THE FORMATION, CONTENT AND EFFECT OF AN ARBITRAL SUBMISSION UNDER ETHIOPIAN LAW

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INTRODUCTION

Despite the fact that the Ethiopian society had been traditionally using arbitration through the system of referring disputes to a third person called "shimagle"[1]and despite the fact that we have elaborate and modern laws on arbitration (since 1960), there is still gross unfamiliarity with the meaning and application of arbitration. There are times when foreign researchers have come to the conclusion that Ethiopia does not have any arbitration laws at all.[2] There are also times when certain institutions[3] have attempted to draft separate arbitration laws governing international arbitration in the belief that the present laws have major deficiencies in this respect. Many a time, enterprise managers simply refer a dispute to arbitration in Paris under the International Chamber of Commerce without bothering to know whether we have such a thing as arbitration law or whether there are mandatory provisions. The purpose of this paper, therefore, is a modest one. It is an attempt to familiarize those who are interested in the use and application of arbitration, i.e., students, lawyers, businessmen and managers, with our major arbitration laws. Since the subject of arbitration is quite wide, I have regrettably limited myself to the examination of the law on arbitral agreement - what it is, how it is concluded, what its contents are and its legal effect. I have found it useful to add a section on applicable law in international arbitration. One more thing. The paper deals only with arbitration based on agreements concluded by the parties voluntarily It does not deal with compulsory arbitrations. Hence, family arbitrations, labour arbitrations and arbitrations through what were called the Central Arbitration Committees are not covered.

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[1]Thomas Geraghty, <u>People, Practice, Attitudes and Problems in the Lower Courts of Ethiopia</u>. Journal of Ethiopian Law, Vol. VI, No. 2 (Dec. 1969), p. 427

[2]See the paper presented on "Arbitration Laws of PTA Member States" at the Regional Seminar on International Trade Law, Maseru, Lesotho, July 1988.

[3]The Ethiopian Chamber of Commerce, Draft Proclamation Relating to the Conduct of International Commercial Arbitration, 1988.

PART I FORMATION OF AN ARBITRAL SUBMISSION

A. Definition and Nature of an Arbitral Submission

Arbitration, as a device of dispute settlement, is founded on an agreement called arbitral submission. Arbitral submission is the term consistently used both by the Civil Code as well as by the Civil Procedure Code. In this paper, however, we shall be using the terms arbitral submission and arbitral agreement interchangeably since the French master-text from which both the Amharic version and the English version of the Civil Code are translated uses the term "la convention d'arbitrage" which means arbitration agreement.[4]

The term 'arbitration clause' is also sometimes used in the Civil Code and the Maritime Code.[5] This, too, is an arbitral agreement,[6] the difference being that the agreement is inserted as a clause in the main contract made by the parties instead of having a separate agreement dealing with arbitration.

Article 3325 (1) of the Civil Code defines an arbitral submission 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 principles of law." It is also provided that only questions of fact may be entrusted to the arbitrator[7] and also that the arbitrator could be one or several.[8] As a contract, arbitral submission is subject, firstly, to the special provisions dealing with arbitration, and secondly, to the general provisions of Contracts in General, Title XII, Book IV, of the Civil Code.[9]

An arbitral submission, though a contract, is, however, peculiar in many respects. One of its peculiarities has been put succinctly by Lord Macmillan thus:

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[4]Harrap's Mini Pocket French and English Dictionary.

[5]Civil Code Art. 3328 (See the title) Maritime Code, Art. 209.

[6]Assefa Desta, Arbitration in Construction Contracts, Senior Paper, Law Faculty, Addis Ababa University (No date), p.8.

[7]Art. 3325 (2), Civil Code (hereafter C.C.)

[8]Art 3331 (2), C.C.

[9]Art. 1676 (1) & (2), C.C.

> "...*The other clauses set out the obligations which the parties undertake towards each other hinc inde, but the arbitration clause does not impose on one of the parties an obligation in favour of the other It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution.*[10]

In arbitral submissions (or arbitration clauses), as stated above, the obligations that the parties undertake are not towards each other but rather they both undertake to submit the resolution of their dispute to a person or persons called arbitrators.

Another peculiarity of the agreement is that, in the words of Rene David, there is an "interplay of two conventions, one between the parties (submission to arbitration), and the other between the parties and the arbitrators (receptum arbitri)."[11] This interplay of two conventions is obvious from the definition of arbitral submission itself where it is stated "the arbitrator, who undertakes to settle the dispute. " The mechanism of arbitration entails not merely the appointment of any arbitrator but a willing arbitrator, that is why it is provided thus: "the person appointed as an arbitrator shall be free to accept or to refuse his appointment."[12] The second convention which David called 'receptum arbitri' appears into the picture, then, when the arbitrator accepts the appointment.

The fact that parties are able, through arbitral submission, to create their own private regime of administration of justice is another peculiarity By this mechanism, parties can have their own 'private judges', outside the court system, and if they both continue subjecting themselves to this mechanism throughout, there is a possibility of settling their dispute up to the end without the intervention of the state authorities.

B. THE FORMATION OF AN ARBITRAL AGREEMENT

How is an arbitral agreement formed? One has to refer to the general provisions dealing with the formation of contracts, i.e., Arts 1678-1730 of the Civil Code. An arbitral agreement is formed and completed where the offer for arbitration made by one party is accepted by the other

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[10]Heyman and another V Darwins Ltd. from Eric Lee, Encylopedia of Arbitration Law, Lloyd's of London Press, 1984 Sec. 3.1.3

[11]Rene' David, Arbitration in International Trade, Kluwer Publishers, Deventer/Netherlands, 1985, p. 78.

