ARBITRABILITY IN ETHIOPIA: POSING THE PROBLEM

Zekarias Keneaa*

I. INTRODUCTION

Arbitration, as an alternative dispute settlement mechanism, is widely in use in the world of today. It is a mechanism whereby disputing parties submit the resolution of their differences and or disagreements to judges of their own choice instead of taking them to sovereign appointed judges in courts of law. Many disputing parties, in fact, prefer arbitration to courts because their differences, quarrels etc. are adjudicated by persons chosen by themselves and in a private process. Those who care for their good names and reputation are always against the disclosure of the details of their disputes in an open and public court.[1] Arbitration as a means of disputes settlement is also said to be "more flexible and adaptable and as a result quicker and more efficient than litigation."[2]

It is not at all the intention of this writer to deal with arbitration in general or extensively advocate the advantages of it as a means of settling disputes. My intention, as the topic speaks for itself, is restricted to just one very small area in arbitration, the question of arbitrability, not generally again, but with respect to Ethiopia.

Despite the advantages one can avail himself of by resorting to arbitration, not all disputes or quarrels, or even differences arising in peoples' relations can be submitted to the adjudication of parties' chosen experts. For different reasons, different states exclude disputes of certain categories from the ambit of arbitration. Hence, in every state, there would always be matters capable and permitted to be submitted to arbitration - arbitrable matters and there would, as well, always be

---

* Lecturer in Law, Addis Ababa University, Faculty of Law.

[1] Allan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration, Sweet and Maxwell. London, 1986, p. 17.

matters regarded as not capable of being arbitrated - inarbitrable matters. Redfern and Hunter beautifully summarise it as quoted herebelow:

> The concept of arbitrability is, in effect a public policy limitation upon the scope of arbitration as a method of settling disputes. Each state may decide, in accordance with its own public policy considerations which matters may be settled by 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 will be 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.[3]

As inferable from the above quotation, which disputes may be submitted to arbitration (arbitrable) and which ones may not be submitted to arbitration (inarbitrable) is usually decided on by states and such decisions are expressed in national laws pertaining to arbitration. Because of diverse policy considerations, national interests and commercial realities, matters that are capable of being arbitrated in some states may constitute matters incapable of being arbitrated in other states. In other words, in some states, some categories of disputes must, as a matter of public policy, be adjudicated by state courts staffed by sovereign appointed judges and the submission of such matters to disputing parties' appointed private judges may be considered as illegal and the resultant award unenforceable.

In this limited work, attempt is made to assess what is arbitrable and what is not in Ethiopia. The work doesn't exhaustively deal with the question. Far from it, all it does is, it tries to pose the problems that have occurred to the author's mind related to arbitrability in Ethiopia. The endeavour, however, might hopefully assist future research to be conducted on the subject.

II. ARBITRABILITY AND FAMILY MATTERS

In Ethiopia, there are no other substantive legal provisions, other than Civil Code Articles 722, 724, 729 and 730 wherein it is clearly stated that it is only the court that is competent to decide on matters stated under those provisions. The messages contained in the above - mentioned Civil Code Articles may be put as : it is the court and only the court, in exclusion of all other alternative dispute settlement

---

[3] Ibid., p. 105.

mechanisms and tribunals, including arbitration, that can give decisions the issues of which squarely fall within the spirit of those provisions. In other words, matters falling within the limits and bounds of those provisions are not arbitrable.

Pursuant to Article 722 of the Civil Code, the issue of whether a bethrothal has been celeberated or not and whether such a bethrothal is valid, cannot possibly be submitted to arbitration because the very article makes the court the only competent organ to hear and give decisions on such matters. To put it otherwise, the phrase "only the court is competent" does away with the possibility of submission of matters the issue of which pertain to the celebration of a bethrothal or whether a bethrothal is valid or not to private adjudication.

Similarly, in line with the provisions of Article 724 of the Civil Code, the possibility of submission or reference of suits the issues of which relate to the determination of whether or not a marriage has been contracted and whether such marriage is valid to arbitrators is prohibited and it is only the court that is recognized as competent to hear and decide on such matters. In a similar vein, in Article 730 of the Civil Code, the law has taken the stand that no other tribunal except the court is competent to decide whether an irregular union has been established between two persons. Unlike difficulties and/or disputes arising between spouses during the currency of their marriages or even the petitions for divorce whether made by both or one of the spouses, which have to compulsorily be submitted to arbitration, disputes arising out of irregular unions have to be submitted for resoultion to the court and to no other tribunal.

