

ADDIS ABABA UNIVERSITY SCHOOL OF GRADUATE STUDIES

The Prospect of Commercial Arbitration in Ethiopia: A Practice
Oriented Study

By: Mohammed Nure

ADVISOR: ATO ZEKARIAS KENEA
(Ass. Professor of Law)



Faculty of Law
ADDIS ABABA UNIVERSITY

March 2008

ADDIS ABABA UNIVERSITY SCHOOL OF
GRADUATE STUDIES

The Prospect of Commercial Arbitration in Ethiopia: A Practice Oriented
Study

By: Mohammed Nure

ADVISOR: ATO ZEKARIAS KENEA
(Ass. Professor of Law)

Faculty Law
ADDIS ABABA UNIVERSITY

March 2008

SIGNED APPROVAL SHEET BY THE BOARD OF EXAMINERS

THE PROSPECT OF COMMERCIAL ARBITRATION IN ETHIOPIA: A PRACTICE
ORIENTED STUDY


BY: MOHAMMED NURE

APPROVED BY BOARD OF EXAMINERS

Supervisor..... *Zekarias Keneaa* 

Name

Affiliation..... *AAU*

Examiner..... *Yazachew Belew* 

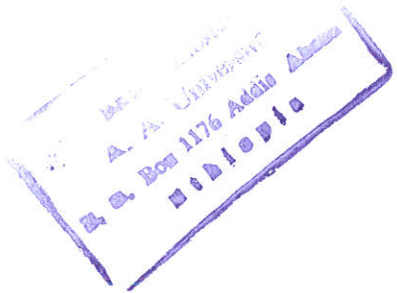
Name

Affiliation..... *AAU*

Examiner..... *Zelalem Gebremariam*

Name

Affiliation..... *AAU*



ABSTRACT

Commercial arbitration, an alternative method of dispute settlement, is an integral element in contemporary dispute settlement modalities, both nationally and internationally. Commercial arbitration is proved more confidential, flexible and speedy compared to the orthodox dispute settlement modality, court litigation. With due regard to these advantages, Ethiopia has also adopted the basics of commercial arbitration in its Civil Code and Civil Procedure Code. Likewise, there are also some arbitration institutions that purport to enhance application of commercial arbitration in Ethiopia. However, commercial arbitration in Ethiopia is still at an embryonic stage. The law is scanty and riddled with inconsistencies. The practice too is yet fledgling due to the multitude of factors that inhibit its progress. Lack of awareness is immense, both within the business community as well as among those who apply the law. Attitudinal challenges are also serious predicament, and more there is the question of arbitrators' code of conduct and integrity. Nonetheless, however debilitating the challenges of commercial arbitration in Ethiopia are, it is possible to revive the commercial arbitration in Ethiopia if measures are taken to address the existing challenges and revitalize the legal and institutional settings to enhance the progress of commercial arbitration in Ethiopia.

ACKNOWLEDGMENT

First of all, I would like to express my gratefulness to my advisor Ato Zekarias Kenea, for his scholarly advice and for commenting the paper with utmost patience and diligence.

Next, I would like to thank Ato Tilahun Teshome, an associate professor at Addis Ababa University, faculty of law, for he has spared me his precious time in conducting an interview with me and for the important information he has provided me.

I would also like to thank my mother W/ro Danbobe Obse and my brother Amano Nure for their continuous moral and material support over the years.

I am also grateful to my friend Shaggee whose moral assistance meant a lot for me while writing this thesis.

I am also indebted to Ato Yazachew Balew, Mokonen Firew, Urgessa Genemo and Bahiru Gurmessa.

Last, but not least I would like to thank W/ro. Buze, Lakech, Birke and Chuchu who have supported me in writing this paper.

TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION

1.1. BACKGROUND	1
1-2 Statement of the problem.....	4
1-3 Objective of the study	6
1-4 Limitations of the study	6
1-5. Methodology of the research	7
1-6. The structure of the study	7



CHAPTER TWO

The Conceptual Framework of Commercial Arbitration	9
2.1. The nature and meaning of arbitration	9
2.2. Arbitration Compared with Other Alternative Dispute Resolution (ADR) Mechanisms	13
2.3. Commercial Arbitration Defined	16
2.4 The Development of Commercial Arbitration	18
2.5. Factors in Choosing Commercial Arbitration	22

CHAPTER THREE

The Legal Framework of Commercial Arbitration in Ethiopia	27
3.1. The Law Regulating Arbitration in Ethiopia	28
3.2. Formal and Substantive Validity of an Arbitration Agreement	32
3.3. Effect of an Arbitration Agreement	37

3.4. The Doctrine of Separability and Kompetenz-Competenz	39
3.5. Court Assistance in the Course of Arbitration Proceedings	43
3.6. Review and Enforcement of an Arbitral Award	46

CHAPTER FOUR

The Current State of Commercial Arbitration in Ethiopia: an Appraisal of its Practical Utilizations	51
4.1. Overview	51
4.2. The State of Commercial Arbitration in Ethiopia.....	52
4.2.1. The Actual Utilization of Commercial Arbitration in Ethiopia	56
4.2.2. Factors Affecting the Actual Utilization of Commercial Arbitration in Ethiopia	58

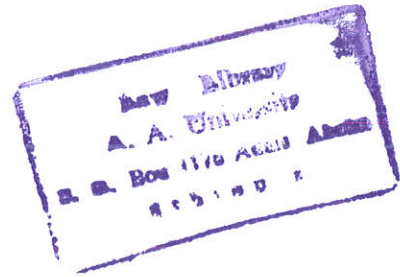
CHAPTER FIVE

The Prospects and Problems of Commercial Arbitration in Ethiopia, and the Possible Remedies	73
5.1. The Prospects and Problems of Commercial Arbitration in Ethiopia	73
5.2. Possible Measures	79
Conclusion.....	87



CHAPTER ONE

INTRODUCTION



1.1. BACKGROUND

Disputes are inevitable part of the human relationship.¹ People encounter conflict with each other for different and innumerable reasons; economic, cultural, differences in perception, change of circumstances...etc. Generally every human interaction has the potential for conflict.² The central point is to understand the inevitability of disputes and to provide for an efficient mechanism for dispute resolution.

There are various methods of resolving disputes. Litigation in courts is the most common form of disputes resolution to day. All other mechanisms, other than court litigation, are generally categorized under an umbrella term called “Alternative Dispute Resolution” or “ADR”.

ADR was developed in the western legal system as a result of the short comings in the formal court litigation.³ The shortcomings of litigation include the cumbersome rules of procedure, the high cost of litigation and publicity which goes with the hearings and the judgments. The most

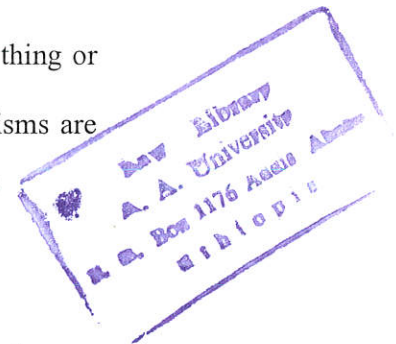
¹ ALVIN L.GOLDMAN & JACQUES ROJOT, NEGOTIATION: THEORY AND PRACTICE, Kluwer Law International, 7(2003, The Hague/London, New York).

² Ibid.

³ D.Paul Emond (ed.), Alternative Dispute Resolution: A Conceptual Overview, COMMERCIAL DISPUTE RESOLUTION: ALTERNATIVE TO LITIGATION, 1989 Canada Law Book Inc., Ontario, p.5.

commonly used alternative disputes resolution mechanisms are, negotiation, conciliation, mediation and arbitration. There are also various other modes of dispute resolution out side the formal court system namely med-arb, early neutral evaluation, ombudsman, etc.

Some scholars argue as to the appropriateness of the term “alternative” in the expression Alternative Dispute Resolutions (ADR). It has been noted that the term alternatives indicates that adjudication in court is the real thing or the mainstream dispute resolution mechanism, while other mechanisms are peripheral and apart from the hardcore of judicial dispute resolution.⁴



Whether the term “ADR” is proper in the content of Africa has also been a subject of contention among many scholars.⁵ In other words, although in Africa official state law is imported from the West, in parallel however, Africans do have their own indigenou system of dispute resolution.⁶ Nowadays many scholars argue that extra-judicial dispute resolution mechanisms are not alternatives, but rather they are the “appropriate dispute resolution devices.”⁷ The scope of ADR is also sometimes contentious. Some

⁴ See e.g. KARL MACKIE ET. AL., COMMERCIAL DISPUTE RESOLUTION: AN ADR PRACTICE GUIDE, 7(Butterworth 1995); See also D.Paul Emond (ed), Commercial Dispute Resolution: Alternative to litigation, 2 (Canada Law Book Inc., 1989).

⁵ See Draft presentation of Dominick Kohl Hagen, Alternative Dispute Resolution (ADR) and Mediation: The Experience of French speaking countries, course held at the EACC. Addis Ababa ,on how to integrate ADR in Ethiopia, available at: www.dhdi.free.fr/recherches/etudesdiverses/articles/kohlhagenmediation.pdf (last visited on February 20, 2008). See also Oluseun Abimbola,ADR: How does it complement Mainstream Litigation Relating to Negligence/Damages in Jurisdiction how its use should be improved /expanded d/curtailed? Available at: http://primesolicitors.com/papers/website_resource_1.pdf? (Last visited on February 20, 2008).

⁶ Ibid.

⁷.Karl Mackie, supra note 4 at 7.

scholars define “ADR” as a term used to encompass a wide variety of dispute resolution outside the formal court processes. Others however, limit ADR to those extra-judicial dispute resolution processes in which the role of the third party neutral is facilitative rather than decisional.⁸

According to the latter view of “ADR,” mediation and conciliation are the mainstream ADR mechanisms, whereas arbitration is not. In this work however, a wider view of ADR is adopted, so that arbitration is considered as one form of, in fact, the most common and the oldest form of extra-judicial dispute resolution mechanisms.

Although arbitration is decisional as opposed to other ADR mechanisms, like other ADR mechanisms, however, arbitration is a private dispute resolution process. As opposed to state appointed judges, arbitrators are selected and paid by the parties. The parties have the right to choose (prescribe) the technical and other qualifications required of a person to judge their case. Compared to litigation in courts, arbitration is generally considered as a speedy, flexible and confidential form of dispute resolution.

Arbitration is incorporated in our law, with the adoption of the Civil Code and the Civil Procedure Codes of Ethiopia in the early 1960’s. Since then however, many changes were undergone world wide, new rules and concepts of arbitration have been introduced. Despite this, the Ethiopian Law of

⁸ *Id.*

arbitration is on the one hand sketchy,⁹ and it does not cover all the important issues that it ought to cover. It is also outdated, in a sense that, it does not incorporate most of the modern rules and conceptions on commercial arbitration. As the provisions of the law on arbitration are scattered here and there in the Civil Code and the Civil Procedure Code, there is a drafting problem, in that, sometimes the different provisions of the two codes contradicting each other.

There are also lack of sufficient institutions in Ethiopia to support the development of arbitration in general and commercial arbitration more specifically. Only recently two arbitral institutions namely the Ethiopian Arbitration and Conciliation Center and Addis Ababa Chamber of Commerce Institute of Arbitration are established.

Though insufficient the laws and institutions on arbitration might be, the utilization of arbitration among Ethiopian business people, as an alternative dispute resolution mechanism to the national courts is very low.

1-2 Statement of the problem

Commercial arbitration is a dispute resolution process by which parties to a dispute undertake to refer their controversies for determination by a third party neutral called arbitrator (s). Commercial arbitration is usually preferred

⁹ The detail of the problems and the gaps in the Ethiopian Law of Arbitration are discussed in chapter three of this work.

by business men to litigation, among other factors, because of the formers flexibility, expeditious settlement of disputes, confidentiality, and selection of experienced arbitrators. In contrast, however, courts are highly overloaded with cases. There is lack of trained manpower; as a result there is an excessive delay.

In the Ethiopian context too the situation is not different from the above general assertion.¹⁰ Despite this however, alternative dispute resolution mechanisms including commercial arbitration are not resorted to by business people in Ethiopia. Business people in Ethiopia usually resort to the formal state courts whenever they encounter disputes.¹¹

This work is an attempt to identify, first whether commercial arbitration as an alternative dispute resolution mechanism is used in Ethiopia, and if not the possible reasons why it is not commonly utilized. The research paper also examines the existing legal and factual situations in relation to commercial arbitration in Ethiopia and attempts to indicate what ought to be done if commercial arbitration is going to serve as a viable alternative dispute resolution mechanism in Ethiopia.



¹⁰ The state of the Ethiopian Courts in this respect is briefly considered in Chapter 4.2 of this work.

¹¹ One can easily make similar conclusions by simply comparing the number of cases that are brought before arbitral institutions with the number of cases filed each year with Ethiopian Courts.

It also attempts to make some inferences as to what the future of commercial arbitration would be, based on the existing factual and legal situation in Ethiopia.

1-3 Objective of the study

The following are the main objectives of the study:

- A- To make an assessment of the actual utilization of commercial arbitration in Ethiopia and identify the possible factors affecting the actual utilization.
- B- To examine whether or not there are sufficient legal and institutional set-up for the development of commercial arbitration in Ethiopia.
- C- To make some inferences about the future of commercial arbitration based on the existing realities so as to suggest the possible remedies so that commercial arbitration may serve as a viable alternative dispute resolution mechanism.

1-4 Limitations of the study

The objective of this study, as mentioned above, is to make assessment of the current legal and factual situations in relation to the utilization of commercial arbitration in Ethiopia and to forward suggestions as to what should be done in the future in this respect. Gathering an empirical data in relation to the current state of affairs is not an easy task. Since the information in this respect is to be gathered from the business community, lawyers, and arbitrators and generally from prominent personalities, accessing these

sources was a very difficult task. The researcher was initially eager to cover various data sources. Due to the unwillingness of some of the sources, the study does not claim to be comprehensive. It can however establish a sufficient ground for further research.

1-5. Methodology of the research

Relevant information for this study has been collected from both primary and secondary sources using the following sets of methods: First, questionnaires were distributed to the different category of people; namely judges, advocates (attorneys), arbitrators, business people and law instructors. Out of the total 150 questionnaires distributed to the different groups mentioned above, 24 questionnaires were properly filled by the judges, 54 questionnaires were collected from persons who are engaged in different business activities in Ethiopia. 37 Questionnaires were filled by lawyers, arbitrators and law instructors.

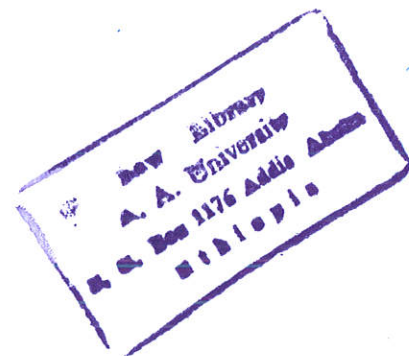
An interview was also conducted with lawyers and prominent arbitrators and persons who were working and/ or heading arbitral institutions in Ethiopia. Relevant books and literatures were also utilized particularly to indicate the conceptual underpinnings of commercial arbitration and its advantages.

1-6. The structure of the study

The study is organized in to five chapters. The first chapter is devoted to the introductory part. The background, the statement of the problem, objective of

the study, and the methodology and data sources are provided in the first chapter. The second chapter of the thesis provides the conceptual framework of commercial arbitration. In particular, it defines and distinguishes commercial arbitration from other dispute resolution mechanisms. The chapter also provides the (historical) development of commercial arbitration in different countries. It also illustrates the factors in choosing commercial arbitration.

The third chapter deals with the legal framework of commercial arbitration in Ethiopia. Accordingly, the major gaps in our law of arbitration in light of the modern arbitration rules and concepts are identified. The fourth chapter provides the state of affairs in respect of the practical utilization of commercial arbitration in Ethiopia and the major factors affecting commercial arbitration. The last (fifth) chapter deals with the prospect of commercial arbitration in Ethiopia. This chapter aims at indicating the major challenges to be tackled and the suitable circumstances for the development of commercial arbitration on the one hand and attempts to point out as to what the future of commercial arbitration in Ethiopia might be, given the current conditions. Finally, the study would end with conclusions.



CHAPTER TWO

The Conceptual Framework of Commercial Arbitration

This chapter focuses on the theoretical and conceptual framework of commercial arbitration. In particular, issues relating to the nature of arbitration as distinct from litigation and other alternative dispute resolution processes will be discussed. Furthermore, the concept of commerciality in commercial arbitration in general and under Ethiopian law in particular will be elaborated. The historical development of commercial arbitration will also be examined. The factors in choosing commercial arbitration as opposed to formal legal machinery will also be critically examined.

2.1. The nature and meaning of arbitration

Time has now come to end the monopolistic view of public court.¹² Now many private dispute resolution mechanisms operate side by side with state courts. Arbitration is one such mechanism by which one or more persons, who are parties to a dispute, entrust the determination of a question to a third party neutral, called arbitrator(s), who decide the case based on the parties agreement.¹³ It is a process by which parties refer their controversies to an impartial person, who undertakes to decide the case based on the “arguments and evidences” to be presented by the parties.¹⁴ The parties may agree in advance, that the arbitrators’ decision will be final and binding on them.¹⁵

¹² Jack Effron, Alternatives to Litigation: Factors in choosing, 52 THE MODERN LAW REVIEW 480 (July. 1989).

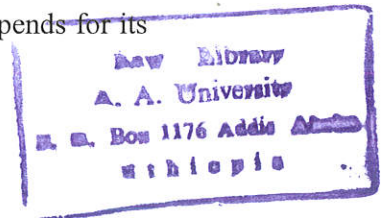
¹³ RENE DAVID, ARBITRATION IN INTERNATIONAL TRADE, 5 (Kluwer Law and taxation publishers, Deventer, Netherlands, 1985).

¹⁴ Domke on commercial arbitration (database updated march 2003), p.3.

¹⁵ *Id.*

Arbitration is a private dispute resolution device which generally emanates from the consent of the parties. Parties to a dispute select their own judges (arbitrators), fix the time and place of arbitration and design the rules of procedure to be followed by the arbitrators.

It has been pointed out that “the arbitrator is neither a judge, nor a vigilante”.¹⁶ Unlike a judge who derives decision making authority from the state, or a vigilante whose role in furthering justice is self-generated, an arbitrator’s power derives from the consent of the individuals or entities involved in a particular dispute.”¹⁷ Therefore, consent is the foundation or the basis for any arbitration. A Judge’s authority or power may extend by the mere presence of the parties within the territorial Jurisdiction of the court. However, an arbitrator’s authority emanates from and depends for its existence on the agreement of the parties.



Although a valid arbitration agreement emanates from the parties consent,¹⁸ it however ends up in final and binding decisions. It is adversarial in character, and results in one party winning and the other losing the case. Some scholars classify arbitration together with litigation as essentially an adjudicatory process than an ADR.¹⁹ Arbitration as an out-of-court procedure whereby the parties design the process though not the outcome,

¹⁶ William W. Park, *The Arbitrability Dicta in First options vs. kalpan what sort of kompetenz-kompetenz has crossed the Atlantic?* 12 *ARBITRATION INTERNATIONAL*, (LCIA) 1996, p-139.

¹⁷ *Id.*

¹⁸ There is in fact a mandatory arbitration, which emanate from the law, for instance, the provisions of the previous arbitration system in Ethiopia.

