WOLKITE UNIVERISTY

SCHOOL OF LAW

A RESEARCH ON: *THE CRITICAL ANALYSIS OF THE WAY OF PROTECTION OF THRID PARTIES RIGHT IN ARBITRATION PROCEEDINGS UNDER ETHIOPIAN ARBITRATION LAW*

A RESEARCH SUBMITTED TO WOLKITE UNIVERSITY SCHOOL OF LAW FOR THE PARTIAL FULLFILMENT OF (LLB) DEGREE IN LAW

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DECLARATION

I, Abdlmejid , declare that this senor essay is my own work and all sources or materials used for this paper have been duly acknowledged. This thesis is submitted in partial fulfillment of the requirements for the degree of Bachelor of law (LLB) to Wolkite university school of law I confidently declare that this senior essay has not been submitted to any other institutions.

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Acknowledgment

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I am thankful to my family who are always on my side by supporting and encouraging me and contributed a lot in my life.

ACRONOMY

AAA:……..American Arbitration Association

ADR: ……. Alternative Dispute Resolution

ICC:……International chamber of commerce

UK……..United Kingdom

UNCITRAL……. United Nation Commission on International Trade Law

USA. ……. United States of America

ABSTRACT

Dispute is an indispensable part of the society. Whenever dispute arises they should be settled in one way or another. Arbitration is one of the mechanisms of dispute settlement in which the parties submit their dispute to an impartial third party. The consent of the parties is a preliminary ground for the arbitration process. It has many principles that stands for the necessity of consent of all parties involved. However, the subject matter of the dispute they submit may involve the interest of third party who could be affected the settlement of the subject matter of the dispute but doesn't give their consent at the submission of the contract. And a principle of privity of contract doesn't allow the contract to create any effect on the third party. Due to these principles, the question, how the interest of those can be served after the commencement of arbitration proceeding is become confusing. Different countries answer this question in their arbitration act. Countries like Netherlands, gives priority to the principle of privity of contract and allows the intervention of third person even without the consent of original parties. This research is aimed at elaborating the ways of protection of third parties under Ethiopian arbitration laws. By using qualitative data thorough doctrinal method, the researcher has discovered three ways of protection of third parties from the effect of arbitration. These mechanisms are either at the course of the proceeding or after the end of the proceeding or based on the consent of the parties or not. As the protection mechanisms after the end of the proceeding are un economical and contradict the very advantage of Arbitration, the researcher recommends the legislature to enact laws that makes the protection mechanism to be applied at the course of the proceeding without securing the consent of the parties i.e. intervention without the consent of the original parties.

Key words; intervention, third parties, arbitration.

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CHAPTER ONE

1. INTRODUCTION

1.1. BACKGROUND

Conflict is unavoidable in human relationships. It is indeed inevitable part of social life. But if there is conflict or dispute it must be resolved one way or the other. For instance, it could be resolved through litigation in the courts or through any of the windows of alternative dispute resolutions mechanisms namely: arbitration, mediation, negotiation or conciliation. If the parties to the dispute fail to select any of the alternative dispute resolution mechanisms, the court would settle their dispute. In view of the adversarial nature of court proceedings and coupled with its rules of technicality, attention is fast shifting from litigation to resolution of disputes by arbitration.[1]

Arbitration is an alternative to litigation or mediation in order to resolve a dispute. Arbitration panels are composed of one or three arbitrators who are selected by the parties. They read the pleadings filed by the parties, listen to the arguments, study the documentary and/or testimonial evidence, and render a decision. The panel's decision, called an "award," is final and binding on all the parties.[2] The binding effect and finality of the award lies the difference between arbitration in one hand and other alternative dispute resolution on the other hand respectively. Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions.[3]

The issue of consent to arbitrate is one of the important issues in arbitration. The arbitration agreement is the corner stone of arbitration process.[4] As submission of the dispute to arbitration necessitates an agreement between the parties, and the parties of the dispute cannot be forced to arbitrate without consent (directly or even in directly, if the interest of the party may be affected by the arbitration process of other parties whom gives their consent). This approach is reflected

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[1]A.Fagbemi, "The doctrine of party autonomy in international commercial arbitration: myth or reality", journal of sustainable development law & policy vol.6(2020) p. 222, 223

[2]Finra dispute resolution service, arbitration and mediation over view, available at https://www.finra.org/arbitration-.mediation/arbitrationoverview

[3]ibid

[4]V. Tabor, international Commercial Arbitration; a Transnational perspective (6th ed.2006) P.85

in New York convention and UNICITRAL model of law international arbitration. Art 7 of UNICITRAL model of law on international commercial arbitration defines arbitration as *agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between the parties.*[5]

The New York convention also takes stand as same as the UNICITRAL model in defining arbitration.[6]

These definitions show the necessity of agreement between the parties to submit their dispute to arbitration. As can be inferred the above meanings of arbitration the base for an arbitration proceeding is an agreement of the parties (contract between the parties). As it is a contract the formalities, principles and other things that are applicable to contract in general should be applicable in arbitration too. Furthermore, the principle of confidentiality of arbitration requires the consent of parties. This principle is incorporated under the Ethiopian arbitration laws.[7]

So pursuant to this incorporated principle anyone other than the parties and an arbitrators doesn't entitle to know the proceeding and the final award in the absence of contrary agreement or law since if he is allowed to intervene without the consent of the consent of the original parties, he would acquire the confidential information. So, if the parties other than consented to arbitration agreement are entitled to be a party without the consent of parties to arbitration, this is against this principle and the very consensual nature of arbitration.

Similarly, one of the main principles among the principles of contract is the principle of privity of contract. The doctrine of privity in contract law provides that a contract cannot confer rights or impose obligations arising under it on any person or agent except the parties to it. This seems to make adequate sense, in that only parties to contracts should be able to sue to enforce their rights or claim damages as such. This principle is incorporated in the Ethiopian civil code.[8]

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[5]United nation commission on international trade law model on international commercial arbitration ,united nations document A/40/17, annex A/61/17, JULY 2, 2010

[6]Convention on recognition and enforcement of foreign arbitral awards, New York, June 10 1958

[7]Arbitration and conciliation working procedure proclamation 2020, art 37, pro. No.1237, fed. Neg. Gaz. Year. 27 no. 21

[8]Civil code of the Empire of Ethiopia 1960, Art 195, pro. No.165 Fed. Neg.Gaz, year, 19, no.2

Though the principle of privity of contract advocates that the parties only not third party should affected by the contract, it is sometimes difficult specially when the issue involves more than two persons is submitted to arbitration by only two parties.

With this regard the practice of international arbitration tribunals and other states is not similar. Some states like Netherlands insist on protection of third parties right. In Netherlands unless otherwise stated by agreement any person who request to intervene or join to arbitration proceeding has a right if his or her interest would be affected by the final award of arbitration.[9] Here the principle is the intervention or joiner but the parties may by agreement erode this principle. The South African arbitration law gives the priorities to party. Accordingly if the parties to arbitration doesn't give consent to join third parties, these third parties can't involve in arbitration proceeding. With regard to the principle of party autonomy UNICITRAL rules also implies that only a person who was the party to arbitration agreement can be joined in arbitration proceeding.[10] So this research is designed to show the existence or not of the way of protection of the right of third parties in arbitration proceedings in Ethiopia by assessing the relevant laws of arbitration in Ethiopia.

1.2 STATEMENT OF PROBLEM

The consensual nature of arbitration lies at the heart of this study: only those persons that have clearly consented to an arbitration agreement may participate in arbitration proceedings.[11] This constitutes the fundamental difference between litigation and arbitration. In arbitration, the parties to proceedings are determined on the basis of interest(s).

The principle of "procedural party autonomy" provides parties with the freedom to contractually determine the circle of persons entitled to participate in the arbitration proceedings. Thus, the principle of procedural party autonomy and the contractual foundations of arbitration make arbitration a flexible dispute resolution mechanism, allowing parties to design a system of dispute resolution in accordance with their needs. This ability has proved to be a significant advantage of arbitration over litigation, and it has contributed to the increasing popularity of the former amongst members of the international community. By the same token, however, the

[9]Alemu balcha, "the place of multiparty commercial arbitration under Ethiopian arbitration law", Oromia law journal vol. 9(2020), p. 130
[10]United nation commission on international trade law model, cited above at note 5,art. 17(5)
[11]J. Lew., Comparative International Commericial arbitration (2nd ed. 2003) P. 141

contractual and thus relative nature of arbitration frequently leads to unfavorable results. This is particularly the situation in the context of multiparty concerned disputes, where the consensual limitations of arbitration preclude any person not bound by an arbitration agreement from taking part in arbitration proceedings. Third parties are altogether excluded from the arbitration process, notwithstanding legal or financial interests they might have in the pending dispute. In short, third parties are considered aliens, with interests that are largely irrelevant to arbitration. The third parties to arbitration proceeding involvement is largely based on the consent of all the parties to the arbitration and the consent of the third party itself. The principle of confidentiality of arbitration has also needs obtaining of the consent of the parties of the arbitration. Thus, third parties who are strangers to an arbitration agreement, but involved in or allegedly responsible for the underlying issues in arbitration, can be significantly affected by the course of arbitration.[12] On the other hand principle of privity of the contract doesn't allow for the contracting parties to create effect on third parties. Those principles which are evolve around arbitration makes the protection of third parties in arbitration proceeding confusing.

