

Chapter-7B
Dispute resolutions: Arbitration. Arbitration act.

Background

Dispute resolution may have the following aspects/
dimensions, namely,

Preventive dimension;

Amicable settlement dimension; and

Judgmental dimension;

In relation to this there is also the concept of ADR:
Alternative Dispute Resolution. Alternative to what?

Resolution...

- The concept of ADR is related to alternative to litigation or sometimes alternative to all binding decision making process (including the decision of the arbitrator & adjudicator).
 - Both preventive & amicable dispute resolution systems may be categorized under Alternative Dispute Resolution (ADR). There is no any binding or imposed decision by a third party in them.
 - In this respect, except with respect to the preventive aspect, the Ethiopian law recognizes both the amicable & the judgmental aspect of dispute resolution systems
 - The scope of the Ethiopian law may be limited in this regard. Because not all amicable & judgmental forms of dispute resolution systems are recognized.
 - From the amicable settlement both:-
 - Negotiation (Compromise: See Article 3307-Article 3317 of the Civil Code); and
 - Conciliation: See Article 3318-Article 3324 of the Civil Code);
- are recognized.

• Resolution...

- From the judgmental forms of dispute resolution both:-
- Litigation (the Court System or the Judiciary System: See Article 78-Article 82 of the FDRE Constitution); and
- Arbitration (See Arbitral Submission: Article 3325-Article 3346 of the Civil Code & Article 315-Article 319, Article 350-Article 357 & Article 461(for foreign arbitral awards) of the Civil Procedure Code)

are recognized.

- To prevent construction disputes, there are a host of factors to be considered.
- The following aspects may contribute to the prevention of construction disputes. To mention few of them:-
 - To have a well planned project;
 - To have a well studied project;
 - To have a well designed project;
 - To have a clear, accurate & complete tender dossier & document;
 - To have a clear, accurate & complete contract document;
 - To have a balanced (in terms of allocation & distribution of risks, rights & obligations) contract document;
 - To discharge the expected contractual & legal obligations by the contracting parties;
 - To have a good project governance;
 - To have a well thought & suitable dispute prevention system;

Preventive...

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- To discharge the expected contractual & legal obligations by the contracting parties;
- To have a good project governance;
- To have a well thought & suitable dispute prevention system;
- The following are some of the internationally recognized dispute prevention systems.
 - Disputes Potential Index (DPI);
 - Intelligent Allocation of Project Risks;
 - Incentives to Encourage Cooperation;
 - Partnering;
 - Others
- Dispute Potential Index
 - The Construction Industry Institute, as the result of a study into the causes of construction disputes & the characteristics of construction projects that are more likely than others to generate disputes, has developed a predictive tool called the Dispute Potential Index or DPI.
 - DPI identifies the presence of dispute-prone characteristics on a project, evaluates them, and reports the results to project team members so they can take action to correct them before they actually generate problems.

Preventive ...

- The DPI is in effect a “cholesterol test” of the health of a construction project. The results of such analysis can be used to take action to eliminate potential problems & to design dispute resolution systems that will be suited to resolve particular kinds of problems that are likely to occur.
 - **Intelligent Allocation of Risks**
 - **The most efficient & cost-effective way to structure project relationship is to assign each risk to the party who is best able to manage or control the risk.**
 - **Unrealistic shifting of risks to a party who is unable to manage the risk can increase bid prices, sow the seeds of countless potential disputes, create distrust & resentment, and establish adversarial relationship that can interfere with the success of the project.**

The specific studies made in relation to the subject conclude the following.

- **Owners should avoid dictating preferential contract language through superior bargaining power;**
- **Owners should not attempt to shift inordinate risks to the contractor through one-sided contract language;**
- **The ideal contract is one that assigns each risk to the party that is best equipped to manage & minimize that risk, recognizing the unique circumstances of the project;**

Preventive...

