Formation of Arbitral Tribunals and Disqualification and Removal of Arbitrators under Ethiopian Law

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INTRODUCTION

Although Compromise, Conciliation and Arbitration were given recognition by the 1960 Ethiopian Civil Code as alternative mechanisms of dispute settlement in Ethiopia, the three aspects have not been put into practice excepting may be arbitration, which, it may be said, is put into operation to some extent. Because of the fact that these alternative mechanisms are not put into practice, or are, as such, not tested, disputes have been, at least in major townships in Ethiopia, been taken to public courts. Also notable is that in rural Ethiopia, and even in some Ethiopian townships, disputes have been and still are settled through traditional mechanisms practiced amongst the different ethnic groups in the country.

As stated above, arbitration as an alternative means of adjudicating disputes has, to some extent, been put into effect in Ethiopia. Although the Civil Code recognized arbitration as one mechanism of settlement of disputes, however, little has thus far been done to elucidate the provisions of the Code on arbitration.

This modest work on "Formation of Arbitral Tribunals and Disqualification and Removal of Arbitrators Under Ethiopian Law" hopefully contributes something towards shading light on the provisions of the Civil Code on arbitration. The paper is divided into two parts. The first part deals with the formation of arbitral tribunals and the second part deals with disqualification and removal of arbitrators. The essay comes to an end by some remarks in the form of conclusion.

I. *FORMATION OF ARBITRAL TRIBUNALS*

A. Appointment of Arbitrators

One of the main characteristics of arbitration is that there would be private judges or referees that would consider and resolve the dispute(s) between the parties as opposed to judges sitting in courts which are appointees of the sovereign. In other words, arbitrators are appointees of the parties or

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disputants, or as the case may be the appointees of the parties / disputants through some kind of an appointing authority designated as such by the parties themselves. As the reference is going to be considered and finally resolved by the arbitrators, their appointment becomes very important in the sphere of arbitration. It could in fact be said that without the appointment of the arbitrators in one way or another, the arbitral tribunal [1]cannot be formed and the agreement of the parties to refer their existing or future disputes to arbitration cannot be executed. It would remain an agreement without effect.

Primarily, the appointment of the arbitrators constituting the private dispute resolution tribunal is the right of the parties. However, if the parties fail to agree on the appointment of their private judges, they may seek a court's assistance. Here below we will consider situations where both parties appoint their arbitrators, courts appoint them, when they are appointed by a third party entrusted with such an appointment, and the role of arbitrators in appointing or choosing a chairman, a president, or an umpire as it may be called.

1. Appointment by the Parties

Parties may appoint their respective arbitrators [2] the moment they agree to submit their existing disputes to arbitration, or may even agree on the proposal made by one of them. The same applies when parties agree to submit their future disputes to arbitration. The parties can, right from the moment they gave their free consent to submit their future disputes "arising from" or "in relation to" their main underlying contracts to arbitration, appoint their respective arbitrators or endorse the proposal of the appointment of arbitrators submitted by one of them which would be tantamount to appointing one's arbitrator(s) respectively.

The equality of the parties as stated under the provisions of Article 3335 of the Civil Code, must, however, not be forgotten with regard to the appointment of arbitrators. The provisions of Article 3335 are so strict that the agreement to arbitrate is rendered invalid where it places one of the parties in a

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[1] The 1960 Civil Code of Ethiopia doesn't use the word "tribunal." It simply refers to Arbitrators as individuals. Under French Law, which is the main source of Ethiopian Private Law, the term "arbitral tribunal" is a recent phenomenon intended to give to arbitrators the status of a collegial jurisdictional body rather than viewing it implicitly as merely a group of private individuals. See for instance R. David Arbitration in International Trade, Kluwer, Law and Taxation Publishers, Deventher/ Netherlands, 1985 p. 225.

[2] The Civil Code of Ethiopia Articles 3331 & 3337.

privileged position as regards the appointment of the arbitrators.[3] This presupposes that there has to be an agreement between the parties as to the appointment but the agreement reached on cannot be valid if it puts one of the parties on a privileged position. Professor Rene David wrote:

> *A restriction on the freedom of the parties would seem to be imposed in all countries. It is imperative that parties should be ensured full equality in the constitution of the arbitral tribunal. A specific provision of the law in some countries, the general principles of law in other countries condemn a number of practices on the grounds that they result in a privileged position for one of the parties as regards the constitution of the arbitration tribunal.* [4]

The "equality of the parties" requirement imposed by Article 3335 of the Civil Code doesn't, however, prohibit the endorsement by one party of the list of would-be arbitrators submitted by the other, provided however, that the endorsing party's consent is freely given. What Article 3335 purports to guard against, is that it should not be acceptable where "all arbitrators are appointed by one of the parties only," [5] or in case of a sole arbitrator, where his appointment was made by one of the parties without securing the free consent of the other, or by ignoring his objection as to the appointment of the sole arbitrator. [6]

Appointment of arbitrators necessarily involves the naming of the arbitrators by the parties and hence the parties agreeing only on the procedure for appointment doesn't mean appointment in the sense it is used in the Civil Code. The naming of arbitrators in the agreement to arbitrate is left to the discretion of the parties. They may agree to appoint their arbitrators in the agreement to arbitrate or provide in their agreement for the number and procedure of appointment and leave the actual naming for a future date but before a dispute arises or until after a dispute has arisen between them. [7] The

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[3] See the discussion on "equality of the parties" infra.

[4] Rene David, Arbitration in International Trade Kluwer, Law and Taxation publishers, Deventher/Netherlands, 1985, p.23.

[5] Ibid.

[6] Incidentally, it is commendable to note that the Civil Code uses "arbitrator" throughout in its singular form although in Article 3331 it is provided that there may be one or several arbitrators. I personally, prefer the plural form because the appointment of three arbitrators has gained so much popularity and the Code also recognizes collegiality.

[7] The Civil Code, in Article 3331(1) provides that appointment of the arbitrators may be made in the arbitral submission or subsequently.

simultaneity of agreement to arbitrate and the naming of arbitrators then and there seem to be highly probable in the cases where the agreement to arbitrate is in reference to already existing disputes. It is, however, possible even in agreements to arbitrate existing disputes for the parties to postpone the appointment of arbitrators until a future date. In agreements to arbitrate future disputes, the highly probable arrangement would be that the agreement provides for the procedure and number of arbitrators, but the likelihood would be that the naming of the arbitrators is left until after the dispute has arisen between the parties. Nevertheless, the possibility that the appointment is made at the time of the agreement cannot be dismissed.

Both in "*compromis*" agreement i.e., the agreement to submit existing disputes to arbitration or in the "clause *compromissoire*" i.e., the agreement to submit future disputes to arbitration, there may be advantage in leaving the appointment of arbitrators until after a dispute has arisen between the parties. It is submitted, that awareness by the parties of the nature and extent of their disputes before they appoint their arbitrators would be advantageous to them. This is so, particularly because it enables them to select the appropriate persons with the necessary qualification and expertise to facilitate the speedy disposal of their disputes and to avoid the trouble of re-appointing in cases where the pre-dispute appointed arbitrators may have died or have become incapable.

Sub-article (3) of Article 3331 of the Civil Code provides: "where the parties have failed to specify the number of arbitrators or the manner in which they shall be appointed, each party shall appoint one arbitrator". This is intended to fill the vacuum left by the parties in the event that they weren't careful enough to fix the number of arbitrators or the procedure by which they shall be appointed, without, of course, prejudice to the provisions of Article 3335 of the Civil Code. Sub-article (3) of Article 3331 has three limbs. The first one is intended to cover the situation where the parties have agreed on the procedure of appointment of their arbitrators but failed to have provided for the number of arbitrators in which case they shall appoint one arbitrator each and if their agreement on the manner of appointment happens to be different from appointing one arbitrator each, without prejudice to Article 3335, it seems that such an agreement on the manner of appointment is overridden by the application of article 3331(3). If, for instance, the parties have agreed that the arbitrators were to be appointed by the Ethiopian Chamber of Commerce but failed to provide for the number of arbitrators, and how many arbitrators each party should appoint, then they shall appoint one arbitrator each but their agreement that the arbitrators were to be appointed by the Ethiopian Chamber

of Commerce is impliedly rendered ineffective unless one argues that the parties' agreement as to the appointing authority should remain effective and only the aspect of Article 3331(3) dealing with the number of arbitrators should be given effect.

