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UNDER ETHIOPIAN LEGAL FRAMEWORK: COMPARATIVE INSIGHT

A Thesis Submitted to Jimma University in Partial Fulfillment of the Requirements of the LLM Degree  
in Commercial and Investment Law

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AT COLLEGE OF LAW AND GOVERNANCE OF JIMMA UNIVERSITY

OCTOBER 15 2019

**Declaration**

The thesis is my original work, has not been submitted for a degree in any other University and that all materials used have been duly acknowledged.

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## **LIST OF ACRONIMIES AND ABBREVIATIONS**

AAA	AMERICAN ARBITRATION ASSOCIATION
AACCSA	ADDIS ABABA CHAMBER OF COMMERCE AND SECTORIAL ASSOCIATIONS
AA	ARBITRATION ACT
ABA	AMERICAN BAR ASSOCIATION
ADR	ALTERNATIVE DISPUTE RESOLUTION
ART.	ARTICLE
BUAC	BAHIRDAR UNIVERSITY ARBITRATION CENTER
CC.	THE CIVIL CODE OF THE EMPIRE OF ETHIOPIA, PROCLAMATION NO. 165/1960, NEGARIT GAZETA, 19TH YEAR NO.2
CPC	THE CIVIL PROCEDURE CODE OF THE EMPIRE OF ETHIOPIA, . DECREE NO 52/1965, NEGARIT GAZETA, 25TH YEAR NO.3
CR.C	THE CRIMINAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, PROCLAMATION NO. 414/2004
NYC	THE NEW YORK CONVENTION ON THE ENFORCEMENT AND RECOGNITION OF FOREIGN ARBITRAL AWARDS
FDRE	FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA
HKIAC	HONG KONG INTERNATIONAL ARBITRATION CENTRE
HKIA	THE HONG KONG INSTITUTE OF ARCHITECTS
HKIS	THE HONG KONG INSTITUTE OF SURVEYORS
IBA	INTERNATIONAL BAR ASSOCIATION
ICC.	INTERNATIONAL CHAMBER OF COMMERCE
IBA	INTERNATIONAL BAR ASSOCIATION
ICSID	INTERNATIONAL  CENTER FOR INVESTMENT DISPUTES
LCIA	LONDON COURT OF INTERNATIONAL ARBITRATION
SCC	STOCKHOLM CHAMBER OF COMMERCE
SIAC	MEANS THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE
UK	UNITED KINGDOM



UNCITRAL UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE  
LAW.  
UNCITRAL MODEL ARBITRATION LAW- THE 2010 UNITED NATION  
COMMISSION ON INTERNATIONAL TRADE LAW WITH ITS  
AMENDMENT OF THE 2010  
US UNITED STATES

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## ABSTRACT

*Conflict of interest is something which is inevitable fact in commercial transaction among commercial communities. Under the current situations the commercial transaction within and across different jurisdiction are increasing. There are different dispute resolution mechanisms which are available for those individual which participate in such activities. Those dispute resolution mechanisms can be categorized into state court litigation and alternative dispute resolutions mechanisms in general. Arbitration is one type of dispute resolution mechanisms among the different alternative dispute resolutions. The commercial communities make use of the arbitration due to different benefit of it such as dispute resolutions timely, with less cost, confidentially, as well as parties control over the procedure of the dispute resolutions. Owing to those positive features, arbitration as a dispute settlement mechanism has given a great legal recognition in almost all jurisdictions legal system among which Ethiopia is one. Similarly Arbitration has got recognition in various international legal documents. To avoid conflict of interest in justice administration, national laws and international legal document requires arbitrators to be independent and impartial while conducting the arbitrations to deliver the award which has integrity. In case when the arbitrators breach such and other duties the issue of the liability of the arbitrators may arise. Having all such situations in mind, the purpose of this paper is to examine Ethiopian arbitration laws that mainly encompassed in the Civil Code and the Civil Procedure Code on the independence, impartiality and liability of the arbitrators. The paper in detail will also discuss the disclosure obligations and the challenge and disqualifications of the arbitrators in case when there are doubt as to the independence and impartiality of the arbitrators. The researchers in doing these will take the different international legal instrument, institutional arbitration rules and national arbitration rules as a plat form to examine the Ethiopian arbitration rules as to issues in hand. The Ethiopian arbitration law has some inadequacy as regards to independence and impartiality of arbitrators. The Ethiopian arbitration rules are silent as to disclosure as well as standard for disclosure and standard for independence and impartiality as well as standard of challenge of the arbitrators. As regard to the liability of the arbitrators, the Ethiopian arbitration still opted for silence. So, upon examining Ethiopian arbitration law on the aforementioned issues in light of those entire instrument models, the researcher has provided some sorts of possible recommendations to that effect at the end.*

## CHAPTER ONE

### 1. INTRODUCTION

#### 1.1. BACKGROUND OF THE STUDY

As the commercial transaction timely expands the need for dispute resolution through the arbitration is rapidly growing in this era of internationalization due to its bold benefits. Arbitration as defined by **Black law** dictionary is “*The investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, called “arbitrators,” or “referees.” Chosen by the parties*”<sup>1</sup> It is one form of alternative dispute resolution, where the parties agree that the dispute will not be decided by a state court, but rather by a panel of arbitrators.

In Ethiopia, the Ethiopian Civil Code defines Arbitration as; “A contract whereby the parties to a dispute entrust its solution, to a third party, the arbitrator who undertakes, to settle the dispute in accordance with the law.”<sup>2</sup> Thus, in Ethiopia, Arbitration is also seen as a contractual based non-judicial dispute settlement mechanism whereby parties to a dispute resort to a third party (or parties) whose decision over the dispute is based on law and which is binding like that of regular court decisions. In fact, in many cases, parties have autonomy to agree even on the procedures.<sup>3</sup>

Arbitration is an alternative dispute resolution method (ADR) voluntarily chosen by the parties though not always as sometimes there could be law/court ordered arbitration. It is a private and effective method to resolve disputes. Nowadays, it tends to be the preferred means for settling disputes within the business community. Because, in comparison to state court litigation, arbitration is thought to be quicker, cheaper and more confidential and informal than litigations that renders internationally enforceable award. It also thought to provide predictability.<sup>4</sup> Furthermore, the other positive side of the

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<sup>1</sup> Black law dictionary, available on, < <https://the law dictionary.org/arbitration.>> accessed on 06/03/201

<sup>2</sup> Civil code of Ethiopia, 1960, Negarit Gazzeta, Extraordinary issue, proc. No.165, 19th year, No.2, Art.3325 (1), [here in after; Ethiopian CC]. In the same manner the UNCITRAL model arbitration law under art, 7(1) defined the arbitration agreement as an agreement to submit arbitration to all or certain dispute which have arisen or which may arise between them in respect of defined legal relationship whether contractual or not.

<sup>3</sup> CC see for example: Arts.3325(2),3330,3331

<sup>4</sup> This actually may not always true, for example the arbitration may be expensive than regular court sometimes and also different commentators believe those justifications to be debatable. Normally arbitration is considered as preferable due to its various benefits. Meanwhile, others can argue that the virtues of arbitration have eroded and indicated that arbitration can be as lengthy and costly as litigation and increasing the expertise in decision making. Matthew Rasmussen: *Overextending Immunity: Arbitral Institutional Liability in the United States, England, and France*, Issue 6 Article 9. Fordham International Law Journal Volume 26, (2002) at p1828

arbitration is that, parties are able to shape the proceedings to a great extent (e.g. language, seat of arbitration, applicable law and the arbitrators) to the need of the parties involved.<sup>5</sup> Due to the aforementioned benefits, Arbitration tends to be the most popular dispute resolution method for commercial disputes.

Arbitration is considered as a quasi-judicial process and hence in the field of commercial arbitration, issues that are fundamental to arbitral process are ensuring the independence and impartiality of the arbitrator.<sup>6</sup> To safeguard justice in private dispute resolution system, the government shall protect and regulate the private dispute resolution via providing the standards for the independence, impartiality and liability of the arbitrators. It is noted by commentators on the area that, “Independence and impartiality underpin the entire arbitral process”.<sup>7</sup> One ways to ensure the independence and impartiality are subjecting the arbitrators to liability to limited circumstances plus obliging the arbitrators to disclose the relationship with parties that may hinder justice through affecting the impartiality and independence of the arbitrators.

The most common sayings in connection with this issue is that, in order for the parties to perceive that justice is being done, it is essential that arbitrators are independent and impartial. It is commonly perceived that, it is “of fundamental importance that justice not only be done, but should manifestly and undoubtedly is seen to be done”.<sup>8</sup> Independence and impartiality are two different concept and the two terms are not interchangeable.<sup>9</sup> Normally the two are not the same and it is possible to distinguish between the two. But the two are very much interrelated, For example, the term independence is the value which measures the relationship between the arbitrators and parties which could be –personal, social and functional relationship, thus the closer relationship in any of these spheres, the less

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Available on <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1909&context=ilj>> retrieved on 09=03-2019. For example Matthew Rasmussen(2002) cited that ”Yet, not all commentators agree that arbitration is faster or cheaper than litigation ”this article further asserted that in longer and more complicated arbitration cases between international corporations, time or cost are rarely significantly reduced. Even so, arbitration in general is less expensive and more expedient.

<sup>5</sup>See LI Xiaofu :*China Pilot Free Trade Zones Call Reform of Arbitrator Liability J. Shanghai Jiaotong Univ. (Sci.)*, (2016), 21(2): 220-224 DOI: 10.1007/s12204-016-1716-1 see also Id

<sup>6</sup> Hong-Lin Yu and Laurence shore: *independence, impartiality, and immunity of arbitrators -us and English perspectives Cambridge University Press, British Institute of International and Comparative Law are collaborating with JSTOR to digitize, preserve and extend access to The International and Comparative Law Quarterly* vol 52, pp. 935-967 referred from 196.191.127.48 on Fri, 01 Mar 2019 07:35:50 UTCAll retrieved from <<https://about.jstor.org/terms>> (2003) at p 935

<sup>7</sup> Id

<sup>8</sup> Valentina Renna: report on independence and impartiality of arbitrators, institute for promotion of arbitration and mediation in the mediterranean at p-4. Available on <<https://www.ispramed.com/wp-content/uploads/2012/09/Report-on-Independence-and-Impartiality-of-Arbitrators6.pdf>> retrieved at 05-03-2019.

<sup>9</sup> See Hong-Lin Yu and Laurence Shore, *Supra note 6*

independent arbitrator is from the parties.<sup>10</sup> Impartiality on the other hand is relates to a state of mind.<sup>11</sup> This nature of impartiality makes it much more abstract concepts than independence and is difficult to measure it as its measurement bases on the conduct demonstrating that state of mind.<sup>12</sup> As some authors noted out, an arbitrator is partial towards one party in case they displays preference for, or partiality towards one party or against another, or whether a third person reasonably apprehends such partiality.<sup>13</sup> There are requirement of impartiality and independence that are widely emphasized in the arbitration guidelines, arbitration rules and ethical codes of most of arbitral institutions like UNCITRAL, ICC, ICSID and LCIA, AAA and IBA.<sup>14</sup> To achieve those qualities of arbitrators to be independent and impartial, mechanisms like duty to disclosure and declaration of independence are employed almost by those entire instruments.

The independence and impartiality of the arbitrators are the major concerns of the ethical code of conduct. In the arbitration process like that of judicial process a clear ethics code is important to create some behavioral benchmark and uphold the integrity of arbitration practice.<sup>15</sup> Thus the work will further deals with the liability of the arbitrators in case when they breaches those duties and caused damages to the parties. So the work will try to answer the question as to whether the arbitrators should be liable or not in the case when the arbitrator fails to apply sufficient care and attention to their case or who does not in the arbitrant`s view, adhere to proper rules of procedure, or fails to display the appropriate level of skill expected of him.

As regard to the liability of the commercial arbitrators, there is different approach from jurisdiction to jurisdiction. Even the approaches adopted are different among the international instrument and arbitral

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<sup>10</sup> *Id*, at p 935-936

<sup>11</sup> *Id*, at p 936. See also Zekarias Kene'áa; Formation of Arbitral Tribunals and Disqualification and Removal of Arbitration under Ethiopian Law" (2007) available on <<https://www.abbyssinialaw.com/about-us/item/336-arbitrators> > (last visited on October 09-2019)

<sup>12</sup> See Hong-Lin Yu and Laurence Shore; supra note 6 at p 936.

<sup>13</sup> *Id*, 936.

<sup>14</sup> Bruno M Bastidato: The independence and impartiality of arbitrators in international commercial arbitration *revist@ e – Mercatoria* Volumen 6, Número 1 (2007) at p-8. Available on < <https://dialnet.unirioja.es/descarga/articulo/5197420.pdf>> (last visited on October 09-2019)

<sup>15</sup> Olga K. Byrne: New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-Appointed Arbitrators on a Tripartite Panel *Fordham Urban Law Journal* Volume 30, Issue 6 Article 1 pp. 1815-1847 2002 at p 1816 available on <<https://ir.lawnet.fordham.edu/ulj/vol30/iss6/1/> > retrieved on 05-03-2019. The American Bar Association for instance provided a number of code of conduct for arbitrators among which the obligation to disclose the relationship between arbitrators and parties is one. The American Bar Association, The Code of Ethics for Arbitrators in Commercial Disputes Effective March 1, 2004

institution.<sup>16</sup> So the work will grasp those different experiences. Most of the institutional arbitration rules provide for a limited liability of arbitrators: Pursuant to Article 46 of the Rules of Arbitration of the Vienna International Arbitral Center (VIAC) the liability of arbitrators is excluded “to the extent legally permissible.”<sup>17</sup> Similarly, Article 41 of the Rules of Arbitration of the International Chamber of Commerce (ICC) states that arbitrators shall not be liable for any act or omission in connection with the arbitration, “except to the extent such limitation of liability is permitted by applicable law.”<sup>18</sup> Article 16 of the UNCITRAL Arbitration Rules provides that the parties “save for intentional wrongdoing, waive to the fullest extent permitted under the applicable law any claim against the arbitrators based on any act or omission in connection with arbitration.”<sup>19</sup> Likewise different countries have different experience as regards to liability of the arbitrators, taking UK and US from common law legal system for instance, In UK the arbitrators are given the qualified immunity (i.e. Absolute Immunity with the Exception of bad faith) and under US the arbitrator’s law made arbitrators absolutely immune from liability.<sup>20</sup> Some countries for instance France seems to stick on the contractual theory as regard to the liability of the arbitrators.<sup>21</sup> Hence, the arbitrator is related to the parties by virtue of a contract and as a general rule of French law, the liability of an arbitrator to the parties is contractual by nature. Thus, an arbitrator’s immunity is not absolute in French law and does not cover all acts and omissions included in the scope of the arbitrator’s mandate. In particular, the arbitrator remains liable for fraud, gross negligence and willful misconduct.<sup>22</sup> Talking about the practice of Germany on liability of arbitrators, the law does not

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<sup>16</sup> There are different ways of managing liability of the arbitrator under different jurisdiction, those are absolute immunity, qualified immunity and absolute liability and limited liability of the arbitrators,

<sup>17</sup> See Vienna International Arbitral Center (VIAC) Available on <[https://www.viac.eu/images/documents/vienna\\_rules/Wiener\\_Regeln\\_2018\\_Brosch%C3%BCre\\_en\\_Onlinefassung\\_Einzels\\_eiten\\_20171219](https://www.viac.eu/images/documents/vienna_rules/Wiener_Regeln_2018_Brosch%C3%BCre_en_Onlinefassung_Einzels_eiten_20171219)> Retrieved on 07/03/2019

<sup>18</sup> ICC 2017-arbitration and 2014 mediation English version pdf available on <<https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf>> retrieved on 07/03/2019 at art 41

<sup>19</sup> UNCITRAL Arbitration Rule (as revised in 2010) UNITED NATIONS UNCITRAL UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW available on <<https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>> retrieved on 07/03/2019

<sup>20</sup> See Hong-Lin Yu and Laurence Shore; *supra* note 6, at p 951-967

<sup>21</sup> The contractual theory concerns the relationships between arbitrators as well as the status of the arbitrators are contractual and this agreement will determine almost everything including the liability of the arbitrators. As France law made the liability of the arbitrators contractual than statutory.

<sup>22</sup> Jean De La Hosserye, et. Al: *Arbitration in France CMS Guide to Arbitration*, Vol I page 331-362 (1999). At p 344-345. available at <[https://eguides.cmslegal.com/pdf/arbitration\\_volume\\_i/cms%20gta\\_vol%20i\\_france.pdf](https://eguides.cmslegal.com/pdf/arbitration_volume_i/cms%20gta_vol%20i_france.pdf)> retrieved at 06-03-2019

contain any explicit provision and arbitrators may be liable to the parties in the same way as court judge.<sup>23</sup>

Coming to the situation of Ethiopia, even though it may not be possible to exactly trace back when the traditional arbitration started, Ethiopian, modernized the arbitration laws with the enactment of the Civil Code and Civil Procedure Code as of 1960 and 1965 respectively. The arbitration law as existed mainly on the Civil Code (3325 through 3346)<sup>24</sup> and Civil Procedure Code (315-319; 350 through 357) purports to govern the arbitration process.<sup>25</sup> The provision of Civil Code under art 3340(2) stated that the parties can apply for disqualification of arbitrators if there is doubt as to the independence and impartiality of arbitrators.<sup>26</sup> However both the Civil Code and Civil Procedure Code don't give the meaning of the words "independence" and "impartiality". Both laws don't give any kind of hint as to which factors affect the independence and impartiality of arbitrators. The CC and CPC also remains silent about the disclosure obligation and liability of the arbitrators.<sup>27</sup> Actually one can argue that, the law governing the liability and code of ethics shall be separately enacted than the basic law governing the arbitration itself, but considering the experience of the other countries the basic law itself as special law governs the liabilities of the arbitrators. Talking about the separate laws governing the arbitrator's liability, there is one provision which provides the liability of the arbitrator under Proclamation No. 881/2015. Accordingly art.12 of the same proclamation provides that arbitrator is liable if they committed corruption crime.<sup>28</sup> But this is governing only the criminal liability whilst reading nothing about the civil liability of the arbitrators which is the main concerns of this work.<sup>29</sup> However, the issue of arbitrator's independence, Impartiality and liabilities, the proper scope and limitations of those values, and the theory underlying those values, remain unexamined in Ethiopia. Despite its practical importance and the growing number of (legally trained) professionals in the field, relatively little attention has so far been paid to the issue of arbitrators independence, impartiality and 'liability. Thus the researcher will

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<sup>23</sup> Torsten Lörcher, Arbitration in Germany, CMS Guide to Arbitration, Vol pp367-389 at p 372.

<sup>24</sup> *Supra note 2, CC*

<sup>25</sup> The Federal Negarit Gazeta, Civil Procedure Code of the Empire of Ethiopia, 1965. here in after CPC

<sup>26</sup> See CC *supra note 2*, at art 3340(2), see also CPC *Id.*

<sup>27</sup> The researcher found nothing provision which talks about the liability of the arbitrators and the disclosure requirement of arbitrators in Ethiopian arbitration law

<sup>28</sup> See Federal Negarit gazette of the federal democratic republic of Ethiopia. Corruption Crimes Proclamation NO, 881/2015 21- Year No 36 Addis Ababa 3<sup>rd</sup> April, 2015 at art 12

<sup>29</sup> The writer of this work believes that everyone shall not be immune from criminal liability for commission of crime, but the issue under the consideration is about the civil liabilities



comparatively analyze and explore the issues of independence, impartiality and liability of the arbitrators in the context of Ethiopia.

## 1.2. STATEMENT OF THE PROBLEM

In Ethiopia the rules of arbitration based basically on the civil code (art. 3325 through 3346) and civil procedure code (in article 315-319; 350 through 357) aspire to govern the substantive and procedural aspect of commercial arbitration in Ethiopia respectively. Despite its many advantage arbitration law of Ethiopia has many defective provision. Those laws also suffer from *lacuna*. For instance, both the Civil Code and Civil Procedure Code don't provide the definition of partiality or impartiality as well as independence. The Codes also doesn't give any kind of hint as to which factors affect the independence of arbitrators. Nor do the Codes provide any clue as to what circumstance or which factors constitute cases of partiality. The only reference provision is art.3340 (2) of the CC which provides that the application for disqualification of arbitrators is possible if there is doubt as the independence and impartiality of arbitrators.<sup>30</sup> In addition to the above, the Ethiopian arbitration provisions are silent about liability of the arbitrator. The silence of the law about the liability of the arbitrator could negatively affect the rendering of justice in arbitration process. Thus, the issues such as independence, impartiality and the liability of the arbitrators should be given a particular emphasis. The gap of the law as to independence, impartiality could negatively affect justice. Absence of the law which deals with the liability of the arbitrator may make the parties interest at stake when the arbitrator acts in bad faith against the interest of parties and when the arbitrators committed fraudulent acts against parties' interest. those problems could occurs easily because the law is not clear, even it is possible to say that, the law is silent on these issues.

In addition to the above problem in the context of Ethiopia, The arbitration law of Ethiopia lack detail elements for independency and impartiality of arbitrators. For instance the Ethiopian arbitration law has no provision which imposes the duty to disclose on the arbitrators of any relation between arbitrators and parties which could give rise to doubt as to the independence and impartiality of arbitrators. Such silence of the law may have negative impacts on the independence and impartiality of the arbitrators. The other problematic issue in arbitration laws of Ethiopia is absence of the standards that help to determine independence, impartiality, to disqualify the arbitrator and standards of disclosure of any relation that could create doubt as to the independence and impartiality of arbitrators. The requirement

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<sup>30</sup> See *Supra note 2* at art.3340 (2).

of the disclosure and declaration of independence are mechanisms to ensure the independence and impartiality of arbitrators in the arbitration legal regime. Absence of the disclosure requirement and also absence of the declaration of independence and impartiality in the Ethiopian arbitration statutes could affect the overall arbitration process via affecting the independence and impartiality of the arbitrators.<sup>31</sup> Of course the duty to be impartial and independent, breach of which leads to disqualification of an arbitrator is envisaged under article 3340 of the CC, However, there are problems as to factors that helps to determine the independence and impartiality as well as the factors that help to determine the sufficiency of the grounds to disqualify arbitrators if the claim arise before and during arbitration proceedings. The process and the technique to challenge of awards to reduce bias are not relatively clear and sufficient in the context of Ethiopia. Pursuant to art 351 and 355 of the Civil Procedure Code the dis-satisfied parties can allege appeal and setting aside against award. But such traditional remedies provided under the CPC are insufficient. The appeal is not advisable and not existing under the modern arbitration rules like UNICTRAL model laws due to its effects on the principle of the arbitration like party autonomy and also finality of the arbitration awards.<sup>32</sup> In other countries experiences and under International Bar Association, there are provided code of ethics. This code of conduct of arbitrators provides the list of factors that helps to determine the independence and impartiality of arbitrators that can reduce the problem of dependence and partiality of arbitrators. However, in Ethiopian there is no clear code of conduct and the absence of such code of ethics for arbitrators may cause problems on the preservation of the independence and impartiality. And hence the arbitration law shall address this issue carefully.

Thus, addressing the aforementioned problems under the Ethiopian arbitration laws comparatively and giving recommendations upon taking lesson from internationally accepted arbitration law and arbitration law of most advanced nation can relieve the disputant's from the risk of fearing arbitration process due to the *lacuna* of laws in independence, impartiality and liability of arbitrators. Furthermore, having clear laws on the aforementioned issues will secure the core features of arbitration itself- relieving the parties from lack of justice in general and undue delay in getting justice in particulars and avoids the arbitrators' fears of arbitrary claim of parties.

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<sup>31</sup> Actually those requirements exists in the institutional rules Arbitration Rules For AACCSA Arbitration Institute at art 9

<sup>32</sup> *Supra note 2* CC at art 351 and 355

The researcher interested to deal with these issues because many literature on arbitration law in Ethiopia paid less attention to this issue and the law either silent about some of the above issues or some are drafted not in a good articulation which might became a reason for many problem and hence, gaps therein will be exposed by this research and the possible lesson will be recommended by the researcher. For that matter the international model arbitration rules and experiences of some other countries as well as the arbitral institution will be consulted on the issues under study for the above reasons

In nutshell, it is the gaps in Ethiopian arbitration laws and the scarcity and gaps of written literatures that particularly and sufficiently address the problem under investigation that motivated the researcher to conduct in depth research on the aforementioned problems.

### 1.3. OBJECTIVE OF THE STUDY

#### 1.3.1. General objective

- ❖ The general objectives of this study was to analyze Ethiopian arbitration law comparatively with some selected countries` arbitration law, selective rules of arbitral institution and other international instruments as to the preservation and regulation of independence, impartiality as well as liability of the arbitrators

#### 1.3.2. Specific objectives

The researcher`s objectives specifically were:

- To investigate whether Ethiopian arbitration laws has adequately regulated independence, impartiality and the liability of the arbitrators.
- To examine the factors to determine the independence, impartiality and uses to determine the grounds of removal (disqualification of arbitrators) under Ethiopian statutes as well as arbitration rules of institution.
- To examine liabilities of arbitrators under Ethiopian arbitration law
- To explore and examine the law governing the ethical duty of the arbitrators under Ethiopian law.
- Analyzing the Ethiopian arbitration law against laws of some selected countries and arbitration rules of some selected arbitration institution.

- Finally, to make appropriate recommendation that the country should have to make to improve the legislation on the preservation of independence and impartiality, and how to regulate the liability of arbitrators.

#### 1.4. RESEARCH QUESTIONS

##### 1.4.1. Central questions

- ❖ Does the Ethiopian law adequately regulated and addressed the issues of the independence and impartiality of arbitrators?
- ❖ Does the Ethiopian arbitration law regulate the liability of the commercial arbitrators adequately?

##### 1.4.2. Specific questions

- Do the Ethiopian laws adequately regulate the independence and impartiality of the arbitrators?
- Do the Ethiopian laws have the ethical code of conduct for the arbitrators on the duty to independence, impartiality and disclose their relationship with the parties to preserve the independence and impartiality in the overall arbitration process?
- Do the Ethiopian arbitration rules have clear standards for determination of independence and impartiality?
- Do the Ethiopian arbitration rules have clear standards for determination of reasonability of disclosure duty and challenge of arbitrators?
- Do the Ethiopian laws regulate adequately and clearly commercial arbitrator's liabilities for damages that may cause to parties?
- Do the Ethiopian laws regulate the arbitrators who consciously and deliberately do wrongs to the parties to arbitration in their capacity as arbitrators?
- Is Ethiopian arbitration law on right track on the issue of independence, impartiality and liability of arbitrators looking in line of arbitration laws of some selected countries and arbitration rules of some selected arbitral institution as to the issue of independence, impartiality and liability of arbitrators?

