

# NOTES ON ARBITRABILITY UNDER ETHIOPIAN LAW

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## Introduction

Regular courts have a significant role in resolving disputes that arise between various members of the society. However, experience tells us that the task of settling disputes cannot be properly administered by the regular courts alone. Arbitration is one of the institutions designed to serve as an alternative dispute settlement mechanism, and it plays a vital role in dispute resolution.

In spite of its importance, not all matters can be referred to this institution. Certain matters, for different reasons, cannot be resolved by arbitration or in short, they are non-arbitrable. The main purpose of this note is, therefore, to highlight the conceptual underpinnings of arbitrability in general and its treatment under Ethiopian laws in particular.

## 1. The concept of Arbitrability

The question of arbitrability focuses on whether a particular dispute can be the subject of arbitration.<sup>1</sup> For different reasons, various states exclude disputes of certain categories from the ambit of arbitration.<sup>2</sup> Especially matters concerning high government or public policy such as grave crimes or felonies are non-arbitrable. As Redfern and Hunter noted:

... Each state may decide, in accordance with its own public policy considerations which matters may be settled by an arbitration and which may not. If the arbitration agreement covers matters incapable of being settled by arbitration, under the law of the agreement or under the law of the place of arbitration, the agreement is ineffective since it is unenforceable. Moreover, recognition and enforcement of an award may be refused if the subject matter of the difference is not arbitrable under the law of the country where enforcement is sought.”<sup>3</sup>

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<sup>1</sup> Jacqueline M. Nolan-Haley (1992), *Alternative Dispute Resolution (in a nutshell)*, (St. Paul Minnesota: West Pub., Co.), , pp. 131.

<sup>2</sup> Zekarias Keneaa, (1994), “Arbitrability in Ethiopia, posing the problem”, *Journal of Ethiopian law* Vol. XVII, p. 116.

<sup>3</sup> A. Redfern, and M. Hunter (1986), *Law and practice of International Commercial Arbitration*, London, (cited in Zekarias Keneaa, *Ibid.*, pp. 117). See also David, Rene (1985), *Arbitration in International Trade*, Kulwer Law and Taxation publishers, Netherlands, p. 186.

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Arbitrability can be of two types,<sup>4</sup> substantive and procedural. Substantive arbitrability is concerned with whether a particular subject-matter was intended by the parties to be covered by their arbitration agreement, whereas procedural arbitrability is concerned with whether the procedural requirements for arbitration, such as timeliness and specificity have been satisfied.<sup>5</sup>

## 2. Arbitrability in civil matters

### 2.1- Family relations and successions

The former family law provisions in the 1960 Ethiopian Civil Code gave a very significant power to family arbitrators. Disputes arising out of an existing marriage, petitions for divorce or even disputes arising out of divorce were submitted to arbitration,<sup>6</sup> and courts could only decide whether a divorce has been pronounced by the arbitrators.<sup>7</sup> This was so because the institution of family arbitration was believed to have various merits. According to Aklilu W/Amanuel:

- it is a well-established and respectable tradition worth preserving for purposes of resolving family conflicts,
- it is a means of settling family disputes through arbitrators who are more qualified for this purpose, and
- family arbitration reduces the congestion of the courts by providing a special forum for the settlement of family disputes.<sup>8</sup>

But, in practice, it hardly attained the abovementioned objectives and as a result, the Revised Family Code of 2000 has significantly reduced the role of family arbitrators in matters of divorce. The role of arbitration has now been restricted to making efforts to reconcile the spouses to drop their idea of divorce; and arbitrators are no more entrusted with the power to give any order or decision of divorce.<sup>9</sup> Family Codes of some of the regional states also followed the same restrictive approach with respect to arbitrable issues in family matters.<sup>10</sup> In spite

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<sup>4</sup> Nolan-Haley, *supra* note 1, p. 131. See also *Arbitrability*, Domke on Commercial arbitration, West Thomson Business, (Compilation Material on *International Commercial Arbitration*, Compiled by Salomon, C.T., and Sterken, S.J.), AAU, Faculty of Law, 2008, p. 137.

<sup>5</sup> *Id.*

<sup>6</sup> Zekarias Keneaa, *supra* note 2., p. 118.

<sup>7</sup> Ethiopian Civil Code, (1960), Art. 729.

<sup>8</sup> Aklilu W/Amanuel (1973), "The Fallacies of Family Arbitration under the 1960 Ethiopian Civil Code", *Journal of Ethiopian Law*, Vol. IX, No. 1, p. 176.

<sup>9</sup> The Revised Family Code, Procl. No. 213/2000, Art. 121(1) and (3).

