REVIEW OF ARBITRATION IN ETHIOPIAN CONSTRUCTION INDUSTRY

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A Thesis Submitted to
Graduate Studies of Addis Ababa University

In partial fulfillment of the requirements for the Degree of Master of Science in Civil Engineering
(Construction Technology and Management)

May, 2014

ADDIS ABABA UNIVERSITY

SCHOOL OF GRADUATE STUDIES

ADDIS ABABA INSTITUTE OF TECHNOLOGY

SCHOOL OF CIVIL AND ENVIRONMENTAL ENGINEERING

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Acknowledgements

First of all, I would like to thank almighty God who helped me in all aspects of my life including this work.

The next appreciation goes to Prof. Dr-Ing Abebe Dinku who has given me 40% of my MSc courses and also became an advisor for this thesis. Also I would like to thank Ato Zewdu Tefera and Ato Yohannes Woldegabriel. They have given me different materials and clarifications on the subject matter of the research. I would like to appreciate also Dr-Ing Wubishet Jekale for his valuable contributions in achieving this thesis.

Moreover, I owe all the interviewees and different construction and public companies‟ heads a debt of gratitude for their participation and their willingness to co-operate during the execution of this master thesis.

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Abbreviations

AAA	= American Arbitration Association
AACCSA	= Addis Ababa Chamber of Commerce and Sectoral Association
AACCSA AI	= Addis Ababa Chamber of Commerce and Sectoral Associations Arbitration Institute
BaTCoDA	= Building and Transport Construction Design Authority
C.C	= Civil Code of Ethiopia
C. Pr. C	= Civil Procedure Code of Ethiopia
DRB	= Dispute Review Board
EACC	= Ethiopian Arbitration and Conciliation Center
ELCA	= Ethiopian Local Contractors Association
ERA	= Ethiopian Roads Authority
FIDIC	= Federation International Des Ingenieurs Conseils
GM	= General Manager
ICC	= International Chamber of Commerce
IHA	= Imperial Highways Authority
LCIA	= London Court of International Arbitration
MoWUD	= Ministry of Works and Urban Development
PPA	= Public Procurement Agency
UNCITRAL	= United Nations Commissions for International Trade Law

Abstract

Disputes in construction industry are frequent because of the uniqueness and complexity of construction projects. Court is not effective in solving construction disputes because of the technical nature of construction disputes. However, Arbitration is considered to be an effective final dispute resolution mechanism in solving such disputes. In this thesis the acceptance and awareness level of Ethiopian construction parties about arbitration is reviewed. This is done for contributing for the effectiveness and efficiency of alternative dispute resolution mechanisms in the country where massive construction projects are being undertaken.

Theoretical analysis about arbitration and its procedure as per the Ethiopian law and as per the local arbitration institute has been done. Questionnaires are distributed for local contractors and clients in order to investigate their awareness level about arbitration. Also interviews were conducted with selected professionals who have ample experiences in arbitration for commenting for the future improvements of arbitration in the construction Industry of Ethiopia.

This research clearly shows that there is less awareness and confidence about arbitration among the construction parties of Ethiopia. The low awareness about arbitration among the construction parties of the country and their lack of confidence in arbitrators' impartiality and enforcement of arbitration awards, the existence of only one local arbitration institute and its being in infant stage and the inarbitrability of administrative contracts are what discouraged arbitration in the construction industry of Ethiopia. Further ways of promoting and improving arbitration in the construction industry of Ethiopia are described in the recommendation part of the thesis.

Keywords: Arbitration, Court, ADR, Construction Industry.

1) INTRODUCTION

1.1) Background

Construction projects in Ethiopia are increasing from time to time. The rapid growth of cities, the increasing demand of housing, and the Growth and Transformation Plan of Government have tremendously increased the construction projects in the country. Construction of the low cost houses, real-states homes, different multi-purpose buildings, highways and railways, and dams being undertaken can be cited as examples. Therefore big emphasis should be given for the construction sector of the country.

In fact, unlike other projects, construction project is unique. It is accomplished with in a specific period of time and with specifically created groups of experts. It can become more complicated because of the different attitudes and areas of interests of the involving parties and the important issues of time, money and quality. Moreover, globalization is playing a greater role in the field of construction from time to time. It is making two or even more parties from different countries accomplishing a given project. Therefore considering all these influences, the appearance of disputes in construction project is quite frequent.

Obviously the final consequence of two parties in dispute is to submit their case to a court in order to get possible solution for their differences. However, court is an expensive and time-consuming procedure in solving construction disputes. Its final judgment can request recourses that can make the losing party bankrupt. Also the hard-won reputation and good will of construction contractors will be damaged. In fact, the damage to the good reputation of contractors in the market place will tax the contractor‟s business heavily due to loss of confidence in the eyes of potential employers. Furthermore, courts are overloaded and the proceeding mostly ends with a settlement including disappointed parties. Also in most cases court judges lack the necessary know how about construction which necessitates additional experts. But, even though court judges are advised by the experts, as Douglas (1993) stated “there is a very real danger that a non-technical judge may be influenced more by the eloquence and powers of explanation and persuasion of the expert than by the technical

merits of his evidence." Therefore more efforts should be done in order to create an effective, economic, and efficient means of out-of-court construction disputes settlement methods in Ethiopian construction industry.

Arbitration is one of the out-of-court formal dispute settlement methods which have a legal support in Ethiopia. Awards from arbitration are enforceable as same as judgments from courts. Also its peculiarity for construction disputes makes it to be acceptable internationally. It secures the privacy of the parties in the dispute. It is flexible and can be adapted to the needs of the particular dispute. It also gives full freedom for the parties to choose a suitable person to be an arbitrator. Generally it is one of the best alternative dispute resolution methods being used in the world. Therefore in this thesis arbitration as dispute resolution method in the construction industry of Ethiopia is reviewed and investigated.

1.2) Statement of the problem

Disputes in construction projects should be settled quickly and efficiently otherwise will damage the mutual relationships between parties, which will in turn affect the time, the money and the overall quality of the project. Court is not effective in solving construction disputes. This is because the settlement of construction disputes needs not only knowledge of legal aspects but also the knowledge of technical aspects. And most of the time court judges lack this technical background. Also as Redfern et al (2004) explains, it is more likely that for proceedings in court to be followed by a series of costly appeals to superior courts which causes the procedure to be more time taking and expensive. This makes the important issue of time in construction projects under question. Therefore an out-off-court sttelement of disputes is very essential for constrution disputes.

Arbitration is one of alternative dispute resolution technique which have a binding effect in Ethiopia. It has different advantages over court. The existance of considerable amount of institution of arbitration as well as different treaties of arbitration around the world are also indicatives of preference of arbitration over court for solving disputes arising from commercial matters such as construction. Therefore in Ethiopia great effort should be done

to create awareness about arbitration and promote it as final dispute resolution method. A continuos improvement also should be done to make it more suitable for its users.

Generally the following questions initiated the researcher to conduct this thesis. What are the procedures of arbitration under Ethiopian law and local arbitration institute? How is the performance of local arbitration institute ? What do the conditions of contracts mostly used in Ethiopian construction industry say about arbitration? How is the awareness level of Ethiopian construction stakeholders about arbitration? Is it really accepted as final option of resolving disputes among the construction parties of the country? Is there any reasons that hinders them from using arbitration as dispute resolution methods instead of court?

1.3) Objectives of the research

The targets of this thesis are:

- To review arbitration process in the construction industry of Ethiopia.
- To highlight the general arbitration procedure as per the country"s law and as per the current local arbitration institute (AACCSA AI).
- To discuss arbitration related clauses of conditions of contracts which are used in Ethiopian construction industry
- To discuss and assess the advantages of arbitration in comparison with court in solving construction related disputes of the country.
- To assess the awareness level about arbitration of local contractors and major clients in the country.
- And finally to suggest what should be done to promote and improve arbitration in the future construction industry of Ethiopia.

1.4) Application of the research

Arbitration is applicable for solving disputes arising from all contracts including civil engineering projects‟ contracts. And it is the best method which substitutes court. Using arbitration for solving construction disputes has many different advantages both for the parties and for the overall growth of the industry. The results of this thesis will assist the concerned bodies to know the awareness level of Ethiopian construction parties about arbitration and what hinders them from using arbitration as their final dispute resolution method than a court. Also suggests what should be done to improve arbitration in the future construction industry of Ethiopia. Generally it will be one of the attributes for the improvements alternative dispute resolution methods in the country in addition to what different researches done in this area so far.

1.5) Limitations

This paper is focused only on arbitration in the construction industry of Ethiopia. Its advantage as compared to court is also investigated mostly in the context of Ethiopia. Investigating contracts that are different from construction contracts is not the scope of this study. Only construction contracts used in Ethiopian construction industry is reviewed.

2) THEORETICAL FRAMEWORK

2.1) A Brief Historical Overview of the Development of Arbitration

Mustill (1989) claimed that commercial arbitration must have existed since the beginning of commerce. He argues that there is no trade which potentially does not involve disputes and in any successful trade, arbitration or other alternative dispute resolution methods must have been practiced to resolve any rising dispute.

However, mediaeval Western Europe is the origin of modern private arbitration (Mustill, 2004). As per Redfern et al. (2004) at that time if two traders are in dispute over the price or quality of goods delivered, they would come to their fellow merchant whom they trusted and accept his decision. Even though there is no law on arbitration in those days, traders would act in this way" not because of any legal sanction, but because this was expected of them within the community in which they carried on business". Redfern et al. (2004) also explains that, "Trader"s concern for his reputation or the risk of sanctions being imposed by a trade association would probably be sufficient to ensure compliance." David (1985) also supports this idea by stating that in the past arbitration was mainly considered as an institution of peace with a primary purpose of maintaining good relations between persons who were intended to live together rather than to ensure the rule of law.

However, as the time goes, due to the complexity of business systems it was difficult to allow arbitration which only depended on the goodwill of participants. Something more was needed. What was needed is as Redfern et al. (2004) explained," the support of legal system within which the process of private dispute resolution operates". Therefore, it was expected that at some stage the national state would step in and regulate the commercial activities which were of increasing importance (Redfern et al., 2004).

This happened in England in 1698, where the first statute concerning arbitration was promulgated and called "Arbitration Act". Also in France in 1560, merchants were obliged to settle their dispute with arbitration, although this law was later ignored and reinstalled

again during French revolution (Redfern et al., 2004). Italy also treated arbitration in its code of procedure of 1865(David, 1985).

Besides the formulation of legal system concerning arbitration, different important arbitration institutes were also established. The London Court of International Arbitration (LCIA) in 1892, the Court of Arbitration of the International Chamber of Commerce (ICC Court) in Paris in 1923 and the American Arbitration Association (AAA) in 1926, can be mentioned as examples (Redfern et al., 2004). And Manson(1983), states the main purposes of these chambers as " …to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, peace-maker instead of a stirrer-up of strife".

2.1.1) Important International Conventions and Rules on Arbitration

Because of globalization and the growing importance of international co-operations, commercial arbitration does not stay within the national boundaries, rather it crosses them. Therefore again something more was needed and that is "an international treaty or conventions which would link together national laws and provide a uniform solution" (Redfern et al., 2004). In 1923 as a response to this problem, the Geneva protocol came in to being. And nowadays there are several important International Conventions and Rules on arbitration. Some of them are briefly discussed below.

2.1.1.1) The Geneva protocol of 1923

This protocol was the first international convention which was initiated by the ICC and carried out under the auspices of the League of Nations at Geneva on September 24, 1923. It had two objectives. The first is to make arbitration clauses enforceable internationally so that parties to any arbitration agreement would be obliged to resolve their disputes by arbitration, rather than through the courts. And the second is to ensure the arbitration awards made pursuant to such arbitration agreements to be enforced in the territory of the states in which they were made (Art 1 and 3 of Geneva protocol, 1923).

As per the report of the Secretary-General of the United Nations (1966), the Protocol has been ratified by fifty-three countries and all the involved parties agreed on the execution of the consensus made above.

2.1.1.2) The Geneva protocol of 1927

Similarly this convention has been adopted at Geneva on September 26, 1927 under the auspices of the League of Nations. The aim of this convention was to widen the Geneva protocol of 1923. It is to ensure the recognition and enforcement of Protocol awards within the territory of contracting states rather than only within the territory of states in which the awards was made (Juris International [1], 2002). However, the parties seeking enforcement should prove that the conditions necessary (which are tiresome) for the enforcement are fulfilled.

The member states of the Geneva Convention were basically the same as of the Geneva Protocol, with notable omissions, such as Brazil and Norway (Redfern et al., 2004). It has been ratified by forty-four countries.

2.1.1.3) The New York convention of 1958

This convention is also known as "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards"**.** As per the report of the Secretary-General of the United Nations (1966), the major causes that initiate the international business community to consider Geneva Convention of 1927 arrangements as inadequate were the rapid growth of international trade and the associated need to develop facilities for arbitration. It was ICC who prepared the draft of this convention and later on the United Nations Economic and Social Council had taken up the proposal of ICC and resulted in the New York convention on June 10, 1958. The improvements done on the New York convention are the provision of a much more simple and effective method of obtaining recognition and enforcement of foreign arbitral awards than that of 1927 Geneva convention and the wider validity of arbitration agreements than that of 1923 Geneva protocol (Redfern et al., 2004).It is now the most important international treaty relating to international commercial arbitration.

Nowadays 144 countries around the world signed the New York Convention (Hefin, 2010). Still Ethiopia is not the member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

2.1.1.4) The UNCITRAL arbitration rules

As per 39 Essex Street Chambers seminar report (2010) "an increasing need for a neutral set of arbitration rules suitable for use in ad hoc arbitrations" in early 1970s was one of the reasons which necessitated the adoption of the UNCIRAL arbitration rules. It was adopted by one of the supplementary body of General assembly of the United Nations called the United Nations Commission on International Trade Law (UNICTRAL) on December 15, 1976. That is why it is named UNICTRAL arbitration rules.

The UNCITRAL arbitration rules mainly developed for ad hoc arbitrations by providing model arbitration rules covering all aspects of arbitration process and setting out of the procedural rules. Nowadays it has widely used and achieved international recognition. In 2010 the working group of United Nations Commission on International Trade Law revised the 1976 arbitration rules for making it more suitable for its purpose.

2.1.1.5) The UNCITRAL Model law on arbitration

UNCITRAL model law on arbitration was adopted in December 1985. The idea that necessitated this model law was that in addition to providing arbitration rules "harmonization of the arbitration laws of the different countries of the world could be achieved more effectively by a model or uniform law" (Redfern et al., 2004). It is the best model that shows the arbitral process in a simple and readily understandable form starting from its beginning to the end (Redfern et al.2004). More than 40 states in the world have implemented it either as it stands or with minor changes including Canada, Germany and Australia (Christen et al., 2010). Furthermore it was revised in 2006 to cope up it with the fast-moving world of international arbitration (39 Essex Street Chambers report, 2010).

These days, UNCITRAL model law on arbitration is accepted to be one of the best legal norms in the world concerning International arbitration (Blanch et al., 2006).

2.1.1.6) Summary

Despite their limitations, the Geneva contracts of 1923 and 1927 "represent a first step on the road towards international recognition and enforcement of international arbitration" (Redfern et al., 2004). As Blanch et al (2006) describes them, the New York Convention, the UNCITRAL arbitration Rules and the Model Law are also "the most important legal frameworks to have assisted the worldwide development of international commercial arbitration". All three of them, besides being the landmark in the development of international arbitration, they were also essential for the improvement of national arbitration (Blanch et al., 2006).