[12]Art. 3339 (3), C.C.

party without reservation. Such offer and/or acceptance "may be made orally or in writing or by signs normally in use or by a conduct such that, in the circumstances of the case, there is no doubt as to the party's agreement."[13]

The negotiation that took place between the Ethiopian Import-Export Corporation (ETIMEX) and a Dutch cooking oil supplier by the name B.V. Vereenigde Oliefabrieken (Oilos) is a good illustration of the point in question.[14] The tender document issued by ETIMEX, after specifying the type and quantity of the product and other terms, invited foreign suppliers by telex to submit their offer. This, under Ethiopia law, is a declaration of intention and not an offer.[15]

Oilos, as one of the competitors, submitted its offer by telex. The offer was accepted by ETIMEX and a contract of sale was concluded by the parties. Up to this point, there was no mention of arbitration. After this, ETIMEX asked Oilos to send a 'draft supply contract' for the purpose of L/C (letter of credit) processing. Oilos, accordingly sent a 'draft supply contract' in which was included:

> *"The parties hereby agree to submit all disputes arising out of or in connection with this contract to arbitration in Rotterdam in accordance with the Rules for Arbitration of the NOFOTA."*[16]

ETIMEX, after receiving this offer for arbitration, sent its reply by amending the arbitration clause thus:

> *"Arbitration: Any dispute arising out of or in connection with this contract is to be submitted to ICC,*[17] *Paris for arbitration."*

The reply of ETIMEX did not confirm to the terms of the offer and hence was deemed to be a new offer[18] for arbitration. If this new offer had been accepted by Oilos, we could have said that an arbitral agreement was formed or concluded. But unfortunately, a dispute in the

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[13]Art 1681 (1), C.C. We shall discuss the "form" of the agreement under a separate heading.

[14]Legal Department file, ETIMEX. A suit based on breach of contract was instituted against Oilos in Rotterdam and the court had decided in favour of ETIMEX.

[15]Art. 1687 (1), C.C.

[16]"Netherlands Oils, Fats and Oilseeds Trade Association."

[17]"International Chamber of Commerce".

[18]Art. 1694, C.C.

meantime, arose between the parties and no agreement was reached on arbitration. The case, as it is, however, abundently demonstrates the process of forming or concluding an arbitral agreement and also its separableness from the main contract.[19]

C. THE CAPACITY OF PARTIES TO MAKE AN ARBITRAL AGREEMENT

Eventhough establishing a principle regarding capacity of persons is not within the domain of procedural laws, our Civil Procedure Code provides thus: "No person shall submit a right to arbitration unless he is capable under the law of disposing of such right."[20] As stated earlier, even here the Code uses the phrase "unless he is capable under the law" implying that capacity is governed by other substantive laws. Accordingly, the principle regarding the capacity of persons to arbitrate as laid down in the Civil Code reads:

> *"The capacity to dispose of a right without consideration shall be required for the submission to arbitration of a dispute concerning such right."*[21]

Where the party to an arbitral agreement is a physical person, the basic requirement that he must be capable, i.e. free from all disabilities is obvious.[22] Where the party is a juridical person, such person must be endowed with a legal personality. This, too, is obvious. Rather, we are concerned, here, with the content of the additional requirement, i.e., "the capacity to dispose of a right without consideration."

We have said earlier that arbitral agreements are not ordinary agreements. They are agreements that subject parties to different and private type of dispute settlement process. They "may lead to a solution of the dispute other than that which would be given by the courts."[23] Hence, it is necessary that the parties must have the power to dispose of the right in question, in the words of the Amharic version, "without price"

[19]See our discussion under the heading "Form and Proof of an Arbitral Agreement" below.

[20]Art. 315(3), Civil Procedure Code (hereafter C.P.C.)

[21]Art. 3326(1), C.C.

[22]Art. 1678(a): Arts, 192-194 C.C. where these disabilities exist, he will act through his tutor Art. 3327(2), C.C.

[23]R.David, Arbitration in ., p.174.

Where the parties are acting on behalf of other persons, either physical or juridical, then, a special authority to settle a dispute by arbitration is required.[24] That special authority is derived from the principal who has the necessary capacity. Where the principal is a juridical person, such as, a business organization, it is derived from its governing body. i.e., the board of directors.[25]

So much for capacity at the level of physical persons and business organizations. It is at the level of public bodies such as the state, public administrative authorities and public enterprises that more controversial points could be expected to arise, considering the fact that the interest of the public is involved in their transactions. So, the question is: do these bodies have the capacity to make arbitral agreements? If so, to what extent?[26]

Let us take, first, the Ethiopian State. In the Civil Code, it is stated that the State is "regarded by law as a person" and that as such it has "all the rights which are consistent with its nature."[27] If the distinction is not to be stressed between the State and the Government, we see that the Ethiopian Government, for instance in a petroleum agreement, is allowed to submit a dispute to arbitration.[28] We also see that the State, as one of the parties in a joint venture agreement, can settle disputes by arbitration.[29] Other than these, we have not found a general provision that expressly allows or expressly prohibits the State from making an arbitral agreement. In these circumstances, the easier answer would have been to say that the State does not have the capacity to submit to arbitration. But that would be unrealistic. The state is the source of all rights and obligations and of all laws (including the provision on capacity) It is also the trustee of all public property. It follows, therefore, that as long as the right which is to be the subject of arbitration belongs to the State, and not to someone else, i.e., individual citizens or groups, it can be said that the State has the capacity to make arbitral agreements.

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[24]Art. 2205, C.C.

[25]Arts. 313(10); 347(2); 363(1), Commercial Code.

[26]The subject of submitting arbitrable and non-arbitrable disputes will be discussed separately below.

[27]Art. 394, C.C.

[28]Petroleum Operations Proclamation, No. 295/1986, Art. 25.

[29]Joint Venture Council of State Special Decree, No. 11/1989, Arts, 4(1), 36.

Regarding the capacity of public authorities and public enterprises, after making a short survey of various legislations, we find amongst them three categories: Those with no express power to submit to arbitration, those with limited power and those with express power to do so.

Public authorities such as the Ethiopian Science and Technology Commission[30] are conferred with such powers like entering into contracts, suing and being sued, pledging and mortgaging property. The power to submit to arbitration is not expressly given to them. The same is true for such public enterprises like the Agricultural Inputs Supply Corporation.[31] On the other hand, we see that public enterprises like the Ethiopian Domestic Distribution Corporation[32] and the Ethiopian Import-Export Corporation[33] have the power to settle disputes out of court (presumably this includes arbitration) only with the permission of their supervising Minister. Then, there are many public authorities which are expressly empowered to submit disputes to arbitration like the Civil Aviation Authority[34] or the National Water Resources Commission[35] which are empowered to settle disputes out of court. Public enterprises like the Blue Nile Construction Enterprise[36] are also given similar power The conclusion to be made is, therefore, that in the case of public authorities and public enterprises, the power to submit a dispute to arbitration is not to be presumed and that they need either an express power, or in the case of some public enterprises, special permission to do so.

