

School of Graduate Studies
Addis Ababa University, Faculty of Law

Mediation as an Alternative Commercial Dispute Resolution
Mechanism in Ethiopia

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School of Graduate Studies
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Resolution Mechanism in Ethiopia**

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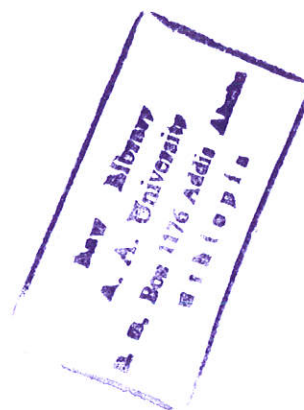
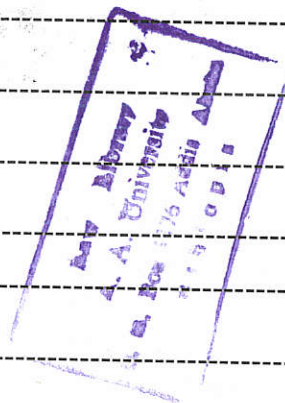


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Introduction

As Ethiopia has pursued market economic policy, private sector has been encouraged to engage in business activities and give rise business to be the point of discussion. Since commercial transactions have developed in scope and amount, the potential disputes that arise thereof may also increase. When a dispute arises, businesspersons may be worrying how to resolve, and which dispute resolution mechanisms, may be appropriate and effective to settle such a dispute.

Litigation has been used as a popular traditional and adversarial method of resolving disputes but since it involves extensive pretrial procedures and protracted trial, it takes a long time from the start of lawsuit until a judgment takes place. Like wise, litigation in Ethiopia is time taking, adversarial and follows complex procedures, which are not appropriate for businesspersons. This delay of time and other problems of litigation, obstruct businessmen, not to run their business effectively. These problems would become worse with the growth and expansion of commercial transactions.

Therefore, a prompt and an effective commercial dispute resolution mechanism that would facilitate the smooth flow of commercial transactions and encourage investment in the country, is required. Thus, it may be essential to introduce an effective system of legal aid for alleviating problems that are connected with litigation.

Since mediation for commercial dispute is a mechanism of settling disputes out of a court, and it is supposed to be more appropriate than litigation in many respects, it may alleviate problems that are attached with litigation. Commercial mediation is thought to promote the smooth flow of commercial transaction by reducing the occurrence of commercial disputes by narrowing the area of disputes during their trade agreement and giving a quick settlement to the disputes that have already created. It is supposed to be an important cost and time saving, and enable disputants actively participate in suggesting of solutions that suited for both of them. More over, as it is a mechanism of settling disputes out of courtroom, it would contribute to the reduction of case backlogs in court.

This study tries to examine whether mediation is appropriate for commercial disputes in Ethiopia and that it serve as a cost effective dispute resolution mechanism. It also



assesses whether it alleviates problems of delay of cases in court and contributes for access to justice.

The study is organized in to four chapters and the respective sections and sub sections. Chapter one deals with the proposal of the study. Under this part, an attempt has been made to show the background, the problems that need to address, the purpose, significance, and the method how the study is conducted.

Chapter two provides an overview of commercial disputes and the main types of alternative dispute resolution mechanisms that may fit for commercial disputes. In particular, the focus has been given to negotiation, conciliation /mediation, arbitration and litigation

In chapter three, attempts have been made to discuss on commercial mediation with a particular attention to the legal framework and the practice in Ethiopia .In particular, it has been made to review and explore legal issues arising in practicing mediation in the process of settling commercial disputes.

Chapter four dealt with the assessment of commercial mediation by given emphasis to public opinion, which comprises of businesspersons and legal practitioners. In light of the other countries experience, an attempt has been made to indicate prospects how mediation would be restructured and served as appropriate as in the manner that attracts businesspersons in settling their commercial disputes. The study comes to an end by adding the findings in the conclusion and recommendation section.

Chapter One: Proposals of the Study

1. Background of the study

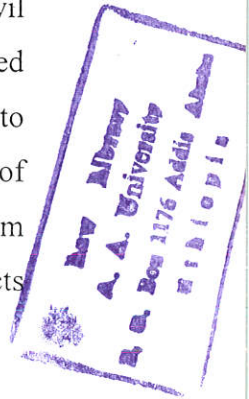
Mediation as alternative dispute resolution is different from the adversarial approach of arbitration and litigation in that it is a settlement of disputes by parties themselves with the assistance of a neutral third party known as mediator.¹

Despite the fact that mediation has not been explicitly recognized in the Ethiopian Civil Code of 1960, like conciliation and arbitration, most consider it is interchangeably used with conciliation. As a result, provisions governing conciliation shall also apply to mediation (this study also favors the latter position). Regardless of the issue of recognition, however, as Ethiopia is a nation of diverse cultures, almost all of them employ mediation as an informal dispute resolution mechanism for majority of conflicts such as family, civil, including commercial and criminal conflicts.

Mediation as a traditional method of dispute resolution exists in urban areas where prominent leaders assist disputants in resolving disputes. In particular, in rural areas where 85% of population lives, majority of conflicts have been settled through mediation by volunteers and community elders.² Though there is no evidence as to when resolving commercial disputes through mediation was actually started, many argue that it has been with us probably as long as there have been people doing business.³

Despite mediation has been practiced traditionally as alternative dispute resolution mechanism in Ethiopia, it has yet developed in its modern approach. That is to mean, while judicial adjudication and arbitration have traditionally been common forms of settling disputes, mediation has remained underdeveloped as an alternative dispute resolution mechanism in the legal system of Ethiopia, like many countries of the world.

In the past decade, the position of many countries in the world like the USA, most of the European countries, have significantly changed their legal system for settling disputes. Accordingly, as litigation is procedurally far more complex and heavily dependent on a court imposed time table and court related congestion, Alternative Dispute Resolution Mechanism (hereinafter is used, ADR) particularly, arbitration and mediation have become an accepted move in the business world.⁴ Hence, several ADR chambers'



mediation have been observed in many countries of the world. This justifies to state that mediation has come under the spot light and the watchful eye of many state legal systems for its ability to resolve disputes in a short time and reduce court caseloads and overall legal costs.⁵

ADR in general and mediation in particular is believed to have the effect of reduction of backlogs of courts in various countries. As the study made on this area in America testifies, most of the parties and their counsel (85-65%) believe that mediation and arbitration reduce the time and the cost of commercial disputes as compared to litigation. Due to this, the American firms opt to go in mediation instead of litigation for settling their commercial disputes.⁶

Although mediation in Ethiopia has extended in all sectors of society such as; in areas of community mediation, family, tort, insurance and so on, its practical significance in the business world is still limited as compared to USA, Canada, Australia, United Kingdom.⁷ In such countries, there are few types of civil disputes that can not be mediated and it has now becoming the ADR process of choice in the business world.⁸

Issues relating to delay of cases and backlogs of courts are also crucial problems in Ethiopia. The report on the Ethiopian Justice System Reform confirmed these problems in the statement:

One of the most important obstacles in front of a good access to justice is the backlog that has plagued courts and delayed of justice by months and in some cases by years. Full priority should be given to solving this problem. "Justice delayed is justice denied," is in some cases in Ethiopia literally the daily practice. The backlog is a plague of the system and a shame to justice that should be remedied as soon as possible.⁹

In particular, in the contemporary world where business transaction is highly developed and being globalized backlogs of courts and delay of cases in litigation would harm business transaction and investment in the country. Since businessmen might spend much time in litigation or paid a lot of fees for lawyers, it impairs business transaction. Because the time spent for litigation and the money paid for lawyers would be used to run and strength business. Thus, introducing mediation may be one of the solutions for it



diminishes court congestion by narrowing issues that need to be submitted before the court.

The move to ADR, particularly to mediation has extended and applied by different countries. For instance in Germany after the first treatises authored by scholars on mediation and other dispute resolution related subject, mediation has become widely known and accepted as an option with in the panoply of dispute resolution mechanism.¹⁰ In the same way, Australia appears to be moving in the implementation of it, following the national mediation conference held in may 2006.¹¹

Likewise, Ethiopia has begun to give recognition for the establishment of ADR institutions. The Addis Ababa Chamber of Commerce Sectoral Association (here after is used, AACCSA) Arbitration Institute and Ethiopia Arbitration and Conciliation Centre (here after it is used, EACC) established in 2002 and 2004 respectively are evidential facts.

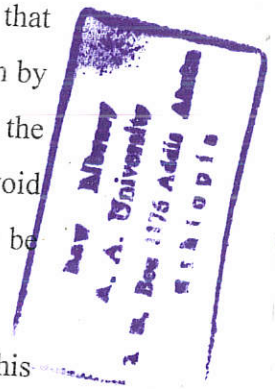
When persons involve in litigation, obviously they do not have much time for the activities which they would prefer to do. For businesspersons in particular, the impact of being involved in litigation should not be underestimated because the primary purpose of businessmen is to run business effectively and to earn a profit, otherwise it would result loss. Hence, it is a great wastage for them to fight a lawsuits.¹² This is more explained in the way that,

Settling disputes by way of protracted and expensive litigation no longer meets the needs of to day's business world when the vast majority of business disputes can and should be settled using a process which is less expensive and salvages business relationship.¹³

The idea is since commercial disputes have an impact on the operation of the business process, the business issues require expeditious and cost effective resolution with out the business being affected. In certain situations, when cases involving commercial disputes are taken to court as a preference to resolve through it, the business may be faced by many other problems, such as injunction, suspension, dissolution of the business in association, etc.



What about when disputes are settled through mediation is the issue that may be raised. In mediation, disputes are settled by parties themselves with the assistance of third party neutral without taking a lot of time and costs. As the mediation process is controlled by parties themselves, they can define issues, develop options and achieve a mutually agreed resolution.¹⁴ Since the dispute settlement is achieved primarily by parties' active participation, parties may feel satisfaction and may be able to preserve or restore their business relationship. Moreover, as commercial disputes often involve complex issues, acrimony, and occur between disputants who have an ongoing relationship, mediation may help to resolve such problems quickly, inexpensively in a way that maintains their relationship. In view of this, Gold Berg says, "heightened participation by disputants in resolving their own dispute should leave them more satisfied with both the process and the outcome than if they had their case adjudicated."¹⁵ Therefore, to avoid the problems that exist in litigation in resolving commercial disputes, mediation may be an effective alternative dispute resolution mechanism.



Another reason that is more closely related to the above issue which necessitates this study to come to life relies on the contribution of mediation to the justice reform system currently in progress in the country to day. Settling disputes through ADR, in particular mediation and arbitration is recognized as one of the remedies in the Justice System in Ethiopia. To do so, however, a recommendation was made that a research is to be conducted whether the above mentioned dispute resolution mechanisms are effective in the manner of using such mechanisms.¹⁶ Hence, this study would examine whether mediation is an effective alternative dispute resolution to litigation and resolve the existing judicial problems. Thus, this study would direct its investigation as to its usefulness and contribute significant source for its application.

To summarize, on the one hand, there are problems of court congestion and unnecessary litigation against which the Justice System Reform Program has been launched. On the other hand, some relative advantages have been suggested to resolve disputes out of court, through mediation. The study, therefore, tries to test whether mediation is a better way to settle commercial disputes in Ethiopia and examine the relative advantages that it offers more appropriate than litigation. It also, evaluates and analyzes whether the

existing laws are adequate to regulate mediation in comparison with experienced foreign states.

1. 2 Statement of Problem

- It is viewed that commercial mediation as compared to litigation offers more advantages and potentially more hospitable to unique solutions. Since there is no empirical basis for the claimed advantages, this study tries to identify and adequately measure the asserted advantages of mediation over litigation for the Ethiopian business community. In particular, the study addresses issues whether commercial mediation reduces;
 - case backlogs of courts
 - formality and complexity of procedures, and whether it;
 - is more cost and time saving dispute resolution mechanism
 - helps to continue the previous business relationship among disputants
 - provides satisfaction of disputing parties
 - ensures to preserve confidentiality, and
 - creates access to justice
- It also addresses problems in connection to the application of commercial mediation in Ethiopia like for instance, problems of effective legal framework that suits the present business practices.
- It discovers why the demand to settle commercial disputes through mediation is unlikely by the businesspersons in Ethiopia and other incidental issues will be treated in the due course.

1. 3 Objective of the Study

- As the study focuses on mediation, as an alternative dispute resolution mechanism on commercial disputes in Ethiopia, it tries to distinguish merits acquired by using mediation for commercial dispute settlement as compared to litigation.

- It identifies legal principles and rules that enable businesspersons to resolve commercial disputes effectively through mediation as it has been practiced in foreign experiences in a manner that would attract them to resolve their disputes.
- Since the study primarily focuses on empirical evidences and analysis of the primary data surveyed, it would provide original information for the law makers and policy makers to set rules for the application of commercial mediation.
- It tries to discover reasons that diminish the demand of businesspersons for commercial mediation and suggests recommendations how to solve the problems.

1. 4 Significance of the Study

- Since there is no adequate academic research in this specific field in our country, it provides first hand information for the subsequent researchers and encourages mediators to participate in resolution of commercial disputes.
- As the study is closely related to the problems of justice system reform in the country, mediation has a great impact on it so that it may call the attention of the lawmaker, lawyers, judges and other legal practitioners to promote the applicability of mediation as a means of alternative commercial dispute resolution mechanism.
- By establishing ADR as a legal system in the country, it creates access to justice thereby facilitates business transactions and investment in the country.
- It may serve as a reference material in this field of study.

1.5. Scope of the Study

This study concerns on alternative commercial dispute resolution mechanisms with a special focus on mediation in Ethiopia.

Mediation as a resolution mechanism may be relevant for disputes that arise from social relationships, such as; family disputes, disputes of succession, tort, neighborhood. Nevertheless, this study limits itself only to commercial disputes. Mediation can be mandatory where parties are compelled by courts or statute or it can be voluntary where parties themselves agree to settle their dispute by third party neutral or institution. This

study, however, focuses on voluntary mediation of the commercial dispute. To put it in more precise, this study deals with voluntary mediation as an alternative commercial dispute resolution mechanism for the settlement of disputes that may arise from the business activities which may be called commercial transactions.

As regards to the geographical boundary, it is limited to the Ethiopian context so that it doesn't extend to the assessment of the relevancy of mediation in the world perspective except for appreciating the countries' experience to relate to the Ethiopian perspective.

1. 6. Method of the study

This study has been conducted based on both quantitative and qualitative research methods. It is qualitative because the study is based on reasons, logic and justifications developed by the different literatures and the previous knowledge.

It also employs quantitative method for the reason that the study will depend on the statistical data collected by and through a sample survey. Such sample survey is used for collecting data through a closed ended and an open-ended questions and unstructured interviews in the application of mediation as alternative commercial dispute resolution in Ethiopia.

The target group in collecting the data are mainly businessmen because they are the direct concern and utilizers of the process so that it enables the writer to get first hand/ original/ information.

In addition, lawyers, judges, law schoolteachers, and other legal experts have been also be included as a target group for they have a legal knowledge in general, and specific know how about the impact of mediation in respect of commercial dealings so that their opinion will be paramount importance to the finding of the study.

The sample survey was made in Addis Ababa and Debre Markos based on the available practices. These are selected purposefully for the main reason that the data collected from businesspersons living in such areas can represent the same person in any other cities or towns in the country because business community is homogenous in pursuit of the common goal with out diversity of objectives except maximizing profit by competing in market place. Besides this, the writer would get access for collecting data in these areas



with less inconvenience than the others. As they are homogenous the number of sample unite is limited to 200 for businessmen because a single person can represent a large number of businessmen. The other group constitutes legal practitioners (i.e. law schoolteachers, judges, lawyers and other legal experts) the sample unit is 100, which comprise 25 from each group mentioned, above. Since a complete source (population list) is not available, method of selecting respondents is convenience sampling which is a type of non-probability sampling.

1.7. Literature Reviews

Where as mediation as alternative commercial dispute resolution does not have a long years experience, it has now become the ADR process of choice in the business world. Despite the fact that several countries traditionally used it to settle controversies of many types, its modern approach has not yet been developed in many countries¹⁷ including Ethiopia.

To analyze whether mediation is more efficient, cost and time saving dispute settlement mechanism, it requires to have made a close look at the litigation process. Literatures in this field of study suggest competing views. Accordingly, while some argue that mediation has several importances as compared to litigation, others emphasize on its shortcomings and favors litigation and even there are other categories who put themselves in the middle of the two competing views. In the views of advocates of litigation, the person with bargaining power causes the disempowered person to make decisions based on fear than on logic so that the judicial system is the only way to protect the right of the disempowered person and makes sure that the result is fair. In their view, "law is the sole arena with in which unequals can hope to achieve justice."¹⁸ Proponents further explain that mediation cannot guarantee settlement as a result; it will take time and costs of disputants. Even when a dispute is settled, according to them, it may prevent precedents from being set so the law may not develop which would have developed in judicial adjudication. Fiss who is a prominent advocate of litigation, argue that litigation is to be encouraged because it is a forum for the articulation of important public values. In his view, "the movement to claim legitimacy of ADR turns the inefficiency of the legal system and popular dissatisfaction with law."¹⁹

Advocates of ADR do not however accept the argument that inequality of bargaining power between parties can be found only in mediation. According to them, power imbalance could not be taken away from people who have it and give it to people who do not.²⁰ They believe that people in dispute do not usually have the same level of power in any type of dispute resolution mechanism, including litigation but in the case of mediation, successful mediator could avoid it and enable parties' willingness to come to the bargaining table in good faith.²¹

The advocates of ADR, further criticize the opponents' views. In their opinion, even if litigation may be appropriate for situations where settlement in mediation and other ADR system may not be appropriate, it has several drawbacks. Its shortcomings are primarily manifested by being too expensive and time consuming. In addition," dispute processing in litigation requires adversaries that it unnecessarily creates hostility between disputants as courts largely rely on a formal adversarial process that may further antagonize the disputing parties."²²

However, in mediation the structure is not adversarial. In their view since mediation enables disputants to talk about what has gone wrong and to see if there are opportunities to work together in the future, it resolves their problems for common interest and preserve business relationships, which is unlikely to happen in litigation. In mediation, a third party assists disputants in applying their values to the facts and reaches a result.²³ Proponents of mediation further argue that compulsory to apply the law doesn't exist in mediation. According to them, "a voluntary mediation, provides options to parties to have a primary protection for the fairness of the process and the freely obtained consent by the parties make more likely that their interest will be served by the settlement and that they will voluntarily comply with it²⁴ and encourages voluntary compliance with the resolution.

Fuller who stands in favor of mediation strengthens the above views that:

Mediation has the capacity to reorient the parties to wards each other not by imposing rules on them but by helping them to achieve a new and shared perception of their relationship and disputing parties have considerably more



autonomy in mediation than they would in adjudication process where judge or arbitrator would impose a decision.²⁵

The literature on ADR suggests that instead of risking an imposed decision by a judge or arbitrator, people may prefer a non-binding settlement process in which the third party empowers the participants to control and shape the outcome. To them, since adjudication presents an imposed rather than a bargained or mediated solution, it is ineffective for the resolution of disputes.²⁶ In their view, to reduce time, money and exposure to a litigious atmosphere, business men have to use mediation as an alternative dispute resolution mechanism.²⁷

Apart from the above views, a third category places itself in the middle. In their views, no one approach is best for resolving all disputes. For them, there is no right or wrong answer to the question of which process is most appropriate depending on many factors, such as parties' needs and expectations, cause of the dispute, confidentiality and others²⁸ influence to determine which process of dispute resolution would be the most useful and effective.

To summarize the whole idea of literature review, there is no a uniform world view of dispute resolution. Literature reviews reveal divergent views on whether ADR in general or mediation in particular is appropriate for settling disputes with particular emphasis on business disputes in comparison with litigation. Since businesspersons primarily run the business and doesn't need to waste much of its time and cost in litigation, this paper attempts to ascertain this fact and further substantiate and analyze the above conflicting views. Besides this, it tries to relate the relevancy of mediation process and outcome with the Ethiopian context to give cognizance its importance to the relevant authority.

End Notes

1. IllinoisADR:CommercialLitigation,atwebsite, www.weblocator.com/adrecomlit.htm
2. Alternative Dispute Resolution in Ethiopia: at website,[www.sfhgroup.com/alternative dispute resolution p.1](http://www.sfhgroup.com/alternative-dispute-resolution-p.1)
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4. <http://www.cpradr.org> p.1
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10. Illinois cited above at note 1,p.2
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18. Id, p.155

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2. Alternative Dispute Resolution in Ethiopia: at website, www.sfhgroup.com/alternative-dispute-resolution p.1
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16. Ministry of Capacity Building, cited above at note
17. Jacqueline M. Nolan Haley, Alternative Dispute Resolution in a Nutsnell, (1992), p.180
18. Id, p.155

resolution mechanism with the intention to contribute for the accessibility of justice in the country.

- Laws on mediation should as well be adopted as part of the country's legal system and address significant facets in the legislation framework that would put mediation to be an attractive commercial dispute resolution mechanism.

More specifically

- It is necessary to ensure enforcement of the settlement agreement by providing procedure whereby a settlement agreement can be confirmed in a judgment by a court or be registered by public authority as notary so that it would be recognized and enforced with out instituting a suit incase of violation of the settlement agreement.
- Since the viability of mediation as an alternative to litigation depends on parties that may be assisted by appropriately trained and experienced third party neutrals, it would be important to have made regulatory framework for mediators.
- Since confidentiality is a crucial ingredient for commercial mediation, which encourages parties to undertake frank and open discussion in the process of mediation, disclosure of information in the subsequent litigation or arbitration should be prohibited unless it is necessary by law or in enforcement of the settlement.
- As it has been witnessed by the questionnaire, most businesspersons are not familiar with the existence of institutions such as EACC, AACCSA that can conduct mediation. Thus, the government should make them familiar and create awareness through different mechanisms such as mass media, using local associations, etc.

In general, rewarding the above-mentioned recommendations would result in the movement of businesspersons away from lawsuits in commercial disputes thereby reduces backlogs of courts and facilitates smooth commercial transactions by preserving their relationship

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Interviewees

- Interview With Abebaw Tadesse, High Court judge, in the Amhara Regional Sates on November16,2007.
- Intreview with Beza Ashenafi ,Business Owner in Addis Ababa,Chirkos Sub City,Kebele16/17,on November 19,2007.
- Interview with Getaye Endalew, High Court Judge,in Amhara Regional State on December 20,2007.
- Interview with Leol G/egziabher,judge of the Federal High Court,Addis Ababa,on December 11,2007.
- Intrview with Mamaru Gella,High Court Judge,in Amhara Regional State On December18,2007.
- Interview with Yohannes Seifu, Head of Legal Drafting, Organizing, and Consultancy Department; FDRE, Ministry of Justice, on February 6,2008.
- Interviewed with Woubshet Ayele,Secretary General of Ethiopian Arbitration Center on November 6,2007.

Date-----2007

Questionnaire

This questionnaire is designed to be completed by legal practitioners to make surveying assessment on the settlement of commercial dispute through mediation .The purpose of collecting this surveying data is to conduct a research on whether “mediation” is appropriate dispute resolution mechanism as an alternative to litigation.

This questionnaire comprises two parts:

The first part concerns personal data of the respondents, which helps to know who the respondents of the questionnaires are? The second part deals with ‘status,’ which refers to the respondents’ position to the questions in the questionnaire document.

Therefore, your cooperation to fill this questionnaire diligently and with precaution will considerably be significant for the accomplishment of the research.

Having recognized your significant contribution, you are politely requested to choose what you think is appropriate in an unequivocal manner.

