

Alternative Dispute Resolution

Chapter One

General Overview of ADR

- Dispute is indispensable part of societal interaction since the inception of human settlement. If it is not well taken and resolved early, dispute between two individuals will grow up and become treat to national security, peace and stability, which are the basic parameter to measure the development of a nation.
- With the objective of settling dispute in a more justifiable manner, national governments and the constitutions of most nations establish institutions; judiciary organs of the government. It is the natural mandate of courts of law to entertain disputes.
- Courts and administrative tribunals are public

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- But before the establishment of courts and administrative tribunals, and even after their establishment, there have been other private tribunals by which the society is trying to settle disputes. These are called Alternative Dispute Resolution (ADR) mechanisms.
- ADR doesn't refer a single kind of mechanism, but it is a generic name to refer dispute settlement mechanisms other than court and administrative tribunals. Arbitration, Conciliation, Mediation, Negotiation and Mini- Trial are some of them which are referred as ADR.
- The provision of effective dispute resolution is the core concern of domestic as well as international legal system. The aim of devising mechanisms to afford effective dispute resolution is to ensure that disputes are solved through effective and efficient means for the benefits of the disputants and the society in general.

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- Alternative Dispute Resolution is a generic term used to describe a range of procedures designed to provide ways to resolving a dispute as an alternative to court procedures.
- ADR had been used by human society since ancient times though it gets wide acceptance and recognition in countries' laws recently. ADR methods, in comparison with court litigation, have various advantages though it is not free from different short comings.

1.2. Definition; What is Alternative Dispute Resolution?

- ADR is composed of different words: Alternative, dispute and resolution. Thus to clearly understand or define the phrase it is paramount important to understand each words separately thereof.
- The word 'Alternative ', as to the definition given in

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- The nouns 'Conflict' and 'Dispute' are used interchangeably all time and indeed, are synonymous for each other in English Language.
- Abebe Semagne in his unpublished senior thesis also quoted the meaning of dispute as;
“ a conflict or controversy; conflict of claims or right; an assertion of right, claim or demand on one side met by the contrary claims or allegations on the other; the subject of litigation; the matter for which a suit is brought and which issue is joined; and in relation to which jurors are called and witness examined”
- The other element of ADR is Resolution. The Oxford Advanced Learner's Dictionary defines 'Resolution' as the act of resolving or settling a problem, dispute, etc.

1.3. Historical Development of ADR

- There is no clear information when exactly ADR had been used as means of dispute resolution but it quite possible to conclude its dating back to the history of human society since there were no courts to resolve differences during ancient time .Different scholars have showed the long history of ADR methods in their work.

1.4. Purpose of ADR

What are the advantages of ADR?

A. Reduction of Cost and Time

- ❖ Law suits are expensive, some times the cost goes even the extent of making the victory of a party insignificant or exceeding of the amount of judgment .
- ❖ There are court fees, filing fees, lawyers' fees, and other costs. There would also be loses to be incurred by both litigants because of spending longer time in litigation that may not be covered by the courts awards. On the other hand, an ADR system can make it possible to use process that cost small fraction of the litigation, and yet produce as good or even better results.

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B. Improve or Maintain the Relationship

- In situations where the disputants have an ongoing relation , ADR system allows them to work through their difficulties in a productive way that does not destroy their relationship.
- After acrimonious litigation, disputants rarely want to put the past behind them and work cooperatively. The dispute resolution system may provide process that will not leave people to work together angry and frustrated with either the result or the process itself. In the ADR process the disputants could rather learn information that will allow them to work more effectively in the future.

C. Satisfactory Outcome

- ❖ Regardless of the process used, the solution must solve the problem that exists. ADR procedures tend involve the parties with the view to achieving settlement.

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D. Deal with Emotion

- The ADR process will give disputants an outlet to discuss their frustrations. They will get the chance of venting emotions in a non-threatening environment. This will help the disputants be satisfied with the outcome. ADR provides for effective and neutral methods or factors for achieving maximum impact on the process, strategy, and tactics to words resolution. A disputant will be ready to deal with the issues when he or she is satisfied that other person has listened to his or her point of view.

E. Avoid Future Disputes

- An ADR system can yield us techniques that can resolve disputes effectively and without damaging relationships. The process used for a dispute at hand can provide a framework to deal with anticipated disputes. In the future or recurring disputes, the system may help to take advantage of the resolution in the past to avoid guidance for the future, and to learn from experience.

1.5. Demerits (Shortcomings) of Litigation

A. Cost of Litigation

- Law suits are expensive. There are legal fees, filing fees and cost that can be imposed against the losing disputant. There are costs for being away from daily work to attend court hearing and at this moment the employer increase cost. In some cases, too, the cost of trying the case may exceed the amount of the judgment.

B. Time

- It takes time from the commencement of the law suit until a judgment at the trial. Even after the trial, the losing disputant may appeal and it may take a good deal of time before final decision is rendered. There is also time that is needed for the implementation of the judgment.

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C. Emotional Cost

- Litigation is an emotional process. It increases tension between the parties. Litigants consider, while they are out of court, what they have said; what they should have said; what they will say; how unfair the process; what they may come out under cross-examination; and the consequence of losing.

D. Litigation is Public

- The public has the right to attend court proceeding but in few confidential cases. The press report and comment on the proceeding might be dispersed through different Medias. On the other hand, the issues in the dispute may be confidential ones that the disputants do not want to share with others. Litigants may be embarrassed about the allegations made against them and may be made public regardless of whether they are true or not.