#### 1.4. SIGNIFICANCE OF THE STUDY

As far the knowledge of the researchers concerns there are no sufficient literature on the issue in hand in the context of Ethiopia even though there are sufficient literature internationally and in the context of other jurisdiction (i.e. on independence, impartiality, and liability of the arbitrators), thus, this work will have significant at first instances. Because, it will shows the gaps of the Ethiopian laws on the issues of independence, Impartiality of arbitrators as well as the liabilities of the arbitrators.

This work also shows loopholes of Ethiopian arbitration laws as regard to the independence, impartiality and liabilities of the arbitrators. And since it shows the scarcity and gap of the laws on the area it will have knowledge contribution on the area. It will also be helpful as an input for another further research on the problems of the independence, impartiality and liability of the arbitrators to heal some of the defective part of arbitration legal regime.

Finally this work is significant because it recommends policy makers how to solve the defective part of Ethiopian arbitration law upon investigating the best experience of some selective countries, international and national arbitration institution as well as UNICITRAL model law. These all are significant because Ethiopian arbitration law need to be modernized upon adopting the lesson from international modern arbitration institution and model law as well as other countries which has good experience on the area.

#### 1.5. LIMITATION OF THE RESEARCH

This paper work was constrained due to lack of sufficient time as the researcher do not believe that the time given for this work is enough. There was also lack of sufficient literature in the context of Ethiopia. Still there was lack of sources of courts case on internet in Ethiopian case on the issue in hand. This could have negative impact on the qualities of this work. The other probable limitation may be that, the researcher has no much more experience as the comparative research conducting. Thus, all this aforementioned problem may affects the qualities of this work.

## 1.6. DELIMITATION OF THE RESEARCH

The scope of this study was limited to:-

- ❖ Examining the independence, impartiality and liability of the arbitrators under the Ethiopian law (mainly arbitration law).
- ❖ Examining the factors employed by Ethiopian arbitration regime to strengthen preservations of independence and impartiality of arbitrators in the context of Ethiopia.
- ❖ Comparing the arbitration law of Ethiopia with some selective countries arbitration law and arbitration rules of some selective institution and UNICTRAL model law, IBA guidelines. Then finally recommending the best lesson to be taken from those institution, model law, countries and guidelines.

## 1.7. ORGANIZATION OF THE PAPER

The research was organized into four chapters. The first chapter obviously is this proposal as introductory remarks. Chapter two will explore the theoretical framework and general concepts of the arbitrator's independence, impartiality and liabilities. Under this chapter independence, impartiality and liability of arbitrators in general was discussed. Chapter three have dealt with independence, impartiality and liability of the arbitrators under Ethiopian legal regime. in this section the Ethiopian arbitration law as regard to the issue in hand were compared with some selective countries law and arbitration institution and finally with UNICTRAL model law. The last chapter will deals with conclusion and recommendation.

## 1.8. CRITICAL LITERATURE REVIEW

To answer the question as to who controls the arbitral process, there are various theories which are identified by different scholars, i.e. whether the arbitrators or parties or state control it. In relation to this, Hong linyu and Laurence on their work on independence, impartiality and immunity have argued that, "it is the state rather than parties and arbitrators who control the arbitral process" on one side.<sup>33</sup> They evidenced their argument by the fact that, in the arbitration, it is only the state that can cede powers to the parties and this role of the state is apparent from a consideration of the principle of independence, impartiality of arbitrators and the principle of arbitrator's immunity.<sup>34</sup> There are so many literatures and

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<sup>33</sup> Hong-Lin Yu and Laurence shore, *Supra* note 6, at p 938

<sup>34</sup> *Id*

study conducted on the independence, impartiality and liability of the arbitrators under other countries. However, as far as the knowledge of this researcher concerns, the same issues are not studied well in Ethiopia so far.

According to Judge *Dominique Hascher*, the “Independence and impartiality underpin the entire arbitral process”.<sup>35</sup> Likewise the existence or non-existence of the arbitrator’s immunity or liability has the effects on the arbitrators and on the entire arbitration process. As regards to the independence of the arbitrators, Judge *Dominique Hascher* argued that, an arbitrators shall be independent and an arbitrator’s duty to disclose is an essential undertaking for the independent and impartial resolution of the dispute as the disclosure of the relationship has been characterized as the cornerstone of an arbitrator’s duty of independence and impartiality.<sup>36</sup> In the arbitration, due to the reason that parties lack judicial protection in arbitral proceedings the arbitrator should be impartial and independent when rendering an arbitral award to avoid problem arbitration process and arbitral awards, many arbitral institutions require arbitrators to disclose a relationship with related parties.<sup>37</sup>

As regard to the disclosure requirement, *Seung-Woon Lee* on his work about the impartiality and independence of arbitrator in US, reflected that, the independence and impartiality of arbitrators becomes a matter of disclosure of the relationship with parties by an arbitrators.<sup>38</sup> Similarly, *Jean de la Hosserraye*.et al, in their book about the arbitration in France noted that, arbitrators are under the obligation to disclose to the parties any information which could create a potential cause of challenge, as well as any circumstances that may affect their independence or impartiality.<sup>39</sup> This literature also showed that, this duty to disclosure of the arbitrators applies before and during the arbitration and a failure on the part of an arbitrator to disclose any relevant information could lead to the setting aside of the award.<sup>40</sup> There are differences as to standards regarding the duty to disclosure to preserve the independence and impartiality of arbitrators. In connection to this, *Hong-Lin Yu and Laurence Shore* in their study on *independence, impartiality, and immunity of arbitrators -us and English perspectives in*

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<sup>35</sup> Judge Dominique H: independence and impartiality of arbitrators: 3 issues p 789-806) AM. U. INT’L L. REV. [27:4] (2012) at p 793 available at <http://digitalcommons.wcl.american.edu/auilr/vol27/iss4/5/> retrieved on 07-03-2019

<sup>36</sup> *Id.* at p 793

<sup>37</sup> Seung- Woon Lee: Arbitrator’s evident partiality: current U.S standards and possible solutions based on comparative reviews; article 2(2017arbitration law review volume 9 yearbook on arbitration and mediation (2017).Available on <<https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1199&context=arbitrationlawreview> >(last visited on October 09-2019)

<sup>38</sup> *Id.*

<sup>39</sup> Jean De La Hosserraye, et. al. *Supra note 22* At p 344-345

<sup>40</sup> *Id.*

2003 identified that, many arbitral institution such as London Court of International Arbitration (LCIA), American Arbitration Association (AAA), and Stockholm Chamber of Commerce (SCC) with exception of International Chamber of Commerce, has expressly adopted a '*justifiable doubts*' standard regarding impartiality or independence of arbitrators, in similar way, according to the same study, The UNICITRAL arbitration rules and IBA draft have expressly adopted the same standard(i.e. justifiable doubts).<sup>41</sup> According to this literature, the ICC used the eyes of the parties rather than justifiable doubts as to standard to determine the independence and impartiality and the grounds to disclose any circumstances showing this point.<sup>42</sup> Similarly *Seung-Woon Lee* on his study about arbitrator's evident partiality in US identified the different standards that are being used by US, UK and France.<sup>43</sup>

As regard to the liabilities of the arbitrators, there are different theoretical foundations and as regards to the approaches to liability, there are differences from one country to another country. There are so many studies on the liability and immunity of arbitrators globally and in different countries. In relation to this, *Asif Salahuddin*, (2017) on his article about the liabilities of the arbitrators noted that, "liability is essential to keep the arbitrators accountable, prevent abuse of power and ensure high quality of services in the arbitration process".<sup>44</sup> *Matthew Rasmussen* (2002), on the other side argued that, immunity of the arbitrators is essential than holding the arbitrators liable. Accordingly, "If immunity is necessary to protect the decisions of judges, freeing them from concern for liability, then the same logic shall apply to the decisions of arbitrators".<sup>45</sup> *Prathima R. Appaji* in connection with this seems to provide the most balance striking solution by arguing that, a fine distinction shall be drawn in the law where the arbitral immunity though wide is not absolute and there shall also exists recourse against the arbitrator when he is biased under arbitration law and under tort law in all circumstances.<sup>46</sup> Ethical code of arbitrators is something which may be related to the liability, impartiality and independence of the arbitrators. In connection with this, *Olga K. Byrne* in his work on code of ethics for arbitrators, identified that, in the arbitration process like that of judicial process a clear ethics code is important to create some behavioral

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<sup>41</sup> Hong-Lin Yu and Laurence shore ,*Supra note 6*, at p 938

<sup>42</sup> *Id*

<sup>43</sup> Seung-Woon Lee, *Supra note 37*

<sup>44</sup> Asif Salahuddin : Should arbitrators be immune from liability? *Arbitration International*, Volume 33, Issue 4, 1 December 2017, Pages 571–581<<https://doi.org/10.1093/arbint/aix023//>> (last visited on October 09-2019)

<sup>45</sup> Matthew Rasmussen, *Supra note 4*

<sup>46</sup> PRATHIMA R. APPAJI arbitral immunity: justification and scope in arbitration institutions Volume I: Issue 1 *Indian Journal of Arbitration Law* available on <[http://www.ijal.in/sites/default/files/IJAL%20Volume%201\\_Issue%201\\_Prathima%20Appaji.pdf](http://www.ijal.in/sites/default/files/IJAL%20Volume%201_Issue%201_Prathima%20Appaji.pdf)> retrieved on 09-03-2019



benchmark and uphold the integrity of arbitration practice.<sup>47</sup> Different institutional rules but not all have arbitrators code of ethics to preserve independence and impartiality of arbitrators. For instance, the American Bar Association provided code of conduct for arbitrators among which the obligation to be independent, impartial and to disclose the relationship on arbitrators are major one.<sup>48</sup>

Coming back to the available literature in Ethiopia on the study in hand, a number of literatures could be found on the arbitration in general, but the researcher found lack of literature and study conducted on the issue of independence, impartiality as well as liability in the context of Ethiopia. As regard to the independency and impartiality of the arbitrators and arbitral institution there are some lacuna and there are no sufficient literature, *Prof, Zekaias K. (2007)* has a work on the general concepts of independence and impartiality as subsection within the mainstream work on the arbitration in Ethiopia. Accordingly the work of Prof, Zekarias K. showed a little bit the problem of Ethiopian arbitration law as to independence and impartiality of arbitrators. Accordingly, the Ethiopian arbitration laws have no defined concept of independence and impartiality. But, this does not fully address the issue in hand as the different factors that helps to determine the independence and impartiality of arbitrators such as: standards to determine independence and impartiality, disclosure requirement, standard to challenge the arbitrators and disqualification of arbitrators and liability of arbitrators in case of breach of different duties were not addressed under the works of Zekarais.<sup>49</sup> As regard to the independence, impartiality and liability of the commercial arbitrator *Robsan Wakuma (2017)* on his work titled “*the duties and powers of arbitrators in commercial arbitration in Ethiopia; critical analysis*” have tried to touch upon the concept but does not addressed the problem of the concept and conception in comprehensive way.<sup>50</sup> *Haileyesus F*, in his work on the role of courts in the arbitration process identifies that the arbitrators could be challenged on the grounds of independence and impartiality basing on article 3340(a) of the Ethiopian civil code.<sup>51</sup> And also, so many literatures reflect that, independence and impartiality are clearly the grounds of disqualification of arbitrators and grounds for challenge of arbitral awards. But,

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<sup>47</sup> Olga K. Byrne : *supra note* 15 at p 1816.

<sup>48</sup> ABA, *Supra note* 16,

<sup>49</sup> See Zekarias Kene'aa, *Supra note* 11

<sup>50</sup> See Robson Wakuma; *The powers and duties of arbitrators in commercial arbitration in Ethiopia; critical Analysis*, (Unpublished, LLM Thesis in in commercial and investment law, Jimma University, June 2017). Available at Jimma University post graduate library).

<sup>51</sup> Hailegabriel G. Feyissa: the role of Ethiopian courts in commercial arbitration mizan law review Vol. 4 No.2(2010), available at

<[https://www.researchgate.net/publication/272340367\\_The\\_Role\\_of\\_Ethiopian\\_Courts\\_in\\_Commercial\\_Arbitration](https://www.researchgate.net/publication/272340367_The_Role_of_Ethiopian_Courts_in_Commercial_Arbitration)>  
retrieved on 09-03-2019

those article are showing nothing about the factors to be used to determine the independence and impartiality of arbitrators and obligation of arbitrators to *disclose* any relation with parties which can affects the independence and impartiality and also nothing is identified by those previous study about the standards to be applied on duty to disclose and in removing the arbitrators to preserve the independence and impartiality of arbitrators.

In the article written by *Biranu Beyene*, doubt as to the independence and impartiality was discussed as a ground for the application by parties to the arbitration for disqualification of arbitrators.<sup>52</sup> The work of Birhanu is from the perspectives of the court interference into arbitration process, Therefore, the concerns of this paper will be the independence and impartiality of arbitrators from the perspectives of the party's relation with arbitrators mainly and liabilities and immunity of arbitrators on the other way. These articles identified that, the independence and impartiality of arbitrators is not guaranteed due to both legal gap and practical situation of the court. As regards to the liability and immunity of arbitrators, as far as the best knowledge of the writer of this proposals concern, there are no sufficient law as well as literature and study conducted in the context of Ethiopia.

#### 1.9. RESEARCH METHODOLOGY

Generally, regarding methodology, the paper has used doctrinal type of legal research methodologies. So, depending on the cases, it employed doctrinal (fundamental or pure) legal research methodology with a comparative study. And to examine the current commercial arbitration systems of Ethiopia, it employed doctrinal comparative method to obtain a lesson from IBA guidelines, arbitral rules and arbitration institutions 'experience like UNCITRAL, ICC, LCIA, AAA, SIAC, and HKIAC. Comparison also made with other countries experience such as Singapore and Hong Kong.

The Ethiopian arbitration law is needed to compare with UNCITRAL model rules because nowadays there is the need for uniformity of law which is advocated by UNCITRAL model rules. Comparison is made with the other arbitration rules of institutions such as ICC, LCIA, AAA, SIAC and HKIAC because those institutions are the top ranked institution in their rules and delivering arbitration services. They have very comprehensive rules on the independence, impartiality and liability of the arbitrator(s). Being the top ranked hub of arbitration could help them to attract investment to their countries. And

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<sup>52</sup> Biranu Beyene: *the degree of court`s control on the arbitration under Ethiopian law; is it to the right extent?* at p 26-43 available on Oromia journal of law

Ethiopian arbitration law is needed to be compared with other jurisdictions` arbitration laws such as Hong Kong and Singapore arbitration rules because those countries has adopted the UNCITRAL model rules. The UNCITRAL arbitration rules intended to harmonize the arbitration rules across national laws and there are some surveys that come with the evidence that, this rules is the first choice of commercial communities in dispute resolution more than any arbitration rules. Particularly, the UNCITRAL model rules have the most comprehensive rules on the independence, impartiality and liability of the arbitrators. As a result, some of the national arbitration acts such as Singapore and Hong Kong arbitration act and institutional rules such as SIAC and HKIAC adopted the UNCITRAL model arbitration rules. So that, Ethiopia need to take an experience from them as to how it could be adopted. The writer compares those national arbitration laws which adopted the harmonized arbitration rules and top ranked institutional rules mainly in their procedural rules. Thus, Ethiopia upon modeling her arbitration rules in light of the above rules may enable her to easily attract investment. Because good and modern arbitration rules in the commercial area is the means to achieve justice in the commercial communities. This in turn will encourage the attractions of investment to the country.

#### **1.9.1. Data sources**

- **Regarding Primary sources**, authoritative legislations: Ethiopian legislations (mainly, the Ethiopian civil code and civil procedure code), institutional rules, judicial cases and arbitral awards that related to the concepts in hand; selected arbitration rules of other Nations and International arbitration institutions `arbitration rules relating to the issue has been analyzed and interpreted, purposively.
- **Regarding secondary sources**: Books, Articles, Journals, Internet sources, unpublished materials and reports that are related with the issue has been analyzed and interpreted, selectively and purposively.

### **1.9.2. Tools of data collection**

Generally, regarding methods, the paper has used conceptual and legal analyses and interpretation in a comparative manner. In order to accomplish the purposes of the research, the following methods of data collection is used:

- **Reviewing relevant literature:** The existing international and domestic legal documents such as UNCITRAL model rules, various arbitration institutions rules, IBA guideline, and Ethiopian arbitration legislation were employed to evaluate the Ethiopian arbitration legal regime. In addition to these, relevant literatures like books, journals, and research paper and internet sources were used as secondary source of information for this study.
- **Analyzing the relevant data:** All available data were systematically analyzed and interpreted.
- Moreover, on the way of examining our arbitration system, for further clarification and to take a lesson in eclectically manner, with comparative analyses, the paper will try to over view an international guideline, UNCITRAL Model law and national law of some countries selectively and some institutional rules selectively

### **1.9.3. Data analyzing methods**

The researcher used descriptive inferences for this study purpose. Each step followed by preliminary analysis of legal document on the area. Finally, the collected data analyzed and presented descriptively and in qualitative form based on research questions and objectives.

## CHAPTER TWO

### 2. GENERAL OVERVIEW OF CONCEPTS AND FOUNDATIONS OF INDEPENDENCE, IMPARTIALITY AND LIABILITY OF ARBITRATORS

#### 2.1. INTRODUCTION

Arbitrators conflict of interest in general terms could arise when the arbitrators who is in the position of deciding a case has a material interest which is either in actual conflict with that party making or participating in making that decision, or can be reasonably so inferred in the circumstances.<sup>53</sup> That interest could arise out of a relationship in which that arbitrator or other party is involved and that affects arbitrator's independence; or it can arise by virtue of the behavior or other course of conduct involving that arbitrator and that relate to that arbitrator's impartiality.<sup>54</sup> Such arbitrator's conflict of interest usually could rise due to the reason that falls into one of the two categories: lack of independence and lack of impartiality.<sup>55</sup> Several international arbitration law commentators and authors have reached on common consensus that "the requirements of independence and impartiality serve the purpose of protecting the parties against arbitrators being influenced by factors other than those related to the merits of the case."<sup>56</sup> Taking such statement as a starting point, this paper will focus on the importance that this double requirement has, both for resolving particular disputes as well as for the whole arbitration process. For that purpose, it will be divided into different parts. In the first section of this chapter, this paper will try to define the concepts of "independence" and "impartiality", while at the same time, discuss a distinction between them. All of that, with the ultimate purpose of finding a common ground between them. In the next sections of the chapter the paper will examine the disclosure requirement as well as the challenge of the arbitrators as the general standards for assessing the independence and impartiality of the arbitrators.

A different authors and commentators have made a great deal about both independence and impartiality, including whether they amount to the same thing or not. Mostly the answer is that they do not amount

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<sup>53</sup> Kuala Lumpur: *independence, impartiality and conflicts of interest in arbitration 2nd ipba ASIA-PAC arbitration day*, by Luke parsons QC quadrant chambers, Thursday 8th September 2016 at p 2. Available on <[https://www.quadrantchambers.com/images/uploads/documents/Luke\\_Parsons\\_QC\\_-\\_IPBA](https://www.quadrantchambers.com/images/uploads/documents/Luke_Parsons_QC_-_IPBA)>(last visited on October 09-2019)

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

to the same thing but the two concepts are usually seen as the two sides of the same coin.<sup>57</sup> Thus, the two concepts clearly overlap, but they are distinguishable in important respects. Having all those points in mind, the chapter will describe and analyze the notion of the independence and impartiality of the arbitrators, disclosure duty and challenge of the arbitrators under IBA guideline, under different national law, UNCITRAL model arbitration rules and some institutions arbitrations rules.

The other relevant point in this section is the liability of the arbitrators. Certain types of professionals including arbitrators are immune from liability in different jurisdictions either under statute or respective institutional rules due to different policy justifications.<sup>58</sup> As to this there are two major different debates. On one side arbitrators is seen as the creature of contract and arbitrators are appointed by the parties to resolve their dispute with a binding judgment rendering an enforceable award under the contract and will be liable in case when they breaches such obligation under the contract.<sup>59</sup> On the other side some commentators argues that the arbitrators are not only the creature of the contract rather it also jurisdictional in nature and should enjoy the immunity akin to the judge.<sup>60</sup> This paper would argue in the middle ground. The paper would analyze the different theories on the relationship between the arbitrators and parties to arbitrations, the policy arguments in favor and against the notions of both immunity and liability of the arbitrators and approaches of both immunity and liability of the arbitrators.

## 2.2. THE NOTION OF INDEPENDENCE AND IMPARTIALITY

In all forms of adjudication, the decision-maker is usually expected to be independent of the parties and impartial towards parties. So, the commercial arbitrator(s) has duty to be independent and impartial.<sup>61</sup> Hence, such qualities of arbitrator(s) have become a universally accepted principle. Those are essential for the integrity of the arbitral process. The legitimacy of its outcome that arbitrators be impartial and independent and act accordingly throughout the arbitral proceedings as arbitrators dispose of the parties' rights in a binding manner and their decisions are subject to minimal judicial review.<sup>62</sup>

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<sup>57</sup> Valentina Renna, *Supra note 8* at p 4

<sup>58</sup> Asif Salahuddin: *Supra note 44*, at p- 572

<sup>59</sup> *Id*

<sup>60</sup> *Id*

<sup>61</sup> Richard M & Mosk Tom Ginsburg: *Becoming an International Arbitrator: Qualifications, Disclosures, Conduct, and Removal; Practitioner's Handbook on International Arbitration and Mediation* pp344-398 at p 354 Available at <[http://arbitrationlaw.com/files/free\\_pdfs/00-titlecopyrighttoc\\_practhbintlarbmed3rd.pdf](http://arbitrationlaw.com/files/free_pdfs/00-titlecopyrighttoc_practhbintlarbmed3rd.pdf)> (last visited on October 09-2019)

<sup>62</sup> Christoph Müller and Antonio Rigozzi (Eds): *New Developments in International Commercial Arbitration Schulthess Juristische Medien AG, Zurich • Basel • ISBN 978-3-7255-6921-2 Geneva 2013* at p 2. Available at <<http://www.derainsgharavi.com/wp-content/uploads/2013/11/New-developments-2013.pdf>> (last visited on October 09-2019)

Different legal instruments incorporate independence and impartiality of arbitrators as the general principle. For instance, IBA guidelines under its general standards provided that “Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been delivered or the proceedings have otherwise terminated finally”.<sup>63</sup> Like the IBA guideline almost all other arbitral rules such as UNCITRAL arbitration rules, ICC arbitration rules, LCIA, AAA, SIAC and HKIAC provide the arbitrators duty of independence and impartiality in almost similar language.<sup>64</sup> Likewise in almost all legal systems there are accepted requirements that an arbitrator(s) must be independent and impartial towards the parties involved in the arbitration process.<sup>65</sup> Thus, it is noted that, the issues of the independence and impartiality of the arbitrator are fundamental in the field of commercial arbitration to ensure fairness and integrity of arbitration proceedings.<sup>66</sup> As stated above, a great deal has been written by different commentators and authors about these two key elements of neutrality that helps to enable reducing of conflict of interest.

It is noted that, the notions of independence and impartiality are elusive, since the terms can be employed with several different meanings in legal analyses.<sup>67</sup> When one simply considers, the two concepts seems similar and may easily confuse the two in the arbitration context. The two concepts may have similarity. However despite their similarity the two concepts have fundamental difference. Hence there is clearly an overlap between arbitrator’s independence and impartiality.<sup>68</sup> To deal with the two concepts differently, it is better to have separate subsection for further detailing.

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<sup>63</sup>See IBA Guidelines on Conflicts of Interest in International Arbitration, ISBN: 978-0-948711-36-7 Adopted by resolution of the IBA Council on Thursday 23 October 2014. At general standard 1 under the general standards of the guidelines Available at <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d3>>(last visited on October 09-2019)

<sup>64</sup> See ICC Rules of Arbitration | Arbitration | Arbitration & ADR | Products & Services | ICC - International Chamber of Commerce 1 January 2012.at article 11(1) of the ICC reads as; every arbitrator must be and remain impartial and independent of the parties involved in the arbitration paragraph 2 of the same instrument also obliges the prospective arbitrators to sign the declaration of impartiality and independence see also art 11 & 12 of the UNCITRAL arbitration rules, see also rule 18 of the AAA and art 5(3) of LCIA.

<sup>65</sup> Helena Jung (author) & Kaj Hobér (Mentor): *A comparative study between the standards of the SCC, the ICC, the LCIA and the AAA Faculty of Law Uppsala University*. Master’s thesis with internship Procedural Law, pp. (1-35) spring semester 2008 at p 7. Available at <[https://sccinstitute.com/media/61993/the\\_standard\\_of\\_independence\\_helena\\_jung-1.pdf](https://sccinstitute.com/media/61993/the_standard_of_independence_helena_jung-1.pdf)> (last visited on October 09-2019)

<sup>66</sup> Hong Lin Yu and Laurence shore.Supra note 6 at p 935

<sup>67</sup> United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-sixth session: *Possible reform of investor-State dispute settlement (ISDS) Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS Vienna*, Note by the Secretariat V.18-05764 (E) 29 October–2 November 2018 at p 17. Available at <[https://uncitral.un.org/sites/uncitral.un.org/files/draft\\_report\\_of\\_wg\\_iii\\_for\\_the\\_website.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf)> (last visited on October 09-2019)

<sup>68</sup> See for instances Leon Trackman; whom his work on independence and impartiality explored the a great deal of debate that takes place in the United States as to whether and when a party appointed arbitrator lacks independence on account of a

### 2.2.1. INDEPENDENCE

The term “Independence” in the context of commercial arbitration refers to that an arbitrator must be free from any involvement or relationship (connection) with any of the parties.<sup>69</sup> According to Hong-Lin Yu and Laurence Shore, the concept refers to the personal connection or relationship between the arbitrator and the parties or their counsel personal, social (familial), business and professional relationship.<sup>70</sup> A personal relationship could include, for example, friendship between the arbitrator and a party.<sup>71</sup> A familial relationship could arise when an arbitrator, partner or business associate is related to one of the parties due to blood or affine relationship, i.e. parent, aunt, or cousin and as a spouse.<sup>72</sup> A business relationship that affects the independence of arbitrators could include a business venture in which the arbitrator or a partner holds position or is a party to a business transaction, such as a property or stock investment, with one party to arbitration.<sup>73</sup> Finally, a professional relationship could include a relationship in which the arbitrator, or partner, has acted or is acting different functions on behalf of one party.<sup>74</sup> Relatively with impartiality, it is easy to measure the relationship between the arbitrators and the arbitrators as its test is objective one and as it’s test is test for appearance of bias rather than the actual bias.<sup>75</sup> Thus, the closer relationship due to the aforementioned factor of connection, the less independent the arbitrators are.<sup>76</sup> Such a lack of the independence derives from what might be called problematic relationships between the arbitrator and one party or other(s).<sup>77</sup> Therefore, to maintain the neutrality of arbitrators there are various duty to be imposed on the arbitrators and the general duty of the arbitrators to preserve the independence. As noted out by different authors the lack of independence endangers the

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relationship between the arbitrator and the party making the appointment, and being partial on account of that relationship. See Trackman, Leon, *The Impartiality and Independence of Arbitrators Reconsidered*. UNSW Law Research Paper No. 2007-25; *International Arbitration Law Review*, Sweet & Maxwell, Vol. 10, Int.ALR, 2007. at p 8 Available at SSRN:<<https://www.ssrn.com/abstract=981085>>

<sup>69</sup> Richard M & Mosk Tom Ginsburg, *Supra note 61* at p 355

<sup>70</sup> Hong-Lin Yu and Laurence Shore, *Supra note 6* See also *Id*

<sup>71</sup> Leon Trackman, *Supra note 68* at p 7 See also William W. Park: *Arbitrator Bias Transnational Dispute Management (TDM)*, *Boston University School of Law Public Law & Legal Theory Paper* No. 15-39 January 2015 at p 6. available at <https://www.ssrn.com/abstract=2675291> (last visited on October 09-2019)

<sup>72</sup> *Id* (Leon Trakman) at p 6 See also *Id* (William W. Park)

<sup>73</sup> *Id* (Leon Trackman)

<sup>74</sup> *Id*. See also William W. Park, *Supra note 71*.