This research is intended in exploring the way of protection of third party in arbitration proceedings.

1.3 RESEARCH QUESTION

1.3.1 GENERAL REASEARCH QUESTION

The general question of this research is

- How Ethiopian laws of arbitration protects third parties from the effect of arbitration proceeding?

1.3.2 SPECIFIC RESEARCH QUESTION

The specific questions of this research are

- How Ethiopian laws of arbitration protects third parties from the effect of arbitration proceeding?
- How other countries arbitration laws settle the protection of third parties in arbitration proceedings?

[12] David Tupper and Stefani Wesley, ADR institute of Canada Third parties to arbitration agreement, ADR insttitute of canada, available at; http//adric.ca/third parties-toarbitrationagreements/ accessed on Oct 21, 2022.

- How the internal rule of international arbitration tribunals settle the protection of third parties in arbitration proceedings?
- How the principle of privity of contract affects arbitration proceeding involving multiparty?
- How the principle of party autonomy disposition of arbitration affects the protection of third parties under Ethiopian arbitration laws?
- How the principle of confidentiality of arbitration affects the protection of third persons under Ethiopian arbitration laws?

1.4 LITRETURE REVIEW

Arbitration as a means for resolving disputes has become more evident in the past several decades, as trade, commercial transactions and investments have experienced a boom. Currently, the growing interdependency of commerce and the globalization of the business world have led to complex contractual relations, which very often involve more than two parties bound by a multitude of contracts. This in turn would results in difficulties of resolving the subject matter of the dispute which contains the interest of third persons who doesn't submit the dispute to arbitrators, by arbitration of only two parties. Many authors work on the possibility of participating those person in arbitration after the commencement of the arbitration proceeding.

For instance, Sirak Akalu and Michael Teshome (2017) argued that joinder, intervention, and consolidation are allowed under the Ethiopian arbitration law. Accordingly, based on Article 317(1) of Civil Procedure Code, and Article 3345(1) of Civil Code, they have been arguing that, since the Civil Procedure Code allows for joinder, intervention, and consolidation of suits, these procedural aspects would inevitably apply in case of the arbitral proceeding.[13]

Again, Alemayehu Yismaw and Haile Gabriel G. Feyisa (2015) emphasized that the existing arbitration laws are sketchy and do not cope with the emerging modern laws and practices in international commercial arbitration but without mentioning multi-party issues. Though their work is not directly emphasized on the issues of multiparty arbitration, from their assertion, one can take a presumption that since multi-party arbitration is a currently circumventing practice in

[13]Sirak Akalu and Michael Teshome, "vegelgel dagnnet be ethiopia" (2ed, 2017), p.93-108

international commercial arbitration, the Ethiopian arbitration law is devoid of rules on multiparty disputes.[14]

Alemu Balcha (2020) argues that, the current legal regulation of commercial arbitrations, as contained in the Civil Code and Civil Procedure Code is not clear on the issues of appointments of arbitrators, joinder, intervention, and consolidation of arbitral proceeding in multiparty disputes. It is not possible to extend the provisions of civil code and civil procedure code of Ethiopia to allow intervention, joinder, and consolidation to arbitration as the procedural dissimilarity between litigation and arbitration. [15]

Though aforementioned authors try to explore the ways of participating in the commenced arbitration their work is based on the repealed provisions of laws; civil code and civil procedure code. And emphasized on participation of third parties as joinder, consolidation and intervention in general. The researcher in this research explores the way of the protection of third persons to the agreement of arbitration according to the recent law, Arbitration and Conciliation Working procedure Proclamation.

1.5 OBJECTIVE OF THE RESEARCH

1.5.1 GENERAL OBJECTIVE

The general objective of this research is:

To assess the protection of the right of third parties to arbitration proceeding in Ethiopian legal system.

1.5.2 SPECIFIC OBJECTIVE

This research has objectives to:

- To assess the way of protection of third parties right in arbitration proceeding under Ethiopian arbitration law.
- To assess the experience of other countries in relation to protection of rights of third parties in arbitration proceedings.
- To assess the effect of principle of privity of contract on arbitration proceeding.

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[14]AlemayehuYismawu, "The Need to Establish A Workable, Modern and Institutionalized Commercial Arbitration in Ethiopia", Haremya law review, vol.4 (2015) p.37

[15]Alemu Balcha, cited above at note 9 vol.9, p.140

- To assess the effect of the principle of party autonomy on the rights of third parties in arbitration proceeding.
- To assess the effect of the principle of confidentiality of arbitration on rights of third parties.

1.6 METHDOLOGY OF THE STUDY

1.6.1 RESEARCH DESIGN

This research employed the qualitative research method because the detailed understanding of the issues in this research can be established by referring laws, literature books, or by reading writings about the issues.

Thus, the researcher in qualitative method collects data in the form of texts rather than in the form of numerical data. And make detailed exploration of the topic. More importantly the selection of a given research method depends on the objectives and questions of the research framed. Thus from these vantage points qualitative method is appropriate to answer the research question framed and objectives identified in this research.

1.6.2 SOURCES OF DATA

The researcher used primary and secondary source of data to conduct the research. And cited them properly by using Addis Ababa university law school legal citation style.

Primary data

- National laws: - the researcher used national laws of Ethiopia as a primary source of data with other source of data to answer the first, fourth, fifth and sixth question of the research.
- Internal rules of international arbitration tribunals as a primary source of data together with other source of data, to answer the third question of the research.
- Foreign laws: - the researcher also used the laws of foreign countries as a primary source of data together with other source of data, to answer the second question of the research.

Secondary data

- Books: - the researcher used books of different author as a secondary source of data together with other sources to answer the entire question.
- Publications: - the researcher also used publications as a secondary source of data together with other sources to answer the entire questions.
- Online sources: - the researcher used a data from online as a secondary data.

1.6.3 SAMPLING TECHNIQUE

The researcher used the purposive technique of sampling to address the second and the third question of the research. To address the second question of the research the researcher selects some countries purposefully in order to make the data representative. The researcher refers some countries laws from some developed continents. The researcher also refers some internal arbitration rule of two well-known international arbitration institutions (AAA&ICC).

1.6.4 DATA COLLECTION METHOD

The researcher used doctrinal method of data collection. By the doctrinal method of data collection, the researcher refers and searches for different primary and secondary source of data.

1.6.5 DATA INTERPRETATION METHOD

The researcher will use qualitative data interpretation method due to the absence of quantitative data. The research questions are served as guide for conducting of the analysis. So, the researcher will use the qualitative method of data analysis to review data obtained from different litterateurs and laws.

1.7 SIGNIFICANCE OF THE STUDY

The research gives the clue with regard to the protection of the rights of third parties in arbitration proceedings in Ethiopia.

The research will also help as spring board to conduct related research in the study area and beyond at least by indicating as there was an issue and it open the gate to more comprehensive and coherent research in the feature.

The recommendation of the thesis will also serve the legislature and other stake holders to come up with the way which protects the right of third parties in arbitration proceedings.

1.8 SCOPE OF THE STUDY

The research focuses on the protection of the rights of third parties in arbitration proceedings in Ethiopia. With regard to the law the research will examine the issue in all applicable laws and principles that may be applied in arbitration proceedings.

1.9 LIMITATION OF THE STUDY

It is clear that preparing research paper could not be free from some limitation and problems. Some of these are:

- It was hard to find adequate materials.
- Time constraints connected with attending class and preparation for National Exit Exam

1.10 CHAPTER ORGANIZATION

This research paper generally consists of five chapters. Accordingly, the first chapter introduces the reader with the study. It highlights the reason that necessitated the study and the objectives that are intended to be achieved. It also presents the statement of problem, research question, general and specific objectives, significance of research and research methodology briefly.

The second chapter is devoted to review conceptual frame work. Which include the concept of ADR in general and of arbitration in particular, the general overview of arbitration, and other related concepts.

The third chapter will deal with the protection of third parties right on arbitration proceedings in foreign jurisdictions and international arbitration tribunals or institutions.

The fourth chapter deals with the protection of third party are right in arbitration proceedings in Ethiopia. In this chapter the researcher will discuss the protection of third parties from the effect of arbitration award by examining the law in the area.

And finally, the last chapter will contain conclusion and recommendations.