Instructions

- You need not write your name
- For our appropriate choice mark a right symbol (tick) in the box, that constitutes your choice for each question.
- You are free to choose more than one choices for each question.

Part 1 -personal data

- Age _____
- Sex _____
- Profession _____
- Qualification _____
- Address (it suffices to write city/town where you are living)

Part two-status

1 Resolving commercial disputes through mediation is more advantageous than litigation
Do you agree? Yes No

2. If your answer for the above question is "yes", which one of the following advantages can be obtained by employing mediation?

- expeditious settlement of the dispute(time saving)
- satisfaction of the parties with the settlement (win/win)
- confidentiality of the process and the settlement.
- reduction of costs
- reduction of case backlogs of courts.
- helps to preserve business relationship

Specify other advantages, if any _____

3 what may be the disadvantages of mediation in the settlement of commercial dispute?

- it is more susceptible for unequal bargaining
- lack of enforcement mechanism

other reasons, if any _____

4 If you believe that mediation is more appropriate for commercial dispute resolution which approach may be preferable for its effective application?

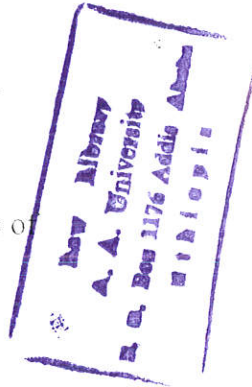
- traditionally, by elders and popular in the business community.
- with established institution and governing rules of procedures and trained mediators

Specify, if you might wish to suggest any other approach _____

5 If you agree that mediation is an appropriate commercial dispute settlement, how would it be familiarized with the business community so that it may be effectively utilized.

- by establishing institutions which is responsible to mediation as part of ADR
- by creating awareness of the businessmen
- by providing training to mediators about the concepts, application, principles of mediation and skills of mediating disputants in a way to attract clients.
- By advertising and promoting through the different communication media

Specify if there is any other reason _____



6 Which one of the following commercial dispute resolution mechanism do you think has been practiced in Ethiopia as an informal traditional system of dispute settlement.

- Mediation conciliation both of them

7 Some writers have the opinion that there is no clear distinction between mediation and conciliation and that they are used interchangeably, while others do not agree with this assertion. To which group do you belong?

- to those who believe having distinction between them.
- to those who do not believe having a distinction between them

8 I appreciate if you have any comment, which you think is relevant and wish to add _____

ቀን -----

መጠይቅ

ይህ መጠይቅ በንግድ ማህበረሰብ የሚሞላ ነው ። አላማውም ከንግድ ስራ ጋር በተያያዙ ምክንያቶች የሚከሰቱ አለመግባባትን በፍርድ ቤት ክርክር ከመፍታት ይልቅ በአማራጭ የችግር አፈታት ዘዴ በተለይም በሽምግልና (Mediation) መፍታት የተሻለ ጠቀሜታ ስለመኖሩ ጥናትና ምርምር ለማድረግ በማሰብ መረጃዎችንና የሕዝብ አስተያየቶችን ለመሰብሰብ ነው ።

ይህ መጠይቅ ሁለት ክፍሎች ይዘአል የመጀመሪያው ክፍል መጠይቁን ስለሚሞላው ሰው ማንነት የሚገልጽ ሲሆን ሁለተኛው ክፍል የጥናተና ምርምር ስራ በተገቢው መንገድ እንዲጠናቀቅ ደጋፊ ማስረጃዎችንና የተጠቃሚውን ሕዝብ አስተያየቶች የሚሰበሰብበት ነው ።

በመሆኑም ጥያቄዎቹን በአግባቡና በማያሻማ መንገድ እንዲሞሉልን መልካም ትብብርዎን እየጠየቅን ላሳዩን መልካም ትብብርና ሐላፊነት በተሞላበት ሁኔታ በጥንቃቄ ሞልተው ስላስረከቡን በቅድሚያ እናመሰግናለን ።

ማሳሰቢያ:- ይህ መጠይቅ ከጥናቱ አላማ ውጭ ለሌላ መረጃ አገልግሎት አይውልም

- መጠይቁን ለመሙላት የሚከተለውን መመሪያ ይጠቀሙ
- ስምዎን መጻፍ አስፈላጊ አይደለም
- በእያንዳንዱ ጥያቄ ሊሰጡ የሚፈልጉትን መልስ በሳጥን ውስጥ የራይት ምልክት (✓) በማድረግ ይጠቀሙ
- ለአንድ ጥያቄ ከአንድ በላይ መልስ ካልዎት በሁሉም መልሶች አንጻር የራይት ምልክት ይጠቀሙ ።

ክፍል አንድ

- እድሜ ----- ጾታ----- ስራ ----- የንግድ
አይነት -----
- የትምህርት ደረጃ -----

- አድራሻ (የሚኖርበትን ከተማ ብቻ መጻፍ በቂ ነው) -----
- የንግድ ድርጅትዎ የካፒታል መጠን በእርስዎ ግምት በየትኛው ይመደባል ::
 - ከፍተኛ (500 000 ብር በላይ)
 - መካከለኛ (100 000 — 500 000 ብር)
 - ዝቅተኛ (ከ100 000 ብር በታች)

ክፍል ሁለት

1. በንግድ ስራ ላይ ከተሰማሩ ጀምሮ ከንግድ ስራ ጋር በተያያዘ ምክንያት አለመግባባት አጋጥሞዎት ያውቃል ?
 - አዎን የለም
2. በ1ኛው ጥያቄ መልስዎ አዎን ከሆነ ይህ አለመግባባት ከየትኛው የሕብረተሰብ ክፍል ጋር ነው ::
 - ከንግዱ ተጠቃሚዎች ችርቻሮ ነጋዴ
 - ተመሳሳይ የንግድ ስራ ከሚሰሩ
 - ከጅምላ አከፋፋዮች

ሌላም ካለ ይጥቀሱት

3. ያጋጠመዎትን የንግድ አለመግባባት (ቶች) ምክንያት (ቶች) ምን ነበር (ሩ) ቢዘረዝሩት -----

4. እነኚህን አለመግባባቶች በምን ሁኔታ ሊፈቷቸው ቻሉ (ሞክሩ)
 - በፍርድ ቤት ክርክር / Litigation in court /
 - በሽምግልና/ mediation/
 - በእርቅ / conciliation /
 - በግልግል ዳኝነት/ Arbitration/
 - በሁለታችን ስምምነት / Negotiation/

4.1 መልስዎ በፍርድ ቤት ክርክር ከሆነ በምን ያህል ጊዜ ተወሰነልዎት -----

5. ንግድ ነክ አለመግባባት ከፍርድ ቤት ይልቅ በሽምግልና በ3ኛ ሰው አማካይነት መፍታት ጠቀሜታ አለው ብለው ያምናሉ ?
 - ጠቀሜታ አለው
 - ጠቀሜታ የለውም

- በአማራጭ የአፈታት ዘዴ ተቋም ሆኖ በሕግና ስርአት የሚመራ እና እውቀቱ ባላቸው ባለሙያዎች ቢሆን
- ከበሬታ ባላቸው አዛውንቶች ወይም ልምድ ባላቸው ሰዎች አማካይነት ልማዳዊ ሽምግልና ቢሆን

11. ከንግድ ስራ ጋር የተያያዙ አለመግባባትን በሽምግልና የመፍታት ዘዴ ጠቃሚነው ካሉ በአገራችን በዘመናዊ መንገድ እንዲዳብር ምን መደረግ ይገባዋል ::

- አማራጭ የችግር አፈታት ዘዴ የሚመራ ተቋም መቋቋም
- የንግድ ማህበረሰብን ግንዛቤ መፍጠር
- በሽምጋይነት የሚያገለግሉ ባለሙያዎችን ማሰልጠን
- መንግስት ልዩ ልዩ ድጋፍ ቢያደርግ
- ሌላም ካለ ቢጠቅሱት -----

ጥር 25 ቀን 1999 ዓ.ም.

የሰነድ ግብር ውል

- 1ኛ. እኔ ወ/ሮ ወብላም አስማረ
- 2ኛ. » » አማላይ መኮነን
- 3ኛ. » » ምስራቅ ሰብሐ.

ሆነን ከዚህ በታች የተመለከተውን ውል ተዋውላለን።

የውሉ ዝርዝር ሁኔታ

እኛ ከ1 - 3 ተቋማት የተጠቀሱን የሚችሉ የአቶ ጌታቸው ሽቲ ካሳ የልጅ እናቶች ስንሆን ከዚህ በታች የተመለከተውንና ፍሬ ነገሩም ሚች አቶ ጌታቸው ሽቲ ካሳ ሀ/ማርቆስ ከተማ በቀበሌ 04 ቅዳምን እዳባ በነበራቸው ሁለት የቦርሰሬና አንድ የአሁን ገንዘብ ስብደት የተፈጠረውን ያለመግባባት ለመፍታት በተስማማን መሆንን

- 1. አቶ ታዮ አለምነህ
- 2. ማሪ ገደፋው ስልጣን
- 3. አቶ አሰባ ሽቲ
- 4. » ባያብል ተሞላጊን





የተባሉትን ሽማግሌዎች መርጠን የወሰኑትን ውሳኔ ለመቀበል ተስማምተን በየሰነድ አንጻር በራራማችን አረጋግጠናል።

እኛም ለስታራቲቭ ሽማግሌዎች እንደናስታርቃቸው በጠየቁን መሆንንም እና ተወያይተን የሚከተለውን ውሳኔ ወስነናል።

ው ሳ ኔ

ከላይ በተጠቀሰው ጉዳይ በልጅ እናቶች አለመግባባት የተነሳ የአቶ ጌታቸው ሽቲ ካሳ የገንዘብ ፈቃድም ሆነ የግብር አስፋፈል በአጠቃላይ የሥራ እንቅስቃሴ ያለ ወይም ወብላም አስማረ አውቅና እንዳይንቀሳቀስ በሳይቤት እንዲታገድ ማድረጋቸውን ለማረዳት ፍላጎት

- 1. ያህ ችግር ተወግዶ ልጆች በአንድነት ተፈቃቅረው ማድን እንዲችሉ።
- 2. ስብደት ስብደት 51 የሆነውን በአቶ ጌታቸው ሽቲ ስም የተያዘው የቦርሰሬ ግብር ስብደት ስምን ስምንት ጌታቸው
- 3. ስኞት ስምንት ጌታቸው ስም ሆኖ እየነገዱ እንዲተዳደሩበት
- 4. የሱቅ ቁጥር 74 የሆነው በአባታቸው በጌታቸው ሽቲ ስም የተያዘው ደልገና ዓሳገጠው ያሰራበት የነበረው የቦርሰሬ ገንዘብ መደብ።
- 5. ስኞት ስምንት ጌታቸው

2ኛ. በሀገን ሐፍ ጌታቸው ስም ሆኖ በየሞግዚቶቻቸው አማካኝነት እየነገዱ እንዲተዳደሩበት አቶ ድልነሳ ባሳዘነውም ጽሑፉን ቀልፍና ጭዛን እንዲተሟላ አስረከበዋቸው ስራቸውን እንዲቀጥሉ

የሱቅ ቁጥር 38 በአቶ ጌታቸው ሽቲ ስም የእህል ንግድ የሚካሄድበት ስት ገዢ/ር አማዋይ መኮነን አየሰፊ እንዲተዳደሩበት ወስነናል። ውሳኔያችንን ለሚመለከታቸው ይድረስ ብለናል።

የእቃ ክፍፍልን በተመለከተ ከወ/ር ውባለም አስማረ ጥያቄ ቀርቦ ለወደፊት እኩል ለማዘጋጀት ያመች ዘንድ ወ/ር አማዋይ መኮነን የእቃውን ዝርዝር ለሽማግሌ እንዲያተርቡ በተጨማሪ ተስማምተናል።

ከዚህም በላይ

1ኛ. በታዳምን የሚገኘው የአቶ ጌታቸው ሽቲን የእህል መደዘን በተመለከተ

2ኛ. በቀበሌ 03 የአቶ ጌታቸው ሽቲን መኖሪያ ቤት በተመለከተ ከወ/ር ውባለም

አስማረ ጥያቄ ቀርቦ

01 መደዘን በውስጡ ያለው እቃ ወጥቶ ደማ ከተማ በሚገኙ ልጆች ሞግዚቶች

አማካኝነት ተገራይቶ ከራዩ ለ4ቱም ልጆች እንደያደርሳቸው እንዲሰጥ

ለ/ የመኖሪያ ቤቱ ክፍፍል በተመለከተ ለወደፊት በሚደገቡ ሽማግሌ እንደሚታዩ በኛ

ለጊዜው ግን ግብሩ በአባታቸው ስም እየተከፈለ እንዲቆይ በላ ልት ተስማምተን

ሰብሰባችንን ይጠቃለናል።

የልጆች ሞግዚቶች ስምና ፊርማ

1. _____
2. _____
3. _____

የአስተዳደር/ሽማግሌዎች ስምና ፊርማ

1. _____
2. _____
3. _____
4. _____



በአማራ ቤተ-ሰላም ዘርፍ መንግስት

የምዕራብ ገንጭ አስተዳደር ቤት

ዘርፍ ግድግዳ ቤት

ደብረ ማርያም

ጽ/ቤት 21

የፋይል ቁጥር 17982

ቀን

☎ 0587711128/7711521/7714736

058 7714737/7714738 ፖ.ሣ.ቁ.47

ማርያም ማህበራዊ ታሪካዊ

የሰነድ ማረጋገጫ ሰነድ ለማረጋገጥ ይገባል

ጽ/ቤት

የሰነድ ማረጋገጫ ሰነድ ለማረጋገጥ ይገባል
የሰነድ ማረጋገጫ ሰነድ ለማረጋገጥ ይገባል
የሰነድ ማረጋገጫ ሰነድ ለማረጋገጥ ይገባል
የሰነድ ማረጋገጫ ሰነድ ለማረጋገጥ ይገባል
የሰነድ ማረጋገጫ ሰነድ ለማረጋገጥ ይገባል
የሰነድ ማረጋገጫ ሰነድ ለማረጋገጥ ይገባል

የሰነድ ማረጋገጫ ሰነድ ለማረጋገጥ ይገባል

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77: 4099
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Annex IV

ኅግ. 92 ቀን 2000 ዓ.ም.

3

ለምሥራቅ ጊዜ ዞን ከፍተኛው ፍ/ቤት

ደብረ ግርብ

በከላሹ በኒ በአቶ ይላሽ ጋሹ ተወካይ ጋሹ ቤተው

-በ-

ተከላካዥ: በአቶ ተስፋዩ ታዲና በወ/ር በርቱካን አገልግሎት ጠባብሎ በሰው ምክር ቤት የተሰጠ የግል ግብር ደፍረሰሰና የግብር ጋራ ላይ አገልግሎት ይታዘዛል።

በሰው ምክር ቤት ጠባብሎ አርቶ ተፈጻሚ ተባሎ ከርከረ ተቋም ጠባብሎ አገልግሎት ይታዘዛል።

ዳረ ገን በወቅቱ በጠባብሎ ተፈረገ የተሰጠው የአርቶ ስም ነው ከሌላ አገልግሎት ላይ ለፈጻሚ የሚያገለግል ፍ/ቤት ተቋም ሆኖ በጠባብሎ ጠባብሎ ተፈረገ የተሰጠው የአርቶ ስም ነው በፍርድ ይህ አገልግሎት በዚህ ፍ/ቤት ላይ ክስ ጠባብሎ ፍ/ቤት ክፍት ተቋም የወ/ክፍር 21185 ተከፍቶ ተከላካዥ አገልግሎት ተለዘዘ ተብሎ በጠባብሎ ላይ ይገኛል።

በሰው ምክር ቤት ጠባብሎ ጠባብሎ ጠባብሎ ስም ነው የአርቶ የግልግል ጠባብሎ ጠባብሎ ፍ/ቤት 3024 ጠባብሎ ተፈጻሚነት የሰጠው ስም ሆኖ ከተገኘ በተፈረገው ስም ስም ስም ነው ስም የተዘጋጁ ጠባብሎ ጠባብሎ ስም ስም ስም ስም የተዘጋጁ ጠባብሎ ተከፍቶ አገልግሎት አገልግሎት ጠባብሎ አጠባብሎ።

የቀረበው አባቶች ስም ነው በሰው ምክር ቤት ፍ/ቤት/ቤት/ቤት ፍ/ቤት 92 ጠባብሎ አረጋገጠሁ።

አጠባብሎ: ይላሽ ጋሹ ወኪል ጋሹ ይላሽ

Handwritten notes and signatures on the left side of the page, including a large signature and some illegible text.

Handwritten signatures and notes on the right side of the page, including several names and a date '26-5-00'.

2. የሁለተኛ ክፍያ ብር 23,333.33 /ሃያ ሶስት ሺህ ሶስት መቶ ሰባ ሶስት ብር ከሰላሳ ሶስት ሳንቲም/ ከታህሳስ 16/2000 ዓ/ም እስከ ጥር 16/2000 ዓ/ም ድረስ ፣

3. የመጨረሻውና ሶስተኛው ክፍያ ብር 23333.33 /ሃያ ሶስት ሺህ ሶስት መቶ ሰላሳ ሶስት ብር ከሰላሳ ሶስት ሳንቲም/ የተለያዩ የወንጀል የክስ መዝገብ መዘጋቱ ሲረጋገጥ ሊከፈል ሲሆን ይህንን በ3 ደረጃ የሚከፈለውን ገንዘብም እስቀድሞ በአቶ የኔሰው ገላጋይና በአቶ ዩርዳኖስ ስም ባንክ እያስገባ ገንዘቡን ከእነዚህ ከሁለቱ ሰዎች ሊቀበል ነው።

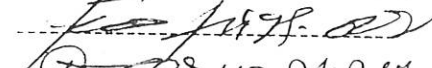
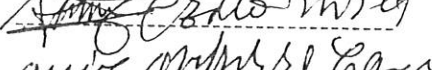
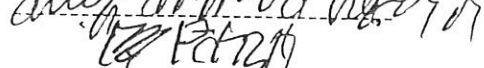

4. የአቶ (ጋሹ) ይለማ ወኪል አቶ ጋሹ ቢተውም የጋራ አክሲዮን ማኅበሩ ነው ብሎ ክስ የመሰረተበትን አቶ ተስፋዬ ታደሰና ወ/ሮ ብርቱካን እንዳለው ለቆ ይህንን የለቀቀ መሆኑን ውል ክፍል ቀርቦ ሲያረጋግጥ ሊቀበል ነው።

እኛም አቶ ተስፋዬ ታደሰና ወ/ሮ ብርቱካን እንዳለው ከላይ በተጻፈው መሰረት ተስማምተን በአስታራቂ ሽማግሌዎች አማካኝነት መታረቃችንን እናረጋግጣለን።

ይህንን ውል ያፈረሰ ውሉ ለፈረሰበት ወገን በኪሳራ ስም ብር 20,000.00 /ሃያ ሺህ ብር/ ለመንግስት 10,000.00 /አስር ሺህ ብር/ በፍ/ቤ/ሀ/ቁጥር 1889 በተመለከተው መሀረት ለመክፈል ተስማምተናል። ውሉንም ለፍ/ቤት ልናቀርብ ነው።

እኛም አስታራቂ ሽማግሌዎች ከላይ በተጻፈው ውል መሀረት ከላሽና ተከላሽን ማስታረቃችንን እናረጋግጣለን።

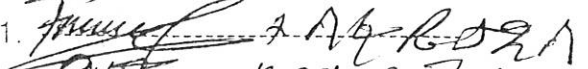
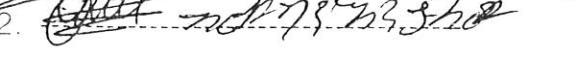
የአስታራቂ ሽማግሌዎች ስምና ፊርማ

1. 
2. 
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የከላሽ ወኪል ስምና ፊርማ

1. 

የተከላሽ ስምና ፊርማ

1. 
2. 

8ኛ/ ለዚህ እርቅ ውለ ሰማ. ሽማግሌዎች

1ኛ/ አቶ ነብዩ ወርቅነህ 2ኛ/ መቶ አለቃ ተስፋ መሰ. 3ኛ/ አቶ ተስፋዬ አባቱነህ

4ኛ/ አቶ ዩሐንስ ይማም ናቸው :: እኛም ውለ ሰማ. ሽማግሌዎች ሁለቱም የግራቀኝ ተዋዋይ ወገኖች ከላይ ከተራ ቁር 1 - 7 በተመለከተው መሰረት ወደውና ፈቅደው ሲሰማሙ አይተን ሰምተን አረጋግጠን ፈርመንበታል :

የታራቂ ተከላሾች /ውል ተቀባዮች/

1. ስም ~~ተላላ ሹ ፲፱፻፲፱~~ ፊርማ ~~ገሠፍ~~

ቀን 9/10/99

2. ስም ~~ገብረ ገብረ ገብረ~~ ፊርማ ~~ገብረ~~

ቀን 9/10/99

የታራቂ ከላሽ /ውል ሰጭ/

ስም ~~ገብረ~~

ኃላፊነት ~~ገብረ~~

ፊርማ ~~ገብረ~~

ቀን _____

የዋስ ስምና ፊርማ

ስም ~~ገብረ ገብረ ገብረ~~

ፊርማ ~~ገብረ~~

ቀን 09/10/99

የእማኞች ስምና ፊርማ

1ኛ/ ስም ~~ገብረ ገብረ ገብረ~~ ፊርማ ~~ገብረ~~

ቀን 9/10/99

2ኛ/ ስም ~~ገብረ ገብረ ገብረ~~ ፊርማ ~~ገብረ~~

ቀን 9/10/99

3ኛ/ ስም ~~ገብረ ገብረ ገብረ~~ ፊርማ ~~ገብረ~~

ቀን 9/10/99

4ኛ/ ስም ~~ገብረ ገብረ ገብረ~~ ፊርማ ~~ገብረ~~

ቀን 9/10/99

ይህ የእርቅ ውል ስምምነት ዛሬ ሰኔ 9 ቀን 1999 ዓ.ም በደ/ማርቆስ ስተማ ተፈፀመ

ፈቃደኛ ሆኖ የሰጠውን ገደብ እንዲወጣ ዛሬ በ አገራዊ አስፈላጊነት የሚገፈጽም መሆኑ ተገልጿ ለካላሽ በቁጥር 04199 ባቶን 01/08/99 ዓ.ም የተጻፈው የማስጠንቀቂያ ደብዳቤ ከላሽ እንደሚል በመመልከት ድርጅቱን ለማፍረስና ለሰጠው ስሜን በውስጡ ያለውን ደብቅ ሴራ ከዳር ለማድረስ ድርጅቱ እንዲረብስ ከሰ ከመመስረቱም አልፎ ድርጅቱ ከ3ኛ ወገን ጋር ያደረጋቸው ውሎችና በድርጅቱ ስር ተቀጥረው ራሳቸውንና ቤተሰቦቻቸውን የሚመሩትን ሰራተኞች እጅግ ወደ ከፊት ችግር ውስጥ ለማስገባት እንዲሁም ድርጅቱ ስራውን የሚያቆምበት ጊዜ ለኪሣራ እንዲደረግና ከፍተኛ መጥፎ ያደረጉት የድርጅት አባላት ሀብትና ንብረት በእጽ ለማስያዝ በማሰብ የድርጅቱ ሀብት ንብረት እንዲታገድ ድርጅቱ የእሳት ከእሳት ስራውን እንዳያከናውንና ከ3ኛ ወገን ጋር እንዳይወዋል የእገዳ ትእዛዝ እንዲሰጠው ጠይቋል። በተለይም ካላሽ በድርጅቱ ውስጥ ከገዛው 50 አጣዎች ውስጥ የሚረገጡበትን ብር 58141 /ሃምሳ ስምንት ሺህ እንደ መቶ አርባ እንድ ብር/ ለመክፈል ፈቃደኛ አድሆነም ደህንን ገደብ-ገምት እንዲወጣ ከቃል ጥያቄ አልፎ በጠቅላላ ጉባኤ የተወሰነውን ውሳኔ ሊፈጸምና ሊያከብር አልቻለም።