<sup>75</sup> M.Scott Donaye, Jacques Werner (Publisher and editors), Ruth Benjamin (editorial assistant), *the independence and neutrality of arbitrators. Journal of international arbitration law*, (Geneva Switzerland) Vol 9 Number 4(, ISSN 0255-8106) December 1992, at p 2. Available at <<http://www.scottdonahey.com/wp-content/uploads/2015/03/IndependenceNeutralityOfArbitra>> (last visited on October 09-2019)

<sup>76</sup> *Id*. See also Hong-Lin Yu and Laurence shore ,*Supra note 6* p 935

<sup>77</sup> *Id* (M.ScottDonaye, Jacques Werner (Publisher and editors), Ruth Benjamin (editorial assistant)). See also Hong-Lin Yu and Laurence shore, *Supra note 6* p 935. See also William W. Park: *Supra note 71* at p 6



fairness and integrity of the arbitral process.<sup>78</sup> Those duties may not be a matter of negotiation between the parties.<sup>79</sup> Thus the arbitrator(s) has duty bound to avoid any relationship with the parties and/or their counsels.<sup>80</sup> - Which may be ambiguous or potentially detrimental to his/her independence - in the personal, social and financial spheres<sup>81</sup> In a nutshell, the concepts of independence refer to that arbitrator does not have any type of personal and/or employment relationship, nor any economic link or tie, or does not depend in any way on any of the parties.<sup>82</sup> This duty should be met in the course of the entire arbitration proceedings.<sup>83</sup>

### 2.2.2. IMPARTIALITY

Coming to the impartiality, as Riodev note out, impartial arbitrator does not have any inclination or disinclination towards any of the parties to arbitration.<sup>84</sup> Many works on the area generally confirmed that, impartiality is the subjective standard.<sup>85</sup> As different commentators noted that, it is difficult to measure the existence of impartiality as it is about the attitude of mind i.e. mental state of the arbitrators towards the case, the parties and their counsels in the context of the issue in hand.<sup>86</sup> As noted out by some authors, the partiality of arbitrators could be evidenced through conduct demonstrating that state of mind.<sup>87</sup> Therefore, an arbitrator is partial towards one party if he displays preference for, or partiality towards one party or against another or whether a third person reasonably apprehends such partiality.<sup>88</sup> Unrelated factors to a reasoned decision on the merits of the case might give rise to the reasonable belief that the arbitrator is partial.<sup>89</sup> These unrelated factors could include a relationship, such as the influence that a professional, business, or personal relationship.<sup>90</sup> Sometimes also the arbitrator's conduct in the absence of those a relationship such as a bad or good statement during the course of arbitration against one of the parties could relate to partiality.<sup>91</sup> The test of impartiality of arbitrators unlike the

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<sup>78</sup> ValentinaRenna, *Supra note 8*

<sup>79</sup> *Id*

<sup>80</sup> See Chan Leng Sun; *Arbitrators' Conflicts of Interest, bias by any name* pp245-266 (2007) at p 246.see also *Id*(ValentinaRenna) at p 7

<sup>81</sup> *Id*

<sup>82</sup> *Id*

<sup>83</sup> *Id* (ValentinaRenna)

<sup>84</sup> Riodev: *The double requirement that the arbitrator be independent and impartial* (2015) at p 24

<sup>85</sup> Leon Trackman, *Supra note 68* at p 6. ValentinaRenna, *Supra note 8* at p 7

<sup>86</sup> See Hong-lin Yu and Laurence Shore, *Supra note 6* at p 935. See also *Id* (ValentinaRenna) at p 7.

<sup>87</sup> Leon Trackman, *Supra note 68* at p 6. *Id* (ValentinaRenna)

<sup>88</sup> See Hong-line Yu and laurence Shore, *Supra note 6* at p 935. See also *Id* (Valentina Renna). See also *Id* (Leon Trackman) at p 7

<sup>89</sup> *Id* (Leon Trackman).

<sup>90</sup> *Id*

<sup>91</sup> *Id*

independence is subjective and as a result it is difficult to prove it as it goes to the actual state of mind and where applicable, ensuing the external conduct of the arbitrator which may serve as evidence or indications of the arbitrator's state of mind.<sup>92</sup> Therefore "impartiality" means that the arbitrator does not have a bias in favor or against one of the parties.<sup>93</sup> With regard to the distinction between the two, it is noted that while impartiality is needed to ensure that justice is done, independence is needed to ensure that justice is seen to be done.<sup>94</sup> Further, it is noted that the distinction between independence and impartiality is not crucial in practice because case law predominantly considers impartiality and independence in the two side of the same coin, under the test of apparent bias.<sup>95</sup> The requirement that arbitrators be both independent and impartial constitutes basically two different means of aiming at common end which is to have a neutral person who can guarantee a fair trial for parties.<sup>96</sup> Thus an arbitrator's ability to exercise fair judgment will be most likely compromised or affected if both or either of those two requirements is missed.<sup>97</sup>

### 2.3. INDEPENDENCE AND IMPARTIALITY AS A CODE OF CONDUCT OF ARBITRATOR(S) UNDER DIFFERENT INSTRUMENT

#### 2.3.1. THE IBA GUIDELINES

Various associations of practitioners, government representatives, and academics have developed guidelines relevant to arbitrator conduct in international arbitrations. Among them, the IBA adopted its Guidelines on Conflicts of Interests in International Arbitration in May 2004. Both the 2004 and the new guidelines on conflicts of interest of the International Bar Association (IBA) of 2014 among other things address arbitrators' general obligations of independence and impartiality; circumstances under which arbitrators should decline appointment, disclosure obligations, obligations to withdraw, the meaning of "justifiable doubts" justifying withdrawal, duties to investigate potential conflicts, and waiver.<sup>98</sup> The IBA Guidelines consist of two parts in generals in addition to the introduction part. The first part of the guideline sets out different general standards and their explanatory notes, namely the general principle

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<sup>92</sup> See Hong-lin Yu and Laurence Shore, *Supra note 6* at p 935 See also Valentina Renna, *Supra note 8* at p 7. See also *Id* (Leon Trakman) at p 8

<sup>93</sup> See *Id* (Leon Trakman)

<sup>94</sup> See Hong-lin Yu and Laurence, *Supra note 6* at p 935. See also Valentina Renna, *Supra note 8* at p 7. See also *Id* (Leon Trakman) at p 8

<sup>95</sup> See Chan Leng Sun, *Supra note 80* at p 249

<sup>96</sup> See also Valentina Renna, *Supra note 8* at p 7. See also Leon Trakman, *Supra note 68* at p 8

<sup>97</sup> *Id* (Valentina Renna). See also *Id* (Leon Trakman) at p 8

<sup>98</sup> For the complete information see IBA Guidelines on Conflicts of Interest in International Arbitration, *Supra note 63*. Part I of this guideline dealt with General Standards Regarding Impartiality, Independence and Disclosure at par 4-17

of impartiality and independence, conflicts of interest, disclosure by the arbitrator, waiver by the parties, scope, relationships and the respective duties of the arbitrator and the parties.<sup>99</sup> In the IBA guideline the issues of the independence and impartiality were much more elaborated than any national laws and arbitration institution rules.

Under the general part I General Standard 1 of the IBA guidelines (general principle) provides that:<sup>100</sup> "Every arbitrator shall be impartial and independent of the parties while accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated." So that the guideline clearly provided the independence and impartiality duty of arbitrators at all stages of arbitration proceedings. IBA part I at general standard 1 as to conflict of interest General Standard 2 of the IBA guidelines provides that;<sup>101</sup> "an arbitrator shall decline to accept an appointment or refuse to continue to act as arbitrator if: facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts that could give rise to justifiable doubts as to the arbitrator's independence and impartiality". The general standard 2 (c) of the guideline also tries to define of the justifiable doubts. Accordingly, doubts are justifiable if: "a reasonable person and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case that presented by the parties to reach his or her decision."<sup>102</sup>

The second part of the guidelines formulates the application lists of specific situations that commonly arise in practice. The Guidelines list specific situations indicating whether they warrant disclosure or disqualification of an arbitrator in order to promote greater consistency and to avoid unnecessary challenges and arbitrator withdrawals and removals.<sup>103</sup> The application lists is categorized by the guidelines into four lists in accordance with their color code 'The non weavable Red lists', 'The

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<sup>99</sup> See David. A Lawson: *impartiality and independence of international arbitrators; Commentary on the 2004 IBA guidelines on Conflicts of interests on the international arbitration* (2007) at p 2-5. Available at <<https://www.kluwerlawonline.com/abstract.php?area=Journals&id=ASAB2005003>>(last visited on October 09-2019) actually the commentary is on the 2004 guidelines but the issue is the same with that of 2010 guidelines and that is why the author used this literature. See also Helena Jung (author) & Kaj Hobér (Mentor) *Supra note 65* at p 7. See also Ramon Mullerat *OBE arbitrators' conflicts of interest revisited: a contribution to the revision of the excellent IBA guidelines on conflicts of interest in international arbitration* at p 2. Available at <<https://a.storyblok.com/f/46533/x/bb7c2241bb/arbitrators-conflicts-interest-revisited-contribution> >(last visited on October 09-2019)

<sup>100</sup> IBA part I at general standard 1

<sup>101</sup> *Id.*, at general standard 2

<sup>102</sup> See *Id.*, part I at general standard 2 (c).

<sup>103</sup> It is possible to collect the justification for application lists under the guidelines from the introduction part of the IBA Guidelines on Conflicts of Interest in International Arbitration, *Supra note 63*.

waivable red lists`, 'Orange' and 'Green' lists which provide an indication whether disclosure or removal of an arbitrator is justified. The red lists describe situations in which an arbitrator should not accept appointment, or withdraw if already appointed and such situations constituting disqualifying conflicts of interest (divided into non-waivable and waivable situations).<sup>104</sup>

The guidelines categorized certain situations described in the red list as non-waivable list which are an enumeration of situations, which give rise to justifiable doubts as to the arbitrator's impartiality and independence.<sup>105</sup> The situations are such as when there is an identity between a party and the arbitrator, or the arbitrator has a significant financial interest in one of the parties or the outcome of the case. These are the situations deriving from the overriding principle that no person can be his or her own judge.<sup>106</sup> Thus, the disclosure of the circumstances and facts that give rise to the doubt as to the independence and impartiality of arbitrators in non-waivable lists cannot cure the conflict and the arbitrator has to decline to accept or refuse to continue to act as an arbitrator(s).<sup>107</sup> The Waivable Red List<sup>108</sup> on the other hand encompasses situations that are serious but not as severe as those in the Non-Waivable Red List. These lists are neither severe unlike non-waivable nor less severe unlike orange lists. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable if and only if the parties, being aware of the situation, expressly state their willingness to have such a person act as arbitrator despite the awareness of the fact there could be doubt as to independence and impartiality.<sup>109</sup>

The orange list is a non-exhaustive enumeration of specific situations,<sup>110</sup> which, in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence.<sup>111</sup> According to the guidelines, the arbitrator has a duty bound to disclose situations falling under the orange list.<sup>112</sup> However

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<sup>104</sup> See Leon Trackman, *Supra note 68* at p 12-13. See also Ramon Mullerat, *Supra note 99* at p 2

<sup>105</sup> *Id* (Ramon Mullerat).

<sup>106</sup> See the IBA guideline at General Standards 2(d) and 4(b)), The enumeration of non-waivable lists is made under Part II: Practical Application of the General Standards list 1

<sup>107</sup> *Supra note 99* at p 2

<sup>108</sup> see IBA guideline at General Standard 4(c)) Waivable Red List are enumerated under made under Part II: Practical Application of the General Standards list

<sup>109</sup> See *Id*, at Part II: Practical Application of the General Standards list paragraph II the last two sentence of the 2019 IBA guideline See also Ramon Mullerat, *Supra note 99* at p 2

<sup>110</sup> *Id* (IBA guideline) at Part II: Practical Application of the General Standards list paragraph VI and practical standards 3 the of the 2014 IBA guideline

<sup>111</sup> *Id*.

<sup>112</sup> *Id*

such disclosure does not automatically result in a disqualification of the arbitrator.<sup>113</sup> The parties can waive, or be deemed to waive, that duty if parties fail to object with reasonable time despite the disclosure of the situation by the arbitrators. The purpose of such disclosure duty is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively i.e., from a reasonable third person of view having knowledge of the relevant facts, there is a justifiable doubt as to the arbitrator's independence or impartiality.<sup>114</sup> In situations under the orange list, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made (i.e. within 30 days after disclosure or knowing via other means the situation as per the suggestion of the general standards of the IBA) for parties to raise objections.<sup>115</sup> Such situations include previous services for one of the parties within the past three years other or involvement in the case and current relationships between an arbitrator and a co-arbitrator or counsel.<sup>116</sup>

The green list contains an enumeration of situations where no appearance of lack of independence or impartiality exists and no conflict of interest from the relevant objective point of view.<sup>117</sup> Under green lists the guideline describes situations in which there is no disqualifying conflict of interest and no disclosure is necessary.<sup>118</sup> These situations include previously expressed legal opinions, Current services for one of the parties, Contacts with another arbitrator, or with counsel for one of the parties. Contact between the arbitrator and one of the parties to arbitration.<sup>119</sup> The subjective test devised and prevails over the objective test in the green lists under the IBA guidelines.<sup>120</sup> As per some scholars and the guideline itself, sometimes the green list may also include situations described in the orange list such as previous services for one of the parties when more than three years have passed.<sup>121</sup>

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<sup>113</sup> *Id*

<sup>114</sup> *Id*

<sup>115</sup> *Id*

<sup>116</sup> *Id*

<sup>117</sup> *Id*, at Part II: Practical Application of the General Standards under paragraph 7 states “The Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exist from an objective point of view...”

<sup>118</sup> *Id*, at Part II: Practical Application of the General Standards under paragraph 7 states; “the arbitrator has no duty to disclose situations falling within the Green List.

<sup>119</sup> *Id*, at general explanation of the practical lists 4 under part II: This listed four general situation and more sub circumstances.

<sup>120</sup> *Id*, at Part II: Practical Application of the General Standards under paragraph 7

<sup>121</sup> See Helena Jung(author) & Kaj Hobér( Mentor) *Supra note 65* at p 8

### 2.3.2. SOME CODE OF ETHICS

The 1987 IBA international arbitrators' code of ethics imposes the duty to be impartial, independent, competent, diligent and discreet under its introductory note.<sup>122</sup> Plus the same code of ethics provided the independence and impartiality of arbitrators as the criteria for assessing questions relating to bias under its rule 3.<sup>123</sup> Further, this code of ethics has provided the list of factors which give rise to partiality and dependence under rule 3.<sup>124</sup> Those lists of the standards are almost the same with what provided by the IBA guideline. The code of ethics also posited the duty of disclosing on the arbitrators if there are factors which give rise to doubt as to the independence and impartiality of the arbitrators.<sup>125</sup> The AAA has also arbitrators code of ethics on the same issues. The ABA arbitrators code of ethics of the 2004 provided that the one should accept appointment as an arbitrator only if fully satisfied: (1) that he or she can serve impartially; (2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;<sup>126</sup> Furthermore the ABA arbitrators code of ethics under canon II has imposed the duty on arbitrators to disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.<sup>127</sup> Like that of the IBA arbitrators code of Ethics, the ABA arbitrators code of ethics has provided a numerous factors that may give rise to doubt as to independence and impartiality from which the duty to disclosure arise.<sup>128</sup>

Beside to those well-known codes of ethics for commercial arbitrators, there is also other arbitrator's code of ethics like SIAC which contains the same provision with the above well-known code of ethics of arbitrators.

### 2.3.3. EXPERIENCE OF COUNTRIES

#### 2.3.3.1. SINGAPORE

There are two separate legal regimes that govern the conduct of arbitration proceedings in Singapore. Those are: domestic arbitration act which came into force on 1 March 2002 and repealed the former Arbitration Act (Cap. 10) in its entirety and international arbitration act of 1994. The domestic

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<sup>122</sup> See 1987 IBA international arbitrators' code of ethics at its introductory note.

<sup>123</sup> *Id.*, at rule 3

<sup>124</sup> *Id.*, at rule 3(1-5).

<sup>125</sup> *Id.*, at rule 4.

<sup>126</sup> See the Code of Ethics for Arbitrators in Commercial Disputes; Approved by the American Bar Association House of Delegates on February 9, 2004 Approved by the Executive Committee of the Board of Directors of the AAA at canon I(B(1-2))

<sup>127</sup> *Id.*, at canon II

<sup>128</sup> *Id.*, at canon II(A-H)

arbitration act governs the domestic arbitration or it applies to any arbitration where the place of arbitration is Singapore and where Part II of the IAA does not apply.<sup>129</sup> The domestic Arbitration Act was enacted to align the laws applicable to domestic arbitration with the 1985 UNCITRAL Model Law on International Commercial Arbitration (Model Law). On the other side, Singapore's` international arbitration act is the statutes in Singapore that is applicable to international arbitration agreements as well as non-international arbitrations where parties have a written agreement for Part II of the IAA or the Model Law to apply.<sup>130</sup> As to independence and impartiality of commercial arbitrators in Singapore, the arbitration act under chapter 10 obliges the appointing authority to secure the appointment of an independent and impartial arbitrator.<sup>131</sup> Further, the act imposed a duty on the arbitrators to disclose any circumstance likely to give rise to justifiable doubts as to his impartiality or independence where any person is approached in connection with his possible appointment as an arbitrator.<sup>132</sup> Independence and impartiality have also been provided as a ground for challenge of arbitrators on the same act.<sup>133</sup> The standard to challenge hereunder is objective standard as the laws reads “arbitrators may be challenged if circumstances that give rise to justifiable doubts as to arbitrator’s impartiality or independence exists.”<sup>134</sup>

#### 2.3.3.2. HONG KONG

In Hong Kong Arbitration is primarily governed by the Hong Kong Arbitration Ordinance (Cap. 609) (the “Arbitration Ordinance”), which came into effect on 1 June 2011 and replaced the old Arbitration Ordinance (Cap. 341). This current Arbitration Ordinance of Hong Kong has a unitary regime for foreign and domestic arbitration, which based on the UNCITRAL Model Law upon incorporation of most of the 2006 amendments to the Model Law. As regard to the independence and impartiality of commercial arbitration in Hong Kong, the arbitration ordinance under section 24 adopted the wordings of the UNICTRAL model rules of commercial arbitration that provided under art 11. Thus, the concerned authority (i.e. court or other authority) in appointing an arbitrator, shall have due regard to

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<sup>129</sup> Singapore Domestic Arbitration Act of (2002) at section 3.

<sup>130</sup> The statutes of the republic of Singapore; international arbitration act (chapter 143a) Original Enactment: Act 23 of 1994) at sect. 5(1)

<sup>131</sup> See domestic arbitration act of Singapore, *Supra note* 129, at sect 13(6(f))

<sup>132</sup> *Id*, at sect 14(1)

<sup>133</sup> *Id*, sect 14(3) states that; Subject to subsection (4), an arbitrator may be challenged only if (a) circumstances exist that give to justifiable doubts as to his impartiality or independence; or....

<sup>134</sup> See domestic arbitration act of Singapore, *Supra note* 129 at sect 14(3) which states as; Subject to subsection (4), an arbitrator may be challenged only if (a)circumstances exist that give rise to justifiable doubts as to his impartiality or independence; or....

any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.<sup>135</sup>

#### 2.3.4. SOME INSTITUTIONAL RULES AND OTHER MODEL ARBITRATION RULES.

Most of the international arbitral rules have, in some form or another, requirements of both independence and impartiality on arbitrators. The UNCITRAL model arbitration Rules recognize the principle that arbitrators shall be impartial and independent. It requires the prospective or appointed arbitrator to disclose promptly any circumstances likely to cast doubt on his impartiality or independence and further lays the basis for securing impartiality and independence by recognizing those circumstances that give rise to justifiable grounds in this regard as reasons for a challenge under article 11.<sup>136</sup> Likewise the ICC Rules 2012 require arbitrators to be and remain "impartial and independent" of the parties.<sup>137</sup> Accordingly, before appointment or confirmation, a prospective arbitrator must sign a statement of acceptance, availability, impartiality and independence.<sup>138</sup> The same rules of ICC via imposing the obligations of both independence and impartiality, provides that an arbitrator may be challenged for "an alleged lack of impartiality or independence, or otherwise".<sup>139</sup> In the same manner the LCIA Rules under Article 5.3 provided that: "All arbitrators shall be and remain at all times impartial and independent of the parties; and none of the arbitrators shall act in the arbitration as advocate for or representative of any of the party to arbitration. Further the rules stated factor for bias and partiality and stated the standards for independence and impartiality according to this rules, no arbitrator shall advise any party on the parties' dispute or the outcome of the arbitration."<sup>140</sup> Further, the rules also requires them to sign a declaration stating "whether there are any circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence, and if so, specifying in full such circumstances in the declaration".<sup>141</sup> In similar way the AAA provided the duty of arbitrators to be independent and impartial under article 7(1).<sup>142</sup> And also

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<sup>135</sup> See Hong Kong Arbitration Ordinance Chapter: 609 L.N. 38 of 2011 01/06/2011 at section 24. This section directly adopted the rule of appointments of the arbitrators in general and the independence and impartiality of arbitrator as a qualification that required from the arbitrators under art 11 of the UNCITRAL rules of the appointments of the arbitrator(s).

<sup>136</sup> UNCITRAL Rules 2010 at art 11

<sup>137</sup> ICC rules 2012 at Article 11(1)

<sup>138</sup> *Id.* at Article 11.2).

<sup>139</sup> *Id.*, at Article 14.1

<sup>140</sup> (LCIA Rules at Article 5.3.)

<sup>141</sup> *Id.*, at Article 5.4

<sup>142</sup> AAA arbitration rules of 2001 at art 7(1)



the AAA rules under article 7(2) prohibited the Ex-parte communication between the arbitrators and parties to further ensure the independence and impartiality of arbitrators.<sup>143</sup>

#### 2.4. THE DISCLOSURE REQUIREMENT AND THE DECLARATION OF INDEPENDENCE AND IMPARTIALITY

One key to avoiding later on problems due to lack of independence and impartiality is early disclosure of factors creating doubt as to the independence and impartiality of arbitrators.<sup>144</sup> This requirement requires the arbitral candidate to disclose actual and apparent conflicts of interest of arbitrators.<sup>145</sup> Thus, the primary regulatory mechanism designed to ensure independence and impartiality of arbitrators is the requirement that they disclose all interests or other relationships that may be “problematic” in justice administration by the decision makers or arbitrators in the context of this work i.e. raise potential conflicts of interest.<sup>146</sup> Arbitrators` disclosure duty is the cornerstone of justice in arbitration in general and to maintain the independence and impartiality of the arbitrators in particular.<sup>147</sup> And it is common for institutional rules and most modern arbitration laws to contain a provision referring to a disclosure obligation.<sup>148</sup> This requirement is not limited to one stage of the arbitration process rather it is continuous and imperative requirement for the arbitrator throughout all the arbitral process from the day of proposal for appointment to the end of arbitration process.<sup>149</sup> Hence, if any new circumstances arise, that may influence his impartiality or independence, he should disclose them at any stage of arbitration process.<sup>150</sup> The requirement of the disclosure by arbitrators of any circumstance that might cause doubts regarding the independence and impartiality of the arbitrator includes the signing of a declaration disclosing any past or present relationships with the parties and any other circumstances that might cause a party to question the arbitrator's reliability for independent judgment at the time of

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<sup>143</sup> Id, at art 7(2)

<sup>144</sup> Richard M. Mosk and Tom Ginsburg, *Supra note* 61 at p 356

<sup>145</sup> *Id*, at p 356

<sup>146</sup> United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-sixth session: *Supra note* 67 at p 11

<sup>147</sup> Bruno M Bastidato, *Supra note* 14 at p-10

<sup>148</sup> *Id*,

<sup>149</sup> *Id*, see also United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-sixth session, *Supra note* 67, at p 11

<sup>150</sup> The ongoing nature the duty of disclosure the facts or circumstances that give rise to the doubt of the independence and impartiality of the arbitrators is clearly provided under the IBA guidelines 2014 in the Explanation of general standard 3 on the last phara. Even though, the guidelines cannot override the applicable national and selected law, See also *Id* (Bruno M Bastidato). See also *Id* (United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-sixth session) at p 11

appointment.<sup>151</sup> Thus, while appointment of arbitrators and arbitration proceedings, an arbitrator's duty to disclose any facts and circumstances which could give rise to a doubt as to the independence and impartiality of arbitrators is quintessential requisite to the arbitral process and to the perception of its fairness and integrity.<sup>152</sup> Such requirement has been characterized as the cornerstone of an arbitrator's duty of independence and impartiality.<sup>153</sup>

Almost all arbitration rules impose a duty on prospective arbitrators to disclose all facts and circumstances which might give rise to doubts as to independent and impartiality.<sup>154</sup> The disclosure includes any relationship, experience and background information that may affect or even appear to affect the arbitrator's ability to be impartial and the parties' belief that the arbitrator will be able to give a fair decision.<sup>155</sup> Such disclosure could include any disclosure about clients, accounts or conflicts, including the nature of the conflict.<sup>156</sup> Thus, it has become an international customs and usage that arbitrators must determine and disclose those facts and circumstances that might give rise to a challenge the fitness of arbitrators to serve.<sup>157</sup>

#### 2.4.1. DISCLOSURE DUTY UNDER IBA

Under the IBA guidelines the duty of the arbitrators' to disclose the circumstances and facts that gives rise for the doubt as to the independence and impartiality of the arbitrators is recognized well.<sup>158</sup> A general rule as to which facts an arbitrator should commonly disclose is set forth in General Standard 3(a) which provide that;

'if facts or circumstances exist that may, "in the eyes of the parties", give rise to doubts as to impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and to the co-arbitrators, if any, prior to accepting his or her appointment or, if

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<sup>151</sup> Id (United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-sixth session) at p 11

<sup>152</sup> Judge Dominique H. *Supra note 35* at p 793, see also M.Scott Donaye, *Supra note 75* at p 36.

