ADDIS ABABA UNIVERSITY COLLEGE OF LAW AND GOVERNANCE STUDIES

SCHOOL OF LAW

MODERNIZATION AND INSTITUTIONALIZATION OF MEDIATION TO RESOLVE COMMERCIAL AND INVESTMENT DISPUTES IN ETHIOPIA

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Declaration

The thesis is my original work, has not been submitted for a degree in any other University and that all materials used have been duly acknowledged.

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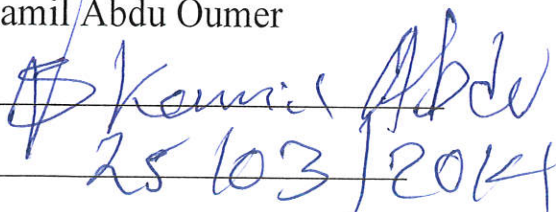

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Modernization and institutionalization of mediation to resolve commercial and investment disputes in Ethiopia

A Thesis Submitted In Partial Fulfillment of the Requirements For LLM Degree In Business Law

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Acronyms

AAA	American Arbitration Association
AACCSA	Addis Ababa Chamber Of Commerce and Sectorial Association
AALCO	Asian-African Legal Consultative Organization
ADR	Alternative/ Amicable/ Appropriate Dispute Settlement
Arb-Med	Arbitration- Mediation
AI	Arbitration Institution
Art	Article
BATNA	Best Alternative to Negotiated Agreements
BC	Before Christ
BDR	Better Dispute Resolution
BIT	Bilateral Investment Treaty
CRCICA	The Cairo Regional Centre for International Commercial Arbitration ,
DR	Dispute Resolution
DSB	Dispute Settlement Body
ECX	Ethiopian Commodity Exchange
EACC	Ethiopian Arbitration and Conciliation Center
ENE	Early Neutral Evaluation
FDI	Foreign Direct Investment
FDRE	Federal Democratic Republic of Ethiopia
ICA	International Court of Arbitration
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICJ	International Court of Justice
ICSID	International Convention on Settlement Of Investment Disputes
IDR	Innovative Dispute Resolution

IMSSA	Independent Mediation Service of South Africa
LCIA	London Court of International Arbitration
MDC	Multi-Door Court House
Med-Arb	Mediation- Arbitration
NGO	Non-Governmental Organization
OECD	Organization of Economic Cooperation For Development
UK	United Kingdom
UMG	Ukraine Mediation Group
UN	United Nation
UNCITRAL	United Nation Commission on International Trade Law
USA	United States of America
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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Abstract

Dispute settlement is usually considered as an important issue in investment and commercial transactions for disputes are unavoidable. In the modern era, court litigation was considered to be the main and inherent dispute resolution mechanisms including for commercial and investment disputes. Unlike the needs of commercial and investment disputes, however; Court litigation is generally characterized by, among others, cost inefficiency, adversarial nature and delay. Consequently, modern alternative dispute settlement mechanisms are becoming more popular in resolving commercial and investment disputes. The primary choice for commercial and investment disputes has been modern arbitration. But, modern arbitration is also becoming more adversarial, costly and lengthy. Therefore, more flexible interest based ADR mechanisms like mediation is becoming more important to resolve investment and commercial disputes.

In Ethiopia, resolving disputes using traditional mediation is common throughout the country. But, Modern & institutionalized mediation is very recent and rare. There is also no legal regime specifically governing modern & institutional mediation in the country. Even if we can take mediation and conciliation to mean a similar concept, legal rules governing conciliation are insufficient. However, few ADR centers like the Addis Ababa Chamber of Commerce and Sectorial Association arbitration institute and Court annexed mediation Center at federal courts are rendering mediation services.

Using both qualitative & quantitative methodologies as well as primary & secondary data, the research examines modern and institutional mediation in Ethiopia and the needs to further modernize and institutionalize it to resolve commercial and investment disputes. By analyzing primary & secondary data and using logical reasoning, the research recommends, among others, the need to reconsider the policy towards modern and institutionalize mediation on the side of the government, undertaking various legal reforms, strengthening and expanding existing court annexed mediation centers, increasing accessibility of chamber mediation in the country, considering establishment of new mediation centers and the need to consider establishing a regional mediation center in Addis Ababa.

Introduction

In every human interaction, disputes are generally unavoidable. In investment and commercial activities, they commonly arise between/among those participating in the transaction. Hence, the main issue is how to manage and resolve disputes through appropriate mechanisms whenever they arise.

In the modern Era, court litigations are traditionally considered as the natural dispute resolvers including for commercial and investment disputes. Nowadays, however; litigations are being seen as lengthy, costly and more adversarial that has little concern for the future relationship of disputing parties. In commerce and investment transactions, on the other hand, speedy disposal of disputes, cost efficiency and maintaining friendly relationship of disputing parties are usually considered very important.

Alternative dispute resolution (ADR) mechanisms are generally speedier, cost efficient and give more care for the post resolution relationship of disputing parties than court litigation. Hence, they are becoming more popular to resolve investment and commercial disputes. From among different alternative dispute resolution mechanisms, modern arbitration has been seen as very important mechanism to resolve commercial and investment disputes. However, modern arbitration itself is becoming very costly, more adversarial and lengthy. Consequently, less adversarial flexible interest based ADR mechanisms like mediation are becoming more important in resolving these disputes. Mediation, among others, empowers disputing parties to resolve their disputes by themselves.

In Ethiopia, traditional mediation is not uncommon. Modern and institutional ADR mechanisms are, however; very recent and rare. Modern mediation in the country is under developed and lacks necessary legal & institutional frame works. Thus, necessary measures should be taken to modernize and institutionalize mediation in the country.

The paper is organized in four chapters. The first chapter is about the proposal of the study, which is concerned with background, the problems that need to be addressed, and

the objective of the study, the significance, the scope& limitations and methodology employed in the study.

The second chapter deals with disputes in general and commercial & investment disputes in particular. In this chapter an overview of disputes in general, commerce, investment, commercial disputes and investment disputes are explained.

Chapter three is devoted to the discussion of Public and private justice systems as means of resolving commercial and investment disputes. Hence, an attempt has been made to discuss Public justice system, private justice system, different ADR mechanisms, major principles f ADR, role of Courts in private justice systems, and the likes. Special emphasis is also given to modern and institutionalized mediation.

Chapter four is concerned with the theme of the paper, which is about Modernization and institutionalization mediation to resolve commercial and investment disputes in Ethiopia.

Finally, the fifth chapter is devoted to conclusion and recommendations on the basis of the findings of the study.

CHAPTER ONE

1. General back ground to the research

1.1. Back ground

1.1.1. Commercial disputes

It is believed that commerce commenced at the early stages of the human civilization. The usage of the term 'commerce', however; has been changing throughout history with the development of the human society. In early times, it was simply used to denote buying and selling of goods or to describe the action of people who sell and buy goods for profit as a means of their living.[1] Nowadays, the term 'commerce' represents wide and complex transactions denoting "*the chain of actions that brings goods and services from production to consumption in which the dealer works for profit.*"[2]

Distinguishing commercial activities from other activities is vague and country specific. Some countries rejected the distinction while others maintain it. Even in those countries that maintain the distinction, there are neither clear criteria nor essential elements which make an activity commercial.[3] But, a legal system may define commercial activities in its own ways. In Ethiopia, the Commercial Code of the country has come up with extended list of activities that any individual who carries out such activities professionally and for gain shall be considered to be a trader.[4]

Despite the existence of various views as to what commercial transactions are, there are some special characteristics that 'commercial' transactions have. Commercial activities, among others, need speedy transaction, higher degree of trust and more protection for the creditor. [5]

Commercial activities are not free from disagreements and disputes. In fact, in Commerce, disputes are inevitable ordinary occurrences. They usually arise among merchants or between

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[1] Robert g. Natelson, The legal meaning of "commerce" in the commerce clause, in St. John's law review vol. 80, 2006 p30
[2] Julio cueto-rua, Administrative, civil and commercial contracts in Latin American law, Fordham law review volume 26 | issue 1, 1957 p28
[3] Ibid
[4] Commercial Code of the Empire of Ethiopia ,Negaret Gazeta, extra ordinary Issue, No. 3 of 1960, Art 5
[5] Tubingen & Martinus Nijhoh, civil law and commercial law", in International encyclopedia on comparative law, Hague, 1983 p4

merchants and consumers. In general, as there are divergent views as to what commercial activities are, there are also divergent views as to what commercial disputes are.

When it comes to Ethiopia, there is no clear legal definition of what commercial disputes are. But, disputes traditionally considered as commercial disputes before Ethiopian courts include: *"failure to pay one's debt, disputes as to change of price, payment of dividends, failure to deliver in sales contracts, cases related with checks and promissory notes, disputes in money transfer, questions in relation to membership to a share company, failure to pay 'Equb' contribution, actions for the calling of meetings in business organizations, cases of bankruptcy, files for appointment of an arbitrator, actions for the deposition of a manager, action for the cancellation of decision of general assembly of a business organization, disputes in auditing reports, appointment of directors, payment of contribution of a partner and claims for the execution of sales contracts.*[6]*"*

1.1.2. Investment disputes

The on line World Wide Web dictionary defines investment as:

"The act of investing; laying out money or capital in an enterprise with the expectation of profit, Money that is invested with an expectation of profit; the commitment of something other than money (time, energy, or effort) to a project with the expectation of some worthwhile result"

There is no single universally accepted definition of investment and investor.[7] Rather, there are different definitions across different legal systems. In Ethiopia, the latest investment Proclamation no. 769/2012 defines investment under article 2(1) as:

"Investment means expenditure of capital in cash or in kind or in both by an investor to establish a new enterprise or to expand or upgrade one that already exists."

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[6] ዮሴፍአዕምሮ, የፍትሀብሄርክርክሮችሂደት፡ ፈተናዎች እና ተስፋው , Ethiopian business law series vol. 5, 2012, p 22-23
[7] Barton Legum , Defining Investment and Investor : Making the most of international investment agreements, a paper for symposium co-organized by ICSID, OECD and UNCTAD, Paris, 12 December 2005, p 23

In many Bilateral Investment Treaties (BITs) Ethiopia has signed with different countries, investment has been defined in different ways. The Ethio-Chinese BIT, for example, defines investment under article 1(1) as:

" ... *every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, and in particular, though not exclusively, includes:*

a) Movable, immovable property and other property rights such as mortgages and pledges;

b) Shares, stock and any other kind of participation in company;

c) claims to money or to any other performance having an economic value;

d) copyrights, industrial property, know-how and technological process;

e) Concessions conferred by law, including concessions to search for or exploit natural resources "

Globally, there are asset based definition of investment, extended list of definition of investment which includes tautological elements to accommodate future new areas of investment and providing closed lists in defining investment. [8]

Investment in a country can be foreign or domestic. Domestic investment is investment invested by a domestic investor while foreign investment is an investment invested by a foreign investor. Domestic investor under Ethiopian law is "*an Ethiopian or a foreign national treated as domestic investor as per the relevant law and includes the Government, public enterprises as well cooperative societies established under the relevant law.*[9] Foreign investor on the other hand is "*a foreigner or an enterprise wholly owned by foreign nationals or a foreigner or an Ethiopian incorporated enterprise owned by foreign nationals jointly investing with a domestic*

[8] UNCTAD, Bilateral investment treaties 1995-2006: Trends in investment rule making, New York and Geneva, 2007 p 9-11
[9] Investment Proclamation No. 769/2012, Negarit Gazeta, 18th year No. 63 article 2(5)

investor and includes an Ethiopian permanently residing abroad and preferring treatment as a foreign investor"[10]

Like the in case of commerce, disputes are inevitable in investment. In investment, there are three types of disputes: state- state disputes, state- investor dispute and investor-investor disputes. [11]State-state dispute is a phenomenon in the case of cross boundary investment in which a national of one state invests in the other state. State –investor dispute, on the other hand, is a dispute between a foreign investor and the host country. Finally, there is also investor-investor dispute.

1.1.3. Resolution of commercial and investment disputes

Whatever commercial and investment disputes are, settlement of these disputes, among others, requires speedy disposal, expert knowledge about commerce and investment and more care for future business relations of the parties in the dispute.[12] In business, time is a very important thing. Over a period of time, the price of merchandizes fluctuates; merchants may get bankrupt or gain huge profit, etc. If a dispute settlement is delayed, it is highly probable that one of the parties in the dispute either gains unnecessary advantages or loses. Commercial and investment dispute resolutions also require expertise and good knowledge about the case. Commercial and investment activities are too diverse to be known to a single expert. Accordingly, it is better if a person who is in charge of resolving disputes in each commercial and investment activity has special expert in that specific area. Moreover, the settlement should be as cheap as possible. Finally, the future relation of the parties in dispute should be given much attention. Business requires working together and having loyal partners or clients. Losing a client or a partner for a merchant/ investor is very costly. Therefore, the settlement of commercial and investment disputes should be in such a way that it would bring littler no harm to the future relation of parties.

Alternative dispute settlement mechanisms (ADRs) in general are becoming popular for settlement of commercial and investment disputes in the world. Mediation as one of ADR

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[10]Ibid article 5(6)

[11] UNCTAD, Bilateral investment treaties 1995-2006 ,supra note 8, p 99

[12]የሱፍ አዕምሮ, (2012) Supra notes 6, p 22-23,

mechanisms is also attracting much attention in this regard. The business community is looking towards mediation than other mechanisms like litigation.[13]

Mediation is a process in which parties in a dispute negotiate their cases by the help of a neutral third party who has no power to pass a binding decision.[14] It, among others, enables parties to maintain and even improve their relation by creating opportunities to discuss in good faith and reach a mutual agreement rather than settling disputes by the decision of a neutral third party. It also can be more efficient in terms of time and cost if it is managed well.[15]

Mediation in every society was first known as a traditional mechanism usually used by village elders.[16] To cope with the more complex modern business transactions, however; it hasto be modernized and many jurisdictions have already formalized and institutionalized mediation for settlement of, not only domestic but also international, business disputes.[17]

In Ethiopia, traditional mediation as a means of settlement of disputes of any kind is known and used in many societies across the country. But, mediation in its modern and institutionalized form is little known. Despite the recognition of conciliation as one means of resolving civil and/or commercial disputes in the country, modern and institutionalized mediation is still at its infant stage in the country. The two functioning centers which are currently rendering mediation service in the country are the Addis Ababa Chamber of Commerce and Sectorial association Arbitration institute and recently started Court annexed mediation centers. The former Ethiopian Arbitration and Conciliation Center had been closed.[18] In addition, the mediation service in the Ethiopian Commodity Exchange is not working and, currently, there is no separate dispute

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[13] United Nations Office on Drugs and Crime, training manual on alternative dispute resolution and restorative justice, October 2007 p 21

[14] Roger E. Hartley, Alternative Dispute Resolution in Civil Justice Systems, American Legal Institutions, LFB Scholarly Publishing LLC, New York 2002 p 13

[15] International arbitration forum, Out-of-Court Solutions for Resolving Commercial Mortgage Disputes, December 2005, available at http://www.adrforum.com/users/naf/resources/CommercialMortgageFinanceWP.pdf and accessed on 26 July, 2013 , p i

[16] Roger, (2002) supra notes 14, , p 19

[17] Sharon press, Institutionalization: savior or saboteur of mediation? Florida state University law reviewvol. 24, 1997, p 909

[18] Phone interview with w/ro Haregeweyn, Director of the former Ethiopian arbitration and conciliation center held on 1/04/2013

settlement organ in ECX.[19] To cope with the growing investment and commercial sector and become an alternative mechanism of dispute settlement, mediation should be more modernized and institutionalized.

1.2. Statement of the problems

After decades of monarchial and socialist rule, Ethiopia is currently moving towards a market economy in which the private sector has a significant role. Consequently, the role of trade and investment in the economy of the country is increasing. In the past ten years, billions of dollars have been invested by both foreigners and nationals in different sectors of the economy. From January 1 2001 to September 2013, a total of 59,185 projects with a total capital of 1,174,948,203 dollar have employed 2165,582 permanent and 4814,006 temporary workers throughout the country.[20]

With the growing role of the private sector, there should be a parallel move to build appropriate dispute settlement mechanisms in the country so that the efficiency of the sector can be promoted and it is possible to attract more capital to the sectors.[21] Settlement of commercial and investment disputes, among others, require speedy disposal, expertise knowledge about commerce and investment and more care for future business relation of parties in the dispute.[22]

Because of delay in the court system, increasing cost of litigation, jurisdictional issues in international litigation, etc, ADR mechanisms are becoming popular in commercial and investment dispute settlements.[23]The primary preference for the resolution of commercial and

[19] Interview with Ato Mulu Teafe, assistant General counsel at ECX, held on September 23, 2013
[20] Data obtained from Data Base department, Ethiopian Investment Agency, September 13, 2013
[21] Supreme Court of India, Mediation training manual of India, Mediation and Conciliation Project committee, available http://supremecourtofindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA. and accessed on May 19, 2013, p 3
[22]የሱፍ አዕምሮ(2012(supra notes 6, p22-23
[23]Billal Farooq, The Advantage of using commercial mediation over commercial litigation, project submitted in partial fulfillment of the post graduate of LLM, available at http://uobrep.openrepository.com/uobrep/bitstream/10547/252415/1/farooq. and accessed on April 27, 2013,p 5

investment disputes has been arbitration.[24] Modern Arbitration, however, is the most structured, rigid, adversarial, and even costly in terms of payment for lawyers, arbitrators, experts, etc so that it is losing its popularity in commercial and investment disputes.[25]On the contrary, modern and institutional mediation is becoming popular to resolve such disputes. [26]

Modern and institutional mediation is different from traditional informal mediations. It is more formal and professional dispute settlement mechanism in which professionals act as a neutral mediator. In its institutional form, mediation centers provide mediation services for the community as their regular business.

As a formal non-binding dispute settlement mechanism, modern and institutional mediation requires, among others, legal frame work to integrate it with the public justice system of a country, to define and regulate major principles of mediation, to regulate the mediation process so that major principles of justice are not violated, to regulate the role of the stakeholders in the process, code of Ethics for mediation professionals, to protect property right of individuals, to regulate how mediation centers that renders modern mediation service can be established, etc. [27]

In Ethiopia, conciliation is a legally recognized ADR mechanism under the 1960 Civil Code. But, the term mediation is alien to the Civil Code in particular and the legal system in general.[28]Even if one may consider mediation and conciliation to mean a similar concept, the provisions in the Civil Code that govern conciliation are not sufficient. There is no legal rule governing institutionalization of mediation, cases that may/may not be subject of mediation, the power to submit for mediation, and that regulate major ADR principles like confidentiality, etc; despite the enormous increase in the number of cases coming before courts and work load on

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[24] United Nation Conference on Trade and development, Investor–State Disputes; Prevention and Alternatives to Arbitration, UNCTAD Series on International Investment Policies for Development, United Nations, New York and Geneva 2010. p xxii

[25] Ibid p 4

[26] Ibid p4

[27] Lukasz Rozdeiczer &Alejandro Alvarez de la Campa, Alternative Dispute Resolution Manual: Implementing Commercial Mediation, The World Bank Group, Commercial Small and Medium Enterprise Department , USA, 2006 p 2

[28] Shipi M. Gowok, Alternative Dispute Resolution in Ethiopia - A Legal Framework, Vol. 2 No.2 available at http://www.ajol.info/index.php/afrrev/article/download/41054/8478 and accessed on 13/o3/2013 p 265

courts, there is no law that prescribes compulsory mediation; and, the legal rule that regulate the role of stakeholders in mediation/conciliation procedure is insufficient. Finally, ADR mechanisms in general and modern & institutionalized mediation in particular are also given marginal attention.

Despite all these, there are few institutions rendering mediation services to resolve commercial and investment disputes in the country. The Addis Ababa Chamber of Commerce and Sectorial Association Arbitration Institute and Court Annexed Mediation Centers at Federal Courts are currently mediating commercial and investment disputes. But, they are bounded by a number of problems.

To the knowledge of the researcher, there is no research work concerning modern & institutional Mediation in Ethiopia to date. So, the main focus of the study is to examine modern & institutionalized mediation in Ethiopia and suggest ways to further modernize and institutionalize it. Accordingly, the research tries to answer the following three questions.

1. How modern and institutionalized mediation, as a means to resolve commercial and investment disputes, is doing in Ethiopia?
2. Is modern and institutional mediation appropriate to resolve commercial and investment disputes in Ethiopia? If so;
3. What measures should be taken to further modernize and institutionalize mediation, as a means to resolve commercial and investment disputes, in the country?

1.3. Objectives of the study

The overall objective of the study is to assess the place of modern and institutionalized mediation as a means of commercial and investment dispute settlement in Ethiopia and indicate ways for further modernization and institutionalization. In doing so, the study shall

- Explain what commercial and investment disputes are
- Explores the notion of ADR in general and its use to resolve commercial and investment disputes
- Provide a brief discussion about ADR mechanisms in Ethiopia

- Explore the status of modern and institutionalized mediation as a means of resolving commercial and investment disputes in Ethiopia
- Provide a brief discussion about the current dynamics calling for modernization and institutionalization of mediation in Ethiopia
- Investigate ways and means for further modernization and institutionalization of mediation to resolve commercial and investment disputes in Ethiopia

1.4. Significance of the study

The study will focus on modernization &institutionalization of mediation to resolve commercial and investment disputes in Ethiopia. In this regard, it recommends various measures to be taken. Hence, it may hopefully contribute much for the forthcoming legislation on mediation. It will also have certain contributions for the legislative body, the judges, and the lawyers in creating awareness in relation with modern &institutionalized mediation. The study will also serve as a basis and may call the attention of those who want to conduct further research in the field. The study may, further, be used as a base to establish a mediation center for it tries to describe necessary steps in this regard. Finally, it may serve as a reference material in the academic sphere.

1.5. Scope and limitations of the study

Nowadays, ADR mechanisms in general and mediation in particular are widely used to resolve various types of disputes throughout the world. Mediation is being used to resolve political disputes among states; family disputes like divorce, succession, maintenance; labor disputes between employer and employees and even criminal matters which are usually considered to be the affairs of the state. But, this study is limited to the use of mediation to resolve commercial and investment disputes.

The study is to examine modern and institutionalized mediation in Ethiopia. Despite shading light on the informal mediation system and court litigation in the country, the main them of the study is modern and institutional mediation.

The research also has its own limitations. Among the limitations, no investor is interviewed. It has also been impossible to collect data from government institutions like the Ministry of Justice and Ministry of Foreign Affairs despite repeated attempts.

1.6. Methodology

The research is mainly qualitative research in that it will analyze legal provisions, provisions under international agreements, court cases, data collected through interviews and focus group discussions and use logical inferences to reach on its conclusion. It will devote on the reasons, justifications or logical arguments on legal provisions, and authoritative texts, etc. The research is also quantitative for, to a certain extent, it depends on quantitative data from federal courts, Ethiopian investment agency and some ADR centers.

The study benefits from both primary and secondary data. Primary data is collected through interview and focus group discussion. Interview is made with former officials of the former Ethiopian Arbitration and Conciliation Center, a Court appointed mediator in Lideta Federal First Instance Court(Addis Ababa), officials from Addis Ababa Chamber of Commerce and Sectorial Association, Ethiopian Commodity Exchange, Ethiopian Investment Agency, selected lawyers and traders. In addition, some primary data has also been collected from Federal Courts in Addis Ababa, Ethiopian Investment Agency and ADR Centers in the country. With regard to Secondary data, different books, journals, Articles, laws, international treaties, rules of different international, regional and national mediation centers have been consulted.

CHAPTER TWO

2. Commercial and investment disputes

2.1. Disputes in general

Before rushing towards discussing what commercial and investment disputes are, it would be better to briefly deal with what disputes are in general. Black's law dictionary defines the term 'dispute' as:

"*a conflict or controversy, esp. one that has given rise to a particular lawsuit.*"

Likewise the world web reference dictionary defines it as:

"*A disagreement or argument about something important.*"

Disputes are generally understood to be unavoidable in any human interaction.[29]They, rather, can be managed, channeled, contained and resolved.[30]Every human relation has the potential for dispute and disputes have been the inalienable parts of the human societies. They have been occurring and they are expected in any future human relation.

"*Conflict began with human history and will probably never end. How to resolve is what matter*"[31]

Recognizing the possibility of the occurrence of disputes in every human relation, human beings have made them subjects of study since ancient times. In social sciences; the study of conflict is as old as the science itself. [32]. If conflicts are unavoidable, then, what actually are they? What is their source and how can we understand them are questions that need to be addressed. There are various views as to what disputes are.

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[29] Jerome T. Barrett, & Joseph P. Barrett, A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement, *HB Printing,* USA, 2004, p 3

[30] Gold man and Jaques Rojot, Negotiation theory and practice, IBR international, London 2003, p 15
[31] Clinton F. Fink, Some conceptual difficulties in the theory of social conflict, Conflict resolution Volume XII No. 4, Center for Research on Conflict Resolution, University of Michigan availlable at , http://deepblue.lib.umich.edu/bitstream/handle/2027.42/67560/10.1177_002200276801200402.pdf?sequence=2 and accede on May 25, 2013
[32] Ibid

For Luhman, conflicts are the results of explicitly communicated contradictions and they are at the 'behavioral level' or are results of 'observable' communications.[33]For some others, "*there can be a structural reason that gives rise to repeated and perpetual out breaks of conflict.*"[34] The visible conflict may be caused by invisible incompatibilities of positions or interests.[35] Accordingly, conflicts are the results of *'purposeful interactions'* among individuals in a 'competitive setting.'[36]

The permanent court of international justice in the case of the Mavromattes Palestine concession explained that:

"*...what is critical to finding a dispute is that the claim of the parties must be in opposition to each other... it is not enough that the interests of parties are in conflict. Rather, it must be positively opposed to each other. It is by their opposing attitude that the dispute is given its essential element.*"[37]

Disputes usually begin with grievances when an individual or group believes that he has been denied a certain right or resource he is entitled to by another individual or group. [38]Grievances, on the other hand, emerge from objective happenings, subjective perceptions of individuals and their tendency to label the objective happenings in a certain way.[39]The perception of the aggrieved partyis usually influenced by a number of factors. It, among others, is affected by background of the party particularly by the educational, social & economic status of the party, the economic, social and political context in which the event that causes the grievance occur, etc.[40].

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[33] Thomas Malsch, & Gerhard Weiß, conflicts in social theory and multi-agent systems: *Hamburg University* ,Germany available at http://link.springer.com/chapter/10.1007/0-306-46985-5_4#page-1 and accessed on Mau 26, 2013 p 9-10

[34] Ibid p 9-10

[35] Daniel Dang, conflict resolution, MCGraw Hill, New York, 2001, p 13
[36] Clinton supra notes 30
[37] Nii Lanto & Wallace Bruck, The settlement of international disputes, the contribution of Australia and new Zealand, Nijhoft publication, London, 1998 p 3
[38] Alan Scott, Edward F. Sherman, & Scott. Peppet, Negotiation, University case book , (2nd edition) Foundation press , New york 2002 p 3
[39] Ibid p 4-5
[40] Ibid p 4-7

Grievance by itself is not enough for the occurrence of disputes. A Dispute arises when the person who has perceived to be hurt claims and the other party refuses the claim in whole or in part.[41] If the aggrieved party refrains from claiming or the other party complies with the claims of the aggrieved party, there shall be no dispute. .

"*Disputes are not discrete events like births or deaths; they are more like such constructs as illnesses and friendships, composed in part of the perceptions and understandings of those who participate in and observe them. Disputes are drawn from a vast sea of events, encounters, collisions, rivalries, disappointments, discomforts, and injuries. The span and composition of that sea depend on the broad contours of social life ... The disputes that arrive at courts can be seen as the survivors of a long and exhausting process*" [42]

There are some distinctions made between the terms 'conflict' and 'dispute'.

"*Conflicts are those issues that lack a legitimate, reliable, transparent, non-arbitrary, forum for the peaceful settlements of differences*" while "*disputes ...are pre-described as having recognized forums for their expression and resolution.*"[43]

Accordingly, there shall be no conflict in democratic societies but only disputes for there are appropriate dispute settlement mechanisms while there is only conflict in totalitarian countries and interstate relations for conflicts are usually avoided using force, avoidance, ideology or repression.[44]

In other words, conflicts are usually political and mostly non-justiciable or the political system makes the disagreements not to be resolved in a pre-determined procedures and forums. Where there are pre-determined procedures and forums for resolving conflicts, conflicts shall become disputes.[45] In democratic societies, there is narrower gap for policy discretion so that law and legally recognized institutions to resolve disputes have vast space for resolving disputes. In the totalitarian regimes and international relations, on the other hand, there is vast policy discretion

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[41] Gold man & Jaques Rojot, supra notes 29 p 7
[42] Ireland Law Reform Commission, Alternative dispute resolution, law reform commission,2008, p9
[43] Raymond Shonholtz, A General Theory on Conflicts and Disputes, Journal of Dispute ResolutionVol.2 No2, 2003, p 400

[44] Ibid 401
[45] Ibid , p 402

for decision makers. Therefore, political decision making dominates the legal dispute settlement systems. But, it does not mean that all types of conflicts are identical and can be resolved in a similar fashion.

There shall be both political and legal conflicts in every society whether they are under democratic regime or totalitarian regime. Legal disputes are disagreements"... *on a point of law or fact...*"[46]The permanent court of international justice in the case of the Mavromattes Palestine concession defined legal dispute as dispute as:

"A dispute is a disagreement on a point of law or fact, a conflict of legal views or interest between two parties"[47]

Political disputes are on the other hand disagreements over interests.[48]But, the way these disputes are to be resolved differs in the two regimes. In democratic societies, even political conflicts have a pre-determined ways of resolving them. The way of resolving political disputes, however can be different from the way legal disputes are resolved.

There are also some special types of conflicts called Aporetic conflicts.[49] Aporetic conflicts are disputes in which there are two parties with contradicting but 'legitimate/true claims/positions' and the two claims/positions depend on each other. [50] In such kind of disputes, both parties have 'legitimate' claims and one cannot live without the other. Examples of such kind of disputes include strike of workers against their employers, the conflict between law and order and freedom, etc. [51]

Xenophobia is a special type of aporetic dispute.[52] It is fear/hatred against someone for being a stranger.[53]In Xenophobia, being different is enough for the fear or hatred like in the case of

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[46] Nii lanto, wallace Bruck,(1998) supra notes p 3
[47] Ibid p 3
[48] Ibid
[49] Dr. Günther Ossimitz, The Evolution of Conflicts: The Conflict Theory of Gerhard Schwarz and its Application to Xenophobia1, available at http://www.uniklu.ac.at/~gossimit/ifsr/evolconf and accessed on July 3 2013 p 4

[50] Ibid
[51] Ibid p 5
[52] Ibid p 7
[53] Ibid p 7

racism, sexism, fascism, etc.[54] To resolve aporetic types of conflicts special institutions are needed.[55]

In the world we live in today, disputes are normal occurrences in all kind of human interactions. They are common in international interactions among states, with in a nation state and even at individuals level.