CHAPTER TWO

CONCEPTUAL FRAME WORK

2.1 INTODUCTION

Conflict is unavoidable in human relationships. It is indeed inevitable part of social life. However, whenever there is conflict or dispute it must be resolved one way or the other. For instance, it could be resolved through litigation in the courts or through any of the windows of alternative dispute resolutions mechanisms namely: arbitration, mediation, negotiation or conciliation. If the parties to the dispute fail to select any of the alternative dispute resolution mechanisms, the court would settle their dispute. In view of the adversarial nature of court proceedings and coupled with its rules of technicality, attention is fast shifting from litigation to resolution of disputes by arbitration. In this chapter the researcher is going to elaborate the concept of ADR with its varieties; negotiation, mediation, and arbitration. More emphasis is given for arbitration and its principle.

2.2 ADR IN GENERAL

2.2.1. DEFINITION OF ALTERNATIVE DISPUTE RESOLUTION (ADR).

Alternative dispute resolution is a procedure for setting a dispute by means other than litigation such as arbitration or mediation. Alternative dispute resolution (ADR) is the general name given to varsity of procedures available to parties in civil cases to resolve their disputes out of a formal adjudication.

ADR is an umbrella term which refers generally alternative to court Adjudication of dispute such as negotiation mediation, arbitration, and summary jury trial. Within the range of ADR though there are variedly in number, negotiation, mediation and arbitration are the three most common forms of ADR.[16]

ADR is a generic term used to describe range of procedures designed to provide away to resolving a dispute as an alternative to court or administrative tribunal procedure.[17]

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[16]J. Nolan, Alternative Dispute Resolution In Nutshell,(2d ed., 1992), P.3
[17]Tefera Eshetu and Mulugeta Getu Alternative dispute ressolution teaching material (2009), p.6

Therefore, ADR is a generic term used to describe range of procedures designed to provide ways to resolving as an alternative to court procedures-Here it is to be noted that ADR mechanisms are not intended to supplant court adjudication rather to supplement it.

2.2.2 THE NEED OF ADR

The formation of institutionalized Justice System had previously underestimated the potential advantages of the ADR. Never theses, the formation of institutionalized or formal justice system did not totally substitute alternative dispute resolution mechanisms society had been looking for alternative dispute resolution even in the existence of formal justice system.

The rationale behind looking for alternative dispute resolution mechanisms emanated from multidimensional reasons. For one thing the procedural laws of the formal court to reach at adhesion are very long and time consuming for another, there is case overload in the court and also the cost detestation is not affordable by ordinary citizens.[18]

It can be said that now it is common knowledge that existing justice system is not able to cope up with the ever-increasing burden of civil and criminals' litigation. The problem is not of load alone the deficiency lays in the adversarial nature of judicial process which is time consuming and more often procedure oriented. The end result of court litigation is a win-lose litigation the difference between the parties contain us-to subsist the inter personal relationship of the parties becomes more hardened.[19]

ADR model is considered to be model in which the dispute resolution process is qualitatively distinct from judicial process. Where the proceeding are informal devoid of procedural technicalities and con ducted, by and large, in the manner agreed by the parties ; where the dispute is resolved expeditiously and with less expenses: where the decision making process aims at substantial justices keeping in view the interests involved and the contextual realities In substance the ADR process aims at rendering Justice in the form and content which not only resolve the dispute but tens to resolve the conflict in relationship the parties which has given rise to that dispute.[20]

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[18] S. Goldberg, Dispute Resolution; Negotiation, Mediation and other Process (2nd ed, 2007), p.5
[19] Ibid
[20] Tefera Eshetu and Mulugeta Getu cited above at note 17, p. 17

2.2.3 MERITS OF ADR

ADR has received worldwide recognition as prefer able mechanism for the resolution of disputes for the following advantages:

- Flexibility: - as opposed to the procedure of formal court which is rigid, there is no such stringent procedure in the ADR the procedure of ADR is so simple and flexible so as to adjust itself to parties interests. [21]
- Confidentiality: - The parties usually agree to keep the resolution reached at the negotiation or arbitrator hearing private. This is not possible in an adjudicatory method, as most trials and proceedings in the adjudicatory method are open to the general public/ press. The confidentiality of ADR allows them to focus on the merits of the dispute without concern about its public impact.[22]
- Deals with emotion: - The ADR process will give disputants an out let to discuss their frustrations. They will get the chance of venting emotions in 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.[23]
- Party autonomy: - Because of its private nature, ADR affords parties the opportunity to exercise greater control over the way their dispute is resolved than would be the case in court litigation. In contrast to court litigation, the parties themselves may select the most appropriate decision-makers for their dispute. In addition, they may choose the applicable law, place and language of the proceedings. Increased party autonomy can also result in a faster process, as parties are free to devise the most efficient procedures for their dispute. This can result in material cost savings.[24]

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[21] REA group, What are the advantage of ADR , REA group available at; http;//www.raegroup.com/advantages.htmp1 accessed on Dec 20, 2022

[22] Edeh Samuel, Advantages and Disadvantages of Alternative Dispute Resolution (ADR), legal article, available at ; https://bscholarly.com/advantages-and-disadvantages-of-alternative-dispute-resolution-adr/ accessed on Dec 10 2022

[23] Tefera Eshetu & Mulugeta, cited above at note 17, p. 20

[24] ibid

- Less Costly: - in the formal litigation the process is very costly this is so because the fee for the court and the attorney is not the one afforded by ordinary citizen. This prevents the access to court and even these with access are often victim of delay. For most litigants delay causes added cost.[25]
- Time: - As the ADR mechanisms follow the flexible procedure adapted to the point at issue the resolution for the dispute is timely. In the ADR there is no need to for some after time as in the formal court of law, in which the parties should wait for the appointment on which their case will be heard, and the parties are ready to settle their disputes without delay.[26]

- Win – win solution: - The formal court of litigation, the aim is to differentiate truth from wrong and this in turn puts the parties at polarity i.e. the winner and lesser which in turn aggravates the animosity between the disputants. In the other hand, the objective behind most ADR first of all is to settle the dispute amicably without giving emphasis to fault finding. In other words, the idea behind ADR is just to restore a peace between the disputant without need to magnify one's truth or fault.

- Reserving the relationship: - Parties are more able to preserve relationships since are solution is usually reached faster than with the litigation; the dispute can be resolved before the parties do irreparable harm to their relationship; parties are free to talk each other and this facilitates understanding the other side of truth of the case. This facilitates the parties working with each other after the dispute is resolved.[27]

2.2.4 COMMON FORMS OF ADR

When ADR is thought there are most commonly known and applicable me thuds in the system. But here in below mentioned are the most common forms of ADR. These common forms of ADR are negotiation, mediation and arbitration. The former two will discussed here in this sub section but the latter will be discussed in the following section.

[25] ibid
[26] Ibid
[27] Ibid

- Negotiation

Settlement is the primary way people dispute, and rearranges their relationships. Because we reach settlements by negotiating, bargaining pervades personal social, commercial and political life.[28]

Negotiation can be defined as: anon 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 other's position.[29]

In this process, it is face to face parties' discussion on the matter disputed without the need to involve third party on the process of dispute settlement. Negotiation has the advantage of allowing the parties themselves to control the process and solution.[30]

It differs from other methods of dispute resolution in the degree of autonomy experienced by the disputing parties who are attempting to reach without the intervention of third parties. Negotiation may be principle or position based.

Principled negotiation is a mechanism of settling dispute in which, compromises and agreements are reached while avoiding disputes and arguments. Principled negotiation, also known as integrative negotiation, employs a method that integrates the interests of each party to find a compromise. It allows one to move past the position of a win/lose mentality and focus on the negotiation. The approach is popularly known as the "win-win" method since it focuses on the interests of the parties involved and removes the "all-or-nothing" attitude. During the negotiation process, parties identify the significant points of contention and establish tradeoffs. This negotiation method is driven by the assumption that two parties need to maintain a business rapport even after the negotiation is done. [31]

Unlike principled negotiation, which is entirely interest-based, **distributive bargaining** is position-based. Distributive bargaining is a type of negotiation where a fixed asset is divided up,

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[28]Id. p.28
[29]Id. p.29
[30]S. Gold Berg, cited above at note 18, p.9
[31]Tyrah Diaz, Principled Negotiation Method and Examples,study.com; available at https://study.com/learn/lesson/principled-negotiation-method-examples.html , accessed on Feb, 20, 2023

and a winner carries away a more significant piece. It focuses on the winner taking a bigger pie while the loser takes away a smaller portion, feeling demoralized and defeated.

- Mediation or Conciliation.

Some argues that mediation and conciliation is not same procedure of dispute settlement.

The basic difference those people argue between mediation and conciliation is based on the role played by the third party who is selected by the parties seeking a settlement, in consensus. In mediation, the mediator acts as a facilitator who helps the parties in agreeing. Conversely, in conciliation, the conciliator is more like an interventionist who provides probable solutions to the parties concerned, to settle disputes.[32] However, as both share most characteristics some consider as the same.