2.2) A Brief historical overview of Arbitration in Ethiopia

Arbitration has been one of the oldest mechanisms of dispute resolution in the life of Ethiopians. As Fekadu (2009) suggests „*Shimglina*" and „*Giligildagninet*" are of the many traditional Ethiopian dispute settlement devices which could be approximated to what is now known as arbitration. Especially *Shimglina* is the most rooted system in Ethiopian traditional dispute resolution scheme. He argues that "Strikingly most Ethiopian nationalities have dispute resolution institutions which either literally in names, composition and function correspond to Shimglina, or at least in composition and function resemble it". Still the 21stcentury Ethiopian businesses use this alternative dispute resolution method to settle disputes (Hailegabriel, 2010). Therefore it can be said that arbitration has been not unknown to Ethiopian society.

However, what is called Shimgilina in Ethiopia seems to have much wider concept than the modern perception of arbitration, since the former merges aspects of different ADR mechanisms including mediation, conciliation, compromise and arbitration (Hailegabriel, 2010).Therefore modern arbitration is only as old as the promulgation of our 1960 Civil Code and the 1965 Civil Procedure Code. And Since Ethiopia is not joined the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; still these two codes are the major sources of arbitration law in Ethiopia.

Nevertheless, recent developments show that Ethiopia has gradually developed an interest for alternative dispute settlement mechanisms including arbitration. Modern arbitration is now being a popular dispute settlement process among businesses in Ethiopia. The establishment of the two arbitral institutions i.e. the Ethiopian Arbitration and Conciliation Centre (EACC) and the Arbitration Institute of the Addis Ababa Chamber of Commerce and Sectoral Associations (AACCSA) are also indicatives of the current trend towards a better utilization of arbitration in commercial disputes. Here below an introduction of the two arbitration institutes in the country will be discussed briefly.

2.2.1) Arbitration Institution of Addis Ababa Chamber of Commerce

Addis Ababa Chamber of Commerce and Sectoral Associations (AACCSA), is established in 1947 under a charter granted by His Majesty Emperor Hailesellassie. The major objective of AACCSA is to promote the establishment of conditions in which business in general and in Addis Ababa in particular can prosper. It was also legally mandated and authorized to carryout arbitration on business and industrial differences among the business community. Still the Chamber is offering dedicated arbitration and other alternative dispute resolution service to its members and the business community at large. With over 7,000 registered members, it is the largest and oldest chamber of commerce in Ethiopia and several cases were reportedly settled under its support. In January, 2002 in response to the rising need for reliable, effective, fast and flexible commercial dispute resolution mechanisms, the Chamber established the Arbitration Institute, which is the first of its kind in Ethiopia aimed at providing the whole range of commercial arbitration services.

Administrating and facilitating the settlement of disputes in accurate accord with the Arbitration Rules of the AACCSA, ensuring the proper and effective application of the relevant AACCSA Rules, and promoting and disseminating the settlement of commercial disputes by Alternative Dispute Resolution (ADR) mechanisms are the main objectives of the institute (AACCSA rules, 2008).

2.2.2) Ethiopian Arbitration and Conciliation Center (EACC)

Ethiopian Arbitration and Conciliation Center (EACC) were established by a group of Ethiopian lawyers in March 2004 with the aim of providing an alternative mechanism for private dispute resolution. It offers arbitration and mediation services on commercial, labor, construction and family disputes. Providing a less costly and a more rapid system of dispute resolution, offering ADR services to the business community by making available a wide range of expertise for resolving commercial disputes and giving professional ADR training for those who wish to qualify as arbitrators and mediators are among the objectives of the center.

Unfortunately, at this time EACC has stopped providing arbitration services for its customers.

2.3) Arbitration in General

2.3.1) Definitions of Arbitration

Bergsten (2005) described the principal elements of arbitration in the module he prepared at the request of United Nations. These are:

1. Arbitration is a mechanism for the settlement of disputes, which is to mean that if there is no dispute, there can be no arbitration.
2. Arbitration is consensual, which is to mean that it must be founded on the agreement of the parties unless the cases are made compulsory to be arbitrated by law of a country.
3. Arbitration is a private procedure, which is to mean that it is confidential. It will not be permitted to reveal anything about the arbitration including its existence unless otherwise one of the parties had to invoke the aid of a court in regard to the arbitration or to set aside or enforce an arbitral award.
4. And lastly Arbitration leads to a final and binding determination of the rights and obligations of the parties, which is to mean that a procedure that does not lead to a final and binding determination of the rights and obligations of the parties is not arbitration.

However, the fourth principal element of arbitration from the above definition is not true in Ethiopia. Since as per the country"s civil procedure code of article 350(1) "Any party to arbitration proceedings may, in the terms of the arbitral submission and on the conditions laid down in Art. 351, appeal from any arbitral award."

English law also in a similar way defines arbitration as:

> "…a mechanism for the resolution of disputes. The process takes place, usually in private and on confidential basis, pursuant to an agreement between two or more parties. Under the agreement, the parties agree to be bound by the decision to be given by the arbitrator according to law or, if so agreed, other considerations, after a fair hearing, such decision being enforceable at law" (Tackaberry et al., 2003).

Similar concepts are also revealed by the definition of Carbonneau (2007), which says arbitration is a "private and informal trial procedure for the adjudication of disputes. It is an extra-judicial process. It functions as an alternative to conventional court. It yields binding determinations through less expansive, more efficient, expert, and fair proceedings".

2.3.2) General advantage and disadvantage of arbitration

As everything has merits on one side and demerits on the other, the same is true for arbitration. In the following part of the paper, the advantages and the disadvantages of the arbitration are described.

2.3.2.1) Advantage of arbitration

Arbitration has many advantages when it is compared with court. Here below most of the advantages of arbitration most frequently claimed are listed. However, many of them can only be relevant for disputes arising from construction contracts.

2.3.2.1.1) Freedom in choice of arbitrator

Unlike in court, in arbitration the parties are free to choose a suitable person to be an arbitrator. This will give full freedom for the parties to choose a person who is appropriate for their cases. It is often said that an arbitrator chosen partly because of his technical

training, can grasp the facts and understands them much better and faster compared to lay judges. Douglas (1993) in his book supports this idea by stating that "while it is recognized that technical expertise is available in court through the appointment of experts, there is a very real danger that a non-technical judge may be influenced more by the eloquence and powers of explanation and persuasion of the expert than by the technical merits of his evidence". Therefore one of the merits for parties in arbitration is to have the possibility to select competent arbitrators which might be experts on the field of the subject-matter of the dispute.

2.3.2.1.2) Flexibility

Procedure in arbitration is flexible and can be adapted to the needs of the particular dispute. Arbitration in respect of the quality of grain delivered in a sales contract does not call for the same procedures as would arbitration in regard to the construction of a factory. The parties in arbitration can agree how best to conduct the proceedings from its commencement to its conclusion.

2.3.2.1.3) Cost

Arbitration can be cheaper than proceedings in court. However, there should be a conscious effort to make it so, otherwise it may be even costly than court. But since proceedings in the court is more likely to be followed in series of costly appeals to superior courts, arbitration can be cheaper if "parties act sensibly in choosing the form of the proceedings and of their representation"(Douglas, 1993).

2.3.2.1.4) Speed

A properly used arbitration resolves disputes in minimum delay of time as compared to court (Douglas, 1993). Most of the time court is eventful and take much more time to give its service.

2.3.2.1.5) Privacy

Privacy is one of the most important advantages of the arbitration as compared to court. Unlike the latter, in the former proceedings are not open to the press or to the public. Only

those persons involved in the proceedings are permitted to attend. Also individuals involved in the proceeding do not allowed to disclose the information about the proceeding without the consent of the parties. This will avoid the disclosure of commercially sensitive information and any undesirable publicity or loss of reputation.

2.3.2.1.6) Finality of the award

Unlike the award given by the judges, the award rendered by the arbitrator in most jurisdictions is final and binding unless it can be shown that the arbitrator has made a mistake in law or has treated the proceedings unfairly.

2.3.2.1.7) No obligation to be represented

As Lachmann (2002) explains, in arbitration procedure parties are not forced to be represented by a lawyer, which is must in the case of court. This can somehow reduce the expenses of the parties**.** However, this advantage of arbitration does not hold true in Ethiopia since in Ethiopian courts parties are not forced to be represented by a lawyer.

2.3.2.2) Disadvantage of Arbitration

Even though the advantage outweigh, there are some drawbacks of arbitration which are being raised nowadays. Next some of the critics of arbitration are discussed.

2.3.2.2.1) Cost

It is not true that arbitration is always a cheaper method of resolving disputes than court. Unlike the salary of a judge, the fees and expenses of the arbitrators which are to be paid by the parties may be substantial. Also other costs like administrative fees and expenses of an arbitral institution, hiring rooms for meetings and hearings can raise the cost of arbitration. Therefore unless a conscious effort is done, arbitration is unlikely to be cheaper than proceedings in court (Redfern et al., 2004). But as mentioned above, even though it may not be cheaper than that of proceedings in court, the award of the arbitrators is unlikely to be followed by a series of costly appeals to superior courts (Redfern et al., 2004).

2.3.2.2.2) Conflicting awards

Because of the confidentiality of arbitration, different awards may be given for similar issues or facts. As Redfern et al (2004) explains it "there is no rule in arbitration that an award on a particular issue, or a particular set of facts, is binding on arbitrators confronted with similar issues or similar facts". That means in arbitration each award stands on its own. Therefore there is a possibility that different awards may be given for the same case.

2.3.2.2.3) No possibility of prediction

Once again because of the confidentiality of arbitration, there is no available data of previous endings. Therefore parties have less possibility to predict how their dispute will end.

2.3.2.2.4) Incompetent arbitrators

Sometimes in ignorance of the requirements of the appointment, arbitrators having inadequate qualification are appointed either by an appointing authority or by parties (Douglas, 1993). However, in order to alleviate this problem, nowadays arbitration institutions have a list of qualified arbitrators in which the parties can appoint their arbitrators from the list.

2.3.2.2.5) No reconsideration

Even though finality of arbitration awards can be seen as advantage on one hand, on the other hand sometimes parties may be obliged to accept unfair arbitral decisions which are not reviewable.

2.3.3) Institutional and ad hoc arbitration

The arbitration process can be divided into two different kinds of arbitration proceedings. These are Ad hoc arbitration and Institutional arbitration.

2.3.3.1) A*d hoc* Arbitration

This is a kind of arbitration where the procedure of arbitration in most of the time set by the disputing parties themselves. Parties are free to work out and establish rules of procedure for themselves under ad hoc arbitration, as long as these rules treat the parties with equality and allow each party a reasonable opportunity of presenting its case (Redfern et al., 2004). Therefore the major advantage of ad hoc arbitration is that, it may be shaped to meet the wishes of the parties and the facts of the particular dispute (Redfern et al, 2004). However, since drafting special rules for an ad hoc arbitration is a time-consuming process, most of the time rules of procedure which have been specially formulated for this purpose like UNCITRAL Rules are adopted.

The principal drawback of ad hoc arbitration as Redfern et al (2004) suggests is that "it depends for its full effectiveness on co-operation between the parties and their lawyers, backed up by an adequate legal system in the place of arbitration." Therefore in ad hoc arbitration it is easily possible for one party to delay arbitral proceedings by refusing to act actively.

2.3.3.2) Institutional arbitration

This is the kind of arbitration which is administered under the rules of arbitral institutions. In institutional arbitration, the parties will incorporate into their arbitration agreement by reference, the arbitration rules of an identified arbitration institution. The main advantage of institutional arbitration is that, it is possible to arbitrate effectively even if at some point one party is found to be reluctant to go ahead with the arbitration proceedings since the institute provides a set of procedural rules for different cases (Weigand, 2002). Another important advantage of institutional arbitration is in most arbitral institutions arbitration is administered by a trained staff and also "the institution itself reviews the arbitral tribunal‟s award in a draft form, before it is sent to the parties" (Redfern et al., 2004).

The drawback of institutional proceeding is a fixed fee to be paid by the parties in advance for the fees and expenses of the institution and of the arbitral tribunal is substantial. Also delay caused by the institution in order to follow their bureaucratic steps can be taken as a demerit (Redfern et al., 2004).

2.4) Arbitration in the Ethiopian Construction Industry

2.4.1) Basis of law for arbitration

As explained before, the major sources of arbitration law in Ethiopia are the 1960 Civil Code (CC) and the 1965 Civil Procedure Code (CPC). And as per the civil procedure code, arbitration emanates either from the consents of parties or from a law (Art. 315). In Ethiopia, there are matters, based on the consent, capable and permitted to be submitted to arbitration, which are called arbitrable matters and there are also certain matters regarded as not capable of being arbitrated, which are called inarbitrable matters. Again there are also certain matters such as family dispute for which the law provides a compulsory arbitration (Arts 725- 728 of C.C).

As Teclehagos (2009) explains it, the laws regulating construction industry in Ethiopia has two domains. These are private construction laws and government construction laws. The private construction laws apply where a private individual or company usually enters into a construction contract with a contractor whereas government construction laws apply where a government department intends to have construction works carried out on behalf of the government for public interest. That means separate rights and obligations apply depending on whether contract involves the former or the latter one.

Civil procedure code in Art 315 (2) reads “no arbitration may take place in relation to administrative contracts ... or in any case where it is prohibited by law.”And as per Article 3132 and 3244 of Civil Code, public construction contracts (Public works contracts) are included under administrative contracts. This means under Ethiopian law disputes arising from public construction contracts are inarbitrable. There are some controversies about

whether the stated article can prohibit public construction contracts from being arbitrated or not. Regarding this matter Bezzawork (1994) stated in his article:

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

It is not the scope of this paper to discuss in-depth all rights and obligation stated about private and government constructions. However, here below dispute settlement mechanisms stated under the Ethiopian conditions of contracts are discussed briefly.

2.4.2) Dispute settlement under conditions of contract in Ethiopia

The major contract conditions used in Ethiopian construction industry are:

1. The 1987 Standard of condition of contract of Building and Transport Construction Design Authority (BaTCoDA), which is reprinted in 1994 by ministry of Urban Works and Developments and now it is called MoWUD condition of contract
2. The 1968 Ethiopian Road Authority standard specification which is mainly for road projects (ERA"s standard specification)
3. FIDIC Condition of contract for Civil Engineering Construction
4. The 2005 Public Procurement Agency conditions of contract (2005 PPA conditions of contract)
5. The 2011 Public Procurement Agency conditions of contracts (2011 PPA conditions of contract)

2.4.2.1) Dispute settlement under 2005 MoWUD conditions of contract

As per Article 67.1 of the MoWUD conditions of contract "any dispute or difference of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract, or the execution of the Works whether during the progress of the work or after their completion and whether before or after the termination, abandonment or breach of the Contract" will be settled as summarized as follow.

First the Engineer, who is the natural or judicial person designated as Engineer in writing by MoWUD, will settle the claim within a period of 90 days after being requested by either party to do so and give written notice of his decision to the Employer and the Contractor. Then if the Engineer failed to give notice of his decision within the specified period or if either the Employer or the Contractor be dissatisfied with his decision, either of the party will refer the case to MoWUD or his Authorized Representative. And the decision of MoWUD will be final and binding.

Many critics have been raised regarding this way of dispute settlement. Teclehagos (2009) in his article written on this issue as below:

> "Although it is not unusual for parties to nominate a neutral third party (physical or juridical) who is entrusted with appointing (an) arbitrator(s), it is unusual to appoint a juridical person as arbitrator. To begin with, why would MoWUD be an arbitrator in the face of the fact that the dispute or difference involves a Government Department (including, if not in majority cases, MoWUD itself) and a private Contractor (international or national) and that the award rendered at the hands of MoWUD would be „final and binding"? It simply flies in the face of one of the basic natural justice tenets: *nemojudex in causasua*."

Therefore it can be said that there is no provision for formal arbitration under MoWUD conditions of contract, even though the title of the clause bears arbitration (Abera, 2006).