At the international level, there can be disputes between/among states for different reasons. Disputes may arise between neighboring countries due to territorial claims, boundary disagreements, accusation of conspiracy to intervene in internal affairs of the other state, etc. They may also arise between/among nation states due to claims of violation of international obligations by one to the other, etc. Furthermore, disputes may arise between/among international organizations as well as between states and international organizations. For example, disputes may occur between the United Nation and a certain country or between the United Nation and the African Union. Finally, with the growing role of individuals on the international arena and emerging international legal personality for individuals, disputes may arise between/among individuals of different nations, individuals & states and individuals & international organization.

Within a given nation state, conflicts may arise at different levels. Conflicts may arise among various political powers, among various social sects, among the different sectors of a government, between workers and the government, individuals and the government, etc. At individual level, there may be conflicts among workers &employers, husband & wife, among traders, between consumers & producers, consumers& business owners, etc.

Disputes are usually seen as negative encounters in human relations. But, they may also be important and productive.

"The binding values and norms are brought in to awareness through conflicts so that, far from being only incidental to affirmation of common values, (a dispute) is an agency through which these values come to be affirmed."[56]

[54] Ibid p 7
[55] Ibid p 7

They can be tools of social change in that a dispute can be a base for developing new social order in a society in order to cope with the causes of the dispute.[57]

In general, the prevailing proposition about resolving conflicts, today, is that disputes are inevitable and generally resolvable.[58] They may be caused by incidental disagreements between parties or due to complex issues. The underlying problem may also be either differences in expressly communicated claims and counter claims or hidden contradicting interests of the parties. It may also be a mere misunderstanding between parties or problem of perception.

2.2. Commercial disputes

2.2.1. Definition of commerce

It is believed that Commerce commenced at the early stage of human civilization. With the development of human society, however, the usage of the term 'commerce' has been changing throughout history. In early times, it was simply used to denote buying and selling of goods or to describe the action of people who sell and buy goods for profit as means of their living.[59]Nowadays, the term commerce represents wide and complex transactions denoting "*the chain of actions that brings goods and services from production to consumption in which the dealer works for profit.*"[60].

Terms like trade and business are usually confused with commerce. Likewise the distinction among the terms merchants, traders and business persons are usually unclear. Actually, the terms trade, commerce & business normally express economic transactions and terms trader, merchant & business person also represent persons involved in the transactions. But, technically, they mean different concepts.

The World Wide Web dictionary defines commerce as:

"Transactions (sales and purchases) having the objective of supplying commodities (goods and services)."

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[56] Thomas Malsch supra notes 33, p 2
[57] Ibid
[58] Daniel Dang (2001) supra notes 35 p 13
[59] Robert g. Natelson (2006), supra notes 1 pp30
[60] Julio Cueto-Rua, (1957), supra notes 2 , p28

The dictionary also defines trade as:

"the commercial exchange (buying and selling on domestic or international markets) of goods and services."

Finally, it defines business as:

"a commercial or industrial enterprise and the people who constitute it, the activity of providing goods and services involving financial and commercial and industrial aspects"

From the above definitions, we can infer that trade and commerce represents almost similar concepts; buying and selling of goods. But, the term business comprises the activity, the enterprise and the people performing it.

The Black's Law Dictionary differentiates business from trade and commerce. Accordingly, business is "a *commercial enterprise carried on for profit.*" It is not an activity, rather an establishment, enterprise. It also defines trade as *"the business of buying and selling or bartering goods or services.* In similar ways, the dictionary defines commerce as *"the exchange of goods and services, esp. on a large scale involving transportation between cities, states, and nations"*

According to the definitions, business is an entity comprising of goods and individuals dealing with goods. Within a business, there are trade/commercial activities. Commerce and trade, on the other hand, are activities/ transactions involving the transfer of goods from one party to another.

Trade and commerce are usually used interchangeably. But, some authors have tried to distinguish between the two terms. According to the world wide online dictionary, commerce is a much wider activity comprising of international as well as national transactions in goods while trade is usually local and at retail level[61]. Likewise is the distinction among terms merchant, trader and business person. All of these terms are nouns representing individuals who are engaged in trade or commerce.

While the use of the three terms (commerce, trade & business) in literature is as we have seen above, there are different uses of the terms in different legislations. In the Ethiopian legal system,

[61] www.thefreedictionary.com/worldwide

the use of these terms in not consistent. They are employed to denote different things in different legislations.

In the Commercial Code, the terms trade and trader are used extensively to express 'commercial activities' and persons performing the activities respectively. At the very beginning of the Code, article 1 stipulates that:

*"Unless otherwise provided in this Code, the provisions of the Civil Code shall apply to the status and activities of persons and business organizations carrying on **a trade**."*(emphasis added)

Likewise, article 5of the Code defines traders as *"persons who professionally and for gain carry on any of..."* the listed activities under sub articles 1-21 of the same article. In addition, the terms are used under various articles of the code such as articles 11, 12, 13, 16, 22, 23, 24, 25, 35, 36, etc to denote similar meanings.

The term 'commerce', on the other hand, is usually used in its adjective form as 'commercial' in the Commercial Code. Even in its use as an adjective, it is rarely used to qualify activities. It rather is used to qualify status. Under articles 10 and 213, it is used to qualify the status of business organizations; under title II, it is used to qualify auxiliaries and agents and under title IV, it qualifies register as commercial register. Under article 124, the phrase 'commercial activities' is used to express activities under article 5.

In general, the terms trade and trader are used to express activities and physical persons carrying on trade respectively while the term commerce is usually used in its adjective form to express artificial persons carrying on trade, to qualify auxiliaries, agents and even a register as commercial register and rarely to qualify activities.[62]

The Commercial Code has expressly distinguished the term business from commerce and trade. It defines business under article 124 as:

[62] See articles 11, 12, 13, 16, 22, 23, 24, 25, 35, 36, 100, 124,etc

"A business is an incorporeal movable consisting of all movable property brought together and organized for the purpose of carrying on any of the commercial activities specified in Art 5 of this code."

Accordingly, business is neither an activity nor a tangible thing. It is, rather, a general term used to express a collection of tangible movables brought together in order to carry on trade activities. It has also been legally attributed an incorporeal nature.[63]

The use of the three terms in subsequent legislations is not in line with their use in the Commercial Code. Article 2(6) of Income Tax Proclamation Number 286/2002, for example, defines both trade and business in identical terms as:

""Business" or "Trade" shall mean any industrial, commercial, professional or vocational activity or any other activity recognized as trade by the Commercial Code of Ethiopia and carried on by any person for profit."

Accordingly, both terms (ie. business and trade) are used to mean the same thing rather than expressing different concepts as they are used in the Commercial Code.

Trade Practice Proclamation Number 329/2003 used the term 'trader' to refer to individuals and 'commercial activity' to refer to trade activities while Chamber of Commerce and Sectorial Associations Establishment Proclamation Number 341/2003 uses 'business persons' instead of 'traders'. [64]Commercial Registration and Business Licensing Proclamation Numbers 67/97 and 689/2010, on the other hand, use business person instead of trader and 'commercial activities' instead of 'trade'[65].

Generally, the terms 'business person' and 'trader' are used to represent a person who engages in 'commercial activities.' To the knowledge of the writer, the term 'merchant' is not familiar to the Ethiopian legal system. Terms 'business activities', 'trade' and 'commercial activities', on the other hand are used to express 'commercial activities'. The term 'business' is given different

[63] Article 124 of the commercial code

[64] See article 2(5) Proclamation Number 341/2003 and Proclamation Number 329/2003 article 2(10&11)

[65] See articles 2(2), 2 (3), 2(5) and 2(6) of Proclamation No. 689/2010 and articles 2(2 &3), 5 and 20 of proclamation umber 67/97

meanings in the commercial code and other proclamation, particularly the income tax proclamation number 286/02.

2.2.2. Commercial disputes

Once we have tried to show the distinction among trade, business and commerce, let us now clarify what commercial activities are as a legal terminology and what their distinctions are from other activities.

The legal distinction of commercial activities from other activities is vague and country specific. Some countries reject the very distinction of commercial activities from other economic activities at all while others maintain it. Even in those countries that maintain the distinction, there is no clear criteria and essential element which makes an activity 'commercial'. But, each legal system may have its own definition of commercial activities.[66]

Theoretically, there are subjective and objective approaches to decide whether a certain activity is commercial or not. According to the subjective approach, activities carried out by traders shall be considered to be commercial activities.[67]In legal systems that follow this approach, there are certain class of people called traders and special commercial laws.[68]Historically, all activities carried out by traders were subject to special 'commercial law' as if they all are 'commercial activities.'[69]But, nowadays, the theory is meant to consider commercial activities as activities that are conducted by a group of persons called 'traders' in relation to their profession.[70]

The objective approach, on the other hand, relies on the nature of the activity rather than on the parties involved. Accordingly, a commercial activity is an activity that is carried out in expectation of profit.[71] There are also activities which are commercial by their nature like banking, insurance and contracts involving negotiable instruments.[72]

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[66] Julio Cueto-Rua, (1957), supra notes 2 2 p28
[67] id
[68] Tubingen, International encyclopedia 6 pp 9
[69] ibid pp 24
[70] Julio Latin American law supra notes 2 pp 25
[71] Andersen, J., Elsborg, E.: Compositional specification of commercial contracts, M.S. term project, 2003, pp48
[72] Tubingen & Mmartinus Nijhoh, (1983) supra notes 5 p4

Under article 5 of the Commercial Code of Ethiopia, persons who carry out activities listed in sub articles 1-21 of the article, professionally and for gain, shall be deemed to be 'traders'. Commercial Registration and Business Licensing Proclamation No. 67/1997 also listed additional activities as commercial activities like higher education and hospital service that needs business license.

Then what are commercial disputes? There is no express legal definition for both commercial transactions and commercial disputes in Ethiopia. The country also does not recognize the distinction between commercial and non-commercial disputes.[73] Even, the distinction between the Commercial Code and the Civil Code is only mechanical and the contents of the two codes are arbitrarily determined.[74]

"The distribution of matters between the Civil Code and the Code of Commerce, not being dominated by Commercial criteria, is in large measure arbitrary. All sales, all mandates, and all pledges are thus regulated in the civil code, while all insurance, all conveyances, and all partnership are regulated in the commercial code."[75]

Therefore, it is difficult to establish a clear line for what commercial disputes are. But, disputes traditionally considered as commercial disputes before Ethiopian courts include:

"failure to pay one's debt, disputes as to change of price, payment of dividends, failure to deliver in sells contract, cases related with checks and promissory notes, disputes in money transfer, questions in relation to membership to a share company, failure to pay 'Equb' contribution, actions for the calling of meetings in business organizations, cases of bankruptcy, files for appointment of an arbitrator, actions for the deposition of a manager of a business organization, action for the cancellation of decision of general assembly of a business organization, claims of auditing, appointment of directors for a business organization, payment of contribution of a partner and claims for the execution of sells contract."[76]

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[73] Tewodros Mehere, reconnaissance of the Ethiopian law of Arbitration, is reform due?, Ethiopian business law series, vol. 5 December 2012, p 220

[74] Mulugeta M. Ayalew, Contracts in Ethiopia, University of Surrey, Kluwer Law International, The Netherlands(2010), p29

[75] Ibid p29

[76] የሴፍአዕምሮ(2012) supra notes 6, p 22-23,

2.3. Investment disputes

2.3.1. Definition of investment

Definition of the term 'Investment' has been very controversial in the past decades.[77] With the controversy, however, there have been various attempts to define what investment is. Webster international dictionary defines it as:

- *An expenditure of money for income or profit or to purchase something of intrinsic value*
- *The commitment of funds with a view to minimize risk and safeguarding capital while earning a return contrasted with speculation*
- *The commitment of something other than money to a long term interest or project.*

The online Investopedia, (www.investopedia.com) also defines investment from different perspectives. Accordingly, investment is:

"*an asset or item that is purchased with the hope that it will generate income or appreciate in the future.* ***In an economic sense,*** *an investment is the purchase of goods that are not consumed today but are used in the future to create wealth.* ***In finance,*** *an investment is a monetary asset purchased with the idea that the asset will provide income in the future or appreciate and be sold at a higher price.*" (Emphasis added)

Globally, different approaches have been employed in defining investment in general and foreign investment in particular. The two main approaches usually used in defining investment are the objective and subjective approaches.

The objective approach defines investment in the abstract and tries to describe it'ex ante'.[78] Accordingly, investment is an expenditure of capital for longer duration, in expectation of

[77] Julian Davis Mortenson, The Meaning of "Investment": ICSID's *Travaux* and the Domain of International Investment Law, in *Harvard International Law Journal Vol. 51* NO, 1, 2010, p 258

[78] United Nations Conference on Trade and Development, Latest Developments in Investor–State Dispute Settlement, Issue note No. 1, United Nations , New York and Geneva, 2010 p 257

regular profit/return by assuming inherent risks in a substantial mode so that the expenditure can have significance for the economic development of a country.[79]

In investment, the return from the capital spent is expected after a certain period of time, not immediately. An investor may not expect revenue in a short period of time. Due to this requirement, investment is different from ordinary commercial transactions. In ordinary commercial transaction, those in the transactions deliver a thing and take payment or any other return immediately.[80]Lose and/or profit may be recognized within a short period of time. Accordingly, claims to money, contractual performances, ordinary sale of goods, etc are excluded from the definition of investment.[81]

Investment also involves some risk. Risk represents the possibility of losing due to different causes. While investing for future return, the capital owner cannot be fully confident about the profitability of the investment. A tribunal that looked the case between Romak Company and Uzbekistan defined investment as *"a contribution that extends over a certain period of time and that involves some risk"*[82]

The main purpose of investment on the side of the investor is to gain profit. There is no investment unless a certain profit is expected from the expenditure. On the part of the state where the capital is spent, on the other hand, the main expectation is a certain contribution for economic development. A dissenting arbitrator on the Ad hoc arbitration panel that adjudicated the case between Malaysian historical salvors (MHS) and Malaysia stated that *"a substantial or significant contribution to the economic development of the host state is necessary condition in defining investment... "*[83]

The subjective approach relies on the specific provisions of an agreement between parties in dispute in which they determine what investment means ex ante. Accordingly, everything that the parties agreed to be considered as investment shall be taken to be as such even if it is against the ordinary understanding of the term.

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[79] Ibid p 257
[80] Veijo Heiskanen, The definition of "investment" in international investment law, ASA special series No. 34, 2010 p 55
[81] Ibid56
[82] United Nations Conference on Trade and Development(2010) supra notes 24, p 4
[83] Ibidp 4

In most international investment agreements, asset based definition of investment is widely used. The asset based approach defines investment by providing list of assets that are to be considered as investment.[84]. For example, the Ethio-German BIT defines investment under article 1 as:

1. The term "Investments" comprises every kind of asset, in particular:

a) Movable and immovable property as well as any other rights in rem, such a mortgages, liens and pledges;

b) Shares of companies and other kinds of interest in companies;

c) Claims to money which has been used to create an economic value or claims to any performance having an economic value;

d) Intellectual property rights, in particular copyrights, patents, utility-model patents, registered designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how, and good will;

e) Business concessions under public law, including concessions to search for , extract and exploit natural resources.

Any alteration of the form in which assets are invested shall not affect their classifications as investment.

This approach may provide a broader definition of investment by providing a non-exhaustive list of assets or may follow a restrictive approach by providing exhaustive list of assets that are to be considered investment and, sometimes, by excluding some assets from the definition.[85]The broader definition is, however, usually blamed for avoiding the distinction between investment and ordinary commercial transactions[86]. Investment can also be classified as domestic and

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[84] Organization for Economic Co-operation and Development , Definition of investment and investor, Negotiating Group on the Multilateral Agreement on Investment (MAI),, January 1996, available at http://www1.oecd.org/daf/mai/pdf/ng/ng962e.pdf accessed on August 24, 2013, p 3

[85] Ibid p 4

[86] Veijo Heiskanen (2010) supra notes 80, p 68

foreign investment, usually, based on the nationalities of the persons who own the investment and the source of capital for the investment.

In ancient times, foreigners, in general, were seen as enemies in different empires and local administrative entities.[87] With the advent of trade and other relations, individuals began to have a certain degree of protection outside their home state. Before the advent of the 20th century, this protection was limited to diplomatic protection through their nation state.[88] In the 20th century in general and after the Second World War in particular, cross boarder flow of capital increased and the traditional diplomatic protection was understood to be insufficient to protect the interest of individual capital owners and capital exporting countries.[89]

Capital exporting & capital importing countries contested each other on the existence of minimum standard of treatment for 'investment' in customary law and attempted to codify international investment laws.[90] With the failure to make an international investment agreement, bilateral investment treaties proliferated following the 1959 BIT between Germany and Pakistan.[91] Currently, the international legal regime governing foreign investment includes BITs, double taxation avoidance treaties, preferential free trade areas, ICSID, customary laws, general principles of international law and municipal laws.[92]

Foreign investment can also be classified as foreign direct investment and portfolio investment. Foreign direct investment (FDI) reflects:

"the objective of obtaining lasting interest by a resident entity in one economy('direct investor') in an entity resident in an economy other than that of the investor." [93]

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[87] Andrew Newcombe &Lluís Paradell, Law and Practice of Investment Treaties, Kluwer Law International BV, Netherlands, 2004, p4
[88] Ibid p 5
[89] Ibid p 13
[90] Ibid p 13
[91] Ibid p 42
[92] United Nations Conference on Trade and Development, Investor-State disputes arising from Investment Treaties: A review, UNCTAD Series on International Investment Policies for Development, United Nations, New York and Geneva, 2005, p 3
[93] Organization For Economic Co-Operation And Development, benchmark definition of foreign direct investment, (third edition), OECD 1996 p 7

Accordingly, there should be long term relation between the investor and the enterprise outside the home country of the former. In FDI, the investor has direct control or /and significant influence on the management of the investment. [94]

Investment is usually expressed in terms of enterprise in which a foreigner has a significant share. In the treaty of organization of economic cooperation for development (OECD) countries for example, "direct *investment enterprise (is) defined as incorporated or unincorporated enterprise in which a foreign investor owns (at least) 10 % of ordinary shares or voting rights.*"[95]Foreign direct investment is more preferable in developing countries than in developed countries.[96]

Portfolio investment, on the other hand, is a type of foreign investment in which capital owners spend their capital without having direct access to the management of the investment.[97]Those who have the capital simply invest it in an already existing enterprise or a new enterprise that is to be established under the control of somebody other than the investors. This kind of foreign investment is popular in developed countries than developing countries. [98]

In Ethiopia, the legal regime governing investment comprises Investment Proclamations, Bilateral Investment Treaties that Ethiopia has signed with different countries, various bilateral economic treaties, and the commercial law regime. In our laws, investment and investor have been defined in different ways.

The latest Investment Proclamation Number 769/2012 defines investment under article 2 (1) as:

"Investment means expenditure of capital in cash or in kind or in both by an investor to establish a new enterprise or to expand or upgrade one that already exists"

According to the definition, the capital needs to be expended to establish an enterprise which is defined under article 2(2) of the same Proclamation to be:

"2(2)... an undertaking established for the purpose of profit making."

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[94] Ibid p 7
[95] Ibid p 8
[96] Ibid P 251
[97] Ibid P 251
[98] Ibid P 251

Should the enterprise be in accordance with forms of business organizations recognized under the commercial code? Under part three of the Proclamation, there are provisions about forms of investment. According to article 10, investment can be carried out in the form of sole proprietorship, business organizations, public enterprise or cooperative societies.

In Bilateral investment treaties (BITs) that Ethiopia has signed with different countries, there are three approaches in defining investment. In BITs Ethiopia has signed, for example, with china, Kuwait and Turkey, the term investment is defined as any asset invested in accordance with the law of the host state and extended illustrative list of assets has been included. In the BIT Ethiopia has signed with the people republic of China, the term investment is defined under article 1(1) as:

"The term "investment" means every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, and in particular, though not exclusively, includes:

a) *movable, immovable property and other property rights such as mortgages and pledges;*

b) *shares, stock and any other kind of participation in company;*

c) *claims to money or to any other performance having an economic value;*

d) *copyrights, industrial property, know-how and technological process;*

e) *concessions conferred by law, including concessions to search for or exploit natural resources."*

The Bilateral Investment Treaties Ethiopia has signed with France, UK, Belgium, South Africa, Swiss Confederation, Netherland, Australia, etc also follow the same asset based definition without referring to the domestic laws of the parties. Finally, the Ethio-American investment

agreement is hardly a bilateral investment agreement. Rather, it is a unilateral concession by the USA government for Ethiopia. Hence, it defines "investment support" rather than investment as:

"*...any debt or equity investment, any investment guaranty and any investment insurance or reinsurance, which is provided by the Issuer in connection with a project in the territory of the Federal Democratic Republic of Ethiopia. The term "Issuer" refers to OPIC and any successor agency of the United States of America, and any agent of either.*"[99]

The term investor has also been defined under Ethiopian law side by side with the term investment. In Ethiopia, distinction is made between domestic and foreign investor. Proclamation Number 769/2012 defined domestic and foreign investors under article 2(4) and 2(5) respectively as:

"Domestic investor means an Ethiopian national or a foreign national treated as a domestic investor as per the relevant law and includes the government, public enterprises as well as cooperative societies established as per relevant laws."

"Foreign investor means a foreigner or an enterprise wholly owned by foreign nationals having invested foreign capital in Ethiopia or a foreigner or an Ethiopian incorporated enterprise owned by foreign nationals jointly investing with domestic investors and includes an Ethiopia permanently residing abroad and preferring treatment as a foreign investor.

2.3.2. Investment disputes

In investment, there are usually three participants; the investor, the government and, in the case of foreign investment, a foreign government. In foreign investment, the state in which the investment is made is called host state while the capital exporting state is called home state. Thus, investment disputes may arise among the participants. Accordingly, there are three types of investment disputes. State- state investment disputes, investor-state disputes and finally, investor-investor disputes.

State-state investment disputes are disputes that may occur between home state and host states. They are disputes under public international law, usually, based on bilateral investment treaties

[99] Investment incentive agreement between the government of the Federal Democratic Republic of Ethiopia and the Government of the United States of America(24th day of October 2000) article 1

and/or based on an alleged mischief against the investor of one state by the other state. Before the proliferation of bilateral investment treaties, there have been various disputes among capital importing and capital exporting countries on the standard of protection international customary law provides for foreign investors.[100]

In the current era of bilateral investment treaties, almost all BITs provide provisions concerning state-state dispute settlement.[101]Accordingly, state-state investment disputes are disputes under investment agreements concerning the investment. Under BIT between Ethiopia and France, state- state dispute is referred as:

"... d*isputes relating to the interpretation or application of (the) Agreement"*[102]

Investor-state dispute is a recently growing phenomenon in foreign investment with the proliferation of BITs. These disputes, also called mixed disputes, are the most 'characteristic' investment disputes in the world today. [103]Traditionally, a foreign investor used to claim through the home state for any damage caused by the host state. With the proliferation of BITs, individual investors are having right to directly claim against the home state.[104]Investor-state disputes can arise either from the bilateral investment treaty between the home and host state or from the contract between the investor and the host state.[105]Unlike commercial disputes, investor state disputes involve a sovereign as a party in which an individual investor may challenge the actions, inactions, policy measures, etc of a sovereign if it is believed that such acts have an effect on the investment.[106]

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[100] Andrew Newcombe &Lluís Paradell, supra notes 87, p 25

[101] Ibid

[102] Agreement between the government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of France for the reciprocal promotion and protection of investments(25th June 2003) article 10(1)

[103] Taida Begic, Applicable law in international investment disputes, *Eleven International Publishing, Nether Lands,*2005, p 1

[104] Andrew Newcombe &Lluís Paradell, supra notes 87, p 8

[105] United Nation Conference on Trade and Development(2005) , supra notes 92, p5

[106] United Nation Conference on Trade and Development (2010), supra notes 24, p 6

Under bilateral investment treaties, one of the more controversial issues is the provision of the so called umbrella clause.[107]The clause "*...in many BITs imposes a requirement on each Contracting State to observe all investment obligations entered into with investors from the other Contracting State.*"[108]In some BITs, it is restricted to disputes in relation with the BIT itself while in others; it covers any dispute between the investor and the state.[109]In the Ethio-Turkey bilateral investment treaty, for example, state-investor dispute is restricted to be only a dispute between a state and the national of the other state concerning the investment.[110]

Almost all current investment treaties have provision about how to resolve investor-state disputes. The preamble of ICSID, for example, provides that:

"*Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between contracting states and nationals of other contracting states;* "

The type of disputes that occur between investor and state "*involves disagreement over the interpretation of their respective rights. In addition, they may involve allegations ...such as failure to provide treatment according to certain standards...* "[111]

Finally, there may be investment dispute among investors themselves. It can be among foreign investors or between foreign and domestic investors or it can be between domestic investors. Such kinds of disputes are of little concern in international agreements. Under international bilateral investment treaty trends, very few treaties provide for investor-investor dispute.[112] The 2001 BIT between Australia and Egypt, for example, provides the following.

Article 14 settlement of disputes between investors of the parties

Each party shall in accordance with its laws:

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[107] *Jarrod Wong*, Umbrella clauses in bilateral investment treaties: of breaches of contract, treaty violations, and the divide between developing and developed countries in foreign investment disputes, GEO. MASON L. REV. VOL. 14:1, 2006, p 136

[108] Ibid

[109] United Nation Conference on Trade and Development(2007), supra notes 8, p 102

[110] See article article 7(1) of the BIT

[111] United Nations Conference on Trade and Development, Dispute settlement: Investor-State, UNCTAD Series on issues in international investment agreements, United Nations, Geneve Switzerland, 2003 p 7

[112] United Nation Conference on Trade and Development(2007), supra notes 8

a) Provide investors of the other party who have made investment with in its territory and personnel employed by them for activities associated with investments full access to its competent judicial or administrative bodies in order to afford means of asserting claims and enforcing rights in respect of disputes with its own investors
b) Permit its investors to select means of their choice to settle disputes relating to investments with the investors of the other party, including arbitration concluded in a third country; and
c) Provide for the recognition and enforcement of any resulting judgment or awards

2.4. Natures of commercial and investment disputes

Most commercial and investment disputes have at least three dimensions, legal, commercial and emotional.[113] Resolving such disputes requires consideration of the three elements to the end. In addition, more than other disputes, settlement of these disputes, among others, require speedy disposal, expertise knowledge about commerce and investment and more care for future business relation of parties in the dispute.[114]

In business, time is a very important consideration. Over time, the price of merchandizes vary, traders may get bankrupt or gain huge profit, etc. If a dispute settlement is delayed, it is highly probable that one of the parties in the dispute either gains unnecessary advantages or loses.

Commercial and investment dispute resolution also requires specific expertise knowledge about commerce and investment. Commercial and investment activities are too diverse to be known by a single expert. So, it is better if a person in charge of resolving such disputes has special expertise in that specific area. Moreover, the settlement should be as cheaper as possible.

Finally, the future relation of the parties in dispute should be given much attention. Business by itself requires working together and having loyal partners or clients. Losing a client or a partner for a merchant/ investor may be very costly.

[113] ADR p 136
[114]ዮሴፍአዕምሮ(2012), የsupra notes 6, p 22-23

"In business disputes are inevitable. Resolving them quickly while reserving important business relation is a key priority in a modern commercial environment."[115]

The way commercial and investment disputes are resolved has a direct effect in the flow and profitability of commerce and investment.[116]Therefore, the settlement of a commercial and investment disputes is a key component in the development of commerce and investment. In general, they should be resolved in an efficient, effective and equitable manner.[117]

[115] World Bank Group, Ukraine commercial dispute resolution study, researching commercial disputes among Ukrainian companies, International Finance Corporation, 2007, p 6

[116] Law reform commission, Alternative dispute resolution: Mediation And Conciliation, Law reform commission , Dublin , 2010, p 143

[117] International labour Office, Collective Dispute Resolution through Conciliation, Mediation and Arbitration: European and ILO Perspectives, International Labour Office, Geneva, 2007, p 2

CHAPTER THREE

3. Public and private justice systems as a means of resolving commercial and investment disputes

3.1. General overview to dispute settlement mechanisms

Disputes are most likely to occur in any human interaction and generally unavoidable. In commercial and investment transactions, they are common. Since such transactions involve detail dealings between/among participants, the possibility of occurrence of disputes is very high.

Once a dispute arises, the main issue is how to manage or resolve it. Historically, various methods of dispute resolution mechanisms have been put to use by different societies. Every society has had its own methods of resolving disputes for it is impossible for a society to develop without effective dispute settlement mechanisms.

> *"In fact societies could not grow larger in size and complexity without first evolving a system of resolving disputes that could keep the peace and harmony in the society and keep trade and commerce growing efficiently."*[118]

In ancient times, before the creation of nation states, violence has been the main mechanism to resolve disputes. [119]A party in a dispute has to surrender, run away or over power his opponent in order to resolve disputes.[120]Even after the creation of nation states, violence had been the main alternative to resolve inter-state disputes including investment and commercial disputes involving nationals of the disputing states. [121]

Despite the fact that force had been the main mechanism to resolve disputes, societies have had alternative dispute settlement mechanisms of their own for peaceful settlement of disputes.[122]These mechanisms have been, initially, alternative to force & other self-help mechanisms and have been familiar in every society.[123]With the growing complexity of societies

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[118] Supreme Court of India, supra notes 21, p 3
[119] Jerome T. Barrett, & Joseph P. Barrett(2004) supra notes 29, p1

[120] Ibid p1
[121] Ibid 14
[122] Ibid
[123] Jerome T. Barrett, & Joseph P. Barrett(2004) supra notes 29, p 1

and establishment of states, however; the state established itself as a primary and indispensible system of dispute settlement. By establishing courts, states dominate formal dispute settlement system.

> *"Resort to the courts, however, has become increasingly necessary as tradition yields to modernization."*[124]

In the modern era, Courts are no more the only formal dispute settlement mechanisms. ADR mechanisms are, once again, becoming important formal mechanisms of dispute settlement, specially, in commercial and investment disputes. Even if they are not to replace the court system, they are coming more popular in commercial and investment cases.[125]In international commercial transactions and state-investor disputes, ADR mechanisms are recognized as principal means of dispute resolution.[126]

It should be noted that informal ADR mechanisms are still the first and most popular mechanisms for resolving disputes including commercial and investment disputes[127]. But, to cope with the complexity of modern live in general and commercial and investment transactions in particular, the ADR mechanisms that are known traditionally should be formalized and institutionalized.[128]

Following the prevalence of ADR mechanisms, in the current global order, there are two justice systems in every jurisdiction; the public justice system/ judicial mechanisms/ which mainly is represented by court systems & administrative tribunals and the private justice system/extra judicial/ which comprises different ADR systems. They are both indispensable for socio-economic development of a society. No socio-economic activity is possible without ADR

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[124] Shelley M. Liberto, The institutionalization of commercial dispute mediation in Morocco: a preliminary need assessment, World Bank Group, Rabat, 2007, p6

[125] United Nations Office on Drugs and Crime (2007), supra notes 13 p 21

[126]Taida Begic, (2005), *supra notes 103* p 158

Most BITs also prefer ADR mechanisms than court actions as a means to resolve disputes. In all BITs Ethiopia has signed with other countries, for example, ADR mechanisms are agreed to be the primary means of dispute settlement. National courts are rarely recognized as a secondary choice based on the consent of the investor

[127] Ireland law Reform commission(2008) supra notes 42, p 12

[128] Sharon press (1997) supra notes 17, p 909

methods while no 'hierarchical socio-economic activity' can exist without the court system.[129] The two systems exist side by side so that cases may be resolved through the appropriate system and parties in a dispute or in a potential dispute may choose among different methods of the two systems.

