”

What is impartiality then?

It is really difficult to define either partiality or impartiality in black and white and that might be the reason most arbitration rules including the Ethiopian arbitration rules fail to give what it mean. Ato Zekarias Keneaa, however, in his article entitled ‘The formation of arbitral tribunals and disqualification and Removal of arbitrators under the Ethiopian law’ summarized partiality in the following manner.

‘The concept of impartiality may be concerned with bias of arbitrator either in favor of one the parties or in relation to the issue in a dispute. partiality would be the state of mind which is harbored by an arbitrator and which dictates the out come of the proceeding so much so that the arbitrator whose impartiality is challenged would decide or oppose to decide the case in front of him favouring the party to whom he is predisposed and naturally against the party about whom he is biased.’

Once arbitrator becomes biased he will decide cases at his disposal based on his own biasness instead of reason and evidences available to him/her.

To re-state, the idea of impartiality has been given special emphasis to maintain fair administration of justice by arbitral tribunal. On top of that, arbitrator, especially party appointed arbitrator, starts his arbitral process having the mentality that he has to struggle for the success of the party who appoint him. In extreme cases arbitrators assume themselves as advocates than being party appointed judge.

Besides arbitrators perception as if they were parties' advocates, practices in certain countries allow arbitrators' partiality in limited manner. For example in England there was a practice that parties in a dispute appoint arbitrators, one from each side. Then, these two arbitrators would try to resolve the case but if they could not settle the case themselves, they used to appoint an umpire, sole adjudicator whilst the two arbitrators represent the parties who appointed them.

Apart practice or laws which sometimes except the impartiality role arbitrator for party appointed arbitrator, disputing parties also could agree to exclude the impartiality principle in general.

To sum up impartiality of arbitrator is the principle but this principle might be devoid by parties through their agreement or the law may specify exception thereof.

When we turn our face to Ethiopian case one can not find definition about what partiality or impartiality is all about. Nevertheless, Art 3340(2) civil code of Ethiopia specifies 'partiality' as one of grounds to the disqualification of arbitrators. Art 3340(2) reads "The arbitrator appointed by agreement b/n the parties or by third party may be disqualified where there are any circumstance capable of casting doubt upon impartiality or...."

This article tells us the following matters:

1. Let alone real biasness of an arbitrators even circumstance which gives reason for reasonable person to doubt the impartiality arbitrator can be ground to disqualify arbitrary.

2. Only arbitrators who are appointed by agreement of conflicting parties or by third party, who is entrusted to appoint arbitrators, are duty bound to be impartial. Party appointed arbitrator seems can be partial to a party who appointed him.

Sub article 3 of similar provision remarks the impartiality an arbitrator who is appointed as an umpire despite his appointment procedures.

Countries' laws give conditions in which arbitrator may act in favour of one of the disputing parties. However, the idea does not escape critics from scholars. As to the view of these scholars designing a system which does not require impartiality of arbitrator would affect genuine disputing party who always appoint impartial arbitrator.

2.5.8.2 Independency of arbitrator

Earlier we stated that "impartiality" and/or "independency" of arbitrators is equally important as the impartiality of judges in court of law. Despite their overlapping nature, "impartiality" and "Independency" are not one and the same, that why the civil code of Ethiopia specifies both issues separately. An arbitrator, who has not any relationship whether financially or not with one of conflicting parties, might be independent but we could not conclude that this person is impartial also. The other possibility is that an arbitrator, who is dependent for one of disputing parties, may give an award without any partiality.

As far independency concerned causes are many in number and the civil code of Ethiopian also does not mention conditions that constitute dependency of arbitrator, it lets the issue as check in blank.

2.5.9 Arbitration Procedure

Arbitration procedure accommodates processes which include from the establishment of arbitral tribunal to declaration of award by the tribunal.

2.5.9.1 Formation of Arbitral Tribunals

Constitution or establishment of arbitral tribunal is obviously the primary step in arbitration procedure. One of the typical features of arbitration is, indeed, establishment of private arbitral tribunal, which investigates and resolves the case unlike government established courts. This also highly demands appointment procedures of arbitrator (s).

In relation to this we can raise the following questions.

1. Should the parties to an arbitration agreement be able to agree on the appointment of arbitrator or upon the procedure for appointing an arbitrator, including naming another person to make the appointment.
2. Should court have power to appoint an arbitrator;
 - A. When persons (including parties) whose agreement on the appointment of an arbitrator is contemplated by an arbitration agreement or by statute, do not agree?
 - B. When a person or persons by whom the arbitration agreement contemplates the making of an appointment does or do not do so?
 - C. When an arbitrator dies, is or becomes incapable, or simply does not act, and either there is no machinery in the arbitration agreement or the machinery for some reason has not worked?
3. What guidance should the court follow to appoint arbitrator if there is condition to do so?
4. Can parties be able to avoid the court's discretion to appoint arbitrator(s) by their agreement?
5. What is the position of Ethiopian law in this regard (appointment of arbitrator)?

Coming to the first question above, establishing private tribunal by appointing arbitrator(s) through their agreement is primarily left to the disputing parties. "Parties are free to provide as they wish for the choice of arbitrator" or "they are free on a procedure for appointing an arbitrator including naming person to make the appointment."

In this regard scholars have the opinion that it hardly possible to find "private" or "public policy" which recommends the restriction of power of parties to choose their own tribunal -arbitrators.

This is to mean that arbitration agreement may provide for the appointment of a single arbitrator by consensus. It may only provide agreement for settling dispute by arbitration, setting aside the number of arbitrators and method of their appointment to arbitration statute/ laws. It may name the arbitrator. It may specify that each party shall appoint one arbitrator and those two shall appoint a third arbitrator.

In relation to the second inquiry above, the role of a court on appointment of arbitrators, Art (3) and (4) of UNICITRL MODEL LAW ON INTERNATIONAL ARBITRATION of 1985 (A proposal for national legislation) gives us some clue how and/or when courts may appoint arbitrator (s).

The full version of the provision reads.

Art II

Appointment of arbitrators

1....

2. The parties are free to agree on a procedure of appointing the arbitrator or arbitrators subject to the provisions of paragraphs (4) and (5) of this article.

3. Failing such agreement.

- a. In arbitration with three arbitrators, each shall appoint one arbitrator and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of request to do so from the other party or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made upon request of a party by the court or other authority specified in art
- b. In arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed upon request of a party by the court or other authority in article 6

4. Where under an appointment procedure agreed upon by the parties

- i. A party fails to act as required under such procedure or

- ii. The parties or two arbitrators, are unable to reach an agreement expected of them under such procedure or
- iii. A third party including institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in art 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

This provision gives power to court in order to appoint arbitrator (s) when the procedures set out in an agreement do not result in the requisite appointment.

The above article seems to use the “policy of saving” agreement of arbitration. The policy empowers court to appoint an arbitrator in every case in which there is no other machinery for making appointment. The subsequent articles i.e. Art 13, 14 and 15 of UNICITRAL MODEL Law gives power for court when appointed arbitrator fails to perform his function due to different reasons. Saving all arbitral agreement by giving power to the court to appoint arbitrators do not escape opposition.

According to this opposition the difficulty to save arbitrate agreement happens when “parties name an arbitrator in the agreement to arbitrate and the named arbitrator is unwilling or unable to act.” And further asked question as “Is it better to assume that personality of arbitrator is so important that arbitration should not go on with another arbitrator? “

Concerning appointment of arbitrators so as to establish tribunal in Ethiopia has been discussed in chapter three and please compare with the above description.

2.5.9.2 Arbitral Proceedings in general

Article 21 of the UNCITRAL Model Law on international arbitration provides that in the absence of agreement to contrary, the arbitral proceedings commence on the date on which a request for a dispute to be referred to arbitration is received by the respondent.

- Should there be rules to conduct arbitration proceeding?

- Can parties avoid such rules by their agreement?
- What sort of procedures may arbitral tribunal use with absence of procedures specified by a parties or law?

For arbitral proceedings there might be different procedural rules though it might differ from one country to another. The presence of rules, however, will not override contrary agreement of the parties. Section 36 of AIC Draft rule, for example, provides for rules which would apply if the parties do not agree on procedure or if an arbitration agreement is silent or deficient with respect to a specific question of procedure.

Parties in arbitration agreement are free to set the kind of procedure they want. This is consistent with the notion of arbitration as a private contractual arrangement b/n the parties. The freedom includes freedom to agree to follow the rules of professional or of an organization under whose auspices the parties agree to hold arbitration.

In the absence of agreement by the parties or binding rules, an arbitrator may prescribe his own procedure.

Should the parties to arbitration be required to define the issues in writing?

It has been suggested that it is vital for a good arbitration that the parties define the issues which are to be arbitrated. Without defining issues arbitration will have no focus. On the other hand, a rigid procedural requirement may inhibit unsophisticated party from starting arbitration proceedings, and the arbitrator can exert pressure on the parties to define their issue once they are before him.

The ICAA(ICAA/Model law Art.23) requires the claimant to state the facts supporting his claim, the points at issue and the relief sought. It requires the respondent to state his defence in respect of these particulars. This must be done within the time periods agreed on by the parties or set by arbitrator. The parties may agree otherwise ‘as to the required elements of such statements’. The ICAA, of course applies mostly to arbitrations which are among sophisticated business people and which involve substantial amounts of money

Should it be mandatory that arbitrator adhere to the rules of natural justice or to some of them?

If so, should the arbitration statute talk in terms of “rules of natural justice” or should it lay down specific rules intended to ensure fairness to the parties?

Sujan explains the Indian practice in the following way. As to him in India though the arbitrator could not use civil procedure which is applicable for judicial proceedings in courts, in the absence of stipulated procedure by the disputing parties, the arbitrator is duty bound to follow “ordinary rules” laid down for the administration of justice unless he is expressly absolved from doing so. “Ordinary rules of administration of justice” refers to rules which are applicable in Indian civil bench but they do not include all rules which are applicable in ordinary courts. He further explains that though the arbitrator will not tightly bound to use rules and procedures observed in courts, his procedure may not be opposed ‘natural justice.’ His procedure should, therefore, be such as a reasonable man should follow in deciding the dispute impartially.

An excerpt from Sujan’s book states as:

An arbitrator constitutes a quasi judicial tribunal and it is implied terms of an arbitration agreement that appointed arbitrator will determine the disputes referred to him according to the law of the land. Even a recital in the agreement that the arbitrator can decide in whatever he thinks fit, can not be interpreted to empower to him to deviate from the law or the principle of natural justice and to base his decision on his personal knowledge. An arbitrator is required to consider the evidence; oral or documentary evidence placed before him and to conduct hearing in the presence of both, parties and base his decision on that evidence. The parties will be unaware of the contents of his personal knowledge and would have no opportunity to correct any misconceptions that may have crept in to neutralize the assumption made; this would result in denial of justice to the parties.

What is mean by the power of arbitrator to decide in accordance with natural justice?

When parties fail to specify the procedure in which the arbitrator use during his arbitration, the arbitrator will use some basic principles of justice though he/ she is not conform to minor regularity due to his lack knowledge on them. The court will invalidate the arbitration resolution where the arbitrator disregards basic principles of justice. Principles of nature justice, in this context refers, “ principles which the arbitrator must conduct a fair and impartial trial and afford full and equal opportunity to both parties.” He must hear evidence and a arguments in the presence of both parties and give an opportunity to the parties to cross-examine the witness who gives oral evidence. The arbitrator, nevertheless, can hear one party alone when the other party is not willing to present at the time of hearing after the latter is notified. More over the arbitrator need to give equal chance for disputing parties to present their relevant and admissible evidence, be it oral or documentary.

When we investigate laws of arbitrations, they incorporate the idea of natural justice either directly or indirectly. Some countries’ arbitration act ,for example, give power to court to remove an arbitrator or to set aside or remit an award on the grounds that an arbitrator has” misconduct himself” and the courts have held an arbitrator who has failed to follow the rules of natural justice has misconduct him self. Therefore mixture of statute and common law effectively requires an arbitrator to follow those rules.

The UNCTRAL model law on international arbitration also incorporates the following provision which have direct or indirect impact on the concept of natural justice.

Art 18

Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Art 24

Hearing and written proceeding

1.
2. The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of good, or other property or documents.

3. All statements, documents or other information supplied to arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary documents on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Art 34(2) (a) of the same model law also states that an award may be set aside on the grounds that the party applying to set it aside was not given proper notice of the appointment of arbitrator or of the arbitral proceedings or was otherwise unable to present his case.

There are strong arguments in favour of legal requirements that require arbitration be conducted fairly, though it may be argued on the other side that the judicial system which the parties have agreed to avoid, should not intrude itself through the back door. If fairness is to be required, there are strong arguments in favour of having the fundamental requirements of the arbitration process stated in the arbitration statute, so that there may be no doubt about them.

To incorporate natural justice in arbitration legislation may not necessarily mean to write the phrase natural justice in the document; it is possible to state different rules like the UNCITRAL model law which ensure natural justice. In fact there is argument against to specify natural justice in legislation.

Argument in favour of referring to ‘natural justice ‘ is that it is concept which is flexible and which continues to be developed by the courts. The argument against it is that it is a term which is likely to be forbidding and unintelligible to many of the non- lawyers who use it and who should be able to find in the statute rules which are plain and comprehensible.

Should a hearing be mandatory in arbitration proceeding?

Under the present law the parties can agree that there be no hearing. They may agree that arbitrator can make a decision upon files or other materials which they submit to him or that he can examine goods to decide whether they meet a contractual term about quality.

The UNCITRAL MODEL Law states the following concerning hearing.

Art 24

Hearing and written proceeding

1. Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearing for the presentation of evidence or for oral argument or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold such hearing at an appropriate stage of the proceeding if so requested by a party.
2.
3.

According to this article parties can decide whether or not to hold a hearing and if they do agree on the presence of hearing that is the end of the matter- there will be hearing. Secondly if they make no agreement on the point, the arbitrator can decide whether to hold a hearing or to proceed on the basis of documents and/or materials but, thirdly, either party can still demand hearing.

Should the arbitrator be bound by the rules of evidence applicable to proceeding in court of law?

If not what evidence should the arbitrator be entitled and obliged to receive?

As to various literatures (1) the arbitrator has the power to admit evidence whether or not it would be admissible in court of law (2) that he be required to admit evidence which would be admissible in court, and (3) that he has power to admit evidence on oath, affidavit, or otherwise as in his own discretion he consider proper.

An arbitrator has power to call a witness on his own motion but that witness called by him be subject to cross examination and rebuttal as specified in arbitration rules of countries.

Art 26 of UNCITRAL mode law in powers the arbitrator to require a party to give an expert called by the arbitral tribunal relevant information and to allow inspection of documents and things.

Regarding the Ethiopian arbitration rules one can find few provisions which deal with arbitration proceeding independently. Art 317 of the civil procedure code which gives guideline what procedure arbitration tribunal need to follow while conducting its function obliges tribunal to follow almost similar procedures what civil court would follow during its proceeding. See chapter three.

2.5.10 Legal effects of Arbitration

The term “arbitration “ is to mean a process by which a tribunal other than the a court decides a dispute b/n parties under a prior agreement by which the parties have agreed to honour the decision of the tribunal(the arbitrator). And there are also conditions where parties in a conflict should submit their dispute to arbitration before they proceed to court regardless of their consent.

The legal effect of arbitration emanates form the nature of arbitration itself. In arbitration there are two kinds of awards: binding and non-binding. In case of non-binging arbitration, conflicting parties refer the dispute to an arbitrator whose decision will not be binding. However, some people deny the use of the word arbitration for a process in which third party gives non-binding decision on the disputed matter. As to the idea of these people, the world arbitration is used to denote and to denote only, a process which will result in an award which is binding upon the parties to the dispute.

A part the above argument against the use of the word “arbitration” for non- binding decision of third party for a dispute, commonly arbitration has two effects. It decides the case either in binding manner or as mere opinion of the arbitrator on the case, and these can be considered as the effects of arbitration.

The most dominant effect of arbitration, in fact, is producing an award which is binding upon parties as if it were court judgment. Here under the types of award and challenges

against award have been dealt as legal effect of arbitration has close relation with these concepts.

2.5.10.1 Arbitral award

Award – this is the decision of an arbitrator which decides the dispute and the rights of the parties with respect to it. Award can be said in trim and final awards, both of them are results of arbitration.

A. Intrim awards

Does the arbitrator have the power to make an in trim award?

An interim award is one which disposes of one or more issues in the arbitration but which does not dispose of all issues. It may, for example, be useful for an arbitrator to decide about liability before entering upon a complex determination of amount which may be wasted if there is no liability. Depending on the circumstance of the case interim awards can be given where: jurisdiction of the arbitral tribunal is contested by any of the parties and the law applicable to substance is not determined.

Since in trim awards may cause delays on the proceeding, precaution has to be given before it is chosen. Even some countries, like Australian state of Victoria, permit interim awards if an arbitration agreement provides for the same and the general view seems that in absence of express power, an arbitrator can not make an interim award.

B. Final awards

Where the award of the arbitrator eventually settles all issues which were forwarded for him, there will be final award. The final award will put an end to the dispute b/n the parties. There are various questions related with nature or scope of the award given by tribunal. Among these questions the following are examples.

Should an arbitrator have the power to decide about his own jurisdiction?

Should an arbitrator be obliged to make his decision on the basis of the law which courts apply? If so, should the parties be able to agree to the contrary?

Regarding these questions the ' Arbitration issue paper' prepared by the Alberta Law research and reform Institute incorporates comments and positions hold by national and international instrument on the same . Concerning the first point the comment suggests that an arbitrator can not make a binding decision as to whether or not the arbitration agreement came in to existence, because if there is never was a contract he could not have the power to act as arbitrator, and it further explains that, it has seemed wrong to say that he has the power to decide that he has no power to decide. The comment adds also that the arbitrator can not make a binding decision as to a fact upon which his jurisdiction depends, e.g that certain event has occurred which must occur before a party has certain aright to arbitrate.

Regarding the second point above the paper incorporates a general principle by showing experiences adopted by different instruments. The general rule, as to this source, is that arbitrator must apply the law but that the parties can agree that arbitrator should be able to decide on another basis. The ICAA provision is that "the arbitration tribunal shall decide ex aequo et bono or amiable compositor only if the parties have expressly authorized it to do so." The parties may agree that arbitrator can decide with out following what the law says but the difficulty is to know whether the arbitrator is bound by the express terms of the parties and, if so how he is to be held to them or whether he can simply ignore public policy as set out in the legislation or in such rules as that against enforcing contracts to commit crimes.

When we come to the point (legal effect of arbitration) , Once the arbitrator gives final decision on the case , parties or one of them can not bring the case to court -it will have resjudicata effect. Having rendered the final judgment, the arbitrator, unless he/she is requested to revise his award by the court would make himself/ her self free from obligations because arbitration agreement imposes obligations not only on disputing parties to a bind by the award, but it also imposes duties on the arbitrator to give judgement.

Unless an award is set aside or declared to be nullity it is final and binding. The parties' original right and obligations are to the extent of that they were the subject of arbitration, at an end. Instead they have the rights and obligations which the award gives and

imposes. Neither party can, as against the other, dispute the facts which the arbitrator has found.

In summary an arbitrator's award is final and government can not interfere with it except in some specific situations where the courts deemed the award as unlawful or inappropriate.

The grounds to nullity or set aside arbitral award may differ from country to country. Often the following grounds are taken as grounds to set aside awards or send back the arbitrator for reconsiderations. These are:

1. Where the arbitrator has not conducted the proceeding according to the arbitration agreement, has acted in a way which is contrary to public policy, has dealt with issue which is out side his jurisdiction, has not dealt with an issue which was referred to him or has given an award which is not clear.
2. Where the arbitrator is corrupt or biased.
3. Where the arbitrator has been "improperly procured". Apart from cases in which the arbitrator has been corrupted, which will fall under misconduct as well as improper procurement, there may be a case in which a party has deceived the arbitrator or concealed evidence.
4. Where the arbitrator has made a mistake and asked to have the award remitted to him for reconsideration where fresh evidence of some weight has been discovered and the evidence could not be due diligence have been obtained for the arbitration proceeding
5. Where there is error the face of the award.

A look at Art 319 of the civil procedure code of Ethiopia clearly indicates the effect of arbitration award. This article assimilates arbitration award and court judgment –arbitral tribunal has to decide the issue in the dispute and state the reason for the decision thereof. And in effect the award is implemented as of court judgement.

Review Questions

- 1) What requirements should be made about the form of the award?
- 2) States the steps in negotiation process
- 3) Elaborate the difference and similarty of litigation and arbitration

- 4) When, if ever, should a court have power to decide that, despite the agreement to arbitrate, a dispute should not be arbitrated?
- 5) Upon what grounds should the court be able to upset an arbitrator's award?
- 6) What are the differences and similarities between conciliation and mediation?
- 7) What powers does the court have when it upsets the award of an arbitrator(s)?

2.6. Summary

“Alternative Dispute Resolution “ or “ADR” , as the current search for better dispute resolution methods has come to be labelled , embraces processes for dispute resolution that are truly alternative to the judicial system. Even if it is difficult to mention out all types of ADR methods as continues to evolve from time to time, its continuum from self-help to adversarial arbitration. The most dominant and widely applicable ADR types, however, are negotiation, mediation/ conciliation and arbitration. In negotiation, the parties to a dispute, through communication and discussion, convey their position to each other and attempt to persuade the other to take a position by making compromise. Mediation / conciliation is negotiation by nature , the only difference being the appointment of one or more neutral third parties to the conduct of the negotiation. In mediation proceeding there are different processes in which the mediator performs different activities starting from setting the table for parties discussion to proposing alternative solutions for parties agreement. Both in negotiation and mediation if parties reached in terms of agreement to settle their difference, their agreement would bind them and has legal effect based on law of contract. Arbitration is a mode of settling differences through the investigation and determination, by one or more unofficial persons selected for the purpose of some disputed matters submitted to them by contending parties for decision and award, in lieu of a judicial proceeding. In arbitration the agreement of the parties to be arbitrated by private judge is the primary condition, and after this agreement arbitral tribunal will be established by the appointment of arbitrator(s). Unless otherwise parties agree on the contrary, proceeding in arbitration is pretty much similar with that of court proceeding.

CHAPTER THREE

ADR IN ETHIOPIA

3.1. Introduction

Alternative Dispute Resolution which is a generic name to the method of resolving disputes amicably with no or less adjudicative nature is a common phenomenon in Ethiopian societies known by the most common Amharic term “*SHIMAGILE*”, which literally mean elders. The ‘*Shimagiles*’ are known by different (*names*) in different societies and the way the dispute will be seen is also different in different localities. This customary practice doesn't stand for a single kind of the modern ADR – arbitration or conciliation. It may seem arbitration in sometimes like in family arbitrators, ‘*yebeteseb shimagile*’, and in other cases it may seem conciliation. We will see the common characteristics of Ethiopian customary dispute settlement.

Though it is not well developed yet we have also formalized this proceeding by giving legal recognition since the establishment of standardized court system in the 1950’s. This chapter is devoted to explore the existing legal grounds of ADR under Ethiopian context. Thus, its constitutionality and the specific laws that regulate the regime will be covered here. The provisions of Ethiopian law which regulates ADR are not consolidated and are scattered in different legislations. The provisions of the Civil Code, Articles 3307 – 3346, the Civil Procedure Code, Family Code, Labor Proclamation that governs ADR, specifically Arbitration and Conciliation, will be assessed in different sub sections of this chapter. In addition, we have got two institutions, Ethiopian Arbitration and Conciliation Centre and Addis Ababa Chamber of Commerce, practicing institutionalized ADR having their internal rules and providing the disputants with Arbitration and Conciliation forum; will we will see how they are working these days.

Objective

At the end of this chapter students will be able to;

- Identify the place of ADR in Ethiopian customary dispute settlement

- Identify the constitutionality of ADR;
- Define compromise and determine its relation with arbitration and conciliation;
- Determine the place of conciliation in the Ethiopian legal system;
- Define arbitration under Ethiopian context;
- Determine the legal provisions regulation arbitration;
- List down institutes practicing ADR in institution level;
- Analyze the application of ADR in settling disputes in family, labour and insurance cases.

3.2. Historical Background

In our prior discussion in the first chapter, we have seen that ADR is as old as early society. In the old civilization of ancient history the Greek mythology, the laws of Babylonian, i.e. Hammurabi Code (1750 BC), the XII Tables of the Ancient Romans (Table I paragraph 6) and the laws of the Ancient Jewish and the teaching of Apostle Paul (**I Corinthians 6:1-7**) witnesses the undeniable significant role of ADR in settling disputes of any nature and degree amicably. Those ancient societies were using primitive form of ADR not as an alternative as we used today but as a primary devise to settle disputes.

For instance in the Ancient Far East legal system, i.e. Confucianism, which were used by the peoples of China and Japan , formal complaint before the local chiefs were not prohibited but not advised and encouraged. The societies were tied together by social norms and hence one who brought cases before these chiefs were considered as worthless and who lacks tolerant, and may be segregated from communal life. On the other hand, if one settled his matter amicably by using the informal means he will be uplifted by the community and will be considered as a man of tolerance. The remedy given by the society for such action forced the disputants to look for compromise rather than formal complaint before the local chiefs to get remedy for their grievance of varying nature and degree. This shows us the place of compromise or amicable settlement of dispute plays a significant role in a day to day life of the ancient society and helped them to have smooth relation among them selves.

We the Africans, who believed to be the cradle of man kind, had our long history tied with amicable settlement of dispute. In the Ancient Egyptian history who had more formalized litigation structure as has been written by Mark Andrew “*Minor cases were tried by a local council of elders and each town or village had its own local Kenet in charge of legal proceedings. Such case usually involved minor problems, such as default on loans*”(Murado P 122). Before the era of discovery and colonialism, the African continent was ruled by customary practices which had some characteristics in common. Muradu Abdo in his Legal History and Traditions course material best describes this incidence by saying “*Conciliation plays a very important part in African law since the community life and group isolation give rise to a need for solidarity. As a result the Africans always seek unanimity through dialogue, since only conciliation can put an end to disputes*” (Page 80). This was alternative to the possible complaints that might be lodged before the local or village chiefs. Each practice of the Africans was filled with traditional beliefs based on a common sense of right and wrong in settling disputes.

As part of the long African history, Ethiopia had practiced traditional ADR in her long history. As it is true in most of the ancient society, local chiefs who are known by different names in different localities like clan leader, village heads etc are local governors with extended privileges. They are mostly nominated by the will of the kings or leaders of the country or community as the case may be. Thus, they were seen as representative of the one who nominate them, i.e., the king, and are the right hands of the king to enforce decree, levy and collect taxes, secure peace and stability within their local jurisdiction. The traditional obligation or privilege in the view of some historians, of the king were unlimited and were extended to issuing laws, enforcing it and adjudicating disputes. The kings used these local chiefs to take care of all these obligations in the remote areas, including the settlement of disputes. Thus, formally, when these local administrators try to resolve conflict, they were acting not in their individual capacity, but rather in their official capacity as a magistrate. They used the customary laws, religious beliefs and their own sense of right and wrong to settle the matter. Even the decisions of such type were appeal able to the next higher administrator or sometimes to the king directly. The king himself hears some first instance litigation and appeals. Because it was the traditional obligation of the kings to make sure that justice had been done in his

empire. In Ethiopian history this was the fact before the formal establishment of courts in the 1940's and after that in some localities.

The above discussion gives us some light about the administration of justice our early history. But this was not the only means of settling dispute and making justice. The formal adjudicative function of the governors in their different hierarchy contributes only for the settlement of some of the disputes. Most of the disputes were settled by elders, religious leaders, like priests, or clan chiefs elected by the community.

There are two views as to the development of proceedings which are called ADR these days. Some scholars said that ADR is the primitive form of litigation and so is the earliest mode of adjudicative litigation. But most of the scholars do not agree with this opinion and rather, they said, ADR is an independent form of dispute settlement which is different from adjudicative form of litigation and developed independent of it. The proponents of the second view agree with the opinion that says ADR developed much earlier than adjudicative and authoritative form of litigation. But they are saying that this does not mean that the two proceeding developed together. This argument can be raised in same way in the development of Ethiopian legal system. While entertaining cases did our elders acting authoritatively? Does it had adjudicative in nature or compromise? Do the parties had the right to go for appeal from the decision of the elders? The answers for these questions will probably lead us to decide whether ADR developed independently or is part of adjudicative litigation. The fact is in the administration of justice, cases of any nature had unlimited opportunity to go for appeal to doors of the king.

Before the 20th century where there were customary laws prevailing all over the nation, different localities had their own ways of dispute settlement inherent in their identity with out reaching their local governors. These means used the elders or “SHIMAGILE”, which are the most respected and wise part of the society because of their status or age, as an intermediate. The powers of the SHIMAGILE's were limited on persuading the disputing parties to compromise their matter. These intermediates were wise and persuasive enough to succeed backed by the norms of the community. We will discuss the customary ways of dispute settlement later which is still prominent in some parts of the society making life easier.

As a result of formal establishment of institutions in the second half of the 20th century like courts with state nominated judges and administrators nominated by the state, the roles of customary ways of dispute settlement became absolutely alternative.

At the time when we establish formal administration of justice due cognizance has been given to these alternative means of dispute settlement. The 1950's and 60's codes have in its different parts dealt the most widely used ADR types, i.e., Arbitration and Conciliation, as an alternative to court litigation. This is an evident to show that these alternative means grow parallel to formal adjudicative litigation system. The coming section discusses them a lot.

Questions: Which one do you think developed first in Ethiopian history, ADR or adjudicatory dispute resolution system?

3.3. Constitutionality of ADR

This days adhering to constitutional values is becoming a standard to determine the stage of development of a certain nation. Constitutional values can be seen in to angles. One from the eyes of the subjects – as a means to check whether the elected and ruling parts are working with in the limitation given to it by the people; second in the eyes of the elected officials – as a means of showing their obedience by proofing them selves that they are loyal, committed and work only for the best interests of the subjects with in their limitations. It is for mutual benefit that each and every activity in a constitutionally established state functions with the limitation put by the supreme law of the land.

Constitution regulates most important activities of the state. For example, it recognizes inherent rights of citizens with its respective duties, and also establishes government agencies together with its responsibilities. One of the pillar rights of citizens which are recognized by Ethiopian constitution, as it happens in all the constitutions of other nations of the world, is *access to justice*. Article 37 of the same reads as follow

“Everyone has the right to bring a justifiable matter to and to obtain a decision or judgment by, a court of law or any other competent body with judicial power”.

This part of the constitution which is subject to broader interpretation has incorporated different elements. At least the following can be said about the included rights in this provision. The first clause speaks about the rights of individuals to bring any of his grievances to the appropriate body. The second phrase qualifies the nature of the matter that can be safely taken to the body, i.e. justifiable matter only. This seems to talk about the real interests of the claimant and the existent of cause of action. Thirdly, we should not think of a mere right of bringing the matter to the authorized body but also to get remedy for his or her grievances. This puts a positive duty to the state to make sure, that after the claim has been accepted by the appropriate organ, justice has been done to the satisfaction of the general public. The provision further determines and limits the bodies that have the authority and competency to settle disputes. In doing so, its only courts which are constitutionally established institutions of the state and other bodies with judicial power which can validly look at the matter and give binding decision which is enforceable before law.

When we talk about the right to bring grievances before the competent authority, it is not a mere right granted for the citizens with negative obligation on behalf of the state. But as most scholars agree it is the duty of the state to make sure that judicial bodies are really accessible to the public. Here accessibility needs to be interpreted broadly. It may mean material accessibility, i.e. the average distance between the one who is with his grievance and judicial offices; the expenses disputants supposed to cover to get justice; the duration of time the matter takes to be settled; getting qualified experts to give reasoned decision which satisfies the general public. These all parameters and its fulfillment are a relative test which differs according to the level of development of the nation. What is denial of justice in a certain developed nation might not be the same for Ethiopian instance. And what we have to see is the economic and human resource of the nation and its development in the passage of time.

At this moment it might be extra ambitious to require the state to establish a court in each and every locality; degree holder and experienced lawyers in each court room; dispose of each cases with in days; make court services free of payment or much less than what we have today etc. Lack of resources might be the primary obstacle to accomplish all those

activities prior to all other obligation of the state. This by itself might not be denial of justice if the state tries its level best to get rid of these obstacles by other means.

Alternative dispute settlement can be thought as one remedy to rectify those in cumbersome we have discussed. As we have discussed in the first chapter it is believed to be speedy, less costly, easily accessible for all, affects future relations of the parties positively and possibly a place where persons with experience in the specific subject matter we sought justice might be obtained. Since it is beyond the capacity of the state to satisfy the needs and interests of all the needy citizens, encouraging the establishment of ADR institutions and letting disputants settle their dispute amicably is the extended obligation of the state to best secure access to justice.

In the other case as per this constitutional provision courts are the primary institution empowered to settle disputes, but by no means are the only institution with such power. Though the article fails to specify them, it tells us that there might be other organs with judicial powers other than courts of law as long as it did not take away from court of law. As long as we have not absolutely prohibit citizens from taking their cases to the court of law, as long as we have not prohibit appeal from going to ordinary courts, the government has the right to establish specific courts. This can be witnessed from Article 78(5) of the same. This very article empowered the House of Peoples Representative or as the case may be State Councils might establish or obliged to give recognition to the established customary and religious courts. The existing Shari' a court is an example of religious courts established in the nation under state recognition.

By the same taken the House of Peoples Representative can establish other institutions with judicial power or give recognition if they have been established by private individuals. Giving due cognizance for arbitration and conciliation proceeding specifically and compromise in general is start but not an end by it self. More over, by recognizing instructions which serves as a forum for arbitration and conciliation, like the Addis Chamber and Ethiopian Arbitration and Conciliation Center (EACC), the state is promoting the ideal constitutional access to justice principle.

Questions:

1. List other constitutional articles than discussed above which have some relation with ADR practice?
2. Can you interpret Article 78(4) of the Constitution to prohibit ADR practice in Ethiopia? Here is the provision:

“Special or ad hoc courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established.”

3.4. Customary ways of Dispute Settlement

Customary and religious laws are earliest and prominent in Ethiopia to settle disputes. African continent were filled with customary laws before the incursions by foreigners. Particularly in Ethiopia customary laws of different ethnic groups were the major body of law in Ethiopia for centuries. Even after the introduction of written and authoritative laws, like the Fetha Negest in the 15th century, customary laws played a significant role in the administration of justice. The roles of customary laws were not totally taken away even after Ethiopia adopted legislation as a basic source of law in the on set of 20th century. The reason may be that those piece meal enactments were far away from being exhaustive to regulate all matters in terms of subject matter and detail ness, not accessible for the ordinary people and not well customized to the local needs but substantially imported from foreign experience. These factors paved the way for the application of customary laws in most of the citizens’ activities.

The 1950’s and 60’s transformation era primarily aimed at unifying the laws of the nation under the same authoritative legislation and the minimization of application of customary laws. Article 3347(**Civil code**) envisages this objective the civil code. But this does not mean that the applications of customary laws are totally abolished by these new enactments. Rather they are legalized in a sense that the codes recognized the importance of customary norms of the society in two ways. One, by directly incorporating the prevalent customary norms in the codes, like in the family, succession and property laws. In the other hand some times direct reference had been made to those customary laws of the society as long as they are not contrary to the prevalent laws, like formation of marriage, interpretation of contract (Article 1713 of the civil code).

Under the FDRE constitution customary laws and practices have been given due cognizance unless they are not contrary to the legal norms. Reference can be made to articles 9, 34(5), 41(9) and 91 of the same. These show as still now customary norms are sources of law in some subject matters.

Customary laws of Ethiopia which are different in form and substance are deeply rooted in the traditional institutions of each ethnic group. They are not uniformly applied but are mostly peculiar to ethnic groups with some exception. As rightly witness by Dr Aberra Jembere, who extensively studied customary norms of different ethnic groups;

“Customary laws of Ethiopia were different in form and substance, and each applied to a given area only. So they did not have uniform application all over the country. They were made and accepted at the community level. Their common characteristics were rooted in the participation and consensus of the community. They derived their legitimacy, therefore, from these factors.”

Among the subject matter where the customary laws are still enforce are administration of justice or settlement of disputes. We have ample and unique ways of settling disputes of any nature and degree arisen among themselves and with their interaction to other ethnic groups. Some exist though they are contrary to public policy, like arbitrating criminal matters between the victim and accused.

3.4.1. Common characteristics of customary dispute settlement

It would be important to deal with all kinds of customary ways of dispute settlement inherent in each ethnic group, but for lack of resource and some other reason (I) will confine my self to their common characteristics and describe some in detail.

1. Intermediates (SHEMAGILES) - The third parties who act as an intermediate between the disputants have some common character in their identity, ways of nomination and their role through out of the proceeding. Here for easy understanding of the customary proceeding I will use the term “SHIMAGILE” to refer the third parties though they are known by different names in different localities. When we see their

identity, they are the most respected parts of the society as a result of different reasons. Some times they are chiefs of the clan or the community, religious leaders or heads of the religion, or local administrators who have the official capacity. In some other instances they might be the parts of the society who have wealth in that specific locality. The role of priests in most parts of Ethiopia especially in the highland parts and cities can be taken as an example here. What ever that matter could be he is expected to be an old person (mostly men are favored over the women), wise and experienced enough in settling disputes. Those **shimagiles** might be from the relatives or clan of both the disputant equitable in their number in addition to neutral intermediates or some other times only with neutral once.

The criteria for a party to be a shimagile are not subtle and it is inherent in the nature of these customary ways of dispute settlement. The third parties are expected to persuade the disputants in resigning their initial claims against their contender. To do so the third party should be of a person with wider acceptance in that community, fluent in speech and critical thinker, who can admire any person in his public speech, whose words or ideas can be accepted by parties. Some times relatives of the disputants may be a third party and may be it is to best negotiate about the remedies of the dispute with out substantially affecting the financial status of the disputant. But, in the other instance it is also believed that relatives of the disputant might be the best person to convince their own respective relatives to put down its extra ambitious claims and sometimes disputant who is not willing to submit him self to the authority of shimagiles. The disputant will be reluctant to go away from the concern of his relatives, who might help him financially if he is required to compensate the victim or the creditor.

When we come to the ways of nomination of the shimagiles, it is basically the concern of the community and relatives of the disputants to make sure that the victim is not left with out being dully compensated and left retaining his hostility with the other disputant, who might be subject to an intentional attack by the first victim as a retaliation for his grievance. Thus, the third parties may be nominated by person who are closer to the disputants, i.e. neighbor, relative, closer friend or family member. Some other times the concerned third parties them selves may present them selves as a concerned person to settle the dispute. In other cases, the community it self may had a pre nominated third party who serves as an intermediate in any cases, like clan leaders. Here, the third parties

may try to settle the dispute even with out the knowledge of the disputants but only with the consent of the relatives or clans of the disputants. And it is uncommon to see resistance made by the disputants as to the authority of the shimagiles because of the social norms and [grave effect of such refusal](#).

2. The nature of the proceeding – After the nomination of the shimagiles, they will officially start their function of pushing or persuading the disputants to submit their matter for review before them. We might not get formal and standard steps followed by all customary ways of dispute settlement. But mostly they will make a mini investigation as to the nature of the dispute and the personal characteristics of the disputants. Then they will move to one of the disputant by studying a period where he will be home and with no duty. Mostly they favor weekly rest days or holidays and early morning times than the other days and time. Before they move to the house of the disputant they might inform him that they have got some concern to talk with him on that specific day and time, and sometimes even with out making appointment with him.

After they try to persuade him to resign some of his claims depending on the nature of dispute, they will move to the other disputant, probably the wrong doer, to tell him the offer made by the other disputant and to persuade him as well as they did previously with the other disputant. The important thing here can be best described by the Amharic proverb which says “*shimagile washto yastarkal*”, which literally means ‘the shimagiles will **lie** to get the parties compromised’. It is to mean that they will hide some facts and offers made by one of the disputant if it is offensive to the other or if it is not substantially important or if it would not help to end up the dispute amicably. They will shuttle in between the disputants until the they make sure that the disputants have agreed on same point, which might require more than one separate meeting with the parties individually.

After they fix the nature of compensation, they will call a joint session of the disputants, his families, relatives, clan members as the case may be if it were as such serious matter which affects them. A feast will be prepared in this specific date and their will be exchange of apologies by the wrong doer and acceptance of the same by the victim. Shaking of hands and kissing is the important part of the proceeding which is a declaration of ending hostility among the disputants once and fore ever. It means that the

disputants are returned to their previous status as if they never got into dispute, i.e. re-creating the past by forgiving the wrong act.

The compensation will be handed to the victim in cash or in kind, like herds of cattle. Often the shimagiles will not be compensated the expense they have incurred during the proceeding nor paid for the service they have delivered. It is considered as a public duty and some times with no option to resign from the status of being shimagile.

3. Subject matter of dispute presented before SHIMAGILES - As customary laws were in force for a long period of time in Ethiopia, we can not see choice being made in the subject matter of the dispute. Customary dispute settlements have a wider scope in settling family, succession and property disputes. Specially, bringing family dispute before court of law will be considered as a shame for the spouses.

Very often dispute which involve a class of peoples or the whole member of a clan or locality, like a dispute over grazing lands and water in the lowland areas, murder, rape and abduction cases, are referred to customary dispute settlement. Even it is believed that the quality of the outcome of such a method in creating peace and harmony cannot be compared with what might happen in the courts of laws.

It is also usual to see serious criminal matters like homicide and offences against property like robbery being referred to the hands of shimagiles. The payment of blood money by the murderer and his relatives to the families of the victim is a common form of remedy for such a case in most parts of Ethiopian localities far away from big cities. And some witnesses the effectiveness of the method in creating sustainable peace and harmony in the relations of the relations of both parties by avoiding retaliation among them selves. An important argument may be raised about the criminal policy of Ethiopia in conciliating criminal matters which can be prosecuted without the requirement of private complaint. This will be dealt in the other section of this chapter later on.

4. Effect of out come and enforceability – though not often it happens that the disputant may stick to their contentious claims through out the proceeding irrespective of the efforts of the shimagiles and it may end up without success. Thus, like the modern conciliation proceeding there is to possibility, i.e. compromise or non compromise. As

the nature of the outcome differs, it does the effect to the disputants. If it is a compromise, the disputant who is declared to be the wrong doer will be required to compensate the victim. The compensation may be in kind or in cash. The amount of money will be determined by looking at the gravity of the wrong act, the extent of the injury sustained by the victim and to some extent the financial capacity of the wrong doer. Some times in case of serious offences the wrong doer might not be capable of paying the compensation from his individual wealth. At this moment his relatives or clan members will contribute towards the payment and relieve him from the debt.

The nature of this compromise is like a contract and parties are bound to perform the obligation they have assumed before the shimagiles. If they fail to perform their obligation they will be called and asked why they fail to do so. A party who insists in his failure will be considered as a man of no worth for the community, the shimagiles will consider this an insult directed towards them and the hostility between the disputants will be aggravated.

On the other hand, if the proceeding ends up with no success, the disputant who fails to resign his contention claim will be seriously condemned by the community for failing to obey the words of those wise elder men. This will result in him being isolated from the community in his daily life and in time of emergency to the extent of expelling him from the clan or religious group. The disputants will submit themselves to the words of the shimagiles though they personally believe that they are not fully compensated or not yet forgiven. This is how customary norms maintain solidarity and buy obedience from the members of the community.

As Dr. Abera Jembere described the customary ways of dispute settlement of different ethnic groups, which are at different stages of social, economic and political development, exhibits the attributes of both homogeneity and heterogeneity. The above discussion is an example to show the homogeneity of different customs. The diversity and similarity is due to the factor that the different cultures have passed through multiple associating and dissociating factors such as;

- i. The difference in the political experience of these peoples;
- ii. The influence that the ecological and climatic factors have had on them;

- iii. The extent to which the processes of acculturation and assimilation in to other groups have taken place among them.

Question:

1. Check the existence of these common characteristics in the customary dispute settlement which you know very well?
2. Can you list down some more common characteristics of Ethiopian customary dispute settlement?

3.4.2. Customary dispute settlement of some specific ethnic groups

Different writers have tried to describe the diversified customary practices of different ethnic groups. Ato Tesfaye Abate in “Introduction to Law and Ethiopian Legal System” course material has discussed in detail the Afar customary law including the devices employed there to settle different kinds of disputes among them selves and with their neighbors. Dr. Aberra Jemberre in his book entitled “Legal History of Ethiopian – 1434 – 1974”, which has been used as a text book for the course Legal History for years in law schools, has made a land mark discussion in revealing the customary laws of ten ethnic groups of Ethiopia. I have selected **randomly** the administration of justice part of the customary laws of two ethnic groups among those ten.

A. Amhara

The customary law that was applied among the Amhara was not written. It was transmitted from generation to generation by words of the mouth. Amhara customary law was dominated in some parts of Ethiopia. Some of its norms have been embodied in the codified laws of Ethiopia, for example the principle of usucaption, the institution of family arbitration, equal sharing of property in inheritance by female descendants, etc.

Traditional Institutions

The most prominent traditional institutions are Abat, yegobez aleqa, chiqa shum and yezemed dagna.

i. Abat: People's nominee

Right from the village level called qero (village or guagne (locality) up to wereda and awradja level, local administration and judicial functions were both discharged by the institution that was known as abat which was created in certain circumstances.

Whenever justice was found to be lacking or the government apparatus failed to operate and as a result, crime and insecurity prevailed in a region, the institution of abat came in to the picture. Persons known for their intelligence and, most of the time, elderly persons who were respected and feared in the community, were elected to this office at a general meeting of the community. Depending on the area and population, a community might elect as many as seven abats who would collectively be responsible for making laws, dispensing justice, and executing it. They were, in general, entrusted with the maintenance of law and order. This institution was established to decide criminal as well as civil cases on the basis of customary law.

Once these persons were elected, a general meeting of the members of the community was called to approve the rules of the institution of the abat. The message calling a general meeting was communicated by lighting fires on mountains or hill tops at sun set so that everybody might see them. Whoever saw the sign would like wise light a torch and so would every member of the community. In this way every one in the community would be informed of the meeting that would take place on the morning at a market place, in a church yard or at any other specifically designated for such purpose.

The elected persons would then read out to the general assembly the rules prepared by them. The meeting would approve the rules and adjourn after making a statement that runs: "Let your cattle be kept by my cattle". This statement had two meanings among the Amhara. First it means that the cattle would be safe with out a headsman as long

as there was unity among the members of the community. Second, it serves as warning to those persons who used to take the cattle of others. In this sense, it was understood to mean: “If you dare to take my cattle, I will do the same to yours”. In addition, directives containing the following orders were issued;

- *Remain on your own holding;*
- *Avoid any trouble;*
- *Watch out for strangers. Do not let them go in and out on their own will. Bring them and those who violate the law before the public authorities;*
- *Beware and keep your ears open, ask for information from persons who go to the market and from any passer-by; and*
- *Help any person in distress and help persons to find their way.*

Any one who infringes on the law would first be advised by his relatives and neighbors. If he did not heed the advice, a reprimand by the assembly of the locality followed. If he still persisted in his misbehavior, he would be made to appear before the abat and could be given a warning. Finally, if he still continued to misbehave, he would, within the limit of his capacity, be ordered to prepare food and tella (local beer) so that the members of the community would feast on it. If he committed the same wrong for the third time, everybody would conspire against him. If he still failed to abide by the customary law, eroge (ostracism) would be decided.

In this way, law and order used to be maintained from village up to Awradja (province) level. (The norm being that everyone conduct his or her daily activity in peace: a merchant his own trade, a farmer his farming, a priest his religious duty, etc.). This system of self administration usually proved more effective than one performed by corrupt or negligent administrators appointed and sent by the central government.

ii. Yegobez Aleqa: “Chief of the strong” or Military Leader

The institution of Yegobez Aleqa was created by the members of the community wherever there was a cause to revolt because the burden imposed by governors had become unbearable. The Yegobez Aleqa was empowered to lead all able-bodied men in the community. The group under Yegobez Aleqa maintained peace and order; re-

institute property to those who were dispossessed and forced outlaws to submit to the people's power.

iii. Chiqa Shum: Village Chief

Chiqa Shum was another well-established administrative institution the Amhara community. Besides administering the locality, the Chiqa Shum was also empowered to adjudicate cases involving divorce, battering, trespass and other minor cases. He was responsible for communicating the government orders and collecting taxes. One of his main responsibilities was to act as state functionary below the wereda dug (dug was a name for the village chief) the melkegna (mean a local chief above the Chiqa Shum) or the abegaz (a governor of a locality) or gult-gezji (a hereditary local chief). The office of the Chiqa Shum was an hereditary title in Wello, while it was a privilege which rotated in turn every year among all rest holders in the Gojjam and Gonder region, and in Northern Showa.

iv. Yezemed Dagna: Family Arbitrator

Another important institution in Amhara community was Yezemed Dagna (family arbitrator). They were elected for every dispute that arose with in a community. The entire functions of the family arbitrators were to bring the opposing parties to an amicable solution. Such attempt helped to settle cases without going to regular courts whose decision might inflict further damage on an already precarious relationship. In all minor disputes, family arbitrators helped to bring the parties to an agreement on their own before seeking the assistance of the abat or governor officials.

