FORMAL REQUIREMENTS FOR THE CONCLUSION AND MODIFICATION OF CONTRACTS UNDER THE ETHIOPIAN CIVIL CODE OF 1960[1]

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Introduction

The Civil Code of 1960 in general recognizes the validity of contracts regardless of whether they are concluded orally or in writing.[2] Similarly, modifications of a contract ordinarily need not be in writing to be valid. Nevertheless, in some cases the Civil Code requires that a contract be made or modified in writing in order for the contract or the modification to be valid. The general rule and the exceptions to it are given in Articles 1719-27 of the Code.

In *Bayessa Jammo v. Assefa Wolde Giorgis*, published in the preceding issue of the *Journal of Ethiopian Law*,[3] the Supreme Imperial Court has construed Artcile 1722, which deals with the formal requirements for the modification of contracts. The import of this decision is not completely clear, but we wish to discuss briefly Articles 1719-27, and incidentally the Court's decision in *Bayessa Jammo*.

We shall first set forth the law's formal requirements for the conclusion of contracts in terms of four types of contractual situations. Then we will discuss the formal requirements for the modification of contracts in terms of these same four type-cases. We shall consider *Bayessa Jammo* in light of this general discussion.

A. Formal Requirements for the Conclusion of Contracts.

Article 1719(1) provides that "Unless otherwise provided, no special form shall be required and a contract shall be valid where the parties agree." The remainder of Articles 1719-27 are concerned with the exceptional cases in which the law requires a special form[4] or enforces a preliminary "stipulation" by the parties establishing a special form.[5]

Let us now consider those provisions in terms of four illustrative type-cases.

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1 The author is indebted to Ato Hailu Makonnen, senior student in the Faculty of Law, Haile Sellassie I University, for his help with the problems of Amharic terminology discussed below.

2 Civ C., Art. 1719(1).

3 (Sup. Imp. Ct. 1965), *J. Eth. L.*, vol. 3, p. 401.

4 Civ. C., Arts. 1719(2), 1720(1), 1723-25, and 1727.

5 Civ. C., Arts. 1719(3) and 1726.

1. A and B conclude a contract of insurance. For the validity of this contract, Articles 1719(3), 1725(b) and 1727(2) require a written instrument signed by the parties and attested by two witnesses.[6]

2. A and B enter into an oral contract for the sale of A's horse to B. This is clearly a valid oral contract under the principle expressed in Article 1719(1) that generally parties are free to contract in any form whatsoever. The law does not "require" the oral form here in any sense.

3. A and B enter into a written contract for the sale of A's horse to B. This is clearly a valid written contract. The law does not require a special form for the sale of a horse, so the parties are free to conclude the contract orally or in writing. The law does not require the use of the written form for this contract any more than it requires the use of the oral form in the second type-case.

4. A and B are involved in complicated negotiations concerning the establishment of a business enterprise. They enter into a preliminary agreement that their contract will not be complete until it is incorporated in a written contract. This is clearly a situation in which Articles 1719(3) and 1726 provide that their preliminary agreement shall preclude a valid final oral contract. Their final contract must be in writing.

B. Formal Requirements for the Modification of Contracts.

The Supreme Court in *Bayessa Jammo v. Assefa Wolde Giorgis* dealt with the question of whether a special form is required for the modification of a written contract. We shall consider this problem by examining first the language of Article 1722 and then the meaning of this article in terms of the type-cases set forth above.

French: "Les modifications au contrat originaire doivent être faites dans la forme prescrite pour ce contrat."

English: "A contract made in a special form shall be varied in the same form."

Amharic: ዋናውን ውል የመለወጥ ጉዳይ ለዚሁ ውል በተደነገገው አጻጻፍ (ፎርም) መሠራት አለበት ።

Our attention must center on the phrase *forme prescrite* in the French version and its Amharic and English counterparts, በተደነገገው አጻጻፍ (*betedenegegaw atsatsaf*) and "special form." The question to be answered is: In what cases does the law require a particular form the modification of a contract? The answer is: In the cases where there is a *forme prescrite* or በተደነገገው አጻጻፍ (*betedenegegaw atsatsaf*) for the conclusion of the main contract. We must therefore determine the import of these phrases.

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6 Other cases in which a special form is required for the conclusion of a valid contract are: contracts creating, extinguishing, or transferring certain rights in immovables (Art. 1723), contracts binding the Government or a public administration (Art. 1724), and contracts of guarantee (Art. 1725(a)). The form required is not always the same, since registration of the contract with a particular body is required in some cases and not others. This requirement of registration will affect the validity of the contract unless it is interpreted to be a "measure of publication." (See Civ. C., Art. 1720(3)).

It is important to note that in all cases where the law requires that a contract be in writing, Article 1727(2) requires, in addition, that the contract be attested by two witnesses. It is clearly desirable that individual articles requiring the written form be technically amended to reflect this additional requirement of Article 1727(2) and thus avoid confusion on the part of the casual code reader.

The English version of the Code renders this phrase "special form," but this is clearly a bad translation and does not carry the same meaning as the French and Amharic phrases used. A better English translation from the French would be "A contract may be varied only in the form required (or prescribed) for the original contract." The divergence of the English from the Amharic version is probably even greater than from the French. The word በተደነገገው፡ (*betedenegegaw*) is the verbal form of the noun ድንጋጌ፣ (*denegagi*), which means "decree."[7] Thus, a reasonable English translation of the Amharic version might be: Contracts made in a *legally required* (or *decreed*) form shall be modified in the same form. In the rest of our discussion we shall use the French phrase *forme prescrite*.[8]

Let us now turn to the question of the applicability of Article 1722 to the four types of situations outlined above and thus to the situation that confronted the Court in *Bayessa Jammo*. In which of the four type-cases is there a *forme prescrite*? Clearly there is a *forme prescrite* in the first type-case, that of the insurance contract, since the law imperatively requires the written form. Equally clearly in the second case, that of the oral contract to sell a horse, there is no prescribed form. In no sense can one say that the oral form is required.