3.2. Public justice system as a means to resolve commercial and investment disputes

The term public justice system mainly represents the court system and administrative tribunals which are legally empowered to adjudicate cases. As the term 'public' indicates, this justice system is under direct government control. They are expressions of the sovereign status of states.

To date, Court litigation is an indispensible mechanism of dispute settlement in the world. It encourages *'value creating'* activities and deters *'value destroying'* moves by applying laws and enforcing contracts. [130]In investment, any investor, be it foreign or domestic has been subject to domestic court's jurisdiction.[131]Only diplomatic protection was available For foreign nationals who may be affected by the decisions of a foreign court. [132]. In international courts like ICJ, only state parties can be parties. Therefore, individual investors or traders and companies may claim against a foreign state only through their home state.

In some continental law jurisdictions like France, there are independent commercial courts to adjudicate commercial cases. [133] Some others establish special benches for commercial and investment cases to cope with special needs of such transactions.

In litigation, cases are decided based on legal rules and disputing parties have no choice than complying with what a court decides. They are determinative systems of dispute settlement in which parties have little control over the process as well as the outcome.[134]

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[129] American arbitration law p 4

[130] Kathryn E. Spier, Litigation , in Hand Book of law and Economics, Vol 1, Elsevier B.V, 2010, p 262

[131] Susan Franck, Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in International Investment Agreements, Washington & Lee Public Legal Studies Research Paper Series #1427590 Accepted Paper, available at: http://ssrn.com/abstract=1427590 and accessed on August 19, 2013 p 144

[132] United Nation Conference on Trade and Development,(2003) supra notes 111, p 6

[133] Tubingen & Martinus Nijhoh, (1983) supra notes 5 p4

[134] World Bank Group Ukraine Commercial dispute resolution supra notes 115, p24

The court system is blamed to be mostly inappropriate for commercial and investment disputes. They are usually less efficient, rigid, non-accessible, and open to abuse and have little expertise to adjudicate such case.

Court litigation are usually said to be more expensive relative to other out-of-court private mechanisms. The costs in court litigation include court fee, lawyers' fee and other costs like witness fee, etc. These costs are coming to be very expensive in many jurisdictions. Accordingly, large corporations are taking advantage of their financial strength while smaller ones usually prefer not to enter in to litigation. [135]

Commercial and investment litigations also need speedy dispensation of cases. Litigation in many jurisdictions, however; is usually very slow. From filing complaints to enforcement of court decisions, there are extended and rigid procedures that take long time. Some authors, even, dared to compare litigation with Thomas Hobs description of human life as *'nasty, brutish and short'* and concluded that litigation is *'nasty brutish and long.'*[136]

In international commercial and investment disputes in which there can be multiple parties of different nationality, preliminary procedures are much time consuming.[137] Deciding Jurisdictional issues, choice of applicable procedural and substantive laws, etc require elongated hearings and may take months and even years. It should be noted that, not only for investment and commercial disputes but also for any dispute, justice delayed is said to be justice denied. [138]

Court litigations, in principle, are open for anyone who wants to attend. Commercial and investment disputes, on the other hand, require confidential hearings for they usually arise on detail issues. For one thing, the parties want to save their reputation, for the other, they don't want their business secrets being revealed to outsiders.

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[135] Ibid

[136] John Lande, The Movement Toward Early Case Handling in Courts and Private Dispute Resolution, ***Ohio State Journal On Dispute Resolution*** **,Vol. 24: No. 1, 2008,** p 83

[137] United Nations Institute for Training and Research, Alternative Dispute Resolution Methods, UNITRA Geneva ,2001 available at www.unitar.org/dfm and accessed on September 26, 2013, p 3

[138] Law reform commission (2010), supra notes 15, p 1

In addition, court litigation cares little about the future relation of parties. It is simply a win-lose system in which one of the parties wins at the expense of the other[139]. The court imposes the decision against the will of the parties so that the losing party feels as defeated while the prevailing one feels as a winner. Courts simply decide based on the legal rights of parties without considering the principal interests of parties. Hence, litigation simply decides on the dispute without resolving the principal issues in conflict.[140]They are more adversarial that they usually create antagonistic feelings between the parties. Therefore, it is likely that future business relation between the parties is endangered by litigation.

Further, court litigation is usually open to abuses.

"In an ideal world, the court system would be accurate, unbiased, and free. The enforcement of rules would take place immediately and no transaction costs would be incurred. But, the world is far from ideal. Mistakes are made....judges and juries may also bring their personal and political biases in to the courtroom. Errors, biases... "[141]

In investment and commercial disputes involving foreigners, courts may not be seen as neutral forums to resolve a dispute. Especially, in investor-state disputes, national courts of a host state may fail to neutrally adjudicate a case between the sovereign government of their own and an individual foreign investor. [142]

The court system is also very rigid and usually follows the "*one size fits all*" model in which a single procedure is followed for every type of conflict be it simple, complex, etc.[143] Courts follow rigid legally provided civil procedure laws for every civil suit including commercial and investment disputes. These rigid procedures, in addition to the long period of time needed to comply with them, may be found to be inappropriate in some situations.[144]

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[139] Lukasz Rozdeiczer &Alejandro Alvarez de la Campa, Alternative Dispute Resolution Manual: Implementing Commercial Mediation, The World Bank Group, Commercial Small and Medium Enterprise Department , USA, 2006 p 2
[140] Billa Farooq supra notes 23, p 28
[141] Kathryn E. Spier (2010) supra notes 130 , p 263
[142] United Nation Conference on Trade and development(2010), supra notes 24, p 13
[143] International Arbitration Forum (2005) supra notes 15, p 12
[144] Law reform commission (2010), supra notes 116, p 7

The last, but not the least problem, courts have while adjudicating commercial and investment disputes is having appropriate experts. On the one hand, courts have limited number of judges and other staffs. On the other, there are diverse commercial and investment transactions that require special expertise. Using rigid procedures lawyers had totally excluded other professionals from dispute settlement procedures inside the court room.[145]So, courts cannot afford to provide experts in all such fields.

In summary, "*Consensus is nearly universal that the judicial system is in crisis. The business community complains that commercial litigation is frustrating, costly, and an impediment to business operations. The courts suffer administrative stress in managing overbearing caseloads in a weak procedural environment exploited by attorneys working in an adversarial environment. The competency of court personnel is constantly under scrutiny.*"[146]

Despite all this, courts are indispensible and 'central' actors of justice system in the world. [147]Therefore, nothing can be an alternative to the 'sovereign authority of the court system'.[148]The public justice system also has its own advantages. It, among others, passes binding decisions, provides effective enforcement mechanism, etc.

Decisions in court rooms are binding and no one can refuse to be bound by them. They are usually final, with guaranteed out comes and are enforceable. [149]In addition, courts are the sole players for the strengthening of rule of law.[150] There are also some cases that have to be decided only by courts.[151]

For they have the ultimate power in enforcing decisions and agreements, they are also important for the performance of the private justice system. [152]Interim reliefs in ADR mechanisms are

[145] Bilala Farooq supra notes 23, p 6
[146] Shelley M. Liberto, (2007), supra notes 124, p 9

[147] Law reform commission (2010), supra notes 116, p 8
[148] Ibid, p 14
[149] Bilala Farooq supra notes 23, 28
[150] Law reform commission (2010), supra notes 138, p 13
[151] Ireland Law Reform Commission(2008), supra notes 42, p17
[152] Allen B. Green & William T. O'brieN, International Arbitration And Multi-National Litigation Of Commercial Disputes, available at http://www1.oecd.org/daf/mai/pdf/ng/ng962e.pdf and accessed on July 23, 2013, p 3

usually ordered and final settlements are enforced through the courts.[153] They are also the only alternatives when ADR systems fail.

In general, the court system has its own advantages and disadvantages. Therefore, it can neither be ignored nor is enough for resolving investment and commercial disputes in a country.[154] Rather, it should exist together with other alternative mechanisms of dispute settlement.

3.3. Private justice systems to resolve commercial and investment disputes

Delivering justice has never been the sole monopoly of sovereign authorities. Rather, there have been ways outside the power of sovereign authorities that have been in use throughout human history. These systems, outside court system, are what we call private justice system. They have been in sole use for amicable settlement of disputes before the emergence of structured state system and continue in existence to date side by side with courts.

Private Justice System represents various mechanisms of dispute settlement which are called ADR mechanisms. The term ADR was first used in USA representing Alternative dispute settlement mechanisms as alternative to court litigation[155]. It represents all out-of-court dispute settlements, be it formal or informal that can be provided by individuals, private institutions, by the community and sometimes by the government itself.[156] ADR encompasses:

"... *a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes.*"[157]

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[153] Ibid p 3
[154] Law reform commission (2010), supra notes 116, p 13, p 13
[155] Ibid p 39
[156] Judicial council of California, Alternative dispute resolution in civil cases, Report of the task force on the quality of justice sub-committee on alternative dispute resolution and the judicial system, Judicial council of California, 1999, p 7
[157] Mediation and conciliation quoting eu commission report p 13

In recent times, explaining ADR as an alternative dispute settlement mechanism is being challenged. One argument is that ADR should be explained as appropriate dispute settlement mechanism for both the court system and ADR mechanisms are appropriate among which individual parties to a dispute may choose. [158] In addition, ADR has been there before the introduction of the court system as an alternative for use of violence. [159]When the term alternative is used, it 'echoes' that ADR is not appropriate which disguise the use of ADR.[160] ADR is not also alternative to the court system. But it is a complementary to the court system. [161]Further, it is difficult to look at ADR simply as alternative mechanisms, specially, in international commercial and investment disputes for they are the principal mechanisms of dispute settlement.[162]

Phrases like additional dispute settlement mechanisms and amicable dispute settlement mechanism are also being used to describe ADR. It is said amicable for ADR mechanisms are less adversarial than court litigation and, additional, for they are additional alternatives to the court system. [163] In addition, terms like BDR (for better dispute resolution) and IDR (for innovative dispute resolution) are also being used rather than the generic term ADR.[164] Finally, new ideas for dropping letter 'A' and calling the mechanisms simply DR (dispute resolution) mechanisms is also emerging.[165]

ADR predates litigation and its known historical beginning dates back to 4000 BC.[166] In the ancient Greek and Egypt, it has been widely in use.[167]The three 'Abrahamic religions'; Judaism, Christianity and Islam also encourage ADR mechanisms in different forms.[168]In the ancient time, different ADR mechanisms were used by the community in an informal manner. Those informal

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[158] Judicial council of California, Alternative dispute resolution in civil cases, Report of the task force on the quality of justice sub-committee on alternative dispute resolution and the judicial system, Judicial council of California, 1999, p 2
[159] Law reform commission (2010), supra notes 116, p 14
[160] Ibid
[161] Ibid
[162] Taida Begic (2005), supra notes 103 , p 158
[163] Ireland Law Reform Commission(2008), supra notes 43, p 39
[164] Ibid
[165] Ibid
[166] Jerome T. Barrette & Joseph P. Barrette, supra notes 29, p xxv
[167] Hailegabriel G. Feyissa, The role of Ethiopian courts in commercial arbitration, Mizan Law Review Vol. 4 No.2, 2010, p 298
[168] Jerome T. Barrette & Joseph P. Barrette, supra notes 29, p 9

ADR mechanisms share 'some procedural features' with the modern ADR mechanisms.[169]With the advent of civilization and complexity of human life, however; the court system tried to overrule ADR mechanisms and they began to be seen as "*an unlawful attempts to oust the courts from their jurisdiction.*"[170]In the late 18th and 19th century, ADR mechanisms once again gained greater attention, specially, in commercial and investment disputes[171].

ADR can be formal or informal. Informal ADR mechanisms predated litigation and existed in every society in different forms. They have existed in every society of every time in one or another form.[172]Nowadays, from '*playing children*' to the more sophisticated commercial and investment disputes, ADR mechanisms are widely applied globally. [173] They are becoming more and more popular for commercial and investment disputes. High litigation cost and delay of court proceedings are usually quoted as the two factors for this popularity of ADR mechanisms.[174]

The inefficiency of court systems is one of the driving forces for the expansion of formal ADR mechanisms. But, at least, in theoretical analysis, in-efficiency of court systems may also be a challenge for ADR mechanisms. One of the parties may want to hide in the '*week shadow*' of a court system and refuse to resolve disputes through ADR. [175]

In the current socio-economic and politically complex society, a single dispute settlement mechanism like a court system may not be enough for resolving disputes.[176] There should be '*menu of choices*' for dispute settlement. Thus, ADR can provide greater choices for the resolution of disputes. [177] Since ADR mechanisms are not to supplementary to court systems, they are additional options for dispute settlements. Parties in a dispute can choose between ADR mechanisms and the court system as well as among the various ADR techniques. Employment of any dispute settlement mechanism is left to parties depending on the availability of professionals,

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[169] Suprem Court of Indea,,supra notes 2,1 p 1
[170] Allen B. Green & William T. O'brieN (2013), supra notes 152, p 3
[171] Jerom T. Barrette & Joseph P. Barrette (2004) supra notes 29, p 73
[172] United Nations Institute for Training and Research (,2001) supra notes 137, p 4
[173] Jerom T. Barrette & Joseph P. Barrette (2004) supra notes 29, p 260
[174] International Arbitration Forum(2005), supra notes 15, p i
[175] Lukasz Rozdeiczer & Alejandro Alvarez de la Campa (2006), supra notes 27, p 14
[176] Ireland Law Reform Commission (2008) supra notes 42, p13
[177] Judicial council of California (1999), supra notes 156, p 8

the support of the legal system of a country, the goals of the resolution, and availability of infrastructure.[178]

First of all, in order to choose between litigation and ADR mechanisms, the legal system of the country, the nature of the dispute and the agreement of the parties are vital. Some legal systems may put some types of disputes to the exclusive jurisdiction of courts. Some disputes in which there is power imbalance between the parties, public interest for public hearing, etc may not also be appropriate for ADR.[179]In addition, since ADR mechanisms can usually be deployed if and only if parties agree the agreement of the parties is also another factor. Further, the duration of the dispute may also be a factor for choosing between ADR mechanisms and court litigation. The longer the dispute continues, the more parties become more distanced in their position and ADR is unlikely to be successful.[180]

Once choice is made between court litigation and ADR mechanisms, the next question is which type of ADR mechanism is appropriate for a dispute on hand. The major factor influencing such decision is the agreement of the parties. But, other issues like the need to improve relation may also affect the choice. Accordingly, if parties need to improve their relation, they may choose extra-legal processes like mediation than arbitration. With all these, however, there is no black and white formula to decide which mechanism is appropriate for a dispute.[181]

ADR systems have great contribution in promoting the right to access to justice. Access to justice encompasses various issues like having access to affordable dispute settlement system, appropriate dispute settlement system, etc. In this regard, ADR services can be delivered even at grass root levels and they can be more appropriate for some disputes than the court system.[182]The European Union asserted this role of ADR in promoting access to justice as :

"The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice should encompass access to judicial as well as extrajudicial dispute resolution methods. Furthermore ...ADRs offer a solution to the problem of access to justice faced by citizens in many countries due to three factors: the volume of disputes

[178] United Nations Institute for Training and Research (2013), supra notes 137, p 4
[179] Ireland Law Reform Commission (2008) supra notes 42, p17
[180] Ibid p 15
[181] Ibid
[182] Law reform commission (2010), supra notes 15, p 1p 7

brought before courts is increasing, the proceedings are becoming more lengthy and the costs incurred by such proceedings are increasing."[183]

ADR mechanisms may also provide faster dispute resolution mechanism. For one thing, ADR mechanisms can be used at the earliest possible time of a dispute before the relationship of the parties is burnt.[184]They may also serve, even, as means to prevent and control disputes.

"It is also important to note that ADR is now becoming more than dispute resolution in the strict sense of the term, and also encompasses conflict avoidance, conflict management and conflict resolution. For example, in elder mediation, the mediation may focus on planning the future care of the older member of the family, a dispute as to this matter may not have arisen yet. A further example includes succession mediation, whereby family members come together at a mediation to plan for the succession of the family business to the next generation."[185]

For the other, the time resolving disputes through ADR mechanisms takes is usually shorter than the time needed to resolve disputes in court litigation. However, there are cases in which attempts to resolve disputes fails and the time taken to try ADR mechanisms becomes simply an additional delay to court proceedings like in the case of unsuccessful mediation.[186]

ADR mechanisms are also considered to be less costly than the court system. Some even attribute the rapid expansion of the mechanisms in the current order to their cost effectiveness relative to litigation. Unlike in litigation where the losing party is, most of the time, to cover costs, parties usually share costs in ADR proceedings like mediation.[187]But, nowadays, ADR mechanisms like arbitration are also becoming extremely costly. Even if there is no comprehensive empirical evidence backing the conclusion, some studies indicate that they are becoming more costly than litigation itself.[188] In addition, when non-binding ADR mechanisms like mediation are not successful to resolve a dispute and the dispute is taken to court, they simply become additional layers in the litigation process which adds to the expense incurred.

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[183] Law reform commission (2010), supra notes 15, p 8
[184] Judicial council of California (1999), supra notes 156, p 10
[185] Law reform commission (2010), supra notes 15, p 9
[186] Ibid
[187] Ibis, p 90
[188] United Nation Conference on Trade and Development (2010) supra notes 24, p 4

There is also greater satisfaction for parties in dispute if they resolve it under ADR than court litigation.

"*...sometimes an alternative dispute resolution procedure can improve the quality of justice by improving the parties' clarity of understanding of their case, their access to evidence and their satisfaction with the process*"[189]

ADR mechanisms empower parties and offer more control over the process, enables them to define their dispute and offer an opportunity to decide on the binding nature of the outcome by their own.[190]In addition, there are a range of broader alternative remedies in ADR than in litigation where only legal remedies are available.[191] Therefore, parties are likely to be more satisfied in ADR than in litigation. Since parties are more satisfied in ADR than in court decisions, the future business relation of parties is more likely to be preserved.[192]

ADR is also becoming very important for multi-party disputes involving different nationals. Under normal court systems, preliminary issues like jurisdiction and choice of law are very time consuming and confusing. Under ADR systems, however, such issues are usually resolved in advance by choosing neutral forums and applicable substantive and procedural laws, if they are necessary at all.[193]Further, ADR 'depoliticizes' dispute settlement by excluding the role of home states in settlement of dispute involving foreign nationals.[194]

Finally, the prevalence of ADR reduces work load of courts. If courts are the sole mechanisms for modern dispute settlement, it is very difficult to cope with the growing number of cases in the face of complex interaction of modern society.

ADR mechanisms have become very popular for resolution of investment and commercial disputes in the world. Almost all bilateral investment treaties (BITs), bilateral trade treaties, multilateral trade agreements, etc have recognized ADR mechanisms like arbitration, mediation,

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[189] Local Rules for Alternative Dispute Resolution Mediation in the United States District Court for the Northern District of Illinois, Western Division article 1.2.

[190] Judicial council of California (1999), supra notes 155, p 20

[191] Ibid p 13

[192] International Arbitration Forum (2005) supra notes 15, p 7

[193] United Nations Institute for Training and Research (2013), supra notes 136, p 3

[194] United Nation Conference on Trade and Development (2010) supra notes 24, p 13

conciliation and even other new forms of ADR for dispute settlement.[195] Various institutions which provide ADR services have also been established internationally, regionally and in different domestic jurisdiction.

Within the UN system, the importance of ADR mechanisms has been recognized well. Annex II of WTO that provides for dispute settlement body (DSB) provides for mediation and arbitration as means to resolve trade disputes. [196]In addition, the United Nation commission on international trade law (UNCITRAL) has legislated model laws on different ADR mechanisms.

3.3.1. Types and classifications of ADR mechanisms

The term ADR encompasses various mechanisms which are different in many ways.

"*ADR is an umbrella term for a variety of processes which differ in form and application. Differences include: levels of formality, the presence of lawyers and other parties, the role of the third party (for example, the mediator) and the legal status of any agreement reached.*"[197]

ADR is a spectrum comprising various mechanisms in dispute settlement.[198] Different ADR mechanisms can be arranged across the spectrum based on the role of third party, party control on the process and outcome, the fate of the relation of the parties during and after the process, ect.[199]But, it is difficult to conclude that each type of ADR mechanisms have identical features across the world.

"*It should be emphasized that there is no one type of any dispute resolution procedure. Each type of procedure is not a point on the continuum, but an area (segment) encompassing a variety of modifications or other similar processes.*"[200]

Different jurisdictions recognize different types of ADR mechanisms according to their respective needs. In India, for example,

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[195] United Nations Office on Drugs and Crime (2007), supra notes 13, p 21
[196] Ibid
[197] Law reform commission (2010), supra notes, p 15
[198] Commecila mediation p 4
[199] ADR p 40
[200] Lukasz Rozdeiczer & Alejandro Alvarez de la Campa (2006), supra notes 138, p 4

"Alternative dispute resolution methods which are recognized include settlement negotiations, arbitration, mediation, conciliation, facilitation, mini-trials, summary jury trials, private judges and judging, convening or conflict assessment, neutral evaluation and fact-finding, multi-door case allocations, and negotiated rulemaking."[201]

a. Mediation

The term mediation came from the Latin term '*mediare*' which means 'to be in the middle'.[202]In the formal use of the term, it is difficult to give a single exact definition. Scholars argue that it is difficult to define mediation conceptually and every jurisdiction has its own definition.[203]

"Mediation changes as it travels; its instantiation anywhere is subject to local variation and intervention as it makes contact with state and customary law, politics, and social struggles."[204]

Despite all the controversy surrounding it, mediation is one of ADR mechanisms in which *"two disputants, with the aid of a third party intervention, are brought together to craft their own agreement.*[205]

It is "... *a flexible, non-binding, confidential process in which a neutral person (the mediator) facilitates settlement negotiations. The mediator improves communication across party lines, helps parties articulate their interests and understand those of their opponent, probes the strengths and weaknesses of each party's legal positions, identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute"*[206]

Mediation lays somewhere between negotiation and Arbitration. Unlike negotiation, there is a neutral third party that facilitates the discussion between parties in dispute. But, unlike arbitration, the neutral third party has no power to pass a binding decision. Mediation offers best alternative for those who need the assistance of third party as well as to determine their case by

[201] Rules for Alternative Dispute Resolution, Indiana Rules of Court, rule number 1.1 available at http://www.in.gov/judiciary/rules/adr/and accessed on May 11, 2013

[202] Ireland law reform commission (2010) supra notes 116, p 19
[203] Ibid
[204] Susan Franck, supra notes 130, p 160
[205] Roger E. Hartley (2002), supra notes 14, p 13
[206] Local Rules for Alternative Dispute Resolution Mediation in the United States District Court for the Northern District of Illinois, Western Division article 4

themselves. The mediator has no power to impose or compel a settlement. She/he rather helps parties to explore all possible alternatives to reach an agreement.

"The person (mediator) controls the process while parties control the outcome."[207]

Mediation is an interest based mechanism in which parties try to keep their interest, not their legal right. Therefore, mediation changes the 'zero sum game' of litigation to a 'value creating' agreement between parties.[208]Mediation is not also bound by rigid legal procedures. Even if procedural rules are important to conduct modern mediation, mediators usually rely on equity, principle of objectivity, fairness, justice, trade usage and the likes while conducting the mediation process than rigid legal rules.[209] It is an extra legal mechanism involving different creative procedures in order to help parties reach a mutually accepted settlement. What matters is that the settlement should be acceptable to both parties and, not necessarily its legality.

"A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by exploring litigant needs and interests that maybe formally ***independent of the legal issues in controversy****."(Emphasis added)*[210]

Some writers say that Mediation and conciliation are identical while others try to differentiate them. According to the proponents of the duality of mediation and conciliation, conciliation is a more formal and interventionist procedure that follows formal rules related with "*jurisdictional objections, potential pleadings, gathering of evidence and issuing recommendation.*"[211] It is also argued that the role of the third party in mediation and conciliation is different. While a mediator simply facilitates the discussion of the parties in dispute, a conciliator may "*draw up and propose the terms of an agreement.*"[212] Accordingly, mediation is a facilitative process while conciliation is an advisory process.[213]

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[207] United Nations Institute for Training and Research (2013), supra notes 137, p 17
[208] Lukasz Rozdeiczer & Alejandro Alvarez de la Campa (2006), supra notes 139, p 5
[209] United Nations Institute for Training and Research (2013), supra notes 137, p 11
[210] Local Rules for Alternative Dispute Resolution Mediation in the United States District Court for the Northern District of Illinois, Western Division article 4
[211] Susan Franck supra notes 132, p 172
[212] Law Reform Commission (2010), supra notes 116, p 18

[213] Ibid p 20-23

Others argue that mediation and conciliation simply represents similar concepts. The UNCITRAL model rule on conciliation, for example, asserted that mediation and conciliation are similar. The rule under article 1(3) defines conciliation as:

"For the purposes of this Law, "conciliation" means a process, ***whether referred to by the expression conciliation, mediation or an expression of similar import,*** *whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute" (emphasis added)*

Some allege that the UNCITRAL model law has differentiated between conciliation and mediation under article 6(4).[214]

6(4) *The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute*

But, in line with the definition of conciliation under the model law, this provision only shows mediation/conciliation can be advisory and that Conciliation is simply one form of mediation.

Mediation can be facilitative, evaluative, conciliative, transformative or therapeutic. In facilitative mediation, the mediator simply helps parties to communicate and re-evaluate their position without commenting on the merit of the case.[215]In evaluative mediation, on the other hand, the mediator, in addition to his role as a facilitator, may give opinions on the merits of the dispute.[216]Conciliative mediator, in addition to giving opinion on the merit of the case, may propose non-binding resolution to parties.[217]Transformative mediation aims not to solve the immediate problem. But, to empower parties so that they can resolve any dispute, be it future or current dispute, by themselves.[218]Therapeutic mediation focuses on treating emotional wounds that parties in a dispute face rather than resolving the dispute; focusing on the parties rather than

[214] Law Reform Commission (2010), supra notes 116, p23
[215] Lukasz Rozdeiczer & Alejandro Alvarez de la Campa (2006), supra notes 139, p, p 3
[216] id
[217] id
[218]Ireland Law reform Commission(2008), supra notes 42, p 47

the dispute.[219]Finally, there is 'shuttle mediation' in which the third party talks to the disputing parties separately without any face to face discussion between/among the parties. [220]

Despite these scholarly arguments, the difference and similarity of mediation and conciliation is to be decided by laws of each jurisdiction. A legal system can opt to differentiate mediation and conciliation or to merge them as having identical meanings. In France, for example, the difference between conciliation and mediation is unclear except that conciliation is a free service given by *'non-professional legal assistants'* and there exist very minor procedural differences.[221]But, the writer believes that mediation and conciliation should be understood to express the same concept.

Mediation/conciliation is a well-known dispute settlement mechanism in commercial and investment disputes in today's world. Many jurisdictions and international agreements provide for the use of mediation/conciliation. In most bilateral investment treaties (BITs), mediation is rarely mentioned by name. Rather, the phrase 'amicable resolution' is used to refer to resolution of disputes through mediation/conciliation.[222]

b. Arbitration

Arbitration is one of the universally recognized ADR mechanisms. It is a form of determinative ADR mechanism in which one or more third party neutrals pass a binding decision called 'award' after examining agreements and evidences of disputing parties. [223] It is a rights based approach in which decisions are to be made based on legal rules. Even if there are some mandatory arbitrations in some jurisdictions, parties are free to enter in to an arbitration agreement, to choose the third party neutral, to choose applicable substantive and procedural laws, to decide the place and time at which the arbitration will be proceeded in advance or after the dispute has occurred.[224]

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[219]Ibid
[220] Ibid
[221] Dominik Kohlhagen, How to make ADR work in Ethiopia, Alternative dispute resolution (ADR) and mediation: the experience of French-speaking countries, a module for training held in EACC on April 16-17, Addis Ababa, Ethiopia, p 3
[222] Tida Begic (2005) supra notes 103, p 153
[223] Ireland Law reform Commission(2008), supra notes 42, p 50
[224] United Nation Conference on Trade and Development (2010) supra notes 24, p 23

Once parties agree on the process, they cannot withdraw nor refuse to be bound by the decision of the third party unless they consensually agree to.[225]The awards in arbitration are final and binding if there is no agreement to the contrary.[226] Accordingly, parties can determine the binding nature of the process and its finality in advance through agreement.

There are different kinds of arbitration. From the perspective of nationality of the parties, arbitration can be international or domestic. [227] International arbitration is used "*when the parties or the subject of the dispute are based in different jurisdictions.*"[228] While arbitration is domestic "*when the parties reside in or have a business registered in the same country and refer the dispute to an arbitration court in that country.*"[229]

From the perspective of the role of the parties, arbitration can be baseball arbitration, bounded arbitration or incentive arbitration. In baseball arbitration, the arbitrator is simply to choose among different 'awards' proposed by parties in dispute themselves, not to decide by herself/himself.[230] Whereas, in bounded arbitration, parties may agree that the award of the arbitrator may be adjusted to abounded range.[231] Finally, incentive arbitration is an arbitration in which parties agree simply to penalize a party that rejects the award of the arbitrator.[232]

Arbitration is among the widely used methods of dispute settlement mechanisms in the world. In the United States, for example, the use of arbitration has grown extensively.

"*The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights.*"[233]

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[225] Ibid p 23 Judicial council of California (1999), supra notes 156
[226] ADR in civil cases p 34
[227] Hailegabriel G. Feyissa(2010), supra notes 167, p 289
[228] World Bank Group Ukraine commercial dispute resolution (2007) supra notes 114, p 5
[229] Ibid
[230] Ireland Law reform Commission(2008), supra notes 42, p 51
[231] Ibid
[232] Ibid, p 52
[233] *American Bar Association House,* The Code of Ethics for Arbitrators in Commercial Disputes, *February 9, 2004, preamble*

In foreign investment, following the proliferation of BITs and subsequent empowerment of private parties to directly engage in dispute settlement, Arbitration is the primary dispute settlement mechanism.[234]

But, not all cases are subject to arbitration. There are different exclusionary rules in different countries in which some disputes are expressly prevented from being submitted to arbitration. Under Chinese arbitration law for example, "*...Marital, adoption, guardianship, support and succession disputes, administrative disputes that shall be handled by administrative organs...*" cannot be arbitrated.[235]

c. Negotiation

Negotiation can be either an independent dispute settlement mechanism or a process with in another dispute settlement mechanism like mediation. As an independent dispute settlement mechanism, negotiation is a process of consultation between/among parties in a dispute without third party intervention. In negotiation, disputing parties themselves control the process and the outcome of the process without any intervention from a neutral third party. It can be simple informal talk or a formal and highly structured process[236].

Negotiation is much more flexible and universally acceptable for bilateral or multilateral disputes.[237] There is no formal rule of procedure to follow nor is there applicable substantial law in the process. Parties in the dispute use their creativity to proceed the negotiation process as well as to reach a settlement agreement. It is totally an interest based approach in which parties try to secure their interests rather than their legal rights. .