In general, the institution that served as courts of first instance were, according to Amhara community law, the family arbitrators, village elders (the qero judges in Wello) or the Chiqa Shums. To justify this, it was said that, "Even a swarm of bees would not leave their hive and go to a new one before they settle down on a nearby tree or fence". So a person aggrieved should attempt to settle his case by referring it to the village elders or the chiqa shum before taking it to the regular court or the administrator. Although taking a case directly to the officials of the government was never prohibited, it was always the practice to try to have a case resolved by the

traditional institutions first. Even after a case was instituted in a court, the elders secured permission from the court to attempt to settle the matter first among themselves. This was always accepted by the court with appreciation.

B. Somali

The Somali in Ethiopia (in the Ogaden region) are a herding people, keep cattle, camel, and small livestock. They are also traders operating through out the eastern Ethiopia and beyond.

The political and social structure of traditional Somali society was based on lineage and clan. Although clans do not represent permanent and homogenous unit, the social organization of Somali is in many respects shaped by clan identification and clan social networks. Clans can be seen as related to a higher-level unit, usually called (by outsiders) clan-family. There is a large diversity and number of clans and sub-clans.

Somali society is patrilineal. Most Somali social relations are based on kinship links: on ideas of consanguinity: tracing or recognition of genealogical or blood relationships, although affinal links traced through the family of the wife or the mother are also vital. Although the clan is not a homogenous unit settled in one area, it represents a level of political power. Lineage relationships derived from clan identity and identification, also in a political sense. This was because there were and are instances where the corporate function of the clan, as an overarching group identity based on kinship feelings, transcends relations of individuals and groups that fall under it.

The clan is, therefore, a political frame work, and this inclusive level of politics has a certain reflection in the patterns on settlement. When one refers to a pattern of settlement, one does not mean that clan members live in a definite circumscribed territory. They live in groups along a definite area of movement. Since these peoples are pastoralists, the reference to the area of movement pertains to the area in which the nomads roam about in search of pasture and water. Nonetheless, the unity of the clan (as a frame work for social identification) does not in the main emanate from an ecological factor, i.e. territorial unity based on common exploitation of pasture, waterholes, etc, but usually from the same descent.

Traditional Institution

i. Ugaz: Paramount Leader

Each clan has prestigious and authoritative leader. The leader is known in various regions either as the ugaz, garad or bogar. The reference to the clan leader does not mean that the Somali had a single administrative machinery. Nor does it imply that each clan has its own ugaz. Some clans have ugaz or a person who has the same function and status, while others do not have anything of this sort. In such case the leader of the clan represents his clan in dealing with other clans, more often in the settlement of disputes.

ii. Lineage Leader

The next political level below the clan is the lineage. Lineage refers to a relation which is traced by all its members and every person knows to which lineage he or she belongs. The lineage leader administers the affairs of his lineage and represents them in administrative organs.

iii. Dia-paying Group Leader

The group below the lineage is characterized by Lewis as a mag- or dia-paying group. The dia-paying group comprises of persons falling within at most, the fourth or the fifth generation. As a result, it can be held liable for paying compensation such as blood-money, and it can also require others to discharge their obligation to it, as a legal entity. Although it does not have a formal leader, it enforces law and order through its elders. Hence, the bond of blood relation that is characterized as dia-paying groups may be looked upon as the territorial and political unit.

In terms of the descent principle, there is no great difference between a clan and a "tribe" in the Somali social structure. The clan signifies a kinship unit, a political unit, a unit of war and blood feud relation and a unit of marriage. As a result, it plays a major role in the wide range of social and political function.

In Somali society, legal procedure follows the pattern of the political structure. The fact that the clan is the highest political unit has already been stated. The significant of such a statement is that it also expresses the judicial relationship. Although Islamic law nowadays determines a great deal of the marriage laws among the Somali people, a good part of the clans' relationship is governed by customary laws. Although the qadis are established as the competent tribunal to adjudicate cases on the basis of Islamic law, the clan leaders still maintain some residual judiciary powers.

The customary law that was known as merk was initiated by a Council of Elders (ordeal) and it was submitted to the assembly of people for approval.

iv. Assembly of the People

The assembly of the people was the highest law making organ. Regarding the crime of homicide, the basic principle of the customary law of the Somali people is that: "Life is redressed by life". The primary duty to track down the slayer fell on the brothers of the slain. The revenge is primarily directed against the person who committed the crime and secondly on any close relative of the murderer. If the crime is committed among the warring lineages, the issue ceases to be a family problem and assumes a higher stage, i.e. an inter-clan feud.

Concerning family disputes, the legal proceeding is initiated by individuals. Clan disputes, on the other hand are taken on a clan level. In most cases it is the dia paying group that bears the responsibility. The compensation is known as aefessa among Somali.

After committing homicide, the slayer usually runs away to some other locality or hides himself in the abode of a tribal leader, sheik or the sultan. He then pays for arbitrators to intervene. In most cases his request will be accepted. In fact, there are instances where clan leader simply hand over the cattle of the slayer to the relatives of the victim. If the relatives of the deceased decline to receive blood money, they would hand over the slayer to them on whom vengeance would be taken in the same manner as the slayer had done when committing the crime. However, this does not usually happen.

The obligation of the clan members to pay compensation depends on the closeness or remoteness of the relationship among lineage members. For the purpose of compensation, a lineage may be divided into first, second and third circles. Relatives of the slayer who fall in the first circle have the obligation to contribute one-third of the total compensation; relatives in the second and third circle would be obliged to cover the remaining amounts of compensation. Once compensation is decided to be paid in one of the two ways, relatives of the first circle are obliged to undertake the actual handing over of the amount due to the relatives of the slain.

Every naroleh, i.e. male relatives in the first circle – whether he is young or old should contribute an equal amount. Relatives in the second circle may contribute according to their economic status (kabara). The amount payable as compensation in case of a woman is less than the amount due for a man.

The manner of payment of compensation for bodily injury is, more or less, the same as that of homicide. The compensation for moral injury is known as haewul. Damage sustained as a result of contractual relations and that which is sustained out of extra-contractual relations (tort) is usually paid as haewul (moral damage). Some of the faults which entail the payment of compensation are to beat one's wife or child with a stick or whip, to have sexual intercourse by force to commit adultery. The last two are regarded as fault and they cause moral injury to the relatives of the woman.

A breach of contract of betrothal is regarded as moral damage to the honour of the family members of the other party. Insult such as those implying slavery, low caste and the like, also entail the payment of compensation. According to some writers, such injuries can be compensated by the payment of a horse, for horses are believed to honour the wronged person.

These two ethnic groups dispute settlement mechanism are only few examples of the Ethiopian practice. It is possible, here, to check the existence of the common characteristics of dispute settlement.

Questions

1. Take time to think about the society you came from. What mechanisms do your people use to settle dispute arising there under? Is there any limitation to the subject matters that can't be taken before them? Describe the procedures of this customary dispute settlement.
2. There are lots of argument about the similarity and difference between Conciliation and Mediation.
 - a. Discuss two points which are alleged to be the points of disparity between these two proceedings.
 - b. Think about the customary ways of dispute settlement prevailed through out of Ethiopia known by its diversified names according to the customs of the ethnic group (commonly known as SHIMAGILES in the cities) but with similar proceeding and effects. Which of the modern concept - Arbitration, Conciliation or Mediation, resembles these customary ways of dispute settlement?

3.5. Compromise in General

The fact that we do not have a consolidated legal document to regulate ADR matters does not mean that we do not have any laws to regulate the matter. Thus, we have got lots of provisions and principles regulating the issues related with ADR. These principles, however, are scattered through out of different substantive as well as procedural enactments. In this sub section we will try to look at those legal provisions which govern compromise with out specific reference to any of the types of ADR. In doing so the civil code and civil procedure code provisions will be assessed.

3.5.1. Definitions

Gilbert's Law Dictionary defines the term compromise as "An agreement to settle differences by making mutual concessions; it can be made in or out of court."

Not far different from the above documents our civil code under Article 3307 defines compromise as "A compromise is a contract whereby the parties, through mutual concessions, terminate an existing dispute or prevent a dispute arising in the future".

These different definition shows as that we have common practice and more or less similar attitude towards the concept compromise. Before rushing in to the next sub section it will be important to answer the following questions about the definition of compromise and its relation with other kinds of ADR like conciliation and arbitration.

Questions:

1. What are the elements of compromise or what makes a certain phenomena or document to be called as a compromise?
2. Is compromise a process or a result? (Refer Arts 3321 of c.c and 274 ff of c.pr.c.)
3. What is the difference between compromise and arbitration?

3.5.2. Nature and effect of Compromise

We have got articles in the civil code and civil procedure code dealing with compromise and in the next part we will see them in detail. When we see the part of the civil code where compromise and arbitral submission are discussed, it is under Book V - Special Contract. It is not expected for this part of the code to deal compromise as well as other like the kinds of ADR. This part of the book is meant to incorporate only the contract aspect of those concepts though some times it goes beyond its scope. Even from the contract part of these concepts only special and peculiar elements which have not been dealt in the Contract in General part of the civil code. That may be one of the reasons for non exhaustiveness of the law regulation the matter.

Article 3308 seems to speak about "Form of Contract" as the title indicates but it, in fact, speaks about what matters can be dealt by compromise. Thus, it seems it is speaking about the object of compromise. Any ways, parties, based on the subject matter at their hand and their pre existing relation, can conclude a compromise contract to create legal rights and obligations; to modify the existing rights and obligations; and possibly to extinguish or terminate the already existing relation among themselves. As to the renunciation (which means voluntary abandonment of his right) made by one party, it will be interpreted restrictively and so that such renunciation extinguishes the right which has been mentioned in the compromise in his relation with the contracting party. But if he

acquires the same right from other person, he will not be bound by the renunciation he did.

The other effect of compromise is that the parties will bind only to the extent they have agreed and also it will not have an effect to other parties alien to the contract, i.e. principle of Privity of Contract (Art. 3311). Further, compromise is more than a contract in a sense that "it will have the force of *res judicata* with out appeal". But it may be contested on the ground of fundamental mistake if any of the following conditions are fulfilled;

1. The instrument for the performance of which it is made is void, or one or both of the parties was due to the existence of a document which is shown to be false, and (in both of the above cases) where the parties have no doubt as to the possible voidability or falsification of the documents at the time of contracting (Art 3313), or
2. The dispute they regulated has been already settled by a judgment having the force of *res judicata* of which both of the parties are unaware and no appeal has been started against this judgment (3314), or
3. A document unknown to any of the parties at the time of the contract have subsequently been discovered and if this document were willfully withheld by one of the parties and if the contract is of a general settlement on all matters they have in common (3315).

Article 3316 seems the other version of Arts 1714 - 1716 which determines that the object of a contract should be lawful, moral, possible and defined though the former speaks only about legality and morality.

3.5.3. Compromise before a Court of law

The above are not the only provision regulation compromise but we got some more provisions in the civil procedure code from article 274 onwards though they are far from being exhaustive. We have seen that most subject matters of disputes can be safely settled by compromise up on the parties' willingness. This analysis applies even after a case has been instituted before a court of law on the same subject matter (274). This part of the

civil procedure code provision gives the parties the right to terminate all or part of the claim (including accessory matters like cost, damage and execution 276) for which a substantive litigation has been instituted and proceed with compromise.

After a case has been instituted before a court of law compromise can be made in two different ways; one during the hearing before the court of law and the other is out of court. In both ways the content of agreement is advised to be drafted in line with the Art 276(1).

Compromise in a pending case can be initiated by either of the disputant by their own motion or possibly by the court in the attempt of reconciling the disputants. In any of these cases, however, the willingness and consent of the disputants is mandatory and the court, in no way, can force them to do so. If they agreed to reconcile the matter, they can do it at the hearing before the court of law. This agreement will be made in written form and signed by both of the parties. The court after being satisfied that the contract is not contrary to law and public moral will enter the compromise in the case file and make a decision or judgment accordingly. And this will end up the litigation between the parties (277).

The other alternative is the parties can make the compromise out of the court room. If such comes to happen, the court shall be informed of such a matter and the plaintiff may apply to the court for permission to withdraw from the suit (277(3)). The permission granted by the court will enable the plaintiff to institute a fresh suit in respect of the same subject matter of the suit in case if they failed to agree and end up the dispute in compromise (278(2)).

Question:

There was a dispute between Mr. Hassen and Mr. Kalid which is being entertained (pending) in a court of law. They want to resolve the conflict by compromise. How would you advise them to do it without losing any of their rights granted by the law?

3.6. Conciliation

3.6.1. Preliminary Points

Conciliation is one type of ADR, which may be used in the settlement of a variety of dispute. The term conciliation is sometimes used interchangeably with mediation though there is slight difference among these two processes. The Ethiopian law used conciliation rather than mediation and it is the second widely used ADR next to arbitration. The civil code in its special contract part discusses conciliation not in the sense of contract only but also its procedural aspect. Though it fails to define what conciliation means, it provides procedure for appointment of conciliator, the rights and duties of the parties and the conciliator, and its effects.

The specific articles under Section 2 which is entitled as "Conciliation" regulate only few matters of conciliation. This, however, does not mean that these are the only articles about conciliation. The discussion we have made above about compromise is equally applicable to conciliations if the proceeding ends up with success (compromise) (3321).

Even if the Ethiopian law failed to define what the term conciliation means, it can be defined as an informal process in which a neutral third party, conciliator, tries to bring the disputants to agreement, lowering tension, improving communications, interpreting issues and exploring potential solutions so that they can discuss their dispute and come to a negotiated settlement. Thus, conciliation can be viewed as a process towards compromise by the help of the intermediates, conciliators. This is to recall the discussion so far made in the second chapter of this material about conciliation.

Concerning the commencement of conciliation proceeding and how it comes in to existence, the Ethiopian legal system is not totally silent. According to the civil procedure code provisions it come in to existence by the initiation of one of the parties or by the initiation of the court if the case is before it. We are not far from the truth if we take this part of the code and make it to have effect in all cases though the dispute is not brought before the court of law.

The other important issue which is not well addressed by the Ethiopian law is about the kinds of subject matters which could be safely resolved by conciliation. Conciliation can be opted in relation to disputes arising out of a legal relationship, whether contractual or not, provided that the parties have chosen to refer their dispute to conciliation. Conciliation might be the most favourable means of dispute settlement over arbitration and litigation in some cases like where a higher amount of flexibility is required, secrecy is top priority, the dispute is of less serious in nature, the parties' future relation should not be prejudiced (e.g. disputes in family and employment relation) etc. But this does not mean that all disputes are allowed to be referred to conciliation. Our law is not clear enough to distinguish these subject matters of dispute.

Questions

1. Which matters of dispute are expressly or impliedly allowed to be conciliated and which are prohibited under Ethiopian laws? (civil as well as criminal matters)
2. What do you think should be the standard to determine so if the law is not clear enough?

3.6.2. Conciliators

Conciliators are persons who act as an intermediate during the conciliation proceeding between the disputants in their effort to resolve the dispute by compromise. If the proceeding is out of court, in fact it is in most of the cases, the power, right and duties of conciliators are regulated by Arts 3318 - 3324 of the civil code.

It is the inherent right of the disputant or parties to determine the identity and number of conciliator whom they believe that he or she can protect their interest by bringing them together and negotiating a settlement between them. This inherent right extends in discharging the conciliator from his office as well. However, the conciliator may be appointed by an institution or third party where the disputants wish so to happen (3318(1) and (2)). To be a conciliator is not a public duty to be imposed against the interest of the person nominated to such status. Thus, a person appointed as a conciliator shall be free either to accept or refuse his appointment (3318(3)). As to the qualification of the person to be appointed as a conciliator, the Ethiopian law is silent and what matters here is only

the interest of the parties. Thus, the conciliator can be any laymen, lawyers or other professionals. But it is advisable for the parties to select a person who is having experience and knowledge concerning the matter at hand and feels responsible in discharging his duty.

Concerning the number of conciliator, Ethiopian law is silent too. There is no limitation as to the number of conciliator; it can be one, two, three, four, etc. The parties may determine the number of conciliators as they want. The experiences of others show us that the number of conciliators can be odd or even since there is no decision to be made by him (them). However, it is advisable to have limited number of conciliators according to the complexity of the case.

Conciliators are only facilitators and make no decisions on the merit of the case and can not impose his view of what a fair settlement would be. The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of dispute. The conciliator is to be guided by the principle of objectivity, fairness and justice, The followings are some of his specific duties;

1. He shall give the parties an opportunity of fully stating their views before expressing his findings (3320 (1) and (2)),
2. He shall draw up the terms of compromise if the parties come to a negotiated understanding or a memorandum of non-conciliation if the parties failed to reach a negotiated settlement of the dispute. And also he has to communicate such documents to the parties (3320(3)),
3. He is required to keep confidential all matters relating to the conciliation proceeding. This obligation also extends to the negotiated settlement or agreement, except where its disclosure is necessary for the purpose of implementation and enforcement,
4. Principle of impartiality; He should be neutral, honest and diligent and stand only to protect the interest of both parties to the dispute. In discharging his duty he has to be guided by the principle of objectivity, fairness and justice.
5. He shall try to complete the whole proceeding of conciliation within six months (3321(1)),

6. Help the parties to enforce the conciliation, e.g. discharge stamp duty as per the stamp duty proclamation, he may sign up on the negotiated settlement agreement, but this is not mandatory.

The corresponding right of the conciliator will be to get due respect and recognition from the disputants. In addition, he "shall be refunded of any reasonable expense he has incurred in the discharge of his duties". This is some sort of compensation for the money he has spent during the proceeding while facilitating the compromise. But for the time he devoted and service he delivered, there won't be any payment or remuneration unless the parties expressly agreed (3323).

When we see the rights and duties of the parties, substantially it will be determined by the agreement of the parties and commitments they will exchange during the on set of the proceeding. In addition, there are some mandatory duties dealt by the code. Some of these duties are the following;

1. They shall provide the conciliator with all the information necessary for the performance of his duties,
2. They shall refrain from any act that would make the conciliator's task more difficult or impossible,
3. They shall refund any reasonable expenses incurred by the conciliator while discharging his duties, and, if agreed, the remuneration due to him,
4. During the proceeding, they shall refrain themselves from taking their cases before the courts of law or administrative tribunals unless the conciliator draw up memorandum of non-conciliation. This is in order to avoid multiplicity of proceedings on the same dispute. But the parties are free to other thing to preserve their right when necessary.

It is hardly possible to set standard procedures to be followed during the conciliation proceeding. But we can say some by looking the practice and international experience. The conciliator up on his appointment may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. He may send a copy of such statement to the other party. By giving consideration to rights and obligations of the parties as per their agreement, trade usages, circumstances surrounding the dispute, including any previous business practice between them, the

conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate. The conciliator may invite the parties to meet him for discussion, communication with them orally or in writing, communicate with the parties together or with each of them separately.

Normally the place of meeting is arranged by the parties. However, if they are failed to do so, the conciliator may decide the place of meeting. The parties must in good faith cooperate with the conciliator. They must supply the needed written materials, provide evidence and attend meetings when they called by the conciliator.

When a settlement is reached the parties may draw it in written form and sign up on it. The settlement agreement may be authenticated by conciliator and such a settlement agreement shall be final and binding on the parties.

3.6.3. Effects of Conciliation

After you get in to the proceeding, there are two possible outcomes; compromise or non conciliation. If it end up with success and the parties sign up on the compromise that will be the end of the case and the one we have discussed above about the effect of compromise (e.g. *res judicata*) will apply. This means if the parties have expressly undertaken in writing to confirm the terms of compromise drawn by the conciliator, they shall be bounded by it. In addition, after a compromise is reached through conciliation and settled the dispute, then it may be taken as preliminary objection before the court if one of the parties takes the case before the court after the dispute had been conciliated. The one who wants the enforcement of the compromise will get it enforced as he wishes after paying the stamp duty as per the Stamp Duty Proclamation No 110/1998.

The other possibility is that the parties or one of them may adhere to his original extra ambitious claim and fail to drop his proposal. The law gives the conciliator a maximum of six months to come up with some result unless the parties provide a different period (3321(1)). Before the expiry of this time the parties can not institute a case before court of law on the same cause of action. But even before the expiry of the time if the conciliator feels that it is worse less to proceed further, he shall draw the memorandum of non - conciliation. This entitles both of the parties to institute court case on the same

subject matter. The parties are also free to institute a case before the conciliator draws the memorandum of non-conciliation or compromise if the stipulated period of time expires.

Question:

1. Can the disputants provide for a longer period of time than stipulated under Art 3321(1)? Or is the right only to shorten it down?
2. Do you think that these provisions of the codes are exhaustive to regulate conciliation? If not, which matters are unregulated and how can we fill these gaps?
3. TDN Company and XY pvt. had a conflict over the ownership of a certain building. They have agreed to take their case to conciliators nominated by them. On September 11, 2007 the conciliators started looking the case. There was no agreement as to how long the conciliators should try to compromise them.
 - A. On October 11, 2007, TDN Company sued XY pvt to court over the ownership of the same building without informing the conciliators and XY pvt in advance. Is that possible? Why or why not?
 - B. Once you started conciliation what are the possible conditions (phenomenon) required to be fulfilled to bring a suit before the court of law over the same dispute?

3.7. Arbitration

3.7.1. Introduction

This is the most widely used and commonly known type of ADR. "It is the submission of a dispute between two parties to a third impartial (arbitrator) with the agreement that the decision of the arbitrator will be binding and final. It is a quasi-judicial procedure that avoids the formality, delay and expense of normal trial." (Gilbert's Law Dictionary). Before we move on to the discussion about arbitration under Ethiopian laws, let's see some points and controversies about it in the general jurisprudence.

Though it is known as arbitration commonly, there are other kinds of hybrid kinds of proceeding. These hybrid forms are not purely arbitration or conciliation/mediation as the case may be, but share some ideas with arbitration or conciliation/mediation. Fast-truck arbitration is one kind which is accelerated kind of arbitration applied in some disputes which requires quick disposition. The very objective of this type of arbitration is to get rid of some substantive and procedural laws set by the state to regulate arbitration to facilitate speedy award being given. The other hybrid types are MEDOLA and MED – ARB, as the name speaks for them, these are the hybrid of mediation and arbitration to dispose of a single case. The procedure starts with mediation and if not successful will be immediately followed by arbitration, which have more binding effect than mediation. But none of these hybrid kinds of arbitration are experienced in Ethiopian laws and practises these days.

The other point which should be raised at this junction is its similarity with court litigation. There are two different opinions about this matter. The dominant view is that which say arbitration is one kind of ADR though it shares some common character with court litigation. They further say that arbitration can be called as the extreme kind of ADR since it has some adjudicative character similar to that of court litigation. The other opposing view states that arbitration should not be viewed as ADR but it is one kind of court litigation. The latter sites the binding nature of the outcome (award) as an example. These arguments shows us at least the fact that there are some character arbitration shares with court litigation and the fact that arbitration is more procedural and rigid than any other kinds of ADR.

It is only to remind you some points about arbitration that you have discussed in the first and second chapter. Under Ethiopian law, arbitration is regulated in more detail than any other kinds of ADR. The civil code provisions of Arts 3307 – 3346, civil procedure provisions which are scattered in different parts of the code, the family code, labour codes are only some of them. This by it self shows us how arbitration has got a place under Ethiopian law. Below we will see some of prevailing legal principles under Ethiopian law in different sub headings.

3.7.2. Sources of Arbitration and Arbitral Submission

A. Source of Arbitration

The first thing we have to see here about the valid source of arbitration, which is either consent or sometimes from the law. Arbitration emanates either from consents of parties or from law. (Art. 315(c)).

a) **Consent (agreement)** – when arbitration emanates from agreement, the arbitral submission should fulfil requirement of valid contract (Art. 1678 c.c.) and observe mandatory laws: parties should have the capacity to contract and dispose of that right without consideration, the contract should be in a written form and other forms required by law for disposing the right without consideration (Arts. 3326 c.c. and 315 c.pr.). But in case where the law provides an issue for arbitration, tutors on behalf of minors or interdicted persons can make it, and no special form is required for their agreement (Art. 3327 c.c.). In addition, full consents of parties and requirement of lawful and immoral object of agreement is mandatory.

Arbitral submission can be a separate document or an arbitration clause attached to the contract creating the right that creates the dispute. Such dispute may be an existing one or future disputes which may arise out of contract or other specific obligation (Art.3328 c.c.). Jurisdiction of arbitrator in the submission should be interpreted strictly. An arbitrator can do such but he cannot decide over the validity of the submission if contested (Arts. 3329 and 3330 c.c.).

b) **Law:** - In certain matters, like family dispute, the substantive law provides a compulsory arbitration (e.g. family matters – arts 725- 728 c.c.). In such cases either the law itself provides details of arbitration proceedings or let it to parties determination (agreement) in which the agreement or the contract should observe the above applicable rules.

B. Arbitral Submission

About the arbitral submission, here is a journal article

THE FORMATION, CONTENT AND EFFECT OF AN ARBITRAL SUBMISSION UNDER ETHIOIAN LAW (Bwzzawork Shimelash s - Journal of Ethiopian Law Vol XVII, 1994

INTRODUCTION

Despite the fact that the Ethiopian society had been traditionally using arbitration through the system of referring disputes to a third person called 'shimagile' and despite the fact that we have elaborate and modern laws on arbitration (since 1960), there is still gross unfamiliarity with the meaning and application of arbitration. There are times when foreign researchers have come to the conclusion that Ethiopia does not have any arbitration laws at all? There are also times when certain initiations have attempted to draft separate arbitration laws governing international arbitration in the belief that the present laws have major deficiencies in this respect. Many a time, enterprise managers simply refer a dispute to arbitration in Paris under the International Chamber of Commerce without bothering to know whether we have such a thing as arbitration law or whether there are mandatory provisions. The purpose of this paper, therefore, is a modest one. It is an attempt to familiarize those who are interested in the use and application of arbitration, i.e. students, lawyers, businessmen and managers, with our major arbitration laws. Since the subject of arbitration is quite wide, I have regrettably limited myself to the examination of the law on arbitral agreement -what it is how it is concluded, what its contents are and its legal effect. I have found it useful to add a section on applicable law in international arbitration. One more thing, the paper deals only with arbitration based on agreements concluded by the parties voluntary. It does not deal with compulsory arbitrations. Hence, family arbitrations, labour arbitrations and arbitrations through what were called the Central Arbitration Committees are not covered.

PART I FORMATION OF AN ARBITRAL SUBMISSION

A. Definition and Nature of an Arbitral Submission

Arbitration, as a device of dispute settlement, is founded on an agreement called arbitral submission. Arbitral submission is the term consistently used both by the civil code as well as by the civil procedure code. In this paper, however, we shall be using the terms arbitral submission and arbitral agreement interchangeably since the French master-text from which both the Amharic version and the English version of the Civil Code are translated uses the term “la convention d’arbitrage” which means arbitration agreement.

The term arbitration clause is also sometime used in the civil code and the maritime code, this too, is an arbitral agreement, the difference being that the agreement is inserted as a clause in the main contract made by the parties instead of having a separate agreement dealing with arbitration.

Article 3325 (1) of the civil code defines an arbitral submission as a “contract whereby the parties to a dispute entrust its solution to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the principles of law.” It is also provided that only questions of fact may be entrusted to the arbitrator (Art. 3325(2)) and also that the arbitrator could be one or several (Art. 3331(2)). As a contract, arbitral submission is subject, firstly, to the special provisions dealing with arbitration, and secondly, to the general provisions of contracts in General, Title XII, Book IV, of the civil code (Art. 1676(1-2)).

An arbitral submission, though a contract, is however, peculiar in many respects. One of its peculiarities has been put succinctly by Lord Macmillan thus:

“...The other clauses set out the obligations which the parties undertake towards each other hinc inde, but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute

shall be settled by a tribunal of their own constitution.” (Heyman and another v. Darwins Ltd. from Eric Lee, Encyclopedia of Arbitration Law, Lloyd’s of London press, 1984 sec. 3. 1. 3.)

In arbitral submissions (or arbitration clauses), as stated above, the obligations that the parties undertake are not towards each other but rather they both undertake to submit the resolution of their dispute to a person or persons called arbitrators .

Another peculiarity of the agreement is that, in the words of Rene David, there is an “interplay of two conventions one between the parties (submission to arbitration), and the other between the parties and the arbitrators (receptum arbitri) (“Rene ‘David, Arbitration in International Trade, kluwer publishers, Deventer /Netherlands, 1985,p. 78.). This interplay of two conventions is obvious from the definition of arbitral submission itself where it is stated “the arbitrator, who undertakes to settle the dispute The mechanism of arbitration entails not merely the appointment of any arbitrator but a willing arbitrator, that is why it is provided thus: “the person appointed as an arbitrator shall be free to accept or to refuse his appointment” (3339). The second convention which David called ‘receptum arbitri’ appears into the picture, then, when the arbitrator accepts the appointment.

The fact that parties are able, through arbitral submission, to create their own private regime of administration of justice is another peculiarity. By this mechanism, parties can have their own ‘private judges’ outside the court system and if they both continue subjecting themselves to this mechanism throughout, there is a possibility of settling their dispute up to the end without the intervention of the authorities.

B. THE FORMATION OF AN ARBITRAL AGREEMENT

How is an arbitral agreement? One has to refer to the general provisions dealing with the formation of contracts, i.e. Arts. 1678 – 1730 of the civil code. An arbitral agreement is formed and completed where the offer for arbitration made by one party is accepted by the other party with out reservation. Such offer and /or acceptance “may be made orally or in writing or by signs normally in use or by a conduct such that, in the circumstance of the case, there is no doubt as to the party’s agreement.” (1681 of the c. c.)

The negotiation that took place between the Ethiopian Import - Export Corporation (ETIMEX) and a Dutch Cooking oil supplier by the name B.V. Vereenigde olifarieken (Oilos) is a good illustration of the point in question. (Legal Department file, ETIMEX. A suit based on breach of contract was instituted against oilos in Rotterdam and the court had decided in favour or: ETIMEX.)

The tender document issued by Etimex after specifying the type and quantity of the product and other terms, invited foreign suppliers by telex to submit their offer. This under Ethiopian law, is a declaration of intention and not an offer.

Oilos, as one of the competitors submitted its offer by telex. The offer was accepted by ETIMEX and a contract of sale was concluded by the parties. Up to this point there was no mention of arbitration. After this, ETIMEX asked Oilos to send a draft supply contract in which was included:

“The parties hereby agree to submit all disputes arising out of or in connection with this contract to arbitration in Rotterdam in accordance with the rules for Arbitration of the NOFOTA.”(Netherlands oils, Fats and oilseeds Trade Association.)

ETIMEX, after receiving this offer for arbitration, sent its reply by amending the arbitration clause thus:

“Arbitration: Any dispute arising out of or in connection with this contract is to be submitted to ICC (International Chamber of Commerce), Paris for arbitration.”

The reply of ETIMEX did not confirm to the terms of the offer and hence was deemed to be a new offer for arbitration. If this new offer had been accepted by Oilos, we could have said the arbitral agreement was formed or concluded. But unfortunately dispute in the meantime arose between the parties and no agreement was reached on arbitration. The case as it is, however, abundantly demonstrates the process of forming or concluding an arbitral agreement and also its separableness from the main contract.

C. THE CAPACITY OF PARTIES TO MAKE AN ARBITRAL AGREEMENT

Even though establishing a principle regarding capacity of persons is not within the domain of procedure law, our civil procedure code provides thus: “No person shall submit a right to arbitration unless he is capable under the law of disposing of such right.” (Art. 315 of the civil Pr. C.). As stated earlier, even here the code uses the phrase ‘unless he is capable under the law’ implying that capacity is governed by other substantive laws. Accordingly, the principle regarding the capacity of persons to arbitrate as laid down in the civil code reads:

“The capacity to dispose of a right without consideration shall be required for the sub-mission to arbitration of a dispute concerning such right.” (Art. 3326 of the C. C)

Where the party to an arbitral agreement is a physical person, the basic requirement that he must be capable, i.e. free from all disabilities is obvious. Where the party is a juridical person, such person must be endowed with a legal personality. This too is obvious. Rather, we are concerned, here, with the content of the additional requirement, i.e. “the capacity to dispose of a right without consideration.”

We have said earlier that arbitral agreements are not ordinary agreements. They are agreements that subject parties to different and private type of dispute settlement process. They “may lead to a solution of the dispute other than that which would be given by the courts?”(R. David, Arbitration in.. P. 174.). Hence, it is necessary that the parties must have the power to dispose of the right in question, in the words of the Amharic version, “without price”.

Where the parties are acting on behalf of other persons either physical or juridical, then, a special authority to settle a dispute by arbitration is required. That special authority is derived from the principal who has the necessary capacity. Where the principal is a juridical person, such as, a business organization, it is derived from its governing body, i.e. the board of directors.

So much for capacity at the level of physical persons and business organizations - It is at the level of public bodies such as the state, public administrative authorities and public enterprises that more controversial points could be expected to arise, considering the fact that the interest of the public is involved in their transactions. So, the question is: do these bodies have the capacity to make arbitral agreements? If so, to what extent?

Let us take first, the Ethiopian state. In the civil code, it is stated that the state is “regarded by law as a person” and that as such it has “all the rights which are consistent with its nature.” (Art 394 C. C). If the distinction is not to be stressed between the state and the government, we see that the Ethiopian Government, for instance in a petroleum agreement, is allowed to submit a dispute to arbitration. (Petroleum Operations Proclamation, No. 295/1986, Art. 25). We also see that the state, as one of the parties in a joint venture agreement, can settle disputes by arbitration (Joint venture council of state special Decree, No 11/1989, 4(1), 36.). Other than these, we have not found a general provision that expressly allows or expressly prohibits the state from making an arbitral agreement. In these circumstances, the easier answer would have been to say that the state does not have the capacity to submit to arbitration. But that would be unrealistic. The state is the source of all rights and obligations and of all laws (including the provision on capacity). It is also the trustee of all public property. It follows, therefore, that as long as the right which is to be the subject of arbitration belongs to that state, and not to someone else, i.e. individual citizens or groups, it can be said that the state has the capacity to make arbitral agreements.

Regarding the capacity of public authorities and public enterprises, after making a short survey of various legislations, we find amongst them three categories: Those with no express power to submit to arbitration, those with limited power and those with express power to do so.

Public authorities such as the Ethiopian Science and Technology Commission (Proclamation No.62/1975.) are conferred with such powers like entering into contracts, suing and being sued, pledging and mortgaging property. The power to submit to arbitration is not expressly given to them. The same is true for such public

enterprises like the Agricultural Inputs Supply Corporation (Proclamation No. 269/1984). On the other hand, we see that public enterprises like the Ethiopia Domestic Distribution Corporation and the Ethiopia Import-Export corporation have the power to settle disputes out of court (Presumably this includes arbitration) only with the permission of their supervising minister (Legal Notice No. 104/1987. Art.12 (3) and Legal Notice No. 14/1975 and public Enterprises Regulation No. 5/1975, Art 7(2)). Then there are many public authorities which are expressly empowered to submit disputes to arbitration like the Civil Aviation or the National Water Resources Commission which are empowered to settle disputes out of court (Proclamation No. 111/1977.Art. 8(18) Proclamation No.217/1981,Art .8(16)). Public enterprises like the Blue Nile Construction Enterprise (Proclamation No. 234/1982, Art. 10(2) (C)) are also given similar power . The conclusion to be made is, therefore, that in the case of public authorities and public enterprises, the power to submit a dispute to arbitration is not to be presumed and that they need either an express power, or in the case of some public enterprises, special permission to do so.

D. THE FORM AND PROOF OF AN ARBITRAL AGREEMENT

Form requirements are associated with the question of whether an arbitral agreement can be made orally or in writing. In this regard, Article 3326 (2) of the civil code, which is the main source on this point provides thus:

“The arbitral submission shall be drawn up in the form required by law for disposing without consideration of the right to which it relates.”

According to this Article, admittedly quite a difficult one, the special rules of form for disposing a right without consideration to which the submission relates must be followed.

On the question of capacity to submit to arbitration, (see section C above) it is indeed necessary to require that one have the widest right. That seems to be the reason for the existence of the phrase “the capacity to dispose of a right without consideration”. But, on the question of form as of to why the phrase “for disposing without consideration” is added in Art . 3326 (2), is to say the least, most confusing. In

fact, if we follow the provision strictly, we may reach an absurd conclusion as shown below.

Let us say, for example, the right over the dispute concerns the transfer of an immovable property. For the disposition of a right over an immovable without consideration (donation) the law requires that it be made in the form governing a public will, i.e., it must be written by the donor or by any person under the dictation of the donor, it must be signed by the donor and by four witnesses. Now, if the parties who are involved in the transfer of that immovable property want to submit their dispute to arbitration, it means their submission must be drawn in the form described above. It must be written by the parties themselves or by any person under their dictation, signed by them and by four witnesses. It is really doubtful whether this is the intention of the legislator.

*As a result, one is at a loss to determine, in a definite manner, the “formality” required regarding arbitral submission. In spite of this, some transactions like the transfer of a right over an immovable or over a ship, or over a business, and long term contracts like guarantee, or insurance policy are required by law to be in written form and be attested by two witnesses. To submit disputes that arise from any one of these contracts to arbitration, therefore, it would be safer and advisable that the submission be concluded in a written form and also be attested by two witnesses. Many other transactions, however, like the sale of goods or contract of carriage of goods (except a contract of carriage of goods by sea), or construction contracts are not required to be in writing. It is the contention of this writer that if disputes arise out of these transaction, submission to arbitration can be made orally, although, as Schmitthoff has rightly said they are rare in practice and “import...an element of uncertainty with respect to the implications and enforcement of the arbitration agreement” (Clive M. schimitthoff’s *Export Trade the Law and practice of International Trade*, London, Stevens and Sons 1986, 8th edition, P. 583. In practice, we recommend a written arbitral submission that is carefully drafted.). In these situations, the parties have the option of having their submissions in writing. The implication of this is that a mere document signed only by the parties or an exchange of letters, or telex or telegrams would be sufficient. If the necessity of proving the arbitral submission arises, the burden of proof is on the party who alleges its existence. And according to the source of the legal relationship*

involved, he may have to present the “formal” instrument, or the written documents or witnesses, or other means of evidence.

The manner of making an arbitral agreement varies according to the wishes of the parties. Where the dispute between the parties is an existing one, they can refer their dispute to arbitration by a separate document. If, on the other hand, the dispute is a future one, they can either refer it to arbitration by a separate document or can insert their submission as a clause (called an arbitration clause) of the main contract.

PART II

THE CONETENT OF AN ARBITRAL SUBMISSION

(Parts omitted)

B. THE POWER OF THE ARBITRATORS

Delimitation of the arbitrator’s power is the second matter that may be dealt with in the arbitral submission. The parties, of course, do not have to provide anything about this because the arbitrator, once he is appointed, shall settle the dispute, i.e. hear evidence and deliver an award in accordance with the principles of law. The necessity to delimit the arbitrator’s power arises when the parties wish to narrow or widen his power than what is already provided by law. The situations where that is made possible and the limitations thereof prescribed by the law are discussed below.

1. The dispute between the parties may involve both questions of law is and questions of fact. In both cases, the arbitrator is required to settle the dispute in accordance with the principles of law. The parties, cannot, in contracts to some foreign laws where it is allowed, empower the arbitrator to act as ‘amiabile compositeur’, i.e. decides on the basis of equity or fairness. This basic policy of the Ethiopian law is also reflected in the maritime code where it is provided:

“An Arbitration clause inserted in a bill of lading may in no event grant to the arbitrators the power to settle a difference by way of composition.”(Art. 209 Maritime Code)

True, the civil procedure code (Art. 317) envisages a possibility whereby the parties could, through their submission, exempt the arbitrator from deciding according to law. But, this is a clear contradiction of the substantive law and cannot be tenable (See Sedler, Ethiopia civil procedure P. 387). On the other hand, where the parties wish to narrow the arbitrator's power they can instruct him only to establish a point of fact, for example, the occurrence or non- occurrence of an earthquake, without deciding on the legal consequences following there from (Art. 3325 of the C. C)

2. There is one area –variation of contracts- where the parties can widen the arbitrator's power beyond that of deciding upon legal or factual dispute. On this subject, Art. 1765 (civil code) provides:

“When making the contract or thereafter, the parties may agree to refer to an arbitrator any decision relating to variations which ought to be made in the contract, should certain circumstances occur which would modify the economic basis of the contract.”

As can be observed from the article, the power to vary or modify a contract is different from the ordinary power in that the arbitrator with such a power would decide on and regulate the future relationship of the parties concerned.

3. The power of the tribunal to decide on its own jurisdiction called “kompetenz-kompetenz” in foreign legal systems (UNCITRAL Model law on International commercial Arbitration Note by the secretariat, A/CN 9/309, 25 march 1988, P. 6.) is another area that may need delimitation by the parties. The parties, in particular, may authorize the tribunal to decide disputes relating to its own jurisdiction. Suppose one of the parties, raises an objection alleging that the tribunal has no jurisdiction because it is made up of one arbitrator instead of three, or that the dispute brought before it is not covered in the submission, the implication of the above authority is that the tribunal would have the power to decide on such objection. On the other hand, if the parties wish to go beyond this and empower the tribunal to decide on whether the arbitral submission is or is not valid, that, I am afraid, is not permitted because Art. 3330 (3) (civil code) mandatory provides: “The arbitrator may in no case be required to decide whether the arbitral submission is or is not valid.” (The French master - Text as

translated by Elias Daniel reads: “the arbitrator may in on case be called upon to rule on the question of whether the arbitral submission is or is not valid.”)

The implication of this mandatory provision is that if any jurisdictional objection based on invalidity of an arbitral submission is raised, the power to decides such issue rests not on the tribunal but on the court. The policy behind this rule also seems to be a sound one because the arbitrator, unless so restricted, may be inclined, in order not to lose his fees, to decide always in favour of having jurisdiction.

In this connection it must be realized that some international arbitration rules particularly that of the ICC Arbitration Rule Art. 8(3) which give the arbitrators the power to decide on such issues violate the mandatory provision of Ethiopia law.

C. SPECIFYNG ‘ARBITRABLE’ DISPUTES

An arbitral submission must specify which dispute is referred to arbitration. Specially where the submission related to future dispute (where the dispute was not known at the time of making the submission) the law provides that “this shall not be valid unless it concerns disputes which flow from a contract or other specific legal obligation” (Art. 3328 of the C. C.).

The intention of the parties whether they have chosen a “narrow arbitration clause” or a “broad arbitration clause” is determined by the words they have used in the submission. A formation such as “a dispute arising under the contract” is held to be a narrow one while “all disputes arising out of the contract or in connection with it” is considered a broad one. If a case is brought in Ethiopia, there is little doubt that the courts will follow similar lines because they will enforce an arbitral an arbitral submission only when they are convinced that the dispute is “covered by the submission” (Art, 3344 C. C).

In one case the arbitrator assumed jurisdiction on a formulation that read: “If a difference arises as to the amount of any loss or damage such difference shall.... (be

settled by arbitration).” But the Supreme Court revised the Award on the ground that the dispute relating to liability of the insurer was not covered by the submission.

As I have stated above, specifying a dispute is important. But, the more important point (that may well affect the legality of the arbitration process) is that the dispute must be capable of settlement by arbitration. The Civil procedure code (Art. 315) in which this principle is strangely laid down provides: “No arbitration may take place in relation to administrative contracts as defined in Art. 3132 of the civil code or in any other case where it is prohibited by law.”

If this provision had been placed in the civil code rather than in the civil procedure code or alternatively, or if the civil code had similar provision, no one would have dared to make an issue out of it. But because of this stated situation, the question of whether or not administrative contracts are capable of settlement by arbitration has continued to be a subject of much controversy.....(Parts omitted)

PART III

THE EFFECT OF AN ARBITRAL SUBMISSION

A. BINDING NATURE AND ENFORCEABILITY

An agreement made between parties to settle their dispute by arbitration is binding on them and it shall be enforced as though it was law. If both parties, knowing the binding nature of their agreement, wholly comply with it, the arbitral tribunal created by them will proceed with the hearing of the case and will deliver an award, to the exclusion of the courts. On the other hand, if one of the parties, in disregard to the arbitral agreement, institution an action in a court of law, the other party has the discretion to consider the agreement to have lapsed and continue to defend his case there.

The binding nature of the agreement and the necessity of enforcement appears in head-on fashion when one of the parties, in disregard to the arbitral agreement institutes an action in a court of law while the other party wants to take the case

to arbitration. It is in relation to this situation that Article 3344(1) (civil code) entitled “penalty for non- performance” provides thus:

“ where a party to an arbitral submission brings before the court a dispute covered by the submission, refuses to perform the acts required for setting the arbitration in motion or claims that he is not bound by the arbitral submission, the other party may in his discretion demand the performance of the arbitral submission or consider it to have lapsed in respect of the dispute in question.”

In the hypothetical situation described above, the courts in Ethiopia, in contrast with some countries like England where they have a discretion, are bound to decline their jurisdiction and refer the parties to arbitration. This is what the courts do in practice as well. In the case between Agricultural Marketing Corporation (AMC) and Ethiopia Amalgamated (High court, civil File No. 1101/82.), AMC instituted an action in the High court against the defendant claiming around Birr ten million. The defendant submitted a preliminary objection alleging that since the parties had earlier concluded an arbitral agreement, the court should refer the case to arbitration, struck out the suit and referred the case to arbitration, even though the arbitral tribunal contemplated by the parties was not yet set up.

B. Some preconditions

Before referring the dispute to arbitration, however, it is incumbent upon the court to ascertain : a) That there is a valid agreement to arbitrate, b) that arbitral submission covers the dispute at hand, and C) that the submission has not lapsed . These will be discussed one by one.

1. The defendant who wishes to raise a preliminary objection on the ground that the claim is to be settled by arbitration or that the dispute is the subject of arbitration, is expected to raise this objection at the earliest opportunity, otherwise it shall be deemed to have been waived. Now if the plaintiff, in his reply alleges that there was no valid agreement, the case shall be referred to arbitration only after this issue has

been ascertained and decided by the court. The issue may as well be complex especially when defective arbitration clauses are involved.

2. The second condition is the one concerning the ambit of the arbitral submission. The court will give effect to the arbitral submission only when the “dispute is covered by the submission”. In one insurance case I cited earlier (Insurance corporation V. Gebru and Lemleme), where the arbitral clause covered only “differences arising as to the amount of any loss or damage” the insurances objected to the jurisdiction of the arbitrator by saying that the dispute on liability was not covered by the submission. To illustrate our point better, however, let us reverse the situation and assume that Gebru and Lemlem brought their claim to court. Let us also assume further that the Insurance corporation objected to this and demanded performance of the arbitration. If this situation occurs, the court after ascertain the nature of the dispute involved, will, no doubt, reach the conclusion (just as Supreme court has reached the same conclusion) that the plaintiffs claim based on liability is not covered by the submission which talks of amount issue only. Hence, it will continue hearing the case.

3. The third condition concerns the non- lapsing of the arbitral submission. An arbitral submission that has lapsed cannot be enforced. The burden of proof lies on the party who alleges the lapsing, normally the plaintiff who wants to pursue his case in court. Any one of the following could be the causes for lapsing of the arbitral agreement (Arts. 3337, 3338 and 3344 C. C.).

- a) Default of an arbitrator named in an arbitral submission,*
- b) Death of one of the parties before appointing an arbitrator , and*
- c) Acts of the party demanding arbitration such as bringing a claim before a court (excepting actions to preserve rights from extinction) or refusal to set the arbitration in motion.*

If the factors enumerated above are proved to the satisfaction of the court, it will reject the defendant’s demand for arbitration and will continue hearing the case. Otherwise, it will reject the plaintiff’s arguments and refer the dispute to arbitration.

3.7.3. Arbitrators

Here there is a journal article about the appointment and disqualification of arbitrators entitled

“Formation of Arbitral Tribunals and Disqualification and Removal of Arbitration under Ethiopian Law” by Zekarias Kene’áa from Journal of Ethiopian Law 2007

FORMATION OF ARBITRAL TRIBUNALS

A. Appointment of arbitrators

One of the main characteristics of arbitration is that there would be private judges or references that would consider and resolve the dispute(s) between the parties as opposed to judges sitting in courts which are appointers of the sovereign. In other word arbitrates are appointees of the parties or disputants or as the case disputants or as the case may be the appointers of the parties /disputants through some kind of an appointing authority designated as such by the party themselves. As the reference is going to be considered and finally reserved by the arbitrators, their appointment becomes very important in the sphere of arbitration. It could in fact be said that without the appointment of the arbitrators in one way or another, the arbitral tribunal cannot be formed and the agreement of to refer their existing or future disputes to arbitration cannot be executed. It would remain an agreement with out effect.