The second limb of Article 3331(3) would be that in the agreement to arbitrate the parties would have provided for the number of arbitrators but have failed to agree on how they are to be appointed and may be on who appoints them. In such a case again, the simple way out provided by Article 3331(3) would be that the parties should themselves appoint one arbitrator each. On the other hand, if the agreement of the parties provides that there shall be appointed five arbitrators, the parties should be able to appoint two arbitrators each.

The third aspect of Article 3331(3) would be that in certain circumstances the "or" in sub-article (3) of Article 3331 might need to be taken as an "and". Parties may fail to provide for both the number of arbitrators and the manner or procedure of appointment in which case Article 3331(3) should again be of use to remedy the situation. The more likely applicability of sub-article (3) of Article 3331 is after disputes have arisen between the parties but in the circumstances where there is no recalcitrance of the parties to constitute the tribunal.

On the other hand, Article 3333 gives the procedure of appointment, which may be used by the parties to constitute the tribunal in cases that fall under Article 3331(3). As Article 3333 begins with "where necessary," one would imagine that there is an implied pre-supposition that as far as possible, the parties should try to agree both on the number and procedure of appointment of arbitrators. Failing such agreement, one would also imagine that "the party availing himself of the arbitral submission" may make use of the procedure under Article 3331(1). In such a situation, the concerned party shall have to specify the dispute he wishes to raise and appoint an arbitrator and has to give notice of his action to the other party or the person entrusted with the appointment of arbitrators in the arbitration agreement.[8]

The notice receiving party, or somebody authorized by him, is given 30 days commencing from the date of reception of the notice under Article 3333(2) within which he may appoint his arbitrators(s) failing which he loses

[8] Civil Code Article 3333(2).

his right of appointing his arbitrator and the right shifts over to the court. [9] Sub-article (3) of Article 3334 may be taken as a provision of the law empowering the parties, in their agreement to arbitrate, to modify the rules of sub-articles (1) and (2) of the same Article. The parties can, among others, agree to shorten or elongate the thirty days time limit or shift the commencement of the running of the limitation from date of reception to date of dispatch.

2. Appointment By the Court

(i) Of Arbitrators

Where the parties fail to appoint their arbitrators either in the agreement to arbitrate or subsequently, the right of appointment shifts over to the court. [10] This is so because at least one of the parties, i.e., the one seeking to "avail himself of the arbitral submission" should, to set the arbitral justice into motion, "specify the dispute he wishes to raise and appoint an arbitrator" [11] as a corollary of which the other party or the person entrusted with the appointment of arbitrator under the arbitration agreement shall be given notice of his willingness to avail himself of the agreement and his appointing an arbitrator. [12] It is not until after the party or as the case may be the appropriate person entrusted with the appointment of arbitrator is put the right to appoint arbitrators shifts over to the court. Putting the notice-receiving party in default would only materialize where thirty days have elapsed after he has received a notice specifying the dispute the other party wishes to raise and the fact of his having appointed his arbitrator. [13] In circumstances where the parties may have agreed to modify the provisions of Article 3334(1) & (2) of the Civil Code, putting in default may materialize in a shorter or longer time than thirty days after reception or dispatch of the notice.

If the notice receiving party or person wants to make use of his right of appointing his share of arbitrator after receiving the notification given by the other party, he can still proceed and appoint his arbitrator provided it is within the limitation period of 30 days or longer or shorter period of time if otherwise fixed by the parties. The court's right of appointing an arbitrator becomes

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[9] Civil Code Article 3334(1) cum 3334(2).
[10] Civil Code Article 3334(1).
[11] Civil Code Article 3333(1).
[12] Ibid, sub-article (2).
[13] Civil Code Article 3333(1) and (2).

exercisable after it is made certain that the notice receiving party or person has failed to make use of the notification of the initiation of the arbitral justice.

(ii) Of Presidents of Tribunals

The right of the court to appoint "an arbitrator who shall as of right preside over the arbitral tribunal" becomes exercisable after the appointed arbitrators have failed to agree to appoint a chairman either from among themselves or somebody outside of themselves. [14] Sub-article (1) of Article 3332 in this respect orders that in the situations where there is an even number of arbitrators, they shall, before assuming their functions, appoint another arbitrator, outside their own rank, who shall as of right preside over the tribunal. This provision presupposes agreement between the arbitrators in appointing the umpire and it is when they fail to reach an agreement as to who shall chair the tribunal in its proceedings leading to an enforceable award, that the right to appoint the chair arbitrator passes over to the court. The right of appointment of a presiding arbitrator however, doesn't automatically pass to the court merely because the arbitrators have failed to agree to appoint such a president. Although it is not explicitly provided, it seems that the arbitrators whose number is even and who have failed to reach an agreement as to who should preside over the arbitral tribunal report back to the parties of their inability to agree as a consequence of which one of the parties applies to the court for appointment of a president. Incidentally, even in the appointment of an ordinary arbitrator, by the court, it should be noted that it is the party seeking to avail himself of the agreement to arbitrate that after putting the other party in default, applies to the court that the rest of the arbitrators, presumably including the chairman,[15] be appointed by the court.

The provision of Article 3332(1) applies where the number of arbitrators appointed either by the parties or as the case may be by the person authorized to appoint on their behalf is, to take the minimum, two, i.e., where the parties or the persons entrusted with appointing appointed one each only. Starting from two, it could be any number as long as the number of appointed arbitrators is even.

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[14] Civil Code Article 3332, especially sub-article (3).

[15] Alternatively, the court may only appoint the arbitrators and leave the right of appointing a president to the court-appointed arbitrators themselves until after they fail to agree in appointing such a president in which case it can exercise its right of appointing the president.

Where the number of arbitrators chosen by the parties is odd, they have to appoint the president from among themselves. [16] This could be taken as an indication that despite the number of the parties being just two, there may be the possibility of their appointing more than one each arbitrator provided such uneven appointment doesn't violate the equality provision of Article 3335 of the Civil Code. One of the parties or one of the persons or authorities in charge of appointing the arbitrators can, therefore, agree to endorse the appointment of the arbitrators nominated by the other.

3. Appointment by the Person Entrusted With the Appointment

It may be appropriate, at this juncture, to at least briefly deal with the appointment of arbitrators by a person who may be entrusted with the power of such an appointment by the parties.[17] Ideally, it would be preferable if the parties themselves appoint their arbitrators by reaching agreement between themselves for "a major attraction of arbitration is that it allows parties to submit a dispute to judges of their own choice; and parties should exercise this choice directly rather than allowing it to be exercised by third parties on their behalf."[18] However, parties cannot, in all cases of appointing their arbitrators, among themselves reach agreement particularly in cases where they have opted for a sole arbitrator as distinguished from a collegial arbitral tribunal. It, therefore, becomes imperative that "In all types of arbitration, a method of appointing the arbitral tribunal should be available to break the deadlock which arises if the parties cannot agree on the composition of the arbitral tribunal" [19] As has already been observed above, the law provides for the courts to appoint arbitrators where the parties fail to reach agreement or where one of the parties fails to appoint his share of arbitrator whereas the other wants to avail himself of the arbitration agreement and hence applies to the court after giving notice and waiting for the legally prescribed period of limitation. But the court's involvement should be as a final resort and parties might want an intermediary third party to appoint their arbitrators before finally the court, in order to protect the interest of the party seeking to avail himself of the arbitral submission imposes some arbitrators on them.

As stated above, the right of appointment of arbitrators, however, may be entrusted to another person by the parties or may be one of them so that that

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[16] Civil Code Article 3332 (2).

[17] This is the principle enshrined in Articles 3333(2) and 3334(1) of the Civil Code.

[18] Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration, Sweet and Maxwell, London, 1986, p.160.

[19] Ibid. p. 365.

other person "may exercise the right on behalf of him/them." Such other person, who becomes a trustee of the parties, exercises his right before a final resort is made to the court. It, in fact, transpires from Article 3333(2) and 3334(1) that the trustee for the appointment of arbitrators plays the parties' role whenever there happens to be one. Nonetheless, it could be that first the parties themselves try to appoint their arbitrators and if they fail entrust another person with the appointment, but it may as well be that the parties right from the beginning entrust the appointment of arbitrators to a third person. In Ethiopia, there is no guiding rule as to who may be entrusted with the power of appointing arbitrators on behalf a party. Any capable person may be entrusted with the power to appoint an arbitrator on behalf a party. Without the possibility of other persons being entrusted, and without losing sight of the fact that an arbitration may be ad hoc, the two recently formed institutions, i.e., The Ethiopian Arbitration and Conciliation Center and The Arbitration Institute of the Addis Ababa Chamber of Commerce and Sectoral Associations may be mentioned as well-posited persons (institutions) to appoint arbitrators on behalf parties in Ethiopia. These two institutions keep their own rosters of competent arbitrators. For commercial arbitrations, the National and the Addis Ababa Chambers of Commerce may also be entrusted.