¹⁹ Arthur Marriott, “tell it to the Judge ... but only if you feel you must”; the 1995 Fresh field Lecture, . 12 *Arbitration International* (1996) LCIA, p.13,

could however not be denied. It is truly an alternative to the courts which are bound by a rigid procedural rules fixed in advance. In contrast, arbitration proceedings are more flexible, speedy and efficient

There are different views on the legal nature of arbitration.²⁰ There are different debates as to whether and to what law arbitration is subjected. Some scholars argue that, arbitration is in the nature of Jurisdictional.²¹ Accordingly, arbitrators exercise judicial function, because they are allowed by the law of the place of arbitration. That is the reason why arbitral awards, where not voluntarily given effect to, are enforced by courts equally like court judgments.²²

The arbitrators function is judicial; therefore it is subject to the law of procedure. Others emphasize on the contractual aspect of arbitration.²³ For them consent being the basis for every arbitration, the whole process i.e. both the agreement and the award, are reflections of the contractual character of arbitration.²⁴ With a view to bridge these contrary schools of thought another third theory, known as, the mixed or hybrid theory was propounded. Accordingly arbitration is both contractual and jurisdictional in nature. It is contractual because it emanates from the parties consent. It is also jurisdictional, in the sense that, the arbitrators exercise the function of a

²⁰ JULIAN D.M. LEW ET AL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, 71 (New York, 2003) (the authors identify about four theories on the Judicial nature of arbitration: jurisdictional, contractual, mixed (hybrid), and antonymous). See also RENE DAVID, ARBITRATION IN INTERNATIONAL TRADE (1985) (pointing out the two major views on the nature of arbitration and concluding that neither of them is conclusive.)

²¹ Julian D.M Lew et al, supra note 20 at 73.

²² *Id* at 75.

²³ *Id*, at 77.

²⁴ *Id*.

judge. In the words of Lew and his co-authors, these two aspects are “indissolubly intertwined.”²⁵ It is “an institution between the law of contracts and the law of civil procedure.”²⁶ That is why it is sometimes difficult to differentiate the procedural aspect of arbitration from its contractual aspects. Most states, especially the civil law countries, adopted provisions on arbitration in either the civil code or the civil procedure code.

There are different forms of arbitration. The major ones are: ad-hoc and institutional arbitrations. Ad-hoc arbitration refers to arbitration where the parties and the arbitral tribunal conduct the arbitration according to procedures which will either be agreed by the parties or, in default of agreement, laid down by the arbitral tribunal at a preliminary meeting once the arbitration has begun.²⁷ It is a form of arbitration in which the parties do not stipulate to the procedural rules of any particular arbitration body to govern the conduct of their arbitration. The disputant parties themselves or the tribunal will set the procedure to be followed in the arbitration proceeding. The parties may also adopt the rules of a certain institution to govern the arbitral proceeding without subscribing to the rules of a certain institution as regards administration matters. An institutional arbitration on the other hand, is one that is administered by one of the arbitral institutions under own rules of procedures.²⁸

²⁵ *Id.* at 80

²⁶ David, *supra* note 13 at 78.

²⁷ ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, Para 1-76 (3rd ed., 1999).

²⁸ *Id.* at 1-77.

Both forms have their own merits and demerits. On the one hand, ad-hoc arbitration is the most flexible form of arbitration which the parties can easily design to meet their own factual situation and to the particular dispute.²⁹ However it depends for its full effectiveness up on the will and co-operation of the parties and their lawyers, backed up by an adequate legal system in the place of arbitration.³⁰ On the other hand institutional arbitration has some degree of permanency compared to ad-hoc ones.

2.2. Arbitration Compared with Other Alternative Dispute Resolution (ADR) Mechanisms

The term Alternative Dispute Resolution is used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, full-scale Court processes.³¹ The major Alternative Dispute Resolution Mechanisms are: negotiation, mediation, conciliation and arbitration. There are various other alternative mechanisms which are a hybrid of one or the other of the major ones, such as med- arb, mini trial, ombudsman etc.³²

Although the characteristic of the ADR mechanisms vary from each other, all share some common characteristic features which distinguish them from the formal judicial structure. Most fundamentally ADR processes are

²⁹ *Id* at 1-83.

³⁰ *Id* at 1-84.

³¹ There are in fact different debates among scholars as to what constitutes an ADR. Some scholars argue that ADR refers to a structured process in which the role of third party intervention does not lead to a legally binding outcome imposed on the parties. See e.g. KARL MACKIE ET.AL., COMMERCIAL DISPUTE RESOLUTION: AN ADR PRACTICE GUIDE 7(1995). See also ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, Para 1-51(1999). But see Jethro K. Liberman & James F. Henry, Lessons from the Alternative Dispute Resolution Movement, 53 CHICAGO L.REV.424,424-439(1986)

³² LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS, 10(West Publishing, 1987).

informal compared to judicial processes. Parties have the opportunity to design the rules of procedure by which disputes are resolved. In most cases ADR rules are flexible and parties will have the chance to directly communicate and resolve their conflict as opposed to litigation. One scholar has noted that, in the case of court adjudication not only that parties do not speak on their own behalf, they do not also talk to each other.³³ Instead, they speak to a third party decision maker.

As stated above, ADR processes are distinct from one another. What distinguishes the various processes of dispute resolution and gives each its characteristics distinct from others is the level of intrusiveness.³⁴ It is whether and the extent of third party intervention which basically distinguishes one process from the other. In other words some extra-judicial dispute settlement mechanisms do not require third party intervention, while others do. Among those ADR (Alternative Dispute Resolution) mechanisms which involve third party intervention too, the role played by the third party neutral is different from one mechanism to another. They also generally differ in their processes and outcomes.

Accordingly arbitration as an alternative dispute resolution process ends up in a binding and final decision. The role of third party neutral is very high compared to the role played by a neutral third party in case of other ADR mechanisms. It is the most intrusive method of dispute resolution next to

³³ D. Paul Emond, *supra* note 2, at 8

³⁴ Jack Effron, *supra* note 12 at 482.

court litigation. Unlike the role of third party in mediation or conciliation, the third party neutral, arbitrator, renders a binding and final decision on the parties. The parties can only control the process and not the outcome. The outcome will be determined by the neutral arbitrators.

In the case of mediation, the third party neutral, called the mediator, assists the parties to the dispute to negotiate and resolve their dispute. It is a “negotiation carried out with the assistance of third party,”³⁵ The mediator, as opposed to an arbitrator or a Judge, has no power to impose an outcome on disputing parties.³⁶ All the mediator can do is to persuade parties to the dispute to focus “on his/her real interest, rather than on what it conceives to be its contractual or legal entitlement.”³⁷



Conciliation is another dispute resolution process which shares common characteristics with mediation. The two terms are sometimes interchangeably used.³⁸ Some scholars however point out that in conciliation, the third party neutral, called the conciliator at the end of the day gives his own recommendations or proposal,³⁹ while the mediator in mediation only assists and does not suggest. This view is still not conclusive because the role of a mediator in an evaluative mediation is almost similar to the role of a conciliator stated above.

³⁵ GOLDBERG STEPHEN ET AL, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES, 103 (2nd ed., 1992).

³⁶ Ibid.

³⁷ Alan Redfern & Martin Hunter, *supra* note 27, at Para. 1-53.

³⁸ Karl Mackie, *supra* note 4, at 8.

³⁹ Redfern & Hunter, *supra* note 27, Para 1- 54.

Negotiation is the least intrusive process of dispute resolution whereby the parties to the dispute are left to them to directly discuss with each other and settle their controversies. Here there is no third party intervention. Karl Mackie and his co-authors assert that” it is the most flexible, informal, and party oriented, closest to parties circumstance and control and can be geared to ease party’s own concerns.”⁴⁰

It is for the parties to choose the time, place and the subject matter for negotiation. The parties themselves decide on the process and the outcome of the discussion.

2.3. Commercial Arbitration Defined

Commercial arbitration is a term that is used to refer to the resolution of commercial disputes through arbitration. There is however no consensus as to what constitutes a “commercial dispute.” The distinction between commercial and non-commercial is much more common in the civil law countries than in the countries having the common law system. International Convention on the Recognition and Enforcement of Foreign Arbitral Awards, i.e. the 1958 New York Convention and the UNCITRAL Model Law do also recognize the distinction, by granting state contracting parties the right to limit the application of the Conventions to what they consider by their national laws as commercial.⁴¹ Different states have also interpreted the

⁴⁰ Karl Mackie, *supra* note 4 at 8.

⁴¹ See Art 1(3) of the 1958 New York Convention and Art 1(1) of the UNUTRAL Model Law. Footnote (2) of art 1(1) of the Model law however provides a list of some activities which may be considered as commercial, though the list seems broad and indicative and not exhaustive

term “commercial” differently.⁴² Under Ethiopian law arbitration is subjected to the provisions of the Civil Code and the Civil Procedure Code. The part of the Civil Code governing “arbitral submission”,⁴³ does not make any distinction between arbitral submissions in relation to commercial and non-commercial disputes, what matters is whether those disputes emanate from a contract or other specific legal obligations. Art. 5 of the 1960 Commercial Code of Ethiopia provide a list of activities which are considered as commercial.

Therefore commercial dispute, under our law, is a dispute arising out of the carrying out of one of those activities which are considered by the pertinent laws as commercial. What should however be noted is that as to who should carry out those activities so as to be regarded as commercial. What if one of the activities listed under Art-5 of the Commercial Code is carried on by a state administrative organ? A trader as per art-5 of the Commercial Code is a person who carries out the activities listed thereunder professionally and for gain. Commercial arbitration is therefore the resolution of disputes arising out of transactions carried out by persons generally considered under Ethiopian law as traders. A noted scholar has pointed out that:

Commercial arbitration, as used generally, is not confined to traditional commercial transactions such as the sale and purchase of commodities and manufactured goods, and issues in the maritime field. It is also used to decide controversies arising out of building and engineering contracts, agency and distribution

⁴² Agarwal Anurag k. and Harsh Jain D., Commerciality in International Commercial Arbitration, at <http://www.iimahd.ernet.in/publications/data/2006-04-10agarwal.pdf>, (visited on 20 oct., 2007...)

⁴³ Civil Code of Ethiopia, Proclamation No. 165 of 1960, NEGRIT GAZETA, extra-ordinary Issue, 19th year, No.2. , Arts. 3325 -3346.

arrangements, close corporation and partnership relation, separation agreement, individual employment contracts, license agreements, leases, estate matters, contracts of government agencies and municipal bodies with private firms for construction work, stock exchange transactions ...⁴⁴

As stated earlier, what constitutes “commercial” differs from state to state. But it should be noted that the scope of application of commercial arbitration is not confined to disputes arising out of traditional transactions such as the sale of goods and services. On top of the nature of the transactions to which parties are engaged, commerciality of a transaction may be defined in terms of the parties to the transactions. In other words, if the parties to the transaction or one of them are commercial, for instance share companies and private limited companies, per Art. 10 of the Ethiopia the dispute to which such parties are engaged may be considered as a commercial dispute.

2.4 The Development of Commercial Arbitration

The origin of commercial arbitration as a mechanism for dispute resolution dates back to time immemorial.⁴⁵ At what time and place man first decided to refer his controversies with another to the determination by his chief or fellow friends is not known.⁴⁶

Arbitration was commonly used among early Roman and the Greeks.⁴⁷ Traditionally too there were practices of arbitration and mediation in every community. Commercial Arbitration was extensively used in the medieval

⁴⁴ Domke, *supra* note 11 at 4.

⁴⁵ Wolaver Earl S., *The Historical Background of Commercial Arbitration*, 83 UNIVERSITY OF PENNSYLVANIA LAW REVIEW AND AMERICAN LAW REGISTER, 132 (1934).

⁴⁶ *Id.*

⁴⁷ *Id.*

English, where merchant guilds and fair courts played a significant role in the settlement of disputes among their fellow members.⁴⁸

The dispute among those traders was also settled by “fair law” which was in accord with the universal custom of the merchants and had no reference to the courts of the realm.⁴⁹ The courts were also called the pie-powders, because of the speed with which they render justice people may come to it with out even brushing their shoes.⁵⁰ “*pie-poudre*” is a French term which means dusty- shoes.⁵¹ Membership in those guilds was also treated as an object of ownership.⁵² “In this setting arbitration awards were largely enforced through communitarian norms.”⁵³ But as arbitration became popular, disputants increasingly looked to public courts to enforce private agreements to arbitrate.⁵⁴

The common law courts of the 17th and 18th Centuries, however did not give recognition to arbitration agreements. Beginning with the often quoted *vynior’s case*⁵⁵, an agreement to arbitrate was considered revocable. Any party to an agreement to arbitrate could put an end to the arbitration

⁴⁸ *Id.*, at.133.

⁴⁹ *Id.*, at 136.

⁵⁰ John R. Abersold, Commercial Arbitration: A practical plan, 148 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES, 251 (March 1930).

⁵¹ *Ibid.*

⁵² Pollock and Maitland, History of English LAW, 666(2nd ed. 1911) (cited in Wolaver Earls, *supra* note 28 at 135).

⁵³ Reuben Richard c., Public Justice: Towards State Action Theory of ADR, 85 CAL. L. REV., 599 (1997).

⁵⁴ *Id.*

⁵⁵ In *Vynior’s v. wiled* (1609) Lord Coke is quoted to have decided that: “A man can not by his act make such authority power, or warrant not countermendable which is by the law and its own nature countermendable.” By these ruling arbitrators authority was equated to the rule of agency, whereby the principal can at any time revoke the authority he has given to his agents.

agreement before an arbitral award was made and thereby render the arbitrators' authority in-effective.⁵⁶ Vynior's case was an action brought by vynior against Wilde for failure to submit disputes to arbitrators, whereby the defendant argued that since no award was made to the plaintiff, the defendant had revoked the authority to be bound by arbitrators awards. The judgment was entered in favor of the defendant on the condition that he pays to the plaintiff the sum agreed by way of penalty.

Following the *vynior's* case, common law judges became very hostile to arbitration. They took an agreement to arbitrate as an act to oust the power of legally constituted courts. Commentators point out that the ouster rule was developed by the common law judges, among other reasons, because of their private interests⁵⁷, the judges were jealous, because their income largely depended on fees from the disputants, of which the judges were deprived by the private tribunals⁵⁸. This attitude of the common law courts were however gradually changed through the parliaments' effort in enacting statutory laws.⁵⁹

Commercial arbitration as a private dispute resolution mechanism is a recent phenomena in the Latin American countries.⁶⁰ Latin America's perspective

⁵⁶ John R. Abersold, *supra* note 50 at 251.

⁵⁷ Reuben Richard c. *supra* note 53 at 599.

⁵⁸ *Id.*

⁵⁹ In common law England, for instance, Arbitration Act of the 1689 has made submission agreement irrevocable by making it a rule of court. Similarly many arbitration laws were enacted in England such as the 1833, 1854 and 1898 laws, all of which finally made arbitration in England, irrevocable binding and enforceable. In the US, the FAA which was modeled on the 1920's New York state act has created an arbitration system which is irrevocable, binding and final. Until such a time that these laws are enacted in the US distinctions were made between agreements to submit future dispenses to an arbitration and submission agreements (of an existing dispute). As of the enactment of these laws, both have got equal recognition and enforcement

⁶⁰ Daok Bishop R. et.al, international commercial arbitration in South America, available at: <http://www.kslaw.com/library/pdf/bishop3.pdf>. (last visited in Dec, 10 2007).

on arbitration has only evolved since the last two to three decades.⁶¹ Historically Latin American countries were for years hostile to arbitration, particularly by virtue of Calvo doctrine⁶² parties to any disputes (including foreign nationals doing business in Latin America) were obliged to submit to the local law and local courts⁶³. Latin American parties embraced this doctrine to prevent foreign parties from arbitrating disputes.⁶⁴ This aversion to international arbitration gradually took its way in to domestic policy, restricting the use of arbitration including in domestic disputes.⁶⁵ It was only since the 1990's that most Latin American countries changed their hostile attitude towards arbitration. Currently most of the Latin American countries have enacted modern arbitration laws; they are also parties to international conventions such as the New York Convention and the Panama Conventions.⁶⁶ In Africa the former French colonies have signed the OHADA treaty which provides for a "joint court of justice and arbitration."⁶⁷ Many African states have also enacted modern arbitration laws following the western countries track. However, Rene David notes that although the concept of arbitration and conciliation are not alien to traditional Black Africa, arbitration which is based on western traditions and way of life is foreign to the conception of justice which prevails in Africa.⁶⁸

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

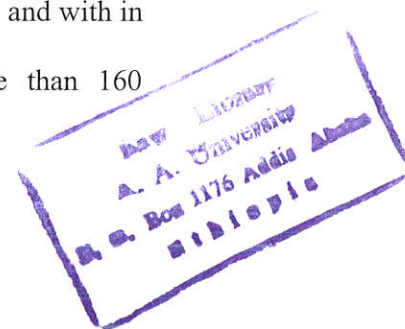
⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Ronald Amoussou Guenouo, *The Evolution of Arbitration Laws in Francophone Africa*, International Law FirmScpW.G.Z.(1996-1998), available at: <http://www.wgzavocats.com/articles/guideforarbitration-afrique.html> (last visited on Dec, 18, 2007).

⁶⁸ David, *supra* note 13, at 127.

In China, the first arbitration law was enacted only in 1994.⁶⁹ Before the enactment of this legislation there were practices of international commercial arbitration administered by the two major arbitral institutes in China, CIETAC and CMAC.⁷⁰ Domestic arbitration was conducted on the basis of a totally different theory from the modern arbitration.⁷¹ Domestic arbitration was conducted under the aegis of administrative organs. Since the 1994 Act however independent arbitral institutions were legally recognized and with in few years after the enactment of the Arbitration law more than 160 arbitration institutions have been established in China.⁷²



2.5. Factors in Choosing Commercial Arbitration

The relative advantages of commercial arbitration over litigation are contentious issues. Some scholars argue that neither mechanism has an innate superiority over the other.⁷³ What matters is the nature of the dispute. However some scholars and practitioners fiercely argue against commercial arbitration asserting that it is a threat to true justice⁷⁴ rendered by sovereign courts. Arbitration is also challenged as a tool used by the powerful (the haves) to evade state machinery.⁷⁵

⁶⁹ Arbitration law of the people's Republic of china (Adopted at the Ninth Meeting of the standing committee of the eighth National peoples congress on August 31, 1994, promulgated by order No 31 of the president of china and effective as of sept. 1995-24 available at: [http:// www lexmercatoria. org.](http://www.lexmercatoria.org) (last visited on January 10 2008).

⁷⁰ Li.HU, Introduction to commercial Arbitration in china, available at <http://www.softic.or.jp/symposium/open-materials/11th/en/LiHu/pdf>.

⁷¹ *Id.* See also art 8 of the 1994 Act which clearly states that: arbitration shall be carried out independently according to law and shall be free from interference of administrative organs, public organization or individuals

⁷² Li.HU, supra note (70) above

⁷³ ROY GOODE, COMMERCIAL LAW, 53 (penguins Books 2nded, 1995).

⁷⁴ David, supra note 13 at 53.