Knowingly or unknowingly, every one engages in negotiation in his/her day to day life. Any dispute, be it political, commercial, investment, justiciable or non-justiciable, etc can be resolved

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[234] UNCTAD (2007) , supra notes 8, p 124
[235] China - Arbitration Law, 1994, available at www.lexmercatoria.org and accessed on May 25, 2013 article 3

[236] Ireland Law reform Commission(2008), supra notes 41, p 42
[237] United Nations Office of Legal Affairs Codification Division, Handbook on the Peaceful Settlement of Disputes between States, United Nations, New York, 1992

through negotiation. It is widely used for disputes under public international law, for family disputes, for commercial and investment disputes, etc.

In principle, negotiation ends in a win-win manner. The parties in the disputes are expected to come with a mutually accepted settlement so that both of them feel winning. But, sometimes, an adversarial negotiation backed by threats, power imbalance, etc may end in a win-lose manner.[238]

Principled negotiation is an interest based mechanism with four main elements; separation of the people from the problem, focusing on interests, inventing options for mutual gain and insisting on objective criteria.[239]. Separating people from the problem is usually a difficult task. But, it is important to address issues rather than look for personal problems. Negotiation is also an extra legal process. So, parties in negotiation should not stick to their legal rights, rather to their long-run interests. There should be a give and take approach so that the long-run interests of both parties may be served. There should also be creative generation of options for mutual agreement. In negotiation, there is no black and white approach and procedure. Rather, parties need to be creative in order to generate mutually acceptable options. Finally, the criteria parties use to decide on specific issues should be free from bias and should be objective.

Before entering negotiation, parties should identify their best alternative to a negotiated agreement (BATNA). BATNA is the next best alternative of parties to rely for resolving the dispute in case negotiation fails. The better the BATNA of a party, the more that party pushes for favorable settlement in a negotiation. Likewise, the worse the BATNA of a party is, the more that party will be willing to give more in the negotiation.[240]

d. Others

Even if the more known ADR mechanisms are those mentioned above, there are also other ADR mechanisms that are being used for investment and commercial disputes in different jurisdictions. These, among others, include hybrid mechanisms, private judging, mini-trial, Early Neutral Evaluation, Settlement council, Ombudsman and expert assessment and/ determination, etc

[238] Ireland Law reform Commission(2008), supra notes 42, p 42
[239] Ibid
[240] Ireland Law reform Commission(2008), supra notes 42, p 42

The hybrid system involves mediation and arbitration. It can be Med-Arb or Arb-Med. In some jurisdictions, mediation is a mandatory pre-condition for arbitration. [241]Accordingly, parties in a dispute should attempt to resolve their disputes through mediation before proceeding to arbitration. They proceed to Arbitration only when mediation fails. This is what we call Med-Arb hybrid system. In Arb-Med system, on the other hand, parties shall first go to arbitration. After deciding on the case, the arbitrator keeps the award secret and the parties try to resolve their dispute through mediation. If the mediation fails, the award made shall be effective.[242]

Private judging is a process in which Parties in a dispute agree that their case be adjudicated and decided by a neutral third party. .[243]Also called 'renting a judge', in private judging, the judge, who is usually experienced and retired judge, is proposed by parties and has to be appointed by a court.[244]This is a formal adjudicatory adversarial mechanism outside the court system. It is like litigation except that it is to be outside the court.

Mini-trial is another ADR mechanism in which parties to a dispute present their respective claims to a neutral third party who shall examine the case and explain to the parties the strength and weakness of their respective claims.[245] The neutral third party, then, shall encourage the parties to reach agreement.[246]It is a blend of negotiation, mediation and adjudication.[247]

In expert assessment, a neutral expert is authorized to examine the issue in dispute and determine accordingly. The opinion of the expert can be binding or non-binding based on the agreement of parties in the dispute. [248]Similar to expert determination is adjudication. In adjudication, the neutral third party uses his knowledge and investigation as well as evidences presented by parties to reach a conclusion.[249]

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[241] International arbitration and litigation p 4
[242] Ireland Law reform Commission(2008), supra notes 4, 1 p 52
[243] Judicial council of California (1999), supra notes 156, p 27
[244] Jill S. Robbins, the private judge: California anomaly or wave of the future available athttp://www.iaml.org/cms_media/files/the_private_judge_california_anomaly_or_wave_of_the_future.pdfand accessed on May 27, 2013p 7
[245] United Nations Institute for Training and Research (2013), supra notes 137, p 12
[246] Ibid
[247] Judicial council of California (1999), supra notes 156, p 69
[248] United Nations Institute for Training and Research (2013), supra notes 137, p 12
[249] Judicial council of California (1999), supra notes 156, p 53

There is also Early Neutral Evaluation (ENE) which is "*a confidential process early in litigation where each side*(in the dispute) *presents a summary of its position and a neutral expert provides an evaluation of strengths and weaknesses of each party.*"[250]

"*In early neutral evaluation, a neutral evaluator (usually a private attorney expert in the substance of the dispute) holds a brief, confidential, nonbinding session early in the litigation to hear both sides of the cases. The evaluator identifies the main issues in dispute, explores the possibility of settlement, and assesses the merit of the claims. The evaluator also may discuss and review ways of settling or simplifying the case with the parties, for example, a discovery or motion plan.*"[251]

Settlement Council on the other hand is 'a negotiation process usually used in large businesses.'[252]In settlement council, the council investigates the facts of the case presented by a client and the interests of both parties in the dispute after which it invites the other party for negotiation on behalf of the client. [253]

In disputes related with professional conducts like medical claims, there is a growing trend of using 'mal practice screening panels'.[254] Known by different names in different jurisdictions, a malpractice screening panel is usually a composition of medical and legal professionals who "*render an opinion regarding the liability of the health care provider subject to a medical malpractice.*"[255] The panel may have the power to call witnesses and examine documents to determine liability of the professional and may even assess the damage depending on the consent of the parties and governing legal rules in the country. [256]

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[250] courts and prvt ADR p 101

[251] Alaska Judicial Council, Report to Alaska legislators; alternative dispute resolution in Alaska court system, 1997, p 4

[252] John Lande (2008) supra notes 136, p 101

[253] Ibid

[254] Jean Macchiaroli Eggen , Medical Malpractice Screening Panels: An Update and Assessment, Journal of Health & Life Sciences Law Volume 6, Number 3, 2013, p 8

[255] Ibid p 8

[256] Ibid p 9

The use of Ombudsman to resolve disputes is also familiar in different parts of the world. In Ombudsman, the neutral third party tries to assist managers and employees to resolve disputes. But, in no case she/he acts as arbitrator, fact finder or adjudicator.[257]

The last, but not the least ADR mechanism is summery jury trail. It is "*... an abbreviated trial with a jury in which the litigants present their evidence in an expedited fashion. The litigants and the jury are guided by a neutral who acts as a presiding official who sits as if a judge. After an advisory verdict from the jury, the presiding official may assist the litigants in a negotiated settlement of their controversy.*"[258]

3.3.2. Principles of ADR

There are certain universally recognized principles in ADR. Some of these principles are said to be inherent to the very concept of ADR while others are formulated by statutes and other by rules in order to promote the positive aspects of ADR mechanisms. The extents to which such principles apply also vary across the ADR spectrum from negotiation to arbitration. Among the well-recognized principles are principles of voluntariness, self-determination, flexibility, confidentiality, good faith and principle of neutrality.

a. Principle of Voluntariness

ADR mechanisms in general are voluntary processes in which they can be held based on the consent of the parties in a dispute. Also called principle of party autonomy, principle of voluntariness is an important principle 'inherent' to ADR.[259]This voluntariness of ADR mechanisms is expressed when the parties enter in to a certain ADR mechanisms, in the process of the settlement and in the final resolution of the disputes. The applicability of the principle, however, varies across the ADR spectrum.

In principle, disputants are free to choose a certain ADR mechanism in order to resolve their dispute, be it future dispute or a dispute already in existence. In contractual relations, Parties can agree to resolve their future disputes through a certain ADR mechanism under dispute settlement

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[257] Mary P Rowe, The Ombudsman's Role in a Dispute Resolution System, Negotiation Journal *October 1991* p 354-355
[258] Indiana Rules of Court, Rules for Alternative Dispute Resolution, 2011 article 1.3(D)
[259] Taida Begic (2007) supra notes 103, p 11

clauses. In arbitration and mediation, for example, parties in a contract can provide dispute settlement clauses called 'arbitration/mediation clauses' in which they express their consent to resolve disputes through arbitration/mediation. In such cases, the agreement of the parties as to dispute settlement is usually independent from the parent contract. In case the parent contract is alleged to be invalid, the dispute settlement clause usually remains to be valid so that the invalidity of the contract itself shall be seen by the agreed ADR mechanism.[260] This is what we call the principle of severability.[261]

Likewise, parties in an already existing dispute may also enter to an independent agreement to resolve the dispute through a certain ADR mechanism. This agreement is usually referred, in arbitration, as arbitration submission.[262]Through the agreements, parties may choose forums, applicable laws, if necessary, etc.

Sometimes, there can be mandatory requirement to engage in ADR from courts or legal rules. In such cases, parties have no choice and the principle of voluntariness is at risk. Advocators of mandatory ADR argue that, on the one hand, ADR mechanisms have enormous advantages, on the other; they are little known in most societies. Therefore, mandatory ADR enables to create awareness about ADR systems.[263] Mandatory mediation is well known in many jurisdictions for cases involving an amount below a certain threshold.[264] For opponents of mandatory ADR, it is against the very 'inherent' voluntary nature of ADR.[265]

Once parties consented or obliged to resolve their disputes through a certain ADR mechanism, the effect of their agreement differs according to the type of ADR mechanisms they choose. In case arbitration is chosen, a party has no choice to withdraw from the process and is to be

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[260] Law Reform Commission (2010), supra notes 116, p 70

[261] Ibid

[262] Hile Gabriel Feyisa(2010) supra notes 167, p 306

[263] Ireland Law reform Commission(2008), supra notes 42, p 74

[264] Investment Climate Advisory Services of the World Bank Group, Alternative Dispute Resolution Center Manual: A Guide for Practitioners on Establishing and Managing ADR Centers, the World Bank Group, 2011, p 11

[265] Ireland Law reform Commission(2008), supra notes 4, p 74

bounded by the decision of the arbitrator. In mediation and negotiation, they are obliged only to attempt the process. They are free to continue or to withdraw from the process.[266]

The express intention of parties is also required in the selection of third party (mediator or arbitrator...), place and time for the conduct of the ADR process, fee for the third party etc.[267] In both mediation and arbitration, parties have full power to elect the third party/s. In arbitration, parties have also the power to elect applicable procedural and substantive laws.

Unlike in Arbitration, parties in mediation and negotiation defines their problems, needs ,solutions and they can terminate the process any time they wish even if they entered in to the process mandatorily. [268]Parties are empowered to handle their cases with little interference from the third party. [269]But, if they once agreed on a settlement, their agreement shall be binding contract and enforceable before court of law. [270]

b. Principle of self determination

Another similar principle to voluntariness is the principle of self-determination.

"Self-determination is present where the following processes are offered: the parties are at the center of the process; the parties are the principal actors and creators within the process; the parties actively and directly participate in the communication and negotiation; the parties choose and control the substantive norms to guide their decision-making; the parties create the options for settlement; and the parties control whether or not to settle."[271]

The capacity of parties to enter to ADR agreements is also one aspect of self-determination.[272] Accordingly, there should be no fraud, coercion or any other vice to the consent of the parties

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[266] Ireland law reform commission supra notes 25, p 3o
[267] Yohans W/gebriel, Institutional commercial arbitration under Ethiopian law, the case of chamber arbitration institute, Ethiopian business law series vol. 5, December 2012 , p 84
[268] Rolando Anillo-Badia, Arbitration and mediation: impartial forums to resolve international commercial disputes in Cuba, Cuba in Transition, ASCE , 2010, pp 273
[269] Oana mihaela Orheian, A new business-mediation: Advantages and disadvantages of mediation and negotiation, Dimitrie Cantemir Christian University, Bucharest, 2008 , p 172

[270] Rolando Aniloo-Badia(2010), supra notes 268, p273
[271] Ireland Law reform Commission(2008), supra notes, 42 p 113
[272] Law Reform commission(2010), supra notes 116, p 47

while agreeing to engage in ADR systems. Their consent should also be an informed consent and parties should be free to seek independent advice at any point of the ADR process.[273]

c. Principle of Flexibility

Court litigations follow stringent and rigid procedures. In ADR, however, there is wider flexibility. Flexibility can be flexibility in the process and flexibility in the outcome of the process.[274] Like in the principle of voluntariness, the extent of flexibility varies in different types of ADR mechanisms.

In mediation and negotiation, usually, there is no rigid black and white procedure to follow. Both the process and the outcome of the discussion are flexible and are independent of law and legal doctrines.[275]

"Mediation... offers a variable, non-linear process aimed at facilitating layered negotiation... Mediation typically follows no legislatively or judicially-proscribed procedures; instead, it uses informal norms to avoid rigid structural rules, anticipate ambiguities, tolerate differences, and encourage non-linear outcomes."[276]

Arbitration on the other hand is more structured and rigid than mediation. Arbitrators follow legally prescribed procedures and decide based on the agreed law. But, still, it is flexible relative to court litigation. Arbitration usually uses 'tailored' and 'flexible' rules of procedure.[277] In addition, there are cases in which arbitrators can chose among proposed awards by parties, the extent of liability may be bounded by parties, etc.

While arbitration and litigation follows the rights based approach, mediation, uses interest based approach to resolve disputes.[278] In Arbitration and litigation, disputing parties/their lawyers and arbitrators/ judges look for the rights of the parties under the law. In mediation, on the contrary,

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[273] Ibid p 49
[274] Ibid p 59
[275] Don Peters, It takes two to tango, and to mediate: legal cultural and other factors influencing United States and Latin American lawyers' resistance to mediating commercial disputes, Richmond journal of global law & business vol. 9 article 4, pp 411
[276] Don Peters, It takes two to tango, and to mediate supra notes 283, p 408
[277] Allen B. Green & William T. O'brieN, supra notes 152, p 2
[278] Lukasz Rozdeiczer &Alejandro Alvarez de la Campa (2006) supra notes 139, p 3

participants look the short run and long run interests of parties in dispute beyond the legal rights and obligations. Parties also present their interests, not their positions.

d. Principle of confidentiality

Most ADR mechanisms are out-of-court private justice systems. In such mechanisms, persons outside the parties and/or their representative and the mediator/ arbitrator have no right to follow the proceeding and see the outcomes unless the parties permit. Confidentiality is usually considered to be a very important principle in ADR. Out of confidentiality, it is difficult for the mediation process to be fruitful.

"Confidentiality is a critical element of successful mediation. In order for the mediator, the attorneys and the clients to understand the central issues, the motivations, the pressure points and the risks of litigation, the participants must be assured the discussions cannot and will not be disclosed to others so they can talk openly... If discussions with the mediator are not confidential and privileged, the mediation process, the mediator's role and the potential for resolution are significantly diminished."[279]

Confidentiality is the privilege of parties in the dispute, not the third party neutral, so that the third party or any other person who has access to the process may not expose their case to third parties and may not be called as a witness on the case in court of law.[280]

Confidentiality is required concerning communicated issue, be it orally, in written, through conduct or other recording mechanisms. [281]Conferring privilege on communications depends on the confidential nature of the relationship between the communicants. In the UK, for example, privilege may be established where a court is satisfied that:[282]

1. *The communication was confidential;*

2. *Confidentiality is essential to the satisfactory maintenance of the relationship;*

3. *The relationship is one the community deems necessary to foster; and*

[279] Ireland law reform commission supra notes 42, p 33
[280] Dominik Kohlhagen, supra notes 221, p 5

[281] Law Reform commission(2010), supra notes 116, p 40
[282] Ireland law reform commission(2008) supra notes 42, p 106

4. The likely harm caused by mandatory disclosure outweighs the benefit to be gained in the instant case by it

Principle of confidentiality is ill-defined and its boundaries are little known.[283] There is also debate whether the principle of confidentiality should be recognized by law or not. Most of the time, it is left to the agreement of the parties. Accordingly, parties are expected to address the issue of confidentiality in their agreement to resolve their disputes through ADR mechanisms. [284]

In addition, there are well recognized exceptions to the principle. Article 9 of the UNICITRAL Model Law on International Conciliation, for example, states that:

"Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except ***where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.*** *"(Emphasis added)*

Courts in England have ruled out defense of confidentiality in ADR if *parties* agree, it is important to prevent physical or psychological injury or ill-health to a person, to protect the interests of children, is associated with the commission of a crime and it is required to defend charges of professional misconduct brought against the mediator.[285]

e. Principle of good faith

ADR is, most of the time, a voluntary dispute settlement mechanism. In such mechanism, unless parties engage in the discussion in good faith, it is difficult to reach a settlement. Some argue that out of good faith, it is even difficult to observe all other principles[286].Unless a party engages in ADR in good faith, the total process can be ineffective, unfair and paralyzed.[287] A party may, for example, use it to deliberately delay accountability.

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[283] Allen B. Green & William T. O'brieN, supra notes 152, p 11
[284] Ibid, p 14
[285] Ireland law reform commission(2008) supra notes 42, p 33-46
[286] Ireland law reform commission supra notes 42, p 90
[287] Law Reform commission(2010), supra notes 116, p 91

Not reaching on an agreement does not show bad faith of parties. So, what is bad faith in ADR and how can we know it? Most of the time, good faith or bad faith is known when it is seen in cases rather than trying to define it in the abstract.[288]

Despite the consensus as to the great importance of good faith in ADR, there are arguments as to whether good faith requirement should be sanctioned by law or not. Some argue that good faith requirement should not be imposed by law. They argue that, if a party can claim against the other party based on lack of good faith in the ADR process, ADR in general and non-binding mechanisms like mediation are becoming mandatory losing their voluntary nature.[289]Therefore, good faith should be encouraged, but not imposed as a legal requirement. Other disagrees with the argument. Accordingly, ADR in general and non-binding mechanisms like mediation cannot work out of good faith. Parties can refuse not to engage or they can expressly withdraw from the process. But, once they agree to engage, they should be in good faith.[290]

f. Principle of neutrality

In ADR, another important principle is principle of neutrality. According to this principle, the third party in charge of the process, the situs /forum/ and applicable laws in case of arbitration should be neutral.[291] This principle is inherent in justice that any individual who has interest in a dispute is likely to be biased. The third party should be objective and should not favor either party in a dispute. When there is a conflict of interest, the third party should expose the conflict.[292]

3.3.3. The role of courts for better ADR

As it has been said many times, ADR is not supplementary to the court system. It is rather a complementary mechanism of dispute settlement. ADR is not only complementary to the court system; it is also difficult for most of formal ADR mechanisms to be effective out of the court system. The court system plays a number of roles for the effectiveness of ADR mechanisms.

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[288] id
[289] Ireland law reform commission supra notes 25, p 90
[290] id
[291] Allen B. Green & William T. O'brieN, supra notes 152, p 1
[292] Law Reform commission(2010), supra notes 116, p 62

Since ADR mechanisms are private systems, they do not have the authority to enforce awards/agreements. Agreements and awards under ADR proceedings are usually enforced through the order of the court.[293]

Even if there is some possibility when parties agreed in advance, in ADR proceedings, it is usually difficult to order interim relief. [294]In case the third party has been given the power to order interim relief, the order cannot be self-executing. It is rather to be executed through court order.[295]Accordingly, courts strengthen the ADR process by giving interim orders, like attachment and injunction concerning cases under ADR proceedings.

Another very important role that courts play in ADR process is staying court proceeding while a case is being entertained through ADR mechanisms. Article 5 of Ireland - Arbitration Act, 1980, for example, provides that:

"If any party to an arbitration agreement, or any person claiming through or under him, commences any proceedings in any court against any other party to such agreement, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the proceedings may at any time after an appearance has been entered, and before delivery of any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

Sometimes, courts play a great role in appointing the third party neutral. In case one of the parties fail to appoint an arbitrator/mediator in accordance with the agreement with the other party, courts may force or may themselves appoint the neutral third party. Finally, courts may play a great role in correcting, confirming and reviewing awards.[296]

[293] Allen B. Green & William T. O'brieN, supra notes 152, p 8
[294] Ibid, p 3
[295] Ibid, p 8
[296] Judicial Councile of California (1999), supra notes 156, p 35

3.3.4. Modern and institutionalized mediation

ADR mechanisms in general and mediation in particular used to be run outside the formal authority of law in almost all societies of the world.[297]They actually pre-date litigation itself. For most of their history, ADR mechanisms including mediation have been used by societies in an informal and traditional way based on the needs of each society. Individuals in dispute elect among respected individuals in their locality who are usually non-professional lay persons to mediate or arbitrate between them. Nowadays, ADR mechanisms in general and mediation in particular are becoming more formalized and institutionalized.

With the expansion of trade and investment, on the one hand, and the growing number of cases before courts of law on other, the need for ADR mechanisms has been recognized. In the 20th century, delay in the court system, increasing cost of litigation, jurisdictional issues in international litigation, etc make ADR mechanisms most popular in commercial and investment dispute settlements.[298] This time, however, the traditional and informal systems of ADR are not able to cope with the growing complexity of modern life in general and commercial & investment disputes in particular.

The primary preference for the resolution of commercial and investment disputes has been arbitration.[299] Modern Arbitration, however, is the most structured, rigid, adversarial, and even costly in terms of payment for lawyers, arbitrators, experts, etc so that it is losing its popularity in commercial and investment disputes.[300]

"*...the resort to international arbitration as a means to achieve a swift and efficient settlement of a dispute is currently being questioned not only by governments, but also by investors that spend large amounts of resources on the resolution of investment treaty conflicts.*"[301]

With active participation of lawyers, it is also becoming more adversarial losing most of the advantages ADR mechanisms are supposed to have over litigation. With this dissatisfaction over arbitration, the less structured more flexible and less costly mechanisms like

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[297297] Roger E. Hartley (2002), supra notes 14, p 19
[298] Billa Farooq supra notes 23, p 5
[299] United Nation Conference on Trade and Development(2010) supra notes 24, p xxii
[300] Ibid p 4
[301] Ibid

mediation/conciliation are becoming more popular for commercial and investment disputes.[302] Accordingly, modernizing and institutionalizing of mediation is becoming vital.

a. Elements of modern mediation

Mediation should be modernized so that it can cope with the modern complex commercial and investment disputes. If so, what are the basic elements of modern mediation? How is it differentiated from traditional and informal mediation? Modern mediation has its own basic components that differentiate it from traditional and informal mediations. These elements include, among others, existence of laws and rules regulating the process, formal integration in to the court system, formal criteria to regulate mediators, formal qualification requirements for mediators, rules and regulations clarifying the role of stakeholders, etc.

There are arguments whether the existence of legislative frame work is necessary for launching ADR programs in general and mediation in particular. According to some commentators, legislative frame work is not necessary to start mediation projects.[303]However, it is believed that if enforcement of the mediated agreement is sought from courts rather than from the community, legal frame work is usually necessary. [304]

According to the proponents of legal frame work for mediation, on the other hand, legal and administrative frame works should be adjusted to accommodate and integrate mediation to the judicial system.[305]In addition, at least major ADR principles should be legally sanctioned.[306] For example, some elements of confidentiality and the need to expose possible conflict of interest by mediator should be legally sanctioned either by legislations or under mediation rules.[307]Further, enforceability of the mediated agreement is another very important issue that deserves legal regulation.[308]

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[302] Bilal Farooq supra notes 23, p 5
[303] Lukasz Rozdeiczer and Alejandro Alvarez de la Campa(2006) supra notes 139, p 37
[304] Ibid
[305] Shelley M. Liberto (200, supra notes 123, p 39
[306] Law Reform commission(2010), supra notes 116, p 29
[307] Ibid p 33
[308] Ibid

The necessity of legal frame work for modern mediation projects actually depends on the special circumstance of a country.[309]In the common law legal system, legislation is thought to be unnecessary for the principles are well-established in *'general principles of law'* and they have evidence rules while, it is said to be important in continental legal systems. [310]But, it is generally agreed that the existence of legislative frame work is very important for it bestows state recognition on the mediation process. [311]

Modern mediation is usually governed by legislations, mediation rules and the agreement of the parties. But, arguments about the issues that should be covered in legislations, mediation rules and agreements vary.[312]The legislation governing mediation reflects the policy of the government towards mediation. Issue like cases that may not be subjected to mediation, the place of major principles of ADR in the legal system, possible institutional forms of mediation centers, etc are usually governed by legislations.[313]

In addition, Legislative frame work for integrating mediation to court system is very important. Accordingly, enforcement of mediated agreements, default rules on appointment of mediators, laws regulating period of limitation while parties are in mediation, etc should be governed by legislations.[314]

The role of stakeholders in general and legal advisors in particular need also be regulated. Bars are usually resistant for mediation programs.[315] But, they should be included in the process and can have constructive role in the pre-mediation, during the mediation and post mediation stages of the mediation process. [316] In the pre-mediation process, lawyers can advise clients in the preparation of BATNA, the very appropriateness of mediation, etc. During the mediation, they may help in drafting agreement, briefing issues to clients, etc. Finally, in the post mediation stage, they may take case to the other appropriate mechanism if the case fails and if it is successful, they can assist in the enforcement of the agreement.

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[309] Lukasz Rozdeiczer and Alejandro Alvarez de la Campa(2006) supra notes, 27p 38
[310] United Nations Institute for Training and Research (2013), supra notes 137, p 12
[311] Lukasz Rozdeiczer and Alejandro Alvarez de la Campa(2006) supra notes 139, p 38
[312] Law Reform commission(2010), supra notes 115, p 33
[313] Investment Climate Advisory Services of the World Bank Group_(2011), supra notes 264, p 12
[314] Ibid
[315] Shelley M. Liberto (200, supra notes 124, p 38
[316] Supreme court of India, supra note 21, p 62-70

Finally, in modern mediation, issues like qualifications of mediators, trainings required, and languages to be used, fee schedules, etc need to be regulated by rules.[317]Unlike traditional mediation, modern mediation requires some sorts of training and skill. Hence, mediators need to be trained professionals. Therefore, there should be clear criteria for selecting mediators. Their age, training background, ethical requirements, etc need to be provided. In addition, professional service usually demands payment. If so, the rate of payment need also be regulated by rules.

Backing the necessity of legal frame works, United Nation Commission on International Trade Law (UNCITRAL) has model arbitration and conciliation/mediation rules that can be used either by ad hoc or institutional ADR forums for international disputes. The United Nation General assembly has also '*recommended all countries give due consideration*' for the rules adopted by the UNCITRAL.[318] The UNCITRAL Model Law, even if it was designed only for commercial disputes, nowadays, it is being used in both commercial and investment disputes.[319] In addition to its direct use by different ADR centers, it is also serving as a model rule for countries and institutions in case they want to have their own arbitration and mediations rules. [320]Most countries in the world have legislative frame work for ADR mechanisms in general and mediation in particular.[321]Likewise, International arbitration institutions like International Chamber of Commerce have conciliation rules.[322]

b. Institutionalizing mediation

Modern mediation can be institutional or ad hoc. Ad hoc mediation is a mediation process in which the mediator/s and rules and regulations governing the process are selected by parties in dispute only for their specific dispute.[323] The rules and the mediator are usually elected and the mediation facility is provided after the occurrence of the dispute between the parties. Institutional mediation, on the other hand, is a mediation process under a permanent entity using its facilities

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[317] United Nations Institute for Training and Research (2013), supra notes 137, p 7
[318]Indian Bare Acts No.26 of 1996, The Arbitration And Conciliation Act, 1996, preamble
[319] Taida Begic (2005) supra notes 103, p 7
[320] United Nations Institute for Training and Research (2013), supra notes 137, p 5
[321] United Nations Institute for Training and Research (2013), supra notes 137, p5
[322] Ibid p 9
[323] Yohans W/Giorgis (2012), supra notes 266, p 78

and procedural rules.[324]Accordingly, institutionalization of mediation is one aspect of modernization of mediation.

If institutionalization of mediation is one aspect of modernization, what does it mean to institutionalize mediation? Sharon Press in her article 'Institutionalization: savior or saboteur of mediation?' tried to define the term institutionalization as:

"... *I use the term "institutionalization" to refer to any entity (governmental or otherwise) which, as an entity, adopts ADR procedures as a part of doing business. Some examples include schools that develop peer mediation programs, courts that establish rules to govern referral to ADR procedures, and government agencies that incorporate ADR processes in developing rules and regulations.*"[325]

The term institutionalization refers to having an organization with its own establishing laws, working procedures, norms, code of conduct for those working in it, etc.[326]Accordingly, institutionalizing mediation means establishing legally recognized mediation centers /organizations/ with their own working procedures so that they can formally mediate between parties in a dispute.

In spite of the fears that institutionalization of mediation may cause regulation of mediation by many laws which in turn may lead the mediation process to seem court room litigation, mediation is being institutionalized in many legal systems.[327] It is usually conducted under the shadow of rules and regulations of an already existing ADR institution. Mediation centers are most of the time associated with arbitration institutions. In the current order, ADR centers established solely for delivering mediation service are rare.

Institutionalization of mediation in a legal system requires lots of activitiesin advance. Starting from understanding the overall judicial system in the country to identifying problems in the system, from assessing the need for mediation in the legal system to establishing the center, diligent work is required.

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[324] Roger E. Hartley (2002) supra notes 14, p 9
[325]Sharon Press(1997) , supra notes 17, p 905
[326] Roger E. Hartley (2002) supra notes 14, p 9
[327] Sharon Press(1997) , supra notes 17, p 909

There are three rules for a mediation center. The first one is legislation/ statute enacted by appropriate government authority in a country. This law is necessary only for domestic mediation centers and sometimes for enforcement of international mediation agreements. The other one is a rule of procedure for the institution. This is rule about how to use the services of the center. Finally, there is rule for mediation procedures in the center. These procedures include mediation rules that give, unless a legislation provides for, among others, guide lines as to how cases are to be submitted to the center, how mediators are to be accredited and elected, the roles of parties to the dispute, the role of mediator, the role of lawyers and other consultants, etc.

Mediation rules of a center are subject to legislations and the agreement of the parties. The mediation rule of the institute of arbitrators & mediators in Australia, for example, provides under article 3 as:

"These Rules are subject to any law which governs mediation in the place where the mediation held, and to any agreement between the parties in relation to the mediation process."