MoWUD condition of contract is now replaced by PPA conditions of contract. The Ministry of Construction and Urban Development (The then Ministry of Works and Urban Development) now stopped settling dispute referred to it from this conditions of contract

2.4.2.2) Dispute settlement under ERA's standard specification

This standard specification used mainly for road projects. It gives an option for arbitration. However, as per ERA"s standard specification one should pass through different steps to reach arbitration. The general steps to be followed are summarized below.

1. Like the MoWUD conditions of contract any dispute which will arise during an execution of the contract will be referred to the Engineer. However, in this standard 120 days are given for recommendation to the Engineer.
2. If the Engineer fails to make his recommendation within the specified days or if either of the parties is dissatisfied with his recommendation, the disappointed party may refer the dispute to the General Manager of Highways within 150 days of the original request to the Engineer. The General Manager of Highways is expected to give his decision within 30 days.
3. Up on the disagreement with decision of the GM of highways, the contactor will notice GM for his intention to submit the dispute to arbitration within 30 days after the receipt of such decision.
4. The General Manager of the Highways up on receiving the intention of the contractor will refer the case to the Imperial Highways Authority (IHA) Board of Commissioners who shall attempt to bring the parties to agreement or otherwise give a decision within a reasonable time.
5. Finally if the contractor is still dissatisfied, within 30 days of the recipient from the IHA board of commissioners, he will notify the GM of highways for his appeals of arbitration and commence arbitration.

As it is shown above, the ERA‟s standard specification have a place for arbitration. And as per this standard the seat of arbitration will be Addis Ababa and the rules to be followed are the rules stated under Ethiopian civil code (Articles 3325 – 3346 of Arbitral Submission). Both of the parties have the right to appeal to high court up on any disappointment of the arbitration award.

However, ERA‟s standard specification is no more in use at this time. Nowadays Ethiopian Roads Authority uses FIDIC conditions of contracts.

2.4.2.3) Dispute settlement under FIDIC conditions of contract

Dispute settlement stated under clause 67.1 of the 1987 FIDIC conditions of contract is a little bit updated by the World Bank and eight other Multilateral Development Banks (MDBs) and it is now called „MDB Harmonized Conditions of Contract for Construction

March 2006". It is mandatory for all infrastructure work financed by those institutions to follow this conditions of contract. This condition of contract clearly gives option for arbitration. Here below the steps followed to settle dispute/claim under this MDB Harmonized Conditions of contract will be highlighted briefly.

1. If the contractor considers himself to be entitled to any claim, first he will give his notice to the Engineer within the next 28 days after he became aware or should have become aware of the event and also he will give his fully detailed claim within 42 days after he became aware or should have become aware of the event or within such other period as may be proposed by him and approved by the Engineer.
2. Then the Engineer will be expected to respond to the claim within 42 days after receiving the claim or within such other time proposed by him and approved by the contractor.
3. If the Engineer does not respond within the timeframe stated above, any of the parties can refer its case in writing to the Dispute Board (can be one or three person/s based up on the agreement of the parties) with copies to the other party and Engineer. However, as per under sub-clause 20.8 if there is no Dispute board in place, the dispute will directly referred to arbitration.
4. The Dispute Board will give its decision within 84 days after receiving the case or within such other time proposed by the Dispute Board and approved by both parties.
5. If the DB failed to give its decision within the timeframe stated above, any of the parties may give its notice of dissatisfaction and intention to commence arbitration to the other party within 28 days of the expire of DB"s 84 days or if either of the party dissatisfied with DB"s decision, then the disappointed party may within 28 days after receiving of such decision give its notice of dissatisfaction and intention to commence arbitration to the other party.
6. At this point MDB Harmonized Conditions of contract will give chance to the parties to attempt to solve their dispute amicably before the commencement of arbitration. However, if the parties are not agreed, arbitration may begin on or after the 56 days after the day on which the notice of dissatisfaction and commencement was given to the other party.

As per the MDB Harmonized Conditions of contract unless otherwise the parties agreed, for the contracts with foreign contractors, the place of the international arbitration will be the city where the headquarters of the appointed arbitration institute is located and the rules of the proceeding will be based at the choice of the institution either in accordance with the arbitration rules of the institution or in accordance with UNCITRAL arbitration rules. However, for the contracts with domestic contractor, the arbitration proceedings will be conducted in accordance with the laws of the Employer‟s country. The language of the proceeding will be the language stated in the contract data. MDB Harmonized condition of contract is being widely used in the developing countries.

2.4.2.4) Dispute settlement under 2005 PPA General Conditions of contract

PPA conditions of contract are prepared by the Public Procurement Agency of Ethiopia for the purpose of international competitive biddings. This conditions of contract also gives an option for arbitration in settlement of dispute arising in relation to the contract. Under clauses 24 and 25 of the general condition, the following steps are listed.

1. Similar to the above conditions of contract, the Engineer (who is appointed by the Employer for supervising the execution of the works and administering the contract) will give his decision for disagreement happened.
2. And if the contractor is dissatisfied with decision of the Engineer or if he believes that a decision taken by the Engineer was outside the authority given to the Engineer by the Contract, within 14 days of a recipient of such decision will refer the case to the adjudicator (a person appointed jointly by the Employer and the Contractor to resolve disputes).The adjudicator will render his decision within 28 days from the receipt of a notification of a dispute.
3. Finally up on the dissatisfaction of the adjudicator‟s written decision, either of the party can appeal the matter to arbitration.

PPA conditions of contract leaves the place and the name of the arbitral institution for the parties so that they will agree on it in the special conditions of contract.

2.4.2.5) Dispute settlement under 2011 PPA General Conditions of contract

Sadly, the newly implemented 2011 PPA General Conditions of contract has removed the arbitration clause that was written in the previous 2005 PPA General Conditions of contract. As per 2011 PPA conditions of contract if any disagreement or dispute happened between the Procuring Entity and the Supplier under or in connection with the Contract, they shall make every effort to resolve amicably by direct informal negotiation. However, if the parties are failed to resolve such a dispute or difference by mutual consultation within twenty-eight (28) days from the commencement of such consultation, either party may require that the dispute be referred for resolution to the formal mechanisms specified in the Special conditions of contract. Therefore the current 2011 PPA General conditions of contract do not have a room for arbitration clause. This may somehow discourage arbitration in the country.

2.5) The General arbitration rules under Ethiopian law

Now the requirements needed to inter into arbitration agreements and the rules of arbitration proceedings under the 1960 Civil Code (CC) and the 1965 Civil Procedure Code (CPC) will be discussed briefly.

2.5.1) Arbitration Agreements under Ethiopian Law

Redfern et al. (2004) explains that "An agreement by the parties to submit to arbitration any disputes or differences between them, is the foundation stone of modern commercial arbitration." Which means arbitration is valid, if only there is a valid agreement to arbitrate between parties. Arbitration agreement shows the parties consent to solve their differences or disputes through arbitration and a valid arbitration agreement is acceptable in national laws as well as in international treaties.

Under Ethiopian law also it has recognition. In the Civil Code and Civil procedure Code of Ethiopia, words arbitration agreement, arbitration submission and arbitration clause refer the same thing (Bezzawork, 1994). However, as per Teclehagos (2011) their slight difference is

that arbitration submission is relating to the existing disputes while arbitration clause considers future disputes that might arise in the course of the performance of contractual obligations. And also the former exists separately of the main agreement contract and the latter is inserted as a clause in the main contract.

Article 3325 (1) of the civil code defines an arbitral submission (arbitration agreement) as a "contract whereby the parties to a dispute entrust its solution to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the principles of law." As per this definition arbitration agreement is a contract. Therefore as a contract it should fulfill not only the special provisions relating to arbitration but also the general provisions of contract (Bezzawork, 1994).

2.5.1.1) Special provisions relating to arbitration agreements

There are special provisions under the civil code and civil procedure code which the parties in arbitration agreement should consider so that their agreement will be valid.
These are:

1. Article 3326 of the civil code says, "The capacity to dispose of a right without consideration shall be required for the submission to arbitration of a dispute concerning such right." This is explained by Bezzawork(1994) in his article as:

   > "where the party to an arbitral agreement is a physical person, the basic requirement that he must be capable, i.e. free from all disabilities, where the party is a juridical person, such person must be endowed with a legal personality… where the parties are acting on behalf of other persons, either physical or juridical, then, a special authority to settle a dispute by arbitration is required. That special authority is derived from the principal who has the necessary capacity. Where the principal is a juridical person, such as, a business organization, it is derived from its governing body, i.e. the board of directors."

2. As per article 3328(3) of civil code, "An arbitral submission relating to future disputes shall not be valid unless it concerns disputes which flow from a contract or

other specific legal obligation". That means the parties should not have to use a narrow arbitration clause. The arbitration clause should be wide enough to describe all sorts of disputes that may arise. This is because courts will enforce the arbitral award only when they are convinced that the dispute is covered by the arbitration agreement (Art 3344 of C.C). Bezzawork (1994) gives the following example to clarify it **"**a formation such as „a dispute arising under the contract" is held to be a narrow one while „all disputes arising out of the contract or in connection with it" is considered to be a broad one".

3. As per article 315 of civil procedure code "No arbitration may take place in relation to administrative contracts as defined in Art.3132 of the civil code or in any other case where it is prohibited by law…"). Therefore the parties in arbitration agreement should verify that they are making their arbitration agreement on matters that are arbitrable. The dispute must be capable of settlement by arbitration as per the law of the country otherwise there may not be enforcement.

4. As per article 3326 (2) of the civil code, "The arbitral submission shall be drawn up in the form required by law for disposing without consideration of the right to which it relates." Unlike some contracts like guarantee or insurance policy, submission to arbitration for disputes arising out of construction contracts, can be made orally or it can be in writing (Bezzawork, 1994).

2.5.1.2) General provisions relating to arbitration agreements

In addition to the above special provisions, since arbitration agreement is a contract, the requirements for the validity of contract have to be also applied to it without the prejudice to the other special provision of arbitration (Zekarias, 1994).

Therefore, the general requirements needed for the parties in arbitration agreement as any contract demands are:

1. As per article 1678 of civil code, No valid contract shall exist unless,

a) The parties are capable of contracting and give their consent sustainable at law.

b) The object of the contract is sufficiently defined and possible and lawful.

c) The contract is made in the form prescribed by law, if any.

2. There should be an offer by one party and acceptance by another party without reservation and as per article 1681(1) of the civil code "offer or acceptance may be made orally or in writing or by signs normally in use or by a conduct such that, in the circumstance of the case, there is no doubt as to the party"s agreement."

Generally construction contract arbitration clauses fulfilling the above requirements are enforceable under Ethiopian law.

2.5.2) Arbitration procedures under Ethiopian law

Now we will assess some of the important rules relating to arbitration proceedings under Ethiopian law.

2.5.2.1) Appointment of Arbitrators

Constitution or establishment of arbitral tribunal is obviously the primary step in arbitration procedure. Under Ethiopian law, parties are normally free in appointing their arbitrators provided that each party is treated equally (Art 3331 and 3335 of Civil Code). They can appoint arbitrators in their arbitration agreement, either by specifying the names of arbitrators or by specifying the procedure of appointing arbitrators without necessarily mentioning the name of arbitrators. They can also refer the appointment of arbitrators to other arbitral codes or arbitration rules of institution. However, if the parties are failed to do these, the relevant provisions of the civil code would be applicable (Art 3331-3343 of civil code). As Zekarias (2007) explained in his article, these provisions of the civil code are:

> "...intended to fill the vacuum left by parties in the event that they were not careful enough to fix the number of arbitrators or the procedure by which they shall be appointed, without, prejudice to provisions of article 3335 of the civil code."

As per these provisions of the civil code, if the parties are failed to agree, the number of the arbitrators shall be three (Art 3331(3) and 3332(1) of civil code).The manner of appointment

will be: first the concerned party shall have to specify the dispute he wishes to raise and appoint an arbitrator and give notice of his action to the other party or the person entrusted with the appointment of the arbitrators in the arbitration agreement. Then the notice receiving party, or somebody authorized by him, will be given 30 days after receiving such a notice to appoint his arbitrators. And finally the two arbitrators will appoint their presiding arbitrator (Art 3332-3334 of civil code).

However, if notice receiving party or somebody authorized by him failed to appoint his arbitrator within the given 30 days, or if the arbitrators failed to appoint their presiding arbitrator, the appointment shall be made, upon request of a party, by the court (Art 3332(3) & 3334(1) of civil code) (Zekarias, 2007).

2.5.2.2) Replacement of arbitrator

As per the provision of the civil code article 3336(1), in case arbitrator is refused to accept his appointment or he has died after having accepted his appointment or he became incapable after his appointment or he resigned after having accepted his appointment, the code permits the replacement of such an arbitrator. The manner of his replacement shall be **"…**by the procedure prescribed for his appointment…" (Art 3336(1)).

2.5.2.3) Disqualification of arbitrator

Similarly, the civil code under its article 3340 lists dawn the grounds for the disqualification of an arbitrator. Where an arbitrator is not of an age or he has been convicted by a court, where he is of unsound mind, ill or absent, where there is any circumstances capable of casting doubt up on his impartiality or independence or where there is any reason that make him unable to discharge his function properly or within a reasonable time, the code again permits the disqualification of an arbitrator. However, article 3341 of civil code provides: "unless otherwise provided, a party may seek the disqualification of the arbitrator appointed by him only for a reason arising subsequently to such appointment, or for one of which he can show that he had knowledge only after the appointment".

The procedure for disqualification of an arbitrator will be: first, the party seeking to have an arbitrator disqualified as soon as he knew the grounds for disqualification shall give his application file to the arbitral tribunal or another authority agreed by the parties and this should be done before the award is given. Then the arbitral tribunal or the authority agreed by the parties will rule up on the application either to disqualify the arbitrator or deny the application. However, up on the denial of the application, the party seeking the disqualification of arbitrator can appeal to court within 10 days of receiving such a decision.

2.5.2.4) Removal of arbitrator

The code also permits either of the parties to apply for the removal of an arbitrator who unduly delays his duties having accepted his appointment (Art 3343 of civil code). Regarding the manner of the removal of an arbitrator, article 3334 says "the authority agreed up on by the parties or, on the absence of such agreement, the court, may remove the arbitrator up on the application of either party."

To end up, article 3336(2) of the civil code also says "Where an arbitrator is disqualified or removed**,** the new arbitrator shall be appointed by the court."

2.5.2.5) Procedure before an Arbitral Tribunal

Arbitration proceedings have to be made effectively and fairly. Under Ethiopian law, the main rules governing procedure before the arbitration tribunal are contained in Article 317 of Civil Procedure Code. This article suggests that, the arbitral proceedings should be nearly the same as a proceeding in a court and the tribunal must conduct a fair and impartial trial and afford full and equal opportunity to both parties. That is an equal chance should be given for disputing parties to present their relevant and permissible evidence otherwise the court will invalidate the arbitration resolution where the tribunal disregards basic principles of justice (Art 351 of C. Pr. C).

2.5.2.6) The Challenge and Enforcement of Arbitral Awards under Ethiopian law

Under Ethiopian civil procedure code of article 318(2), an arbitral award is required to be made "in the same form as a judgment." That means like a judgment an arbitral award must be in writing and signed by the arbitrators. It must also contain the points for determination, the decisions and the reasons for such decisions and where it has been rendered by a majority decision, the minority must also state in writing the decision which it thinks should be made together with the reasons (Art. 181 (1) and (2) of civil procedure code). And up on the fulfillment of the requirements of the law, the arbitral award can 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" (Art 319(2) of C. Pr .C).