As is in use in very many countries the world over, particularly in relation to international commercial arbitrations, professional institutions may also be entrusted with the power to appoint arbitrators. Professional Institutions are, to mention just two of them, organizations like the Institute of Chartered Arbitrators and the International Bar Association.

On the other hand, on the regional or international plane, there are arbitral institutions, which may assist in appointing arbitrators. Such arbitral institutions include, the International Chamber of Commerce (ICC), the LCIA (The London Court of International Arbitration) the LMAA (The London Maritime Arbitration Association), The Kuala Lumpur Regional Center for Arbitration, The Hong Kong International arbitration Centre, The Cairo Regional Centre for International Commercial Arbitration, The Spanish Court of Arbitration, The American Arbitration Association (AAA), and The Inter-American Arbitration Commission, and the International Centre for the Settlement of Investment Disputes(ICSID).[20]

[20] See generally Redfern and Hunter, Supra, footnote #18 pp. 160 Et. Seq. See also Rene David, Supra footnote #4 p. 230.

The discussion above, might possibly lead to the view that "persons" entrusted with the appointment of arbitrators should only be a juridical one as opposed to a physical person. There is, nevertheless, no indication in the Civil Code that the "person" to be entrusted with the appointment of arbitrators need necessarily be juridical. There appears to be no reason why the parties, provided they agree, cannot entrust the appointment of their arbitrators to another third party who is a physical person.

4. Appointment by the Court in Cases of Default

It is not only in situations where the parties have failed in their submission to provide for the appointment of arbitrators or fail to agree on the appointment of arbitrators subsequently that the court's assistance in appointing is sought. Article 3336(1) of the Civil Code in a mandatory fashion[21] provides that "where an arbitrator refuses his appointment, dies, becomes incapable, or resigns, he shall be replaced by the procedure prescribed for his appointment in accordance with the provisions of the preceding Articles." According to this provision, appointment of an arbitrator in replacement of one who has already been appointed by the parties but because of the latter's refusal to accept the appointment, death, post appointment incapacity, or resignation, the tribunal couldn't have been formed though Articles 3331and 3335 come into application to fill the gap created. On the other hand, a look at those Articles reveals that appointment in accordance to them is either by the parties, arbitrators, the court or the person entrusted with the power of appointment of an arbitrator. Leaving aside appointment by the parties, by the arbitrators, and by the person entrusted with the power, it may be worthwhile, at this juncture, to look at the power of the court in appointing arbitrators in cases of refusal, incapacity, death or resignation of an already appointed arbitrator.

The parties to an agreement to arbitrate or even disputing ones may have agreed and named or appointed some persons who they believe would resolve their dispute. Unless one thinks of such naming of arbitrators after securing the consent of the would-be arbitrators, there may be the possibility that one of the named arbitrators may refuse to take the appointment. As a result, there may be created a vacancy that needs to be filled. Failing the agreement of the parties to fill such a vacancy or in case of impossibilities for

[21] However, it would be important to note that mandatory ness of Article 3336 of the Civil Code doesn't seem to be absolute. The provisions of the Article are in fact subject to the parties' modification if and when they think fit.

the parties to do so, it should be the court that should be given the power to fill the vacancy there by assisting in the constituting of the tribunal.

Where an arbitrator who presumably has been appointed by the parties dies, the incident automatically affects the constitution of the tribunal. This could happen immediately after the appointment of their respective arbitrator by the parties but before a third arbitrator, who, as of right, will preside over the tribunal is appointed. In such a situation, the single left arbitrator cannot exercise his right under Article 3332(1). Under the provisions of the latter Article, the right is given to both arbitrators to be exercised simultaneously and jointly i.e., by reaching an agreement as to who should be presiding over the arbitral proceedings. It may also be that the death of one of the arbitrators appointed by the parties or by the court whose number is odd may occur before they have appointed a chairman arbitrator from among themselves in which case their number would definitely be reduced to and becomes even and consequently either Article 3332(1) should come into application or a replacement appointment should be made in the section under consideration by the court although it could as well be made by the parties themselves.

The court's assistance in appointing an arbitrator may also be sought when an arbitrator becomes incapable [22] after he has been appointed. It should, however, be noted that there seems to be an overlapping between the application of Article 3336(1) on the one hand and that of Article 3340(1) *cum* 3336(2) on the other. According to Article 3336(1), it seems that where an already appointed arbitrator becomes incapable, his case comes under default. Hence, he could be replaced either by the parties or the arbitrators or the person entrusted with the appointing of the arbitrators. Failing agreement between the parties, the arbitrators, or persons entrusted with the power to appoint, then the power to appoint shifts over to the court at the request of one of the parties or the party wishing to avail himself of the arbitral agreement. Pursuant to Article 3340(1) *cum 3336*(2) on the other hand, the situation where an arbitrator becomes incapable constitutes a legal ground for disqualification and in such a case, the court may only make replacement appointment. Though sub-article (3) of Article 3336 states that the provisions of Article 3336 may be modified by the agreement of the parties anyway, the court's assistance could

[22] The term "becoming incapable" does not necessarily denote the technical legal meaning it usually carries in legal texts. In particular, the way the term "becoming incapable" is employed in Article 3336(1) gives it a broader meaning which embraces illness other than insanity, judicial or legal interdiction etc.

still be sought in appointing replacement arbitrators even if it is because of disqualification which is going to be considered later.

Where an arbitrator resigns after he has accepted his being appointed but before he has started discharging his duties or even after he has started discharging his duties as an arbitrator, a replacement appointment may be made by the court. Before summing up my discussion on replacement appointment of arbitrators by the court on default grounds, under Article 3336(1), it may be said that sub-article (1) of the Article deals with two voluntary and two involuntary grounds as causes for replacement of arbitrators. Accordingly, refusal to accept one's appointment and resignation could be categorised as voluntary causes for replacement of an arbitrator whereas death and incapacity may be categorised as involuntary. It must not be forgotten that the provisions of Article 3336, in general, are not mandatory in the strict sense. They may be modified by the parties' agreement as stated in sub-article (3) of the Article.

At this juncture, it may be necessary to consider the relationship between the provisions of Article 3336 and Article 3337. The latter Article in its first sub-article provides: "where the arbitrator has been named in the arbitral submission, and the parties do not agree on who is to replace him, the arbitral submission shall lapse." What does this mean vis-à-vis the provisions of Article 3336? If the provisions of article 3337 were to be given effect, when would the provisions of Article 3336 come into application? In other words, if an arbitrator has been named in the agreement to arbitrate and there arises the need to replace him because of the taking place of one of the reasons under Article 3336(1), and the parties do not agree on who is to replace him, does the arbitral submission lapse in the absence of a modifying agreement between the parties? Or can one of the parties, more likely the one wishing to avail himself of the arbitration agreement, apply to the court for a replacement appointment? In sub-article (2) of Article 3337, the law makes it clear that an agreement to arbitrate future disputes should be treated differently. In contradistinction to the situation where the parties agree to submit an existing dispute to arbitration, an agreement to submit future disputes to arbitration does not lapse in case the parties did not agree on who is to replace him if an arbitrator is unable to discharge his duties because of any of the reasons provided for in sub-article (1) of Article 3336. However, sub-article (2) of Article 3337 is qualified and the agreement to submit future disputes shall only remain valid, if at the time a dispute arises the ground that gave rise to the inability of the arbitrator to discharge his duties has ceased. According to sub-article (2) of

Article 3337, therefore, the application of the provisions of sub-article (1) of Article 3337 is limited to cases of agreements to arbitrate existing disputes.

Accordingly, if one limits himself to arbitration of existing disputes, and the disputants fail to agree on who is to replace an arbitrator who has been named in the agreement to arbitrate, and the parties did not, by agreement, set aside or modify the seemingly mandatory provision of sub-article (1) of Article 3337, it is provided that the arbitration agreement lapses and the party seeking to avail himself of the arbitral submission cannot apply to the court for a replacement appointment.

There is nothing clear as to whether Article 3337(1) is applicable only to cases where there is only one arbitrator as distinguished from a tribunal constituted of "several" arbitrators although the definite article "the" used in that sub-article seems to indicate that it is. It is highly probable, however, that sub-article (1) of Article 3337 is limited to sole-arbitrator cases because in cases where there is appointment of at least one arbitrator each by the parties, the likelihood of the application of the sub-article under consideration is remote in that each party would be replacing his arbitrator who refuses to accept his appointment, dies, becomes incapable, or resigns. If the parties fail to agree on who replaces their sole-arbitrator appointed to resolve their existing dispute, therefore, their submission shall lapse on the strength of Article 3337.