ድርጅቱም እስካሁን ድረስ ገደብ-ገምትን በመወጣት የአጣ ክፍያቸውን ባጠናቀቁት አባላት የገዝብ ባደረገው የአደረጃጀትና የማቴሪያል ግዥ እንዲሁም ባሳየው ክፍተኛ የሰራ እንቅስቃሴ በወር የ4000 /አራት ሺህ / የእትክልት ሳጥን ማሰሪያ የሚሆን እንጨት ለማቅረብ ከሌሎች ግለሰቦች ጋር ውለታ ገብቶ ስራውን እያከናወነ ከመሆኑም በላይ የገዝብ አቅሙን የበለጠ ለማጠናከር ሲል ከአበዳሪ ግለሰቦች የብር 150000 /አንድ መቶ ሃምሳ ሺህ ብር/ ብድር ወስደው በወቅቱ ለመክፈል በክፍተኛ እንቅስቃሴ ላይ ይገኛል።

ድርጅቱ ግላግውን ከዳር ለማድረስና ከግለሰቦች ጋር የገባውን ውለታ ባገባ ለመፈጸም በስሩ ከ15 በላይ ሰራተኞችን ቀጥሎ እያለራ ይገኛል።

ስለሆነም ድርጅቱ በዚህ አይነት ሂደት ውስጥ እያለ የእሳት ተዕለት ስራውን እንዲያቆም በፍ/ቤቱ በተሰጠ የእገዳ ትእዛዝ ላይ ያለንን ተቃውሞ እንደሚከተለው እናቀርባለን፡-

1. ድርጅቱ ስራውን እቅድ ባለበት ጊዜ ከሌሎች ግለሰቦች ጋር የገባውን ውለታ ለመፈጸም ስለማይችልና ካልሰራም የተበደረውን ብድር ለመክፈል ስለማይችል የእሳት ተዕለት ስራውን እንዲያቆም የእገዳ መስጠት ድርጅቱን ለኪሣራ መደረግ ከድርጅቱ ጋር ውለታ በገቡበት ግለሰቦች መብት ላይ ከፍተኛ ተጽኖ ከማድረስ አልፎ የሀገርን አካዳሚ የሚጉዳ እና አጠቃላይ የድርጅቱን ሀብትና ንብረት በክሰረት ምክንያት ለ3ኛ ወገኖች እንዲውል የሚያደርግ በመሆኑ።
2. ከምንም በላይ በድርጅቱ ውስጥ ተቀጥረው ራሳቸውንና ቤተሰቦቻቸውን በመምራት ላይ የሚገኙ ከ15 በላይ የሚሆኑትን ሰራተኞች ለችግርና ለመክራ የሚያጋልጥ በመሆኑ።
3. የድርጅቱ ሥራውን ማቆም ገደብ-ገምት በሌላው ተጽዕኖተኛ በድርጅቱ ውስጥ ሀብታቸውን ያፈለሱትን የድርጅቱ አባላት ከመጉዳት አልፎ ጋህገር ሀብትና የገባ ልማት ላይ ከፍተኛ ተጽኖ የሚያስከትልና በሰንት ጥረት የተከናወነ ድርጅት ለማፍረስ የሚገባበት መንገድ እንቅስቃሴን የሚገባ በመሆኑ።

[Handwritten signature]

4. ከ ያህሉን ግዴታ በአገባቡ ተወጥተው በደ ቁ . ገጽ መቀጠል የማይችሉ ቢሆን እንኳን ድርጅቱ ከላሽን በህግ አግባብና በመመዘኛ ጽሑፍና በመተዳደሪያ ደንቡ መሰረት በአገባቡ አሰናቆተና የመመዘኛ ጽሑፉንና የመተዳደሪያ ደንቡን አሻሽሎ ለመቀጠል በቂ የገንዘብ አቅምና አባላት ያሰው በመሆኑ፤
5. በድርጅቱ ላይ የመከሰር ውሳኔ በድርጅቱ ባለተሰጠበት ባለገደ የድርጅት አባይ ጥያቄ ብቻ ያውጥ ግዴታውን ሳይወጣ የመብት ተጠቃሚ ብቻ ለመሆን የሚፈለገውን መብት በማስጠበቅ የባዙ አባላትን ማለትም ከፍተኛ እጣ በመግዛት ከፍተኛ መዋጮ አውጥተው በድርጅቱ ደንብና መመሪያ መሰረት በመሰራተ ላይ ያሉትን አባላት መብትና ጥቅም እንዲሁም ከድርጅቱ ጋር ውለታ የገቡትን የገደ ወገኖች እጣ ፈንታ ግምት ውስጥ ሳያስገባ ድርጅቱ የአለት ከአለት ስራውን እንዲያቆም መታዘዙ /መታገዱ/ ፍትህዊነት የለለው በመሆኑ፤
6. ከላሽ ከድርጅቱ በድርጅቱ መውሰድ የሚገባቸውን ሀብትና ንብረት አላቸው ቢባል እንኳን ግለሰቡ ከድርጅቱ ላይ አለኝ ብለው የሚጠይቁትን ገንዘብና ንብረት ለመመለስ በቁጥር 17980 በቀን 26/08/99 ዓ.ም በተዳይ የአገጻ ደብዳቤ የታገዱት ሀብትና ንብረቶች ከበቂ በላይ በመሆናቸው ለ2ኛ ጊዜ በቁጥር 17981 በቀን 02/9/99 ዓ.ም ከድርጅቱ ላይ መብራት ተቆርጦ፣ ድርጅቱ እንዲታሸግና ስራውን እንዲያቆም ብሎም በሌላ ዘበኛ እንዲጠበቅ የሰጠው የአገጻ ትእዛዝ በአገባቡ ያልተቃኘ በመሆኑ፤
7. ድርጅቱ እንዲታሸግና ስራውን እንዲያቆም የተሰጠው ትእዛዝ በቂ ሆኖ ራሷ ለአገባብ ለድርጅቱ የሚውለው መብራት እንዲቋረጥ ለመብራት ሀይል ትእዛዝ መስጠቱ ድርጅቱ በጨለማ ምክንያት ሌሎች ግለሰቦች ሊዘርፉትና ሊያጠቁት የሚችሉበትን ሁኔታዎች የሚያመቻች ስለሆነ፤
8. በድርጅቱ ቅጥር ገቢ የሚገኝ 6 ቢያጆ የጽድ እንጨትና 10 ቢያጆ የባህር ዛፍ እንጨት እንዲሁም ከፍተኛ መጠን ያሰው ሰጋቱራ እንዳይሸጥ እንዳይለወጥ ለ3ኛ ወገን እንዳይተላለፍ መታገዱ እንጨቶቹ የአገልግሎት ላይጅም ጊዜ ሲቆዩ የሚበላሹ ከመሆንም በላይ አሁን ያለንበት መብት ወራት ክረምት በመሆኑ በዝናብና በፀሐይ ምክንያት ለብልሽት ስለሚዳርጋቸው ድርጅቱን ለከፍተኛ ኪሣራ የሚያጋልጥ በመሆኑ፤
9. በድርጅቱ ላይ የአገጻ ትእዛዝ ከመስጠቱ በፊት የተመረቱት በግምት 2000 /ሁለት ሺህ/ የአትክልት ሳጥን በላይ የሚያሰራ የተዘጋጀ ጣውላ ለባለውለታዎች እንዳይተላለፍ የታገደ በመሆኑ እንጨቶቹ በመጥቀሱና በመጣመም ብልሽት የሚያጋልጣቸው መሆኑ ከበዙ በጥቂቱ የሚጠቀሱ ናቸው።

በዚህ አገባብ ሲታይ በአጠቃላይ ፍ/ቤቱ ከድርጅቱ ላይ መብራት እንዲቋረጥ፣ ድርጅቱ እንዲታሸግ፣ በሌላ ዘበኛ እንዲጠበቅ፣ የተመረቱት ምርቶች እንዳይሸጡ እንዳይለወጡ የሰጠው ትእዛዝ የማህበሩን በዙሀን አባላትና የድርጅቱን ስራተኞች፣ ከድርጅቱ ጋር የተዋዋሉት 3ኛ ወገኖች መብትና ጥቅም ገምት ውስጥ ያለስገባ እና ድርጅቱን ለክስረት የሚዳርግና በከፍተኛ ጥረት የተጀጅመውን ማህበር

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በማፍረስ የአካባቢው ልማትና እድገትን የሚያደናቅፍ፣ የአንባቢነት መንገድ ላይ የሚገታ
 በመሆኑ ፍ/ቤቱ በዚህ ድርጅት ላይ መብራት እንዲቀረጥ፣ ድርጅቱ እንዲታሸግ፣
 የተመረቁ ምርቶች እንዲይሸጡ፣ ድርጅት በሌላ ዘበኛ እንዲጠበቅ፣ የተሰጠውን ትእዛዝ
 በማንሳት /በመሻር/ ድርጅቱ ታሸጎ በቆየበት ጊዜ የደረሰውን ክላራ የመጠየቅ መብቶችንን
 ጠብቆልን የታሸገው ድርጅት ተከፍቶ ቀደም ሲል በነበረበት ሁኔታ የእለት ከእለት
 ስራውን እንዲቀጥል፣ ከድርጅቱ ላይ የተደረገው መብራት እንዲቀጥል፣ በድርጅቱ ቅጥር
 ግቢ ውስጥ የሚገኙት የተለያዩ እንጨቶች ለብልሽት ከመዳረጋቸው በፊት ጥቅም ላይ
 እንዲውሉ ትእዛዝ እንዲሰጥልን በአክብሮት እንጠይቃለን።

አመልካች፣

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አዲስ አበባ ጥቅም
 የድርጅቱ የሀገር አማካሪ ጠበቃ



ገጽ 08
ቁጥር 17981
ቀን 9-11-99

ዳኞች - በአሳሪነት ከሥራ
- የሥራ ስልጠና
- ማህተም ማስፈጸም

ከሣሽ - በሥራ ስልጠና
ተከሣሽ - ከሥራ ስልጠና

መዝገቡ ዛሬ ከቀጠሮው በፊት የቀረበው ከሣሽ 175/11/99 በተጻፈ ማመልከቻ ተከሣሾች መከሰሳቸውን አውቀው ንብረታቸውን ለማሸሽ ጥረት በማድረግ ላይ ስለሆኑ የተከሣሾች ንብረት ቢሸጥ ቢለወጥ ወይም ለሌላ ሰው ቢዛወር ከሣሽ ምናልባትም የመርታት እድል ቢገኝም የሚያስፈጽምበት ንብረት ስለማይኖር

1. ~~የሥራ ስልጠና ማስፈጸም~~
2. _____
3. _____
4. _____
5. _____



በፍ/ብ/ሥ/ሥ/ሀ/ቁጥር 154 መሠረት ተከብረው እንዲቆዩ ይታዘዝልን በማለት በቃለ መሃላ አረጋግጠው አቅርበዋል።

ትእዛዝ

ከሣሽ እንደሚሉት ተከሣሽ መከሰሳቸውን ከወዲሁ አውቀው ያላቸውን ንብረት ከሸጡና ከለወጡ ከሣሽ የፍ/ባለመብት 175/11/99 ፍርድን የሚያስፈጽምበት ንብረት ያገኛል ተብሎ ስለማይገመት ከላይ ከተራ ቁጥር 175/11/99 የተዘረዘሩት ንብረቶች እንዳይሸጡ እንዳይለወጡ በማናቸውም ሁኔታ ወደ 3ኛ ወገን እንዳይተላለፍ በአሉበት ሁኔታ ተከብረው እንዲቆዩ በፍ/ብ/ሥ/ሥ/ሀ/ቁጥር 154 መሠረት ታዘዘዋል።

ከፍ/ብ/ሥ/ሥ/ሀ/ቁጥር 154 መሠረት
ከ 175/11/99 የተዘረዘሩት ንብረቶች
አንዳንድ ላይ ስለሚገኙት ፍ/ባለመብት

እንደትእዛዙ እንዲያስፈጽም ለ- የትእዛዙ
ግልባጭ /ኮፒ/ ከመሸኛ ጋር ይድረሰው ይጻፍ። ቀጠሮ አልተለወጠም።

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Declaration

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

Declared by:-

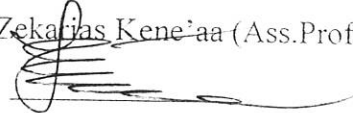
Mekuriaw Alemenew

Signature 

31 March, 2008

Confirmed by:

Zekarias Kene'aa (Ass. Professor)


(Signature)

March 31, 2008

(Date)

- 19 Leonard L.Riskin and James E. West Brook, Dispute Resolution and Lawyers,(1987),
p.34
- 20 Stitt, cited above at note,p.8
- 21 P.J Fitzgerald: Salmond on Jurisprudence,(12th ed.,1966) p.184
- 22 .Riskin cited above at note,19 p.406
- 23 Fitzgerald,cited above at note 21,pp.192-193
- 24 Goldberg,eta'l, cited above at note 15, p.265
- 25 Nolan Haley,cited above at note 17,p.58
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- 27 Illinois ADR: cited above at note 1, p.1
- 28.Cited above at note 12, p.88

Chapter Two- Commercial dispute and dispute Resolution Mechanisms: An overview

As human beings are social animals, interactions made among them are natural phenomena. In the process of interactions, disputes may arise among them. A variety of personal, social, economic, etc disputes may be created among families, couples, employees, neighbors, businessmen, and so on. However, not all such disputes will be covered by this study. This study is rather limited to commercial disputes that arise from commercial matters. Before discussing commercial disputes, however, it seems proper to acquaint readers with the terms “commercial transactions” and related concepts.

2.1 Commercial transactions and disputes that arise there from.

2.1.1 Commercial transactions

There are some terminologies that are often used in connection with commercial activities; such are commerce, commercial, trade or business activities. It will be essential to acquaint with their definitions so that readers may get a clear understanding about them in particular, and commercial transactions in general.

Commerce is defined to mean,

the exchange of goods, productions or property of any kind,
the buying and selling and exchange of articles ... including
trade, traffic commerce, transaction, communication ...¹

The other source restates the above definition, and added further that it is

trade and traffic carried on between different peoples or state and its inhabitants, including not only the purchase, sale and exchange of commodities but also the transportation and communication of people of the different jurisdictions, including instrumentalities, agencies, and the means by which business is accomplished.²

Commerce is therefore, about trade and it is often used interchangeably with trade activities. Nevertheless, commerce describes the exchange of merchandise on a large scale business activity between different states/ interstate/ while trade is referring to the commercial traffic with in a state/ intra state/³. It also applies to the exchange of goods and services on a large scale involving between states and nations. Since intrastate or domestic commerce is a trade activity that occurs solely with in the geographic borders of a given state, it is subject to an exclusive control of that state (i.e. national legislation) but the interstate commerce refers to the exchange of commodities between citizens of different states across a state lines.⁴

In the Ethiopian case, even though the right of engaging in any economic activity has been incorporated in the FDRE constitution,⁵ the term commerce is not defined as in the American constitution. The American constitution in its commerce clause, defines "commerce" to mean, business or commercial exchange in any and all of its forms between citizens of different states⁶ and empowers the congress to regulate it.

"Commercial" is also the other term, which often used to matters relating to business activities. It is defined to mean, "that which relates to or is connected with trade and traffic or commerce in general; which is occupied with business and commerce of buying and selling"⁷. Commercial is some thing related with trade and commerce and encompasses all aspects of buying and selling with a view to trade activities, and covers matters arising from all relationships of a commercial nature whether contractual or not. It would be impossible to exhaustibly specify all types of activities which are of commercial nature except demonstrating some examples, such as; any trade transaction for the supply of exchange of goods or services, distribution agreements, commercial representation or agency, factoring, leasing, construction of works , consulting, engineering, licensing, investment, financing.⁸

Since business activities are covered in a wide range under the term "commercial transaction", to define it may help us to know more about business activities.



Commercial transaction is defined

To include not only contracts for the supply of goods or services but also the provisions of finance through loans and the like and any guarantee and indemnity in respect of such transactions or activities whether of a commercial, industrial, financial, professional or other similar activities.⁹

The author of this definition tries to define it by way of descriptions of the activities that make up commercial transactions. As it is also defined by the organization for the Harmonization of Business Law in Africa (here after is called OHADA), “commercial transaction” shall include;

the purchase of movable or immovable property for sale, banking, stock exchange, currency exchange, brokerage, and transit transactions, contracts between traders for the purpose of business exploitation of mines, quarries, rental of personal property, manufacturing, transportation and communication, operations...and transaction carried out by commercial companies. It also adds that a bill of exchange, promissory notes and a warrant by virtue of their form, shall be considered commercial transactions¹⁰.

In both definitions given, the term commercial transaction is explained in descriptive. It is merely a designation of the activities that relate to business dealings and as inferred from the above definition (i. e words such as; similar activities, includes), the lists are illustrative

As attempted to clear out in the OHADA, persons whose regular occupation is to carry out commercial transaction are traders¹¹. As per this provision, to be a trader, a person should carry out commercial transactions as a regular occupation. Accordingly, a person who involves in commercial transactions as on and off basis may not be a trader.

In order to know whether there is a similar understanding in the Ethiopian context, we should resort to the Ethiopian Commercial Code, 1960(here after is called, Commercial Code).Under the Ethiopian Commercial Code, persons who professionally, and for gain,

carry on any of the enumerated activities under Article 5, on a regular basis, are called traders¹². The activities specified under Article 5 of the Commercial Code, such as; purchase of movable or immovable, exploitation of mines, banking, brokerage etc, are almost similar with that listed in the category of commercial transaction under OHADA. Therefore, despite the fact that commercial transaction is not defined in the commercial code, the trade activities specified under Article 5 are essentially similar with the list that constitutes commercial transactions in the OHADA and so does the definition of traders. This perhaps may not be a mistake to say commercial transaction is implicit in our case because all authoritative commercial activities, which are carried out by traders, are regarded as commercial transactions.¹³

The commercial activities specified in Article 5 of the Commercial Code can also be carried out in groups in the form of business organization. In this respect, where the objects of business organizations under the memorandum of association or in fact involve in any of the activities specified under Article 5 of the same code, the business organizations shall be called commercial business organizations¹⁴ and the activities to be carried out by them may be commercial activities by the same analogy discussed above.

Therefore, a business organization other than ordinary partnership may be commercial business organization¹⁵ depending on whether they involve in the commercial activities as specified in Article 5 Commercial Code. However, such rule does not apply for companies in Ethiopia. In the case of share companies and private limited companies, they shall always be categorized as commercial business organizations¹⁶ irrespective of whether they carry out in any of the enumerated commercial activities in Article 5 of the same Code.

One more point to be raised in connection with the commercial activities is whether such activities listed in Article 5 of the Commercial Code are illustrative or exhaustive. As regards such issue there is no uniform understanding. Some argue that the lists are exhaustive based on the fact that there are extended lists with no any phrase indicating it being continued. The advocates of such line of argument, view that the limit of commercial activities as such might have been done deliberately by the law makers in order to encourage professional activities by a voiding the burden or in conveniences

imposed up on traders. The opponents on the other hand argue paying emphasize on the continuous nature of commercial activities with the changing demand of the society. In their believe, the lists enumerated in Article 5 of the Commercial Code are illustrative. According to them, since commercial activities by their nature are dynamic, which could be improved and being extended with the changes of social environment, it would be difficult to enumerate in a system of exclusive listing.

This last approach mainly based its argument on the natural fact that the commercial activities cannot be limited but it does not attempt to indicate which word or phrase thereon may refer to the continuing nature of such activities.

Despite many activities have been left from being included in the lists such as practice of law, medicine, operating school, hospital etc, exemption of such activities from the list might seem the deliberate act of the legislature with a view to encourage them by making free from the obligations of traders. More over; the long lists of trade activities in Art. 5 of the Commercial Code and the absence of any phrase or word thereof showing a sense of continuity may lead us to conclude that the lists are exhaustive. This is what Winship is trying to put his opinion in his "Back Ground Document" on the Commercial Code, 1960.

According to him, the list in Article 5 of the Commercial Code is very long, but its significance to prevent difficulties of interpretation and to guide the judge in detail is vital. In his view, each activity enumerated has been weighed to include activities, which should be subject to commercial law, but the enumeration should be limitative.¹⁷

The recent Proclamation that deals with commercial activities in Ethiopia is Proclamation No.167/1997. Article 2(3) of this proclamation provides that,

Business person is a physical or juridical person who: a) Professionally and for gain carries out any of the activities enumerated under Article 5 Com. C, b) Who dispenses any services for consideration other than for wages or salary, or c) Carries out any one of the commercial activities designed as such by Regulations issued by the government.¹⁸

As envisaged from the above provision, “dispensing services for consideration” which were absent from the commercial code are added in the current proclamation. More specifically, professional activities that were not considered commercial activities in the Commercial Code seem considered commercial activities in the above proclamation under the phrase “dispensing services for consideration”. In addition, as one could understand from the phrase “that may be designated by Regulations” in the above provision, commercial activities other than provided in the commercial code and the proclamation just mentioned, seem open ended but creates confusion as to when and how the Council of Ministers may specify. Leaving the dilemma for the movement, the prospect seems that commerce is experienced an expansion far beyond earlier which might result from the multiplication of commercial transactions.

In this regard, one may be able to raise other issues in connection with the implementation of the law but the points just discussed are adequate for our purpose. To be more specific, except acquainting readers with the basic concepts related to commercial activities, the author of this study does not intend to put a boundary line or a clear demarcation between the commercial activities and non- commercial activities. The discussion focusing on the legal concepts of commercial transaction as such is believed to enable readers to distinguish commercial legal relationship from non- commercial one. The basic idea that the writer intends to convey under the present discussion is that it will be helpful to know commercial matters to choose a number of areas that commonly create commercial disputes.

To summarize the point under discussion, Ethiopia attempts to designate rules that are peculiar to commercial transactions under the commercial code that would result a number of specific legal consequences, which are different from the ordinary contractual agreements. Since the law of commercial transactions covers a wide range of commercial activities, the disputes that may arise in connection with such activities entail commercial disputes.

2.1.2 Commercial Dispute

In order to understand about commercial disputes, it needs first to define the term “dispute”. “Dispute” may be defined as “a conflict or controversy, especially one that has

given rise to a particular lawsuit".¹⁹ Pursuant to this definition, the controversy or conflict is said to be a dispute, particularly when it gives rise to a lawsuit. What if the controversy does not give rise to a lawsuit seems not covered by this definition. The other author, however, defines it in a manner that may avoid the above uncertainty. Accordingly, dispute is a "conflict or a controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other. It is the subject of litigation; the matter for which a suit is brought and up on which issue is joined."²⁰

The other issue that may arise here is whether there is a distinction between the term conflict and dispute. Regarding this issue, some argue that they are synonymous and are used interchangeably²¹ but others do not accept. Those who draw a distinction between conflict and dispute assume conflict, as the parent and, dispute as children, which describes that a conflict gives rise, and sustains disputes.²²

In their perspective, dispute is a specific manifestation of conflict so that the former is a subset of the later.²³ In both cases, however, there has been identifiable parties and delineated points of difference between those parties.