<sup>153</sup> Id (Judge Dominique H.)

<sup>154</sup> M.Scott Donaye, *supra note 75* at p 36.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> IBA Guideline, *Supra note 63* at Part I: General Standards Regarding Impartiality, Independence and Disclosure under general standards 3 obliges *the arbitrators to disclose the facts and circumstances that gives rise to the doubts as to the independence and impartiality of arbitrators and the practical application list under the part II regarding the Green lists obliges the arbitrators to disclose the facts and circumstances that arbitrators believes it could not be ground for refusal of appointment and could make him independent and impartial.*

thereafter, as soon as he or she learns about them'.<sup>159</sup> And also the part II of the IBA guidelines in the practical lists stated under the orange list the disclosure of the facts and circumstances that could give rise to the doubt as to the independence and impartiality of arbitrators.<sup>160</sup> The IBA Guidelines set forth a more subjective standard for disclosure by requiring the communications of facts or circumstances that may “*in the eyes of the parties*” give rise to doubt about independence or impartiality.<sup>161</sup> Besides, the IBA guidelines provided the most useful but controversial enumeration of illustrative elements that discussed in the above section which creates varied level of duty of arbitrator to disclose.<sup>162</sup> The red list describes a situation that gives rise to justifiable doubts about an arbitrator’s independence and impartiality. As it is discussed again and again so far in the previous section some are non waivable red list(such as financial interest in the outcomes of the case) while others are waivable (such as a relationship with council) which may be ignored by mutual consent.

An orange lists concerns a scenarios (such as past services as a council for a party) that the parties are deemed to have accepted if no objections is made after timely disclosure. The Guidelines provide for some situations in which disqualification will not arise under the subjective test and where no disclosure is required regardless of the parties’ perspective (such situation occurs under green lists).<sup>163</sup> Requiring the arbitrators to make disclosures in the case of doubt raises different issues: it helps to protect arbitrators from challenges in one hand. But, sometimes it may also facilitate over-disclosure and can give rise to yet further problems on the other hand.<sup>164</sup> Some commentators noted out disclosure may not necessarily the best.<sup>165</sup> Excessive disclosures can cause as many problems as inadequate disclosure.<sup>166</sup> To avoid such problem that may rise due to the disclosure, the guidelines strike a middle course. Under the guideline the disclosure should be made in cases of doubt, but provision is made for recognition of the need to avoid over-disclosure.<sup>167</sup> The guideline with the intention to reduce the excessive disclosures

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<sup>159</sup> For complete information see *Id* at Article 3(a). See also Anne K. H o f m a n : *Duty of Disclosure and Challenge of Arbitrators: The Standard Applicable Under the New IBA Guidelines on Conflicts of Interest and the German Approach, Arbitration International*, Volume 21 Number 3 (pp. 427-436 ) (2005) at p 428-429

<sup>160</sup> See *Id* (IBA guideline) at the standard number VI , practical application list under part II

<sup>161</sup> See *Id*, at general standard 3(1) see also Leon Trackman, *Supra note 68* at p 10

<sup>162</sup> *Id* (IBA Guideline) in part II provided different illustrative elements that categorized into three basing on color codification

<sup>163</sup> Leon Trackman, *Supra note 68* at p 12

<sup>164</sup> *Id*

<sup>165</sup> *Id*

<sup>166</sup> *Id*

<sup>167</sup> See IBA guideline, *Supra note 63*, the Explanation to General Standard 3(a) that provides that... “Any doubt as to whether certain facts or circumstances should be disclosed should be resolved in favor of disclosure. However, situations that, such as

provides the existence of the circumstances which does not need the disclosure under the green list.<sup>168</sup> Under the guideline, the duty of disclosure is continuing.<sup>169</sup> Therefore, in evaluating whether or not a conflict of interest exists, it should not make any difference at what the stage of the arbitral proceedings the conflict arises.<sup>170</sup> The ongoing nature of the disclosure duty is justified as, “the existence of the conflict, not the time it came to light, is determinative.”<sup>171</sup> But, this justification is counteracted by justification of practical considerations, according to which a different view of a conflict of interest may be warranted, depending on the stage of proceeding.<sup>172</sup> The guidelines recommended by some authors to have provided for such flexibility.<sup>173</sup> Commonly, almost all the well-known institutional arbitration rules and modern arbitration law has recognized such duty of disclosure by the arbitrators. However, as some authors cited, for example as *Anne K. Hoffmann* reflected on his work on the area, mostly those institutional rules and modern arbitration law do not contain a standard as to who determines when exactly circumstances are of a nature to give rise to doubts as to the arbitrator's impartiality and independence.<sup>174</sup>

#### 2.4.2. MODEL ARBITRATION RULES AND INSTITUTIONS ‘ARBITRATION RULES AS REGARD TO DISCLOSURE REQUIREMENT

The various systems of the arbitration rules are almost uniform in their recognizing of disclosure of facts and circumstances which may give raise to doubt as to the independence and impartiality of arbitrators. To begin with the UNCITRAL model rules on the arbitration, the most widely regarded standard of disclosure applicable to international commercial arbitration is embodied in the UNCITRAL Model Law. Art 11 of the model rules provides that, a prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.<sup>175</sup> The model rules on the same provision also provided that, an arbitrator, once appointed or chosen, shall disclose such circumstances to the parties

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those set out in the Green List, could never lead to disqualification under the objective test set out in General Standard 2, need not be disclosed...”see also *Id*, at p 12

<sup>168</sup> See *Id* (IBA guideline).

<sup>169</sup> See *Id* (IBA) at the Explanation to General Standard 3(a) the last paragraph states the duty of disclosure under General Standard 3(a) as ongoing in nature.

<sup>170</sup> Leon Trackman, *Supra note* 68 at p 12

<sup>171</sup> *Id*

<sup>172</sup> *Id*

<sup>173</sup> *Id*

<sup>174</sup> See Anne K. Hoffmann, *Supra note* 159 at p 428-429

<sup>175</sup> See UNCITRAL Arbitration Rule (as revised in 2010) at article 11

unless they have already been informed by him of these circumstances.<sup>176</sup> Thus, the model rules adopted a standard of continuing disclosure as a result of which a number of jurisdictions that follow the Model law adopt such a standard of continuing disclosure.<sup>177</sup> However, there are differences as to the standard of measurement from jurisdiction to jurisdiction as the standards of measurement in some jurisdiction are objective<sup>178</sup> whilst subjective in some other jurisdiction.<sup>179</sup> There is a doubt on the subjectivity test certainty as it can be based on the arbitrators or the parties' perspective.<sup>180</sup> Thus, it is problematic if it is based on the parties' perspective.<sup>181</sup> Because, it may lead to delays or disruption as parties may demand excessive disclosures from arbitrator(s).<sup>182</sup> The new American Arbitration Association's (AAA) Arbitration Rules establishes in similar terms by using almost the same language. Accordingly, rule 17 of the AAA reads as "Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives."<sup>183</sup> Like UNCITRAL model rules, such obligation shall remain in effect throughout the arbitration under AAA rules.<sup>184</sup> In the case of ICC, article 11 paragraph 2 of the Arbitration Rules provides that; Before appointment or confirmation by the Court, a prospective arbitrator shall disclose in writing to the Secretary General of the Court any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties.<sup>185</sup> Besides, the ICC rules on the same articles provided that, before appointment or confirmation, a prospective arbitrator shall sign a declaration of acceptance, availability, impartiality and independence.<sup>186</sup> Paragraph 3 stated also the arbitrators shall disclose the same circumstances to the secretariat and party if the facts and circumstances that cause doubt to the independence and impartiality occurs during the arbitration

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<sup>176</sup> *Id*

<sup>177</sup> Leon Trackman, *Supra note 68*, at p 10. According to this literature those countries which modeled on the UNICTRAL MODEL RULES for instance like Australia, Canada, Mexico, the Netherlands, New Zealand and Singapore has adopted the Model Law by statute.

<sup>178</sup> For example Europe and United States in which the courts uses the objective standard see *Id* (Leon Trackman).

<sup>179</sup> For example French courts usually adopt a subjective standard of disclosure, English courts do so as well in seeking to identify whether the failure to disclose gives rise to a real danger of bias see *Id* (Leon Trackman).

<sup>180</sup> *Id*,

<sup>181</sup> *Id*

<sup>182</sup> *Id*

<sup>183</sup> See the American Arbitration Association: Commercial Arbitration Rules and Mediation Procedures, Including Procedures for Large, Complex Commercial Disputes, Rules Amended and Effective October 1, 2013 Fee Schedule Amended and Effective July 1, 2016 at rule 17

<sup>184</sup> *Id*

<sup>185</sup> See ICC Rules of Arbitration of 2016.at article 11 phara.2

<sup>186</sup> *Id*

process.<sup>187</sup> This shows that the disclosure duty of arbitrators is ongoing under the ICC arbitration process also. The new LCIA provides under article 5 in paragraph 4 the fact that the arbitrators shall sign the declaration of independence<sup>188</sup> and impartiality and the arbitrators shall forthwith disclose in writing any circumstances becoming known to the arbitrators after the date of his or her written declaration which are likely to give rise in the mind of any party to any justifiable doubt as to the independence and impartiality of arbitrators.<sup>189</sup> The test under LCIA is objective test as it purports to determine the doubt in the mind of any party.<sup>190</sup>

As regards to the standards of disclosure, most of the arbitral rules requires an arbitrators disclosure of circumstances that may cause doubts as his or her ability to serve independently and impartially during proceeding.<sup>191</sup> Some other marks reference to justifiable doubts.<sup>192</sup> While others still direct arbitrators to ask whether questionable circumstances would causes doubts in the eyes of the parties.<sup>193</sup>

### 2.4.3. EXPERIENCE OF COUNTRIES AS TO DISCLOSURE REQUIREMENT

#### 2.4.3.1. SINGAPORE

Disclosure of all circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence is required of arbitrators acting under the domestic Arbitration Act of Singapore,<sup>194</sup> the SIAA<sup>195</sup> and the SIAC Rules.<sup>196</sup> Likewise the instrument that discussed so far all the relevant rules in Singapore shows that the duty to disclose is ongoing, and runs from the time of appointment and continues throughout the arbitration proceedings.<sup>197</sup> As regards to the legal standard on which to analyze arbitrators' independence and impartiality there is no uniform practice.<sup>198</sup> The standard of bias or partiality that has been applied by the Singapore courts is whether a reasonable and fair-minded

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<sup>187</sup> *Id.*, at article 11, phara 3.

<sup>188</sup> See LCIA Arbitration rules (2014)at article 5 phara.4

<sup>189</sup> *Id.*, at article 5 phara.5

<sup>190</sup> *Id.*

<sup>191</sup> See for instance the 1987 AAA/ABA code of arbitrators ethics

<sup>192</sup> See for instance UNICTRAL 2010 arbitration rule at art 11 and LCIA (2014) arbitration rules at art 10(3)

<sup>193</sup> See for example 2016 ICC rules of arbitration at art 11(2).

<sup>194</sup> See Singapore domestic Arbitration Act at Sect. 14(1),

<sup>195</sup> See Singapore International Arbitration Act at Art. 12.

<sup>196</sup> See Singapore International Arbitration Centre Rules (2013) at Rule 10. 4,)

<sup>197</sup> Singapore domestic Arbitration Act at Sect. 14(2) sees also Singapore International Arbitration Act at Sect.14 (2). See also see also of Code of Ethics for an Arbitrator of SIAC(2016) Rule at rule 2.1 see also SIAC Rules at rule10.5,

<sup>198</sup> For instance “the real danger of bias” applied by English Courts, the American standard that “an arbitrator not only has to be impartial but also appear to be impartial”, and the “justifiable doubts” standard applied by the UNCITRAL Model Law and different arbitration institutions` rule, which has been adopted by several jurisdictions including Singapore and Hong Kong.

person sitting in court and knowing all the relevant facts would have a reasonable suspicion that the tribunal was biased.<sup>199</sup> The SIAC arbitrator's code of ethics also provides that, the prospective arbitrator shall accept an appointment only if he is fully satisfied that he is able to discharge his duties without bias.<sup>200</sup> The general criteria for assessing questions relating to bias are impartiality and independence as it is stated under the code of Ethics of SIAC.<sup>201</sup> The general definitions of the partiality and dependence as a cause for the bias have been stated on the SIAC code of ethics. Accordingly, Partiality arises when an arbitrator favors one of the parties or where he is prejudiced in relation to the subject matter of the dispute.<sup>202</sup> Whilst dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties.<sup>203</sup> Like that of the lists under the IBA, any close personal relationship or current direct or indirect business relationship between an arbitrator and a party, or any representative of a party, or with a person who is known to be a potentially important witness, will normally give rise to justifiable doubts as to a prospective arbitrator's impartiality or independence.<sup>204</sup> Past business relationships will only give rise to justifiable doubts if they are of such magnitude or nature as to be likely to affect a prospective arbitrator's judgment.<sup>205</sup> Thus the arbitrators should decline to accept an appointment in such circumstances unless the parties agree in writing that he may proceed.

#### 2.4.3.2. HONG KONG

Section 25 of the Hong Kong Arbitration Ordinance addresses the important question of arbitrators' ethics. It does so by adopting art 12 of the UNCITRAL model rules which addresses the important question of arbitrators' ethics firstly by imposing on each arbitrator a continuing duty to disclose to the parties' circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.<sup>206</sup> Besides to the provision of the Arbitration Ordinance there are also different codes of ethics of arbitrators and institutional rules which provides the ongoing duty of disclosure of any interest

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<sup>199</sup> Yee Hong Pte Ltd v. Power Electrical Engineering Pte Ltd [2005] 3 SLR 512

<sup>200</sup> See the SIAC code of ethics 2016 at sect 1(1).

<sup>201</sup> *Id.*, at sect 3(1)

<sup>202</sup> *Id.*, at sect 3

<sup>203</sup> *Id.*, at sect 3(1)

<sup>204</sup> *Id.*, at sect 3(2)

<sup>205</sup> *Id.*

<sup>206</sup> See Hong Kong arbitration ordinance Chapter: 609 L.N. 38 of 2011 01/06/2011 at section 25(1)

or relationship likely to affect his impartiality or which might reasonably create an appearance of partiality or bias.<sup>207</sup>

## 2.5. LACK OF INDEPENDENCE AND IMPARTIALITY AS A POSSIBLE GROUNDS FOR CHALLENGES AND DISQUALIFICATION OF ARBITRATORS

A further critical safeguard to ensure independence and impartiality on the part of arbitrators in addition to disclosure requirement that discussed in the above section of this work comprises standards and procedures for parties to challenge arbitrators based on a real or apparent lack of independence or impartiality.<sup>208</sup> The procedure adopted in relation to challenge and disqualification most but not all arbitration rules and ethical code of conducts of proceeding allows a party to ‘challenge’ (i.e. seek the removal of) an arbitrator on the grounds that circumstances exist that give rise to justifiable doubts about the arbitrator’s independence and impartiality.<sup>209</sup> The procedure that is rooted in the principle “*nemo iudex in causa sua*” (no one should be a judge in their own case) which in turns enhanced by the principle that ‘justice must not only be done, but must be seen to be done.’<sup>210</sup> In order to preserve the integrity of the arbitral process and justice for commercial communities, allowing parties to challenge, principally, the adjudicators of their disputes on the grounds that the parties have genuine doubts as to the independence and impartiality of the decision-maker is a fundamental element of the arbitral process.<sup>211</sup> So, the legal provision should serve as a means to serve that function. Those challenges may result in removal of the arbitrators but not mandatorily. The IBA guidelines as well as almost all arbitration laws and arbitration rules contain provisions on procedures for challenging arbitrators for non-compliance with ethical requirements. As to this issue some writers on the area argues that

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<sup>207</sup> See The Hong Kong Institute of Architects (“HKIA”) and The Hong Kong Institute of Surveyors (“HKIS”) *code of ethical conduct for members in the joint panel of arbitrators* at rule 2. Available at <<http://www.jdrc.com.hk/CodeConductArbitrator.htm>> (last visited on October 09-2019) See also the Hong Kong International Arbitration Centre administered arbitration rules at art 11(4(b)) which provides that; *before confirmation or appointment, a prospective arbitrator shall... (b) Disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator once confirmed or appointed and throughout the arbitration, shall disclose without delay any such circumstances to the parties unless they have already been informed by him or her of these circumstances. This rule also stated the declaration of statement of independence and impartiality by arbitrators under sub a of the same article which provides that... a prospective arbitrator shall (a) sign a statement confirming his or her availability to decide the dispute and his or her impartiality and independence...Available at <<https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018>>(last visited on October 09-2019)*

<sup>208</sup> United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-sixth session, *Supra note 67*.

<sup>209</sup> Mark Baker & Greenwood, Lucy. ‘Are Challenges Overused in International Arbitration?’ *Journal of International Arbitration* 30, no. 2 published by 2013 Kluwer Law International BVISSN 0255-8106 101–112 (2013): at p 102. Available at <<https://www.kluwerlawonline.com/abstract.php?area=Journals&id=JOIA2013008>>(last visited on October 09-2019)

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*



arbitrator(s) independence and impartiality can only be properly maintained by a high degree of self-policing by the arbitrator so that the codification process that arbitration, in general and challenges in particular, are undergoing is not always useful.<sup>212</sup> According to the view of advocates of the self-policing principle, in the absence of highly moral, self-policing players, it does not matter how many codes or guidelines are enacted, there will not be an independent and impartial tribunal.<sup>213</sup> Any way the main function of effective challenge mechanisms is to provide the teeth of the requirements for independence and impartiality and so to the public interest in fair procedures:<sup>214</sup> that is, it must allow for partisan arbitrators to be disqualified (removed) so that any means securing effective challenge to achieve independence and impartiality of arbitrators via regulation is the necessary evil.<sup>215</sup>

As to tests of bias, there are different tests of bias that to be used in disqualification of arbitrators once a challenge is alleged. Actually the lack of independence and impartiality are the two general tests of bias of arbitrators as it is provided on different national arbitration rules as well as on different institutional and code of ethics of arbitrators. But coming to the specific tests of bias, the various standards of bias could be whether there is an actual bias, imputed bias or apparent bias.<sup>216</sup>

### 2.5.1. CHALLENGE AND DISQUALIFICATION UNDER IBA

The IBA Guidelines set forth both objective and subjective general standard for the challenge and disqualification of an arbitrator on grounds of partiality or lack of independence. According to the IBA guidelines, an arbitrator shall decline appointment or refuse to continue to act as an arbitrator if facts or circumstances exist that, from a reasonable person's point of view having knowledge of the relevant facts, give rise to "justifiable doubts" as to the arbitrator's impartiality or independence<sup>217</sup> or if justifiable doubts exists from a reasonable third persons perspectives <sup>218</sup> if an arbitrator chooses to

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<sup>212</sup> *Id.* at p 111.

<sup>213</sup> *Id.*

<sup>214</sup> United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-sixth session: *Supra note 67* at p 12

<sup>215</sup> *Id.*

<sup>216</sup> DR. Andrea's Respondek (editor) & fan pte ltd, Asia arbitration guide 5th (Extended and Revised) Edition ISBN: 978-981-11-2964-3 2017 at p 262. Available at <<https://www.rf-arbitration.com/upload/document/asia-arbitration-guide-2017.pdf>> (last visited on October 09-2019) <[https://bbpartners.ru/storage/editor/ASIA\\_ARBITRATION\\_GUIDE\\_2019.pdf](https://bbpartners.ru/storage/editor/ASIA_ARBITRATION_GUIDE_2019.pdf)> (last visited on October 09-2019) and <[http://cdn-arbitralwomen.s3.amazonaws.com/wp-content/uploads/2018/12/377\\_ASIA-ARBIT](http://cdn-arbitralwomen.s3.amazonaws.com/wp-content/uploads/2018/12/377_ASIA-ARBIT)> (last visited on October 09-2019)

<sup>217</sup> see IBA guideline, *Supra note 63* at general standards 2(a)

<sup>218</sup> *Id.*, at general standard 2(b)

accept or to continue with an appointment despite the existence of bias application for disqualification is appropriate and a challenge to the appointment should succeed.<sup>219</sup>

## 2.5.2. CHALLENGE UNDER SOME NATIONAL ARBITRATION LAWS

### 2.5.2.1. SINGAPORE

As regard to challenge of the arbitrators, the Singapore legislation and arbitration rules adopted the grounds of challenge under article 12 of the UNCITRAL model rules.

Article 12(2) of the model rules provides that:

*“Arbitrators may be challenged only if circumstances that give rise to justifiable doubts as to his impartiality or independence or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware the appointment”*

A similar provision is made in respect of domestic arbitrations in Singapore under section 14(3) of the Arbitration act.<sup>220</sup> Accordingly arbitrator’s appointment may be challenged only if circumstances exist which give rise to justifiable doubts as to his impartiality or independence or he does not possess the qualifications agreed by the parties.<sup>221</sup> Such circumstances could include any personal, business or professional relationship with the parties to the dispute or an interest in the outcome of the dispute. The Singapore International Arbitration Centre Rules also provide for a similar standard for the challenge of arbitrators in rule 11 of SIAC.<sup>222</sup> Once a challenge of an arbitrator is made standard of bias in disqualifying the arbitrators in Singapore that used by the courts are whether there is an actual bias, imputed bias or apparent bias.<sup>223</sup>

### 2.5.2.2. HONG KONG

Since the Arbitration Ordinance of Hong Kong adopted the UNICTRAL rule of arbitration, art 12 of the model rules applicable in Hong Kong. Accordingly, section 25 and 26 of the Arbitration Ordinance

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<sup>219</sup> See Leon Trackman, *Supra* note 68 at p 13

<sup>220</sup> See Singapore domestic arbitration at act section 14(3)

<sup>221</sup> *Id*

<sup>222</sup> See the arbitration rules of the Singapore international arbitration center in rule 11 5<sup>th</sup> editions.

<sup>223</sup> DR. Andreas Respondek, *Supra* note 216 at p 262

incorporates the grounds for challenges and procedures of challenges respectively.<sup>224</sup> Thus, an arbitrator may be challenged if there are circumstances that give rise to justifiable doubts as to the arbitrator's impartiality and independence, or if he or she does not possess the qualifications agreed upon by the parties.<sup>225</sup> A party can only challenge an arbitrator that it has itself appointed if the reasons for the challenge were unknown to such party at the time of the appointment.<sup>226</sup>

### 2.5.3. CHALLENGE AND DISQUALIFICATION OF ARBITRATOR(S) UNDER UNCITRAL MODEL ARBITRATION RULES AND INSTITUTIONAL ARBITRAL RULES

The independence and impartiality as grounds of challenge and probably of disqualification is clearly provided under art.12 of the UNCITRAL model rules.<sup>227</sup> Similarly, the 2016 ICC arbitration rules provides that an arbitrators may be challenged 'whether for an alleged lack of impartiality or independence, or otherwise and may be disqualified (emphasis added by writer) under article 14.<sup>228</sup> The challenges in the ICC shall be made in writing to the ICC Secretariat.<sup>229</sup> Once an application for a challenge is submitted, the ICC court decides on admissibility and merits of the challenges. Upon determination of those situations or relationship whether or not it undermine the independence and impartiality of arbitrator(s) the court could either decide suspension or proceeding and the decisions is final and the reasons for such decisions shall not be communicated.<sup>230</sup> The LCIA arbitration rules of 2014 also set out the standard applicable to arbitrator challenges in Article 10. It provides that, the appointment of the arbitrators can be revoked and challenged upon the courts initiatives, at the written request of all other members of the arbitral tribunal or upon written challenge by any party if ...there is/are the existence of the circumstance(s) that gives rise to justifiable doubts as to that arbitrator's independence or impartiality.<sup>231</sup> Like that of ICC, in LCIA arbitrations, challenges must be submitted in writing to the LCIA Court, the tribunal and all other parties 'within 14 days of the formation of the

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<sup>224</sup> See Hong Kong arbitration ordinance Chapter: 609 L.N. 38 of 2011 01/06/2011 at section 25 and 26

<sup>225</sup> *Id*

<sup>226</sup> *Id*

<sup>227</sup> See UNCITRAL arbitration Rules 2010 at art 12. Accordingly any arbitrator may be challenged and may be disqualified (added by the writer) if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence

<sup>228</sup> See ICC Rules of Arbitration | Arbitration | Arbitration & ADR | Products & Services | ICC - International Chamber of Commerce 2016.at article 14 which states as (1) A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.

<sup>229</sup> See *Id* (ICC ) at article 14 which states as (1) A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based

<sup>230</sup> *Id*, at art 11(4)

<sup>231</sup> See LCIA(2014) at art 10

Arbitral Tribunal or (if later) after becoming aware of any circumstances referred to in the rules that includes the situation or relationships that ‘give rise to justifiable doubts as to independences and impartiality.’<sup>232</sup> Similar to arbitrations conducted according to the ICC Arbitration Rules, the tribunal is empowered to suspend or to continue the proceedings.<sup>233</sup> Similarly under the 2013 AAA arbitration rules any arbitrator who fails to be impartial, independent, diligence and in good faith, they shall be subject to disqualification for their partiality or lack of independence.<sup>234</sup> Likewise, the SIAC rules under rule 11(1)<sup>235</sup> and HKIAC rules under art.11 (6) <sup>236</sup> rules the lack of independence and impartiality of arbitrator(s) as a ground for challenge of them.