<sup>10</sup> The Oromia National Regional State's Family Code, Proc. No.83/2003 (as amended), Art. 108(1) and (3)

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of such changes in the degree of arbitrability, family matters are among the disputes that are arbitrable (i.e subject to arbitration). With regard to successions, the only matter that is arbitrable, pursuant to Art. 945 of the Civil Code,<sup>11</sup> is a dispute arising between the heirs and the legatees regarding the liquidation or partition of the succession. According to this provision, the parties in dispute are at liberty to agree that their dispute be submitted to one or more arbitrator/s.

## 2.2- Property matters

In matters of property relations, there are three circumstances, which can be subject of arbitration. In cases of *joint ownership of property*, resolution of disputes by arbitration can be agreed upon either by inserting a clause in the original act which creates the institution of joint ownership or in the subsequent agreements entered into by the joint owners. The law does not seem to limit the scope of the issues that are arbitrable because “any dispute arising between the joint owners in relation to the thing jointly owned”<sup>12</sup> can be settled by arbitrators. With regard to the detailed procedures as to how the dispute is going to be settled, Article 1275(2) of the Civil Code makes a cross reference to the arbitration and compromise provisions of the Civil Code, i.e. Arts. 3307-3346.

The second situation where arbitration is possible with respect to property matters is *compensation in cases of expropriation*. The concept of expropriation involves compelling an owner of an immovable property to surrender the ownership of it, and it is done by the competent authorities for public purpose (public interest).<sup>13</sup> The compelled owner claims compensation. Under the Civil Code the person who seeks compensation submits a claim, but if the authorities against whom the compensation claim is made do not accept the amount of compensation claimed, such amount shall be fixed by an arbitration

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- Art. 132(1) and (3) of the Amhara National Regional State’s Family Code (Proc. No. 79/2003.

- Art. 136(1) and (3) of the Southern Nations, Nationalities and People’s (SNNP) Regional State’s Family Code of Proc. No. 75/2003.

<sup>11</sup> Art. 945(2) is deleted in the *Corrigenda* of the Civil Code (English version). Article 945(1) is thus considered as Art. 945 (as in the Amharic version).

<sup>12</sup> The Ethiopian Civil Code, (1960), Art. 1275(1).

<sup>13</sup> This notion “public interest” has been a subject of controversy for a long time as it is very much subjective. Under Art. 2(5) of Procl. No. 455/2005 (Expropriation of Land holdings for Public Purposes and Payment of Compensation Proclamation), public purpose (interest) is defined as “the use of land defined as such by the decision of the appropriate body in conformity with urban structure plan or development plan in order to ensure the interest of the people to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development.”

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appraisal committee.<sup>14</sup> However, this provision, i.e. Art. 1472 of the Civil Code, does not seem to be applicable at present as it is tacitly repealed by arts. 10 and 11 of Proclamation No. 455/2005. According to these provisions of the Proclamation, any complaint arising out of grievances on amount of compensation, will be decided either by an administrative organ established for such a purpose by the government or by the regular courts as the case may be and as a result, such a claim is no longer subject to arbitration.

The third situation which is the subject of arbitration is where ownership passes to an association of land owners. In cases where the members of the association want to assign their share in the property of the association to any one for consideration or gratuitously, the consent of the association shall be sought. And if the association fails to give its consent within the prescribed period of time, i.e. three months, the person who wants to buy the share shall be informed by the association that it has the intention to retain the property by paying its value, and such person shall assign his share to the association or another buyer. Where there is no provision in the charter as regards to the price of the share, it shall be fixed by arbitrators.<sup>15</sup>

### **2.3- Matters of actions for damages in tortuous liability**

With respect of liability in non-contractual obligation, parties may agree, in actions for damages, as to which compensation may not be paid; or they may compromise on the conditions on which it shall be made good.<sup>16</sup> So, the matters that are arbitrable in tortuous liability are exclusion of compensation and compromise regarding the manner of compensation.

### **2.4- Matters concerning contracts in general**

Before looking into matters related to special contracts, we need to consider the general contract provisions concerning arbitration. When parties encounter a circumstance which modifies the economic basis of the contract, they may agree to refer the matter to an arbitrator concerning any decision relating to the variation, which ought to be made in the contract.<sup>17</sup> Therefore, readjustment of contracts, which become economically unbalanced, can be considered as

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<sup>14</sup> Art. 1472 of the Ethiopian Civil Code.

<sup>15</sup> Arts. 1530-1534 of the Ethiopian Civil Code of 1960. Again these provisions do not seem to have an effect today as land is publicly owned as per art 40(3) of the current Ethiopian Constitution, and the issue of arbitrability, in this regard, may not be an issue here.

<sup>16</sup> Ethiopian Civil Code, (1960), Art. 2148.

<sup>17</sup> *Ibid*, Art. 1765.