The existence of a legal frame work that integrates mediation centers in to the court system is also another very crucial precondition. To mention some of the importance of the integration, mediation centers have no power to enforce agreements between parties. So, there should be a legal base for the enforcement of the decision through the court system.[337] In addition, Mediation is a voluntary process. Parties should not lose their legal rights while they are engaging in negotiation. Therefore, there should be legal rule that suspends period of limitation during the mediation period.[338]

Rules are also important in determining the competence/jurisdiction of the center. Determining the jurisdiction of the center is an important procedural issue. Who should decide in case a party challenged the jurisdiction of the center after submitting the case to the center consensually? The ICSID convention article 32(2) provided that:

"Any objection by a party to the dispute that the dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission, shall be considered

[337] Shelley M. Liberto, J.D. (2007) supra notes 124, p 8
[338] Lukasz Rozdeiczer & Alejandro Alvarez de la Campa, (2006), supra notes 138 p 93

Before institutionalizing mediation in a legal system, there should be a diagnostic phase in which the existence of pre-conditions should be investigated.[328] First of all, we have to know how courts actually work in the legal system.[329] In depth assessment about the problems of the litigation process in the courts, the attitude of the people towards courts, etc. should be made. Once the assessment is made, there should be a detail plan as to how to reduce problems of litigation by institutionalized mediation. [330]It is known that ADRs in general are not supplementary to the court system, they are rather complementary. But, as they are usually private systems, disputing parties should have an incentive to prefer them to court litigation.[331]

The attitude of the general public towards out of court private justice systems should also be examined and appropriate mechanisms to enhance the confidence of the public on such systems should be planned.[332]Is there a perceived need to institutionalized mediation? How can stakeholders like the ministries of justice, lawyers, courts, business persons, chambers, etc. make positive contribution in the establishment of a mediation institution and the mediation processes?, etc should be dealt with in advance. [333]

To institutionalize mediation, the existence of appropriate legal environment is another pre-condition.[334]Questions like, are there adequate legal rules to resolve commercial disputes in the country? How will an institutionalized mediation work in the legal system? etc should be addressed. The legal system of the country should be, at least, one that tolerates the existence of institutionalized ADR mechanisms including mediation in the country.[335] In addition, principles like confidentiality need to be sanctioned by law.[336]Further, there should also be legally sanctioned code of conduct for mediators.

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[328] Lukasz Rozdeiczer & Alejandro Alvarez de la Campa, (2006), supra notes 139, p 7
[329] Ibid , p 7
[330] Ibid, 13, p 7
[331] Ibid, p 9
[332] Ibid, p 7
[333] Ibid
[334] Ibid
[335] Ewa Wojkowska , Doing Justice: How informal justice systems can contribute, United Nations Development Program, Oslo , December 2006, p 13
[336] Brain Dorini, Institutionalizing ADR: wagshal Vs Foster and mediator immunity, Harvard Negotiation law review, Vol 1 1996, p 185

by the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."

The role of lawyers and other consultants in the mediation process is another issue that should be determined. Unless the lawyers has role in the process, they may hamper the performance of mediation in general.[339] On one hand, lawyers have no positive attitude to ADRs in general for fear of reduction of their role in dispute settlement.[340] On the other, there is a fear that they may bring the traditional court room adversarial system to the mediation room if they are allowed to get involved in the mediation process.[341] Therefore, some argue that, it is advisable to restrict the role of lawyers to the pre-mediation stage[342]. The participation of actual parties who have the ultimate power to make decision on the issue on hand (they may be owners of the disputed object or actual beneficiaries of the proceeding) is also required.[343]

The existence of adequate professionals is also another very important pre-condition for institutionalization of mediation. Institutions offering mediation should provide list of professional mediators so that clients may choose from among those in the list. If there are no professionals, appropriate mechanisms, like trainings, should be devised to have them. With that, accreditation and selection of mediators is another issue. For the institutionalization of mediation, there should be guidelines as to the accreditation and selection of mediators like minimum standards of mediation trainings[344]. There are arguments in this regard. Some argue that this should be left to a government organ which should be empowered to determine criteria that a mediator should fulfill and give license.[345] Others, on the other hand, argue that this power should be given to individual centers. Accordingly, the empowerment of a government organ may bring more formalities to mediation which in turn forces it out of its innate

[339] Rolando Anillo-Badia (2010), supra notes 268, page 12
[340] Ibid
[341] Forrest S. Mosten, *Institutionalization of mediation*, Family court review, *vol. 42 no. 2. April 2004*, p 300

[342] Craig R. Smith, Mediation: The Process and the Issues, Industrial Relations Center, Canada, 1998, p 1
[343] id
[344] Forrest S. Mosten, (2004), supra notes 341, p185
[345] Ibid, p 296

characteristics.[346] Internationally, there is international mediation institution (IMI) for accreditation of mediators.[347]

The role of the neutral third party in the mediation process should also be determined. Whether the role of the mediator is facilitative, evaluative or conciliative should be indicated. The role of parties and how they are to engage in the mediation also needs guideline.[348]

The form of the would be mediation center is also another important element in a project to institutionalize mediation. In the world, there are various alternative forms to establish a mediation center. A mediation center can be a standalone independent center or a mediation center hosed by an existing entity.[349] A standalone mediation center can also be governmental, community-based or private. A governmental standalone mediation center can be established by legislation or administrative order or court order.[350] While to establish non-governmental mediation center, obtaining license may suffice.[351]Community-based mediation center usually emphasizes on empowerment of parties and transformation of the society or may follow a social service model which focuses on the personal growth and development of disputants. [352]

The private standalone Mediation centers can be business organization or NGO based on the legal environment of the specific country. It can also be international, regional or domestic. Currently, there are various private ADR centers which are rendering mediation service internationally, regionally and in various domestic jurisdictions.

The major international ADR centers that are rendering mediation services include London Court of International Arbitration(LCIA), International Center for Dispute Settlement which is international division of American Arbitration Association(AAA),[353]the tribunal under International Convention on Settlement of Investment Disputes(ICSID), the Permanent Court of Arbitration (initially established for state stat disputes),[354]International Centre for Dispute

[346] Ibid
[347] Investment Climate Advisory Services of the World Bank Group(2011), supra notes 264, p 23
[348] Ibid, p 23
[349] Shelley M. Liberto, J.D. (2007) supra notes 124, p 8
[350] Alaska Judicial Council(1997) supra notes 251, p 10
[351] Shelley M. Liberto, J.D. (2007) supra notes 124, p 8
[352] Roger E. Hartley (2002) supra notes 14, p 22
[353] Ireland Law Reform commission, (2008) supra notes 42, p 255
[354]Jerome T. Barrett, & Joseph P. Barrett (2004) supra notes 29, p80

Resolution (ICDR) (another branch for American arbitration association), Court of Arbitration for sports, etc.[355]

Most of the centers were designed for commercial disputes and the only institutional frame work designed for investment disputes is the ICSID system. Article 1(2) of the ICSID convention provides that

"The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention."

But, even if they were established for commercial arbitration, most of the international ADR centers also have guide lines for mediation that is being used in both commercial and investment disputes. [356]For example, ICSID, ICC and UNICITRAL have guidelines for conciliation/mediation.[357]

The UNCITRAL model laws have no institutional back up. But, it provides options for ad hoc international ADR mechanisms. ICSID, ICC and UNICITRAL model laws are the three international legal frame works for conducting ADR on investment disputes. [358]Further, the Permanent Court of Arbitration which was initially designed for state-state disputes has produced optional conciliation/mediation rules for investor-state investment dispute settlements.[359]

Regionally, there are ADR centers like the Cairo Regional Center for International Commercial Arbitration and the Center for Commercial Arbitration in the Americans, Kuala Lampur Regional Center for Arbitration. They have facilities and rules on mediation for both investment and commercial disputes.[360]

There are also intergovernmental ADR centers that deliver mediation services like the world Intellectual Property Organization (WIPO) Arbitration and Mediation Centers, the World Trade Organization Dispute Settlement Body(WTO DSB), etc.

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[355] Ireland Law Reform commission, (2008) supra notes 42, p 256
[356] Shelley M. Liberto, J.D. (2007) supra notes 124, p 15
[357] United Nation Conference on Trade and Development (2010), supra notes 24, p xxv
[358] Ibid p 54
[359] United Nation Conference on Trade and Development (20o3), supra notes 111, p 35
[360] United Nation Conference on Trade and Development (2010), supra notes 24, p 60

Mediation center hosted by an existing institution on the other hand may be, for example, mediation center in chambers of commerce, trade associations, profit organizations, court annexed mediation center, etc. These centers, outside the court annexed mediation centers, are, sometimes, referred as free-standing mediation centers as private standalone mediation centers for they have no direct connection with courts.[361]International Court of Arbitration (ICA) which also has mediation facilities is one example of international ADR centers hosted by International Chamber of Commerce (ICC).[362]

Mediation centers can also be associated with court systems. In the modern era, there was a tendency of looking court litigation as *'a natural and obvious dispute resolver.'*[363]But, scholars have learnt the inadequacy of litigation in the court system to resolve the dynamic and increasing disputes as early as the 1970s. In 1997, the Harvard law professor Frank E.A Sander recommended the introduction of various dispute settlement mechanisms with in the court system itself, in addition to litigation.[364] Accordingly, various dispute settlement mechanisms including arbitration, mediation, negotiation, mini-trail, expert determination, etc have been put to use with in court systems in different jurisdictions. [365]

Professor Sandler initially used the phrase 'comprehensive justice center' to describe the new multi-track process with in the court system.[366] Latter, the phrase 'Multi- door Court house' became the formal naming for the process. [367] When different alternative dispute resolution mechanisms were institutionalized with in the court '*as a set of series of processes leading to the resolution of disputes*,' courts became multi-door dispute resolution centers.[368]Unlike the

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[361] Lukasz Rozdeiczer & Alejandro Alvarez de la Campa, (2006), supra notes 139, p22
[362]United Nation Institute for Training and research(2001), supra notes 137, p 6
[363] John Daniel Rooke, the multi-door courthouse is open in Alberta: judicial dispute resolution is institutionalized in the court of queen's bench, A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Laws in Dispute Resolution, Faculty of Law, University of Albert, Edmonton, 2010

[364] Louis Phipps and Cynthia A. Savage, ADR in courts, progress, problems, and possibilities, Penn State Law Review Vol. 108 No. 1, 2003p 327
[365] Kehinde Aina,., The "multi-door" concept in Nigeria: the journey so far, available at www.ainablankson.com and accessed on December 23, 2013, p 3
[366] Ibid p 3
[367] Chief Justice Robert French , Perspectives on Court Annexed Alternative Dispute Resolution, , a paper for Multi-Door Symposium by Law Council of Australia , Canberra, 27 July 2009, p
[368] John Daniel Rooke(2010) supra notes 361, p 12

traditional 'mono-track' process with in a court system, the multi-door court house incorporates litigation and ADR mechanisms with in a court system.[369]

Accordingly, disputants have the chance to choose appropriate dispute settlement mechanisms among different mechanisms with in the court after they file their claim in a court.[370]Parties in a dispute try to match their case with an appropriate dispute resolution mechanism in cooperation with a clerk with in a court registrar.[371]Nowadays, many countries are institutionalizing mediation with in the court either as part of multi-door court house project or independent mediation project.[372]

Court annexed mediation centers may be either 'court connected' or 'court referred'.[373] In court connected centers, mediators are usually to be selected and paid by the court.[374]The center itself is '*authorized and controlled*' by the court.[375]In addition, cases are referred to the center only from the court and the agreement of the parties in the mediation process is to be taken as the decision of the court. [376]

In court referred mediation, cases may be referred to the center either from the court or from outside the court.[377]Like in the case of court connected systems, however, agreements reached are enforced as if they are the decision of the court.[378]These centers, like government owned standalone mediation centers, are blamed for bringing the hand of the government in the private justice system.[379]They, on the other hand, are highly acceptable.

"ADR services, under the control, guidance and supervision of the court would have more authenticity and smooth acceptance. It would ensure the feeling that mediation is complementary and not competitive with the court system. The system will get a positive and willing support

[369] Dr Emilia Onyema, The Multi-door Court House (MDC) Scheme in Nigeria: A Case Study of the Lagos MDC available athttp://eprints.soas.ac.uk/14521/1/Final_Report_on_LMDC_2012_pdfp 1
[370] John Daniel Rook(2010) supra notes 362, p 21
[371] Louis Phipps and Cynthia A. Savage (2003) supra notes 364 p, p 331
[372] Shelley M. Liberto, J.D. (2007) supra notes 124
[373] ADR in civil cases p 48
[374] Judicial Councile of California (1999) supra notes 156 p 54
[375] Investment climate advisor service of World Bank group (2011) supra notes 264, p7
[376] Judicial Councile of California (1999) supra notes 156 , p 54
[377] Roger E. Hartley (2002) supra notes 14, p 24
[378] Investment Climate Advisory Services of the World Bank Group (2011) supra notes 264, p 7

[379] Ibid

from the judges who will accept mediators as an integral part of the system. If reference to mediation is made by the judge to the court annexed mediation services, the mediation process will become more expeditious and harmonized. It will also facilitate the movement of the case between the court and the mediator faster and purposeful. Again, it will facilitate reference of some issues to mediation leaving others for trial in appropriate cases. Court annexed mediation will give a feeling that court's own interest in reducing its caseload to manageable level is furthered by mediation and therefore reference to mediation will be a willing reference. Court annexed mediation will thus provide an additional tool by the same system providing continuity to the process, and above all, the court will remain a central institution for the system. This will also establish a public-private partnership between the court and the community. A popular feeling that the court works hand-in-hand with mediation facility will produce satisfactory and faster settlements."[380]

Different countries have different mediation centers. Most courts in the USA and other jurisdictions have established court annexed mediation centers in order to reduce workloads.[381]In South Africa and Ukraine, there are mediation centers established in the form of NGOs; Independent Mediation Service of South Africa (IMSSA) and Ukraine Mediation Group (UMG) respectively.[382]Finally, there are community based mediation groups in which the community elects mediation boards and the government oversees the process by establishing a national mediation board commission in Sirilanka.[383]Generally, among 140 countries surveyed in 2010, 41% (58 countries) have Free-standing institutions, 25% (35) have Court-annexed mediation and 11 % (15 countries) have Court-referred mediation institutions.[384]

Cases may be submitted to a mediation center either by the will of the parties or by court order. [385]Parties can express their consent either before the conflict, when they enter to the transaction,

[380] Suprem Court of India, supra notes 21, p 24
[381] Ibid, p
[382] Lukasz Rozdeiczer & Alejandro Alvarez de la Campa, (2006), supra notes 139, p 108
[383] Ibid, p 107
[384] Investment climate advisor service of World Bank group (2011) supra notes 264, p11
[385] Ibid, p 2

on which the conflict arises or after the conflict. [386]To formalize the submission, there should be a format by the center to the submission. Submission to a mediation center can also be compulsory by court order or legal prescription. In Egypt for example, all civil cases brought against the government should be sent to mandatory ADR, it may be mediation or arbitration. [387], Cases are also usually referred to court annexed mediation centers by the order of the court.[388]

The internal structure of the mediation center should also be critically considered. Most of the time, mediation centers have four functional divisions. They are, management, administrative, the third party neutrals and advisory board.[389] The management controls the overall work of the center while the administration focuses on the day to day activities of the center. The third party neutrals are menu of list of mediator among which disputants are to choose from. Finally, the advisory board shall give directions about the strategic moves of the center.

Financing the center is also a key issue. The mediation center should secure sustainable funding. At least a budget for three consecutive years should be held before the beginning of a mediation project.[390]

Finally, how to start the mediation program is also another issue that need be decided. Whether to start with pilot programs or to open centers in different places at a time, the location of the centers and the likes are important questions that should be addressed.[391] Should mediation centers be established here and there by any one that needs to establish? For beginners, starting with pilot programs under the shadow of a government institution is recommended.[392]

3.2. The modern mediation process

Mediation centers have primarily two main functions; case intake administrations and process management.[393]In mediation, the process usually begins by the submission of the parties.

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[386] Ibid

[387] Ibid p, 91

[388] Roger E. Hartley (2002) supra notes 14, p 87-8

[389] Investment climate advisor service of World Bank group (2011) supra notes 264, p 18

[390] Ibid, p 29

[391] Lukasz Rozdeiczer & Alejandro Alvarez de la Campa, (2006), supra notes 139, p 62-3

[392], Shelley M. Liberto, J.D. (2007) supra notes 124, p 32

[393] Investment climate advisor service of World Bank group (2011) supra notes 264, p 13

Centers have their own admissibility criteria for cases to be mediated and they also have case referral forms which parties shall fill. Once cases are admitted, the center simply manages the process. Unlike the court system, the centers simply provide facilities like forums, menu of mediators, and rule of procedures. Then parties themselves choose mediator/mediators and the way the mediation continues.

Article 6 of the UNCITRAL Model Law on International Commercial Conciliation (2002) for example provides under the title conduct of conciliation that:

(1) The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted.

(2) Failing agreement on the manner in which the conciliation is to be conducted, conciliator may conduct the conciliation proceedings in such a manner as the conciliator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

(3) In any case, in conducting the proceedings, the conciliator shall seek to maintain 40 fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

After the commencement of the mediation process, there are four main functional stages of mediation; introduction, joint session, separate session and closing.[394]

In the introduction stage, the mediator allows parties to introduce themselves, brief the process, advises parties about the appropriateness of the process and ensure the willingness of parties to the mediation process.[395]At this stage, the mediator tries to "*establish neutrality,... create an awareness and understanding of the process... develop rapport with the parties...gain confidence and trust of the parties...establish an environment that is conducive to constructive negotiations... Motivate the parties for an amicable settlement of the dispute ...(and) establish control over the process.*"[396]

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[394] supreme Court of India, supra notes 21, p 25
[395] Ireland Law Review Commissions (2008) supra notes 42, p 16
[396] supreme Court of India, supra notes 21,p 25

In the opening statement, the mediator, among others, addresses issues like "*Concept and process of mediation, stages of mediation, role of the mediator, role of advocates, role of parties, advantages of mediation and ground rules of mediation.*"[397]

In the joint session, parties are encouraged to narrate their side of the story and communicate with the other party. The mediator, among others, invites parties to narrate their case, explain perspectives, vent emotions and express feelings without interruption or challenge. The mediator should also

"*encourage and promote communication, and effectively manage interruptions and outbursts by parties, may ask questions to elicit additional information when he finds that facts of the case and perspectives have not been clearly identified and understood by all present, summarize the facts, as understood by him, to each of the parties to demonstrate that the mediator has understood the case of both parties by having actively listened to them and Parties may respond to points/positions conveyed by other parties and may, with permission, ask brief questions to the other parties, identify the areas of agreement and disagreement between the parties and the issues to be resolved.*"[398]

The mediator should be in control of the proceedings and must ensure that parties do not 'take over' the session by aggressive behavior, interruptions or any other similar conduct.[399]In the mediation course, the mediator tries to understand the problem, the interest of parties, defining the problem, creating the option, evaluating options then bring the process to conclusion. [400]To that end, there can be written submission by parties, joint and separate sessions, hearing evidence, etc.[401]

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[397] supreme Court of India, supra notes 21,p 26
[398] Ibid p28
[399] Ibid p 24
[400] Ibid p 24
[401] ICSID Convention, Regulations and Rules, Rules of Procedure for Conciliation Proceedings (Conciliation Rules) , ICSID, April 2006, articles 24-28

In the separate session, the mediator further tries to have additional facts, emotional feelings of the parties and their tendency towards the settlement.[402]Both the joint and the separate sessions serve for exploration of facts and emotions. Then, parties try to bargain through negotiation.[403]

Dead-lock in the mediation process called 'Impasse' can occur at any stage of the mediation process.[404]The mediator should use his own creativity to break the dead-lock and proceed forward.

The enforcement of the agreement is another main issue in mediation, especially in international mediation. Article 14 of the UNCITRAL Model Law on International Commercial Conciliation (2002) for example provides under the title conduct of conciliation that:

"If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable ... [the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement]."

Likewise, the European commission directive on mediation urges member states to enforce any mediated agreement in the European Union up on a request from a party.[405]

In some jurisdictions, mediated agreements need to be ratified by courts in order to have effect while in others; mediated agreements are considered as binding contracts between the parties. Therefore, they are treated as contracts are treated in the legal system.[406]

After the mediation is concluded, the mediator still has roles to play.

"The mediator concludes post mediation administrative functions, which may include completing a Mediation Summary Form (appendix G.1), which asks the parties to provide feedback on the mediation process and the mediator. The mediator informs the ADR Center of the outcome of the mediation (after each mediation session, if applicable). In other words, the mediator keeps the ADR Center informed of whether the mediation is continuing or has been finalized. This information is then recorded by the ADR Center in its database management system (appendix

[402] supreme Court of India, supra notes 21, p 32
[403] Investment climate advisor service of World Bank group (2011) supra notes 263, p 16
[404] supreme Court of India, supra notes 21, p 62
[405] Lukasz Rozdeiczer & Alejandro Alvarez de la Campa (2006) supra notes 139, p 63
[406] Investment climate advisor service of World Bank group (2011) supra notes 264, p 18

I). Sometime after the settlement agreement is signed, interviews with the parties should be held (if they have previously agreed) to assess if the settlement agreement has been fulfilled (appendix H.3)" [407]

[407] Investment climate advisor service of World Bank group (2011) supra notes 264, p 26

Chapter Four

4. Modernization and institutionalization of Mediation to Resolve Commercial and Investment Disputes in Ethiopia

4.1. Mechanisms of Resolving Commercial Disputes in Ethiopia

4.1.1. The court system

In Ethiopia, kings and their executive officials used to exercise legislative, judicial and executive powers all together for centuries.[408]Even if institutionally independent judiciary has been declared following the 1931 constitution, practically, the judicial and the executive powers had been exercised together by executive officials until the fall of the emperor.[409] During the era of the military junta, the courts continued to exercise judicial power with various interventions from the government. [410]

In the 1995 constitution, an independent judiciary was declared. The constitution established a federal state structure in which there are federal and state courts. *"Judicial powers, both at the federal and state level are vested in courts."*[411] Accordingly, courts are the principal power holders on any justiciable matter in the country. Commercial disputes are not exceptions. But, which courts have the jurisdiction to adjudicate commercial disputes? The Constitution simply provides that *"supreme federal judicial authority is vested in the federal supreme court"* and states shall establish state Supreme, High and first instance Courts leaving the particular for legislators.[412]

The Federal government issued the controversial[413] Federal Courts Proclamation No. 25/96 in which it determined matters that fall under the jurisdiction of federal courts. According to article 3 of the Proclamation, federal courts shall have jurisdiction over cases arising under the

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[408] National Judicial Institute for the Canadian International Development Agency , Independence, transparency and accountability in the judiciary of Ethiopia, 2008 (unpublished) obtained from Federal Supreme court Information Desk, p 85

[409] Ibid

[410] Ibid

[411] The constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta 1st year, No. 1 1995, article 79(1)

[412] Ibid art 78(2,3)

[413] controversial because there is no constitutional power for the federal parliament to demarcate federal cases and grant powers to federal courts

Constitution, Federal Laws & International Treaties; Parties specified in Federal Laws and Places specified in the Constitution or in Federal Laws. Article 55 of the Constitution, on the other hand, provides that the House of People Representatives has the power to enact laws on inter-state commerce & foreign trade, Commercial code and other Civil laws that the House of the Federation deems necessary to establish and sustain one economic community. Accordingly, in a strict legal language, commercial disputes are under the jurisdiction of federal Courts.

Federal courts Proclamation No. 25/96 has established criminal, civil and labour divisions at First, High and Supreme Court levels. But, federal Courts Re-amendment Proclamation Number 454/2005 left the type of benches at the First Instance and High Courts to the needs of the Courts. Based on this discretion, various divisions/benches have been established in different federal First Instance and High courts. Accordingly, Commercial benches that adjudicate cases under the Commercial Code, benches devoted to Banking and Insurance cases as well as cases involving negotiable instruments have been established.

There have been attempts to improve the capacity of Courts to render accessible, quality, predictable, speedy, etc justice for the Ethiopia society. Among the attempts, the 2005 Comprehensive Justice System Reform Program and the 2008 BPR programs are to be mentioned. These attempts have brought about some improvements in the system. For example, the introduction of commercial benches has brought a significant change in terms of improving the length of time needed for clearing cases.[414]Despite some improvements, the Court system is bound by enormous problems that are contributing for the reduction of the quality of justice to date.

The judiciary in general and Judges in particular, are not free from government intervention. [415] This intervention from the government has been admitted by the study of Comprehensive Justice Reform Program by the Minister of Capacity Building as one of the basic problems of the judicial system in Ethiopia. [416] Presidents of federal Courts, sometimes, establish special

[414] Interview with Ato Enyew Lema, lawyer in federal courts, held on 12 September 2013
[415] Shipi M. Gowok, supra notes 28, p 279
[416] FDR, Ministry of Capacity Building Justice System Reform Program Office (2005) supra notes 408, p 14

benches or refer cases to "pro-government" benches in a way that threatens independence of the judiciary.[417]

Corruption and maladministration is also another problem in the Ethiopian judicial system. Poor working condition of judges and other administrative staffs in the court system has been an incentive for corrupt practices. [418] The government is working to combat corruption. For example, different judges are being assigned to handle a case at different levels, rather than letting a judge see a case from the initial to the end, as a means to combat corruption.[419] "*Despite the efforts of the Government, Ethiopia scored 2.3 out of a score of 10 in the rating of the index for perception on corruption by Transparency International in 2005.*"[420] In 2007, Ethiopia was ranked 137 out of 179 countries for perceived level of corruption.[421] For the prevalence of real and perceived corruption, the society as a whole has little trust on the court system. [422]

Inexperienced and inadequately trained judges, inadequate number of judges, poor working condition, 'debilitating infrastructure' and logistical problems, etc. are also other factors for the poor quality of justice. [423] In Ethiopia, there is no clear judicial career path and serving as a judge is simply becoming as a training ground and opportunity for publicizing oneself for the future career of being an attorney and/or a legal consultant[424]. Poor working condition forces experienced judges to leave courts and engage in private businesses.[425]

Delay is another chronic problem in the Ethiopia legal system in general and Federal Courts in particular. Most cases in the federal Courts are to be adjourned for 15-20 times and take more than a year until they are finally decided.[426] In the 2008 BPR program, the Federal Supreme

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[417] National Judicial Institute for the Canadian International Development Agency(2008) supra notes 407, p 109

[418] FDR, Ministry of Capacity Building Justice System Reform Program Office (2005) supra notes 408 , p 14

[419] National Judicial Institute for the Canadian International Development Agency(2008) supra notes 407, p 109

[420] Teigist Lemma, Review of the Program of Action for the Least Developed Countries for the Decade 2001-2010, Case study on Ethiopia, Addis Ababa, May 2006, p 11

[421] National Judicial Institute for the Canadian International Development Agency(2008) supra notes 407, p 84

[422]ዮዮሴፍአዕምሮ (2012) supra notes 6, p 10

[423] Michelle Guttman, , Ethiopia Legal and Judicial Sector Assessment, The World Bank , 2004, p 20

[424] Ibid, p 15

[425] Ibid

[426] Ibid p 12

Court proposed to reduce the life span of cases in federal Courts. To reduce the life span, the BPR study recommended the observation of the civil procedure code concerning cases that should pass through regular, summery and accelerated procedures.[427]Cases have also been classified as those which should follow expedited track, standard track and complex track based on their complexity.[428] Cases that should follow expedited track usually are less complex and needs little effort to decide. Cases that should follow the standard track are more complex than those which follow expedited track but, less complexes than the complex track. Commercial and investment disputes are identified as they are among cases that should follow the complex track. The study also proposed to reduce the time span of a case as follows.

Proceeding	Previous experience	the Would be reform			
First instance courts	9. 8 months	Regular proceedings	Summery proceedings	Accelerated proceedings	Cassation proceedings
High courts	10. 94 months	4 months	2 months	2 months	2 months
Supreme court	8. 7 months				

Table 1. The proposed time needed to clear cases before federal courts by the 2001EC BPR study

Source: ፌዴራል ጠቅላይ ፍርድ ቤት፣የፍትህብሔር አድሱ የስራሂደት፣መጋት 2001

In the pre-2005 trend, a case takes 29.44 months for it to go from First Instance to Cassation decision.[429]Despite the proposal, delay continues to be a major problem.[430]In 2003 EC, 65.95%, 27.28%, 58.46% of cases before Federal Supreme, High and First Instance Courts, respectively,

[427]ፌዴራል ጠቅላይ ፍርድ ቤት፣ የፍትህብሔር አድሱ የስራ ሂደት፣መጋት 2001,(unpublished) obtained from Federal supreme court Information Desk p 10
[428]Ibid

[429] Ibid
[430] Ibid p 13

took more than 6 months.[431] Likewise, in 2005EC, 57.8%, 49.69% and 68.44% of cases before Federal Supreme, High and First Instance courts took more than 6 months[432].

There are many reasons for the delay of cases before federal courts. One of the causes is the disproportion between the number of cases and judges. Between 2004 and 2007, for example, the number of cases decided increase from 459,486 to 998720 (117%) while the number of judges increase only from 2400 to 2729(11.3%) in the country as a whole.[433]According to the 2005EC report of the Federal Supreme Court on the overall performance of Federal Courts, a judge in Federal Courts, on average, has been able to handle73.44 cases per month and 5887.56 cases from late September to late June.[434]

Finally, Predictability of decisions of courts is one of the known criteria for measurement of court performance in a legal system. Decisions rendered by Ethiopian Federal Courts are not also usually harmonized and predictable.[435]

4.1.2. ADR mechanisms

The term ADR has never been explained under federal or regional legislations in Ethiopia. But, the Federal Supreme Court in its decision has explained that ADR represents alternative dispute settlement mechanisms. In a case between Ato Mukemil Mohamed and Ato Miftah Khedir(file number 38794/2001 Ec), the cassation bench asserted that among those recognized as alternative dispute settlement mechanisms are arbitration, conciliation and negotiation.[436]

In the academic arena, 'ADR' is usually explained as 'alternative dispute resolution mechanism' to the extent of naming courses in ADR as 'Alternative dispute settlement mechanisms'. Accordingly, there is no controversy in explaining ADR beyond some academic writings on

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[431]የፌደራልፍርድቤቶችየ2003 ዕቅድ አፈጻጸም ሪፖርት፣ ፌደራል ጠቅላይ ፍርድ ቤት ሐምሌ 2003 ፣አዲስ አባባ፣ p 12

[432]የፌዴራልፍርድቤቶችየ2005 በጀት ዓመት የአስራ ሁለት ወራት እቅድ አፈጻጸምሪፖርት፣ፌደራልጠቅላይፍርድቤት፣ሰኔ 2005፣ አዲስአበባ, P18

[433] National Judicial Institute for the Canadian International Development Agency(2008) supra notes 407, p 116

[434]የፌዴራልፍርድቤቶችየ2005 በጀት ዓመት የአስራ ሁለት ወራት እቅድ አፈጻጸም ሪፖርት፣ ፌደራል ጠቅላይ ፍርድ ቤት፣ሰኔ 2005፣ አዲስአበባ፣ p18

[435]ዮሴፍአዕምሮ (2012) supra notes 6, p 15

[436]የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ውሣኔዎች ቅጽ - 9፣ህዳር 2003 ዓ.ም፣አዲስ አበባ

foreign experiences. Therefore, under the current Ethiopian legal terminology, 'ADR' simply stands for 'alternative dispute settlement mechanisms'.

a. Informal ADR

Alternative dispute settlement mechanisms have been in use in Ethiopia for long period of time. They have been informal and traditional mechanisms that pass from generations to generation orally. They are usually locally adopted and vary from society to society across the country.