## 2.6. IMPORTANCE OF ARBITRATORS IMPARTIALITY AND INDEPENDENCE

It is often said that the quality of the arbitration proceeding as well as arbitral awards is as much as the quality of an arbitrator(s) involved in it.<sup>237</sup> Such quality of the arbitrators that involved in the arbitration might be determined by the how many independent and impartial arbitrators are.<sup>238</sup> That is why most of the national arbitration acts and arbitral institution rules require the independence and impartiality of the commercial arbitrators. The fundamental purpose of both the impartiality and the independence requirement is to ensure that the arbitrator is unbiased and fair-minded upon avoiding conflicts of interest on the side of arbitrators.<sup>239</sup> Independence and impartiality of arbitrators are considerable safeguards for the parties to a dispute in particular and arbitration process in general.<sup>240</sup> Independence and impartiality of arbitrators are also important in ensuring confidence in the integrity not only of the arbitral process, “but also the whole arbitration establishment”<sup>241</sup> i.e. Independence and impartiality are recognized to be a key element for maintaining the credibility and legitimacy of arbitrator as well as arbitral tribunal<sup>242</sup> In other words, the impartiality, independence and liability of arbitrators are

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<sup>232</sup> *Id.*, at art 10(1-3)

<sup>233</sup> *Id.*, at art 10(4,6,and 7)

<sup>234</sup> See AAA 2013 at rule 18

<sup>235</sup> See SIAC (2013)Rules at 11(1)

<sup>236</sup> See HKIAC(2008) rules at art.11(6)

<sup>237</sup> Kuala Lumpur, *Supra note 53* at p 1

<sup>238</sup> Bruno Manzanares Bastida, *Supra note 14* at p 2.

<sup>239</sup> Christophe Müller and Antonio Rigozzi, *Supra note 62* at p 12

<sup>240</sup> Ahmed Mohammad & Al-Hawamdeh: *The Effects of Arbitrator's Lack of Impartiality and Independence on the Arbitration Proceedings and the Task of Arbitrators under the UNCITRAL Model Law Journal of Politics and Law*; Vol. 11, No. 3; 2018 ISSN 1913-9047 E-ISSN 1913-9055 Published by Canadian Center of Science and Education. pp. 64-73 Online Published: August 30, 2018 at p-64. Available at <http://www.ccsenet.org/journal/index.php/jpl/article/download/76863/42871> (last visited on October 09-2019)

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

important to promote litigants' trust in the arbitral process.<sup>243</sup> In general the requirement that an arbitrator need to be both independent and impartial constitutes basically two different means but aiming at a common end,<sup>244</sup> i.e. for the parties to have a neutral person who can guarantee them a fair trial and also legitimates the whole concept of arbitration altogether.<sup>245</sup> If either or both of these requirements are missing, chances are that an arbitrator's ability to exercise fair judgment will be most likely compromised or affected.<sup>246</sup>

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<sup>243</sup> *Id*

<sup>244</sup> Riodev, *Supra note* 84 at p 24

<sup>245</sup> *Id*

<sup>246</sup> *Id.*

## 2.7. THE NOTION, THEORY AND LEGAL FRAMEWORKS AS TO LIABILITY OF COMMERCIAL ARBITRATORS IN GENERALS

Some of the advantages of the arbitration more than the state court litigation as discussed so far in the above section are that the parties are free to choose independent, impartial and highly specialized experts to decide their cases. Yet, if these arbitrators negligently or even deliberately violate the duties that come after they accepted the appointment, the issue of liability may arise. One may think of instances such as unjustified delays in the rendering of the arbitral award, the deliberate non-disclosure of information that could exclude the respective individual from serving as arbitrator, or procedural conduct that gives rise to a setting aside of the arbitral award.<sup>247</sup> Since the available remedies, such as the possibility to challenge and even remove the arbitrator from office or the setting aside of the award, do not encompass monetary compensation for damage effectively suffered by the parties, the relevance of the liability of the arbitrators seems even more striking. Under this section the writer would analyze and describe the different theories and approach of both immunity and liability of the arbitrators adopted by different legal and non-legal instrument. In this section, the paper would argue in favor of the qualified immunity (limited liability) of the arbitrators. The paper would conclude the section by suggesting and justifying the best approach of liability of the arbitrators.

### 2.7.1. MAJOR SCHOOLS OF THOUGHT ON THE ARBITRATOR(S) RELATIONSHIP WITH PARTIES

The arbitrator(s) has relationships with the parties to arbitration.<sup>248</sup> Such relationships impose obligations on the arbitrator.<sup>249</sup> Thus, in case when the arbitrators breach these obligations, the issues of the arbitrator(s) legal liability and obligation to pay compensation may rise.<sup>250</sup> Actually there is no uniform idea as to whether the arbitrators should be subject to liability or immune from such liability. There is also no uniform argument as to the relationships between the arbitrators and parties. There are two main different positions with regard to the nature of the relationship between the arbitrator and the parties involved in the arbitration.<sup>251</sup> The contractual school considers that this relationship between the

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<sup>247</sup> Ramón Mullerat: The liability of Arbitrators: a survey of current practice, International Bar Association Commission on Arbitration Chicago, 21 September 2006 at p 7. Available at [https://www.josemigueljudice-arbitration.com/xms/files/02\\_TEXTOS\\_ARBITRAGEM/01\\_Dout](https://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Dout) (last visited on October 09-2019)

<sup>248</sup> *Id.*, at p 1

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*, at p 2.

arbitrator(s) and parties is established by contract.<sup>252</sup> The status school considers that the judicial nature of the arbitrator's function results in a treatment assimilated to that of a judge.<sup>253</sup> Those are contractual and status school of thought which will be the part of discussion in the immediate sections.

#### 2.7.1.1. CONTRACTUAL SCHOOL OF THOUGHT

According to the proponents of contractual theory' which is mostly common in civil law legal system,<sup>254</sup> arbitrators are neither part of the government nor do they perform public functions rather they are purely the creation of the contract between the parties.<sup>255</sup> As per this philosophy the arbitrator promises to conduct the arbitration proceedings and render an appropriate award resolving the parties' dispute; in return the parties promise to compensate the arbitrator in exchange for his professional services.<sup>256</sup> So that, arbitrators are treated as professionals rather than quasi-judicial officials and as such they are subject to liability as any other professionals such as doctor(s), lawyers etc.<sup>257</sup> This theory purports to respects party autonomy principle of arbitration which was discussed in the introduction part of this work as the best advantages of the arbitration why the commercial community opt for the arbitration than state court litigation. Thus, it is up to the parties to negotiate between themselves as to the duties and obligations arbitrators owe to their clients and at what point to impose liability on arbitrators.<sup>258</sup> Even the parties can agree in their establishment of the contract the liability of the arbitrators.<sup>259</sup> As to the views of the advocates of this position, the liability of arbitrators can increase transparency, accountability, independence, impartiality and integrity in the arbitration process.<sup>260</sup> As regards to the liability of the arbitrators under contractual theory, the arbitrators can give an awards independently without any fear of incurring liability but may subject to liability in case when the arbitrators acts in bad faith or in gross negligent.<sup>261</sup> Pursuant to this theory the liability of the arbitrators should be based on

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<sup>252</sup> *Id*, at p 1

<sup>253</sup> *Id*

<sup>254</sup> *Id*, at p 2. For example in civil law jurisdiction such as Germany arbitrators are professionals whose liability is determined by the general principals of contractual liability see for example EmmanuelaTruli: *liability v. quasi-judicial immunity of the arbitrator: the case against absolute arbitral immunity, the American review of international arbitration* vol. 17 2006 at p 17) .Available at < [https://www.academia.edu/13444342/LIABILITY\\_V. QUASI-JUDICIAL\\_IMMUNITY\\_OF\\_THE..](https://www.academia.edu/13444342/LIABILITY_V._QUASI-JUDICIAL_IMMUNITY_OF_THE..) >(last visited on October 09-2019)

<sup>255</sup> Ramón Mullerat, *Supra note 247* at p 2. See also As if Salahuddin, *Supra note 44* at p 580 see also Eric Robine; *The Liability of Arbitrators and Arbitral Institutions in International Arbitrations under French Law* pp. 323-332at p 323

<sup>256</sup> EmmanuelaTruli, *Supra note 254* at p 10

<sup>257</sup> As if Salahuddin, *Supra note 44* at p 580

<sup>258</sup> *Id*, at p581.

<sup>259</sup> *Id*

<sup>260</sup> *Id*.

<sup>261</sup> *Id*

their terms of appointment agreements with the parties.<sup>262</sup> Thus, the bases of the liability of the arbitrators bases on the express contract that could be created by the arbitrators with parties setting out their rights and responsibility as well as liability while conducting arbitration in their judicial capacity.<sup>263</sup>

#### 2.7.1.2. STATUS SCHOOL OF THOUGHT

This theory is the counter response to the contractual theory that has been discussed in the above section. It is common that almost all theories are subject to criticism so that the contractual theory likewise is subject to critics. One of the critics against the contractual theory argues that, the relationship between the arbitrators and the parties is jurisdictional or at least hybrid but not purely contractual.<sup>264</sup> The status school of thought entitles the arbitrators the treatment similar to that of a judge on the basis of the functional similarity as to their view.<sup>265</sup> Accordingly, the arbitrators like that of the judge perform the judicial or quasi-judicial function, which grants an element of “status” which in turn guarantees the akin treatment to arbitrators with judge.<sup>266</sup> The status theory is mostly common in common law legal system.<sup>267</sup> The proponents of this position contend against the contractual theory as the contractual theory is misleader because they argue that the power of the arbitrators is absolutely established by the contractual relationship.<sup>268</sup> Finally, the status theories proponents try to establish the arguments that the arbitral process is a function of the power conceded by the State to arbitrators rather than pure contractual.<sup>269</sup>

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<sup>262</sup> See Susan D. Frank: *The liability of international arbitrators: comparative analysis and proposals for qualified immunity* (2000) at p 5.

<sup>263</sup> *Id.*

<sup>264</sup> As if Salahuddin, *Supra note 44* at p 580

<sup>265</sup> Ramón Mullerat, *Supra note 247* at p 2

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* Cited Red fern, Alan and Hunter, Martin, *Law and practice of international commercial arbitration, 2004, p. 285 and Must ill and Boyd, Commercial Arbitration, 1989, p. 220.*

<sup>268</sup> *Id.* (Ramón Mullerat) Cited from Hong-Lin Yu and Laurence Shore, *Independence, impartiality and immunity of arbitrators. US and England perspectives, 2006*

<sup>269</sup> *Id.*



## 2.7.2. CONTROVERSIAL ISSUES ON THE LIABILITY OF THE ARBITRATORS

### 2.7.2.1. IMMUNITY OF THE ARBITRATORS; APPROACH TO IMMUNITY

The origins of the notions of immunity of the arbitrator(s) based up on the doctrine of judicial and quasi-judicial immunity.<sup>270</sup> It was argued that, this is so because of the inherent functional similarities (i.e. administration of the justice) between arbitrators and judges and thus arbitrators must be extended the same privilege.<sup>271</sup> This is originated from the common law legal system basing on different policy justification such as preserving finality of judgments, ensuring independence of judges, maintaining public confidence in the justice system and freedom from continuous calumniations.<sup>272</sup> In spite of their disciplinary obligation to be imposed by the states judges are normally immune from liability.<sup>273</sup> As cited and quoted by Asif Salahuddin (2017), “The United Nations Human Rights’ Article 16 of the Basic Principle on the Independence of the Judiciary provides for judges to be immune from civil suits for monetary damages for improper acts or omissions within their judicial capacity”.<sup>274</sup> Some of the authors assimilate such the adjudicator function, independence, impartiality functions of the judge and arbitrator(s).<sup>275</sup> As a result, some authors concluded that, the arbitrators should be immune from liability (Civil liability) like that of judge<sup>276</sup> upon the justification that based on the judicial capacity with which arbitrators serve.<sup>277</sup> The key justification of the immunity of the arbitrator as noted out by different authors are therefore, “the functional comparability between judges and arbitrators and the performance<sup>278</sup> of the function of resolving disputes between parties authoritatively adjudicating private rights”. However such analogy is contrasted by some other authors. Accordingly, such analogy is

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<sup>270</sup> Dennis R. Nolant & Roger I. Arbitral Immunity Abrams Berkeley Journal of Employment & Labor Law Volume 11 | Issue 2 Article 2 pp. 228-267 (1989) at p 229. <<https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1184&context=bjell>> (last visited on October 09-2019) see also Richard J. Matter: *Has the Expansion of Arbitral Immunity Reached Its Limits after United States v. City of Hayward*? Pp. 779 -799 (1995) at p 780 see also *Id* (Ramón Mullerat) at p 8. See also As if Salahuddin, *Supra note 44* at p 2

<sup>271</sup> *Id* (Dennis R. Nolant & Roger I.) at p 230 Prathima R. Appaji; *supra note 46* at p 64. See also Susan D. Frank, *Supra note 262* at p 16

<sup>272</sup> In common law countries the doctrine of judicial immunity can be traced to Lord Coke’s 1607 judgment in *Floyd & Barker*, which held that judges of England’s principle common law court, the King’s Bench were immune from being sued in competing courts for acts performed in their judicial capacity. see *Id* (Prathima R. Appaji) at p 64 see also As if Salahuddin, *Supra note 44* at p 572

<sup>273</sup> The rule of the immunity of the judge is that judges of courts of record are not liable for damages for their decisions see Dennis R. Nolant & Roger I. *Supra note 270* at p 230

<sup>274</sup> As if Salahuddin, *Supra note 44* at p 572 see also UNHR Basic Principles on the Independence of the Judiciary 13 December 1985)

<sup>275</sup> see for instance Ramón Mullerat, *Supra note 247* at p 10

<sup>276</sup> *Id*

<sup>277</sup> See As if Salahuddin, *Supra note 44* at p 572

<sup>278</sup> See Ramón Mullerat, *Supra note 247* at p 11

considered as not perfect and eventually the functional similarity which bases on their functional comparability between the two is flawed and considered as misleading.<sup>279</sup> This is contested because the judges are considered as state appointed so that they receive their power and remuneration from the state.<sup>280</sup> Whereas, the powers of the arbitrator(s) are derived from the private contract and receives remuneration in return for his professional service from the contracting parties. Henceforth arbitrators but not a judge should be accountable for the professional services they provide like that of the other professional like doctors, lawyers, accountants.<sup>281</sup> In case when the arbitrators act negligently or even maliciously as such misconduct would result in liability in other profession.<sup>282</sup>

Thus, as it can be understood from the above different arguments, there are two different positions for and against immunity. On one side some commentators on the area argues that arbitrators are/shall be granted immunity to guarantee arbitrators' independence, impartiality and arbitrators confidence upon protecting them from losing parties' vexatious litigations and to ensure finality of awards.<sup>283</sup> As it is noted out by some authors different courts in common law countries have asserted that exposing arbitrators to liability in damages would undermine their impartiality and independence.<sup>284</sup> The proponents of this position justify the necessity of the arbitrators' immunity as it is necessary to safeguard the arbitrators from harassment and intimidation of litigation by dis-satisfied parties.<sup>285</sup> According to the arguments of the proponents of the immunity of the arbitrators, unhappy parties may threaten or harass the arbitrators as a result the arbitrators may fail to make principled decision if they are concerned about being sued and about reprisals from the parties who are dissatisfied.<sup>286</sup>

On the other hand the justifications against immunity are that, immunity can encourage carelessness; there are no disciplinary remedies against arbitrators; and alternative remedy such as appeal,<sup>287</sup> Vacation of award via setting aside and withholding of fees are considered as inadequate.<sup>288</sup> The level of the

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<sup>279</sup> See Richard J. Matter, *Supra note 270* at p 65. See also As if Salahuddin, *Supra note 44* at p 579.

<sup>280</sup> See Prathima R. Appaji; *supra note 46* at p 65.

<sup>281</sup> *Id.* See also Richard J. Matter, *Supra note 270* at p 65 As if Salahuddin, *Supra note 44* at p 579

<sup>282</sup> See Prathima R. Appaji; *supra note 46* at p 66

<sup>283</sup> See Dennis R. Nolant & Roger I. *Supra note 270* at p 230. See also As if Salahuddin *Supra note 44* at p 571

<sup>284</sup> See for example As if Salahuddin, *Supra note 44* at p 572

<sup>285</sup> *Id.*

<sup>286</sup> See Susan D. Frank, *Supra note 262* at p 28

<sup>287</sup> Appeal actually may not appear in some jurisdictions arbitration law especially in arbitration rules which adopted the UNCITRAL arbitration rules, thus it is applicable only to some countries like Ethiopia in which the appeal from the arbitral awards is possible.

<sup>288</sup> See Ramón Mullerat, *Supra note 247* at p 10

immunity of the arbitrators from the liability may be varies from country to country<sup>289</sup> and institution to institution which depends on the legislative provisions which have been passed and also on the agreement with the parties or the arbitration institution.<sup>290</sup> Basing on the extent of the liability the approaches to immunity of the arbitrators may categorized into different types.<sup>291</sup> In the immediate next section the paper will try to discuss the different approaches to the immunity of arbitrators.

#### 2.7.2.1.1. ABSOLUTE IMMUNITY

Under absolute immunity approach, arbitrators enjoy total or absolute immunity for suit of actions taken within their duties.<sup>292</sup> This is an orthodoxy approach under which the dis-satisfied parties as to the way arbitrators handle their dispute have absolutely no right to challenge arbitrators for their actions and decisions in the courts or before their arbitration institution.<sup>293</sup> Arbitrators accordingly are free from the liability that may rise from their decision, duties and obligation.

This approach bases on the public policy justification which supports that, a person who exercises a quasi-judicial function should be able to perform that function without looking over his shoulder to assess which result is least likely to lead to him being sued.<sup>294</sup> As it is stated above this approach is a traditional approach which is considered as peculiarity of U.S. common law.<sup>295</sup> Such approach is not recommended because as different authors on the area has noted it; if the absolute immunity is granted to the arbitrators it creates absolute shields for arbitrators from any accountability for their wrongful conduct and denies the aggrieved parties any remedies for the damage suffered.<sup>296</sup> So that adoption of such approach in statute and in contractual relationships is considered as bad because in the absence of any liability arbitrators are most likely to commit or fail to commit an increasingly diverse array of acts which can damages the interests of the parties.<sup>297</sup>

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<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> For example Ramos Mullerat classified the approaches to immunity into three types; see *Id.*, the articles on which the authors categorized the approaches to immunity into: absolute immunity, limited or qualified form of immunity and no immunity whatsoever

<sup>292</sup> *Id.* see also EmmanuelaTruli, *Supra* note 254 at p 4

<sup>293</sup> See *Id.* (Ramós Mullerat), see also Susan D.Frank,262) at p 31-33.

<sup>294</sup> *Id.* (Ramos Mullerat) at p 11.

<sup>295</sup> EmmanuelaTruly, *Supra* note 254 at p 7

<sup>296</sup> See Prathima R. Appaji; *supra* note 46 at p 66.

<sup>297</sup> *Id.*

#### 2.7.2.1.2. QUALIFIED IMMUNITY

As asserted by different writers on the area, academician and commentators have come up with suggestions that qualified immunity is the best alternative in addition to liability to arbitral institutions, and contractual liability<sup>298</sup> as an alternative to the absolute immunity. The limited (qualified immunity) is the most common form of immunity granted to arbitrators in national law as well as institutional arbitration rules.<sup>299</sup> A number of authors and commentators recommended the statutory adoption of qualified immunity the approach which is similar with limited liability and which considered as the best approach.<sup>300</sup> Under qualified immunity approach, the arbitrators as a rule enjoys immunity still, but would be liable for their actions and granting of the award, in limited circumstances, for acts or omissions which are conscious and intentional wrong doing but which are reasonably avoidable.<sup>301</sup> The supporter of this approach argues that, qualified immunity strike to balances the need to protect arbitrators from vexatious litigations from unsuccessful parties on one side and holding them accountable for acts done in bad faith in the other side.<sup>302</sup> As regard to this issue some commentators such as Susan D. Frank (2000) recommended the way the statute should be articulated in adopting the qualified immunity.<sup>303</sup>

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<sup>298</sup> As if Salahuddin, *Supra note* 44 at p 578-79

<sup>299</sup> See for example Scotland national arbitration act 2010 at rule 73; according to which arbitrator(s) is/are immune from the liability for anything done or omitted to be done in the performance or purported performance while conducting their function except when the arbitrators acted or omitted in bad faith or liability arise from an arbitrators resignation available on [https://www.trans-lex.org/605010/mark\\_970032/arbitration-act-2010/](https://www.trans-lex.org/605010/mark_970032/arbitration-act-2010/) retrieved on august 10, 2019 likewise Australian international arbitration law of 1974 at section 28 available on [https://www.trans-lex.org/606200/mark\\_970032/australian-international-arbitration-act-1974/](https://www.trans-lex.org/606200/mark_970032/australian-international-arbitration-act-1974/) retrieved on august 10, 2019 English arbitration act of the 1996 at rule 29 available on [https://www.trans-lex.org/602750/mark\\_970032/english-arbitration-act-1996/](https://www.trans-lex.org/602750/mark_970032/english-arbitration-act-1996/) retrieved on august 10, 2019 See also Ramos Mullerat, *Supra note* 247 at p 13. Most of the institutional arbitration rules and other model arbitration rules have adopted this style of arbitrators immunity see for example AAA (2001) at art 35, LCIA (2014) at art 31, ICC 2012 at art 40, and UNCITRAL model arbitration rule (as revised 2010) at art 16. By reverse some jurisdiction for example the US arbitration seems recognized the absolute immunity approach. see the US uniform arbitration act of 2000 at section 14 available on [https://www.trans-lex.org/604810/mark\\_970032/us-uniform-arbitration-act-2000/](https://www.trans-lex.org/604810/mark_970032/us-uniform-arbitration-act-2000/) last accessed on august 10, 2019

<sup>300</sup> See for example Elvi J. Olsen: Baar v. Tigerman: An Attack on Absolute Immunity for Arbitrators! California Western Law Review Volume 21 | Number 3 Article 6 pp. 564-589 (1985) at 564 through 589 the qualified approach is rationalized by different authors because the qualified immunity protects the arbitrators from harassment of the vexatious litigants one side by providing the immunity as principle but subjects the arbitrators who are malice or of reckless disregard of a party's rights liable and thus enable a litigant to recover damages under exceptional scenarios (see Emmanuela Truli, *Supra note* 254 at p 20-21).

<sup>301</sup> See Ramos Mullerat, *Supra note* 247 at p 13. As if Salahuddin, *Supra note* 44 at p 578-79

<sup>302</sup> *Id* (As if Salahuddin).

<sup>303</sup> According to Frank pointed out that, as a general rule the arbitrators shall be immune from civil liability to parties to arbitration agreement for anything done or omitted to be done in their capacity as arbitrators, except, i) if the arbitrators unjustifiably fails to render arbitral awards and i) arbitrators acted in bad faith while conducting in their judicial capacity (the exceptional scenarios subjects the arbitrators to liability. See Susan D. Frank, *Supra note* 262 at p 5

### 2.7.3. DO ARBITRATORS HAVE ANY LIABILITY?

What will be the fate of the parties if the arbitrators intentionally cause damages to the disputing parties? For example the arbitrators may fail to give an awards within a specified time, may refuse to sign the awards without the justification. Different arbitration rules normally impose the duties on the arbitrators among which the duty to remain independent, impartial, disclosure and due diligence are common. So the questions are, Should the duties of an arbitrator be backed by legal and contractual sanctions and how extreme should these duties be, once they are coupled with liability in cases of breach? Are different duties which are imposed by the different arbitration rules and which may be imposed by contractual relationship are without any sanction? Or shall the arbitrators enjoy immunity like judge? To what extent of immunity is to be enjoyed by arbitrators?

As different literatures shows that traditionally, the doctrine of quasi-judicial immunity has insulated the arbitrators from liability for their intentional wrong doing.<sup>304</sup> Accordingly the only traditional remedies for the arbitrator(s) misconduct are appeal and vacatur of the tainted award, a remedy available only under specific circumstances.<sup>305</sup> However, nowadays some commentators and authors argue that, the arbitrators should be liable like any other professionals for breaches of their duties which arise from various grounds.<sup>306</sup> The bases of the liability of the arbitrators as asserted by different writer are: -<sup>307</sup> The arbitrator's duties due to contractual obligations with the parties;<sup>308</sup> obligation to abide by institutional rules,<sup>309</sup> obligations under the law of the jurisdiction and ethical duties which require due diligence so that they shall be liable for breach of such duties.<sup>310</sup>

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<sup>304</sup> EmmanuelaTruli, *Supra note 254* at p 3

<sup>305</sup> *Id*

<sup>306</sup> See for example As if Salahuddin, *Supra note 44* at p575

<sup>307</sup> *Id*

<sup>308</sup> *Id*

<sup>309</sup> *Id*

<sup>310</sup> *Id*

### 2.7.3.1. APPROACHES TO LIABILITY

#### 2.7.3.1.1. ABSOLUTE LIABILITY

This is the approach in which there is no immunity to be enjoyed by arbitrators i.e. where parties or others involved in the dispute can challenge his handling of the matter for any reason and he can be held accountable by the national courts or the institution to which he is affiliated.<sup>311</sup> This is extreme liability and difficult to adopt like the absolute immunity. It is justified by the rationale that the arbitrator is a professional, and that he is therefore expected to carry out his function with a professional duty of care.<sup>312</sup> In line with the promise between the parties and arbitrators the parties are paying the arbitrator for his services and therefore they have a legitimate right to see that he handles their dispute in a professional manner and are liable for any damage that they may cause.<sup>313</sup> According to the reflection of the different literature on the area, it seems there is no jurisdiction in which arbitrators are fully liable for any failure like error of view or judgment in the decisions they reach.<sup>314</sup> The writer of this work also did not face institutional rules and other arbitration rule which adopted the absolute liability.<sup>315</sup>

#### 2.7.3.1.2. LIMITED LIABILITY

This approach is the same with the qualified immunity approach that has been discussed so far in the previous sections. This approach is the most commonly adopted approach in that the arbitrators will be granted immunity but held liable in limited circumstance, especially when the arbitrators intentionally act in bad faith against the parties.<sup>316</sup> It is better to cross refer with qualified immunity approach instead of writing redundantly since the two approaches are almost the same.

### 2.7.4. TYPES OF ARBITRATORS LIABILITY

Once it is argued that the arbitrators shall be subject to the liability even though it is difficult to subject the arbitrators to absolute liability, on the basis of the above grounds of the arbitrators liability one can talk different types of liability.<sup>317</sup> In the previous section, it is discussed well that, there are almost no

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<sup>311</sup> Ramos Mullerat, *Supra note 247* at p 13

<sup>312</sup> *Id*

<sup>313</sup> *Id*

<sup>314</sup> *Id*

<sup>315</sup> For instance except SIAC which adopted absolute immunity, all institutional rules and UNCITRAL rules adopted the qualified immunity or limited liability under their arbitration rules, the next section will further discuss the approach that adopted in the institutional and other arbitral rules

<sup>316</sup> Ramos Mullerat, *Supra note 247* at p 14.