Parties in arbitration have a right to appeal from the awards of arbitrators to ordinary court for any of the grounds lay down under article 351 of the civil procedure code. However, the award may be remitted for the reconsideration to the arbitrator who made it only for a case where "the award is inconsistent, uncertain or ambiguous or is on its face wrong in matter of law or fact;" or "where the arbitrator omitted to decide matters referred to him". In case of remission of an award, unless otherwise directed in the order or remission, the arbitrator will be required to make his second award within three months (Art 345(2)) .But parties can waive their right of appeal, provided that they are with full knowledge of the circumstances (Art. 350(2) C. Pr. C).

Also an arbitral award may be set aside on the following grounds when: (a) the arbitrator decided matters not referred to him or made his award pursuant to a submission which was invalid or had lapsed; (b) the arbitrators, being two or more, did not act together; or (c) the arbitrator delegated any part of his authority to a stranger, to one of the parties, or to a co-arbitrator (Art 356 of civil procedure code).Up on these grounds, application to set aside awards can be made to a court within 30 days from the date of making of the award.

Having brief overview of the rules of arbitration under Ethiopian law, in the following section of the paper the arbitration rules under the prominent arbitration institute of the

country will be discussed briefly. Addis Ababa Chamber of Commerce and Sectoral Associations Arbitration Institute is the only local arbitration institute in the country at this time.

2.6) Revised Arbitration Rules of AACCSA Arbitration Institute

The current arbitration Rules AACCSA AI was put into force on November 25of 2008 (AACCSA arbitration rules, 2008). Here below the arbitration procedure promulgated as per this new rule of the institute will be discussed.

2.6.1) Initiation of arbitration proceedings in AACCSA AI

If the parties want to settle their dispute through arbitration under the administration of the AACCSA AI, their intention should be stated as clearly as possible in their written arbitration clause. Therefore the AACCSA AI provides a model arbitration clause:

> "Any disputes, controversies or claim arising out of or relating to this contract, or the breach, termination or invalidity or any subsequent amendment of this contract thereof, shall be settled by arbitration in accordance with the Arbitration rules of AACCSA Arbitration Institute as at present in force."

As per AACCSA rules, the arbitration agreement should be in writing and the parties are advised to incorporate in their agreement an arbitrator appointing authority, number of arbitrators, and place and language of arbitration (AACCSA arbitration rules, 2008). This is may be to avoid waiting periods and additional disputes.

The chamber‟s arbitration proceeding is launched when the claimant hands in the request for arbitration to the institute. The applications for arbitration should satisfy all the necessary requirements listed under the rules of the institute such as the contact information of both parties, a description of the dispute and a copy of the arbitration agreement and so on (AACCSA arbitration rules, 2008). And also it should be accompanied with all relevant documents on which the claimant‟s claim based and the advance payment needed by the institute. When the secretariat of AACCSA AI deems that the claimant has completed all the formalities, it shall immediately send to the respondent a notice of arbitration together with

one copy each of the claimant's application for arbitration and its attachment together with all necessary requirements of the institution. And as per the AACCSA arbitration rules, the respondent should respond within 45 days from the date of receipt of the notice of arbitration.

Generally the Initiation of arbitration proceedings is regulated as per articles 6, 7 and 8 of the arbitration Rules of the institute (AACCSA Arbitration Rules, 2008).

2.6.2) Composition of Arbitral Tribunal in AACCSA AI

The parties are free to agree on the number of arbitrators while executing arbitration under the AACCSA Rules. However, if there is no agreement on a number of arbitrators, the arbitral tribunal shall consist of three arbitrators unless the institute looking on the complexity of the case and other circumstances decided for sole arbitrator.

For a case of three arbitrators, each party has to appoint one arbitrator; whereas the third arbitrator who is going to be the chairperson of the tribunal is then appointed by the two previously chosen arbitrators. But where a party fails to nominate an arbitrator within 20 days of the receipt of a request for the nomination of an arbitrator or where the arbitrators failed to appoint the chairperson of the tribunal within 20 days of their appointment, the Institute shall make the nomination.

For a case of sole arbitrator, the parties shall jointly nominate the arbitrator. If parties failed to nominate the sole arbitrator within 20 days from the receipt of the statement of claim by the respondent, again the Institute shall make the nomination, unless otherwise agreed by the parties (Article 10 of AACCSA AI rules).

For the case of parties with different nationalities, the Institute may appoint a sole arbitrator or Chairman of the Arbitral Tribunal of a nationality other than that of the parties, unless the parties have agreed differently.

Finally as per articles 12 and 13 of the AACCSA AI Rules, the Institute confirms the arbitrator‟s impartiality and independency. Therefore the arbitrators will be contacted directly after they have been nominated and be summoned to fill out a standard form which

will secure impartiality and independence. The Secretariat of the institute shall provide such information to the parties in writing and fix a time limit for any comments from them.

2.6.3) Challenge of arbitrators under AACCSA AI

Article 14 of the AACCSA AI Rules regulates the procedure for challenging of an arbitrator and as per this article, the party who intends to challenge an arbitrator has to send in a written statement about the reasons for the challenge to the Director of the Institute within 15 days from the date on which the arbitrator is appointed or the evidently disqualifying circumstance became known to the party. However, the party can challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

Up on receiving of the notification of the challenge, the Director of the Institute shall provide the parties and the arbitrators the opportunity to comment on the challenge and then the final decision will be made by the Institute.

2.6.4) Removal and Replacement of an Arbitrator under AACCSA AI

An arbitrator will be replaced as per article 15 of the institute upon his death, upon the acceptance by the Institute of Arbitrator's resignation, upon the acceptance by the Institute of a challenge or upon the request of all the parties. However, the institute has the possibility to remove an arbitrator if he is prevented from fulfilling his functions in accordance with the Rules or within the prescribed time limits. As per sub article 4of above mentioned article "Where an arbitrator nominated by a party dies, the party in question shall nominate another arbitrator and where an arbitrator nominated by the Institute dies, the Institute shall appoint another arbitrator."

However, if an arbitrator is resigned or removed, he will be replaced by the Institute. And also up on the consideration of the views of the parties and the arbitrators, the Institute may decide whether only the remaining arbitrators shall proceed with the case.

2.6.5) Procedure before an Arbitral Tribunal under AACCSA AI

General Principles of the institute regarding the proceeding before the arbitral tribunal is that the tribunal should ensure that the parties are treated with equality and are given a full opportunity of presenting their case (Art 17 of AACCSA AI rules). However, in the absence of either party request to hold hearings, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

As per article 19 and 20 of the institute‟s rule, unless the parties agreed up on it, the place and the language of the proceeding will be decided by the arbitral tribunal having regard to all relevant circumstances of arbitration.

2.6.6) Award and Termination of the Arbitration Proceeding under AACCSA AI

Under the AACCSA Rules, the award must be rendered within six months as of the date of arbitral tribunal constitution (Article 24 AACCSA Rules). However, in special cases the institute can extend this period of time.

For in case of three arbitrators, any order or other decision of the arbitral tribunal shall be made by a majority of the arbitrators. But when there is no majority or when the arbitral tribunal so authorizes, with the subjection to revision by the arbitral tribunal, the decision may be made by the presiding arbitrator. As per the rules of the institution, an award shall be made in writing and also unless otherwise agreed by the parties before the commencement of the arbitration, it shall be final and binding to the parties (Article 26 of AACCSA AI rules).But the reasons upon which such award is based should be stated by arbitral tribunal unless the parties have agreed that no reasons are to be given.

Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to interpret the award or to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature (Article 30 of AACCSA rule). Also within thirty days after the receipt of the award either of the

party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

Under AACCSA AI rules in addition to making a final award, the arbitral tribunal shall have the power to either issue an order for the termination of the arbitral proceedings or record the settlement in the form of an arbitral award on agreed terms (Art 28 of AACCSA rules).

2.6.7) Costs of the Arbitration Proceeding under AACCSA AI

The costs of the arbitration proceeding in AACCSA shall include the fees and expenses of the arbitrators, the administrative expenses fixed by the Institute, the fees and expenses of any experts appointed by the Arbitral Tribunal, and the reasonable legal and other costs incurred by the parties for the arbitration (Art 33 of AACCSA AI rules). At the beginning of proceeding upon filing the Request, the Claimant shall pay a non-refundable registration fee of 500 ETB. The advance on costs in an amount likely to cover the fees and expenses of the arbitrators and administrative costs shall be fixed by the Institute and it shall be payable in equal shares by the claimant and the respondent.

However, in the final award of the arbitration, the Arbitral tribunal shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall bear them.

The fees of an arbitrator shall be fixed by the institute in accordance with the scale set out as Annex 1 of AACCSA IA rules (illustrated below). However, if it is deemed necessary due to the exceptional circumstances of the case, the Institute may fix the fees of the arbitrators at a figure higher or lower than that of fixed by the institute (Art 32.1 of AACCSA AI rules).

Table 2.1: Arbitrators' Fee Schedule of AACCSA Arbitration Institute

(AACCSA arbitration rules, 2008)

Amount in Dispute	Minimum (Birr)	Maximum (Birr)
Up to 50,000	10,000	15,000
From 50,001-100,000	10,000+10% of the amt. above 50,000	15,000+25% of the amount above 50,000
From 100,001-500,000	15,000+5% of the amt. above 100,000	27,500+12.5% of the amt. above 1000,000
From 500,001 -1,000,000	35,000 + 4% of the amt. above 500,000	77,500 + 10% of the amount above 500,000
From 1,000,001 - 2,000,000	55,000 + 3% of the amt above 1,000,000	127,500 + 7.5% of the amt. above 1,000,000
From 2,000,001 -5,000,000	85,000 + 1% of the amount above 2,000,000	202,500 + 2.5% of the amount above 2,000,000
From 5,000,001- 10,000,000	115,000 +0.5% of the amount above 5,000,000	277,500 +1.5% of the amount above 5,000,000
From 10,000,001- 50,000,000	140,000 +0.3% of the amount above 10,000,000	352,500 +0.75% of the amount above 10,000,000
From 50,000,001- 80,000,000	260,000 +0.25% of the amount above 50,000,000	652,500 +0.6% of the amount above 50,000,000
From80,000,000- 100,000,000	335,000 +0.2% of the amount above 80,000,000	832,500 +0.5% of the amount above 80,000,000
Above 100,000,000	375,000 + 0.1% of the amount above 100,000,000	932,500 + 0.25% of the amount above 100,000,000

The Institute shall prepare an estimate of the costs of Arbitration and request each party to deposit an equal amount as an advance for those costs. The amount shall be determined in accordance with the schedule provided under Annex II of the arbitration rule of the institute (illustrated below).

Table 2.2: Administrative service Fee Schedule of AACCSA Arbitration Institute (AACCSA arbitration rules, 2008)

Sum in dispute in ETB	Administrative expenses
Up to 50,000	2,500
From 50,001 to 100,000	2500 + 3.50% of amount over 50,000
From 100,001 to 500,000	4250 + 1.70% of amount over 100,000
From 500,001 to 1,000,000	11,050+1.15% of amount over 500,000
From 1,000,001 to 2,000,000	16,800+0.60% of amount over 1,000,000
From 2,000,001 to 5,000,000	22,800+0.20% of amount over 2,000,000
From 5,000,001 to 10,000,000	28,800+0.10% of amount over 5,000,000
From 10,000,001 to 50,000,000	33,800+0.06% of amount over 10,000,000
From 50,000,001 to 80,000,000	57,800+0.06% of amount over 50,000,000
From 80,000 001 to 100,000,000	75,800
Over 100,000,000	75,800

3) METHODOLOGY

3.1) Research Methodology

The following research methodologies have been employed in order to achieve the objectives of this research.

1. Case study

The information of construction disputes cases has been taken from local courts and local arbitration institute in order to investigate the duration of their settlement. This is done in order to assess the effectiveness of court and arbitration in solving local construction disputes.

2. Questionnaires

Slightly separate questionnaires have been designed and distributed for contractors and clients in order to assess their awareness level about arbitration, effectiveness of local courts and local arbitration institute.

3. Interviews

Interviews have been also conducted with professional who has tremendous experiences on the subject matter of the research. This is done in order to investigate the current situation of arbitration in the industry and to identify what should be done to promote arbitration in the future in solving disputes arising in the construction industry of Ethiopia.

4) ANALYSIS AND DISCUSSION

4.1) Analysis and Discussion based on the information of case studies

The information of the cases was taken from the federal Supreme Court of Ethiopia and from the Addis Ababa Chamber of Commerce and Sectoral Associations Arbitration Institute (AACCSA AI). This is done just to know how much time the disputes have taken during their settlement. The information from the cases is summarized in tables below.

Table 4.0: The duration of three construction disputes settled through court.

Case	The disputants	The project and its cost	Estimated time for project completion	Reason of the dispute	Date of start for the dispute to be settled in a court	Date at which the dispute got its final judgment	Total time taken	Duration of dispute versus duration of the project
1	Urban Development, Trade and Industry Office of Adigrat town and Ambachew Asgidom Building Contractor	Construction of drainage line for a city of Adigrat with amount of 5,566,276.01 ETB	160 days	The contractor is unable to finish the project within the specified time even though he is granted additional 100 days	May 26, 2009 in Supreme Court of Tigray	October 28, 2012 in Federal Supreme Court	504 days (in Supreme Court of Tigray) + 379 days (in Federal Supreme Court of Ethiopia) = 883 days (2 year and five months)	more than 5 times the duration of the project
2	Dawtrom General Contractor and Addis Ababa Broadcasting Agency	construction of studio for radio broadcasting and installation of broadcasting equipment with amount of 1,126,164.75 ETB	90 days	The client breached the contract and gave it to the other contractor b/c the former contractor is unable to install the broadcasting equipment within the agreed time	October 6, 2011 in Federal High Court of Ethiopia	November 11, 2013 in Supreme Court of Ethiopia	264 days (in Federal High Court) + 496 days (in Federal Supreme Court) =760 days (2 years and 1 month)	7 times the duration of the project.
3	Baro Construction Plc and The Ethiopian Roads Authority	Construction of rural road between Gog to Akobo towns in Gambela with amount of 45,547,030.00 ETB	1080 calendar days	Due to non- completion of the project on time, the Employer terminated the Contract and take possession of the equipment and machineries of the contractor on site	June 7, 1998 in Federal High Court of Ethiopia	October 27, 2012 in Federal Supreme Court of Ethiopia	more than 8 years(in federal High Court) + 384 days (in arbitration)* + 1042 days (in Federal Supreme Court)**= 14 years & 4 months	Almost 5 times the duration of the project

*On October 16, 2006 the disputants asked the federal high court to solve their case through arbitration and as a result arbitration is commenced.

**The Federal Supreme Court of Ethiopia after analyzing the case rendered its judgment without changing the decision made by the Arbitral Tribunal

Table 4.1: The duration of three construction disputes settled through arbitration

Case	The project and its cost	Reason of the dispute	Date of start for the dispute to be settled in a in the AACCSA	Date at which the dispute got its final award	Total time taken	Cost of the dispute	Cost of the arbitration procedure
1	Construction of bridge in southern Wello with a cost of 1,510,404.25 birr	Lack of payment for additional work by the Employer	On October 5, 2012 the contractor noticed the Institute to commence arbitration.	On September 23, 2013, the final award rendered by the tribunal is approved by the institute	353days (almost 12 months)	516,392.07 birr	35,655.68 birr for arbitrators and 11,869.50 birr for administrative services
2	Construction of school with a cost of 1,286, 060.065 birr	Even though the contractors is completed the construction, the employer is not willing to pay full payment	On December 18, 2012.	August 11, 2013	237 days (almost 8 months)	806,924.85 birr	47,276.95 birr for arbitrators and 14,579.65 birr for administrative services
3	Construction of G+2 building with a cost of 4,077,379.8 birr	Due to non-provision of construction materials by the employer as per the contract, the contractor claimed additional payment	May 14, 2012	September 24, 2013	460 days (almost 15 months)	1,831,654.39 birr	A total of 110,739.55 birr (for the administrative services and arbitrators)

Table 4.2: Comparison of the duration of disputes settled by court and arbitration

Cases settled by court			**Cases settled by arbitration**		
Case	Project cost	Total time taken	Case	Project cost	Total time taken
1	5,566,276.01 ETB	2 years and five months	1	1,510,404.25 ETB	Almost 12 months
2	1,126,164.75 ETB	2 years and 1 month	2	1,286,060.065 ETB	Almost 8 months
3	45,547,030.00 ETB	14 years and 4 months	3	4,077,379.8 ETB	Almost 15 months

Comparing the tabulated information of the three cases of disputes settled by arbitration in Addis Ababa Chamber of Commerce Arbitration Institute with the information of three cases of disputes settled by the court, the following points can be concluded.