- Some owners believe that the best contract is one that forces the contractor to hold the owner harmless against all possible risks. The owner ultimately must pay the costs of project risk-either by assuming them or by requiring the contractor to include the insurance costs in the bid. If the particular risk is one that the contractor is ill-equipped to avoid or manage, the insurance cost may be excessive.
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- Incentive to Encourage Cooperation
 - Incentive techniques are available to encourage cooperation among all participants in the construction project.
 - By temporarily subordinating their individual interests to the legitimate needs & success of the project as a whole, they achieve a greater ultimate benefit for all project participants, including themselves.
 - An example of such an incentive is the establishment by a construction manager or general contractor of a bonus pool.
 - Upon attainment of specific project goals, the bonus will be shared

Preventive...

- Partnering
- Partnering is a team-building effort in which the parties establish cooperative working relationships through a mutually developed, formal strategy of commitment and communication.
- It can be used for long-term relationships or on project-specific basis.
- When used on a project-specific basis, partnering is usually instituted at the beginning of the construction process after the contractor has been selected, by holding a retreat among all project personnel who have leadership & management responsibilities.
- The participants, assisted by an independent facilitator, become acquainted with & understand each other's project objectives & expectations recognize common aims, initiate open communications, and establish nonadversarial processes for resolving potential problems.
- The basic premise of partnering is that the success of every project relies upon good faith, not legal enforcement. It therefore, seeks to create an environment of good faith, where open & free communication, mutual trust & respect, and team work take the place of adversarial, competitive relations.
- The first cornerstone of partnering is recognizing & developing common goals.
- The second cornerstone of partnering is issue resolution. Of course, partnering first aims to prevent conflict.
- The third cornerstone of partnering is continuous improvement throughout the life of the project.

Amicable Aspect

- The very feature of amicable settlement is that the disputing parties shall have full control both over the process & the outcome.
- There is no third party imposition of solution on the parties to the dispute.
- The following are some of the highly recognized amicable settlement methods.
 - Negotiation;
 - Mediation;
 - Conciliation;
- Negotiation
- Negotiation is a give & take process, a serious attempt to reach a settlement agreement.
- Negotiation could be:-
 - Direct negotiation; or
 - Assisted negotiation;

Settlement...

- Direct negotiation is held directly between the very parties to the dispute. The parties may, of course, be assisted by their own internal advisors.
- In case of assisted negotiation, mediation & conciliation come in to picture.
- Negotiation requires two qualities or skills:
 - knowledge on substance or the subject matter to be negotiated; and
 - knowledge on the art & skill or process of negotiation.
- There are two types of negotiation:
 - Interest based negotiation; and
 - Rights based (positional) negotiation;
 - Alternatively they may also be called:
 - Competitive or hard-bargaining (for rights based); and
 - Cooperative or soft-bargaining (for interest based) negotiation

Settlement...

- Both types of negotiation may have their own advantages & disadvantages._
- In an attempt to avoid the disadvantages while gaining the benefits of competitive & cooperative bargaining techniques, principled negotiation has been developed at Harvard Law School by certain professionals.
- The principled negotiation has seven elements.
 - These are:
 - Alternatives;
 - Interests;
 - Options;
 - Legitimacy;
 - Communication;
 - Relationship; and
 - Commitment;

- **Settlement...Negotiation...**

- A good deal in negotiation is, therefore:-

- One that is better than your Best Alternative to a Negotiated Agreement (BATNA);
- One that satisfies your interests & the other person's interests;
- One that has been achieved after you have brainstormed & explored numerous options;
- Based on a standard of legitimacy that is fair, persuasive for you, and the other negotiator;
- One that has been achieved through effective communication, where you have interactively listened to the other negotiator;
- One where the relationship has been maintained, if not improved, and certainly not destroyed; and
- One where the appropriate level of commitment is made at the end of the negotiation, not at the beginning;

- Negotiation helps to save time & money for the parties in dispute.
- It maintains also relationship between the parties.
- It creates a win-win-situation.
- The settlement is also easily implement able.

Arbitration

- Definition
- Arbitration is a process whereby parties in dispute agree to submit the matter in dispute to the decision of a person or persons in whom they have confidence & trust & undertake to abide by that decision.

Arbitration...

According to Article 3325(1) of the Civil Code:-

- The arbitral submission is the contract whereby the parties to a dispute entrust its solution to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the principles of law.
- The very nature of arbitration is that it is fundamentally consensual. Arbitration is based on contract between the parties to the construction contract & the dispute:
- The contract to resolve a construction dispute is known as agreement to arbitrate.
- Agreement to arbitrate or the “Arbitration Clause” is independent from the substantive contract. It is called severability or autonomy of the arbitration agreement from the rest of the construction contract.
- The construction dispute shall also be arbitrable.