As it was the case in other parts of the world, ADR in Ethiopia began outside the authority of the state by members of the society.[437] Different societies have their own traditional ADR mechanisms by which they resolve disputes. In the northern part of the country, it is common that elders and clergy men, by their own initiation or by the initiation of one of the parties in dispute, try to resolve disputes through 'shimgilina,' usually interpreted as arbitration. But, strictly speaking, the term 'shimgilina' is a general term representing concepts like the modern arbitration, mediation and conciliation. In'shimgilina,' the role of third parties called 'shimagile' may, some times,be like the role of mediator/conciliator or like arbitrators. The traditional institution of 'Jaarsummaa' in the Oromo community and the 'Adar' tradition in Afar are also traditional informal ADR mechanisms that deserve to be mentioned.[438]

Traditional/ informal mediation in Ethiopia has been used to settle any dispute, be it criminal or civil. Even if there is no comprehensive empirical research and data collected on the issue, most disputes in the country, to date, are settled through informal ADR mechanisms. Commercial and investment disputes are not exceptions. Even in the developed world, only 5% of disputes are taken to court.[439]An interviewee in Merkato (the largest market place in Addis Ababa, Ethiopia) replied that:

"There are enormous commercial disputes in Merkato on daily bases. Disputes in relation to retail and whole selling, Equb contributions, rent, contribution and dividends in business*

[437] Roger E. Hartley (2002) supra notes 14, p 25
[438].Jetu Edossa, Mediating criminal matters in Ethiopian criminal justice system: the prospect of restorative justice system. Oromia Law Journal Vol.1 No. 1, 2012 p 90
[439] Tihut Asfaw, Gender relation in local level Dispute settlement in Ethiopia's Zeghie Pensula, University of British Colombia Human ecology Review Vol. 17 No. 2, 2010, p 160

organizations, etc. Had these all gone to court, it would have been impossible for courts in Ethiopia to entertain even disputes arising in one day in their one year session. But, most cases are being handled here in Merkato through negotiation, mediation and sometimes Arbitration (ባህላዊሽምግልና).The focus of the disputants is not on their legal rights. But, what and how they can work for tomorrow."[440] (Translation myself)

In Ethiopia, informal systems and formal systems of dispute settlement mechanisms are not connected.[441] Both operate in their own ways and sphere of application.

b. Modern ADR mechanisms

Traditional ADR mechanisms have been in use in Ethiopia for a long period of time to resolve all types of disputes. Even if our laws provided for modern ADR mechanisms more than half a century ago, modern ADR mechanisms are, however; little known and rarely used in the country.[442] The 2001EC BPR study by the Federal Supreme Court concluded that ADR has not been in use in the civil justice system business process in Ethiopian courts for there was an assumption that people go to court for they are unable to resolve the dispute through ADR mechanism and courts do not assume that ADR is part of their business.[443]Under the Ethiopian legal system, compromise, conciliation and arbitration are recognized as alternative dispute settlement mechanisms.

Modern Arbitration is the widely used dispute settlement mechanism relative to other ADR mechanisms in Ethiopia.[444] It has also relatively detail legal provisions in the civil code. Under Ethiopian law, arbitration is usually a consensual process, open for any dispute, is needed to follow regular civil procedures and the award is subject to revision under the cassation power of the federal supreme court.

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[440] Interview with a merchant in Merkato held on 19 march 2013

[441] Dr. Julie Macfarlane, Working towards restorative justice in Ethiopia: Integrating traditional conflict resolution systems with the formal legal system, Cardozo J. of Conflict Resolution Vol. 8: 487, 2007, p 501

[442] ፌዴራል ጠቅላይ ፍርድ ቤት፣የፍትህብሔር አዲሱ የስራሂደት፣መጋት 2001, p 22

[443] Ibid

[444] Arbitration is being used in the AACCSA AI, was used in the former Ethiopian Arbitration and Conciliation center and even in ECX more than any other modern ADR mechanism

Arbitration is usually a consensual process in Ethiopia. It usually begins by an agreement to submit a dispute to arbitration by parties in a dispute.

3325. Definition.

(1) The arbitral submission is the contract whereby the parties to a dispute entrust its solution to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the principles of law.

Even if arbitration is a voluntary process in principle, article 3327 of the Civil Code and 315(1) of the Civil Procedure Code indicates the possibility of compulsory arbitration. There are also some other legislations that provide or compulsory arbitration. For example, arbitration is compulsory for disputes arising from transactions in Ethiopian Commodity Exchange[445]and disputes arising due to reasons related to the water development permit between the Ministry of Water Resources and the permit holder unless they can be resolved amicably.[446]

Unlike other jurisdictions, Arbitration under Ethiopian laws is open for any dispute; be it commercial, family, etc. There is no law in the Civil Code provisions concerning arbitration that restricts arbitration to certain types of disputes. Under article 315(2) of the civil procedure code, administrative contracts are excluded from being submitted to arbitration. This rule is, however, being challenged. For one thing, there is argument that this matter should have been regulated in the substantive law rather than the procedure. For the other, practically, they have been subject of arbitration.[447]

Another important characteristic of arbitration in Ethiopia that deserves mentioning is that arbitration should be in accordance with principles of law and should proceed in accordance with the provisions of the civil procedure code.

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[445]Rules of the Ethiopia commodity exchange, Rev. No. 5/2010, article 16.1.3

[446]Ethiopian Water Resources Management regulation Council of Ministers Regulation No. 115/2005, Negarit Gazeta 11th year No 27, article 36

[447] Zekarias Keneaa, Arbitrability in Ethiopia : posing the problem, Journal of Ethopian Law, Vol.17 , 1994

3345. - Reference to Civil Procedure Code.

(1) The procedure to be followed by the arbitration tribunal shall be as prescribed by the Code of civil procedure.

Article 317 of the Civil Procedure Code, likewise, provides:

The procedure before an arbitration tribunal, including family arbitration, shall, as near as may be, be the same as in the civil court.

But, arbitration proceedings need not proceed strictly in accordance with the provisions of the Civil Procedure Code. Rather, arbitration should be more flexible than the relatively rigid court proceeding. Under file number 38794, in a case between Ato Mukemil Mohamed and Ato Mifetahe Kedir, the Cassation Division of the Federal Supreme Court explained that arbitration need not strictly follow the regular civil procedure law and legal rules. It rather should be flexible.[448]

Finally, the Federal Supreme Court has cassation power over the decision of arbitration tribunals in Ethiopia. In principle, in Ethiopia, like in any other jurisdiction, the decision of an arbitration tribunal may be final and binding based on the consent of the parties. The Federal Supreme Court Cassation Division, in its latest decisions, asserted that it has jurisdiction over any final award made in Ethiopia even if Parties agree that the award can be final so long as the award suffers from substantial error of law. In the case between National Mineral Corporation PLC and Dan trading PLC, file no. 42239, the Cassation Bench explained that the purpose of power of cassation in a country is to ensure uniform interpretation of laws and any decision involving error of law should not stay valid. Therefore, the cassation division should have power over any final award made in Ethiopia.[449]

Some legally established institutions in Ethiopia are empowered to give arbitration service. The Ethiopian Commodity Exchange (ECX) and Chambers of Commerce and Sectorial Associations are empowered to resolve disputes among their members through arbitration. Under article 6(7) of ECX Establishment Proclamation Number 550/ 2005, providing mechanisms for dispute

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[448] የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ውሣኔዎች ቅጽ - 9፣ህዳር 2003 ዓ.ም፣አዲስ አበባ

[449] የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ውሣኔዎች ቅጽ - 10፣ህዳር 2003 ዓ.ም፣አዲስ አበባ

settlement through arbitration is indicated as one of the purposes of the Exchange. Likewise, article 5(6), 15(3), 19(3), 27(1e), 27(2e), 27(3d) of Proclamation Number 341/2003 indicate that Chambers of Commerce and Sectorial Associations at various levels may provide mechanisms of dispute settlement through arbitration for their members if the parties in dispute so agree.

There are also some governmental organizations which are empowered by law to resolve their disputes with their respective customers through arbitration. The Privatization of Public Enterprises Proclamation Number 146/98 provides under article 15 that the Privatization Agency and the investor can agree to submit their case for arbitration. The Cooperative Society's Proclamation Number 147/98, on the other hand, dictates under articles 46-49 compulsory arbitration for disputes:

1) *Members or former members and members and members or representatives of former members or persons claiming in the name of deceased members; or*
2) *Members, former members or members or representatives of former members or heirs of deceased members and any officer, representative of the management committee or employee of the society; or*
3) *The society or the management committee and any former management committee, any officer, agent or employee, or any former officer, agent or employee or the nominee heirs or representatives or representatives of deceased former members or employees; or*
4) *The society and any other society.*

Finally, regulation number 115/2005 under article 36 empowers the Ministry of Water Resources and its delegates to submit to arbitration in case there is a dispute between it and permit holders.

4.2. Mechanisms of resolving Investment disputes in Ethiopia

Investment disputes that can arise in Ethiopia can be divided in to two, domestic investment disputes and international investment disputes. Domestic investment disputes are disputes between domestic investors and the government of Ethiopia. These disputes are like any other dispute. They are governed by the Commercial Code, Investment Proclamation and other

relevant procedural and substantive laws. There are also international investment disputes in which foreign investors may be parties.

4.2.1. Resolution of domestic investment disputes

There are three recognized mechanisms to resolve domestic investment disputes in Ethiopia. They are administrative forums with in the Ethiopian Investment Agency, Regular Courts and ADR mechanisms.

There are administrative forums with in the Ethiopian Investment Agency for resolving investment disputes, be it domestic or international. According to article 32 of Investment Proclamation Number 769/2012, investors have the right to lodge complaint concerning their investment to appropriate organ and to appeal to the Investment Board or to a regional investment bureau. According to article 2(16) of the Proclamation, the appropriate organ can be the Agency or executive organs of a region empowered to issue investment permits.

Courts are other alternative mechanisms to resolve investment disputes in Ethiopia. Domestic investment disputes, like any other disputes are subject to the jurisdiction of domestic courts. The latest proclamation number 769/2012 has no provision regarding dispute settlement. There is also no special investment courts or investment benches with in Federal Courts. The BPR study simply states investment disputes as those requiring complex procedures.[450]Thus, like any other dispute, investment disputes are subject to the jurisdictions of courts.

In strict legal language, investment disputes are under the jurisdiction of Federal Courts. A rough reading of the latest Investment Proclamation number 769/2012 which is enacted by the House of People Representatives reveals that both regional and federal governments should administer investment according to the proclamation. Article 3 of Federal Courts Establishment Proclamation Number 25/96, on the other hand, dictates that any dispute under the Investment Proclamation, which is a federal law, should be under the jurisdiction of Federal Courts. Therefore, domestic investment disputes are under the jurisdiction of Federal Courts. In the

[450]ፌዴራል ጠቅላይ ፍርድ ቤት፣የፍትህብሔር አዲሱ የስራሂደት፣መጋት 2001, p 22

Federal Courts, there is no special bench devoted for investment disputes and they are entertained as any commercial disputes.[451]

ADR mechanisms in general are also other means for the resolution of domestic investment disputes. As it has been discussed, ADR mechanisms under Ethiopian laws are open for any civil disputes including investment disputes. Therefore, domestic investment disputes can be resolved using arbitration, mediation/conciliation or any other compromise agreement so long as they are done in accordance with the law.

4.2.2. Resolving international investment disputes

International investment disputes involve foreign elements. They can be either investor-state or state-state disputes to which the Ethiopian government is a party. The main body of laws that governs these disputes to which Ethiopia is a party is bilateral investment treaties (BITs) which Ethiopia has signed with various countries. So far, Ethiopia has signed BITs with 30 states from all over the world. In all bilateral investment treaties, dispute settlement provisions for both investor-state and state-state disputes are provided.

In all the bilateral investment treaties to which Ethiopia is a party, state- state disputes in relation to 'application and interpretation of the treaty' should first be resolved amicably. Most BITs simply provide that the dispute should be resolved amicably through diplomatic channels. The BIT between Ethiopia and Belgian-Luxembourg, for example, provides under Article 12(1) that:

> *Any dispute relating to the interpretation or application of this Agreement shall be settled as far as possible through diplomatic channels.*

Some BITs like Ethio-Russia BIT, BIT with Swiss Federation, etc also provide that disputes shall be resolved through diplomatic channels by consultation and negotiation. In addition to negotiation and consultation, some BITs like the BIT with Israel also provide that the dispute can

[451] Interview with Ato Sintayehu Zeleqe, a judge in Commercial Bench at Lideta First Instance Court, held on July11, 2013, at Lideta First Instance Court Commercial bench Court Room

be referred to joint commission to be established by the two states or conciliation. Article 9(1)of the BIT with Israel states that:

"Disputes between the Contracting Parties concerning the interpretation or application of this Agreement, should be settled through the diplomatic channel, which may include, if both Contracting Parties so desire, referral to a Bilateral Commission composed of representatives of both Contracting Parties or to conciliation.'

All BITs Ethiopia has signed except the BIT with the republic of South Africa provides ad hoc-arbitration as an alternative mechanism of dispute settlement in case amicable settlement fails. Even in any dispute with South Africa, ad hoc arbitration can be used if both parties agree for ADR mechanisms can be relied any time by any separate agreement.

The way disputes between the home state and the host state are to be resolved in front of ad hoc arbitration tribunals is almost similar in all BITs. The tribunal is to be established by the parties. In case one of the parties refuses to appoint an arbitrator, in the majority of the BITs, the president of ICJ, or his vice or the most senior judge of the court shall appoint.

Article VIII(2-4) of the Ethio-Turkey BIT, for example, provides that

2) Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator, who is a national of a third state, as Chairman. In the event, either Party fails to appoint an arbitrator within the specified time; the other party may request the President of the International Court of Justice to make the appointment.

3)If both arbitrators cannot reach an agreement about the choice of the chairman within two months after their appointments, the Chairman shall be appointed upon the request of either Party by the President of the International Court of Justice.

4)If, in the cases specified under paragraphs (2) and (3) of this Article, the president of the International Court of Justice is prevented from carrying out the said function or if he is a national of either Party, the appointment shall be made by the Vice-President, and if the Vice-

President is prevented from carrying out the said function or if he is a national of either Party, the appointment shall be made by the most senior member of the Court who is not a national of either party.

The BIT with Israel gives this power to the officials of the Permanent Court of Arbitration.[452]BITs with Iran, Sudan and Yemen, on the other hand, have restricted the nationality of the chairman of the tribunal to be from a country with which both countries have friendly relation. In all the BITs to which Ethiopia is a party, the tribunals shall determine their own procedures and apply general principles of international law as well as the BIT. In addition, the Ethio-Netherland BIT provides under article 12 that cases can be decided ex aequo et bono if parties agree. Finally, the award shall be final and binding.

The main type of investment dispute in the current world experience is the dispute between investors and the host state of the investment.[453]In all BITs Ethiopia has signed, relatively detail provisions governing investor-state disputes are provided except the one with the USA which has no provision at all. Amicable mechanisms, ad hoc and institutional arbitrations, mediation and National Courts are the main mechanisms to resolve such disputes.

Like in the case of state-state disputes, investor state disputes in all BITs are first to be resolved amicably. Some of the BITs have clearly provided that disputes should be resolved amicably through negotiation and consultation. But, it is not clear whether the term 'amicable' includes conciliation/mediation. None of the BITs provides conciliation/mediation as amicable means. Rather, some of the BITs like the BIT with India provide conciliation as an alternative in case amicable settlement fails.[454]From the international experience, however; the term includes mediation and conciliation.[455]In addition, conceptually, the term 'amicable' represents

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[452] Agreement between the government 0f the Federal Democratic Republic of Ethiopia and the Government of the State of Israel for the reciprocal promotion and protection of investments(26 of November 2003), article 9(3)

[453] Taida Begic (2005) supra notes 103, p 1

[454] Agreement between the Federal Democratic Republic of Ethiopia and the Republic of India for the reciprocal promotion and protection of investments (5th of June 2007), article 9(2b)

[455] United Nation Conference on Trade and Development(2007) supra notes 8, p 120

mechanisms in which the parties can agree in an extra-legal way. Therefore, mediation/conciliation can be used as a means to resolve disputes amicably.

In case amicable dispute settlement mechanisms fail, BITs have provided three alternative mechanisms to be relied on based on the choice of the investor; national courts, institutional arbitration/conciliation and ad hoc arbitration tribunals.

A dispute between a foreign investor and the Ethiopian state that fails to be resolved amicably may be submitted to other binding mechanisms, usually arbitration by the initiation of the foreign investor. This begs the question about whether states can bring arbitral action against the investor or only the investor has the right.

BITs in general and BITs Ethiopia has signed with other countries seems to be protecting investors against possible misdeeds of host states. Therefore, Most of the BITs provide that the investor can submit the case to binding mechanisms in case amicable resolution fails. The BIT, with France, for example provides under article 9 paragraph2 that:
"If the dispute has not been settled within a period of six months from the date either Party to the dispute requested amicable settlement, the dispute shall ***at the request of the national or the company concerned be submitted to…*** *"(emphasis added)*

In some other BITs, it is simply provided that the dispute shall be submitted to arbitration tribunals. The BIT with Sweden, for example, provides under article 8(2) that:
"if any such dispute cannot be settled within six months following the date on which the dispute has been raised by the investor through written notification by the Contracting Party, each Contracting Party hereby consents to ***the submission of the dispute,*** *… " (emphasis added).*

Finally, some of the other BITs expressly provide that either party to the dispute can submit the case to agreed forums. The BIT with China under article (9 2.), for example, provides that:
"If the dispute cannot be settled through negotiations within six months, ***either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party*** *accepting the investment."(Emphasis added)*

It may seem immaterial whether a host state can submit a dispute to binding mechanisms or not. For one thing, the host state can take legal action against the investor in case the investor fails to discharge its obligation in the territory of the latter. For another, it can be argued that it is inherent to the principle of justice to grant the right to submit cases to binding mechanisms for both parties. However, Tribunals may strictly follow provisions in the BITs and the domestic legal action to be taken by the host state against the investor for any breach of treaty provisions may constitute a breach of the BIT, by its own. Accordingly, it is better to expressly provide for the possibility of submission of the dispute to binding mechanisms by both parties.

Some of the BITs provide that investment disputes may be submitted to Ethiopian Courts if the investor wishes. The appropriate Courts that have jurisdiction over international investment disputes are Federal Courts. According to article 3 of the Federal Courts Establishment Proclamation Number 25/96, Federal Courts shall have jurisdiction over cases arising under international treaties. In addition, article 5(f) of Federal Courts Proclamation No. 25/96 provides that cases involving foreign nationals shall fall under the jurisdiction of Federal Courts.

But, under the various BITs, Courts may have jurisdiction if and only if the foreign investor willingly submits. In addition, in most BITs like the BIT with Finland, the submission of the investor to national courts does not prohibit the investor to rely on other mechanisms like arbitration so long as it is made before the court decides. Further, in the Ethio-German BIT, the right to ignore court proceedings and bring claims before arbitration tribunals is recognized only for German investors against the Ethiopian state. [456]Unlike most BITs, the BITs with Libya and Tunisia have expressly prohibited the investor from relying on arbitration once s/he has submitted to the jurisdiction of national courts.[457]

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[456] Treaty between the Federal Democratic Republic of Ethiopia and the Federal Republic of Germany concerning the encouragement and reciprocal protection of investment(19 January 2004), Article 11(3)
[457] Agreement between the government of the Federal Democratic Republic of Ethiopia and the Great Socialist People's Libyan Arab Jamahiriya concerning the encouragement and reciprocal protection of investments(27 January 2004), article 9(3), Agreement between the government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Tunisia for the reciprocal promotion and protection of investments(14th of December 2000), article 7(3)

Another alternative for an investor is institutional ADR mechanisms, particularly conciliation and arbitration. Conciliation as a means to resolve investor state disputes is mentioned in few BITs to which Ethiopia is a party like BITs with Israel, Sweden and India. While BIT with Israel simply provides that the dispute may be resolved "by conciliation", [458]The BIT with India clarifies that the dispute may be submitted to *"an International Conciliation under the Conciliation Rules of the United Nations Commission on International Trade law (UNCITRAL)."*[459] The BIT with Sweden, on the other hand, provides under article 8(2iii) that *"if the Parties to such a dispute have different opinions as to whether conciliation or arbitration is the more appropriate method of settlement, the investor shall have the right to choose."*

Arbitration is the usual and final alternative mechanism for investors to rely on in order to resolve their dispute with the states. Even if, almost all of the BITs have similar provisions concerning arbitration clauses, there are some differences concerning the nature of disputes that may be submitted to arbitration, forums, as to applicable laws and enforcement procedures.

In almost all of the BITs, all investment disputes may be submitted to one of arbitration tribunals that are agreed in the treaty. Article 8(1&2) of the BIT between Ethiopia and the government of the kingdom of Sweden, for example provides

(1) Any dispute concerning an investment between investors of one Contracting Party and the other Contracting Party shall, if possible, be settled amicably.

(2) If any such dispute cannot be settled within six months following the date on which the dispute has been raised by the investor through written notification by the Contracting Party, each Contracting Party hereby consents to the submission of the dispute, at the investor's choice, for resolution by international arbitration to one of the following fora without prejudice to the investor's rights to submit an investment dispute to a competent court of the Contracting Party alternatively:

[458] BIT with Israel article 8(2b)
[459] BIT with India article 9(2b)

The BIT with the Great Socialist Republic of Libya has took a different approach. The BIT provides amicable settlement and National courts as the only means to resolve any investment dispute while reserving ad hoc arbitration for claims for compensation in case of expropriation. Article 9(1,2,3) of the BIT provides that:

1) *Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.*

> 1) *If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to competent court of the Contracting Party accepting the investment.*
>
> 2) *If a dispute involving the amount of compensation for expropriations cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc Arbitral Tribunal. The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in the Paragraph 2 of this Article*

In most of the BITs, the usual alternative arbitration forums are ICSID tribunal and ad hoc tribunals that may be instituted either under the Rule of UNCITRAL or otherwise. The BIT with the Kingdom of Spain, for example provides under article 11(2)

2. *If the disputes referred to in paragraph (1) of this Article cannot be thus settled amicably within six months from the date of the written notification, the investor shall be entitled to submit, at his choice, for resolution to:*

a) The competent court of the Contracting Party in whose territory the investment was made; or

b) An ad hoc tribunal of arbitration established under the Arbitration Rules of the United Nations Commission on International Trade law (UNCITRAL); or

a. The International Center for Settlement of Investment Disputes (ICSID) set up by the "Convention on Settlement of Investment Disputes between States and Nationals of other States", opened for signature at Washington on 18th March 1965, in case both Contracting Parties become members of this Convention. If a Contracting Party which is party in the dispute has not become a contracting State of the Convention mentioned above, the dispute shall be dealt with pursuant to the Rules of the Additional Facility for the Administration of Conciliation, Arbitration and Fact- Finding proceeding of the ICSID.

Few BITs like the BIT with Belgian Luxemburg provide for the ICC tribunal, London Court of International Arbitration and the Arbitration Institution of Stockholm in addition to ICSID Tribunal and ad hoc tribunals.[460]In addition, some others like the BIT with Kuwait provide that the dispute may be submitted to any mutually agreed up on institution.[461]Furthermore, the BIT with the Islamic republic of Iran provides domestic arbitration tribunals in the host state as an alternative.

Another issue in the bilateral investment treaties is the issue of applicable procedural and substantive laws. In case the forum is an already existing institution or an ad hoc tribunal is agreed to be under the UNCITRA rules, there shall be no problem concerning applicable procedural rules. The institutions have default rules for applicable procedural rules if parties fail to agree. If the tribunal is an ad hoc tribunal outside of the UNCITRAL rules, either parties have to agree or the tribunal shall decide on its rule of procedures.[462]

[460] Agreement between the Federal Democratic Republic of Ethiopia and the Belgian-Luxembourg economic union on the reciprocal promotion and protection of investments(26th of October 2006), article 11

[461] the agreement between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the encouragement and reciprocal protection of investment (14,, September 1996), article 9(3c)

[462] Agreement between the government of the Federal Democratic Republic of Ethiopia and the government of the People's Republic of China concerning the encouragement and reciprocal protection of investments(1998)

The issue of applicable substantive law has been also addressed in almost all BITs to which Ethiopia is a party. There are two approaches. One approach is that the BIT and general principle of international law shall apply. The other is that the BIT, general principles of international law and domestic law of the host state, usually including its conflict of laws rules, shall apply.[463] But, in Ethiopia, there are no conflict of laws rules. Then, it is likely that the substantive law of Ethiopia shall apply. In addition, what if there is a conflict between general principles of international law and the domestic law that is applicable? Which one should be override? Who is to determine general principle of international law? In international disputes, principles of international law are usually taken as binding on any party and are usually favored. Accordingly, general principles of international law are seemingly to be favored. The power to determine general principles of international law is also vested on tribunals after hearing parties in the dispute on the issue.

Finally, enforcement of arbitral awards is an issue in all of the BITs. Under the BITs Ethiopia has signed with different countries, there are two approaches. Some BITs provided that the arbitration should be held in a country which is a party to the New York convention.[464] Others simply provide that the award shall be enforced in accordance with the laws of the host state. The BIT with the republic of Tunisia under article 7(5), for example, provides that "the *arbitral award shall be final and binding for the parties to the dispute and shall be executed according to national laws."*

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[463] Bit with Libya article 9

[464] BIT with Kuwait article 9(6b)

4.3. Mediation in Ethiopia

4.3.1. Mediation in general

Traditional and informal mediation is not uncommon in Ethiopia. Negotiating among disputing parties is common phenomenon in the day today activities across the country. But, modern ADRs in general and Mediation in particular have not been given significance consideration in Ethiopia.[465]Even if it is difficult to say that modern mediation is alien to the formal civil justice system in Ethiopia, it is very rare and recent.

The Fetha-Negest encouraged amicable dispute settlement.

"Under the Fetha -Negast, disputes between individuals or communities were encouraged to be settled amicably. This process usually entailed the committee of elders-Shimagelle - or people appointed on ad-hoc basis to settle particular disputes that have arisen either in matrimonial case or between communities."[466]

But, there was no specific reference to mediation as mechanism. The first legal recognition to ADR mechanisms, especially Arbitration was given by General Notice No. 40/1947 when the Chamber of Commerce of Addis Ababa was empowered to arbitrate disputes between its members. [467]Still, there was no mentioning of mediation.

When the 1960 Civil Code provided provisions for conciliation and Arbitral submissions, it remained short of mentioning mediation by name. Likewise, cooperative societies proclamation number 147/98 prescribes mandatory conciliation, not mediation, before a dispute is submitted for arbitration.

Article 46 conciliation

"The disputes provided under Article 49 of this Proclamation shall be heard by a third party appointed by the disputing parties before they are referred to the arbitrators

In addition, the Water Resource Proclamation Number 197/2000 calls for amicable settlement of disputes through negotiation without any indication of mediation. Further, Ethiopian water

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[465] Shipi M. Gowok , supra notes 28, p 265
[466] Ibid
[467] Yohans W/ Giorgis(2012) supra notes 267, p78

Resources Management Council of Ministers Regulation No. 115/2005 under article **36** provides that disputes between the supervisory board and law full right holder should be tried amicably before they are submitted to arbitration. In summary, to the knowledge of the writer, there is no term 'mediation' under Ethiopian legal system except to certain explanations with in Supreme Court cassation bench decisions[468] and a BPR study document that calls for mandatory mediation programs in the civil justice system according to which Court Annexed Mediation Centers have been established. [469]

Even if the Civil Code does not have provisions regarding mediation, it has a section on conciliation. The provision on conciliation neither defines what conciliation is nor provides sufficient provision governing conciliation. However, from the reading of articles 3318(1) 3320(2), the third party in conciliation may propose a settlement that parties may accept or reject based on their free will. Accordingly, conciliation is a process in which disputing parties empower a third party to bring them together for negotiation among themselves and propose a settlement, if possible.

3318. - Appointment of conciliator.

(1) The parties may entrust a third party with the mission of bringing them together and, if possible, negotiating a settlement between them.

3320. Duty of conciliator.

(2) The parties shall not be bound by the terms of the compromise drawn up by the conciliator unless they have expressly undertaken in writing to confirm them.

For those who accept the conceptual similarity between conciliation and mediation, the one that is provided in the Civil Code can be taken as a 'conciliative mediation' for the neutral third party may propose non-binding resolution. With the recent history of modern mediation and low level of societal awareness about it in Ethiopia, increasing the role of the mediator, who is supposed to be professional, to have conciliative role more than facilitative or advisory role can contribute for the efficiency of mediation.

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[468] Example In a case between Ato Mukemil Mohamed and Ato Miftah Khedir(file number 38794/2001 Ec),የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ውሣኔዎች ቅጽ 10፣ህዳር 2003 ዓ.ም፣ አዲስ አበባ

[469] ፌዴራል ጠቅላይ ፍርድ ቤት፣ የፍትሀብሔር አዲሱ ስራሂደት፣መጋት 2001

According to Article 3319, parties in the dispute have the obligation to *"provide the conciliator with all the information that are necessary for the performance of his duties"* and should *"refrain from any act that would make the conciliator's task more difficult or impossible."* What kind of obligation is this? What if parties fail to discharge this obligation? Is it a requirement of good faith in conciliation or merely moral obligation? Is not conciliation a voluntary process? The writer views the provision as good faith requirement while engaging in conciliation. If one party sustains harm due to the failure of the other party to discharge his obligations, it should be taken as a fault under the extra contractual provisions of the civil code. If not, we are encouraging fraud.

The conciliator, on the other hand, has to draw the compromise agreement after hearing both parties in the dispute.

Art. 3320. - Duties of conciliator.

(1) *Before expressing his findings, the conciliator shall give the parties an opportunity of fully stating their views.*

(2) He shall draw up the terms of a compromise or, if none can be reached, a memorandum of non-conciliation.

The conciliator shall strive to grasp the issue in the dispute and draw terms of possible agreement after hearing both parties. The terms of the agreement drawn by the third party may also be binding if parties have agreed in advance to that effect.[470] If parties agree, they shall sign a compromise agreement.

A compromise agreement is defined under article 3307 of the civil code as:

"A compromise is a contract whereby the parties, through mutual concessions, terminate an existing dispute or prevent a dispute arising in the future."

First of all, a compromise agreement is **a** contract. Therefore, the four essential conditions of contract should be fulfilled. The parties in the agreement should be capable, should give their

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[470]The civil code of the empire of Ethiopia proclamation No. 165/1960, Negarit Gazetta extra ordinary issue, 19th year No. 2, article 3322(2) of the civil code

consent free from the vices of consent, the object of the agreement should be legal, possible & defined and the prescribed legal form should be fulfilled. According to article 3308(2) of the Civil Code, "*the form required by law for the creation, modification or' extinction of these obligations without considerations shall be complied with.* "The compromise agreement shall also have the effect of "*...extinction of such rights, actions and claim only in respect of which the compromise has been reached.*" [471]

Finally, disputing parties cannot resort to other binding dispute settlement mechanisms unless the conciliation procedure ends or the time agreed for the process ends. According to article 3321(3) of the Civil Code, parties "*...may not bring their dispute before the court prior to the expiration of this period unless the conciliator has drawn up a memorandum of non-conciliation.*"

4.3.2. Institutional mediation/conciliation in Ethiopia

In Ethiopia, neither the Civil Code nor other laws have provided for institutionalization of conciliation/mediation. But, there are recent moves in institutionalization of mediation/conciliation in the country. The Moves of the Addis Ababa Chamber of Commerce and Sectorial association, the former Ethiopian Arbitration and Conciliation Center, the ECX and Federal Courts in Addis Ababa deserve mentioning.

a. Chamber Mediation in Ethiopia

The Ethiopian Chamber of Commerce and Sectorial Association has been established in the Imperial era under General notice number 90/1947. The powers granted to the Chamber includes "*the conduct of any arbitration up on commercial and industrial differences between members,*" [472]

When the chamber has been re-established in the current federal system, Chamber of Commerce and Sectorial Association Establishment Proclamation number 341/2003 established the Ethiopian Chamber of Commerce & Sectorial Association and provided for the possibility of the

[471] Ibid article 3310(1)
[472] Article 4V of notice number 90/1947

establishment of Regional, City and Woreda Chambers of Commerce and Sectorial Associations.[473] Among powers and duties such Chambers of Commerce and Sectorial Associations have, one is "*to settle disputes arising out of business transactions between members by way of arbitration, when the parties so request.*"[474]

Even if the Proclamation empowered all Chambers of Commerce and Sectorial Associations to resolve disputes among their members through arbitration, the only Chamber exercising this power is the Addis Ababa Chamber of Commerce and Sectorial Association. The Chamber established an Arbitration institution, and formulated rules for Arbitration, Adjudication, mediation/conciliation & institutional rules.