D. THE FORM AND PROOF OF AN ARBITRAL AGREEMENT

Form requirements are associated with the question of whether an arbitral agreement can be made orally or in writing. In this regard, Article 3326 (2) of the Civil Code, which is the main source on this point, provides thus:

> *"The arbitral submission shall be drawn up in the form required by law for disposing without consideration of the right to which it relates."*

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[30]Proclamation No. 62/1975.

[31]Proclamation No. 269/1984.

[32]Legal Notice No. 104/1987. Art. 12(3)

[33]Legal Notice No. 14/1975 and Public Enterprises Regulations No. 5/1975, Art. 7(2)

[34]Proclamation No. 111/1977. Art 8(18)

[35]Proclamation No. 217/1981, Art 8(16)

[36]Proclamation No. 234/1982, Art 10(2) (C)

According to this Article, admittedly quite a difficult one, the special rules of form for disposing a right without consideration to which the submission relates must be followed.

On the question of capacity to submit to arbitration, (see section C above) it is indeed necessary to require that one have the widest right. That seems to be the reason for the existence of the phrase "the capacity to dispose of a right without consideration." But, on the question of form as to why the phrase "for disposing without consideration" is added in Art. 3326 (2), is, to say the least, most confusing. In fact, if we follow the provision strictly, we may reach an absurd conclusion as shown below.

Let us say, for example, the right over the dispute concerns the transfer of an immovable property. For the disposition of a right over an immovable without consideration (donation) the law requires that it be made in the form governing a public will,[37] i.e., it must be written by the donor or by any person under the dictation of the donor, it must be signed by the donor and by four witnesses. Now, if the parties who are involved in the transfer of that immovable property want to submit their dispute to arbitration, it means their submission must be drawn in the form described above. It must be written by the parties themselves or by any person under their dictation, signed by them and by four witness. It is really doubtful whether this is the intention of the legislator

As a result, one is at a loss to determine, in a definite manner, the "formality" required regarding arbitral submission. In spite of this, some transactions like the transfer of a right over an immovable[38] or over a ship,[39] or over a business,[40] and long term contracts like guarantee,[41] or insurance policy[42] are required by law to be in written form and be attested by two witnesses.[43] To submit disputes that arise from any one of these contracts to arbitration, therefore, it would be safer and advisable

[37]Arts. 2243, 881 - 883, C.C.

[38]Art. 1723, C.C. in addition, it has to be registered with a court or notary.

[39]Art. 7, Maritime Code.

[40]Art. 152, Commercial Code.

[41]Art. 1725 (a), C.C.

[42]Art. 1725(b), C.C.

[43]Art. 1727(2), C.C.

that the submission be concluded in a written form and also be attested by two witnesses. Many other transactions, however, like the sale of goods or contract of carriage of goods (except a contract of carriage of goods by sea),[44] or construction contracts are not required to be in writing. It is the contention of this writer that if disputes arise out of these transactions, submission to arbitration can be made orally, although, as Schmitthoff has rightly said they are rare in practice and "import...an element of uncertainty with respect to the implications and enforcement of the arbitration agreement."[45] In these situations, the parties have the option of having their submissions in writing. The implication of this is that a mere document signed only by the parties or an exchange of letters, or telex or telegrams would be sufficient.[46] If the necessity of proving the arbitral submission arises, the burden of proof is on the party who alleges its existence.[47] And according to the source of the legal relationship involved, he may have to present the "formal" instrument, or the written documents or witnesses, or other means of evidence.[48]

The manner of making an arbitral agreement varies according to the wishes of the parties. Where the dispute between the parties is an existing one, they can refer their dispute to arbitration by a separate document. If, on the other hand, the dispute is a future one, they can either refer it to arbitration by a separate document or can insert their submission as a clause (called an arbitration clause) of the main contract.[49]

PART II
THE CONTENT OF AN ARBITRAL SUBMISSION
A. APPOINTMENT OF ARBITRATORS

The first thing that an arbitral submission may contain is a set of provisions that deal with the establishment of what is called the arbitral tribunal. (An arbitral

[44]Art. 134, Maritime Code.

[45]Clive M. Schmitthoff's Export Trade, the Law and Practice of International Trade, (London, Stevens and Sons 1986) 8th edition, p. 583. In practice, we recommend a written arbitral submission that is carefully drafted.

[46]It must be noted that if the parties expressly agree to make it in a special form, then that form must be followed. Art. 1726 C.C.

[47]Art. 2001(1), C.C.

[48]Art. 2002, C.C.

[49]Art. 3328, C.C.

tribunal may be made up of one or several arbitrators) On this matter, the parties can take any one of the four options available to them. 1. They can appoint, in the submission or subsequently, the arbitrators by name; 2. They can specify, without the necessity of appointing by name, the manner of appointing arbitrators (specifying an appointing authority falls under this category); 3. The parties can merely refer to other arbitral codes[50] or arbitration rules such as the International Chamber of Commerce (ICC) Arbitration Rules or the United Nations Commission on international Trade Law (UNCITRAL) Arbitration Rules; and 4. They can omit providing for appointment of arbitrators in which case the relevant provisions of the Civil Code[51] would be applicable. It must be pointed out that since arbitrators could, for various reasons, be unable to discharge their functions,[52] the parties would normally lay down the procedure for the replacement of the arbitrators as well. In the absence of such an agreement between the parties, again it is the Civil Code that fills the gaps. Going further than what I stated above on appointment and replacement of arbitrators, would be outside the scope of this paper But, at the same time, I ask the reader to bear with me while I comment upon certain arbitral clauses that I have come across and that do not seem to accord with the law. For the sake of convenience I will treat them under separate sub-headings:- a) appointment under the Ethiopian Chamber of Commerce (ECC); and b) inequality of parties during appointment.

a) **APPOINTMENT UNDER THE ECC**. In many international sale contracts[53] we find clauses referring disputes to arbitration under the ECC. This assumes that the ECC has a set of arbitration rules and a well established system for appointing and replacing arbitrators. The fact, however, is that it does not have such rules or system. One can even go as far as saying that the ECC has not yet reached the stage to serve as an arbitral body. The Ethiopian Chamber of Commerce was established by Proclamation No. 148/1978 and one of its powers and duties include:

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[50]Art. 3346, C.C.