Having said this much about dispute as an introductory point in general, we now pay our attention to disputes that arise from commercial transaction.

Scholars on the subject could not define commercial dispute directly. This may build uncertainty to comprehend it. Therefore, it will be essential to adopt our understanding *mutatis mutandis* from the discussion made so far. Accordingly, commercial dispute may be understood as a dispute that may arise out of the legal relationship whether contractual or not as being considered commercial transactions under the law of the country. In our case, for instance such disputes may be raised between/or with traders or commercial business organizations according to the meaning provided in the commercial code 1960 and proclamation No. 67/97. That means disputes that arise from the legal relationship of commercial transactions that are governed under the commercial code and subsequent proclamations that may have an effect of amendment of the commercial code may be considered commercial disputes.

By implication, disputes that may arise essentially out of non-commercial relationship such as succession, family, labor, child disputes, etc may not be considered commercial for the reason that they are not grouped under the category of commercial transactions and are not regulated by the Commercial Code and other laws.

Once commercial dispute arises, the next issue that comes to the mind of disputants is to find remedy either by instituting court action or by employing alternative dispute settlement mechanisms. What may be these dispute settlement mechanisms that enable to resolve commercial disputes will be the focus below.

2.2 Commercial dispute settlement mechanisms

As attempted to make clear in the foregoing section, wherever a dispute including commercial dispute arises, the aggrieved party may initiate his /her case to one of the dispute settlement mechanisms, which she/he thinks appropriate seeking pecuniary or moral remedies. Other than this, unless the dispute is settled with out delay, it may threat or cause social or economic loss. Therefore, an attempt to seek a remedy for the loss being sustained by the aggrieved party or claims against the other person may be considered as a customary practice.

The issue is, instead, to choose which commercial dispute resolution mechanism may be appropriate to the dispute occurred. In order to choose which one is appropriate, it requires to be acquainted with important dispute resolution mechanisms. Various commercial dispute resolution mechanisms have been practiced in different countries of the world. Below, an attempt will be made to acquaint readers with the major dispute resolution mechanisms and their respective features.

2.2.1 Litigation as commercial dispute resolution mechanism.

Litigation is a traditional form of settling disputes in a court of law. In the Black's Law Dictionary, litigation is defined to be "a law suit, legal action including all proceeding there in, contest, in a court of law for the purpose of in forcing a right or seeking a remedy. It is a judicial contest, a judicial controversy, a suit of law".²⁴

From the definition given, we may take cognizance that litigation is a traditional form of dispute resolution mechanism that can be used where there is contention between two or

more persons with the purpose to enforce rights or seek remedies before a court of Law and following the legal procedures. For doing so, the claimant need to initiate his case before a court. Therefore, litigation is often used to resolve disputes of any type in a judicial process regardless of their causes.

Traditional courses such as civil, and criminal procedures, and trial advocacy focus on the litigation process, which implies that lawyers have been trained to accept litigation as the standard process for resolving disputes through the use of court procedures and litigation management.²⁵ It is due to this problem that increased concern has been expressed by both the professionals who are engaged in litigation and the public at large about the court system. The importance and shortcomings of litigation can be grasped from the views given by advocates and opponents below.

2.2.1,1 Competing views against litigation as a means of dispute Resolution

There seems to have confusion between litigation and adjudication because they are often used as if they were interchangeable. However, adjudication refers to the process by which final authoritative decisions are rendered either by official court system or arbitral tribunal.²⁶ By contrast, parties in litigation invoke the official court mechanism but it needs not lead to any final decision.²⁷

Abundant features that indicate its importance and shortcomings may characterize litigation. As could be understood below, there are opposite views about litigation as a dispute resolution mechanism.

On the advocates' point of view, adjudication is a forum for the articulation of important public values.²⁸ According to them, judicial system is the only way to protect the disempowered person in dispute and makes sure that there is fair, and wish to remain the sole arena with in which unequal can hope to achieve justice.²⁹

According to the proponents' even when a dispute is settled by any other settlement mechanisms other than litigation, it may prevent precedents from being set and becomes up set for the development of law. They further argue that litigation is believed to serve the public interest, as in the case of consumer fraud³⁰ and in case of threats of violence or other conducts³¹ of the disputants or one of them. By continuing their argument.



proponents appeal to litigation as a significant dispute resolution mechanism in order for protecting constitutional issues.³² According to this group, constitutional or other strict legal issues must be resolved only by court in a view to protect public interest and not by mediation in a private capacity.

On the other hand, opponents reject their argument and raise their critiques against litigation. Yet, they do not totally reject the above justifications; they accept few of them with some qualifications that will be raised in the next chapter under the title 'demerits of mediation'. their critiques will be demonstrated as follows.

The complaints criticize litigation with its frequent delay and expenses that exist in the legal proceedings as it takes a long time from the start of law suit until a judgment takes place at trial. According to opponents' view, litigation process often takes a prolonged time because it involves extensive pretrial procedures and protracted trial.³³ For the opponents, such delay and the respective expenses are more sever when the losing party appeals after the judgment hence, it is too expensive and time taking. According to them, litigation is not only too slow and expensive but also creates an inefficient and unproductive sense between disputants.³⁴

The other point that is often raised about the limitation of litigation is its arbitrariness.³⁵ Since courts rely on a formal adversarial process, which antagonizes the disputing parties, in trade sector it hinders to operate business effectively. Therefore, arbitrariness is one of the main features of litigation which it unnecessarily intensifying hostility between disputants. In the adversarial system, parties are of assertive, aggressive, rights conscious, litigious people, ready and eager to challenge each other.³⁶ The other writer describes how litigation aggravates adversary as, "dispute processing in litigation requires adversaries that it unnecessarily encourages hostility between disputants that antagonizes the disputing parties."³⁷ Besides, the process of litigation eventually ends up on a win/ loses result, which causes their relationship being terminated. This being the reason that commentators argue the adversarial proceedings destroy the possibility of constructing human relationships and makes the exercise of rationality alien to the resolution of conflicts.³⁸

In the opponents' position, litigation is distinguished from other resolution mechanisms

by the fact that it normally settles the dispute in favor of the party with the strongest argument³⁹ that does not indicate the protection of the unequal litigant as argued by the advocates.

The other criticism against litigation is that it is non-confidential.⁴⁰ though in certain situation that may exclusively be private litigation may be carried out in Camera, in most cases it is known to be a public process which is open for public to attend it. However, such public proceeding may not be the litigants' best interest because to have their cases involved in public as such, may prejudice their reputation and being embarrassed by the allegation against them .

The other reaction against litigation rests on the strict rules and formal procedures⁴¹ that are prescribed in the Civil Procedure Code and that it does not allow people to talk what they feel and why they are upset. That it to say they are obliged to speak to the extent that may be relevant and permitted by the court. This reminds us that adjudication presents an imposed rather than a bargained or mediated solution⁴² so that it is ineffective for resolving commercial disputes. Opponents, also raised litigation to create backlogs of courts, which in their view results a longtime with out a remedy and at the end of the date causes inaccessibility of courts. This fact is evidenced by the report made in the Ethiopian Justice System Reform (EJSR); thus; "one of the most important obstacles in front of a good access to justice is the backlog that has plagued courts and delayed, justice by months and years".⁴³

As could be understood from the report document, backlog is a plague of the system and a shame to justice (this will be more elaborated in the next section).Finally, opponents' condemn litigation for its lack of expertise knowledge⁴⁴ for settling commercial disputes. They argue that a judge to whom commercial dispute is presented may not have appropriate knowledge and experience about commercial transaction. Due to this, businessmen may not be guaranteed to have a reasoned decision. As a result, disputants usually need to settle their disputes by those who have expertise knowledge in the area of the dispute. Given all the above problems and litigation risks that are prevalent in Ethiopia, there has been more pressure to explore alternatives to litigation.

Due to these problems, opponents of litigation recommend to look for alternatives such as

mediation. By doing so, problems of delay, waiting for a long time in court and high legal costs and other expenses, court congestion etc, which are directly connected with litigation and which became a way of life for countries like Ethiopia, will be resolved.

From the above contending views, we could grasp the idea that the search for alternative dispute resolution process stems from a number of perceived deficiencies of litigation.

Though mediation offers a great promise for more effective forms of dispute resolution⁴⁵, it cannot however be a substitution of courts. This is because in situations where disputes are involving public interest, cases need to be referred to court where they may appropriately be resolved. In particular, due to the particular nature and extent of the dispute and the behavior of disputants, there may be a situation where litigation may be appropriate than mediation. As a result, litigation in court may not be totally disregarded, and neither mediation to be taken appropriate for all commercial disputes.

2.2.2 ADR for Commercial Dispute Resolution

The term “ADR” is an abbreviation that stands for alternative Dispute Resolution. It is an umbrella that comprises dispute Resolution mechanisms alternative to court adjudication such as negotiation, mediation, conciliation, arbitration, med-Arb, minitrial and summary jury trial.⁴⁶ Therefore, ADR may be defined as all legally permitted dispute resolution mechanism other than litigation or it is the process of resolving disputes with out going to trial in front of a judge.⁴⁷ Since it is not possible to describe every ADR procedure in this study, our emphasize is on presenting the major process of alternative dispute resolution; including; negotiation, mediation, conciliation and Arbitration, Each of them will be discussed below.

2.2.2.1 Negotiation

Negotiation may be defined as a “consensual bargaining process in which parties attempt to reach an agreement on a dispute or potentially disputed matter.”⁴⁸ Negotiation is therefore, a voluntary bargaining process on the existed dispute or a dispute that may arise in the future. However, since this definition does not suggest the way in which the communication between parties is initiated, it needs to search other definition that makes it more plain. In the other source, it is defined as “any form of verbal communication

direct or indirect, where by parties to a conflict of interest discuss with out resort to arbitration or any other judicial process, the form of any joint action that might take to manage a dispute between them".⁴⁹

This definition attempts to make clear that negotiation is a means of dispute settlement mechanism as between parties themselves with out the intervention of third party and usually by means of verbal communication.

Negotiation is therefore, distinguished from any other dispute resolution mechanisms by the fact that in negotiation, disputing parties come face to face or indirect discussion forum by their own initiative with out being assisted by third party. To restate it in the other way, negotiation is different from the other types of dispute settlement mechanisms by the degree of autonomy experienced by the disputants who are attempting to reach an agreement with out the intervention of third parties. Negotiating in such a way to resolve commercial dispute may take place either by the parties in dispute or by their lawyers.⁵⁰

Whoever the negotiators may be, the style of negotiation is two types: competitive and co-operative.⁵¹ This suggests since there is no purely one type of negotiation, negotiators can move back and forth between the two options just mentioned.

Competitive negotiation, which is also called adversarial or non-cooperative is a type of negotiation where parties are more interested in the bargaining position and the bottom line of the other negotiating party.⁵²

Cooperative negotiation on the other hand is also called integrative problem solving or soft bargaining. It is a type of negotiation, based on win/win mentality and is assigned to increase joint gain⁵³ with the assumption to create a common interest among parties in dispute. Though it may be difficult to create a clear cut distinction between competitive and co-operative negotiations, the study made in this area indicate that the chance of being an effective co-operative lawyer is greater than being an effective competitive lawyer.⁵⁴

Even if the two techniques of negotiation are often employed in the same negotiation, it is advisable for the negotiators to identify the one that maximizes their negotiation effective, because of the prevalence of merits and demerits on both sides

Every negotiation may differ but the basic elements of it do not change. In spite of the fact that it may be dictated by intervening circumstances, to make it more effective it is suggested that the process be supported with overt principles. As proposed by Fisher and Ury in their Book "Getting to Yes", there are seven elements known by the term principled negotiation viz⁵⁵: alternative, interests, options, legitimacy, communication, Relationship, and commitment. In principled negotiation, a person is required to look for mutual gains whenever possible but where his interests conflict, he should insist that the result be based on some fair standards independent of the will of either side.⁵⁶

This paper will not pay more attention to this issue because of being less important to the study under discussion. However, before winding up the point of discussion on negotiation, it is essential to examine whether negotiation as a commercial dispute settlement mechanism is incorporated under the Ethiopian legal system.

In this regard, the Ethiopian Civil Code incorporates the idea of ADR under title XX of the Civil Code entitled "Compromise and Arbitral submission" and "compromise in general" in Chapter one and Section one of the same title.

As defined under Art. 3307 of the Civil Code, "a compromise is a contract, where by the parties, through mutual concession, terminates an existing dispute or prevent a dispute arising in the future" This definition goes in line with the definition of negotiation given at the beginning of this section. This triggers us to conclude the term "Compromise" stands for negotiation under the Ethiopian Civil Code⁵⁷, 1960; so it is being recognized in the Ethiopian legal system.

In general, while negotiation is most frequently used and common means of resolving commercial disputes,⁵⁸ in situations where parties are extremely hostile, it may be impossible for them to come to talk to each other or may not communicate in a way they could be understood. This may occur in particular, where they are becoming aggressive to understand each other. Under this situation, parties may tend to fight rather than to settle to reach in mutual agreement in negotiation, as a result, they prefer to resolve through mediation. To make it more plain, where disputing parties are unable to communicate effectively, they may wish to make a settlement by the assistance of a third party.

To deal with their difference wisely, disputants use third party neutral who would help them to settle their problems by way of conciliation or mediation. This is well expressed by one writer as, "proactive intervention is almost always necessary to resolve any dispute where the parties are unable to reach a compromise by themselves".⁵⁹ Therefore, it would be sound to conclude that negotiation is the foundation for other important dispute resolution mechanisms, including mediation.⁶⁰

As mediation will be discussed in chapter three in more detail, by now the focus will be given to conciliation.

2.2.2.2 Conciliation/mediation

Some legal systems like the United States use conciliation interchangeably with mediation but others such as Japan, Britain distinguish them based on the degree of third party's intrusiveness.⁶¹

Accordingly, in conciliation the role of third party neutral called conciliator is mainly to bring the parties together and acts as a facilitator in their discussion where as in mediation, the third party neutral, called mediator, works with the parties to a dispute to facilitate their negotiations more effectively⁶² and to enable them arrive a mutually acceptable settlement. Conciliator, can make suggestions for settlement terms and can give advice on the subject matter where as a mediator seeks to help parties to develop a shared understanding of the conflict and to work towards building a practical and lasting resolution.⁶³

The other scholar also put it as;

while in mediation, a mediator plays more active role by giving independent compromise formulas after hearing both parties stating their case, and terms for compromise; in conciliation, the conciliator's role is mainly to bring the parties together in frame of minds to forget their animosities and be prepared for an acceptable compromise on terms mid way between the stands taken before the commencement of conciliation proceedings.⁶⁴

The proposal made by the conciliator however, is not binding unless the parties have expressly undertaken in writing to confirm it⁶⁵ the above arguments lead us to conclude that while conciliation may be an interchangeable terms with mediation, there is a subtle difference between them. However, regardless of such insignificant difference, others argue that Conciliation and mediation seem the twin devices of peaceful dispute mechanism. Other authorities even recognize conciliation as one model of mediation. In this respect one authority wrote:

One model of mediation requires that the disputants remain in separate rooms while the mediator shuffles back and forth between the rooms. This process is sometimes called conciliation or shuttle diplomacy. The mediator (or conciliator) may exchange offers between the disputants or may engage in private discussions with the disputants to learn facts that may assist him or her to settle the dispute.⁶⁶



Having acquainted with conceptual understanding, one may resort to inquire about whether conciliation and mediation are being recognized in Ethiopian. This issue leads us to examine provisions of the Ethiopian Civil Code and other laws. Though conciliation is not defined in the Civil Code, provisions that regulate conciliation have been introduced in it.

However, it is defined in Labor Proclamation as:

the activity conducted by a private person or persons appointed by the ministry of labor and social affairs at the joint request of the parties for the purpose of bringing the parties together and seeking to arrange between them voluntary settlement of a labor dispute which their own efforts alone do not produce.⁶⁷

Thus, conciliation is a dispute settlement mechanism by the involvement of third party chosen by disputants or by the institution on their request, for bringing them together to look for voluntary settlement of a labor dispute with their assistance.

Accordingly, the disputing parties may agree to submit their cases to conciliator by their own choice or may submit their case to the Ministry of Labor and social affairs to assign a conciliator.

To resort to the Civil Code, there are certain provisions that regulate conciliation. To begin with the appointment of conciliator, it is provided that “parties may entrust a third party with the mission of bringing them together and if possible negotiating a settlement between them”⁶⁸ and the “conciliator may be appointed at the request of the parties by an institution or by third party.”⁶⁹

As far as duties of conciliator is concerned, the Civil Code provides; that s/he shall draw up the terms of a compromise but the parties shall not be bound by the terms of compromise drawn up by her/him, unless parties have expressly undertaken in writing.⁷⁰

This carries the same idea with the duties that has been described at the beginning of this section. If this is so, one may raise an issue whether the rules governing conciliation are applicable to mediation as there is no any provision that mentions mediation. Though the term mediation is not mentioned anywhere, we have seen that their distinction is insignificant. In both cases, there is a third party intervention but

the ultimate authority rests on disputants. Their settlement agreement will be binding only where parties confirm it by their signature. Therefore, it would be sound to argue that the rules governing conciliation can be applicable *mutatis mutandis* to mediation.

Since not all mediations or conciliations may result in settlement, parties may wish another option that may resolve their commercial disputes. If the parties cannot resolve their disputes by conciliation/mediation, they often submit it to binding arbitration by a neutral arbitrator or to a court of law.

2.2.2.3 Arbitration

Arbitration may be defined as; a “non-judicial proceeding in which disputing parties submit their conflict to an impartial person or group of persons for a final and binding decision instead of judicial tribunal.”⁷¹ Arbitration is, thus, a process by which a tribunal other than a court decides a dispute under the authority granted by parties in dispute in an arbitration agreement.

Arbitration agreement is;

an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of defined legal relationship whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement⁷²

Therefore, the agreement of parties to settle the existed or future dispute may be made in the form of a contract separate from the main contract or in a given clause from the main contract. An arbitration that results from an agreement of parties as such is called voluntary arbitration because the contract between the disputing parties is consensual.

This type of arbitration is provided in the Civil Code under Arts. 3325- 3346. The other type of arbitration which exists when specific cases are directed for mandatory arbitration by the operation of the law is called compulsory arbitration.⁷³ Though it has been repealed, Compulsory arbitration was also recognized in Ethiopia, particularly in resolving family disputes as in the case of disputes arising out of betrothal⁷⁴ marriage⁷⁵ and dissolution of marriage by death.⁷⁶

The same is true under the Federal Revised Family Code, 2000. According to the Revised Family Code, where a petition for divorce is made either by the two spouses conjointly or any one of them, the court may direct the spouses to settle their dispute through arbitrators.⁷⁷ It is also true that the dispute arising from marriage shall be decided by arbitrators chosen by spouses.⁷⁸

These statutory provisions lead us to conclude that the above two types of arbitration are being recognized in Ethiopia.

Details of the rules governing arbitral proceedings are not the concern of this study but it will be appropriate to examine certain provisions of voluntary arbitration in Ethiopia.

To begin with its definitional provision, arbitration submission is:

the contract where by the parties to a dispute entrust its solution to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the principle of law.⁷⁹

Arbitration agreement is;

an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of defined legal relationship whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement⁷²

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the contract where by the parties to a dispute entrust its solution to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the principle of law.⁷⁹

Since the arbitral submission is a contract, parties in the arbitration agreement must fulfill prerequisite conditions which the law so require. That is, for the arbitration agreement to be valid, parties to the contract must be capable, should give free and sustainable consent, and the object of the contract should be lawful and possible.⁸⁰

In addition, parties in the arbitration agreement must have the capacity to dispose of a right with out consideration, to submit to arbitration of a dispute concerning the right⁸¹ subject to the arbitration. However, the Civil Procedure code bears an in consistent provision with the above substantive law by stating, “no person shall submit a right to arbitration unless he is capable under the law of disposing of such right.”⁸²

The later does not include “with out consideration” which is a special capacity required by the substantive law. Therefore, to make it consistent, the Civil Procedure Code, either needs to add the missing idea or since it only deals with the means of exercising the substantive right, it would strike out from its provision.

Once the arbitration agreement is validly concluded, the award made by the arbitrator shall be binding on the parties and is enforced in the same way as an ordinary judgment up on the request of the successful party.⁸³

As regards the issue of procedure to be followed during arbitration proceedings, Art. 3345 Civil Code refers to the provisions of the Civil Procedure Code. It provides that the procedure to be followed by the arbitration tribunal and matters arising out of the execution of the award and appeals against the award shall be as prescribed by the civil code. To this end, the Civil Procedure Code provides that: “the procedure before an arbitration tribunal, including family arbitration shall as near as may be, be the same as in a civil court.”⁸⁴ It may also be true to make an inference that commercial arbitration shall also be followed the same procedure as has been used in the civil court.

From the above rules and analysis, it will be safe to argue that arbitration is formally organized than the other types of ADR mechanisms that have been discussed in the preceding sections. This formal procedure and the binding enforcement of the award distinguish it from the other ADR mechanisms.

Here one may raise an issue that if the procedure in arbitration is the same as in the court, then what makes it different from litigation. The issue may be clear by reading Article 317(3) of the Civil Procedure Code. If one thoroughly read this provision, he could find some sort of clue to be flexible if parties wish to do so. It reads, "The tribunal shall in particular hear the parties and their evidence respectively and decide according to law unless by the submission it has been exempted from doing so."

As inferred from the last statement of the above provision, if parties wish to exclude the strict adherence of the procedure, they can do so and include such effect in their arbitration agreement, hence, it may not be as strict as judicial adjudication. Viewed from this perspective, some argue that;

Arbitration is speedier process for the reason that it allows the parties to by pass long procedure at the court house door and to schedule hearings at their own convenience. Since the procedure is relatively informal because the pretrial procedures, pleadings motion practice are substantially streamlined or in many cases completely eliminated.⁸⁵

Affirming this view, Fitz Gerald put it that arbitration offers greater flexibility of process than litigation and there is an opportunity for the parties to consider the latitude forum shopping.⁸⁶ Therefore, one may conclude that in arbitration parties are not obliged to follow the strict procedure as in the civil court. They rather have the freedom to determine the procedure to be followed or may chose any other institutional procedure if they wish so.

In addition, one may argue that commercial arbitration has significant advantages over litigation on issues relating to confidentiality, parties freedom to select expert decision maker, and the applicable norms, regarding costs and delay of cases.

These may be taken substantial advantages of commercial arbitration in particular, for business men. However, such advantages may not remain the same when compared with the other ADR mechanisms in particular, with the settlement of commercial disputes through mediation (this will be seen in more detail next).

Provisions dealing with the appointment of arbitrators, procedures regarding disqualification and removal of arbitrators, the enforcement of arbitral awards and other rules governing arbitration are adopted in the Civil Code and other laws such as, Civil Procedure Code, Labor Law and other Proclamations. As the strict adherence of every laws and provisions is not a necessary part of our duty, the next focus will be on settlement of commercial dispute through mediation and related issue.