⁷⁵ *Id.*

Some scholars such as Marc Galanter and Owen Fiss challenged the whole theory on the basis of which ADR programs stand. They argue, that that there is court congestion is exaggerated,⁷⁶ that the increase in the number of cases is proportional to an increase in the number of judges and support staff.⁷⁷ Prof. Owen Fiss also, in his popular work, *Against Settlement*, notes that settlement is inferior to adjudication and that given the power imbalance among the disputant parties and lack of consent, the justice rendered out side court is a second class justice.⁷⁸ It is further pointed out that settlement is not equated with court adjudication, for courts are public institutions whose purpose is to “explicate and give force to values embodied in authoritative texts such as the constitution and statues to interpret those values and to bring reality in to accord with them”.⁷⁹ Susan Leubusher also argues in relation to international commercial arbitration and the role of transnational corporations that it creates a situation in which state judicial system is robbed off the power to control its own economic, social, political and cultural system.⁸⁰ Susan in her work entitled “Privatization of Justice” notes that commercial arbitration is one such means by which MNC’s, from the well to do countries lessen the impact of local laws and local justice system.⁸¹

⁷⁶ Marc Galanter, *Reading the Landscape of Disputes: what we know and Don’t know (and think we know) about our allegedly contentious and Litigious society: in Dispute Resolutions and Lawyers* 17, 17-25 (Leonard L. Riskin & James E. Westbrook eds., American case book series, west pub. Co, (1987), PP, 17-25.

⁷⁷ *Id.*

⁷⁸ Owen M. Fiss, *Against Settlement*, 93 *Yale l. j.*, Reprinted in Riskin & westbrook, *Dispute Resolution and Lawyers* 28-34 (1987).

⁷⁹ *Id.*

⁸⁰ Susan Leubuscher, *The privatization of justice. International commercial Arbitration and the Redefinition of the state* (June 2003) at <http://www.fern.org/pubs/reports/dispute%20resolution%20essay.pdf>

⁸¹ *Id.*

Despite the above criticisms and debates however, commercial arbitration has got a number of advantages compared to litigation. It is a fact of common knowledge that courts everywhere are congested with cases; Court proceedings are extremely slow and costly. ADR mechanisms in general and commercial arbitration in particular would help in making justice accessible to the public.⁸² Commercial arbitration provides a healthy competition to the state justice itself,⁸³ which in effect improves the quality of justice rendered to the public at large. Furthermore, the use of commercial arbitration would help disputes to be resolved speedily and creates an opportunity for courts to redirect the limited resources to resolve other disputes which are of more importance to the society.⁸⁴ In the words of professor Sanders, given the case load, the in-efficiency and the cost, "it would enable to reserve the courts for those activities for which they are best suited and to avoid swamping and paralyzing them with cases that do not require their unique capabilities".⁸⁵ Generally speaking all these mentioned merits equally hold true for all extra-judicial settlement mechanisms. Still commercial arbitration has the following further and typical advantages compared to litigation.

Unlike trial in courts which requires strict adherence to the rules of procedure and evidence laws, parties to arbitration are offered the freedom to

⁸² Mauro Cappelletti, *Alternative Dispute Resolution Processes With In the Frame Work of The World Wide Access To Justice Movement*, 65 *THE MODERN L. REV.*, 287 (1993).

⁸³ Edward Brunet, *Book Review on "measuring the costs of civil justice"*, 83 *MICHIGAN L.REV.*, 33 (1985).

⁸⁴ Arthur Marriott, *Tell It To The Judge...But Only If You Must: The 1995 Fresh Field Lecture*, 12 *ARBITRATION INTERNATIONAL*, 5 (1996).

⁸⁵ Sander, *varieties of Dispute processing*, as reproduced in Riskin & Westbrook, *supra* note 54 at 15

design a procedure appropriate to their own situation.⁸⁶ Subject to the mandatory rules of law parties may define what the arbitrators can do and can not, they may agree in advance on the procedure to be followed for instance in the selection, appointment and removal of arbitrators, the time and place where arbitration is to be conducted and on other very important issues. Arbitration proceedings are therefore generally flexible compared to the rigid court proceedings. Since the parties to the dispute have the opportunity to select their own judges of special skill in whom they have confidence, an experienced tribunal of this kind does have the ability to quickly grasp the salient issues in fact or law in dispute and so save the parties time and money.⁸⁷ It would therefore enhance the speed by which decisions are rendered.

The parties to the dispute in their power and capacity to design their arbitral proceedings may also limit the time within which an arbitration tribunal must render an award, which may be very short. The parties may, for instance, agree that the arbitrators skip the ordinary hearing procedures, or that witnesses give their testimonies in writing. These would enable arbitration proceedings to be speedy and flexible.

Confidentiality is another essential feature of a commercial arbitration. In contrast to court proceedings which are generally public, arbitration proceedings are private. No one except the arbitrators, the parties and their

⁸⁶ Pepper R.A, Why Arbitrate? Ontario's Recent Experience with Commercial Arbitration, 36 OSGOODE L. J., 817(1998).

⁸⁷ Alan Redfern & Martin Hunter, *supra* note 27 Para 1-36.

legal representatives can attend meetings at the arbitral proceedings. Alan Redfern and Martin Hunter point out that court litigation is like washing dirty linen in public.⁸⁸ As opposed to this, arbitration proceedings are absolutely confidential.⁸⁹ This means that “the subject matter, the evidence, the documents prepared during arbitration by the parties, and the arbitrators’ awards can not be divulged to third parties”.⁹⁰

The most important advantage of arbitration compared to litigation is the power of the parties to arbitration to select their own arbitrators, of relevant expertise.⁹¹ For instance parties to a construction dispute may provide in their submission agreement that the tribunal be composed of at least one construction engineer or a lawyer and so on.

Arbitration also offers commercial parties an award which is final and less subject to the delays and uncertainty inherent in a litigation appeal process.⁹² Appeal and Set-aside, if any, are for limited and exceptional grounds. It would enhance parties’ future business relationship.

As an alternative dispute resolution mechanism, commercial arbitration is therefore, flexible, confidential, and enables parties to choose arbitrators of their own selection, in whose skill and expertise the parties owe full confidence.

⁸⁸ *Id.*, Para 1-37.

⁸⁹ Lew Julian D.M et al, *supra* note (20) at 8.

⁹⁰ *Id.*

⁹¹ Rajah and Tann, available at: www.rajahtan.com (last visited on January 19 2008).

⁹² Pepper R.A., *supra* note 86 at 821.

CHAPTER THREE

The Legal Framework of Commercial Arbitration in Ethiopia

This chapter explores commercial arbitration in Ethiopia from legal dimensions i.e. the gaps and limitations in the laws. It commences by identifying the laws governing commercial arbitration in Ethiopia and examines whether the Ethiopian law on commercial arbitration is comprehensive enough to respond to the needs of contemporary business realities in Ethiopia in light of some of the modern commercial arbitration rules and concepts. To be more specific, this chapter examines the Ethiopian law of arbitration in light of modern developments in the area of commercial arbitration and identifies the core problems of Ethiopian law in that respect.

Crudely stated, one can posit that the Ethiopian law on commercial arbitration is not comprehensive and it is back-ward. It is not comprehensive because it does not include some of the most important concepts and features of commercial arbitration. The law is out-dated because it is almost about 50 years since the law on arbitration in general and commercial arbitration in particular was passed. Because of its old-age, it is plausible to argue that the new developments on commercial arbitration due to the changing modalities of international and national commercial transactions are not incorporated in our law of arbitration. On top of that, there are drafting and translation problems in our law on arbitration. For instance on the arbitrability of administrative contracts, while the Civil Code is silent; the Civil Procedure

Code clearly provides that such issues are in-arbitrable. This issue has been subject to debates and discussions among Ethiopian scholars.

This chapter considers in detail the flaws of the Ethiopian law of commercial arbitrations and specifically the assertions that it is outdated and lacks comprehensiveness. It also shade light on some important points, such as the law regulating commercial arbitration in Ethiopia, particularly with a focus on the law regulating the formal and substantive requirements of an arbitration agreement, the effect of an arbitration agreement, i.e., whether an agreement to arbitrate constitutes a bar to court action under our law and a question of waiver. Moreover, the role of courts in assisting arbitration and their role in reviewing arbitral awards will also be elaborated.

3.1. The Law Regulating Arbitration in Ethiopia

As one form of dispute resolution mechanisms arbitration has long been part of the custom and tradition of the different communities in Ethiopia.⁹³ As understood today, the concept of arbitration which emanates from the parties consent and results in binding and enforceable award, is only incorporated in Ethiopian law with the enactment of the Civil Code⁹⁴ and the Civil Procedure Code⁹⁵. The substantive aspect of arbitration is governed by the provisions of the Civil Code, while its procedural aspect is subject to the Civil Procedure

⁹³The different nations and nationalities of Ethiopia have their own mode of resolving dispute which until today is practiced in some part of the country. These modes of resolving are customary and informal and akin to arbitration fused with conciliation.

⁹⁴ Civil Code of the Empire of Ethiopia, Proclamation No. 165 of 1960, Negrit Gazeta, extra-ordinary Issue, 19th year, No.2.

⁹⁵ Civil Procedure Code of the Empire of Ethiopia, Decree No.52 of 1965, Negarit Gazeta, Extra-ordinary issue, 25th year, No.3.

Code. There are also provisions in the Commercial Code,⁹⁶ Maritime Code,⁹⁷ the Family Code⁹⁸ and the Labor Proclamation⁹⁹ which make reference to the resolution of a dispute by arbitration.

The substantive aspect of arbitration is regulated by the provisions of the Civil Code, Title xx, Chapter 2, which is entitled “Arbitral Submission”. Arbitral submission is defined as “a contract whereby the parties to a dispute entrust its solution to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the principle of law.”¹⁰⁰

An arbitral submission may be made in relation to an existing dispute.¹⁰¹ It may also relate to a future dispute which may arise out of a contract in the future.¹⁰² An agreement to submit existing disputes to arbitration is commonly referred to as a submission agreement.¹⁰³ While an agreement to submit future disputes to arbitration, usually takes the form of an arbitration clause in the principal agreement between the parties.¹⁰⁴ Therefore, both submission agreements and

⁹⁶See for instance, Arts. 267(2), 500(1),1038(2) of the Commercial Code of Ethiopia of the 1960, proclamation No.166 of 1960, Negarit Gazeta, Extra-ordinary issue No.3, year 19th.

⁹⁷Maritime Code of The Empire Of Ethiopia, Proclamation No.166 of 1960, Negarit Gazeta, 19th year extraordinary issue No. 1 Art.209 of the Maritime Code of Ethiopia .

⁹⁸ The Revised Family Code, Proclamation No. 213 of 2000, Federal Negarit Gazeta, year 6, extra-ordinary issue No. 1/2000, Art.82.

⁹⁹Labor proclamation, proclamation No.377of 1996, FEDERAL NEGARIT GAZETA, year 10, No.12.

¹⁰⁰ Civil Code supra note (94) Art. 3325(1).

¹⁰¹ Ibid Art.3328(1)

¹⁰² ibid Art. 3328(2)

¹⁰³ Redfern & Hunter, supra note(27) at para 3-02

¹⁰⁴ Ibid

arbitration clauses are recognized and equally given effect under Ethiopian law.

However, although both submission agreements and arbitration clauses are recognized under Ethiopian law, there is a mild ambiguity about whether the term “arbitral submission” as used in the Civil Code refers to both “arbitration clause” and “submission agreement” or to the actual submission of a dispute that already arose. This issue is important because it is often difficult to differentiate the term arbitral submission from submission agreements. Therefore the term “arbitral submission” in the Civil Code ought to be understood to mean both arbitration clause as well as submission agreement. In other words, the title of the civil code which reads “Arbitral Submission” should have been “Arbitral Agreement”.

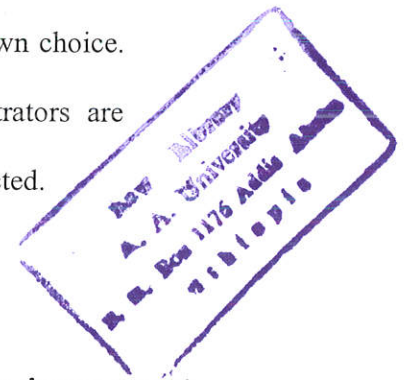
Moreover, there is no comprehensive and separate law of arbitration in Ethiopia. As stated above, Chapter 2 of Title xx mainly regulates the substantive aspect of arbitration. Furthermore, commercial arbitration is stipulated as a modality of dispute resolution under various circumstances. For instance, we find specific provisions referring to the resolution of disputes through arbitration in many parts of the Civil Code, Commercial Code, Maritime Code and the Labor Law. This fact triggers a question that, since the legislature made specific reference to arbitration here and there on different matters, whereas it is silent in

other cases, does that mean those matters to which the legislature makes no clear reference or silent are in-arbitrable? To further clarify this, for example, Art. 209 of the Maritime Code of Ethiopia provides for the possibility of inserting an arbitration clause in the case of a contract of carriage supported by a bill of lading. However, whether a contract of carriage that is not supported by a bill of lading is arbitrable or not is not clearly indicated in the Maritime Code.

Furthermore the problem of arbitrability issue indicated in the above paragraph is exacerbated by the provision of Art. 315(2) of the Civil Procedure Code which provides that, parties may not agree to arbitrate in the case of disputes arising out of administrative contracts or where arbitration is prohibited by law. From this provision one can argue that every matter is arbitrable but administrative contracts and matters that are clearly declared in-arbitrable by law. Therefore, based on the position of the Civil Procedure Code it is possible to agree to arbitrate in relation to any matter under Ethiopian law, where not clearly prohibited and except in the case of administrative contracts. The provision of the Civil Procedure Code triggers further questions. For example, there are no discernible rules in the Criminal Codes, Tax proclamations and other public law legal regimes of Ethiopia that indicate in-arbitrability. Thus, in accordance with the text of Art.315 (2) of the Civil Procedure Code these matters would be deemed arbitrable. But it is an established practice in law jurisprudence that

public law matters are generally in-arbitrable. That public law is subject to arbitration also tends to be against juridical common sense.

A further question may be posed in the existing legal regime of Ethiopian Commercial arbitration or even arbitration in general. The Civil Code Provision deal with contractual arbitrations, what law applies to legal arbitrations i.e. arbitration compulsorily ordained by the law? The Family Law case is governed by that law itself, the labour Proclamation of Ethiopia of the 1996, under Art. 43, provides for the parties right to settle their disputes by arbitrators of their own choice. The proclamation is however silent as to how the arbitrators are appointed and how the arbitral proceedings should be conducted.



3.2. Formal and Substantive Validity of an Arbitration Agreement

For an arbitration to have a binding effect, it has to fulfill the formal and substantive validity required by law. In other words, the parties to the agreement must be capable of contracting and give their consent sustainable at law, subject matter of the agreement must be sufficiently defined and lawful, and contract (an arbitration agreement) must also be made in the form prescribed by law, if any.¹⁰⁵

Consent of the parties is the foundation of every agreement including arbitration agreement. The parties must also be capable of contracting.

¹⁰⁵ Civil Code Arts.1678 and Art.3325 (1).

Capacity is generally presumed under our law.¹⁰⁶ However, certain groups of persons are deprived of the capacity to perform acts of civil life.¹⁰⁷ This includes the capacity to enter into an arbitration agreement. The capacity to agree to arbitration under our law requires a special capacity. The person consenting to arbitration must have the right to dispose of without consideration the matter to which the dispute relates.¹⁰⁸ Where a person is acting on behalf of another, therefore, a special authority is required to enable him/her to consent to arbitration.¹⁰⁹

Parties to an arbitration agreement must also clearly define the dispute to which the arbitration agreement relates. Such an agreement must also be possible and lawful under the law. In other words, the subject matter of the agreement must be capable of being resolved by arbitration under our law. This refers to the “arbitrability” of an issue i.e., as to which issues are arbitrable or in-arbitrable under Ethiopian law. In principle, any question capable of being resolved by national courts of law should be capable of being resolved by arbitration. However, because of public policy reasons states reserve the resolution of certain issues such as criminal law, taxation, anti-trust issues and similar others to be resolved by state courts. Some arbitration laws clearly demarcate the boundary between arbitrable and in-arbitrable

¹⁰⁶ Civil Code of Ethiopia supra note (94) Art. 192

¹⁰⁷ Minors, insane persons and persons who because of mental healths are unable to administer their affair and persons who may be interdicted because of criminal sentence passed on them are generally are not capable to perform acts of civil life.

¹⁰⁸ Civil Code Art.3326(1)

¹⁰⁹ *Id.* Art. 2205(1).

matters. For instance, the 1994 China Arbitration Act clearly states disputes relating to marital, adoption, guardianship, support and succession issues and disputes to be handled by administrative organs as matters which may not be subject to arbitration.¹¹⁰ Generally, each state is to define for itself as to which matters are to be arbitrated based on its own social, political and economic policies.¹¹¹

¶ The relevant provisions of the Ethiopian Civil Code are silent as to which issues may or may not be arbitrable. However, Art. 315(2) of the civil procedure code provides that “no arbitration may take place in relation to administrative contracts as defined in Art.3132 of the Civil Code or in any other case where it is prohibited by law.” On the other hand Sub-Art. (4) Of Art. 315 prescribe that nothing in this chapter shall affect the provisions of the Civil Code relating to arbitral submissions. The most contentious issues here is whether the question of arbitrability which has to do with sensitive public policy issues could be determined in the Code of the Civil Procedure, while the Civil Code is silent on this issue. Like most other states had there been a comprehensive Ethiopian Arbitration law, which consists of both substantive and procedural matters, this issue could not have been so contentious.

Though the arbitrability of disputes arising in relation to administrative contracts is contentious, the prohibition under Art. 315(2) of the Civil

¹¹⁰ China Arbitration Law of the 1994, Art. 3.

¹¹¹ Alan Redfern and Martin Hunter, *supra* note (27) at Para 3-21

Procedure Code does not incorporate all the contracts concluded by administrative organs. It is restricted to those contracts which by virtue of Arts. 3131 and 3132 of the Civil Code are considered as administrative contracts.

With respect to the formality requirement most national and international arbitration rules require arbitration agreements to be made in writing.¹¹² An arbitration agreement is required to be in writing because on the one hand, it is an evidence of the parties consent. On the other hand, it is also the source of power for the arbitrators. Above all, an agreement to arbitrate involves a serious step to take.¹¹³ By agreeing to arbitrate the parties are waiving the right to take their case before the national courts of law. This has to be made in writing.

Most international conventions and institutional arbitration rules require arbitration agreements to be made in writing. Art. 2(2) of the 1958 New York Convention for instance provide that "arbitration is in writing if signed by both parties or contained in an exchange of letters or telegrams." The UNCITRAL Model law which was promulgated 30 years after the New York Convention goes much further than the New York Convention in its definition of writing." The model law provides that:

The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document

¹¹² Art.1443 of the France Civil Procedure Code Amendment of the 1981, see also Art 1021 of the 1980 Netherlands' code of Civil Procedure, Art 7(2) of the UNCITRAL Model Law, Art 2(2) of the 1958 New York Convention.

¹¹³ Alan Redfern and Martin Hunter supra note (27) at para 3-09

signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provides a record of the agreement, or in an exchange of statement of claim and defense in which the existence of an agreement is alleged by one party and not denied by another, the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.¹¹⁴

All that is required under the model law is some written evidence of an agreement to arbitrate.¹¹⁵ Accordingly, an implied consent to an arbitration agreement constitutes the writing requirement. Currently however, subjecting arbitration agreement to a strict form requirement is highly criticized as incompatible with the present day commercial practice. It is noted that: "There is no justification to submit arbitration agreements to stricter form requirements than other contractual provisions. Arbitration is no longer considered a dangerous waiver of substantial right."¹¹⁶

Based on this notion many recent arbitration statutes have either abolished the form requirement¹¹⁷ or liberalized the writing requirement so as to consider the oral agreement to arbitrate as writing, if it is made by reference to terms which are in writing. Thus, in some

¹¹⁴ UNCITRAL Model Law Art. 7(5) .