B. The Number of Arbitrators

The Civil Code in Article 3331(2) states that the parties may, in the agreement to arbitrate, provide that there shall be one or several arbitrators. This may automatically be taken as a legal provision giving the parties the freedom to submit the resolution of their dispute to one or three or more arbitrators. It, in other words, gives the discretion to the parties on whether to submit their case to one private judge (a sole arbitrator) of their choice or to a tribunal constituted of three or more odd-numbered arbitrators the chairman of which is to be chosen either from among themselves or from outside depending on the number of arbitrators appointed by the parties.

It is important to note that there is no provision of the law that limits the number of arbitrators to be chosen by the parties. It, therefore, follows that the maximum number of arbitrators to be appointed, is left to be fixed by the parties as conveniently numbered as they think fit for the quick and just disposal of their case, without ignoring the possibility that the parties may go for a sole arbitrator.

One thing to be noted is that the Civil Code implicitly reflected its preference for a panel of three arbitrators[23] in comparison to a sole arbitrator[24] or an odd number of arbitrators, which is more than three. This is indicated in Article 3331(3) of the Civil Code wherein it is provided "where the submission fails to specify the number of arbitrators or the manner in which they shall be appointed, each party shall appoint one arbitrator" This, of necessity, leads to the application of Article 3332 which is to the effect that the two arbitrators appointed by the parties will have to appoint another third arbitrator[25] who shall as of right preside over the arbitration tribunal. Together with the president, therefore, the arbitral tribunal would be constituted of three arbitrators. The procedure for appointment provided in Articles 3333 and 3334 of the Civil Code also consolidates the stand taken in Article 3331(3).

On the other hand, though the Civil Code's preferred number, at least impliedly, seems to be three arbitrators for a tribunal, in general however, it is important to note that the Code, in one way or another, tends to go for uneven number of arbitrators thereby avoiding the "possibility of a deadlock and the attendant dilatory tactics."[26] This is manifested in the Code's imposition on the appointed arbitrators either by the parties or persons in charge of their appointment or even by the courts whose number is even, unless the parties have agreed otherwise, to appoint another arbitrator (outside themselves) who shall as of right preside over the arbitral tribunal and whose addition makes the number of the arbitrators on the tribunal odd thereby facilitating decision by majority.

II. DISQUALIFICATION REMOVAL AND REPLACEMENT OF ARBITRATOR

A. Disqualification.

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[23] Professor Rene David advocates that there are advantages in having a tribunal constituted of more than one arbitrator. See David, Supra footnote # 4, pp 224-225.

[24] Professor David as well as Redfern and Hunter also share the view that having a single arbitrator may be advantageous when it comes to the payment of fees to the arbitrators and the difficulty of pooling arbitrators together for meetings or hearing and speed in giving an award etc. See p. 224 of David and p.157 of Redfern and Hunter.

[25] I am referring to him as a "third arbitrator" although it may be arguable that it would be more appropriate to call him the president, the chairman or umpire. Nevertheless, it is also important to note that there is no code-based special role he plays other than presiding over the tribunal.

[26] Jean Robert and Thomas Carbonneau, The French Law of Arbitration, New York, 1983, S.2:04 p.I: 2-16

In addition to the grounds for replacement of an arbitrator for his default, this is as used in Article 3336 of the Civil Code, which may either be voluntary or involuntary as the case may be, there are other[27] reasons for which an arbitrator may either be disqualified or removed.

As has already been discussed, by virtue of the provisions of Article 3336(1) of the Civil Code, there is a procedure for the replacement of an arbitrator who refuses to accept his appointment, who dies after having accepted his appointment, becomes incapable after his appointment or resigns after having accepted his appointment. Articles 3340-43 on the other hand, provide for the grounds that may cause the disqualification and removal of an arbitrator and the procedure to be followed in putting into effect removals and disqualifications. As has already been hinted, there is much in common between what Article 3336 provides by way of the grounds and the replacement procedure of an arbitrator in case of his default on the one hand and what Articles 3340 et seq. on the other provide on the disqualification and removal of an arbitrator. Despite the similarities between the provisions of Article 3336 and those of Articles 3340 et seq., yet there are observable differences between replacement for default and disqualification and removal, which merits to be discussed herein below.

(i) Grounds of disqualification

Article 3340(1) of the Civil Code lays down a number of reasons why an arbitrator may be disqualified some of which, to state again, did appear in the provisions of Article 3336(1). The grounds enumerated under the provisions of sub-articles (1)&(2) of Article 3340 are: minority, conviction by a court, unsound mind, illness, absence, impartiality, independence and any other reason sufficient to indicate the inability of the arbitrator to discharge his functions properly or within a reasonable time. Each ground deserves to be considered separately and below is an attempt made in that line.

a) Minority of an arbitrator

Mention has already been made that even though "any person may be appointed as an arbitrator" the effect of such a wide and unqualified provision seems to have been curbed by the provisions dealing with disqualification of an arbitrator. It therefore follows that a minor appointed as an arbitrator may later on be disqualified merely because he is not of age. What one should bear

[27] See the discussion on pp 9-10 above that indicates that the grounds for replacement may overlap with that of disqualification and removal.

in mind here is that unless one of the parties, presumably the one entitled by law to avail himself of the disqualification applies to the court to that effect, a minor arbitrator need not be disqualified merely because he is not of age. To repeat what has already been said earlier, there is no positive requirement of capacity laid down in the arbitration provisions of the Civil Code unless one argues that the requirement is there by implication. Although there is the risk of disqualification in as much as an arbitrator didn't attain the age of 18, a 15 years old boy could however be appointed an arbitrator and the award he renders could be enforceable. As distinguished from the application of Article 1808, here, it is one of the parties that should apply for disqualification and not the minor arbitrator. An arbitrator may, however, avail himself of his being incapable to initiate the replacement under Article 3336(1) of the Civil Code.

b) Where an arbitrator has been convicted by a court

An arbitrator may be disqualified if he has previously been found guilty of a crime. This is clearly a very wide ground that may be said embodies any crime for which an arbitrator whose disqualification is being sought has been convicted and the record of which has been kept. Normally, one would have thought of crimes like bribery, corruption, breach of trust and others akin to such crimes to be the most relevant types of crimes justifying the disqualification of an arbitrator. However, according to the phrase used in Article 3340(1) of the Civil Code, there seems to be no distinction between the nature and/or gravity of the offence for which an arbitrator has been charged and convicted. It seems the presentment of a record of conviction of any crime would be sufficient to warrant disqualification for the purposes of Article 3340(1) of the Civil Code.

As a ground warranting disqualification, one also would wonder if legal interdiction (this would be consistent with capacity provisions of the Civil Code) may fit into the situation envisaged under Art. 3340(1). A legal interdiction signifies the circumstances in which the law withdraws from a person the administration of his property as a consequence of a criminal sentence passed on him[28] and penal laws determine the cases in which a person is to be considered as interdicted.[29] In our case, the relevant provision of The Criminal Code of the Federal Democratic Republic of Ethiopia 2004 is Article 123 and it provides:

[28] Civil Code, Article 380(1).
[29] Civil Code, Article 380(2).

Where the nature of the crime and the circumstances under which the crime was committed justify such an order and the criminal has, by his unlawful act or omission shown himself unworthy of the exercise of any of the following rights, the court may make an order depriving the offender of:

a) his civil rights particularly the right to vote, to take part in any election, or to be elected to a public office or office of honour, to be a witness to or a surety in any deed or document, to be an expert witness or to serve as an assessor; or

b) of his family rights particularly those conferring the rights of parental authority of tutorship or of guardianship; or

c) his rights to exercise a profession, art, trade or to carry on any industry or commerce for which a licence or authority is required.

In Article 3340(1) of the Civil Code, "conviction by a court" is not qualified as to whether the conviction must be coupled with the deprivation of the rights mentioned in Article 123 of the Criminal Code in which case it may have to be taken literally. If it is to be taken literally, it doesn't matter whether the criminal court that has convicted the arbitrator whose disqualification is being sought has gone further to find the previous criminal (the present arbitrator) to be unworthy of the exercise of his civil rights or may be to put it more aptly, to be appointed as an arbitrator.[30]

According to Article 3340(1) of the Civil Code, therefore, an arbitrator may be disqualified if the penalty or the measure pronounced in the judgment by which he has been convicted has been entered in police record in cases where such an entry is required by law and in accordance with the order relating there to.[31] Of course, the party seeking to disqualify the arbitrator should have had access to police record provided he meets the requirement of a person having a justified interest in them which again is determined by the law referred to in sub-article (1) paragraph (1) of Article 156 of the Criminal Code.[32]

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[30] If analogy is permissible, or there may be forwarded an argument that the rights enumerated under Article 123(a) of the Criminal Code are not exhaustive, then the right of being appointed as an arbitrator should, I think, come under that sub-article.