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E. Absence of creative solutions

- Judges are empowered to decide the issue before them according to the law, even if the solution to the issue is best fit to the other issue. Judges interpret the law relevant to the case and determine the case based on the legal rights of the parties. They are not permitted to expand the list of possible options to see if the particular case would be best served by a solution that was not argued and that application of the law would not allow.

F. Little Opportunity for the Parties to Vent Frustration

In court litigation the opportunity for the parties to say what is in their minds and to

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- There is no opportunity for them to talk about how the litigation has affected them, or to vent about what has occurred. Although there is discovery, indirect and cross- examination, there is no opportunity to ask the questions that the parties want to ask each other and to say what the parties want to say.

G. Unpredictability

- In litigation, both sides argue the facts that they believe apply to the issue to support their positions. However, at the end, the judges will decide on the issue each side usually believed that his arguments and analysis is better than the other side's. However, the issue is unpredictable and is necessary for the judge to make a decision, which is binding. As a result a risk in going to trial and putting the decision in the hands of the judge. Besides there is no guarantee that the judge will always find the truth.

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H. Expertise of Decision Maker

- In trial, the court selects the judge. Moreover, the judge may or may not understand the unique attributes of the dispute. Judges may work hard to learn the law relevant to the case before them and do their best to make informed and reasoned decision. Nevertheless, they may lack the expertise in all area to properly address the merits of the claim being made.

G. Control over the Process

- In litigation, the process is determined by procedural laws and by the judge, the disputants have no control over it. They are told when to sit, when to stand, when to speak, etc. they have no control who presents first and who follows, when the process at a day will finish.

H. Win/Lose

- In court litigation, a judge must, determine the winner and the loser. There must be a loser in particular litigation. Therefore, litigation ends up in determining the winner and the loser; not in an agreement or will full disagreement.

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I. Decisions are Imposed

- Court decision is imposed on the loser against his /her expectation. People rarely like to have decision imposed on them. Most of the judgment debtors of the court judgments perceive it as extremely imposed and unjust. They consider themselves as loser. And even though judicial enforcement mechanisms can be used, mostly they attempt to avoid enforcement of this decision.

J. Damage to Relation

- Usually the end of litigation leads disputants to hate each other and their relationship is destroyed. The disputants may face difficulty to amend their relationship to the point where they can do business together and enter into future negotiation –they will take it not worth to enter in to contact with their former adversary

1.6. Demerits of ADR

A. In balance of power

- The benefit of voluntary negotiating agreement may be undermined where there is a serious imbalance of power between the parties –in effect , one party is acting less voluntarily than the other.

B. Lack of legal expertise

- Where a dispute hinges a difficult point of law, an arbitrator may not have the required legal expertise to judge.

C. No system of precedent

- There is no doctrine of precedent, and each case is judge on its merits, providing no real guidelines for future cases.

D. Enforcement

- The decision not made by the court may be difficult to enforcement. Don't forget that other ADR scholars take easily enforcement of compromise in ADR process as one of the advantages of the system.

CHAPTER TWO TYPES OF ADR

- Types of ADR list cannot be exhaustive or final as there are various dispute resolution mechanisms other than court litigation and it is still evolving.
- The types of Alternative Dispute Resolution, however, can be categorized into three categories based on the procedures we follow in each dispute resolution mechanisms. These categories are formed by considering the kind of work product resulting from ADR and how the parties participate. The categories of ADR procedures are agreement, decision and advice.

1. Negotiation

Negotiation can be defined as: a non-binding procedure involving direct interaction of the disputing parties where in a party approaches the other with the offer of a negotiated settlement based on an objective assessment of each others position.

It may be to agree to change or refrain from changing: their relationship with each other; their relationship

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❖ **Perceived advantages of negotiation**

- ✓ One special attribute of negotiation as a method of resolving difference is flexibility, both with regard to the manner in which the parties proceed and with respect to the ultimate accommodation reached.
- ✓ It allows difference to be adjusted in a way that either maximum mutual gains or meets at least some needs of all parties to settlement.
- ✓ A third attribute is that it implicitly recognizes the dignity and worth of all participants since negotiated resolution requires the parties assent.
- ✓ Finally, unlike some other methods of resolving difference, negotiation takes in to account unofficial as well as official values –that is, it can reflect values that are important to the parties even though these values not have legal status.

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❖ **Perceived disadvantages of negotiations**

- ✓ Firstly, as negotiation is all about bargaining, the parties have no assurance that they will reach a settlement. Nevertheless, the process requires an investment of time, effort, and often other expenses.
- ✓ Secondly, the soundness of the resolution may be impaired if the parties miss present their goal or the back ground information or if, after agreement is reached, circumstances change from what one or more parties anticipated during bargaining.
- ✓ Thirdly, some times negotiated settlement does not satisfy community mores or relevant and lawful interest of third parties and thus, may be unenforceable or subject to one or more participants to criminal penalties. Accordingly, it is not always the most desirable means of resolving conflict.