¹¹⁵ Redfern and Hunter, supra note 27 at para 3-11

¹¹⁶ Julian D.M.Lew et.al, supra note 20 at 133

¹¹⁷ See for example Swedish arbitration Act of the 1999, see also Art. 7(1) of New Zealand Arbitration Act of the 1996.

systems of law, there is no formal requirement for an arbitration agreement.¹¹⁸

Under Ethiopian law, Art. 3327(2) of the Civil Code require that “an arbitral submission be drawn in the form required to dispose of with out consideration the right to which the dispute relates.” Thus for instance, an arbitration relating to an immovable ought to be made in the form of a public will, because that is how an immovable property could be disposed without consideration by virtue of Art. 2443 and Art 880-881 of the Civil Code. That means an arbitration agreement regarding an immovable property must be written by the parties themselves or by third party under their dictation. It must also be read in the presence of and signed by the parties to the agreement and four witnesses. This requirement, at least as far as arbitration of immovable properties are concerned, seems unnecessarily formally rigorous given the needs and exigencies of contemporary business transactions. }

3.3. Effect of an Arbitration Agreement

An arbitration agreement, like any agreement, must be capable of being enforced by law. In other words, once the parties agree to oust the jurisdiction of state courts, that intention of the parties must be enforced. One of the fundamental principles of modern arbitration laws is that parties should be stopped from bringing legal recourse in relation to the subject

¹¹⁸ Art. 5(3) of the English Arbitration Act of the 1996 states that “where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.”

matter of a dispute on which the parties have agreed to be determined by arbitral tribunal.¹¹⁹ This principle is incorporated in many of the modern arbitration laws¹²⁰, institutional arbitration rules and international conventions.¹²¹ The party relying on an arbitration agreement has to invoke such an agreement.¹²² If the other party fails to do so, there is nothing which precludes the court from entertaining the matter. In other words, the court does not of its own motion preclude parties to arbitration from taking legal recourse to the regular court of law.

Under the Ethiopian Civil Procedure Law, one of the preliminary objections a party against whom a civil proceeding is made can raise is the objection that the claim is to be settled by arbitration.¹²³ Some laws require in similar situations the parties invoking an arbitration agreement by way of objection to court proceeding to be willing to do all things necessary for the proper conduct of the arbitration.¹²⁴ The court may while referring the matter towards arbitration in accordance with the parties consent, for instance, order the party invoking arbitration to produce some kind of securities. This is done because, sometimes, parties to a dispute may invoke arbitration or some other objection simply for dilatory purposes, so that, in the mean time an irreparable damage may be caused to the other party. Therefore the courts

¹¹⁹ Pepper R.A., supra note (86) at 811, see also Domke supra note (14) at 13.

¹²⁰ See for example part 3, Art. (6) of the 2001 Arbitration Act of Singapore. See also Art. 1458 of the French civil Procedure amendment of 1981.

¹²¹ New York Convention Art. 2(1), see also UNCITRAL Model Law, Art. 8.

¹²² See again Art. 8(1) of the Model Law.

¹²³ Civil Procedure Code of Ethiopia of the 1965, Art. 245(2) (g)

¹²⁴ See for Example Art. 6(2) (b) of the 2001t Arbitration Act of Singapore. There is an old legal maxim that "one who comes to justice should come with clean hands." If the party invoking arbitration himself is reluctant to cooperate for instance he may not raise arbitration as defense to the legal recourse taken by the other party.

giving such an interim order of protection minimizes such an undesirable effect. However, such provisions are not incorporated in our civil Procedure Code. What is clear is that the party invoking such an objection has to raise it at the earliest possible time, most likely at the time of (or before) delivering a statement of defense. The court is also required to decide on such an objection before proceeding with the trial of the suit.¹²⁵

In such a case, the party invoking arbitration is also required to present evidences showing the existence of a valid and lawful arbitration agreement. If the court is convinced that the matter in dispute is covered by an arbitration agreement, it has to make an order striking out the suit.¹²⁶

3.4. The Doctrines of Separability and Kompetenz-Competenz

The doctrine of “separability” and “kompetenz-kompetenz” are fundamental concepts in modern arbitration. The doctrine of separability refers to the idea that arbitration clauses are deemed separate from the main contract of which they form part.¹²⁷ This doctrine ensures that the validity of an arbitration clause will not be affected by the defects in the main contract. The effect of this concept or principle is that the power of an arbitral tribunal survives even if the main contract to which the dispute relates comes to an end or terminate.¹²⁸ Had it not been for this doctrine one of the parties to an

¹²⁵ Civil Procedure Code. Art. 244(1) of the

¹²⁶ Civil Procedure Code. Art. 245 (2).

¹²⁷ Redfern & Hunter, *supra* note (27) at Para 3-31

¹²⁸ *Id.*

arbitration who is reluctant to arbitrate could have challenged the arbitration proceeding by simply raising defenses based on the validity of the main contract.

This doctrine has got wider acceptance in many modern Arbitration laws, international conventions and institutional rules. For instance, the English Arbitration Act of 1996 provides that “ unless parties agree otherwise arbitration agreement forming part of another agreement shall not be considered as invalid, non-existence or ineffective because of the invalidity or in effectiveness of that other agreement and shall for that purpose be deemed as a distinct agreement.¹²⁹ The same principle is incorporated in the Arbitration Act of Singapore¹³⁰, and that of China.¹³¹ UNCITRAL Model Law also provides that an arbitration clause forming part of a contract shall be treated as an agreement independent of the terms of the contract, and the decision by the tribunal that the main contract is null and void shall not entail the invalidity of the arbitration clause.¹³²

Another fundamental concept of modern arbitration law which along with the doctrine of separability purports to prevent a bad-faith party from stopping the arbitral proceeding before they have begun is the principle of *competenz-competenz*.¹³³ *Competenz-competenz* refers to the idea that the

¹²⁹ The 1996 English Arbitration Act. Art. 7.

¹³⁰ Singaporean Arbitration Law of the 2001, Art. 21 (2) (3).

¹³¹ China Arbitration Law, of the 1994 Art.19

¹³² UNCITRAL Model Law Art. 16 (1) .

¹³³ William W. Park, the Arbitrability Dicta in First Options, Kaplan: what sort of kompetenz-kompetenz has crossed the Atlantic? 12 ARBITRATION INTERNATIONAL 137, 154(1996) LCIA

arbitral tribunals must be empowered to exercise jurisdiction to decide over their jurisdiction. This would help the arbitrators to continue with the arbitration without being required to stop to refer the jurisdictional issues to a judge or court of law.¹³⁴

This idea has different notions in different jurisdictions. In Germany, for instance, the notion of *kompetenz-kompetenz* refers to a situation whereby the arbitral tribunal is given competence to rule in a binding way without an independent judicial review on its own jurisdiction.¹³⁵ In France, however, arbitrators decide jurisdictional issues as preliminary matter without prejudice to the judiciary's ultimate power to monitor the procedural integrity of the dispute.¹³⁶ Art. 30 of the English Arbitration Act also provides for the competence of an arbitral tribunal to rule on its own jurisdiction, which may be subject to challenge by way of appeal or review.

Under Ethiopian Law, Art. 3330 of the Civil Code provides for the parties right to authorize in their submission agreement or subsequently the arbitral tribunal to decide over difficulties arising out of the interpretation of the submission itself. In particular, the parties may authorize the tribunal to decide disputes relating to its own jurisdiction. The parties' right to authorize the tribunal does not however incorporate disputes with respect to the validity of the submission itself.¹³⁷

¹³⁴ William W. Park, *supra* note(133) at 149-150

¹³⁵ *Id* at 151

¹³⁶ *Id* at 150, see also Art. 1466 of the French Civil Procedure Code

¹³⁷ Civil Code, Art. 3330(2) and (3) .

It is not clear why the Ethiopian law that recognizes the parties' right to authorize the arbitrators to decide over their jurisdiction denies them of the right to authorize to decide on issues arising out of the validity of the submission agreement itself. If ultimately the court has the power to review the arbitrators' decision on such issues there is no justification for making such a distinction. On the other hand, strictly speaking our law does not clearly recognize the rule *competenz-competenz*. The tribunal can not exercise such an authority or power, if it is not specifically authorized by the parties to the arbitration. In other words, while the power of arbitrators to decide on their jurisdiction is an inherent power of arbitrators in most modern arbitration rules, under Ethiopian law of arbitration, this power of arbitrators depends on the clear stipulation by the parties to the dispute, in the absence of which there is no such a power.

On top of that, the law requires that the provisions of arbitral submission relating to the jurisdiction of arbitrators be interpreted restrictively.¹³⁸ In other words, even if the arbitrators are authorized by the parties to decide disputes arising out of jurisdictional matters, they have to interpret the provisions of the agreement granting them jurisdiction very restrictively.

With respect to the doctrine of “separability” although the Ethiopian law recognizes arbitration clauses forming part of the main contract, there is no

¹³⁸ Civil Code of Ethiopia, Art. 3329.

provision under Ethiopian law regarding whether these clauses are to be considered as a separate (independent) agreements from the main contract or not. Under such condition there is no reason why arbitration clauses, as per our law, can not be affected by the defects in the main contract. In the absence of such a clear stipulation, for all purposes an arbitration clause remains part and parcel of the main contract.

3.5. Court Assistance in the Course of Arbitration Proceedings

One of the underlying principles of arbitration is the principle of *party-autonomy*. This principle recognizes parties right to design the arbitral proceeding which includes the right to decide the time and place of the arbitration, the appointment and challenge of arbitrators and other procedural matters. In view of this principle the integrity and independence of the arbitration system should be maintained. Courts should refrain from intervening in the arbitral proceeding for minor reasons time and again. Otherwise, it would contradict the very purpose in choosing arbitration itself.

That is why many model law based statutes restrict the grounds on which courts' assistance and supervision may be sought. In the UNCITRAL Model Law the grounds on which courts' assistance and supervision may be sought are listed under Art. 6. These are, in the appointment of arbitrators,¹³⁹ challenge of arbitrators,¹⁴⁰ a plea on the decision of an arbitral tribunal on its

¹³⁹ UNCITRAL Model Law, Art. 11(3) and (4) .

¹⁴⁰ *Id.* Art. 14

jurisdiction,¹⁴¹ an application to set aside an arbitral award.¹⁴² An application for an interim measure of protection is also recognized in the model law.¹⁴³

In general, although arbitration is based on the principle of parties-autonomy, an arbitral system can not stand by itself with out the support of the national court system. That is why most laws clearly provide the limited grounds on which courts assistance or supervision may be required. However with the view to maintain the integrity and independence of an arbitral system, courts' power of support and intervention should also be restricted.

Under Ethiopian law, parties may appoint their arbitrators in the arbitral submission or subsequently.¹⁴⁴ The submission may provide that there shall be one arbitrator or several arbitrators.¹⁴⁵ Where the submission fails to specify the number of arbitrators or the manner in which they shall be appointed, the law fills the gap stating that each party shall appoint one arbitrator.¹⁴⁶ Under Ethiopian law, therefore, in the absence of clear agreement of the parties, the number of arbitrators shall be three and each party shall appoint one arbitrator and the third arbitrator is to be appointed by the two party's appointed arbitrators.

¹⁴¹ *Id.* Art. 16(3)

¹⁴² *Id.* Art. 34 (2)

¹⁴³ *Id.* Art. 9

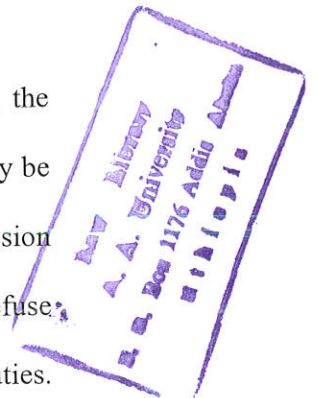
¹⁴⁴ Civil Code. Art.3331 (1).

¹⁴⁵ *Id.* Art.3331(2).

¹⁴⁶ *Id.* Art.3331(3).

The issue of courts' assistance in the appointment of arbitrators arises, in the case of three arbitrators, when two of the arbitrators appointed by the parties fail to agree on the third (presiding) arbitrator.¹⁴⁷ Likewise, if the parties agree on sole arbitrator but fail to agree on the manner of appointment such an arbitrator, the final resolution of the manner of appointment in such a situation should also be made by the assistance of the court.

Another area where court assistance is required under our law is in the challenge and substitution of arbitrators. Substitution of an arbitrator may be sought for different reasons. An arbitrator appointed in the submission contract or subsequently may be unable to carry out his duties, he may refuse his appointment, and he may also die before or while carrying out his duties. In all these cases a new arbitrator is to be substituted by the same procedure prescribed for the appointment of an arbitrator.¹⁴⁸ When an arbitrator is disqualified or removed, the new arbitrator is to be appointed by the court.¹⁴⁹



An application requesting the court for the appointment of an arbitrator may be made to any court.¹⁵⁰ When effecting such assistance, the court must be able to make a *prima facie* examination of the existence and the validity of an arbitration agreement. An application for disqualification of an arbitrator under Ethiopian law is normally made to the tribunal itself or to other authority entrusted by the parties with such power. Court intervention is only

¹⁴⁷ Id. Art. 3332 (3).

¹⁴⁸ Id. Art. 3336 (1).

¹⁴⁹ Id. Art. 3336 (2).

¹⁵⁰ Id. Art. 316 (1).

sought by way of appeal when an application for disqualification is dismissed.¹⁵¹ An application for removal in the absence of an otherwise agreement by the parties is to be made to the court.¹⁵² It is not clear to which level of court such an application is to be made.

In many arbitration rules including the UNCITRAL Model Law,¹⁵³ the assistance of courts may be required in taking evidence. Though arbitral tribunals have similar function to that of state courts, they do not have all the powers and privileges of the state courts. The power of an arbitral tribunal may not have an effect on third parties other than the parties to the submission. They may not for instance compel the attendance of third party witnesses or the production of evidence in the hands of third party. That is why in many modern statutes the possibility of courts assisting in similar situations is envisaged. Our law is silent on this issue, there is no clear provision in our civil procedure requiring courts to give interim order of protection of the taking of evidence in support of an arbitral tribunal or parties to arbitration proceeding.

3.6. Review and Enforcement of an Arbitral Award

When parties by common intention submit their controversies to the determination of third party arbitrators, ousting the jurisdiction of state courts, that common intention of parties has to be respected. In other words, arbitration should proceed in confidence without substantial intervention by

¹⁵¹ Id. Art. 3342 (3).

¹⁵² Id. Art. 3343.

¹⁵³ Art. 27 of the UNCITRAL Model Law on Arbitration and the Swedish Arbitration Act ; a comparison

the courts and the resulting award should be readily enforceable, subject to review only on the basis of a limited and specified list of fatal flaws in form or procedure. The current view is, therefore, that the courts' power of review should be restricted to narrowly defined procedural grounds.¹⁵⁴ The problem lies in the extent of the court's review power. An eminent scholar has once described the anomaly as follows:

The extent to which arbitral awards should be subject to judicial review is a question of some delicacy. On the one hand, parties select arbitration for its privacy, its finality and the ability to have adjudication by a person of their own choice. On the other, there is the perceived need for some form of judicial control of the arbitral system to ensure that proceedings are conducted fairly and that arbitrators do not go wildly wrong.¹⁵⁵

Though ensuring the fairness and integrity of arbitration may justify a Court's intervention, "the increasingly favorable climate for arbitration has led to arbitration award being considered final and binding and to a pro-enforcement policy over the last twenty years."¹⁵⁶ Thus some States have abolished the possibility of Court review of arbitration awards through appeal.¹⁵⁷ Others have limited the courts' power of review to appeals from arbitral awards on points of law.¹⁵⁸ The English Arbitration Act of 1996 provides for the possibility of appeal on points of law, however, subject to a number of restrictions. One of such restrictions is that the party against

¹⁵⁴ Jernej Sekolec and Nils Eliasson, *The UNCITRAL MODEL LAW on Arbitration and the Swedish Arbitration Act: a Comparison*, available at: http://www.sccinstitute.com/_upload/shared_files/artikelarkiv/report_sekolec.pdf. (Last visited on January 27, 2008).

¹⁵⁵ Ray Goode *supra* note (73) at 1196

¹⁵⁶ Lew et al. *supra* note(20)at373

¹⁵⁷ The 1991 Swedish law, for instance, totally abolished the possibility of appeal from arbitral awards on points of merit.

¹⁵⁸ English Arbitration Act of the 1996, Art. 69.

which the award is rendered may only lodge appeal with the leave of the Court.¹⁵⁹ This means that he/she has to get the permission of the appellate court to take an appeal. The same party is also required to exhaust any available arbitral process of appeal or review before lodging an appeal to a court.¹⁶⁰

In other jurisdictions, for-instance in the Netherlands, the law provides for a second tier of arbitral tribunal, so that, there is a possibility of appeal from the award by the first tribunal to the second tier of tribunal.¹⁶¹ Generally the trend is towards restricting courts power of intervention by way of appeal, particularly on points of fact. The courts power of intervention in an arbitration generally and in reviewing arbitral awards specifically is restricted, as time and again stated, to ensure the finality and binding nature of arbitral awards by minimizing court intervention.

Another point of Arbitrators- Court nexus is the process by which the courts may *set aside* the arbitral awards. Courts may set-aside an arbitral award primarily on procedural grounds, i.e. the parties may require after an arbitral award is given to set-aside an award for irregularities in relation to the constitution of the tribunal, for the power exercised by the tribunal in light of the arbitral agreement, for the tribunals giving an award on issues differing from the ones submitted to them, etc...The central theme of this process is

¹⁵⁹ Id Art.69(2)b

¹⁶⁰ Id. Art. 70(2)a

¹⁶¹ Netherlands Arbitration Act, 1 December 1986 Code of Civil Procedure-Book Four: Arbitration, Art.1050

Arb = fair & just
Set aside = procedural irregularities in decision making

that the court is required to annul or vacate a judgment or an order or establishes that the judgment never existed in law¹⁶² and it differs from the process of appeal that has been considered above in that the appellate court has the power either to affirm, vary or reverse the award or the judgment appealed from based on the record of the lower tribunal.

In most countries with modern arbitration laws, although the possibility of appeal on points of facts is restricted, parties may always require the setting aside of arbitral awards for one reason or another depending on the law of the country concerned. The UNCITRAL MODEL Law also provides the procedure of set-aside as the sole recourse against an arbitral award.¹⁶³

✦ Under Ethiopian law, both the grounds for appeal and set-aside are listed under Arts. 351 and 356, of the Civil Procedure Code, respectively. One of the grounds as provided under Art.351 (a) of the procedure Code is where “the award is inconsistent, uncertain or ambiguous or is on its face wrong in matter of law or fact.” This clearly indicates that under Ethiopian Law, the Court has power of reviewing the arbitral award on several grounds including when the award rendered by a tribunal on its face shows that it is wrong. As stated earlier above, while the procedures of set-aside could have been resorted to when there are procedural irregularities, like in the formation of an arbitration tribunal, irregularities that have occurred in the

¹⁶² Blacks Law Dictionary (Bryan A. Garner ed., 7th ed., West Group, St. Paul. Minn.)

¹⁶³ UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL LAW, 1985 U.N.DOC. A/40/17, Annex I, Art.34

CHAPTER FOUR

The Current State of Commercial Arbitration in Ethiopia: an appraisal of its Practical Utilizations

4.1. Overview

Commercial arbitration is increasingly in use today as an alternative to the national courts world wide. With the view to avoid the risk of having to litigate in national courts of one or the other party, most international transactions contain clauses providing for the arbitration of disputes in a neutral territory.