<sup>317</sup> For instance Ramon Mullerat classified the liability of the arbitrators into: Civil, Disciplinary and Criminal liability. Similar classification is made by Asif Salahuddin. See Ramón Mullerat, *Supra note 247* at p 7-8. See also Asif Salahuddin *Supra note 44*

scenarios in which the arbitrator are absolutely immune from the liability and it is possible to argue no absolute liability at all. The most commonly accepted approach as to the liability of arbitrators is qualified immunity or limited liability. Having this in mind, it is possible to deduce that, arbitrators may be subject to the civil liabilities for damages which may be caused to the different parties in different ways.<sup>318</sup> Mainly, such liability may arise due to breach of their legal and contractual obligations. In addition to the civil liability of the arbitrators that may arise due to contractual relationship with parties, breaches on the part of the arbitrators of the instructions of the arbitration institution may generate a disciplinary responsibility which may result in their dismissal or failure to receive payment.<sup>319</sup> Disciplinary rule may also be enacted by the state the breach of which brings the liability. The third ground of the liability of the arbitrators may be the violation of the specifically provided provisions of certain criminal law while acting their judicial capacity would make the arbitrators criminally liable.<sup>320</sup> However, the criminal liability of the arbitrators is not the concerns of this paper as the writer has limited himself to the civil liability of the arbitrators only.

The other debatable issue as to the liability of the arbitrators is whether or not the arbitrator(s) is/are liable for their tortious activity. Some commentators advocate for non-liability of the arbitrators for their misconducts (which could be affirmative misconduct and failure to act). However, some other boldly advocates for the liability of the arbitrators for any fault he committed which could results in damages to parties.<sup>321</sup> According to the second argument which the writer consider it as the strong position, the arbitrators should subject to the tortious liability for damages that arises due to misfeasance such as; in appropriate withdrawal from the arbitration process, fraud, corruption and bad faith actions.<sup>322</sup> Similarly, the advocates of the tortious liability of the arbitrators argues that the arbitrators should be subjects to the tortious liability that arises from non-feasance such as failure to disclose conflict of interest, failure

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<sup>318</sup> See Id (Ramos Mullerat). at p 8. This journal has listed different grounds of liability of the arbitrators such as; i) Liability to the parties for breach of his legal or contractual obligations with the parties. ii) Liability towards the arbitration institution if he fails to comply with the institution's rules. iii) Liability towards all those who are involved in the arbitration process; lawyers, experts, witnesses (for instance, for breach of confidence). iv) Liability towards third parties who may suffer damage as a consequence of the culpable actions of the arbitrator.

<sup>319</sup> *Id.*, at p 8.

<sup>320</sup> For example criminal liability due to bribery under arts. 385 and 388 of the Criminal Code and illegal negotiations with the parties (art. 297-298 Criminal Code) of the Spanish criminal code. Criminal liability due to misconduct under art. 269 of Argentinian Criminal Procedure Code). See Id (RamósMullerat) at p 8.

<sup>321</sup> See Susan D.Frank, *Supra note* 262 at p 11

<sup>322</sup> *Id.*, at p 11-12

to abide by duty that imposed by contract and arbitration rules.<sup>323</sup> But, shall not be always rather should be if the non-feasance is under serious degree.

#### 2.7.5. LIABILITY OF ARBITRATORS UNDER SOME SELECTED NATIONAL ARBITRATION LAWS

There is no unanimous approach among the country as to the extent of civil liability for arbitrators. The positions are very different from jurisdictions which do not recognize any immunity to jurisdictions which apply an absolute immunity to jurisdictions. But for the case of these sections the writer will discuss only specified countries which are available for comparisons with Ethiopia. The Singapore's and Hong Kong's arbitration law will be discussed for the sake of comparisons with Ethiopia. Those countries are selected because the two have adopted the UNCITRAL model arbitration rules the issue in hand, i.e. independence and impartiality of arbitrators. Plus, those two states have added the liability provision beside the incorporation independence and impartiality of arbitrators from the model rules. So the writer consider the laws of those countries as UNCITRAL plus, but akin with the new (2010 UNCITRAL)

##### 2.7.5.1. SINGAPORE

It is seen in the previous part of this work that the Singapore international arbitration rules of 2002 and Domestic arbitration act of 2001 largely adopts the 1985 UNCITRAL Model Law. The 1985 UNCITRAL Model Law on arbitration rules has no provision for the liability of the arbitrators. It is the 2010 UNCITRAL arbitration rules which contain the best provision for the liability of the arbitrators but the 2010 UNCITRAL arbitration rule which contains the provision for liability arbitrator is not adopted in Singapore's domestic arbitration act of 2001 and Singapore's international arbitration rules of 2002. The Singapore's arbitration acts adopted provision for the liability of arbitrators and as regard to this liability of the arbitrators, the Singapore arbitration acts seems to adopt the immunity of the arbitrators from the liability. The domestic arbitration act of Singapore and SIAA under article art 20 and article 25 respectively stipulated that, an arbitrator shall not be liable for i) negligence in respect of anything done or omitted to be done in the capacity of the arbitrator; or ii) any mistake of law, fact or procedure made in the course of arbitration proceedings or in the making of an arbitral award.<sup>324</sup> Upon close reference of this provision one may argue that this provision has an implied liability upon express provision of the

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<sup>323</sup> Id, at p 12

<sup>324</sup> See the Singapore Domestic Arbitration at art 20and SIAA at art 25



immunity in the given scenarios. The writer belief that in the situation other than expressly provided under the provision the arbitrators is impliedly liable under article 20 of Singapore domestic arbitration act and 25 of SIAA.<sup>325</sup> The SIAC arbitration rule as regard to the liability of arbitrators is not part of this because it will be discussed as a part of institutional arbitration under the next section.

#### 2.7.5.2. *HONG KONG*

As it is noted out so far in the previous section, arbitration in Hong Kong is primarily governed by the Hong Kong Arbitration Ordinance (Cap. 609) (the “Arbitration Ordinance”), which came into effect on 1 June 2011.<sup>326</sup> This arbitration law of the Hong Kong which governs both domestic and international arbitration incorporated most of the provisions of the 2006 UNCITRAL model law. The liability provisions articulated under this act like that of the UNCITRAL arbitration rule of the 2006. Accordingly, as it can be inferred from section 104 and 105 of Hong Kong arbitration ordinance, the arbitrators are liable if and only if it is proved that the act was done or omitted to be done dishonestly.<sup>327</sup> Accordingly, other than those scenarios that expressly provided under the rule the arbitrators are immune from the liability. Thus arbitrators are immune unless the arbitrators acted or omitted dishonestly (bad faith causes liability)

#### 2.7.6. LIABILITY OF ARBITRATORS UNDER IBA, SOME SELECTED INSTITUTIONAL LAWS AND OTHER ARBITRATION RULES

As a general concept, almost all of the arbitration rules of institutions state that the arbitrator should have duty of independence and impartiality. Finally the arbitrators would be removed and replaced in case of existence of justifiable doubts of the arbitrator’s independence or impartiality. IBA guidelines, UNCITRAL model law and almost all the institutions arbitration rules impose the duty to disclose on the arbitrator of any circumstances that is likely to result in justifiable doubts. Having this in mind, the question may be; are the arbitrators held liable as to IBA Guideline, under the UNCITRAL model rules and different arbitration rule of institution? These all question would be answered in this section.

Normally, the extent of the arbitral liability and immunity are different under different arbitration guidelines, rules and institutions. At the inception, the IBA guideline and its code of arbitrators` ethics

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<sup>325</sup> Id.

<sup>326</sup> Dr. Andreas Respondek, Supra note 216 at p 80

<sup>327</sup> Hong Kong Arbitration Ordinance 2011 at art 104 and 105

stated arbitrator's duty to be impartial, independent, competent, diligent and discreet.<sup>328</sup> Those statements can be collected from the introduction part of the IBA guideline and its arbitrators code of ethics.<sup>329</sup> However, despite its assertion of different duty of the arbitrators, the IBA guideline and its code of arbitrators ethics remains silence about the arbitrator's liability or immunity in cases it poses different material and moral damages to the parties to arbitration. Therefore it is problematic because it is questionable whether or not the arbitrators are liable in case when they breach those duties.

The 1985 UNCITRAL arbitration rule keeps silence with regard to the arbitrator's liability. However, later on the revised arbitration rule of 2010 incorporated the provision that deals with the liability of the arbitrators under section II article 16.<sup>330</sup> This model rules on the arbitration prescribes the arbitral immunity as a matter of general principle. But already contemplate the possibility of arbitrator's liability as an exceptional circumstance for their conscious or deliberate wrong doing.<sup>331</sup> The UNCITRAL arbitration rules recognized the waiving possibility of the party of the liability of the arbitrators. .i.e. it is possible to make the arbitrators absolutely immune from the liability by the agreement.<sup>332</sup> The rule seems to intend to acknowledge the principle of parties' freedom to contract.<sup>333</sup> Some institutional rules also prescribe the arbitral immunity as a principle. Notably of AAA, and LCIA already contemplate the possibility of arbitrator's liability for their intentional misfeasance and bad faith conduct and when the applicable law says so.<sup>334</sup>

Likewise, ICC arbitration rules of 2012 under art 40 provided the arbitrators rights to enjoy immunity as a general rules but prescribe the liability of the arbitrators when the applicable law prohibits the

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<sup>328</sup> See the IBA code of ethics of the 1987 as stated under its introduction part

<sup>329</sup> See the introduction part of the 2014 IBA guidelines and its code of ethics 1987 The IBA code of arbitrator's ethics also made the same declaration.

<sup>330</sup> See UNCITRAL arbitration rules, (as revised by 2010) at art 16.

<sup>331</sup> See UNCITRAL arbitration rules (as revised by 2010) at art 16 which reads as: any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration save for intentional wrongdoing and when the parties waive, to the fullest extent permitted under the applicable law.

<sup>332</sup> *Id.*

<sup>333</sup> The principle of freedom of contract refers to the rights of parties to make contract as they likes, actually this principle may be subjects to the restriction (limitation) when the law requires so, but the UNCITRAL arbitration rules does not restricted this rights of the parties. See UNCITRAL arbitration rules at art 16

<sup>334</sup> See international Arbitration Rules of the American Arbitration Association (2001) at art 35 which reads as: The members of the tribunal (arbitrators are member of the tribunals) and the administrator shall not be liable to any party for any act or omission in connection with any arbitration conducted under these rules, except that they may be liable for the consequences of conscious and deliberate wrongdoing. See also LCIA arbitration rules of 2014 at art 31 which also reads as: *None of...any arbitrator(s), any emergency arbitrator(s) and any expert to arbitral tribunals shall be liable to any party howsoever for any act or omission in connection with any arbitration save for; i) When it is showed that the arbitrators committed consciously and deliberately wrong against party.*

limitation of the liability of the arbitrators.<sup>335</sup> However, the ICC arbitration rules is not clear as regards to the applicable law which prohibits the immunity of the arbitrators. Unlike the above practice of different arbitration institutions rules as regards to the liability of the arbitrators, under the Singapore International Arbitration Centre (SIAC) Rules 2013, an arbitrators enjoys the a blanket immunity under Rule 34.1.<sup>336</sup> Wherein arbitrators, among officers, employees and directors shall not be held liable for any arbitration proceedings governed under these rules.<sup>337</sup> SIAC seems adopted the absolute immunity scenarios of the US which under modern practice is almost impossible. The HKIAC have a nice articulation as regard to such liability. Pursuant to article 46 of the Hong Kong International Arbitration Centre (HKIAC), arbitration Rules of 2018, the liability of the arbitrators is excluded as a matter of principle except under limited circumstances.<sup>338</sup> Accordingly save for where the act was done or omitted to be done dishonestly, the arbitrators shall not be liable for any act or omission in connection with an arbitration conducted under HKIAC Rules.<sup>339</sup>

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<sup>335</sup> See ICC arbitration rules of 2012 under art 40 that provided as: *The arbitrators, ...(some other organs omitted intentionally here) ... shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law* at art 40.

<sup>336</sup> See SIAC Rules 2013 at rule 34(1)

<sup>337</sup> *Id.*

<sup>338</sup> See HKIAC Arbitration Rules of 2018 at art 46.

<sup>339</sup> *Id.*

## CHAPTER THREE

### 3. INDEPENDENCE, IMPARTIALITY AND LIABILITY OF COMMERCIAL ARBITRATORS UNDER ETHIOPIAN LEGAL FRAME WORK; COMPARATIVE INSIGHT

#### 3.1. INTRODUCTIONS

The alternative dispute resolution (ADR) in general and arbitration in particulars were known even before codification in Ethiopia.<sup>340</sup> Different literatures indicate that globally ADR which includes arbitration predates formal state court litigation.<sup>341</sup> So, that could be true also for Ethiopia. Traditionally the communities were using the ADR in general and arbitration in particular to solve different disputes that could arise due to commercial and non-commercial transactions.<sup>342</sup> The alternative dispute resolution named differently upon basis of the various languages. For instance nomenclature such as, *Shimglina, gilgil, jarsuma* are given for arbitration in Ethiopia literally.<sup>343</sup> However, such traditional words may not represent the current commercial arbitration. The modernizations of the ADR and arbitration legal framework in Ethiopia have taken place during the codification of the rules by 1950s and 1960s.<sup>344</sup> Before which, arbitration was only known within the context of traditional dispute resolution processes.<sup>345</sup> The 1960 Ethiopian Civil Code and the 1965 Ethiopian Civil Procedure Code were the two main laws which have the great impact in the introduction and development of modern ADR in general and arbitration in particulars in Ethiopia.<sup>346</sup> The 1960 Civil Code of Ethiopia incorporates the substantive aspects of the ADR. Conciliation, compromise and arbitration are among the different ADR mechanisms that are incorporated in the code.<sup>347</sup> However, since both the civil code and civil procedure code of Ethiopia reflects the spirit of the 1960s the laws cannot fit for the modern commercial transactions of this century.<sup>348</sup>

The paper in this chapter would describe and analyze the Ethiopian laws on the independence, impartiality and liability of the arbitrators. The writer in this chapter would rise up the silence of the

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<sup>340</sup> Michael Tashome law and practices of commercial arbitration in Ethiopia: brief overview.at p 14

<sup>341</sup> See for instance Haile Gabriel G. Feyissa, *Supra note 51* at p 298

<sup>342</sup> Michael Tashome, *Supra note 340* at p 14

<sup>343</sup> *Id.*

<sup>344</sup> Haile Gabriel G. Feyissa *Supra note 51.* at p 300 see also *Id* (Michael Tashome).

<sup>345</sup> *Id* (Haile Gabriel G. Feyissa).

<sup>346</sup> Michael Tashome, *Supra note 340*

<sup>347</sup> *Id*

<sup>348</sup> See for instance Alemayehu Yismaw Demamu: *Haramaya law review VOL. 4:1The need to establish a workable, modern and institutionalized commercial arbitration in Ethiopia* pp. 37-57 (2015) at p 37 & 42

Ethiopian arbitration laws on the issues of the factors and the standards that help to determine the independence and impartiality of the arbitrators. The paper would also disclose the silence of the Ethiopian rules on disclosure duty of the arbitrators and the liability of the arbitrators. The paper would further compare the Ethiopian arbitration rules in light of the different instrument such as IBA guideline, UNCITRAL arbitration model rules, some selected national arbitration laws and some selected institutions arbitration rules. The writer would finally suggest the most appropriate and best model to keep the arbitrators independent and impartial as well as to keep them accountable (liable) for their misconduct.

### 3.2. THE CURRENT LEGAL FRAMEWORK OF COMMERCIAL ARBITRATION IN ETHIOPIA

As regard to the arbitration in particular, currently the governing arbitration laws are found in article 3325 through 3346 of the CC and article 315 through 319 as well article 350 through 357 of the CPC. The civil code governs the substantive parts of the overall arbitration process such as arbitration agreement, appointments and removal (disqualification) of the arbitrator(s)<sup>349</sup> and the civil procedure code governs the procedural parts of the arbitration process such as principles and procedures as well as grounds of appeal, setting aside, recognition and enforcement of arbitral awards.<sup>350</sup> To begin with the concepts and meaning of the arbitration in the context of those Ethiopian laws, the Ethiopian Civil Code defines Arbitration as; “A contract whereby the parties to a dispute entrust its solution to a third party, the arbitrator who undertakes, to settle the dispute in accordance with the law.”<sup>351</sup> Thus, as it can be inferred from the above provision, in Ethiopia, Arbitration is a contractual based non-judicial dispute settlement mechanism whereby parties to a dispute resort to a third party (or parties) whose decision over the dispute is based on rules and which is binding like that regular court decisions. In fact, in many cases, parties have autonomy to agree even on the procedures of arbitration even under the Ethiopian Civil Code.<sup>352</sup>

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<sup>349</sup> This information can be collected from 3325 through 3346 of the CC

<sup>350</sup> See the Civil procedure code of Ethiopia at 315-319; 350 -357 of See also Michael Teshome *Supra note* 34o

<sup>351</sup> CC at Art.3325 (1)

<sup>352</sup> See for example CC at arts.3325 (2), 3330, 3331.

*In Ethiopia, there should be sufficient and separate arbitration laws that govern the domestic and international commercial arbitration.*

The commercial arbitration in Ethiopia is still governed by the old arbitration rules of the civil code and civil procedure code which are enacted by 1960 and 1965 respectively. As it is noted by a different author, these scattered arbitration laws under the CC and CPC are sketchy and non-comprehensive.<sup>353</sup> As a result those arbitration rules of Ethiopia cannot fit for the emerging modern laws and practices in international commercial arbitration in the modern arbitration system.<sup>354</sup> Further, different commentators on the Ethiopian arbitration law noted out that, Ethiopia is not gifted with workable, modernized and institutionalized commercial arbitration as a result of the above problems.<sup>355</sup> Thus due to the aforementioned and other reasons some writers concluded that the arbitration laws of Ethiopia existing under the civil code and civil procedure code of the 1960 and 1965 respectively do not go with the pace of today's more complex domestic as well as international commercial transactions, disputes settlement mechanisms.<sup>356</sup> As a result, the Ethiopian arbitration law and arbitration center that situated in Ethiopia may not become the choice of the business community in their national and international commercial dispute resolution.<sup>357</sup> As it known those laws have not been revised since its enactment and as a result the primitive arbitration laws of Ethiopia under CC and CPC expresses and shine the spirit of 1960s.<sup>358</sup> Thus one can easily understand that the Ethiopian arbitration rules are primitive and full of gap. For instance those laws have no doctrines and standards comparable with modern international commercial practice.<sup>359</sup> They are not, for example, comparable with arbitration guidelines, arbitration rules and practice of mostly accepted international and regional commercial arbitration institutions such as IBA guidelines on conflicts of interest, UNCITRAL, International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), American Arbitration Association (AAA), SIAC and HKIAC arbitration rules. Ethiopian arbitration rules also lag behind when compared with some national

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<sup>353</sup> See for instance Alemayehu Yismaw Demamu: *Supra note* 348 at p 37 & 42

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*, at p 45

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

arbitration acts such as Singapore and Hong Kong systems which have relatively modernized arbitration laws when seen in light of the Ethiopian context.<sup>360</sup>

The Ethiopian arbitration rules cannot fit with the best international practice. For instance as some authors noted that, the Ethiopian arbitration law cannot cope with UNCITRAL model law.<sup>361</sup> UNCITRAL model rule is an international non-binding model rules that intends to harmonize and modernize domestic and international law to enhance predictability in cross border commercial transactions.<sup>362</sup> It has international legal texts that address international commercial dispute resolution; non-legislative texts that include rules for conduct of arbitration proceedings; and notes on organizing and conducting arbitral proceedings.<sup>363</sup> As it is noted by authors on the area, as a result of the aforementioned problems, Ethiopia is facing difficulty in international commercial practice.<sup>364</sup> The UNCITRAL Model Law has principles and standards which are acceptable to nations having different legal systems and levels of economic and social development.<sup>365</sup> But Ethiopia has neither adopted nor incorporated those principles and standards of the UNCITRAL model rules.

It seems that the Ethiopian arbitration rules on the provisions of the civil code and civil procedure code are applicable to both domestic and international arbitration.<sup>366</sup> If so, the arbitration rules on the civil code and civil procedure code provides the unitary regimes for both domestic and international arbitration. On the other side some commentators argues that, Ethiopian arbitration laws seems to be designed for domestic arbitration regardless of international arbitration<sup>367</sup> attributing the fact to the reason that Ethiopia have not adopted and ratified different international instrument on arbitration such as New York Convention on recognition and Enforcement of foreign awards and also the fact that the arbitration laws of Ethiopia have not articulated in accordance with UNCITRAL model rule on arbitration.<sup>368</sup> It is further noted that, the arbitration rules in Ethiopia do not make difference as regard to

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<sup>360</sup> The arbitration laws of both Singapore and Hong Kong have been modernized upon incorporation of the UNCITRAL model arbitration rules and New York convention on the recognition and enforcement of foreign arbitral awards. However Ethiopia has neither adopted the UNCITRAL arbitration rules nor signed the New York convention.

<sup>361</sup> Alemayehu Yismaw Demamu: *Supra note* 348 at p 46

<sup>362</sup> UNCITRAL as revised 2010 arbitration model rules at preamble.

<sup>363</sup> UNCITRAL as revised 1985 as revised 2006 at preface

<sup>364</sup> Alemayehu Yismaw Demamu, *Supra note* 348 at p 46

<sup>365</sup> *Id*

<sup>366</sup> Hailegabriel G. Feyissa *Supra note* 51 at p 302

<sup>367</sup> see also Michael Tashome, *Supra note* 340 .at p 16

<sup>368</sup> *Id.*

domestic and international arbitration and the regime governing the two save for the recognition and enforcement of foreign awards which treated separately from domestic arbitral awards.<sup>369</sup>

### 3.3. THE CONCEPT OF INDEPENDENCE, IMPARTIALITY AND DISCLOSURE DUTY OF ARBITRATOR(S) IN COMMERCIAL ARBITRATION UNDER ETHIOPIAN LEGAL FRAMEWORK

There should be sufficient and clear provisions as to requirements for “impartiality” and/or “independence” under Ethiopian arbitration legal stream. Pursuant to Article 3325(1) of the civil code, the arbitrators required to “undertakes to settle the dispute in accordance with the principles of law.”<sup>370</sup> This provision of the Civil Code seems intended to realize the arbitration predictions on the two minimum standards of natural justice: “*audita alteram partem*” and “*non judex in causa sue*” (purports to preserve the parties’ equalities in the arbitration proceedings). According to this provision of the Civil Code, although it is not explicitly stated, an arbitrator should settle disputes using the basic principles of natural justice. Thus, it can be inferred from this provision that, an arbitrator must conduct the arbitration process fairly and impartially as well as independently upon avoiding different conflict of interest that could result from different factors.

However beyond the above inference in both Civil Code and Civil Procedure Code of Ethiopia there are no provision which adequately and explicitly obliges the arbitrators to be independent and impartial from the time of its proposals for appointment to the end of the arbitration process. Of course, it is possible for any of the parties to have recourse to the court pursuant to article 3325(1) and 3340(2) of the Civil Code and article 351 the Civil Procedure Code on the grounds of lack of independence and impartiality, with the result that requirements for impartiality and independence from date of proposal for appointment to the last date of delivering of the awards are implied by the arbitration law of Ethiopia.

Despite the above indirect but inadequate provision for the independence and impartiality requirement of the arbitrator(s) under the Ethiopian civil code and civil procedure code, unfortunately, those arbitration legal regimes doesn’t provide the definition of independence or dependence and partiality or impartiality as well. The law also doesn’t encourage declining nomination from the time when the parties approach the arbitrators for appointment, nor declaration of doubtful circumstances as to

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<sup>369</sup> Haile Gabriel G. Feyissa, *Supra note* 51 at p 300 see Id.

<sup>370</sup> See Cc at art 3325(1)



independence/ impartiality. Furthermore the arbitration legal regime also doesn't provide any clue as to what circumstance or which factors affects the independence and impartiality of the arbitrators.<sup>371</sup> The lack of sufficient clarity on the list of specific situations meant to give practical guidance could give rise to different problems. Thus, one can ask a question that, what if the parties do not go to the court despite the arbitrator's lack of dependence and lack of impartiality? In-short, the law fail to clearly inform the arbitrators to be independence and impartial from the time of the appointment of arbitrators to the end of the arbitration process.

### 3.3.1. THE DISCLOSURE DUTY: THE IGNORED STANDARD

As it is discussed so far under the above sections, the quality of individuals selected and appointed to perform arbitration functions is crucial for the capacity of the arbitrator(s) to deliver high quality services. International standards recognize the vital importance of objective criteria in selection and appointment of the arbitrators. As it is said again and again in the previous sections of this works, the quality of justice in commercial community in the arbitration process directly depends on the quality of the individuals chosen to be arbitrators. The importance of the quality of arbitrators for the overall strength of the arbitration process requires that applicable criteria and procedural rules be crafted and applied in a manner that ensures clear, rational and objective appointment so as to prevent injustice in the arbitration field. Among the different criteria for appointment of the arbitrators are the requirement to be independent and impartial are the two pillars international standard for arbitrators whilst there appointment for this capacity. But, such criteria and qualification for arbitrators are not explicitly provided under the Ethiopian arbitration legal regime as it is discussed in the above section. One may argue that such criteria and qualification can be derived from article 3340(2) of the civil code<sup>372</sup> which will be the concerns of the following section of this work. This writer argues that, this is not sufficient provisions to govern the issue in hand as there are so many inadequacies.

Beside to the above, the law doesn't require declaration of circumstances that could create doubtful as to impartiality/independence nor require the arbitrators to disclose the existence of any circumstances that could give rise to doubt as to independence and impartiality of arbitrators which are also another

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<sup>371</sup>See the IBA guideline, *Supra note* 53. Such instrument provides different factors that could be reason for a doubt as to the independence and impartiality of the arbitrators. The IBA guidelines classified those lists of factors into three groups with different level of effects and different duty of the arbitrators by using color code. So that it is better for Ethiopian legislator to see that guideline in the enactment of the future arbitration law to take a better experience from this guideline.

<sup>372</sup> See CC at art 3340(2)

standardized duty of arbitrators. But, unlike the Ethiopian case, the different national laws and arbitration rules has incorporated those duties of arbitrator(s) as standardized duty of arbitrators.

However, the writer would argue that, the disclosure duty on the arbitrators of any interest or relationship likely to affect independence and impartiality or which might create an appearance of partiality seems ignored under the Ethiopian arbitration rules. Plus there is no code of arbitrator's ethics which orders the arbitrators to notify the parties if he became aware of any kind of circumstances that may give rise to doubt as his/her independence and impartiality.

The silence of Ethiopian arbitration about the disclosure obligation of the arbitrators of any situation giving rise to doubt as to the independence and impartiality may create a problem. This is because absence of the disclosure obligation paves a way for partiality and lack of independence of the arbitrators.