Primarily, the appointment of the arbitrators consisting the private dispute resolution tribunals is the right of the parties. How ever if the parties fail to agree on the appointment of their private judges, they may seek a court's assistance. Here below we will consider situations where both parties appoint their arbitrators, courts appoint them, when they are appointed by third party entrusted with such an appointment, and the role of arbitrators in appointing or choosing a chairman, a president, or an umpire as it may be called.

1. Appointment by the parties

Parties may appoint their respective arbitrators the moment they agree to submit their existing dispute to arbitration, or may agree on the proposal made by one of them. The same applies when parties agree to submit their future dispute to arbitration. The parties can, right from the moment they gave their free consent to submit their future dispute" arising from" or "in relation to" their main underlying contracts to arbitration, appoint their respective arbitrators or endorse the proposal of the appointment of arbitrators submitted by one of them which would be tantamount to appointing one's arbitrator(s) respectively.

The equality of the parties as under the provision of Article 3335 of the civil code, must however not be forgotten with regard to the appointment of arbitrators. The provision of Article 3355 is so strict that the agreement to arbitrate is rendered invalid where it places one of the parties in a privileged position as regarded the appointment of the arbiters.³ This presupposed that there has been an agreement between the parties to the appointment but the agreement reached on cannot be valid if it puts one of the parties on a privileged position. Professor Rene David wrote:

A restriction on the freedom of the parties would seem to be imposed in all countries. it is imperative that parties should be ensured full equality in the constitution of the arbitral tribunal. a specific provision of the law in some countries, the general principles of law in other countries condemn a number of practices on the grounds that they result in a privileged position for one of the parties as regarded the constitution of the arbitration tribunal. ('Arbitration in International Trade', 1985)

The equality of the parties requirement imposed by Article 3335 of the Civil Code doesn't, however, prohibit the endorsement by one party of the list of would be arbitrators submitted by the other provided however, that the endorsing party's consent is freely given. what article 335 purports to guard against, is that it should not be acceptable where " all arbitrators are appointed by one of the parties only", or in case of a sole arbitrator, where his appointment was made by one of the parties with out securing the free consent of the sole arbitrator .

Appointment of arbitrators necessarily involves the naming of the arbitrators by the parties and hence the parties agreeing only on the procedures for appointment does not mean appointment in the sense it is used in the Civil code. The naming of arbitrators in the agreement to arbitrate is left to the discretion of parties. They may agree to appoint their arbitrators in the agreement for the number and procedure of appointment and leave the actual naming for future date but before a dispute has arisen between them. The simultaneity of agreement to arbitrate and naming of arbitrators then and there seem to be highly probable in the cases where the agreement to arbitrate is in reference to already existing disputes. It is, however, possible even for the parties to postpone the appointment of arbitrators until a future date. In agreements to arbitrate future disputes, the highly probable arrangement would be that the agreement provides for the procedure and number of arbitrators, but the likelihood would be that the agreement provides for procedure and number of arbitrators, but the likelihood would be that the naming of the arbitrators is left until after the dispute has arisen between the parties. Nevertheless, the possibility that the appointment is made at the time of the agreement cannot be dismissed.

Both in compromise agreement i.e. the agreement to submit existing disputes to arbitration or in the clause compromisers i.e. the agreement to submit future dispute to arbitration, there may be advantage in leaving the appointment of arbitrators until after a dispute has arisen between parties. It is submitted, that awareness by the parties of the nature and extent of their disputes before they appoint their arbitrators would be advantageous to them. This is so particularly because it enables them to select the appropriate persons with the necessary qualification and expertise to facilitate the speedy disposal of their disputes and to avoid the trouble of re appointing in cases where the pre-dispute appointed arbitrators may have died or have become incapable.

Sub- article (3) of Article 3331 of the civil code provides “where the parties have failed to specify the arbitrators or the manner in which they shall be appointed, each party shall appoint one arbitrator”. This is intended to fill the vacuum left by parties in the event that they were not careful enough to fix the number of arbitrators or the procedure by which they shall be appointed, without, prejudice to provisions of article 3335 of the civil code.

Sub article (3) of article 3331 has three limbs. the first one is intended to cover the situation where the parties have agreed on the procedure of appointment of their arbitrators but failed to have provided for the number of arbitrators in which case they shall appoint one arbitrator each and if their agreement on the manner of appointment HAPPENS to be different from appointing one arbitrator each, without prejudice to Article 3335, it seems that such an agreement on the manner of appointment is overridden by the application of article 3331(3).If , for instance, the parties have agreed that the arbitrators were to be appointed by the Ethiopian chamber of Commerce but failed to provide for the number of arbitrators, and how many arbitrators each party should appoint, then they shall appoint one arbitrators each but party should appoint ,then they shall appoint one arbitrator each but their agreement that the arbitrators were to be appointed by the Ethiopian chambers of commerce is impliedly rendered ineffective unless one argues that the parties agreement as to the appointing authority should remain effective and only the aspect of Article 3331(3) dealing with the number of arbitrators should be given effect.

The second limb of Article 3331(3) would be that in the agreement to arbitrate the parties would have provided for the number of arbitrators but have failed to agree on how they are to be appointed and may be on who appoints them. In such a case again, the simple way out provided by Article 3331(3) would be that the parties should themselves appoint one arbitrator each. On the other hand, if the agreement of the parties provides that there shall be appointed five arbitrators, the parties should be able to appoint to arbitrators each.

The third aspect of Article 3331(3) would be that in certain circumstances the “or” in sub-article (3) of Article 3331 might need to be taken as an “and”. Parties may fail to provide for both the number of arbitrators and the manner or procedure of appointment in which case Article 3331(3) should again be of use to remedy the situation. The more likely applicability of sub-article (3) of Article 3331 is after disputes have arisen between the parties but in the circumstances where there is no recalcitrance of the parties to constitute the tribunal.

On the other hand, Article 3333 gives the procedure of appointment, which may be used by the parties to constitute the tribunal in cases that fall under Article 3331(3). As

Article 3333 begins with “where necessary,” one would imagine that there is an implied pre-supposition that as far as possible, the parties should try to agree both on the number and procedure of arbitrators. Failing such agreement one would also imagine that “the party availing himself of the arbitral submission” may make use of the procedure under Article 3331(1). In such a situation, the concerned party shall have to specify the dispute he wishes to raise and appoint an arbitrator and has to give notice of his action to the other party or the person entrusted with the appointment of the arbitrators in the arbitration agreement.

The notice receiving party, or somebody authorized by him, is given 30 days commencing from the date of reception of the notice under Article 3333(2) within which he may appoint his arbitrator(s) failing which he loses his right of appointing his arbitrator and the right shifts over to the court.⁹ Sub-article (3) of Article 3334 may be taken as a provision of the law empowering the parties, in their agreement to arbitrate, to modify the rules of sub-article (1) and (2) of the same article. The parties can, among others, agree to shorten or elongate the thirty days limit or shift the commencement of the running of the limitation from date of reception to date of dispatch.

2. Appointment by the Court

(i) Of arbitrators

Where the parties fail to appoint their arbitrators either in the agreement to arbitrate or subsequently, the right of appointment shifts over to the court. This is so because at least one of parties, i.e. the one seeking to “avail himself of the arbitral submission” should, to set the arbitral justice in motion, “specify the dispute he wishes to raise and appoint an arbitrator” as a corollary of which the other party or the person entrusted with appointment of arbitrator under the arbitration agreement shall be given notice of his willingness to avail himself of the agreement and his appointing an arbitrator. It is not until after the party or as the case may be the appropriate person entrusted with the appointment of arbitrator is put the right to appoint arbitrator shifts over to the court. Putting the notice – receiving parties in default would only materialize where thirty days have elapsed after he has received a notice specifying the

dispute the other party wishes to raise in the fact of his having appointed his arbitrator. In circumstances where the parties may have agreed to modify the provisions of Article 3334(1) and (2) of the Civil Code, putting in default may materialize in shorter or longer time than thirty days after reception or dispatch of the notice.

If the notice receiving party or person wants to make use of his right of appointing his share of arbitrators after receiving the notification given by the other party, he can still proceed and appoint his arbitrator provided it is within the limitation period of thirty days or longer or shorter period of time if otherwise fixed by the parties. The court's right of appointing an arbitrator becomes exercisable after it is made certain that the notice receiving party or person has failed to make use of the notification of the initiation of the arbitral justice.

(ii) Of presidents of tribunals

The right of the court to appoint "an arbitrator who shall as of right preside over the arbitral tribunal" becomes exercisable after the appointed arbitrators have failed to agree to appoint a chairman either from among themselves or somebody outside of themselves. Sub- article (1) of Article 3332 in this respect orders that in the situations where there is an even number of arbitrator, they shall, before assuming their functions, appoint another arbitrator, outside their own rank, who shall as of right preside over the tribunal. This provision presupposes between the arbitrators in appointing the umpire and it is when they fail to reach an agreement as to who shall chair the tribunal in its proceedings leading to an enforceable award, that the right to appointing the chair arbitrator passes over to the court. The right of appointment of presiding arbitrator passes over to the court. The right of appointment of presiding arbitrator however, doesn't automatically passes to the court merely because the arbitrators have failed to agree to appoint such a president. Although it is not explicitly provided, it seems that the arbitrators whose number is even and who have failed to reach an agreement as to who should preside over the arbitral tribunal report back to the parties to the court for appointment of a president. Incidentally, even in the appointment of an ordinarily arbitrator, by the court, it should be noted that it is the party seeking to avail himself of the agreement to arbitrate that after putting the other

party in default, applies to the court that rest of the arbitrators, presumably including the chairman, be appointed by the court.

The provision of Article 3332(1) applies where the number of arbitrators appointed either by the parties or as the case may be by the person authorized to appoint on their behalf is, to take the minimum, two, i.e. where the parties or the person entrusted with appointing appointed one each only. Staring from two, it could be any number as long as the number of appointed arbitrators is even.

Where the number of arbitrators chosen by the parties is odd, they have to appoint the precedent from among themselves.¹⁶ This could be taken as indication that despite the number of the parties being just two, there may be the possibility of their appointing more than one each arbitrator provided such an even appointment doesn't violet the equality provision of Article 3335 of the civil code. One of the parties or one of the persons or authorities in charge of appointing the arbitrators can, therefore, agree to endorse the appointment of the arbitrators nominated by the other.

3. Appointment by the person Entrusted with the Appointment

It may be appropriate, at this juncture, to at least briefly deal with the appointment of arbitrators by a person who may be entrusted with the power of such an appointment by the parties. Ideally, it would be preferable if the parties themselves appoint their arbitrators by reaching agreement between themselves for “a major attraction of arbitration is that it allows parties to submit a dispute to judges of their own choice; and parties should exercise this choice directly rather than allowing it to be exercised by third parties on their behalf.” However, parties cannot, in all cases of appointing their arbitrators, among themselves reach agreement particularly in cases where they have opted for a sole arbitrator as distinguished from a collegial arbitral tribunal. It, therefore, becomes imperative that “in all types of arbitration, a method of appointing the arbitral tribunal should be available to break the deadlock which arises if the parties cannot agree on the composition of the arbitral tribunal”.

As has already been observed above, the law provides for the courts to appoint arbitrators where the parties fail to reach agreement where one of the parties fails to

appoint his share of arbitrator where as the other wants to avail himself of the arbitration agreement and hence applies to the court after giving notice and waiting for the legally prescribed period of limitation. But the court's involvement should be as a final resort and parties might want an intermediary third party to appoint their arbitrators before finally the court, in order to protect the interest of the party seeking to avail himself of the arbitral submission imposes some arbitrators on them.

As stated above, the right of appointment of arbitrators, however, may be entrusted to another person by the parties or may be one of them so that that other person "may exercise the right on behalf of him/them." Such other person, who becomes a trustee of the parties, exercise his right before a final resort is made to the court. It, in fact, transpires from Article 3333(2) and 3334

Other Person "may exercise the right on behalf of him/them." Such other person, who becomes a trustee of the parties, exercises his right before a final resort is made to the court. It, in fact, transpires from Article 3333(2) and 3334(1) that the trustee for the appointment of arbitrators plays the parties' role whenever there happens to be one. Nonetheless, it could be that first the parties themselves try to appoint their arbitrators and if they fail entrust another person with the appointment, but it may as well be that the parties right from the beginning entrust the appointment of arbitrators to a third person. In Ethiopia, there is no guiding rule as to who may be entrusted with the power of appointing arbitrators on behalf a party. Any capable person may be entrusted with the power to appoint an arbitrator on behalf a party. Without the possibility of other persons being entrusted, and without losing sight of the fact that an arbitration may be ad hoc, the two recently formed institutions, i.e., The Ethiopian Arbitration and Conciliation Center and There Arbitration Institute of the Addis Ababa Chamber of Commerce and Sect oral Associations may be mentioned as well-posed persons (institutions t appoint arbitrators on behalf parties in Ethiopia. These two institutions keep their own rosters of competent arbitrators. For commercial arbitrations, the National and the Addis Ababa Chambers of Commerce may also be entrusted.

As is in use in very many countries the world over, particularly in relation to international commercial arbitrations, professional institutions may also be entrusted

with the power to appoint arbitrators. Professional Institutions are, to mention just two of them, organization like the Institute of Chartered Arbitrators and the International Bar Association.

On the other hand, on the regional or international plane, there are arbitral institutions, which may assist in appointing arbitrators. Such arbitral institutions include, the International Chamber of Commerce (ICC), the LCIA (The London Court of International Arbitration) the LMAA (The London Maritime Arbitration Association), The Kuala Lumpur Regional Center for Arbitration, The Hong Kong International arbitration Center, The Cairo Regional Center for International Commercial Arbitration, The Spanish Court of Arbitration, The American Arbitration Association (AAA), and The Inter-American Arbitration Commission, and the International Center for the Settlement of Investment Disputes(ICSID).

The discussion above, might possibly lead to the view that “persons” entrusted with the appointment of arbitrators should only be a juridical one as opposed to a physical person. There is, nevertheless, no indication in the Civil Code that the “person” to be entrusted with the appointment of arbitrators need necessarily be juridical. There appears to be no reason why the p[arties, provided they agree, cannot entrust the appointment of their arbitrators to another third party who is a physical person.

4. Appointment by the Court in Cases of Default

It is not only in situations where the parties have failed in their submission to provide for the appointment of arbitrators or fail to agree on the appointment of arbitrators subsequently that the court’s assistance in appointing is sought. Article 3336 (1) of the Civil Code in a mandatory fashion provides that “where an arbitrator refuses his appointment, dies, becomes incapable, or resigns, he shall be replaced by procedure prescribed for his appointment in accordance with the provisions of the preceding articles.” According to this provision, appointment of an arbitrator in replacement of one who has already been appointed by the parties but because of the latter’s refusal to accept the appointment, death, post appointment incapacity, or resignation, the tribunal couldn’t have been formed though Articles 3331 and 3335 come into application to fill the gap created. On the other hand, a look at those Articles reveals

that appointment in accordance to them is either by the parties arbitrators, the court or the person entrusted with the power of appointment of an arbitrator. Leaving aside appointment by the parties, by the arbitrators, and by the person entrusted with the power, it may be worthwhile, at this juncture, to look at the power of the court in appointing arbitrators in cases of refusal, incapacity, death or resignation of an already appointed arbitrator.

The parties to an agreement to arbitrate or even disputing ones may have agreed and named or appointed some persons who they believe would resolve their dispute. Unless one thinks of such naming of arbitrators after securing the consent of the would-be arbitrators, there may be the possibility that one of the named arbitrators may refuse to take the appointment. As a result, there may be created a vacancy that needs to be filled. Failing the agreement of the parties to do so, it should be the court that should be given the power to fill the vacancy there by assisting in the constituting of the tribunal.

Where an arbitrator who presumably has been appointed by the parties dies, the incident automatically affects the constitution of tribunal. This could happen immediately after the appointment of their respective arbitrator by the parties but before a third arbitrator, who, as of right, will preside over the tribunal is appointed. In such a situation, the single left arbitrator cannot exercise his right under Article 3332(1). Under the provisions of the latter Article, the right is given to both arbitrators to be exercised simultaneously and jointly i.e., by reaching an agreement as to who should be presiding over the arbitral proceedings. It may also be that the death of one of the arbitrators appointed by the parties or by the court whose number is odd may occur before they have appointed a chairman arbitrator from among themselves in which case their number would definitely be reduced to and becomes even and consequently either Article 3332 (1) should come into application or a replacement appointment should be made in the section under consideration by the court although it could as well be made by the parties themselves.

The court's assistance in appointing an arbitrator may also be sought when an arbitrator becomes incapable after he has been appointed. It should, however, be noted that there seems to be an overlapping between the application of Article 3336(1) on the

one hand and that of Article 3340(1) cum 3336(2) on the other. According to Article 3336(1), it seems that where and already appointed arbitrator becomes incapable, his case comes under default. Hence, he could be replaced either by the parties or the arbitrators or the person entrusted with the appointing of the arbitrators. Failing agreement between the parties, the arbitrators, or persons entrusted with the power to appoint, then the power to appoint shifts over to the court at the request of one of the parties or the party wishing to avail himself of the arbitral agreement. Pursuant to Article 3340 (1) cum 3336(2) on the other hand, the situation where and arbitrator becomes incapable constitutes a legal ground for disqualification and in such a case, the court may only make replacement appointment. Though sub-article (3) of Article 3336 may be modified by the agreement of the parties anyway, the court's assistance could still be sought in appointing replacement arbitrators even if it is because of disqualification which is going to be considered later.

Where an arbitrator resigns after he has accepted his being appointed but before he has started discharging his duties or even after he has started discharging his duties as an arbitrator, a replacement appointment may be made by the court. Before summing up my discussion on replacement appointment of arbitrators by the court on default grounds, under Article 3336(1), it may be said that sub-article (1) of the Article deals with two voluntary and two involuntary grounds as causes for replacement of arbitrators. Accordingly, refusal to accept one's appointment and resignation could be categorized as voluntary causes for replacement of an arbitrator whereas death and incapacity may be categorized as involuntary. It must not be forgotten that the provisions of Article 3336, in general, are not mandatory in the strict sense. They may be modified by the parties' agreement as stated in sub-article (3) of the Article.

At this juncture, it may be necessary to consider the relationship between the provisions of Article 3336 and Article 3337. The latter Article in its first sub-article provides: "where the arbitrator has been named in the arbitral submission, and the parties do not agree on who is to replace him, the arbitral submission shall lapse." What does this mean vis-a-vis the provisions of Article 3336? If the provisions of article 3337 were to be given effect, when would the provisions of Article 3336 come into application? In other words, if and if arbitrator has been named in the agreement to arbitrate and there arises the need to replace him because of the taking place of one

of the reasons under Article 3336(1), and the parties do not agree on who is to replace him, does the arbitral submission lapse in the absence of a modifying agreement between the parties? Or can one of the parties, more likely the one wishing to avail himself of the arbitration agreement, apply to the court for a replacement appointment? In sub-article (2) of Article 3337, the law makes it clear that an agreement to arbitrate future disputes should be treated differently. In contradistinction to the situation where the parties agree to submit an existing dispute to arbitration, an agreement to submit future disputes to arbitration does not lapse in case the parties did not agree on who is to replace him if an arbitrator is unable to discharge his duties because of any of the reasons provided for in sub-article (1) of Article 3336. However, sub-article (2) of Article 3337 is qualified and the agreement to submit future disputes shall only remain valid, if at the time a dispute arises the ground that gave rise to the inability of the arbitrator to discharge his duties has ceased. According to sub-article (2) of Article 3337, therefore, the application of the provisions of sub-article (1) of Article 3337 is limited to cases of agreements to arbitrate existing disputes.

Accordingly, if one limits himself to arbitration of existing disputes, and the disputants fail to agree on who is to replace an arbitrator who has been named in the agreement to arbitrate, and the parties did not, by agreement, set aside or modify the seemingly mandatory provision of sub-article (1) of Article 3337, it is provided that the arbitration agreement lapses and the party seeking to avail himself of the arbitral submission cannot apply to the court for a replacement appointment.

There is nothing clear as to whether Article 3337(1) is applicable only to cases where there is only one arbitrator as distinguished from a tribunal constituted of "several" arbitrators although the definite article "the" used in that sub-article seems to indicate that it is. It is highly probable; however, that sub-article (1) of Article 3337 is limited to sole-arbitrator each by the parties, the likelihood of application of the sub-article under consideration is remote in the event each party would be replacing his arbitrator who refuses to accept his appointment, dies, becomes incapable, or resigns. If the parties fail to agree on who replaces their sole-arbitrator appointed to resolve their existing dispute, therefore, their submission shall lapse on the strength of Article 3337.

B. The Number of Arbitrators.

The Civil Code in Article 3331(1) states that the parties may, in the agreement to arbitrate, provide that there shall be one of several arbitrators. This may automatically be taken as a legal provision giving the parties freedom to submit the resolution of their dispute to one or three or more arbitrators. It, in other words, gives the discretion to the parties on whether to submit their case to one private judge (a sole arbitrator) of their choice or to a tribunal constituted of three or more odd-numbered arbitrators the chairman of which is to be chosen either from among themselves or from outside depending on the number of arbitrators appointed by the parties.

It is important to note that there is no provision of the law that limits the number of arbitrators to be chosen by the parties. It, therefore, follows that the maximum number of arbitrators to be appointed, is left to be fixed by the parties as conveniently numbered as they think fit for the quick and just disposal of their case, without ignoring the possibility that the parties may go for a sole arbitrator.

One thing to be noted is the Civil Code implicitly reflected is preference for a panel of three arbitrators²³ in comparison to sole arbitrator or an odd number of arbitrators, which is more than three. This is indicated in Article 3331 (3) of the Civil Code where in it is provided “where the submission fails to specify the number of arbitrators or the manner in which they shall be appointed, each party shall appoint one arbitrator” . This, of necessity, leads to the application of Article 3332 which is to the effect that the two arbitrators appointed by the parties will have to appoint another third arbitrator²³ who shall as of right preside over the arbitration tribunal. Together with the president therefore, the arbitral tribunal would be constituted of three arbitrators. The procedure for appointment provided in Articles 3333 and 3334 of the Civil Code also consolidated the stand taken in Article 3331(3).

On the other hand, through the Civil Code’s preferred number, at least impliedly, seems to be three arbitrators for a tribunal, in general however, it is important to note that the Code, in one way or another, tends to go for uneven number of arbitrators there by avoiding the “possibility of a deadlock and the attendant dilatory tactics ” This

manifested in the code's imposition on the appointed arbitrators either by the parties or persons in charge of their appointments or even by the courts whose number is even unless the parties have agreed otherwise, the appoint another arbitrator (outside themselves) who shall as of right preside over the arbitral tribunal and whose addition makes the number of the arbitrators on the tribunal odd there by facilitating decision by majority.

II. Disqualification Removal and replacement of arbitrator

A. Disqualification.

In addition to the grounds for replacement of an arbitrator for his default, this is as used in Article 3336 of the Civil Code, which may either be voluntary or involuntary as the case may be, there are other reasons for which an arbitrator may either be disqualified or removed.

As has already been discussed, by virtue of the provisions of Article 3336(1) of the Civil Code, there is a procedure for the replacement of an arbitrator who refuses to accept his appointment, who dies after having accepted his appointment, becomes incapable after his appointment or resigns after having accepted his appointment. Article 3340-43 on the other hand, provide for the grounds that may cause the disqualification and removal of an arbitrator and the procedure to be followed in putting into effect removals and disqualifications. As has already been hinted, there is much in common between what Article 3336 provides by way of the grounds and the replacement procedure of an arbitrator in case of his default on the one hand and what Articles 3340 et seq. on the other provide on the disqualification and removal of an arbitrator. Despite the similarities between the provisions of Article 3336 and those of Articles 3340 et seq., yet there are observable differences between replacement for default and disqualification and removal, which merits to be discussed herein below.

(i) Grounds of disqualification

Article 3340 (1) of the Civil Code lays down a number of reasons why an arbitrator may be disqualified some of which, to state again, did appear in the provisions of Article 3336(1). The grounds enumerated under the provisions of sub-articles (1) & (2)

of Article 3340 are: minority, conviction by a court, unsound mind, illness, absence, impartiality, independence and any other reason sufficient to indicate the inability of the arbitrator to discharge his functions properly or within a reasonable time. Each ground deserves to be considered separately and below is an attempt made in that line.

a) Minority of an arbitrator

Mention has already been made that even though “any person may be appointed as an arbitrator” the effect of such a wide and unqualified provision seems to have been curbed by the provisions dealing with disqualification of an arbitrator. It therefore follows that a minor appointed as an arbitrator may later on be disqualified merely because he is not of age. What one should bear in mind here is that unless one of the parties, presumably the one entitled by law to avail himself of the disqualification applies to the court to that effect, a minor arbitrator need not be disqualified merely because he is not of age. To repeat what has already been said earlier, there is no positive requirement of capacity laid down in the arbitration provisions of the Civil Code unless one argues that the requirement is there by implication. Although there is the risk of disqualification in as much as an arbitrator didn’t attain the age of 18, a 15 years old boy could however be appointed an arbitrator and the award he renders could be enforceable. As distinguished from the application of Article 1808, here, it is one of the parties that should apply for disqualification and not the minor arbitrator. An arbitrator may, however, avail himself of his being incapable to initiate the replacement under Article 3336(1) of the Civil Code.

b. Where an arbitrator has been convicted by a court

An arbitrator may be disqualified if he has previously been found guilty of a crime. This is clearly a very wide ground that may be said embodies any crime for which an arbitrator whose disqualification is being sought has been convicted and the record of which has been kept. Normally, one would have thought of crimes like bribery, corruption, breach of trust and others akin to such crimes to be most relevant types of crimes justifying the disqualification of an arbitrator. However, according to the phrase used in Article 3340(1) of the Civil Code, there seems to be no distinction between the nature and/or gravity of the offence for which an arbitrator has been charged and convicted. It seems the presentment of a record of conviction of any crime

would be sufficient to warrant disqualification for the purposes of Article 3340(1) of the Civil Code.

As a ground warranting disqualification, one also would wonder if legal interdiction (this would be consistent with capacity provisions of the Civil Code) may fit in to the situation envisaged under Art. 3340(1). A legal interdiction signifies the circumstances in which the law withdraws from a person the administration of his property as a consequence of a criminal sentence passed on him 28 and penal laws determine the cases in which a person is to be considered as interdicted. In our case, the relevant provision of The Criminal Code of the Federal Democratic Republic of Ethiopia 2004 is Article 123 and it provides:

Where the nature of the crime and the circumstances under which the crime was committed justify such an order and the criminal has, by his unlawful act or omission shown himself unworthy of the exercise of any of the following rights, the court may make an order depriving the offender of:

- a) His civil rights particularly the right to vote, to take part in any election, or to be elected to a public office or office of honor, to be a witness to or a surety in any deed or document, to be an expert witness or to serve as an assessor; or*
- b) Of his family rights particularly those conferring the rights of parental authority of tutorship or guardianship; or*
- c) His rights to exercise a profession, art, trade or to carry on any industry or commerce for which a license or authority is required.*

In Article 3340(1) of the Civil Code, “conviction by a court” is not qualified as to whether the conviction must be coupled with the deprivation of the rights mentioned in Article 123 of the Criminal Code in which case it may have to be taken literally. If it is to be taken literally, it doesn’t matter whether the criminal court that has convicted the arbitrator whose disqualification is being sought has gone further to find the previous criminal (the present arbitrator) to be unworthy of the exercise of his civil rights or may be to put it more aptly, to be appointed as an arbitrator.

According to Article 3340(1) of the Civil Code, therefore, an arbitrator may be disqualified if the penalty or the measure pronounced in the judgment by which he has been convicted has been entered in police record in cases where such an entry is required by law and in accordance with the order relating there to. Of course, the party seeking to disqualify the arbitrator should have access to police record provided he meets the requirement of a person having a justified interests in them which again is determined by the law referred to in sub-article (1) of Article 156 of the Criminal Code.

An arbitrator, can validly object to his being disqualified on the ground of criminal conviction if he had been re-instated and his conviction cancelled pursuant to Articles 232-237 of the Criminal Code . In general, it doesn't seem to be an easy task for a party to probe his allegation of the past criminal conviction of an arbitrator whom he is desirous of having disqualified. In the event that the party seeking the disqualification of an arbitrator on the ground of past criminal conviction fails to prove his allegation, it may be argued that the concerned arbitrator would remain on the tribunal. On the other hand, there is also the possibility of the arbitrator being removed from the tribunal and be replaced by another arbitrator immediately after an allegation of past criminal conviction has been tabled. The later argument may be strong especially taking into consideration the time lost in proving and/or disproving past criminal conviction of an arbitrator whose disqualification is being sought.

c) Where an Arbitrator is of Unsound Mind

The other ground for disqualification of an arbitrator is if he/she is found to be a person of unsound mind. This generally expressed ground could, however, cause debate as to whether it refers to somebody who is notoriously insane or whether it's also applicable to a person who is mentally unbalance. The law deems a person to be notoriously insane where by reason of his mental condition he is an inmate of a hospital or of an institution for insane persons or of a nursing home for the time for which he remains an inmate. In the rural areas, i.e. in communes of less than two thousands inhabitants, the insanity of a person shall be deemed to be notorious, where the family of that person, or those with whom he lives, keep over him a watch requested

by his mental condition and where his liberty of moving about is, for that reason, restricted by those who are around him.

Where the case of an arbitrator whose disqualification is sought on the ground of being a person of "unsound mind" happens to be notorious, then the proof of his insanity might not, as such, cause difficulty thanks to the two Civil Code provisions above-mentioned i.e. Arts 341 and 342. It would be a matter of obtaining evidence as to the mental condition of the concerned arbitrator from a hospital, or an institution for insane persons or from a nursing home. If, on the other hand, the concerned arbitrator happens to be from the rural area, evidence may be obtained from his commune (may be from his local Peasant Association or a Cooperative Society?).

On the other hand, if the insanity of the arbitrator one of the parties wants to have disqualified is not notorious, the proving of the "unsound" status of the concerned arbitrator's mind might not be very easy. In urban context, in a while visiting a mental hospital or institution as an outpatient in which case there may be the possibility of obtaining medical evidence from the hospital or institution visited by the concerned arbitrator. On the other hand, if the concerned arbitrator has never been to a mental hospital or institution, but yet people in the community he lives and/or works regard him as a person of "unsound mind," then proving his mental condition might not be easy. Even in such circumstances, however, resort may be had to the Urban Dwellers' Association or Kebele Administration of the urban centre wherein the concerned arbitrator lives, or in rural communities to the concerned Peasants' Association and/or Cooperative Society. How far such non-medical evidence may be a conclusive proof to have an arbitrator disqualified on the ground of being a person of "unsound mind," however, becomes an issue by itself. Going back to the provisions of the Civil Code that deal with capacity, one notes that where the insanity of a person is not notorious, juridical acts performed by such a person may not be impugned by himself on the grounds of his insanity unless he can show that at the time he performed them, he was not in a condition to give a consent free from defects.

Subject to the exception in Articles 349 and 350 of the Civil Code, therefore, if a person whose insanity is not notorious cannot invalidate his acts, can a party to an arbitration proceeding have an arbitrator disqualified on the ground of the latter being of

“unsound mind” where such “unsoundness” is not notorious? Who is to determine the truth of the allegation that an arbitrator is a person of “unsound mind” to bring about the desired disqualification on the ground of his being a person of “unsound mind” be submitted to a court? These and similar other questions remain unanswered since there is no provision in the Code that addresses them.

d. Where an Arbitrator is Ill

Pursuant to Article 3340(1) of the Civil Code, illness may also constitute a ground for disqualification of an arbitrator. As no indication as to what sort of illness may be taken as a valid ground to disqualify an arbitrator is given by the Code, it may possibly be said that any illness other than mental illness which is treated separately, and which has already been discussed above, may be taken as a ground for having an arbitrator disqualified. “Illness” as a ground to justify the disqualification of an arbitrator appears to be an even more awkward ground relative to “unsound mind” as a ground. To envisage the application of illness as a ground for disqualification, the situation may be such that the concerned arbitrator might want to continue to serve on the tribunal pretending that he is healthy but in actuality he is ill. This might sound unlikely but it may sometimes happen because of the fees to be paid to an arbitrator. The more likely imaginable circumstance in relation to illness would be where an arbitrator is no longer able to regularly appear for meetings of the tribunal or generally unable to discharge his responsibilities as a member of the tribunal or generally unable to discharge his responsibilities as a member of the tribunal. There may also be the possibility that the ailing arbitrator submitted a resignation letter to the tribunal and to the party that appointed him with the view to voluntarily trigger his being disqualified and being replaced by another. Application to have an arbitrator disqualified also may possibly be submitted by the party who appointed the ailing arbitrator in the circumstance where the concerned arbitrator struggles to continue to serve on the tribunal with the hope that he will soon get well and resume rendering the services expected of him.

In general, and as stated earlier on, illness as a ground for disqualification consists in situations where an arbitrator is not healthy and as result cannot attend the meetings of the arbitrators and moreover, the proceedings of arbitral tribunal. If the tribunal

cannot effectively continue to discharge its duties because would be to adjourn the hearings and/or meetings may be once or twice.

Nevertheless, since it would definitely be detrimental and unfair to the parties if the resolution of their dispute is to be dragged indefinitely because of the illness of one of the arbitrators, it would become appropriate for the entitled party to apply to the tribunal or “another authority”, where there is one, to have the ill arbitrator disqualified.

e. Where an Arbitrator is absent

To begin with, it is not clear whether “absence” in Article 3340(1) of the Civil Code is used in reference to failure to attend the arbitral proceedings and/or meetings of the arbitrators, or the technical legal circumstance where an arbitrator has disappeared and has given no news of himself for two years and hence is declared to be absent. In any event, and despite lack of clarity in its meaning, “absence” is mentioned in Article 3340(1) of the Civil Code as one of the grounds to disqualify an arbitrator.

If the word “absence” in Article 3340(1) of the Civil Code is intended to cover the situations where the arbitrator fails to attend meetings and/or proceedings; then the absence could be due to mental illness or another type of illness that may suffice to cause disqualification. “Absence” if it is in relation to failure to attend meetings and/or proceedings could also be attributable to any other reason that debars an arbitrator from discharging his functions properly or within a reasonable time. In other words, the arbitrator could still be around but is unable to attend meetings and/or proceedings regularly. Failure to attend just one very important preliminary meeting of the arbitrators may possibly result in having the absentee disqualified for the purposes of Article 3340(1) of the Civil Code unless the parties are convinced that the absentee arbitrator is kind of a key person for the resolution of their dispute and would accordingly wait and see if he could resume his functions soon.

On the other hand, if absence in Article 3340(1) is in reference to the technical legal situation covered by Articles 154-173 of the Civil Code, starting from the very first article., i.e. Article 154, there should at least be a lapse of time of two years since the

last news about the person purported to be absent has been heard from him. After an application has been submitted to a court of jurisdiction, there will also, of necessity, be lapse of time, which probably would push the time until the final declaration of absence is made. The question would, therefore, be could parties to a dispute be patient enough to wait for longer than two years and until a declaration of absence is made to have the absentee arbitrator disqualified? The answer to this query should naturally, be in the negative. This is so simply because of parties should wait for longer than two years to have an absentee arbitrator disqualified; then arbitration process cannot but be taken as a means of speedy resolution of disputes. It, therefore, follows that “absence” in Article 3340(1) cannot be in reference to the declaring of absence at least with respect to the disqualification of an arbitrator appointed to resolve an existing dispute. However, there may be the possibility of the term “absence” used in Article 3340(1) in reference to the legal circumstances covered by Article 154-177 of the Civil if the arbitrator to be disqualified on the ground of “absence” was appointed to resolve a future dispute.

f. any Other Reason That Renders an Arbitrator Unable to Discharge His Functions Properly or Within a Reasonable Time

Without prejudice to the grounds considered above, Article 3340(1) in its latter limb also recognizes “any” other reason rendering an arbitrator unable to discharge his functions or within a reasonable time” to be a ground for disqualification. This latter limb of Article 3340(1) is so wide any may be taken as accommodating very many reasons. The following may be considered as few of the possible grounds that may fit into this last limb of Article 3340(1).

1. Detention and/or imprisonment. Where an arbitrator is imprisoned for sometime, this fact may be taken as a factor adversely affection his ability to attend the arbitral proceedings and/or meetings of the arbitrators. The detention and/or imprisonment may be for a brief period of time. Nevertheless, however brief the period may be, it might still render the concerned arbitrator unable to discharge his functions within a reasonable time.

2. Fulltime engagement otherwise. Where an arbitrator is fulltime engaged otherwise, and is, as a result, unable to discharge his functions of being an arbitrator, this very situation may be taken as sufficient enough to constitute a ground for disqualification.

3. Insurmountable Personal and/or Family Problems. Where an arbitrator is faced with an insurmountable personal and/or family problem and is unable because of that to discharge his functions or within a reasonable time the situation in which the concerned arbitrator finds himself may be a sufficient ground to have him disqualified. Blanket as the last limb of the provisions of Article 3340(1) is, any reason, which could not be imagined now, may be invoked to have an arbitrator disqualified as long as the concerned arbitrator is totally unable to discharge his functions as an arbitrator because of that reason or though he may be able to discharge his functions, is unable to do so within a reasonable time because of the same reason.

g. Partiality of an Arbitrator

Unfortunately, the Civil Code doesn't provide the definition of partiality or impartiality. Not does the Code provide any clue as to what circumstance or which factors constitute cases of partiality. We may, therefore, be forced to look elsewhere in order to be able to get some ideas as to what "partiality" may mean or those factors that constitute it. To begin with, "the concept of partiality may be concerned with the bias of an arbitrator either in favor of one of the parties or in relation to the issues in dispute". Partiality would be the state of mind, which is harbored by an arbitrator and which dictates the outcome of the proceedings so much so that the arbitrator whose impartiality is challenged would decide or propose to decide the case in front of him favoring the party to whom he is predisposed and naturally against the party about whom he is biased. 39 Partial arbitrator would be dictated by his bias instead of being led by his conscience and judgment in disposing of the case.

The impartiality of an arbitrator may also be challenged where an arbitrator exhibits prejudice against one of the parties to the dispute or one or more of the issues in the dispute. At the end of the day, however, both bias and prejudice may be taken as meaning the same thing, at least for the purposes of challenging the impartiality of an arbitrator.

An arbitrator who is personally interested in the outcome of a case in from of him or whose interests would be adversely affected by the outcome of the case may also be predisposed in such a way that his conducts would be telling that he is biased against one of the parties or one or more of the issues in the dispute.

In some respects, the partiality of an arbitrator may also be inferred from the conducts he openly exhibits in the course of the arbitral process. Clear and indubitable animosity, for example, of an arbitrator, presumably against one of the parties, may be a sufficient cause to challenge that arbitrator on the ground of partiality. For that matter, any improper conduct and detected improper motives exhibited by an arbitrator may also be taken as sufficient to challenge and possibly to warrant the disqualification of an arbitrator on account of impartiality.

Although the relationship an arbitrator has had or is currently having or may be contemplating of having in the future with one of the parties, primarily affects the independence of an arbitrator, in may instances, however, the bias or prejudice or the partiality because of which an arbitrator may be challenged may also arise from relationships. In other words, the bias or prejudice an arbitrator may be accused of may simply be because of no other reason but the relationship between the challenged arbitrator and the party he tended to favor. According to Red fern and Hunter: “impartiality is a much more abstract concept than independence in that it involves primarily a state of mind which presents special difficulties of measurement.” Incidentally, impartiality is by far the most important ground for which an arbitrator may be disqualified since “justice must be beyond all suspicion as to the independence and impartiality of the judges, and this basic principle of justice administered by an arbitral tribunal.” Impartiality becomes even more glaringly important because of the general tendency of party-appointed arbitrator’s misconception of his role as he “will approach the examination of the dispute with some prejudice in favour of the party who has appointed him and it may even happen that in some cases, especially if he is not a lawyer, he will conceive his role as that of an advocate rather than a judge” A party-appointed arbitrator, however, “is not a partisan.” Arbitration being a private mechanism of dispute settlement, it is, on the other hand, submitted that parties may want that their arbitral adjudication to proceed in sort of a partisan way. This may be

achieved by the parties agreeing that “one arbitrator shall be an umpire and the other arbitrators as mere advocates and representative of the parties who have appointed them.” It is believed that parties are at liberty to do so and consequently, it would only be possible for them to challenge the impartiality of the umpire and they cannot raise that of the other advocate arbitrators. Professor David is of the opinion that partisanship in arbitration proceedings may still be tolerable but on condition an arbitrator avoids dishonesty:

“It is fundamental that this should be done openly. A party cannot be prevented from choosing an arbitrator a person who will consider his case in a friendly way, but in this case it cannot be possible for the other party as well to designate an arbitrator a person devoted to his interest. What is unacceptable is concealment, which would result in the inequality of the parties. Also forbidden of course is dishonesty. As M. Domke has said in respect to the partisan-arbitrator” partisan he may be but not dishonest.

Article 3340(1) of the Civil Code seems to indirectly recognize that an arbitrator appointed by one of the parties may be partisan to the party who appointed him by limiting the disqualification of an arbitrator for partiality and lack of independence only applicable in respect of an arbitrator appointed by agreement between the parties or by an appointing neutral third party. In other words, what Article 3340(1) provides is that an arbitrator who is common to both parties should be impartial and independent. Such an arbitrator, it seems, could either be a sole arbitrator appointed either by the agreement of both parties or failing such an agreement by a third party usually referred to as an between the parties that each of them appoints one arbitrator and the president be appointed by the two party-appointed arbitrators; then the latter, who as of right presides over the tribunal, may not be partial to one of the parties. He may be disqualified if there happens to be any circumstance capable of casting doubt upon his impartiality. On the other hand, if the parties have agreed to have a tribunal of five arbitrators and they have managed to agree on three of them and for the appointment of the remaining two they designated a third party; the two arbitrators appointed by the designated appointer shall have to be impartial to the parties lest they be disqualified.

That the stand adopted by the Ethiopian legislature in this respect is a widely accepted view has been confirmed by Prof. David's statement:

“If doubts may be entertained as to the party-appointed arbitrators, the situation is different in case of arbitrators designated otherwise; by an agreement between the parties or by the other arbitrators or by some third person. The arbitrator is then bound to be independent and impartial in the same manner as a judge. This principle is unanimously recognized; how it is implemented and guaranteed differs, however, from county to country.”

Whether a court-appointed arbitrator, be he a president of the tribunal or otherwise, may be subjected to the disqualification provisions and procedures of the Civil Code may be a matter of controversy. If a court may be treated as a “third party” in discharging its law-given responsibility of appointing arbitrators cannot be assimilated to that of a third party appointing authority or person, then the question as to whether or not a court-appointed arbitrator may be disqualified for partiality may arise. It appears to be a little awkward to assimilate an arbitrator-appointing third party of necessity designated by the parties as such with a court, which is there independent of the will of the parties. It, therefore, seems that a party seeking to avail himself of the arbitration agreement may resort to the court to have an impartial arbitration appointed by a third party removed irrespective of whether or not such a right is spelt out in the arbitration agreement.

The issue as to whether or not a court-appointed arbitrator may be removed if he happens to be partial to one of the parties remains to be addressed. Accordingly, one may pose the queries: should a court-appointed arbitrator be subjected to the same procedure as party or third-party appointed ones for the purposes of being disqualified on the ground of partiality? Who is to remove a court-appointed arbitrator? Is it the party seeking to have him disqualified? The tribunal? Or the court that appointed him? These and similar other queries are yet to be ruled upon by courts in the future.

As is provided clearly under sub-article (3) of Article 3340 of the Civil Code, the president of an arbitral tribunal may be disqualified for the same reasons and by the same procedures that the applicable to the other arbitrators. If this is so, it should be

taken as a clear indication that a president appointed by the party-appointed arbitrators either from among themselves or from outside is taken as a third-party appointed arbitrator. A court-appointed outside is taken as a third-party appointed arbitrator. A court-appointed president's disqualification for partiality, however, is as stated above for non-president arbitrators a matter to be ruled upon in the future.

As has already been discussed, "a party may not nominate an arbitrator who is generally predisposed towards him personally or as regards his position in the dispute provided that he is at the same time capable of applying his mind judicially and impartially to the evidence and arguments submitted by both parties". We have also considered that the predisposition of an arbitrator towards the party who appointed him, does not apply to a presiding arbitrator who "must be, and be seen to be entirely neutral as well as impartial."

h. Independence of an Arbitrator

Independence of arbitrators is a topic that is very much related to impartiality of arbitrators. Sometimes, the partiality of an arbitrator may be for no other reason but merely because of lack of independence on the part of the arbitrator that acted partially. Irrespective of the overlapping between impartiality and independence, however, it may be worthwhile to treat the topic of independence distinct from impartiality for a number of reasons. First, because, treating the question of independence is as important as treating impartiality and secondly because the Ethiopian Civil Code in Article 2240(2) treats the two separately and distinctly. Independence, in other words, is written as a ground separate from impartiality for the purposes of challenging arbitrators under Ethiopian Law. In this regard, Redfern and Hunter opined:

The terms "independent" and "impartial" are not interchangeable. It would be possible, for instance, for an arbitrator to be independent in the sense of having no relationship or financial connection with one of the parties, and yet not impartial. He might have such strong beliefs or convictions on the matter in issue as to be incapable of impartiality. The converse can also be imagined of an arbitrator who is not

independent of one of the parties (because he has some financial interest) yet who is perfectly capable of giving an impartial view on the merits of the case.

The Ethiopian Civil Code doesn't give any kind of hint as to which factors affect the independence of arbitrators. The Civil Code doesn't give the meaning of the word "independence" either. In fact, the only article of the Civil Code wherein reference is made to "independence" happens to be in Article 3340(2). In the face of lack of any provision of our law that at least explains what independence means, one would be circumstantially dictated to look for what is meant by independence, elsewhere. Redfern and Hunter offered the following:

There is both an objective and a subjective aspect to the question of independence, which is a less abstract concept than that of impartiality. Objectively, it is easy to see that a person should be precluded from acting as an arbitrator if he has a direct professional relationship with one of the parties; and still more, if he has financial interest in the outcome of the arbitration (through a shareholding, perhaps in a company which is a party to the dispute). Subjectively, the position is less simple to analyze.

The same learned authors in the third edition of their book on the same subject wrote that "The concept of "dependence" is concerned exclusively with questions arising out of the relationship between an arbitrator and one of the parties, whether financial or otherwise. By contrast, the concept of "partiality" may be concerned with the bias of an arbitrator either in favor of one of the parties or in relation to the issues in dispute."⁵³ The following may be considered as situations signifying relations between a challenged arbitrator and one of the parties.

1. Past Business Relations(s)

It may be that one of the arbitrators in a tribunal of three or more arbitrators has had business relation with one of the parties sometimes in the past. The relationship may have taken place some ten years back or a few weeks or days before the arbitral tribunal constituted, among others, by the arbitrator who is not being challenged. So, the pertinent query would be could the other party apply for the disqualification of the arbitrator who has had prior business relations with his opponent on the allegation

that the relation is sufficient to constitute a circumstance capable of casting doubts upon the concerned arbitrator's impartiality? This query may be answered in the positive and it is regarded by renowned authors as "a special case where a party may wish to challenge an arbitrator is when he discovers that business relations have been or are entertained or likely to be entertained between the other party and the arbitrator."

Professor David offered the following on business relations: [A] decision of the Supreme Court of the U.S.A. given in 1968 has marked a reaction. The person appointed as a third arbitrator in this case in which one of three arbitrators had four or five years previously given some advice to one of the parties as an engineer and for which he had received twelve thousand dollars, and the fact of which was not disclosed by him at the time of accepting his appointment was held by the U.S. Supreme Court as a sufficient ground for disqualification on the strength of the mere fact that he has previously had business relations with one of the parties and has derived some profit there from.

The problem of challenging of an arbitrator on the ground of business relations would be frequent in cases where the arbitrators are themselves, business men or as is usually called "commercial men."

2. Existing Business Relations

Where one of the parties discovers that an arbitrator is currently having a business relationship with the other party, his opponent, whilst the arbitral process is in progress; for stronger reasons the situation may be a ground to challenge the arbitrator having such a relation. The widely known approach to avoid the disqualification or challenge of an arbitrator in this respect would be disclosure on the part of the concerned arbitrator. The expectation is that the concerned arbitrator, at the time of accepting his appointment as an arbitrator, should disclose the fact of his having business relation with one of the parties to both parties involved in the dispute to be adjudicated by arbitration. If the parties agree after such a disclosure, to still have him continue as an arbitrator, then they shall be regarded as having done away with

their right to challenge the impartiality of the concerned arbitrator on the ground of having business relations with one of them.