Many states have either reformed their laws or enacted new ones,¹⁶⁴ following the UNCITRAL MODEL Law to enhance their attractiveness as a center of commercial arbitration. Many states including our neighbors¹⁶⁵ are now parties to the New York convention on the recognition and enforcement of arbitral awards.¹ A number of regional and international institutions¹⁶⁶ are also established with the view to facilitate and administer the resolution of commercial disputes through arbitration. These institutions perform the most important functions such as the appointment of arbitrators and providing logistic services for arbitration. Given the increasing importance of commercial arbitration world wide today, this chapter focuses on examining the factual state of affairs of commercial arbitration in Ethiopia. Whether

¹⁶⁴ France has amended part of its civil procedure code on arbitration in 1980 and 1981. England has also following the Uncitral Model Law modified its arbitration law in 1996. China enacted a new law on arbitration in 1994. Many other states such as Sweden, Netherlands and Canada have also reformed their laws

¹⁶⁵ Egypt, Djibouti and Kenya are parties to the New York convention. They have also modern arbitration Law rules. Some of them are serving as a *lex fori* for regional and international arbitrations

¹⁶⁶ E.g. The American Arbitration Association International chamber of commerce, London court of International Arbitration, Cairo Regional Center Arbitration.

commercial arbitration is being utilized among businessmen in Ethiopia and factors affecting the utilization of commercial arbitration are also identified in this chapter. Accordingly, this chapter reveals that despite the factors necessitating the practical utilization of commercial arbitration in Ethiopia, businessmen in Ethiopia do not make use of Arbitration as an alternative dispute resolution mechanism. In other words, commercial arbitration is not a popular dispute resolution mechanism in Ethiopia.

4.2. The state of commercial arbitration in Ethiopia.

As set-out in the preceding chapter, in commercial arbitration disputes are resolved with great expedition. This is so, because disputes are to be resolved by fellow business men, which would enable the parties to directly utilize the opinion of experienced commercial men on disputed commercial matters.¹⁶⁷ Above all, for a businessmen time is money, and the vexatious delays in litigation, the interruption caused by recurrent consultations and the legal hearings and the mental disruptions following such controversies are inimical to the proper conduct of business activities.¹⁶⁸ With respect to the reason why business men prefer arbitration than litigation in court, it was noted that:

There is a category of disputes for which the courts seem poorly designed. When two businessmen dispute about a breach of contract, often neither of them wants vindication, or to assuage a feeling of injustice. What they may want is a speedy sensible readjustment of their relations, so that they can resume or maintain their usual

¹⁶⁷ S. Azadon Tiewul & Francis A. Tsegah, Arbitration and the settlement of commercial dispute; A Selective Survey of African Practice, 24 INT'L & COMP. L.Q., 396,393-418 (1975).

¹⁶⁸ Ibid.

mutual business transactions. Because of the difficulty of precise ascertainment by a court of the actual past factors out of which their dispute arose, it may well be that the best mode of settling it is not a court decision in a law suit but arbitration in which the disputants agree to abide by the decision of arbitrators.¹⁶⁹

On the other hand, courts everywhere are overloaded with cases. There is lack of skilled man power. As a result there is excessive delay, which a rational businessman who seeks profit may not bear. The question here is whether there is any such factor necessitating resort to the use of commercial arbitration in Ethiopia. In other words, whether our formal justice machineries (the courts) are so efficient and effective as to prevent (or insulate) business men from resorting towards commercial arbitration as an alternative dispute settlement mechanism.

Assessment made earlier in 2002 by the Justice reform program of Ethiopia indicated that courts in Ethiopia suffer from acute shortage of trained man power.¹⁷⁰ As a result, the Civil Justice is too costly, complex and unpredictable.¹⁷¹ Moreover, courts in Ethiopia are heavily congested with cases and as a result, there is an excessive delay within the system.¹⁷²

The government has undertaken many judicial reform programs with the view to make the judiciary efficient, effective and generally live up to the expectation of the public. Despite the many initiatives however, there is still case overloads and delay both at regional and federal courts level. Cases are being filed at an increasing rate from year to year.

¹⁶⁹ Jerome Frank, *Courts on Trial* (1949), as quoted in S. Azadin Tiewul & Francis A. Tsegal, *supra* note 167 at 395.

¹⁷⁰ Justice Reform program. Preliminary profile, program contents and objectives PP. 35

¹⁷¹ *Id*

¹⁷² *Id*

The following table (table 1) indicates the rate at which new cases are being filed at Federal and Oromia Regional Supreme Courts.

Ethiopian Fiscal year	Federal	Oromia
1995	3350	10597
1996	3847	12,000
1997	4347	15,674
1998	5193	18,389
1999	4504 (10 month report only)	20,075

As indicated in the above table, cases are being filed at an increasing rate both at the Federal and Oromia Supreme Court levels.¹⁷³ The number of Judges serving in the Federal Supreme Court in the Years 1998 and 1999 are 13 and 15 respectively. In the year 1998 if the whole cases are to be disposed with the then existing judges, a single Federal Supreme Court Judge was expected to dispose around 400 cases. Accordingly, a judge at Federal Supreme Court level is required to dispose around 33 files (cases) per month. Otherwise, the court would have to adjourn the cases from time to time.

Given the number of judges and the case load, the threat lies between compromising quality of Justice and creating backlog. Both options are equally not to be desired by a rational business person and at the same time by the court it self.

¹⁷³The above data is taken from Federal supreme courts 1999 report to the parliament and Oromia supreme court of the 1999 report to the state council.

An attempt is also made to see pending cases according to the year they are filed with the two Supreme Courts. The Following table (table 2) shows the number of live files on the date 18 Feb. 2000 E. C. as per the year they were filed.¹⁷⁴

Court	Years							Total
	1994	1995	1996	1997	1998	1999	2000	
Federal Supreme court		1	5	14	151	477	1463	2,111
Oromia Supreme Court	1	9	33	317	1,057	4,812	4,604	10,833

As one can observe from the above table, about 171 cases in the Federal Supreme Court were filed before 1st September 1999 E.C., which means that, these files have stayed with the court at the apex alone for more than one and half years. This does not include the time the cases took to be disposed in the Federal First Instance and High courts, as the Supreme Court is primarily an appellate court.

One should also consider the time it takes the parties to have court judgments executed. Usually losing parties do not voluntarily execute judgments rendered in court as the forum it self ends up in win/lose scenario. One may also think of the amount of money or the value of property that remains out of transaction because of court injunction. Although the above data is not restricted to cases relating to commercial dispute the whole idea here is to indicate how much Ethiopian courts are being overloaded with cases. Given

¹⁷⁴These data are taken from the Federal and Oromia Supreme Courts' data- base on the date 26 Feb. 2008,

the backlog, the problem of quality which incidentally emanates from the inefficiencies and in-effectiveness of the courts, the businessmen in Ethiopia, are rationally compelled to opt for alternatives to the courts or to the formal justice machinery.

In addition to the above problems, some people argue that judicial offices in Ethiopia are filled with inexperienced personnel.¹⁷⁵ This would somehow compromise the quality of justice to be delivered by courts. It is not also uncommon to see a person without the requisite qualification (law degree or diploma) serving as a high court Judge, especially in the regions.¹⁷⁶ Therefore, there is a strong reason for businessmen in Ethiopia to resort towards alternative dispute resolution including commercial arbitration.

4.2.1. The Actual Utilization of commercial Arbitration in Ethiopia
It has been so long since the law on commercial arbitration, as part of the Civil Code and Civil Procedure Code is enacted in Ethiopia. When it comes to the actual utilization, however the result is not rewarding. To see whether arbitration is utilized as an alternative dispute resolution mechanism by businessmen in Ethiopia, questionnaires were distributed to persons engaged in different trade activities.

¹⁷⁵ Getachew Kitaw, Judicial Reform for Harnessing Economic Growth and Development, at <http://www.eeaecon.org/EEA/conferences/papers/Getachew%20Kitaw%20-%20PROBLEMS%20OF%20THE%20ETHIOPIA%20JUDICIARY.doc> (last visited on January 15, 2008).

¹⁷⁶ The personal experience of the researcher himself as head of Judges Department at Oromia Supreme Court.

The Following table (table 3) indicates a sample of the perceptions and actual utilization of commercial arbitration by businessmen in Ethiopia.

No of respondents	Respondents that have encountered business disputes	Those who used arbitration	Those who feel arbitration is advantageous	Those who feel arbitration is not popular
56(100%)	44(78.57%)	22(39.3%)	52(95%)	36(64%)

As indicated in the above table, 78.57 % of the total businessmen respondents have encountered disputes in their business relations with others or in relation to the business activities in which they are engaged. However, only 39.3% of the total respondents have settled the dispute with their adversaries through arbitration. The rest resorted to the formal legal machinery i.e., the regular Courts. Even those who used arbitration have only used it once or twice. In addition to that, most businessmen respondents are not aware of the distinction between arbitration and other non-judicial dispute resolution mechanisms. Most of the respondents emphasize the importance of developing the traditional and communal dispute resolution mechanisms, which are in the nature of arbitration fused with reconciliation. Therefore only few of my respondents, strictly speaking, have made use of the modern system of commercial arbitration.

Surprisingly however, 95% of the businessmen respondents feel that commercial arbitration is advantageous compared to court litigation. Many of them clearly stated in their responses that arbitration creates smooth future business relationship among the disputants, although only few of them have practically used arbitration to settle their conflicts. 64% of the respondents do also feel that commercial arbitration is not popularly and widely utilized in Ethiopia.



Similar questionnaires were also distributed to some of the practicing lawyers and Judges in Ethiopia (61 in number). 95% of the respondent lawyers and Judges stated that commercial arbitration is advantageous compared to litigation. 93% of the respondents stated that commercial arbitration is not a popular dispute resolution mechanism in Ethiopia.

Generally one can easily observe that, despite court congestion, delay and increased transaction costs, businessmen in Ethiopia do not commonly make use of commercial arbitrations to resolve their commercial disputes. In other words, commercial arbitration is not a popular dispute settlement mechanism in Ethiopia. There are many factors that affect the actual utilization of commercial arbitration in Ethiopia, and the following part deals with some of these factors.

4. 2. 2. Factors Affecting the Actual Utilization of Commercial Arbitration in Ethiopia

Many factors affect the utilization of commercial arbitration by businessmen in Ethiopia. The most common factors are lack of awareness, problem of attitude, problem of institutions, lack of comprehensive and up-to date law, lack of trained and qualified arbitrators. Some people argue that the level of the economy is also one factor that has an adverse effect on the utilization of commercial arbitration.

The following table (table 4) shows the level to which commercial arbitration is being utilized in Ethiopia.

Type of Respondent	Total No of Respondents	Respondents who feel arbitration is not popular	Factors affecting the utilization of commercial arbitration						
			Lack of institutions	Problem of law	Lack of awareness	Problem of attitude	Problem of trained arbitrator	Integrity and quality of arbitrator	Efficiency of courts
Businessmen	56	23 (64.3%)	27 (48.2%)	17 (30.35%)	41 (73.2%)	15 (26.8%)	18 (32.1%)	-	3 (5.35%)
Judges	24	23 (95.8%)	18 (75.%)	14 (58.3%)	23 (95.8%)	14 (58.3%)	15 (62.5%)	10 (41.66%)	1 (2.7%)
Lawyers	37	34 (91.9%)	27 (72.97%)	21 (56.75%)	31 (83.78%)	18 (48.64%)	18 (48.64%)	8 (21.6%)	10 (8.54%)
Total Respondents	117	93 (79.5%)	72 (61.5%)	52 (44.4%)	94 (80.3%)	47 (40.17%)	50 (42.76%)	18 (15.4%)	10 (8.54%)

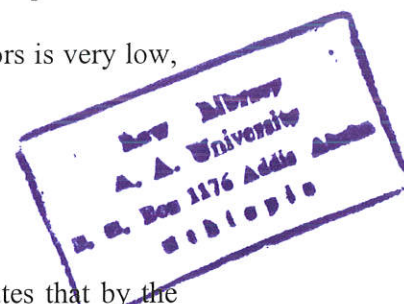
1. Lack of awareness

As stated earlier, commercial arbitration is advantageous to the business community in terms of keeping business secrecy, expeditious settlement of disputes and selection of persons with special skill and expertise as arbitrators. Commercial arbitration would also enable parties to get final and binding awards which are equally enforceable like court judgments. These facts should be known to the business community so that they may make use of arbitration as an alternative to litigation.

As indicated in the above table (table 4) out of the total respondents 80% of them stated that there is lack of awareness by judges, lawyers and the business community on the nature and advantages of commercial arbitration.

Ato wasihun Asres, formerly a legal expert at Addis Ababa Chamber of Commerce states that "businessmen in Ethiopia are not aware that arbitral awards are equally enforceable like court judgments".¹⁷⁷ Ato Fikadu Petros¹⁷⁸ and W/ro Haregewoin Ashannefi¹⁷⁹ do also share Ato Wasihun's view that business people in Ethiopia feel court rendered judgment as the only enforceable decisions.

Ato Wasihun further states that the problem starts with contract drafting. Accordingly, contracts are commonly drafted by the parties themselves. Since parties do not seek the support of lawyers at the early stage of contract drafting, they usually fail to foresee the possibility of disputes arising in the future. Consequently, contracting parties usually do not incorporate arbitration clauses in their contracts.¹⁸⁰ Even if parties incorporate arbitration clauses in their principal contract, they usually forget to agree on a specific arbitral tribunal or institution. As a result, the probability of parties later agreeing to submit to a specific arbitrator or panel of arbitrators is very low, according to Ato Wasihun.



Ato Charinat Hordofa,¹⁸¹ concurring with the above view, states that by the time parties contact a lawyer, they often have already exhausted all the extra-judicial settlement possibilities. Therefore, there is no room for a lawyer to

¹⁷⁷ Interview with Ato Wasihun Asres, former legal head at A.A. chamber of commerce (2 Feb 2008)

¹⁷⁸ Interview with Ato Fikadu, former legal expert at A.A. chamber of commerce Arbitration institute (5 Feb, 2008)

¹⁷⁹ Interview with W/ro Haragewoin Ashenafi project and training co-ordinator of the EACC and acting director at the time of conducting this interview 21 Feb, 2008

¹⁸⁰ Ato Wasihun cited at 177 above

¹⁸¹ Interview with Ato Cherinet Hordofa, attorney at law, (18 Feb, 2008)

refer them back to arbitration or mediation. According to Professor Tilahun Teshome,¹⁸² it is not only the parties but also some lawyers and judges that lack awareness on the nature and the effect of commercial arbitration. Because of lack of awareness, they are reluctant to encourage parties using commercial arbitration as an alternative to courts. Professor Tilahun further states that when parties agree to settle their differences through arbitration they are ousting the jurisdiction of courts.¹⁸³ Contractual as arbitration agreement is, courts are bound to give effect to parties' consent.¹⁸⁴—Ato Fikadu also adds to Professor Tilahun's view by saying that most of the practicing lawyers and judges today were educated at a time when ADR is not offered as a course in the law schools.¹⁸⁵ Therefore, problem of awareness is one of those factors that affect the utilization of commercial arbitration in Ethiopia.

2. Problem of attitude

Some of the reasons why arbitration is not commonly utilized in Ethiopia emanate from the problem of attitude. Attitude is ordinarily defined as the way that one thinks and feels about some thing or some body, the way one behaves towards some thing that shows how you think and feel.¹⁸⁶ Although measuring some one's attitude is a difficult task which requires special expertise and skill, ordinarily, however, one's attitude towards a certain act may be observed from the way that person behaves towards that. A symbol

¹⁸² Interview with Ato Tilehun Teshoma Associate professor at AAU, faculty of law, (4 Feb, 2008)

¹⁸³ Id.

¹⁸⁴ Interview with Ato Fikedu, supra note (178)

¹⁸⁵ Id.

¹⁸⁶ Oxford Advanced learners dictionary, (6th ed, 2000) oxford university press

of love is quite different from a symbol of hatred, unless the person appears in a façade manner.

As can be noted from table 4 above, 40.17% of the respondents feel that businessmen, judges and lawyers in Ethiopia do have negative attitude towards commercial arbitration. At first glance this may look an exaggeration. However, most of my interviewees share the same view. According to Ato Wasihun, Ato Fikadu and W/ro Haregewoin, part of the community as they are, businessmen in Ethiopia perceive defeating one's adversary in a court of law as a symbol of bravery. Moreover, businessmen perceive that arbitration awards will not have equal status with judgments of court.

Lawyers also do not want to refer cases to arbitration. According to Ato Wasihun, lawyers feel that in referring cases for settlement through arbitration they lose income. In other words, some lawyers feel that they lose income if they advise their clients to settle their differences with others through arbitration. One attorney¹⁸⁷ has also indicated that if he is going to advise his clients to agree on arbitration rather than taking court actions, he is not clear as to how to charge his client. In the normal course of things when attorneys take court action, representing their clients, lawyers' fee is determined based on the amount involved in the dispute and the nature of the case.

¹⁸⁷ An interview with Anonymous attorney (lawyer) dated 18 Feb, 2008

Another dimension to the problem of attitude, according to professor Tilahun is that, the ideological shift of the *Dergue* time. Many private businesses have collapsed during the *Dergue* regime, as a result even after the changes in the economic policy of post- 1991, the mind- set of socialism still remains with the private sector i.e. businessmen. Because of such mind-set most businessmen perceive that the solution for every conflict lies with the governmental legal machinery. According to Professor Tilahun, lawyers and judges in Ethiopia can also not be free from such perception. Moreover, even historically courts were aggressive towards arbitration. They feel that arbitration usurps constitutionally and legally vested jurisdiction of courts. In our courts too, according to Professor Tilahun, some judges are reluctant to enforce arbitration agreements and awards with this perception.

3. Lack of institutions that support the development of commercial arbitration

There are different institutions that may help enhance the development and utilization of commercial arbitration. Courts are among such institutions. But the point in this section is on arbitral institutions. Arbitral institutions may be established as separate or independent organizations or as part of the Chamber of Commerce or with in trade associations¹⁸⁸ Arbitral institutions have a number of advantages. One of the principal advantages of arbitral institutions is the provision of rules under which arbitration may take

¹⁸⁸ Domke, supra note (14) at 7.

place.¹⁸⁹ Another important role of arbitral institutions is the provision of trained staff to administer the arbitration.¹⁹⁰ Arbitral institutions will ensure that “the arbitral tribunal is appointed, that advance payments are made in respect of the fees and expenses of the arbitrators, that time-limits are kept in mind and generally the arbitration is run as smoothly as possible.”¹⁹¹

The advantages of arbitral institutions are not limited to the above mentioned points. Institutional arbitration under the auspices of trade associations and chambers of commerce also serve to “standardize business transactions and trade practices and to control the business ethics of the participants.”¹⁹² They are also helpful in creating a uniform system of contract forms defining terms and conditions that previously were the source of frequent controversies.¹⁹³

In addition to the foremost functions or roles of arbitral institutions in providing rules of arbitration and logistic services for arbitral tribunals, arbitral institutions have also been playing a significant role in creating awareness on commercial arbitration, and in disseminating knowledge in relation to commercial arbitration. Concerning the role of American Arbitration Association one commentator has noted that:

Another organization which deserves a considerable amount of credit for the part which it has played in the

¹⁸⁹ Redfern and Hunter supra note (27) at pare 1-80.

¹⁹⁰ Id.

¹⁹¹ Id.

¹⁹² Domke supra note (14) at 8.