### 3.3.2. CHALLENGES AND DISQUALIFICATION OF ARBITRATORS IN ETHIOPIAN ARBITRATION LEGAL REGIME

*There should be a clear provisions of law governing the challenge or removal of arbitrators due to suspicion of independence and impartiality under Ethiopian arbitration law*

The other issue which must be duly considered in this section is the challenge or removal of arbitrators due to suspicion of independence and impartiality in the context of Ethiopian arbitration law. The Ethiopian civil code under art 3340 provided the various grounds of challenge and disqualification of the arbitrators. Among those different grounds, the independence and impartiality are the two main grounds for challenge and disqualification of arbitrator(s) if the reasons become sufficient to indicate the inability of the arbitrator to discharge his functions properly.<sup>373</sup> In addition to the above provision, pursuant to art.351 of the civil procedure code of Ethiopia, the circumstances which could be a reason for doubt of the independence and impartiality of the arbitrators are stated as the grounds for appeal.<sup>374</sup> However, the

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<sup>373</sup> CC at art 3340 sub 2: provides that, the arbitrator appointed by agreement between the parties or by a third party may be disqualified where b) there are any circumstances capable of casting doubt upon his impartiality or independence.

<sup>374</sup> CPC at art 351 provides that: No appeal shall lie from an award except i) where failed to .inform the parties or one of them of .the time or place of the hearing or to comply with the" terms of the submission regarding admissibility of evidence; or (ii) refused to bear the evidence of material witness or took evidence in the absence of one of the parties or of one of them: or (d) the arbitrator has been guilty of misconduct, in particular where: (i) be heard one of the parties and not the other; ii) be was unduly influenced by one party, whether by bribes or otherwise; or (iii) be acquired an interest in the subject-matter of dispute referred to him. These grounds of appeal are the situation that affects the independence and impartiality of arbitrators. Different rules of arbitral and national arbitration rules institution made those factors as circumstances that may undermine the independence and impartiality of arbitrators.

main problem with this provision are that: at first instance, the provision does not clearly and sufficiently lists the circumstance that gives rises to doubt as to independence and impartiality of the arbitrators upon which the arbitrators can be requested to be removed(disqualified) from the position.<sup>375</sup> The paper in the previous sections has discussed the lists of the circumstances under IBA guidelines and its arbitrator's code of ethics which could be a lesson for Ethiopia. That list of situation can also be found in the ABA/AAA and its code of Ethics.<sup>376</sup> Plus the arbitration laws of some countries and institutional arbitration rules contains such lists that may give rises to the doubt as regard to the independence and impartiality of arbitrators. But unfortunately the Ethiopian arbitration law under both Civil Code and Civil Procedure Code neither provided those circumstances clearly and sufficiently which may be a ground for removal nor have arbitrators code of ethics which gives the clear and sufficient information to the arbitrators as regards to what situation that gives rises to doubt as to independence and impartiality of the arbitrators which could be a reason for removal. Indeed the tribunal may require furnishing of persuasive evidence as to existence of different factors which could give rise to doubt as independence and impartiality of the arbitrators in their eve of application for removal in Ethiopia. As regard to this, there is a court decision on the case between Harar Trading Co.v.Gelatali Hankina Co.<sup>377</sup> in which the courts attempted to explain the factors that may affects independence and impartiality of the arbitrators. Basing on Art 3340(2) of the CC the appellate court argued that enough and persuasive evidence was not presented as to the dependence and partiality of the arbitrator due to their previous relationship: and finally concluded that arbitrators must stay on the proceedings.<sup>378</sup>

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<sup>375</sup> Actually it is impossible to "strip" adjudicators of everything that influences or "biases" their decision making. It is also undesirable: even stripping those of any such influence or bias would remove all the qualities that make them competent and good decision makers but setting the standard is important on the other side.

<sup>376</sup> For example under ABA/AAA and its code of ethics, the factors that may affect impartiality or which might create an appearance of partiality are; i) any known direct or indirect financial or personal interest in the outcome of the arbitration. ii) Any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts; ii) any prior knowledge they may have of the dispute; and (iv) any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

<sup>377</sup> Harar Trading Co.v.Gelatali Hankina Co.Vol 2,Report of Arbitral Award, Ethiopian Arbitration and conciliation Center at p 190- 198

<sup>378</sup> The final conclusion made after the two side argument in which the respondent argued that the arbitrator has to be replaced because there is a sufficient reason to believe that the arbitrators will be prejudiced against him due to their previous relationship and on the other side the arbitrators counter-argued that the claim is baseless as the respondent also failed to corroborate evidence as to his partiality.

In addition to the aforementioned problem, the other main gap of Ethiopian arbitration laws as to the views of the writer is that, there is no provision which obliges the arbitrators to notify the parties the existence of the situation which can give rise to doubt as to the independence and impartiality of the arbitrators as a ground of the disqualification of the arbitrators in the future.

Still the other gap is that, there is no provision as to the standard on which the arbitrators could be removed or disqualified from his/her position. Therefore, this may enable one to ask the question such as: should the arbitrators be challenged and removed from the position for the mere reason that the parties apply for disqualification? What will be standard to challenge and disqualify the arbitrators from their position? Whether objective standard (doubt in the eyes of reasonable man) or subjective standard (doubt in the eyes of parties)? All those questions are remained unanswered under art 3340 and other provisions of the civil code of Ethiopia.<sup>379</sup> Therefore, this writer would argue that, the doctrine of independence and impartiality are thus not, adopted in its full-fledged conception in the Ethiopian arbitration legal regime.

#### 3.4. LIABILITY OF ARBITRATORS

The Ethiopian arbitration legal regime that mainly scattered under the civil code and civil procedure code are silent about either the immunity or the liability of the arbitrators as well as the question of the applicable law. There are of course the criminal provisions which deal with the criminal liability of the arbitrators in Ethiopia. The laws which trace as to criminal liability of the arbitrators are Corruption Crime Proclamation No. 881/2015 and Criminal Code Proclamation No. 414/2004 of Ethiopia. Accordingly, art.12 of the Federal Negarit Gazette of the FDRE corruption crimes proclamation no 881/2015 and art 410 of the FDRE criminal code reads that, the arbitrators are criminally liable if they committed corruption crime.<sup>380</sup> Those few provisions are about the criminal liability of the arbitrators in Ethiopia. However, there are no provisions as to the civil liability of the arbitrators which is the concern here. This may give a rise to various questions such as: what will be the fate of parties in case when the arbitrators caused damages to them? Sometimes the arbitrators may cause damages to the parties to arbitration with bad intention. If so, are the arbitrator(s) immune from civil liability under any circumstances? Are the duty of arbitrators to be independence and impartial without any sanction? To what extent the arbitrators can enjoy immunity from the liability? On the other side, if one argues that

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<sup>379</sup> See Cc at art 3340.

<sup>380</sup> See Proclamation No. 881/2015, *Supra note* 28 at art 12 The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004 at art 410

arbitrators are liable, what principles of law apply to determine the liability of arbitrators for acts related to their decision making function under Ethiopian arbitration law? Whether it is under Contract law or Tort law that the arbitrator(s) could be liable is no clear. To what extent the arbitrators are liable? Those entire questions are not answered by the Ethiopian arbitration legal regime. However, the users of arbitrations who are paying for the services of an arbitrator, would like to have an avenue of redress if the arbitrator fails to apply sufficient care and attention<sup>381</sup> to their case or who does not in the arbitrant`s view, adhere to proper rules of procedure, or fails to display the appropriate level of skill expected of him.<sup>382</sup>

In a nutshell the Ethiopian arbitration law neither contains the provision for civil liability of the arbitrators nor does backed by the arbitrators` code of ethics. Thus, there are no laws that contain the provisions for liability of arbitrators. Beside to this, Ethiopia does not have arbitrators code of ethics which contains the liability provision. Such silence of the law may give rise to different problems. For instance, if there is no civil liability of the arbitrators, the parties who face damages due to the arbitrator(s) malicious and bad faith act remains without being compensated. Plus the arbitrators may become negligent in the arbitration process if there are no such provisions at all. The court may faces dilemma as to what principles of law will be applicable in case when the suit for damages brought against the arbitrators if the provision for liability is not clear under the arbitration legal regime. The court may also faces difficulties as to whether to relieve the arbitrators immune from liability or to rule them liable in case the claim is brought against the arbitrators.

### 3.5. INSTITUTIONAL ARBITRAL RULE IN ETHIOPIA

Currently in Ethiopia, there are only two institutionalized commercial arbitration centers: Addis Ababa Chamber of Commerce and Sectorial Association Arbitration Institute and Bahir Dar University Arbitration Center. Hereunder, the thesis will discusses and compares every aspect of arbitration rules of AACCSA and BUAC in light of international arbitration rules and with various institutions arbitration rules as to independence, Impartiality and liability of arbitrator(s). BUAC actually is using the AACCSA

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<sup>381</sup> Those standards are not actually exists on the UNCITRAL model rules on the arbitration and different national and institutional arbitration rules rather those are the necessary language that employed by report that made by Singapore Academy of law so that the writer believes such standards should be taken into consideration while enacting the rule the liability of the commercial arbitrators. See. Singapore Academy of Law, report on review of arbitration laws law reform committee august 1993 at p 28

<sup>382</sup> Id, (Singapore Academy of Law).

rules but to date there is draft arbitration work. The writer uses the draft arbitration rules of the BUAC because the writer hopes this draft rule is better than even the AACCSA rules.

### 3.5.1. INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS UNDER INSTITUTIONAL RULES IN ETHIOPIA

As regards to independence and impartiality of arbitrators under institutional rules in Ethiopia, both the AACCSA and BUAC Rules of Arbitration provided an arbitrator duty to be impartial and independent while they conduct the arbitration process.<sup>383</sup> Further, to ensure the independence and impartiality of the arbitrators` in the arbitration process, both the AACCSA and the draft BUAC arbitration rules requires the arbitrators to sign declaration of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties.<sup>384</sup> As regard to the standard of independence and impartiality of arbitrators, the draft BUAC arbitration rules clearly provided that, when accepting his/her mandate, the arbitrator shall, to the best of his knowledge, be objectively independent and impartial (the second concept is added by the writer).<sup>385</sup> The AACCSA actually seems silent as to general standard for general rule of independence and impartiality.

#### 3.5.1.1. THE DISCLOSURE DUTY

As it is made part of discussion in the previous sections, the requirement of disclosure is one pillar means to ensure the independence and impartiality of arbitrator(s). Like the other international arbitration institutions and arbitration rules, the AACCSA rules and the draft rules of BUAC requires the arbitrators to disclose any circumstances that gives rise to the doubt as to independence and impartiality of him/her.<sup>386</sup> The standard for disclosure of any circumstances that may give rise to doubt as to independence and impartiality of the arbitrators is subjective standard under the AACCSA arbitration rules.<sup>387</sup> Because the rules reads as “in the eyes of parties”<sup>388</sup> Whereas such standard for disclosure

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<sup>383</sup>The Addis Ababa Chamber Of Commerce and Sectorial Association Arbitration Institute Rules of Arbitration November 25,2008 at art 13(1) see also the BUAC draft arbitration rules at art 11,12 and 16 (1)

<sup>384</sup> Id, at art 13(2) & 13 (3) See also the draft BUAC arbitration rules at art 13 but the BUAC rules is not clear to the written statement will be submitted

<sup>385</sup> See Id (BUAC) at art 12

<sup>386</sup> See AACCSA, *Supra note 383* at art 13(2) &13(3) See also the draft arbitration rules of BUAC at art 16(2). The AACCSA obliges the arbitrators to disclose to both secretariat of the arbitration institution and parties to arbitration while the BUAC requires the arbitrators to disclose to the other arbitrators and parties to the arbitration the existence of the circumstances.

<sup>387</sup> Id (AACCSA) at art 13(2)

<sup>388</sup> *Id*

under the draft arbitration rules of BUAC is objective one.<sup>389</sup> As the draft rules requires the justifiable doubt to disclose the existence of the circumstances.<sup>390</sup> So that the arbitrators are required to disclose the existence of the circumstance which may give rise to doubt as to the independence and impartiality<sup>391</sup> in the eyes of the parties as per the rules of the AACCSA arbitration rules<sup>392</sup> and if there is justifiable doubt under the draft rules of BUAC.<sup>393</sup> However the subjective standards is blamed for its lack of the certainty and the recommended standard most of the case is objective standard which is adopted by the most institutional arbitration rules in the world experience.<sup>394</sup>

### 3.5.1.2. CHALLENGE OF ARBITRATORS

As regards to challenge, so far, this work has showed that different institutional arbitration rules and international arbitration rules explicitly provides the lack of independence and impartiality as a grounds for application for disqualification of the arbitrators. Likewise the draft rules of the BUAC clearly stated the doubt as to the independence and impartiality of the arbitrators as ground for challenge and removal of the arbitrators.<sup>395</sup> However, coming to the AACCSA, it fails to show clearly the lack of independence and lack of impartiality as a ground for application of disqualification. Even though the laws fails to clearly provide it, one can infer from the close readings of art 13-15 of the AACCSA that lack of independence and partiality can be a ground for application for challenge and disqualification of arbitrators.<sup>396</sup> Pursuant to article 14 of the AACCSA, a party who wishes to challenge an arbitrator shall send a written statement to the Director of the Institute stating the reasons for the challenge.<sup>397</sup> Whereas the draft rules of the BUAC stated the submission of the written statement to the arbitral tribunal and to the other party.<sup>398</sup> The AACCSA arbitration rules failed to state the reasons that are grounds for challenge of the arbitrators. By the reverse the draft rules of the BUAC clearly provided the grounds for the challenge of the arbitrators.<sup>399</sup> Thus under both institutions arbitration rules, a party who wishes to

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<sup>389</sup> BUAC at art 16(2)

<sup>390</sup> BUAC at art 16(2)

<sup>391</sup> See both AACCSA at art 13(2) and Draft arbitration rules at art 16(2)

<sup>392</sup> See *Id* (AACCSA) at art13(2)

<sup>393</sup> BUAC at art 16(2)

<sup>394</sup> Most of the best experienced institutions UNCITRAL Arbitration Rule (as revised in 2010) at article 11 see also See ICC Rules of Arbitration 2016.at article 11 phara.3 see also See the AAA 1, 2013 Fee Schedule Amended and Effective July 1, 2016 at rule 17 see also See LCIA Arbitration rules (2014)at article 5 phara.5

<sup>395</sup> See the draft arbitration rules of the BUAC at art 17 & and 18

<sup>396</sup> See AACCSA at art 13-15

<sup>397</sup> *Id*, at art 14(1)

<sup>398</sup> See the draft rules of the BUAC at art 18 (2(a))

<sup>399</sup> See the draft arbitration rules of the BUAC at art 17 (2) accordingly the lists of the grounds are; a) He has a direct interest in the outcome of the dispute; b) He is a relative to one of the parties to the dispute or to their agent, as provided for under the

challenge arbitrators can submit such statement to do so upon stating the lack of independence and partiality as reasons for challenge.<sup>400</sup>

### 3.5.2. LIABILITY UNDER THE INSTITUTIONAL ARBITRAL RULES

The issue as refers to either immunity or liability of the arbitrators is not addressed under the AACCSA. Similarly the draft rules BUAC fail to address the liability of the arbitrators.<sup>401</sup> Actually if one can consider the disqualification and removal of arbitrators as a liability of arbitrators it is provided by AACCSA arbitration rules that the arbitrators may be disqualified (removed) upon the fulfillment of the conditions under article 14-15 and by the draft rules of the BUAC under art 17 &18.<sup>402</sup> However, beyond the implication on the probability of challenge and disqualification of the arbitrators for either lack of independence and partiality of arbitrator(s) or other grounds, there is no provision that addresses the liability of the arbitrators. As it was discussed in the previous section, different national arbitration acts and different institutions` arbitration rules adopted different approach to liability of arbitrators. But such is not clear under arbitration rules of both AACCSA and draft rules of the BUAC. Most of the institutional arbitration rules and UNCITRAL model arbitration rules of the 2010 adopted the qualified immunity which is the most best and recommended approach. However the AACCSA and BUAC arbitration rules adopted nothing as to those approaches of liability of arbitrators. Thus, the AACCSA and the draft arbitration rules of BUAC are unclear whether the arbitrators are immune from liability or subject to liability at any circumstance.

#### 3.5.2.1. *THE INSUFFICIENCY OF TRADITIONAL REMEDIES*

The traditional and most sought after remedy for arbitral misconduct may be appeal rights and the setting aside of the arbitral award as it is stated under the 1965 of the Ethiopian Civil procedure code.<sup>403</sup> Some contest that such remedies for breach of the arbitrators duties such as appeal and setting aside are

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appropriate law; c) He has privately met with one of the parties to the dispute on matters pertaining thereto after the commencement of the arbitral proceedings; d) He has accepted an invitation to entertainment or a gift from a party to the dispute or from his agent after the commencement of the arbitral proceedings

<sup>400</sup> This can be inferred from article 14 of the AACCSA. see the AACCSA at art 14(1) but clearly provided under the draft arbitration rules of the BUAC at art 17 & and 18

<sup>401</sup> The phone interview with the Tagagne (the Bahirdar Universtity school of law V/Dean and the member of the working group of the draft rules) on 09-09-2019.The writer obliged to conduct the phone interview with concerned parties because the draft rule is not published and not provided to the writer in its full text.

<sup>402</sup> The AACCSA at art 14 reads about the challenge and grounds for a challenge of the arbitrators and art 15 removal as well as grounds to be fulfilled to remove an arbitrator(s) see also Draft arbitration rules of the BUAC at art 17 & 18

<sup>403</sup> The CPC under its article 351 and 355 provided the grounds for appeal and setting aside respectively which may be considered as a remedy for misconduct and gross negligence.



not a sufficient remedy for parties unless those misconduct backed by the sanction (liability).<sup>404</sup> This is because, although there are such traditional remedy to reverse the bad effects of the improper awards, those traditional remedy such as appeal and setting aside does not compensate the aggrieved parties for lost time, wasted attorney's fees, payments to arbitrators and other incidental and consequential damages which are substantial for the aggrieved parties.<sup>405</sup> So that, the above remedy may not ensure the parties benefits the reason why they resorts to the arbitration instead of going to the courts.<sup>406</sup> Beside to the above insufficiency of remedies, the writer also believes that, it is better to introduce the prior remedy like disclosure duty of arbitrator and liability of the arbitrators.

### 3.6. COMPARATIVE INSIGHT AND LESSON FOR ETHIOPIA

#### 3.6.1. ETHIOPIAN ARBITRATION LAW IN LIGHT OF IBA GUIDELINES

The IBA guidelines provided almost the comprehensive idea of the independence and impartiality of the arbitrators. However the Ethiopian arbitration legal regimes are not comprehensive because at first instance it does not clearly oblige the arbitrators to be independence and impartial while accepting an appointment to serve and remain so until the final award has been rendered. Such scenarios are clearly provided by the IBA guideline. In fact there are some provisions which contain the hint as to the issue in hand. The article 3325(1) of the Ethiopian civil code requires the arbitrators to undertake to settle the dispute in accordance with the principles of law.<sup>407</sup> And also art 3340 of civil code provides independence and impartiality as a ground for disqualification and also there is an inference from art 351 of the civil procedure code that such value may be a ground of appeal.<sup>408</sup> Therefore one can argues that, independence and impartiality are fundamental parts and parcel of the principles of law thereby the arbitrators required to undertake to settle dispute independently and impartially at all stages of arbitration proceedings. But, this writer believes that the law was no sufficient and clear to put those values in the mind of the parties who administer justice in arbitration mainly the arbitrators. So that there are so many experience that the guideline could lend to Ethiopian arbitration regime on independence and impartiality of the arbitrator(s).

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<sup>404</sup> See for instance EmmanuelaTruli, Supra note 154 at p 19. Accordingly the problem with appeal and setting aside is that both may not deter misconduct or provide an incentive for increased professionalism.

<sup>405</sup> Id

<sup>406</sup> It is discussed in the introduction part of this work that when the parties choose to entrust their dispute to arbitration instead of a court, they do so because they believe arbitration is flexible in its procedure, faster and more cost-effective way of dispute resolution. But the traditional remedy such as appeal and setting aside under the Ethiopian civil code and civil procedure code cannot achieve this purpose see Id (EmmanuelaTruli)

<sup>407</sup> See CC at art 3325(1).

<sup>408</sup> See CC at art 3340 and CPC at art 35.

In general, the IBA guideline is clear in providing the circumstances under which arbitrators should decline appointment, duties to investigate potential conflicts, and so on.<sup>409</sup> Further, the Guidelines list specific situations indicating whether they warrant disclosure or disqualification of an arbitrator in order to promote greater consistency and to avoid unnecessary challenges and arbitrator withdrawals and removals. However under Ethiopian arbitration legal regime there are no clear provisions at all as to all those things.

The IBA guidelines also provided the multi factors that can put the independence and impartiality of arbitrators in question and classified those factors into different codes with their respective different effects. As regards to the standards of determination of the independence and impartiality whilst the appointment of the arbitrators there are so many issues that addressed by the IBA guidelines. To ensure the independence and impartiality of the arbitrators the IBA guideline, has a comprehensive guideline for disclosure obligation of arbitrators, the level of the disclosure are different under the guideline basing on the factors that rise doubt as to independence and impartiality of the arbitrators which classified into red list, orange list and green list. Those could be a great lesson for Ethiopia to establish the comprehensive arbitration legal framework in the future

The IBA guideline provides different standards of the disclosure on the bases of the lists type i.e. red, orange and green lists. The objective test devised and prevails over the subjective test in the red lists and orange lists in the IBA guidelines (i.e. justifiable doubt is the standards to disclose under the red lists and green lists). Whilst under the green lists, the standard of disclosure is the subjective standard. This subjective standard is from “the eyes of parties.” In Ethiopia, there are neither disclosures nor classification of those grounds or standards of disclosure with their different effects on the level and necessity of disclosure. Thus Ethiopian arbitration legal regime needs to be clear and be comprehensive by classifying those factor with their different effects on disclosure like that of IBA guideline upon taking the situation of the country into consideration.

As regards to the challenge of arbitrators on the bases of lack of independence and impartiality, the IBA guideline, implies as those lists coded into red, orange and green lists can warrants the challenge and disqualification of the arbitrators. As some commentators note out, the guidelines implies that, if an arbitrator chooses to accept or to continue with an appointment despite the existence of bias application

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<sup>409</sup> see IBA Guidelines, *Supra note* 63 4-17

for disqualification is appropriate and a challenge to the appointment should succeed.<sup>410</sup> Thus, the standards of challenge and disqualification of the arbitrators under the guideline could be both objective and subjective standards as the two are the standards that help to determine the independence and impartiality of the arbitrators.

Coming to the case of Ethiopia in light of IBA guideline, the Ethiopian arbitration law also provided that the arbitrators can be disqualified provided that, there is/are any circumstances capable of casting doubt upon his independence and impartiality.<sup>411</sup> However, the problem with Ethiopian arbitration laws is that there are no clear provisions as to both factors and standard that helps to determine the independence and impartiality of the arbitrators for challenge and disqualification of the arbitrators. Beside, Ethiopian arbitration laws are not clear as to who will determine the independence and impartiality of the arbitrators in the process of challenge and disqualification of the arbitrators.

As regards to the liability of the arbitrators, the IBA guideline likewise the Ethiopian case is not clear. Despite its assertion of different duty of the arbitrators, the IBA guideline and its code of arbitrator's ethics remains silence about the arbitrator's liability or immunity in cases arbitrator(s) poses different material and moral damages to the parties to arbitration. Therefore it is problematic as it is questionable whether or not the arbitrators are liable in case when they breach those duties. The same is true in the context of Ethiopia. The Ethiopian arbitration law should be clear and should have good practice in the future.

### 3.6.2. ETHIOPIAN ARBITRATION LAW IN LIGHT OF SOME SELECTED COUNTRIES LAW

Almost all jurisdictions arbitration act obliges the arbitrator(s) to be independent and impartial. This work will compare the Ethiopian arbitration legal regime with two countries arbitration act. i.e. with Singapore and Hong Kong as to the issues in hand. The rules of those countries are chosen because both countries have attempted to adopt the internationally harmonized rule on the arbitration via adopting the UNCITRAL model rules on the arbitration. As regards to the independence and impartiality of the arbitrators in Singapore, the domestic arbitration act under chapter 10 obliges the appointing authority to ensure the appointment of an independent and impartial arbitrator.<sup>412</sup> The same is true under Hong Kong

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<sup>410</sup> See Leon Trackman, *Supra note* 68 at p 13

<sup>411</sup> See CC at art 3340(2)

<sup>412</sup> Singapore Domestic Arbitration Act of (200) at sect 13(6(f))

arbitration ordinance.<sup>413</sup> Both the Singapore's and the Hong Kong's arbitration rules adopted the UNCITRAL arbitration rules so that both laws can be considered as the moderns laws which cop up with modern transaction laws.<sup>414</sup> Comparing with the case of Ethiopia, The Ethiopian arbitration laws does not clearly gives a hint as to ensuring of the appointment of an independent and impartial arbitrator at earlier period of the appointment of the arbitrators

As regards to the disclosures obligation of the arbitrator from earlier proposal for appointment up to the end of the arbitration process, both the Singapore's arbitration laws and Hong Kong arbitration ordinance requires the arbitrators to disclose all circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence.<sup>415</sup> When we consider the case of Ethiopia, the arbitration laws are silent as to the disclosure duty of the arbitrators of any interest or relationship likely to affect independence and impartiality or which might create an appearance of partiality. Plus in Ethiopia, there is no code of arbitrators' ethics which orders the arbitrators to notify the parties if he became aware of any kind of circumstances that may give rise to doubt as to his/her independence and impartiality. Such absolute ignorance may be backed with problem against the mechanisms to ensure the independence and impartiality of the arbitrators. The reasonable doubt which is objective standard of independence and impartiality helps to determine the necessity of the disclosure by arbitrators in both Singapore and Hong Kong.<sup>416</sup> As regards to the independence and impartiality as a ground for challenge and disqualification of the arbitrators, the Singapore and Hong Kong arbitration act adopted the UNCITRAL arbitration rules of article 12. Accordingly art 14 of SAA and art 25 through 26 of HKAO reads that, arbitrator's appointment may be challenged only if circumstances exist which give rise to justifiable doubts as to his

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<sup>413</sup> See al Hong Kong arbitration ordinance Chapter: at section 24 this section directly adopted the rule of appointments of the arbitrators in general and the independence and impartiality of arbitrator as a qualification that required from the arbitrators under art 11 of the UNCITRAL rules of the appointments of the arbitrator(s).

<sup>414</sup> The Singapore arbitration laws adopted the 1985 UNCITRAL arbitration rules whereas the Hong Kong Arbitration Ordinance adopted the 2006 UNCITRAL arbitration rules.