First, the settlement of construction disputes through court takes more duration than the settlement of construction disputes through arbitration. In the above tables, the project cost of the third arbitration case and the first court case are comparable, however, the time taken to settle the latter through court is almost twice the time taken to settle the former through arbitration. Even though the project cost of the second court case is less than the project cost of second arbitration case, the time it took to be settled through court is more than three times the time the latter took through arbitration. Also as it is shown in the third court case (Table 4:0), the Federal High Court took eight years to settle the dispute without giving any decision and additionally the Federal Supreme Court took around three years to render its final judgment. However, the arbitral tribunal took only one year to render its final decision for the same case.

The second, we can say is that, proceedings in the court are most likely to be followed in a series of appeals to superior courts. From the above mentioned three court cases, none of them were completed in the court level at which they were started. This makes the court process also to be expensive.

Thirdly, it is also observed that as a size of the project gets bigger, the dispute arising from it becomes more complicated to be settled through court. This is because court judges have no technical knowledge about construction. And this is clearly reflected in the third court case. As per the report stated by the Supreme Court Judgment of this particular case, the reason for the parties to withdraw their case from the Federal High Court in order to settle it through arbitration is that, they understood the technical difficulty of their dispute for judges in Federal High Court. This shows that construction disputes are not suitable for court because of their technical content, especially when they arise from big projects.

Lastly, as it is seen in third court case, the award given by arbitral tribunal was not amended by the Federal Supreme court of Ethiopia. This shows that an award from arbitration by arbitrators is most likely to be an accurate. This is because, most of the time in arbitration, the arbitral tribunal is composed of arbitrators with legal and technical background; which will empower the tribunal to see the dispute from technical as well as legal perspective.

4.2) Analysis and discussion based on the questionnaire distributed for contractors

This analysis and discussion is done based on the questionnaire distributed for local contractors. The lists of the contractors were taken from Ethiopian Local Contractors Association. Simple random method was used to select a sample from the list of registered contractors under the Association. Only Grade 1, Grade 2 and Grade 3 contractors are used for the study. This is because the researcher believed that contractors with good capital are relevant for the study and also have high experiences with the research topic under investigation. Therefore contractors below Grade 3 are not included under the study.

The questionnaire was distributed for 40 local contractors, of which:

- 25 are Grade 1 contractors (Building and General contractors)
- 5 are Grade 2 contractors (Building and General contractors)
- 10 are Grade 3 contractors (Building, Road and General contractors)

Out of the 40 contractors only 30 responded for the questionnaire. This implies 75% of the targeted contractors. Thus the following analysis and discussion is based on the response made by these contractors.

4.2.1) Assessment regarding disputes in the Construction Industry of Ethiopia

The complexity of construction project makes it to face different kinds of disputes in different stages. In this part of the questionnaire, contractors are asked about the amount and kinds of disputes they face in executing their construction project.

As per the survey, in annual bases 48.3 percent of the respondents encounter one up to five disputes while 3.4% of them encounter six to ten disputes. The rest 48.3 percent responded that they will encounter almost zero disputes annually.

In fact from the contractors under the survey, 78.6 percent of them are in charge of 1-5 projects annually while 17.9% are in charge of 6-10 projects. But 3.5 percent of them admitted that they win 10-15 projects in annual bases.

The above replies of the contractors implies that more than 50 percent of them encounters considerable amount of potential disputes which can lead them to go to court if not solved amicably. We can imagine how many construction disputes will happen in a given year in the country and how local courts will be crowded with these disputes. This shows that alternative dispute resolution methods should be encouraged and improved in the country to solve these flourishing disputes in effective and efficient way.

The majority of disputes in the current construction sector of the country as per the survey are described in the table below.

Table 4.3: Responses of contractors for the types of disputes in construction industry of Ethiopia

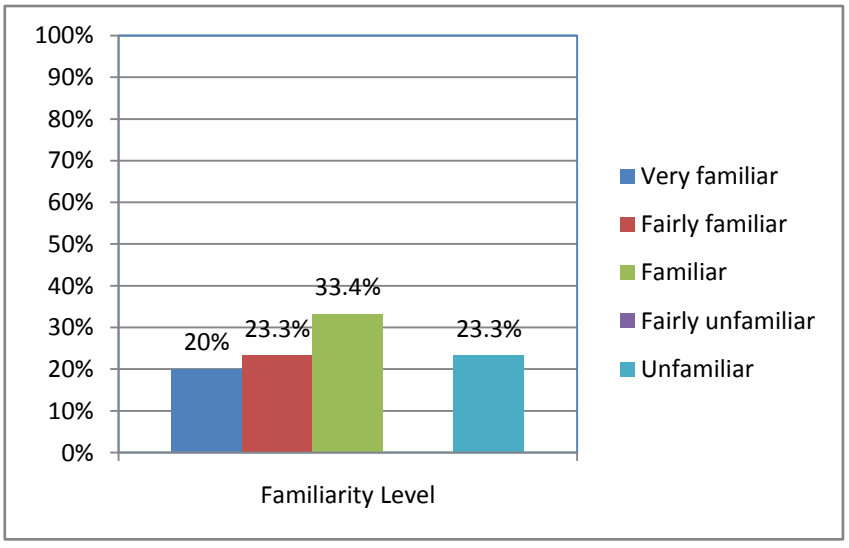
Sources of disputes	Percentage responses of contractors				
	Infrequent	Fairly infrequent	Frequent	Fairly frequent	Very frequent
Financial	10.3%	27.6%	34.5%	10.3%	17.3%
Contractual	7.2%	32.1%	32.1%	21.4%	7.2%
Defective work	13.8%	34.5%	27.6%	24.1%	0%
Variation	7%	13.8%	37.3%	24.1%	17.2%
Other					

Form the above replies, we can say that financial and variation disputes are very frequent in the current construction sector of Ethiopia.

4.2.2) Assessment regarding arbitration

Under this part of the questionnaire, the familiarity level of contractors with arbitration and their participation level in arbitration proceedings as one of the dispute parties are assessed. The responses of the contractors are shown in the charts below.

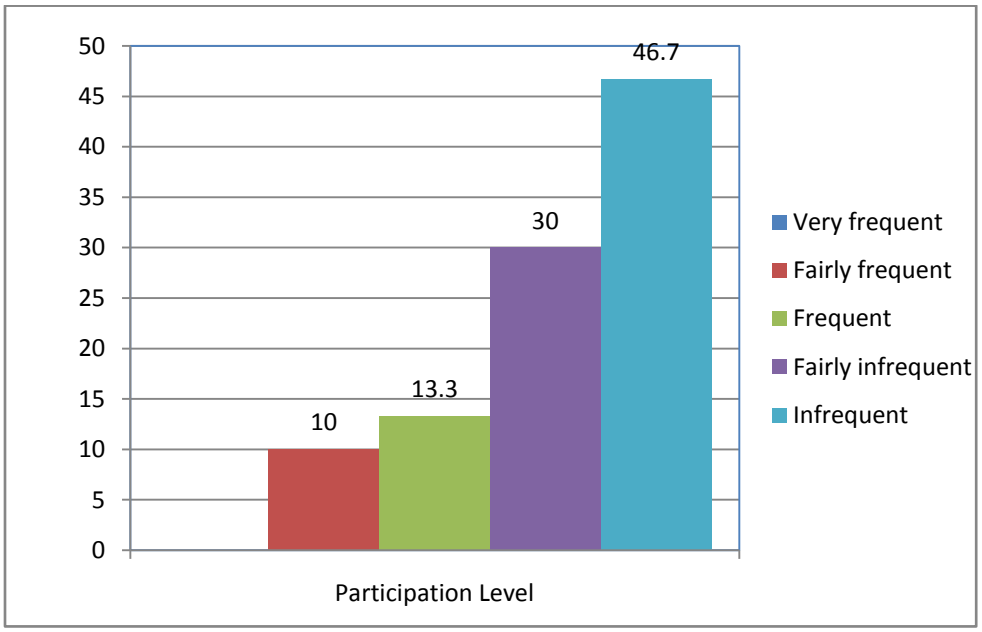
Chart 4:1 Familiarity level of contractors about arbitration



From the chart, even though most of the respondents are familiar with arbitration, but 23.3 percent of the respondents are totally unfamiliar with arbitration. This shows that still awareness creation should be done about arbitration for construction parties of the country.

Here below is also the participation level of the respondents in any arbitration proceedings.

Chart 4.2: The participation level of contractors in arbitration proceedings.

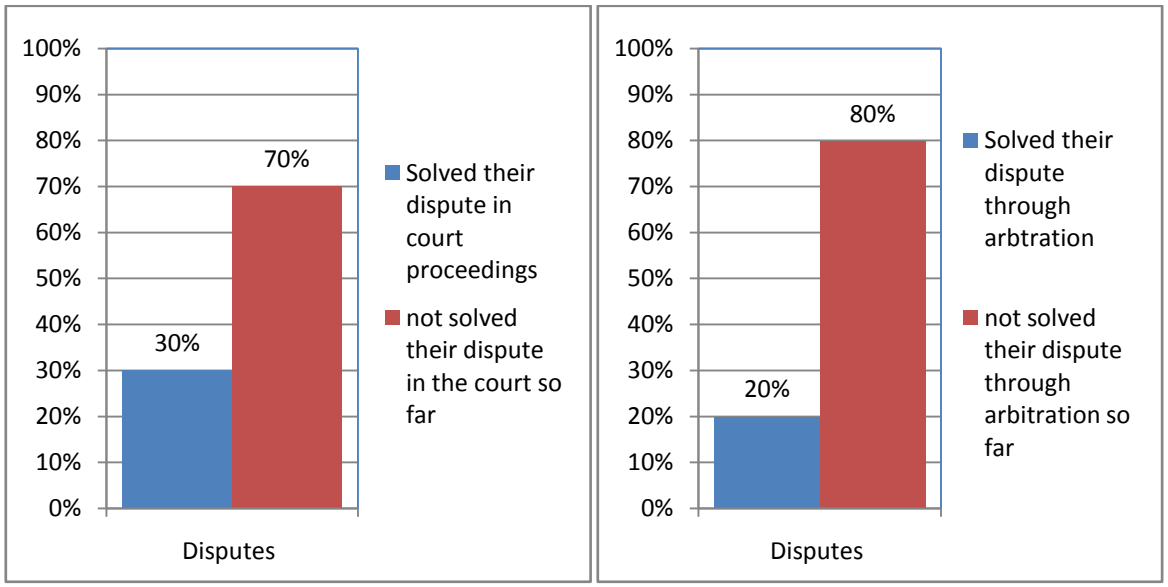


As it is seen from the chart, more than 46 percent of the respondents are infrequently participated in any arbitration proceedings so far, which means arbitration proceedings are new for them. They have never experienced the merits of arbitration practically. Again this shows that still awareness creation programs should be designed by the responsible bodies in order to indicate the advantages of arbitration for parties in the construction sector.

4.2.3) Assessment about court and arbitration proceeding from contractors

Under this part of the questionnaire also the percentage of respondents who solved their dispute through court and arbitration so far, their satisfaction level during their involvement in court trails and arbitration proceedings, and the time taken in solving these disputes are assessed. The responses of the respondents are shown in the charts below.

Chart 4.3: The percentage of respondents who solved their dispute through court and arbitration



The charts result show that more contractors have chosen court than arbitration as their final dispute resolution method. Since the result of the survey indicates that the number of contractors used court exceeds the number of contractors used arbitration. It reveals that the advantage of arbitration over court is not so much understood by the local contractors. An awareness creation should be done on the importance of arbitration over court litigation for contractors of the country.

Satisfaction levels of contractors who have participated in court and arbitration proceedings are also assessed and the results found are shown below.

Chart 4.4: Satisfaction levels of contractors involved in court proceedings

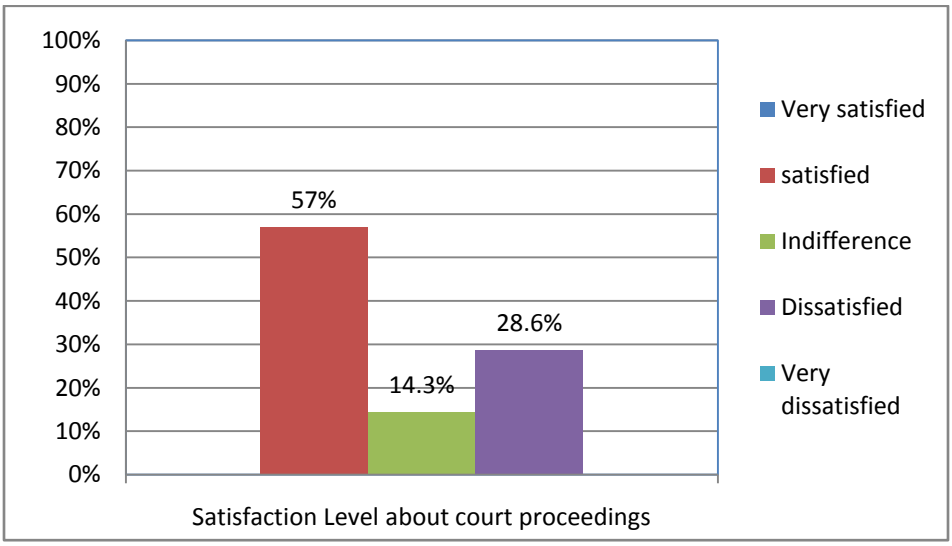
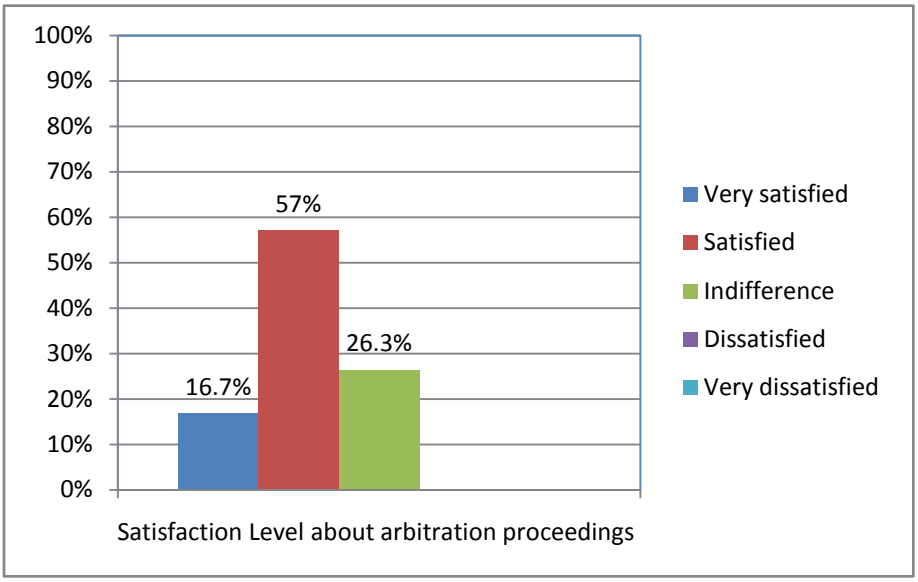


Chart 4.5: Satisfaction levels of contractors involved in arbitration proceedings



From the above charts, we can see that 73.3 percent of contractors who participated in arbitration proceedings are either satisfied or very satisfied. However, only 57 percent of contractors who participated in the court are satisfied. Again even though 28.6 percent of contractors who are involved in the court proceeding are dissatisfied, no contractors are dissatisfied among those involved in arbitration proceedings. This implies that the outcomes of arbitration proceedings are more satisfactory than the outcomes of court proceedings.