¹⁹³ Id.

furtherance of the arbitration movement is the American Arbitration Association. It has functioned along three lines: as an educational body, as a service organization and as a practical arbitral tribunal. As an educational body, its purpose is to collect and to publish information concerning commercial arbitration. As a service organization, it assists trade bodies in drafting arbitration rules and trade agreements and in the installation and improvement of arbitral machinery. It has taken a foremost place in advancing arbitration legislation so that trade associations and the business community generally may benefit by effective arbitration statutes..... Finally, it maintains a practical arbitral tribunal to which individuals, firms, corporations and trade bodies may bring disputes for settlement by a speedy, just and inexpensive method.¹⁹⁴

Considering the situation in Ethiopia, the issue is whether we have an institution playing the role similar to the American Arbitration Association or other internationally reputed institutions such as the ICC and the LCIA. Until recently there were no institutions to further the development and utilization of commercial arbitration in Ethiopia.¹⁹⁵ It was only recently that two arbitral institutions were established. These are the Ethiopian Arbitration and Conciliation Center and the Addis Ababa Chamber of Commerce Arbitration Institute. The former is a civil association established and licensed by the Ministry of Justice in 2003.¹⁹⁶ Since its establishment, only 9 cases have been brought to the center for arbitration.¹⁹⁷ Of the 9 cases, 8 were brought to the center simply to utilize the logistic services of the center.¹⁹⁸ Only one case was brought to the center to be resolved according to the Center's Rules of Arbitration and by the center appointed arbitrators. The

¹⁹⁴ John R. Abersold, *supra* note (50) at 274.

¹⁹⁵ Interview with Ato Tilehun Teshome, *supra* note 182.

¹⁹⁶ Interview with W/ro Harageewoin *supra* note (179).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

Chamber's Arbitration Institute is somehow in a better situation. Since its establishment in 2002, about 8 institutional arbitration and 4 ad-hoc arbitration cases were brought to the institution.¹⁹⁹ In addition to providing the parties with arbitration tribunals and list of qualified arbitrators, although in very few cases as indicated above, both institutions have tried their best to create awareness. Both have drafted their rules of arbitration and arbitrators code of conduct. They have drafted their own rules on arbitration and administrative fees.

The issue here is whether those two institutions established in the capital city, Addis, are sufficiently providing an alternative in the actual work of adjudicating cases. Data gathered from the respondents disclosed that these institutions are less known to the business community in Addis; leave alone the community in the country-side. As indicated in table 4 above, 61.5% of the respondents also state that lack of institutional arbitration as one of the reasons why arbitration is not commonly utilized in Ethiopia.

The efforts made by the two institutions in the last few years should not however be undermined. According to W/ro Haregewoin, the EACC has, for instance prepared and submitted a draft arbitration law of Ethiopia to the Ministry of Justice. In addition, the Center is providing training services to potential arbitrators and mediators. The Chamber's Arbitration Institution has also been doing its best to advertise itself but primarily to the members of the Addis Ababa Chamber of Commerce. With due credit to the effort

¹⁹⁹ Interview with W/ro Kibebe W/Medhin Director of AAI (18 Feb. 2008).

made by these two institutions, however, the role of arbitral institutions in furthering the development of commercial arbitration in Ethiopia is almost nil. Given that there are only two institutions which are budget wise very much dependent on external donations, the majority of the business community out there does not have any alternative means of resolving disputes. This becomes apparent particularly, when the geographic location of these institutions is taken into account i.e. the fact that both are located in Addis Ababa.

4. Lack of sufficient arbitration law

Statutory laws play a significant role in the development of commercial arbitration. In many states modern and comprehensive laws have been enacted. Whether Ethiopian law is comprehensive and up to date have been considered in the preceding chapter. In this chapter, we will only be considering lack of comprehensive law as one of the factors affecting the actual utilization of commercial arbitration in Ethiopia.

Most of the interviewees indicated that lack of sufficient legal framework is one of the factors, in fact, the major factor affecting the development of commercial arbitration in Ethiopia. As indicated in table 4 above, 44.4% of the respondents noted that lack of sufficient law is one factor for the low utilization rate of commercial arbitration in Ethiopia.

This can be explained in many ways, firstly, with respect to international transactions, since our economic power is low, our businessmen are purchasing not only goods, but also the law and the dispute settlement mechanism on conditions set by foreigners.²⁰⁰ According to Ato Tamiru Wandim Agenyehu, this could be changed with the development of our economy, and our businessmen's bargaining position. On top of that, however, our laws should be up-dated so as to attract international arbitrations to be conducted in our country. Then our businessmen may refuse the conditions set by foreign customers.

In addition to this, Ethiopia's failure to sign (ratify) the New York Convention is also another factor for the low utilization of arbitration in Ethiopia. Especially, currently when the inward flow rate of foreign direct investment is becoming very high in Ethiopia compared to other times, Ethiopia's failing to ratify the New York Convention means the dispute arising between an Ethiopian/Ethiopia/ and a foreign investor will go to the ICC or another international arbitral institute for resolution. This is because since Ethiopia is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, countries are not obliged to recognize and enforce awards rendered by arbitrations conducted in Ethiopia. Generally, when foreign investors come to invest in a certain country, one of the factors they take in to consideration is whether that state has a conducive legal and policy environment to conduct investment therein. In addition to

²⁰⁰ Interview with Ato Tamiru wondim Agenyehu attorney at law, Addis Ababa (20 Feb, 2008)

that, the reputation of countries, among others, depend on their being signatories of different international agreements.

With respect to domestic arbitration, a law providing for compulsory arbitration of certain matters to be resolved through arbitration before taking court action will also contribute to the development of commercial arbitration in the country. Particularly in our country, some judge respondents feel that the absence of the law enabling them to refer some of the disputes to arbitration or to any other ADR mechanisms, would make them helpless, even if they feel the latter is more appropriate than litigation.

5. Lack of Experienced Arbitrators

Basically, the success of an arbitral proceeding and the success of arbitration as an institution itself depends on the quality of those who serve as arbitrators. That is why in the celebrated words of Redfern and Hunter: *“the quality of an arbitrator makes and breaks arbitration.”*

The quality of arbitrators can not be exaggerated any more. Yet, the decision as to who shall serve as an arbitrator is left to the parties themselves. Perhaps, this might be the virtue of arbitration. Equally, however it could end up being a vice. Although arbitration initially is a consensual process, it ends up in an award having equal status in law with court judgments. Therefore, the public has an interest in the integrity of the institution. That is

why some countries determine in-advance generally as to what category of people may qualify to serve as arbitrators. In Argentina for instance, only lawyers admitted to practice law in the place of arbitration may serve as arbitrators.²⁰¹ In Chile, there are two types of arbitrations; namely, arbitrations based on the principles of Law and one based on the principle of equity i.e. *amiable compositeur*. Only lawyers may serve as arbitrators in the case of arbitration based on the principles of law²⁰²

The Chinese arbitration law of 1994 also requires that a person may only serve as an arbitrator if he has served for eight years as a Judge, attorney, or as a law professor or if he has acquired the knowledge of the law, engaged in the professional work in the field of economy and trade.²⁰³ This point is highly emphasized because most of the interviewees of this research indicated that lawyers are contributing to the under-development of commercial arbitration in Ethiopia. Many of them do not want cases to be resolved through arbitration. Even if they refer cases towards arbitration, they don't incline to institutional arbitration. They only would like to constitute ad-hoc arbitration themselves, selecting their closest friends as arbitrators. On the one hand, since they are highly connected to one another, it would compromise the independence of the person serving as an arbitrator. On the other hand, at times the competence and integrity of the person so selected will not be taken into account. As a result, the possibility of failure in the arbitral proceeding is likely.

²⁰¹ R-Daok Bishop et.al, supra note (60) at 11-7

²⁰² Id. at 11-12

²⁰³ Chinese Arbitration Act of 1994, Art.13

the backlog, the problem of quality which incidentally emanates from the inefficiencies and in-effectiveness of the courts, the businessmen in Ethiopia, are rationally compelled to opt for alternatives to the courts or to the formal justice machinery.

In addition to the above problems, some people argue that judicial offices in Ethiopia are filled with inexperienced personnel.¹⁷⁵ This would somehow compromise the quality of justice to be delivered by courts. It is not also uncommon to see a person without the requisite qualification (law degree or diploma) serving as a high court Judge, especially in the regions.¹⁷⁶ Therefore, there is a strong reason for businessmen in Ethiopia to resort towards alternative dispute resolution including commercial arbitration.

4.2.1. The Actual Utilization of commercial Arbitration in Ethiopia
It has been so long since the law on commercial arbitration, as part of the Civil Code and Civil Procedure Code is enacted in Ethiopia. When it comes to the actual utilization, however the result is not rewarding. To see whether arbitration is utilized as an alternative dispute resolution mechanism by businessmen in Ethiopia, questionnaires were distributed to persons engaged in different trade activities.

¹⁷⁵ Getachew Kitaw, Judicial Reform for Harnessing Economic Growth and Development, at <http://www.eeaecon.org/EEA/conferences/papers/Getachew%20Kitaw%20-%20PROBLEMS%20OF%20THE%20ETHIOPIA%20JUDICIARY.doc> (last visited on January 15, 2008).

¹⁷⁶ The personal experience of the researcher himself as head of Judges Department at Oromia Supreme Court.

The Following table (table 3) indicates a sample of the perceptions and actual utilization of commercial arbitration by businessmen in Ethiopia.

No of respondents	Respondents that have encountered business disputes	Those who used arbitration	Those who feel arbitration is advantageous	Those who feel arbitration is not popular
56(100%)	44(78.57%)	22(39.3%)	52(95%)	36(64%)

As indicated in the above table, 78.57 % of the total businessmen respondents have encountered disputes in their business relations with others or in relation to the business activities in which they are engaged. However, only 39.3% of the total respondents have settled the dispute with their adversaries through arbitration. The rest resorted to the formal legal machinery i.e., the regular Courts. Even those who used arbitration have only used it once or twice. In addition to that, most businessmen respondents are not aware of the distinction between arbitration and other non-judicial dispute resolution mechanisms. Most of the respondents emphasize the importance of developing the traditional and communal dispute resolution mechanisms, which are in the nature of arbitration fused with reconciliation. Therefore only few of my respondents, strictly speaking, have made use of the modern system of commercial arbitration.

Surprisingly however, 95% of the businessmen respondents feel that commercial arbitration is advantageous compared to court litigation. Many of them clearly stated in their responses that arbitration creates smooth future business relationship among the disputants, although only few of them have practically used arbitration to settle their conflicts. 64% of the respondents do also feel that commercial arbitration is not popularly and widely utilized in Ethiopia.



Similar questionnaires were also distributed to some of the practicing lawyers and Judges in Ethiopia (61 in number). 95% of the respondent lawyers and Judges stated that commercial arbitration is advantageous compared to litigation. 93% of the respondents stated that commercial arbitration is not a popular dispute resolution mechanism in Ethiopia.

Generally one can easily observe that, despite court congestion, delay and increased transaction costs, businessmen in Ethiopia do not commonly make use of commercial arbitrations to resolve their commercial disputes. In other words, commercial arbitration is not a popular dispute settlement mechanism in Ethiopia. There are many factors that affect the actual utilization of commercial arbitration in Ethiopia, and the following part deals with some of these factors.

4. 2. 2. Factors Affecting the Actual Utilization of Commercial Arbitration in Ethiopia

Many factors affect the utilization of commercial arbitration by businessmen in Ethiopia. The most common factors are lack of awareness, problem of attitude, problem of institutions, lack of comprehensive and up-to date law, lack of trained and qualified arbitrators. Some people argue that the level of the economy is also one factor that has an adverse effect on the utilization of commercial arbitration.

The following table (table 4) shows the level to which commercial arbitration is being utilized in Ethiopia.

Type of Respondent	Total No of Respondents	Respondents who feel arbitration is not popular	Factors affecting the utilization of commercial arbitration						
			Lack of institutions	Problem of law	Lack of awareness	Problem of attitude	Problem of trained arbitrator	Integrity and quality of arbitrator	Efficiency of courts
Businessmen	56	23 (64.3%)	27 (48.2%)	17 (30.35%)	41 (73.2%)	15 (26.8%)	18 (32.1%)	-	3 (5.35%)
Judges	24	23 (95.8%)	18 (75%)	14 (58.3%)	23 (95.8%)	14 (58.3%)	15 (62.5%)	10 (41.66%)	1 (2.7%)
Lawyers	37	34 (91.9%)	27 (72.97%)	21 (56.75%)	31 (83.78%)	18 (48.64%)	18 (48.64%)	8 (21.6%)	10 (8.54%)
Total Respondents	117	93 (79.5%)	72 (61.5%)	52 (44.4%)	94 (80.3%)	47 (40.17%)	50 (42.76%)	18 (15.4%)	10 (8.54%)

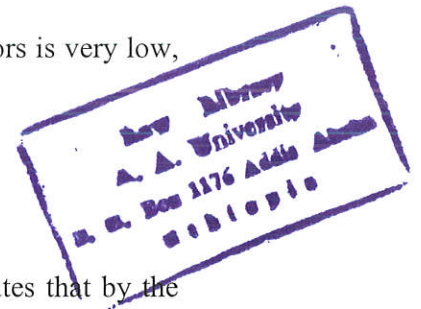
1. Lack of awareness

As stated earlier, commercial arbitration is advantageous to the business community in terms of keeping business secrecy, expeditious settlement of disputes and selection of persons with special skill and expertise as arbitrators. Commercial arbitration would also enable parties to get final and binding awards which are equally enforceable like court judgments. These facts should be known to the business community so that they may make use of arbitration as an alternative to litigation.

As indicated in the above table (table 4) out of the total respondents 80% of them stated that there is lack of awareness by judges, lawyers and the business community on the nature and advantages of commercial arbitration.

Ato wasihun Asres, formerly a legal expert at Addis Ababa Chamber of Commerce states that "businessmen in Ethiopia are not aware that arbitral awards are equally enforceable like court judgments".¹⁷⁷ Ato Fikadu Petros¹⁷⁸ and W/ro Haregewoin Ashannefi¹⁷⁹ do also share Ato Wasihun's view that business people in Ethiopia feel court rendered judgment as the only enforceable decisions.

Ato Wasihun further states that the problem starts with contract drafting. Accordingly, contracts are commonly drafted by the parties themselves. Since parties do not seek the support of lawyers at the early stage of contract drafting, they usually fail to foresee the possibility of disputes arising in the future. Consequently, contracting parties usually do not incorporate arbitration clauses in their contracts.¹⁸⁰ Even if parties incorporate arbitration clauses in their principal contract, they usually forget to agree on a specific arbitral tribunal or institution. As a result, the probability of parties later agreeing to submit to a specific arbitrator or panel of arbitrators is very low, according to Ato Wasihun.



Ato Charinat Hordofa,¹⁸¹ concurring with the above view, states that by the time parties contact a lawyer, they often have already exhausted all the extra-judicial settlement possibilities. Therefore, there is no room for a lawyer to

¹⁷⁷ Interview with Ato Wasihun Asres, former legal head at A.A. chamber of commerce (2 Feb 2008)

¹⁷⁸ Interview with Ato Fikadu, former legal expert at A.A. chamber of commerce Arbitration institute (5 Feb, 2008)

¹⁷⁹ Interview with W/ro Haragewoin Ashenafi project and training co-ordinator of the EACC and acting director at the time of conducting this interview 21 Feb, 2008

¹⁸⁰ Ato Wasihun cited at 177 above

¹⁸¹ Interview with Ato Cherinet Hordofa, attorney at law, (18 Feb, 2008)

refer them back to arbitration or mediation. According to Professor Tilahun Teshome,¹⁸² it is not only the parties but also some lawyers and judges that lack awareness on the nature and the effect of commercial arbitration. Because of lack of awareness, they are reluctant to encourage parties using commercial arbitration as an alternative to courts. Professor Tilahun further states that when parties agree to settle their differences through arbitration they are ousting the jurisdiction of courts.¹⁸³ Contractual as arbitration agreement is, courts are bound to give effect to parties' consent.¹⁸⁴—Ato Fikadu also adds to Professor Tilahun's view by saying that most of the practicing lawyers and judges today were educated at a time when ADR is not offered as a course in the law schools.¹⁸⁵ Therefore, problem of awareness is one of those factors that affect the utilization of commercial arbitration in Ethiopia.

2. Problem of attitude

Some of the reasons why arbitration is not commonly utilized in Ethiopia emanate from the problem of attitude. Attitude is ordinarily defined as the way that one thinks and feels about some thing or some body, the way one behaves towards some thing that shows how you think and feel.¹⁸⁶ Although measuring some one's attitude is a difficult task which requires special expertise and skill, ordinarily, however, one's attitude towards a certain act may be observed from the way that person behaves towards that. A symbol

¹⁸² Interview with Ato Tilehun Teshoma Associate professor at AAU, faculty of law, (4 Feb, 2008)

¹⁸³ Id.

¹⁸⁴ Interview with Ato Fikedu, supra note (178)

¹⁸⁵ Id.

¹⁸⁶ Oxford Advanced learners dictionary, (6th ed, 2000) oxford university press

of love is quite different from a symbol of hatred, unless the person appears in a façade manner.

As can be noted from table 4 above, 40.17% of the respondents feel that businessmen, judges and lawyers in Ethiopia do have negative attitude towards commercial arbitration. At first glance this may look an exaggeration. However, most of my interviewees share the same view. According to Ato Wasihun, Ato Fikadu and W/ro Haregewoin, part of the community as they are, businessmen in Ethiopia perceive defeating one's adversary in a court of law as a symbol of bravery. Moreover, businessmen perceive that arbitration awards will not have equal status with judgments of court.

Lawyers also do not want to refer cases to arbitration. According to Ato Wasihun, lawyers feel that in referring cases for settlement through arbitration they lose income. In other words, some lawyers feel that they lose income if they advise their clients to settle their differences with others through arbitration. One attorney¹⁸⁷ has also indicated that if he is going to advise his clients to agree on arbitration rather than taking court actions, he is not clear as to how to charge his client. In the normal course of things when attorneys take court action, representing their clients, lawyers' fee is determined based on the amount involved in the dispute and the nature of the case.

¹⁸⁷ An interview with Anonymous attorney (lawyer) dated 18 Feb, 2008

Another dimension to the problem of attitude, according to professor Tilahun is that, the ideological shift of the *Dergue* time. Many private businesses have collapsed during the *Dergue* regime, as a result even after the changes in the economic policy of post- 1991, the mind- set of socialism still remains with the private sector i.e. businessmen. Because of such mind-set most businessmen perceive that the solution for every conflict lies with the governmental legal machinery. According to Professor Tilahun, lawyers and judges in Ethiopia can also not be free from such perception. Moreover, even historically courts were aggressive towards arbitration. They feel that arbitration usurps constitutionally and legally vested jurisdiction of courts. In our courts too, according to Professor Tilahun, some judges are reluctant to enforce arbitration agreements and awards with this perception.

3. Lack of institutions that support the development of commercial arbitration

There are different institutions that may help enhance the development and utilization of commercial arbitration. Courts are among such institutions. But the point in this section is on arbitral institutions. Arbitral institutions may be established as separate or independent organizations or as part of the Chamber of Commerce or with in trade associations¹⁸⁸ Arbitral institutions have a number of advantages. One of the principal advantages of arbitral institutions is the provision of rules under which arbitration may take

¹⁸⁸ Domke, supra note (14) at 7.

place.¹⁸⁹ Another important role of arbitral institutions is the provision of trained staff to administer the arbitration.¹⁹⁰ Arbitral institutions will ensure that “the arbitral tribunal is appointed, that advance payments are made in respect of the fees and expenses of the arbitrators, that time-limits are kept in mind and generally the arbitration is run as smoothly as possible.”¹⁹¹

The advantages of arbitral institutions are not limited to the above mentioned points. Institutional arbitration under the auspices of trade associations and chambers of commerce also serve to “standardize business transactions and trade practices and to control the business ethics of the participants.”¹⁹² They are also helpful in creating a uniform system of contract forms defining terms and conditions that previously were the source of frequent controversies.¹⁹³

In addition to the foremost functions or roles of arbitral institutions in providing rules of arbitration and logistic services for arbitral tribunals, arbitral institutions have also been playing a significant role in creating awareness on commercial arbitration, and in disseminating knowledge in relation to commercial arbitration. Concerning the role of American Arbitration Association one commentator has noted that:

Another organization which deserves a considerable amount of credit for the part which it has played in the

¹⁸⁹ Redfern and Hunter supra note (27) at para 1-80.