3. Future Business Relations

If one of the arbitrator or in a sole arbitrator case, if the arbitrator is likely to entertain a future business relation with one of the parties, it may be a ground for the other party to challenge the independence of such an arbitrator. This would, personally, consist in the belief that the challenged arbitrator would incline to favour the party with whom he is anticipating or hoping to have business relationship. It would, however, be difficult for the party wanting to avail himself of disqualification because of lack of proof of future business relation unless he is able to produce clear and tangible evidence as to the intention or plan of the arbitrator to have business relation with his opponent party.

It is not very clear as to what standards of proof would be required to show circumstances capable of casting doubt up on the impartiality and independence of an arbitrator. On the other hand, since the matter is civil, as opposed to criminal, it may be said that ordinary civil standard of proof would do. On the other hand, there is a mild form of crimination of an arbitrator whenever the impartiality of such arbitrator is challenged and hence his disqualification is sought by one of the parties. The disqualification of an arbitrator for fear of impartiality may be damaging to his future reputation and may have bearing on his being chosen as an arbitrator in the future after his impartiality has once or twice been challenged and he was disqualified as a consequence of that. More over, a controversial issue may arise because of the application of the phrase used in Art. 3340(2), i.e. "... any circumstances capable of casting doubt upon his impartiality...." It is feared that the application of the said phrase might give rise to controversy because there is no clue as to whether the "circumstances capable of casting doubt" should necessarily and tangible be in existence at the time of invocation of the challenge or, whether fear of impartiality and lack of independence may be proved by putting bits and pieces of apart circumstances i.e., those circumstances which may be capable of indicating that the person whose disqualification is being sought might be impartial in disposing of the case submitted to him for adjudication. In other words, the scope of application of the crucial phrase in Art 2240(2) is not clear as to whether the "circumstances capable of casting doubts on

an arbitrator's impartiality and lack of independence should be only those which constituted precise, relevant and well established or establishable ones or even those ones that are remote, uncertain or conjectural to have an arbitrator disqualified on the ground of impartiality.

4. Non Business Relations

Other relationships other than business relationship may as well be the cause for disqualification of an arbitrator on account of lack of independence. Consanguine or affinal relations between the arbitrator whose independence is being challenged and one of the parties, may very well constitute “a circumstance which is capable of casting doubt “ up on the impartiality of an arbitrator. One of the arbitrators’ having love affairs with one of the parties may possible constitute a circumstance falling under Article 2240 (2) and thereby become a ground for challenging the impartiality and independence of the concerned arbitrator.

5. Employer-Employee Relations

An arbitrator who may be having an employment relationship with one of the parties may be challenged on the ground of lack of independence. Although the focus generally is on an on-going employment relationship between the challenged arbitrator and one of the parties, it may sometimes be the case that past employment relationship that may have been brought to an end before the nomination of the challenged arbitrator may as well be a ground for challenging the independence of an arbitrator. If, in particular, the reasons for termination of the relationship has been such that there was on disagreement or misunderstanding between the parties; the ex-employee of one of the disputants in an arbitral process may still be inclined to favour his ex-employer. It may, as well, be that if the previous employment relationship was brought to an end in an unpleasant way to the ex-employee, it may constitute a bias against the former employee and hence a ground for him to challenge his ex-employee's but present arbitrator.

It is said that in an on-going employer-employer-employee relationship between a party and an arbitrator, not only does such an arbitrator “have a financial interest in

keeping his job, but he is also by definition, in a subordinate relationship to his employer”.

6. Lawyer-Client Relationship

According to the International Chamber of Commerce, a lawyer of one of the parties who has been appointed as an arbitrator may be challenged and “it is generally recognized that the regular counsel for one of the parties may not serve as an arbitrator in the absence of agreement to the contrary.

Other than bias and/or relations, an arbitrator may be disqualified whenever there happens to be “any circumstance capable of casting doubt up on his impartiality and independence” In other words, the impartiality and/or independence of an arbitrator is not only affected where an arbitrator harbors a bias against one of the parties or where he has some kind of relation with one of the parties. As mention has already been made as regards that last limb of article 3340 (1), sub-article (2) of the Article is in the same fashion, so wide and blanket. It may accommodate, any circumstance, which in any way, is capable of casting, even the slightest doubt, up on the impartiality or independence of an arbitrator.

Before finalizing our discussion on grounds of disqualification, it would be worthwhile to take a brief look at the proviso stated in Article 3341 of the Civil Code under the title of “demurrer” Article 3341 provides: “unless otherwise provided, a party may seek the disqualification of the arbitrator appointed by himself only for a reason arising subsequently to such appointment, or for one of which he can show that he had knowledge only after the appointment” It is not clear whether the phrase “unless otherwise provided” refers to the provision of the law or the stipulation of the parties. This writer believes that the phrase should be taken as referring to the agreement of the parties, if any, and not the provisions of the law. This is, it is believed, to be so primarily because of the fact that the proviso being imposed by the law cannot be excepted by another legal provision.

ii. Procedure for disqualification

Notwithstanding the fact that arbitration is a mechanism of private adjudication, the law has prescribed a procedure for disqualification of arbitrators. As we have already noted that there are law-prescribed grounds for disqualification, the law clearly states that the party attempting to have an arbitrator disqualified must comply with the prescribed procedure. Per the provision of Article 3342(1) of the Civil Code, first of all, the party seeking to have an arbitrator disqualified must file an application to the arbitration tribunal. Such party must file his application before the tribunal renders an award and as soon as he knew of the grounds for disqualification. Sub-article 2 of Article 3342 provides: “The parties may stipulate that the application for disqualification be made to another authority.” And where there is such a stipulation, there has to be filed an application for disqualification to the designated authority before the tribunal renders an award.

The arbitration tribunal, or the designated authority, must rule on the application for disqualification by either granting the application by ruling that the concerned arbitrator is disqualified or deny the application by ruling to dismiss the request to have the concerned arbitrator disqualified. In the latter case, i.e., where the tribunal, or as the case may be, the designated authority, dismisses the application for disqualification, sub-article 3 of article 3342 provides that an appeal may be lodged within ten days as of the date of the ruling to a court of law against the denial.

B. Removal

Though it doesn't address “replacement” and the procedure to be followed in replacing arbitrators whose impartiality and independence has been successfully challenged, the Civil Code, however, addresses removal of arbitrators. The Civil Code in Article 3343 prescribes removal as a remedy in the event that an arbitrator who had accepted his or her appointment unduly delays the discharge of his/her duty. An interesting point worth noting in the provisions of Article 3343 is that the power to remove an arbitrator who unduly delays the discharge of his/her duties is primarily given to the authority designated by the parties. Article 3343 of the Civil Code doesn't leave any clue as to whether the authority envisaged therein is the one entrusted by the parties to appoint

arbitrators; or a separate one with a special power to remove an arbitrator who unduly delays the discharge of his/her duties.

Article 3343 of the Civil Code also addresses the question: “who may apply to have an arbitrator who unduly delays the discharge of his/her duties removed”? Article 3343 does not provide that request of removal must be submitted by the “party availing himself of the arbitral submission.” Neither does the article provide that the right to have an arbitrator who unduly delays the discharge of his/her duties must be given to the party that appointed the concerned arbitrator. Quite logically, and with the view to assist the constitution of the arbitral tribunal, the lawmaker has given the right to apply to have an arbitrator removed to either one of the parties.

C. Replacement

An arbitrator, whether an umpire or otherwise, whose impartiality or independence has been successfully challenged must, naturally, be replaced by another arbitrator. The Civil Code does not address whether an arbitrator whose impartiality has been unsuccessfully challenged stops discharging his duty all by himself or whether the court must remove him. Moreover, it is nowhere provided as to how an arbitrator whose impartiality or independence has successfully been challenged may be replaced. Exceptionally, it seems that the legislator may have thought that the challenged arbitrator would stop discharging his/her duty after the challenging party has proved that the concerned arbitrator is either partial or not independent. However, in the circumstances that the arbitrator whose partiality or lack of independence had been proved doesn't, by him/herself stop discharging his/her duty as an arbitrator, then removal by the court upon the application of the challenging party seems to be inevitable. Though nothing has been provided for in the Civil Code as to replacement procedure, it may be argued that the procedure of appointment of arbitrators with all its ramifications may be repeated again when an arbitrator shall have to be replaced.

This journal article is so important I took it as it existed only by omitting the footnotes, introduction and conclusion parts.

3.7.4. Scope of Arbitration

An Article taken from: Arbitrability in Ethiopia: posing the problem (Zekarias Keneaa JEL Vol XVII, 1994)

I. Introduction

Despite the advantage one can avail himself of by resorting to arbitration, not all disputes or quarrels, or even differences arising in peoples' relations can be submitted to the adjudication of parties' chosen experts. For different reasons, different states exclude disputes of certain categories from the ambit of arbitration. Hence, in every state, there would always be matters capable and permitted to be submitted to arbitration – arbitrable matters and there would, as well, always be matters regarded as not capable of being arbitrated – in arbitrable matters. Redfern and Hunter beautifully summarized it as quoted here below:

*The concept of arbitrability is in effect a public policy limitation upon the scope of arbitration as a method of settling disputes. Each state may decide, in accordance with its own public policy considerations which matters may be settled by arbitration and which may not. If the arbitration agreement covers matters incapable of being settled by arbitration, under the law of the agreement is ineffective since it will be unenforceable. Moreover, recognition and enforcement of an award may be refused if the subject matter of the difference is not arbitrable under the law of the country where enforcement is sought. (Allan Redfern and Mertin Hunter, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell. London, 1986, p. 105).*

As inferable from the above quotation, which disputes may be submitted to arbitration (arbitrable) and which ones may not be submitted to arbitration (in arbitrable) is usually decided on by states and such decisions are expressed in national laws pertaining to arbitration. Because of diverse policy considerations, national interests and commercial realities, matters that are capable of being arbitrated in some states may constitute matters incapable of being arbitrated in other states. In other words, in some categories of disputes must, as a matter of public policy, be adjudicated by state

courts staffed by sovereign – appointed – judge and the submission of such matters to disputing parties’ – appointed private judges may be considered as illegal and the resultant award unenforceable.

In this work, an attempt is made to assess what is arbitrable and what is not in Ethiopia. The work does not exhaustively deal with the question. Far from it, all it does is, it tries to posse the problems that have occurred to the author’s mind related to arbitrability in Ethiopia. The endeavor, however, might hopefully assist future research to be conducted on the subject.

II. Arbitrability and Family Law

In Ethiopia there are no other substantive legal provisions, other than civil code articles 722, 724, 729 and 730 wherein it is clearly stated that it is only the court that is competent to decide on matters stated under those provisions. The message contained in the above – mentioned civil code articles may be put as: it is the court only the court, in exclusion of all other alternative dispute settlement mechanisms and tribunals, including arbitration, that can give decision on the issues of which squarely fall within the spirit of those provisions. In other words, matters falling within the limits and bounds of those provisions are not arbitrable.

Pursuant to Art 722 of the civil code, the issues of whether a betrothal has been celebrated or not and whether such a betrothal is valid, cannot possibly be submitted to arbitration because the very article makes the court the only competent organ to hear and give decisions on such matters. To put it otherwise, the phrase “only the court is competent” does away with the possibility of submission of matters the issue of which pertains to the celebration of a betrothal or whether a betrothal is valid or not to private adjudication.

Similarly, in line with the provisions of Article 724 of the civil code, the possibility of submission of reference of suits the issues of which relate to the determination of whether or not a marriage has been contracted and whether such marriage is valid to arbitrators is prohibited and it is only the court that is recognized as competent to hear and decide on such matters. In a similar vein, in Art 730 of the civil code, the law has

taken the stand that no other tribunal except the court is competent to decide whether an irregular union has been established between two persons. Unlike difficulties and/or disputes arising between spouses during the currency of their marriage or even the petitions for divorce whether made by both or one of the spouses, which have to compulsorily be submitted to arbitration, disputes arising out of irregular unions have to be submitted for resolution to the court and to no other tribunal.

In spite of the fact that pursuant to the mandatory provision of Article 725 – 728 of the civil code, despite, (difficulties) arising out of existing marriages, petition for divorce or even disputes arising out of divorces have to but compulsorily be submitted to arbitration: it is according to Article 729 of the civil code, only the court that is competent to decide whether a divorce has been pronounced or not. Article 729 of the civil code may be taken as having the message that the divorce decision made by family arbitrators have to be obligatorily be submitted to the court. The court, after having ascertained that family arbitrators have complied with the necessary legal requirements, and that the decision for divorce is rendered by a duly constituted panel of arbitrators, make its own decision that an enforceable decision of divorce has been pronounced. Though in line with the provision of Article 729 of the civil code the court seems to be making the latter decision on its own initiative, on the other hand, appeal may also be lodged to the court to have the decision of arbitrators impugned on the ground of corruption of arbitrators or third parties fraud or the illegal or manifest unreasonableness of the decision made by arbitrators (Art. 736 of the civil code). Yet still, Article 729 also seems to be imparting the message that the court renders a kind of homologation and or certification service with respect to divorce decision given by family arbitrators. In other words, certifications that a married couple has been divorced or a marital union has been dissolved can only be given by the court and not by arbitral tribunal or the arbitrators that pronounced the divorce. The article seems to be imparting the latter message particularly when one considers the controlling Amharic version of Article 729 of the civil code. (Include the Amharic version here)

III. Matters Relating to Administrative Contracts Inarbitrable?

On the other hand, when one shifts from the substantive law over to the procedural one, one encounters Article 315(2) of the civil procedure code wherein it is clearly

provided that only matters arising from Administrative Contracts and those prohibited by law are said to be Inarbitrable. Naturally, therefore, a question follows as to whether or not all other matters except those arising from Administrative Contracts and those prohibited by law could be regarded as arbitrable in Ethiopia, subject of course to the provisions of Articles 3325-3346 of the civil code. First of all it is surprising to find a provision that reads:

No Arbitration may take place in relation to Administrative Contracts as defined in Article 3132 of the civil code or in the other case where it is prohibited by law in the civil procedure code but nothing to that effect or even similar to that is stated in anyone of Articles 3325-3346 of the civil code.

As issue of interpretation or construction of the two legal texts i.e. Article 315(2) of the civil procedure code on the one hand and Articles 3325-3346 of the civil code on the other might as well arise. This becomes even more glaring as one considers the provisions of Article 315(4) of the civil procedure code which states that “Nothing in this chapter shall affect the provisions of Articles 3325-3346 of the civil code”.

If nothing in Book IV of the civil procedure code affects the provisions of Articles 3325-3346 of the civil code, and nothing as to whether or not matters arising from Administrative Contracts are Inarbitrable is mentioned in Articles 3325-3346, could Article 315(2) be given effect? In other words, if the overriding text of Articles 3325-3346 of the civil code are silent as to whether or not disputes emanating from Administrative Contracts are arbitrable; can't that be taken as an implication that even disputes from Administrative Contracts are arbitrable in so far as nothing express is stated in Articles 3325-3346 that they are not? Or should there be a manifest contradiction between the two codes' relevant texts for Articles 3325-3346 to be overriding?

In Water and Sewerage Vs Kundan Singh Construction Limited (High court, Civil file No 688/79) the court took a stand that Article 315(2) is a sufficient provision to exclude disputes relating to Administrative Contracts from the ambit of arbitrable matters. A close consideration of the main reasoning of the High Court to justify this stand, however, tells that the court based its reasoning on a poit jurisdiction instead of taking Article 315(2) of the civil procedure code as a legal provision, sufficient on its face, to

prohibit the submission of matters relating to Administrative Contracts to Arbitration. In the course of justifying its stand, the court said “question pertaining to which court or which tribunal has jurisdiction is a matter of procedure and that procedural matters are provided for in the code of civil procedure and not in the civil code”. The court, it may be said, endeavors to use this line of argument in its attempt to defeat the strong point in Article 315(4) of the civil procedure code, i.e. that nothing in the chapter in which Article 315 of the code of the civil procedure is found shall affect the provisions of Articles 3325-3346 of the civil code. By so doing, the court rejected the argument raised by the defendant that Article 315(2) of the civil procedure code should not be given effect in the face of Articles 3325-3346 of the civil code wherein nothing is mentioned as to the inarbitrability of disputes arising from Administrative Contracts.

The other point the High Court raised to justify its ruling that matters related to Administrative Contracts are Inarbitrable was that the provisions of our civil code relating to Administrative Contracts were taken from French law. The court went further and stated that in French law there is a prohibition that disputes arising from Administrative Contracts should not be submitted to arbitration, and that such a prohibition is found in the French Code of Civil Procedure. Consequently, said the court, the prohibition in Article 315(2) is appropriate taking French law and the fact that provisions on Administrative Contracts in our civil code were taken from French law.

On the principle of interpretation that a latter law prevails over a preceding one it could be said that the civil procedure code which was promulgated in 1965 as opposed to the civil code which was promulgated in 1960, is overriding. This, point of interpretation was also raised by the court in the Kudan Singh case.

Would the approach of interpretation that follows the hierarchy of laws be of help in the context under consideration because of the fact that the seemingly contradictory legal provision appear in different types of legislations, i.e., Arts. 3325-3346 in a proclamation, whereas, Art 15(2) of the civil procedure appears in an Imperial Decree?

IV. Other Substantive Law Provisions Indicative of Arbitration

Yet still, the main problem in relation to arbitrability in Ethiopia, however, seems to emanate from the confusion created by the Civil, Commercial and Maritime codes' express provisions for arbitration in certain respects and their silence otherwise. Family disputes arbitration dealt with in the civil code is, I think, a compulsory arbitration (Starting 1977, disputes between state – owned enterprises were also made as compulsorily arbitrable in Ethiopia by virtue of a directive No 2756/fe 1 ha/20 issued on Hamle 14, 1969 (July 21, 1977) by the then Prime Minister, Ato Hailu Yimenu.) rather than it is consensual. In other respects, the 1960 civil code for instance, expressly provides for arbitration under Articles 941, 945, 969(3), 1275, 1472ff, 1534(3), 1539, 1765, 2271 and is silent otherwise. (However, it is good to note that it is doubtful if Article 2271 of the civil code may be taken as a provision indicative of arbitration in the sense of Article 3325 of the same code. Where a seller and a buyer, refer the determination of a price to a third party arbitrator, it doesn't mean that the parties submit a dispute to be resolved. Unless the parties have unequivocally agreed that they will bound by it the "price" to be quoted by the "arbitrator", cannot be taken as binding as an award is in case of arbitration proper.)

The commercial code expressly provides for arbitration under Articles 267, 295 and 303 by way of reference to Articles 267, 500(1), 647(3), 1038, 1103(3) and the Maritime Code's only provision wherein it is expressly mentioned about arbitration in Article 209.

In the labour legislation we had for the last two decades, i.e. Proclamation 64 of 1975, the possibility of submission of a collective or individual trade dispute to arbitration was provided for in Article 101(1). In sub-article 3 of the same provision, arbitration, in fact, seems to have been envisaged as obligatory with respect to disputes arising in undertakings which do not have trade dispute committee.

In the new Labour Proclamation, i.e. Proclamation No 42 of 1993(It is noted here that the current labour proclamation was not enacted at the time when the this article is published and the observation on the current labour proclamation is discussed under

3.7.3. of this chapter), it is provided in Article 143 that “parties to a labour dispute may agree to submit their case to their own arbitrators...”

Now, therefore, it would be appropriate if one asks a question doesn't the fact of the existence of such express provisions for arbitration by the Codes mean that all other matters are Inarbitrable? What was it that necessitated express provision for arbitration in certain cases only? Was it just an endeavour to bring the possibility of arbitration to the attention of the parties concerned as an alternative dispute resolution mechanism or as an alternative to court action? Or was it meant to clear out the doubts from people's mind that disputes arising from those situations for which the codes mention arbitration may be submitted to arbitration although the Codes' provisions, including those mentioned under Article 3325-3346 of the civil code, do not mention what is not arbitrable as a matter of Ethiopian public policy except what is stated under Article 315(2) of the civil procedure code?

In some jurisdictions, there are well defined areas of matters which, as a matter of public policy, are designated as not arbitrable. For example, the German Civil Procedure Code Article 1025a provides: “An agreement to arbitrate disputes on the existence of contract referring to renting rooms is null and void. This does not apply when reference is made to section 556a paragraph 8 of the German Civil Code.” (Reproduced in Ottoatndt Glosner, *Commercial Arbitration in the Federal Republic of Germany*. Kluwer, 1984, p. 42.)

The French Civil Code Article 2060, on the other hand, provides: “One may not submit to arbitration questions relating to the civil status and capacity of persons or those relating to divorce or to judicial separation or disputes concerning public collectivities and public establishments and more generally in all areas which concern public policy.”

In Italy, parties may have arbitrators settle the disputes arising between them excepting those provided in the civil code Articles 409 i.e., those concerning labour disputes and those provided I Article 442 concerning disputes relating to social security and obligatory medical aid.

Some other jurisdictions have adopted different approaches from that of German and France. The Swedish Arbitration Act of 1929 (as amended and in force from January 1, 1984) for instance, provides in Section 1 that “Any question in the nature of civil matter which may be compromised by agreement, as well as any question of compensation for damage resulting from a crime, when a dispute has arisen with regard thereto, be referred by agreement between the parties to the decision of one or more arbitrators.”

The Swiss Inter cantonal Arbitration Convention of March 27/August 29, 1969, on the other hand, provides in article 5 that “the arbitration may relate to any right of which the parties may freely dispose unless the suit falls within the exclusive jurisdiction of state authority by virtue of a mandatory provisions of the law.”

Coming back to Ethiopian law, wherein we don't have provisions limiting the kind of question that may or may not be submitted to arbitration except for what is stated under Article 315(2) of the civil procedure code, how should we go about deciding what's arbitrable and what's not? Especially, how should the approach taken by the codes to have here and there provided for arbitrable matters be viewed? Can we argue a contrario that the rest, i.e. those numerous matters for which the codes do not expressly provide for the discretion to arbitrate, save of course those matters for which the civil code imposes obligatory arbitration, are Inarbitrable? Or can we by way of argument settle on the test of arbitrability that is close to the Swedish test that bases itself on the provisions of Article 3326(1) of our civil code and say “any matter which relates to any right which the parties can dispose of without consideration” is arbitrable in Ethiopia? This test becomes a fallacious on the moment one reads the provisions in sub-article 1 of Article 3327 that goes; “the provision of Art 3326 shall not apply where this code provides for arbitration.” It, therefore, follows that if the capacity to dispose of a right without consideration is not needed when the codes expressly provide for arbitration, the test that “any matter which relates to any right which the parties can dispose of without consideration is arbitrable in Ethiopia” fail to be an always working criterion.

Added to the above, the very approach taken by the legislator i.e. considering the situation where the codes provide for arbitration and where they don't, tells us that

matters not expressly provided for in the codes may as well be made subjects of arbitral jurisdiction. The Swedish approach, therefore, doesn't, I think, work for the present Ethiopian reality and the test that's similar or identical to there's should be seen cautiously if not totally dismissed. The line of thought that pursues the idea that the matters not expressly provided for by the civil or other codes are inarbitrable also fails automatically because of the above mentioned argument. Hence, it could be said that the codes' express provision for arbitration here and there is meant to hint to the parties involved pertaining to matters provided for, that arbitration is an alternative to judicial proceedings or to encourage them to submit to arbitration.

Except for what is stated under Article 315(20 of the civil procedure code, the approach taken by the German, Italian and French arbitration laws also doesn't seem to fit in to the existing Ethiopian legal reality.

V. Arbitrability and the High Court's Exclusive Jurisdiction

The provisions of Article 25(2) of the civil procedure code may also be worth considering at this stage to see if there is in anyway the possibility of arguing that those matters provided for under Article 15(2) (a-i) could be taken as not arbitrable. One thing clear from Article 15(2) of the code is that the High Court, in exclusion of all other courts, shall have an initial material jurisdiction to try cases the matters of which emanate from those areas enumerated (a-i). Does this, however, mean that the exclusion applies to arbitration as well? If the extension is appropriate to speak in terms of tribunals does the exclusion apply to arbitral tribunal as well or is it limited to courts? Most important of all, could it be taken that those matters provided for under Article 15(2) of the code are meant to be inarbitrable?

Provisions of Article 15(2) of the code, coming under chapter 2 of the Book I of the code and dealing with material jurisdiction of courts, are meant to serve as a exception to the principle laid down under Article 12(1) as further expounded by the two articles immediately following and sub-article 1 of article 15.

Article 15(2) in other words, confers jurisdiction on the High Court irrespective of whether or not the amounts involved in the suits springing from matters listed (a-i) are

worth either 5,000 Birr or below for suits not regarding immovable property or the amount involved is 10,000 Birr or less in a suit, for instance, relating to expropriation and collective exploitation of an immovable property.

The clear message in Article 15(2) is that the High Court has jurisdiction to try cases involving matters listed (a-i) by virtue of the law itself ousting the material jurisdiction of the Awraja and Woreda Courts. The clarity of the message of the article, however, doesn't seem to have ready answer to quarries like: What if the parties to a contract or even to a dispute agree to oust the jurisdiction of the High Court by considering to submit their future or existing disputes in relation to those matters mentioned under Article 15(2) to arbitration? Should such an agreement be regarded as illegal or unenforceable? If parties knowingly or unknowingly agree to submit an existing or future dispute emanating from one of those areas mentioned under Article 15(2) to arbitration, and there arises some sort of disagreement as to the formation of the tribunal: should the court whose assistance is sought in appointing an arbitrator decline to do that on the strength of the provisions of Article 15(2) of the code? What about a tribunal duly constituted either by the parties themselves or through the assistance of the court, should it decline jurisdiction in favor of the High Court or should it assume jurisdiction, proceed and give an award? At the enforcement stage, would such an award be recognized and be given effect by the court to which an enforcement application is filed? These and other related questions may be raised in relation to Article 15(2) of the code and arbitrability.

Would figuring out the rationale behind the giving of exclusive jurisdiction of the High Court regarding suits springing from those matters provided for under Article 15(2) (a-i) be an answer to the questions raised above? Could the purpose behind Article 15(2) be the public policy to make sure that the matters provided for in that sub-article are tackled by the court of high position that is staffed with high trained and or experienced judges? Or could the purpose be more serious than that? Was the intention behind the conferring of exclusive jurisdiction on the High Court in suits regarding those areas to single out certain areas of importance in Commercial and Maritime relations and other sensitive areas, to give emphasis to some and to thereby ensure certainty in the way of interpretation of the laws involving those areas which in turn would help develop the jurisprudence of the laws in those area?

The rationale behind Article 15(2) may be to facilitate trials of the suit arising from those matters by (highly) trained and experienced judges, or judges that have specialized in dealing with those matters. If that is the case, the submission to arbitration of disputes emanating from those matters might have not been intended to be excluded altogether because in the modern world arbitrators are, generally, qualified enough to deal with all sorts of complicated matters. Incidentally, the provision of the civil code Article 3325(1) makes it clear the arbitrators “under take to settle disputes in accordance with the principles of law.” And if arbitrators have to resolve disputes in accordance with the principles of law, then it follows that arbitrators should, of necessity, be legal professionals of some sort whether trained or those who have managed to acquire the expertise through practice and /or experience.

On the other hand, if the intention behind Article 15(2) was to ensure certainty and, may be, predictability in the way in which the areas of law dealing with those matters are interpreted, then the argument that those matters provided for under Article 15(2) may not be submitted to arbitration could, generally speaking, hold true. Nevertheless, even if the disputes arising from those matters are submitted to arbitration, in certain respects, it could be argued that it doesn't make a glaring difference because Ethiopian arbitrators are appointed to resolve disputes according to principles of law anyways. It should, however, be noted that in accordance with the provisions of Article 317(2) of the civil procedure code, arbitrators may, where the parties at dispute have agreed to that effect, decide without giving regard to the “principle of law”. The authorization given to arbitrators by disputing parties to decide without being bound by the strict application of the law is referred to as amiable composition or ex aequo et bono. The arbitrator(s) who is (are) authorized to proceed in amiable composition is (are) called amiable compositeur(s).

If parties in their agreement to arbitrate existing or future disputes empower their arbitrator to proceed as an amiable compositeur, that would be tantamount to ousting the provisions of Article 15(2) of the civil procedure code, unless it is arguable that parties can not contract out the exclusive jurisdictional power of the High Court vested in it by virtue of the said provision. Unless the existence of Article 15(2) is taken as a prohibition (to meet the requirement of the last part of Article 315(2) of the same code),

not to submit to arbitration disputes emanating from any one of those areas, there is no convincing reason, I would say, why parties can not submit disputes of at least some of those matters to arbitration.

Off hand, what is it, for instance, that prohibits the submission of disputes arising from insurance policies (Article 15(2) (c) of the code to arbitration? I wonder if there is any public policy reason that precludes insurance disputes from being submitted to arbitration. If the provision of Article 15(2) (c) of the code is to be construed as showing the inarbitrability of insurance disputes, then those arbitration clause in a number of standard policies that have been in use and currently in use by the Ethiopian insurance corporations are to be taken as contrary to the spirit of the above-mentioned provision, and hence are not to be given effect. The clauses may, as well, be taken as an evidence showing circumstances of opting out the application of Article 15(2) (c) by parties to insurance contracts, thereby waiving their right to initially submit their disputes to the High Court and only to it. True, the legislator might have had it in mind that consumers (insurance policy holders) and insurers usually are unequal parties and hence might have thought that policy holders need to be given the backing of state courts, in fact that of the High Court right from the initiation stage of their cases.

One also wonders if there is a public policy reason why suits relating to the formation, dissolution, and liquidation of bodies corporate (Article 15(2) (a) of the code cannot be submitted to arbitral jurisdiction.) Could the legislative worry that triggered this specific provision be the protection of interests of individual third parties so that there won't be miscarriage of justice when arbitrating disputes between giant big business monopolies or trust and individuals? If that is the case, dos it imply that third parties interests cannot be protected through arbitral adjudications? Or is it because formation, dissolution and liquidation of bodies corporate could as well be applicable to the so called "administrative bodies" which category includes the "State, Territorial subdivision of the state, Ministries and Public Administrative Authorities?" (Article 394-397 of the civil code) Though it may be understandable why suits pertaining to the state, its territorial subdivisions, Ministries and Public Administrative Authorities may not be arbitrable; one, but, can't help wondering why suits regarding the formation,

dissolution and liquidation of bodies corporate, for instance associations, may not be submitted to arbitration.

*As mention has been already made, French law prohibits arbitration in a number of specific areas among which “disputes concerning public collectivities and public enterprises” constitute one category. Mr. Carbonneau is of the opinion that it should be emphasized that disputes falling in the latter category “in which arbitration agreements are prohibited has been interpreted to entail lack of capacity of the state and its entities to arbitrate disputes in which they are involved. (T. E. Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration*, *Tulana Law Review*, 1980, p. 9).*

*It is also true that in many countries matters relating to patents and trade marks are excluded from being arbitrable (Rene David, *Arbitration in International Trade*, 1985, p. 188). Bankruptcy is also regarded not arbitrable matter in quite a number of states. But I wonder if Article 15(2) (b) and (d) of the code were formulated with the objective excluding those matters from the purview of arbitrability.*

It is difficult to understand why maritime disputes or suits arising from negotiable instruments are put out of arbitral adjudication. If Article 15(2) of the code in general, and Article 15(2) (b) in particular is to be construed as indicating inarbitrable matters, I wonder as to what construction should be given to Article 209 of the Maritime Code where it is stated that parties to the Bills of Lading may insert arbitration clauses and hence agree to adjudicate their future disputes by way of arbitration as long as they (parties) do not, give power of amiable composition to the arbitrator. In England, maritime arbitration is a very specialized arbitration and for that matter Londoners have a kind of specialized association, the London Maritime Arbitration Association (LMAA) just to arbitrate maritime disputes.

When one thinks of disputes relating to or arising out of negotiable instruments, one necessarily wonders why such disputes or matters pertaining to negotiable instruments cannot be submitted to arbitration. Starting from the Geneva Protocol of 1923, arbitrable matters (at least for international arbitration) were formulated as limited to “...Commercial matters or to any other matter capable to settlement by arbitration.” If

this is the yardstick, there seems to be no reason, why disputes relating to negotiable instruments cannot be arbitrable. After all, negotiable instruments are, typically, commercial in their very nature. Or if according to Article 715(2) of the Commercial Code some negotiable instruments fail to qualify to be in the category of “Commercial” like, “documents of title to goods” or “transferable securities”, could it be argued that the latter two categories of negotiable instruments are not “Commercial” in their very nature? I personally doubt. True, “transferable securities” or “documents of title to goods”, do not, as such, carry “unconditional order(s) or promise(s) to pay a sum certain in money”, a typical characteristics of Commercial negotiable instruments under Ethiopian law (Articles 732, 735, 823, 827 of the commercial code). Minus the requirement of carrying unconditional order(s) or promise(s), however transferable securities are generally understood as “evidence of obligation to pay money or of rights to participate in earnings and distribution of corporate, trust and other property are mere choses in action. Nevertheless, in modern commercial intercourse, they are sold, purchased, delivered and dealt with the same way as tangible commodities and other ordinary articles of commerce...” Being evidence of debt, of indebtedness or of property, transferable securities usually include bonds, stock (share) certificates, debentures and the like. In other literatures dealing with negotiable instruments, it is good to note that the term “securities” is usually preceded by “instrument” and documents known as “transferable securities” in our commercial code are transferable to as “Investment securities”.

“Documents of title to goods” from legal point of view, though they may as well have other meanings, may be generalized as written evidences that enable the consignee to dispose of goods by endorsement and delivery of the document of title which relates to the goods while the goods are still in the custody of the carrier or in transit. Documents of title to goods may as well be evidences as to the title of the person claiming the status of a consignee of the goods.

The generic expression of documents of title to goods in modern business, includes Bills of Lading, Airway and Railway Bills, depending on whether goods represented by the document on title are carried by sea, air or by rail.

In so far as documents of title to goods are very much related to international sale, purchase and carriage of goods, it is hard for one to categorize such documents as falling outside the purview of commercial transactions and/or relationships. As transferable securities and documents of title goods, the other two categories of negotiable instruments given recognition by the Ethiopian Commercial Code, are not, function wise, away from business activities, there seems to be no reason why disputes arising from or suits relating to negotiable instruments irrespective of whether the instruments fall in the category of commercial, transferable securities or documents of title to goods may not be submitted to arbitration.

What about those matters stated under Article 15(2) (e) and (f) of the code? Should matters that pertain to “expropriation and collective exploitation of property” be excluded from being seen as matters capable of being arbitrated in Ethiopia? In as far as expropriation results from an act of a competent public authority, and in as much as an “authority” is to be taken as “administrative body”

There may be the possibility of arguing that matters relating to expropriation are inarbitrable. The private person whose interest is affected by expropriation, it seems, may apply to a competent court of law where he/she thinks is expropriated outside the spirit of the relevant constitutional provisions, if any, or without due process of law. Otherwise, disputes arising out of a competent authority’s appropriate decision to expropriate and the dispute (agreement) ensuing because of resistance of the interested owner to such a decision, cannot be submitted to arbitration on the ground of sovereign immunity. Nevertheless, it is worthwhile to note that though disagreements relating to expropriation per se are inarbitrable, matters of compensation due by expropriating authority to the owner of an expropriated immovable and possibly the claims of third parties against the expropriating authority may be submitted to arbitration (Article 1467(3) cum 1472ff).

What about disputes pertaining to “collective exploitation of property”? Would there be a valid public policy reason why such disputes may be regarded as inarbitrable? Why should, in particular, disputes arising from collective exploitation be termed to be inarbitrable where all the parties concerned have freely consented to arbitrate? One possible reason why such disputes may be seen as inarbitrable might be because of the plurality of the parties involved, lest it might be difficult to justifiably safeguard the

interests of all of them. Imaginably, the interests of the pluri-parties concerned could be quite complicated and such multiple interests and the ensuing complication it creates may, as well, constitute sufficient public policy reason not to submit such dispute to arbitration. Moreover, an arbitral tribunal generally doesn't have the power to order the consolidation of actions by all parties involved even if this would seem to be necessary or desirable in the interests of justice.

With respect to suits relating to “the Liability of public servants for acts done in discharge of official duties” (Art 15(2) (f) of the code), it would be argued that the exclusion of such suits from the ambit of arbitrable matters may be justifiable based on the widely known reasoning of sovereign immunity again. Under Art 2126 of the civil code, (It is worth to note that arbitration, save in situations it is imposed by law, arises from contract. Doubt may, therefore, be expressed whether tort cases are, generally, arbitrable. As to the non arbitrability of suits arising from contracts to which the state or its territorial sub-division is a party, and may be the liability of officials involved in state contracts, Art 315(20 of the civil procedure code is the only authority available.) whose title reads: “Liability of the State” particularly in the second sub-article, it is provided “Where the fault is an official fault the victim may also claim to be compensated by the state, which may subsequently recover from the public servant or employee at fault.”

The above quoted provision shows that the state, almost certainly, becomes a party to literally all suits instituted on the basis of this provision (the state, it is submitted, is presumed to be financially better off than the official, employee, or public servant that causes the damage by his fault.). Article 2128 further states that the provisions of the two immediately preceding articles apply to the liability of public servants or employees of a territorial sub-division of the state or of public service with legal status (Art 394ff of the civil code).

Those suits emanating from sub-sub-articles (g) nationality; (h) filiation and (i) habeas corpus of Art 15(2) of the code may be said, fall outside the purview of arbitrable matters. Suits relating to these matters are instituted based on specific legal provision(s) and usually for the personal protection and interests of the person(s) filing them. The state and the public at large would, normally, have interests in the final outcome of

cases pertaining to these matters as well. Nationality “represents a man’s political status by virtue of which he owes allegiance to some particular country.” This, without more, can be taken as indicative of the interests of the state in nationality suits and which may constitute a sufficient public policy reason why nationality suits should not be submitted to private adjudication.

As to filiation, which is “primarily the relation of parent and child,” it would, I think, be possible to argue that such suits (filiation suits) are inarbitrable. The society would definitely be interested in the final outcome of filiation cases, and the law wouldn’t want, as far as practicable, that children be left without fathers or mothers. From family matters, filiation seems to be the only aspect that may have been envisaged as inarbitrable, for other family disputes particularly divorce cases and those related ones are compulsorily arbitrable in Ethiopia. (Art 725-737 of the civil code).

Generally, matters relating to status, like filiation, nationality, etc. are regarded as inarbitrable. Family disputes are not regarded as arbitrable in quite a number of jurisdictions, and ours in that respect is an exception that came about, presumably, because of tradition.

Suits (actions) relating to habeas corpus, for sure, can’t be arbitrable. Robert Allen Sedler, based on Article 177 of the civil procedure code argues that, habeas corpus suits are actions for a writ “usually sought by persons in custody on a charge of having committed a penal offence, and that the action to obtain the writ is considered a civil action”. Often it is expected that the official to whom the writ is addressed might refuse to obey to “bring the body” to court and it is in that respect that the compelling power of the High Court for the public official in question comes in to play. So, it may be said that it is understandable if actions for suits of habeas corpus are said to fall outside arbitrable matters.

VI. Arbitrability and Objects of a valid Contract

Finally, in the absence of provisions supplying us with adequate guidelines of arbitrability in Ethiopia, we would, I think, make some further interpretational endeavors. Except for the provisions of Article 315(2) of the civil procedure code and in situations where the law provides for a compulsory one, arbitration arises from

contracts whether it is an agreement to submit existing or future disputes to private adjudication. If arbitration emanates from contracts, it is, by virtue of Article 1676 of the civil code, subjected to the general provisions of contract i.e., Article 1675-2026 of the civil code and without prejudice to the application of the special provisions of Arts 3325-3346 of the same code and probably Arts 315-319 and 461 of the civil procedure code. If arbitration is subject to the general provision of contracts, then the requirements laid down under the provisions of Art 1678 viz:

No valid contract shall exist unless:

- a. The parties are capable of contracting and give their consent sustainable at law;*
- b. The object of the contract is sufficiently defined and is possible and lawful;*
- c. The contract is made in the form prescribed by law, if any*

apply to arbitration. From among those elements mentioned under Article 1678, the requirement that the object of a contract must be sufficiently defined, must be possible and lawful for it to validly exist in the eyes of the law, are quite pertinent to the subject of arbitrability. It may be debatable whether those three strict requirements do squarely apply to the arbitration agreement per se. Nevertheless, they definitely do apply to the underlying contract for the enforcement, variation, or interpretation of which parties agree to submit their disputes to arbitration. It could, therefore, at least be said that disputes arising from illegal or immoral underlying contracts cannot be arbitrable. Problems are bound to arise when an arbitral tribunal constituted to adjudicate a dispute arising from contracts having illegal or immoral objects seeks the assistance of the court of the place where it is stated. Problems might as well arise when recognition and enforcement of

Questions:

1. What do you say about the scope of arbitration in other undetermined subject matters of disputes?
2. Can we safely conclude that all criminal matters are inarbitrable? (Hint: in criminal matters some crimes are prosecutable up on complaint)

3. Under Ethiopian law courts may appoint arbitrators in default of parties or arbitrators to do so. When is the court required to appoint arbitrators? Is there any limitation as to who should be appointed by the court?
4. *What is amiable compositeur* and its place in Ethiopian legal system?

3.7.5. Arbitration Proceedings

As per the objective of the law, arbitration proceedings have to be made expeditiously and fairly. In the parties' failure, arbitrators will determine the place, time and language of the proceeding. The proceedings, however, as per article 317 of Civ. Pr. should be nearly the same as a proceeding in a civil suit. These are: -

- i. Summoning parties (in their failure to appear – judgment in default), and fair hearing of parties and their evidences (Art. 317 c.pr.),
- ii. Inspection of documents and summoning of witnesses (rights and duties of witnesses are similar with court witnesses) (Art. 317(3) c.pr.),
- iii. When an arbitrator is discharged, any court can appoint them up on application by any party (Art. 316(3) c.pr.).
- iv. Parties can determine a period within which the award must be given and they can extend it (Art. 318 c. pr.).
- v. Decision to be given by a majority vote if there are more than one arbitrator (Art. 318 c. pr),
- vi. Successful party should have the award confirmed by the court that has jurisdiction to see the dispute (called homologation) (Art. 319 c.pr.),

3.7.6. Arbitral Award

Final decision or judgment of an arbitrator(s) on all matters referred to arbitration is called the *arbitral award or award*. No special form is provided, but it should be in the form provided for judgment and signed and dated by all arbitrators (Art. 318 (4) c.pr.). This shows that award should be in a written form. It should contain clear, final and certain awards over dealt matters, i.e., reasoned awards. As per article 318(2) Ci.

Pr., unless it is determined earlier, awards should include costs of arbitration. Copy of it will be served to both parties. Award will be executed as judgment after homologation (court affirmation)(Art. 319(2) c.pr.).

A. Appeal from the Awards

A party can appeal from the awards of arbitrators to ordinary court in the grounds listed below. But parties can waive this right if they are with full knowledge of the circumstance (Art. 359 c.pr.). The procedure is similar with the making and hearing of an appeal from a judgment. Such jurisdiction is given to a court which would have had appellate jurisdiction had the dispute not been referred to arbitration (Art. 352 ccc.pr.). The grounds of appeal are; in consistency, uncertainty or ambiguity of the award or when the award is wrong in matters of law or fact, or the arbitrator omitted to decide matters referred to him. In such instance the appellate court may confirm or remit to the arbitrator to reconsider it within three months. Other grounds are irregularities of proceeding and misconduct of arbitrator, i.e., partiality of arbitrators, which can be confirmed or varied as the court thinks proper (Arts. 351 and 353 c.pr.).

B. Enforcement of Awards (Arts. 456-461 c.pr.)

a. Foreign arbitrary awards- conditions to be fulfilled (Arts. 458 and 461 c.pr.)

1. A written application to the High Court where execution is to take place. It should contain certified copy of the award and court certificate showing that the award is final,
2. Reciprocity- i.e., execution of Ethiopian arbitral award must be permitted in the country where the award sought to be executed was rendered.
3. Award given following regular arbitration agreement or other legal act in the country where it was made.
4. Parties were given equal opportunity in appointing arbitrators and hearing,
5. Matters not prohibited to be submitted to arbitration as per Ethiopian law,

6. Award not contrary to public order and morals, and enforceable as per Ethiopian law,

The court will summon parties and ask to present his observance. Except where hearing is ordered, decisions will be given according to the application. When the application is allowed, the award will be executed as if it had been given in Ethiopia.

- b. **Domestic awards-** if the award was given in Ethiopia according to the conditions listed above – 3, 4, 5, 6, it will be executed as judgment of a court after homologation (Art. 319(2) c.pr.).

C. Setting Aside of Awards (Arts. 355-360 c.pr.)

Application to set aside awards has to be made to a court who has appellate jurisdiction had the dispute not been referred to arbitration within 30 days from the making of the award. Making and hearing of application is similar with making and hearing of opposition (Arts. 355(3), 358 and 359 c. pr.).

There are limited grounds for application. As per art 356 Civ. Proc.Code

- a. When arbitrators decides matters not referred to it or when the submission was invalid or had lapsed,
- b. In case of two or more arbitrators, when they did not act together,
- c. When arbitrator delegates his authority to a stranger, to one of the parties or to a co- arbitrator.

After receiving the application, the court will fix date for hearing and will summon and serve the copy of application to the other party. The application may be dismissed which validates the award given, or the award will be null and void and will be set aside if the application is granted (Art. 357 c.pr.).

Questions:

1. Ato Fitsum and W/ro Askala had a conflict over the ownership a minibus which exists in Ethiopia .The disputants are Ethiopian nationals but living in USA. They

took their dispute before an Arbitration tribunal established in the land of USA. The tribunal decided in favor of W/ro Askala. She brought the award decided by the tribunal and wants to enforce it in Ethiopia. What are the specific conditions to be fulfilled for that award to be easily enforced in Ethiopia?

2. Ato Yaregal and Ato Solomon referred their dispute to be decided by arbitration and they appointed Ato Liul, W/ro Semira and Ato Zergaw as arbitrators. The tribunal decided the case in favor of Ato Yaregal. Later on Ato Solomon came to know that one of the arbitrators Ato Zergaw never involved in the decision but rather was replaced by Ato Tigabu. Now Ato Solomon wants to raise such fact and raise a claim before court of law.
 - A. what type of legal action can he raise? How and why?
 - B. which court has a jurisdiction to hear his case? (Assume that the Federal High Court would have a jurisdiction, had the case not been referred to Arbitration)

3.7.7. Institutionalized Practice in Ethiopia

When we talk about institutionalized arbitration practice in Ethiopia, we are referring to entities or organizations or association which are established solely or incidentally to serve as a forum for the disposition of disputes by employing arbitration proceeding. These duly registered institutes work not only as a forum to facilitate the smoother bargaining between the disputants but also work in the fostering of arbitration and introducing the ADR options for the society and judicial offices. The existence of these institutes to the minimum helps the society to use the ADR options backed by framed rules of these institutes, encourages disputants to use the option and not to question the lack of forum as one obstacle, create awareness about the alternative through their different activities and forums.

A branch under Addis Ababa Chamber of Commerce and the Ethiopian Arbitration and Conciliation Centre (EACC) are the two currently well functioning institutes practicing institutionalized ADR, more widely arbitration, in Ethiopia. Often these institutes dispose disputes by arbitration and they have framed rules to guide the proceeding other than the mandatory laws enacted by the state which the parties might be obliged to adhere. With regard to EACC, it has Mediation Rule and a well furnished room to accommodate

mediation proceeding, which is different from the room where arbitration will be held. Let's see these institutes in detail and how they work.

3.7.7.1. Ethiopian Arbitration and Conciliation Centre (EACC)

A. Background

Ethiopian Arbitration and Conciliation Center (EACC) were established by a group of Ethiopian lawyers, with the aim of providing an alternative mechanism for private dispute resolution. The Center provides arbitration and mediation services on commercial, labor, construction and family disputes. It is an independent body and facilitates the resolution of disputes in a non-adversarial atmosphere, by providing a service that is less costly and time saving than court litigation. Currently, the program is implemented in Addis Ababa with future plans to expand to the regions, in order to make the service accessible nation wide. (Currently one of the regional offices is on the way to be established in Arba Minch, in SNNP) The Center is governed by a board of directors who meet regularly.

EACC was registered at the Ministry of Justice of the FDRE, as a non-profit juridical entity, according to the 1960 Civil Code of Ethiopia and Legal Notice No. 321 of 1966. The Center was inaugurated on the 7th of August 2004, in the presence of the Vice Minister of the Ministry of Justice and the Vice President of the Supreme Court. More than 200 people, including various representatives of the public, business people and, legal and other professional attended the inauguration ceremony, which received wide media coverage. Brochures in Amharic and English, which provide an insight into the Center's objectives and activities were prepared and disseminated. These can now be accessed from EACC's offices.