Mediation or conciliation can be defined as the process 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 consensual settlement that will accommodate their needs. It is a process that emphasis the participants own responsibility for making decisions that affects their lives. Thus, it is puny different from negotiation so long as there exist a third party involvement.[33]

It is an extension of negotiation, parties who have been unable to settle their dispute use neutral third party to assist them in reaching an agreement. Unlike adjudication process where a third party applies to the fact, to reach at a result in mediation a third party assists disputes In applying their values to the facts and reaching result, such compulsion to apply the law does not exists in mediation.

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. [34]

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[32]Surbhi S, Difference Between Mediation and Conciliation key differences available at https://keydifferences.com/difference-between-mediation-and-conciliation.html accessed on feb, 5, 2023
[33]Tefera Eshetu & Mulugeta Getu, cited above at note 17, p. 36
[34]Id. p. 37

Even if the third party is requires to recommend a solution, if negotiation fails to achieve a settlement, this solution only becomes a binding on the parties with their consent. The mediator role is advisory, the mediator may offer suggestions but resolution of the dispute rests with the parties themselves.

In general mediation /conciliation is a type of dispute resolution where by natural third party, the mediator involves in the settlement process. The third party is between individuals in the dispute resolution process, but whose opinion does not have binding effect up on the parties to the dispute.

2.3 ARBITRATION

2.3.1 DEFINITION

Arbitration is typically an out of court method for resolving a dispute in which a party submits a disputed matter to impartial person or the arbitrator for decision. The arbitrator controls the process; listen both sides and make decision.

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 of the course of common law depending up on the voluntary acts of the parties, disputants, on the selection of judges of their choice.[35]

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. The main difference between the former two modes of dispute resolution and the third one arbitration is that in arbitration, the third neutral person. Arbitrator is empowered to render decision on the point of contention. Verities of dispute may be resolved by this mechanism, even today where over two or more points have disputes, be it personal, commercial or other activities, the parties end their case to arbitration by mutual consent.

Arbitration is used to resolve disputes in the construction industries, dispute between consumers and Manufactures, family disputes, medical malpractices, community disputes, security, disputes, civil right disputes and the like.

[35]Id. p. 44

2.3.2 PRINCIPLES OF ARBITRATION

There are many principles of arbitrations recognized under different arbitration proceedings among the followings are the most practicable and recognized principles of arbitration.

2.3.2.1 PRINCIPLE OF CONFIDENTIALITY

Confidentiality has always been considered one of the most important aspects of arbitral proceedings and until recently a principle that could never be ignored. However, under the shadow of the increasing number of arbitral cases in which States are involved, there has recently been a tendency towards publicity.[36] Confidentiality is applicable to any aspect of life and the Law, acquires particular relevance in arbitration where privacy and confidentiality have, since its inception, played a very important role. There is consensus amongst all the participants in arbitration (be they arbitrators, institutions or the litigating parties) as to the reasons why arbitration is chosen over the traditional judicial dispute resolution practices. If a survey were to be conducted amongst these participants the result would probably be a list enumerating the advantages: the speed and flexibility of the process; lower cost; greater guarantee of settlement due to the specialization of the arbitrators (as opposed to civil judges); the possibility of continuity of the commercial relationship between the disputing parties; etc., but without doubt they would highlight confidentiality as one of the most salient aspects of arbitration. Arbitration has always been characterized, amongst other things, by this singular essential, yet alluring, characteristic[37]. It is well known that in the vast majority of judicial systems around the world the information and results of proceedings in courts of ordinary jurisdiction are, with very few exceptions, in the public domain. In such a globalized and interdependent society as ours it is practically impossible to maintain privacy in the court cases and judicial matters which are brought before judges and State courts. On the other hand, arbitral proceedings, except for investor-State arbitration, are almost always confidential and publicity is only to be found exceptionally.[38]

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[36]M. Cremades, "The Principle of Confidentiality, in Arbitration: A Necessary Crisis", journal of arbitration study, vol.23(2013) p.15

[37]J. Rosell, "Confidentiality and Arbitration", Croatian Arbitration Yearbook journal, vol 9(2002), p.234

[38] S. Goldberg, cited above at note 18, p.26

2.3.2.2 PRINCIPLE OF DISPOSITION

An arbitration agreement is primarily a substantive contract between the parties to international commercial arbitration.[39] The agreement is central to arbitration proceedings; hence, its importance has been attributed to many factors. First, it reflects the party autonomy to settle their disputes through arbitration rather than the court of law. It also describes arbitration agreement as a binding promise made between two or more parties to a contract to settle the present and/or future disputes through international commercial arbitration instead of dealing with them in the national courts.[40] Thus, when parties draft an arbitration agreement, they enjoy wide freedom to construct a dispute resolution system of their choice. An arbitration agreement, therefore, derives its power from party autonomy.

Second, the essential rule of the principle of arbitration is that where two parties freely enter into an arbitration agreement, there are few restrictions on their freedom to formulate their own terms of the agreement or to design a process, which caters precisely to their needs[41]. Third, an arbitration agreement precludes judges from resolving the conflicts that the parties have agreed to submit to arbitration. If one of the parties files a lawsuit in relation to those matters, the other may challenge the court's jurisdiction on the grounds that the jurisdiction of the courts has been waived.[42] Thus, once a conflict has arisen over any of the subjects included in arbitration agreement, the courts will have no jurisdiction to resolve it unless both parties expressly or tacitly agree to waive the arbitration agreement. Again, the parties' consent is a basic requirement for the arbitration agreement. Their intention to submit to arbitration must unequivocally arise from the agreement freely entered into by parties. For instance, if one of them has been induced to act against his will as a result of fraud, coercion or undue influence, there has been no real consent and the agreement to arbitrate is invalid. Article 11 (1) of the New York Convention requires *inter alia* that each contracting state shall recognize an agreement in writing in which the parties undertake to submit to arbitration their disputes. The implication of this provision is understood in two senses. First, it means the agreement must contain a mandatory, rather than permissive, undertaking to submit disputes to arbitration. Second, it

[39]A. Dursun, "A Critical Examination of the Role of Party Autonomy In International Commercial Arbitration and an Assessment of Its Role and Extent" Journal of Yelova Universities Dergesi vol. 6 (2012) p.165
[40]A. Fagbemi, Cited above at note 1 vol.6 p. 230
[41]ibid
[42]The International Chamber of Commerce, internal Arbitration Rules 2012 Art 39

means that agreement must provide for arbitration, rather than another process of dispute resolution.

2.3.2.3 PRINCIPLES OF PARTY AUTONOMY

Basically, the principle which makes the arbitral process flexible is party autonomy. The principle of party autonomy, in the general sense, started to develop in the 19th century.[43] Party autonomy is based on choice of law in a contract. However, this principle has broader meaning in international commercial arbitration than in domestic arbitration. In international commercial arbitration, the parties to the arbitration agreement are free not only to choose laws but also to conduct the arbitration process. The parties to an arbitration agreement waive the right to bring an action in court and exclude the jurisdiction of courts by agreement.

Arbitration agreement is the primary resource of arbitration and the strongest evidence of party autonomy.[44] Nearly all international arbitration laws, rules, and conventions recognize the principle of party autonomy. Thus, arbitration agreement between parties today must include arbitration clauses with an explicit choice of law, and, in keeping with the principle of party autonomy, the parties' choice of law is "invariably" applied by arbitrators. The concept is the high point of the provisions of the Nigeria Arbitration and Conciliation Act, 2004, the New York Convention, UNCITRAL Model Law, the English Arbitration Act, 1996, Indian Arbitration and Conciliation Act, 1996, Ghana Arbitration and Conciliation Act, 2010. And the International Chamber of Commerce (ICC) Arbitration Rules, 2012, just to mention a few. The provisions of the above laws and rules, in varying degrees, explicitly require respect for the parties' choice of procedural provisions.[45]

[43]O. Chukwumerije, A Choice of Law in International Commercial Arbitration, (1 st ed1994) p.161
[44]E. Shackelford, "Party Autonomy and Regional Harmonization of Rules in International Commercial Arbitration" University of Pittsburgh Law Review, vol.67(2006), P. 897
[45]A. Fagbemi, cited above at note 1, vol.6, p. 231-238.

CHAPTER THREE

PROTECTION OF THIRD PARTIES RIGHT IN FOREIGN JURISDICTION AND ARBITRATION INSTITUTIONS.

3.1 INTRODUCTION

There is no a uniform mechanism of protection of third parties in the world. This difference is a result of the countries attitude toward either the principles of arbitration or the principle of privity of contract. These principles largely affect the countries position held by their law as to the protection of third parties. In this chapter the researcher will analyze the recognition of these principles and the ways of protection of third parties in some countries and the ways of protection of third parties in well-known international arbitration institutions.