The third type-case, that of the written contract to sell a horse, should be no more difficult than the second, but it seems to give rise to confusion. The law in no sense requires the use of a written form for the conclusion of such a contract. There is no legal provision saying that sales of horses, movables, must be writing. Neither do Articles 1719(3) and 1726 apply to this case, since the parties did not stipulate or agree that their contract must be in a special form. They simply put it in writing. In interpreting Article 1722, it would make as much sense to say that a contract made orally may only be modified orally as to say that a contract made in writing may only be modifed in writing. In the absence of a preliminary agreement concerning the form of the agreement, one cannot say that the law requires, *in any sense*, the use of a particular form for the conclusion of such a contract. Thus, Article 1722 does not require the use of a particular form for the modification of such a contract.

This third type-case seems to represent the type of the situation the Court was dealing with in *Bayessa Jammo*. The apparent issue in the case was whether it is possible to have a valid oral modification of a written contract of work and labour relating to immovables. No particular form is required by the law for the conclusion of such a contract.[9] The Court does not state that the contract was put in writing because of a preliminary agreement to do so. It was merely put in writing. Therefore, unless there are crucial omissions in the Court's statement of facts, there seems to be no basis for saying that the law required the modification of the contract to be in writing. The Court stated, however, that "if the principal contract is in writing, it must be modified in writing" and decided that evidence of oral modification was not admissible.

Let us now go on to the fourth type-case, the only situation in which there can be any doubt as to the meaning of Article 1722; and even this case does not seem very doubtful to this writer.

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7 See Rev. Con., Art. 64 (Amharic version).

8 The Amharic version of the Code should ordinarily be the controlling one, since Amharic is the official language of Ethiopia (Rev. Con., Art. 125) and is the version used in the courts. The French version may be of use in some cases, since it is the language of the *avant projet*. The English version is clearly without authority when in conflict with both the Amharic and French versions.

9 See Civ. C., Arts 1719(1) and 3020(1).

A and B, negotiating the establishment of a business, agree that their contract will not be validly concluded until it is embodied in a signed written document. In the absence of such a preliminary agreement, the law does not require any special form for this kind of a contract, but Articles 1719(3) and 1726 state explicitly that the preliminary agreement of the parties shall be enforced by treating any later oral contract as invalid. Thus, in one sense the law requires no special form, but in another sense it does by requiring the form agreed to by the parties. Should Article 1722 when it refers to "*forme prescrite*" be interpreted to include a form agreed upon by the parties in preliminary negotiations and enforced by the law, or to include only those cases where *the law itself* prescribes a particular form?

Clearly, the language of Article 1722 does not contain the answer to this question, and if the Court in *Bayessa Jammo* was dealing with this kind of a situation it has taken an arguably correct position. This writer prefers the narrower interpretation, however.

A narrow interpretation of Article 1722, to include only the first type-case above, seems preferable for the following reason. In the first type-case, that of the contract of insurance, the same policies that lead the legislature to insist that the original contract be in writing (fear of undue influence, desire for great certainty concerning the parties' respective obligations) require that any modifications to the original contract comply with the same form. In the fourth type-case, on the other hand, the law has no policy reason of its own for forcing the parties to conclude the original contract or any modifications to it in a particular form; the function of Articles 1719(3) and 1726 is simply to enforce the will of the parties. Thus, the imposition in this kind of case of a special form for *modifications* is only justified if one can reasonably infer that the parties themselves intended by their preliminary agreement to restrict their own freedom not only with respect to the form for their original contract but also with respect to the form for any modification.

In order to decide what inferences regarding the parties' intention one can reasonably draw from a preliminary agreement that a contract must be concluded in a particular form, we must envision the situation in which the parties make such a preliminary agreement. It will ordinarily be a situation where there are complicated negotiations or planning discussions involving the exchange of documents that might be taken to indicate the existence of a contractual relationship. The parties want to be sure that their correspondence and these preliminary negotiations will not be misinterpreted as evidence of an already existing contract; they guarantee this by a preliminary agreement that no contract will be concluded except in writing.

Should such a preliminary agreement be held to preclude oral modifications of the contract? It is hard to see why it ordinarily should. The parties may, of course, always provide in their contract that modifications must be made in a particular form, or a court might legitimately decide in a particular case that such an intention is to be inferred from particular surrounding facts. However, in the absence of peculiar circumstances justifying such an interpretation, ordinarily there is no reason to think that a preliminary agreement on the form for conclusion of the principal contract would be intended also to require the same form for modifications. The function of the preliminary agreement is to make perfectly clear the time at which the principal contract was concluded and the contents of the principal contract. The parties wish to avoid confusion that is particularly likely

to result from protracted precontractual negotiations. Once the negotiations are finished and the principal contract concluded, the function of the preliminary agreement is fulfilled and the need for it is over.

Naturally, testimony concerning oral modifications of written contracts may be viewed with circumspection, but there is no valid reason to exclude the evidence completely and to say that even if there was a clearly-proved oral agreement of modification it is ineffective because of Article 1722.

Conclusion

It is important to note that these Code articles are complex. It is also important to repeat that it is possible that *Bayessa Jammo v. Assefa Wolde Giorgis* dealt with a situation like the fourth type-case rather than the third, in which case the decision would be arguably correct in this writer's view. It remains true, however, that the judgment of the Court indicates that this is a case similar to the third type-case above, in which case, in this writer's opinion, the Court's decision is clearly incorrect.