EACC receives funding for its activities from Canadian International Development Agency (CIDA) and Swedish International Development Cooperation Agency (Sida). Furthermore, on a project basis, EACC receives funding from Initiative Africa and French Embassy. EACC has recently received funding from Japan Embassy.

B. Objective of the Centre - EACC has the following specific objectives:

1. Providing a less costly and a more rapid system of dispute resolution and contributing to the reduction of the current overload on the court system;
2. Providing ADR services, to the business community, by making available a wide range of expertise, for resolving commercial disputes;
3. Providing to the needs of the community as a whole, by dealing with construction, contract, labor, tort, inheritance, and family disputes, including divorce, child custody and maintenance;
4. Providing professional ADR training for those who wish to qualify as arbitrators, conciliators and mediators;
5. Make use where appropriate, traditional methods of dispute resolution, particularly through mediation and reconciliation, and to that end, develop and promote these services to adopt to the needs of the newly emerging needs of the community;
6. Providing 'training of the trainers' course to qualified ADR professionals, in order to enable them to train those involved in the provision of traditional dispute resolution to the community.
7. Preparing a “Roster of ADR Professionals” qualified to provide ADR services and monitoring the activities of mediators, arbitrators and conciliators as detailed under the ‘Rules of Arbitrators and Mediators’, which has been prepared by the Center.
8. Organizing and providing appropriate facilities, for arbitrators, mediators and conciliators, such as appropriate venues and archives;
9. Developing a working relationship and exchange of experience with like minded national and international organizations, and foreign arbitrators and mediators, especially where a case involves foreign investors;
10. Conducting research into arbitration, mediation, and conciliation, and disseminating the findings of the research and educating the public, with the objective of introducing to the public the benefits of using the Center’s service and creating overall public and official awareness on ADR;
11. Advocate for law reform by way of the introduction of a legislation on ADR and related policy changes;

12. Make accessible a reference and documentation section on arbitration, mediation and conciliation, for legal practitioners, academics and students.

C. How to Use the Service:

Parties could stipulate in their contract, that in case dispute arises to use the E.A.C.C in resolving their dispute. Moreover, parties in dispute could direct their case to the E.A.C.C to get the center service.

Here are Model Dispute Resolution Clauses which the parties might make;

1. Parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the Ethiopian Arbitration and Conciliation Center under its Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

2. Arbitration of existing disputes may be accomplished by use of the following:

"We, the undersigned parties, hereby agree to submit to arbitration administered by the Ethiopian Arbitration and Conciliation Center under its Arbitration Rules the following controversy: (describe briefly) We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award."

3. Parties can provide for mediation of future disputes by inserting the following clause into their contract:

"If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the Ethiopian Arbitration and Conciliation Center under its Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure."

4. If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission:

"The parties hereby submit the following dispute to mediation administered by the Ethiopian Arbitration and Conciliation Center under its Mediation Procedures. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)"

An interested party should lodge his/her case with the E.A.C.C, by completing a form which can be obtained directly from our website or by contacting the Secretary General at the Center. Once this form is lodged with the E.A.C.C, it will then be assessed in order to ascertain whether the case falls within the rules of arbitration. The applicant will then be informed of the outcome. If a case is accepted and arbitration is deemed to be suitable for resolving the dispute, a notice will be sent to the other party, in order to notify him/her of the case and to allow him/her to prepare a defense. In the case of mediation, the other party is contacted for his agreement to resolve the dispute through mediation. If he/she agrees the case then proceeds to the next stage.

D. Arbitrators and Mediators:

All arbitrators and mediators are qualified lawyers & experts in other fields with years of experience and training. Once parties decide to resolve their disputes through arbitration or mediation, they will then be provided with a list of arbitrators or mediators. The parties will be given a reasonable time in order to choose an arbitrator or a mediator from the list. Alternately, if the parties fail to respond within reasonable time, then the center will select a suitable arbitrator or mediator to adjudicate the case.

EACC maintains a roster of trained arbitrators and mediators which contains details of qualified mediators and arbitrators. Where a case requires a foreign arbitrator, EACC can arrange for the same as it has agreements with foreign ADR organizations that are willing to provide the service.

E. Arbitration Rule of the Centre

The rule has 43 articles divided in to five further chapters. The first chapter – General Provisions (Arts. 1 – 9) comes exactly next to the preamble and discusses generally about arbitration, its effect, scope and related matters. Chapter two entitled as 'Arbitration Tribunal' (Arts 10 – 15) is dedicated for matters related with the arbitrators – ways of nomination, discharge from office etc. Next to this we have Arts 16 - 33 which deals about the detailed procedural rules that guide the conduct of the arbitrator and the disputants. The next chapter which runs from Art 34 to 36 is exclusively about the award – the nature, content, effect etc. Lastly, we have the Miscellaneous Provisions (Arts 37 – 43).

For better understanding of the rule, in the following discussion we will try to evaluate this rule with the some of the existing and widely used principles that we have discussed under chapter two, its relation with the mandatory laws of the state and how it tried to address some of the contentious issues over the proceeding.

I. Flexibility of the whole proceeding

Flexibility refers to the non-rigidity of the proceedings in relation to normal court litigation i.e. the rules of the centre can be applied or changed based on the consent of the parties to the arbitration. This stresses on the rights of the parties than their duties on the other hand, it is unto the parties to be ruled by these rules or by their own rules of agreement when they come before this centre.

The rules of arbitration under EACC are aimed to be flexible. This can be inferred from the reading of the rules Arts (10 & 11) which gives the parties the rights to determine the numbers and the procedures of appointing the arbitrators. This means the parties, without

prejudice to the mandatory provisions of the law, can elect any odd number of arbitrators, either from their relatives or out side based on their free willing and they can also determine ways how to appoint these arbitrators This concept is also given under our 1960 civil code art. 3333. While in normal court preceding this concept is highly under the absentee discretion of court and laws rather than under parties' discretion. This in turn shows the more flexibility of arbitration proceedings than that of the normal court litigation.

Art (20 & 21) says, both place and language of proceeding are also chosen by parties before the arbitration center determines where to proceed their case and through which language the proceeding has to be conducted. They can do this through agreement they make before they come to the center Arts. 5(2) (6) or 5(2. 6). While in normal court litigation forum and languages are provided by laws and courts based on the jurisdiction (Judicial, material and local), type of cases and parties involved in the case and other grounds for selection of places and languages.

(Art 22) reads as “ parties can choose applicable laws regarding their case”. Thus, it is up to them to be ruled by any rules or regulations while appearing before arbitration center. The center can't enforce them to be governed by the rules of the center when they have chosen their own rules. Parties can make this choice on their petition of agreement Art 5(2.6).

Art 36 and 38 also gives the flexibility of the arbitration centre. Under art 36 the parties can request for the interpretation and correction to be made on the award if they want, and this shows how much the center's rule is flexible to review the award or to interpret the award Art 38 further gives parties the right to settle the dispute out of the centre before the award is made and they begin to follow the proceeding, and so they can leave the proceeding based on their consent.

In general, this Arbitration Rule shares the principle of flexibility than court proceedings. When we say these rules are flexible, we are not saying that there are no rules which are rigid in their nature for example arts (31(1) & (2), 38 (2) ... etc) are rigid provisions.

II. Neutrality and Impartiality

As Black law dictionary defines neutrality dictates judges, arbitrators, mediator or actors in an international law to refrain from taking side in disputes.

From the very purpose of ADR and also arbitration, the proceedings have to be fair between parties and this is fictitious with out being neutral and impartial. These two principles can be attained by giving equal places and equal considerations to both parties and giving decision only based on rules and evidences but not based on biased attitudes and minds. These terms refer to the state of mind or attitude of the arbitrator in relation to the issues in question and parties to the particular case.

Art 12 (1) (2) & (3) deal with this principle of neutrality and impartiality. It provides even to take an oath which the arbitrator fears not to be partial since human being in nature fears his oath. This principle seems similar with normal court proceeding for judges as per Art 18 of FDRE constitution required to take an oath.

Art 26 (2) reads as [#]Tribunal may refuse to grant leave for amendment when it is convinced that the request is made with view to causing undue delay or harassing the other party^s. When we scrutiny the basis of this provision, it is to help the arbitrators give equal opportunity for the disputants and see them in equal eyes. Art 34 also confirms the already said principle for the award need to be given through the majority rule. So any other case of giving award other than the principle of majority is termed to be bias and unfair which constitutes absence or failure to comply with neutrality and impartiality. Generally, majority rule implies the existence of fairness and justice which is the end product of neutrality and impartiality.

But here as per Art 11 parties can elect any person of their choice as arbitrators and they may appoint their relatives or parents or neighbours who can keep their best interests. This might affect the neutrality of the arbitrator in some instances for such persons

nominated as arbitrators stand for the interest of the disputant who nominated him. A little guarantee for this problem has been listed under article 13(2) i.e. when it is "proven that he has acted with clear partiality in favour of one party at the expense of the other" the other part can apply for his removal from his office. Similarly, civil code art 3340 and 3341 also provide the removal of arbitrators when he becomes partial through the application of the other party to guarantee the arbitrators neutrality.

III. Independence

There are two in dependences:

- (a) Functional (decisional) independence:-This independence deals with the liberty of the arbitrator while giving an award. He should not be influenced by any external influence. He has to depend only on laws rules and evidences.

- (b) Institutional independence (organizational):-This refers to the independence of the center rather than that of the arbitrator. The center should be free from external influence in it's over all activity. When the center deals with the budget allocation or similar cases, it should enjoy this type of independence.

But it is the first type of independence, which is the relevant one in our dealing. Art. 12(1) provides the functional independence of arbitrators. Art. 39 also give the exclusion of the arbitrator of liability in rendering awards based on rules and laws. This implies that, arbitrator is not liable for any damages if he complies with the mandatory provisions and rules; so he enjoys independence. But if he breaks the mandatory provisions and rules provided by this center, he will be accountability. That means he will be liable for any infringement he made and this makes ADR proceeding especially, Arbitration similar to normal court litigation.

IV. Confidentiality

Secrecy is the state of having dissemination of certain information restricted. Confidentiality of relationship is characterized by trust and willingness to confine the message in the others wind (e.g. between attorney and client). This means any arbitrator shall have the obligation to keep in secret the personal or organizational information of

the parties coming before them to settle their disputes. Art. 24 says "unless the parties agree other wise or the law provides to the contrary the hearing and ruling of the tribunal shall remain confidential".

Any information of a party shall be kept secret but to what extent this confidentiality extends? To whom it will be applied? What constitutes confidential? Is every information confidential? The rule doesn't answer all these questions and it is left for interpretation.

About the extent of confidentiality many says that though the nature of the case affects the reasonable time, it has to be extended to the life span of the arbitrator. This is because one of the objectives of ADR is to keep the secret of the parties to bring conducive situation for their future relationship. But the arbitrator may reveal it when the parties give their consent, or for the benefit of society at large, or to defend him self before the judiciary ... etc. The arbitrator can't reveal it to any body without the case mentioned under (b) to his wife.

V. Expenses before the Tribunal

Generally it is obvious that there would be some amount expense to be incurred through out of these proceedings. The same is true in case of arbitration service. Though parties benefited more, they are required to pay some amount for the center which gave them service and for witnesses who testified their testimony. Expense includes the payment for the arbitrators, cost of transportation of witnesses and other costs fixed by the rules. But there is no administration fee to be paid to the centre for the service it has delivered.

Art 28(4) makes the party who calls a witness to whom language interpreted is provided to pay the fee for the interpreter. But what if the party cannot afford the payment? The amount of payment may be as well a source of controversy. Art 29(4), 30(1) and 37 also mention costs and fees to be paid. But, the amounts to pay and criterion or procedures to be taken in assessing these costs and fees need to be well stated.

Art 41 imposes a burden to pay costs on the losing party this is very reasonable as far this article puts limitation on 3rd party not to bring an innocent person and unjustifiable matter

before this center. It is up to 3rd party to pay all expenses incurred due to a case brought by him without having any reason to sue a person. But the amount to be paid is not known. It is fixed by the tribunal any how it should be reasonable payment.

VI. Quality of Outcomes

Quality of outcome can be influenced by qualification of arbitrators and the devices of gathering and treating evidences.

a. Qualification of arbitrators

A judge in court litigation is expected to be a qualified lawyer and the same requirement is put under Art 4(2). This requires the arbitrator in the centre's list to be a highly qualified person in his profession with proved competence and experience, a person who commands high esteem and moral standing in the community, one who upholds the rule of law, and one reputed for his dispute management skills. Arbitration service is a huge service to community so the one who gives this service has to be well qualified at least in fields having certain connection with the subject matter of the dispute

b. Treatment of Evidence

To say the decision given is reasoned and best quality, the handling of evidence must be looked as well. The manner of conducting the proceeding, order of presenting evidence, relevancy and admissibility of evidence...etc are decided by the tribunals if the parties failed to agree (Art 17). Art 28 also puts ways of conducting the proceedings and presentation of evidences and the order of presentation are - parties present evidence orally, additional evidences required (if any), tribunal hears and determine its relevancy and admissibility.

Is there examination of witnesses in arbitration? Art 317 CPC and art 3345 of civil code answer this question these law articles together say, procedures in arbitration shall be the same or governed by civil procedure code. In addition, Art 16(2) of the rule states that the relevant laws shall apply on matters of procedural that are not covered by these rules or by parties' agreement. Thus, the rules of examinations of witnesses under civil procedural

code are applicable under arbitration through the commutative reading of all the above articles of civil code, civil procedure code and the rules under arbitration.

Since arbitrators are highly experienced persons in their profession and evidences are also treated as we treat them under normal court litigation, including the examination of witness and determination of relevancy and admissibility, we can conclude that the quality of arbitration out come will be reasoned decision (award). But this quality may be affected when parties appoint their own arbitrator who may not fulfil the requirements under these rules.

VII. Arbitrable Matters

The rules of EACC did not solve the problem regarding to arbitrability. It simply provides that arbitrable disputes to mean any civil dispute, which is subject to adjudication by arbitration under the relevant law (preamble and Art 2). The existing problematic rules on arbitrability under the relevant laws are left unabridged by the rule of EACC. It is with the aim of filling this gap, that we proposed public policy and other justifications in order to enable us decide on issue of arbitrability under the relevant laws of Ethiopia.

F. Mediation Rule of EACC

Relatively speaking the rules regulating mediation is smaller and less detailed than that of the centre's arbitration rule. There are only 15 articles with out further division to deal the whole issues. For a better understanding of the centre's mediation rule, this is the only one in its type in Ethiopia, we will compare it with the overriding principles in the general jurisprudence and Ethiopian laws, and how it addresses the basic issues. Through out of the following discussion we will notice that the rule used the term "mediation" instead of "conciliation" which is used by the laws of the state like the civil code. Why is that so happened? Do you think it is a mere mistake or intentionally done since the two concepts are not totally different?

I. Neutrality

Though the function of the mediator is not decisive as compared to arbitrator so far as he is one who inserts input for the final settlement of disputes, he shall perform his duty neutrally. As we clearly infer from the rule, the mediator is an investigator of evidence and he is one who forwards settlement and frames issues. Though the mediator doesn't finally determine the result of the dispute, unless this function is performed neutrally it endangers the outcome of the case. What needs to be emphasized here is that he is with a persuasive power in the process. The neutrality of the mediator may be affected either from the relation that he has with the issue or the party and the threat exerted from the outside.

- i. **The relations of the mediator with the party:** - This potential relation emanates from the manner of appointment. The rule suggests the existence of one mediator ([Art 12\(2\)](#)) as to whose identity the parties have agreed. If so he is one who parties relay their trust and confidence. This specific rule closes the door for the possibility of functioning in determinant of one party. So the given priority for the existence of one agreed mediator is a rule created for avoidance of partiality. But we're in suspicion of other rule which gives each party the right to appoint a mediator unilaterally than by mutual agreement. There is no or little reason for this person to be neutral rather than predisposing the matter in favour of his appointment. The rule as a method for fact finding process allows separate meeting ([Art 6\(5\)](#)), but from the view of neutrality, he may negotiate his neutrality while he spent time with one party.

- ii. **The relation of mediator with the issue at stand:** - since the mediator has a possibility of engaging in many activities, his interest may be involved directly or indirectly with the issue at hand. Really, the mediator doesn't act contrary with which finally affects his interest. So he may not be neutral at such a case. The rule needs to fabricate a device to avoid such danger. But we're not lucky to see any rule which prohibits mediator from entertaining some matters or there is no place which have effect of disqualifying the mediator from his position.

II. Flexibility

Flexibility is very important ingredient of mediation. Concerning this matter our civil code provides some provisions (Art 3318(1) and 3320), but the rule enacted by the center is more flexible for the parties since it provides specific provisions. From the very beginning until the final settlement, consent of the parties have a great place. When we consider scope of application of the rule, it depends up on the discretion of the parties to apply or reject (Art 2(2)).³⁰ This means if the parties bring another rule of mediation, the rule enacted by the center has no place. Besides this, even if the parties agreed to apply rule of the center, there are a lots of discretions left for them.

As to appointment of mediator respective consent of the parties are very crucial (Art 6(2)). Flexibility of the rule extends up to the determination of venue by the parties. If the parties did not agree to the contrary, it will become the head office of the center. (Art 7(4))

Finally we consider flexibility in relation with the result or settlement. The mediator after fulfilling mediation procedure and believe that there is a ground of settlement; he formulates his own terms of settlement in writing. In this time the parties have the right to accept or reject the settlement brought by the mediator (Art 12(6)). Therefore, this all shows us how the rules enacted by the center are as flexible as the general rules of mediation orders.

III. Scope of Mediation

We understand from the preamble, the center only consider those civil matters brought by the parties to solve their dispute amicably. The center accepts two types of cases (Art 12(7)); when parties bring their case by realizing the benefit of amicable dispute settlement mechanism and when a court ordered mediation- some times courts order parties to solve their dispute by rules of mediation when it believes that, the parties settle their dispute effectively.³⁵

Even if the rule provides some guideline as to cases which can be entertained by the center, it is still defective by failing to provide those civil cases which can not be settled by mediation. The reason is that, in order to protect public interest it is obvious that some civil cases like administrative contract prohibited from being entertained by arbitration might not be possible for mediation as well. So there is a lacuna as to this matter, because this rule of mediation did not provide such matters excluded from mediation.

IV. Time Limit

Our civil code provides time limit for the mediator to carry out his duties³⁶. The rationale behind providing such time limit is that to fulfil the purpose of law, i.e. speedy proceeding and speedy settlement of the dispute. However, the rule made by the center did not constitute any provision in relation with time limit. This may affect the parties by blocking speedy settlement of their dispute.

V. Confidentiality

All matters which have been raised in then proceeding could be kept confidential between the parties as well as the mediator.³⁷ Even if the case is finally brought to the court or any arbitration tribunal or any adjudicatory organ, the out come of the mediation should not be introduced as evidence for the new litigation¹⁸. So through out the proceeding until the disposition of the mediation, confidentiality has to be extended³⁸

Confidentiality is not the only issue through out the settlement of a dispute, but after the process has been finalized it should continue as confidential as before. The mediator shall not represent at any rate in any judicial or arbitral proceedings in supporting one of the disputant and to the disfavour of the other, as far as between the same parties and the case brought the litigation is the matter what he had a role on it³⁹ The information what he knows in the mediation process prohibits him even to be called as a witness in the same dispute and among the same parties.⁴⁰ Generally, the disclosure of information in relation to the process, in any form is not allowed whether by the mediator, by the parties or by the center. But it is not as such absolute, there are some exceptions which lead disclosure acceptable, when it has been provided by law⁴¹ and as well when revealing is necessary for the implementation of the settlement. From the above discussion we can decide that

the way of disclosure is under a very rarest case and with in a justifiable ground. Therefore, the confidentiality element has been absent in other legislations including Ethiopian civil code.

3.7.7.2. Addis Ababa Chamber Commerce and Sectorial Association Arbitration Centre

A. Background

The Addis Ababa Chamber of Commerce and Sectorial Associations, established in 1947, provide technical and advocacy services to help business people start, run, and grow their businesses. Today the AACCSA is the only organization that provides a wide range of non-financial assistance to business in the country. The AACCSA also plays a major role in voicing the business concerns to the government. With over 7,000 registered members, the AACCSA is the largest and oldest chamber of commerce in Ethiopia. It is the only representative body that speaks with authority on behalf of the business community. The AACCSA is an autonomous non-governmental, non-political and non-profit organization that acts on behalf of its members. Since, its establishment it has served its members in promoting socio-economic development and commercial relations with the rest of the world. Its major objective is to promote the establishment of conditions in which business in general and in Addis Ababa in particular can prosper. The AACCSA is today one of the most dynamic civil society organizations representing business in Ethiopia and is active in matters of importance extending beyond its regional geographic base.

B. Mission Statement

The Addis Ababa Chamber of Commerce is set to create an environment in which business in Addis Ababa can develop and grow at a much faster pace. In doing so, the Chamber will encourage the Addis Ababa business community to direct its resources on the critical issues facing our city. In the coming years the Addis Ababa Chamber of Commerce will forge a partnership between the private and public sectors:

- to strengthen Addis Ababa's economy across the six zones,

- to promote a more flexible and hospitable condition for small and medium businesses,
- to promote business ventures that contribute to a large employment base.
- to improve the overall physical condition of the city.

This will be achieved not only by building a team of highly trained and dedicated staff but more importantly by forging a consensus among all stake holders on how best to promote faster and widely shared economic growth.

Business Missions

The AACC strives to strengthen the relationship and co-operation of itself and its members with counterpart organizations and partners in the sectors of International Trade, and Investment. Strengthening friendly cooperative relations by promoting the exchange of business delegates from time to time, and the exchange of publications and other information related to trade, technology and the economy in general, is mutually advantageous in promoting investment and trade relations in various fields. Thus, the Chamber serves as a link between its members and foreign companies by hosting trade missions and providing forums for the exchange of opinions. It also organizes trade missions to different countries and facilitates the establishment of business contacts. The Chamber receives visitors from various countries and organizes business trips for its members abroad.

C. Arbitration Rule of the Chamber

The rule has got articles which are put in to different categories. The first chapter is about the preliminary points, the second about the initiation of the proceeding, the third about the composition of the tribunal, the fourth about the arbitral proceeding, the fifth exclusively about the nature of the award, the sixth about the cost of arbitration and two more schedules dealing with the cost of the proceeding and the declaration of independence to be signed by arbitrators. As we did for the EACC rules, let's see this rule in light of the prevailing principles of the concept.

I. Short Summary on Rules of Arbitration of AACC

I. Institution of proceeding - Any disputes to be settled by AACC should fulfil certain pre-conditions required by the institute. The arbitral proceeding shall start by written application of the parties to the institute which may be in the form of an arbitration clause in a contract or a separate agreement stating disputes which have arisen or which may arise in the future (Art 3). The claimant, upon depositing a down (installation) payment specified in annex 1 of the chamber, shall make application for arbitration. Such application must contain the name and address of the claimant, respondent, arbitrator (if more than one is to be appointed) and advocate, if any, and all documentary evidences on which the claim is based on (Art 4(1) (i) and (ii)). The secretariat of the institute examines the technical sufficiency of the claim and if it finds not sufficient, it shall reject to be completed the formality. But if the secretariat finds sufficient, then it shall send a notice of arbitration with the copy of the claimant's application. It shall send also a copy of arbitration rules, list of arbitrators and arbitration fee schedule simultaneously to both parties (Art 4(2)).

The respondent shall, within 45 days (subject to extension by the institute if there are justifiable reasons) from the date of receipt of the notice, submit his documentary evidences and written defence appoint his arbitrator to the secretariat. However if the respondent has counter claim, by paying the down payment specified in the annex, he shall submit with his statement of defence the facts and reason, and documentary evidences on which the claim is based to the secretariat (Art 5).

The arbitral tribunal may allow the parties to amend their respective claims if it is not too late to raise the request, and such amendment does not affect the proceeding. If the respondent fails to file his defence, then the proceeding shall be conducted by ex-parte hearing. The same rule shall also be applicable when the claimant fails to file a reply against the respondent's counter claims (Art 5).

ii. Appointment of arbitrations - the parties under the arbitration rules of AACC shall freely determine the number of arbitrators, if not agreed, the tribunal shall decide to be three arbitrators (two of them appointed by each and one jointly). But where the case is not complex, the institute may appoint a sole arbitrator. The arbitrators, to keep the

confidentiality and interest to the parties, are expected to be absolutely impractical and independent. There are also other obligations imposed on the arbitration such as entering in to oath and signing on the following "arbitration declaration of independence" and performing in utmost good faith and disclosing any facts or circumstances connected with the case which may put into question his independence in the eyes of the parties (Art 9).

Here it is

I, The Arbitrator whose name is hereunder mentioned, hereby declare and confirm that:

"To the best of my knowledge, there is no reason why I should not serve the Arbitral Tribunal Constituted by the Arbitration Institute of the Addis Ababa Chamber of Commerce with respect to a dispute between ----- and -----."

."I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal."

"I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the International Conventions and in the Regulations and Rules made pursuant thereto."

"A statement of my past and present professional, business and other relationships (if any) with any one of the parties is attached hereto."

Name of Arbitrator: -----

Date of Declaration: -----

Up on reasonable grounds, the parties have a right to challenge appointment of any arbitrator within 15 day from date of appointment. Generally an arbitrator may be replaced only on the following grounds; when an arbitrator dies (Art 12(1)); when he removed due to failure to perform de jure and de facto his duties (11(10)); and when both parties agree to replace him or the challenge got acceptance by the tribunal (12(3)).

However, taking into consideration the comment of the parties and arbitrators, the court may decide, when it deems appropriate, to continue the proceeding with the remaining Arbitrators (Art 12(7)).

iii. Arbitral Proceeding - In the absence of agreement between the parties, the court shall determine the applicable law (Art 21(1)), the language (Art 15) and the place (Art 14) of arbitration on which awards shall be made. On this stage parties have a right to treat and present their case equally. When the court deems necessary, it shall decide whether the proceeding shall be conducted on the basis of the documentary evidences, witnesses (Expert) hearing or oral arguments. But if such party requests to conduct so, the court shall follow it (Arts 13(2) and 16(3)). Subject to prior summon to the parties to appear before it on the day fixed for first hearing, the court shall hear the presentation of their cases in person or representative capacity.

If a party duly summoned fails to appear, without good cause, the Arbitration tribunal shall proceed with the hearing (Art 17(2)). Finally, when the tribunal satisfied that the parties have had a reasonable opportunity to present their cases and evidences, it shall declare the proceeding closed.

iv. Awards and its effects - any order or decision shall be made by majority vote and when there is no majority, the presiding judge may decide on his move. The award shall be in writing and a copies signed by the arbitrators shall be given to the parties. It shall also be final and binding preventing the parties' right to appeal against the awards.

Before an award is made, a proceeding may be terminated on the following grounds:

- If the parties settled their dispute by their agreement (Art 22(1)),
- If continuation of the proceeding becomes unnecessary or becomes impossible (Art 22(2)),
- If a party fails to pay an additional provisional costs in advance during the proceeding (Art 26 (4) and 29(2-4)),

After an award is made, either party with notice to the other party, may request the tribunal:

- To interpret the award (Art 23),
- To correct the award on errors in computation, clerical ...etc (Art 24)
- To give additional award on claims presented in the proceeding but omitted from the award and can be rectified without any further hearing or evidence (Art 25)

The award includes determination of cost arbitration which are fees and expenses of arbitration expert witnesses, institute's administrative expenses and legal & other reasonable costs of the parties during the proceeding. These costs are determined in advance according to the scale set out in annex 1 and considered as partial payment principally and cost in advance shall be payable in equal share by both parties. But the institute may set separate advances on costs corresponding to their claims or set offs (Art 26(2&5)).

The final award shall fix costs of arbitration and decide which party, in what proportion they shall bear them. However, if the proceeding is suspended or terminated, the institute shall render an accounting to the parties on deposits received and return any unexpended balances to the parties (Art 29(5)).

II. Comments on Rules of Arbitration of AACC

First and for most, according to the provisions of the civil code and civil procedure a party submitting an arbitral submission should be capable under the law and have the capacity to dispose of a right with out consideration (for gift) on the matter in dispute (Arts 3326(1) civ.c. & 315(3) c. pr. c.). However, provisions of rules of arbitration of AACC does not clearly state such pre-requests except to have a defined legal relationship, whether contractual or not, irrespective of his minority, interdiction or any other reason incapacitating him to discharge his function properly. The same is true to arbitrators that he could not be an arbitrator if he is not of age, where convicted by a court or unsound mind ...etc (Art 3340(1) c.c.). But no such pre conditions under the chambers rules have been put.

Secondly, Arbitrators shall be appointed freely by the parties and in the absence of such agreement or in case of request, the ordinary court and the institute may appoint arbitrators under the codes and the chamber, respectively (Arts 3332 (3) c.c., 316(1) c. pr. & 7 of AACC). Under the civil code without any regard to his nationality, any person can be appointed as arbitrator. However, if the parties are of different nationalities, the institute may appoint a sole arbitrator or chairman of a nationality, other than of the parties unless otherwise agreed or deems necessary by the institute (Arts 3339(1-2) c.c. & 8 of AACC). Can you justify this part of the rule and whether it is in line with the provisions of the civil and civil procedure codes?

Thirdly, the proceeding before the arbitral tribunal under the civil procedure shall, as near as or be the same as in a civil court. For instance if a witness duly summoned fails to appear, without good cause or intentionally avoided the service of summons the court may issue arrest warrant with or without bail and he may be liable to criminal prosecution for his failure to assist justice (Arts 118 & 317 of c. pr. and 440 cr.p.c. and notes by R. Alen Sedler on Ethiopian C. pr). Even the proceeding in AACC is also more or less similar with that of court proceeding, the institute or arbitral tribunal shall not have a power to order arrest warrant for a witness who is duly summoned and failed to appear before it.

Fourthly, all persons have a right to appeal to a court against any order or judgment of a tribunal which first heard the case (Art 20(6) FDRE Constitution).

The parties shall not waive their right of appeal except such waiver made by the party with full knowledge of the circumstances (Art 350 (2) civ pro). However, the institute clearly prevented the parties to exercise their right to appeal (Art 20 (4) of AACC) except to make application to correct errors on awards. In addition, unlike the arbitration rules of the civil procedure, the institute does not also contain provisions applicable to setting aside awards (Art 355-357 of civ pro) because the institute's award would be final and binding.

Fifthly, as we stated earlier, it is inevitable during the proceeding that the institute and the arbitrators would incur costs and the disputants shall pay in advance as partial payment,

when the proceeding started to secure to bind the parties by the decision of the arbitrations. The fees shall be calculated according to the scale in Annex 1 of the chamber put below.

a. Administrative service Fee Schedule of AACCSA Arbitration Institute

<i>Sum In Dispute in ETB</i>	<i>Administrative Expenses</i>
<i>Up to 50,000</i>	<i>2,000</i>
<i>From 50,001 to 500,000</i>	<i>2,500+3.50% of the amount above 50,000</i>
<i>From 100,001 to 500,000</i>	<i>4,250+1.70% of the amount above 100,000</i>
<i>From 500,001 to 1,000,000</i>	<i>11,050+1.15% of the amount above 500,000</i>
<i>From 1,000,001 to 2,000,000</i>	<i>16,800+0.70% of the above 10,000,000</i>
<i>From 2,000,001 to 5,000,000</i>	<i>23,800+0.30% of the amount above 2,000,000</i>
<i>From 5,000,001 to 10,000,000</i>	<i>32,800+0.20% of the amount above 5,000,000</i>
<i>From 10,000,001 to 50,000,000</i>	<i>42,800+0.07% of the amount above 10,000,000</i>
<i>From 50,000,001 to 80,000,000</i>	<i>70,800+0.06% of the amount above 50,000,000</i>
<i>From 80,000,001 to 100,000,000</i>	<i>88,800</i>
<i>From 100,000,000</i>	<i>88,800</i>

b. Miscellaneous fees

- 1. Registration fee-500.00 ETB***
- 2. Arbitrator/Adjudicator/Conciliator appointment fee-1000.00 ETB***
- 3. Ad-Hoc Arbitration/Adjudication/Mediation Service fee-4000.00 ETB per three months.***

If we take for instance the first schedule for claims involving up to 50,000 Birr, assume there is 10,000 Birr claim in the dispute:

Then the parties would pay,

- 2000 Birr for administrative expenses
- 500 Birr for registration fee
- 1000 Birr for Arbitrators fee
- 4000 Birr for Ad-hoc Arbitration service per 3 months

- Some other costs of expert witnesses, if any

Finally the parties would pay approximately $\geq 7,500$ Birr for a dispute having a claim value of 10,000 lasted for 3 months. Therefore, this seems very unreasonable and disproportional with claim instituted and the cost the parties would pay in courts of law. In other perspective for a giant companies like construction and infrastructure companies which are involved in arbitration proceeding, the fee might be reasonable because-

- The companies carried out their transaction through a huge amount of moneys even the scale is at increasing rate in the first nine schedules, finally it is constant.
- The dispute involving such companies is more complex in nature, and needs relatively longer time to settle. So due to these reasons the arbitral proceeding would incur higher expenses, fees and costs required the parties to be paid become reasonable. However, the registration fee (500 Birr) is not proper at all for parties to a mere technical matter.

Questions:

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1. Article 12 section 2 of EACC Arbitration Rules reads as follow;

An arbitrator who accepts his appointment shall sign the oath of impartiality drawn up by the Center prior to commencing his functions in accordance with the provisions of these Rules.”

Draw the Oath of Impartiality for the centre?

2. The *mediator may not give his testimony as a witness before any court, arbitration tribunal or similar such organ in respect of a dispute in which he served as a mediator.*”

Assume that this is an article taken from Addis Chamber Mediation Rules. What do you think is the reason behind such article and do we have any stipulation under the substantive laws of the nation to support the justification.

3.8. ADR in other Laws

The coming discussion is intended to show you the place and importance of ADR in the dispute settlements arising over different subject matters. In the previous discussions we have seen the role of ADR in the customary dispute settlement and also the provisions under Ethiopian laws regulating the matter under the general provisions of the civil code and the civil procedure code. Now we will see the specific provisions in different subject matters like family law, labour law and insurance law. I would like to remind here the discussion we have made about the issue of arbitrability or scope of arbitration and the blurred legal regime we have. Thus, we are not saying that it is only in those subject matter that arbitration would come. But it is evident in many other fields, like investment law, contract, expropriation of property in property law and others. So it is only an example and the student them selves can look fore ward to see other fields. The other thing here is that, we believe that each specific subject has thoroughly dealt ADR in respect to the dispute arising there under like in the family law, labour law or insurance law courses. It is to emphasise its importance and to compare it with the prevailing principles that we have discussed so far.

3.8.1. Arbitration in Family Law

3.8.1.1. Introduction

Arbitration, as an alternative dispute settlement mechanism, is widely in use, especially in family matters in Ethiopia. Its proceedings are more preferable to the parties in the dispute due to its speedy nature. Both the civil code and RFC (The Revised Family Code) expressly provides for arbitration. In such away those spouses under the dispute are tried to settle their dispute through their appointed family arbitrators other than the ordinary court litigation.

Family arbitration as one method is established in modern way in Ethiopian since 1960 when the civil code came into force for facilitating settlement of family disputes by identifying the chronic problems and helping the couples to communicate, and the arbitrators may indeed help save the marriage. This method also improves the

relationships between even previously hostile married partners who have prepared themselves for divorce.

This method is the one which has a mandatory power to family disputes. It is clearly seen under Art.731 of the civil code of Ethiopia “if it is found that no arbitrator had been designated ...” shown that arbitration be permanent institution rather than a body that being selected periodically as is known in today’s practice. (Art.82(2) of RFC)

The new revised family code of Ethiopia diminished the role of institution of family arbitration as one devise of settling family disputes. For instance, the sole jurisdiction to see and decide divorce cases is given to the court unless the court forwards the spouses taking their consent to family arbitrators to change their mind. (Senior research paper on function of family arbitration under Ethiopian law, by Medhanit Adamu p.18 Unpublished, Haramaya University) But where the court fails to settle a dispute, the court will refer the spouses to nominate their own family arbitrators to solve the dispute amicably. These arbitrators, unlike the civil code family arbitrators, could be any person either professional, family member or any third party as long as the spouses are well consented.

Generally the rationale behind the RFC for the exclusion of the institution of family arbitrators is that, the appointed family arbitrators in both side devoted much time through litigation by supporting their own sides’ interest. It affects the justice system that tries to solve as speedy as possible in a minimum cost. As it has been shown earlier, the purpose of inclusion of family arbitrators, under the civil code, has been taken away under the RFC since the drafting committee came to know that the pre existing family arbitrator failed to meet the objective it was established.

The positions taken by RFC is that determining or settling family disputes should be substantially made through court litigation means’s. If the court failed to do so, it may recommend the parties to settle their disputes through arbitrators by their own choices. But the problem here is that there is no separate division in the court system which independently sees these family cases like divorce. In Ghana, Brazil & elsewhere marriage and family issues have special tribunals and speedy proceedings. (Senior

research paper on function of family arbitration under Ethiopian law, by Medhanit Adamu p.18 Unpublished, Haramaya University).

3.8.1.2 Kinds of Family Disputes Governed By ADR

Before discussing the subject matters of family disputes that are governed by ADRs in our legal system it is better to have a bird over view of the US model. From the US model the kinds of family disputes that are subject to ADR are broadly categorized into two categories: these are 1) divorce and 2) non divorce. In order to solve the above kinds of disputes among the most applicable dispute resolution mechanism, they use a competent mediator by giving positive strategies in order to manage the problems. (Rebert Coulson, Family Mediation: Managing Conflict, Resolving Disputes, Jossey Bass Publishers, 2nd Edn, p 43ff).

The subject matters of family disputes in general constitute the following matters among other things:

- A) ***Divorce***- it is a very common kind of marital disputes that arise when marriage is being dismantled from the human complexity of custody and visitation to the complicated financial and legal aspect of property transfer.
- B) ***Pre-marital agreement***- it is a negotiation prior to marriage and planning to protect spouses interest.
- C) ***School and parent***- such kind of dispute arise between parents and school authorities because of to receive appropriate educational service to wards their children based on their contract.
- D) ***Teenagers and their parents***-such dispute arise when adolescent behavioral problems create emotional climax in a family.
- E) ***Teenager pregnancy***-when unmarried teenagers becomes pregnant the dispute arises between the two family groups.
- f) ***Other family disputes***-here under are some of the examples

- D) ***Relocation***- disagreement may arise when spouses receives promotion or job after that moving elsewhere of one of the spouse.

II) Nursing care -when a family member retires sometimes other members of the family adjust their life style, as a result of such agreement failure to pay the service reward creates dispute between them.

III) family business-control of family owned companies can be come an issue especially when a founder or subsequent owner dies as a result dispute arise among heirs and legatees.

IV) inheritance- dispute over the meaning and application of a will.

V) violence- the disagreement of a family escaletes into violence.

Under Ethiopian law almost all family disputes that are mentioned above are not subject to ADRs and most of them are not recognized in Ethiopia. As has been stated earlier the family arbitration that was established by the civil code has no or only little recognition in RFC. This shows that arbitrators have no power to decide even the matters that were assigned to them by the civil code. Disputes that arise out of the dissolution of marriage, difficulties that arise between the spouses during the marriage, disputes arising out of betrothal or out of breach of a betrothal (Arts 723. 725 and 726 of the Civil Code), were among the subject matters that were governed by ADRs according to the civil code prior to the coming in to force of the RFC.

As it is clearly provided under the RFC art.115-117 the existence of valid marriage, the established of irregular union and divorce did not belong to the family matters that has to be governed by ADRs rather they are matters which will be seen exclusively by the court. Similarly, under the RFC art.118 (1) stated that “without prejudice to art.177 of the provision of this code, disputes arising out of marriage shall be decided by arbitrators chosen by the spouses.” From this provision it is possible to point out disputes that arise in family can be governed by ADRs. Any non divorce conflict, distribution of property, family business, inheritance by will not by law, violence, relocation of the spouses and the like can be resolved by family arbitrators chosen by the consent of the spouses. Mehari Redaie, on his comment on the RFC, takes the position of appreciating the submission of family disputes to the family arbitrators and justifies its importance to the disputing parties, the government and the society. (Some points to understand the RFC by Mehare Redae p. 108) Here, it is noticed that while the code recognized celebration or conclusion of marriage before religious officers and also according to custom, but limited the decision over divorce to courts of law only.

- Question:** 1. Why Arbitration under Ethiopian law and Mediation under the US law?
2. Why does the RFC restricted the arbitrability of most family disputes?

3.8.1.3. Appointments and Removal of Third Party

A. Appointments - The consent of the spouses is determinant for the appointment of family arbitrators. The number of the arbitrators will also be determined by the spouses. The RFC allows the possibility of number of arbitrators being one or more than that under art.119 (1). So there is no indication as to the evenness or oddness of their number. As it is enshrined under the civil code (Art 332-) and accepted in general jurisprudence it is preferable if the number is odd; otherwise, if their number is even, it will create difficulty while giving decision. In order to avoid this problem the civil code dealt some indications about the number of the arbitrators. It provides that they should be two from wife side and two from husband side and one by their agreement, if failed, by the nominated fours or some times by the court. This was important as the other arbitrators are chosen from both sides to save the possibility of partiality.

Another point in relation to appointment is about their qualification. There is no qualification requirement to be an arbitrator in the RFC. If they are chosen by the consent of the spouses they can arbitrate the dispute. Regarding this issue the civil code pursuant to art.725 (1) had required **the personal testimony** of the marriage in order to arbitrate the dispute that arises between the spouses during marriage. But this requirement is not absolute and the spouses can agree to the otherwise.

We will deal latter, in recommendation part, with the issue- what will be the solution if the spouses initially agreed to settle their dispute through arbitration and latter fails to agree on the appointment of the arbitrators?

B. Removal of third parties - An arbitrator is required to conduct the arbitration with in a certain accepted standards. The court has the power to remove an arbitrator, (Civil code art. 733(2)) who fails to use all the reasonable dispatch and diligence in conducting the proceeding. (Art 668 of C. C.) Removal of an arbitrator is the act of removing the same

from his/her power to arbitrate the disputant. To revoke the authority of an arbitrator is an extreme remedy which might deprive interest of one party. According to the general accepted principle, arbitrator will be removed from entertaining and handling the issue. Grounds for the removal of arbitrators can be; serious and irreparable misconduct, actual/potential bias, incapacity, where he failed to perform the function of arbitrators, where justice requires so and others.

All the aforementioned discussions are based on the general jurisprudence. In our law under the civil code, which is actually repealed, it confirms with the above discussion. Whereas under the RFC it is not stated about the removal of the arbitrators and the grounds of their removal. So there is a gap in this area of the law. The writers of this paper will recommend later to fill the gap.

3.8.1.4. Powers and Duties of Third Party

A. Powers - After their appointment, family arbitrators have the power upon the spouses. Their power is recognized both by the civil code and the revised family code. (Mehare Redae RFC commentary p.106) These family arbitrators are empowered by the spouses. Since they are appointed by the free consent of the spouses, the power of the arbitrator emanates from the disputing parties.

When we compare the power of family arbitrators in the previous law and the current law, family arbitrators had more power in the previous. Their power was up to the pronouncement of divorce for serious causes.(RFC Art.121(1)) But this power is revoked by the RFC and here what we have to understand is that, even though their power to pronounce divorce is taken away by the current family law it is impossible to say that family arbitrators have no any role.(RFC Art 121(3)) Indeed, their power is to reconcile or making an effort to reconcile the spouses and to make the spouses to renounce their petition for divorce in case of divorce issues now. Family arbitrators have no any power other than reconciling the disputing spouses for disputes involving in divorce (RFC Art.117). As we can see the RFC family arbitrators have the power to act as mediator as far as their purpose is to reconcile the spouses. They can use all possible meanses to settle the dispute and to keep the sustainability of marriage.

Generally speaking, any attempt of the third party arbitrators to pronounce divorce other than persuading for the conciliation has no legal effect. This is for the fact that marriage is the base for the society in general and for the family in particular. Therefore, it should not be as such flexible to be dissolved by the decision of third party arbitrators. But some scholars argue to the contrary saying that once we have recognized conclusion of marriage to be made in offices other than the court or notary, it would be justifiable to allow divorce in the same cases.

B. Duties of Third Party Arbitrator - Arbitrators, due to the irony relationship that they have with the spouses, play a vital role in family dispute resolution. Both the repealed provisions of the civil code and the RFC, confer duty upon arbitrators. Hence we will see the duties conferred upon them in some detail in this section. What is expected from the chosen arbitrators to be fulfilled includes keeping the principle of confidentiality and arbitrators are assumed to be neutral.

According to the RFC Art. 83(2), they have the duty to report on their efforts to reconcile the spouses and renounce the desire of divorcing. Regarding this point the repealed law had contained broad duty which gives them the power of deciding over the fate of the marriage though it is subject to the approval of the court (Civil code Art. 679(1)). Similarly they were duty bound to pronounce judgments that could enable the parties to solve all disputes arising out of divorce. The means of liquidation to be employed were to be decided by the family arbitrators.

3.8.1.5. Procedure

After the arbitrators are already appointed and they accept the status, the next step is starting the procedure to resolve the family dispute. Under the revised family code there is no requirement as to the acknowledgement of arbitrators' acceptance for being arbitrator by the dispute. However, the civil code had employed such mechanisms to know the willingness of the arbitrators to arbitrate the dispute. After having appointed the arbitrators, the spouses should submit their choice to the court within 15 days (art.119 (1) of RFC). On receiving the list of arbitrators or the appearance of the arbitrators the court will make a record and give direction as to how reconciliation has to be preceded and to submit the result of the arbitration or the attempt of reconciliation within three months.

From this time on wards the work of reconciliation is left to the arbitrators except submitting some reports about their progress.

Even though the revised family code provides for direction as to how to proceed the conciliation, it did not mention even some of the procedures to be followed in the reconciliation process. It seems that it is left to the discretion of the arbitrators and the court. Nevertheless, the procedure most likely has to be in the following manner. The arbitrators appoint a day which is convenient for the disputants in the most probably convenient place. Most importantly the place should not be a place having many persons, for example, market place and the like. After asking them separately about the matter, the arbitrators could start the arbitration in the presence of the spouses. Separate talking with the spouses at this level does not amount to caucus since it is made only at the earliest time and for reconciliation but not for transfer of other information.

If they are not able to decide the issue at that day they may adjourn another day which is convenient to the spouses. But it is not possible to adjourn for more than three months, unless the court orders to do so, (art. 119 of RFC). But lastly if they are not successful in reconciling the spouses, they have no power to pronounce divorce of the spouses rather they only report the result of their attempt to the court without delay (art121 (2) of RFC).

3.8.1.6. Outcomes and enforcement of the proceeding

A. Outcome of arbitration in family dispute - The outcome of arbitration by arbitrator tells us an important step for the resolution of the dispute among the spouses. If reaching an agreement was impossible, there will be no further step, except the reporting step. The outcome of the arbitration will be either of the following two options:

- i) Resolving the dispute
- ii) Divorce

i).Resolving the dispute - the main purpose of founding arbitration tribunal is to resolve the disputes among the spouses in amicable way. Because of this reason if a petition is taken to the court for divorce, the court will let them to take their case to the arbitrator of their choice and to reconcile as much as they can. After the process, the arbitrators who

dealt the issue may come up with conciliating the spouses or they may not. If the arbitrators successfully resolved the dispute, their decision will be effective and they should report the same to the court.

ii). Divorce - once the arbitrators entertain the case and fails to persuade the spouses to reconcile, according to the RFC the arbitrators have no power to pronounce divorce, but it is the court that has the power to deal with the issue of divorce (RFC Art 10). But according to the civil code the arbitrator had this power if there exist a serious cause for divorce (Art 668 of the C. C.).

ADR proceeding are playing a pivotal role to settle family disputes in the administration of justice. Family disputes, particularly disputes among the spouses are the crucial problems in the society. This problem most of the time settle by ADR meanses, especially by arbitration proceedings out of court. Nowadays the process of settling family disputes out of court is very much encouraged because the courts are becoming more and more congested and a case requires a long time to be decided. In return arbitration institutions help the justice system by reducing the burden of courts.

This arbitration proceeding are like a mini-trial court proceedings which are conducted by those arbitrators who are appointed by the common interest of the spouses. This proceeding has its own procedures and enforcement mechanisms in which arbitrators have to follow through out of their effort of settling the disputes. Arbitrators have their own powers and duties which they have to discharge and apply where they conducts the arbitration proceedings. If they are not able to carry out their function competently and diligently, they will be removed from their position.