¹⁹⁰ Id.

¹⁹¹ Id.

¹⁹² Domke supra note (14) at 8.

¹⁹³ Id.

furtherance of the arbitration movement is the American Arbitration Association. It has functioned along three lines: as an educational body, as a service organization and as a practical arbitral tribunal. As an educational body, its purpose is to collect and to publish information concerning commercial arbitration. As a service organization, it assists trade bodies in drafting arbitration rules and trade agreements and in the installation and improvement of arbitral machinery. It has taken a foremost place in advancing arbitration legislation so that trade associations and the business community generally may benefit by effective arbitration statutes..... Finally, it maintains a practical arbitral tribunal to which individuals, firms, corporations and trade bodies may bring disputes for settlement by a speedy, just and inexpensive method.¹⁹⁴

Considering the situation in Ethiopia, the issue is whether we have an institution playing the role similar to the American Arbitration Association or other internationally reputed institutions such as the ICC and the LCIA. Until recently there were no institutions to further the development and utilization of commercial arbitration in Ethiopia.¹⁹⁵ It was only recently that two arbitral institutions were established. These are the Ethiopian Arbitration and Conciliation Center and the Addis Ababa Chamber of Commerce Arbitration Institute. The former is a civil association established and licensed by the Ministry of Justice in 2003.¹⁹⁶ Since its establishment, only 9 cases have been brought to the center for arbitration.¹⁹⁷ Of the 9 cases, 8 were brought to the center simply to utilize the logistic services of the center.¹⁹⁸ Only one case was brought to the center to be resolved according to the Center's Rules of Arbitration and by the center appointed arbitrators. The

¹⁹⁴ John R. Abersold, *supra* note (50) at 274.

¹⁹⁵ Interview with Ato Tilehun Teshome, *supra* note 182.

¹⁹⁶ Interview with W/ro Harageewoin *supra* note (179).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

Chamber's Arbitration Institute is somehow in a better situation. Since its establishment in 2002, about 8 institutional arbitration and 4 ad-hoc arbitration cases were brought to the institution.¹⁹⁹ In addition to providing the parties with arbitration tribunals and list of qualified arbitrators, although in very few cases as indicated above, both institutions have tried their best to create awareness. Both have drafted their rules of arbitration and arbitrators code of conduct. They have drafted their own rules on arbitration and administrative fees.

The issue here is whether those two institutions established in the capital city, Addis, are sufficiently providing an alternative in the actual work of adjudicating cases. Data gathered from the respondents disclosed that these institutions are less known to the business community in Addis; leave alone the community in the country-side. As indicated in table 4 above, 61.5% of the respondents also state that lack of institutional arbitration as one of the reasons why arbitration is not commonly utilized in Ethiopia.

The efforts made by the two institutions in the last few years should not however be undermined. According to W/ro Haregewoin, the EACC has, for instance prepared and submitted a draft arbitration law of Ethiopia to the Ministry of Justice. In addition, the Center is providing training services to potential arbitrators and mediators. The Chamber's Arbitration Institution has also been doing its best to advertise itself but primarily to the members of the Addis Ababa Chamber of Commerce. With due credit to the effort

¹⁹⁹ Interview with W/ro Kibebe W/Medhin Director of AAI (18 Feb. 2008).

made by these two institutions, however, the role of arbitral institutions in furthering the development of commercial arbitration in Ethiopia is almost nil. Given that there are only two institutions which are budget wise very much dependent on external donations, the majority of the business community out there does not have any alternative means of resolving disputes. This becomes apparent particularly, when the geographic location of these institutions is taken into account i.e. the fact that both are located in Addis Ababa.

4. Lack of sufficient arbitration law

Statutory laws play a significant role in the development of commercial arbitration. In many states modern and comprehensive laws have been enacted. Whether Ethiopian law is comprehensive and up to date have been considered in the preceding chapter. In this chapter, we will only be considering lack of comprehensive law as one of the factors affecting the actual utilization of commercial arbitration in Ethiopia.

Most of the interviewees indicated that lack of sufficient legal framework is one of the factors, in fact, the major factor affecting the development of commercial arbitration in Ethiopia. As indicated in table 4 above, 44.4% of the respondents noted that lack of sufficient law is one factor for the low utilization rate of commercial arbitration in Ethiopia.

This can be explained in many ways, firstly, with respect to international transactions, since our economic power is low, our businessmen are purchasing not only goods, but also the law and the dispute settlement mechanism on conditions set by foreigners.²⁰⁰ According to Ato Tamiru Wandim Agenyehu, this could be changed with the development of our economy, and our businessmen's bargaining position. On top of that, however, our laws should be up-dated so as to attract international arbitrations to be conducted in our country. Then our businessmen may refuse the conditions set by foreign customers.

In addition to this, Ethiopia's failure to sign (ratify) the New York Convention is also another factor for the low utilization of arbitration in Ethiopia. Especially, currently when the inward flow rate of foreign direct investment is becoming very high in Ethiopia compared to other times, Ethiopia's failing to ratify the New York Convention means the dispute arising between an Ethiopian/Ethiopia/ and a foreign investor will go to the ICC or another international arbitral institute for resolution. This is because since Ethiopia is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, countries are not obliged to recognize and enforce awards rendered by arbitrations conducted in Ethiopia. Generally, when foreign investors come to invest in a certain country, one of the factors they take in to consideration is whether that state has a conducive legal and policy environment to conduct investment therein. In addition to

²⁰⁰ Interview with Ato Tamiru wandim Agenyehu attorney at law, Addis Ababa (20 Feb, 2008)

that, the reputation of countries, among others, depend on their being signatories of different international agreements.

With respect to domestic arbitration, a law providing for compulsory arbitration of certain matters to be resolved through arbitration before taking court action will also contribute to the development of commercial arbitration in the country. Particularly in our country, some judge respondents feel that the absence of the law enabling them to refer some of the disputes to arbitration or to any other ADR mechanisms, would make them helpless, even if they feel the latter is more appropriate than litigation.

5. Lack of Experienced Arbitrators

Basically, the success of an arbitral proceeding and the success of arbitration as an institution itself depends on the quality of those who serve as arbitrators. That is why in the celebrated words of Redfern and Hunter: “*the quality of an arbitrator makes and breaks arbitration.*”

The quality of arbitrators can not be exaggerated any more. Yet, the decision as to who shall serve as an arbitrator is left to the parties themselves. Perhaps, this might be the virtue of arbitration. Equally, however it could end up being a vice. Although arbitration initially is a consensual process, it ends up in an award having equal status in law with court judgments. Therefore, the public has an interest in the integrity of the institution. That is

why some countries determine in-advance generally as to what category of people may qualify to serve as arbitrators. In Argentina for instance, only lawyers admitted to practice law in the place of arbitration may serve as arbitrators.²⁰¹ In Chile, there are two types of arbitrations; namely, arbitrations based on the principles of Law and one based on the principle of equity i.e. *amiable compositeur*. Only lawyers may serve as arbitrators in the case of arbitration based on the principles of law²⁰²

The Chinese arbitration law of 1994 also requires that a person may only serve as an arbitrator if he has served for eight years as a Judge, attorney, or as a law professor or if he has acquired the knowledge of the law, engaged in the professional work in the field of economy and trade.²⁰³ This point is highly emphasized because most of the interviewees of this research indicated that lawyers are contributing to the under-development of commercial arbitration in Ethiopia. Many of them do not want cases to be resolved through arbitration. Even if they refer cases towards arbitration, they don't incline to institutional arbitration. They only would like to constitute ad-hoc arbitration themselves, selecting their closest friends as arbitrators. On the one hand, since they are highly connected to one another, it would compromise the independence of the person serving as an arbitrator. On the other hand, at times the competence and integrity of the person so selected will not be taken into account. As a result, the possibility of failure in the arbitral proceeding is likely.

²⁰¹ R-Daok Bishop et.al, supra note (60) at 11-7

²⁰² Id. at 11-12

²⁰³ Chinese Arbitration Act of 1994, Art.13

Furthermore, apart from manner of selection, there is the problem of ethical behavior of the arbitrators. The judges of the regular judiciary are supposed to uphold the ideal standards of their office, and violation of judicial ethics is sanctioned by measures ranging from disciplinary actions to criminal prosecutions. Similarly, the office of the arbitrators demands a comparable standard of behavior to that of the judges. Thus, arbitrators need also be subject to a defined code of conduct and proper remedies in case of violations. For instance, an arbitrator may engage divulging the secrets of the proceedings to one of the parties.

However, as the current law and practice stand, there is no code of conduct for arbitrations in Ethiopia except those who are appointed in accordance with institutional rules of arbitration. There is neither registration nor certification of arbitrators in Ethiopia. Some of the respondents also said that arbitration circulate around few lawyers.

Although arbitration is an alternative procedure to litigation in courts, it involves theoretical and jurisprudential issues. It requires some training and certification. Some balance should lie between the parties' inherent authority to select their own arbitrators and maintaining the integrity of the institution. Some scholars argue that the law should not limit parties right of appointing any one whom they think is qualified to serve as arbitrator. However, when public interest in arbitration is considered, at least it is

contentious as to whether the quality of arbitrators should wholly be left to be determined by the individual disputants.

Generally, therefore, while there are many factors which compel businessmen in Ethiopia to resort to extra-judicial settlement mechanisms, including commercial arbitration, the actual utilization of such mechanisms is very low. Many factors account for the low utilization rate of commercial arbitration. Some are legal factors. Other relate to awareness and attitude of the public at large and the business and legal community in particular.

CHAPTER FIVE

The prospects and problems of commercial Arbitration in Ethiopia, and the Possible Remedies

This chapter comprises of two parts. The first part focuses on the prospects and problems of commercial arbitration in Ethiopia. More specifically, given the realities as presented in the preceding chapters of this work, we will consider what the prospect of commercial arbitration would be in Ethiopia. In other words, whether there is a bright future for commercial arbitration or whether it is a dead and buried agenda will be looked into. The second part will critically examine the possible measures that should be taken to address the problem of commercial arbitration in Ethiopia.

5.1. The Prospects and Problems of Commercial Arbitration in Ethiopia

The actual utilization and factors affecting the utilization of commercial arbitration in Ethiopia have been considered in the last chapter. As stated earlier, commercial arbitration is not a popular mode of resolving business disputes in Ethiopia. A number of factors have contributed to the under-utilization of commercial arbitration, namely: lack of awareness, problem of attitude, lack of sufficient institutions supporting the utilization and development of commercial arbitration, problem of law and those factors relating to the quality and integrity of arbitrators are some of the major ones.

Not all the above factors do have equal impact on the underdevelopment and under-utilization of commercial arbitration in this country. As stated earlier in table (4) above, 80% of the total respondents say that there is lack of awareness or that lack of awareness is one of the factors contributing to the underutilization of commercial arbitration in this country. Only 40% of the respondents mentioned problem of attitude (see table 4 above). Despite the difference in the extent to which the above factors affecting the development and utilization of commercial arbitration in Ethiopia, in reality however, all the factors have some contribution to the existing problem.

The most intriguing question in the analysis of the status of commercial arbitration in the Ethiopian system is the question about the future, given the existing problems. To state this question more clearly, would there be any hope for the development and utilization of commercial arbitration in Ethiopia? The question about the future prospect of commercial arbitration is a very difficult question, because the future is full of uncertainties and it is impossible to talk about it with certainty. Such prediction about the future run the risk of being mere speculations or prophecies. In recognition of this fact, however, given the current realities: that Ethiopia has a law on arbitration which is as old as 50 years and which is not yet being widely utilized, that there are few number of arbitral institutions, that there is lack of awareness, that there are attitudinal problems and the problems relating to the quality and integrity of arbitrators, can we imagine a smooth development of commercial arbitration in the near future in Ethiopia?

The challenges are debilitating and therefore, it is unlikely to have the development of Commercial arbitration in Ethiopia in the near future unless some measures are taken. As set-out in the above chapter, the business community in Ethiopia lacks sufficient awareness about the nature and advantages of commercial arbitration. Even if they do, the business community in Ethiopia is highly ingrained in the culture of litigation, that they do not even wish to make use of extra-judicial dispute resolution mechanisms, including arbitration. On top of that, there is a problem of institutions providing extra-judicial dispute resolution services (including arbitration). The few arbitration institutions existing in Ethiopia are not known to the public at large. Judges and lawyers do not encourage parties to settle their conflicts by arbitration either due to lack of awareness or due to lack of confidence in the existing extra-judicial mechanisms of resolving disputes. The cumulative effect of the problems in the current utilization of commercial arbitration as an alternative form of dispute resolution in Ethiopia tends to persuade one that there is no prospect of commercial arbitration in Ethiopia in the near future.

However, there are opportunities that one can capitalize on to revitalize the commercial arbitration in Ethiopia. The following are some of the opportunities for the development of commercial arbitration in Ethiopia.

1- The free market economic policy adopted by Ethiopia: Since the implementation of the market economic policy in Ethiopia in 1992, a number of policy measures and reforms have been undertaken to change the structure of the economy and encourage rapid economic growth and development

through a market led economy. In the current economic policy of Ethiopia, the private sector is given prime importance and in fact, the private sector is considered as the “engine” of the economy. Following the transition period that commences in 1991, government owned enterprises have been privatized and as a result of the lifting of restrictions in private ownership of means of productions, the role of the private sector has significantly been changed. Although some sensitive sectors are not yet liberalized to foreigners, still foreign directed investment is gradually increasing.

The involvement of the private sector in the economy implies a large amount of transactions will be conducted by the sector. This would potentially entail conflicts of interests. With the development of the economy along with the private sector involvement in many transactions, a large number of cases will be coming to the courts, which are already overburdened with cases. All these factors might push the commercial operators in Ethiopia to opt for an efficient and effective dispute resolution mechanism. This would only mean a good reason for the development of commercial arbitration in the dispute settlement modalities of Ethiopia.

Likewise, Ethiopia’s accession to the WTO could also be considered as one of the opportunities for the development of commercial arbitration in Ethiopia. Some sources indicate that Ethiopia is going to accede to the WTO

hopefully in the near future.²⁰⁴ Ethiopia's membership to the WTO would entail larger number of commercial disputes that have to be accommodated within the Ethiopia's legal and institutional framework. Otherwise, foreign investors or businesspersons may resort to external or international legal frameworks and institutions. Thus Ethiopia needs to reform the laws and institutions to properly address those questions that may arise along with its WTO accession. This in effect means another potential opportunity for the development of commercial arbitration in Ethiopia.

2- Government support could also be considered as one opportunity for the development of commercial arbitration in Ethiopia. It seems that the government is becoming conscious of the importance of adopting alternative dispute resolution mechanisms as part of the justice system reform. The Ministry of Justice has currently prepared a comprehensive draft arbitration and mediation law which is based on the detailed study of many countries' laws and domestic situations.²⁰⁵ The Minister of Justice, is also recently stated, in his keynote address at the opening of an ADR work shop, that "with out implementing ADR it would be difficult for sure to say it is possible to make the justice system in general and the judicial system in particular meet the desired objectives."²⁰⁶

²⁰⁴The General Council established a Working Party to examine the application of Ethiopia on 10 February 2003. The Memorandum on the Foreign Trade Regime was circulated in January 2007. The Working Party has not yet met.

²⁰⁵Draft Arbitration and Mediation Proclamation of Ethiopia, soft copy with the researcher.

²⁰⁶The Daily Monitor, vol.14, no. 305, Addis Ababa Ethiopia, Saturday- Sunday, Dec.29-30, 2007.

Oromia Supreme Court has recently, as part of the Business Process Reengineering package, adopted within the court itself a mediation - adjudication program, which means that certain categories of cases will be referred to a certain bench which would first try to mediate the parties, in case the parties fail to agree the same bench would have the power to adjudicate the matter.²⁰⁷ Although the project is not yet completed it shows the extent to which some of the state judiciary is also laying the foundation for the development of extra judicial dispute resolution mechanisms.

3- Increased awareness of the legal community on the nature and advantages of extra- judicial settlement mechanisms: As opposed to the lawyers already practicing, a great number of law graduates today are equipped not only with the skill of orthodox court litigation, but also they are equipped with a fair understanding of extra judicial settlement mechanisms, commercial arbitration. Alternative dispute resolution mechanisms are incorporated in the curricula of today's law schools. Therefore, a graduate will have a better understanding of the subject when he/she goes to practice.

Given the current problems and the perceived and real opportunities for the development and utilization of commercial arbitration in Ethiopia, the next question is whether we can promote the development of commercial arbitration in Ethiopia and the question of how to promote it.

²⁰⁷ Interview with one of the Oromia Supreme Court BPR Committee members and my personal observations as head of the Judges Administration at Oromia.

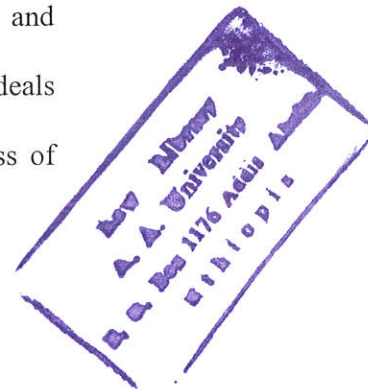
As stated earlier in chapter two of this work, commercial arbitration has a number of advantages compared to court litigation. As opposed to litigation, arbitration is a speedy and confidential dispute resolution mechanism. It is a flexible mode of resolving disputes in that the parties to the dispute can easily adopt the procedure to their own demands. It enables the disputants to choose arbitrators of their own selection, on whose skill and expertise the parties owe full confidence.

In addition to the poor state of the courts in Ethiopia, which necessitates the resort towards commercial arbitration, there is a strong reason for the business communities in Ethiopia to opt for commercial arbitration as an alternative dispute resolution in Ethiopia. Therefore, there is a strong reason to take remedial action to promote commercial arbitration in Ethiopia. The question is how to alleviate the existing problem affecting the use and development of commercial arbitration in Ethiopia. The following part deals with some of the major measures that should be taken for the success of commercial arbitration in Ethiopia.

5.2. Possible measures

1. Awareness creation, Promotion and advocacy works:

As stated time and again, lack of awareness is one of the major factors affecting the development and utilization of commercial arbitration in Ethiopia. It has been so long since the legal framework is set for commercial arbitration in Ethiopia. Recently arbitral institutions are also established. Despite all these, the existing laws and institutions are under-utilized. The



most important point here is how this awareness creation and promotion works have to be done. Awareness does not come by itself. It requires the effort of governmental and non governmental institutions, namely: the civil societies, government offices, Chamber of Commerce and other trade and professional associations.

Government should assume a leading role in the promotion of alternative means of dispute resolution including commercial arbitration, because implementing alternative dispute resolution mechanisms would help the government's effort at improving the countries justice system.