The durations taken by the contractors while solving their dispute through arbitration and court proceedings are tabulated below.

Table 4.4: Time taken to solve dispute through court proceedings

Duration	**Contractors who solved their dispute within this time**
< 1 year	16.70%
1-2 years	66.60%
>2year	16.70%
Total	100%

Table 4.5: Time taken to solve dispute through arbitration

Duration	**Contractors who solved their dispute within this time**
< 4 months	66.70%
6-12 months	33.30%
Total	100%

Therefore, we can see from the table that court took 3-4 times longer time than arbitration. This is also revealed in the case study part of this paper. Thus it can be concluded that, in Ethiopia court is a lengthy process than arbitration in solving disputes arising from construction industry.

At last, the contractors were also asked to answer which one they can choose from arbitration and court as their final dispute resolution method and as per the survey, 92 percent of the respondents have chosen arbitration as their final dispute resolution method whereas only 8 percent have chosen court. These responses of the respondents reveal that arbitration is being accepted as a final dispute resolution method among local contractors.

The reasons they mentioned for choosing arbitration as their final dispute resolution method were:

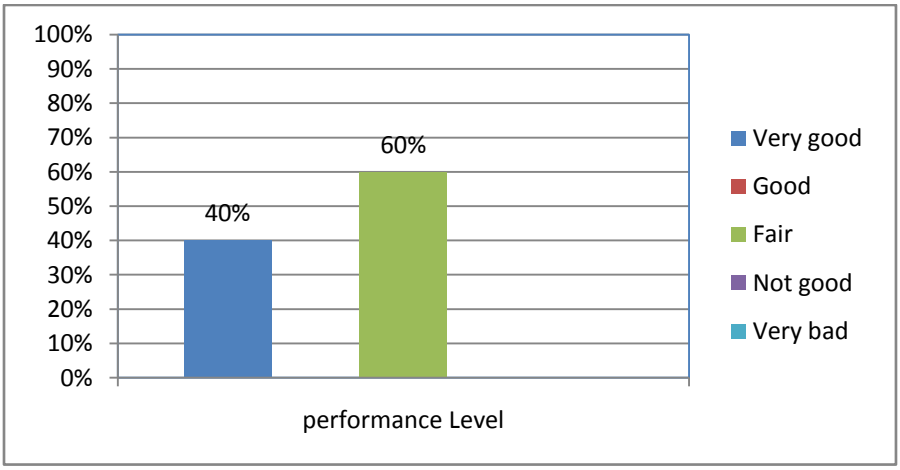
- Unlike court judges , arbitrators know the subject matter of the disputes very well
- Arbitration promotes future smooth relationship among the parties in dispute
- Arbitration takes shorter time than court and also less expensive
- Arbitration gives chance for the parties in dispute to choose arbitrators and institution they like
- Arbitration fits the dispute at hand
- Local courts are busy with other cases as a result take longer time

The respondents confirmed what were discussed as the advantages of arbitration in the literature review of this paper. However, since those 8 percent preferred court than arbitration, it indicates that still there are contractors who are not ready to take their dispute to arbitration. They consider court as effective means of dispute resolution method. The only reason they gave for choosing court as their final dispute resolution method was that court decision are more binding than the award given by the arbitrator/s.

4.2.4) Assessment about local arbitration institute

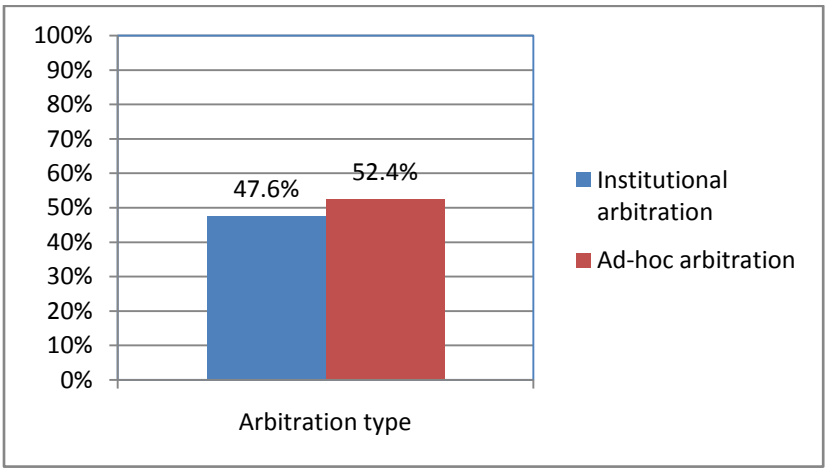
Lastly, under this part of the questionnaire, the performance of the current local arbitration institute and the preference of contractors from the forms of arbitration were surveyed. They are illustrated under the following charts.

Chart 4.6: The performance of local arbitration institute



From the chart we can understand that the performance of local arbitration institute is at least fair. However, more efforts should be exerted by local arbitration institute to highly satisfy its customer.

Chart 4.7: Preference of contractors from the forms of arbitration



Form the two arbitration types, 52.4 percent of the respondents have chosen to use Ad-hoc type of arbitration as it is shown in the above chart. This demonstrates that local contractors are not attracted in institutional type of arbitration

4.3) Analysis and discussion based on the questionnaire distributed for clients

Separate questionnaires were also distributed for major clients in the construction industry of Ethiopia. These clients or employers are governmental companies which offer many construction projects throughout the year. Structured questionnaires are distributed for these public companies.

The questionnaires were distributed for six public companies. The companies were selected because they execute huge amount of projects in the country. As per the survey result, in annual bases, an average of 200 construction projects offered for contractors by these companies and most of the projects are given for local contractors and only very large and complex projects are handed for foreign contractors.

Almost similar questions with that of contractors have also been raised for the clients and their responses are summarized as follows.

As per the responses from the questionnaires of the clients, 50% of the respondents encounter zero disputes in annual bases, and 33.3% encounter 1-5 disputes whereas the rest 16.6% encounter more than 15 disputes annually.

The majority of disputes in the companies under survey are tabulated below.

Table 4.6: Responses of clients for the types of disputes in their companies

Sources of disputes	Percentage responses of Employers				
	Infrequent	Fairly infrequent	Frequent	Fairly frequent	Very frequent
Financial	-	33.3%	33.3%	33.3%	-
Contractual	-	33.3%	-	-	66.7%
Defective work	66.7%	33.3%	-	-	-
Variation	66.7%	-	-	-	33.3%
Other	-	-	-	-	-

As we can see from the table, it can be said that contractual disputes are very frequent in companies.

Regarding their experience with court and arbitration, so far 33.3% of the respondents have solved their disputes through court whereas 33.3%of them have solved their dispute through arbitration and the rest 33.3% of the respondents neither encountered court trail nor arbitration procedure.

From those submitted their case to court, 50% have responded that the court took more than 2 years to resolve their dispute and the rest 50% responded that the court took more than 3 years. However, from those submitted their case to arbitration, 50% have responded that it took about 2 years to resolve their dispute and the rest 50% responded that their case is not yet completed.

On the other hand, the respondents were asked to answer which one they prefer as their final dispute resolution method from arbitration and court and 100% of the respondents were chosen arbitration to be their final dispute resolution method for the future. This shows that all of the respondents do not consider normal court as effective means in solving construction disputes.

The reasons mentioned by the respondents for their preference of arbitration as their dispute resolution method were because: arbitration takes shorter time, in arbitration issues are dealt by professionals with relevant experience, in arbitration parties select arbitrators by themselves and it reduces overall cost of the resolution. These responses of the companies indicate that more awareness is there about arbitration in the major public companies that undertake construction in the country.

66.7% of the respondents preferred institutional arbitration than Ad-hoc arbitration and 16.7% preferred Ad-hoc arbitration than institutional whereas the rest 16.7% preferred both of them. Regarding the performance of local arbitration institute, 16.7% the respondents responded that it is good and 16.7% responded that it is not good whereas the rest 66.7% answered that they don‟t know whether it is good or not. Therefore from this response, we can say that still the local arbitration institute should strife hard in order to be very competent institution rendering satisfactory arbitration services for its customers.

Finally, the general comments from the respondents about arbitration in the current construction industry of Ethiopia were asked and as per their responses, the lower level of know-how about arbitration, lack of enough amounts of professionals and well-organized institution in the country generally discouraged arbitration. Thus from the above comments of the respondents, it can be said that creating awareness programs to increase the construction parties‟ level of know-how about arbitration, training more professions who can be good arbitrators, increasing the number and efficiency of local arbitration institutes are what should be done in order to promote arbitration in the future construction industry of Ethiopia.

4.4) Analysis and discussion based on Expert interview

Interviews were conducted with professionals who had served as an arbitrator in different local construction disputes. Professionals with legal and engineering background were selected for the interviews. The respondents were selected based on their qualification and experience they have about arbitration. The researcher believes that the opinions based on the experience of the expertise are very important to address the research objectives in addition to the questionnaires distributed to contractors and clients.

The interview questions were designed in a way to answer the research objectives. Unlike questionnaires of contractors and clients, open deductive questionnaires were designed for the interview. This is done to get open responses from the experts without any restrictions. The interview questions are attached in the appendices of this research.

4.4.1) The result and analysis of the interview

The results of the interviews are analyzed based on the responses of the experts. In the first part of the analysis, the personal careers of the experts will be presented. In the second part, the interviewees" opinion about the general reasons for disputes in construction industry of Ethiopia will follow. In the third and main part, responses about arbitration by the respondents will be analyzed. Lastly the overall responses of the interviewees will be discussed.

Part 1: General information

Respondent-1 has got his LLB and LLM from Addis Ababa University and London school of law respectively and occasionally serves as an arbitrator and advocator. He has served as an arbitrator for three construction disputes so far. He has also published article on commercial arbitration.

Respondent-2 has BSc in Civil Engineering, MSc in Structural Engineering and PhD in Construction Management and owner and head of Construction Management Consultancy

Office. He acted as an arbitrator for more than fourteen construction disputes so far and of which for six of them acted as presiding arbitrator.

Respondent-3 has BSc in Civil Engineering, PGDip in Sanitary Engineering. He has served as an Adjudicator and also participated in Mediation and Conciliation. He acted as an arbitrator for more than ten Construction disputes so far and in addition, he acted as expert opinion giver in court for different construction disputes.

Respondent-4 has BSc in Civil and Municipal Engineering, Postgraduate Diploma in Arbitration, Diploma in International Commercial Arbitration, Postgraduate Certificate and Postgraduate Diploma in Adjudication, Fellow of Chartered Institute of Arbitrators, London. Also he acted as a presiding arbitrator for different construction disputes.

Respondent-5 is a Lawyer by profession and acts as an advocator. He has also acted as an arbitrator for more than ten construction disputes so far.

Respondent-6 has BSc in Civil Engineering and also specialized in Construction Management. Now he is working as a business development manager in MIDROC Construction.

Respondent-7 has LLB and LLM. He is also an Environmental and Engineering contracts lawyer. He is currently working as Construction Arbitrator, Construction Arbitration Counsel; Legal Advisor related to all construction and also trainer on ADR mechanisms related to negotiation, mediation, conciliation, adjudication and arbitration. So far he acted as an arbitrator for seven construction arbitration cases mostly as Presiding Arbitrator and sometimes as Co-arbitrator.

Part 2: Reasons for disputes in construction

In the second part of the questionnaire, the interviewees were asked where the potentials for the development of disputes in constructions industry exist. They responded as per their experiences as follow.

Respondent-1 sees the potentials for the disputes in construction industry as being the nature of construction project itself, which is very technical. As per his opinion technicality surrounding the construction project is a huge potential for disputes in construction industry. Also he adds that the parties‟ failure to understand of construction contracts and non-fulfillment of their obligation are the potentials for dispute in construction industry of Ethiopia.

Respondent-2 mentioned the potentials for disputes in construction industry as the existence of incomplete documents and unbalanced agreement of conditions between the contracting parties, the existence of differences between the specifications and drawings and, lack of good attitudes in requesting or in responding to any claim by one of the contracting parties. As per his opinion, when variations happen because of the above reasons, either inappropriate time extension will be asked or will be responded which leads to dispute.

Respondent-3 sees the potentials for disputes in construction industry as lack of proper contract administration, failure to understand their duties and responsibilities in the conditions of contract by the contracting parties as well as by the consultants and poor drafting of conditions of contract. Also the other potential for dispute as per this respondent is the acceptance of non-responsible lowest bidder during tender which results in poor works.

Respondent-4 the potentials for disputes in construction industry of Ethiopia as per respondent-4 are carelessness during drafting of contracts, Employers lack of identifying what clearly they want to be constructed which leads to variation and, non-handling of those variations in a correct way and not being so careful in selecting the appropriate contractor during the tender stage. As per his opinion contracts should fulfill all the legal aspects, a dispute settlement clauses and every detail in a precise and clear way.

As per the opinion of **Respondent-5,** the potentials for disputes are contractors‟ poor performance both in quality and time.

Respondent-6 sees the potentials for disputes in construction industry of Ethiopia as a lack of qualified project management team with knowledge of contract conditions, communication problem between the Engineer and Project manager, delay in approval of payments, absence of claim experts which handle claims throughout the execution of the projects.

Respondent-7 states clearly the potentials for the developments of disputes in Ethiopian construction industry as poor contract drafting which expressed in terms of lack of clarity, consistency and completeness, lack of planning culture, poor construction contract management practice and knowledge on construction contract documents, poor construction process and resources management, lack of knowledge on contractual rights and/or obligations, lack of payment on time or denial of payment by the employers and lack of financial resources on the part of the contractors.

Part 3: Arbitration

Under this part of the questionnaire the interviewee were asked about arbitration in construction industry of Ethiopia. The duration taken by arbitration in solving construction disputes, the advantages and disadvantages of arbitration as compared to court, their choices from the forms of arbitration for current construction industry of Ethiopia, performance of current local arbitration institute, and the effectiveness of court in solving construction disputes were the major questions raised for the professionals. Finally their recommendations in order to promote arbitration in the future construction industry of Ethiopia were asked.

The interviewee responded for the above questions as follows;

Respondent-1 has been involved in solving three construction disputes as an arbitrator so far and as per his experience arbitration takes from 6 months‟ up to 18 months‟ time and sometimes even up to 2 years time. However, this depends on the arbitrators understanding of the technicality of the issue very well, up on the cooperation of the arbitral tribunal, on the timely submissions of arguments, documents and evidences by the parties, on the

existence of precise legal provisions (in Ethiopia you should put bits and pieces of the provisions together in order to able to interpret one provisions) and on the clarity of the contracts between the disputants. Even if this is the case, the respondent argues that still arbitration is swifter than court procedure in Ethiopia.

As per Respondent-1, arbitration is advantageous than court. This is because: arbitration takes shorter time, it is a private process, and it is also economical. He stated that though some people argue that direct cost of arbitration is higher than a court but considering the time taken and the quality of award rendered by the arbitration, it is economical as well. He argues that most of the time, arbitral tribunal is composed of two technical background and one legal background arbitrators which makes it to understand the dispute very easily and swiftly. However, in Ethiopia court judges are not specialized on certain issues rather they are generalists.