[51]Arts. 3331 - 3343.

[52]The Persons appointed could, for example, be of unsound mind. Note also that it is human beings that are appointed and not institutions like the Addis Ababa University

[53]See, for example, sample purchase order of the Ethiopian Import Export Corporation, (ETIMEX) form OP/13, Art. 9. See also sample sales contract of the Ethiopian Oilseeds and Pulses Export Corporation (EOPEC)

> *"to settle, when the parties so request, by way of arbitration, disputes arising out of business transactions."*[54]

The power of issuing regulations and directives necessary for the proper implementation of the Proclamation rests with the Minister of Trade[55] and upto now there are no regulations or directives from the Minister that deal with such matters.

There is another problem that originates from bad drafting of the law. The Proclamation cited above empowers the ECC to act as an arbitrator But this violates, as Girma Zelleke has said, "the principles and legal concepts of commercial arbitration in that it authorizes an institution to be involved in the actual dispute settlement process instead of supervising the process."[56] The best that can be said, at present, is that the ECC can serve as an appointing authority like any other institution when it is requested by the parties.

b) **Inequality of parties during appointment**. One of the mandatory provisions of the law of arbitration is that the equality of parties as regards the appointment of arbitrators must be maintained. If one of the parties is placed in a privileged position, then the arbitral submission shall not be valid.[57] The arbitration clause that allows a party to appoint a sole arbitrator after the failure of the other party is ascertained, is a valid one.[58] On the other hand, the clause that empowers only one of the parties to appoint a sole arbitrator[59] is a gross violation of the mandatory provision of the law and hence is not valid.

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[54]Art. 6(5) of the Procl.

[55]Art. 23. In the Proclamation, Minister of Commerce and Tourism is mentioned.

[56]Girma Zelleke, Commercial Arbitration as an Alternative to Judicial Settlement of Business (Economic) Disputes. Senior Paper 1988, Faculty of Law, A.A. University. p. 107. See also the case between Vettori Menghi and the Horticulture Development Corporation where the Corp. asked the ECC to settle the dispute as an arbitrator. The ECC, however, declined to serve in that capacity

[57]Art. 3335, C.C.

[58]Sample Workmen's Compensation Policy of the Ethiopian Insurance Corporation, Art. 14.

[59]Standard terms and Conditions of Contract for the Supply of General Goods ETIMEX, Art. 26. At present, it is no more being used.

B. THE POWER OF THE ARBITRATORS

Delimitation of the arbitrators' power is the second matter that may be dealt with in the arbitral submission. The parties, of course, do not have to provide anything about this because the arbitrator, once he is appointed, shall settle the dispute, i.e., hear evidence and deliver an award in accordance with the principles of law.[60] The necessity to delimit the arbitrator's power arises when the parties wish to narrow or widen his power than what is already provided by law. The situations where that is made possible and the limitations thereof prescribed by the law are discussed below.

1. The dispute between the parties may involve both questions of law and questions of fact. In both cases, the arbitrator is required to settle the dispute in accordance with the principles of law. The parties cannot, in contrast to some foreign laws where it is allowed,[61] empower the arbitrator to act as "amiable compositeur", i.e., decide on the basis of equity or fairness. This basic policy of the Ethiopian law is also reflected in the Maritime Code where it is provided:

> *"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."*[62]

True, the Civil Procedure Code envisages a possibility whereby the parties could, through their submission, exempt the arbitrator from deciding according to law.[63] But, this is a clear contradiction of the substantive law and cannot be tenable.[64] On the other hand, where the parties wish to narrow the arbitrator's power, they can instruct him only to establish a point of fact, for example, the occurrence or non-occurrence of an earthquake, without deciding on the legal consequences following therefrom.[65]

2. There is one area - variation of contracts - where the parties can widen the arbitrator's power beyond that of deciding upon legal or factual dispute. On this subject, Art. 1765 (Civil Code) provides:

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[60]Art. 3325(1), C.C.; Arts. 317-318. C.P.C.

[61]See the discussion in R.David, p. 88, cited at Note No. 11.

[62]Art. 209 Maritime Code.

[63]Art. 317(2), C.P.C.

[64]See Sedler Ethiopian Civil Procedure. , p. 387

[65]Art. 3325(2), C.C.

> *"When making the contract or thereafter, the parties may agree to refer to an arbitrator any decision relating to variations which ought to be made in the contract, should certain c rcumstances occur which would modify the economic basis of the contract."*

As can be observed from the article, the power to vary or modify a contract is different from the ordinary power in that the arbitrator with such a power would decide on and regulate the future relationship of the parties concerned.

3. The power of the tribunal to decide on its own jurisdiction called "Kompetenz-Kompetenz" in foreign legal systems,[66] is another area that may need delimitation by the parties. The parties, in particular, may authorize the tribunal to decide disputes relating to its own jurisdiction.[67] Suppose one of the parties, raises an objection alleging that the tribunal has no jurisdiction because it is made up of one arbitrator instead of three, or that the dispute brought before it is not covered in the submission, the implication of the above authority is that the tribunal would have the power to decide on such objection. On the other hand, if the parties wish to go beyond this and empower the tribunal to decide on whether the arbitral submission is or is not valid, that, I am afraid, is not permitted because Art. 3330(3) (Civil Code) mandatorily provides:

> *"The arbitrator may in no case be required to decide whether the arbitral submission is or is not valid."*[68]

The implication of this mandatory provision is that if any jurisdictional objection based on invalidity of an arbitral submission is raised, the power to decide such issue rests not on the tribunal but on the court.[69] The policy behind this rule also seems to be a sound one because the arbitrator, unless so restricted, may be inclined, in order not to lose his fees, to decide always in favour of having jurisdiction.

In this connection, it must be realized that some international arbitration rules particularly that of the ICC Arbitration Rule Art. 8(3) which gives the arbitrator the power to decide on such issues violate this mandatory provision of Ethiopian law.

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[66]UNCITRAL Model Law on International Commercial Arbitration, Note by the Secretariat, A/CN. 9/309, 25 March 1988, p. 6.

[67]Art. 3330(2) C.C.

[68]The French Master-Text as translated by Elias Daniel reads: "The arbitrator may in no case be called upon to rule on the question of whether the arbitral submission is or is not valid."