3.2 PROTECTION OF THIRD PARTIES RIGHT IN ARBITRATION PROCEEDING IN FOREIGN JURISDICTION

3.2.1 PROTECTION OF THIRD PARTIES IN ARBITRATION PROCEEDING IN NETHERLANDS

Confidentiality of arbitral proceedings under Netherlands law is not regulated in the new Act, despite being included in the initial draft of the new Act. While arbitration is generally considered to be confidential, parties should explicitly agree on this in their arbitration agreements to ensure confidentiality.[46] As the principle of confidentiality is not the rule, it have a favorable effect on the protection. Dutch arbitration act grants more autonomy for the parties in conducting arbitration proceedings, making the procedure much more flexible. Many of the provisions of the act are regulatory rather than mandatory nature. Many of the provisions contains the wording “unless otherwise agreed by the parties” and gives more power to the parties while conducting the proceeding.[47]

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[46]J. Willem de Groot, Is Dispute Resolution through Arbitration a Common Alternative in the Netherlands? dutch law institute, available at; https://dutchlaw.com/arbitrationnetherlands.html#:~:text=Confidentiality%20of%20arbitral%20proceedings%20under%20Netherlands%20law%20s,this%20in%20their%20arbitration%20agreements%20to%20ensure%20confidentiality Accessed on Feb 15 2023

[47]ibid

Procedures for arbitrations taking place in The Netherlands are determined by the parties or, in the absence of the parties' agreement, by the arbitrator. Whatever the procedure, however, parties must be treated equally and be given an opportunity to substantiate their claims and present their cases. The arbitrator is permitted to act upon the agreement of the parties.[48]

The Netherlands is also among the few states to address third parties' interests in an arbitration. According to article 1045, "a third party who has an interest in the outcome of the arbitral proceedings" may ask to intervene in the proceedings. Art 1045 (1) of the Netherlands arbitration act states that,

"At the written request of a third party who has an interest in the outcome of the arbitral proceedings, the arbitral tribunal may permit such party to join the proceedings, or to intervene therein. The arbitral tribunal shall send without delay a copy of the request to the parties." [49]

This provision allows the arbitration tribunals to permit the intervention of third parties who has an interest on the outcome of the arbitration proceedings and requests to intervene in writing after sending of the copy of the request to the parties in the proceeding. By allowing the intervention of third parties, Netherlands compromises the principle of party autonomy for principle of privity of contract. As the duty of confidentiality is not a rule, allowing third parties to intervene doesn't violate this principle.

The other way of protection of third parties in Netherlands, is an objection to the arbitral award before the enforcement of the award.[50]

3.2.2 THE PROTECTION OF THIRD PARTIES TO ARBITRATION PROCEEDING UNDER ARBITRATION ACT OF ENGLAND

English arbitration act 1996 doesn't expressly provides for confidential arbitration proceedings since the drafters regarded confidentiality to be better left to the common law principle while acknowledging no doubt at English law the existence of the general principle of confidentiality. Thus, the common law has long recognized the duty of confidentiality as an implied obligation

[48]S. I. Strong, Intervention and Joinder As of Right in International Arbitration: An Infringement of Individual Contract Rights or A Proper Equitable Measure*?*, Vanderbilt Journal of Transitional Law, vol 31(1998), p. 915
[49]Netherlands Arbitration Act no. 1, December, 1986,(Netherlands), art 1045(1)
[50]S. I. strong cited above at note 48 p. 935

out of the parties' agreement to arbitrate.[51] This principle is for example ascertained on the case between Hassen insurance co. of Israel and others v. Stuart J. Mew.[52] This duty of confidentiality requires the tribunal not to allow any person to know about to the proceeding without the consent of the parties. With regard to the privity rule, it is emerged as established law in England in the middle nineteenth century. The doctrine of privity emerged alongside the doctrine of consideration, one of the rules which state that consideration must move from the promisee. This principle recognized in the case of Price v Easton.[53] The rule was further developed in Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co [5], a leading House of Lords case on the doctrine. In this case, Lord Haldane said:

My Lords, in the law of England certain principles are fundamental. One is that only a person who was party to a contract who had provided consideration can sue on it. Our law knows nothing of a jus quaesitum tertio (third party effect of action) arising by way of contract[54]. This principle doesn't allow the contract of arbitration to create effect on third parties.

Section 1(b) of the Act sets 'party autonomy' as one of the basic principles of arbitration. It states that 'the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.'[55] The reference to certain terms in this provision discloses that freedom of parties is subject to certain limitations. The first part of this provision, for instance, 'should be free to agree' signifies the parties' freedom to design the laws and proceedings of the arbitration while recording an agreement. This design is not unqualified because the words 'should be free' indicate an implied restriction in exercising wide autonomy because the word 'should' is a conditional one. It allows the parties to exercise of discretion in

[51] Maxi Scherer, the English approach to the law governing confidentiality in arbitration, kluwer arbitration blog, availableat;https//arbitrationblog.kluwerarbitration.com/2022/08/18theEnglishapproachtolawgoverningconfidentialit. accessed on Feb 19, 2023

[52]Hssenh insurance co. and others v. Stuart J.mew, queen's bench division of united kingdom,1993, p 246-247

[53]All Answers ltd, 'English Doctrine of Privity of Contract' (Lawteacher.net, Feb 19, 2023 1;00) <https://www.lawteacher.net/free-law-essays/contract-law/english-doctrine-of-privity-of-contract-contract-law-essay.php?vref=1>

[54]Ibid

[55]The UK Arbitration Act no. 99, 1996 (United Kingdom), section 1(b).

agreeing any matter.[56] As discussed, the all of the major principles that affect third parties in favor or in adverse are contained in the laws applicable for arbitration.

In 1996, England and Wales adopted a new arbitration law that superseded several earlier enactments[57]. The Act also includes a number of mandatory provisions which may not be waived or amended by the parties and a number of non-mandatory default rules.[58] Arbitral procedure is one of the areas where party autonomy prevails, possibly even taking precedence over the arbitrator's duty to manage the process properly.[59] If a third party were to attempt to intervene or be joined under the Arbitration Act 1996, he /she can't intervene but through application of paragraph 68 of that law can to object the enforcement of the award.[60] By denying intervention the arbitration act of England insists on the principles of arbitration like confidentiality, autonomy & etc. by compromising the principle of privity of contract and protection of third parties. But the UK arbitration act allows third parties to object the enforcement of the arbitral award on the ground of their interest.[61]

The Rights of Third Parties Act of UK also provides to third parties, that a third party (who need not be named or in existence at the time of the contract) is entitled to enforce a term that purports to confer a benefit on him/her[62]. Section 8(1) of the Rights of Third Parties Act states that

where a right to enforce a term of a contract under section 1 of the Rights of Third Parties Act is subject to an arbitration provision and that arbitration provision is in writing, then the third party shall be treated for the purposes of the Arbitration Act 1996 as a party to the arbitration agreement 'as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party'.

The logic behind this subsection is straightforward. If a party wants to take the benefit of a right under a contract, then it will be bound by the arbitration clause within the contract. Therefore, if a third party brings court proceedings claiming a benefit under a contract to which the Rights of

[56]Z. Nayeen, Principles of Party Autonomy and Limited Judicial Intervention in Contrast: Does the English Arbitration Act Strike a Fair Balance*?* 4 City Law Review, vol. 4(2022) p.5
[57]A. Fagbemi cited above at note 1, vol. 6 p.238
[58]ibid
[59]ibid
[60]United Kingdom arbitration act cited above at note 55, section,68(2);
[61]Z. Nayeen, cited above at note 56 vol. 4, p. 15
[62]A. Tweeddale, Arbitration under the Contracts (Rights of Third Parties) Act 1999 and Enforcement of an Award Journal of London Court of International Arbitration vol. 24(2011) p. 656-657

Third Parties Act applies, the promisor can insist that the litigation be stayed to arbitration. This, however, creates some difficulty where a third party has a variety of claims – some founded in contract and some negligence. Unless section 8(2) of the Rights of Third Parties Act applies, then in this situation the claims that are based on rights arising under section 1 of the Rights of Third Parties Act may have to be dealt with in an arbitration and the other claims in court proceedings. Section 8(2)(a) states:[63]

(2) Where

(a) a third party has a right under section 1 to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration ('the arbitration agreement'),

... the third party shall, if he exercises the right, be treated for the purposes of that Act as a party to the arbitration agreement in relation to the matter with respect to which the right is exercised, and be treated as having been so immediately before the exercise of the right.

The explanatory notes state that this subsection is likely to be of rarer application. It applies, for example, where the contracting parties give the third party a unilateral right to arbitrate or a right to arbitrate a dispute other than one concerning a right conferred on the third party under section (1). There is no case so far reported where section 8(2) of the Rights of Third Parties Act has been used or considered.[64]

Here, when the beneficiary accepts the stipulation and want to enforce the contract, he deemed as the parties to the contract through the representative. So, if he is deemed as a principal, the act of the agent, with regard to the arbitration agreement also bound him.