[31] Criminal Code, Article 156 (1).

[32] Paragraph (2) of Article 156(1) of the Criminal Code.

An arbitrator, can validly object to his being disqualified on the ground of criminal conviction if he had been re-instated and his conviction cancelled pursuant to Articles 232-237 of the Criminal Code. In general, it doesn't seem to be an easy task for a party to prove his allegation of the past criminal conviction of an arbitrator whom he is desirous of having disqualified. In the event that the party seeking the disqualification of an arbitrator on the ground of past criminal conviction fails to prove his allegation, it may be argued that the concerned arbitrator would remain on the tribunal. On the other hand, there is also the possibility of the arbitrator being removed from the tribunal and be replaced by another arbitrator immediately after an allegation of past criminal conviction has been tabled. The latter argument may be strong especially taking into consideration the time lost in proving and/or disproving past criminal conviction of an arbitrator whose disqualification is being sought.

c) Where an Arbitrator is of Unsound Mind

The other ground for disqualification of an arbitrator is if he/she is found to be a person of unsound mind. This generally expressed ground could, however, cause debate as to whether it refers to somebody who is notoriously insane or whether it's also applicable to a person who is mentally unbalanced. The law deems a person to be notoriously insane where by reason of his mental condition he is an inmate of a hospital or of an institution for insane persons or of a nursing home for the time for which he remains an inmate.[33] In the rural areas, i.e. in communes of less than two thousands inhabitants, the insanity of a person shall be deemed to be notorious, where the family of that person, or those with whom he lives, keep over him a watch requested by his mental condition and where his liberty of moving about is, for that reason, restricted by those who are around him.[34]

Where the case of an arbitrator whose disqualification is sought on the ground of being a person of "unsound mind" happens to be notorious, then the proof of his insanity might not, as such, cause difficulty thanks to the two Civil Code provisions above-mentioned i.e. Arts 341 and 342. It would be a matter of obtaining evidence as to the mental condition of the concerned arbitrator from a hospital, or an institution for insane persons or from a nursing home. If, on the other hand, the concerned arbitrator happens to be from the rural area,

[33]Article 341 of the Civil Code.
[34]Article 342 of the Civil Code.

evidence may be obtained from his commune (may be from his local Peasant Association or a Cooperative Society?).

On the other hand, if the insanity of the arbitrator one of the parties wants to have disqualified is not notorious, the proving of the "unsound" status of the concerned arbitrator's mind might not be very easy. In urban context, the situation might be such that the concerned arbitrator may have been, once in a while visiting a mental hospital or institution as an outpatient in which case there may be the possibility of obtaining medical evidence from the hospital or institution visited by the concerned arbitrator. On the other hand, if the concerned arbitrator has never been to a mental hospital or institution, but yet people in the community he lives and/or works regard him as a person of "unsound mind," then proving his mental condition might not be easy. Even in such circumstances, however, resort may be had to the Urban Dwellers' Association or Kebele Administration of the urban centre wherein the concerned arbitrator lives, or in rural communities to the concerned Peasants' Association and/or Cooperative Society. How far such non-medical evidence may be a conclusive proof to have an arbitrator disqualified on the ground of being a person of "unsound mind," however, becomes an issue by itself. Going back to the provisions of the Civil Code that deal with capacity, one notes that where the insanity of a person is not notorious, juridical acts performed by such a person may not be impugned by himself on the grounds of his insanity[35] unless he can show that at the time he performed them, he was not in a condition to give a consent free from defects.[36]

Subject to the exception in Articles 349 and 350 of the Civil Code, therefore, if a person whose insanity is not notorious cannot invalidate his acts, can a party to an arbitration proceeding have an arbitrator disqualified on the ground of the latter being of "unsound mind" where such "unsoundness" is not notorious? Is the phrase "unsound mind" equitable with insanity? Who is to determine the truth of the allegation that an arbitrator is a person of "unsound mind" to bring about the desired disqualification? Is it the tribunal itself? Should the request to have an arbitrator disqualified on the ground of his being a person of "unsound mind" be submitted to a court? These and similar other questions remain unanswered since there is no provision in the Code that addresses them.

d) Where an Arbitrator is Ill

[35] Article 347(1) of the Civil Code.
[36] Ibid. sub-article (2).

Pursuant to Article 3340(1) of the Civil Code, illness may also constitute a ground for disqualification of an arbitrator. As no indication as to what sort of illness may be taken as a valid ground to disqualify an arbitrator is given by the Code, it may possibly be said that any illness other than mental illness which is treated separately, and which has already been discussed above, may be taken as a ground for having an arbitrator disqualified. "Illness" as a ground to justify the disqualification of an arbitrator appears to be an even more awkward ground relative to "unsound mind" as a ground. To envisage the application of illness as a ground for disqualification, the situation may be such that the concerned arbitrator might want to continue to serve on the tribunal pretending that he is healthy but in actuality he is ill. This might sound unlikely but it may sometimes happen because of the fees to be paid to an arbitrator. The more likely imaginable circumstance in relation to illness would be where an arbitrator is no longer able to regularly appear for meetings of the tribunal or generally unable to discharge his responsibilities as a member of the tribunal. There may also be the possibility that the ailing arbitrator submitted a resignation letter to the tribunal and to the party that appointed him with the view to voluntarily trigger his being disqualified and being replaced by another. Application to have an arbitrator disqualified also may possibly be submitted by the party who appointed the ailing arbitrator in the circumstance where the concerned arbitrator struggles to continue to serve on the tribunal with the hope that he will soon get well and resume rendering the services expected of him.

In general, and as stated earlier on, illness as a ground for disqualification consists in situations where an arbitrator is not healthy and as result cannot attend the meetings of the arbitrators and moreover, the proceedings of the arbitral tribunal. If the tribunal cannot effectively continue to discharge its duties because of the non-appearance of one of the arbitrators due to illness, the procedure would be to adjourn the hearings and/or meetings may be once or twice.

Nevertheless, since it would definitely be detrimental and unfair to the parties if the resolution of their dispute is to be dragged indefinitely because of the illness of one of the arbitrators, it would become appropriate for the entitled party to apply to the tribunal or "another authority", where there is one, to have the ill arbitrator disqualified.

e) Where an Arbitrator is absent

To begin with, it is not clear whether "absence" in Article 3340(1) of the Civil Code is used in reference to failure to attend the arbitral proceedings and/or meetings of the arbitrators, or the technical legal circumstance where an arbitrator has disappeared and has given no news of himself for two years and hence is declared to be absent.[37] In any event, and despite lack of clarity in its meaning, "absence" is mentioned in Article 3340(1) of the Civil Code as one of the grounds to disqualify an arbitrator.

If the word "absence" in Article 3340(1) of the Civil Code is intended to cover the situations where the arbitrator fails to attend meetings and/or proceedings; then the absence could be due to mental illness or another type of illness that may suffice to cause disqualification. "Absence" if it is in relation to failure to attend meetings and/or proceedings could also be attributable to any other reason that debars an arbitrator from discharging his functions properly or within a reasonable time. In other words, the arbitrator could still be around but is unable to attend meetings and/ or proceedings regularly. Failure to attend just one very important preliminary meeting of the arbitrators may possibly result in having the absentee disqualified for the purposes of Article 3340(1) of the Civil Code unless the parties are convinced that the absentee arbitrator is kind of a key person for the resolution of their dispute and would accordingly wait and see if he could resume his functions soon.

On the other hand, if absence in Article 3340(1) is in reference to the technical legal situation covered by Articles 154-173 of the Civil Code, starting from the very first article., i.e. Article 154, there should at least be a lapse of time of two years since the last news about the person purported to be absent has been heard from him. After an application has been submitted to a court of jurisdiction, there will also, of necessity, be lapse of time, which probably would push the time until the final declaration of absence is made. The question would, therefore, be could parties to a dispute be patient enough to wait for longer than two years and until a declaration of absence is made to have the absentee arbitrator disqualified? The answer to this query should naturally, be in the negative. This is so simply because if parties should wait for longer than two years to have an absentee arbitrator disqualified; then arbitration process cannot but be taken as a means of speedy resolution of disputes. It, therefore, follows that "absence" in Article 3340(1) cannot be in reference to the declaration of absence at least with respect to the disqualification of an arbitrator appointed to resolve an existing dispute.