Regarding the forms of arbitration, Respondent-1 prefers institutional arbitration for the future construction industry of Ethiopia. He suggests that we should strive towards institutional arbitration as most of the time the case in developed country. This is helpful as per the respondent for having a roaster of professionals so that the case will be assigned to right arbitrators. He asked, as globalization is knocking at our door these days, can it be possible to have only bits and pieces of ad-hoc arbitration here and there? Foreigners will be happy if institutional arbitration is developed in the country.

But as per the respondent 1, the current local institution is not yet strengthened, it needs to be revitalized and strengthened. Since some people are unaware of existence of local arbitration institute, awareness creation also should be done.

Respondent-1 admits that local courts are not effective in solving disputes arising within construction industry. Because they are time pressed and busy, which is not the case in arbitration which handles one or two cases at a time? Also since the training given throughout the country for the local judges are a general one, it will be difficult for them to consider construction cases easily. Therefore construction disputes take longer time in local

court than in arbitration. Even the judge who started the case will be transferred to other Chilot without finishing the case in his hand and other judges who came after will see it from the scratch. As a result, it will be postponed again and again.

For the question raised why there are still construction party who prefer to take its case to court, Respondent-1 replied, lack of awareness of formalized arbitration, lack of confidence on private mechanism, lack of awareness of advantages of arbitration and lesser chance of corruption in arbitration than in court as the reasons.

Finally the respondent is asked to recommend on what should be done in the future in order to promote arbitration in construction industry of Ethiopia and he recommends that the associations around the industry should work hard to create awareness about arbitration to potential construction parties. Efforts also should be done to modernize the laws in Ethiopia. Especially AACCSA AI should work very hard in promoting arbitration among the business people and create awareness about itself for the potential construction parties. Parties also should not simply sign a contract just not to miss opportunities. Rather they should understand a contract and include every possible clause in it before contracting. Finality clause also should be included in the contracts of contracting parties so that cases will not be appealed to court.

Respondent-2 has been an arbitrator for more than fourteen construction disputes and as per his experience the shorter one takes 6 ½ months whereas the longer one takes up to 3 years. He said that the duration for arbitration varies this much due to two reasons.

The first reason is the parties‟ good will to finish their disputes through arbitration. Some parties use arbitration just as a ladder to go to court rather than giving themselves for it as their final dispute resolution method. They do not have pure motive to finish their cases in arbitration.

The second reason is the commitment of arbitrators for finishing the cases in their hand. Sometimes arbitrators are too busy in their own business and not willing to meet at timely bases.

Therefore Respondent-2 advised that in order to speed up arbitration, it is preferable if only one arbitrator is chosen for small projects and only three arbitrators for medium and large projects. Choosing five arbitrators makes the cooperation between them very worse. Five arbitrators should be chosen only for very special cases. He also added that great care should be given in selecting the appropriate person to be an arbitrator otherwise the awards rendered will not be fair. Arbitrators should be able to consider both the technical and legal aspects of the dispute. Also parties should cooperate actively and in a good will to solve their dispute through arbitration.

The advantages of arbitration as per the Respondent-2 are; arbitrators know the subject matter of the dispute very well; arbitration is a private process and mostly it is shorter than court and also considering the output of arbitration makes it to be cheaper.

Regarding the forms of arbitration, if the administration of the institute is very good, institutional arbitration is preferable for respondent-1. However, if the institute is not competent and efficient, then institutional arbitration is very worst. The target of the institution should not be getting money and its administration also should be free from any form of biases. Again there should not be only one arbitration institute in the country. Different associations like Ethiopian Civil Engineers Association, Ethiopian Architects Association and so on can establish their own arbitration institute. This will create very efficient and responsive institutes in the country. However, in the current condition of country, the respondent prefers Ad-hoc arbitration than institutional.

Respondent-2 considers the legal court to be ineffective in solving construction disputes in the past. He knows construction dispute which took 19 years to be solved in the court. But he said that the local courts are implementing new system now it is difficult to comment on the current conditions of the courts as he doesn"t have any data about it.

The reasons for construction parties still to take their cases to court as per the opinion of Respondent-2 are; lack of awareness and confidence on arbitration, lack of prior agreement on their contracts and party‟s bad intention to make different tricks. Also since many projects are public projects and country‟s law do not allow them to be arbitrated, the parties are forced to take their cases to court.

Finally, Respondent-2 recommended what should be done for making arbitration effective in the future. The recommendations are; the number of local arbitration institute should be increased, different arbitration laws should be promulgated, and the current arbitration institute also should be efficient.

Respondent-3 has been an arbitrator for more than 10 construction disputes so far and as per his opinion arbitration takes one to three months‟ time. Satisfaction of the parties depends on the output of the award i.e. the parties who win the award gets more satisfied. However, the parties who loss the award will not loss all what he claims, therefore will not be very dissatisfied.

The advantages of arbitration as per his opinion are, most of the time the outputs of the court procedure have negative psychological effect on the losing party because of its publicity and the awards of arbitration are more likely to be fair than that of court judgments. This is because arbitrators have much knowledge on the subject matter of construction disputes than local court judges.

As per Respondent-3, institutional arbitration is more preferable than Ad-hoc arbitration. Because arbitration institutions provide different services and make more support from legal aspects. The current local arbitration institute is in a good condition and different cases are being settled by it.

Respondent-3 sees local courts as ineffective in solving disputes arising in construction industry of Ethiopia. It is being time taking process and court judges‟ lacking of construction knowledge was mentioned as reasons by him.

The reasons for still some construction parties prefer to go to court for solving their cases are: lack of awareness of the parties about the advantage of arbitration, lack of incorporating arbitration clause in their contract which may be made knowingly or unknowingly and being careless in including other dispute settlement mechanisms in their contract.

At last, Respondent-3 recommended that creating awareness for construction parties about arbitration should be done by the responsible bodies.

Respondent -4 have arbitrated different road and water supply projects and as per his opinion arbitration takes almost the same length with that of court even in developed countries. But it is possible to minimize it. One of the reasons which make arbitration very lengthy as per his opinion is that arbitrators are very busy with their own job. If arbitrators are very committed, they can finish the dispute in their hand very swiftly.

An advantage mentioned for arbitration by Respondent-4 is that arbitrators have most of the time technical background for the subject matter of the dispute in addition to legal knowledge. Even though this is not the case in our country, in developed countries most of the time arbitration awards are binding. Efforts should be done to make arbitrations awards binding in our country too. But as per his opinion, arbitration is not cheaper than court since for the former one there is arbitrator‟s fee which is to be paid by the parties.

Ad-hoc and Institutional arbitrations are not so much different for Respondent-4. Both of them can be used in the current construction industry of Ethiopia.

The reason for parties to take their dispute to court as per his opinion is the existence of some previous bad examples of arbitration cases. Those specific cases push construction parties not to have confidence on further arbitration mechanism.

As per the recommendations of Respondent-4, efforts should be done to stop an appeal from arbitration awards. Emphasis also should be given on the character of arbitrators in selecting them so that they fulfill their obligation effectively and without any biases. The concerned

bodies like Ministry of Justice, Ministry of Construction and Urban Development, Public Procurement Agency, well-known contractors and professionals and AACCSA AI should continuously investigate where the problems exists, work together in improving dispute settlement mechanisms in the country.

Respondent-5 has participated as an arbitrator in solving about ten construction disputes so far. As per his experience arbitration procedure takes one to two years.

The advantages of arbitration are its speed, its privacy, its being cost effective and the parties‟ freedom to choice the person they like as their arbitrator.

From the forms of arbitration available, Respondent-5 prefers institutional arbitration for the current construction industry of Ethiopia. As per his opinion this is because there are some degrees of supervision and fixed fee in institutional arbitration. The current local arbitration institute has also improved a lot.

Respondent-5 admits that local courts are not effective in solving construction disputes. The reasons for parties still to take their cases to court as per his opinion are cost of arbitration, lack of confidence in private dispute settlement mechanism and lack of confidence on the integrity arbitrators.

To make arbitration effective as per the recommendations of respondent-5, arbitration has to be institutionalized, arbitrators have to be trained and some mechanisms also have to be in place to ensure arbitrators integrity.

Respondent-6 has an experience of being an arbitrator for three construction disputes and as per his experience arbitration takes 1 year in average.

The advantages of arbitration as per Respondent-6 are, its being more open for hearing and providing of additional evidences for parties, availability of interim or partial award in arbitration, and arbitration‟s shorter duration for giving award than in court and the technical

knowledge of arbitrators. However, he also raised the disadvantages of arbitration as problem in implementation of an arbitration award if one of the disputants abrogates the award and the difficulty of checking the partiality of arbitrators.

Regarding the forms of arbitration, Respondent-6 is ok with both Ad-hoc and institutional type of arbitration and the current local arbitration institution is very good as per his knowledge.

However, he considers local courts as ineffective in solving construction disputes. This is because construction disputes involve technical interpretations and Ethiopia don‟t have specialized construction claims court.

The reasons for some parties to prefer to take their case to court as per Respondent-6 are: lack of confidence about implementation of arbitration award as court judgment, lack of awareness about benefits of arbitration and fear of arbitrators partiality and finality of its award.

Respondent-6 recommends that AACCSA AI should conduct different workshops for awareness creation purpose. This helps to promote arbitration in the future construction industry of Ethiopia. Employers also should include arbitration clause in drafting their conditions of contract.

Respondent-7 has been an arbitrator for seven construction disputes. And as per his experience, the duration of arbitration depends on many factors like complexity of the construction dispute under process, willingness of the parties to observe the procedural time table set by the arbitration tribunal, ability of the disputing parties (through their representatives) to present and defend their case, the existence or non-existence of hearing after submission of the respective written pleadings and competency of the arbitrators to understand and dispose the construction dispute under consideration. If everything is ok, based on his experience at least from 9 months to one year time on average is enough to settle arbitration case.

The advantages of using arbitration as per Respondent-7 are: to have an expert judge for the matter which requires specialized knowledge and experience in construction process; to have flexibility to present and defend the case in terms of time scale, language, venue and so on; and to have confidentiality of the process unless, indeed, the case submitted to the court by way of appeal or for enforcement by the court of law. On the other hand disadvantages of using arbitration includes, possibility of lack of finality of the award which paves the way for the re-trial of the merit of the case by the court; translation of the award for enforcement purpose, which is mostly prepared in English, in to the court‟s working language due to lack of voluntary compliance (self-enforcement) of the award by the losing party and the lack of arbitration tribunal to have no legal power to enforce its decision or award.

Regarding the forms of arbitration Respondent-7 prefers institutional arbitration than ad-hoc arbitration. As per his argument, in principle, institutional arbitration provides an organized and well managed arbitration process including some formality to its process. The current local arbitration institute tries its best to provide the required administrative services to the arbitration process though not yet with the level expected comparing to international arbitration institutions like the ICC in Paris, France.

Respondent-7 does not think that the local courts as effective in solving construction disputes, this is due to lack of fundamental knowledge and experience in construction process in general by the judges.

The reasons for some parties to take their cases to court as per his opinion is that, most of the construction contracts do not include arbitration as their final form of resolving construction disputes. This again may be explained due to the non-arbitrability of public construction cases or administrative contracts by arbitration based on Article 315 of the Civil Procedure Code. The 2011 PPA conditions of contract for the Works also favor not arbitration but court.

To promote arbitration as a final dispute resolution method in the future construction industry of Ethiopia the following measures have to be taken as per Respondent-7.

Amendment of the Civil Procedure Code i.e. Article 315(2) has to be deleted expressly in order to submit construction disputes arising out of administrative contracts to arbitration and following this, the 2011 PPA conditions of contract for the Works has to provide room for arbitration as final method of construction dispute resolution. More arbitration institutions have to be established in Ethiopia for the efficient and effective management of the arbitration process. Additional construction arbitrators also have to be trained within the country and abroad to provide the required professional services. Focused training also has to be provided to the judges at all level of courts to provide the required judicial assistance in terms of enforcing the agreement to arbitrate and to assist the arbitration process in various ways; and to recognize and enforce the outcome of the arbitration process as final.

4.4.2) Discussion based on the result of the interview

In this part of the paper, the results of the responses will be summarized in answering the research questions.

The Interview made with professionals in the area proves that the potentials for disputes in construction industry of Ethiopia are high. The possible dispute potentials as per the respondents are related with contracts. These are poor drafting of contracts which expressed in terms of lack of clarity, consistency and completeness, non-understanding of construction contracts by the parties and lack of proper contract administration.

Non fulfillment of contractual obligations by one of the parties is also mentioned as a potential for dispute in construction industry of Ethiopia. These include lack of payment on time or denial of payment, poor performance by a contractor which results from careless selection of contractor during tender.

As per experiences of the majority of the professionals, arbitration takes less than two years. However, it depends on the number, skill and commitment of arbitrators, on the timely submissions of arguments, documents and evidences by the parties and on the existence or non-existence of hearings after submissions.

All of the respondent admit the advantageous of arbitration over court. The mentioned advantages of arbitration are:

- Arbitration is a private process which keeps parties reputation,
- Arbitration takes shorter time than court,
- Arbitration is cheaper than court if the quality of the award and the time taken for the award are considered
- Unlike court judges, arbitrators have technical backgrounds which make them to understand the dispute very well. As a result the awards from arbitration are most likely fair.
- The flexibility of parties to present and defend their cases in arbitration is also mentioned as an advantage by two of the interviewees.

On the other hand, lack of finality of the award in arbitration which paves the way for the re-trial of the merit of the case by the court has been mentioned as a major disadvantage of arbitration.

Majority of the interviewees preferred institutional arbitration for the current construction industry of Ethiopia. Globalization, more legal support, fixed fee and provision of an organized and well managed process were the reasons for preference of institutional arbitration. Also most of them admit that the current local arbitration institute is good. However, they also suggested that it is yet improved with the level expected comparing with other countries arbitration institutions.

Almost all of the professionals agreed on the ineffectiveness of local courts in solving disputes arising from construction industry. The reasons mentioned are: courts being busy with different cases, judges lacking technical background of construction and courts taking longer time for solving construction disputes.

The reasons for some parties to take their cases to court as per the respondents are the inarbitability of administrative contracts, lack of awareness, bad examples of some past arbitration process, lack of confidence on the private mechanism and lack of confidence on the impartiality of arbitrators and finality of arbitration award.

Finally, the recommendations of the interviewees in order to promote arbitration in the future construction industry of Ethiopia are:

- Amendment of the Civil Procedure Code in its arbitrability clause and modernizing Ethiopian laws,
- The establishment of more arbitration institutions in Ethiopia for the efficient and effective management of the arbitration process,
- Training more construction arbitrators to provide the required professional services,
- Training also judges at all level of courts so that they provide the required judicial assistance in terms of enforcing the agreement to arbitrate and the arbitration process in various ways ,
- Conducting different awareness creation programs about arbitration by local arbitration institute and different construction related associations,
- Improving the impartiality and integrity of arbitrators ,
- Provisions of accurate and inclusive arbitration clauses and its finality by contracting parties in their contract and
- The working together of different concerned bodies both governmental and non-governmental in making arbitration more effective and efficient method of dispute settlement method in Ethiopian construction Industry.

5) CONCLUSIONS AND RECOMMENDATIONS

5.1) Conclusions

Based on the research, the following conclusions are drawn.

1. In Ethiopian construction industry, considerable amount of disputes arise in annual basis and these disputes are mostly financial, variation and contractual disputes in nature. They are settled either by court or by arbitration once they passed the other dispute settlement mechanisms. However, court is not effective in solving disputes arising within construction industry of Ethiopia. The longer time it takes, the overall cost it incurs, its inflexible procedure, and the judges lacking of technical background about construction are mostly the reasons for its ineffectiveness.