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❖ **Legal effects of negotiation agreement.**

- ✓ If the parties conclude negotiation in line with the law, this agreement will have effect on the agreed parties. Currently, the general policy of the law favors negotiated settlement of current and future disputes for the obvious benefit that which settlement brings- less litigation and cost in terms of time and money for the parties and the courts. Settlement agreement is, therefore, considered as contracts between negotiating parties.
- In general, terms of agreement lawfully concluded by the negotiating parties shall be binding on them as though they were law. This is to mean that though the requirements for valid negotiation agreement differ from country to country , an agreement which is established with the free consent of the parties in dispute and as to the specific requirement specified by the law at hand , the agreement will be binding upon the parties.

2. Mediation /Conciliation

- It can be defined as the processes by which the participants, together with the assistance of neutral person or persons, systematically isolate disputed issues in order to develop optional alternatives and reach a consensual settlement that will accommodate their needs.
- Mediation/conciliation is a process that emphasizes the participants' own responsibility for making decisions that affects their lives. It is therefore a self-empowering process. Thus , it is purely different from negotiation so long as there exist a third party involvement.
- The more useful way of looking at mediation / conciliation is to see it as a goal -directed, problem -solving intervention. It is intended to resolve disputes and reduce conflict as well as provide a forum for decision making. Even if all elements of the dispute may not be resolved, the underlying conflict can be understood by the participants and reduced to manageable level.

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❖ **Features of Mediation /Conciliation**

- Mediation, differ from arbitration where the outsider decides for the parties (their behalf) how the matter is to be resolved. Although a mediator may recommend or try to influence a party, he or she has no comparable decision making powers and practical or legal ability to compel any party to do or refrain from doing any thing. This is to mean that mediation is not binding.
- Mediation could be annexed to the court system, so as to become a judgment of the court if the agreement is reached. The parties may define the issues to be settled by themselves or the mediator may assist them in this regard. The extent to which the mediator interferes in the negotiation process can vary widely , on a continuum ranging from mere as chairperson , to very structured process in which the mediator go so far as to suggest settlements to the parties.

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❖ **Perceived advantages of mediation**

- When used in the contested of on going relation ships, mediation allows underlying issues and emotion to be addressed and resolved , and so allows the relation ship to be continued in the future . Thus, mediation is commonly used in the area of family law.
- As the decision is reached by the parties to the dispute instead of being imposed on them, there is a great satisfaction with the dispute resolution process and outcome, and consequently, greater compliance with the result.
- The process is less confrontational than adjudication and so reduces the likely hood of win or loss mentality and provides a frame work for the future dispute between the parties.
- As opposed to adjudication, mediation process is faster, cheaper and less formalized, both in terms of process and in tailoring results. This increased flexibility allows the needs of particular parties to be addressed.

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❖ **Perceived disadvantages of mediation**

- It is inappropriate where parties to a dispute are at an imbalance of power, or where there is a history of physical violence, as one intimidates the other;
- It also increases cost if mediation fails and arbitration follows; an unrepresented party by a lawyer may be disadvantaged than the represented one.
- It is also questionable whether the perceived advantages of mediation are possible if the process is involuntary.
- There are concerns regarding the ability and qualification of mediators, and whether they should be subject to professional standards.
- Finally, the use of mediator as alternative to court adjudication may result in second class justice for low-income and disadvantaged peoples.

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❖ **Mediation proceedings and the roles of mediator(s)**

- Mediation involves an impartial, independent third party, mediator, helping disputing parties to reach a voluntary, mutually agreed solution. The disputant, not the mediator decides the terms of the agreement. The only function of mediator is to assist the disputants to overcome any obstacles during their negotiation, to determine the dispute in the hope that disputants and mediator will develop creative solutions that satisfy their interest.

❖ **The roles of lawyers in mediation**

- Lawyers may assume different participatory roles in mediation. A lawyer may represent his client and negotiate on his behalf. In case of court annexed mediation particularly, clients would favour if their lawyers involved in that process.

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- Lawyers should be able to inform disputants of the relevant law and suggest possible court outcome. However, the extent of his help should be limited to general information, to the extent of defining the legal issues. Lawyers should not serve as legal advisors or should not direct the decision of the clients in line with their interpretation of the law as applied to the fact of the situation. Even after agreement of disputing parties is reached, lawyers can play great role to draft the agreement of their clients through mediation process.

❖ **Legal effects of mediated agreement.**

- The purpose of mediation is to enable the parties to arrive at a mutually acceptable resolution of the dispute in a cooperative and informal manner.
- The resolution is considered to be a contract and is enforced under the general principle of contract law. The Ethiopian law, for instance, has the similar position. Art. 3320 of the civil code requires conciliator to draw up the terms of compromise when the parties settled their dispute amicably, i.e. through mediation.
- Art. 3307 C.C also defined compromise as one forms of contract. The provision reads as “A compromise is a contract whereby the parties, through mutual concession, terminate an existing dispute or prevent a dispute arising in the future.” If one of parties in their compromise renounced all of his rights ,actions and claims he will loose such rights ,actions and

Arbitration

- 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 parties present evidence through documents, exhibits and testimony. The parties may agree, in some instances, to establish their own procedure or administering organization may provide procedures.
- 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.

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1. Arbitrability

- 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.
- 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.

2. Arbitration agreement.

- 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.

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.

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Varieties of Arbitration

- 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

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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

Arbitration and litigation

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.

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❑ **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.

Perceived Advantages 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.
- It 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.

Perceived disadvantages of Arbitration

- 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 or law, which may lead to unfair results.

The Role of Arbitrator

- 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 advocates of disputing parties than their being a judge.