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- The arbitration agreement could be:-
 - an ad hoc agreement; or
 - an existing agreement;
 - An ad hoc agreement is an agreement where the parties in dispute agree to refer already existing disputes to arbitration.
 - An existing agreement is one where the parties to a certain contract, usually called the substantive contract, have already agreed to refer any & all of their future disputes to arbitration.

Arbitration...

- Advantages of Arbitration

- In relative terms, the following may be taken as advantages of arbitration.

- Neutrality; (of the arbitrators)
- Confidentiality; (no publicity of both the process & the outcome)
- Procedural flexibility; (the parties in dispute are capable of designing their own process)
- Expert arbitrators;
- Speed & cost;
- Finality of awards; (no appeal, if not always)
- Enforcement of awards; (recognition of the award by national courts)
- Limited powers of arbitrators; (no coercive power)
- Multi-party disputes; (no joinder & no consolidation of third parties without their express consent)
- Awards not binding on third parties;

Arbitration...

- Types of Arbitration
- Arbitration could be voluntary or compulsory, binding or non-binding, international or domestic, institutional or ad hoc, and so forth.
- The most known types of arbitration are:-
- institutional arbitration; and
- ad hoc arbitration;

Arbitration...

- Institutional arbitration is an administered type of arbitration. The process of arbitration is backed by the management support of a given institution. It has its own Rules of Arbitration & institution.
- The following institutions are, for example, internationally recognized in administering international arbitrations.
- International Court of Arbitration of the International Chamber of Commerce (ICC) Paris;
- The London Court of International Arbitration (LCIA) London;
- The American Arbitration Association (AAA) New York;
- The International Center for Settlement of Investment Disputes (ICSID) Washington. DC;

Arbitration...

- Ad hoc type of arbitration has no administering institution behind the arbitration process. Both the management of the case including financial issues has been left to the arbitrators & the parties.
- In case of disagreement between the parties on:-
 - the setting in motion of the arbitration process;
 - the appointment of the arbitrators;
 - the challenge of arbitrators; and
 - other issues the role of the court is also highly essential.

Arbitration...

- Ad hoc arbitration could be managed by the following Rules:
 - By devising special arbitration rules prepared by the parties to the dispute to that effect; or
 - By adoption of the UNCITRAL Arbitration Rules;

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Arbitration...

- Some international arbitration institutions provide some services in case of ad hoc arbitration.
- The Arbitration Institute of the Stockholm Chamber of Commerce may also provide services to the parties to an ad hoc type of arbitration against payment of costs for its services.
- The possible services are provided under the UNICTRAL Arbitration Rules since 1 April 1999.
- The Institute has its own Rules to regulate the provision of the services.

Arbitration...

- The services are;-
- Services as an Appointing Authority; and
- Administrative Services;
 - Services as an Appointing Authority
 - The services are:-
- Appointment of sole or presiding arbitrator; Art. 1;
- Appointment of a “Second” arbitrator in three-arbitration cases; Art. 2;
- Decisions on challenges to arbitrators; Art. 3;
- Appointment of substitute arbitrators; Art. 4;
- Consultation on fees of arbitrators & deposit of costs; Art. 5;

Arbitration...

- Administrative Services
- The services are:-
- Providing, or arranging for, meeting rooms for hearings or deliberations of the arbitral tribunal;
- Providing secretarial or clerical assistance;
- Forwarding of written communications of a party or the arbitrators;
- Arranging for stenographic transcriptions of hearings;
- Arranging for services of interpreters at hearing;
- Up on request, other services;

Arbitration...

- The following points are important in formulating or drafting an arbitration clause.

- The type of arbitration;
 - Institutional vs. ad hoc;
 - International vs. national/domestic;
 - Binding vs. non-binding;
 - Based on the strict principles of law vs. ex aequo et bono (or based on equity)

Arbitration...

- The applicable law;
- Substantive & procedural
- The place of arbitration;
- Neutral vs. home
- The language of the arbitration;
- One or two, if two, ruling language
- The applicable rules of the arbitration;
- The place of arbitration or otherwise

Arbitration...

