Chapter Four: Arbitration

Before looking the discussion made here under, what do you think is arbitration process?

Is there any difference in the above two ADR mechanisms?

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

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

2.5.1 What is Arbitration?

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

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

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

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

But all the definition above connote that arbitration presupposes binding decision from the arbitrators. Whereas some writers use the word arbitration irrespective of the decision that appointed arbitrators would give: whether it is binding decision or non binding decision. In binding arbitration, the arbitrator has the power to render a decision that decides (concludes) the

dispute in a legally binding way by issuing an award. The award can be enforced against a party in the same way that a court judgment can be enforced, such as by seizer and sale of property. If arbitration is not ―binding‖, then it is ―advisory.‖ In advisory arbitration, the parties can choose whether or not to abide by the arbitrator(s) decision.

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

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

2.5.2 Early History of Arbitration

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

A) In india

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

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

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

The Bengal Regulation of 1993, on the other hand , came up with additional concepts: it empowered the court to refer certain suits to arbitration with the consent of parties where the value of the suit did not go 80 beyond sicca‘ Rs 200 and the suits were for counts, partnership debts, non-performance of contracts etc . Apart this substantive issue to refer case to arbitration by court, where parties in a dispute agree, 1793 Regulation specifies procedures to be followed during arbitration.

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

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

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

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

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

In order to avoid corruption, curb it and control the same government of India gave emphasis for the establishment of arbitral tribunal. As of the 1940 Indian Arbitration act, the award of on arbitrator will not have a legal effect unless it get the blessing of the court. As to this arbitration act, the court can: (1) remit the award back to the arbitrator

(2) set it aside (3) Pass a decree in terms thereof. Final supervisory power was rested in the court of law.

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

B) In England

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

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

It was identified that the common law applicable to arbitration was not satisfactory and demanded more clarification and as the result Arbitration Act of 1697 was enacted. And farther amendment was made by Procedure Act 1854. The main purpose of this Act, as Sujan, was to make arbitration submission more binding on the parties ; to make decision of arbitrators more easily enforceable; and to remedy other defects which were brought in to light as the importance of arbitration increased.

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

2.5.3 Preliminary Considerations of Arbitration

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

2.5.3.1 Arbitrability

What do you think is Arbitrability?

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

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

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

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

2.5.3.2 Arbitration agreement.

 Other important concept in arbitration is arbitration agreement. If so, What is arbitration agreement?

 Is there any difference b/n arbitration submission and arbitration clause?

 Can you mention the requirements of arbitration agreement?

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

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

Arbitration agreement

1. In this part ‗arbitration agreement' means an agreement by the parties to submit to arbitration, all or certain dispute which have arisen or which may arise b/n them in respect of a define legal relation ship , weather contractual or not

2. An arbitration agreement may be in the form of arbitration clause in a contract or in the form of a separate agreement.

In arbitration agreement parties need to have a willingness to abide by the decision of the arbitrator(s). Essentials of arbitration agreement providing for arbitration are that there must be an agreement b/n the parties and the parties must be ‗adidem' and that there is intention of the parties to have their dispute or differences referred and decided through arbitration.

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

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

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

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

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

As arbitration submission and clause are contracts, the requirements for valid contract in the general part of law of contract should be full filled for their validity. Different scholars, nevertheless, share the distinct nature of arbitral clause (submission) than other ordinary contracts though it is contract by itself.

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

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

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

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

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

B) Validity requirements for arbitration agreement

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

Art 1678 Elements of contract.

No valid contract shall exist unless.

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

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

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

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

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

2.5.4 Varieties of Arbitration

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

1) *Ad-hoc arbitration* is form of arbitration where the procedure of arbitration, an most of the time, set by the disputing parties them selves. Parties in a dispute need not stick on the institutional procedure. The national law of the place of arbitration avoids any problem arise of ad-hoc arbitration.

2) *Contractual in built arbitration* came to juncture due to increasing of business transaction with complex phenomenon. While business relation increased, presumably clashes b/n parties in the transaction is natural, and this scene called for regular machinery in the shape of in built arbitration clause, an integral part of the contract covering present or future disputes and the system devised was reference to named arbitrator or on arbitrator to be appointed by a designated authority.

3) *Institutional arbitration*- this is another form of arbitration and probably most conducive for the parties‘ as the parties agree in advance that in the advent of future disputes they will be settled by arbitration by the named institute of which one or more of them were members. In institutional arbitration parties‘ dispute is arbitrated according to pre- establish rules of the institution, which most of the times known to disputing parties. The Arbitrators mostly, are among named specialists.

4) Statutory arbitration:- the above three kinds of arbitrations are constituted by the consent of the disputing parties. Where as Statutory arbitration is an imposition by law which governs the parties in dispute- parties should submit the case to specified person or institutions for arbitration to resolve their case irrespective of their consent.

2.5.5 Arbitration and litigation

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

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

Comparing civil arbitration and litigation

Arbitration-resembles litigation

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

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

Arbitration- differs from litigation

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

2.5.6. Perceived Advantages

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

2.5.7 Perceived disadvantages

Arbitration may not always be faster, less expensive, and less formal. It may be more expensive and time-consuming than litigation if the arbitration agreement, choice or conduct of arbitrators, procedure, or award is challenged. In addition, there are concerns regarding ability and qualifications of arbitrators, and whether they should be subject to professional standards.

Generally, arbitral decisions are not reviewable for errors of fact of law, which may lead to unfair results.