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 be impartial to the parties at a dispute so as to maintain 'justice.' similarly the rule of impartiality should apply in arbitration process.
- 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.

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- In 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.

Independency of arbitrator

- 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 relationship 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.

CHAPTER THREE

ADR IN ETHIOPIA

Introduction

- In Ethiopian history this was the fact before the formal establishment of courts in the 1940's and after that in some localities.
- The above discussion gives us some light about the administration of justice our early history. But this was not the only means of settling dispute and making justice. The formal adjudicative function of the governors in their different hierarchy contributes only for the settlement of some of the disputes. Most of the disputes were settled by elders, religious leaders, like priests, or clan chiefs elected by the community.

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- Before the 20th century where there were customary laws prevailing all over the nation, different localities had their own ways of dispute settlement inherent in their identity without reaching their local governors. These means used the elders or “SHIMAGILE”, which are the most respected and wise part of the society because of their status or age, as an intermediate. The powers of the SHIMAGILE’s were limited on persuading the disputing parties to compromise their matter. These intermediates were wise and persuasive enough to succeed backed by the norms of the community.
- As a result of formal establishment of institutions in the second half of the 20th century like courts with state nominated judges and administrators nominated by the state, the roles of customary ways of dispute settlement became absolutely alternative.

Constitutionality of ADR

Constitution regulates most important activities of the state. For example, it recognizes inherent rights of citizens with its respective duties, and also establishes government agencies together with its responsibilities. One of the pillar rights of citizens which are recognized by Ethiopian constitution, as it happens in all the constitutions of other nations of the world, is ***access to justice***.

Article 37 of the same reads as follow

“Everyone has the right to bring a justifiable matter to and to obtain a decision or judgment by, a court of law or any other competent body with judicial power”.

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- This part of the constitution which is subject to broader interpretation has incorporated different elements. At least the following can be said about the included rights in this provision. The first clause speaks about the rights of individuals to bring any of his grievances to the appropriate body. The second phrase qualifies the nature of the matter that can be safely taken to the body, i.e. justifiable matter only. This seems to talk about the real interests of the claimant and the existent of cause of action. Thirdly, we should not think of a mere right of bringing the matter to the authorized body but also to get remedy for his or her grievances. This puts a positive duty to the state to make sure, that after the claim has been accepted by the appropriate organ, justice has been done to the satisfaction of the general public.
- Since it is beyond the capacity of the state to satisfy the needs and interests of all the needy citizens, encouraging the establishment of ADR institutions and letting disputants settle their dispute amicably is the extended obligation of the state to best secure access to justice.

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- Article 78(5) of the constitution empowered the House of Peoples Representative or as the case may be State Councils might establish or obliged to give recognition to the established customary and religious courts. The existing Shari' a court is an example of religious courts established in the nation under state recognition.

Customary ways of Dispute Settlement

- ✓ Customary and religious laws are earliest and prominent in Ethiopia to settle disputes. African continent were filled with customary laws before the incursions by foreigners. Particularly in Ethiopia customary laws of different ethnic groups were the major body of law in Ethiopia for centuries. Even after the introduction of written and authoritative laws, like the Fetha Negest in the 15th century, customary laws played a significant role in the administration of justice.

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- The 1950's and 60's transformation era primarily aimed at unifying the laws of the nation under the same authoritative legislation and the minimization of application of customary laws. Article 3347(**Civil code**) envisages this objective the civil code. But this does not mean that the applications of customary laws are totally abolished by these new enactments. Rather they are legalized in a sense that the codes recognized the importance of customary norms of the society in two ways.
- ✓ One, by directly incorporating the prevalent customary norms in the codes, like in the family, succession and property laws.
- ✓ In the other hand some times direct reference had been made to those customary laws of the society as long as they are not contrary to the prevalent laws, like formation of marriage, interpretation of contract (Article 1713 of the civil code).

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- Under the FDRE constitution customary laws and practices have been given due cognizance unless they are not contrary to the legal norms. Reference can be made to articles 9, 34(5), 41(9) and 91 of the same. These show as still now customary norms are sources of law in some subject matters.
- Customary laws of Ethiopia which are different in form and substance are deeply rooted in the traditional institutions of each ethnic group. They are not uniformly applied but are mostly peculiar to ethnic groups with some exception.
- Among the subject matter where the customary laws are still enforce are administration of justice or settlement of disputes. We have ample and unique ways of settling disputes of any nature and degree arisen among themselves and with their interaction to other ethnic groups. Some exist though they are contrary to public policy, like arbitrating criminal matters between the victim and accused.

Common characteristics of customary dispute settlement

1. Intermediates (SHEMAGILES) - The third parties who act as an intermediate between the disputants have some common character in their identity, ways of nomination and their role through out of the proceeding. When we see their identity, they are the most respected parts of the society as a result of different reasons. Some times they are chiefs of the clan or the community, religious leaders or heads of the religion, or local administrators who have the official capacity.

What ever that matter could be he is expected to be an old person (mostly men are favored over the women), wise and experienced enough in settling disputes. Those **shimagiles** might be from the relatives or clan of both the disputant equitable in their number in addition to neutral intermediates or some other times only with neutral once.

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2. The nature of the proceeding - After the nomination of the shimagiles, they will officially start their function of pushing or persuading the disputants to submit their matter for review before them. We might not get formal and standard steps followed by all customary ways of dispute settlement. But mostly they will make a mini investigation as to the nature of the dispute and the personal characteristics of the disputants.