[69]C. Shmitthoff, p. 578.

C. SPECIFYING 'ARBITRABLE' DISPUTES

An arbitral submission must specify which dispute is referred to arbitration. Specially where the submission relates to future disputes (where the dispute was not known at the time of making the submission) the law provides that this shall not be valid "unless it concerns disputes which flow from a contract or other specific legal obligation."[70]

The intention of the parties whether they have chosen a "narrow arbitration clause" or a "broad arbitration clause" is determined by the words they have used in the submission. A formation such as "a dispute arising under the contract" is held to be a narrow one[71] while "all disputes arising out of the contract or in connection with it" is considered a broad one.[72] If a case is brought in Ethiopia, there is little doubt that the courts will follow similar lines because they will enforce an arbitral submission only when they are convinced that the dispute is "covered by the submission.[73]

In one case the arbitrator assumed jurisdiction on a formulation that read: "If a difference arises as to the amount of any loss or damage such difference shall. (be settled by arbitration) " but the Supreme Court revised the Award on the ground that the dispute relating to liability of the insurer was not covered by the submission.[74]

As I have stated above, specifying a dispute is important. But, the more important point (that may well affect the legality of the arbitration process) is that the dispute must be capable of settlement by arbitration.[75] The Civil Procedure Code in which this principle is strangely laid down provides:

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[70]Art. 3328(3), C.C.

[71]Mediterranean Enterprises V Ssangyong Corporation, (U.S. CircuitCourt), 1983, from Arthur Von Mehren, International Commercial Arbitration, Cases and Materials, (1990), pp 189-190.

[72]C.Schmitthoff, p. 586.

[73]Art. 3344(1) C.C.

[74]Insurance Corp. V. Gebru A.Michael and Lemlem Abraha, Supreme Court File No. 1386/79.

[75]See the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Art. II, Para. 1.

Arbitration

> *"No arbitration may take place in relation to administrative contracts as defined in Art. 3132 of the Civil Code or in any other case where it is prohibited by law."*[76]

If this provision had been placed in the Civil Code rather than in the Civil Procedure Code or alternatively. if the Civil Code had similar provision, no one would have dared to make an issue out of it. But because of this stated situation, the question of whether or not administrative contracts[77] are capable of settlement by arbitration has continued to be a subject of much controversy.[78]

Let me begin by saying that neither Title XIX of the Civil Code on administrative contracts nor Title XX on compromise and arbitral submission prohibit the submission of disputes arising from administrative contracts to arbitration. Such prohibition would have scared off "foreign enterprises and capital to Ethiopia" which was not the intention of the drafter of the code - R.David.[79] In fact, the implication one derives from a reading of Article 3328 (Civil Code)[80] is that any type of disputes

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[76]Art. 315(2). C.P.C.

[77]A contract shall be deemed to be an administrative contract where:
a) it is expressly qualified as such by the law or by the parties; or
b) 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
c) it contains one or more provisions which would only have been inspired by urgent considerations of general interest extraneous to relations between private individuals. Art. 3132, C.C.

[78]Ibrahim Idris, Administrative Contracts and the law of Arbitration in Ethiopia, Faculty of Law, (A.A. University) unpublished, (1979?), p. 13.

[79]R. David, Administrative Contracts in the Ethiopian Civil Code, Journal of Ethiopian Law, Vol., IV No. 1 (1967), p. 145.

[80]Art. 3328 - Object of Contract and Arbitration Clauses.

1) The dispute referred to arbitration may be an existing dispute.

2) The parties to a contract may also submit to arbitration disputes which may arise out of the contract in the future.

3) An arbitral submission relating to future disputes shall not be valid unless it concerns disputes which flow from a contract or other specific legal obligation.

could be submitted to arbitration. If there were any restrictions to the type of disputes to be submitted to arbitration (which would naturally affect the parties' freedom), surely, the legislator would have stipulated them in the substantive law, i.e., the Civil Code. The legislator, however, didn't provide any restrictions, neither did it envisage the inclusion of such restrictions in the Civil Procedure Code. It only left procedural matters (i.e., "the method by which claims of persons are adjudicated and by which rights, privileges and duties are determined and enforced by the appropriate legal tribunals")[81] to be dealt with in the Civil Procedure code. That is why it is provided in Art. 3345 thus:

Reference to Civil Procedure Code

(1) The procedure to be followed by the arbitration tribunal shall be as prescribed by the Code of Civil Procedure.

(2) The same shall apply to matters arising out of the execution of the award or to appeals against such award.

Now, the legislator of the Civil Procedure Code, instead of limiting itself only to procedural matters[82] went out of its way and prohibited the submission of administrative contracts to arbitration, contradicting the substantive provisions of the Civil Code particularly that of Art. 3328. In order to answer the next question of whether the Civil Procedure Code or the Civil Code is overriding,[83] I will simply point out that the Civil Procedure Code has conceded the supremacy of the provisions of the Civil Code by providing thus:

> *"Nothing in this Chapter (the Chapter on Arbitration) shall affect the provisions of Arts. 3325-3346 of the Civil Code."*[84]

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[81]Robert A.Sedler, Ethiopian Civil Procedure (H.S.I.U., 1968) p.1.

[82]Ibrahim, cited at Note No. 78 argues that Art. 315(2) of the C.P.C. deals with the incapacity of arbitrators and hence is a procedural provision. The argument, however, is hardly tenable. See p. 14 of the article.

[83]In the case of WSSA V. Kundan Singh, High Court Civil File No. 688/79, the court had said that Art. 315(2) (C.P.C.), which is compatible and to be read with Art. 3345(C.C.), is in conflict with Art. 3328 and it overrides. The court seems to have completely forgotten the existence of Art. 315(4), (C.P.C.).

[84]Art. 315(4), (C.P.C.)

The conclusion to be reached, therefore, (which, by the way, is supported by the Supreme Court and also by international arbitral tribunal)[85] is that administrative contracts or disputes that arise from them are capable of settlement by arbitration.