<sup>415</sup> See Singapore's domestic Arbitration Act, at Sect. 14(1) & 14(2), see also Singapore's International Arbitration Act at art. 12 Model Law See also Hong Kong arbitration ordinance Chapter: at section 25(1) this act directs incorporated the art 12 of the UNCITRAL arbitration rule. Besides to the provision of the Arbitration Ordinance there are also different codes of Ethics of arbitrators and institutional rules which provides the ongoing duty of disclosure of any interest or relationship likely to affect his impartiality or which might reasonably create an appearance of partiality or bias. See The Hong Kong Institute of Architects ("HKIA") and The Hong Kong Institute of Surveyors ("HKIS") code of ethical conduct for members in the joint panel of arbitrators at rule two see also the Hong Kong International Arbitration Centre administered arbitration rules at art 11(4(b)) which provides that; Before confirmation or appointment, a prospective arbitrator shall... (b) Disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, once confirmed or appointed and throughout the arbitration, shall disclose without delay any such circumstances to the parties unless they have already been informed by him or her of these circumstances

<sup>416</sup> See SAA at art 14 and SIAA at art 12 see also Hong Kong arbitration ordinance, at section 25(1)

impartiality or independence or he does not possess the qualifications agreed to by the parties.<sup>417</sup> As it can be inferred from the above two legal system the standard to determine the independence and impartiality in challenging the arbitrators is “*justifiable doubt*” which is objective standard. So that, arbitrator can be challenged if there is objective standard that is justifiable doubt as to independence and impartiality of the arbitrators. Coming back to the situation of Ethiopia in relation to the experience of those two jurisdictions, the independence and impartiality are the two main grounds for application for disqualification if the reasons become sufficient to indicate the inability of the arbitrator to discharge his functions properly.<sup>418</sup> However, there are is no standard to determine the reasonability of the challenge and disqualification of the arbitrators in the case of Ethiopia.

With regard to the liability of the arbitrators, as it is discussed so far in the previous sections, the Singapore arbitration legislations adopted the UNCITRAL model arbitration rules of the 1985. However the 1985 UNCITRAL model rules do not contains the provisions for the liability of the arbitrators. It is the 2010 revised model rule which contains the provision for liability of the arbitrator. But, the 2010 revised model rule is not incorporated by Singapore’s arbitration legislation. However, both the domestic and international arbitration acts of the Singapore have a provision for the liability of arbitrators under art 20 and 25 respectively.<sup>419</sup> Those arbitration legislations seem to adopt the immunity of the arbitrators from the liability.<sup>420</sup> In considering the arbitration ordinance of the Hong Kong, the section 104 and 105 reads that, the arbitrators are liable if and only if it is proved that the act was done or omitted to be done dishonestly.<sup>421</sup> Thus, arbitrators are immune unless otherwise the arbitrators committed or omitted something that may causes damages to the parties and if and only if it is proved that the act was done or omitted to be done dishonestly. Considering the cases of the Ethiopia, there are no clear provisions as to whether the arbitrators are immune or liable under any circumstances. Thus, Ethiopia should duly consider the practice of those countries and should adopt the best experience as a lesson. As to this issue the writer recommends the adoption of the UNCITRAL arbitration rules of the

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<sup>417</sup> See Id (SAA) at section 14(3See also Id (Hong Kong arbitration ordinance) 1 at section 25 and 26

<sup>418</sup> See CC at art 3340(2).

<sup>419</sup> See SAA at art 20 and SIAA at art 25

<sup>420</sup> The domestic arbitration act of Singapore and SIAA under article art 20 and article 25 respectively stipulated that, an arbitrator shall not be liable for i) negligence in respect of anything done or omitted to be done in the capacity of the arbitrator; or ii) any mistake of law, fact or procedure made in the course of arbitration proceedings or in the making of an arbitral award. See the domestic arbitration act of Singapore at art 20 and Singapore’s international arbitration rules at art 25. upon close reference of this provision one may argue that this provision has an implied liability upon express provision of the immunity. The writer belief that in the situation other than expressly provided under the provision the arbitrators is impliedly liable under article 20 of the above rule.

<sup>421</sup> Hong Kong arbitration ordinance 2011, at art 104 and 105.

2010 as revised which grants the immunity of the arbitrators with the exception in certain situation which Hong Kong can give a good lesson for Ethiopia.

### 3.6.3. ETHIOPIAN ARBITRATION LAWS IN LIGHT OF UNCITRAL MODEL ARBITRATION RULES AND INSTITUTIONAL ARBITRATION RULES

The UNCITRAL model arbitration rules implement the principle that arbitrators shall be impartial and independent from the earlier period of their proposal for appointment to the delivery of the awards.<sup>422</sup> Likewise the different institution's arbitration rules such as the ICC rules of 2012, LCIA of 2014 and AAA arbitration rules of 2001 require arbitrators to remain "impartial and independent" of the parties throughout all stages of arbitration process.<sup>423</sup> As it is said above, the Ethiopian arbitration laws are not clear and comprehensive enough as to requiring the arbitrators to remain "impartial and independent" of the parties from the earlier period of their proposal for appointment to the delivery of the awards. Actually pursuant to Article 3325(1) of the civil code, the arbitrators required to "undertake to settle the dispute in accordance with the principles of law."<sup>424</sup> Beyond such there are no clear provisions as to issue in hand in the context of Ethiopia.

To realize the independence and impartiality of the arbitrators, UNCITRAL model arbitration rules and almost all arbitration rules of institutions require a prospective arbitrator to disclose to those parties to arbitration from the time when parties approach him in connection with his possible appointment up to the end of the arbitration process about any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.<sup>425</sup> Plus some institutions' arbitration rules require the signing of the declaration of independence and impartiality.<sup>426</sup> As regards to the standards of disclosure, some of the arbitral rules require an arbitrator's disclosure of circumstances that may cause doubts as to his or her ability to serve independently and impartially during proceedings.<sup>427</sup> Some other rules refer to justifiable doubts.<sup>428</sup> Some others still direct arbitrators to ask whether questionable circumstances would cause doubts in the eyes of the parties.<sup>429</sup> As it is said so far in the past section, the Ethiopian arbitration rules are silent as regard to the issues in hand. Hence, the legislatures in the future enactment

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<sup>422</sup> UNCITRAL model arbitration Rules 2010 at art 11

<sup>423</sup> See ICC rules 2012 at Article 11(1), see also LCIA of 2012 at art 5(3) see also AAA arbitration rules of 2001 at art 7(1)

<sup>424</sup> See CC at art 3325(1)

<sup>425</sup> UNCITRAL 2016 at article 11 para.3 see also See the AAA at rule 17 see also See LCIA Arbitration rules (2014) at article 5 para.5

<sup>426</sup> See For example LCIA Arbitration rules (2014) at article 5 para.4 and ICC Rules of Arbitration at article 11 paragraph 2

<sup>427</sup> See for instance AAA/ABA code of ethics.

<sup>428</sup> See for instance UNCITRAL arbitration rule at art 11 and LCIA arbitration rules at art 10(3)

<sup>429</sup> See for example ICC rules of arbitration at art 11(2).

of arbitration rules shall adopt disclosure standards as general standards of independence and impartiality and shall closely consider those different standards of disclosure that exists in different rules of different institution and should adopt the most suitable standard of disclosure. In the views of this writer the objective standard shall be adopted in future arbitration laws of Ethiopia as subjective standards is more difficult to determine as to its certainty.

When we come to challenge and disqualification of the arbitrators under UNCITRAL model rules and other institutions arbitration rules, the UNCITRAL model arbitration rules and almost all the arbitration rules clearly provides the independence and impartiality as grounds of challenge and probably of disqualification.<sup>430</sup> The standard of independence and impartiality which helps to determine whether or not the challenge and disqualification of arbitrators is important is mostly objective standards in the UNCITRAL arbitration model rules and almost all institutions arbitrations rules.<sup>431</sup> Comparing the Ethiopian case with those rules, the Ethiopian arbitration laws also stated the lack of independence and lack of impartiality as the grounds for the challenge and disqualification of the arbitrators as it is discussed so far. But the problems of those laws are: there are no clear standards for challenge and disqualification of the arbitrators. The factors upon the existence of which gives rise for doubt as to the independence and impartiality of the arbitrators is not stated also under the Ethiopian arbitration legal regimes.

As regards to the liability of the arbitrators, the UNCITRAL model arbitration rules and almost all institutional arbitration rules contains immunity of the arbitrators as a general rule and liability of them as an exceptions. To begin with UNCITRAL model rules on the arbitration, it provides the immunity off arbitrators as a matter of general principle upon providing the liability under exceptional circumstance for their conscious or deliberate wrong doing.<sup>432</sup> Plus the UNCITRAL arbitration rules also recognized the waiving possibility of the party of the liability of the arbitrators .i.e. it is possible to make the arbitrators absolutely immune from the liability by agreement.<sup>433</sup> Likewise almost all arbitration institutions arbitration rules among which AAA,LCIA,HKIAC rules are the model sample also provides

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<sup>430</sup> UNCITRAL Rules 2010 at art 12. See also the 2016 ICC at article 14. See also LCIA(2014) at art 10 See also AAA arbitration rules of 2013 at rule 18

<sup>431</sup> See for instance UNCITRAL Rules 2010 at art 12. See also the 2016 ICC at article 14. See also LCIA(2014) at art 10

<sup>432</sup> See UNCITRAL arbitration rules (as revised by 2010) at art 16 which reads as: any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration save for intentional wrongdoing and when the parties waive, to the fullest extent permitted under the applicable law

<sup>433</sup> *Id*, The rule seems to intend to acknowledge the principle of parties' freedom to contract.

the liability of the arbitrators under exceptional circumstances when the arbitrators acted or omitted in bad faith, other than this situation the arbitrators are immune from the liability under those institutional rules.<sup>434</sup> Likewise ICC arbitration rules of 2012 stated arbitrator's immunity as a general rule and liability as an exception is contemplated. But what makes the ICC rules unique as to this issue is that it is applicable law which can limit the immunity of the arbitrators even though that applicable law is not clear.<sup>435</sup> But such applicable law is not identified.

Unlike the above practice of different arbitration institutions' rules as regards to the liability of the arbitrators, Under the Singapore International Arbitration Centre (SIAC) Rules of 2013, an arbitrator enjoys a blanket immunity under Rule 34.1.<sup>436</sup> Wherein arbitrators shall not be held liable for any arbitration proceedings governed under these rules.<sup>437</sup> The Ethiopian arbitration legal regime which is unclear on the liability of the arbitrators should take a lesson from UNCITRAL model rules and institutional arbitration rules. For Ethiopia, it is better to adopt the immunity of the arbitrators with the specified exception under which they could be liable.

#### 3.6.4. ETHIOPIAN INSTITUTIONAL RULE COMPARED

In this section the two Ethiopian arbitration institutions' arbitration rules will be compared with each other and with international arbitration institutions. Comparing with the different institutions' arbitration rules that discussed so far in the previous section of this work, there are both common things and unique and primitive nature of the AACCSA and the draft rules of BUAC on governing the independence, impartiality of the arbitrator(s). To begin with the common thing, both the AACCSA arbitration rules and draft rules of the BUAC require the general duty of the arbitrators to be independent and impartial as well as duty to disclose.<sup>438</sup> However the AACCSA has a very gap as to its rules on the issue in hand when compared with those different institutions' arbitration rules and even in comparison with draft rules

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<sup>434</sup> see international Arbitration Rules of the American Arbitration Association (2001) at art 35 which reads as: The members of the tribunal (arbitrators are member of the tribunals) and the administrator shall not be liable to any party for any act or omission in connection with any arbitration conducted under these rules, except that they may be liable for the consequences of conscious and deliberate wrongdoing. See also LCIA arbitration rules of 2014 at art 31 which also reads as: None of...any arbitrator(s), any emergency arbitrator(s) and any expert to arbitral tribunals shall be liable to any party howsoever for any act or omission in connection with any arbitration save for; i) When it is shown that the arbitrators committed consciously and deliberately wrong against party. See also (HKIAC), Arbitration Rules of 2018 at art 46.

<sup>435</sup> see ICC arbitration rules of 2012 under art 40 Which provided as: The arbitrators, ...(some other organs omitted intentionally here) ... shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law at art 40.

<sup>436</sup> See SIAC Rules 2013 at rule 34(1)

<sup>437</sup> See SIAC Rules 2013 at rule 34(1) SIAC seems adopted the absolute immunity scenarios of the US which under modern practice is almost impossible

<sup>438</sup> See AACCSA at art 13 see also draft arbitration rules of the BUAC at art 11,12 and 16 ( 1)



of the BUAC. Thus, the main gap of the AACCSA are that, at first instance unlike UNCITRAL, ICC, LCIA, AAA, SIAC, HKIAC arbitration rules and BUAC draft rules, the AACCA arbitration rules does not contain the clear provisions as to whether the lack of independence and impartiality on the side of the arbitrators could be sufficient condition for the challenge and disqualification of the arbitrators even though there is an implication under which the arbitrators could be challenged and disqualified.<sup>439</sup> The BUAC draft rules actually clearly provided that doubt as to independence and impartiality of arbitrators as a ground for challenge and removal of the arbitrators pursuant to art 17 (1).<sup>440</sup> Secondly, the issue as refers to liability of the arbitrators is not addressed under both the AACCSA and draft arbitration rules of BUAC. Beyond challenge and disqualification of the arbitrators, there is no provision for liability of the arbitrators. However, in the UNCITRAL, ICC, LCIA, AAA, SIAC and HKIAC arbitrations rules, there are clear provisions for the liability of the arbitrators most of which adopted the limited liability of the arbitrators as an approach in which the arbitrators enjoys immunity as a rule but will subject to liability in exceptional circumstances.<sup>441</sup>

As regards to standards for disclosure, the draft rules of BUAC employed objective (justifiable doubt) standard<sup>442</sup> which is also employed by the UNCITRAL model rules and other international arbitration institutions` arbitration rules such as LCIA.<sup>443</sup> Whereas, the AACCSA employed the subjective (in the eyes of parties) standard,<sup>444</sup> that is also employed by the ICC.<sup>445</sup> The writer believes the objective standard is best to be employed because of the lack of certainty of the subjective standards.

Coming to the standards of independence and impartiality which helps to determine whether or not the challenge and disqualification of arbitrators is important is objective (justifiable doubt) standard under the draft rules of BUAC.<sup>446</sup> Such standard is employed also by UNCITRAL arbitration model rules and

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<sup>439</sup> This can be inferred from art 10 sub art 9 of the AACCSA arbitration rules

<sup>440</sup> See BUAC draft arbitration rules at art 17(1)

<sup>441</sup> See UNCITRAL arbitration rules (as revised by 2010) at art 16 see also international Arbitration Rules of the American Arbitration Association (2001) at art 35 which reads as: The members of the tribunal (arbitrators are member of the tribunals) and the administrator shall not be liable to any party for any act or omission in connection with any arbitration conducted under these rules, except that they may be liable for the consequences of conscious and deliberate wrongdoing. See also LCIA arbitration rules of 2014 at art 31 which also reads as: None of...any arbitrator(s), any emergency arbitrator(s) and any expert to arbitral tribunals shall be liable to any party howsoever for any act or omission in connection with any arbitration save for; i) When it is showed that the arbitrators committed consciously and deliberately wrong against party. See also Hong Kong International Arbitration Centre, (HKIAC), Arbitration Rules of 2018 at art 46.see also SIAC Rules 2013 at rule 34(1)

<sup>442</sup> see the draft rules of BUAC at art 16 (2)

<sup>443</sup> see for instance UNICTRAL arbitration rule at art 11 (paragraph. 3) and LCIA arbitration rules at art 10(3)

<sup>444</sup> see AACCSA at art 13 (2)

<sup>445</sup> See ICC rules of arbitration at art 11(2).

<sup>446</sup> see the draft rules of BUAC at art 17 (1)

almost all institutions arbitrations rules.<sup>447</sup> Whilst, the AACCSA unclear regarding the standard for challenge and disqualification of commercial arbitrator(s). Thus, the draft rules of the BUAC appears to be the most comprehensive than the AACCSA arbitration rule as the draft rules almost incorporated the international standards.

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<sup>447</sup> See for instance UNCITRAL Rules 2010 at art 12. See also the 2016 ICC at article 14. See also LCIA(2014) at art 10,

## CHAPTER FOUR

### 4. CONCLUSION AND RECOMMENDATION

#### 4.1. CONCLUSION

Different mechanisms of dispute resolution may be used to solve commercial disputes. The business community may use either court litigation or alternative dispute resolution mechanisms to resolve their dispute. Mostly the business community uses the arbitration than the regular court litigation due to the bold benefits that may be gained from those different alternative dispute resolution mechanisms in solving their difference. Among the multi advantages that could be gained from the resolution of the dispute via arbitration mechanisms than court litigations are; arbitration is considered as faster, less expensive and offers a higher degree of confidentiality, provides predictability, lowers attorney fees, increasing the expertise in decision making and more informal than litigation thought sometimes some of those rationalization are debatable.

The arbitrators in their judicial activities should avoid conflict of interests to deliver the qualified awards. To do so the arbitrators should be independent from the influence of the parties and impartial towards the parties. Hence, it is a universally accepted principle that arbitrators have an obligation to exercise their duties impartially and independently. So that, the different international institutions arbitration rules, UNCITRAL model arbitration rules, the professional guideline such as IBA guideline and national arbitration acts requires the independence and impartiality of the arbitrators to ensure the integrity of the overall arbitration process and awards.

The disclosure duty appear to be the pillar standard to ensure the independence and impartiality of the arbitrators. Among the different experience, the 2014 IBA guideline plays its major role in providing the comprehensive rules of the disclosure duty of the arbitrators. The guideline classified the factors that could affects the independence and impartiality of the arbitrators into three lists i.e. under red, orange and green lists. In case when the factors that listed under the red and orange lists occur the arbitrators required to disclose the existence of the circumstances. Whereas, in case the circumstances that listed under the green lists occur the arbitrators is not required to disclose. The standards of the disclosure under IBA guidelines are objective standard (justifiable doubts) for red and orange lists While, subjective standard (in the eyes of the parties) for the green lists. The different national laws also provide the disclosure obligation of the arbitrators. The paper has entertained the Singapore's and the

Hong Kong arbitration acts. The two national laws impose the obligation to disclose on the arbitrators in case when the circumstances those give rise to doubt as to the independence and impartiality of arbitrators occurs. Similarly different institutions arbitration rules obliges the arbitrators. Those two jurisdictions have adopted the objective standards to determine the disclosure obligations of the arbitrators. Likewise the UNCITRAL model arbitration rules and rules of the different arbitration institutions require a prospective arbitrator to disclose. This made to those parties to arbitration from the time when parties approach him in connection with his possible appointment up to the end of the arbitration process about any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. As regards to the standards of disclosure, some of the arbitral rules such as AAA/ABA code of ethics requires an arbitrators disclosure of circumstances that may cause doubts as to his or her ability to serve independently and impartially during proceeding. Some other such as rules of UNICTRAL and LCIA marks reference to justifiable doubts. While others such as ICC still direct arbitrators to ask whether questionable circumstances would causes doubts in the eyes of the parties.

For further insurance of the independence and impartiality of the arbitrators, providing the parties rights to challenge the arbitrators in case when there is doubt as to the independence and impartiality of arbitrators appear to be the most important. As to this issue, the IBA guideline guides as these factors list coded under red, orange and green lists could warrants the challenge and disqualification of the arbitrators. The different national arbitration act which the writer entertained such as Singapore and Hong Kong clearly provided the lack of independence and impartiality of the arbitrators as a grounds for the challenge and disqualification of the arbitrators. Those acts stated the justifiable doubt or objective standards to determine the reasonability of the challenge and disqualification of the arbitrators. The institutional arbitrations rules likewise provide the same thing with objective standards mostly.

As regards to liability of the arbitrators, the paper has entertained different philosophical studies and debates on the area. Currently most of the national acts and institutions` arbitrations rules stated the immunity of the arbitrators as a general rule and liability of the arbitrators exceptionally in case when the arbitrators acted or omitted in bad faith mainly.

The Ethiopian arbitration law has some inadequacy comparing with the guideline and model rules such as IBA guidelines and the UNCITRAL model rules respectively. Coming to the concept of the independence, impartiality and liability of the arbitrators in particulars, the Ethiopian arbitration rules fails to provide the comprehensive rule on the independence, impartiality and liability of the arbitrators.

At first instance the Ethiopian arbitration law hasn't provided the factors which could affect the independence and impartiality of the arbitrators. The other problem of Ethiopian arbitration laws is that there is no provision for the disclosure requirement of the arbitrators of the existence of the factors which could give rise to doubt as to the independence and impartiality of the arbitrators. There are no clear standards as to independence and impartiality in general and no standard for disclosure obligation of the arbitrators as well. As regards to the challenge and disqualification of the arbitrators due to lack of independence and lack of impartiality, the Ethiopian arbitration law as it is discussed so far is provided under article 3340 of the civil code. However the problem with this provision is that, there are no listed factors or grounds upon the existence of which the parties can challenge for the disqualification of the arbitrators. In addition to this, there are no clear standards for the challenge and disqualification of the arbitrators under the relevant arbitration laws of Ethiopia.

The issue as to the liability of the arbitrators may be problematic under the Ethiopian arbitration rules as there is no clear rule as to whether the arbitrators are immune or liable under any circumstances. Most international institutions arbitration rules and national arbitration acts provide the immunity of the arbitrators as a general rule and liability of the arbitrators exceptionally in case when the arbitrators acted or omitted negligently and intentionally in bad faith.

## 4.2. RECOMMENDATION

The Ethiopian laws of commercial arbitration must be modernized in light of international modern development on commercial arbitration upon analyzing in light of some modern rules and taking a lesson from arbitration instrument such as UNCITRAL arbitration rules, national arbitration acts, guidelines, and institutional rules as regard to the independence, impartiality and liability of commercial arbitrators. This is because, the writer believes that, the comprehensive and separate laws for international and domestic arbitration shall be enacted by Ethiopian parliament to make Ethiopia the hub of commercial arbitration which means to attract investment on the other words. This could be achieved via establishing the best arbitration legal framework which obliges arbitrators to be neutral from conflict of interest and accountable for their misconducts. Having the aforementioned concepts under the Ethiopian arbitration laws the writer recommends the following detail recommendation the concerning authority:

### 4.2.1. AS TO INDEPENDENCE AND IMPARTIALITY OF THE ARBITRATORS

- ✓ The standard of the independence and impartiality shall be clearly and sufficiently provided on the arbitration laws. Further such duty of the arbitrators shall be provided as ongoing duty from the day of their proposal for appointment for judicial capacity up to the giving of awards than considering as one step duty.
- ✓ The disclosure standard which is the fundamental standard to ensure the independence and impartiality of the arbitrators while conducting the arbitration process shall be incorporated in the act of the commercial arbitration legal framework of Ethiopia.
- ✓ The commercial arbitration code of ethics which contains the duty of independence, impartiality, disclosure duty of the arbitrators shall be enacted. Arbitrator`s code of ethics should be enacted separately from the main. i.e. separately from the civil code. The separate arbitrator`s code of the ethics is recommendable because separate rule is the common experience of most jurisdictions and arbitration instructions.
- ✓ The legislation which provides the factors that helps in determination of the independence, impartiality and disclosure should come to into existence.
- ✓ The legislation which clarifies the factors the existence of which undermines the independence and impartiality shall be enacted. The legislation shall also clarify the factors the existence of which obliges the arbitrators to disclose the existence of those factors.

- ✓ The arbitration act and the arbitrator's code of ethics which provides the grounds (factors) upon the existence of which the arbitrators shall be challenged and disqualified shall be enacted.
- ✓ The modern arbitration law should come into existence upon incorporating the standards that helps to determine the independence and impartiality of the arbitrators.
- ✓ The standards for disclosure and challenge of the arbitrators shall also be clearly provided under the coming arbitration rules upon taking a lesson from different international instrument, national arbitration act and institutional rules.
- ✓ The writer believes the adoptions of the objective standards for the determination of the independence and impartiality of the arbitrators in general and disclosure and challenge in particulars is better than subjective standard as subjective standard may suffers from the decease of uncertainty.

#### 4.2.2. AS REGARD TO LIABILITY OF ARBITRATORS

As it is discussed again and again so far, the Ethiopian arbitration laws are silent as regards to liability of arbitrators. However, a clear policy on this issue is important to encourage and build up a core of competent professionals in dispute resolution. Thus the concerned authority i.e. legislator should consider the various arguments for and against granting immunity for arbitrators as well as liability on the arbitrators. As stated earlier, almost all arbitral institutions rules among which ICC, LCIA, SIAC, and HKIAC have adopted and recognized the liability of the arbitrators for their misconduct specifically in case when they acted in bad faith. Likewise the UNCITRAL model rule has recognized the liability of the arbitrators in exceptional circumstances mainly in case when they acted in bad faith. Further as it is said earlier, the Singapore's and Hong Kong's arbitration rules have also recognized the immunity of the arbitrators as a matter of rules and liability of the arbitrators as an exceptional rules. But the Ethiopian arbitration regimes lag behind when compared with those institutions rule. The UNCITRAL model rules as well as the Singapore's and Hong Kong's arbitration acts. The researcher thus recommends that there should be specific rules providing for immunity from liability for arbitrators either in separate laws or within the mainstream laws. The experience of the aforementioned institutions rules and UNCITRAL model rules as well as the jurisdictions such as the Singapore and Hong Kong as discussed in the earlier sections is opted for ruling of the liability of the arbitrators within the main laws rather than enacting the separate laws. Such immunity should not extend to cases where the arbitrator has willfully misconducted himself or inordinately caused delay in the arbitration. In general the researcher recommends the

qualified immunity or limited liability approach to be adopted by Ethiopian arbitration legislation which is experience of the above instruments. Thus, the writer recommends that:

- ✓ The Ethiopian legislature should enact the arbitration laws that incorporate the provision for liability of the arbitrators within the main laws. In order to make the user of the arbitration and arbitrators to aware the situation in which the arbitrators are immune and liable for their misconduct the laws should clearly state such situation.
- ✓ Thus, the writer believes that, the coming modern arbitration laws should adopt the qualified immunity (limited liability) of the arbitrators. The limited liability is the approach that adopted by UNCITRAL model rules as well as by many institutional and domestic rules such as Singapore's and Hong Kong's arbitration rules. So that this could be best suit for Ethiopia also.
- ✓ The Ethiopian arbitration law in the future should clearly state the situation under which the arbitrators will be immune from the liability and the situation under which the arbitrators could be held liable upon considering the experience of the international arbitration instrument, national acts and institutional rules.

And finally, the writer recommends the enactment of the new arbitration act and arbitrator's ethical code of ethics that contains the aforementioned issues in general.



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