The compensation will be handed to the victim in cash or in kind, like herds of cattle. Often the shimagiles will not be compensated the expense they have incurred during the proceeding nor paid for the service they have delivered. It is considered as a public duty and some times with no option to resign from the status of being shimagile.

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3. Subject matter of dispute presented before SHIMAGILES -

As customary laws were in force for a long period of time in Ethiopia, we can no see choice being made in the subject matter of the dispute. Customary dispute settlements have a wider scope in settling family, succession and property disputes. Specially, bringing family dispute before court of law will be considered as a shame for the spouses.

Very often dispute which involve a class of peoples or the whole member of a clan or locality, like a dispute over grazing lands and water in the lowland areas, murder, rape and abduction cases, are referred to customary dispute settlement. Even it is believed that the quality of the outcome of such a method in creating peace and harmony cannot be compared with what might happen in the courts of laws.

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- If it is a compromise, the disputant who is declared to be the wrong doer will be required to compensate the victim. The compensation may be in kind or in cash. The amount money will be determined by looking the gravity of the wrong act, the extent of the injury sustained by the victim and to some extent the financial capacity of the wrong doer. The nature of this compromise is like a contract and parties are bound to perform the obligation they have assumed before the shimagiles.
- On the other hand, if the proceeding ends up with no success, the disputant who fails to resign his contention claim will be seriously condemned by the community for failing to obey the words of those wise elder men. This will result him to be isolated from the community in his daily life and in time of emergency to the extent of expelling him from the clan or religious group.

Compromise in General

- The fact that we do not have a consolidated legal document to regulate ADR matters does not mean that we do not have any laws to regulate the matter. Thus, we have got lots of provisions and principles regulating the issues related with ADR. These principles, however, are scattered through out of different substantive as well as procedural enactments.

Definitions

- Gilbert's Law Dictionary defines the term compromise as "An agreement to settle differences by making mutual concessions; it can be made in or out of court."
- Not far different from the above documents our civil code under Article 3307 defines compromise as "A compromise is a contract whereby the parties, through mutual concessions, terminate an existing dispute or prevent a dispute arising in the future".

Nature and effect of Compromise

- Article 3308 seems to speak about "Form of Contract" as the title indicates but it, in fact, speaks about what matters can be dealt by compromise. Thus, it seems it is speaking about the object of compromise. Any ways, parties, based on the subject matter at their hand and their pre existing relation, can conclude a compromise contract to create legal rights and obligations; to modify the existing rights and obligations; and possibly to extinguish or terminate the already existing relation among themselves.
- The other effect of compromise is that the parties will bind only to the extent they have agreed and also it will not have an effect to other parties alien to the contract, i.e. principle of Privity of Contract (Art. 3311). Further, compromise is more than a contract in a sense that "it will have the force of ***res judicata*** with out appeal". But it may be contested on the ground of fundamental mistake if any of the following conditions are fulfilled;

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1. The instrument for the performance of which it is made is void, or one or both of the parties was due to the existence of a document which is shown to be false, and (in both of the above cases) where the parties have no doubt as to the possible voidability or falsification of the documents at the time of contracting (Art 3313), or
2. The dispute they regulated has been already settled by a judgment having the force of res judicata of which both of the parties are unaware and no appeal has been started against this judgment (3314), or
3. A document unknown to any of the parties at the time of the contract have subsequently been discovered and if this document were willfully withheld by one of the parties and if the contract is of a general settlement on all matters they have in common (3315).

Compromise before a Court of law

- Art. (274) of civil procedure code provision gives the parties the right to terminate all or part of the claim (including accessory matters like cost, damage and execution 276) for which a substantive litigation has been instituted and proceed with compromise.
- After a case has been instituted before a court of law compromise can be made in two different ways; one during the hearing before the court of law and the other is out of court. In both ways the content of agreement is advised to be drafted in line with the Art 276(1).
- Compromise in a pending case can be initiated by either of the disputant by their on motion or possibly by the court in the attempt of reconciling the disputants. In any of these cases, however, the willingness and consent of the disputants is mandatory and the court, in no way, can force them to do so. If they agreed to reconcile the matter, they can do it at the hearing before the court of law. This agreement will be made in written form and signed by both of the parties. The court after being satisfied that the contract is not contrary to law and public moral will entered the compromise in the case file and make a decision or judgment accordingly. And this will end up the litigation between the parties (277).

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- The other alternative is the parties can make the compromise out of the court room. If such come to happen, the court shall be informed of such a matter and the plaintiff may apply to the court for permission to withdraw from the suit (277(3)). The permission granted by the court will enable the plaintiff to institute a fresh suit in respect of the same subject matter of the suit in case if they failed to agree and end up the dispute in compromise (278(2)).

Conciliation

- Conciliation is one type of ADR, which may be used in the settlement of a variety of dispute. The term conciliation is sometimes used interchangeably with mediation though there is slight difference among these two processes.
- The Ethiopian law used conciliation rather than mediation and it is the second widely used ADR next to arbitration. The civil code in its special contract part discusses conciliation not in the sense of contract only but also its procedural aspect. Though it fails to define what conciliation means, it provides procedure for appointment of conciliator, the rights and duties of the parties and the conciliator, and its effects.
- Even if the Ethiopian law failed to define what the term conciliation means, it can be defined as an informal process in which a neutral third party, conciliator, tries to bring the disputants to agreement, lowering tension, improving communications, interpreting issues and exploring potential solutions so that they can discuss their dispute and come to a negotiated settlement.