[37] Article 154(1) of the Civil Code.

However, there may be the possibility of the term "absence" used in Article 3340(1) in reference to the legal circumstances covered by Article 154-177 of the Civil Code if the arbitrator to be disqualified on the ground of "absence" was appointed to resolve a future dispute.

f) Any Other Reason That Renders an Arbitrator Unable to Discharge His Functions Properly or Within a Reasonable Time

Without prejudice to the grounds considered above, Article 3340(1) in its latter limb also recognizes "any other reason rendering an arbitrator unable to discharge his functions or within a reasonable time" to be a ground for disqualification. This latter limb of Article 3340(1) is so wide and may be taken as accommodating very many reasons. The following may be considered as few of the possible grounds that may fit into this last limb of Article 3340(1).

1. Detention and/or imprisonment. Where an arbitrator is imprisoned for sometime, this fact may be taken as a factor adversely affecting his ability to attend the arbitral proceedings and/or meetings of the arbitrators. The detention and/or imprisonment may be for a brief period of time. Nevertheless, however brief the period may be, it might still render the concerned arbitrator unable to discharge his functions within a reasonable time.

2. Fulltime engagement otherwise. Where an arbitrator is fulltime engaged otherwise, and is, as a result, unable to discharge his functions of being an arbitrator, this very situation may be taken as sufficient enough to constitute a ground for disqualification.

3. Insurmountable Personal and/or Family Problems. Where an arbitrator is faced with an insurmountable personal and/or family problem and is unable because of that to discharge his functions or within a reasonable time the situation in which the concerned arbitrator finds himself may be a sufficient ground to have him disqualified. Blanket as the last limb of the provisions of Article 3340(1) is, any reason, which could not be imagined now, may be invoked to have an arbitrator disqualified as long as the concerned arbitrator is totally unable to discharge his functions as an arbitrator because of that reason or though he may be able to discharge his functions, is unable to do so within a reasonable time because of the same reason.

g) Partiality of an Arbitrator

Unfortunately, the Civil Code doesn't provide the definition of partiality or impartiality. Nor does the Code provide any clue as to what circumstance or which factors constitute cases of partiality. We may, therefore, be forced to look elsewhere in order to be able to get some ideas as to what "partiality" may mean or those factors that constitute it. To begin with, "the concept of partiality may be concerned with the bias of an arbitrator either in favour of one of the parties or in relation to the issues in dispute"[38]. Partiality would be the state of mind, which is harboured by an arbitrator and which dictates the outcome of the proceedings so much so that the arbitrator whose impartiality is challenged would decide or propose to decide the case in front of him favouring the party to whom he is predisposed and naturally against the party about whom he is biased.[39] A partial arbitrator would be dictated by his bias instead of being led by his conscience and judgment in disposing of the case.

The impartiality of an arbitrator may also be challenged where an arbitrator exhibits prejudice against one of the parties to the dispute or one or more of the issues in the dispute. At the end of the day, however, both bias and prejudice may be taken as meaning the same thing, at least for the purposes of challenging the impartiality of an arbitrator.

An arbitrator who is personally interested in the outcome of a case in front of him or whose interests would be adversely affected by the outcome of the case may also be predisposed in such a way that his conducts would be telling that he is biased against one of the parties or one or more of the issues in the dispute.

In some respects, the partiality of an arbitrator may also be inferred from the conducts he openly exhibits in the course of the arbitral process. Clear and indubitable animosity, for example, of an arbitrator, presumably against one of the parties, may be a sufficient cause to challenge that arbitrator on the ground of partiality. For that matter, any improper conduct and detected improper motives exhibited by an arbitrator may also be taken as sufficient to challenge and possibly to warrant the disqualification of an arbitrator on account of impartiality.

Although the relationship an arbitrator has had or is currently having or may be contemplating of having in the future with one of the parties, primarily affects the independence of an arbitrator, in many instances, however, the bias

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[38] Redfern and Hunter, supra footnote # 18, p.171.
39 Ibid.3rd edition, 1999, Para. 4-52.

or prejudice or the partiality because of which an arbitrator may be challenged may also arise from relationships. In other words, the bias or prejudice an arbitrator may be accused of may simply be because of no other reason but the relationship between the challenged arbitrator and the party he tended to favour. According to Redfern and Hunter: "impartiality is a much more abstract concept than independence in that it involves primarily a state of mind which presents special difficulties of measurement."[40] Incidentally, impartiality is by far the most important ground for which an arbitrator may be disqualified since "justice must be beyond all suspicion as to the independence and impartiality of the judges, and this basic principle of justice in the court is no less fundamental in the case of justice administered by an arbitral tribunal."[41] Impartiality becomes even more glaringly important because of the general tendency of party-appointed arbitrator's misconception of his role as he "will approach the examination of the dispute with some prejudice in favour of the party who has appointed him and it may even happen that in some cases, especially if he is not a lawyer, he will conceive his role as that of an advocate rather than a judge"[42]. A party-appointed arbitrator, however, "is not a partisan."[43] Arbitration being a private mechanism of dispute settlement, it is, on the other hand, submitted that parties may want that their arbitral adjudication to proceed in sort of a partisan way. This may be achieved by the parties agreeing that "one arbitrator shall be an umpire and the other arbitrators as mere advocates and representative of the parties who have appointed them" [44] It is believed that parties are at liberty to do so and consequently, it would only be possible for them to challenge the impartiality of the umpire and they cannot raise that of the other advocate arbitrators. Professor David is of the opinion that partisanship in arbitration proceedings may still be tolerable but on condition an arbitrator avoids dishonesty:

> *It is fundamental that this should be done openly. A party cannot be prevented from choosing an arbitrator a person who will consider his case in a friendly way, but in this case it cannot be possible for the other party as well to designate an arbitrator a person devoted to his interest. What is unacceptable is concealment, which would result in the inequality of the parties. Also forbidden of course is dishonesty. As*

[40] Ibid. Para. 4-51
[41] David, Supra, footnote # 4 p. 252.
[42] Ibid. p. 253.
[43] Ibid. pp. 245-255.
[44] Ibid. P.255, quoting Martin Domke.

*M. Domke has said in respect to the partisan - arbitrator" **partisan he may be but not dishonest***[45]

Article 3340(2) of the Civil Code seems to indirectly recognize that an arbitrator appointed by one of the parties may be partisan to the party who appointed him by limiting the disqualification of an arbitrator for partiality and lack of independence[46] only applicable in respect of an arbitrator appointed by agreement between the parties or by an appointing neutral third party. In other words, what Article 3340(2) provides is that an arbitrator who is common to both parties should be impartial and independent. Such an arbitrator, it seems, could either be a sole arbitrator appointed either by the agreement of both parties or failing such an agreement by a third party usually referred to as an appointing authority. Or if there may have been an agreement reached between the parties that each of them appoints one arbitrator and the president be appointed by the two party-appointed arbitrators; then the latter, who as of right presides over the tribunal, may not be partial to one of the parties. He may be disqualified if there happens to be any circumstance capable of casting doubt upon his impartiality.[47] On the other hand, if the parties have agreed to have a tribunal of five arbitrators and they have managed to agree on three of them and for the appointment of the remaining two they designated a third party; the two arbitrators appointed by the designated appointer shall have to be impartial to the parties lest they be disqualified.

That the stand adopted by the Ethiopian legislature in this respect is a widely accepted view has been confirmed by Prof. David's statement:

> *If doubts may be entertained as to the party-appointed arbitrators, the situation is different in case of arbitrators designated otherwise; by an agreement between the parties or by the other arbitrators or by some third person. The arbitrator is then bound to be independent and impartial in the same manner as a judge. This principle is unanimously recognized; how it is implemented and guaranteed differs, however, from country to country.*[48]

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[45] Ibid., emphasis supplied

[46] See the discussion on pages 21 Et. Seq. infra, on "independence" , as a ground for disqualification.

[47] Article 3340(3) of the Civil Code separately and distinctly states that the grounds for disqualification applicable to other arbitrators do, as well, apply to the president of an arbitral tribunal.

[48] David, p. 255.