In this regard, Ethiopia should learn from the experience of other African countries such as Ghana, Nigeria, Cameroon and South Africa²⁰⁸. In Ghana, for instance, the University of Ghana law faculty has a program which plays a pioneering role in advancing the knowledge and skill so that more ADR techniques can be infused into different levels of the administration of justice.²⁰⁹ In addition to that, Ghana has developed programs such as 'media week,' in which the media companies provide air time for an ADR task force set by the chief justice of Ghana, to appear and educate the public on live television and radio.²¹⁰

In addition to the Multi-Door Court House system which has generated significant international attention and praise, much is to be learned from

²⁰⁸ Alternative Dispute Resolution Services: A Guide For Investors, 2003 Commercial Law Development Program US Department Office

²⁰⁹ Id

²¹⁰ Id

Nigeria which conducts intensive training on general and specialized trainings both for lawyers and non-lawyers.²¹¹

This task of creating awareness should also be made to the public at large, who may potentially make use of commercial arbitration. In terms of geography too, until now the efforts made by the existing arbitral institutions is restricted to Addis. Today many commercial centers and large towns are being created. Ethiopia is today a federal state comprised of nine autonomous regions.²¹² All these regional administrations have legislative, executive and judicial powers with in the respective power given to them by the federal constitution.²¹³ Potentially all these regions have different laws and institutions. Therefore, any promotion and advocacy work in relation to commercial arbitration must take these factors in to account.

Since some of the problems relating to attitude may also emanate from lack of sufficient knowledge on the nature and advantages of extra- judicial settlement mechanisms, awareness creation and advocacy works should intensively be undertaken in Ethiopia. For that matter, formal and informal associations may be utilized, such as the local chamber of commerce, *Iddir and iqub* and other associations. Traditionally before the incorporation of modern laws and state machinery, the idea of resolving one's dispute extra -

²¹¹Id

²¹²The Constitution of the Federal Democratic Republic of Ethiopia 1995, Procl. No.1/95,FEDERAL NEGARIT GAZETA, year 1, No. 1, Art. 46.

²¹³.Id Art. 50(1) & (2).

judicially was widely practiced among Ethiopian People. This suitable cultural background must be utilized to enhance the awareness.

2. Promotion of Institutions:

As earlier stated, lack of institutions is another major factor affecting the development of commercial arbitration in Ethiopia. 61.5% of the total respondents have mentioned that there is lack of institutional set-up supporting commercial arbitration in Ethiopia. As it has been elaborated in chapter four above, the role of institutions (arbitral) is not limited to the actual conducting of the arbitration proceeding. They also play a significant role in creating awareness. In Ethiopia there are only two arbitral institutions established in Addis. Despite the fact that these institutions are not yet utilized, probably due to lack of knowledge as to their existence, these arbitration centers should spread out their branches, and new institutions should be established in the different regional states of the country. Professor Tilahun Teshome²¹⁴ argues that such institutions are demand driven. In other words, unless there are people who demand their service it would be unprofitable for these private disputes resolution centers to create their branches or to establish themselves outside Addis.

There is some truth in the above assertion, however; it is the mandate of every one who wants to see effective, efficient and accessible justice in Ethiopia to support the development of private dispute resolution

²¹⁴.Interview with Ato Tilehun Teshome, supra note(182)

mechanisms in Ethiopia. This should not be left to those private institutions who sell their ADR services for profit. Governmental and non-governmental institution should lend their hands in this respect.

Arbitral institutions may be established independently or as part of the different chambers of commerce in Ethiopia. Specialized and sector (industry) specific arbitration centers may also be established. For instance, in Ethiopia the newly flourishing businesses such as the construction and real estate, banking and insurance and agri-based industries such as the horticulture and cut-flower industries could set up their own sector specific arbitration centers, to resolve dispute among each other and with government offices.

As sated above, geographically too, each state needs to have its own arbitration centers. Ato Tamiru Wondim Agegnehu²¹⁵ stated in this respect that it is high time for commercial arbitration mechanisms to flourish in Ethiopia, because with the development of trade and commerce in Ethiopia, disputes might arise among businessmen in different regional states of Ethiopia, since issues relating to conflict of laws might arise, the simplest way is to get their conflicts resolved through private dispute settlement mechanisms, of which there should be the center.

²¹⁵ Interview with Ato Tamiru, supra note (200).

Such institutions could be integrated as part of the formal judicial dispute resolution fora. A good example is the multi-door courthouse model, which originally started in the United States, and is currently adopted in some African countries such as Nigeria and Ghana.²¹⁶ In Nigeria, the Lagos state judiciary has adopted the Lagos multi-door courthouse system in which cases are referred to the appropriate dispute resolution fora, including litigation.²¹⁷ Such scheme is currently expanded to all the thirty – five regions of Nigeria.²¹⁸ Such schemes play a significant role in the development and utilization of alternative dispute resolution mechanisms such as arbitration if adopted in our country too.

3. Legal reform

Ethiopia has arbitration law, primarily as part of its Civil Code and Civil Procedural Code that regulates the settlement of differences by arbitration and the enforcement of arbitration awards in Ethiopia. The problem is with the comprehensiveness of the law. In other words, Ethiopian law of arbitration is not detailed. It does not address all the issues that need to be addressed by the standards of modern arbitration statutes. There is no separate arbitration law of Ethiopia, provisions in relation to arbitration are scattered in the different codes for one reason or another, lack clarity and sometimes contradict each other.²¹⁹ Furthermore, the country has not yet adopted the major international conventions and the Model Law Rules. As a result, some of the modern arbitration rules and concepts as incorporated in the major international conventions and institutional rules are unknown to

²¹⁶ ADR services, cited at supra note (208.)

²¹⁷ Id.

²¹⁸ Id.

²¹⁹ See the discussions earlier made in chapter 3 of this work above.

the Ethiopia law of arbitration. Consequently, our law of arbitration seems longing for some reform.

Therefore, Ethiopian law of arbitration should be reformed in such a way that there is a separate, comprehensive and modern arbitration law in Ethiopia. On top of that Ethiopia has to adopt the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Model Law Rules. The Model Law Rules are basically meant to ensure uniformity in international arbitration law rules, which Ethiopia has not yet adopted. But the concepts, incorporated in the Model Law Rules are very important even for domestic arbitrations so that, today they are adapted in many national arbitration statutes. With respect to the New York, Convention, as stated in chapter four above, arbitration awards made in Ethiopia may not be successfully enforced elsewhere unless Ethiopia becomes a party to the New York Convention.

4. Promoting the quality and integrity of arbitrators and the arbitration system:

In addition to the general qualifications as implied in Art. 3340 of our Civil Code, requirements relating to the minimum skill and experience to be attained by a person to serve as arbitrator, should be set in advance. As stated in the preceding chapter this issue should not fully be left to the parties to the dispute or to the specific arbitral institutions. There should also be a code of conduct to regulate the behavior of persons serving as arbitrators. The do's and don'ts should be set in the law. In this respect, arbitral

institutions may have their own code of conduct to regulate persons on their list of arbitrators. The problem lies in relation to ad-hoc arbitration which is un-regulated in Ethiopia. The minimum and maximum fees or at least the rate should also be determined by law. Otherwise, if left to the determination of individual arbitrators or arbitral institutions the system may be abused.

In this respect, an association of arbitrators could serve as an ideal solution to regulate the conduct of its members and in rendering trainings and accreditation of potential arbitrators. This could serve as one means of up holding the quality and integrity of individual arbitrators and the arbitral system. In Nigeria and Ghana, for instance, the chartered institute of arbitrators gives an intensive training for potential arbitrators and gives accreditations to trained mediators and arbitrators to practice.²²⁰ Such schemes are very important, because parties requiring arbitration services will have the chance to select the most qualified arbitrators, perhaps in a specific sector relating to the matter in dispute.

²²⁰Id.

Conclusion

Commercial arbitration is a mode of resolving business disputes by which the parties to a dispute refer their controversies to the determination of third party neutral, called arbitrator(s). Commercial arbitration is primarily consensual. It is based on the consent of the parties who undertakes to agree to resolve their conflict through arbitration. The parties may refer to the third party neutral, an existing dispute. They may also agree to refer a dispute arising out of the contract in the future.

Unlike the rigid court procedures to which the parties to a dispute are obliged to adhere, arbitration proceedings are generally flexible. In arbitration the parties to the dispute have an opportunity to participate in the selection of arbitrators in whose skill and expertise the parties owe full confidence. , As opposed to the pre-set strict court procedures, the parties to an arbitration proceeding can design their own procedure. This would enhance the speed by which conflicts are resolved. Confidentiality is another feature of commercial arbitration. In contrast to court proceedings which in principle are public, arbitration proceedings are private and confidential.

Despite the aforementioned advantages of commercial arbitration, the actual utilization of commercial arbitration by business persons in Ethiopia is insignificant. The business persons in Ethiopia do not have sufficient knowledge on the nature and advantages of commercial arbitration. Part of the society as they are business persons in Ethiopia are entrenched in the

culture of litigation. Winning a case in a court is considered as a mark of courageousness. Furthermore, there are lack of institutions that promote the development and utilization of commercial arbitration in Ethiopia. The two institutions that are recently established in Addis Ababa are less known to the business community in Addis Ababa; leave alone to the rest part of the country.

There is also a problem of law. The Provisions of the Civil Code on Arbitration are sketchy and lack comprehensiveness. The rules relating to arbitration are also scattered in the different laws of Ethiopia, namely; the Civil Code, Commercial Code, The Civil Procedure Code and Maritime Code. On top of that, the Ethiopian law of arbitration is very old. It has been about 50 years since arbitration law is passed as part of the Ethiopian Law. However, new developments on commercial arbitration due to the changing modalities of international and national commercial transactions are not incorporated in the Ethiopian law of arbitration. In view of the many changes in international and national commercial transactions, the Ethiopian law of arbitration requires some reform.

The quality and integrity of arbitrators is also another factor affecting commercial arbitration in Ethiopia. There is no code of conduct of arbitrators in Ethiopia. There is neither registration nor certification of arbitrators in Ethiopia. The cumulative effect of all these problems makes the future development of commercial arbitration gloomy. Therefore, if commercial



arbitration is to serve as a practicable alternative to litigation, in view of its advantages, some measures should be taken, namely; awareness creation, promotion and advocacy works, reforming the Ethiopian law of arbitration, promoting institutions and improving the quality and integrity of arbitrators are the major ones.

BIBLIOGRAPHY

1. BOOKS

DAVIID, RENE. Arbitration in International Trade, (1985) (Kluwer Law and Taxation Publishers, Deventer, Netherlands}

Domke on Commercial Arbitration (database updated march 2003).

Emond, D.Paul. (ed) Commercial Dispute Resolution: Alternative to Litigation, 1989
(Canada Law book Inc., Ontario.)

Goldberg, Stephen et. al., Dispute Resolution: Negotiation, Mediation and Other Processes, (2nd ed., 1992) (Little, Brown & Company, Boston, Toronto, London)

GOODE, ROY. Commercial Law, (2nd ed, 1995) (Penguins Books, London)

Lew, Julian D.M.et.al. Comparative International Commercial Arbitration. (2003),
(Kluwer Law International, The Hague, New York, London)

Mackie, Karl et al. Commercial dispute Resolution: An ADR Practice Guide,
1995(Butterworth's, UK)

Redfern, Alan & Hunter, Martin. Law and Practice of International Commercial Arbitration, (3rd ed., 1999), (Sweet & Maxwell, London)

Riskin, Leonard L. & Westbrook, James E. Dispute Resolution and Lawyers,
.....American casebook Series, 1987 (West Publishing Co., St. Paul, Minn.)

2. Journals and Web-Site Articles

Abersold, John R. Commercial Arbitration: A practical plan, 148 Annals of the
.....American Academy of Political and Social Sciences, (March 1930).

Abimbola, Oluseun. ADR: how does it complement mainstream Litigation Relating to
Negligence Damages in Jurisdiction/ how is use should be
improved/ expanded/curtailed available at [http://primesolicitors.com/papers/wesite-
resource-1](http://primesolicitors.com/papers/wesite-resource-1)

Brunet, Edward. (1985), Book Review on "measuring the Costs of Civil Justice",
83 Michigan L.Rev.

Bishop, Daok R. et. al. International commercial Arbitration in South America,
at <http://www.Kslaw.com/library/pdf/bishop3.pdf>

Cappelletti, Mauro. (1993). Alternative Dispute Resolution Processes With In the
Frame Work of the World Wide Access to Justice Movement, 65 The Modern L.
Rev.

Effron, Jack. (July. 1989), Alternatives to Litigation: Factors in Choosing, 52 The
Modern Law Review

Guenouo, Ronald Amoussou. The Evolution of Arbitration Laws in Francophone
.....Africa, International Law Firm Scp W.G.Z. (1996-1998), at :
<http://www.wgzavocats.com/articles/guideforarbitration-afrique.htm>.

Susan, Leubuscher. The Privatization of Justice: International Commercial
Arbitration and the Redefinition of the State at :
[http://www.fern.org/pubs/reports/dispute%20
resolution%20essay.pdf](http://www.fern.org/pubs/reports/dispute%20resolution%20essay.pdf).

Lieberman, Jethro K. & Henery, James F. (1986). Lessons from the Alternative
Dispute Resolution Movement, 53 the University of Chicago Law Review.

year 10, No.12.

Maritime Code of the Empire of Ethiopia, Proclamation No. 166 of 1960,
Negarit Gazeta, 19th year extraordinary issue No. 1.

The Revised Family code of Ethiopia, Proclamation No. 213 of 2000, Federal Negarit
Gazeta, year 6, Extra-ordinary issue No. 1/2000.

China-Arbitration Law, 1994 at [www. Lexmercatoria.org](http://www.lexmercatoria.org)

The English Arbitration Act of the 1996 Available at:
<http://www.opsi.gov.uk/acts/acts 1996/Ukpga-19960023-en-1>

Netherlands' code of Civil Procedure, 1 December 1986, book 4, Arbitration,
at www.lexmercatoria.org

Singapore-Arbitration Act, 2001, at [www. lexmercatoria.org](http://www.lexmercatoria.org).

4. Interviews

Interview conducted on February 2, 2008 with Ato Wasihun Asres, formerly a legal head at Addis Ababa Chamber of Commerce.

Interview conducted on February 5, 2008 with Ato Fikedu Petros, formerly a legal expert at Addis Ababa Chamber of Commerce Arbitration Institute.

Interview conducted on February 4, 2008 with Ato Tilahun Teshome, Associate Professor at Addis Ababa University, Faculty of Law.

Interview conducted on February 18, 2008 with Ato Charinat Hordofa, Attorney at law

Interview conducted on February 18, 2008 with W/ro Kibebe W/Medhin, Director of AA Chamber of Commerce Arbitration Institute.

Interview conducted on February 21, 2008 with W/ro Haragewoin Ashenafi, Project & Training coordinator and Acting director of the Ethiopian Arbitration and Conciliation Center at the time of conducting this interview.

Interview conducted on February 20, 2008 with Ato Tamiru Wondim Aganehu, Attorney at Law & President of Ethiopia Bar Association.

Declaration

The thesis is my original work, has not been presented for a degree in any other university and that all sources of materials used for the thesis have been duly acknowledged.

Signature of confirmation

Name: Mohammed Nure

Signature.....

Date.....

Name of Advisor.....

Signature.....

Date.....

Questionnaire

A. The title of the thesis is:-

“The Prospect of Commercial Arbitration in Ethiopia: A Practice Oriented Study”

B. Purpose of the Research

The researcher is a post graduate student in AAU Law Faculty, and is currently conducting a research to write his LL.M thesis in partial fulfillment of the requirements for the LL.M Degree.

The purpose of the research is to examine whether arbitration is used as an alternative dispute resolution mechanism among business persons in Ethiopia and if not, to identify the main problems with the current practice of commercial arbitration in Ethiopia and to come up with some suggestions. The research is partly evaluative in the sense that, it evaluates the current status of commercial arbitration in Ethiopia and will try to suggest the possible solutions.

Instructions

- You are not required to write your name.
- Please mark with (√) symbol in the box that constitutes your choice for each question.
- You can have more than one choice where appropriate.
- You are kindly requested to respond to the questions after carefully understanding what they mean.
- Please bear in mind that the quality of the research depends on your contribution.

Part I

Personal Data

Age _____ Sex _____ Profession _____

Qualifications _____

Part II

1. Commercial dispute resolution is advantageous compared to litigation.
 Yes No
2. If your answer to question number (1) is a “yes”, what advantages do you think commercial arbitration does have compared to court litigation?
 Commercial arbitration enables parties to select judges (arbitrators) of their choice in whom they have confidence as to their expertise.
 Confidential nature of dispute (process, outcome).
 Flexibility (parties have the right to set their own procedure).
 Expeditious settlement of disputes.
 Less costly
 Others: please state if there are any advantages you deem mentionable _____

3. If your answer to question number (1) is a “yes”, do you think commercial arbitration is used as a popular method of dispute resolution among business persons in Ethiopia?
 Yes No
4. If your answer to question number (3) is “no”, why do you think is commercial arbitration not popularly used as an alternative dispute resolution mechanism in Ethiopia?
 Lack of sufficient law on commercial arbitration
 Lack of arbitral institutions (arbitration centers)
 Lack of awareness on the part of business persons, lawyers, the judiciary and the society at large
 Attitude of lawyers and judges
 Lack of cases requiring the special expertise and knowledge of arbitrators
 Efficiency and effectiveness of the litigation system in Ethiopia

Lack of confidence in the integrity (independence and impartiality) of arbitrators

Lack of trained arbitrators

Please specify if there is/are any other reason/s _____

5. If your answer to question number (4) is a problem of law, what problems and/or gaps do you think are there in our law on arbitration (provisions of the Civil Code and of the Civil Procedure Code) that have impeded the development of commercial arbitration? Please state your views _____

6. If your reason for question number (4) is lack of arbitral institutions, what do you think of the existence of Ethiopian Arbitration and Conciliation Center and the Addis Ababa Chamber of Commerce Arbitration Institute? Do you believe that these arbitral institutions are known among the business community in Ethiopia?

7. If you are an advocate or private lawyer, have you ever advised your client of using arbitration instead of going to court for litigation?

Yes

No

8. If your answer to question number (7) is “no”, why not? Kindly state your reasons? _____

9. If you are a judge of a court of law, have you ever proposed to parties to resolve their cases using commercial arbitration?

Yes

No

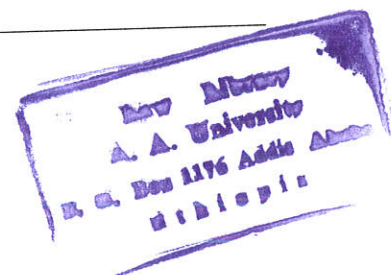
10. If your answer to question number (9) is a "no", why not? Please state your reasons _____
11. Have you ever involved in an arbitration proceeding as an arbitrator?
 Yes No
12. If "yes", how many times? _____
13. If your answer to question number (11) is a "yes", what common problems do you observe in the current practice of arbitration in Ethiopia? Kindly state your views _____
14. Given the advantages of commercial arbitration you might state and the current state of commercial arbitration in Ethiopia, do you suggest that some changes have to be introduced in the law and practice of commercial arbitration in Ethiopia?
 Yes No
15. In what way do you think should the law and practice of commercial arbitration in Ethiopia be reformed? Please state the ways _____
16. Do you think the future of commercial arbitration in Ethiopia is bright?
 Yes No
17. If your answer to question number (16) is a "yes", what opportunities do you think are there? Please state the opportunities _____

Contact address of the researcher

Mohammed Nure

P.O.Box 55946

Addis Ababa, Ethiopia



You are kindly and respectfully requested to fill the questionnaires as soon as possible. Thank you very much for your cooperation.