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- Conciliation might be the most favourable means of dispute settlement over arbitration and litigation in some cases like where a higher amount of flexibility is required, secrecy is top priority, the dispute is of less serious in nature, the parties' future relation should not be prejudiced (e.g. disputes in family and employment relation) etc. But this does not mean that all disputes are allowed to be referred to conciliation. Our law is not clear enough to distinguish these subject matters of dispute.

Conciliators

- Conciliators are persons who act as an intermediate during the conciliation proceeding between the disputants in their effort to resolve the dispute by compromise. If the proceeding is out of court, in fact it is in most of the cases, the power, right and duties of conciliators are regulated by Arts 3318 - 3324 of the civil code.

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- It is the inherent right of the disputant or parties to determine the identity and number of conciliator whom they believe that he or she can protect their interest by bringing them together and negotiating a settlement between them.
- This inherent right extends in discharging the conciliator from his office as well. However, the conciliator may be appointed by an institution or third party where the disputants wish so to happen (3318(1) and (2)). To be a conciliator is not a public duty to be imposed against the interest of the person nominated to such status. Thus, a person appointed as a conciliator shall be free either to accept or refuse his appointment (3318(3)).
- Concerning the number of conciliator, Ethiopian law is silent. There is no limitation as to the number of conciliator; it can be one, two, three, four, etc. The parties may determine the number of conciliators as they want.

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- Conciliators are only facilitators and make no decisions on the merit of the case and can not impose his view of what a fair settlement would be. The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of dispute. The conciliator is to be guided by the principle of objectivity, fairness and justice, The followings are some of his specific duties;
- He shall give the parties an opportunity of fully stating their views before expressing his findings (3320 (1) and (2)),
- He shall draw up the terms of compromise if the parties come to a negotiated understanding or a memorandum of non-conciliation if the parties failed to reach a negotiated settlement of the dispute. And also he has to communicate such documents to the parties (3320(3)),
- He is required to keep confidential all matters relating to the conciliation proceeding. This obligation also extends to the negotiated settlement or agreement, except where its disclosure is necessary for the purpose of implementation and enforcement,

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- Principle of impartiality; He should be neutral, honest and diligent and stand only to protect the interest of both parties to the dispute. In discharging his duty he has to be guided by the principle of objectivity, fairness and justice.
- He shall try to complete the whole proceeding of conciliation within six months (3321(1)),
- Help the parties to enforce the conciliation, e.g. discharge stamp duty as per the stamp duty proclamation, he may sign up on the negotiated settlement agreement, but this is not mandatory.

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- The corresponding right of the conciliator will be to get due respect and recognition from the disputants. In addition, he "shall be refunded of any reasonable expense he has incurred in the discharge of his duties". This is some sort of compensation for the money he has spent during the proceeding while facilitating the compromise. But for the time he devoted and service he delivered, there won't be any payment or remuneration unless the parties expressly agreed (3323).

Effects of Conciliation

- After you get in to the proceeding, there are two possible outcomes; compromise or non conciliation. If it end up with success and the parties sign up on the compromise that will be the end of the case and the one we have discussed above about the effect of compromise (e.g. res judicata) will apply. This means if the parties have expressly undertaken in writing to confirm the terms of compromise drawn by the conciliator, they shall be bounded by it.

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- In addition, after a compromise is reached through conciliation and settled the dispute, then it may be taken as preliminary objection before the court if one of the parties takes the case before the court after the dispute had been conciliated. The one who wants the enforcement of the compromise will get it enforced as he wishes after paying the stamp duty as per the Stamp Duty Proclamation No 110/1998.
- The other possibility is that the parties or one of them may adhere to his original extra ambitious claim and fail to drop his proposal. The law gives the conciliator a maximum of six months to come up with some result unless the parties provide a different period (3321(1)). Before the expiry of this time the parties can not institute a case before court of law on the same cause of action.

Arbitration

- This is the most widely used and commonly known type of ADR. "It is the submission of a dispute between two parties to a third impartial (arbitrator) with the agreement that the decision of the arbitrator will be binding and final. It is a quasi-judicial procedure that avoids the formality, delay and expense of normal trial.
- Under Ethiopian law, arbitration is regulated in more detail than any other kinds of ADR. The civil code provisions of Arts 3307 – 3346, civil procedure provisions which are scattered in different parts of the code, the family code, labour codes are only some of them. This by it self shows us how arbitration has got a place under Ethiopian law.

Sources of Arbitration and Arbitral Submission

A. Source of Arbitration

The first thing we have to see here about the valid source of arbitration, which is either consent or sometimes from the law. Arbitration emanates either from consents of parties or from law. (Art. 315(c)).

a) Consent (agreement) – when arbitration emanates from agreement, the arbitral submission should fulfill requirement of valid contract (Art. 1678 c.c.) and observe mandatory laws: parties should have the capacity to contract and dispose of that right without consideration, the contract should be in a written form and other forms required by law for disposing the right without consideration (Arts. 3326 c.c. and 315 c.pr.).

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b) Law: - In certain matters, like family dispute, the substantive law provides a compulsory arbitration (e.g. family matters – arts 725-728 c.c.). In such cases either the law itself provides details of arbitration proceedings or let it to parties determination (agreement) in which the agreement or the contract should observe the above applicable rules.