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arbitrable.<sup>18</sup> This provision, i.e. Article 1765, is found in Book IV, Title XII of the Civil Code which applies to *Contracts in General*, and in effect, it applies to any special contract “subject to special provisions applicable to” special contracts.<sup>19</sup> Let us now look at some provisions of the Civil Code with respect to arbitration in the special contracts.

#### 2.4.1- Contract of sale

In a contract of sale, price estimation in particular can be referred to the arbitration of a third party in cases of dispute. This renders price estimation in sales contract arbitrable.<sup>20</sup> But it is to be noted that this provision may not be taken as a provision indicative of arbitration *per se* in the sense of Art. 3325 of the Civil Code. When a seller and a buyer, refer the determination (estimation) of a price to a third party arbitrator, it does not mean that the parties submit a dispute to be resolved. Article 2271 thus envisages arbitration to determine price, and “[t]here shall be no sale” where the arbitrator “refuses or is unable to make an estimate.”<sup>21</sup> Unless the parties have unequivocally agreed that they will be bound by it, the ‘price’ to be quoted by the ‘arbitrator’, cannot be taken as a binding award similar to the one rendered in case of arbitration proper.<sup>22</sup> We find similar provisions in contracts of supplies whereby the price for each delivery shall be fixed by an arbitrator if supplies are to be made periodically. Such prices are not regarded as binding arbitral awards unless there is express provision in the contract to such an effect.<sup>23</sup>

#### 2.4.2- Administrative contracts

An administrative contract is a contract concluded between individuals and administrative agencies. More specifically, a contract should be deemed to be an administrative contract where:

- it is expressly qualified as such by the law or by the parties; or,
- it is connected with an activity of the public service and implies a permanent participation of the party contracting with the administrative authorities in the execution of such service; or,

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<sup>18</sup> George Krzeczunowicz (1980), *Formation and Effects of Contracts in Ethiopia*, AAU, Faculty of law, , p. 114.

<sup>19</sup> Ethiopian Civil Code (1960), Art. 1676 (2).

<sup>20</sup> *Ibid*, Art. 2271(1).

<sup>21</sup> *Ibid*, Art. 2271(2).

<sup>22</sup> Zekarias Keneaa, *supra* note 2, p. 121.

<sup>23</sup> Ethiopian Civil Code, 1960, Art. 2418 provides that under such situations, the provisions of Chapter 1 title XV, i.e. the provisions concerning price estimation by an arbitrator, shall apply.

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- it contains one or more provisions which would only have been inspired by urgent considerations of general interest extraneous to relations between private individuals.<sup>24</sup>

In the Civil Code, there is nothing that prohibits the submission of disputes on matters of administrative contract to arbitration. However, the Civil Procedure Code,<sup>25</sup> embodies a prohibitive provision which provides that “[n]o arbitration may take place in relation to administrative contracts ... or in any other case *where it is prohibited by law.*” [Emphasis added]. Neither Title XIX of the Civil Code on administrative contracts nor Title XX on compromise and arbitral submission prohibit the submission of disputes arising out of an administrative contracts to arbitration.<sup>26</sup>

If there were restrictions to the type of disputes to be submitted to arbitration, surely the legislator would have stipulated them in the substantive law, i.e. the Civil Code. The legislator, however, did not provide any restriction. Nor did it envisage the inclusion of such restriction in the Civil Procedure Code. So, the question as to which law prevails becomes pertinent. The Civil Procedure Code seems to answer this question because it stipulates that nothing in this chapter (the Civil Procedure Code’s Chapter on arbitration) shall affect the provisions of Arts. 3325-3346 of the Civil Code (the provisions of arbitration and compromise).<sup>27</sup>

Therefore, is it appropriate to argue that the Civil Code prevails over the Civil Procedure Code as the former is substantive law from which our substantive rights and duties emanate and the latter is the means by which these rights and duties are implemented. Nevertheless, the Civil Code is silent on the issue, and there are currently two courses of interpretation. One may use the principle that “*anything that is not prohibited is presumed to be permitted*”, which leads to the interpretation that matters of administrative contracts are arbitrable.<sup>28</sup> And there are others who opt to confine their analysis to the inconsistency between the two codes regarding the arbitrability of administrative contracts.<sup>29</sup>

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<sup>24</sup> Ethiopian Civil Code, (1960), Art. 3132.

<sup>25</sup> Ethiopian Civil Procedure Code (1965), Art. 315(2).

<sup>26</sup> *Id.*

<sup>27</sup> *Ibid.*, Art. 315(4).

<sup>28</sup> Bezawork Shimelash (1994), “The Formation, Content and Effect of an Arbitral Submission under Ethiopian law”, *Journal of Ethiopian law*, Vol. XVII, p. 85.

<sup>29</sup> See for example, Zekarias Keneaa, *supra* note 2, p. 120.