Even if one holds the contrary view that disputes arising from administrative contracts are not capable of settlement by arbitration by virtue of Art. 315 (2) of the C.P.C., in practical terms it is of minimal effect. This is so because many administrative authorities which are likely to be involved in domestic and international transactions and arbitration are empowered by law to settle their disputes by arbitration. One can cite the following as examples: Ministry of Mines and Energy,[86] the Marine Transport Authority,[87] the Civil Aviation Authority,[88] the Ethiopian Transport construction Authority,[89] the Ethiopian Water Works Construction Authority[90] and the Ethiopian Building Construction Authority [91] The argument that can be forwarded is that these establishment proclamations, by empowering the above state bodies to settle disputes by arbitration, have impliedly amended the "prohibitive" Civil Procedure Code provision.

Having said that, there still remains the question whether there are other types of disputes that are not capable of settlement by arbitration. In some foreign countries, like France a list of items such as matters related to the status and legal capacity of persons or divorce, or to anti-trust laws are excluded from arbitration.[92] In Bolivia, disputes arising from an act of government are excluded from arbitration.[93] In Ethiopia, on the other hand, I have not come across a law that expressly prohibits arbitration other than the law that I mentioned earlier Certain inferences, however, can be made. The Civil code provisions on expropriation (Arts. 1460-1488)

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[85]Ethio-Marketing Ltd. V. Ministry of Information, Supreme Court File No. 1144/67 Kundan Singh V. Water Supply & Sewerage Authority (WSSA), International Chamber of Commerce Arbitration, 1987

[86]Petroleum Operations Proclaim, No. 295/1986, Art. 25 and Art. 27 The latter article repeals conflicting laws.

[87]Proclam. No. 139/1978, Art. 7(19)

[88]Proclam. No. 111/1977. Art. 8(18)

[89]Proclam. No. 189/1980, Art. 8(19)

[90]Proclam. No. 190/1980, Art. 6(13)

[91]Proclam. No. 191/1980, Art. 8(14)

[92]R.David, Arbitration in International Trade, p. 187

[93]Ibid, p. 177

provide that disputes on the amount of compensation to be paid to the owner may be fixed by an arbitration appraisement committee. From this, one may infer that the act of expropriation itself is not subject to arbitration. The Civil Code provision on irregular union (Art. 730) provides that only the court is competent to decide whether an irregular union has been established or not and on disputes arising out of such union. One may infer from this that disputes arising from such matters are not capable of settlement by arbitration. But the strength of these inferences can only be tested by future court decisions and jurisprudence which at present are lacking.

PART III
THE EFFECT OF AN ARBITRAL SUBMISSION
A. BINDING NATURE AND ENFORCEABILITY

An agreement made between parties to settle their dispute by arbitration is binding on them and it shall be enforced as though it was law.[94] If both parties, knowing the binding nature of their agreement, wholly comply with it, the arbitral tribunal created by them will proceed with the hearing of the case and will deliver an award, to the exclusion of the courts. On the other hand, if one of the parties, in disregard to the arbitral agreement, institutes an action in a court of law, the other party has the discretion to consider the agreement to have lapsed[95] and continue to defend his case there.

The binding nature of the agreement and the necessity of enforcement appears in a head-on fashion when one of the parties, in disregard to the arbitral agreement, institutes an action in a court of law while the other party wants to take the case to arbitration. It is in relation to this situation that Article 3344(1) (Civil Code) entitled "Penalty for non-performance" provides thus:

> *"Where a party to an arbitral submission brings before the court a dispute covered by the submission, refuses to perform the acts required for setting the arbitration in motion or claims that he is not bound by the arbitral submission, the other party may in his discretion demand the performance of the arbitral submission or consider it to have lapsed in respect of the dispute in question."*

In the hypothetical situation described above, the courts in Ethiopia, in contrast with some countries like England where they have a discretion,[96] are bound to decline their jurisdiction and refer the parties to arbitration. This is what the courts do in practice as well. In the case

[94] Art. 1731(1), C.C.

[95] Art. 3344(1), C.C.

[96] R.David, Arbitration in , pp. 210-211.

between Agricultural Marketing Corporation (AMC) and Ethiopia Amalgamated,[97] AMC instituted an action in the High Court against the defendant claiming around Birr ten million. The defendant submitted a preliminary objection alleging that since the parties had earlier concluded an arbitral agreement, the court should refer the case to arbitration. The Court, after accepting the defendant's objection, struck out the suit and referred the case to arbitration, even though the arbitral tribunal contemplated by the parties was not yet set up.

B. SOME PRECONDITIONS

Before referring the dispute to arbitration, however, it is incumbent upon the court to ascertain: a) That there is a valid agreement to arbitrate,[98] b) that the arbitral submission covers the dispute at hand, and c) that the submission has not lapsed. These will be discussed one by one.

1. The defendant who wishes to raise a preliminary objection on the ground that the "claim is to be settled by arbitration"[99] or that the dispute is the subject of arbitration, is expected to raise this objection at the earliest opportunity, otherwise it shall be deemed to have been waived.[100] Now, if the plaintiff, in his reply. alleges that there was no arbitration agreement at all or that there was no valid agreement, the case shall be referred to arbitration only after this issue has been ascertained and decided by the court. The issue may as well be complex especially when defective arbitration clauses are involved. Let me illustrate this point by taking two examples from the contracts concluded between Horticulture Development Corporation (H.D.C.) and Vettori Manghi (1984); and between ETIMEX and SAFET (1987).

The arbitral clause between H.D.C. and Manghi reads:

> *"ARTICLE X ARBITRATION*
> *In the event of any disagreement ensuing from this contract such disagreement shall be settled by the arbitration of Chamber of Commerce of Ethiopia in Addis Ababa according to the laws of Ethiopia."*

When a dispute arose between the two parties, H.D.C. was consistently arguing that the Ethiopian Chamber of Commerce (ECC) was appointed as arbitrator and hence should proceed in this capacity. But, let us assume for the moment, in disregarded to this clause, H.D.C. has

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[97]High Court, Civil File No. 1101/82.

[98]From a reading of Arts, 1678, 1731, 3344(1) C.C.

[99]Art. 244(2) (g), Civil Procedure Code.