3.2.3 THE PROTECTION OF THIRD PARTIES TO ARBITRATION PROCEEDING UNDER ARBITRATION ACT UNITED STATES.

United States of America, provides no statutory duty of confidentiality. In terms of the USA,[65] both the Federal Arbitration Act 1925 and the Uniform Arbitration Act 2001 contains no

[63] Id, p. 657
[64] ibid
[65] The United States Arbitration Act (Federal Arbitration Act) 1926

provisions on confidentiality: the National Report on USA Arbitration[66] stressed that the requirement of the duty of confidentiality is a generally accepted practice. Reuben has stated that 'customarily, commercial arbitration is considered to be confidential, primarily because the proceedings are not conducted in public, and the disputing parties can contractually provide for the confidentiality of the proceedings.'[67] It is accepted that the duty of confidentiality is typically provided for in the parties' agreement or by the institutional arbitration rules the parties subject their arbitration to. The autonomy principle is a rule laid down by jurisprudence in the United States. The leading case is, US Supreme Court case of Prima Paint Corp vs. Flood & Conklin Mfg. Co., 388 US 395 (1967).[68] It is well practiced even now. This principle allows the parties to control the way how the proceeding to go.

Privity of contract is also one of the fundamental principles of contract. This principle is recognized almost in all of states contract law. United States is also one of the states that recognize the principle of privity. The federal high court of US in recent case, on 9 March 2022, asserts the principle of privity of the contract by dismissing the case based on that the appellant is not a party to the contract and has no a right derived from the contract.[69] This principle doesn't allow the contract of arbitration to create effect on third parties.

The arbitration act of US is mute about the intervention and joinder of third parties in arbitration proceedings. But several federal cases have addressed intervention and joinder as of right.[70]The standard for intervention is based on Rule 24 of the Federal Rules of Civil Procedure and appears to be interpreted as it is in civil litigation. Cases often deal with the review of arbitral awards and whether non-parties to the arbitration should be allowed to intervene in the appeal, even though

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[66]C. Amirfar, 'National Report for the United States of America', ICCA International Handbook on Commercial Arbitration 2020, available at http://www.kluwerarbitration.com.ezproxys1.stir.ac.uk/booktoc?title=ICCA+International+Handbook+on+Commercial+Arbitration accessed on Dec, 2022

[67]R. Reuben, "Confidentiality in Arbitration: Beyond the Myth", (2006) University of Kanas Law Review vol. 54(2006), p. 1259-1260

[68]Francis Lim, What is the Autonomy Principle in Arbitration Law? Business point of law, https://www.philstar.com/business/2003/01/07/190644/what-autonomy-principle-arbitration-law accessed on Feb 2023

[69]A. Harpur, High Court rules on privity of contract: Is there another way through?, dispute resolution update, https://www.ashurst.com/en/news-and-insights/legal-updates/high-court-rules-on-privity-of-contract-is-there-another-way-through accessed on Feb 2023

[70]Association of Contracting Plumbers v. Local United Assistance of Journeymen, F.2d 461, (2d Cir. 1988), vol. 841, p. 466; F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, , F.2d 1204, (7th Cir. 1980), vol.629, p.1213

they are not technically bound by the award.[71] Where the tribunal finds that the arbitration "directly" affects the third parties' interests, it will generally allow intervention under Federal Rule of Civil Procedure 24(a). If the third party hasn't intervene, he has the right to object the enforcement of the arbitral award.[72] By doing this the third parties can be protected from the effect of arbitration between other parties. Though the arbitration act of US is silent on the issue the practice of the court by insists on the principle of privity of contract and protection of third parties by allowing intervention. The other way of protection of third parties in US. is an objection to the enforcement.

3.2.4 THE PROTECTION OF THIRD PARTIES TO ARBITRATION PROCEEDING UNDER ARBITRATION ACT SOUTH AFRICA.

All the principles of arbitration are found in South African arbitration act. With regard to confidentiality the act requires both parties and the tribunal to keep the award and all documents created for the arbitration which are not in the public domain confidential.[73] The South African Arbitration Act 2017 only allows an opt out clause based on the requirements of a legal duty or to protect or enforce a legal right.

In order to liberate the Parties from the clutches of the Court room procedures the UNCITRAL model was devised and was supposed to be adopted by the different Countries and made a part of their national laws. This would ensure that an effectively time saving mechanism is put in place which will give the parties the freedom to speak their own free will. The provisions of the Model law even allow the parties to devise their own rule and regulations for the effective governance of the Transactions.[74] UNCITRAL model is recognized as a national law of South Africa by arbitration act 15 2017 0f South Africa, the principle of party autonomy is applicable in South Africa.

With regard to the principle of privity, the appellate court of south Africa in cases between Wells v South African Aluminite Company 1927 AD held, the privity and sanctity of contract entails that contractual obligations must be honored when the parties have entered into the contractual

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[71]ibid
[72]ibid
[73]South Africa International Arbitration Act 15 of 2017, Section 11(2).
[74]A. Mushtaq, Party Autonomy in UNCITRAL Model Law, united nations, UNCITRAL, https://blog.ipleaders.in/party-autonomy-uncitral-model-law/ ; accesed on Feb, 19, 2023

agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract. Taking into considerations the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract. This court further stated that as follows: If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice as between the parties themselves only.[75] This principle doesn't allow the contract of arbitration to create effect on third parties.

Concerning intervention, in multiparty disputes, both the South African new Arbitration Act No 15 of 2017 and the UNCITRAL model law that is incorporated by the new Arbitration Act to South Africa's arbitration regime is silent. That means, South Africa's national legislation has not made any provision concerning the participation of third parties in pending arbitration through intervention. However, nothing precludes the extension of the arbitration agreement to third parties if the remaining party to the arbitration agreement consent and the third party submits to the jurisdiction of the arbitration tribunal. In other words, concerning intervention, a third party will be bound by an arbitration agreement and becomes an additional party to the arbitration agreement, where it seeks to participate and submits to the arbitral process, and all parties to the agreement have consented.[76] In circumstances where there is a failure on all parties to agree to third party involvement, there can be no intervention of third party as this frustrates the consensual nature of an arbitration agreement.

The other way of protection in South African arbitration act is termination of the proceeding by the tribunal when it believes that the continuance of the proceeding is unnecessary. [77]

[75]The supreme Court of appeal of south africa judgment, Wells v South African Alumenite Company 1927 AD p 63
[76]G. Rudolph and M. Wright, Global Arbitration Review, available at, https://www.globalarbitration review.com/jurisdiction/1000205/south-africa accessed on Dec, 15,2022
[77]South African arbitration act, 2017, section 47(2)(c)

3.3 PROTECTION OF THIRD PARTIES RIGHT UNDER THE INTERNAL RULE OF INTERNATIONAL ARBITRATION TRIBUNALS.

3.3.1 PROTECTION OF THIRD PARTIES RIGHT UNDER THE INTERNAL RULE OF ICC.

International Chamber of Commerce has a much more global appeal and is, in fact, one of the most popular and most respected arbitral institutions in existence today.[78]

With sixty years of experience in international arbitration, the ICC has overseen well over 5,000 arbitrations[79] and handles several hundred new cases a year, with claims ranging from several million to the tens of thousands of U.S. dollars.[80] As of January 1, 1998, the ICC's amended Rules of Arbitration (New ICC Rules) came into effect. In ICC, the arbitral procedure is governed by the ICC rules; where the rules are silent, the parties or, in the absence of agreement, the arbitrator may decide the applicable procedure, either with or without reference to any procedural law.[81] All sets of rules are subject to the general proviso that, "in all matters not expressly provided for in these Rules, the [ICC] and the [arbitrator] shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law."[82] This language could have an important effect on the development of a third party right to intervene or be joined in ICC arbitration, as an argument may be made that joinder or intervention by third parties constitutes an unwarranted extension of the arbitrator's authority, and thus would make an arbitral award enforceable which would otherwise not. This provision of the act gives direction that the third parties may be a party to arbitration if they are not parties, the award would be unenforceable by objection of these parties. So, to make the award enforceable the arbitrator should allow third parties to intervene.

3.3.2 PROTECTION OF THIRD PARTIES RIGHT UNDER THE INTERNAL RULE OF AAA.

To intervene third parties in arbitration proceeding according to the rules of AAA, the parties should give their consents. But interestingly the AAA International Rules state that if the continuation of the arbitration becomes "impossible," then the arbitral tribunal shall terminate the

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[78]C. Laturno, “International Arbitration of the Creative”: A Look At the World Intellectual Property Organization's New Arbitration Rules, Journal of Transitional Law. Vol.9(1996) p.385
[79]ibid
[80]S.I strong, cited above at note 48, p. 964
[81]Alemu Balcha, cited above at note 15, vol 9, p.120
[82]Ibid

proceedings.[83] This provision might be effective in persuading recalcitrant parties to consent to intervention by or joinder of a third party, if arbitrators were willing and able to hold that it would be impossible to proceed fairly without the participation of the third party.[84] In such a situation, the original parties would then have the choice of allowing the third party to participate in the arbitration or having the arbitration terminated and the dispute litigated.