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### 2.4.3- Matters of labor relations

The legal regime that governs labor relations has undergone frequent changes and amendments. Before the Labour Proclamation which is currently in force,<sup>30</sup> the laws which were effective were Proclamation No. 64/1975 and Proclamation No. 42/1993. In the former Proclamation, the possibility of submission of a collective or individual trade dispute to arbitration was provided for in Art. 101(1). Under Sub-Art. 3 of the same law, arbitration, in fact, seems to have been envisaged as obligatory with respect to disputes arising in undertakings that do not have trade dispute committee.<sup>31</sup> Proclamation No. 42/1993 stipulates that parties to a dispute may agree to submit their case to arbitrators or conciliators, other than the Minister (the Minister of Labor and Social Affairs) for settlement in accordance with the appropriate law.<sup>32</sup> There is no change in the current labor proclamation as regards to the arbitrability of labor disputes.<sup>33</sup> Labor issues are thus among civil matters that can be subject to arbitration.

## 3. Arbitrability in commercial and maritime matters

### 3.1- Matters of dissolution of a partnership and a share company

When a partnership is going to be dissolved and in the process of winding-up, liquidator/s shall be appointed either by the partnership agreement or by all the partners; or, if none of these exists, they shall be appointed by a court.<sup>34</sup> One of the powers of these liquidators is referring any matter in issue, with respect to the liquidation, to arbitration or compromise.<sup>35</sup> So, liquidation in a dissolution and winding-up of a partnership is arbitrable. We find a similar provision in the process of dissolution and winding-up of a share company whereby liquidators have the power to compromise and arbitrate in relation to any matter concerning the share company.<sup>36</sup>

### 3.2- Matters of Bankruptcy

The commissioner (the person who has the power to supervise and deal with all matters concerning the bankrupt's estate, i.e. the whole property) may authorize trustees (three persons who are responsible for the administration of the bankrupt's estate under the supervision of the commissioner and represent the universality of creditors in relation to third parties). A trustee may be authorized

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<sup>30</sup> Labor Proc. No. 377/2003, Federal Negarit Gazette, year 10 # 12, 26<sup>th</sup> February/2004.

<sup>31</sup> Zekarias Keneaa, *supra* note 2, p. 122.

<sup>32</sup> Proclamation No. 42/1993, Art. 143(1).

<sup>33</sup> Proclamation No. 377/2003, Art. 143(1).

<sup>34</sup> Ethiopian Commercial Code (1960), Art. 264(1) and (2).

<sup>35</sup> *Ibid*, Art. 267(2).

<sup>36</sup> *Ibid*, Art. 500(1).

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“to compromise and arbitrate in respect of any claim concerning the bankrupt’s estate” after, of course, hearing the opinion of the creditors’ committee and the bankrupt, but the bankrupt may make an application to a court to set aside the compromise or arbitration.<sup>37</sup> So, at least in principle, matters in relation to the estate of the bankrupt person are arbitrable. We have similar provisions in the Commercial Code. For example, Art. 1103(3) of the Commercial Code of 1960 allows trustees to “compromise and arbitrate” without, however requiring the presence of the debtor.

### 3.3- Matters of contracts of carriage by air

With respect to the liability of the carrier in a contract of carriage of goods by air, provisions may be made for arbitration. The arbitration takes place either at the place where the carrier is domiciled, or has its principal place of business or has an agent [who made the contract) or at the place of the destination.<sup>38</sup> So, matters concerning the liability of the carrier in contract of carriage of goods by air are arbitrable.

### 3.4- Matters of contract of carriage by sea

The only provision concerning arbitration in the Ethiopian Maritime Code of 1960 is the provision which states that an arbitration clause inserted in a bill of lading may in no event grant to the arbitrators the power to settle a difference by way of composition.<sup>39</sup> This provision allows the arbitrability of contract of carriage of goods by sea with the reservation that the arbitrators are not allowed to settle the difference by way of composition; but in principle, it is arbitrable.

### Concluding note

Arbitrable matters in Ethiopia, at least those clearly stipulated in the laws of the country, are the ones that are briefly mentioned above. Based on *a contrario* reading, all disputes other than the ones that are expressly stated as arbitrable can be considered as non-arbitrable. Moreover, as an exception to the general principle of non-arbitrability of criminal matters, offences punishable only upon private complaint can be settled by arbitration and the injured party. If the latter institutes a file in court of law, he/she has the right to withdraw the complaint pursuant to Art. 157 of the Ethiopian Criminal Procedure Code of 1961. This exception is allowed due to the degree and nature of the offence. ■

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<sup>37</sup> *Ibid*, Art. 1038(1) and (2).

<sup>38</sup> *Ibid*, Art. 647(1) and (2).

<sup>39</sup> Ethiopian Maritime Code (1960), Art. 209.

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