- The number of arbitrators;
- Sole or three,
- Appointing authority, in case of disagreement & in case of ad hoc arbitration;
- The place of enforcement
- Home or neutral or otherwise, if to be agreed;

Arbitration...

- Rules of evidence
- factual witness;
- expert witness; (party and/or tribunal appointed)
- documentary proof;
- project site visit or inspection;
- Other sources of evidence, if any;

Arbitration...

- Special power of the arbitrators
- Tribunal's own jurisdiction;
- Assessment of special damages;
- Award on interest;
- Award on costs of arbitration;
- Granting injunctive relief;
- Other issues;

Arbitration...

- Number & Appointment of Arbitrators
- The number of arbitrators could be one or three.
- In case of one arbitrator the arbitrator being called as sole arbitrator.
- In case of three arbitrators, they are called collegiate.
- In both cases the organ, if constituted, is called the Arbitral Tribunal.

Arbitration...

- The following may have a role in the selection, appointment or confirmation of arbitrators.
- The parties to the dispute;
- An agreed arbitration institution;
- A designated appointing authority;
- A competent court;
 - This may depend on the type of arbitration being either institutional or ad hoc and/or the number of arbitrators being either sole or collegiate.

Arbitration ...

In case of institutional arbitration both the parties & the arbitration institution have a direct role to play.

- In case of ad hoc arbitration the parties, and, if they fail to agree, the appointing authority, if any, or the parties, and, if they fail to agree, the court, if no appointing authority has been designated, play a direct role in the appointment process.

Arbitration...

- For example, in case of institutional arbitration under the Arbitration Rules of the Ethiopian Arbitration & Conciliation Center, the appointment process resembles as follows.

Arbitration...

- The Arbitral Proceeding
- Introduction
- The arbitral proceeding covers the period from the constitution of the arbitral tribunal up to the rendition of the final award by the arbitral tribunal.
- The arbitral proceeding is at the heart of the arbitration process.

Arbitration...

- The arbitral proceeding is the process by which the arbitral tribunal discharges its function for which it is established.
- The form of arbitral proceeding may be dependent upon the type of arbitration being either institutional or ad hoc, or being international or domestic.
- The arbitral proceeding is specifically designed both by the parties & the arbitral tribunal without prejudice to the mandatory provisions of the law.
- Procedure

Arbitration...

- The following is the procedure under Clause 67 (Settlement of Disputes) of FIDIC for international construction arbitration.

- Claims made but rejected;
- Construction dispute arises;
- Dispute referred to the Engineer's decision;
- Decision of the Engineer becomes final unless referred to arbitration;
- Notice of intention to commence arbitration;

Arbitration...

- Introduction of procedure for amicable settlement before arbitration but after notice in respect thereof;
- Amicable settlement becomes unsuccessful;

Arbitration...

- The Framework of Arbitration
- The following six points constitute the framework of (international & institutional) arbitration.
- These are:
 - The arbitration agreement;
 - The arbitration rules;
 - The Arbitration institution;
 - The arbitration law;
 - The arbitration treaty;
 - The court;
 - **Litigation takes place at the court of law having jurisdiction over the case.**
 - **The courts play here their dispute resolution role.**
 - **Litigation is the most serious & adversarial method of dispute resolution.**
 - **The procedure before the court is so rigid & not tailor made to the construction dispute resolution**

Litigation

- The courts are following the standard procedure established under the civil procedure code, which applies for all types of disputes brought to them.
- The advantages of arbitration are all missing under litigation.
- The clear disadvantage of litigation is that it being the most time consuming.
- The clear advantage of litigation is that the court itself enforces its own orders & judgments.
- The role of courts, however, very important in terms of:
 - Enforcing an agreement to arbitrate;
 - Recognizing & enforcing domestic arbitral award;
 - Recognizing & enforcing foreign arbitral award;
 - Rendering judicial assistance to the arbitration process or to the settlement agreement;
 - Hearing appeals against the arbitral award, if not final & appeal able; and
 - Setting aside of an arbitral award, if, legally qualified to be set aside;

For details, please, refer to the section of the Course entitled: “Law Enforcement