Generally, the arbitration laws of countries and international arbitration tribunals, discussed above with the exception of Netherlands law of arbitration gives emphasis for the principles of arbitration and don't allow the intervention without securing the consents of all parties concerned. With regard to objection to the award in all states and international tribunals the award may be subject to objections. Lastly ACC has introduced the termination of the proceeding if it would be unnecessary and impossible to enforce.

[83]American Arbitration Association, arbitration and mediation procedures, art. 30(2)
[84]S. Strong, cited above at note 48, p. 950

CHAPTER FOUR

PROTECTION OF THIRD PARTIES RIGHT IN ARBITRATION PROCEEDING UNDER ETHIOPIAN ARBITRATION LAWS.

4.1 FACTORS THAT AFECTS THE PROTECTION OF THIRD PAERTIES IN ARBITRATION PROCEEDING IN ETHIOPIA.

There are some factors that can affect the protection of the third parties in arbitration proceedings. Some of these factors are insisted against the protection of third parties while others are in favor of the protection of third parties. So the issue of protection of third parties in arbitration proceeding is balancing between these factors. These factors are also found in Ethiopian laws in explicit or implied manner. In this sub section the researcher will analyze these factors under Ethiopian laws.

4.1.1 PRINCIPLE OF PRIVITY OF CONTRACT

The doctrine of privity of contract is a common law principle which provides that a contract cannot confer rights or impose obligations upon any person who is not a party to the contract. The premise is that only parties to contracts should be able to sue to enforce their rights or claim damages as such.[85] The Ethiopian law of contract also recognizes the privity of contract impliedly under art 1675, 1731, and explicitly under art 1763 0f the Ethiopian civil code.

The potency of the binding obligations (this force of binding obligations upon parties is set out under Articles 1731 and 1952 of the Civil Code), which parties can decide upon through their contractual freedom, leads to the logical consequence that what they decide upon by contract should normally not affect third parties. A contract may only affect its signatories, whether they benefit from it or have to implement obligations. In the civil law legal system, the basic principle, which is known as contracts produce effects as between the contracting parties is referred to as "relative effect of contracts", while it is called "privity of contracts", in the common law legal system. Similarly, this principle is incorporated under the Ethiopian law of contracts. Article 1675, which defines contracts, states that a contract is an agreement of two or

[85] Wikipedia, available at https://en.wikipedia.org/wiki/Privity_of_contract accessed on Feb 2023

more persons "as between themselves". The phrase "as between themselves" implies that a contract produces effect only among the contracting parties. Similarly, Article 1731, which incorporates the doctrine of pacta sunt servanda states that the provisions of a contract lawfully formed are binding on the parties as though they were law.[86] And 1952 which incorporates the principle of privity explicitly states that unless otherwise stipulated by this law the contract shall affect only the parties to it. These provisions reflect the doctrine of privity of contracts. Thus, third persons, in principle, can neither suffer nor profit from a contract which was neither made by them nor for them. Arbitration is the result of the contract and the provision of general contract is applied to it. So according to art 1675, 1731, and 1952 of the civil code only parties no other person shall be affected by the contract made by two persons as a result only parties who submit their dispute to the arbitrator should be affected by the contact of arbitration agreement.[87] So this principle favors the protection of third parties than strictly applying the principles of arbitration.

4.1.2 PRINCIPLE OF CONFIDETIALITY OF ARBITRATION

As discussed in chapter two principle of confidentiality of arbitration advocates that the award and the proceeding of the arbitration shall be kept secret. The Ethiopian law of arbitration and conciliation also recognizes it under art 37 of arbitration and conciliation working procedure proclamation as "the proceeding and the award of the arbitration shall be kept confidential." According to this provision any person other than the arbitrator and the parties who submit their dispute to arbitrator is not allowed to know about the proceeding. This principle even excludes third parties who may be affected by the arbitration proceeding and prohibits the intervention of such person if the intervene they become aware the proceeding and the award. As a result, we can conclude that this principle is against the protection of third parties right.

4.1.3 PRINCIPLE OF DISPOSITION

Consent is the base for any arbitration proceedings as arbitration is an agreement between disputing parties to submit their dispute to an impartial third party called arbitrator to give his binding decision on the matter. According to this principle to begin the arbitration consent is a preliminary consideration and no one obliged to settle his dispute with other persons by

[86]Balew Mersha and Kahsay Debesu, Law of Contract – II Teaching Material, (2008), p.142
[87]Civil code of the empire of Ethiopia 1660, cited above at note 8, art, 1675, 1731, 1952

arbitration. This principle is incorporated under Ethiopian civil code which governs general contract under art 1675 of the civil code. This provision defines contract as an agreement between two parties. As arbitration is contract between two parties this provision shall also applied in arbitration proceedings. That means if the third person is allowed to participate without the consent of the original parties in pending proceeding, they are going to settle their dispute with such third person without their consent. And specifically, art 2(1) of arbitration and conciliation working procedure proclamation provides an arbitration agreement as a base for arbitration proceeding while defining it. From the provision it is clear that the Ethiopian law of arbitration puts consent as a base ground of arbitration and the proceeding should be held between the parties who agree to submit their dispute to arbitrator. Accordingly, any person who is strange to the agreement can't be allowed to participate unless the parties agree on his intervention. Basing the intervention on the parties' consent gives favor to principles of arbitration than the principle of privity of contract.

4.1.4 PRINCIPLE OF PARTY AUTONOMY OF ARBITRATION

Though this principle resembles the principle of disposition, it is all about the control of the proceeding from the beginning to the end of the process by the parties. The Ethiopian law of arbitration has many provisions that empower the parties to control the overall proceeding without violating the mandatory provision of the proclamation. In Ethiopia the parties can, choose the law to be govern while in arbitration[88] decide on the number and identity of the arbitrator[89], rule of procedure[90], place of arbitration[91] and etc. The question how this principle of arbitration is compromised to protect the third persons is answered in the following subsection.

4.2 WAYS OF PROTECTION OF THIRD PARTIES RIGHT IN ARBITRATION PROCEEDING UNDER ETHIOPIAN ARBITRATION LAWS.

As discussed in the previous sub section of this study the protection of third parties in arbitration proceeding is all about making compromise between contrary the factors that are capable of creating effect on it. So, the Ethiopian arbitration law has tried to create the compromise between

[88]Arbitration and conciliation working procedure proclamation no.1237, cited above at note 7 at art 10
[89]Id at art 11-12
[90]Id at art 29
[91]Id at art 30

these factors. The Ethiopian arbitration has introduced three ways that may protect third parties right in arbitration proceedings; intervention, termination and objection.

4.2.1 INTERVENTION

Intervention is a mechanism by which a party is brought into a pending case to present a claim or defense.

The previous laws governing arbitration hadn't any provision on the intervention of third parties. The then regulation of commercial arbitrations, as contained in the Civil Code and Civil Procedure Code is not clear on the issue, intervention of arbitral proceeding in multiparty disputes. It is not possible to extend the provisions of civil code and civil procedure code of Ethiopia to allow intervention to arbitration as the procedural dissimilarity between litigation and arbitration.[92]

But, art 40 of the arbitration and conciliation working procedure proclamation regulates the issue of intervention of third parties in arbitration proceedings in Ethiopia. Art 40(1) requires the fulfillment of three requirements and art 40(3) of the same proclamation adds the fourth condition to intervene. Here the researcher will discuss all the conditions separately. Art 40(1) states

Any third party whose interest could be affected by the arbitral award may intervene in arbitration proceeding before the arbitral award is rendered up on the submission of their application to the tribunal.[93]

So according to this provision, the third parties who wants to intervene on pending arbitration proceeding shall fulfill three conditions

1) **He/she should have interest on the subject matter of the arbitration proceeding**

The phrase: "*Any third party (to an arbitration agreement) whose interest (on the subject matter of the dispute) could be affected by the arbitral award" (emphasis added)* requires the person who want to intervene in arbitration proceeding to show that he has an interest in the proceeding

[92]Alemu Balcha cited above at note 15, vol.9,p 222
[93]Arbitration and conciliation working procedure proclamation, cited above at note 7 art 40(1)

and his or her interest could be affected by the arbitral award if the arbitration is conducted in absence of him. In other words,

To intervene, a party must be interested in suit between other parties. It is this requirement that justifies a person's intervention in a suit. Hence, the phrase "

Any third party whose interest could be affected by the arbitral award" under Article 40(1) is crucial in determining intervention. This phrase has to be interpreted in a way that maintains the purposes of ADR in general and arbitration in particular. This is because intervention widens the dimension of a dispute and causes delay of arbitration proceedings. The phrase "

The interest of the person is determined by answering the question, whether an intervene gains or losses by the direct legal operation of the award to be rendered in an arbitration proceeding between other parties.