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Chapter Three:-Commercial Mediation: The Legal Framework and the Practice in Ethiopia

3.1 Historical Perspective

Historians thought mediation appeared in a very ancient times as early as the Phoenician commerce and developed in the ancient Greek, and in the Roman civilization, Roman Law recognized it starting from the Justinian Digest of 530-535.¹ It was thought that in the Islamic cultures of the traditional pastoral societies in the Middle East, problems were often resolved through community elders in which participants discussed, debated, deliberated and mediated, to resolve critical and conflicting tribal or inter tribal issues.² However, with the rise of secular society in the west, mediation and the range of people acting as mediators expanded, as a result, guilds and other members practiced mediation in the business disputes arising in the emerging cities.³

From this, one may presume that mediation has been traced as far back as the ancient time and that it has a long and varied history in almost all cultures of the world to practice mediation including Jewish, Christian, Islamic, Hindu, and many indigenous cultures.⁴

The Romans called mediators by different names as medium, intercessor, philanthropus, interpolator, conciliator, interlocutor and finally mediator⁵. In most part of the world, for practicing mediation, mediators learned their craft informally and fulfilled their role as intermediaries. It is only, in the 20th century that mediation has become formally institutionalized and developed in to a recognized profession.⁶ Now, it is widely known and accepted as an option with in the panoply of dispute resolution mechanisms that are available to commercial transaction in certain countries of the world.⁷

This fact is well described as,

resolving disputes by shuttle diplomacy, compromise and conciliation and just plain talking has been around for generations but perhaps it is only now at the very outset of the twenty century that the commercial world is just walking up to see the real value of resolving commercial disputes in this way as

opposed to taking an adversarial approach through the court system⁸

When we come to the Ethiopian perspective, peaceful settlement of disputes through customary practice has a long history. This can be inferred from the statements made in the Bible as cited in the Fetha Nagast after the 15th century; “go first and reconcile thyself to thybrother and then coming back thou shall after they gift” (Mat. 5, 24).⁹ This is the way of settling disputes as commanded by the lord in the Gospel. It was also suggested to settle disputes before requesting for judgment, thus, “try to make peace between those who quarrel before judgment of the Bishop be delivered, and litigation doesn’t achieve any good in this world ...”¹⁰ From the above statements, one could understand that it was encouraged to resolve dispute peacefully and that it was nothing achieved good in litigation. Accordingly, disputes before the 15th century were resolved by customary practices in Ethiopia by way of assembly of people acting as judges and after the 15th century the Fetha Nagast was used as the main source of law.¹¹

Therefore, it may be possible to argue that disputes were resolved amicably through customary practices and according to the rules of the FethaNegast before the introduction of the Civil Code and Civil Procedure Code. More over, it is safe to argue that peaceful dispute settlement is traditional and has a religious base in Ethiopia. Such dispute settlement mechanism had continued up to the enactment of modern laws and has been used parallel with the introduction of the court system after the introduction of the codes.

The issue that might be raised is whether such customary practices of dispute settlement can be considered as alternative dispute settlement. Alternative dispute settlement must be acknowledged by the law of the country for being validly applicable, thus, every dispute settlement may not be considered ADR.¹² In Ethiopia, certain dispute settlement mechanisms have been incorporated in the Civil Code 1960, under title XX, entitled “compromise and arbitral submission”. Under title XX “compromise” being chapter one, and “Compromise in general” and “Conciliation” are provided in section one and two respectively in the same chapter. Provisions regarding the application of compromise and conciliation have also been incorporated in the Civil Procedure Code under chapter three paragraph one, entitled “Compromise and withdrawal.”¹³

The labor proclamations also incorporated provisions¹⁴ to regulate conciliation. All these indicate only certain alternative dispute resolution mechanisms; compromise, conciliation or mediation and arbitration have been formally recognized in Ethiopia. Even though there were no institutions that could take the responsibility of their implementations, they have continued to be utilized in parallel with the court as they were used before the introduction of the code in various parts of the country known by varieties of names like for instance, the “shimglina” and “jarsuma” as being used in the Amhara and Oromia Regional States respectively. Thus, perhaps it may not be a mistake to say that the traditional mode of settling disputes was and still is used as a dominant mode of an informal alternative dispute resolution mechanism. Currently, having recognized the problems relating to the adversarial litigation and the significant contribution of Arbitration and mediation as part of the legal system, ADR institutions have been established in the country.

These are; the Addis Ababa Chamber of Commerce and Sectoral Association Arbitration Institution which was established in 1994 and the Ethiopian Arbitration Conciliation Centre formed in 1996 as an independent private institution with the view to facilitate the resolution of disputes amicably¹⁵ but they are underutilized.

3.2 Definition

The term “mediation” comes from the Latin word “mediare” which means to halve. In Chinese, “mediation” means to step between two parties and solve their problems and in Arabic, “mediation” is defined to mean manipulation.¹⁶ for the westerners “mediation” is a procedure that is used increasingly for conflict resolution¹⁷

Mediation in the recent literature is defined as:

the intervention in negotiation or a conflict of an acceptable third party who has limited or no authoritative decision making power, who assists the involved parties to voluntarily reach a mutually acceptable settlement of the issues in dispute¹⁸

Another literature defines it as: a process in which the parties to a dispute, with the assistance of a mediator, identify the disputed issues, consider alternatives, and try to give an agreement¹⁹

Though the way of defining it may vary, the main idea one could grasp in the above two definitions may be that mediation is a private means to explore the possibility of reaching a mutually acceptable settlement out of the court by the assistance of third party neutral, called mediator. If this carries the meaning of mediation the next issue may be whether mediation is always voluntary and who may appoint the third party neutral. To begin with the first issue, mediation can be categorized in to voluntary and court annexed.

Court annexed mediation may also be called court referred or compulsory mediation, is used where a dispute is referred to mediation by a court²⁰ where law makers intended to introduce a limited mandatory mediation with the view to reduce the volume of cases that may go to court, like for instance the court annexed mediation Act of Germany.²¹ Where a mediation is mandatory because of the statutory power vested in a court, the latter shall also appoint the mediator in case parties in dispute fail to agree to appoint by themselves²²

Voluntary mediation, on the other hand is, a mediation where parties resort to settle their disputes through a third party neutral by their mutual agreement or with out being obliged by court.²³ Therefore, voluntary mediation exists where disputants consensually agree to settle their disputes by mediation or conciliation. It is voluntary because a mediation process comes in to existence only where parties freely give their mutual consent to agree to the same effect. That is in resolving commercial disputes through mediation, the disputants must be willing to allow the mediator to assist them in reaching a resolution. Therefore, the role of a third party neutral in mediation or conciliation boils down essentially to facilitate a compromise rather than decision making²⁴. The mediator's role is limited to assist the parties in reaching their own decision in relation to the dispute. Thus, the viability of mediation as a credible alternative to litigation is dependent on the ability of parties to be assisted by experienced third party neutrals. The active role in the settlement of a dispute shall be left to the parties in dispute because their role is very crucial in mediation. Under voluntary mediation, parties are not obliged to continue with



the mediation process, they are free either to terminate at any time of the process or to end up with a settlement agreement.

As regards the issue who may appoint the mediator, it depends on the circumstances. Obviously, disputants are the first to choose or to authorize a third party to appoint. However, parties may also give a mandate to the institutions which are established for such purpose or the mediator may be appointed by the court where mediation is court annexed and parties fail to agree on the appointment.²⁵

3.3 The Advantages of Commercial Mediation and Constraints of Litigation in Ethiopia

As attempted to make clear in chapter two, commercial disputes are disputes or controversies that arise from commercial matters or contracts relating to trade activities.

While carrying out their commercial transactions, traders and firms may encounter with substantial loss when they devote and spend much of their time in court of suits. This may be true for the reason that disputes particularly that arise from large firms may hardly be possible to get decision with in a short period of time as it would be resolved by mediation or other forms of ADR mechanisms; hence the consequence would be discouraging.

As the primary objective of businesspersons is to make profit by carrying out their business effectively, being involved in litigation entails delay of cases which is a serious problem.²⁶ In addition, litigation makes the disputants thoroughly thinking (sleepless night) about the consequences and the time to be spent for litigation which would be used to operate their business. Even though businessmen would like their disputes to be resolved as rapidly as possible²⁷, the resolution cannot be achieved in litigation. Fear of this delay and other adverse consequences such as, suspension of their business, disclosure of the business secret, some of the businessmen who encounter with disputes often waive the right to take their cases before the court.²⁸ This seems justifiable because the time that is spent in litigation would be used to run the business or expenses to be paid for lawyers would be used to support the business. This is what one commentator is trying to express that the time that is taken away from the business is not a time that is used productively.²⁹ In particular, in the contemporary world where business transaction

is highly developed and being globalized, delay of cases in litigation curtails business transaction and investment in the country. To the contrary, resolution of commercial disputes through mediation avoids the procedural constraints of litigation and enables disputants to achieve significant costs and time savings so that it attract investors and facilitates business transactions.

For further understanding the delay of cases in court of litigation and case backlogs of courts in Ethiopia, the following primary data may be helpful. Given the formal nature of court processes and the problems attached with litigation such as; its expensiveness, unexpeditious, and non-flexible, the court system is still over burdened by an increasing case loads in our country. The cumulative effects of such problems thus result in dissatisfaction of the needs of the parties in disputes and the society at large and delay in the disposition of cases. This would create encumbrance to businessmen to effectively run their business and to make profit by using the time spent on litigation.

The following court performances indicate delay and the case loads of courts.

Table 1, Federal High Court

| Year(E.C) | Cases Transferred from the Previous Year(S) | Opened Files | Closed Files | Disposed Files | Cases Transferred to the Next Year |
|-----------|---|--------------|--------------|----------------|------------------------------------|
| 1997 | 16987 | 8374 | 4777 | 4872 | 15712 |
| 1998 | 15712 | 8439 | 6348 | 7487 | 10316 |
| 1999 | 10313 | 9990 | 4517 | 7707 | 8079 |

Source- Statistics Section, by Ato Solomon Maru, Statistic's Expert dated on 27/2/2000E.C.

Table 2. Amhara Regional State Supreme Court.

| Year (E.C) | Cases Transferred from the Previous Year(S) | Opened Files | Closed Files | Disposed Files | Cases Transferred to the Next Year |
|-----------------------|--|---------------------|---------------------|---------------------------|---|
| 1997 | 1925 | 9297 | - | 7820 | 3402 |
| 1998 | 3402 | 8854 | - | 7734 | 4522 |
| 1999 | 4522 | 9584 | - | 9447 | 4790 |

Source -: Tantiyeggn Yemane, Registrar Officer, dated on 11/2/2000E.C

As you could see from table 1, the number of cases that was available in the court for the years 1997-1999E.C is; 25361, 24151, 20303 respectively but the actually disposed cases in the respective years are: 9649, 13835, 12224. The performance rate in the respective years is; 38%, 57.29% and 60.20%. Thus, even though the crude value of the performance rate of the Federal High Court seems progressive from year to year, the number of cases that are transferred to the coming year is still abundant and creates case backlogs of courts mainly because the number of cases that have been brought before the court for the consecutive years arise in an ascending order with out the proportional growth of efficient case performance.

As shown in table 2, the case backlogs of courts in the Amhara Regional State are 11222, 12256, and 14106 in the consecutive years from 1997-1999E.C and the performance of the courts in the same years are 7820, 7734 and 9447. The performance rate of the courts in the Amhara Regional State, is therefore 69.68 %,63.10% and 66.97 % respectively . In the Amhara Regional State, the court performance is irregular but the suits that have been before the court are still increasing. This shows that the courts are stuffed with a number of cases and the non-disposed cases trigger year after year. As witnessed by one writer, currently court proceedings have often taken more than five years to trial from the date of filing ,even it has becoming longer in case of complex cases.³⁰ In addition to the delay, predictability and the judgment quality of cases in court may not be guaranteed. This coincides with the testimony given by one of the respondents.³¹ of my questionnaire. In

his testimony, in order to minimize court caseloads a system has been designed requiring each judge to render a decision of at least 25-28 files per month as a standard performance.

To achieve such numbers, judges do not often take care about the quality of judgment he/she would render as a result, court decisions remain unpredictable and may result loss of public confidence.

To turn away the backlogs and other problems of courts, the Justice System Reform Program (JSRP) is designed by the government and among the solutions is found, the use of ADR, such as mediation and arbitration.³² This has taken place because case backlogs of courts are serious obstacle of access to justice and that it is a plague of courts and delayed thereby amount to denial of justice. Thus, mediation as an alternative dispute resolution seems to be understood as a policy objective to reduce some of the present problems of litigation.

• The other benefit of commercial mediation relates with the issue of confidentiality. In mediation, parties can have an opportunity to maintain their cases confidential, which is taken as an important aspect of mediation. They can also control over the terms of settlement as well as the settlement process.³³ Since the mediation process and the settlement are confidential, public need not find out the confession that were made, and the settlement reached.³⁴ This is significant with the main reason that businessmen often do not want their cases being disclosed to the public and not being embarrassed about the allegations made against them whether or not the allegations are true unless they decided to make it public.³⁵ Therefore, where parties want to avoid a public hearing of their disputes, they would choose mediation as a private and confidential dispute settlement mechanism.

However, this does not mean that mediation is the only means through which confidentiality is to be kept. Arbitration is the other dispute settlement mechanism which satisfies this requirement. If this advantage is also obtained from using arbitration, then why mediation is preferable to the former is the other issue that might arise.

Though confidentiality is a common feature of both mediation and arbitration, there are other advantages that cannot be shared by arbitration; this will be discussed later.

In mediation, there may be a reduction of anxiety and other negative effects of the conflict by helping the participants to devise a consensual resolution.³⁶ More over, by resolving disputes through mediation, parties can achieve win/win solutions³⁷ because parties in both sides agree with the resolution only where they are happy and feel fair and just. Since the agreement has been reached by parties themselves, they feel satisfaction and continue their business relationship as it was before or repair their relationship if it was gone down.³⁸

The other reason why businessmen would prefer mediation to litigation is because mediation gives greater weight to commercial practices than to rely strictly on legal issues.³⁹ In mediation, the settlement process produces specific out comes by utilizing the values, norms, and principles of the participants, including commercial customs, rather than strict legal issues so that it would be efficient to promote investment and commercial transactions.⁴⁰

More fundamentally, resolving commercial disputes by mediation is more significant where there is a future prospect of business between disputants.⁴¹ In particular, where their relationship under a particular contract is a long term, or has potential possibilities for future business transaction as it would exist between manufacturers and distributors of products, licensor and licensee, etc, a negotiated settlement with or without the assistance of a third party neutral should be of paramount importance because resolving disputes as such, would result in continuing their business relationship as it was before.⁴² This reveals that mediation allows both sides to talk about what has been made wrong and enable them to find options whether there are opportunities to work together in the future and in return to avoid considering themselves adversaries.

Scholars in the field of ADR also argue that resolving commercial disputes by mediation is more important where disputants are several. In their view, as mediation is a “no risk” process, the agreement among several disputants is often fairly easy to handle and is considered effective ADR process.⁴³ unfortunately, the following two cases go in line with the above assertion (see the settlement agreement in Annex-3 and 4). If you go through the cases, parties are several and they have agreed to settle their disputes by the

assistance of third party whom they call conciliator or mediator interchangeably in the agreement documents.

The agreement indicated under annex- 3, is a dispute among three wives and children of the deceased and the causes of their controversy is the issue of managing the businesses left by the deceased and division of the fruit of such businesses. The parties in dispute agreed to settle the dispute with the terms proposed by the conciliators who were elected by them. The terms of the proposal drawn by the conciliators; have been accepted and signed by the disputants. The proposals made by the conciliators include an agreement clause that encourages or requires the parties to return to mediation before they pursue other remedies for a claimed breach of such agreement (see annex- 3 for detailed information).

Therefore, settling their dispute peacefully through conciliation helped them to make the business, which was suspended by the order of the court, being opened and to run the business together in collaboration and finally enable the wives and the children of the deceased to continue their relationship as it was before. If the case hadn't been settled amicably by conciliation or conciliation, it might have been settled by court. In consequence, the number of cases in court would have increased or the case might have remained for a long period of time with out decision, the business under operation might have been ceased and the relationship between disputants might have been terminated.

The other agreement indicated under annex-4 also indicates, the involvement of three disputants who were members of "Yejan Neges Private Limited Company. "The cause of their dispute is because of the request of dissolution and liquidation of such company by one of the members (Ato Yilma).

While the case was on pending⁴⁴, the business was suspended and sealed by the order of the court.⁴⁵ These disputants reached in settlement by the assistance of a mediator. It was proposed to be settled by paying in cash to the member alleged to dissolve and liquidate and the Yejan Neges company continued as between the remaining members (see annex 4, for detail).

Thus, the above opinion which says mediation is effective for several disputants may not always be true.

The other advantage of commercial mediation relates with expert knowledge in the area of the dispute. In mediation, parties in dispute can have the right to select a mediator with substantive or technical expertise⁴⁶ which may not be guaranteed from the judges in litigation because one can't reasonably expect them to be specialist in every conflict. As a result, since a mediator has substantive, technical knowledge and experience, he can easily understand issues which may enable her/him to effectively communicate with disputants⁴⁷ lest he doesn't have the power to decide on it.

To sum up, points that have been raised above are the main advantages of mediation in connection with commercial disputes. This doesn't mean, however, mediation has no any other advantages. It has been thought that mediation has many other advantages but that may not be necessary to describe all of its advantages because those advantages of it as a process of dispute settlement may not be exclusive to commercial disputes. If mediation is more appropriate for commercial disputes than litigation in Ethiopia, then why disputants would not often resolve their disputes through it is the basic issue that may be raised. This issue will thoroughly be examined in the next chapter that will mainly emphasize on empirical study and analysis of primary data collected from the business community and legal practitioners. As in attempt to demonstrate commercial mediation in comparison with litigation", it will also be proper to compare mediation with arbitration because the latter is categorized under ADR but more akin with litigation by certain criteria.

3.4 Mediation as Opposed to Arbitration

As attempted to describe in the preceding chapter, both mediation and arbitration are alternative dispute resolution mechanisms. Under this part, it is intended to focus mainly on the differences that exist between the two. Both mediation and arbitration play important role in making the process of resolving commercial disputes. Mediation and arbitration as dispute resolution mechanisms provide many advantages in common such as; confidentiality, flexibility, expeditious settlement, and the existence of knowledge of professionals. However, there are still some significant distinctions between them.

Mediation is primarily a non binding procedure. As a result, even though parties agree to submit a dispute to mediation, they are not obliged to continue with the mediation



process because the continuing process of it depends on the parties' willingness.⁴⁸ If the parties are not ready and willing to mediate, mediation cannot take place as mediator does not have power to make decision and impose such decision upon parties.⁴⁹ Thus, the owners of the settlement in mediation are parties themselves.

Arbitration is a non judicial proceeding where disputing parties submit their conflict to an impartial person or group of persons for a final and binding decision.⁵⁰ Thus, since arbitration is a private adjudication, it may offer greater flexibility of procedure than litigation. However, arbitration is less flexible as compared with mediation because in the process of arbitration it still follows the procedure prescribed by law unless parties reject and replace it with informal procedure by their agreement.⁵¹ Therefore in the absence of any other agreement of the parties, arbitration must comply with the procedure of the law including presentation of cases, pleadings, producing evidences and so on. This is explicit under the law governing arbitration in the civil code, which reads: "The procedure to be followed by the arbitration tribunal shall be as prescribed by the Code of Civil Procedure"⁵² and the Civil Procedure Code provides that the arbitration tribunal shall follow the procedure in the same way as in the civil court.⁵³ In particular, the tribunal shall be required to hear parties and their evidence and to decide according to the law unless parties exempt in the submission agreement⁵⁴

Therefore, parties are free to determine the procedure to be followed in the arbitral tribunal in conducting the proceedings. Failing such agreement, the arbitral tribunal shall be required to follow the procedure as prescribed in the Civil Procedure Code. In this case, presentation of evidence and argument must be made before a neutral third party (arbitrator) in the same way as the court does. In arbitration, once the case is submitted to the arbitral tribunal by the free consent of the parties in dispute, the decision of the arbitrator is binding upon parties because the award rendered by the arbitrator is considered as if it were made by the judges unless the decision is inconsistent to the law and morality of the society⁵⁵. This is the point that has been prescribed in the civil procedure code which reads "an award may be executed in the same form as an ordinary judgment upon the application of the successful party for the homologation of the award and its execution".⁵⁶ These are the points that would lead us to conclude arbitration is similar to litigation.

The award rendered by the arbitral tribunal is being enforced by court, which may attribute to the merits of arbitration. However, the formal and strict procedures that may be used in conducting the arbitral proceedings and the adversarial nature it would result, make it less beneficial than mediation. In arbitration, the time it takes is longer and the cost involved is higher than mediation. More importantly, in arbitration participation of parties in the resolution process is unlikely as compared with mediation because in mediation the whole process of settlement relies on disputants themselves.

In arbitration a party's task is to convince the arbitral tribunal of her/his case, and addresses his/her arguments to the tribunal, where as in mediation since the out come must be accepted by both parties and not decided by a mediator, a party's task is to convince the other side, and not the mediator.⁵⁷ More fundamentally as discussed above, in arbitration, the out come is determined in accordance with an objective standard based on the applicable law, where as in mediation any out come is determined by the will of the parties so that the parties can consider a broader range of standards often based on their respective business interests⁵⁸

To this end, one may conclude that mediation is an interest based procedure which may be settled by taking in to account parties' future relationship, where as arbitration is a right based procedure which may be achieved by reference to their past conduct.

Since the arbitral award is based on the substantive and procedural provisions of the law, it results a win/lose solution as in litigation. Further more, even though it is categorized as ADR, in arbitration tribunal parties argue against each other to keep their right and antagonize each other. Next, we will examine some critiques against mediation.

3.5 Demerits of Mediation

Even though mediation is said to be more effective and easily accessible than litigation, there are a few circumstances that may make it inappropriate dispute resolution mechanism. Since it is a voluntary settlement even if parties decide to settle by way of mediation, they may not enter in to the agreement. That means, a decision to attend a mediation process may not necessarily be a decision to settle the dispute. Attending a mediation process may be, a decision to explore the possibility of settlement and to see if there is a settlement that makes more sense for both parties than continuing with the

dispute.⁵⁹ It is only where there is no option that makes the settlement possible, disputants would take the case before a court.

In general, the following situations mitigate the importance of mediation. It is argued that commercial mediation is less important where the precedent is more favorable for at least one disputant.⁶⁰ In such situation, mediation may be inappropriate for the party who may be beneficial from the precedent. However, those who argue in favor of mediation do not admit the above argument. According to this group, even a disputant who would be beneficial by such precedent may lose some other advantages such as; cost and time saving, retaining of their business relationship, confidentiality, etc. Therefore, if a disputant, who alleged as beneficial from a precedent, wants to save time, reduces cost, continues his business relationship and keeps the case confidential, still mediation will be appropriate for resolving a dispute.⁶¹ The other point that may be raised as a disadvantage of mediation is, increasing of costs of litigation and lengthening of time that takes place in case parties fail to reach a mediated agreement.⁶² and where such case is taken before a court. Under such circumstance, costs of litigation may be increased and time for trial get longer and other problems, which manifest disadvantage of mediation, may occur.

The other critique of mediation relates with disputes in connection with constitutional and other legal issues. As often suggested by many scholars, constitutional and other strictly legal issues need to be resolved only by court and not be other settlement mechanism, like mediation.⁶³ This may be convincing for various justifiable reasons such as for the purpose of protecting the public interests by avoiding unlikable practices that may affect the public interests, for example, where fraudulent practices, corruption, bad faith, piracy, etc, is involved.⁶⁴ If a dispute arises between a consumer and a trader or commercial entities as a result of fraudulent practices of a trader or firms, it may not be a mere private issue. Since such practices are being prejudicial to the public at large, it would be legally condemned by court and disclosed to the public, thus, a constitutional and strict legal issues, may not be appropriate to be resolved by mediation,⁶⁵ instead, the case should be resolved by the court pursuant to legal provisions.