3.8.2. ADR in Labour Law

3.8.2.1. Introduction

Ethiopia has undergone lots of revisions and amendments in her legal regime regarding labour laws in the different political regimes we experience. It is because that the political system and belief we adhere has got a significant relation and impact as well on the liberalization or otherwise of the labour or industrial relation. What makes legal regimes

regulating labour law different from the others is also that different laws are implemented to guide the relationship of different groups according to the nature of the work (e.g. house servants), the identity of the employer (e.g. civil servants) and some times according to the status of the employee (e.g. managers). It is not the intention of this sub section to deal this categorisation more than this. Rather to look the latest proclamation No 377/2003 in relation to the settlement of disputes other than the labour divisions of the regular courts.

We have three kinds of forums recognized by this proclamation to entertain labour dispute and give valid disposition accordingly; regular courts, labour relation board, and ADR (like Arbitration, Conciliation, strike, lock out, collective bargaining). In this part we will see only some of the ADR means employed in labour dispute and the working of the Labour Relation Board.

ADR is a means to achieve justice without the interference of the government. It is not usually lead by the will and whim of the government. But exceptionally the government may have a limited interest in the ADR proceedings, for instance in labor cases the government plays some role in conciliation proceedings. This part will try to deal with this situation in detail.

ADR in labor relation is aimed in maintaining industrial peace and security towards the all round development of the country. Further more since disputes are bound to arise ADR lays down the procedures necessary for their expeditious settlement. We also aimed at addressing various ADR methods and their legal effects as are used in the labor proclamation. Further more we will see how labor disputes are settled at various levels. The other issues dealt with are the salient features of each dispute settlement methods, in an attempt to familiarize the reader with the legal framework of available dispute settlement methods in the labour law.

3.8.2.2. Conciliation

Conciliation is an activity conducted by a private person or persons appointed by both parties jointly or the ministry at the request of either of the parties for the purpose of bringing the parties together and seeking to arrange between them voluntary settlement of

dispute which their own effort alone could not have produced. (Art 136 (2) of labour proc.).

Nomination is an inherent right of the parties (Art 3318 of the civil code). The parties may entrust a third party with a mission of bringing them together and if possible settling the dispute between them. They can transfer their right to appoint a conciliator to third party when they are not in a position to know the best conciliator. In addition, the conciliator can be appointed at the request of the parties by institution or by third party.

When we come to labor dispute, the question as to who appoints the private person mentioned in article 136(1) of the labor proclamation the Amharic version seems very clear than the English one. In the Amharic version the conciliator is appointed *by the disputing parties* or the *ministry at the joint request of the parties* but the English version of the same article says “by *a private person* or persons appointed *by the Ministry at the joint request of the parties*”. What exactly mean ‘private person’ is not clear in the English version. But the Amharic one speaks about conciliators nominated by the disputants for matters under Article 143. The Amharic version seems to reflect the intention of the legislator more accurately; because article 143(1) clearly states that the parties can resort to conciliation or arbitration of their own choice rather than the ministry. And secondly the proclamation under article 141(1) imposes obligation up on the ministry to assign the conciliator once a labor dispute is reported by other parties.

We have two kinds of conciliation by considering the definition Article 136(1) and Articles 141 - 143 of the same by looking the identity of the person who nominates the conciliators, i.e. the disputants themselves or the Ministry. Article 136(1) left the option open as to who nominates the conciliator; either by the will and interest of the disputants or by the Ministry “at the joint request of the parties”. When the parties themselves nominate the conciliators it is a kind of conciliation recognized under Article 143(1) and there is no limitation of the kind of dispute, collective or individual, in this regard. But if the conciliators are nominated by the Ministry, it will be regulated under Articles 141 and 142, and it is only collective labour disputes that can be entertained by this panel.

The other issue here is the seemingly inconsistency between Articles 136(1) and 141 whether the consent of both of the disputants or only one of them suffices the Ministry to

nominate conciliator for them. Article 136(1) speaks about “joint request of the parties”, whereas the latter article reads that the Ministry shall appoint conciliators when a collective labour dispute “is reported to the Ministry by either of the disputing parties”. One line argument here is that to look the very purpose of ADR proceeding in general and conciliation in particular and try to find out the answer for these seemingly inconsistent articles. Any of the disputants should not be compelled to submit his or her cases for the conciliators nominated by the Ministry if he or she prefers the labour board over this panel. Other wise how could we say it an alternative? This may lead us to give effect to Article 136 over Article 142 and hence the Ministry will be obliged to secure the consents of the disputants as to their willingness to submit themselves to the panel before nominating the conciliators. The other line of argument says that it is public policy which compels collective labour disputants to the conciliation proceeding though one of them prefers labour board over conciliation. Do you think that it is the intention of the legislator to compel the disputants to do so?

In principle conciliation is a consensus oriented joint problem solving process and does not seem to be compulsorily imposed on the parties but in exceptional cases disputants are obliged to bring their case before conciliator, this is true in disputes arising out of co-operative societies (ART 46, Co- Operative Society Proc. No. 147\98). The reason behind compulsory conciliation is encouraging the party initiating it, by saving him from being seen by other parties as a weaker party.

The reading of art 158 (2) of labor proclamation shows that the disputing parties before they strike or lockout partially or wholly shall make all efforts to solve and settle all their disputes through conciliation. In case of Art 157(3) cumulatively taken with art136 (2) of labor proclamation neither have workers the right to strike out nor employers have the right to lockout in cases of essential public undertaking (Art. 136(2) Labor Proc.).

So conciliation is offered by the legislature to serve as appropriate labor dispute settlement means. Generally parties sit together put all the playing cards on the table so as to say, negotiate in good faith and mutually concede a jointly favored settlement which may finally lead them into a mutually agreed solution for the dispute.

As to the determination of the number of the conciliators, there are two arguments. The first one argues their number should be odd while the other says it should be even. One line of argument is that it should be even because the disputant acquire equal opportunity to select conciliator. This means that if one party selects a conciliator the other party also selects another. The other argument is that the number of conciliator should be odd. Even though these arguments are presented, the number of conciliator does not matter as the conciliator does not give a binding decision, so the number of conciliators is not limited.

Individual labor disputes can not be taken to Ministry nominated conciliator, so it is possible to say such kind of conciliation is made for collective labor disputes (Arts141 - 142 of the labour law). The proceedings in conciliation could take place either with a neutral third party conciliator assigned by the ministry or appointed by the parties themselves. Naturally, the disputing parties involved in the labor dispute will try to settle their point of disagreement through a process of communication in the absence of a third party otherwise known as negotiation. This is the most effective and advantageous means of settling disputes. However, the fact remains that, not all disputes are solved through negotiation.

Task: Article 141(2) gives the right to the Ministry to nominate or employ experts to serve as conciliators in the National level and in Woreda level when necessary. Go to the social and labour affair bureaus around your locality and assess how it is conciliation going on there, whether or not there is publicly nominated conciliator, and if not whether or not there is a need for the existence of such employee.

3.8.2.3. Arbitration

Arbitration as pointed out under article 143 of the labor proclamation is recognized as alternative means to conciliation which are provided under art 136,141 and 142 of the above cited proclamation. In conciliation either of the parties can submit their case to the ministry which appoints the conciliator. But alternatively the parties can appoint an arbitrator with out reporting to the minister. This provision also states that the appropriate law shall govern the settlement of dispute by the arbitrator. The appropriate law might mean the provisions of civil and civil procedure code.

Arbitration is one of the ADR means which helps the parties to adjudicate without going to the court litigation or some administrative tribunal. Arbitration seems more rigid than the other ADR means and also more flexible than court litigation. Even though that may not be typically the same with the court proceeding and also the third party in the dispute or the arbitrator give binding decision over the dispute ;because of these procedural activities it is more rigid than the other ADR means's. When we compare it with the courts or administrative tribunal litigation, it is more flexible.

Much has not been said about Arbitration under the labour law when we compare it with the place of conciliation. It only recognizes arbitration as one alternative means of settling labour disputes. This shows us that conciliation is preferable to settle labour disputes than arbitration. Thus, it will be necessary to resort to the civil code and the civil procedure code provisions to guide the procedure.

It is an inherent right of the parties to nominate the third party or the arbitrator though Article 143 doesn't expressly say so and anything as to the determination of the number of third party. But when it say that parties can take their case to arbitrators or conciliators other than the one nominated by the Ministry, it is declaring that the parties can nominate their own arbitrator for the settlement of the dispute. It is noticed as well that there is no Ministry nominated arbitrator in such case.

In relation to the effect of the award one thing has been said under Article 143(2) of the code. As per the civil procedure code Articles 350 – 357, appeal from the award or setting aside of the award is permitted on the grounds listed there under. Article 143(2) in broader term speaks about these rights of the parties. In case of conciliation, for instance, if the parties fail to agree on the matter, they can either take the matter to the labour board if it is a collective labour dispute or to the labour division court if the matter is an individual labour dispute as a first instance case. But if the proceeding is arbitration first we don't expect 'agreement' in the strict sense but only 'award' and this award may satisfy the interest and desire of both or only one of them or none of them though it is not advisable such to happen. In any of the instance any of the parties can take to appeal or setting aside of the ward to the labour board in case of setting aside of collective labour dispute, or to first instance courts in case of setting aside of individual labour dispute, or

to the high court in case of appeal of any type of dispute. This seems the interpretation of Article 143 in line with the other relevant laws regulating the matter.

From the reading of Article 143 we may infer that all kinds of dispute whether individual or collective labour disputes can be entertained by arbitration proceeding unless there is an express prohibition in other parts of the law.

As to the matters related with the way of nomination of the arbitrators, the nature of the proceeding, the costs of the proceeding, the duty and right of the parties as well as the arbitrators, effect and enforcement of the award the general provisions of the civil code and the civil procedure code will apply.

3.8.2.4. Labour Relation Board

Labour relation board is the other kind of organ duly established to address the grievances in the industrial relation of the nation when. This organ has a first instance jurisdiction over collective labour disputes. The question here is, is the labour relation board purely adjudicatory organ? Can we equate the procedures and the rules applied in the board with the same of the courts?

The minister shall assign the members of the board according to the proportional representation of trade unions and employer's association including a chairman and two qualified members on matters of labor relation. This board can entertain cases and pass binding decisions or compromise the parties as to the appropriate end to their issues pursuant to art 147 of the proclamation.

To address this issue it is better to see some provision of the labor proclamation, civil code and civil procedure code. Article 149(5) of the labor proclamation provides that the ad-hoc or the permanent board shall not be bound by the rule of evidence law and a procedure applicable to the court of law. But it may inform itself in such a manner as it thinks fit. From this provision we can understand that the LRB is entrusted with unlimited discretion where it can the case in a flexible and informal manner as it thinks fit in informing itself as empowered by article 148 of the proclamation. But cumulative reading of article 3345(1) of the civil code and article 317 (1) of civil procedure code we

can understand that, even an arbitrator do not have such extended discretion of disregarding the evidence and other adjective and procedural laws of the state.

Article 150(3) of the said proclamation in reaching its decision the board should take in to account the substantive merit of the case and need not follow strictly the principle of substantive law followed by the civil code. Under article 147(4) states that order and decision of the board shall be considered as those decided by the civil court of law. This provision gives the same effect for the decision of the board with the court decision. We will get the same wordings about the states of awards given by arbitrators under Article 319(2) though homologation by the court is additional requirement for the award to get enforced.

Article 147(1)(a) and 150(1) strictly and expressly obliges the board to try to conciliate or compromise the parties before giving any sort of decision of its own. It shows us that at least at the earliest stage of the proceeding it should conciliate but not adjudicate the matter. The other rules under Articles 147ff of the labour law as well resemble the civil procedure rules of arbitration.

Finally, it is noted that conciliation, Arbitration are not the only organs entertaining labour disputes alternative to court litigation. Even the objective of the labour Relation Board is not purely to act as an adjudicatory organ but to serve as a conciliator at least at the earliest stage of the proceeding. In addition we have other ADR types duly recognized under the labour law, i.e. self help. The effective implementation of these meanses will help parties to end up their grievances by extra- judicial devises amicably.

Questions:

1. Can you think of other points which make the boards' working similar with conciliation or arbitration?
2. Can't we think of other kinds of ADR under labour law? The mere fact that they are not mentioned or not expressly recognized under the labour law made them incompetent to be used for labour disputes?

3.8.3. Arbitration under Insurance Law

3.8.3.1. Introduction

The purpose of this sub-section is to give detail about ADR involvement in insurance as a contract and discuss in general and specifically the extent parties' right to waive their right to institute 1st instance substantive litigation, differentiating insurance matters which could be taken to ADR and not. In addition, we will discuss the types of ADR which are recognized in settling insurance disputes and selecting the one which is best, and also discuss as to how the number and identity of third parties which are involved are determined including their role, qualification and steps followed by them by referring to legal provisions and the practical facts we have realized during our interviews and case study.

The insurance relationship is a contract that may involve more than two persons, the **insurer**, in exchange for the payment of consideration (called **premium**) agrees to pay for loss caused by specific events. The **beneficiary** is the person to whom the insurance proceeds are payable. The **insured** is the person whose life is covered by a life insurance policy or the person who acquires insurance on property in which he\she possesses an insurable interest (Law for Business, seventh edition, A. James Barnes, Terry Moretied Dowlkin, Eric L. Richard).

When the parties agree and sign an insurance policy which contains Arbitration clause, it is presumed that they have consented to be bound to settle their dispute by Arbitration. The agreement of insurance presupposes the meeting of mind of the parties that any reservation or restriction by one party shall not affect his agreement unless it is communicated to the other.

3.8.3.2. Kinds of ADR Recognized in Insurance

Types of ADR means are not few in number. However, the most widely used are three in number. The first one is **Negotiation**, a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. And secondly **Mediation** is a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.

And the last one is **Arbitration** which is a method of dispute resolution involving third parties who are usually agreed to by the disputing parties and whose decision is binding. Accordingly we will discuss how the above methods are applied in dispute arising in relation to insurance contract.

A. Negotiation

It is a mechanism by which the parties solve their problems without the involvement of third parties. In this processes the parties' diligence, commitment and confidentiality is substantial. And this shows that Negotiation is consensual means of ADR. Most of the time insurance companies prefer Negotiation to solve their disputes in order to maintain their customers and to preserve their future relationship with the insured. The insurance company uses different ways of communication to invite the insured in order to negotiate with them. Such as, through phone communication and by giving notice. This is the most efficient method especially during the policy issuance time and the first stage of most kind of disputes. In the latter case if they fail to agree, they will proceed to the other advanced kind of dispute settlement mechanism.

B. Mediation

It is a mechanism whereby the parties nominate a third party and willingly produce their case before him in order to resolve their dispute. Most of the time insurance companies use Mediation in order to solve a dispute which arises between the insured and third party. Though most companies recognize arbitration in their policy as a means of dispute settlement, in effect, they start with mediation and some time if mediation fails to pull the parties together, court proceeding starts. The elders of the community or some times experienced lawyers will be called to serve as a mediator. The effect, the procedure and other matters there under will be regulated under the general provisions we have since the policy said nothing about mediation, but only about arbitration.

C. Arbitration

It is a mechanism by which parties submit their case to the third party who renders binding decision. Most of the insurance companies in Ethiopia as stated in their insurance policy adhere to the settlement of disputes through Arbitration (Insurance policy of Nile Insurance Company, Nib Insurance Company, Hibret Insurance Company).

The way of nominating an arbitrator depends on the wordings of their arbitration clause in their insurance policy. The insurance policy of some insurance companies suggests the appointment of the arbitrators by both parties. For instance we can see the content of Arbitration clause No.4.11 of Nib Insurance Company (S.Co.):-

“All differences in amount arising out of this policy shall be referred to the decision of an arbitrator to be appointed by both parties. If they are unable to agree on a single arbitrator then two arbitrators will be appointed each party appointing one arbitrator within one month of being require so to do by the other party. Failing that the party demanding Arbitration shall proceed with a sole arbitrator appointed by him. Where two arbitrators are elected by the parties they shall jointly appoint an umpire who will preside over all their meetings. The conduct of the Arbitration shall be as provided by the relevant law.”

Some other insurance companies even if they include Arbitration clause in their insurance policy, the policy fails to determine the way of nomination of arbitrators and their numbers. Rather it refers the provisions of the Civil Code (Article 3331 of the Civil Code) to be applied with these factors as the case may be (Insurance Policy of Nile Insurance Company). The arbitrators may be any person as far as the parties are consented and most of the time the arbitrators are expertise in the area of the dispute. The decision rendered by an arbitrator is final and binding up on the parties.

Question: Which kind of ADR do you think is best to settle insurance disputes and why? Can we employ different kinds of ADR according to (depending on) the nature of the dispute?

3.8.3.3. Insurance Matters Which Could Be Taken to ADR.

In principle, when a dispute arises it is the court which is expected to solve such dispute. But there is also other means of solving a dispute, i.e. ADR. When we take the matters which can be taken to ADR in to consideration, all disputes cannot be resolved by ADR. Here, the question is all about whether there is public interest in the outcome of the dispute. As the interest of the general public cannot be determined by individuals who are not responsible to the public, we have to refrain from taking such kind of matters to

ADR. Putting this general idea in mind, we are going to see the matters especially related to insurance. In insurance a dispute may arise from two different matters:-

A. Between the insured and the insurer

In any kind of business transactions including insurance the occurrence of dispute is inevitable and in insurance, dispute could happen between the insured and the insurer. In order to resolve such dispute parties can take their case either to the court of law or to ADR. But before deciding in such matter parties must adhere to the policy which the insurance company issues and signed by them.

In terms of subject matter which can be taken to arbitration, most insurance policies allow “all differences” while others only “differences in amount”.

“If any difference arises as to the amount of any loss or damages such difference shall, independent of all other questions, be referred to the decision of an arbitrator...” (AWASH, UNITED, Workmen’s Compensation Policy, Conditions No. 14)

“If any difference arises in connection with this Policy such difference shall independent of all other questions be referred to the decision of arbitrator...” (AWASH Fire and Lightening Policy, Conditions No. 18))

So, if there is Arbitration clause in their insurance policy a dispute that arises between them must be first taken to Arbitration. In the absence of such clause it is up to the discretion of the parties to choose the means to resolve their problem. But when we see the practice of the insurance companies, I meet in Dire Dawa, Companies prefer to solve their dispute by ADR rather than the exhaustive court litigation in order to maintain their customers.

Here is a case about the interpretation of the policy and which matters can be taken to Arbitration decided by the federal first instance court of Addis Ababa Lideta division given on 17 April 1997 E.C (file No 42694 in the case Ato Ayenew Abebe Vs united insurance company).

Ato Ayenew Abebe is the owner of lorry plated 3-14740 E.T. The car get insured in the defendant company by policy No 01-4-03574 on 6 February 1987 E.C where by the company undertakes to pay all damages the car may face. The value of the car at that time was 400,000 birr and it was so in the renewal of 1996 E.C also. Art 8 of the policy reads as " All differences arising out of the policy shall be referred to arbitrations decision".

Unfortunately the car get crushed and totally come out of use on 6 may 1996 E.C while travelling from Addis Ababa to Gondar around *Abbay Bereha* falling to 130 meters cliff with its 150 quintal cement on it. The driver of the car escapes from the disaster by jumping out of the car when it is falling in to the cliff. The police of the Wereda made investigation about the event that the peril is covered by the policy for the reason that the car faces the accident in normal course of movement.

The insured immediately come and request the recovery from the insurer company on 14 July 1996 E.C. The insured Ato Ayenew gave notice to the insurer demanding reimbursement of total damager of birr 400,000 birr. Unlike this situation the company kept silent on the notice and all requests of the plaintiff remained unanswered.

On his defence for the court claim of the plaintiff, the defendant raised many objections among the objections raised by the company is that the court has no jurisdiction because the case has to be referred to arbitration pursuant to the arbitration clause. The court over ruled this preliminary objection of jurisdiction and continued to entertain the subject matter of the case until final decision is given on 29 September 1999 E.C.

The court takes into the meaning of the term of arbitration clause of the policy as presented to it in Amharic translation. The Amharic version of the policy has been considered to mean a difference "...arising on..." instead of "arising out of" the policy. The court used "arising on" to interpret and come to conclude that it is a dispute only about the terms or on the face of the contract. When continuing the analysis the court stated that there is no disagreement about the terms written on the contract. It has said that the plaintiff instituted his claim basing on and in accordance with the contract and this means there is no disagreement about the policy and so the arbitration clause cannot be applied.

Disputes subject to arbitration, according to the court's reasoning, are those composed of disputes on the wording of the contract. The case in hand doesn't contain such disputing word in the contract and so it is with the validity and wording of the contract so that it is not subject to arbitration.

It seems that, the court departs from the principle of interpretation of the contract. When we see the reasoning of the court on deciding the matter as not arbitrable, the court read the translation as “dispute arising on the contract ”. This leads us to mean that disputing parties have to quarrel on the wordings written under the contract. When interpreting the term “arising on” to mean disputes on the wording of the contract, the court departs from the rule of interpretation of contracts specified under Arts.1732-39 of the C.C.

Art. 1734 of the C.C. obliges the court to search out the common intention of parties. Here, it means that what was to mean in saying that word in each of the parties' mind is determinant job, the interpreter has to figure out parties' understanding to the word is essential in interpreting the contract. In our case at hand what parties intended when saying “arising out of” or “arising on” (in translation) has to be ascertained first. The intention of both parties towards the cause of the dispute is clear, that is about the liability or not of the defendant as per the contract to the plaintiff and to what extent. This can be required only after the happening of the event.

I would like to raise another important issue as to which version of the policy should be considered overriding in case of disparity between the original English version and the interpreted Amharic version. In most, if not all, instances insurance policies are prepared in English version and only when required before authorities that it will be interpreted to Amharic version.

B. Between the Insured and third party

A dispute may arise between the insured and third party in a case where the insured or his property causes damage to a third party. In this case, the insurance policy will not govern the matter since the third party injured is not a party to it (Principle of Privity of contract - terms of a contract will only be binding as between the parties to the contract.). Instead, provisions of the Commercial Code, for instance, Liability insurance provisions will

apply (Articles 685-688). Thus, pursuant to **Article 685** of the Commercial Code, matters as between the insured and the third party injured may be settled either in the court or by amicable settlement.

When we see the practice of the insurance companies (particularly Dire Dawa, for instance, Nib Insurance Company), most of the time those companies which have vested interest and allowed by the law to intervene (Article 41 of the Civil Procedure Code, See also Article 687 (1) of the Commercial Code) chooses Mediation to solve such dispute between the insured and third party. For the reason of the companies' desire to maintain their future relationship with the insured and to preserve the good attitude of the public towards them Mediation is preferable.

3.8.3.4. Parties' Rights to waive their Right to institute 1st instance substantive litigation

As a principle any party who claims that his right has been infringed have a right to take his case to the court with good cause (Article 33(2) of Civil Procedure Code). But this does not mean that parties have no right to settle arguments between them by means other than court litigation. Because of the time, money and personal resources that get tied up in litigation, businesses and individuals are increasingly turning to alternative to trials to settle disputes.

Disputants have absolute right to agree to settle any dispute among them by ADR means as they enter in to a contract, that is in their agreement or they even can agree for such means after such dispute arises. In insurance contract, the insurance company and the insured shall agree as to their relationship by a document called an insurance policy (Article 657(1) of the Commercial Code).

Under their insurance policy, many companies found in Ethiopia incorporate a clause that stipulates the handling of any differences, or some times only the claim over the amount of payment, that in case may happen between them and their customers. In such clause most of them prefer Arbitration means to settle disputes arising out of their insurance policy. (Insurance Policy of Nile, Nib, Hibret, Awash, United Insurance Companies).

“All differences arising out of this Policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference, or if they cannot agree up on a single arbitrator to the decision of two disinterested persons as arbitrators, of whom one shall be appointed in writing by each of the parties within thirty days after having been required so to do in writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within thirty days after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint a sole arbitrator and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them I writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings. In the event of the death of an arbitrator or umpire, another shall in each case be appointed in his stead by the party or arbitrators (as the case may be) by whom the arbitrator or umpire so dying was appointed. It is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this Policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained.” (UNITED I. C., Private Vehicle, Commercial Vehicle Policy, Condition No. 8).

“If any difference arises as to the amount of any loss or damages such difference shall, independent of all other questions, be referred to the decision of an arbitrator...” (AWASH and UNITED Insurance Companies, Workmen’s Compensation Policy, Conditions No. 14).

“If any difference arises in connection with this Policy such difference shall independent of all other questions be referred to the decision of arbitrator...” (AWASH I. C., Fire and Lightning Policy, Conditions No. 18)).

The binding nature of such clause is unquestionable. It is clearly stipulated that terms included in a contract by mutual agreement of the parties will be binding between them as if it is law (Article 1731(1) of the Civil Code). Thus, insurance contract being a contract, terms included in the insurance policy binds both parties and if they choose to settle their differences by Arbitration, such must be the first means to be taken when dispute arise between the parties. Whether viewed in terms of morality or of economic

efficiency, the law should enforce as far the parties make their own law by the terms of their agreement. It is unnecessary to look outside rules as regulators of their conduct and they will probably find the results more satisfactory than if such rules were thrust up on them (Commercial Law by Roy Goode).

Furthermore, courts also often require parties involved in certain kinds of disputes to try alternatives in an effort to get the parties to settle before trial. Since our law follows the theory of declaration of will (intention) (George Krzeczunowich, Formation and Effect of Contract in Ethiopia Law, FOL A.A.U 1983, pg.13), the court in order to decide the cases brought before it must look first of all at the parties' concrete expression (Article 1680(1) of the Civil Code).

In one case decision (Ato Chanie Markoss Vs Hibret Insurance Company, Federal 1st Instance Court, Dire Dawa, File No.10560) the court have dismissed a case instituted before it by reasoning that the parties have agreed to settle any differences between them which arises based on the insurance policy by Arbitration. The court said that the parties have to exhaust this first, meaning that before coming to the court they have to try to settle their disputes by Arbitration in accordance to their agreement.

Ato Chane Markos, in this case, is the owner of code 00018Dr. FIAT BUS which is insured in the defendant company by policy no 06-24-0005. Unfortunately the car collided on 6 Dec. 1996 E.C. in Alemaya Wereda. After a lots of notices by the plaintiff to get compensated, lastly the plaintiff instituted file demanding 77,894 birr before federal first instance court of Dire Dawa on 28 Sept. 1997 E.C.

The defendant objected the jurisdiction of the court arguing that the case has to be seen to arbitration as it was referred by the policy. In defending this objection the plaintiff, in his counter defence, argued that the clause (Art.9 of the policy) is simply a policy written by the defendant where the plaintiff gives no willingness to be bounded by it that it shall not bind me. Secondly, even said binding, there is no officially established arbitrator in the country and the clause can not be implemented in such circumstance. Thirdly, the court should sustain preliminary objections only those listed under Art. 244 of C. Pr. C., and so on.

The court decided in favour of the defendant saying that the case has to be referred to arbitrator(s). The court tried to support its decision with reasons that parties agreed to refer all their disputes to arbitrators before taking it to court of law. As per Art 1731 of C.C. it is a law between them and so their case has to be referred to arbitration. As regards the counter claim of the plaintiff, that it has to be specified under Art. 244 of the C.Pr.C, the court said that the said article is illustrative than exhaustive. It is not prohibited to accept other objections which are not listed there. As the principle of Civil laws, all not prohibited are permitted. Therefore, the case has to be seen by arbitrator(s) before court litigation.

The court, in my view, made a surprising analysis with the appropriate law to reach decision. The answer for the argument of the plaintiff that the policy is prepared only by the defendant and the plaintiff gives no consent to be bound, is really appropriate. This means the plaintiff had sufficient information about the arbitration clause in the time of the conclusion of the policy. It is beyond our objective to discuss about the validity of insurance policy as a contract, and hence it is better to pass over this part of the argument.

But the problem, I can see is that, the court failed to answer the argument that there is no state established arbitrator. Actually this may be for the reason that it is easy and obvious. As we have discussed in chapter one and as the definition infers arbitration involves choosing a judge to one self. This directly takes us to conclude the existence of state established arbitrator worth's nothing for arbitration clause to be implemented. Even there were established arbitrators, they couldn't see the case between the parties unless the latter agreed to refer to them. But if the plaintiff wants establish arbitrator for any other center as already established arbitrator in the country.

Moreover, the court effectively interprets Art. 244 C. Pr. C. but failed to apply. The court understood Art. 244 C. Pr. C. to be illustrative than exhaustive and this is well constructed legal analyze (Robert Allen Sedler **Ethiopia civil procedure** pp.174). Those listed under the said article as a ground for preliminarily objection, are not exhaustive and the courts can sustain other preliminary objections out of listed under the article. When we come to its application to the case in our hand, it worth nothing whether it is illustrative or exhaustive. The court's conclusion that, the objection is out of the list, is not correct. Art. 244(2) (a) & (g) are talking about this type of objections. Therefore, the objection is among those listed under the article. The decision of the court sustaining

the objection is right that the case has to be subjected to arbitration. But this is not for the reason that Art. 244(2) is illustrative than exhaustive. This is because the principle is listed under Art. 244 (2) (a) & (g) of C. Pr. C.

After the decision of the court both parties have nominated arbitrators each and the dispute is now in the hands arbitrators.

All in all, the parties have a right to waive their right to institute 1st instance substantive litigation by stipulating a clause in their insurance policy which states that differences between them will be settled by ADR means, Arbitration in our case, and this clause as discussed above have a binding effect as between them and must be the first resort to turn to solution. The court it self should try to enforce the policy which manifests the interest of the parties.

ADR is a mechanism that encourages disputants to arrive at a mutually negotiated understanding with a minimum outside help. In business transaction the existence of dispute is inevitable and in order to solve such dispute parties use ADR as a means instead of going to court litigation which is costly and exhaustive. Parties to an insurance contract may agree and include Arbitration clause in their insurance policy or they may agree after the occurrence of the dispute. The existence of such clause in their policy makes the decision given by the arbitrators binding as that of court. Without exhausting the remedy available in the Arbitration they cannot take their case to the court. They may also resolve their dispute by Negotiation before even going to Arbitration and to the court, in the absence of any Arbitration clause in the insurance policy. If in any case third party is involved the matter will be resolved by Mediation.

Questions

1. Is that safe to conclude that all disputes which arise between the insurer and the insured over the policy can be arbitrable? Do we have a possibility of raising “public policy” test to contest the idea? Why or why not?
2. If all courts of Ethiopia follow the same analysis as the Federal First Instance Dire Dawa court did in the case discussed above and oblige parties to the insurance

policy to take their disputes to arbitration by denying first instance court recourse, what positive and/or negative consequences could you expect to come?

3.9. Summary

ADR as the most widely used mean of dispute resolution has its history in the day to day life of Ethiopian since its early history. The customary ways of dispute settlement which is inherent in each ethnic group is still evident in many parts of the country as a basic channel to settle disputes. Compared to its importance, much has not been done to incorporate these dispute settlement methods in the legal system of the country. Some of the enactments which incorporate ADR as an alternative means of dispute settlement, by itself are not exhaustive to address the issues. ADR can be considered as the best devise to attain the constitutional principle of ‘Access to Justice’.

A better understanding of Arbitration and Conciliation can be understood from the civil code and civil procedure code provisions of Ethiopia. Further, the legal documents that regulate family matters have recognized arbitration as a means of settling family disputes. The labour law, investment proclamation and insurance policies are also other areas where arbitration is mentioned as an alternative to court litigation. In the labour proclamation conciliation is preferred over arbitration.

For a better understanding and wide spread of ADR, institutionalised practice is important. To this end Addis Chamber of Commerce and Ethiopian Arbitration and Conciliation Centre are working their level best in establishing the forum for the disputants, providing them with detailed procedures and assisting them to get in to consensus.

CHAPTER FOUR

ADR IN INTERNATIONAL AND REGIONAL LEVEL

4.1. Introduction

So far a thorough discussion has been made to the kinds of ADR widely used both in domestic and international dispute resolution. This chapter is devoted to look at the needs of ADR in international relations, the documents regulating the matter and the widely known institutions practicing ADR in international relations.

At the end of this chapter, students will be able to;

- Argue the needs of ADR in international disputes;
- Determine the scope and limitation of international ADR;
- List down organs which can be a party to international ADR
- Identify the international documents important in international ADR;
- Describe the names of organs advocating international ADR;
- Convinced to the importance of ADR in regional documents;
- Appreciate Ethiopia's approach to international ADR documents;

Like wise its importance in domestic relations, ADR has been and is an important means of dispute settlement not merely as an alternative but as a basic method. When we say international disputes we are nit referring to a single phenomenon or instance where the disputants are from different sovereign nations, but much more than this, in fact. This days it is common to see parties of the same nation working in their home land submit their disputes to arbitration or mediation tribunals established in foreign country or some times according to the rules of international documents. The importance of international ADR documents and institutions are becoming important even in such domestic disputes by given it the flavor of international character.

Institutions established according to the laws of a nation are developing in to an international forum where lots of disputes from different nations are referred. It is not the intention of this chapter to deal with all such kinds of institutions and their establishment documents. Rather, we will see only a few examples of the most important documents

and institutions that are entertaining wide range of international disputes and documents that are widely influencing domestic legal regimes. To such an end, the institution under UN umbrella, i.e., UNCITRAL and an overview of its documents, the 1958 New York Convention, the document and institution under the International Chamber of Commerce (ICC) and the Permanent Court of Arbitration (PCA) and its founding conventions will be addressed. But, by no means it should be considered to mean that these are the only documents and institutions practicing international ADR. The place of such documents under Ethiopian legal regime and enforceability of outcomes given by international tribunals will be discussed as well.

4.2. The need for ADR in International disputes

We have different forums with the power to entertain disputes and give binding disposition to the dispute there under. The most dominant and binding one is that which derives its power from the supreme laws, i.e. constitution, of each nation to entertain disputes within the nation's jurisdictional limit. In addition, customary and alternative kinds of dispute resolution mechanism supplement the function of courts of law by entertaining disputes of different kinds in the domestic relations. The spheres of functioning of these devices are mostly limited to the disputes that arise in the national level. If the dispute has some nature of international dispute, it is not to mean that these forums established in the national level do not have jurisdiction to entertain the case. The issue here is about the conflict of interest that might arise between the disputants as to forum and law, and the nations and also the enforceability of such outcomes in the other nation. International treaties have tried to address these conflict of interest issues and make court decisions much smoother and enforceable in other nations.

Further, international tribunals have been established by the UN to serve as a forum for international disputes. Most nations of the world are making their diplomatic and commercial relations much smoother by the help of their institutes, i.e. UN. Though, there is unlimited number of critiques against the enforceability and reasonableness of decisions given by UN dispute settlement systems, huge number of international disputes are well addressed by it. The panel established under WTO is also the other most widely acceptable dispute settlement mechanism entertaining a wide range of international trade disputes raised among the member states.

What necessitated ADR in international disputes in the existence of all these different kinds of mechanism function well in different kinds of disputes? Do you think that there are a lot more kinds (subject matters) of disputes not yet addressed by these mechanisms we have seen so far? Or is that because the enforcement of decisions or out comes of these mechanisms have got obstacles?

A. Extra – territorial relations of citizens – With the increasing concept of ‘Globalization’, the interaction of citizens with other person or entity who is not a citizen of him is not uncommon. To survive as a state and to have a civilized nation peacefully established on the willingness of the subjects, the government should encourage such kinds of commercial and social interactions. The state is bound by its commitment to give protection to its and its citizens’ interests. As long as there is relation, commercial or other, it is inevitable for a conflict to arise from that relation. It will be wise to look for effective means of dispute settlement for such kind of dispute where the outcome will get recognition from all parties and which secure the enforceability of it as well. At this time ADR can be thought as a best alternative.

B. Limitations of the domestic courts - As it has been explained earlier the jurisdiction of domestic courts is limited to the matters related with the citizens’ interest and sometimes in the interests of public. Stated differently, state courts might have not jurisdiction to matters arised in international disputes for some times the other party is not clearly under the jurisdiction of the court so that enforcement of such kinds of court decisions will be obstacles. That means citizens might not get the opportunity to get the decision enforced and thereby exercise their rights. Especially, when one of the parties is not an Ethiopian and/or if he doesn’t have any property under Ethiopian jurisdiction, the decision given against him will not be easily enforced unless there is reciprocity in between the nations. The other thing is when there is a conflict of interest between the nations where the two disputants belong to. This happens where, for instance, both of the nation claims to have primary jurisdiction over the matter, when there is no reciprocity agreement to the enforceability of decisions given in one state to the other one. The parties, in such instances, prefer alternative meanses of getting justice by taking their grievances to ADR based on the sole consent of the disputants.

International Arbitration by J.S. Verma (taken from a book entitled, Alternative Dispute Resolution, Univ. Law Publishing. P. 13)

I. Need for International Arbitration,

The growth of international trades bound to give rise to international disputes which transcend national frontiers and geographical boundaries. For the resolution of such disputes the preference to international arbitration vis-à-vis litigation in national courts is natural because of arbitration being preferred to litigation in courts and the foreign element being preferred in the international arbitration to the domestic elements in the national courts. This is also because there is no international court to deal with international commercial disputes. “In situations of this kind, recourse to international arbitration in a convenient and neutral forum is generally seen as more acceptable the recourse to the courts as a way of solving any dispute which can’t be settled by negotiation.” (Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration, 2nd ed. P. 26.)

The rationale and purpose of international arbitration should be to provide a convenient, neutral, fair, expeditious and efficacious forum for resolving disputes relating to international commerce.

Basic features which are uniform in the legal framework for resolution of international commercial disputes “can be broken down in to three stages; (i) jurisdiction, (ii) choice of law, and (iii) the recognition and enforcement of judgements and awards.” (Jonathan Hill, in the Law Relating to International Commercial Disputes, para. 1.1.3).

The trend towards growing judicial intervention which tends to interfere with arbitral autonomy as also finality is a significant factor to be kept in view. The need is to reconcile and harmonise arbitral autonomy and finality with judicial review of the arbitral process. National law differ on this issue. UNCITRAL Mode Law attempts to promote harmony and uniformity in this sphere. The aim is to ensure arbitral autonomy coupled with neutrality or impartiality in the arbitral process by the composition of the arbitral tribunal by competent and impartial members with ensures

equality between the parties and full opportunity to them to present their case. Total exclusion of judicial intervention does not match with the current trend but the scope of judicial supervision needs to be reduced to the minimum. The source of authority of the international arbitral tribunal is the agreement of the parties and not the mandate of the State. The choice of the law applicable is also determined by the provision in the arbitral agreement. With the increased arbitral autonomy the requirement of reasons for the award is greater. Apart from transparency in the arbitral process, it also acts as an inherent check on the arbitrators and discloses to the party the basis of the award and the logical process by which the conclusion was reached by the arbitrators. The presence of the reason also regulates the scope of judicial supervision.

Informality of the arbitral process permits relaxation from strict rules of evidence and it reduces costs and delay which are often unavoidable in litigation. However, observance of basic principles of natural justice cannot be dispensed with.

Appropriate provisions for enforcement of award are essential to impart efficacy to international arbitration.

C. To promote of Access to Justice – It is not only on the national level that peoples will be denied of the right to have access to courts, but some times it happens in the international relations as well. For instance, it happens when none of the domestic courts of the disputants assume jurisdiction over the matter. In other words, some times the national courts where the disputants belong to me may not have the jurisdiction to entertain the case according to their own national laws. In such instances, the parties will not get access to any of the courts and the only alternative for them will be to look for ADR based on their free consent.

“Following its exponential development in US, the ADR movement was exported to many parts of the world. National courts in Europe, stymied by the volume of transborder litigation, have been attracted to ADR. Members of the European Union see ADR as a way to facilitate access to justice, a fundamental right contained inn Article 6 of the European Convention for the protection of Human rights and Fundamental Freedoms. Growing interest in ADR in the European Union has also resulted in a Green Paper proposing greater use of alternative process in civil and commercial matters, and efforts

are currently underway to develop a European Code of Conduct on mediation.” (International Conflict Resolution; Consensual ADR Process, American Case Book Series, Thomson west Pub, 2005, p. 18)

D. Development of e-commerce – Most of the time we think of three parties involved in ADR, the two disputants what ever there number may be and the third neutral intermediary. But these days, it becomes common to see ADR as a square or rectangle instead of a triangle. The fourth party, the new presence in the table, is the technology that works with the mediator or arbitrator. Interest in this fourth party has been fuelled by the emerging cyber market place, a market place of transactions taking place over the internet, known as e-commerce. These buyers and sellers need access to cost effective and efficient means to resolving disputes that arise from these online transactions. These buyers and sellers need a dispute resolution process that is inexpensive- one in which the costs are much lower than the purchase price of the commodity. Going to court or convening mediation are not viable resolution methods for these modest transactions.

“The development of e-commerce also increased the need for ADR. Given the difficulties of processing e-commerce disputes in a global e-market place, on-line dispute resolution has become an attractive alternative, particularly in small disputes. When ADR processes, such as mediation and arbitration, occur in the on-line environment, it is often referred as online dispute resolution (ODR).

In the context of civil disputes ADR processes, such as negotiation and mediation, introduced a civilized way to resolve international conflicts. They were designed to overcome the limitations and failures of domestic judicial processes and the lack of a binding international public process.” (International Conflict Resolution; Consensual ADR Process, American Case Book Series, Thomson west Pub, 2005, P. 19-20)

E. Influence of the UN Charter – The traditional dispute settlement procedures available under international law are enumerated in Article 33 of the UN Charter;

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by

negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle the dispute by such means.

Negotiation is generally acknowledged as the most fundamental of these processes. The most common process for international dispute settlement, however, are the diplomatic or the consensual methods – mediation and good offices, enquiry, and conciliation. The consultation process, although not mentioned in Article 33 of the UN Charter, is a species of negotiation that should be considered as part of the traditional package of processes for the resolution of international disputes. Together with pre-negotiation activities, such as public peace processes, coalition-building, dialogue groups, and co-existence practices, these processes offer a panoply of choices for dispute and conflict resolution practitioners. (p. 20)

This provision of the UN Charter and the general trend in the world towards ADR as a means of settling dispute makes the disputants to put trust and confidence on the procedure. The recognition of ADR in the charter as a first option before resorting to the International Court of Justice (ICJ), a court established under the umbrella of the UN by its charter, dictates the easy enforceability and the quality of ADR outcomes. It is also considered as a preliminary proceeding before going to ICJ.

F. The Limitation of International Courts – Internationally well functioning tribunals like the International Court of Justice (ICJ) and Criminal Court of Justice (CCJ) of the UN and the Dispute Settlement Body of the WTO have lots of limitation. The first one is the identity of the parties that have the right to institute a case or defend their case before these tribunals. It is only sovereign states and some times international organizations that can be a party before the ICJ. By the same token, the WTO tribunal accepts claims only from member states. In terms of the subject matters which can be seen by these tribunals, all cases can't be entertained before them. Most of the time ICJ entertains disputes "concerning issues related to frontiers and maritime boundaries, territorial sovereignty, the non-use of force, non-interference in the internal affairs of States, diplomatic relations, hostage-taking, the right of asylum, nationality, guardianship, rights of passage,

and economic rights.” (International Conflict Resolution; Consensual ADR Process, American Case Book Series, Thomson west Pub, 2005, p. 42). In the other hand, CCJ has jurisdiction to adjudicate only the gravest offences affecting the international community: genocide, crime against humanity and war crimes. The WTO tribunal entertains disputes in the implementation of any of its documents, like the GATT.

Though, these tribunals try to cover most of the possible disputes in terms of subject matters, the right of the international community to take its cases before them is not fully guaranteed. Thus, we have a lot more parties who do not have a right before any of these tribunals, like individuals, NGOs, companies etc. By the taken, we have some more subject matters of disputes which can't be entertained in any of these tribunals, like ownership of property, tort claims etc. ADR tries to fill these gaps or matters which are not well addressed by these well known tribunals of the world.

Question:

1. Can you think of other reasons to justify the need and existence ADR in international dispute settlement?
2. Which of the listed circumstances are experienced by our nation in its international relation?

4.3. Scope and Parties to International ADR

In the field where there exists the involvement of more than one parties or interaction among human beings, it might be inevitable to think of the possible existence of disputes. Human relation ship is becoming diversified backed by modern technologies. The world's commercial and diplomatic relation requires the involvement of at least more than one nation or citizens of a nation. Trade is becoming a global phenomenon which requires the involvement of more than one nations or citizens or entities of different nations. It is also becoming impossible this time to think of internal peace and security with out having smooth diplomatic relation ship with the neighbour and even other states far from once geographical location. Border disputes are also common between states especially after the mid of the 20th century as a result of a lots of independences in Africa, Asia and even in Europe. Extra – territorial crimes it self is one treat to the peace and

stability of the international community which involves the cooperation of the nations of the world in making sure that criminals did not get a shelter in a nation other than where the crime was committed and are duly prosecuted. Dispute may arise in the extradition policy of one nation and the ambition of the other nation to prosecute the suspect. These give rise to the existence of differences or disputes which cannot be easily adjudicated by the formal courts of one of the nations involved there under.

These are some examples of international disputes that are frequent in the current global relations. The question to be raised at this very junction is that can we take all these and other kinds of disputes before ADR tribunal and get a valid and enforceable, before the international community and the disputants, out come from it? Do we have subject matters of dispute which can't be safely entertained by ADR? The other related issue is about the capacity and identity of parties who can be a party before international ADR? The latter question is a kin to the controversy over the subjects of international law; sovereign nations and international organizations only or individual citizens and private institutes as well?

For instance, research has been done about the adequacy of the settlement of trade mark disputes occurring over the world by **Rosanne T. Mitchell** (Rosanne T. Mitchell, Resolving Domain Name-Trademark Disputes: A New System of Alternative Dispute Resolution Is Needed in Cyberspace, 14 OHIO ST. J. ON DISP. RESOL. 157 (1998), Cardozo Journal of Conflict Resolution). This article contends that current dispute resolution procedures are inadequate for alleviating trademark controversies over Internet domain names. The author believes expansion of the number of generic top level domains and registrars around the globe requires the implementation of an alternative dispute resolution system. Mitchell argues that this system will eliminate uncertainties in determining an appropriate forum and will dramatically decrease litigation time and expenses. The International Ad Hoc Committee's proposal, facilitated by the World Intellectual Property Organization ("WIPO"), attains these goals by providing three dispute resolution procedures: (1) on-line mediation; (2) on-line expedited arbitration; and (3) administrative challenge panels. The author contends that this proposal embodies an optimum solution for insufficient conflict resolution methods. Thus, Mitchell proposes that the United States government and WIPO should adopt this method to effectively resolve all trademark domain name disputes.

International arbitration has proved a useful method of settling some territorial disputes between nations. The question remains, however, as to whether arbitration is an appropriate dispute resolution mechanism to settle ethnic-based claims to land and a research was done on this area (*Carla S. Copeland, Note, The Use of Arbitration to Settle Territorial Dispute, 67 FORDHAM L. REV. 3073 (1999), Cardozo Journal of Conflict Resolution*). This research addresses the issue by examining three separate arbitration proceedings that have each involved a territorial dispute: (1) the Rann of Kutch arbitration between Pakistan and India; (2) the Taba Area arbitration between Israel and Egypt; and (3) the arbitration between the two Bosnian entities over the Brko area, as provided for by the Dayton Accords. The note concludes that the use of arbitration to solve territorial disputes can be successful only where the parties are committed to resolving the dispute peacefully through arbitration and that such a commitment is unlikely if the dispute involves an issue of vital national importance. Thus, this note contends that an attempt by the international community to force states to arbitrate such disputes may discourage future parties from using the procedure.

Another research was done to determine whether or not mediation works well in public disputes like armed conflict and deadly conflict and peace making role of mediation. In each of these types of dispute mediation has proved it self to be an effective kind of dispute settlement either in resolving the conflict totally or by mitigating the degree of contention. Peace keeping role of mediation is witnessed, for example, in Senator G. Mitchell's role in mediating the peace talks that led to the Good Friday/Belfast Agreement in 1998 in Northern Ireland. The conflict is often expressed in religious terms as a clash between Catholic and Protestants as a great many Protestants want to keep Northern Ireland in union with the United Kingdom (Unionists) and where a great many Catholics favour Northern Ireland becoming part of the Republic of Ireland (Nationalists). Senator G. Mitchell was appointed as a chair of all party talks and it ends with agreement.

In the field of armed conflicts the effort of Carter Centre's International Negotiation Network (INN) to mediate one of the longest civil wars in African history between the government of the People's Democratic Republic of Ethiopia (PDRE) and the Eritrean People's Liberation Front (EPLF) in 1989 can be mentioned. Lead by the then president

of USA, Carter, the two parties have made a partially successful two round meeting in Atlanta – USA and Nairobi – Kenya which ends with agreement on procedural matters. Mediation was tested in deadly conflicts of Bosnia and Rwanda

The above discussion makes clear the experience of different kinds of ADR in resolving international conflicts of different nature. Public disputes which would get a challenge in the domestic jurisdiction of ADR have been freely and fruitfully entertained in the international relations. Thus, we may say that it would be difficult to say that there are subject matters of a dispute in the international level which can't be entertained by ADR.