2) **The parties who want to intervene should submit his application in writing**

The phrase "……on *submission of their application to the tribunal.*[94]*"* Necessitates the application of the person who requires intervening in pending arbitration between other parties. In other words, a party who wants to intervene shall file an application in which he is expected to state reasons justifying his intervention. Stating the reason helps arbitration tribunal to decide on whether or not the party requesting the intervention has an interest on the arbitration proceeding.

3) **The application shall be filed before a decision is given.**

Intervention is participation in a pending proceeding between other parties. So, it should be filed in pending arbitration proceeding means before the arbitral award is decided.[95] Long as arbitration proceeding is not disposed by giving award the third person can intervene in the proceeding even if he /she is being aware and lately require the intervention as there is a provision to this effect. But in my opinion if the person delays for requesting intervention while aware the initiation of the proceeding early, the tribunal or the parties should reject his application since it may delay the proceeding as he proceeding starts as a fresh and it is against the main advantage of arbitration, speedy solution for disputes.

[94]ibid
[95]ibid

4) **Consent of parties to arbitration proceeding**

Unlike intervention in civil proceeding in the court and unlike the intervention under the arbitration act of Netherlands, intervention in arbitration proceeding requires the consent of the parties between whom the arbitration proceeding is pending. Art 40(3) of the proclamation requires the consent of the parties by stating, *"third parties may only participate in the proceeding if the contracting parties give their consent to such intervention.*[96]*"*

Even if tries to compromise the third parties right and principles of arbitration, this condition seems give the emphasis for the principle of arbitration than protection of third parties right as the contracting parties can block the request of third parties to intervene though the proceeding would affect the interest of third parties.

Generally, the third person who wish to intervene should fulfill the above four conditions. The first three conditions are expected from the side of the person who requires the intervention and they are easy to be fulfilled. But the fourth condition is expected from the side of the parties in proceeding and may be impossible to be fulfilled if the parties wish otherwise.

4.2.2 TERMINATION OF THE PROCEEDING BY THE TRIBUNAL

This is also a new concept that is introduced by arbitration and conciliation working procedure. The previous laws governing arbitration hadn't the concept of termination by the tribunal at all for whatever reason. This type of procedure is introduce by AAA internal arbitration rules and the Ethiopian law of arbitration law incorporates it in arbitration and conciliation working procedure proclamation.

According to art 45(1)(c) arbitration tribunal may terminate the proceeding where the arbitral tribunal finds the continuation of the proceedings unnecessary or there is sufficient reason for not continuing the proceedings. If there is a third person whose interest may be affected by the arbitral award and the parties to the proceeding objects is intervention requested by the third party, this may render the continuation of the proceeding unnecessary as the award may be set aside if the third party oppose the enforcement of the award and the arbitration tribunal may terminate the continuance of the proceeding.[97] This in turn protects the third persons right in

[96]Id at art 40(3)
[97]Id at art 45

arbitration proceeding. The arbitration tribunal doesn't need any procedure to terminate the proceeding. If it believes it suffice to terminate. Any one including the third person may make the fact that makes the proceeding unnecessary known to the tribunal and convince it to terminate the proceeding informally.

4.2.3 OBJECTION

Though the previous laws of arbitration hadn't express rule on the objection, some argues for it by invoking Art 317 cum. Art.358 of civil procedure code, after the award is given the party or third party interested can request setting aside or opposition on the ground that there is irregularity and injustice.[98] However in this case, to which body can the third party submits its opposition; to the Arbitration tribunal or to the court and what will be its effect? Because, here it can be that the application of opposition is similar with appeal).[99] Plus, if it can be said that third party can submit application to the court as per art 358 of the CPC, what will be its effect? Moreover, if the court remands the dispute to Arbitration tribunal, how third party be compelled to take his case before the tribunal in which he had not say, how could be the composition, fee, choice of law, the procedure and the like rearranged? All the above questions need to be addressed

These questions can be answered by art 48 of arbitration and conciliation working procedure proclamation. Sub article one of this provision states that.

"A contracting party or a third party who should have been party to the arbitration proceeding and whose right has been affected by the arbitral award may, within 60 days from the date he became aware of such award, submit his objection against the arbitral award or the execution of the same to the court which has jurisdiction over the case had it not been submitted to arbitration.[100] *"*

So, if the third parties right affected by the arbitral award the third, person can object the award or oppose the execution of the award to the court which would has the jurisdiction had the

[98]G. Neguse, commercial arbitration and accommodation of third parties in Ethiopia, (2018, Unpublished,Addis Ababa University College of Law and Governance Studies, School of Law), p. 64
[99]ibid
[100]Arbitration and conciliation working procedure proclamation, cited above at note 10, at art48(1)

dispute was not submitted to arbitration. In other words, a person whose interest has affected by the judgment of the tribunal and who didn't intervene due to whatever the reason can object the award and oppose the execution within 60 days from he get the knowledge about the existence of the award. The starting point of the period is made on knowledge of the judgment and this makes third parties secure since the time after judgment but before their knowledge about the judgment can't be considered.

By receiving the objection the court may modify or reverse the arbitral award based on the interest of third parties.[101]

To sum up the Ethiopian law of arbitration provides three ways of protection of third persons interest in the arbitration proceeding after the commencement of the arbitration proceeding. Some of the ways are based on the consent of the original parties of the proceeding, intervention. And others don't need any consent of the parties. These are termination of the proceeding by the tribunal and objection to the enforcement of arbitral award.

[101]Id art 48(4)

CHAPTER FIVE

CONCLUSION AND RECOMENADTIONS

5.1 CONCLUSION

Dispute is an indispensable part of the society. Whenever dispute arises they should be settled in one way or another. ADR set of procedures of settlement of disputes. it has many advantages like flexibility, cost and time efficiency, party autonomy, confidentiality, and etc. and it also has its demerits like, lack of precedent, lack of procedural safe guard, and etc.

ADR consists many forms of dispute resolution mechanisms. However, the most common ways of settlement mechanisms are negotiation, mediation and arbitration. Negotiation is a dispute settlement mechanism by which the parties try to settle their dispute without involvement of third persons. On the other hand, mediation is a dispute settlement mechanism in which the parties try to settle their dispute with the assistance of third person who only facilitates the dispute settlement procedure for the disputant parties.

Arbitration is one of the mechanisms of dispute settlement in which the parties submit their dispute to an impartial third party. The consent of the parties is a preliminary ground for the arbitration process. It has many principles that stands for the necessity of consent of all parties involved. However, the subject matter of the dispute they submit may involve the interest of third party who could be affected the settlement of the subject matter of the dispute but doesn't give their consent at the submission of the contract. And a principle of privity of contract doesn't allow the contract to create any effect on the third party.

The afro mentioned incompatible principles make the issue of protection of third parties in arbitration proceeding confusing. With this regard different country uses different approaches. Countries like Netherlands stands as an example of the countries that protects the interest of third persons on pending arbitration proceeding by allowing the third persons to intervene even without the consent of the original parties.

In England and Wales, their arbitration act is silent about intervention. But if all parties agree on the intervention no impendent is there to allow intervention. The other way of protection of third

person from the effect of arbitration in England is objection of the award to court before the enforcement of the award.

Though the arbitration act of US. is mute about the intervention of a third person to arbitration, different cases are entertained through allowing intervention by applying the civil procedure code of the country.

When I come to our country, the Ethiopian arbitration law has three ways of protection of third persons in arbitration proceeding. These are intervention, termination, and objection.

Intervention is a participation on the pending arbitration proceeding. To intervene a person must show that he has an interest on the subject matter of the dispute and this interest could be affected if the award is given, the consent all parties should be secured, and finally he should file an application for intervention before the award is given.

There may be also the termination of the proceeding by the arbitration tribunal if they believe that the continuance of the proceeding is unnecessary. They may believe in the necessity discontinuance of the proceeding when there is a third persons interest in the subject matter of the dispute.

The last way of protection of the third person is objection to the enforcement of the award by those third persons before the enforcement of the award.

5.2RECCOMENDATION

The researcher recommends

- The original parties to allow the intervention of third person whose interest could be affected. As he can object the enforcement of the award and the court may vary or reverse the award they may be exposed to additional cost and the costs incurred in the arbitration process become fruitless. So, they should allow the third person to intervene in order to economical settlement of the dispute.
- The legislator to enact the legislation that guarantees the intervention of third person whose interest could be affected in pending arbitration proceeding when such third party require even without the consent of the parties as a case of Netherlands.

- The tribunal to terminate the proceeding whenever they aware the existence of third persons interest in the subject matter of the dispute as it may render the process unnecessary due to the fact that the court may vary or reverse the award given by the tribunal.

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