This view may be accepted with qualification because it will be unfair and mistaken to eliminate all legal issues from the mediation stream. This is because legal issue is one of

the many issues where solution can be achieved better for both disputants than proceeding to trial.⁶⁶ In this point of view, if disputants, be it individuals, or companies, could receive benefit from the settlement, mediation may still be appropriate. If such issue however causes prejudicial to the public interest, mediation seems inappropriate and may be preferable to be settled in litigation so that the public would learn from the adverse practices and deter it from taking place because a court where litigation takes place is public and open⁶⁷

Imbalance of power is the other challenge of mediation. Under this issue, some suggest that society should never allow mediation to occur where there exists power imbalance because the disempowered person may not be able to make decisions and if he does, it will be based on fear rather than on logic.⁶⁸ In their view, cases with power imbalance between disputants should not be mediated. Instead, litigation should be the only way to protect rights of the disempowered person and to make the result fair.⁶⁹ The contending argument on the other hand is that the court system by its nature favors those who have power, money and that it is naive to expect that courts will protect the disempowered.⁷⁰ For them, it is unfair to prevent the disempowered person from participating in mediation so long as others are free to use mediation. In their view, to deny the disempowered person to resolve his dispute by mediation is in itself discrepancy.⁷¹ According to this line of argument, mediation puts in place safeguards to ensure a fair process and to prevent an in appropriate abuse of power by the role of skilled mediator.

Even though it is often hardly possible to find the same level of disputants, whatever the modalities of resolving disputes may be, the bad consequences of imbalance of power could better be avoided by successful mediator in mediation. Because a mediator has the possibility of using his/her skill full endeavor to enable parties' willingness to come to the bargaining table in good faith.⁷²

As courts strictly follow the legal procedures that would serve both parties equally under the principle of "equality before the law," problems as such may not get a better solution in litigation than in mediation. So the existence of unequal power of the disputants may not necessarily be the weakness of mediation.

The other weak side of mediation which is often raised by many legal scholars is that since it is non-binding resolution, the settlement agreement reached by the disputants may not be enforced in case of non-performance by one of the parties in dispute.⁷³ That is to say, since settlement agreement is reached by the disputants themselves and a mediator doesn't have power to impose such settlement agreement upon the disputants, it won't be enforced by the government agency as if it were decided by judges.⁷⁴ Despite the existence of such problem, still there are a number of people who settle their disputes by mediation. Since mediation is a voluntary process, it gives disputants a sense of involvement in the dispute resolution process and making compliance with the settlement agreement more likely than in the case of an imposed decision.⁷⁵

In spite of the fact that the settlement agreement may be enforced willfully taking in to account the other advantages and moral obligation, this is not always true. There are instances where parties do not comply with the settlement agreement. In this case, as a settlement agreement is a binding contract, the remedy for the other party who requires performance is to institute a fresh suit against the non performing party before a court requiring performance of the mediated agreement, and does not require execution.⁷⁶ Had it been a judgment by court or an award rendered by arbitral tribunal, the right holder (judgment creditor) would have demanded execution, different from the settlement agreement by mediation. This is the main distinction that exists between the settlement agreements in mediation and adjudication made by court of litigation and arbitration. Due to this, the enforcement of settlement agreements in mediation is not as strong as litigation. In the case settlement agreement, an additional effort is required where the agreed party refuses to perform his obligation.

In general, problems that might arise in connection with mediation have not been considered significant in the world experience. As has been experienced by some foreign countries such as USA, Germany, Canada, Utah, Australia, mediation currently is used to resolve disputes in a wide Variety of settling disputes such as among family members, neighbors, businesses, employment, tort, nations⁷⁷ etc. How they are trying to solve such problem is the issue that will be addressed next under the title "enforcement of mediation".

3.6 Types of Mediation

As mediation has come in to existence by the consent of disputant parties and with the help of mediator, mediator may assist the disputants in various forms from which mediation acquires its name, these are;⁷⁸

- a) Evaluative mediation
- b) Facilitative mediation
- c) Transformative mediation

Even if all of these types of mediation are used to resolve disputes, the first two are often used to resolve commercial disputes,⁷⁹ hence; our discussion will focus on them.

3.6.1 Evaluative Mediation

As the name indicates, in evaluative mediation a mediator is required to evaluate the arguments presented by the disputants.⁸⁰ Since parties or their representatives, present their cases in the form of legal argument as would be held in court process, with out formal requirement, some refer to such mediation as non binding arbitration⁸¹ It is non binding because disputants are not obligated to accept the merits of the case as would be evaluated by the mediators. In evaluative mediation, disputants can present persuasive arguments that would convince the mediator and will win if the matter goes to trial. In this respect, the role of a mediator doesn't seem in line with the meaning given to mediation because of this commentators argue that it should be called as non binding judges or non binding arbitrators.⁸²

Despite the existence of such divergent views, many business community believe that it serves as an important role such as providing disputants with an opportunity to receive an unbiased evaluation with out having paid cost in trial and makes the solution to be more of objectives.⁸³

3.6.2 Facilitative Mediation

In case of facilitative mediation, the role of mediator is to facilitate the discussion to reach disputants to a final solution.⁸⁴ In facilitative mediation, a mediator will assist the parties in exploring options and measuring the strengths and weakness of their

respective cases. In facilitative mediation, the mediator endeavors to facilitate communication between the parties and to help each side to understand the other's perspective, position and interests in relation to the dispute.⁸⁵ In the case of evaluative mediation, the mediator provides a non-binding assessment or evaluation of the dispute, which the parties are then free to accept or reject as the settlement of the dispute.⁸⁶ Facilitative mediator is, thus, distinguished from evaluative mediator by the fact that facilitative mediator allows disputants to reach a consensual agreement what they think is fair while an evaluative mediator guides disputants to his /her own assessment of what is fair.⁸⁷ Having understood the different role of mediator, it is up to the parties to decide which of these models of mediation they wish to follow.. In the process of facilitating the discussion, the mediator is also required to be impartial and guarantees that any information received from the parties will be confidential.

Countries which have a developed experience in applying mediation as a dispute resolution mechanism such as; USA, Canada, German, Afghanistan, have supported the principle of confidentiality by law in that mediator is not forced to give her/his witness that he learns during the mediation process which he acted as a mediator.⁸⁸

This is the biggest gap in Ethiopia. In spite of the fact that confidentiality is considered the basic element of mediation, Ethiopia does not incorporate explicit provision under conciliation as to how the principle of confidentiality, is being regulated. Thus, it may not be a mistake to generalize that the provisions governing conciliation are inadequate⁸⁹ to meet the existing needs of businesspersons.

As far as the issue of confidentiality is concerned, many countries explicitly incorporate procedural rules. For example, the Afghanistan commercial mediation law provides;

a party to the mediation proceedings, the mediator, and any other person involved in any manner in the administration of mediation process, shall not in arbitral or judicial proceedings provide evidence or give testimony as a witness.⁹⁰

It also includes that; the disclosure of the information shall not be ordered by an arbitral tribunal, court or other competent state authority and offering such information in contravention of the above rules that evidence shall be treated inadmissible unless the

disclosure of such information is required for the purpose of implementation (enforcement) of a settlement agreement.⁹¹

The Utah Uniform Mediation Act also provided a guide about privilege and confidentiality, thus an agreement must be made to ensure that the process remains confidential and privileged so that it will no longer be a risk in litigation if the mediation fails.⁹² In Germany, confidentiality is protected by statutory professional secrecy, criminal liability for the violation of professional secrecy, and the right to refuse to give evidence⁹³

Therefore, in these countries the information learned during the process of mediation can never be used as evidence in the event that the matter does not settle by mediation and proceed to a court hearing. Having understood that confidentiality is an important element in conducting mediation, the EACC prepared and initiated a draft provisions on mediation and incorporates rules in respect of confidentiality. It reads, “unless the parties agree otherwise, all information disclosed before or during the process of mediation shall be kept confidential.”⁹⁴

It also states,

Unless disclosure is required by law, or for the enforcement of a settlement agreement, a mediator or any staff of an institute in cases of institutional mediation, any representative of a party, an expert or a professional may not disclose any information that came to his /her knowledge during the process of a mediation.⁹⁵

Based on the statements incorporated in the above provisions, one may come to generalize that Mediation is considered private and confidential except certain disputes that involve public interests. For instance, the European Parliament and the Council of the European Union on civil aspects of mediation in civil and commercial matters provides situations where the information may be disclosed or admitted in evidence as in the case of “overriding consideration of public policy, in particular when required to ensure the protection of children or to prevent harm to the physical or psychological integrity of a person.”⁹⁶

Thus, confidentiality is a fundamental element in mediation by the fact that it enables parties to communicate fully and openly without fear of compromising their cases before courts.⁹⁷ Furthermore, parties prefer confidentiality for two main reasons; 1) that parties may not need controversial business practices to become public and to entail negative publicity particularly with regard to competitors, and 2) parties may be concerned that certain information might be used against them in a court proceeding after mediation has failed.⁹⁸ Accordingly, confidentiality is one of the main advantages of mediation that the Ethiopian law makers should give consideration mainly because assurance of confidentiality will attract potential users who are distrustful of publicity to mediation, and promotes frank discussion necessary to achieve settlement.⁹⁹

Therefore, in order to foster mediation as a commercial dispute resolution mechanism, any information revealed during mediation should be shield against subsequent disclosure both in and out of court except where required for societal interests.¹⁰⁰

The third type of mediation called transformative mediation primarily focuses on the personal interaction between the disputing parties, and the role of the mediator is to create conducive environment for the disputants to continue their interaction with one another. As it is more similar with facilitative mediation, we do not devote further discussion on it.

3.7 Role of Mediator

Before the parties commence telling their respective sides of their stories, the mediator should introduce himself and describe that s/he will not render a decision that imposes them¹⁰¹ as if it were made by a judge or arbitrator. In the process of mediation, the mediator needs to assist the parties to begin a productive exchange of information about the issues in dispute and describes the procedures to be followed.¹⁰² The various role of mediator enable disputants to explore whether there is a solution that is better for both of them than continuing to fight the dispute.

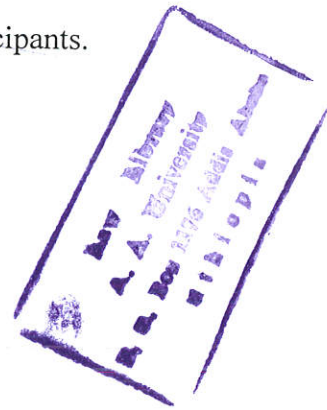
As mediator is a catalyst, by his being present the parties interact and should lend a constructive posture to the discussions rather than causing misunderstanding and polarization.¹⁰³ However, as a mediator it is required of him to explain and make clear to the disputants that s/he may discuss with them the difficulties and the reliability of their

arguments and facilitates their discussion in reaching consensual settlement. In addition, as he is an educator, it is required of him to know the desires, aspirations, working procedures, business constraints of the parties.¹⁰⁴

As Conceptualized by Riskin, one of the functions of mediator is to assist participants.

In his view;

a mediator has a duty to assist participants toward an agreement, and through a process that 1)meets the participants' own senses of fairness 2)does not violate minimal societal notions of fairness between persons who make agreements and 3)does not violate minimal standards of fairness toward unrepresented third parties.¹⁰⁵



There are also a number of statutes and court rules that make mediators accountable for the course of mediation. To mention some of them, mediators are occasionally directed to terminate the mediation if they cannot assure balanced dialogue or protect the parties from harm.¹⁰⁶ In other instances, mediators must make certain that mediated agreements are "consistent with the law" and in others, mediators are required to be certain that parties are informed about legal aspects of their disputes.¹⁰⁷ If these are duties of a mediator, the issue of accountability of her/him if s/he doesn't comply with them might arise. Rarely, the law specifies the consequences for mediators who breach these duties. For instance, a few statutes impose criminal and quasi criminal penalties for disclosing confidential mediation communication or fail to disclose qualifications.¹⁰⁸ However, in frequent occasions, no remedy has been specified where mediators breach their duties. Where no remedy has been provided, the law presumably would be enforced through civil actions if the mediators failed to comply, unless s/he enjoys a statutorily immunity,¹⁰⁹ the predominant opinion is that mediator's liability may be governed by the general rules of liabilities as other professionals. As Ethiopia doesn't have a clear provision in regard of the role of mediator, the issue of mediators' accountability in his act by gross negligent may fall under contractual or extra contractual liabilities under the Civil Code.

In some jurisdictions (example USA), the quality of mediation is ensured through entry requirements for mediators including the education level, training and experience¹¹⁰

which indicate the ability and an inclination of mediator to act in a particular way (example solving the imbalance problem). The set of such criteria for mediators would enable a mediator to improve his capacity and to assist parties in order to facilitate their negotiations and reach an agreement.

Mediator has several duties in mediation process such as; to describe the steps which the parties are required to do, to tell parties how they would solve their disputes and to explain that a private meetings (caucus) may be held where the joint sessions may be inappropriate.¹¹¹ It is also expected of him /her to explain that s/he is impartial and ensure that their information will be confidential and offer the ground rules that they would follow.¹¹² In general, since it would be difficult to enumerate each and every detail tasks of a mediator in every stage of mediation, it may be generalized by the following main tasks of him/her;¹¹³ creating favorable condition, assisting parties to communicate, facilitating the parties' negotiation and evaluating possible solutions.

3.7.1 The Code of Conduct of a Mediator

Subscribing a code of ethics is imperative because parties get an opportunity to know about and value the qualities of mediators. In the Ethiopian Civil Code governing conciliation /mediation, nothing is provided about the ethical code of mediator. This might solve the inadequacy of demand to resolve disputes through mediation as a prevailing mechanism .I would say so because in my questionnaire to the question “why the use of mediation by businessmen is inadequate to resolve commercial disputes”, a number of respondents (56.25 percent) replied that it is because of lack of confidence on the traditional and informal mediation as mediators' experiences indicate that they often commit dishonest practices.

This being the main reason that some countries incorporate provisions in their mediation laws that obliged a mediator to provide the necessary information to the parties concerning his personality or other personal details that will eliminate doubts as to his /her impartiality or independence unless s/he has already provided with such information.¹¹⁴ The draft provision mentioned above, also incorporates this idea. It provides that a mediator shall be neutral both to the parties and issues of the dispute, that s/he shall be independent of the disputant parties, and more significantly, it provides that

a mediator shall have to disclose any relationship with any of the disputants before the process begins.¹¹⁵ As the Australian experience witnesses, the application of a code of conduct to the practice of mediation is problematic due to various reasons. For this reason, the professional societies tend to develop their own codes of conduct to regulate their own members.¹¹⁶ However the writers in the field of mediation normally espouse, a code of conduct that mirrors the underlying principles of mediation process.

Accordingly, some of the most common aspects of codes of conducts of mediator include;¹¹⁷

- Commitment to inform participants as to the process of mediation
- Mediator must adopt a neutral stance towards all parties to the mediation revealing potential conflicts of interests.
- He must conduct the mediation in an impartial manner and should not offer legal advice.
- The information gained by the mediator should be kept confidential.
- Mediator should seek to maintain their skills by engaging in on going training in mediation process, and they should practice only in those fields in which they have expertise gained by their own experience or training.

As one could realize from the criteria set for above, mediators should never give advice to disclose any information, to favor one party's position and to put forth his own morals or opinion to the parties because the settlement should be reached by the dominant role of parties themselves. More fundamentally, he must ensure that he is impartial and has no potential conflicts of interests with the parties to the mediation.

Even though countries may set different standards including the certificate requirements for the successful achievement of settlement, the above ethical standards are recommended to be fulfilled by mediators so that parties can give their trust and people may be encouraged to settle their disputes through mediation.

Therefore, to maintain the reliability of mediation process, the ethical behavior of mediator should pass through all areas of mediation practices. A mediator also must be

alert as to the possibility of coercion, unfairness and power imbalance between the parties and should stop if such elements occur and appear harmful to either of the disputants¹¹⁸

In general, a mediator must be subject to the applicable codes of ethics. Ethiopia has not yet come with a law governing mediation including the code of ethics so the government should come with a new law governing mediation including the code of ethics or adopt the draft law of mediation prepared by the EACC.

3.8 The Legal Status of Mediation Agreement in Ethiopia in

Light of Foreign Experiences.

3.8.1 Agreement to Mediate

For mediation to take place the disputing parties should expressly agree either in writing or orally to settle their disputes in advance of mediation.¹¹⁹ Accordingly, parties in dispute must give consent as a necessary requirement so as to advance a mediation process. Parties in dispute are not only required to fulfill to give consent but also they must fulfill the basic requirements of any other valid contract. That means parties must be capable to enter a juridical act, the object must be lawful, moral and possible, and the agreement needs to comply with the formal requirements, if any.

The issue that may be raised in connection to the agreement to mediate relates to its effect. Even though parties are required to have made an agreement to mediate, it does not seem to have binding effect on them to continue the process of mediation. As parties' participation in mediation is voluntary,¹²⁰ which have a right to terminate the mediation at any stage of the process before a settlement is reached, the agreement to mediate may not be binding.

In concluding the agreement to mediate, it is required to cover issues relating to confidentiality of the process, timing of the mediation, mediator's fees, agreement of the disputants not to call the mediator as a witness, neutrality of mediator, and how the process of mediation is continuing.¹²¹ The agreement to mediate is suggested to be expressed by the parties either in writing or orally. However, if terms of the agreement to mediate are supposed to include the above issues which may be of procedural or substantive, it will be hardly possible to memorize unless it is reduced in writing.

Which types of disputes may be resolved in mediation or conciliation is the other issue that may be raised. As regards this issue, it seems not clear in the provisions governing conciliation/mediation as in the case of arbitration and compromise. In arbitration, it is explicit that an "existing or future disputes can be settled."¹²² Like wise, in case of compromise, it provides that a contract can be concluded to terminate an existing dispute or prevent a dispute that may arise in the future.¹²³ Based on the above mentioned provisions, a possible conclusion can be drawn that there will not be an exception to conciliation /mediation so that either existing or future dispute may be settled by way of mediation.¹²⁴ In addition, since provisions governing conciliation under Art.3324 of the Civil Code provides that provisions governing compromise agreement shall be applicable to the compromise reached in conciliation, it will be safe to conclude that "an existing or future dispute can be settled by mediation. The draft provisions, however, avoid the above mentioned problem by providing that all ~~civil~~ disputes shall have to mediate unless expressly excluded by law."¹²⁵ In conclusion, the disputing parties may agree to have made a contract to settle their future disputes either by inserting a clause to the main contract or to agree on a separate contract as in the case of arbitration.

3.8. 2 Settlement Agreement

Settlement agreement is the final stage of mediation process, and the agreement reached will have to put in writing, signed and dated by the disputants.¹²⁶ Thus, after the parties successfully settled their disputes, it is advised to draft and signed the agreement in a written form. Here, the question what if the settlement agreement is made orally may be raised. Nonetheless, there seems no strict procedure to put the agreement in settling the dispute in writing but it may be appropriate to make it in writing for various reasons. In particular, it may be justifiable to reduce the agreement in writing in order to understand the terms of settlement agreement for implementation, or where interpretation of words in the agreement is required, and to use as evidence in case one of the parties fails to comply with the terms of the agreement. In addition, it is suggested that in drafting the agreement reached through mediation, the mediator or an attorney authorized to draft should consider whether parties need to include a clause that they will return to mediation if

there is a breach of the agreement¹²⁷ which is also true in practice (see the settlement agreement in annex-3).

In Ethiopia, as mediation/conciliation is a contract, the settlement agreement may be governed by the rule of contract relating to form in the Civil Code.¹²⁸ Thus, parties seem to be free to choose which form to follow except that expressly provided by law. However, it is explicitly provided in the draft provision that a settlement agreement shall always be drawn in writing, signed by all the parties and the mediator,¹²⁹ which avoids the vagueness of the law in the civil code. According to the draft provisions, therefore, what ever the object in the dispute may relate (i.e., movable or immovable), the settlement agreement shall be reduced in writing and signed by the parties.

The other issue relates with the terms that are required to be included in the settlement agreement. Despite the existence of variations in the terms of agreement and the issues covered in dispute, it is suggested to constitute the following provisions of the settlement agreement as standards:¹³⁰

- mutual release of liability
- dismissal of law suits
- time lines for payment, security, interest
- confidentiality clauses
- dispute resolution clauses (i.e. mediation), and
- that the agreement is entered freely, voluntarily with out duress or coercion,

Given these settlement provisions as standard requirements, one may draw a conclusion that it would be difficult to remind the parties if the settlement were made orally, hence, it is advisable to reduce the agreement in writing. The formal requirement in our case is not plain and straight forward.

The other issue to be raised in connection to mediation is the issue of enforceability. The following section spells out the detail.

3.8.3 Enforcement Mechanism

As the issue of enforceability of settlement agreement often relies on the application of general contract law, it must fulfill the requirements of contract law in order to be validly enforceable. Some countries have enacted statutes which change the existing contract law relating to enforceability of the settlement agreement. For instance in Minnesota, settlement agreement is not binding unless parties state specifically that it is binding in their agreement.¹³¹ The Afghanistan Mediation Law provides that “if parties conclude and sign an agreement settling a dispute, that settlement agreement shall be enforceable in the same manner as any other commercial agreement.”¹³² Settlement agreement is thus, binding according to the rules of contract law in these countries. Different from the Afghanistan law, Polish enacted a law that provides a settlement agreement in mediation to have a legal status equal to a court judgment.¹³³ The German law, in the Civil Procedure Code (ZPO) of Germany provides, three instances by which a settlement agreement can be enforced. In the first instance, the settlement itself is enforceable as decided by court if lawyers acting on behalf of the respective parties have concluded the agreement and the parties have consented to the enforceability of the settlement. The second situation when the settlement is enforceable as a judgment is when it has been notarized by a notary public. Where one of the above instances is not fulfilled, a settlement is to be enforced in front of the court like other contracts.¹³⁴

The European Parliament on the proposal presented by the European Commission also enacted a law to regulate mediation in civil and commercial matters, which reads;

the member states shall ensure a settlement agreement reached as a result of a mediation can be confirmed by a judgment, decision, authentic instrument or any other form by a court or by a public authority that renders the agreement enforceable in a similar manner as a judgment under the national laws.¹³⁵

Such variations in the enforcement mechanism of a settlement agreement indicate that the application of settlement agreement varies from jurisdiction to jurisdiction.

What is the position of the Ethiopian law governing settlement reached in mediation /conciliation is the point to focus below.