In case of capacity of parties before international ADR, the same conclusion can be reached and say that as long as a party has a cause of action and as long as both of the disputants are consented, it would be the obligation of the panel or tribunal to enforce the interest of the parties. This is witnessed from the provisions of different international documents. In arbitration, a party's ability or obligation to arbitrate an international dispute arises from its consent as a signatory to a contract that contains an arbitration clause. Article 1 of the AAA's International Arbitration Rules provides that an international arbitration shall occur "where parties have agreed in writing to arbitrate disputes." The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the legal framework by which the international community has chosen to regulate the enforcement of arbitral agreements and awards, imparts a similar writing requirement.

The effort made above shows us that the limitation we have in domestic jurisdiction of ADR over public interest cases would not arise in international relation as most of the disputes between states are resolved by using ADR. In addition, public international law denies parties other than sovereign states and some international organization with the right to be a party before it. This will not happen in ADR as private individuals, private commercial and civic institutes, states and group interests are freely entertained before it.

Question:

1. Can we say that every individual can take **any case** before international ADR tribunal? What conditions need to be fulfilled as a pre condition in addition to the consent of the parties to the dispute?

2. Can you think of matters which can't be entertained by ADR? Or, though entertained, the enforceability will face hardship?

4.4. International Documents and Organs Regulating ADR

ADR is being recognised as the most effective means of settling international disputes of any type. Basically, diplomatic and commercial relations are being enhanced by the employment of amicable dispute resolution mechanisms. To help this disposition to ADR than to other courts, lots of treaties have been signed so far either under the supervision of the UN or under the initiation of other public and domestic institutions and states. Tribunals have been established as a result of these treaties to serve as the best forum in settling disputes of international and domestic nature.

In the coming discussions we will try to see few of these international documents and tribunals. The writer of this sections believes that there are much more institutions which are not discussed for it does not get priority. Students are encouraged to make a deeper look to the remaining institutions. Thus, the widely known international institutions like the American Arbitration Association (AAA), the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC), and the Stockholm Chamber of Commerce are not discussed. There are also ADR tribunals that have specialized in settling dispute of specific nature. The London Maritime Arbitration Center is one of them.

I have selected four different sets of international documents for easy understanding of ADR in international level. The 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards as adopted by the UN diplomatic conference on June 10, 1958 and entered in to force in 7th of June, 1959 is the first one. Secondly, the five documents under the Permanent Court of Arbitration (PCA) two of which are Conventions that established the PCA whereas the others are optional laws are summarized. The United Nation Commission on International Trade Law (UNCITRAL) and the documents under it are also introduced in the later part. Lastly, the institution of the International Chamber of Commerce, its tribunal (International Court of Arbitration – ICA) and its rules have been discussed.

4.4.1. New York Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958

A. Background

The **Convention on the Recognition and Enforcement of Foreign Arbitral Awards**, also known as the **New York Convention**, was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959. The Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states. Widely considered the foundational instrument for international arbitration, it applies to arbitrations which are not considered as domestic awards in the state where recognition and enforcement is sought. Though other international conventions apply to the cross-border enforcement of arbitration awards, the New York Convention is by far the most important.

In 1953, the International Chamber of Commerce (ICC) produced the first draft Convention on the Recognition and Enforcement of International Arbitral Awards to the United Nations Economic and Social Council (ECOSOC). With slight modifications, the ECOSOC submitted the convention to the International Conference in the Spring of 1958. The Conference was chaired by Willem Schurmann, the Dutch Permanent Representative to the United Nations and Oscar Schachter, a leading figure in international law who later taught at Columbia Law School and School of International and Public Affairs, and served as the President of the American Society of International Law.

International arbitration is an increasingly popular means of alternative dispute resolution for cross-border commercial transactions. The primary advantage of international arbitration over court litigation is enforceability: an international arbitration award is enforceable in most countries in the world. Other advantages of international arbitration include the ability to select a neutral forum to resolve disputes, that arbitration awards are final and not ordinarily subject to appeal, the ability to choose flexible procedures for the arbitration, and confidentiality.

Once a dispute between parties is settled, the winning party needs to collect the award or judgment. Unless the assets of the losing party are located in the country where the court judgment was rendered, the winning party needs to obtain a court judgment in the jurisdiction where the other party resides or where its assets are located. Unless there is a treaty on recognition of court judgments between the country where the judgment is rendered and the country where the winning party seeks to collect, the winning party will be unable to use the court judgment to collect.

B. Overview of the Convention

The convention has got XVI articles divided in to further sub articles, but with no further division in to parts. It defines ‘foreign arbitral award’ as arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. In addition, arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought can be assimilated to foreign arbitral awards as per Article I(1) of this the convention. Article IV obliges the party applying for recognition and enforcement to provide, in the language of the nation where enforcement or recognition is sought, the copy of the authenticated original award or a duly certified copy thereof and the original agreement (arbitral submission) or a duly certified copy thereof.

Under the Convention documents as per Article II and III, an arbitration award issued in any contracting state can generally be freely enforced in any other contracting state, only subject to certain, limited defenses. These defenses are:

1. a party to the arbitration agreement was, under the law applicable to him, under some incapacity;
2. the arbitration agreement was not valid under its governing law;
3. a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;
4. the award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration, or contains matters beyond the scope of the arbitration (subject to the proviso that an award which contains decisions on such matters may be enforced to the extent that it contains decisions on matters

- submitted to arbitration which can be separated from those matters not so submitted);
5. the composition of the arbitral tribunal was not in accordance with the agreement of the parties or, failing such agreement, with the law of the place where the hearing took place (the "lex loci arbitri");
 6. the award has not yet become binding upon the parties, or has been set aside or suspended by a competent authority, either in the country where the arbitration took place, or pursuant to the law of the arbitration agreement;
 7. the subject matter of the award was not capable of resolution by arbitration; or
 8. enforcement would be contrary to "public policy".

C. List of Member States

Countries which have adopted the New York Convention have agreed to recognize and enforce international arbitration awards. As of September 2007, 141 of the 192 United Nations Member States and the Holy See have adopted the New York Convention. Only 51 Member States and Taiwan have not yet adopted the New York Convention. A number of British Dependent Territories have not yet had the Convention extended to them by Order-in-Council. For easy understanding of the status of world nations in light of the convention, here are the list nations that are signatories and which are not party to it. The fact that Ethiopia and many other African nations are not signatories to the convention can be easily analyzed on the face of these lists. In the last part of this chapter we will see Ethiopian approach to these documents and the alternative one as well.

STATE PARTIES TO THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, 1958 (as of May 2007)

Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Central African Republic, Chile, China, Colombia, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia,

Iran, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Madagascar, Malaysia, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Moldova, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saint Vincent and the Grenadines, San Marino, Saudi Arabia, Senegal, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, The former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Vietnam, Zambia, Zimbabwe.

States which are Not Party to the New York Convention (as of May 2007)

Andorra, Angola, Belize, Belize, Bhutan, British Virgin Islands, Burundi, Cape Verde, Chad, Comoros, Congo - Dem. Republic of the, Equatorial Guinea, Eritrea, Ethiopia, Fiji, Gambia, Grenada, Guinea-Bissau, Guyana, Iraq, Kiribati, North Korea, Libya, Liechtenstein, Malawi, Maldives, Micronesia, - Fed. States of, Myanmar, Namibia, Nauru, Palau, Papua New Guinea, Rwanda, Saint Kitts and Nevis, Saint Lucia, Samoa, Sao Tome and Principe, Seychelles, Sierra Leone, Solomon Islands, Somalia, Sudan, Suriname, Swaziland, Timor-Leste, Togo, Tonga, Tajikistan, Turkmenistan, Tuvalu, Vanuatu, Yemen

This document, in fact, harmonized the enforcement of foreign arbitral award since most of the nations of the world approved it. Its contents help the disputants to fill confidence on enforceability of outcomes of tribunals validly established out of their national jurisdiction. The fact that Ethiopia is not yet the signatory of this document by itself will not absolutely hinder the enforceability of awards given elsewhere for we can use the civil procedure provisions (Arts 450 – 456) in the matter.

Question:

1. How many percent of the non-member states of the 1958 convention are African nations? What do you understand from the figure?
2. What is the basic purpose of the Convention for individuals working in the international market?

4.4.2. Convention for the Pacific Settlement of International Disputes (1899 and 1907) and the Permanent Court of Arbitration (PCA)

The Convention which could be said the first in its nature and content came in to the hands of leaders in the late 1890's for approval. The same document, with out affecting the status of the existing one and as well the commitment of signatories, by enclosing a more detailed stipulation came in to existence in 1907. These two conventions are the founding documents of the Permanent Court of Arbitration (PCA), which is established two decades before the establishment of the Permanent Court of Justice in the late 1910's, which is now replaced by the International Court of Justice.

The objectives behind the initiation of these conventions are set in the preamble of the documents. The great Majesty and Empresses of the time, in 1899, have put the following as their objective

1. a strong desire to work for the maintenance of general peace;
2. to resolve and promote by their best efforts the friendly settlement of international disputes;
3. recognizing the solidarity uniting the members of the society of civilized nations;
4. desirous of extending the empire of law, and of strengthening the appreciation of international justice;
5. convinced that the permanent institution of a tribunal of arbitration, accessible to all, in the midst of the independent Powers, will contribute effectively to this result;
6. having regard to the advantages attending the general and regular organization of the procedure of arbitration;

7. sharing the opinion of the august initiator of the International Peace Conference that it is expedient to record in an international agreement the principles of equity and right on which are based the security of States and the welfare of peoples.

Among the points that necessitated the coming in to existence of the new Convention which was signed in the year 1907 were the following (it is noted that the second Convention also shares the objectives set by the first one listed here above);

1. Insuring the better working in practice of Commissions of Inquiry and Tribunals of Arbitration, and of facilitating recourse to arbitration in cases which allow of a summary procedure;
2. The necessity to revise in certain particulars and to complete the work of the First Peace Conference for the pacific settlement of international disputes (held in 1899);

The first convention has 61 articles under four Titles. Title I, shortly in a single article, sets the objective of the Convention and interests of the signatory nations, i.e. “with a view to obviating, as far as possible, recourse to force in the relations between States, the Contracting Powers agree to use their best efforts to ensure the pacific settlement of international differences.” Title II established the first alternatives of settling dispute among member states by using “Good Offices and Mediation” and the procedures there under. The third Title deals with the possibility of establishing “International Commission of Inquiry” to facilitate a solution for differences of international nature by elucidating the facts by means of an impartial and conscientious investigation. The last Title, in depth, regulates international arbitration between the member states. This part established the Permanent Court of Arbitration in its chapter two having its seat in The Hague. The organization of the tribunal, the powers and duties of the disputant states before the tribunal, the jurisdiction of the court, the effect and binding nature of the award has been thoroughly discussed. At end, the Convention has got a General Provision which speaks about the ratification or membership process, the coming in to force of the Convention and other matters.

When we come to the second Convention, most of its contents are similar with the 1899 Convention except in some circumstances. It has, in deed, 97 Articles under its five Parts.

I could say that the first two parts of this convention is a literal copy of its predecessor. Under Part III, which deals about the International Commission of Inquiry, more detailed provisions have been included as to its working procedure. Especially, the commission has been put under the supervision of the International Bureau of the Permanent Court of Arbitration, which serves as a registrar. Part IV of it included a new system which was not there under the predecessor Convention. Chapter IV of it established “Arbitration by Summary Procedure” in disputes admitting of a summary procedure. The last one, Part V, is devoted for “Final Provisions” regarding membership and coming in to force of the Convention.

When we come to memberships, we can see three different categories of nation; member for one of the Conventions and member for both of the Conventions. Generally speaking, 107 states have acceded to one or both of the PCA's founding conventions. It is noted here that Ethiopia is a member to the 1899 founding convention starting from **May 28, 2003**. Proclamation No 348/2003 approves the said Convention and incorporated it to the legal regime of the nation.

Table showing member states of the PCA’s founding conventions of 1899 and 1907 together with the year of accession

	1899	1907
<i>Argentina</i>	<i>15-06-1907</i>	
<i>Australia</i>	<i>01-04-1960</i>	<i>21-02-1997</i>
<i>Austria</i>	<i>04-09-1900</i>	<i>26-01-1910</i>
<i>Belarus</i>	<i>04-06-1962</i>	<i>04-04-1962</i>
<i>Belgium</i>	<i>04-09-1900</i>	<i>07-10-1910</i>
<i>Belize</i>		<i>21-01-2003</i>
<i>Benin</i>		<i>16-09-2005</i>
<i>Bolivia</i>	<i>15-06-1907</i>	<i>26-10-1910</i>
<i>Brazil</i>	<i>15-06-1907</i>	<i>06-03-1914</i>
<i>Bulgaria</i>	<i>04-09-1900</i>	<i>10-06-2000</i>
<i>Burkina Faso</i>	<i>30-08-1961</i>	<i>30-08-1961</i>
<i>Cambodia</i>	<i>04-01-1956</i>	<i>04-01-1956</i>

<i>Cameroon</i>	<i>01-08-1961</i>	<i>01-08-1961</i>
<i>Canada</i>	<i>19-08-1960</i>	<i>09-07-1994</i>
<i>Chile</i>	<i>15-06-1907</i>	<i>18-01-1998</i>
<i>China, People's Republic of</i>	<i>21-11-1904</i>	<i>26-01-1910</i>
<i>Colombia</i>	<i>15-06-1907</i>	<i>17-03-1997</i>
<i>Congo, Democratic Republic of the</i>	<i>25-03-1961</i>	<i>25-03-1961</i>
<i>Costa Rica</i>		<i>20-07-1999</i>
<i>Croatia</i>	<i>08-10-1991</i>	
<i>Cuba</i>	<i>15-06-1907</i>	<i>22-04-1912</i>
<i>Cyprus</i>		<i>12-11-1993</i>
<i>Czech Republic</i>		<i>01-01-1993</i>
<i>Denmark</i>	<i>04-09-1900</i>	<i>26-01-1910</i>
<i>Dominican Republic</i>	<i>15-06-1907</i>	<i>07-09-1958</i>
<i>Ecuador</i>	<i>03-07-1907</i>	
<i>Egypt</i>		<i>04-11-1968</i>
<i>El Salvador</i>	<i>20-06-1907</i>	<i>26-01-1910</i>
<i>Eritrea</i>		<i>04-10-1997</i>
<i>Estonia, Republic of</i>		<i>01-09-2003</i>
<i>Ethiopia</i>	<i>28-09-2003</i>	
<i>Fiji</i>	<i>02-04-1973</i>	
<i>Finland</i>		<i>09-06-1922</i>
<i>France</i>	<i>04-09-1900</i>	<i>06-12-1910</i>
<i>Germany</i>	<i>04-09-1900</i>	<i>26-01-1910</i>
<i>Greece</i>	<i>04-04-1901</i>	
<i>Guatemala</i>	<i>15-06-1907</i>	<i>14-05-1911</i>
<i>Guyana</i>		<i>25-01-1998</i>
<i>Haiti</i>	<i>15-06-1907</i>	<i>03-04-1910</i>
<i>Honduras</i>	<i>01-12-1961</i>	<i>30-01-1962</i>
<i>Hungary</i>	<i>04-09-1900</i>	<i>26-01-1910</i>
<i>Iceland</i>	<i>08-12-1955</i>	<i>08-12-1955</i>
<i>India</i>	<i>29-07-1950</i>	
<i>Iran</i>	<i>04-09-1900</i>	
<i>Iraq</i>	<i>31-08-1970</i>	<i>30-10-1970</i>

<i>Ireland</i>		<i>06-07-2002</i>
<i>Israel</i>		<i>17-06-1962</i>
<i>Italy</i>	<i>04-09-1900</i>	
<i>Japan</i>	<i>06-10-1900</i>	<i>11-02-1912</i>
<i>Jordan</i>		<i>27-01-1992</i>
<i>Kenya</i>		<i>11-06-2006</i>
<i>Korea, Republic of</i>		<i>21-02-2000</i>
<i>Kuwait</i>		<i>14-09-2003</i>
<i>Kyrgyzstan</i>	<i>04-06-1992</i>	<i>04-06-1992</i>
<i>Lao People's Democratic Republic</i>	<i>18-07-1955</i>	<i>18-07-1955</i>
<i>Latvia</i>		<i>12-08-2001</i>
<i>Lebanon</i>	<i>14-02-1968</i>	<i>14-04-1968</i>
<i>Libyan Arab Jamahiriya</i>		<i>02-09-1996</i>
<i>Liechtenstein</i>		<i>23-09-1994</i>
<i>Lithuania</i>		<i>09-01-2005</i>
<i>Luxembourg</i>	<i>12-07-1901</i>	<i>04-11-1912</i>
<i>Macedonia, Former Yugoslav Republic of</i>	<i>17-11-1991</i>	<i>17-02-2001</i>
<i>Malaysia</i>		<i>06-05-2002</i>
<i>Malta</i>		<i>07-09-1968</i>
<i>Mauritius</i>	<i>03-08-1970</i>	
<i>Mexico</i>	<i>17-04-1901</i>	<i>26-01-1910</i>
<i>Montenegro</i>	<i>03-06-2006</i>	
<i>Morocco</i>		<i>04-06-2001</i>
<i>Netherlands</i>	<i>04-09-1900</i>	<i>26-01-1910</i>
<i>New Zealand</i>	<i>10-02-1959</i>	
<i>Nicaragua</i>	<i>15-06-1907</i>	<i>14-02-1910</i>
<i>Nigeria</i>		<i>16-02-1987</i>
<i>Norway</i>	<i>04-09-1900</i>	<i>18-11-1910</i>
<i>Pakistan</i>	<i>05-08-1950</i>	
<i>Panama</i>	<i>15-06-1907</i>	<i>10-11-1911</i>
<i>Paraguay</i>	<i>15-06-1907</i>	<i>24-06-1933</i>
<i>Peru</i>	<i>15-06-1907</i>	
<i>Poland</i>		<i>26-05-1922</i>

<i>Portugal</i>	<i>04-09-1900</i>	<i>12-06-1911</i>
<i>Qatar</i>		<i>02-12-2005</i>
<i>Romania</i>	<i>04-09-1900</i>	<i>30-04-1912</i>
<i>Russian Federation</i>	<i>07-03-1955</i>	<i>07-03-1955</i>
<i>Saudi Arabia</i>		<i>20-01-2002</i>
<i>Senegal</i>	<i>01-08-1977</i>	<i>30-09-1977</i>
<i>Serbia, Republic of</i>	<i>05-06-2006</i>	<i>05-06-2006</i>
<i>Singapore</i>		<i>11-09-1993</i>
<i>Slovak Republic</i>		<i>01-01-1993</i>
<i>Slovenia</i>	<i>01-10-1996</i>	<i>29-03-2004</i>
<i>South Africa</i>		<i>21-12-1998</i>
<i>Spain</i>	<i>04-09-1900</i>	<i>17-05-1913</i>
<i>Sri Lanka</i>	<i>09-02-1955</i>	
<i>Sudan</i>		<i>02-12-1966</i>
<i>Suriname</i>		<i>27-12-1992</i>
<i>Swaziland</i>		<i>25-12-1970</i>
<i>Sweden</i>	<i>04-09-1900</i>	<i>26-01-1910</i>
<i>Switzerland</i>	<i>29-12-1900</i>	<i>11-07-1910</i>
<i>Thailand</i>	<i>04-09-1900</i>	<i>11-05-1910</i>
<i>Togo</i>		<i>17-12-2004</i>
<i>Turkey</i>	<i>12-06-1907</i>	
<i>Uganda</i>		<i>30-04-1966</i>
<i>Ukraine</i>	<i>04-04-1962</i>	<i>04-04-1962</i>
<i>United States of America</i>	<i>04-09-1900</i>	<i>26-01-1910</i>
<i>United Kingdom</i>	<i>04-09-1900</i>	<i>12-10-1970</i>
<i>Uruguay</i>	<i>17-06-1907</i>	
<i>Venezuela</i>	<i>15-06-1907</i>	
<i>Zambia</i>		<i>31-12-1999</i>
<i>Zimbabwe</i>		

In addition to these founding Conventions, the PCA has some more Arbitration and Conciliation rules where the disputing parties can free to accept or refuse of its application on their disputes. These are, the 1992 PCA Optional Rule for Arbitrating Disputes between two States, the 1996 PCA Optional Rules for Arbitration Involving

International Organization and States, and the 1996 PCA Optional Conciliation Rules. These optional rules made in accordance with the UNCITRAL model laws enacted so far including model Arbitration and Conciliation clauses.

The first two optional rules, i.e. arbitration rules, have been elaborated for use in arbitrating disputes arising under treaties or other agreements between two States, and disputes arising under treaties, or other agreements or relationships between an international organization and a State, or between two international organizations. But they can be, as well, modified for use in connection with multilateral treaties. The Rules are based on the UNCITRAL Arbitration Rules with changes in order to:

(i) reflect the public international law character of disputes between States, and between international organizations and States and diplomatic practice appropriate to such disputes ;

(ii) indicate the role of the Secretary-General and the International Bureau of the Permanent Court of Arbitration at The Hague, and the relation of these Rules with the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes; and

(iii) provide freedom for the parties to choose to have an arbitral tribunal of one, three or five persons.

The Rules are optional and emphasize flexibility and party autonomy. For example:

(i) the Rules, and the services of the Secretary-General and the International Bureau of the Permanent Court of Arbitration, are available for use by *all* States, and are not restricted to disputes in which both States are parties to either The Hague Convention for the Pacific Settlement of International Disputes of 1899 or that of 1907;

(ii) the choice of arbitrators is not limited to persons who are listed as Members of the Permanent Court of Arbitration;

(iii) States have complete freedom to agree upon any individual or institution as appointing authority. In order to provide a failsafe mechanism to prevent frustration of the arbitration, the Rules provide that the Secretary-General will designate an appointing authority if the parties do not agree upon the authority, or if the authority they choose does not act.

The following can be said about the PCA's Optional Conciliation Rule.

A. Purpose of the Rules

Parties who have disputes that they are unable to settle through consultation and negotiation with each other may wish to consider conciliation as a method for resolving their differences without the need to resort to arbitration or judicial means.

Although the benefits of conciliation are widely recognized, some parties may hesitate to enter into conciliation because they may be unfamiliar with the process or may have different views concerning how conciliation should be conducted. In order to facilitate greater use of conciliation, the Permanent Court of Arbitration has, with the approval of the Administrative Council, established these Optional Conciliation Rules ('the PCA Optional Conciliation Rules'). These Rules are based on the UNCITRAL Conciliation Rules, with changes to indicate, *inter alia*, the availability of the Secretary-General of the Permanent Court of Arbitration to assist in appointing conciliators and of the International Bureau to furnish administrative support (Arts 4 (3) and 8).

The purpose of these Rules is to provide a convenient basis for mutual agreement of parties on practical procedures that are useful in the conciliation process. Thus, for example, the Rules describe how to start a conciliation, how to appoint conciliators, what functions conciliators are expected to perform, and how to encourage parties to speak freely and candidly with conciliators while at the same time preserving necessary confidentiality. These Rules also describe how, if the conciliation is unsuccessful, it may be easily terminated so as not to delay or prejudice recourse to arbitration, judicial procedures or other means for ultimately resolving the dispute.

B. Scope of Application

The PCA Optional Conciliation Rules were prepared primarily for use in assisting to resolve disputes arising out of or relating to legal relationships where the parties seek an amicable settlement of their differences. In addition, parties are free to agree to use these Rules in seeking to resolve any other type of dispute.

These Rules are intended for use in conciliating disputes in which one or more of the parties is a State, a State entity or enterprise, or an international organization. Thus, for example, the same Rules may be used in disputes between two States and also in disputes between two parties only one of which is a State.

The PCA recognizes the importance and complexity of disputes that involve more than two parties. These Rules are also appropriate for use in connection with multiparty disputes, provided that changes are made to reflect participation by more than two parties. The Secretary-General of the Permanent Court of Arbitration is available to consult with interested parties concerning modifications that may be considered in adapting these Rules for use in multiparty disputes.

These Rules, and the services of the Secretary-General and the International Bureau, are available for use by all States and their entities and enterprises, and are not restricted to disputes in which the State is a party to either the Hague Convention on the Pacific Settlement of International Disputes of 1899, or that of 1907, nor is the choice of conciliators limited to persons who are listed as Members of the Permanent Court of Arbitration.

In modern international practice, the word ‘mediation’ is sometimes used to designate a process that is very similar to the procedures for ‘conciliation’ described in these Rules. In such cases, these Rules can also be used for mediation, it being necessary only to change the words ‘conciliation’ to ‘mediation’ and ‘conciliator’ to ‘mediator.’

C. Main Characteristics of the Rule

Parties who consider using the PCA Optional Conciliation Rules will wish to be aware of some of the main characteristics of these Rules:

A Voluntary Process - A primary principle that is expressed throughout these Rules is that initiating and continuing conciliation is entirely voluntary. Thus, these Rules provide that conciliation begins when all parties consent (Arts 2 (2) and 3) and that one party may terminate the process whenever it unilaterally determines that conciliation is no longer desirable (Art 15 (a)). These provisions reflect the belief that conciliation has the best chance to succeed when all parties share the desire to participate, and that, if they do not, it may be more efficient to resort without delay to arbitration or judicial means.

Flexible Procedures - Flexibility is another fundamental characteristic of these Rules. Parties are free to agree to have one or more conciliators (art. 3). The conciliator may conduct the process in such manner as he considers appropriate, taking into account the circumstances of the dispute, any views the parties may have expressed and any special need for a speedy settlement. The role of the conciliator under the PCA Optional Conciliation Rules is to assist parties to understand the issues and to reach an amicable settlement of their dispute. In pursuit of this goal, the conciliator may recommend terms of settlement if and when it is considered wise to do so, but the conciliator is not required to give a recommendation (art. 7 (4)). The approach of the conciliator under these Rules is to bring the parties to agreement by a variety of means, rather than to focus primarily on influencing the parties by a recommendation.

An Integrated System - A significant feature of the PCA Optional Conciliation Rules is that they are part of an integrated PCA dispute resolution system that links the procedures for conciliation with possible arbitration under the various PCA Optional Arbitration Rules. This is useful because if a dispute is not resolved by conciliation, parties may wish to move promptly to final and binding arbitration. Therefore, these Rules provide several important safeguards that apply in the event that arbitration, or recourse to judicial means, follows an unsuccessful conciliation.

The ultimate safeguard against using conciliation to delay commencement of arbitration is the key provision of these Rules that, as mentioned above, permits one party to terminate conciliation if it reaches the conclusion that the conciliation is no longer desirable. Moreover, by agreeing to conciliation under these Rules, the parties undertake that if the conciliation does not result in a settlement they will not introduce in any subsequent arbitration, or judicial proceedings, certain specified evidence that might be harmful. The evidence thus barred by these Rules consists of: (i) any views expressed by either party concerning possible settlement of the dispute; (ii) any admissions made by either party in the conciliation; (iii) any proposals made by the conciliator(s); or (iv) the fact that a party indicated willingness to accept a proposal for settlement made by the conciliator (art. 20). These provisions effectively protect parties and thereby encourage candor and a free exchange of views during the conciliation. Additional safeguards in these Rules include that the parties and conciliator undertake that, unless the parties vary the Rules, a conciliator will not act as an arbitrator or representative of a party in any arbitration or judicial proceeding in respect of a dispute that is subject to the conciliation, and that no party will present a conciliator as a witness in any such proceeding (art. 19).

A related safeguard arises from the provision of these Rules that makes clear that the conciliator may speak with the parties together or may meet them separately when that is advisable (art. 9 (1)). These Rules also provide that a party may communicate information to the conciliator subject to the restriction that it not be disclosed to the other party (art. 10). These provisions encourage parties to confide in the conciliator – which may be vital in guiding the conciliator in the search for an amicable solution – and also to protect parties in arbitration or court litigation that may occur if no solution is found in the conciliation.

The Conventions for the Pacific Settlement of International Disputes are the first documents that opened the way towards common understanding of the value of ADR in the settlement of international disputes of any kind. The fact that the PCA were working well even before the establishment of League of Nations and the court under it, i.e. the Permanent Court of Justice, shows us the common understanding of the leaders of the nation about the threat of dispute to the world peace and the value of ADR to tackle it. The new three rules are not mandatory rules and any body whether a member to the PCA or not can freely use it though the matter has not been referred to the PCA.

Questions:

1. List down some of the innovations made by the 1907 Convention over the previous one?
2. What necessitated the second convention in the existence of the former?
3. What benefits are we going to get as we been a member of the 1899 convention?

4.4.3. UNCITRAL Documents

A. Origin

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966 (Resolution 2205(XXI) of 17 December 1966). In establishing the Commission, the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles.

UNCITRAL is a subsidiary body of the General Assembly of the United Nations with the general mandate to further the progressive harmonization and unification of the law of international trade. UNCITRAL has since prepared a wide range of conventions, model laws and other instruments dealing with the substantive law that governs trade transactions or other aspects of business law which have an impact on international trade. UNCITRAL meets once a year, typically in summer, alternatively in New York and in Vienna.

It is important here to brief the difference between UNCITRAL and WTO since some peoples are confused of their difference and take one as part of the other, which in fact is not. UNCITRAL is a subsidiary body of the General Assembly of the United Nations. The Secretariat of UNCITRAL is the International Trade Law Division of the Office of Legal Affairs of the United Nations Secretariat. In contrast, the World Trade Organization (WTO) is an intergovernmental organization independent from the United Nations.

Moreover, the issues dealt with by the WTO and UNCITRAL are different. The WTO deals with trade policy issues, such as trade liberalization, abolition of trade barriers, unfair trade practices or other similar issues usually related to public law, whereas UNCITRAL deals with the laws applicable to private parties in international transactions. As a consequence, UNCITRAL is not involved with "state-to-state" issues such as anti-dumping, countervailing duties, or import quotas.

UNCITRAL plays an important role in improving the legal framework for international trade by preparing international legislative texts for use by States in modernizing the law of international trade and non-legislative texts for use by commercial parties in negotiating transactions. UNCITRAL legislative texts address international sale of goods; international commercial dispute resolution, including both arbitration and conciliation; electronic commerce; insolvency, including cross-border insolvency; international transport of goods; international payments; procurement and infrastructure development; and security interests. Non-legislative texts include rules for conduct of arbitration and conciliation proceedings; notes on organizing and conducting arbitral proceedings; and legal guides on industrial construction contracts and counter trade.

When we look at the mandate or the objectives of its establishment the General Assembly gave the Commission the general mandate **to further the progressive harmonization and unification of the law of international trade**. The Commission has since come to be the core legal body of the United Nations system in the field of international trade law. "Harmonization" and "unification" of the law of international trade refers to the process through which the law facilitating international commerce is created and adopted. International commerce may be hindered by factors such as the lack of a predictable governing law or out-of-date laws unsuited to commercial practice. The United Nations Commission on International Trade Law identifies such problems and then carefully crafts solutions which are acceptable to States having different legal systems and levels of economic and social development.

"Harmonization" may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions. "Unification" may be seen as the adoption by States of a common legal standard governing particular aspect of international business transactions. A model law or a

legislative guide is an example of a text which is drafted to harmonize domestic law, while a convention is an international instrument which is adopted by States for the unification of the law at an international level. Texts resulting from the work of UNCITRAL include conventions, model laws, legal guides, legislative guides, rules, and practice notes. In practice, the two concepts are closely related.

B. Membership

As is the case with most subsidiary bodies of the General Assembly, which is composed of all States members of the United Nations, membership in UNCITRAL is limited to a smaller number of States, so as to facilitate the deliberations. The General Assembly elects states to be a member of the Commission from UN member states. UNCITRAL was originally composed of 29 States; its membership was expanded in 1973 to 36 States and again in 2004 to 60 States. The membership is representative of the various geographic regions and the principal economic and legal systems of the world. Members of the Commission are elected for terms of six years, the terms of half the members expiring every three years.

In addition, there are five regional groups represented within the Commission: African States; Asian States; Eastern European States; Latin American and Caribbean States; Western European and Other States.

As from 25 June 2007, the members of UNCITRAL, and the years when their memberships expire, are listed below.

Thirty states whose membership expire in the year 2010 are Algeria, Australia, Austria, Belarus, Colombia, Czech Republic, Ecuador, Fiji, Gabon, Guatemala, India, Iran (Islamic Republic of), Israel, Italy, Kenya, Lebanon, Madagascar, Mongolia, Nigeria, Pakistan, Paraguay, Poland, Serbia, Spain, Switzerland, Thailand, Uganda, United States of America, Venezuela (Bolivarian Republic of), and Zimbabwe.

Where as the remaining thirty states whose membership expire in the year 2013 are Armenia, Bahrain, Benin, Bolivia, Bulgaria, Cameroon, Canada, Chile, China, Egypt, El Salvador, France, Germany, Greece, Honduras, Japan, Latvia, Malaysia, Malta,

Mexico, Morocco, Namibia, Norway, Republic of Korea, Russian Federation, Senegal, Singapore, South Africa, Sri Lanka, and United Kingdom of Great Britain and Northern Ireland.

The degree of participation of developing nation is maintained to the possible extent. In accordance with its mandate, (Para. 9 of General Assembly resolution 2205 (XXI) of 17 December 1966), UNCITRAL takes into account in its work "the interests of all peoples, and particularly those of the developing countries, in the extensive development of international trade". Members of the Commission represent different geographic areas, and are elected by the General Assembly "having due regard to the adequate representation of the principal economic and legal systems of the world, and of developed and developing countries." (Id., para. 1).

Developing countries play an active role in both drafting and adoption UNCITRAL texts. The commitment of the Commission and the Secretariat to providing training and technical assistance to those countries is also long-standing and constant. Similarly, the General Assembly has expressed strong support for this work. For example, General Assembly resolution 55/151 of 12 December 2000 entitled "Report of the United Nations Commission on International Trade Law" "... reaffirms the importance, in particular for developing countries, of the work of the Commission concerned with training and technical assistance in the field of international trade law, such as assistance in the preparation of national legislation based on legal texts of the Commission".

Though UNCITRAL texts are initiated, drafted, and adopted substantially by a body made up of 60 elected member States representing different geographic regions, participants in the drafting process include the member States of the Commission and other States (referred to as "observer States"), as well as interested international inter-governmental organizations ("IGO's") and non-governmental organizations ("NGO's").

C. Documents adopted by UNCITRAL

So far since its establishment by the decision of the General Assembly of the UN, UNCITRAL has adopted four documents for the purpose of "Harmonization" and "unification" of the law of international trade. These are the 1976 UNCITRAL

Arbitration Rules, the 1980 UNCITRAL Conciliation Rules, the UNCITRAL Model Law on International Commercial Arbitration of 1985 which is later amended in 2006, and the UNCITRAL Model Law on International Commercial Conciliation of 2002 which is also amended in 2004.

The following facts necessitated the adoption of the Arbitration Rules 1976;

- a. Recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations,
- b. Being convinced that the establishment of rules for ad hoc arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations,
- c. Bearing in mind that the Arbitration Rules of the United Nations Commission on International Trade Law have been prepared after extensive consultation with arbitral institutions and centres of international commercial arbitration,
- d. Noting that the Arbitration Rules were adopted by the United Nations Commission on International Trade Law at its ninth session after due deliberation,

This rule has 41 Article under IV different Sections. Section I deals about “Introductory Rules” including the scope of application of the rule, the second about “the composition of the arbitral tribunal”, then about the “arbitral proceeding” and the lastly one about the nature of “the award” including the costs there under.

The Generally Assembly adopted the second rule of UNCITRAL, i.e. 1980 Conciliation rules, which regulate conciliation as an alternative means of dispute settlement. The rules are divided in to 20 Articles and a Model Conciliation Clause. It stipulated a specific rule about the scope of application of the rule; the nomination, role, ethical responsibilities of the conciliators; the rule of evidence before them; the effect and costs of the conciliation proceeding. The followings were the observations of the time that necessitated the adoption of this rules, in addition to the general purpose of the UNCITRAL;

- a. *Recognizing* the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations,

- b. *Convinced* that the establishment of conciliation rules that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations,
- c. *Noting* that the Conciliation Rules of the United Nations Commission on International Trade Law were adopted by the Commission at its thirteenth session¹ after consideration of the observations of Governments and interested organizations.

The recent two UNCITRAL documents which are model laws as the name it self indicates, are specifically meant to regulate arbitration and conciliation proceedings in the international commercial relations. A model law is a legislative text that is recommended to States for incorporation into their national law. Unlike an international convention, model legislation does not require the State enacting it to notify the United Nations or other States that may have also enacted it.

In incorporating the text of the model legislation into its legal system, a State may modify or leave out some of its provisions. In the case of a convention, the possibility of changes being made to the uniform text by the States parties (normally referred to as “reservations”) is much more restricted; in particular, trade law conventions usually either totally prohibit reservations or allow only very few, specified ones. The flexibility inherent in model legislation is particularly desirable in those cases where it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as national law. Some modifications may be expected in particular when the uniform text is closely related to the national court and procedural system. This, however, also means that the degree of, and certainty about, harmonization achieved through model legislation is likely to be lower than in the case of a convention. Because of the flexibility inherent in a model law, the number of States enacting model legislation is likely to be higher than the number of States adhering to a convention. In order to achieve a satisfactory degree of harmonization and certainty, States should consider making as few changes as possible in incorporating the Model Law into their legal systems; however, if changes are made, they should remain within the basic principles of the Model Law. A significant reason for adhering as much as possible to the uniform text is to make the national law as transparent and familiar as possible for foreign parties, advisers and conciliators who participate in conciliations in the enacting State.

International trade and commerce have grown rapidly with cross border transactions being entered into by a growing number of entities, including small and medium-sized ones. With the increasing use of electronic commerce, where business is frequently conducted across national boundaries, the need for effective and efficient dispute resolution systems has become paramount. UNCITRAL has drafted the Model Law to assist States in designing dispute resolution processes that are intended to reduce costs of dispute settlement, foster maintaining a cooperative atmosphere between trading parties, prevent further disputes and inject certainty into international trade. By adopting the Model Law, and by educating parties engaged in international commerce about its purposes, the parties will be encouraged to seek non-adjudicative dispute settlement methods that will increase cost-effectiveness in the marketplace.

The objectives of the Model Law, which include encouraging the use of conciliation and providing greater predictability and certainty in its use, are important for fostering economy and efficiency in international trade.

The Model Law was developed in the context of recognition of the increasing use of Arbitration and conciliation as a method for settling commercial disputes. The Model Law was also designed to provide uniform rules in respect of the conciliation process. In many countries, the legal rules affecting conciliation are set out in various pieces of legislation and take differing approaches on issues such as confidentiality and evidentiary privilege and exceptions thereto. Uniformity on such topics helps to provide greater integrity and certainty in the conciliation process. The benefits of uniformity are magnified in cases involving conciliation via the Internet where the applicable law may not be self-evident.

UNCITRAL is a subordinate body in the UN which have the objective of harmonizing laws regulating international trade. So far it has adopted two arbitration and two more conciliation rules. The last two are model laws which can be used by the nations of the world in formulating their own domestic laws and treaties regulating arbitration and conciliation. This can be inferred from the latest optional laws of the PCA which have been made according to the UNCITRAL laws.

Questions:

1. What is the purpose of the UNCITRAL optional rules and what is degree of its persuasiveness?
2. What do you understand from the phrases ‘Model Conciliation Clause’ and ‘Model Arbitration Clause’?

4.4.4. International Chamber of Commerce (ICC) and the International Court of Arbitration

A. Background and Working of ICC

The International Chamber of Commerce (ICC) was founded in 1919 to serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital. The organization's international secretariat was established in Paris and the ICC's International Court of Arbitration (ICA) was created in 1923.

The International Chamber of Commerce (ICC) is a non-profit, private international organization that works to promote and support global trade and globalization. It serves as an advocate of some world businesses in the global economy, in the interests of economic growth, job creation, and prosperity. As a global business organization, made up of member states, it helps the development of global outlooks on business matters. ICC has direct access to national governments worldwide through its national committees among others.

To attain this objective, ICC has developed a range of activities. The ICC International Court of Arbitration (ICA) is a body which hears and resolves private disputes between parties. Its voluntary rule-writing for business spreads best practice in areas as varied as banking, marketing, anti-corruption and environmental management. Their policy-making and advocacy work keeps national governments, the United Nations system and other global bodies apprised of the views of the world business on some of the most pressing issues of the day.

ICC's first president was Etienne Clémentel. In December 2004 the World Council elected Yong Sung Park as the Chairman of ICC, Marcus Wallenberg as the Vice-

Chairman and Jean-Rene Fourtou as the Honorary Chairman. In June 2005, Guy Sebban was elected International Secretariat by the World Council.

Initially representing the private sectors of Belgium, Britain, France, Italy and the United States, it expanded to represent worldwide business organizations in around 140 countries.

World Council, National Committees, and International Secretariat - The ICC World Council is a general assembly of a major intergovernmental organization composed of business executives. National committees name delegates to the Council. Ten direct members may be invited to participate. It usually meets twice a year. The Council elects the Chairman and Vice-Chairman for two-year terms. The Council elects the Executive Board on the Chairman's recommendation.

The Secretary General heads the International Secretariat. The Secretary General works with the national committees to carry out ICC's work programs and is appointed by the World Council. The ICC International Secretariat, is based in Paris and is the operational arm of ICC. It carries out the work programme approved by the World Council, feeding business views into intergovernmental organizations.

The Executive Board is responsible for implementing ICC policy. The Executive Board has between 15 and 30 members of both business leaders and ex-officio members. They serve for three years. They have a one third rotation in membership. The Chairman, his immediate predecessor, and the Vice-Chairman form the Chairmanship.

National Committees represent the ICC in their respective countries. They recommend to the ICC their respective national business concerns in its policy recommendations to governments and international organizations. There are established formal ICC structures in over 90 countries. In countries where there is no national committee, companies and organizations such as chambers of commerce and professional associations can become direct members. ICC has access to national governments through its network of national committees.

Finance Committee, advises the Executive Board on all financial matters. It reviews the financial implications of ICC's activities and supervises the flow of revenues and expenses of the organization. The Chairman is elected by the ICC World Council.

Commissions develop international and national government initiatives in their subject areas. They also develop business positions for submission to international organizations and governments. Commissions are composed of more than 500 business experts from member companies.

B. Dispute Resolution Services

ICC International Court of Arbitration (ICA) continues to provide the most trusted system of commercial arbitration in the world, having received 14000 cases since its inception in 1923. Over the past decade, the Court's workload has considerably expanded. The Court's membership has also grown and now covers 86 countries. With representatives in North America, Latin and Central America, Africa and the Middle East and Asia, the ICC Court has significantly increased its training activities on all continents and in all major languages used in international trade.

In the world of international commerce, the ICC is perhaps best known for its role in promoting and administering international arbitration as a means to resolve disputes arising under international contracts. It is one of the world's leading institutions in providing international dispute resolution services, together with the American Arbitration Association, the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC), and the Stockholm Chamber of Commerce.

It is common for international commercial contracts to provide for an agreed means of resolving any disputes that may arise, and the ICC is one of leading institutions for administering international arbitration. The ICC's dispute resolution services also include ADR procedures such as mediation and expert determinations.

With the launch of ICC's BASCAP (Business Action to Stop Counterfeiting and Piracy) initiative, more than 130 companies and trade associations are now actively engaged in a

set of projects designed to defeat the pirates and increase public and political awareness of the economic and social harm caused by this illegal activity. BASCAP is using ICC's global media network and national committee structure to spread the word.

BASCAP was launched in 2004 by the then ICC Chairman, Jean-Rene Fourtou, and its an operational platform established by ICC that connects all business sectors and cuts across all national borders, drawing them together to ensure that their message is clearly heard by governments and the public. BASCAP is prepared for a sustained effort to end this scourge. As the only business organization with a truly global reach, ICC is well placed to take the fight against counterfeiting to the level required for action to be effective.

D. ICC Rules

Since its establishment the ICC has adopted different rules to foster the settlement of disputes by using ADR. The rule that establishes the International Court of Arbitration, i.e. ICC Rule of Arbitration is the most recent one. In addition, it has adopted the ICC Rules of Optional Conciliation which came in to force in January, 1988. The later rule is now substantially being replaced by ICC ADR Rules. The widely used definition of ADR is not fully accepted by the ICC. For instance, ADR has been defined by as “Amicable Dispute Resolution” as contrary to the widely used meaning ‘Alternative Dispute Resolution’. In addition, in most of the official ICC documents and its rules, ADR does not include arbitration but only proceedings which do not result in a decision or award of the Neutral which can be enforced at law.

The ICC ADR Rules are the result of discussions between dispute resolution experts and representatives of the business community from 75 countries. Their purpose is to offer business partners a means of resolving disputes amicably, in the way best suited to their needs. A distinctive feature of the Rules is the freedom the parties are given to choose the technique they consider most conducive to settlement. Failing agreement on the method to be adopted, the fallback shall be mediation.

As an amicable method of dispute resolution, ICC ADR should be distinguished from ICC arbitration. They are two alternative means of resolving disputes, although in certain

circumstances they may be complementary. For instance, it is possible for parties to provide for ICC arbitration in the event of failure to reach an amicable settlement. Similarly, parties engaged in an arbitration may turn to ICC ADR if their dispute seems to warrant a different, more consensual approach. The two services remain distinct, however, each administered by a separate secretariat based at ICC headquarters in Paris. The ICC ADR Rules, which replace the 1988 ICC Rules of Optional Conciliation, may be used in domestic as well as international contexts.

Let's have a much closer look at the ICC Arbitration Rule adopted in the year 1998. The arbitration rule composed of different parts that supplement the body of the rule. It has 35 articles, which makes the main body of the rule, followed by three Appendixes.

The rule starts with a standard arbitration clause and standard clause for an ICC pre-arbitration reference procedure and ICC arbitration. As to my own view, it is desired to attain uniformity and common understanding between the disputants as to the valid effect of the proceeding and give full power either to the ICC rule and/or the tribunal as the case may be. Here are these standard clauses, the first being the arbitral clause and the second is the clause for an ICC pre-arbitration reference procedure and ICC arbitration. (www.iccarbitration.org).

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

“Any party to this contract shall have the right to have recourse to and shall be bound by the pre-arbitral referee procedure of the International Chamber of Commerce in accordance with its Rules for a Pre-Arbitral Referee Procedure.

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.”

The main body of the rule has 35 Articles under seven different headings. The first part is 'Introductory Provisions' composed of the declaration of the existence of the International Court of Arbitration (ICA) and definition of terms. The second part deals

with the ‘the Commencement of the Arbitration’ like the effect of the arbitration agreement and the like. The next one is about the “Arbitral Tribunal” followed by the part which defines the ‘Arbitral Proceeding’. In these parts the number, appointment and replacement of arbitrators, and the place, rules, languages and closing of the tribunal has been well defined. The fifth part discusses about the ‘Award’ which, for instance, limits the maximum period when the award should be given to be six months from the commencement of the tribunal. The last two parts speak about the ‘Cost’ and ‘Miscellaneous’ matters, where the cost part is supplemented by Appendix III.

The three appendixes supplement the main body of the rule and they are equally persuasive. Appendix I is the ‘Statutes of International Court of Arbitration’ which stipulates the function of the court, its members and their appointment and their roles. Appendix II is entitled as ‘Internal Rule of the ICA’. This part exclusively regulates the confidential nature of courts work, the relationship of the members of the court (the Chairman, Vice-Chairmen, and members and alternate members - collectively designated as members) with panellists (arbitrators) and with the ICC National Committee. For instance, the members of the ICA may not act as arbitrators or as counsel in cases submitted to ICC arbitration. The last one, Appendix III, deals with ‘Arbitration Costs and Fees’ supported by two schedules, i.e. administrative expenses and arbitrator’s fee. The amounts of payment are determined according to the pecuniary interest involved over the matter in a regressive rate. The least payment is \$2,500 for the administrative expense and the same amount as arbitrators’ fee for a dispute involving an amount not exceeding \$50,000, and the maximum is \$88,800 for the administrative expense and 0.01% to 0.056% as arbitrators’ fees for a dispute involving more than \$100, 000, 000 pecuniary interests.

ICC has over eight decades of experience in devising rules to govern and facilitate the conduct of international business. These include those designed to resolve the conflicts that inevitably arise in trading relations. The ICC being intergovernmental institute is one of the popular institutes in the field of settling trade disputes. Among the means it uses in the settlement of disputes, ADR is one. It has also arbitration tribunal, International Court of Arbitration- ICA, established by the ICC arbitration Rule. Though, it is hardly possible to compare it, the Addis Chamber of Commerce (AACC) Arbitration Rule resembles the ICC arbitration Rule in some respects, like the existence of the cost and expense

schedules. A question can be raised as to the cost effectiveness of ADR by observing the schedule of ICC and AACC arbitration rules.