[100]Art. 244(3), C.P.C.

instituted its claim at the High Court and also assume that Manghi has objected to this and demanded performance of the arbitration clause. H.D.C. cannot deny the making of the agreement; because it is a fact that the parties had concluded an arbitral agreement. The only way out for H.D.C. is to argue (as I have argued earlier) that the arbitral clause is not a valid one because an institution, instead of a physical person, was envisaged to serve as an arbitrator; or that the agreement has lapsed because the ECC has declined to act as an arbitrator. Whether the Ethiopian court would accept the arguments of H.D.C. and continue hearing the case or whether it would send it to other arbitrators by holding, like other foreign courts, that there is a "dominant intent to arbitrate and not merely to arbitrate before particular arbitrators"[101] remains of course, a matter of speculation because no similar case has arisen in reality

The second arbitral clause that of between ETIMEX and SAFET reads:

> "ARTICLE XVI
> SETTLEMENT OF DISPUTES
> *Any disputes, differences of (sic) questions arising between the buyer and the suppliers as to the construction and as to any matter out of the contract, or in any way connected or out of or in connection with this contract shall be solved amicably failing which the case shall be referred (sic) to the International Chamber of Commerce in Paris."*

Just like the above example, let us assume that ETIMEX has brought a suit in Ethiopian courts and that SAFET has demanded arbitration. It is the contention of this writer that SAFET cannot succeed because there was no agreement to arbitrate at all. The term "arbitration" was not even mentioned in the particular provision. The court can only enforce an arbitral agreement if there exists an agreement to arbitrate.

2. The second condition is the one concerning the ambit of the arbitral submission. The court will give effect to the arbitral submission only when the "dispute is covered by the submission." In one insurance case I cited earlier (Insurance Corporation V.Gebru and Lemlem), where the arbitral clause covered only "differences arising as to the amount of any loss or damage" the insurer objected to the jurisdiction of the arbitrator by saying that the dispute on 'liability' was not covered by the submission. To illustrate our point better, however, let us reverse the situation and assume that Gebru and Lemlem brought their claim to court. Let us also assume further that the Insurance Corporation objected to this and demanded performance of the arbitration. If this situation occurs, the court, after ascertaining the nature of the dispute involved, will, no doubt, reach the conclusion (just as

[101] Astra Footwear Industry V.Harwyn International (U.S. District Court, 1978), from A.Von Mehren., p. 203.

Supreme Court has reached the same conclusion) that the plaintiffs' claim based on 'liability' is not covered by the submission which talks of 'amount issue' only.[102] Hence, it will continue hearing the case.

3. The third condition concerns the non-lapsing of the arbitral submission. An arbitral submission that has lapsed cannot be enforced. The burden of proof lies on the party who alleges the lapsing, normally the plaintiff who wants to pursue his case in court. Any one of the following could be the causes for lapsing of the arbitral agreement:

a) default of an arbitrator named in an arbitral submission,[103]
b) death of one of the parties before appointing an arbitrator,[104] and
c) acts of the party demanding arbitration such as bringing a claim before a court (excepting actions to preserve rights from extinction)[105] or refusal to set the arbitration in motion.

If the factors enumerated above are proved to the satisfaction of the court, it will reject the defendant's demand for arbitration and will continue hearing the case. Otherwise, it will reject the plaintiff's arguments and refer the dispute to arbitration.

PART IV
APPLICABLE LAW TO THE AGREEMENT
A. SOME PRELIMINARY REMARKS

The question of which national law applies to a particular dispute at hand arises not in domestic arbitrations but in international arbitrations, i.e., arbitrations dealing with a dispute between parties that reside in different states. The subject which deals with these matters called conflict of laws (sometimes also called private international law) is a tricky one even in those countries that have well developed laws. It becomes all the more complex here because:

[102]A further question could be asked: can the court refer the 'amount issue' to be settled by arbitrators after declaring the insurer liable?

[103]Art. 3337(1), C.C.

[104]Inference from Art. 3338, C.C.

[105]Art. 3344(1) & (2), C.C

(a) Our arbitration laws seem to be basically designed for domestic disputes;

(b Ethiopia does not have conflict of law rules,[106] and

(c) there are no cases directly related to the problem we are examining.

I shall, therefore, base my discussions on Mr. Sedler's book[107] on the subject and on some foreign cases.

In the discussion of which law is applicable to international arbitration, there are three aspects that are involved. Firstly, there is the main contract on which the commercial transaction is founded. It could be sale of goods, agency, construction of works, joint venture, carriage of goods... etc. Secondly, there is the arbitration agreement concluded separately or inserted as a clause in the main contract. In international practice, this is considered to be independent and separable from the main contract.[108] The effect of this principle is that the invalidity of the main contract does not affect its position. Thirdly, there is the arbitral procedure. In the great majority of cases, it is the same law that may apply to all three aspects,[109] but there are times (although rare) when different laws may apply. Thus in one English case, it was held (Per Viscount Dilhorne):

> " .*Thus, if parties agreed on an arbitration clause expressed to be governed by English law but providing for arbitration in Switzerland, it may be held that, whereas English law governs the validity, interpretation and effect of the arbitration clause as such...the proceedings are governed by Swiss Law.* "[110]

Also in another case it was held (Per Lord Denning MR):

> "*We reach, therefore, this point. English law governs the interpretation and effect of the contract. But the Kuwait law, or some other law governs the arbitration procedure. This sort of difference is well known.*"[111]

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[106]Robert Allen Sedler, <u>The Conflict of Laws, in Ethiopia</u>, Addis Ababa. Faculty of Law, Haile Sellassie I University. 1965, p.4.

[107]<u>Ibid</u>.

[108]R.David, Arbitration in , p. 193

[109]Schmitthoff, p. 182.

[110]James Miller V Whitworth, Encyclopedia. , Sec. 3.2.9.

[111]International Tank V.Kuwait Aviation, Ibid, Sec. 3.2.11.

When we take an international arbitral agreement-the area of interest in this chapter - unless the parties expressly stipulate a different law, it will normally be governed by the law applicable to the main con'ract. And since also by definition, it is a contract, ' conflict of law rules enunciated for contracts would n doubt be relevant.[112]

Having said that, I shall now proceed to the situations where the issue presents itself.