As enforcement of the settlement reached in mediation/conciliation is concerned, it has not been covered by the provisions governing conciliation. As conciliation is not defined, it couldn't be easy to infer whether the agreement through it is equivalent to a contract or judgment. However, an inference may be made from the provisions dealing with conciliation. As provided in Art.3318 (1) of the Civil Code, "parties may entrust third party with the mission of bringing them together and, if possible, negotiating a settlement between them." In Art.3321 (1) of the same Code, "conciliator shall carry out his duties within the period of time laid down in the 'contract'---." The terms 'negotiating settlement' and 'contract' used respectively in the above provisions may help us to conclude that the settlement agreement reached in conciliation/mediation is a binding contract. Therefore, the possible conclusion can be made that the settlement agreement in Ethiopia is treated as any contractual obligation, like the Minnesota and Afghanistan mediation laws mentioned above. Hence, the settlement agreement is enforceable in the same manner as any binding contract. Therefore, as a contractual agreement, if one of the parties doesn't comply with the terms of the settlement agreement; the remedy for the other party is to require performance by instituting a fresh suit before the court.¹³⁶

The same position is held in the Draft Provisions on mediation. According to the draft mediation law, the settlement agreement reached between parties shall be enforced like any other valid contract and it may only be set aside by a competent court on grounds of non observance of essential elements and formal requirements of contract.¹³⁷ Therefore, if one of the parties fail after the settlement agreement is reached, the remedy for the other party is to institute a suit against the defaulting party, like in the Afghanistan case mentioned above. However if compromise is reached through conciliation for disputes on pending in court of law, Provisions governing compromise shall be applicable as prescribed in Art.3324 of the Civil Code. In situation where mediation agreement is made while the case is pending, the agreement reduced and signed by the parties is required to be submitted before the court and the court having satisfied that the terms the agreement are not contrary to the law or morals ,makes an order or give judgment in terms of such agreement so that it will have an effect of a judgment.¹³⁸

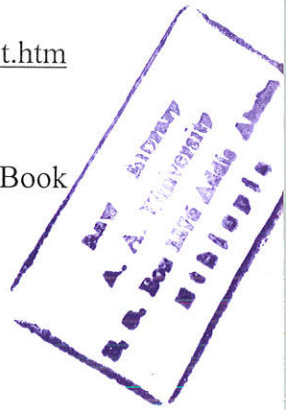
In summary, though mediation laws are necessary to facilitate access to justice for individuals and businesses in Ethiopia like many other countries, the current mediation

laws dealing with conciliation are inadequate. Therefore, having learned the importance of the existence of substantive and procedural laws of mediation from the experience of foreign countries, the legislature and policy makers should endeavor their utmost effort to come up with the modern laws that regulate mediation in general and commercial mediation in particular. As the existence of effective laws to regulate mediation encourage parties to use commercial mediation as a dispute resolution mechanism, it will diminish problems of the backlogs of courts as a result cases that would be presented before the court may be disposed with out delay.

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Chapter Four: - Commercial Mediation in Ethiopia:

The Empirical Assessment and the Prospect

This chapter of the study will provide readers with the assessment and the analysis of commercial mediation in Ethiopia based on primary data that were collected from the target group of the survey as the main source.

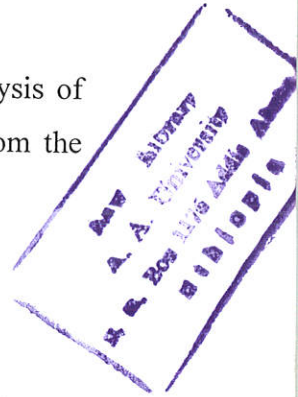
4.1 Public Opinion

4.1.1 Advantages of Commercial Mediation

As attempted to describe the theoretical framework in chapter three, mediation as a commercial dispute resolution mechanism provides more benefits than litigation. The scope of this part of the study relies on the opinion of the public mainly with the composition of the above categories on which the data relies. As found in the survey, commercial disputes may arise between businesspersons, or their employees, or representatives/agents and their customers, competitors, manufacturers/producers, wholesalers, retailers, government agencies. The causes of such disputes might be various but as found by the survey, the main causes of commercial disputes include; breach of commercial agreements, increasing prices, dishonest trade practices (unfair competition), illegal business practices, trespass of business places, non-payment of loans and credits, etc.

Once a dispute arises, the way business people attempt to resolve it varies. As revealed by this sample assessment, some of them have used to resolve their commercial disputes in court while others have used alternative dispute resolution mechanisms. From the respondents of this survey, 71 percent were confronted with commercial disputes. Among these respondents 12.5 percent settled their disputes by litigation in court .While the remaining used to settle their disputes by arbitration (11.5 percent), conciliation (10.5 percent, negotiation (16.5 percent),and mediation (20 percent).

While the Amharic application of the names of such alternative dispute resolution mechanisms might have been mistakenly used, such that “gilgil” (arbitration) may be overlapped with “shimgilna” (mediation), and “shimgilna with“erk”(conciliation), all of them are being used by business community as mechanisms of settling disputes. This



shows despite the existence of inadequate legal framework and dishonest practices of the third party assistance in Ethiopia, businesspersons are still using the above alternative dispute resolution mechanisms to settle their disputes.

Respondents of the questionnaires who were confronted with commercial disputes and who settled their disputes by mediation suggested that they were satisfied with the settlement and only few dissatisfied with it. Most of the businessmen who settled their disputes through mediation expressed their views that resolving their disputes using mediation enabled them to achieve many advantages. In their testimony, settling of their disputes through mediation helped them; continue their relationship, settle their dispute with in a short time, prevent the facts of the dispute from being disclosed to their competitors and customers as it might have resulted negative impact to their business. More importantly, since mediation creates the opportunity to control the process by the disputants themselves, it results satisfaction.

On the contrary, those who were dissatisfied with the settlement through mediation expressed their feeling that it is not appropriate because of the fact that it lacks enforcement mechanism.

Among those who settled their disputes through litigation, the maximum time taken for trial was recorded to be 10 years and the minimum was 1 year. This can be taken the longest time when compared with one or half a day, taken in a mediation/conciliation, or negotiation. From those who were confronted with disputes and used litigation as a means of settlement, few were satisfied with it. However, most of them were dissatisfied with the resolution and witnessed how painful a lawsuit can be and believe that mediation as an appropriate dispute resolution mechanism as an alternative to litigation. In the interview made with them, the main causes of their disappointment are, taking of a lot of time and costs, terminating their business relationship and creating a sense of hostility among them.

As revealed by the assessment, businesspersons have used the main alternative dispute resolution mechanisms mentioned in chapter two, in parallel with litigation. Based on the survey made, one can imagine that if all such commercial disputes, which had been settled by the above mentioned alternative dispute resolution mechanisms were brought

before courts, they would have not only overburdened courts and caused too much delay, but also would have caused crisis in the justice system and the economy of the country. This implies even in the existing situation, the contributing role of alternative dispute resolution mechanisms pointed out above, to ensure justice and to promote investment in the country may not be underestimated.

As revealed from the respondent's explicit statement in the given open-ended question, they suggested if mediation is properly administered by setting up of legal principles, assisted by trained mediators, and the corrupt practices, abuses and partiality of mediators being regulated by adopting code of conducts, business persons would effectively use it. As witnessed by the countries' experiences, their opinion might be correct and justifiable because the use of mediation has grown significantly in many countries and cultures¹, which have regulated mediation via their legal systems. If this is so, civil disputes particularly commercial disputes that qualify for amicable settlement could be resolved by means of commercial mediation

This is testified by the responses of the public to the question whether commercial mediation is more appropriate than litigation. In their responses 82.5 percent believed that commercial mediation is more appropriate. The respondents were 52, 50, and 70 whose business capital are above 500,000 birr, 100,000-500,000 birr and less than 100,000 birr respectively, the remaining (28) were unwilling to indicate their business capital. Among those respondents who disclosed their business capital, those whose capital exceed 500,000 birr, between 500,000-100,000 birr and less than 100,000 birr believed 43(82.6%), 42(84%), and 58(82.8%) respectively that mediation is appropriate. As revealed from the data, even though insignificant differences are evident, an inference can be drawn that commercial mediation is almost equally supported by all level of traders. This is a similar finding to a research made in America. In America, large business firms believed (85-65 percent) that mediation is more appropriate as compared with litigation.² These, may lead us to make an inference that businesspersons are more likely to resolve their disputes through mediation than judicial proceedings.

As regards to the particular advantages it may offer, the businesspersons considered mediation as a suitable method of resolving commercial disputes.

Table 1

| Total number of respondents | Advantages of Mediation | | | | | |
|-----------------------------|------------------------------|--------------------------------|--------------------|------------------------------------|-------------|-----------------------------------|
| | quick settlement of disputes | preserve business relationship | satisfy disputants | reduce the complex court procedure | reduce cost | make any information confidential |
| 200 | 142 | 140 | 127 | 125 | 105 | 70 |

This table shows the advantages of mediation as chosen by **businessmen**

Remark:-The table indicates the particular advantages and the number of votes for the potential advantages of mediation. The number of votes is not as equal as the number of respondents because some respondents have chosen more than one choices while the remaining have chosen only one among the given choices.

The investigation of the survey testifies that for the question whether mediation is more appropriate than litigation, the businesspersons believed (83 percent) that mediation is appropriate. As to the specific advantages, which it would provide, their choice from the highest to the lowest, is as follows;

- it saves time (71percent)
- it helps to continue their business relationships (70 percent)
- it helps to satisfy parties in dispute (63.5 percent)
- it enables to reduce the complex procedure of a court (62.5 percent)
- it reduces cost (52.5 percent), and
- that it enables parties' to make the process and settlement of mediation confidential (37.5 percent)

Accordingly, though people including businesspersons are increasingly their way in to the courtroom for their cases, the above data suggests that commercial disputes are well suited for mediation. Businesspersons are, therefore, familiar with the importance of mediation. In their understanding, mediation is more important to save time, to continue their business relationship as it was before the dispute, to satisfy the parties in dispute and to avoid the complex procedure that exists in court.

As regards costs of litigation, either their understanding seems negligible or the legal fee is not understood as such a serious problem because about half of the respondents believed that settling disputes through mediation is important to reduce costs. However, had they considered costs of litigation as to include professional fees, expenses for application, secretariat services, transport expenses and the time value that it would take to attend the proceedings before the court until the case is disposed, and other expenses in connection with the case in dispute, majority of them would have chosen it. If they had done with the understanding of costs of litigation solely in connection with fees paid for the legal suits, their choice might have been justifiable because service fees for legal action in Ethiopia is not a serious problem.

Therefore, it will be safe to conclude, not only scholars and practitioners but also businesspersons recognize the potential advantages of mediation for the sake of saving time, continuing the existing business relationship, using simple and flexible procedures, cost saving, and often results in a greater levels of satisfaction than litigation.

The importance of confidentiality seems not being recognized by businesspersons as only 37.5 percent of the respondents supported it. This shows that the current practice of mediation in Ethiopia does not serve to protect their cases from being disclosed.

As we have attempted to explain in the preceding sections, Ethiopia does not have adequate mediation laws, including confidentiality. As a result, mediators and other persons who involve in the discussion of mediation process are free to spread information that they might learn in the process of mediation. Moreover, they may be called as witness if parties fail to comply with the settlement agreement and the case goes before a court. Due to this, parties in dispute refrain from disclosing the necessary information to mediators that would enable them resolve disputes in the accepted perception that will be a risk in litigation when it remains with out settlement. In addition to the closed questions of the questionnaires, some of the respondents in their open-ended questions added their opinions that settling disputes through litigation is unnecessary for businesspersons in many aspects. In their opinions, where a civil suit which may relate to commercial matters is instituted before a court, the business in connection to the dispute may come to a close, or the business in dispute may be suspended until the decree is

passed by the order of the court, on the application of the plaintiff (see annex 1V). Moreover, few of them remind that in litigation, matters that may be preserved secret in mediation may be disclosed to the public at large in consequence, reputation of the business may be adversely affected. This may be an accepted wisdom particularly in situation when disputes arise in sensitive areas of their operation or to avoid their affairs being published among business competitors, acquaintances or friends, traders or firms have often considered confidentiality as an essential element to use mediation.³

The responses of the legal practitioners to the question whether commercial mediation is more appropriate than litigation are also affirmative. Out of the total respondents, 95 percent believe that commercial mediation is more appropriate than litigation. As the respondents are combinations of law schoolteachers, judges, lawyers, and other legal experts, their belief to the importance of commercial mediation is positive. The assessment made by category shows that judges and law schoolteachers thought (98 percent) that mediation is an appropriate commercial dispute resolution mechanism. Similarly, legal experts and lawyers also believe (92 percent and 88 percent respectively) that commercial mediation is important.

This data indicates that legal practitioners have a high-perceived demand in settling commercial disputes through mediation. Some of the practitioners also added emphasis that since resolving commercial disputes through mediation has commonly been used in many countries in the present world and has been witnessed cost effective, it must be encouraged in our country.

As you can weigh up the above-mentioned data, as compared with the other category of legal practitioners, the support of lawyers for commercial mediation is relatively low but they still favor it as an effective dispute resolution mechanism.

This finding refutes the theory that lawyers may be unwilling to support mediation due to the fright that there will be a reduction of cases in litigation and the subsequent reduction of lawyers' fee where disputes are being settled through mediation.⁴ The above mentioned discovery rather supports an opinion which holds that if the individual lawyer spent more alternative approaches to dispute resolution, then the loss in litigation fee

income might be replaced by offering new varied professional services that encourage ADR.⁵

To recapitulate the discussion, as in the business community the survey made on the legal practitioners, indicated that mediation is a more appropriate means of resolving commercial disputes. However, by way of taking in to consideration the specific criteria, such practitioners seem to have divergent opinion. The following statistical data evidences this variation.

Table 2

| Respondents | Advantages Of Mediation | | | | | |
|----------------------|-------------------------|--------------------------|--------------------------|------------------------------------|-------------|----------------------------------|
| | expeditious settlement | reduce backlogs of court | continue business r/ship | satisfaction of parties in dispute | reduce cost | Make the discussion confidential |
| Judges | 24(96%) | 23(92%) | 21(84%) | 20(76%) | 18(72%) | 17 (68%) |
| Lawyers | 22(88%) | 17(68%) | 20(80%) | 22(92%) | 21(84%) | 19(76%) |
| Instructors | 25 (100%) | 24(96%) | 23(92%) | 23(92%) | 20(80%) | 21(84%) |
| Legal experts | 21 (84%) | 22(88%) | 21(84%) | 18(76%) | 20(80%) | 18 (72%) |

Table 2 shows advantages of mediation and the representing votes of **legal practitioners**

As shown in table 2 above, most of the respondents believe that mediation offers various advantages. In particular, it is more appropriate on grounds of:

- speedy settlement of cases
- reduction of case backlogs of courts,
- continuation of the existing business relationship between disputants, and
- satisfying parties in dispute

- reduction of costs

- keeping matters in discussion, to be confidential

As indicated in the respective order of the above lists, the advantages of commercial mediation as viewed by legal practitioners can be calculated in percentage as; 92 percent, 86 percent, 85 percent, 83 percent, 79 percent, and 75 percent respectively. The data suggests that settling of commercial disputes through mediation is more appropriate than litigation. As could be read from the data above, even though minimum variations are apparent, all legal practitioners appreciate the importance of mediation.

Despite the fact that it is thought to be more appropriate than litigation, resolving disputes through mediation has not yet reached to the juncture as in the preference the society in our country. The issue that need to arise is then, if it is believed more appropriate than litigation then why the demand for commercial mediation is not as much as that what ought to be. This issue is treated below.

4.1.2 Why the Demand for Commercial Mediation is Inadequate in Ethiopia?

As could be understood from the assessment made in this study, there has been a tendency of settling commercial disputes out of court proceedings by way of mediation or conciliation, arbitration, and negotiation. However, implementation of mediation as well as other alternative dispute resolution mechanisms is not as much as people wish for it as they have testified in this survey. Since mediation in our community has been used informally in a traditional manner and has not been effectively regulated, there appear problems in the implementation of it. As a result, persons may not be encouraged to settle disputes through it so that they remain relatively infrequent. The demand for mediation is also almost nil at the Ethiopian Arbitration and Conciliation Center (EACC) and the Addis Ababa Chamber of Commerce Sectorial Association (AACCSA) Arbitration Institute⁶, where it could be administered as fair as possible.

The reason most frequently given for the failure of businessmen to make greater use of mediation by businessmen is not because they dislike it. In view of the respondents of the questionnaire, the inadequate use of mediation rather emanates from its traditional application where it is not effectively regulated by law. Despite the above mentioned

institutions have been established to undertake alternative dispute settlement through arbitration and mediation to courts, as in the opinion of the respondents, most of the businessmen do not know about their existence.

As we have attempted to describe, Ethiopia does not have adequate legal rules that regulate mediation in issues of neutrality, confidentiality, mediators' fees, and code of ethics of mediators or set of standards about the credential of mediators. Since mediators are not regulated by a set of rules in the current practices of mediation, they are said to be biased and commit dishonest practices and such predisposed and dishonest practices have the effect of deteriorating

the demand of the businessmen for mediation. Therefore, the inadequate regulations that govern the application of mediation on the above specific issues, and the subsequent gloomy consequences, have contributed to the discouraging effect on the demand of businesspersons to commercial mediation. Such malpractices of mediators in the application of mediation have created negative impression to businesspersons and the subsequent reduction of their demand for commercial mediation.

After the above mentioned institutions were established, no extensive promotion has been made to change such negative impression and to make businesspersons familiar with such institutions with a view to facilitate mediation and other mode of dispute settlements.

This may be the reason why most of the respondents who were confronted with commercial disputes settled such disputes in litigation, instead of resolving them through mediation with or without the authorization of the above institutions. Similarly, the other respondents who confronted with commercial disputes settled their commercial disputes traditionally by volunteers and elders who are assumed prominent in business experience, instead of resolving through such institutions.

Unexpectedly, however, a number of disputants settled their disputes by "Alem Mediation and Peace Initiative Organization". This organization was established in 2000 G.C and is situated here in Addis Ababa with the purpose of resolving disputes of various types amicably through mediation. In the interview made with the director of the organization, "until the date of interview (6/2/2008), among others 47 commercial

disputes were resolved through mediation.”⁷ He also stated that such organization has given free mediation services. In his statement, “such necessary expenses, which are required for provisions of such services, have been collected from the contribution of members of the organization and from the aid of charity organizations.” Here one may raise a question why a number of users of commercial mediation relatively increase as compared with the EACC. However, as one could guess, a free service might be one of the reasons that encourage businessmen to use mediation as a dispute resolving mechanism. He, however, was reluctant to furnish the necessary documents relating to mediation process and the settlement, which he might assume that it is confidential.

In the finding of this survey, factors that are supposed to be contributing to the inadequate demand of businesspersons for commercial mediation include;

- 1) lack of awareness of businesspersons. About 52.5 percent of the respondents believe that there is lack of awareness about the existence of institutions which facilitate commercial mediation.
- 2) malpractices of mediators. In their believe (56.5), since mediation has been experienced traditionally by elders in the community and has not been paid remuneration for the time they spent and the effort they made, they often commit biased and deceptive practices, and
- 3) they also believe (61.5 percent) that absence of trained and unregulated mediators contribute for the low demand of mediation. Mediation in the present practice has not been conducted by professionals and experienced mediators who would discharge their duties appropriately and in a manner that attracts businesspersons.

The respondents mentioned some further points that contribute for the inadequate demand of businesspersons to commercial mediation. In their opinion, since mediators in the current practice of mediation are selected by affiliation, they often attempt to benefit the disputant who appointed them. In addition, as mediators are often elders and illiterates (non-professionals), they try to settle disputes customarily and they may not assist in a way that enable disputants discover options that protect their mutual interests. In particular, in situation when one of the parties has greater bargaining power, they

could not help the disadvantaged party to develop a realistic understanding of his/her legal options and to assist parties to negotiate a resolution recognizing their interests.

Finally, respondents' opinions rest on the conduct of mediators in the process of mediation. In the opinion of the respondents, mediators have not been paid remuneration, for that reason they are easily susceptible to maladministration and corruption, which discourages the interest of persons to settle their disputes through mediation.

This may be true because in Ethiopia, remuneration shall not be permissible to conciliators/mediators unless parties in dispute expressly agreed as stated in Art. 3323(2) of the Civil Code. In practice, mediation/conciliation has often been conducted with out being paid remuneration to the mediators/ conciliators. Volunteers and community elders usually carry out mediation in Ethiopia with out remuneration. However, in certain situations where lawyers assisted parties to reach settlement, they have been paid few amounts which discourages strained mediators to provide mediation services as a professional occupation.⁸

All the above factors are supposed to contribute to slow down the demand for commercial mediation. Therefore, taking in to account the above problems as raised by the respondents, the government must exert its efforts to alter such negative feelings of the public or businesspersons.

The other critique against mediation is lack of enforcement mechanism where parties fail to comply with the settlement agreement. As settlement agreement is a binding contract, which is not enforced in Ethiopia by way of execution as if it has been decided by a court, parties that require performance shall institute a fresh suit where the other party refuses to comply with the settlement agreement. Since they are required to institute a fresh suit, they are often exposed to unnecessary expenses, a further delay of cases and for other evils. Such a requirement may be justified for a further protection of the parties in dispute where they may be uncertain about the adverse effects that the agreement could have on their legal rights.⁹ However, some jurisdictions bypass this procedure and consider the settlement agreement as a judgment after being approved by a court or registered by the public notary in order to avoid such uncertainties



A few respondents in this survey do not admit the critique on the enforcement of the agreement. In their opinion, enforcement of settlement agreement is an insignificant problem in Ethiopia. For them, even though settlement agreement is not considered as a consent judgment, which can be enforced by requiring execution, parties are often committed to comply with the settlement agreement. This is for nothing but giving a sense of preference to the other advantages, such as; for repairing their business relationship, reduction of litigating costs and time and above all to keep the sense of being bound by their promise in most cases violating settlement agreement is considered as immoral. It might be from this perspective that 56 percent of the surveyed persons above replied that the settlement agreement reached in mediation is usually enforced voluntarily with out going to court for a new suit. According to this view, once the agreement has been reached, parties in dispute mostly respect the agreement in the sense that it is customarily accepted and none complying with the agreement is thought immoral. It is from this point of view, which is said that mediation as a voluntary process that gives disputants a sense of involvement in the dispute resolution process and making compliance with the settlement agreement is more likely than in the case of an imposed decision.¹⁰

This implies that a uniformly accepted idea has not yet developed regarding the enforcement of settlement agreement. As indicated above a few number of respondents (44 percent) believe that mediation lacks enforceability because of the factual evidences showing the settlement agreement being violated by one party and the other side has instituted a civil suit before a court.

Problems such as this, has been given attention by some foreign countries by incorporating laws that govern enforceability of a settlement. However, the laws regarding the enforcement of settlement agreement vary from jurisdiction to jurisdiction as attempted to indicate in chapter three.

In Ethiopia, settlement agreement reached in 'conciliation' is considered a contract as could be understood from Art.3321 (1). As a result, it is governed by the general principles of contract; hence, they shall be of no effect if the object of the agreement reached by parties is inconsistent with the law or public morality as prescribed in

Art.3316 Civil Code. Based on this provision, we may conclude that a settlement agreement is a contract so that it will be binding so long as it fulfills the essential elements of a contract. Accordingly, if one of the parties after reaching a settlement refuses a voluntary performance, the other party who requires performance can institute a fresh suit before the court but their settlement agreement is used as evidential proof.¹¹

Therefore, settlement agreement in Ethiopia is considered as any contractual agreement and shall be enforceable in the same manner as any other contract, like the Afghanistan Mediation Laws mentioned above. This position of the law is acknowledged in black and white in the draft provision prepared by EACC, which reads, “the settlement agreement reached between the parties shall be enforced like any valid and enforceable contract”.¹²

The other ground that mitigates the demand of mediation is, disclosure of facts in litigation when the settlement agreement fails.¹³ It is obvious that mediators and other parties who involve in mediation process often be called for witnesses in litigation where mediation agreement fails.

If disputants agree in their contract that they will not rely on the testimony of mediators, or other persons who involve in mediation to prevent the use of evidence in a subsequent trial, the pleading or motion for testimony, will not be rejected by the court as the ground of breach of the agreement.¹⁴ Therefore, the attempt of parties to restrict any information that is exchanged in a mediation process in a permissible way for keeping confidential in protecting the interests of parties, does not have a legal recognition. This show, despite the fact that disclosure of matters in the discussion of mediation process has a destructive effect for the decreasing demand of mediation, the experience indicates that their agreement to restrict any information to be confidential has not been applicable in a court to which the settlement agreement is submitted.