B. Arbitral Submission

Arbitral submission can be a separate document or an arbitration clause attached to the contract creating the right that creates the dispute.

Such dispute may be an existing one or future disputes which may arise out of contract or other specific obligation (Art.3328 c.c.).

Jurisdiction of arbitrator in the submission should be interpreted strictly.

An arbitrator can do such but he cannot decide over the validity of the submission if contested (Arts. 3329 and 3330 c.c.).

Arbitral Award

- Final decision or judgment of an arbitrator(s) on all matters referred to arbitration is called the ***arbitral award or award***. No special form is provided, but it should be in the form provided for judgment and signed and dated by all arbitrators (Art. 318 (4) c.pr.). This shows that award should be in a written form. It should contain clear, final and certain awards over dealt matters, i.e., reasoned awards. As per article 318(2) Ci. Pr., unless it is determined earlier, awards should include costs of arbitration. Copy of it will be served to both parties. Award will be executed as judgment after homologation (court affirmation)(Art. 319(2) c.pr.)._

Appeal from the Awards

- A party can appeal from the awards of arbitrators to ordinary court in the grounds listed below. But parties can waive this right if they are with full knowledge of the circumstance (Art. 359 c.pr.). The procedure is similar with the making and hearing of an appeal from a judgment.

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- The procedure is similar with the making and hearing of an appeal from a judgment. Such jurisdiction is given to a court which would have had appellate jurisdiction had the dispute not been referred to arbitration (Art. 352 ccc.pr.). The grounds of appeal are; in consistency, uncertainty or ambiguity of the award or when the award is wrong in matters of law or fact, or the arbitrator omitted to decide matters referred to him. In such instance the appellate court may confirm or remit to the arbitrator to reconsider it within three months. Other grounds are irregularities of proceeding and misconduct of arbitrator, i.e., partiality of arbitrators, which can be confirmed or varied as the court thinks proper (Arts. 351 and 353 c.pr.).

Enforcement of Awards (Arts. 456-461 c.pr.)

A. Foreign arbitrary awards- conditions to be fulfilled (Arts. 458 and 461 c.pr.)

- 1) A written application to the High Court where execution is to take place. It should contain certified copy of the award and court certificate showing that the award is final,
- 2) Reciprocity- i.e., execution of Ethiopian arbitral award must be permitted in the country where the award sought to be executed was rendered.
- 3) Award given following regular arbitration agreement or other legal act in the country where it was made.

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- 4) Parties were given equal opportunity in appointing arbitrators and hearing,
 - 5) Matters not prohibited to be submitted to arbitration as per Ethiopian law,
 - 6) Award not contrary to public order and morals, and enforceable as per Ethiopian law
- The court will summon parties and his observance. Except where hearing is ordered, decisions will be given according to the application. When the application is allowed, the award will be executed as if it had been given in Ethiopia.

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- **Domestic awards**- if the award was given in Ethiopia according to the conditions listed above – 3, 4, 5, 6, it will be executed as judgment of a court after homologation (Art. 319(2) c.pr.).

Setting Aside of Awards (Arts. 355-360 c.pr.)

- Application to set aside awards has to be made to a court who has appellate jurisdiction had the dispute not been referred to arbitration within 30 days from the making of the award. Making and hearing of application is similar with making and hearing of opposition (Arts. 355(3), 358 and 359 c.pr.).

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- There are limited grounds for application. As per art 356 Civ. Proc.Code
 1. When arbitrators decides matters not referred to it or when the submission was invalid or had lapsed,
 2. In case of two or more arbitrators, when they did not act together,
 3. When arbitrator delegates his authority to a stranger, to one of the parties or to a co- arbitrator.
- After receiving the application, the court will fix date for hearing and will summon and serve the copy of application to the other party. The application may be dismissed which validates the award given, or the award will be null and void and will be set aside if the application is granted (Art. 357 c.pr.).

CHAPTER FOUR

ADR IN INTERNATIONAL AND REGIONAL LEVEL

The need for ADR in International disputes

- International tribunals have been established by the UN to serve as a forum for international disputes. Most nations of the world are making their diplomatic and commercial relations much smoother by the help of their institutes, i.e. UN. Though, there is unlimited number of critiques against the enforceability and reasonableness of decisions given by UN dispute settlement systems, huge number of international disputes are well addressed by it. The panel established under WTO is also the other most widely acceptable dispute settlement mechanism entertaining a wide range of international trade disputes raised among the member states.

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A. Extra - territorial relations of citizens – With the increasing concept of ‘Globalization’, the interaction of citizens with other person or entity who is not a citizen of him is not uncommon. To survive as a state and to have a civilized nation peacefully established on the willingness of the subjects, the government should encourage such kinds of commercial and social interactions. The state is bound by its commitment to give protection to its and its citizens’ interests. As long as there is relation, commercial or other, it is inevitable for a conflict to arise from that relation. It will be wise to look for effective means of dispute settlement for such kind of dispute where the outcome will get recognition from all parties and which secure the enforceability of it as well. At this time ADR can be thought as a best alternative.