Under the latter proclamation, the chamber is empowered to resolve disputes through Arbitration. But, the institute is also rendering mediation services.[475] If the institution is empowered to settle disputes, through arbitration, there is no problem if it tries to resolve disputes through mechanisms that are less structured than arbitration, argues Ato Yohans W/Gebriel, director of the arbitration institution of Addis Ababa Chamber of Commerce and Sectorial Association.[476]

The Conciliation/Mediation rule of the Institute differentiates between Mediation and Conciliation based on the role of the third party neutral. Accordingly, Mediation is "*a process at which a third party neutral assists parties to a dispute to reach a negotiated settlement. It is a neutral third party assisted negotiation*" while conciliation is "*a process at which a third party neutral assists parties to a dispute to reach a settlement agreement and goes to the extent of proposing terms of settlement which may be accepted or rejected by the parties.*"[477]But, similar rules govern the conduct of both Mediation and Conciliation.

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[473]Chambers of Commerce and Sectorial Association establishment Proclamation No. 341/2003, Negarit Gazeta 9th year No 61 , articles 4 & 14

[474]Ibid articles 5(6), 15(3), 19(3), 27(1e), 27(2e), 27(3d)

[475] Interview with Ato Yohanis W/Gebriel , Director of the Addis Ababa Chamber of commerce and Sectorial associations Arbitration Institute, held on 25 august, 2013 at the Addis Ababa chamber of commerce arbitration institute

[476] Ibid

[477]The Addis Ababa Chamber of Commerce and Sectorial Associations Arbitration Institute, Conciliation/Mediation Rules, September, 2007, Article 3(2,6)

The Proclamation empowered the Chamber to settle disputes that may arise between/among members. But, the services of the Arbitration Institute are open for anyone who prefers the institute. Article 4 of the Conciliation/Mediation rule provides that:

"these Rules shall apply to parties that have submitted their written request to the Institute to seek its services with the view to have the dispute between them settled through mediation/conciliation."

Practically, the institute is open for any one that wants to use the institute in order to resolve disputes of commercial nature.[478] Since compromise agreements are enforceable under Ethiopian law, there shall be no problem whether disputing parties use the facilities of the Institute or not. Therefore, providing mediation services to non-members has no problem even if the institute is not empowered to do so under the Proclamation.

The institute is settling disputes with in the private sector using mediation. Practically, few cases are being entertained through mediation relative to cases seen by Arbitration.[479]Most of the time, mediations are held in disputes between members about family businesses and some foreign businesses. [480]But, the number of cases being resolved through mediation is growing with the general increasing number of cases being settled through the institute.[481]

[478] Interview with Mistir Mohamed, Chief Registrar of Arbitration Institutions of Addis Ababa chamber of Commerce and sectorial Association, held on 18/03/2013

[479] Ibid
[480] Ibid
[481] Ibid.

Number of Cases	Year	No. of Awards
10	2008/09	1
28	2009/10	3
18	2010/11	3
22	2011/12	5
34	2012/13	12

Table 2. Number of cases presented to and awards made by Arbitration institute of AACCSA(2008/9-2012/13)

Source: ACCSA Arbitration Institute Data Base

ADRs in general and Mediation in particular are considered to be cheaper, faster, and they enable to access various expertise, etc. In line with such supposed advantages of ADR mechanisms, the mediation service of the Addis Ababa Chamber of Commerce and Sectorial Association Arbitration Institute has both advantages and disadvantages when compared to regular courts.

In terms of cost, the mediation service at the institute is more costly than the court fees required by regular courts for cases involving less than hundred thousand Ethiopian Birr.

Amount	Court fee	AACCSA mediation fee(administrative and mediators fee)
25,000	959	1600
35,000	1,319	1880
45,000	1,679.75	2160
55,000	2,015	2380
65,000	2,315	2570
75,000	2,615	2700
100,0000	3,350	3200

Table3. Court fee before Federal courts compared to payments required for mediation at AACCSA arbitration institute

Source: The Addis Ababa Chamber of Commerce and Sectorial Associations Arbitration Institute, Conciliation/Mediation Rules, September, 2007& Legal notice number 177/1952,

At the Institute, for example, parties should pay 1200 Ethiopian Birr for mediators and 400 Ethiopian birr as administrative expenses of the Institute for a dispute involving 25,000 Ethiopian Birr. According to Legal Notice Number 177/1952, the court fee for cases involving 25,000 to 25, 250 Ethiopian Birr is 959 Ethiopian Birr. Accordingly, there is a difference of 641 Birr. It can be argued that there can be additional costs in case of court litigation like lawyers fee. But, we cannot rule out the possibility of such expenses in case of the mediation. Rather, under article 10(1) of the rule, it is provided that "*parties may bring to the venue of conciliation/mediation a representative, a professional or an expert for decision or consultation during the negotiation process.*" Therefore, it can be concluded that cost wise, mediation at the Arbitration Institute is more costly than the regular court litigation.

Conciliation/Mediation inherently empowers parties to control the outcome of their negotiation and sometimes the process. They have the right to choose conciliators/mediators. The conciliation/mediation rule of the Institute has recognized this inherent right of parties.

Article 7 – number and appointment of conciliator/ Mediator

2. Unless the parties authorize the institute to appoint on their behalf, they shall have to appoint a conciliator/mediator by agreement. Failing agreement between the parties, the institute shall appoint the conciliator/mediator for them.

According to article 5(1), of the Rule, the Institute "*shall prepare and keep a Roster of potential mediators and/or conciliators together with their CVs.*" This does not mean, however, that parties cannot appoint a person outside the list as conciliator/mediator. Hence, the possibility of accessing individuals with expert knowledge about the case on hand is very wide. It can be argued that, in mediation, expertise knowledge is not that much important. Rather, a person who has skills of mediation is required. But, a person having expertized knowledge is important even if it is not as important as in the case of arbitration.

The services of the Institute are also inaccessible. For one thing, the Institute at the Chamber is centralized, and few in number; currently, one for that matter. For the other, the public in general and the business community in particular have little awareness about the services at the institute. The writer asked 40 Merchants randomly selected in Merkato(the biggest market place in Ethiopia), whether they have the information about the possibility of resolving a dispute through Arbitration/Mediation at the Addis Ababa Chamber of Commerce and Sectorial Association Arbitration institute or not.

Type of business (organization)	No. of those which Have knowledge of AACCSA Arbitration Institution	No. of those who have no information about AACCSA AI	Total
PLC	3	14	17
Share company	3	0	3
Sole traders	2	18	20
Total	8	32	40

Table 4: Summary of responses made by respondents of unstructured interview about their awareness concerning the existence AACCSA AI

Accordingly, most traders are not aware of the existence of the institute. Among those which have no awareness, most are PLCs and sole traders. Thus, it can be concluded that the mediation service under the chamber is not known to smaller businesses.

Finally, dispute settlement through mediation/conciliation under the AACCSA AI can be speedier than settlement of disputes through the court system. According to article 21 of the rules of the institute, unless otherwise parties agree on their own time table or the institute decides, a case should end with 3 in months. This is a very short time relative to the time litigations before Federal Courts take.

In conclusion, Chamber mediation is a good beginning in Ethiopia. the writer has observed that its institutional structure, including staffing, rules and regulations, office arrangement, etc can be taken as sufficient for the current trend of dispute settlement mechanisms in which ADR mechanisms are least used. But, the Institute is not accessible to the society. For one thing, the

very existence of the Institute in general and mediation service in particular is little known. For another, it is costly in relation to court fees. A mediation process may or may not settle a dispute. Having in mind the possibility of using other binding mechanisms in case mediation fails, it is not attractive to spend more than one would have paid had he applied for court litigation.

b. Court Annexed Mediation Centers

The government of Ethiopia has gone through various judicial reform programs in order to promote the efficiency of the judiciary in the country. The 2001EC BPR study program is one of such programs. The study was launched in two broad groups; one is devoted to Criminal Justice Business Process and the other for Civil Justice Business Process. The Civil Justice Business Process team concluded that the previous process has been lengthy, inaccessible, costly and poor in quality. [482] Accordingly, the team recommended a general transformation is needed to make the justice system more accessible, flexible, transparent and cheaper. [483] To that end, introducing ADR in the court system was found to be one way out and the study proposed compulsory ADR mechanisms with in the court system.[484]The new Civil Justice Business Process is also designed to include conciliation/mediation.

According to the study, cases that may be conciliated/mediated should pass through the Court Annexed Conciliation/Mediation office. Especially commercial cases, construction disputes, labour, succession and family cases should pass through the latter office. [485]Cases involving the constitution, especially issues connected with human rights, cases which have no defendant, cases prohibited by other laws and cases the court may, for any reason, decide not to be subjected for mediation/ conciliation shall not be submitted for court annexed mediation/conciliation. [486]

[482]ፌዴራል ጠቅላይ ፍርድ ቤት፣ የፍትሀብሔር አድሱ የስራ ሂደት፣ መጋት 2001, p 8-14
[483] Ibid,p 3
[484] Ibid p 20 and 36
[485] Ibid p 52
[486] Ibid, p 52

Based on the study, Court Annexed Mediation Centers have been established in Federal Courts starting from October 2003 EC as a pilot program.[487] Mediation has been made part of the Civil Justice Process in Federal Courts in which independent offices have been established with assigned Conciliators/Mediators. The Centers were established in cooperation with the former Ethiopian Arbitration and Conciliation Center which used to train mediators, provide some logistical supports and try to review the monthly performance of all the centers through a coordinator assigned for this purpose. [488]

The Court Annexed Mediation/Conciliation in Federal Courts is neither compulsory nor consensual in the strict sense of the terms. It is not consensual for certain cases should pass through the Conciliation/Mediation Office in which the Conciliator/Mediator shall invite both parties for Conciliation. On the other hand, it is not compulsory for parties may refuse to submit to the jurisdiction of the Office. If either party fails to appear on the date appointed for the commencement of the conciliation or expressly refuses to submit to the office, the case shall directly be referred to jurisdiction of the regular court.[489]

The study expressly provided that the third party neutral can be appointed either by the court or by the will of the parties.[490] But, practically, only court appointed /hired conciliator/mediator, usually assistant Judge and one in number, is managing mediation/conciliation process before conciliation/mediation offices. The Court Annexed Mediation/Conciliation Offices also have not lists of possible mediators among which parties can choose. This is against both the study and inherent nature of mediation. Parties should have the chance to choose from among many conciliators/mediators. Involving outsiders in the process may also help promote mediation in the country in addition to empowering the parties.

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[487] Interview with Ato Menbere Befekadu, Registrar of the Commercial bench In Lideta First Instance Court, held on September 25, at Lideta First Instance Court Commercial bench Registrar Office

[488] Interview with Ato Mikael Tsegaye, a court appointed mediator in Lideta First Instance court, Addis Ababa, held on 12/03/2013

[489] Ibid

[490] ፌዴራል ጠቅላይ ፍርድ ቤት፣ የፍትሀብሔር አድሱ የስራ ሂደት፣መጋት 2001, p 52

At the centers, disputes are to be referred to the Offices after necessary court fee has been paid and the case is adjourned for hearing before a court. The conciliator/mediator would try to resolve the dispute through mediation/conciliation in the meantime. The mediator/conciliator shall inform the process to the court before the date the case is adjourned for hearing.[491] The court appointed mediator/conciliator tries to reconcile the parties before the date appointed to hear the case by the court. If the parties manage to resolve the dispute in the meantime, the agreement shall be forwarded to the court for approval. The court shall approve the agreement after examining the legality and morality of the agreement[492]. If the dispute is not resolved, the mediator shall either forward the case for the court or request additional time in case the mediation process is going well.[493] The court shall further adjourn the case if both parties agree. If either party refuses, the court shall proceed to hear the case.

The Court Annexed Mediation Centers have their own advantages, dis advantages and short comings. In terms of cost, Court Annexed Mediation Centers have no significant advantage over regular court litigation. According to the BPR study, if the parties settle their dispute through the process, the court fee shall be reimbursed to them after some administrative expenses are deducted.[494] If a party fails to appear at the date appointed for the conciliation, the conciliator/mediator shall forward the case for the court and the court shall decide concerning costs. [495] According to article 11 of notice number 177/1952; on the other hand, court fee shall be refunded if a claim is withdrawn before trial. Practically, court fee is not refundable even if parties manage to resolve their dispute through conciliation/mediation. This is because, the case shall be presented for the court for approval and the court is to execute it as if it is its decision after approval. [496] Lawyers also usually agree with their clients that they shall be paid their fee irrespective of the fact that the dispute is resolved through mediation/conciliation.[497] Therefore, the only cost advantage of using the Centers is in terms of reducing adjournments and avoiding expenditures in terms of witness fees, etc.

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[491] Ibid p 53
[492] Interview with Ato Sintayehu Zeleqe, Supra notes 451
[493] Interview with the Mikael Tsegaye, supra notes 488
[494] ፌዴራል ጠቅላይ ፍርድ ቤት፣ የፍትህብሔር አድሱ የስራ ሂደት፣መጋት 2001, p 47
[495] Ibid p 53
[496] Interview with Ato Sintayehu Zeleqe, Supra notes 451.
[497] Interview with conciliator Mikael Tsegaye, supra notes 488

Court Annexed Centers in Federal Courts are much faster than litigation process. For one thing, they are expected to finish the resolution within ten days as long as it is possible. [498]If the parties fail to resolve their dispute within the ten day interval, the court grants additional time rarely, usually not more than another ten days, if the mediation process is promising.[499] For another, they use the mean time in which the case is adjourned for court hearing. Therefore, there is little time to be wasted by the mediation/conciliation process if it is not successful and it is much faster than the court litigation if it is successful. But, sufficient time should be given for the mediation process so that the number of cases that can be resolved through the process may increase.

Mediation Centers have their own role in reducing case load of the courts to which they are annexed. In the Federal Courts, Mediation Centers are playing their roles in this regard. Even if it is difficult to establish comprehensive numerical data due to poor recording in the Centers, it can be said that their role is promising. The Court Annexed Mediation/Conciliation Center in Lideta First Instance Court, for example, has settled 4 cases only in September and October of 2013. With a growing work load on courts, resolving even a single commercial or investment case, which are considered complex cases, is very important for courts; according to Ato Sintayehu Zeleke, a judge in Commercial Bench at Lideta First Instance court. Even if the court annexed mediations centers are good beginnings, there are many problems surrounding them.

First of all, the system is not working in some courts. For example, the mediation center in Lideta High Court has stopped working.[500]At centers which are working, there are also staffing and logistical problems. There is one mediator in each center and appointing a mediator by the parties outside the center is not familiar even if the BPR study permits. At Lideta First Instance Court Conciliation/Mediation Office, an individual is discharging both the secretariat and the

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[498] ፌዴራል ጠቅላይ ፍርድ ቤት፣ የፍትሀብሔር አድሱ የስራ ሂደት፣መጋት 2001, p 52

[499] Interview with Ato Sintayehu Zeleqe, supra notes 450

[500] Interview with a former mediator in Lideta high court held on , April 21, 2013 at Lideta High Court Office of assistance Judges

mediation function. Even worse, the so called conciliator/mediator is working in the office in addition to its main obligation as an Assistance Judge.[501]Generally, it is not a structured system.

Logistically, the mediator has no access to guidelines like the BPR study according to which the office is supposed to work. At Lideta First Instance Court, for example, the writer has noticed that a small office with chairs and a table far from being confortable for mediation is allocated to the Center. In addition, there is no internet service and telephone line inside the office. The conciliator complains that he is using his own resources to communicate with parties in dispute.

Initially, the centers were established in cooperation with the Ethiopian Arbitration and Conciliation Center (EACC) which used to provide logistical and training supports. With the dissolution of the EACC, there are no support and control mechanisms on the function of the Centers. Persons assigned to take monthly report from the Mediation Centers and review their progress have resigned one following another.[502] Further, so far, the performance of the Court Annexed Mediation/Conciliation Centers has not been made part of annual reports of Federal Courts. This shows that little attention is being given to the Centers.

According to Ato Mikael Tsegaye, a court appointed mediator in Lideta First Instance Court, Addis Ababa, the attitude of legal practitioners and the level of awareness in the society is also another problem. Most lawyers have negative attitude towards the Center despite many attempts to discuss the issue with them. Lawyers the writer has spoken to at Lideta First Instance Court, on the other hand, expressed their positive view on the performance of the office.

Finally, there is no clear directive governing the operation of the Offices. They are established under the BPR without any directive from anywhere. The total function of the Centers is based on unwritten principles and the BPR study which does not have the status of law. Therefore, having a legal frame work, be it Proclamation, regulation or directive should be thought about.

c. Mediation at the Ethiopian Commodity Exchange

[501] Interview with Mikael Tsegaye, supra notes 488
[502] Interview with the Mikeal Tsegaye, supra notes 488

The Ethiopian Commodity Exchange is established in 2007 under Proclamation Number 550/2007 in order to facilitate commodity exchanges in general and exchange of agricultural commodities in particular. Among the purposes for which the exchange was established for is *"to provide a mechanism for dispute resolution through arbitration."*[503] To resolve disputes arising from exchange transactions, the Exchange is empowered to establish rules and procedures and put to use up on the approval of the Ethiopian Commodity Exchange Authority.[504]

Based on the above empowerment, the Ethiopian Commodity Exchange has enacted Directives on dispute settlement mechanisms in 2010 as part of general directives of the Exchange. The Directive provide for mediation, arbitration and expert determination as means for resolving disputes. Accordingly, the Exchange, by providing rules and regulations, secretariat service and restricting other alternative means of dispute settlement like court litigation, is acting as an ADR center.

Article 16.1.2 of the Directive provides that:

"Unless the Exchange is a party to a dispute, all other disputes shall be submitted to conciliation or Arbitration."

There are two types of Disputes in a Commodity Exchange; disputes in relation to the quality/grades of the commodities and disputes in relation to transactions in the Exchange.[505] The Proclamation empowers the Ethiopian Commodity Exchange to resolve only disputes resulting from transactions in the exchange, not quality disputes, according to articles 6(7) and 28 of Proclamation number 550/2007. Accordingly, conciliation and arbitration are meant for disputes among members in their contracts[506]. Quality disputes in the Exchange, on the other hand, are disputes between members and the Exchange itself for the Exchange is to determine grades of

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[503]Proclamation to provide for the Establishment of the Ethiopia Commodity Exchange, proclamation No. 550/2007, Negarit Gazeta, 13th year No 61, article 6(7)

[504] Ibid article 28(1)

[505] Fekadu Petros, commodity dispute resolution at the Ethiopian commodity exchange, Addis Ababa university school of law, Ethiopian business law series, Vol. V, 2012, p 114

[506] Ibid p 114

commodities.[507] Therefore, they cannot be submitted to arbitration or conciliation in the exchange.

ECX had established an arbitration tribunal which also was serving as mediation center. Conciliation under the rule of the Exchange is meant for disputes between members in their transaction in the exchange. Unlike mediation at the Addis Ababa Chamber of Commerce AI, the forum in the exchange, be it arbitration or conciliation, is not available for non-members. Even in case associate members(Members sponsored by an Intermediary Member to trade for and manage Clients through such Intermediary Member) are parties in a dispute, the member who is associated to the associate member himself shall become a party to the dispute.[508]

Unlike arbitration, Conciliation in the exchange is also a consensual process that its commencement depends on the will of the parties. Rule number 16.1.4. 1 of the Directive provides that:

"The Exchange shall, with the agreement of the parties to the dispute, refer the case for conciliation before initiating arbitration procedure."

If members in the dispute agree, the Exchange has to refer the case to conciliation. Otherwise, it shall simply be referred for Arbitration.

The Directive of the Exchange also provides that the conciliator should consider rights and obligation of parties while conciliating the parties in the dispute.

According to article 16.1.5.1, "*the Arbitrator and conciliator shall be guided by principles of objectivity ,fairness and justice, giving consideration to, among other things, the rights and obligation of the parties, the usage of the trade concerned and the circumstance surrounding the dispute, including any previous practices.*"

Conciliation/mediation on the other hand is purely an interest based dispute resolution mechanism and it is not concerned with the legal rights and obligation of parties. But, considering the rights and obligation of parties enables the third party and the parties themselves

[507] Ibid p 117

[508] ECX directive 2010 article 16.1.3.4

to reach a negotiated agreement. Therefore, it is not a problem if the third party takes the legal rights and obligations of parties in to consideration. Sometimes, interests of the parties should also be measured in comparison with their rights.[509]So far, there is no case mediated in the exchange. [510]Currently, the arbitration tribunal has been resolved and the obligation is temporary submitted for the general council. [511]

d. The former Ethiopian Arbitration and Conciliation Center

Ethiopian arbitration and conciliation center was an organization established by some legal practitioners in 2003 'to promote and implement alternative dispute settlement mechanisms in the country'. [512]It was a non-governmental organization licensed to research, to teach and practice alternative dispute settlement mechanisms.

The Center formulated its own arbitration, conciliation/mediation and adjudication rules based on which it had been settling commercial, construction, family and other similar disputes based on the consent of the parties in disputes. [513]Even if most of the disputes submitted to the Center were settled through arbitration, there were cases that were settled through mediation/conciliation.[514]

Unlike others, mediation at the Center was designed for both 'party driven submission' and court -ordered mediation.

Article 2 scope of application

These rules apply to mediation of a dispute where parties seeking an amicable settlement express their consent to have it mediated through the Center. They shall also apply to court-ordered mediations.

Accordingly, the Center did work with Federal Courts and some Courts had referred some cases to the Center. [515]

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[509] John Daniel Rook (2010) supra notes 363, p 23
[510] Interview with Ato Mulu Teafe, supra notes 19
[511] Ibid
[512]Ethiopian arbitration and conciliation center, Report of arbitral awards, vol 2, 2002 EC p XX
[513] Ibid p XX
[514] Interview with w/ro Haregeweyin supra notes 18
[515] Ibid

The mediation at the former EACC was also conciliative in which the third party neutral has the right to propose terms for settlement. According to Article 12(3) of the rule, "*the mediator shall work towards an acceptable settlement by framing the core issue of the dispute, by facilitating the conditions in which the parties hold frank and open discussions on the same, or by forwarding his own proposal for settlement.*"

Following the enactment of the new law regulating non-governmental organizations, the center was dissolved. It was dissolved 'because of the prohibition on raising more than 10% of total income from foreign sources'.[516]

4.4. The need to further Modernize and institutionalize mediation in Ethiopia

4.4.1. Social and economic dynamics

Ethiopia is moving towards market Economy from a century of monarchial rule and decades of command Economy. After the overthrowing of the Derg, the Transitional Government, latter FDRE, proclaimed market Economy and encouraged the participation of the private sector, both domestic and foreign. Following the declaration of market economy, the infant private sector emerged in the country. The country also became more open to the external world. With generous incentives offered to investors and the increasing quest for land and cheap labour, many investors are coming to the country. The country is continuing and should continue to attract investors from abroad and encourage the home grown ones as well.

In the past ten years, billions of dollars have been invested by both foreigners and nationals in different sectors of the economy. From January 1, 2001 to September 2013, a total of 59,185 projects with a total capital of 1,174,948,203 dollar have employed 2165,582 permanent and 4814,006 temporary workers throughout the country.[517] This amount of investment is encouraging for a beginner country after decades of war and socialist rule. But, it is, by any means, not sufficient in relative to the potential and the need the country has. Therefore, encouraging the private sector and further attracting foreign investors is still badly needed.

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[516] Interview with w/ro haregeweyin supra notes 18

[517] Data obtained from Data base department, Ethiopian Investment Agency (August 11, 2013)

Encouraging the private sector, attracting investors and retaining the already existing ones require not only providing material incentives but also improving the justice system. Where there are business transactions, disputes are inevitable and what matters is the availability of appropriate dispute settlement mechanisms. In the situations where commerce and investment in the economy are increasing, commensurate appropriate and efficient dispute settlement mechanisms must be put in place.

Business transactions, by nature, require speedy and friendly environment. Even when disputes arise out of transactions, it would be necessary to settle them in a speedy and friendly manner. In the face of ill functioning court system in the country, the negative attitude of the public in general and the business community in particular has to our court system; there should be organized, formal and efficient ADR mechanism.

Mediation, as one of the known ADR mechanisms, is becoming increasingly important to resolve commercial and investment disputes. Globally, its popularity as a means to resolve commercial and investment disputes is increasing.[518]Therefore, modernizing and institutionalizing mediation in the country is very important to the development of the country. Despite the existence of few attempts to modernize and institutionalize mediation, it is hardly possible to conclude that the attempts are sufficient relatives to the actual need of the country. Hence, various measures should been taken to further modernize and institutionalize mediation in the country. To fully formalize and institutionalize mediation in the country, policy commitment from the government, in depth need assessment, legislative reforms, awareness campaign, etc are badly needed.

4.4.2. Policy issues

Institutionalizing and modernizing mediation in Ethiopia needs a policy commitment. With the development of modern ADR centers in general and private and independent mediation centers in particular, modern dispute settlement in part, is being taken away from the hands of governments. This actually can immensely contribute to the overall development of a country in general and the commercial & investment sectors with in that country in particular by providing alternatives to the rigid adversarial court litigation. But, it requires a political commitment from

[518] Roger E. Hartley (2002) supra notes 14, p 25

the side of governments. This in turn requires intellectual lobby. In Ethiopia, it is difficult to conclude that there is a strong policy commitment for the full development of modern and institutionalized ADR mechanisms in the country.

Currently, modern mediation services are being given by two institutions; the Addis Ababa chamber of commerce and sectorial associations and by the court annexed mediation centers. An attempt by the former Ethiopian Arbitration and Conciliation Center (EACC), an NGO established under Ethiopian law, to serve as mediation center 'has been hampered by the latest law regulating charitable organizations in Ethiopia'.

Little attention is also given to Court Annexed Mediation Centers working in the Federal Court system after EACC has been dissolved. As discussed above, the Court Annexed Mediation Centers have no sufficient staffing; logistical provisions and even their performance in the last three years have not been made part of the overall performance of Federal Courts that is annually presented to House of Peoples Representatives.

Further, there is little media coverage about alternative dispute settlement mechanisms in Ethiopia and their advantages. To the knowledge of the writer, national electronic Medias do not have a program on advantages of ADR. But, there are some attempts to write on newspapers and magazines being published in English. In a country where reading habit is believed to be very low, columns in newspapers and magazines which are published in foreign languages would have only little effect.

From all these, we can conclude that there is little policy support from the side of the government. For further development of institutional ADR in general and institutional mediation in particular, there should be a policy support. Accordingly, the government should encourage the already established Court Annexed Mediation Centers & the AACCSA AI and encourage the establishment of out-of court centers.

4.4.3. Constitutional Bases

There are arguments as to whether legislations are pre-conditions for the institutionalization of mediation in a legal system. Some argue that there should be a legislative back up while others do not succumb to that. In Ethiopia, it seems that there should be a legislation which, at least, permits the formation of mediation centers.

The Constitution of the Federal Democratic Republic of Ethiopia, here in after called FDRE constitution, in its access to justice provision, Article 37 (1), provides that: *"Everyone has the right to bring a justiciable matter to and to obtain a decision or judgment by,* a court of law or **any other competent body with judicial power"** *(emphasis added).*

In addition, according to article 79(1) the constitution,

*"**Judicial powers both at federal and state level are vested in courts.**" (Emphasis added)*

*Further, the constitution provides under a*rticle 78(4) that:

*"Special or ad hoc courts that 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."* (Emphasis added)

Then, does that mean there shall be no ADR center in general and mediation center in particular? One thing that is clear from the very provisions is that judicial power is the power of regular courts. It is also clear that there can be other non-court institutions or courts other than regular courts that can be legally empowered to exercise quasi-judicial function. Those legally empowered institutions should also follow legally prescribed procedure.

The other issue that should be clarified is that can we say it is exercising judicial power if a mediation center tries to settle disputes through mediation? Does exercising judicial power simply mean settling disputes? Black's law dictionary defines judicial power as:

"*...the authority vested in courts and judges to hear and decide cases and to make binding judgments on them; **the power to construe and apply the law when controversies arise over what has been done or not done under it.***" (Emphasis added)

Accordingly, judicial power is a power to settle disputes according to the law. Therefore, strictly speaking, settling disputes through mediation cannot be considered as exercising judicial power for mediation is an extra-legal and extra-judicial procedure. But, since mediation is a dispute settlement mechanism which is considered as an alternative to the court system, if a mediation center is established, it would be taking the role of courts. Thus, exercising power that, had it not been for the center, would have been for the courts. Therefore, there should be a legislation that

empowers an institution to have organized mediation centers or establishment of an independent mediation center.

4.4.4. In depth and comprehensive need assessment

It is clear that mediation has advantages in terms of maintaining or even improving the future relation of parties in dispute by empowering themselves to settle their disputes, creating opportunities to elect different experts as mediators, etc. It may also be cheaper and faster if it is managed well. In addition, settlement of commercial and investment disputes using court system in general and Ethiopian courts in particular has proved to be problematic. But, comprehensive need assessment should be made.

A comprehensive formal study about the problems of the court system in Ethiopia in settling commercial disputes, the attitude of the public towards ADR mechanisms in general and mediation in particular, the availability of experts, etc should be seriously taken care of. Independent studies should also be made to assess the pre-conditions for institutionalizing mediation, the fitting forms of organizations for mediation centers (NGOs, business organizations, government institutions, centers hosted by existing institutions, independent centers, etc) in the current reality of Ethiopia, should also be determined.

4.4.5. Legislative reform

We have said that there should be a legal frame work for the very existence of modern and institutionalized mediation in Ethiopia. There should be, at least, a legislative backing for establishing a mediation center. In modern and institutional mediation, the need to regulate mediation through legislation in order to ripe its supposed advantages is universally recognized.[519] Hence, there should be legal regulations governing the mediation process.

In Ethiopia, there is no express legal rule devoted to regulate mediation. But, one can take provisions of the civil code as legal provisions governing mediation for conciliation and mediation are said to be similar. However, those provisions are not sufficient. Therefore, different legal reforms need to be made to the existing legal frame work. The reform, among other things, should consider cases that may/may not be submitted for negotiation, the

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[519] shelley M.Liberto (2007), supra notes 124, p 38

compulsory or voluntary nature of mediation, the power to submit to mediation, the forms of mediation centers, the interaction between courts and mediation centers, etc.

a. Forms of mediation centers

From the global experience, a mediation institution may take various forms (i.e. it can be a government institution, NGO, business organization or a court annexed one.)[520] In Ethiopia, as it has been explained, a center that is to provide ADR service should be legally empowered to do so. Then, what forms can a mediation center take under the current legal order in Ethiopia? NGO, business organization or governmental institution?