The above mentioned draft provision tries to solve this problem. As it has been stated explicitly, unless disclosure is required by law, mediators or other persons who may involve in mediation process and learn information there from, may not be called to give their testimony at any adversarial proceeding.¹⁵ As it has been made clear, the above mentioned persons are therefore prohibited to disclose information that came to their

knowledge in the mediation process and to act as witness unless they are required by other laws to do so.

The prohibition of disclosure of any information acquired in the mediation process as such, is supposed to encourage parties' frankness and openness in the process by assuring that any admissions, proposals, or offers for settlement will not have any consequences beyond the mediation process.¹⁶ Therefore, the prohibition of disclosure as in the draft provision provided above has an effect of encouraging parties to come to the mediation process.

In conclusion, the cumulative effect of all the above problems might arise due to the absence of rules set for governing mediation. Consequently, businesspersons may not be encouraged to take their cases to mediation. Since, the most common pattern of mediation that works to date in our country has not been supported by sufficient legal rules and principles; the pressing need for it has become deteriorated. Due to the above justifiable grounds, it may be possible to draw a conclusion that the demand for commercial mediation is not as much as it is appreciated by businessmen.

Therefore, it is timely for the Ethiopian authorities to come up with the policy framework and the necessary legal framework for the effective implementation of mediation. The enactment may be convinced for at least two main reasons; firstly, there are case backlogs of courts and delays, and secondly, there is a constitutional guarantee to the right of access to justice for citizens. Thus, supplementing the legal systems with amicable or non-adjudicative mechanism as mediation is a sound decision to resolve the above problems.

The idea of access to justice includes; "promoting of access to adequate dispute resolution processes and not, just access to judicial system."¹⁷ However, whether the FDRE constitution incorporates this thought, is questionable because the reading of Article 37 of the constitution relates the "right of access to justice" to a "court of law" or the "competent body with judicial power".

This provision does not seem to include the right of resolving disputes by any other dispute resolution mechanisms, except the judicial system and perhaps, arbitration. Conversely, since there is no explicit prohibition to settle disputes by using other dispute

resolution mechanisms, like mediation, it may not be a mistake to conclude that FDRE constitution does not rule out using of mediation.

In conclusion, since mediation may be considered necessary as an alternative dispute resolution mechanism due to the inaccessibility of ordinary courts, or to avoid the increasing costs of legal fees,¹⁸ permitting commercial mediation as an alternative resolution mechanism for resolving disputes, may be justifiable. Legal fees, in the above expression include; expenses for secretariat services, transport costs, wastage of time and human resources.

The prospects of commercial mediation and the role of the government to promote in using mediation will be discussed in the next section

4.2 Prospects of Commercial Mediation in Ethiopia

In the discussion made so far, you might have acquainted with the idea that mediation as a means of resolving commercial dispute aims at preserving the flexibility of settlement process and ensures the private autonomy of parties.

To do so, however, it requires restructuring and regulating mediation by laws governing it like the mediation laws of Afghanistan, Utah, Germany, Australia etc as attempted to illustrate in chapter three. Nevertheless, as the development of mediation laws, rules and regulations of the various jurisdictions may not be the same due to variations in the legal cultures and values, it does not require to directly incorporating the laws and rules of the above-mentioned countries. The enacting of mediation law as such, has a purpose of encouraging parties to resolve commercial disputes in a manner of speedy and cost efficient dispute resolution process.¹⁹

Therefore, providing principles focusing on issues of confidentiality, code of conducts of mediators and the requirements that qualify mediators, enforceability of the mediation agreements and relating issues, would serve as a general framework for the practice of mediation in general and has an effect of encouraging potential users to settle commercial disputes through it in a more participatory role. Making use of mediation laws as such may be helpful to perform three major functions: to serve as a guide for the conduct of

mediators, to inform the mediating parties; and to promote public confidence in mediation as a process of resolving disputes.²⁰

From the examination made by the survey, mediation as a concept is widely used in Ethiopia but it does not seem to benefit the legal community as a viable means to settle disputes. That means, even though mediation has been practiced as a commercial dispute resolution mechanism in the different parts of the country, its application is still traditional.

As it has been reviewed, mediation laws in Ethiopia are inadequate. As a result, the practice of settling commercial disputes through mediation remains primarily of customary for along period.

In particular, since there are no any set of standards and training skills for third party neutral to serve mediation, mediators may be in efficient to assist parties in dispute to discover options that enable them to protect their mutual interests. Mediators in our country are often volunteers and layman who may be incapable to assist parties to reach fair and just settlement, instead they require parties to “forgive and forget “or avoid the dispute and simply pushes it under the surface²¹ which may not encourage disputants to resolve disputes through it. As a result, a dispute often gets worse instead of being settled or may face the danger of being erupted elsewhere.

As the current practice indicates and witnessed by the respondents, mediators have not often been paid remunerations. As a result, they have not been encouraged to act as mediators should do, or they have often made partial, dishonest, and unfair practices because no code of ethics of mediators by which they could be regulated. More importantly, since there are no governing laws regarding confidentiality mediators and other persons attending the process are free to disclose information, which they have learned during the mediation process and these persons can be called witnesses where the settlement through mediation fails. Due to this, parties will not be initiated to be open in the discussion process, or they have not been encouraged to raise vital information that may help them to resolve the dispute. Unless parties communicate fully and openly without fear of compromising their cases before courts, there will be a doubt to make mediation successful.

Therefore, confidentiality is imperative for parties to trust the settlement in mediation. Having understood such limitations up on the application of commercial mediation in the country, the government and other institutions alleged to work for the development of mediation, require bringing change and improvement in legal framework addressing issues mentioned above.

The existence of such problems in connection to mediation does not mean that commercial mediation has not been used as a dispute resolution mechanism. As it has been proved by the survey, even in the current situation where there are in adequate laws governing mediation, it has been used and it is believed that mediation in Ethiopia is more appropriate than litigation for achieving solutions by mutual agreement. As the respondents in this study suggested, the government should make a legal reform that enable to regulate it and in a manner, that fits the modern situations.

Accordingly, in order to effectively and appropriately use mediation and enable it to contribute more for the justice system and to enable businesspersons to settle their disputes through it, the government should introduce legislative schemes. If the government adopts mediation as a policy objective for the settlement of commercial disputes and incorporates rules for the effective implementation of it, one could presume the prospective improvement in the reduction of court caseloads, in the increment of disputants' satisfaction and in saving of time and other expenses.

In this regard, legal practitioners also held a similar view that commercial mediation should be regulated by laws that avoids the above-mentioned problems and attract traders and firms to resolve their disputes with out difficulty.

In order to bring change of the legal framework in mediation, it perhaps is essential to learn from the world experiences that require mediators to satisfy certain requirements as a prerequisite to ensure that they are competent to provide mediation in a manner that attracts businessmen. Though it may be a difficult task to determine the standards of mediators' competence, some countries grant mediation certificate on condition to the fulfillment of certain requirements such as, training, and experience.²² In spite of the fact that it may be unnecessary to have a detailed knowledge of the subject matter to mediate a dispute, it is equally indisputable that the greater the knowledge and experience in

relation to the subject matter of the dispute is, the greater the possibility of being resolved.²³

Therefore, a mediator with trained, experienced, and expertise knowledge in the subject matter of the dispute may provide appropriate mediation service to resolve commercial disputes and make possible in building public confidence in mediation. In this case, trained mediators can assist the process better than adhoc mediators who have not had the benefit of specific education and experience.²⁴ This is recommended by many scholars in the field of alternative dispute resolution that the government should ensure quality in the mediation process through entry requirements for mediators.²⁵

According to this view, even though the national legal traditions have responded differently, countries that shaped their rules in the modern approach have opted to conduct mediation with established institutions or qualified mediators. Institutions, which are established for conducting mediation can assist the potential disputants in the selection of qualified mediators, supply information about applicable rules and regulations, and administer mediation proceedings, if parties request such services.²⁶

In this sample survey, legal practitioners and businesspersons suggested (95 percent and 74.5 percent respectively) that it is proper to have trained mediators that may be responsible to conduct mediation process and assist parties who demand it to resolve their disputes. They also feel that the establishment of institutions could administer mediation process adequately in a manner better than the traditional approach so that it may attract disputants to settle their commercial disputes.

This does not mean, however, that informal or adhoc mediators who would like to provide mediation services by volunteers should not be allowed. It may rather be reasonable to allow adhoc mediators to take part in the process of mediation. Since there are many disputes that may not necessarily require professional mediators, small claims and other non-complex disputes may be appropriate to be resolved in mediation by untrained friends or volunteers.²⁷ It might be from this point of view that 25.5 percent of businessmen in our survey believe that it should be conducted traditionally as it has been exercised currently.

Had adhoc mediators not practiced in Ethiopia, there would have been increased backlogs of courts more than the existing time. Conversely, if commercial mediation is provided in the form of established institutions or as an individual capacity by trained or experienced and by adhoc mediators, disputants would get options and freedom to which they prefer depending on the quality and amount of the fees as the respondents also mentioned. Besides, the right of access to justice may be ensured and effect of backlogs of courts in the country being reduced. The reduction of backlogs of court by itself enables a court to render quality judgment of cases; as a result, the decision of a public court will be predictable consequently, the public confidence up on it will develop. This is equivalent with the saying of “killing two birds with a stone.” The draft provisions however do not seem to give emphasis on the trained mediators and the possibility of serving mediation as a professional career. According to the draft provision, any one who has a capacity to contract can be a mediator.²⁸

As we have attempted to describe above, established institutions that undertake commercial mediation would facilitate and offer rules and procedures to those who would like to resolve commercial disputes by authorizing them. In this regard, the establishment of the Ethiopian Arbitration and conciliation Center and the Addis Ababa Chamber of Commerce and Sectorial Association Arbitration Institution, which were established in the view to conduct both Arbitration and mediation/conciliation, is a constructive measure in the enhancement of ADR in Ethiopia.

These institutions provide rules for mediation about the code of conducts of mediators; limit its time and costs and maintain rosters of mediators, which may be appointed by parties themselves or by such institutions, in case they are authorized to appoint by the disputants.

However, as they have not been supported with mediation laws, they may not be able to provide their services adequately.

As we have attempted to demonstrate in the preceding section, one of the reasons for the low demand of mediation is lack or inadequate laws for regulating it. Hence, amendment of the existing mediation laws and replacing it with modern approach is a viable option.

If this is so, businesspersons may be encouraged to use mediation and mediators who would like to serve as professional occupation may come in to the market.

Despite the fact that the Ethiopian Arbitration and Conciliation Center prepared a draft proposal for mediation/conciliation laws, until the date of writing this study it has not yet come to be a law.²⁹

In order to comprehend the position of the government and its response for the EACC's Draft Mediation Laws, the author of this study has made an interview with authorities in the Ministry of Justice. In the interview; the head of legal drafting, organizing and consultancy department, made clear that "the government has intended to take account of mediation in general as a policy objective, and even it has been started to establish 'community mediation' to serve for both criminal and civil matters."³⁰

Added in his statement that,

a crude discussion has been conducted on the issue of policy framework regarding customary dispute resolution mechanisms like mediation, but that is too inadequate and requires doing a lot with regard to technical aspects, which would help to draft mediation laws in general. It also requires to identify gaps of the law and to conduct discussion with stakeholders for mediation laws to be enacted.³¹

In the interview made with him, the government recognizes the importance of mediation, as a dispute resolution mechanism for various disputes but the practical progress has not yet commenced. In the statement made by the interviewee, the discussion to encompass mediation as a public policy has not been completed, and the gaps of the law and any technical arrangements that enable to make the framework on mediation have yet designed. However, the prospect seems hopeful for the development of mediation in general and commercial mediation in particular as could be understood from the holding discussion.

As the existing mediation /conciliation laws are inadequate to regulate mediation in particular, where business transactions have become complex and transnational, the enactment of new laws on commercial mediation that would attract businessmen is

indispensable. Thus, by considering the importance of commercial mediation for the reduction of backlogs of courts in the country, and its contribution for promoting investment by making the commercial dispute settlement flexible and expeditious, and with the satisfaction of parties in dispute, it will be a vital importance to enact mediation laws. Therefore, it is noteworthy of the government's commitment to adopt mediation as a policy objective as a means to relieve court congestion and to come up with the new mediation laws or amendment of the existing laws. To this end, it is essential to address issues of code of conducts of mediators, requirements to act as mediators (including, licensing), confidentiality and the enforceability of settlement agreements. As we have attempted to consider in the preceding sections, the draft provisions cover important issues, including; the appointment of mediators, conduct of mediator, confidentiality, agreement to mediate and settlement agreement, and enforceability of the settlement. It, therefore, would solve most of the problems that exist in relation to mediation if it is enacted.

As replied by the respondents of the questionnaires, enacting mediation laws is taken as the basic duty of the government for developing commercial mediation in Ethiopia.

The role of the Ethiopian government, however, may not be restricted only to the introduction of laws on mediation. That means, the government's task in the development of commercial mediation is rather more than issuing laws. For the improvement of mediation as a commercial dispute resolution, the government also would familiarize it to the public. To this end, it seems essential to allow courts to suggest mediation to the parties with out, however, making it mandatory. The draft proclamation in this respect provides two contradictory rules. Art. 2 of the draft provision provides that all civil disputes shall have compulsorily be referred to mediation and that it is prohibited to take cases to court unless the settlement through mediation is failed. By the same provision also, it provides that mediation process may be conducted only where disputants expressly agreed to have their case mediated.

Accordingly, if all civil disputes are compulsorily referred to mediation, it is not required to expect an express consent of parties. Therefore, it requires resolving the inconsistency of the above articles by avoiding the clause that bears compulsory mediation. This is

because compulsory mediation itself, is inconsistent with the constitution which allows every citizen to take justiceable matters before a court. The other problem of compulsory mediation is that it will be difficult to make parties actively participate in the process of mediation by force.

It is also essential to establish a sound relationship between mediation and judicial proceedings because it has positive impact on promoting the use of mediation in a voluntary commitment. In this regard, some of the respondents recommended that the court should develop commitment to initiate disputing parties to settle their disputes through mediation with out compelling them to use it. The other duty of the government, as suggested by the respondents in this questionnaire is that the government should provide training for mediators. As trained mediators are supposed to be more effective in facilitating disputants to reach settlement, it requires offering educational training to lawyers, judges, legal experts, law schoolteachers, law students and the business community or the public at large. This may be true on the assumption that education, training and experience of mediator indicates ability and create an inclination to act in a particular way, like an effective intervening of him/her in an imbalance situation.³² It is thought that a mediator who has met training and experience requirements will presumably be more skillful at leading parties to settlement.³³

This may probably be convinced due to the fact that the viability of mediation as a credible alternative to litigation is dependent on the ability of parties to be assisted by appropriately trained and experienced third party neutrals.³⁴ This may be accepted because a trained and experienced mediator would seek to help parties develop a shared understanding of conflict and to work towards building a practical and lasting resolution.

On the other hand, in the case of poorly trained and inexperienced mediator, the interests of parties may be harmed by incompetent practice, and the public's understanding of mediation services may become confused, and leads to public dissatisfaction.³⁵

By way of being acquainted with the skills and process of mediation through training, mediators may be responsive to assist and promote businessmen to resolve disputes through mediation. Accordingly, businessmen may be encouraged to continue to use mediation successfully so that they will get rid of the old adversarial approach.

With this important caveat in mind, we turn now to deal with what measures should be done for promoting and creating familiarity of commercial mediation with businessmen.

4.1.3 Familiarizing Commercial Mediation in Ethiopia

As attempted to describe in the above section, the government above all is required to improve legal rules governing mediation and to make effort to create institutions that can coordinate and encourage mediation in general or commercial mediation in particular.

As to the manner, how commercial mediation would be familiar to the public, respondents of the questionnaire suggested some four significant points, which the Ethiopian government and the already established ADR institutions would perform.

In their view, establishing institutions is important to facilitate and administer commercial mediation in order to supply information relating to the process of mediation. In this regard, practitioners and businesspersons have the opinion (95 and 62.5 percent respectively) that it will be more appropriate to establish ADR institutions that can provide commercial mediation effectively through trained mediators so that businesspersons will be attracted to settle their disputes.

The other means by which commercial mediation could be familiar to the public is by way of creating awareness to the businesspersons in particular, in the place where they are available. In the finding of the survey, businesspersons and legal practitioners' believe (52.5 percent and 93 percent respectively) that it is essential to create awareness of businesspersons to use commercial mediation for settling their commercial disputes. This can be made by various means, such as; by dispatching brochure for individual traders or firms or by trade associations, conducting conferences with the business community, using community institutions (edir, ekub etc).

The other way through which commercial mediation can develop as a dispute resolution process is providing training to mediators. As a trained mediator can make mediation more attractive by assisting parties to identify the disputed issues and to generate options that help them reach a mutually satisfactory resolution, people may be encouraged to use it. In the opinion of respondents of the questionnaire, trained mediator could provide a skilful mediation services to the parties who would like to settle commercial disputes

through mediation. In this regard, practitioners and businessmen believe (93 percent and 72.5 percent respectively) that providing training for those who would like to serve mediation as a professional occupation is proper to inspire mediation as a dispute resolution mechanism. In the respondents' opinion, it will have an encouraging effect if mediators have acquired education and training because poorly trained and inexperienced mediator is one of the factors for the failure of businesspersons to use commercial mediation.

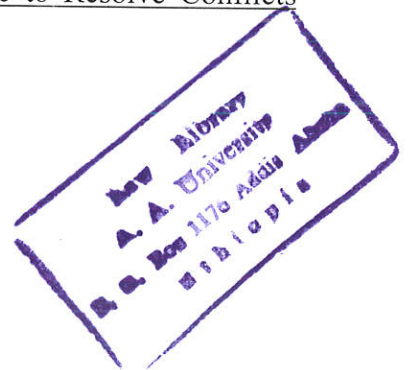
Finally, respondents suggest that it is essential to make the use of commercial mediation recognizable to the public by means of promotion in the manner that enable businessmen easily acquainted with it. Legal practitioners thought (89 percent) that promotion is an important instrument through which the use of commercial mediation can be made familiar to the potential users by advertising it through any available means, such as; mass media, conference, assembly and other locally accessible meetings.

Respondents of businessmen believe (54.5 percent) that special support of the government for the development of commercial mediation in Ethiopia is also essential.. Even though Ethiopia has been used mediation in the name of "shimglina" traditionally before the introduction of modern laws and continuing as a dominant mode of alternative dispute resolution mechanism, it has not been developed as a legal system. Therefore, it needs to bring up to date and modernize it as a system by incorporating it in to the legal system and expanding the number of institutions that would foster commercial mediation in both the Federal and Regional States.

End Notes

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Conclusion and Recommendation

Dispute is a normal incident that may arise from contractual or extra contractual relationships. In our case, once a commercial dispute is created, it may be settled by using judicial system or alternative dispute resolution mechanisms as it has been used in the disputants' traditional manner and with which disputants feel appropriate.

As we have attempted to review in the main body of the discussion, disputes that arise from the relationship on commercial activities have increased owing to the increasing commercial transactions and investment in the country. In the contemporary world where countries, including Ethiopia fall under the influence of globalization, and the involvement of large companies in investment and commercial transaction has rapidly grown, the corresponding increase and complexity of commercial disputes are unavoidable. As the proceedings in the ordinary court often take a longer time in trial, bundle of cases are in a court taking unreasonable time and costs, such delay of cases creates case backlogs in court.

In Ethiopia, people are not only frustrated by the delay of cases in courts but also suffer by the increasing number of civil disputes, which in turn causes in accessibility of justice. Case backlogs of courts and delays of cases in court deter the smooth flow of commercial transactions and investment that have flourished in the country. Therefore, establishing cost saving and effective dispute resolution mechanism that would facilitate the smooth flow of business transaction is one of the measures that the government would take.

Mediation as a commercial dispute resolution mechanism has been significantly grown in many countries, particularly in the business sector. The value of an increasing use of mediation rests chiefly on the advantages of the dispute resolution mechanism itself. Disputes through mediation are settled, in a quicker, simpler, and more cost effective way taking in to account a wider range of interests of the parties, and preserving sustainable relationship between them.

The Ethiopian people in general and businesspersons in particular, have often used mediation as an informal dispute resolution mechanism. The rational behind making use of mediation in Ethiopia emanates from two perspectives. The first one is the advantages inherent in using mediation as a dispute resolution mechanism, and the second one is that

the ordinary courts have not been developed along with the interests of the society in satisfying justice. Mediation, thus, holds an available potential for expediting commercial dispute resolution mechanism, and a means of providing access to justice for the businesspersons.

Therefore, in order to reduce the existing backlogs of courts and to discontinue the delays in litigation, with the state of satisfying parties and obtaining valuable business relationship, it would be appropriate to use mediation under regulation. Where mediation is used to settle commercial disputes with effective legal rules, diversity of mediators may come in practicing it and ensure quality services of mediation that attract businessmen. By using mediation up to date, businessmen can ensure access to justice and resolve disputes with less costly but more efficiently, and pay no attention to adversarial litigation to consider as the main commercial dispute resolution process. In the assessment made by this study, it was found that commercial mediation offers significant benefits; in particular,

- in saving time and cost by making a quick settlement of disputes.
- in continuing their business relationship that existed before the dispute arises.
- in satisfying disputant parties
- in reducing case backlogs of courts in the country by ensuring access to justice
- in staying away from the complex and strict court procedures because the process of mediation is flexible and can be determined by the parties, and
- in preserving, the process and the out come of mediation, confidential.

On top of this, one may conclude that commercial mediation is significant to promote the smooth flow of commercial transaction by way of reducing the occurrence of commercial disputes by means of lessening the area of disputes during their trade agreement and by giving a quick settlement to the disputes that have already been created. Therefore, by introducing mediation, the above mentioned problems, which exist in resolving disputes by litigation, can be ameliorated.

Despite the fact that these advantages are available via commercial mediation, and businessmen are aware of these advantages, they have not devoted to use mediation in as

much as they would appreciate it. That means, even though mediation has public support and the existing customary practices of mediation have contributed a lot in reducing caseloads of courts, businesspersons are not adequately utilizing it.

An inadequate use of mediation by businesspersons arises due to certain thwarted reasons, which are closely connected with the inappropriate application and inadequate regulation of mediation. These include; lack of trained mediators, biased and dishonest practices of mediators and inadequate laws that regulate mediation; in particular, with regard to confidentiality, code of standards and code of ethics of mediators, and enforcement mechanism of the settlement agreement reached through mediation.

The above mentioned grounds are supposed to contribute for the underutilization of mediation and the inadequate demand of disputants. As the above grounds are contemplated to be main constraints for a progressive use of mediation, it is indispensable to find solutions for such problems. Because easing such problems helps to encourage businesspersons to settle their commercial disputes through mediation. As a result, a subsequent reduction of caseloads will be achieved and business transactions and promotion of investments of the country can be facilitated.

To this end, if the draft law on mediation that was initiated by the EACC is accepted with the necessary amendments and additions, it would solve most of the problems that have been pointed out above, which are supposed to inhibit the effective implementation of mediation in the country. This serves as a promotion tool, and encourages commercial mediation as a legitimate mechanism for resolving commercial disputes in a swift, inexpensive and professional manner. That means, as the quality of settlement through mediation is achieved by effective laws governing mediation, enacting such laws covering the above-mentioned issues meant that mediation would result in faster, more convenient and satisfactory resolution of disputes.

Based on the above findings, I hereby forwarded the following recommendations.

- mediation is believed to offload pressure on the court system and the plague of congestion of cases and delays in case handling, which would affect virtually the public at large. Therefore, in order to reduce case backlogs of courts, mediation should be accepted as a policy objective to serve as an alternative dispute