Question:

1. Can you compare the arbitration rule of the ICC with the same of Addis Chamber?
2. How did ICC define 'ADR' in its documents?

4.5. ADR in Regional Level

This part is devoted to appreciate in a bit detail about the importance of ADR in regional institutes. Thus, the experience of European Union and North American Nations under NAFTA in the settlement of dispute is taken care of. Lastly, the African approach to ADR is considered though it is only in its infant stage of development. I put it in the last for we got many things that we should learn from the other two.

4.5.1. Europe

Access to justice is at the top of the political agenda in all Member States of the European Union. More and more disputes are being brought to court. As a result, this has brought not only longer **waiting periods** for disputes to be resolved but has pushed up **legal costs** to such levels as to often be disproportionate to the value of the dispute.

This is where ADRs come in. Alternative dispute resolution (ADR) methods are extra-judicial procedures used for resolving civil or commercial disputes. These usually involve the **collaboration of disputing parties** in finding a solution to their dispute with the help of a neutral third-party. As there are numerous types of ADR methods available, they can be applied and adapted to a variety of areas whether civil or commercial in nature.

The advent of the single European market has increased the movement of goods and of people across the European Union. Unfortunately, it also has increased the number of disputes involving nationals of different Member States. These **cross-border disputes** add another dimension of complexity to already complicated issues. In this context,

ADRs are regarded as an important element in the attempt to provide fair and efficient dispute-resolution mechanisms at EU level.

In recent years, the use of ADRs has **increased considerably** in the European Union. They are being used to resolve disputes between citizens and administrations, within families, working relationships or yet again in commercial relations and consumer disputes.

At the European Council on Justice and Home Affairs that took place in Tampere (Finland) in October 1999, EU leaders drew attention to how much importance they place on the role of ADR in cross-border disputes. In March 2000 at the Lisbon Summit on employment and the information society, EU leaders asked the European Commission and the EU Council of Ministers to reflect upon ways of applying ADR methods to resolve conflicts in the area of e-commerce in view of promoting consumer confidence.

In the field of consumer disputes, ADR has become a special priority of the Commission. As such, it has adopted two recommendations on the subject:

- one on procedures involving a third party who proposes or imposes a solution (30 March 1998);
- another on procedures which are restricted to a single attempt to draw conflicting parties together to help them find a common solution (4 April 2001).

Furthermore, a network of national bodies (ECC-NET) was created to facilitate the task of finding extra-judicial solutions to cross-border consumer disputes. The European Commission has established two ADR related organisations: The European Extra Judicial Network (“EEJ-Net”) and the Financial Services Complaints Network (“FIN-NET”) for matters relating to financial services. The Commission’s Green Paper says: “All political and legislative endeavours, initiatives and debates to date at national, Community and international level have been aimed at preserving the quality of ADRs in terms of accessibility, effectiveness and guarantees of good justice while maintaining their flexibility.”

The Commission has launched in April 2002 a Green Paper on ADR so as to initiate a constructive debate on a certain number of legal issues, which have been raised as regards alternative dispute resolution in civil and commercial law. The questions in the

Green Paper relate to the essence of the various means of alternative dispute resolution such as clauses in contracts, limitation periods, confidentiality, the validity of consent given, the effectiveness of agreements generated by the process, the training of third parties, their accreditation and the rules governing their liability.

The Green Paper talks of certain non-determinative forms of ADR helping to achieve social harmony in that “the parties do not engage in confrontation but rather a process of rapprochement”. Well that is fine in my experience but, in reality, many mediations involve parties who have a considerable enmity towards one another. They may be engaging in the process for a whole variety of reasons - but the desire for non-confrontation and the achievement of rapprochement is often not at the forefront of their minds! They may be engaged in the ADR process because they are adopting a commercial “common sense” approach to the dispute. The dispute may already be subject to litigation with large costs already incurred and perhaps is approaching a lengthy and costly trial. Parties may be there because they have been advised to give the process a chance.

They may be there to elicit information. They may be there to give the impression of being reasonable. Whatever the reason or motivation for parties attending mediations or engaging in other forms of ADR, there is no doubt that it is becoming increasingly popular.

Commission Green Papers are documents intended to stimulate debate and launch a process of consultation at European level on a particular topic (such as social policy, the single currency, and telecommunications). These consultations may then lead to the publication of a White Paper, translating the conclusions of the debate into practical proposals for Community action.

Following this consultation period and based upon the contributions of the debate's participants, the Commission has decided (see the Commission Scoreboard on Justice and Home Affairs [COM\(2003\) 291 final](#)) to launch two initiatives:

- Work will start in 2003 to develop a European plan for best practice in mediation in 2004 a [European code of conduct](#) has been launched.

- In 2004 the Commission is planning to present a proposal for a directive to promote mediation.

On 2 July 2004 a conference was held in Brussels to discuss self-regulatory initiatives for mediation in general and to launch the European code of conduct. The conference was attended by some 100 participants. The morning session saw a number of presentations on national experiences of self-regulation. The afternoon session was introduced by Mr Faull, Director General for DG Justice, Freedom and Security of the European Commission, and was followed by a panel debate on the European code of conduct.

The concept of a European code of conduct as a voluntary instrument to improve quality and trust in mediation was supported. It was generally considered that the code should remain an informal document at this stage and that it should not be adopted formally by any of the institutions of the European Union. It will be the responsibility of those individual mediators and organizations that wish to subscribe to the code to also take ownership of the code, including defining implementation mechanisms.

It was agreed that as a next step the code will be made available on the internet together with general information on the code and a first list of mediation organisations who have declared that they subscribe to the code.

As further follow-up the Commission services will consider organising ad hoc meetings with representatives of organisations subscribing to the code to review implementation and content as necessary.

Further large-scale meetings may also be organised on a yearly basis, open for all interested parties, to discuss specific issues of ADR in order to maintain dialogue and encourage exchange of experiences. The next meeting of that type could be held in 2005.

As to access to justice – this is a fundamental right as provided for by Article 6 of the European Convention on Human Rights and Fundamental Freedoms and the right to valid remedies has been decided as being a general principle of community law (Case 222/84 Johnston [1986] ECR 1651) and this is entrenched in Article 47 of the Charter of Fundamental Rights of the European Union.

Unfortunately with litigation and arbitration, access to justice is sometimes restricted due to the inability of a party to pay the costs involved and by reason of the restrictions of legal aid (not available at all in arbitration and frequently not granted or not adequate in civil litigation in the UK). So it has long been said with a certain irony that “Justice like the Ritz Hotel is open to all!” Perhaps ADR is an effective means of addressing that sorry state of affairs.

It is evident that the European Union is taking positive initiatives to facilitate access to justice through ADR. These initiatives are highlighted in the Green Paper on alternative dispute resolution in civil and commercial law presented by the Commission of the European Communities on 19th February 2002. That paper states that ADR is an “integral part of the policies aimed at improving access to justice”.

In some Countries there is State funding for forms of ADR – for instance in France the justice conciliators are not paid by the parties and in Ireland the family mediation service’s operating costs are funded by the Government. In Sweden the office for damage attributable to road traffic has its operating costs covered by motor insurance companies and in the UK the costs of mediation may properly be claimed against the Legal Services Commission on the part of a legally aid party.

In seeking to harmonise legislation in Member States the Council of the EU in a draft directive (COM (2001) 13 final) has said “Legal aid shall be granted in cases where disputes are settled via extra-judicial procedures, if the law makes provision for such procedures or if the parties are ordered by the court to have recourse to them.” (Art 16).

ADR and its increasing deployment is a political priority within the European Union, particularly in relation to the resolution of disputes involving electronic commerce (note for instance the March 2000 Lisbon European Council).

Different member states not surprisingly approach ADR differently. Finland makes conciliation a pre-requisite to court action. In Germany judges are asked to support an amicable resolution through court proceedings. In France Article 21 of the Civil Code

states that it is the duty of judges to reconcile the parties. In England the Civil Procedure Rules expressly encourage the use of ADR. Various member states have been testing different ADR procedures.

It suggests that it may be sensible to promote legislation extending the limitation periods to account for the period of mediation. The downside is that sometimes ADR fails to achieve a resolution and occasionally (though it is felt rarely) they fail because one party has not been acting in good faith in the process and may simply have been “buying time”. That represents a not insignificant risk and it might be considered that the automatic extension of limitation periods would be unfair in such circumstances. Furthermore the existence of time pressure is sometimes a positive benefit in ensuring that the ADR process reacts flexibly and speedily to the situation at hand and the very existence of time may occasionally be a real disincentive to settlement being achieved.

Confidentiality is a key to the success of ADR procedures whereas the trend with litigation is for openness (including public hearings). In a commercial context confidentiality as such has its benefits and its downsides. . It allows parties to settle matters outside the glare of publicity which may have adverse consequences on their reputations, goodwill, and even share prices. In fact mediation may take advantage of the leverage of publicity in litigation in the sense that parties will know that if the ADR processes fails, it may mean that everything in the dispute will come out into the open – that itself may be an incentive for the parties to make sure that the ADR process succeeds. On the other hand the existence of confidentiality sometimes encourages parties to take realistic positions, which they perhaps would be less willing to expose in a public area.

The bottom line is that ADR is succeeding in the UK and deserves to succeed across Europe but the word needs to be spread. Plainly there is a very favourable climate for ADR and mediation in particular within the European Union. Member States are taking their own initiatives. The commercial community once it has a sufficient experience of the ADR processes will naturally warm to them and at least see ADR as a sensible option for use before an costly “battle” takes place in litigation or arbitration (or at suitable times during the course of litigation or arbitration but before judgment is delivered). In England there is even a mediation scheme in respect of cases going to the Court of Appeal which

have already been determined in the High Court or County Court. A body such as “Euro Expert” is especially well placed to promote the judicious and sensible use of ADR in its members’ home territories and also in cross-border disputes - and I for one encourage such an approach by Euro Expert and the members of its constituent member organisations.

Question:

1. What is the ‘Green Paper’ in European ADR practice?
2. Is there any thing Africans should learn from the European Code of Conduct in the field of mediation?

4.5.2. America (NAFTA)

The North American Free Trade Agreement (NAFTA) is an intergovernmental government that creates a free trade area in North America with the United States, Mexico and Canada. NAFTA's purposes include: eliminating trade barriers, promoting fair competition, increasing investment opportunities, providing protection for intellectual property rights, creating procedures for implementing and enforcing NAFTA, and establishing a forum for further enhancement and expansion of the benefits provided by NAFTA.

NAFTA establishes three new dispute resolution mechanisms: First NAFTA Chapter 20 (Chapter 20) applies to disputes between signatory states. Chapter 20 creates an non-binding process for dealing with most other disputes under the treaty and this process can only be initiated by governments at the federal level. There are several stages to the chapter 20 dispute resolution process including consultation, negotiation and the issuance of report by a five member arbitral panel. Secondly, NAFTA Chapter 19 (Chapter 19) applies to disputes between the signatory states relating to investigations of anti-dumping and countervailing duty (AD/CVD) investigations. This process may be initiated by private parties. And thirdly, Chapter 11 applies to disputes between signatory states and investors from another signatory state (foreign investors). This is one of the more controversial aspects of NAFTA that allows foreign investors to use binding arbitration against another signatory state that violates the investment provisions of NAFTA.

Although NAFTA does not create a private right of action, it encourages alternative dispute resolution methods and the study of the methods' effectiveness to resolve private international disputes.

Chapter 20 establishes the dispute settlement process of conflicts between the parties over the interpretation and application of NAFTA. The process works in multiple stages, giving the disputing parties the opportunity to resolve conflicts in a cooperative manner prior to seeking resolution before a tribunal. The first stage of this process allows NAFTA parties to seek consultations with the other parties in an attempt to arrive at a mutually satisfactory resolution. Pursuant to Article 2006 of NAFTA, the parties have three responsibilities during the consultation phase: (1) to provide the other parties with sufficient information to enable a full examination of how the proposed measure might affect the operation of NAFTA; (2) to protect confidential or proprietary information; and (3) to avoid resolution that adversely affects the interests under NAFTA of any other party.

If the consultations fail to resolve a dispute within the identified statutory period, any of the parties may subsequently request a meeting of the Commission, which Chapter 20 charges with resolving disputes relating to interpretation or application of NAFTA. The Commission must convene shortly after a party has requested its involvement in a dispute, and must attempt to "resolve the dispute promptly." Moreover, in attempting to resolve the dispute, the Commission is permitted to call in technical advisors and make recommendations. It may also have recourse to good offices and have access to conciliation, mediation, or other dispute resolution procedures. If upon the termination of the allocated statutory period (generally thirty days), the parties still have not reached an agreement, any party to the dispute may request that the Commission convene an arbitral panel comprised of five members chosen by the parties from a predetermined roster of eligible panelists. Of the five panelists, the disputing parties must agree on a chairperson; each party then selects two additional panelists who are citizens of the other disputing party.

Upon the convening of a dispute resolution panel, Article 2012 of NAFTA lays out specific Rules of Procedure to which the panel must adhere. These rules guarantee the provision of at least one hearing before the panel, as well as an opportunity to provide

initial and rebuttal submissions. Once the panel has heard all arguments and considered all submissions, it must issue an initial report containing: (1) its findings of fact; (2) its determination as to whether the measure at issue is or would be inconsistent with the NAFTA obligations; and (3) recommendations for resolution of the dispute. Thirty days after the issuance of this initial report, the panel must issue a final report. Upon receipt of the final report, the disputing parties must agree on a resolution that conforms with the panel's determinations and recommendations.

Notably, the findings contained in the final report are not binding on the parties. Article 2018 provides that upon receipt of the final report the parties shall agree on a resolution, and provides that such a resolution "normally shall conform to the determinations and recommendations of the panel." Thus, the parties are not required to follow the letter of a given panel's decision.

If the parties cannot come to an agreement, the complaining party still has some recourse. If within thirty days of receiving the final report the parties have not reached agreement on a mutually satisfactory resolution, Article 2019 of NAFTA empowers the complaining party to suspend benefits to the other party of equivalent effect until the parties resolve the dispute. In making its decision, the complaining party should suspend benefits in the same sector or sectors as that affected by the measure in question, unless the party believes that it is impracticable to suspend same-sector benefits. In such an instance, the complaining party may suspend benefits in other sectors. The cat and mouse game does not end there, however, and if the violating party believes that the suspended benefits are "manifestly excessive," it may then request that the Commission establish another panel to assess the claim.

Aside from Chapter 20, both Chapter 11 and Chapter 19 of NAFTA provide mechanisms for dispute resolution for different subject matters. Chapter 11 provides the rules for dispute resolution with respect to investment disputes; Chapter 19 provides the guidelines for disputes relating to anti-dumping or countervailing duties. Chapter 19 disputes are the most prolific; importantly, they do not require the initial procedural steps that the Chapter 20 disputes do, but rather proceed directly to the arbitration stage. As a result, Chapter 19 panels appear to resolve the disputes more effectively than do Chapter 20 panels, perhaps because the parties must deal with disputes at a faster pace.

Private Commercial Disputes under NAFTA - NAFTA does not create a private right of action, however, it promotes alternative dispute resolution (ADR) methods and mandates the study of the methods' effectiveness to resolve private international disputes. ADR methods offer many advantages over litigation when resolving international investor disputes. Although American businesses embrace litigation to resolve disputes, many other cultures view litigation as a personal failure. International investors using arbitration may not have to worry about some of the factors that can plague them in international litigation, including: choice of law, forum non convenience, home country bias, foreign judicial procedures, or foreign rules of evidence.

NAFTA mandates that the signatory states create an Advisory Committee on Private Commercial Disputes (Advisory Committee) to study the effectiveness of arbitration and other ADR methods to resolve private international commercial disputes. The Advisory Committee was charged with:

1. compilation, examination, and assessment of existing means for the settlement of private international commercial disputes;
2. identification of sectors and types of businesses that would particularly benefit from the use of alternative dispute resolution (ADR);
3. promotion of the use of arbitration and other procedures for the resolution of private international commercial disputes in the NAFTA region, including ways to increase private sector awareness of the benefits of using ADR;
4. facilitation of the use of arbitration and other procedures in the NAFTA region, including the use of model ADR and other contractual clauses;
5. opportunities for expanded cooperation between institutions with an interest or involvement in ADR in the NAFTA region; and
6. issues relating to the enforcement of arbitration agreements and awards, and other litigation issues related to ADR.

The Advisory Committee issued its initial report in November 1996, concluding that "[e]ach NAFTA country has laws and procedures in place to support the use of arbitration, including the recognition and enforcement of arbitral awards, at both the federal and state/provincial levels. No new legislation is recommended at the present time." The Advisory Committee observed a growing interest in ADR methods other than arbitration, noting that "[t]he availability, uses and effectiveness of mediation, conciliation and other forms of ADR are being explored further by the [Advisory] Committee." The Advisory Committee included a brochure of the ADR methods available to parties contracting in the NAFTA region and suggested model clauses to include in private contracts. The Advisory Committee further established subcommittees to study various aspects of ADR in the signatory states.

Investor-State Disputes Under Chapter 11--A Controversial Past - Chapter 11 permits foreign investors to invoke binding international arbitration against another signatory state that violates the investment provisions of NAFTA. Although other countries have attempted to secure similar protections under the Organisation for Economic Co-operation and Development (OECD), currently NAFTA is the only international agreement that provides these protections. Section A of Chapter 11 (section A), designed to deter "illegal takings of U.S. and Canadian businesses by the Mexican government," protects the rights of foreign investors from governmental action by signatory states. Specifically, foreign investors are protected from signatory states' measures. Section A affords four basic protections to foreign investors: parity with investors in the signatory state; freedom from performance requirements; free investment-related funds transfers; and expropriation only in accordance with the international law.

Section B of Chapter 11 (section B) establishes a procedure for binding international arbitration between a signatory state and a foreign investor. The adoption of section B "represents the first time Mexico has entered into an international agreement providing for investor-state arbitration."

Under other multilateral trade regimes, including GATT, companies that suffer damages due to the actions of a foreign government have no right of private action against the host

state; their only remedy is to persuade their home state to pursue a trade complaint on their behalf. Where this remedy is unavailable or inadequate (which is almost invariably the case), the investor's only option is to pursue its complaint under the sometimes inhospitable judicial system of the host country.

Section B allows foreign investors to use international arbitration to resolve a dispute when a foreign investor alleges that foreign investors' investment has been damaged by a signatory state's violation of section A. The foreign investor has three years from when the foreign investor acquires knowledge of the alleged section A violation to notify the signatory state of the foreign investor's intent to submit a claim. Before filing a claim, the foreign investor and signatory state (the disputing parties) are required to attempt settlement. If the disputing parties fail to settle, and the foreign investor wants to pursue arbitration, the foreign investor must notify the signatory state within ninety days of submitting the claim. After following these procedures, the foreign investor may submit the claim to arbitration no earlier than six months after the alleged violation. Arbitration fora available to the foreign investor are:

(a) the ICSID Convention [Convention on the Settlement of Investment Disputes Between States and Nationals of Other States], provided that both the disputing Party and the Party of the investor are parties to the Convention;

(b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or

(c) the UNCITRAL [United Nations Commission on International Trade Law] Arbitration Rules.

The United States is the only signatory state that is a party to the ICSID Convention; therefore, Chapter 11 disputes by foreign investors cannot be heard under this convention. However, claims brought by American investors or claims against the United States may be brought under the ICSID Additional Facility Rules or UNCITRAL. The Additional Facility Rules are only available for investment disputes between signatory states and foreign investors. Specifically, the Additional Facility Rules apply in the following situations:

(i) conciliation or arbitration proceedings for the settlement of investment disputes arising between parties one of which is not a Contracting State or a national of a Contracting State;

(ii) conciliation or arbitration proceedings between parties at least one of which is a Contracting State or a national of a contracting State for the settlement of disputes that do not directly arise out of an investment; and

(iii) fact-finding proceedings.

While there are other international arbitration fora, the available rules for arbitration under Chapter 11 are limited to the three enumerated in the chapter. The arbitration fora available for each signatory state under Chapter 11 are outlined in Table 1.

Remedies available under Chapter 11 arbitrations include: monetary damages and applicable interest, however, no punitive damages are allowed; restitution of property; and costs in accordance with the selected arbitration rules. According to published arbitration awards, arbitrators have used discretion assessing costs.

Questions:

1. Briefly describe the similarity and difference of the three kinds of dispute settlement in the NAFTA and which one is the most advanced one compared to the European system?
2. Which one of the three mechanisms is binding on the parties?

4.5.3. Africa

Under your Legal History and Traditions course you have discussed the legal system of the Africans. African indigenous customary norms encouraged 'Compromise' over litigations before officers. But these days the status seems to have been changed to some other features.

Here is an excerpt from George Washington University, National Law Center 2003, [*Unfinished business: Conflicts, the African Union and the New Partnership for Africa's Development*](#), by Udombana, Nsongurua J. The text reveals the degree of dispute in the continent, the measures being taken to resolve them and attempts of regional institutes (OAU and now AU) on the matter.

III. THE CURRENT AGENDA FOR DEALING WITH CONFLICTS IN AFRICA

A. The Normative Structure

This section highlights the normative framework of African leaders for dealing with conflict, peace, and security in the continent. Though such normative rhetoric on the problem of conflict abounds in many resolutions and declarations of the OAU, this section focuses on the recent AU Act and the NEPAD, the former a binding treaty, the later a declaration of intent.

1. The AU Act

When African leaders adopted the AU Act (the Act) in 2000, they were "conscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda."⁷² Consequently, the Act sets out as some of its objectives to "[p]romote peace, security, and stability on the continent"⁷³ and the establishment of "the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations."⁷⁴ These objectives are supported by principles, including the "establishment of a common defence policy for the African Continent;"⁷⁵ the "peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly;"⁷⁶ and the "prohibition of the use of force or threat to use force among Member States of the Union."⁷⁷ Other principles are the "peaceful co-existence of Member States and their right to live in peace and security"⁷⁸ and "the right of Member States to request intervention from the Union in order to restore peace and security."⁷⁹

One of the functions of the AU Assembly will be to "give directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace."80

Regrettably, the AU Act did not initially provide any mechanisms for conflict prevention, management, and resolution, though this was one of the goals of the Union. It failed to factor in the "Cairo Declaration," which established the Mechanism for Conflict Prevention, Management and Resolution (MCMPR).⁹¹ Likewise, it failed to factor in the "Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World,"⁹² in which the OAU rededicated itself "to work together towards the peaceful and speedy resolution of all conflicts."⁹³ It failed to factor in the "Cairo Agenda for Action,"⁹⁴ in which the OAU pledged to "give the maximum political and financial support to the OAU Mechanism for Conflict Prevention, Management and Resolution, for its effective peace-making operations, by involving all segments of the population and mobilizing adequate official and private resources for the OAU Peace Fund."⁹⁵

The omission was baffling,⁹⁶ considering the sentiment of the OAU in its 1999 Algiers Declaration that "the OAU Mechanism for Conflict Prevention, Management and Resolution [(MCMPR)] is a valuable asset for our continent which must be nurtured and consolidated" and it "symbolises the concrete resolve of our continent to fully assume its responsibilities."⁹⁷ As an afterthought, the OAU rectified these deficiencies by incorporating the objectives and principles of the Cairo Declaration as "an integral part of the declared objectives and principles of the African Union."⁹⁸ For example, in accordance with Article 5(2) of the AU Act, the OAU included the Central Organ of the MCMPR as one of the Organs of the AU.⁹⁹

B. The Institutional Structure

In the past African leaders created various institutions to manage conflicts. Some of these have been in the form of ad hoc committees and commissions. For example, African leaders established the Ad Hoc Committee on Inter-African Disputes in July 1977 at the 14th Ordinary Session of the OAU Assembly in Libreville. Whatever the

benefits of ad hoc arrangements for dealing with conflicts, one of the deficiencies is that such arrangements are remedial rather than proactive.¹¹⁴ The following section, however, deals with three major institutional structures designed by African leaders for the management and resolution of conflicts. The first, which is now defunct but is described below to set the context for the other arrangements, is the OAU Commission of Mediation, Conciliation and Arbitration. The second is the MCMPR and the third and most recent is the Peace and Security Council.

1. The OAU Commission of Mediation, Conciliation and Arbitration

*When African countries adopted the OAU Charter in 1963, they created the Commission of Mediation, Conciliation and Arbitration to accomplish the purposes of the Charter.¹¹⁵ It served as a mechanism for the peaceful settlement of disputes among Member States.¹¹⁶ The Commission was described as the *raison d'être* of the OAU,¹¹⁷ given the fact that peaceful resolution of conflicts, both large and small, provided the necessary conditions for orderly progress of Africa as a whole and of the Member States of the OAU in particular.¹¹⁸ It has, however, been asserted that African leaders gave high priority to the Commission because of the border conflicts then occurring between Ethiopia and Somalia and between Algeria and Morocco.¹¹⁹ In 1964, the OAU adopted a Protocol that defined the duties and powers of the Commission.¹²⁰ The Protocol was made an integral part of the OAU Charter; which is to say that there was no provision for a formal ratification of the Protocol, as the Protocol merely required the approval of the OAU Assembly for it to become an integral part of the OAU Charter.¹²¹ This approval was given at the first Assembly at its meeting in Cairo, Egypt, in July 1964. The Assembly had to dispense with the need for a formal ratification of the Protocol in order to avoid undue delay that might stultify efforts to address urgent security problems that were plaguing Member States.¹²²*

The Commission was not a judicial body, though it provided three modes of settlement: mediation, conciliation, and arbitration, as enjoined by the U.N. Charter.¹²³ The Protocol did not include any provision on the less formal procedures of 'good offices' and 'negotiation,' as these are hardly distinguishable in practical effect from mediation.¹²⁴ Mediation and conciliation are non-adjudicatory, informal procedures.

Mediation, which is the least formal of the modes of settlement in international practice,¹²⁵ involves an official third party seeking to reconcile the views and claims of the parties or offering advice or advancing proposals for a possible solution that is, nevertheless, binding.¹²⁶ The problem with third party mediation is that it can easily transgress the fine line and become intervention, "siding with one party to equalize the power balance, the effect [being] to expand and complicate the conflict by transforming it from an essentially dyadic conflict relationship to a triadic conflict triangle."¹²⁷

By contrast, conciliation refers to an impartial examination of the subject matter and a search for an acceptable settlement to the dispute. It entails objective evaluation and clarification of the issues in dispute, endeavouring to bring about an agreement between the parties upon mutually acceptable terms.¹²⁸ The procedures for conciliation within the framework of the Commission were clearly influenced by the notions of formal judicial procedure and usage.¹²⁹ Where the parties choose this medium, the matter was to be formally brought before the Commission by means of a petition addressed to the President by one or more of the parties to the dispute. Where only one of the parties makes such a request, then it must be indicated in the petition that prior written notice has been given to the other party. Either way, the petition must include a summary of the statement of the grounds of the dispute.¹³⁰ Upon receipt of the petition, the President of the Commission was to set up a Board of Conciliators,¹³¹ which was required to consider all questions submitted to it and to undertake any enquiry or hear any person capable of giving relevant information concerning the disputes.¹³² In short, the duty of the Conciliators was to "bring about an agreement between the parties upon mutually acceptable terms".¹³³

Arbitration, on the other hand, is a compulsory means of dispute settlement, a judicial method that entails the delivery of a binding decision based on law rendered by a tribunal whose composition is determined by the parties. Submission to arbitration is dependent upon prior agreement of the parties. Thus, under the Protocol, if the parties to a dispute that has been brought before the Commission agree to resort to arbitration, an Arbitral Tribunal was to be established by the Commission.¹³⁴ Since arbitrators perform essentially judicial functions, the Protocol provided that the intended arbitrators should possess legal qualification.¹³⁵ The procedure of arbitration has

never been used, however, even within the framework of an ad hoc committee. This reluctance was already manifest at the founding conference of the OAU in 1963, in its rejection of a provision in the draft Charter for a Court of Mediation, Conciliation and Arbitration to be set up by means of a separate treaty.¹³⁶

It is important to note that this ad hoc Commission, which was vested with the powers of investigation and inquiry with regard to disputes submitted to it,¹³⁷ never became operational and was subsequently abolished. Technically, the Commission continued to have a formal existence, since its formal abolition required an amendment to the OAU Charter, which was not done. The OAU mandated that the OAU Secretary-General find ways to dispose of all the assets of the Commission.¹³⁸ Even before its abolition, the OAU restricted the Commission to only interstate conflicts.¹³⁹ In fact, "[r]arely did the OAU attempt reconciliation," even within the framework of an ad hoc committee.¹⁴⁰ While the Commission existed, the OAU starved it for funds.¹⁴¹ It survived on mere handouts from the General Secretariat of the OAU "to enable it [to] operate."¹⁴² Experts attributed its non-functionality to Africa's mistrust of formal dispute settlement.¹⁴³ This argument is logically untenable since "African States have [never] been averse to the establishment of numerous ad hoc bodies under the auspices of the OAU and the involvement of the U.N. to settle their disputes."¹⁴⁴

2. The MCMPR

A serious and potentially significant attempt to tackle the problem of conflicts in Africa came in 1992, when the Secretary-General of the OAU submitted to the 56th Ordinary Session of the Council of Ministers and the 28th Ordinary Session of the Assembly of the OAU, meeting in Dakar, Senegal, the "Report [of the Secretary-General] on the establishment, within the OAU, of a Mechanism for Conflict Prevention, Management and Resolution."¹⁴⁵ Following the report, the OAU Assembly adopted a declaration establishing the MCMPR to take over from the redundant and ad hoc Commission of Mediation, Conciliation and Arbitration.¹⁴⁶ The focus of the MCMPR would be to streamline the procedures and processes of dealing with conflicts and conflict situations.¹⁴⁷ Its establishment was an attempt at putting Humpty-Dumpty together again and giving concrete expression to Africa's commitment to work together towards the peaceful and speedy resolution of all conflicts on the continent.¹⁴⁸ The MCMPR

was and is intended to bring to the processes of dealing with conflicts in Africa a new institutional dynamism that will enable speedy action to prevent or manage and, ultimately, resolve conflicts when and where they occur.¹⁴⁹

The MCMPR is built around a Central Organ, with the Secretary-General and the secretariat comprising its operating arm.¹⁵⁰ The Central Organ consists of the Member States of the OAU Summit Bureau, which are elected annually, bearing in mind the principles of equitable regional representation and rotation.¹⁵¹ To ensure continuity, the States of the outgoing chairman and, where known, the incoming chairman will be members of the Central Organ.¹⁵² The Central Organ functions at two levels-the level of heads of state and that of ministers and ambassadors who are accredited to the AU or duly authorized representatives.¹⁵³ The Organ may, however, seek the participation of other Member States in its deliberations, particularly the neighbouring countries. It may also seek, from within the continent, "such military, legal and other forms of expertise as it may require in the performance of its functions."¹⁵⁴

The primary objective of the MCMPR is the anticipation and prevention of conflicts. This has the advantage of obviating the need to resort to the complex and resource-demanding peace-keeping operations that the continent often finds difficult to finance.¹⁵⁵ However, where conflicts have already occurred, then the MCMPR will embark on peace missions in order to facilitate resolutions of such conflicts and deploy civil or military observer groups for a limited capacity and for a limited duration.¹⁵⁶ It is important to observe that the MCMPR is already engaged in these kinds of exercise. Thus, in May 2002, it deployed a "Military Observer Mission" to the Comoros to assist the Comorian authorities in ensuring the security of the archipelago during the electoral process.¹⁵⁷ The Central Organ of the MCMPR has, in the past, also reviewed various conflict situations in Africa, including internal conflicts.¹⁵⁸

In discharging its mandate, the Central Organ shall coordinate its activities closely with the African regional and sub-regional organizations and shall cooperate, as appropriate, with the neighbouring countries with respect to conflicts which may arise in the different sub-regions of the continent.¹⁵⁹ This obviously applies to sub-regional organizations like the Economic Community of West Africa, the Southern African

Development Community, and the Common Market for Eastern and Southern Africa.160

The MCMPR places particular stress on the role of the Secretary-General. It empowers him or her to deploy efforts and to take all appropriate initiatives to prevent, manage and resolve conflicts, acting under the authority of the Central Organ.161 To achieve this end, he relies on the human and material resources available at the secretariat. He may also utilize eminent African personalities, in consultation with the authorities of their countries of origin and, where necessary, may make use of other relevant envoys or special representatives as well as dispatch fact-finding missions to conflict areas.162 Meanwhile, the OAU had established a special fund, made up of financial appropriations from the regular budget of the OAU/AU, voluntary contributions from Member States as well as other sources within Africa to fund its operational activities relating to conflict management and resolution.163 Disbursement from the fund is, however, subject to the approval of the Central Organ.164

In all situations, the objectives and principles of the OAU Charter, now AU Act, must guide the MCMPA. In particular, the following principles guide the MCMPA: the sovereign equality and respect for the sovereignty and territorial integrity of Member States, the inalienable right to independent existence, the peaceful settlement of disputes as well as the inviolability of borders inherited, (uti possidetis juris).165 The MCMPA will function on the basis of the consent and the co-operation of the parties to a conflict.166 Regrettably, this adherence to sovereignty and non-intervention might weaken the MCMPR. Many critics have actually called for a revision of these doctrines;167 and it is gratifying that the OAU had mandated its secretary-general, now Chairman of the Commission, to undertake a review of the structures, procedures, and working methods of the Central Organ in order to remove all obstacles to the smooth functioning of the MCMPR.168

Overall, it will be necessary to devise a system for early warning, if the MCMPR is to succeed in its allotted tasks. That is to say that it must develop the capacity for information gathering and analysis in order to provide strategic options for preventive action and/or an informed, appropriate response.169 The MCMPR must also design an appropriate mechanism for dealing with the post-settlement phase, as this is, arguably,

the most important part of the conflict resolution process. It is here that the foundations for a genuine culture of peace are laid. As Richard Jackson observed, "[s]tillborn political pacts are much more difficult to resolve than ongoing civil wars, as the parties have hard-won positions to protect and a cadre of armed supporters."¹⁷⁰ Consequently, failures of implementation and reconstruction can have devastating consequences and harden the attitudes of 'spoilers.'¹⁷¹ The experiences in such African countries as Angola, Mozambique, Eritrea, Ethiopia, Sierra Leone, and DR Congo attest to the veracity of this assertion. The key processes that Africa will need for long-term peace building, therefore, include demobilization for fighters, resettlement for displaced persons, economic reconstruction, rebuilding civil society, and national reconciliation.¹⁷²

3. The Peace and Security Council

In July 2002, the Assembly of Heads of State and Government of the AU, meeting in Durban, South Africa, adopted a Protocol on the establishment of Peace and Security Council (PSC) for Africa.¹⁷³ The PSC will be a standing decision-making organ for the prevention, management and resolution of conflicts. It shall be a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa.¹⁷⁴ The Commission, a Panel of the Wise, a Continental Early Warning System, an African Standby Force, and a Special Fund, will support the PSC.¹⁷⁵ Upon its entry into force, the Protocol will replace the Cairo Declaration and will supersede all resolutions and decisions of the OAU relating to the MCMPR in Africa that are in conflict with it.¹⁷⁶

The Protocol establishes an operational structure for the effective implementation of the decisions taken by African leaders in the areas of conflict prevention, peace-making, peace support operations and intervention, as well as peace-building and post-conflict reconstruction.¹⁷⁷ It stresses the need to forge closer cooperation and partnership between the UN, other international organizations and the AU, in promoting and maintaining peace, security, and stability in Africa.¹⁷⁸ The AU is particularly concerned with the impact of the illicit proliferation, circulation, and trafficking of small arms and light weapons in threatening peace and security in Africa and undermining efforts to improve the living standards of African peoples.¹⁷⁹ The

Protocol also recalls an earlier commitment of African leaders to the Solemn Declaration on the Conference on Security, Stability, Development and Cooperation in Africa.¹⁸⁰

The PSC will undoubtedly be the African equivalent of the UN Security Council, except that none of the 15 members will be able to exercise a veto. For example, it will be able to draw on a stand-by force from African armies to intervene if crimes against humanity are being perpetrated. The PSC will be composed of fifteen Members "elected on the basis of equal rights."¹⁸¹ Of this number, ten will be elected for a term of two years while five members will be elected for a term of three years, "in order to ensure continuity."¹⁸² A prospective Member State must, however, satisfy certain criteria. These include a commitment to uphold the principles of the AU; contribution to the promotion and maintenance of peace and security in Africa (for this purpose, experience in peace support operations would be an added advantage); capacity and commitment to shoulder the responsibilities entailed in membership; participation in conflict resolution, peace-making, and peacebuilding at regional and continental levels; and willingness and ability to take up responsibility for regional and continental conflict resolution initiatives. Others include contribution to the Peace Fund and/or Special Fund created for specific purpose; respect for constitutional governance, in accordance with the Lome Declaration, as well as the rule of law and human rights; having sufficiently staffed and equipped Permanent Missions at the Headquarters of the Union and the United Nations, to be able to shoulder the responsibilities which go with the membership; and commitment to honor financial obligations to the Union.¹⁸³ The Protocol sets out the objectives and principles of the PSC. The objectives include the promotion of peace, security and stability in Africa, which is intended to guarantee the protection and preservation of life and property, the well-being of the African people and their environment, as well as the creation of conditions conducive to sustainable development. It also has as its objectives the anticipation and prevention of conflicts. In circumstances where conflicts have occurred, the PSC shall have the responsibility to undertake peace-making and peace-building functions for the resolution of these conflicts; promote and implement peace-building and post-conflict reconstruction activities to consolidate peace and prevent the resurgence of violence; co-ordinate and harmonize continental efforts in the prevention and combating of international terrorism in all its aspects; and develop a common defence policy for the

Union, in accordance with the AU Act.¹⁸⁴ It will also promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, all aimed at preventing conflicts.¹⁸⁵

Similarly, the Protocol provides, by way of principles, that the PSC shall be guided by the principles enshrined in the AU Act, the U.N. Charter, and the Universal Declaration of Human Rights (UDHR). This includes the peaceful settlement of disputes and conflicts, early responses to contain crisis situations in order to prevent them from developing into full-blown conflicts, respect for the rule of law, fundamental human rights and freedoms, the sanctity of human life, and international humanitarian law.¹⁸⁶ Others are interdependence between socio-economic development and the security of peoples and States, respect for the sovereignty and territorial integrity of Member States, non-interference by any Member State in the internal affairs of another, sovereign equality and interdependence of Member States, inalienable right to independent existence, and respect of borders inherited on achievement of independence-uti possidetis juris.¹⁸⁷ This has been a common refrain of African leaders since the days of the OAU Charter,¹⁸⁸ and probably explains why the OAU was often labelled, rightly or wrongly, as a conservative club of African political oppressors. Remarkably, however, things appear to be changing. Thus, the Protocol, like the AU Act, provides for the right of the AU to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances-namely war crimes, genocide and crimes against humanity, in accordance with Article 4(h) of the AU Act-and the right of Member States to request intervention from the Union in order to restore peace and security.¹⁸⁹

Overall, it may be said that the establishment of the PSC in a collective Africa is certainly a welcome development, though its power could be a source of both peace and conflict among Africa's stronger nations. Expectedly, competition among countries for the five seats that will chair the PSC will be intense, as they will be able to advance their individual agendas and foster stability-or even instability-on the continent. It is, however, hoped that these leaders not exploit military interventions to advance their own regional and continent-wide agendas.

Questions:

1. What kinds of measures have been taken by the African Union since its establishment to create common understanding on dispute settlement?
2. What measures should be taken to incorporate ADR under the AU documents?
3. Are there things that we learn from the EU and NAFTA?
4. Which kind of the dispute settlement mechanism is in use in Africa these days?

4.6. Ethiopia's Approach to International ADR

As part of the world, Ethiopia is under the influence of international practices like that of dispute settlement. The existence of very dynamic idea and technology transfer helped the country to expose itself to the world community. In addition, the movement of citizens from place to place for settlement and investment facilitates the flow of practices which were limited to certain part of the world. If a nation have foreign relation with the citizens of the other in private manner and in the state level, it will be inevitable to be exposed itself to the international dispute settlement mechanisms. Thus, it will be important to consider our nation as part of the international practice in the implementation of ADR as an international dispute settlement method.

Ethiopia exposes itself to the international practice of ADR in different respects. The place of those international documents in Ethiopian legal regime and the relation of the institution of the nation with other international institute will be assessed in the coming section.

Ethiopia and International Documents - As we have discussed in preceding parts Ethiopia is not yet a party to the 1958 Convention to the recognition and the enforcement of foreign arbitral awards. This might be considered as one failure of the legal regime in incorporating this very important international document which guarantees the enforcement of an award given in Ethiopia to be enforced elsewhere in other member states. Reciprocally, the convention would have guaranteed the smooth enforceability of an arbitral award given in the other member states of the convention to Ethiopia. Unfortunately, Ethiopia is one among the 51 nation who have not yet approved this convention as of September 2007.

But the New York Convention is not the only document that regulates the reciprocal enforceability of foreign arbitral awards in other states. Other regional and bilateral treaties have also been made in the past years to facilitate the same. In addition to these agreements between states, national laws also regulate the enforceability of foreign arbitral award in the same way as they regulate the enforcement of foreign court decisions.

The enforcement of foreign arbitral award in Ethiopia, therefore, is regulated by the national law and the bilateral treaty signed so far. The civil procedure code provisions, i.e. Articles 456 – 461, are the important one in this respect guarantying the enforceability of foreign award in Ethiopian jurisdiction subject to the fulfillment of the conditions listed there under. Though, the first few articles speak about the enforcement of foreign decision, Article 461, which exclusively deals about enforcement of foreign arbitral awards, refers back to these sets of provisions which are applicable to the foreign decisions. Thus, for a better understanding of this issue a close reading of Articles 456 – 461 and references to the discussion made under section 3.6 of Chapter Three of this course can be made.

On the other hand, we have made a pace in the incorporation of one of the founding convention of the PCA (Permanent Court of Arbitration), the 1899 Convention on the Pacific Settlement of International Disputes. Though, Proclamation 348/2003 ‘A Proclamation to Provide for Ratification of the Pacific Settlement of International Disputes (1899)’ done on June 24, 2003, it has been recorded in the registry of the convention on May 28, 2003. The other founding convention of the PCA done in 1907 didn’t repeal the first one. Of course, the second document has included more detailed provisions in the attainment of its objectives. For example, under Part III, which deals about the International Commission of Inquiry, more detailed provisions have been included for its working procedure. Especially, the commission has been put under the supervision of the International Bureau of the Permanent Court of Arbitration, which serves as a registrar. Part IV of it included a new system which was not there under the predecessor Convention. Chapter IV of it established “Arbitration by Summary Procedure” in disputes admitting of a summary procedure. Remember, we are not yet the signatory for this second document.

Question: Why do you think Ethiopia approved the 1899 PCA founding convention and failed to do the 1907 one? Do you think that the 1899 convention is more beneficial to us than the later one?

Ethiopia's relation with PCA documents does not stop here. She has used the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States in the Ethio – Eritrean border dispute. Section 4 paragraph 11 of the Ethio - Eritrean agreement (the Algiers Agreement) which was done in Algiers on the 12th of December 2000 reads as follow;

The Commission shall adopt its own rules of procedure based upon the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States. Filing deadlines for the parties' written submissions shall be simultaneous rather than consecutive. All decisions of the Commission shall be made by a majority of the commissioners.

From the reading of the agreement, especially section 4, we can easily understand that the neutral Boundary Commission which is composed of five members, four of them elected by the two nations two each and the other presiding commissioner by the already nominated four commissioners or in their failure by the Secretary-General of the United Nations, is an arbitration tribunal. This tribunal had the right to make its own rules of procedure, but this right is a qualified one; its rules should make the 1992 PCA Optional Rule for Arbitrating between two States as a bench mark. Any state or institute can use this optional rule with out any accession to it or to the PCA founding conventions.

There is no specific requirement of accession to the UNCITRAL documents since most of them are Model Laws which might help nations to use it as a bench mark or model in developing its own domestic laws or treaties with other nations. These documents can help us in formulating laws or public policies to fill the gap in the existing legal regime regulating the matter.

The other possibility that Ethiopia will have connection with international ADR is the existence of foreign companies working in the nation in different areas; as investors,

service delivers, constructors, consultants in different field, NGOs, etc. These relations will substantially depend on the agreement made between the two parties who are not regulated by the same law of a nation. Thus, it is common to include dispute settlement mechanisms and determine the applicable laws which will regulate their relation including disputes of the contracting parties. Since the parties are from two different legal regimes, the international ADR tribunals (especially arbitration) and documents will be the first option for the parties to the contract. This is the other possibility that brings Ethiopia before international tribunals and international documents regulation ADR.

Globalization is trying to create one village composed of different and diversified custom and practice. Technology and commerce is accelerating this mob by making some region of the world dependent on the activities of the other tip of the world. As part of this dynamic interaction of peoples of different nations, dispute settlement mechanisms where parties of any nation could be entertained are becoming very important. Ethiopia has been involved in the international ADR in different respects; approving the 1899 PCA founding convention and referring the Ethio – Eritrea Boarder Commission to use the 1992 PCA Optional Rule for Arbitrating between two States are few examples that are discussed above.

Questions:

1. Is there any thing we lost because of Ethiopia's status in the 1958 New York Convention?
2. Can we safely say that the Civil Procedure Code provisions can replace the 1958 New York Convention?
3. Which international documents need to be taken as a bench mark if Ethiopia decided to enact a consolidated law for Arbitration and/or Conciliation?
4. How can we say that the objectives of the establishment of UNCITRAL and enactment of its documents meet its purpose in influencing Ethiopian practice on the matter of ADR?
5. Do you have any idea about the influence of International Chamber of Commerce in Ethiopia?
6. Zani pltd is an exporter company registered under Ethiopian law and functions well for the previous three years. Especially Zani exports first class Sidama coffee

to the international market. Gudi is another company registered and well functioning under Germany law. Zani and Gudi had a long standing business relation in which Gudi is the destination for Zani's coffee exported from Ethiopia. Two weeks ago these companies got in to conflict over the amount of compensation due to Gudi as a result of lower quality coffee delivered to Gudi which is below the quality they have agreed. The companies want to refer the matter to five arbitrators of their own choice and to have their seat in Bone, Germany. In addition, they want the arbitrators to use the 1985 UNCITRAL Model Law on International Commercial Arbitration. Would you advise them in the following issues;

- A. Draw the arbitral submission according to their interest and the general principles.
- B. Gudi came to know that Ethiopia is not yet the signatory of the 1958 New York Convention, whereas Germany did. Hence, Gudi fears the enforceability of the award in Ethiopia and is nearly to cancel the submission. How could you convince Gudi and insure the enforceability of the award in Ethiopia?

4.7. Summary

The role of ADR in the international dispute settlement can not be easily considered as an alternative means of dispute settlement, but as basic one. It is partly because of the non existence of other authoritative international public and private tribunal which has jurisdiction to all subject matters of dispute and all parties of the world. As a result, seeking the assistance of ADR in settling these disputes is becoming a common practice in disputes that arise in the international diplomatic and commercial interactions. The development of e-commerce is also another factor which makes ADR the best solution to settle dispute between parties with out the necessity of the disputant to face each other physically; and it is called ODR (Online Dispute Resolution).

The other factor for the development of ADR in the international level is the right of individual parties to be a party before the tribunal and getting valid out come there under.

In other words, any individuals who have a dispute between them can take their matter before ADR tribunal freely with out the necessity of being represented by its nation or the sovereign government. In addition, almost all matters of disputes can be resolved by one of the ADR methods known these days. So, there is no subject matter of a dispute which can't get remedy by using ADR.

To facilitate the smooth settlement of international disputes by a duly established ADR tribunal and organized procedure and easy enforcement of remedies obtained in foreign nations, different international documents have been adopted and different international tribunals have been established by different parties. The 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Award, the 1899 and the 1907 Convention on the Pacific Settlement of International Dispute (which established the PCA – Permanent Court of Arbitration) are few of them. The UNCITRAL (United Nation Commission on International Trade Laws), subordinate body under UN, is also working to harmonize laws of the nations regulating the matter by its different activities, like adopting model arbitration and conciliation laws. The ICC (International Chamber of Commerce) is another international institution fostering ADR by enacting ADR and Arbitration laws and establishing ICA (International Court of Arbitration). ADR is also a well recognized mechanism in many regional documents like the NAFTA and EU documents.

Though, it requires further attention, Ethiopia is not far away from the international practice. The facts that we have approved the 1899 PCA founding convention, stipulated the procedures of enforcement of foreign arbitral award under our civil procedure code and used the 1992 PCA option arbitration rule in the settlement of Ethio – Eritrean boarder dispute are only few examples to mention.

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