2.5.8 The Role of Arbitrator

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

Having this clue in mind,

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

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

2.5.8.1 Impartiality of arbitrator

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

principle of justice in the court is no less fundamental in the case of justice administered by an arbitral tribunal‖

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

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

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

What is impartiality then?

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

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

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

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

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

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

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

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

This article tells us the following matters:

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

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

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

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

2.5.8.2 Independency of arbitrator

Earlier we stated that‖ impartiality‖ and/or ―independency‖ of arbitrators is equally important as the impartiality of judges in court of law. Despite their over- lapping nature, ―impartiality‖ and ―Independency‖ are not one and the same, that why the civil code of Ethiopia specifies both issues separately. An arbitrator, who has not any relation ship whether financially or not with one of conflicting parties, might be independent but we could not conclude that this person is

impartial also. The other possibility is that an arbitrator, who is dependent for one of disputing parties, may give an award with out any partiality.

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

2.5.9 Arbitration Procedure

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

2.5.9.1 Formation of Arbitral Tribunals

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

In relation to this we can raise the following questions.

1. Should the parties to an arbitration agreement be able to agree on the appointment of arbitrator or upon the procedure for appointing an arbitrator, including naming another person to make the appointment.

2. Should court have power to appoint an arbitrator;

A. When persons (including parties) whose agreement on the appointment of an arbitrator is contemplated by an arbitration agreement or by statue, do not agree?

B. When a person or persons by whom the arbitration agreement contemplates the making of an appointment does or do not do so?

C. When an arbitrator dies, is or becomes in capable, or simply does not act, and either there is no machinery in the arbitration agreement or the machinery for some reason has not worked?

3. What guidance should the court follow to appoint arbitrator if there is condition to do so?

4. Can parties be able to avoid the court‘s discretion to appoint arbitrator(s) by their agreement?

5. What is the position of Ethiopian law in this regard (appointment of arbitrator)?

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

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

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

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

The full version of the provision reads.

Art II

Appointment of arbitrators

1….

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

3. Failing such agreement.

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

b. In arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed upon request of a party by the court or other authority in article 6

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

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

ii. The parties or two arbitrators, are unable to reach an agreement expected of them under such procedure or

iii. A third party including institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in art 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

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

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

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

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

2.5.9.2 Arbitral Proceedings in general

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

 Should there be rules to conduct arbitration proceeding?

 Can parties avoid such rules by their agreement?

 What sort of procedures may arbitral tribunal use with absence of procedures specified by a parties or law?

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

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

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

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

It has been suggested that it is vital for a good arbitration that the parties define the issues which are to be arbitrated. With out defining issues arbitration will have no focus. On the other hand, a rigid procedural requirement may inhibit unsophisticated party from starting arbitration proceedings, and the arbitrator can exert pressure on the parties to define their issue once they are before him.

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

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

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

Sujan explains the Indian practice in the following way. As to him in India though the arbitrator could not use civil procedure which is applicable for judicial proceedings in courts, in the absence of stipulated procedure by the disputing parties, the arbitrator is duty bound to follow ―ordinary rules‖ laid down for the administration of justice unless he is expressly absolved form doing so. ―Ordinary rules of administration of justice‖ refers to rules which are applicable in Indian civil bench but they do not include all rules which are applicable in ordinary courts. He further explains that though the arbitrator will not tightly bound to use rules and procedures

observed in courts, his procedure may not be opposed ‗natural justice.' His procedure should, therefore, be such as a reasonable man should follow in deciding the dispute impartially.

An excerpt from Sujan's book states as:

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

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

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

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

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

Art 18

Equal treatment of parties

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

Art 24

Hearing and written proceeding

1. ……

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

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

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

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

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

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

Should a hearing be mandatory in arbitration proceeding?

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

The UNCITRAL MODEL Law states the following concerning hearing.

Art 24

Hearing and written proceeding

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

2. ……

3. …..

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

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

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

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

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

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

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

2.5.10 Legal effects of Arbitration

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

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

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

The most dominant effect of arbitration, in fact, is producing an award which is binding upon parties as if it were court judgment. Here under the types of award and challenges against award have been dealt as legal effect of arbitration has close relation with these concepts.

2.5.10.1 Arbitral award

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

A. **Intrim awards**

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

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

Since in trim awards may cause delays on the proceeding, precaution has to be given before it is chosen. Even some countries, like Australian state of Victoria, permit interim awards if an

arbitration agreement provides for the same and the general view seems that in absence of express power, an arbitrator can not make an interim award.

B. Final awards

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

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

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

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

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

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

Unless an award is set aside or declared to be nullity it is final and binding. The parties‘ original right and obligations are to the extent of that they were the subject of arbitration, at an end. Instead they have the rights and obligations which the award gives and imposes. Neither party can, as against the other, dispute the facts which the arbitrator has found.

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

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

1. Where the arbitrator has not conducted the proceeding according to the arbitration agreement, has acted in a way which is contrary to public policy, has dealt with issue which is out side his jurisdiction, has not dealt with an issue which was referred to him or has given an award which is not clear.

2. Where the arbitrator is corrupt or biased.

3. Where the arbitrator has been ―improperly procured‖. Apart from cases in which the arbitrator has been corrupted, which will fall under misconduct as well as improper procurement, there may be a case in which a party has deceived the arbitrator or concealed evidence.

4. Where the arbitrator has made a mistake and asked to have the award remitted to him for reconsideration where fresh evidence of some weight has been discovered and the evidence could not be due diligence have been obtained for the arbitration proceeding

5. Where there is error the face of the award.

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