Under the current Ethiopian legal order, a mediation center may be established in the form of non-governmental organization. According to the Registration and Regulation of Charities and Societies Proclamation Number 12/2009 article 14(2n), a charitable society can engage in activities that can promote the efficiency of the justice and law enforcement system.[521] It has been clear that mediation, as one form of ADR mechanisms, promotes justice delivery. Therefore, a mediation center can be established in the form of an NGO. The former Ethiopian Arbitration and Conciliation Center had also been practically established in an NGO form.

Even if it is legally possible to establish ADR center in the form of NGO, it does not mean that it is going to be easy. There are many challenges. The main challenge in this regard is financial. It is clear that NGOs work using finance mobilized from internal and external sources. In Ethiopia, mobilizing large amount of money to fund a mediation center from domestic sources is going to be very difficult. For one thing, the very capacity to donate is lacking. For another, donating to organizations working as such is not familiar in the country. In addition, the new Registration and Regulation of Charities and Societies Proclamation restricted the possibility of raising fund from outside sources to only 10% of total income and an NGO is prohibited from engaging in income generating activities unless Charities and Societies Agency expressly permits.[522] Even if the Agency permits, it is difficult to collect income in the form of mediation fee for, currently, the public awareness about mediation is very low and it is rarely used. The former Ethiopian Arbitration and Conciliation Center ceased operation with the coming of the new Registration

[520] Shelley M. Liberto, J.D (2007), supra notes 123, 74
[521] Registration and Regulation of Charities and Societies Proclamation No. 12/2009 article 14(2n)
[522] Ibid, article 103(1)

and Regulation of Charities and Societies Proclamation Number 12/2009 'due to these challenges.'[523]

Another possible form a mediation center may take is the form of a business organization. According to article 210(1) of the Commercial Code, *"a business organization is any association arising out of partnership agreement."* Article 211, on the other hand, defines partnership agreement as *"a contract whereby two or more persons who intend to join together and to cooperate undertake to bring together contribution for the purpose of carrying out activities of an economic nature and of participating in the profit and losses arising out thereof."* Accordingly, there is no restriction as to the types of the activities which have 'an economic nature.' Therefore; it is possible to engage in any activity capable of generating profit so long as it is not illegal. But, the objective of the organization should be making profit.

Then, can a mediation center in Ethiopia be established in the form of profit making organization? According to the constitution, as discussed above, the center should have a legal authorization. Should that authorization be express or does non-prohibition amounts to permission? It seems that the authorization should be express. Accordingly, in a strict legal language, a mediation center should not be established in the form of business organization unless a new law expressly permits so. Likewise, an existing business organization should not host a mediation center. In the current awareness level of the general public, it is also difficult to make a profit from a mediation service, even if the law permits.

A mediation center maybe established in the form of government entity either hosted by an existing government institution or as independent mediation center. Existing Government institutions which are empowered to settle disputes using ADR mechanisms may host mediation centers. For example, Ethiopian commodity exchange may establish mediation centers.

Other potential government organizations capable of providing institutional mediation, the writer believes, are Universities. According to Higher Education Establishment Proclamation Number 650/2009 article 4(4), one of the objectives of a higher education in Ethiopia is to:

[523]Interview with w/ro Haregeweyin , supra notes 18

"Design and provide community and consultancy services that shall cater to the developmental needs of the country."

Currently, most universities which have law schools are rendering legal aid services as community services. If so, there is no legal challenge if they try to render institutional ADR services in general and institutional mediation in particular. This also has its own advantages for the development of ADR mechanisms. For one thing, it is easy to work with different international and local organizations without any legal restriction on the right to mobilize fund for they are government institutions. On the other, they are considered less affiliated to the executive that they may be taken as independent forums. In addition, they can be easily accessible throughout the country for there are universities here and there. Further, they can provide relatively skilled mediators.

It is also legally possible for courts at various levels to establish mediation centers through directives for the power to settle disputes inherently belong to courts. Further, new government-sponsored mediation centers may be established by law. In general, however; there should be an express legal rule that authorizes establishment of mediation centers in various forms. But, dispute settlement should always be non-commercial for its primary motive should be improving the justice system rather than making profit.

Finally, in Ethiopia, modern alternative dispute settlement mechanisms in general and mediation in particular are rarely in use relative to court litigation. The society is also blamed to be more litigious that it considers wining a case as an expression of honor and dominance. Mediation, on the other hand, is non-binding mechanism that if it fails, parties are to rely on other binding means. Therefore, it is advisable that institutional mediation be hosted by institutions that also render dispute resolution services through binding mechanisms in case mediation fails. Accordingly, mediation service should be given through institutions which also give institutional arbitration service or be court annexed.

b. Cases that can be settled through mediation

In arbitration, the question of arbitrability is often at issue in different legal systems including in Ethiopia. But, there is no law that restricts arbitration to a certain types of disputes except the controversial article 315(2) of the Civil Procedure Code which excludes administrative contracts from the ambit of arbitration. Unlike arbitration, however; cases that may/may not be settled through mediation are rarely at issue.

Considering the special nature of mediation, issues that can be submitted to mediation and issues that should not be submitted or that should follow special procedures should be identified. As explained above, mediation is an extra legal and extra-judicial mechanism in which the parties agree to a negotiated settlement. What matters is the mutual agreement of parties in the dispute, not their legal right or obligation. In line with this nature of mediation, some disputes should be excluded from being submitted to mediation while others should follow extra ordinary procedures.

Some commercial and investment disputes may involve constitutional rights of individuals like the right to property, privacy, etc. Human rights, on the other hand, should never be subject to negotiation.[524] In mediation, one gets what he negotiates, not what he deserves to get or his rights. If we allow cases that involve constitutional rights to be settled through mediation, the one with better bargaining power may take the constitutional right of the other who is at lower bargaining power. Therefore, investment and commercial disputes that may involve constitutional rights should never be allowed to be settled through mediation.

Under Ethiopian law, a trader can be an individual, a government enterprise or a business organization. Government agencies, may also engage in some contractual transactions. Likewise, Governments usually are parties to investment disputes. The dispute may be between government entities, between government entities & individuals including a foreigner or business organizations and even between Ethiopian government and a foreign government. When government enterprises or government agencies (here in after called government entities) are in a

[524] ፌዴራል ጠቅላይ ፍርድ ቤት፣የፍትሀብሔር አድሱ የስራሂደት፣ መጋት 2001, p 59

dispute, public property is usually at issue. For mediation is an extra-legal procedure based on negotiation, special mechanism should be designed to protect such public property.

Excluding disputes involving public property from mediation should not be considered. For one thing, Ethiopian has already been bound through bilateral investment treaties to submit for mediation in case a foreign investor prefers it. For another, public entities should not be excluded from the benefits Mediation offers. Accordingly, the only way forward should be prescribing transparency as a requirement in mediations involving public property. It may be argued that this may harm other major interests like privacy of not only the enterprise/ government office but also the other party in the dispute. But, the problem of corruption should be given more weight.

c. Compulsory Vs Consensual mediation

Mediation by its nature is a consensual process in which parties usually control the process and they often decide the outcome. No one can impose a decision on the parties so long as the process is called mediation. But, mediation can be compulsory or voluntary based on whether parties are obliged to enter to the process or not. Globally, there are at least three approaches; compulsory mediation, partly compulsory mediation and fully voluntary mediation. In compulsory mediation, parties are always obliged to attempt settling the dispute before they rely on binding mechanisms of dispute settlement like arbitration and litigation. In partly compulsory, mediation on the other hand, parties are obliged to attempt mediation for disputes involving an amount below a certain threshold. Finally, mediation can be a fully voluntary process.

Both compulsory and voluntary mediations have their own advantages. Voluntary mediation enables parties to exercise their utmost freedom in dispute settlement. By leaving the chance to choose whether to engage in mediation or not to parties, it saves time for it reduces cases that cannot be resolved through mediation. Some disputants can be so apart that only binding mechanisms can resolve their dispute. Therefore, such individuals need not waste time in attempting mediation. Compulsory mediation also has its own advantage. The main advantage of compulsory mediation is that it enables to raise the awareness of the public about the benefits of ADR mechanisms in general and mediation in particular. If individuals are obliged to attempt

mediation before they submit to binding mechanisms, they may discover the benefits of settlement of disputes through mediation. Accordingly, cases that seem unlikely to be resolved through mediation may end with agreement thereby reducing case load to regular courts.

Coming to the case of Ethiopia, the public in general has little awareness about the existence of modern and institutionalized ADR mechanisms and their advantages. Vice president of a Federal Court of Ethiopia argued with the writer saying 'there are no Court Annexed Mediation/Conciliation Centers in Ethiopia,' let not to the general public.

The number of disputes flowing towards court is also increasing with the growing trend in investment and commercial transactions. It is also asserted in different studies that ADR mechanisms in Ethiopia have their own advantages in reducing case load, promoting access to justice, providing quality justice, etc including for commercial and investment disputes. Therefore, in order to raise the awareness of the public and progressively increase the number of disputes resolved outside the court system, it is advisable to introduce compulsory mediation for commercial and investment disputes.

Many BITs already have provided for compulsory 'amicable' dispute settlement in both state-state disputes and investor-state disputes. In commercial disputes, compulsory mediation should be legally prescribed for disputes involving relatively smaller amount of money.

d. Authority to submit to mediation

As it has been said many times, mediation is an extra-legal and extra-judicial mechanism in which parties get what they negotiate, not what they legally deserve. In mediation processes in which there is a give and take negotiation out of consideration to the legal rights of parties, having the authority to mediate should be seriously considered. Parties themselves are to decide the outcome. Therefore, the individual participating in the mediation process should have the authority to decide.

In investment and commercial disputes, the parties in the dispute may be individuals, business organization or government entities. In case individuals are to be parties in mediation, the

individual participating in a mediation process should have either authority to expose the disputed amount graciously or have special agency specifically authorizing the individual to submit the dispute to mediation. Where the party in a dispute to be mediated is a business organization, the individual submitting to meditation should have the power to do so under the memorandum of association of the business organization or should have express authorization from the business organization.

In a latest decision, the Federal Supreme Court Cassation Division has passed a decision in a case between Ethiopian mineral development share company and JTT trading(file number 30727/ 2000) that a manager of a privatized share company cannot agree to submit for arbitration unless the memorandum of association of the company expressly authorizes to do so.[525]If it is argued like this for arbitration, mediation requires more precaution for it is an extra-legal and extra judicial process.

Finally, if the party is a government entity, that entity should have the power to submit for mediation under the law/memorandum by which it was established. These requirements should be made clear under the law.

e. Role of courts and lawyers

Modern ADR mechanisms in general and mediation in particular cannot be effective out of the support from regular courts and the legal community. In Ethiopia, the endeavor to institutionalize & modernize mediation should consider this fact and regulate it well.

For mediation is an extra-legal procedure, it is clear that it can be conducted outside of the participation of lawyers. But, if lawyers can participate, they can contribute for the effectiveness of the process. Participation of lawyers has its own advantages and disadvantages. If they participate in the mediation process, it is feared that they can bring the adversarial system in the court to the friendly process of mediation. They, on the other hand, may help clear the move for the parties in the disputes (their clients). If they are alienated from the process, on the other hand,

[525]የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ውሣኔዎች ቅጽ 5፣ህዳር 2003 ዓ.ም፣አዲስ አበባ

they may feel that the development of mediation may diminish their future role in dispute settlement and they may play a deconstructive role. Therefore, there should be mechanisms through which lawyers can participate in the process. This issue also should not be left for the discretion of individual mediation centers. It rather should be legally regulated for the law should secure that the expected benefits of mediation are actually pursued. The role of lawyers should, however; be regulated not to hamper the general mediation process.

The role of courts in mediation process is indispensible. Specifically, they play indispensible role in the pre-mediation stage, during the mediation process and in the post mediation process. In the pre-mediation process when mediation is a compulsory mediation, courts may be called for the appointment of mediators in case parities fail to agree. In the process, they may be called for interim orders. Finally, in the post mediation stage, they enforce the agreement of parties. Therefore, there should be a legal rule that formally integrate modern and institutional mediation in the country with regular courts.

f. principles

As it has been discussed in the previous chapter, there are various principles in mediation. Some principles like neutrality and voluntariness are said to be inherent to mediation and some others need to be legally sanctioned or agreed by parties in the dispute. One of the important principles of mediation that needs legal regulation is confidentiality.

Confidentiality is a broad principle involving issues like who should be allowed to have access to the mediation process, which types of communications should be confidential, the evidentiary value of communicated information in the mediation process, who is the holder of the privilege, etc. Among these issues, the writer believes that the evidentiary value of communicated information before Ethiopian courts and the holder of the privilege should be legally regulated.

In Ethiopia, there is no comprehensive written evidence law. Consequently, many major evidence law principles like admissibility of evidences, privileges, etc left to the discretion of courts. In the absence of express legal provisions governing evidence, parties in mediation should not be left for court interpretation. They should be protected by law so that they can negotiate freely thereby, the mediation can be effective.

4.4.6. Awareness campaign

Informal mediation is not alien to the society in general and the business community in particular in Ethiopia. But, phenomenon of formalized and institutionalized mediation is very recent and rare. The emerging private sector either has little information about the existence of the two functioning mediation centers (i.e. the Court Annexed Mediation Centers and the Arbitration Institute in Addis Ababa Chamber of Commerce and Sectorial Association which also serves as mediation center) or has little awareness to the benefits of mediation. The Addis Ababa Chamber of Commerce and the Court Annexed Mediation Centers have mediated few cases so far.[526]In the Chamber, most of the mediated cases are cases related with family businesses and foreign businesses. [527] Therefore, a massive awareness campaign that targets the business community on the advantages of formal mediation should be launched.

The attitude of the legal community to formal mediation needs also to be shaped. In the recent move of the court annexed mediations, the attorneys have shown observable negative attitude towards the mediation centers.[528] Therefore, there is a need to engage with attorneys and device mechanisms to secure their concerns. Bar associations need to be consulted and even invited to participate in mediation services. Finally, attempting to resolve a dispute through mediation before proceeding to court litigation should be provided in the proclamation governing attorneys as one of professional obligation of lawyers. The current laws governing Federal Advocates (Federal Courts Advocates Licensing and Registration Proclamation No. 199/2000 and Federal Court Advocates' Code of Conduct Regulations, Council of Ministers Regulations No. 57/1999) do not have such requirements.

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[526] Interview with w/ro Mistir Mohamed, supra notes 477
[527]Ibid
[528] Interview with Ato Mikael Tsegaye , supra notes 487

4.5. Considering Addis Ababa as a host for a regional mediation center

Dispute settlement has been a global and regional issue especially in commercial and investment transactions. With the development of private ADR mechanisms, any dispute arising in any part of the world can be resolved anywhere in the world without any challenge of jurisdiction and enforcement problem. Accordingly, many international and regional ADR centers have been established around the world.

As a seat of the African union and many other international and regional organizations, Addis Ababa is considered as the capital of Africa. This is a big opportunity that can be exploited. In addition, enormous investment capital is coming to sub-Saharan Africa including Ethiopia. The capital is encouraging growth and development in the region. Further, the relative securities in the country, its historical records, etc are actual opportunities. Accordingly, Addis Ababa can be chosen as a site for regional ADR/mediation center. A regional mediation center in Addis Ababa can be either a branch of internationally established institutions or a domestically grown center. There are challenges and opportunities to establish a regional ADR/ mediation center in Addis Ababa.

There are also challenges that may hinder the possibility for Addis Ababa to be chosen as a seat for a regional ADR/mediation center. The first challenge is the competition with the already established regional centers like the Cairo Center. The Cairo Regional Center already is an established and globally recognized center. So far, the center has managed to get more than 930 cases for mediation and arbitration.[529]Taking its geographical and political relation with the west and wealthy Arab countries, the center is functioning well.[530]In addition, the recent moves of the neighboring city, Nairobi, is another challenge. The Kenyan government established an international commercial arbitration center under the Asian-African Legal Consultative Organization (AALCO).[531]Kenyan parliament already approved a law establishing the center. According to Kenyan Gazette Supplement No. 166 (Bills No. 69) article *4. (1), "there is established a center to be known as the Nairobi Centre for International Arbitration."*

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[529] The Cairo Regional Centre for International Commercial Arbitration , Annual report, ***2012-2013,*** CRCICA available at http://www.crcica.org.eg/feescalc.html and accede on 24 August 2013, p 11

[530] Ibid, p 8

With all these, however, it is possible to establish a regional ADR center in Addis Ababa. For one thing, with the growing focus for Africa in terms of investment destination and trade partner, there is still a great gap between the number of ADR centers and potential demands. For, another, Addis has its own advantages over the two countries.

To use the opportunities and overcome the challenges, a number of activities should be carried on. First of all, the government should consider its policy towards ADR mechanisms in general and the issue of establishing regional ADR centers in Addis Ababa. Accordingly, appropriate legal reforms should be made, regional and international agreements relating to ADR like the New York convention on the recognition and enforcement of foreign arbitral awards should also be considered for ratification. Further, domestic authors and other scholars should engage in advocacy.

Having an institutionalized private justice centers that provides ADR service regionally has many advantages for the country. The center can promote the use of ADR mechanisms in Ethiopia. In addition, the center can serve as an alternative for international investment and commercial disputes to which Ethiopia and/or Ethiopians are a party. Further, it can serve as a means of earning foreign currency for Ethiopia.

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[531] Ibid

Chapter five

5. Conclusion and Recommendations

5.1. conclusion

Commerce and investment are very important sectors for the development of a country. Globally, every country is working to promote these sectors so that they can contribute to boost the overall growth of the country. For the last two decades, Ethiopia has also been working to promote trade and investment; both foreign and domestic.

One means to encourage trade and investment is devising appropriate dispute settlement mechanisms. In investment and commercial activities, disputes are generally an avoidable and may arise any time. What is important is devising appropriate dispute settlement mechanisms in order to resolve such disputes. Commercial transactions usually require, among others, speed, trust & continued relation among those participating in the process and efficient utilization of resources. When disputes arise in such transactions, the dispute settlement mechanisms to be employed needs to be speedier, relatively cost efficient and should care for the future relation of disputing parties.

Court litigation which is traditionally considered as a natural dispute resolver is, nowadays, being seen as lees appropriate to resolve commercial and investment disputes. For one thing, litigation usually takes much time. For another, it is not cost efficient. In addition, litigation is usually a rigid win-lose approach that has little care for the future relationship of parties. Consequently, ADR mechanisms are becoming more popular to the resolution of commercial and investment disputes for they are less costly, speedier &flexible, and usually care for the future relationship of disputing parties. In addition, for multi-party disputes involving individuals of different nationalities, ADR mechanisms offer an important forum in which disputing parties themselves can decide preliminary issues in advance that could have required very extended procedures and take long period of time to decide had it been in court litigation.

ADR mechanisms in every society began outside the authority of the state/law. They had been traditional and informal. With the growing complexity of human interaction in general and commercial and investment transactions in particular, the traditional mechanisms were not found

sufficient. For this reason, ADR mechanisms are being modernized and institutionalized in different jurisdictions throughout the world.

The primary preference to resolve investment and commercial disputes among the modern ADR mechanisms has been Modern Arbitration. But, modern arbitration is becoming more rigid and expensive; even, in some cases, more expensive than court litigation. Consequently, more attention is being given for other interest based ADR mechanisms like mediation.

Mediation/conciliation is an interest based mechanism in which parties try to keep their interest, not their legal right. It is an extra legal mechanism involving different creative procedures in order to help parties reach a mutually accepted settlement. What matters is that the settlement should be acceptable to both parties. Therefore, mediation changes the 'zero sum game' of litigation to 'value creating' agreement between parties. ..

Modern Mediation/conciliation is a well-known dispute settlement mechanism in commercial and investment disputes in today's world. Many jurisdictions and international agreements also provide for the use of mediation/conciliation where disputes arise. This is because mediation can be more efficient in terms of time and cost and maintains/ improves/ the future relationship of disputants.

Modern mediation/conciliation usually requires appropriate legal framework that regulates the role of third party neutrals & legal advisors, formal integration with court systems, enforcement of the agreed settlement, accreditation of professional mediators, etc. It also can be either institutional or ad hoc. Institutional mediation is a mediation process under a permanent entity using its procedural rules and facilities.

In Ethiopia, resolving disputes of any kind, be it civil or criminal, through ADR mechanisms is not uncommon. Different societies across the country have had their own traditional ADR mechanisms that have been used for centuries. Modern ADR in general and modern mediation/conciliation in particular, however; is a recent phenomenon.

The 1960 Civil Code contains some provisions for Arbitration and Conciliation. Subsequent legislations like the Ethiopian Chambers of Commerce and Sectorial Association Establishment Proclamation No. 341/2003 and Proclamation to Provide for the Establishment of the Ethiopia

Commodity Exchange Proclamation No. 550/2007, also provide the possibility of establishing a dispute settlement organ that may try to resolve disputes among their members using Arbitration. In the above laws, however; there is no mentioning of mediation. Modern and institutional mediation has no legal frame work in Ethiopia. But, it is possible to take legal provisions that regulate conciliation as legal rules governing mediation for conciliation and mediation are usually mean similar concepts. These provisions of the Civil Code, however; are not, by any means, sufficient.

Despite the insufficiency of the legal frame work, there have been some institutions that render institutional mediation in Ethiopia. These are: the former Ethiopian Arbitration and Conciliation Center; the Arbitration Institute of Addis Ababa Chamber of Commerce and Sectorial Association, Court Annexed Mediation Centers at the Federal Courts and the Ethiopian Commodity Exchange. But currently, only Arbitration Institute of Addis Ababa Chamber of Commerce & Sectorial Association and Court Annexed Mediation Centers at the Federal Courts are offering formal and institutionalized mediation service. Even in those centers, only few cases have been settled through mediation. The centers are also bound by various problems.

In the face of mal-functioning court system and growing role of the commercial and investment sector in the economy of Ethiopia, mediation is, potentially, a very important mechanism to settle commercial disputes& investment disputes. For a better performance of the commercial sector in the country, there should be a broad based institutionalized ADR mechanism in general and Mediation in particular. Side by side with strengthening the current mediation centers, the establishment of Private Mediation centers should be encouraged in the country. This in turn requires a firm political commitment from the government; in depth need assessment to identify the problems of the court system and offer alternative means by mediation centers; a legislative reform to create friendly legal environment for mediation centers and awareness campaign about the advantages of mediation targeting the business community.

5.2. Recommendations

Courts in Ethiopia are bounded by several problems. Among these problems are delay, inaccessibility, poor staffing, poor logistical provisions, intervention from government, corruption, non-predictable decisions, etc. The number of cases including investment and commercial disputes, one the other hand, is increasing from time to time. Nowadays, ADR mechanisms are becoming important mechanisms to resolve investment and commercial disputes in the world. Mediation as an extra- judicial dispute settlement mechanism is also becoming more popular and being modernized & institutionalized. But, in Ethiopia, modern ADR mechanisms in general and mediation in particular are under used. In addition, lack of appropriate legal and policy frame works for the proper functioning of mediation in the country is another constraint. Hence, for the proper use of modern and institutional mediation/conciliation in the country, the following measures should be taken.

1. The government should consider its policy towards modern ADR mechanisms in general and modern & institutional mediation in particular.

   Currently, little attention is given for modern and institutional mediation. Firstly, to the knowledge of the researcher, there is no ongoing revision of laws regulating mediation. The draft law proposed by Addis Ababa chamber of commerce and sectorial association has not also been given proper attention so far. Further, Court Annexed Mediation Centers at Federal courts are left without considerable governmental support following the dissolution of the former Ethiopian Arbitration and Conciliation center. Therefore now, the government should re-consider its policy towards modern and institutionalized mediation.
2. Unlike traditional mediation, modern and institutional mediation needs appropriate legal frame work. Accordingly, appropriate legal reforms should be made in Ethiopia.
   a. In Ethiopia, judicial powers are vested in courts at various levels. In addition, other legally established institutions may have qausi-judicial power. No institution which has not been given the power, however; can exercise judicial or qausi-judicial power. Even if resolving disputes using mediation is not exercising judicial power in strict legal language, a mediation institution, while resolving disputes using mediation, is taking the role of courts. Therefore, it is better to have a law that expressly provides that an institution that resolves disputes through modern mediation can be established.

b. Mediation by its nature is a voluntary mechanism. But, with a growing number of cases coming before regular courts, numerous countries are introducing compulsory mediation in their legal systems. Accordingly, parties in a dispute should first attempt to resolve the dispute through mediation before they rely on binding mechanisms like litigation. This may also increase the awareness of the public on the advantages of mediation. In Ethiopia, courts are overburdened by flowing cases. A judge in a Federal Court is now holding 588.58 cases annually and/or73.44 cases monthly. The public in general have also little awareness not only about the advantages of modern mediation but also the very possibility of resolving mediation using institutional mediation. Thus, in order to reduce the work load of judges and increase the awareness of the public on the advantages of mediation, compulsory mediation should be introduced by law. .

c. Mediation is an extra-legal mechanism. Parties in mediation gets what they negotiate, not what they are legally entitled. Due to this reason, a person who is directly to engage to mediation proceedings should have the power to make actual compromises. In case individuals are party to mediation, the individual should have either the right to expose the disputed amount without consideration or should be specifically authorized to engage in mediation. In case an organization is a party, the individual who is to participate in the process representing the organization should have a specific authorization from an appropriate organ of the organization. These issues should also be sanctioned by law.

d. There are some major principles in mediation that help the proper function of mediation process. Principle of confidentiality is one of these principles. According to the principle, any communicated information in the mediation process should not be admissible evidence before binding dispute settlement forums. This requirement of confidentiality enables parties to discuss their issue openly and frankly. In Ethiopia, there is no comprehensive written evidence law. Hence, this principle should be sanctioned by law so that parties are not left to the discretion of mediation centers or judges/arbitrators as the case may be.

e. Some individuals like incapable persons may need a special legal protection and any dispute involving such individuals is better to be decided through judicial mechanisms. In addition, some cases may involve Constitutional rights. Constitutional civil rights, on the

other hand, should not be subject to negotiation. Therefore, the law should try to enumerate cases that should not be resolved through mediation.

f. The government in Ethiopia is still a dominant player in the Economy. It has numerous existing state enterprises and is working to establish new ones. As a result, the government may be party in various disputes. In addition, in investment disputes, the government is usually a party. In such situations, government officials are to engage in negotiation representing an enterprise or a government office when disputes are to be resolved through mediation. Nonetheless, since corruption is regarded as a major problem in Ethiopia, allowing officials to resolve disputes using mediation, which is an extra-legal and extra-judicial mechanisms, may pave a way for corrupt practices. Thus, the law should device mechanisms to close this hole. The writer believes that requirement of transparency in mediations involving public interests should be provided by law. It may be argued that this may harm other major interests like privacy of not only the enterprise/ government office/ but also the other party in the dispute. But, the problem of corruption should be given more weight.

g. Modern and institutional mediation should also be integrated to the court system. Unless the two systems are integrated, there may be various problems. For example, an individual who is trying to resolve a dispute through mediation should not lose its right to bring legal action due to period of limitation while he was attempting mediation. Accordingly, such issues should be sanctioned by law.

h. Finally, lawyers can play an important role for development of modern and institutional mediation if they are made players in the process. On the other hand, they may bring the adversarial procedure that is common in litigation to mediation proceedings. Therefore, appropriate legal regulation should be put in place based on intensive research.

3. There are at least two functional ADR centers which are actually rendering mediation services in Ethiopia. They are Court Annexed Mediation/Conciliation Centers at Federal Courts and the Addis Ababa Chamber of Commerce and Sectorial associations Arbitration Institute. However, they have their own short comings. Therefore, the following measures should be taken.

   a. Concerning Court Annexed Mediation Centers :

6. Nowadays, ADR mechanisms are becoming sources of foreign exchange. Different countries are establishing international and regional ADR centers that hosts disputes between/among various international actors. Addis Ababa, as the seat of the African Union, African Economic Commission and various other international and regional organizations, can have a prospect to host an international ADR institute. Accordingly, concerned organs should consider the issue soon.

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- Interview with Ato Mikael Tsegaye, a court appointed mediator in Lideta First Instance court, Addis Ababa, held on 12/03/2013
- Interview with Ato Menbere Befekadu, Registrar of the Commercial bench In Lideta First Instance Court, held on September 25, at Lideta First Instance Court Commercial bench Registrar Office
- Interview with Ato Yohanis W/Gebriel , Director of the Addis Ababa Chamber of commerce and Sectorial associations Arbitration Institute, held on 25 august, 2013 at the Addis Ababa chamber of commerce arbitration institute
- Interview with Mistir Mohamed, Chief Registrar of Arbitration Institutions of Addis Ababa chamber of Commerce and sectorial Association, held on 18/03/2013
- Interview with Ato Sintayehu Zeleqe, a judge in Commercial Bench at Lideta First Instance Court, held on July11, 2013, at Lideta First Instance Court Commercial bench Court Room
- Interview with Ato Enyew Lema, lawyer in federal courts, held on 12 September 2013
- Interview with Ato Mulu Teafe, assistant General counsel at ECX, held on September 23, 2013
- Phone interview with w/ro Haregeweyn, Director of the former Ethiopian arbitration and conciliation center held on 1/04/2013

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- Due attention should be given for the functioning mediation centers. First of all, appropriate logistical and human resource imputes should be provided. Accordingly, at least, one mediator/conciliator and a clerk should be assigned to such centers. At Lideta First Instance Court, for example, an assistant Judge is assigned to serve as a mediator & clerk in the mediation/conciliation office in addition to his responsibility as an assistance judge. Avery small class that lacks appropriate furniture is also allotted to the mediation/conciliation office. In addition, the Court Annexed Centers should consider the participation of external 'mediators' in the process. Accordingly, they should consider keeping a roster of potential mediators among which disputing parties may choose. Moreover, there should be a supervisory organ that follows up the performance of such centers. Further, appropriate directives should be issued for the proper functioning of the Court Annexed Centers. These directives among others should contain rule of conduct for mediators and rules for accreditation of mediators.
- They should be progressively established in all courts of the country and those which are already established, but not functioning, Like the mediation center at Lideta High court should be functional;

b. The Addis Ababa Chamber of Commerce and Sectorial Arbitration Institute should also consider making the service more accessible to the community. Accordingly, the Institute should work on awareness creations and should Re-consider mediation fees.

4. New mediation centers need also be established. Accordingly:
   a. Courts at various levels should consider establishing Court-Annexed Mediation Centers; and
   b. Chambers of Commerce and Sectorial Associations in major towns like Dire Dawa and higher educational institutions like Addis Ababa University also should consider establishing ADR center that renders Arbitration and mediation services
5. At the national level, there should be awareness campaigns about the advantages of resolving disputes using modern and institutionalized mediation through the public and private media. In addition, attempting to resolve disputes through mediation before rushing to litigation should be legally provided as one of the professional obligation of legal advocates.