2. Arbitration is more advantageous than court in solving disputes arising in construction industry. This is because, firstly, arbitration is a private process which keeps the reputation of the disputants; secondly, in arbitration arbitrators have both legal and technical backgrounds which make them to understand the dispute very easily. This in turn results relatively in accurate awards. Thirdly, unlike the busy court in arbitration only one or two cases will be handled at a time which results in shorter time for dispute settlement. Fourthly, it is a cheaper process than court since the latter is unlikely to end up in one court level. Lastly, it gives more freedom for the parties to present their arguments, documents and evidences than court. However, in order to achieve the above merits of arbitration, the number and commitments of the arbitrators and the party‟s good will to finish their cases in arbitration are highly needed.

3. Regardless of the benefits of arbitration, in Ethiopia still there are construction parties who submit their dispute to a court. The major reasons for these are: the inarbitrability of administrative contracts, the parties‟ lack of confidence in

arbitrators‟ impartiality and enforcement of arbitration awards, the parties‟ lack of awareness about the benefits of arbitration and the carelessness of parties in including arbitration clause while drafting their contract.

4. The awareness level of Ethiopian construction parties about arbitration is generally low. Even there are parties who do not know about the existence of local arbitration institute which is the Addis Ababa Chamber of Commerce and Sectoral Associations Arbitration Institute. And even though AACCSA AI is in its fast improvements, still there are parties and professionals in the sector who are not satisfied with its performances.

5. Administrative contracts as per the article 315 of the 1965 civil procedure code are inarbitrable in Ethiopia. As a result, the current 2011 PPA conditions of contract excluded the arbitration clause available in its previous 2005 general conditions of contract. These brought negative impacts on further promotion of arbitration in the country. However, there are public authorities and enterprises who have given legal power by proclamations to arbitrate their disputes.

5.2) Recommendations

Based on the findings of this paper, the following points are recommended.

1. Continuous awareness creation about the benefits of using arbitration as a final dispute resolution method should be done among the construction parties of Ethiopia. This can be done through associations like Ethiopian Local Contractors Association, Ethiopian Civil Engineers and Architects Association and through Universities and AACCSA AI.

2. Ministry of Justice and other concerned bodies of government also should promote arbitration for commercial matters by facilitating necessary provisions of law like avoiding the appeal from arbitration and amending article 315 of civil procedure code. Also the country should look forward in order to sign the New York Conventions of 1958.

3. Parties in construction industry of Ethiopia should not be negligent while drafting their contract. They should incorporate arbitration clause which is wide enough to describe all sorts of disputes that may arise in the future.

4. Even though there are improvements in the Addis Ababa Chamber of Commerce and Sectoral Association Arbitration Institute, it should still make more efforts in order to deliver efficient and effective services of arbitration for its customers as that of other countries arbitration institutions. Also it should advertise itself among the stakeholders of the Construction Industry of Ethiopia since there are parties who do not know even its existence.

5. More arbitration institutions should be opened in the country in order to create competition. This will create very efficient and effective arbitration institutions in the country. This can be done by different construction related associations in the country.

6. Trainings and discussions should be done among the country‟s arbitrators in order to avoid any misconduct while arbitrating disputes so that parties will be attracted for solving their dispute through arbitration. Arbitrators should be committed in solving the disputes in their hand very swiftly and efficiently.

7. Moreover, professionals should be trained so that they will be best arbitrators in the future. This will make the disputants to have more options in choosing arbitrators for solving their dispute.

8. Trainings should be given for Judges in all level of courts about the benefits of arbitration so that they will provide the required judicial assistance for the arbitration process in various ways.

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Appendix A

Questionnaire Survey Prepared for Project Owners (Clients)

Title of the research: Review of Arbitration in the Construction Industry of Ethiopia

This research survey is designed to fulfill an academic requirement of MSc program in Construction Technology and Management Stream of Addis Ababa University. The research data and result are only used for academic purposes. Particularly mentioning of names will not be required anywhere. Your open and prompt response is highly demanded to achieve the goals of this research.

For any clarification on this questionnaire, please contact the researcher on 0912783865.

Thank you in advance for your cooperation!

Objectives of the research are:

- To overview arbitration in the construction industry of Ethiopia.
- To highlight the general arbitration procedure as per the country‟s law and as per the current local arbitration institute
- To discuss the arbitration related clauses of conditions of contracts which are used in Ethiopian construction industry
- To discuss and assess the advantages of arbitration in comparison with court in solving construction related disputes of the country.
- To assess the awareness level about arbitration of local contractors and major clients in the country.
- And finally to suggest what should be done to promote and improve arbitration in the future construction industry of Ethiopia.

PART 1: General Information

1. Year of establishment for the firm ……....

2. Position of the respondent in the firm……

PART 2: About dispute in general

1. How many construction projects your firm offer (as a client) annually (in average)?

2. From your experience which one of the following statement represents your firm?

- ☐ Most of the time the majorities of our projects are undertaken by local contractors
- ☐ Most of the time the majorities of our projects are undertaken by foreign contractors
- ☐ Most of the time both local and foreign contractors undertake our projects in equal share
- ☐ We offer all our projects for local contractors only
- ☐ We offer all our projects for foreign contractors only

If you have any other idea out of the lists above, please write here ...……..…….……

……

3. Which conditions of contract your firm uses most of the time? ……

4. How many construction disputes your firm encounters annually? (please mark one box)

☐ None

☐ 1 -5

☐ 6-10

☐ 10-15

☐ More than 15

5. How would you describe the majority of construction disputes in your firm? (please mark one box for each of them)

	Infrequent	*Fairly Infrequent*	*Frequent*	*Fairly frequent*	*Very frequent*
Financial disputes	☐	☐	☐	☐	☐
Contractual disputes	☐	☐	☐	☐	☐
Defective work disputes	☐	☐	☐	☐	☐
Variation disputes	☐	☐	☐	☐	☐
If other, please specify					
……	☐	☐	☐	☐	☐

PART 3: About acceptance and effectiveness of arbitration

1. Have you ever solved dispute arose in your firm through formal court proceeding?

☐ Yes ↓

(**If your answer is yes, answer the questions below**)

No ☐ →

If your answer is no, please skip from here to O-5

2. How long did it take from its commencement up to its end (if more than one, in average)?

   ……

3. How do you describe your satisfaction with the outcome and overall court proceeding you have been involved in?

   ☐ Very satisfied

   ☐ Satisfied

   ☐ Indifference

   ☐ Dissatisfied

   ☐ Very dissatisfied

4. What were your reasons to use court proceeding instead of arbitration?

   ……

   ……

5. Have you ever solved dispute arose in your firm through arbitration?

   ☐ Yes ↓

   ☐ No → **If your answer is no, please skip from here to Q-8**

6. If your answer for Q-5 above is „**Yes'**, how long did it take from the commencement of arbitration proceeding to the consideration of award by the Arbitrator?

   ……

7. How was your satisfaction with the outcome and overall process of arbitration you have been involved in? (please mark one box)

☐ Very satisfied

☐ Satisfied

☐ Indifference

☐ Dissatisfied

☐ Very dissatisfied

8. If your answer for Q-5 is „**No**", what is/are the reason/s for not using arbitration in solving disputes happening in your firm so far?

……

……

……

9. Which one do you prefer as your final choice to solve disputes in your firm in the future?

☐ Arbitration ☐ Court

If your answer is court, please skip from here to Q-12

(If your answer is arbitration, please answer the questions below)

10. If your answer for Q-9 above is arbitration, what are your reasons for using arbitration as a final dispute resolution method instead of proceedings at the court?

……

……..……

……..……

11. Which of the following arbitration form do you prefer?

☐ Institutional ☐ Ad-hoc

12. If your answer for Q–9 is court, what are your reasons for using court as your final resolution method?

……..……

……

……

13. What do you say about the performance of local arbitration institute/s?

☐ Very good

☐ Good

☐ Fair

☐ Not good

☐ Very bad

☐ I don‟t know

14. We are interested in any other comments you might have concerning arbitration in Ethiopian construction industry. Please use the space provided below for any of your comment,

……

……..……

……..……

…….

…… END……

Appendix B

Questionnaire Survey Prepared for Construction Companies (Contractors)

Title of the research: Review of Arbitration in the Construction Industry of Ethiopia

This research survey is designed to fulfill an academic requirement of MSc program in Construction Technology and Management of Addis Ababa University. The research data and result are only used for academic purposes. Particularly mentioning of names will not be required anywhere. Your open and prompt response is highly demanded to achieve the goal of this research.

For any clarification on this questionnaire, please contact the researcher on 0912783865.

Thank you in advance for your cooperation!

Objectives of the research are:

- To overview arbitration in the construction industry of Ethiopia.
- To highlight the general arbitration procedure as per the country‟s law and as per the current local arbitration institute
- To discuss the arbitration related clauses of conditions of contracts which are used in Ethiopian construction industry
- To discuss and assess the advantages of arbitration in comparison with court in solving construction related disputes of the country.
- To assess the awareness level about arbitration of local contractors and major clients in the country.
- And finally to suggest what should be done to promote and improve arbitration in the future construction industry of Ethiopia.

Part 1: General information

1. Year of establishment for the firm ……..…..
2. Position of the respondent in the firm……
3. As a contractor which one of the following is your category?

   ☐ General contractor (GC)

   ☐ Building contractor (BC)

   ☐ Road contractor (RC)

   ☐ Specialized contractor

4. How about your grade/ class? (As a Contractor) …….
5. Who is/are your client/s? (You can tick more than one)

   ☐ Public

   ☐ Private

   ☐ Non-governmental Organization

   ☐ Others (please specify)……

PART 2: About dispute in general

1. How many construction projects your firm is in charge of annually (in average)? …
2. How many construction disputes your firm encounters annually? (please mark one box)

   ☐ None

   ☐ 1 -5

   ☐ 6-10

   ☐ 10-15

   ☐ More than 15

3. How would you describe the majority of Ethiopian constructions disputes? (please mark one box for each of them)

	Infrequent	*Fairly Infrequent*	*Frequent*	*Fairly frequent*	*Very frequent*
Financial disputes	☐	☐	☐	☐	☐
Contractual disputes	☐	☐	☐	☐	☐
Defective work disputes	☐	☐	☐	☐	☐
Variation disputes	☐	☐	☐	☐	☐
If other, please specify					
……	☐	☐	☐	☐	☐

PART 3: About awareness of arbitration

1. How is your level of awareness/familiarity about arbitration as dispute resolution method?

☐ Very familiar

☐ Fairly familiar

☐ Familiar

☐ Fairly unfamiliar

☐ Unfamiliar → **If you're unfamiliar with arbitration, please go to PART 5 of the questionnaire**

2. How would you describe your level of participation in construction arbitration proceeding?

   ☐ Very frequent

   ☐ Fairly frequent

   ☐ Frequent

   ☐ Fairly infrequent

   ☐ Infrequent

3. Do you know the Arbitration Institute of the Addis Ababa Chamber of Commerce and Sectoral Associations?

   ☐ Yes ☐ No

PART 4: About acceptance and effectiveness of arbitration

1. Have you ever solved your dispute through formal court proceeding?

   ☐ Yes ☐ No → **If your answer is no, please skip from here to Q-5**

   ↓

   (**If your answer is yes, answer the questions below**)

2. How long did it take from its commencement up to its end (if more than one, in average)? …….
3. How do you describe your satisfaction with the outcome and overall court proceeding you have been involved in?

   ☐ Very satisfied

   ☐ Satisfied

   ☐ Indifference

   ☐ Dissatisfied

   ☐ Very dissatisfied

4. What were your reasons to use court proceeding instead of arbitration?

   ……

   ……

5. Have you ever solved your dispute through arbitration?

   ☐ Yes No ☐ → **If your answer is no, please skip from here to Q-13**

   ↓

   (If your answer is yes, answer the questions below)

6. Which of the following arbitration form have you used?

   ☐ Institutional ☐ Ad-hoc

7. How long did it take from the commencement of arbitration proceeding to the consideration of award by the Arbitrator? …….

8. How do you describe the time you specified on Q-7 above?

   ☐ Swift (speedy)

   ☐ Moderate

   ☐ Lengthy

9. In your opinion, the majority of arbitral awards are:

   ☐ Fair and just

   ☐ Unfair and unjust

   ☐ Biased

   ☐ Legally unacceptable

10. From your experience, the majority of arbitrators are:

    ☐ Legal back ground

    ☐ Professional background

    ☐ Legal and professional background

    ☐ Neither legal nor professional background

11. What do you say about the performance of local arbitration institute/s?

- ☐ Very good
- ☐ Good
- ☐ Fair
- ☐ Not good
- ☐ Very bad
- ☐ I don‟t know

12. How was your satisfaction with the outcome and overall process of arbitration you have been involved in? (please mark one box)

- ☐ Very satisfied
- ☐ Satisfied
- ☐ Indifference
- ☐ Dissatisfied
- ☐ Very dissatisfied

13. Are you able to tell from your experiences, how satisfied the involved parties are with the outcome of an arbitration procedure? (please mark one box)

- ☐ Very satisfied
- ☐ Satisfied
- ☐ Indifference
- ☐ Dissatisfied
- ☐ Very dissatisfied
- ☐ I don‟t know

14. Which one do you prefer as your final choice to solve your disputes?

☐ Arbitration ☐ Court

If your answer is court, please skip from here to Q-17

15. If your answer for Q-14 is arbitration, what are your reasons for using arbitration as a final resolution method instead of proceedings at the court?

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16. Which one of the following arbitration form do you prefer?

☐ Institutional ☐ Ad-hoc

17. If your answer for Q–14 is court, what are your reasons for not using arbitration as your final dispute resolution method?

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18. Do you consider court as effective means of dispute resolution method for the disputes arising within the construction industry?

☐ Yes ☐ No ☐ I don‟t know

19. What do you say about the following statements?

„Most contracts entered with public administrative and other offices whose financial source is allocated from the state budget are not arbitrable, and this generally discouraged arbitration in the country.

☐ Strongly agree

☐ Somewhat agree

☐ Neither agrees nor disagrees

☐ Somewhat disagree

☐ Strongly disagree

20. We are interested in any other comments you might have concerning arbitration in Ethiopian construction industry. Please use the space provided below for any of your comment

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PART 5: Only for those who are unfamiliar with arbitration

1. What is/are your reason/s for your unfamiliarity with arbitration as a dispute resolution method?

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2. Have you ever solved your dispute through the procedure at court?

☐ Yes ☐ No

Appendix C

Interview questions for professionals

I. Introduction

- What is your personal career? Educational background, previous and current jobs, current position in your working company.

II. Disputes in general

- What are the reasons for disputes in the construction industry of Ethiopia according to your opinion? Where is the potential for the development of the disputes?

III. Arbitration

1. For how many construction disputes have you acted as an arbitrator so far?
2. From your experiences, how long it take to solve one construction dispute through arbitration (in average) and how satisfied the involved parties are with overall process and outcome of an arbitration procedures?
3. What are the advantages and disadvantages of arbitration in comparison to court in solving disputes arising from construction industry of Ethiopia?
4. Which form of arbitration do you consider appropriate at the current condition of Ethiopia (Ad-hoc or Institutional)? What do you say about the performance of local arbitration Institutes?
5. Do you consider court as effective in solving disputes arising within Construction Industry of Ethiopia? Why?
6. Still there are parties who prefer to use court in Ethiopian Construction Industry, what do you think hinders the construction parties from using arbitration and what should be done to promote arbitration and to make it more effective as final dispute resolution method in Ethiopian Construction Industry?

SIGNED DECLARATION SHEET

This thesis is my original work, and has not been presented for a degree in any other university and that all sources of material used for the Thesis have been dually acknowledged.

Candidate

Name _____

Signature_____