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B. Limitations of the domestic courts - As it has been explained earlier the jurisdiction of domestic courts is limited to the matters related with the citizens' interest and sometimes in the interests of public. Stated differently, state courts might have not jurisdiction to matters arised in international disputes for some times the other party is not clearly under the jurisdiction of the court so that enforcement of such kinds of court decisions will be obstacles. That means citizens might not get the opportunity to get the decision enforced and thereby exercise their rights. Especially, when one of the parties is not an Ethiopian and/or if he doesn't have any property under Ethiopian jurisdiction, the decision given against him will not be easily enforced unless there is reciprocity in between the nations.

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- The other thing is when there is a conflict of interest between the nations where the two disputants belong to. This happens where, for instance, both of the nation claims to have primary jurisdiction over the matter, when there is no reciprocity agreement to the enforceability of decisions given in one state to the other one. The parties, in such instances, prefer alternative meanses of getting justice by taking their grievances to ADR based on the sole consent of the disputants.

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C. To promote of Access to Justice – It is not only on the national level that peoples will be denied of the right to have access to courts, but some times it happens in the international relations as well. For instance, it happens when none of the domestic courts of the disputants assume jurisdiction over the matter. In other words, some times the national courts where the disputants belong to me may not have the jurisdiction to entertain the case according to their own national laws. In such instances, the parties will not get access to any of the courts and the only alternative for them will be to look for ADR based on their free consent.

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D. Development of e-commerce

The development of e-commerce also increased the need for ADR. Given the difficulties of processing e-commerce disputes in a global e-market place, on-line dispute resolution has become an attractive alternative, particularly in small disputes. When ADR processes, such as mediation and arbitration, occur in the on-line environment, it is often referred as online dispute resolution (ODR).

In the context of civil disputes ADR processes, such as negotiation and mediation, introduced a civilized way to resolve international conflicts. They were designed to overcome the limitations and failures of domestic judicial processes and the lack of a binding international public process.

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E. Influence of the UN Charter – The traditional dispute settlement procedures available under international law are enumerated in Article 33 of the UN Charter;

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peace full means of their own choice.

2. The Security Council shall, when it deems necessary, call up on the parties to settle the dispute by such means.

F. The Limitation of International Courts – Internationally well functioning tribunals like the International Court of Justice (ICJ) and Criminal Court of Justice (CCJ) of the UN and the Dispute Settlement Body of the WTO have lots of limitation.

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- The first one is the identity of the parties that have the right to institute a case or defend their case before these tribunals. It is only sovereign states and some times international organizations that can be a party before the ICJ. By the same taken, the WTO tribunal accepts claims only from member states. In terms of the subject matters which can be seen by these tribunals, all; cases can't be entertained before them. Most of the time ICJ entertains disputes "concerning issues related to frontiers and maritime boundaries, territorial sovereignty, the non-use of forces, non-interference in the internal affairs of States, diplomatic relations, hostage-taking, the right of asylum, nationality,

Scope and Parties to International ADR

- In the field where there exists the involvement of more than one parties or interaction among human beings, it might be inevitable to think of the possible existence of disputes. Human relation ship is becoming diversified backed by modern technologies. The world's commercial and diplomatic relation requires the involvement of at least more than one nation or citizens of a nation. Trade is becoming a global phenomenon which requires the involvement of more than one nations or citizens or entities of different nations. It is also becoming impossible this time to think of internal peace and security with out having smooth diplomatic relation ship with the neighbor and even other states far from one's geographical location. Border

International Documents and Organs Regulating ADR

1. New York Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958

It was adopted by a [United Nations](#) diplomatic conference on [10 June 1958](#) and entered into force on [7 June 1959](#). The Convention requires courts of contracting [states](#) to give effect to private agreements to [arbitrate](#) and to recognize and enforce arbitration awards made in other contracting states. Widely considered the foundational instrument for [international arbitration](#), it applies to arbitrations which are not considered as domestic awards in the state where recognition and enforcement is sought. Though other international [conventions](#) apply to the cross-border enforcement of arbitration awards, the New York Convention is by far the most important.

2. Convention for the Pacific Settlement of International Disputes (1899 and 1907) and the Permanent Court of Arbitration (PCA)

- The Convention which could be said the first in its nature and content came in to the hands of leaders in the late 1890's for approval. The same document, without affecting the status of the existing one and as well the commitment of signatories, by enclosing a more detailed stipulation came in to existence in 1907. These two conventions are the founding documents of the Permanent Court of Arbitration (PCA), which is established two decades before the establishment of the Permanent Court of Justice in the late 1910's, which is now replaced by the International Court of Justice.

3. UNCITRAL Documents

- The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966 [\[1\]](#) of 17 December 1966).
- UNCITRAL is a subsidiary body of the General Assembly of the United Nations with the general mandate to further the progressive harmonization and unification of the law of international trade. UNCITRAL has since prepared a wide range of conventions, model laws and other instruments dealing with the substantive law that governs trade transactions or other aspects of business law which have an impact on international trade.

4. International Chamber of Commerce (ICC) and the International Court of Arbitration

- The International Chamber of Commerce (ICC) was founded in [1919](#) to serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital. The organization's international secretariat was established in [Paris](#) and the ICC's International Court of Arbitration (ICA) was created in [1923](#).
- The International Chamber of Commerce (ICC) is a non-profit, private international organization that works to promote and support global trade and [globalization](#). It serves as an advocate of some world businesses in the global economy, in the interests of economic growth, job creation, and prosperity. As a global business organization, made up of member states, it helps the development of global outlooks on business matters. ICC has direct access to national governments worldwide through its national committees among others.