B. BEFORE ARBITRAL TRIBUNALS

In a dispute involving an international transaction, it is possible for one of the parties before an arbitral tribunal to allege that it is a foreign law and not an Ethiopian law that is applicable to the case at hand. The party's possible grounds could be for example, that the arbitral agreement including the main contract was concluded in some other place, or that it was to be performed in some other place. Now, the question is what are the rules to be followed by the arbitral tribunal if it is confronted with this issue? The first rule is that it is the law that is chosen by the parties that is applicable. In the words of R.David:

> *"It becomes clear then, that in the matter of international arbitration, there is a marked tendency to favour where possible the application of the law which was chosen (or may be reputed to have been chosen) by the parties (loi d'autonomie) "*[113]

Where the parties have not chosen the law or where they have not made an effective choice (like the sale contract between ETIMEX and ETEL in which it was stipulated that Ethiopian law and Greek law shall apply), the sound rule which is also recommended by Mr. Sedler is that the 'proper law' of the contract/arbitral agreement should govern.[114] This is in preference to other rules like *lex loci contractus*, in which the law of the place where the parties entered into the contract is governing,[115] or the *lex loci solutionis* in which the law of the place where the contract is to be performed is governing.[116] The main defect of these rules being that they depend only on one aspect of the transaction. The 'proper law' rule, on the other hand, guides the tribunal to reach to the law of the country with which the contract on arbitral agreement has a greater connection by taking all the essential aspects

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[112]R.David, Arbitration in , p. 217

[113]Ibid, p.220.

[114]Sedler, The conflict ., p. 98.

[115]Ibid, p. 91.

[116]Hamlyn V Talisker Distillery, Encyclopedia. , Sec. 3.2.1.

of the transaction such as where the contract was made, where it was performed, where the arbitration was taking place, and where the parties did their business.[117]

Where the parties have chosen a foreign law or where an arbitral tribunal, by applying the above rule, has decided that a foreign law is applicable, a further question that may be asked is: to what extent should it be permissible to apply that foreign law? Firstly, from international practice, it is now accepted to permit parties to choose the applicable law.[118] Many confusions and uncertainties would no doubt be reduced as a result. Not letting parties to choose the applicable law would create inhibitions in international trade and investment, and hence would be contrary to the public interest of Ethiopia. So, there must be no limitations here on the rights of the parties to choose a foreign law. Rather, the limitations or provisos must be directed against a foreign law chosen by the parties or the foreign law found to be the 'proper law'. Surely, the foreign law that is "contrary to public order or morals"[119] cannot be applied here. It is also submitted that a foreign law that clearly deviates from a mandatory provision of Ethiopian law cannot be applied. Unless these exceptional situations are present, it would be proper for the arbitral tribunal to apply a foreign law.

Sometimes, parties, without specifying any applicable law, would simply refer to international arbitration rules such as the ICC Arbitration Rules or the UNCITRAL Arbitration Rules to govern their relations. For all practical purposes these rules are exhaustive and there may be no need to go beyond that.[120] The limitations above mentioned on the applicability of a foreign law would have to be considered here, too. (N.B. If parties wish to adopt ICC Rules, this writer highly recommends that the place of arbitration be in Ethiopia. If they wish to adopt UNCITRAL Rules, it is highly recommended that they designate an appointing authority in Ethiopia)

C. <u>**BEFORE COURTS**</u>

One possible situation where a dispute of this nature could arise before an Ethiopian court is when a petition for the appointment of an arbitrator is submitted and the defendant denies the existence or challenges the validity of such arbitral agreement basing his arguments on some foreign law. It is the contention of this writer that the court has no choice but to follow the conflict of law rules expounded above (the only difference here being that

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[117]Sedler, The Conflicts. ., pp. 95, 98.

[118]<u>Ibid</u>., p. 84.

[119]Art 461(1) (e), the provision on enforcement of foreign awards, C.P.C.

[120]Schmitthoff, p. 581.

the arbitral tribunal has not yet been set up), and decide first on the law applicable to the dispute and next on the existence or validity of the arbitral agreement in accordance with that law. The other possible situation is where a claim is brought before an Ethiopian court and the plaintiff, when confronted with the existence of an arbitral agreement governed by a foreign law, admits its existence but alleges that it is illegal under Ethiopian law. Here, too, the court would have to examine the content of the foreign law in light of whether or not it is contrary to public order or morals or mandatory provisions of Ethiopian law. If the foreign law that is depended upon by the defendant allows, for example, an arbitrator to decide as *amiable compositeur*, this cannot be given effect because it is contrary to our law.[121]

PART V
ARBITRATION, A BETTER MECHANISM FOR THE SETTLEMENT OF BUSINESS DISPUTES

Once disputes have arisen between businessmen, there are various ways of settling their disputes. They may settle their disputes through negotiation and compromise, without the intervention of a third person. But this may not be easy since the relationship between the parties may have been already strained and the parties may have begun mistrusting each other. In these circumstances, there is a need for the intervention of a third person. Thus, they may try conciliation. But here again, the proposals of the conciliator are not binding unless the parties have expressly undertaken in writing to confirm them.[122] It requires a highly competent conciliator to bring the parties to that stage.

The other alternative for the parties is to take their cases to court. But, in Ethiopia today, it is an open secret that the number of judges available is not commensurate with the number of cases they handle. In 1982 (Ethiopian calendar) alone, there were 95,000 civil cases and 115,000 criminal cases at the Awradja Courts and the High Courts.[123] It takes a long time only to get a judgment. The system allows three appeals. The salary of judges is not high. There was no salary increment. The inflationary rate is soaring. It is not surprising, therefore, if 'greasing the palm' is widespread. On top of this, the intricacies of business disputes may not be easily grasped by our judges because they don't specialize in particular fields. They don't have the opportunity to do so because they get transferred frequently from one division to the other.

[121]Art. 3325(1), C.C.

[122]Art. 3332(2), C.C.

[123]Information derived from the Statistics Department Ministry of Justice.

Arbitration

Arbitration is the other alternative left for the businessman with a dispute in his hands. I do not want to give the impression that this mechanism is something perfect. It, too, has its own limitations. Arbitrators who are well versed in the field related to the dispute and in the legal principles involved may be hard to find. The system is dependent upon and requires the assistance of the judiciary during appointment of arbitrators, during appeals and execution of awards. In addition, there are no well organized arbitral institutions in Ethiopia which promote the use and practice of arbitration. In spite of all these shortcomings, however, arbitration, through the use of a carefully prepared arbitral agreement, well before the occurrence of the dispute, can serve as a better means of dispute settlement. Where the dispute is international and where the issues are complex like petroleum operations, or large construction projects or where quite a big amount of money is involved, arbitration becomes no more an alternative, it becomes the only way available.