Whether a court-appointed arbitrator, be he a president of the tribunal or otherwise, may be subjected to the disqualification provisions and procedures of the Civil Code may be a matter of controversy. If a court may be treated as a "third party" in discharging its law-given responsibility of appointing an arbitrator, then it may be said that the provisions of Article 3340(2) of the Civil Code cover it. If on the other hand, the court's role in appointing arbitrators cannot be assimilated to that of a third party appointing authority or person, then the question as to whether or not a court-appointed arbitrator may be disqualified for partiality may arise. It appears to be a little awkward to assimilate an arbitrator-appointing third party of necessity designated by the parties as such with a court, which is there independent of the will of the parties. It, therefore, seems that a party seeking to avail himself of the arbitration agreement may resort to the court to have an impartial arbitrator appointed by a third party removed irrespective of whether or not such a right is spelt out in the arbitration agreement.

The issue as to whether or not a court-appointed arbitrator may be removed if he happens to be partial to one of the parties remains to be addressed. Accordingly, one may pose the queries: should a court-appointed arbitrator be subjected to the same procedure as party or third-party appointed ones for the purposes of being disqualified on the ground of partiality? Who is to remove a court-appointed arbitrator? Is it the party seeking to have him disqualified? The tribunal? Or the court that appointed him? These and similar other queries are yet to be ruled upon by courts in the future.

As is provided clearly under sub-article (3) of Article 3340 of the Civil Code, the president of an arbitral tribunal may be disqualified for the same reasons and by the same procedures that are applicable to the other arbitrators. If this is so, it should be taken as a clear indication that a president appointed by the party-appointed arbitrators either from among themselves or from outside is taken as a third-party appointed arbitrator. A court-appointed president's disqualification for partiality, however, is as stated above for non-president arbitrators a matter to be ruled upon in the future.

As has already been discussed, "a party may not nominate an arbitrator who is generally predisposed towards him personally or as regards his position in the dispute provided that he is at the same time capable of applying his mind judicially and impartially to the evidence and arguments submitted by both

parties".[49] We have also considered that the predisposition of an arbitrator towards the party who appointed him, does not apply to a presiding arbitrator who "must be, and be seen to be entirely neutral as well as impartial".[50]

h) Independence of an Arbitrator

Independence of arbitrators is a topic that is very much related to impartiality of arbitrators. Sometimes, the partiality of an arbitrator may be for no other reason but merely because of lack of independence on the part of the arbitrator that acted partially. Irrespective of the overlapping between impartiality and independence, however, it may be worthwhile to treat the topic of independence distinct from impartiality for a number of reasons. First, because, treating the question of independence is as important as treating impartiality and secondly because the Ethiopian Civil Code in Article 2240(2) treats the two separately and distinctly. Independence, in other words, is written as a ground separate from impartiality for the purposes of challenging arbitrators under Ethiopian law. In this regard, Redfern and Hunter opined:

> *The terms "independent" and "impartial" are not interchangeable. It would be possible, for instance, for an arbitrator to be independent in the sense of having no relationship or financial connection with one of the parties, and yet not impartial. He might have such strong beliefs or convictions on the matter in issue as to be incapable of impartiality. The converse can also be imagined of an arbitrator who is not independent of one of the parties (because he has some financial interest) yet who is perfectly capable of giving an impartial view on the merits of the case.*[51]

The Ethiopian Civil Code doesn't give any kind of hint as to which factors affect the independence of arbitrators. The Civil Code doesn't give the meaning of the word "independence" either. In fact, the only article of the Civil Code wherein reference is made to "independence" happens to be in Article 3340(2). In the face of lack of any provision of our law that at least explains what independence means, one would be circumstantially dictated to look for what is meant by independence, elsewhere. Redfern and hunter offered the following:

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[49] Redfern and Hunter, supra footnote # 18 p.171
[50] Ibid.
[51] Ibid. P.172.

There is both an objective and a subjective aspect to the question of independence, which is a less abstract concept than that of impartiality. Objectively, it is easy to see that a person should be precluded from acting as an arbitrator if he has a direct professional relationship with one of the parties; and still more, if he has financial interest in the outcome of the arbitration (through a shareholding, perhaps in a company which is a party to the dispute). Subjectively, the position is less simple to analyze.[52]

The same learned authors in the third edition of their book on the same subject wrote that "The concept of "dependence" is concerned exclusively with questions arising out of the relationship between an arbitrator and one of the parties, whether financial or otherwise. By contrast, the concept of "partiality" may be concerned with the bias of an arbitrator either in favour of one of the parties or in relation to the issues in dispute."[53] The following may be considered as situations signifying relations between a challenged arbitrator and one of the parties.

1. **Past Business Relation(s)**

It may be that one of the arbitrators in a tribunal of three or more arbitrators has had business relation with one of the parties sometime in the past. The relationship may have taken place some ten years back or a few weeks or days before the arbitral tribunal constituted, among others, by the arbitrator who is now being challenged. So, the pertinent query would be could the other party apply for the disqualification of the arbitrator who has had prior business relations with his opponent on the allegation that the relation is sufficient to constitute a circumstance capable of casting doubts upon the concerned arbitrator's impartiality? This query may be answered in the positive and it is regarded by renowned authors as "a special case where a party may wish to challenge an arbitrator is when he discovers that business relations have been or are entertained or likely to be entertained between the other party and the arbitrator."[54]

Professor David offered the following on business relations:

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[52] Ibid.
[53] Ibid. 3rd edition, 1999, Para. 4-54
[54] David, supra note # 4 p. 257.

[A] decision of the Supreme Court of the U.S.A given in 1968 has marked a reaction. The person appointed as a third arbitrator in this case in which one of the three arbitrators had four or five years previously given some advice to one of the parties as an engineer and for which he had received twelve thousand dollars, and the fact of which was not disclosed by him at the time of accepting his appointment was held by the U.S. Supreme Court as a sufficient ground for disqualification on the strength of the mere fact that he has previously had business relations with one of the parties and has derived some profit there from [55]

The problem of challenging of an arbitrator on the ground of business relations would be frequent in cases where the arbitrators are themselves, business men or as is usually called "commercial men."[56]

2. Existing Business Relations

Where one of the parties discovers that an arbitrator is currently having a business relationship with the other party, his opponent, whilst the arbitral process is in progress; for stronger reasons the situation may be a ground to challenge the arbitrator having such a relation. The widely known approach to avoid the disqualification or challenge of an arbitrator in this respect would be disclosure on the part of the concerned arbitrator. The expectation is that the concerned arbitrator, at the time of accepting his appointment as an arbitrator, should disclose the fact of his having business relation with one of the parties to both parties involved in the dispute to be adjudicated by arbitration. If the parties agree after such a disclosure, to still have him continue as an arbitrator, then they shall be regarded as having done away with their right to challenge the impartiality of the concerned arbitrator on the ground of having business relation with one of them.

3. Future Business Relations

If one of the arbitrators or in a sole arbitrator case, if the arbitrator is likely to entertain a future business relation with one of the parties, it may be a ground for the other party to challenge the independence of such an arbitrator. This

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[55] Ibid. P.258.

[56] Parties, very often in their agreement to arbitration, designate their arbitrators to be "commercial men" probably belonging to the same trade to which they themselves belong.

would, personally, consist in the belief that the challenged arbitrator would incline to favour the party with whom he is anticipating or hoping to have business relationship. It would, however, be difficult for the party wanting to avail himself of disqualification because of lack of proof of future business relation unless he is able to produce clear and tangible evidence as to the intention or plan of the arbitrator to have business relation with his opponent party.

It is not very clear as to what standard of proof would be required to show circumstances capable of casting doubt upon the impartiality and independence of an arbitrator. On the one hand, since the matter is civil, as opposed to criminal, it may be said that ordinary civil standard of proof would do. On the other hand, there is a mild form of crimination of an arbitrator whenever the impartiality of such arbitrator is challenged and hence his disqualification is sought by one of the parties. The disqualification of an arbitrator for fear of impartiality may be damaging to his future reputation and may have bearing on his being chosen as an arbitrator in the future after his impartiality has once or twice been challenged and he was disqualified as a consequence of that. Moreover, a controversial issue may arise because of the application of the phrase used in Art. 3340(2) i.e., ".... any circumstances capable of casting doubt upon his impartiality..." It is feared that the application of the said phrase might give rise to controversy because there is no clue as to whether the "circumstances capable of casting doubt" should necessarily and tangibly be in existence at the time of invocation of the challenge or, whether fear of impartiality and lack of independence may be proved by putting bits and pieces of apparent circumstances i.e., those circumstances which may be capable of indicating that the person whose disqualification is being sought might be impartial in disposing of the case submitted to him for adjudication. In other words, the scope of application of the crucial phrase in Article 2240(2) is not clear as to whether the "circumstances capable of casting doubts on an arbitrator's impartiality and lack of independence should be only those which constituted precise, relevant and well established or establishable ones or even those ones that are remote, uncertain or conjectural to have an arbitrator disqualified on the ground of impartiality.

4. Non-Business Relations

Other relationships other than business relationship may as well be the cause for disqualification of an arbitrator on account of lack of independence. Consanguinal or affinal relations between the arbitrator whose independence is being challenged and one of the parties, may very well constitute "a circumstance which is capable of casting doubt" upon the impartiality of an arbitrator. One of the arbitrators' having love affairs with one of the parties may possibly constitute a circumstance falling under Article 2240(2) and thereby become a ground for challenging the impartiality and independence of the concerned arbitrator.

5. Employer-Employee Relations

An arbitrator who may be having an employment relationship with one of the parties may be challenged on the ground of lack of independence. Although the focus generally is on an on-going employment relationship between the challenged arbitrator and one of the parties, it may sometimes be the case that past employment relationship that may have been brought to an end before the nomination of the challenged arbitrator may as well be a ground for challenging the independence of an arbitrator. If, in particular, the reasons for termination of the relationship has been such that there was no disagreement or misunderstanding between the parties; the ex-employee of one of the disputants in an arbitral process may still be inclined to favour his ex-employer. It may, as well, be that if the previous employment relationship was brought to an end in an unpleasant way to the ex-employee, it may constitute a bias against the former employer and hence a ground for him to challenge his ex-employee's but present arbitrator.

It is said that in an on-going employer-employee relationship between a party and an arbitrator, not only does such an arbitrator "have a financial interest in keeping his job, but he is also by definition, in a subordinate relationship to his employer."[57]

6. Lawyer - Client Relationship

According to the International Chamber of Commerce, a lawyer of one of the parties who has been appointed as an arbitrator may be challenged and "it is

[57] Craig, Park and Paulson, International Chamber of Commerce Arbitration, Paris, 1984, Part III, S. 13.05, p. 44

generally recognized that the regular counsel for one of the parties may not serve as an arbitrator in the absence of agreement to the contrary.[58]

Other than bias and/or relations, an arbitrator may be disqualified whenever there happens to be "any circumstance capable of casting doubt upon his impartiality and independence". In other words, the impartiality and/or independence of an arbitrator is not only affected where an arbitrator harbours a bias against one of the parties or where he has some kind of relation with one of the parties. As mention has already been made as regards the last limb of Article 3340(1), sub-article (2) of the Article is, in the same fashion, so wide and blanket. It may accommodate, **any circumstance**, which in any way, is capable of casting, even the slightest doubt, upon the impartiality or independence of an arbitrator.

Before finalizing our discussion on grounds of disqualification, it would be worthwhile to take a brief look at the proviso stated in Article 3341 of the Civil Code under the title of ***"demurrer"***. Article 3341 provides: "Unless otherwise provided, a party may seek the disqualification of the arbitrator appointed by himself only for a reason arising subsequently to such appointment, or for one of which he can show that he had knowledge only after the appointment." It is not clear whether the phrase "unless otherwise provided" refers to the provisions of the law or the stipulation of the parties. This writer believes that the phrase should be taken as referring to the agreement of the parties, if any, and not the provisions of the law. This is, it is believed, to be so primarily because of the fact that the proviso being imposed by the law cannot be excepted by another legal provision.

ii) Procedure for disqualification

Notwithstanding the fact that arbitration is a mechanism of private adjudication, the law has prescribed a procedure for disqualification of arbitrators. As we have already noted that that there are law-prescribed grounds for disqualification, the law clearly states that the party attempting to have an arbitrator disqualified must comply with the prescribed procedure. Per the provisions of Article 3342(1) of the Civil Code, first of all, the party seeking to have an arbitrator disqualified must file an application to the arbitration tribunal. Such party must file his application before the tribunal renders an award and as soon as he knew of the grounds for disqualification.

[58] Ibid.

Sub-article (2) of Article 3342 provides: "The parties may stipulate that the application for disqualification be made to another authority." And where there is such a stipulation, there has to be filed an application for disqualification to the designated authority before the tribunal renders an award.

The arbitration tribunal, or the designated authority, must rule on the application for disqualification by either granting the application by ruling that the concerned arbitrator is disqualified or deny the application by ruling to dismiss the request to have the concerned arbitrator disqualified. In the latter case, i.e., where the tribunal, or as the case may be, the designated authority, dismisses the application for disqualification, sub-article (3) of article 3342 provides that an appeal may be lodged within ten days as of the date of the ruling to a court of law against the denial.

B. Removal

Though it doesn't address "replacement" and the procedure to be followed in replacing arbitrators whose impartiality and independence has been successfully challenged, the Civil Code, however, addresses ***removal*** of arbitrators. The Civil Code in Article 3343 prescribes ***removal*** as a remedy in the event that an arbitrator who had accepted his or her appointment unduly delays the discharge of his/her duties. An interesting point worth noting in the provisions of Article 3343 is that the power to remove an arbitrator who unduly delays the discharge of his/her duties is primarily given to the authority designated by the parties. Article 3343 of the Civil Code doesn't leave any clue as to whether the authority envisaged therein is the one entrusted by the parties to appoint arbitrators; or a separate one with a special power to remove an arbitrator who unduly delays the discharge of his/her duties.

Article 3343 of the Civil Code also addresses the question: "who may apply to have an arbitrator who unduly delays the discharge of his/her duties removed"? Article 3343 does not provide that request of removal must be submitted by the "party availing himself of the arbitral submission." Neither does the Article provide that the right to have an arbitrator who unduly delays the discharge of his/her duties must be given to the party that appointed the concerned arbitrator. Quite logically, and with the view to assist the constitution of the arbitral tribunal, the lawmaker has given the right to apply to have an arbitrator removed to either one of the parties.

C. *Replacement*

An arbitrator, whether an umpire or otherwise, whose impartiality or independence has been successfully challenged must, naturally, be replaced by another arbitrator. The Civil Code does not address whether an arbitrator whose impartiality or independence has been successfully challenged stops discharging his duty all by himself or whether the court must remove him. Moreover, it is nowhere provided as to how an arbitrator whose impartiality or independence has successfully been challenged may be replaced. Expectedly, it seems that the legislator may have thought that the challenged arbitrator would stop discharging her or his duty after the challenging party has proved that the concerned arbitrator is either partial or not independent. However, in the circumstances that the arbitrator whose partiality or lack of independence had been proved doesn't, by him/herself stop discharging her or his duty as an arbitrator, then removal by the court upon the application of the challenging party seems to be inevitable. Though nothing has been provided for in the Civil Code as to replacement procedure, it may be argued that the procedure of appointment of arbitrators with all its ramifications may be repeated again when an arbitrator shall have to be replaced.

CONCLUSION

As it is in other private mechanisms of dispute resolution, arbitrators are primarily appointed by disputing parties. Parties may also enjoy the liberty of appointing their arbitrators long before a dispute arises between them, i.e., at the time they agree to submit their disputes to judges of their own choice as opposed to those ones appointed by the Sovereign.

Parties may, however, sometimes fail to agree on who may serve them as a sole arbitrator after having agreed that their dispute is to be adjudicated just by one arbitrator as opposed to having a tribunal of plural arbitrators. In the circumstances the parties have failed to agree on a sole arbitrator and didn't designate a third party to appoint the sole arbitrator, then the right to appoint the sole arbitrator shifts over to the court. What ought to have been exercised by the parties may also shift over to the court where the parties having agreed to have a tribunal of plural arbitrators and one of them, usually the party seeking to avail himself the arbitral submission, has appointed his arbitrator and the other party refuses to appoint his.

The party-appointed arbitrators in cases of collegial arbitrations usually appoint presidents or umpires or chairpersons of arbitral tribunals. Parties may also agree that the president of their arbitration tribunal be appointed by a third party designated by them for that purpose. In cases where the party-appointed arbitrators fail to agree on the would-be president of the tribunal, the right of appointing the latter may shift over to the court. The same applies where the third party entrusted with the appointment of the chair arbitrator fails to discharge his function.

A third party may also be called upon to appoint all arbitrators including an umpire where the parties may have, from the very beginning, agreed to entrust appointment of their arbitrators to a third party of their choice. This very often happens when there are neutral institutions that are capable of discharging such functions.

Arbitrators may be disqualified for a number of reasons enumerated by the Civil Code. They may be disqualified for voluntary as well as involuntary grounds the Code lists. Although the remaining grounds of disqualification are not, as such, unimportant, the independence and impartiality of arbitrators are, exceedingly much more important compared to the remaining grounds.