In spite of the fact that pursuant to the mandatory provisions of Articles 725 728 of the Civil Code, disputes, (difficulties) arising out of existing marriages, petitions for divorce or even disputes arising out of divorces have to but compulsorily be submitted to arbitration;it is, according to Article 729 of the Civil Code, only the court that is competent to decide whether a divorce has been pronounced or not. Article 729 of the Civil Code may be taken as having the message that the divorce decision made by family arbitrators have to obligatorily be submitted to the court. The court, after having ascertained that family arbitrators have complied with the necessary legal requirements, and that the decision for divorce is rendered by a duly constituted panel of arbitrators, makes its own decision that an enforceable decision of divorce has been pronounced. Though in line with the provision of Article 729 of the Civil Code the court seems to be making the latter decision on its own initiative, on the other hand, appeal may also be lodged to the court to have the decision of arbitrators impugned on the ground of corruption of arbitrators or third parties fraud or the illegal or manifest unreasonability of the decision made by

arbitrators.[4] Yet still, Article 729 also seems to be imparting the message that the court renders a kind of homologation and or certification service with respect to divorce decisions given by family arbitrators. In other words, certification that a married couple have been divorced or a marital union has been dissolved can only be given by the court and not by the arbitral tribunal or the arbitrators that pronounced the divorce. The Article seems to be imparting the latter message particularly when one considers the controlling Amharic version of Art. 729 of the Civil Code.[5]

III. MATTERS RELATING TO ADMINISTRATIVE CONTRACTS INARBITRABLE?

On the other hand, when one shifts from the substantive law over to the procedural one, one encounters Article 315(2) of the Ethiopian Civil Procedure Code wherein it is clearly provided that only matters arising from Administrative Contracts and those prohibited by law are said to be inarbitrable. Naturally, therefore, a question follows as to whether or not all other matters except those arising from Administrative Contracts and those prohibited by law could be regarded as arbitrable in Ethiopia, subject of course to the provisions of Articles 3325-3346 of the Civil Code. First of all it is surprising to find a provision that reads:

> No Arbitration may take place in relation to Administrative Contracts as defined in Article 3132 of the Civil Code or in other case where it is prohibited by law in the Civil Procedure Code but nothing to that effect or even similar to that is stated in anyone of Articles 3325-3346 of the Civil Code.

An issue of interpretation or construction of the two legal texts i.e Article 315(2) of the Civil Procedure Code on the one hand and Articles 3325-3346 of the Civil Code on the other might as well arise. This becomes even more glaring as one considers the provisions of Article 315(4) of the Civil Procedure Code which states that "Nothing in this chapter shall affect the provisions of Articles 3325-3346 of the Civil Code."

If nothing in Book 4 Chapter 4 of the Civil Procedure Code affects the provisions of Articles 3325-3346 of the Civil Code, and nothing as to whether or not matters arising from Administrative Contracts are inarbitrable is mentioned in

---

[4] Civil Code of Ethiopia of 1960, Article 736, Proclamation No. 165, Negarit Gazeta, (extra ordinary), Year 19, No. 2.

[5] The Amharic version of Article 729 of the Civil Code reads: "የመፋታት ውሳኔ የተሰጠ መሆን አለመሆኑን ለማረጋገጥ ሥልጣን ያላቸው ፋጮች ብቻ ናቸው።"

Articles 3325-3346, could Article 315(2) be given effect? In other words, if the overriding texts of Articles 3325-3346 of the Civil Code are silent as to whether or not disputes emanating from Administrative Contracts are arbitrable; can't that be taken as an implication that even disputes arising from Administrative Contracts are arbitrable in so far as nothing express is stated in Articles 3324-3325 that they are not? Or should there be a manifest contradiction between the two Codes' relevant texts for Articles 3325-3346 to be overriding?

In Water and Sewarage Authority Vs Kundan Singh Construction Limited,[6] the Court took a stand that Article 315(2) is a sufficient provision to exclude disputes relating to Administrative Contracts from the ambit of arbitrable matters. A close consideration of the main reasoning of the High Court to justify this stand, however, tells that the court based its reasoning on a point of jurisdiction instead of taking Article 315(2) of the Civil Procedure Code as a legal provision, sufficient on its face, to prohibit the submission of matters relating to Administrative Contracts to arbitration. In the course of justifying its stand, the court said: "questions pertaining to which court or which tribunal has jurisdiction is a matter of procedure and that procedural matters are provided for in the Code of Civil Procedure and not in the Civil Code."[7] The court, it may be said, endeavoured to use this line of argument in its attempt to defeat the strong point in Article 315(4) of the Civil Procedure Code, i.e., that nothing in the chapter in which Article 315 of the Code of Civil Procedure is found shall affect the provisions of Articles 3225-3346 of the Civil Code. By so doing, the court rejected the argument raised by the defendant that Article 315(2) of the Civil Procedure Code should not be given effect in the face of Articles 3325-3346 of the Civil Code wherein nothing is mentioned as to the inarbitrability of disputes arising from Administrative Contracts.

The other point the High Court raised to justify its ruling that matters related to Administrative Contracts are inarbitrable was that the provisions of our Civil Code relating to Administrative Contracts were taken from French law. The court went further and stated that in French Law there is a prohibition that disputes arising from Administrative Contracts should not be submitted to arbitration, and that such a prohibition is found in the French Code of Civil Procedure. Consequently, said the court, the prohibition in Article 315(2) of our Civil Procedure Code is appropriate taking French Law and the fact that provisions on Administrative Contracts in our

---

[6] Water and Sewarage Services Authority Vs Kundan Singh Construction Limited, High Court, Civil file No. 688/79 (unpublished).

[7] Ibid.

Civil Code were taken from French Law.

On the principle of interpretation that a latter law prevails over a preceding one it could be said that the Civil Procedure Code which was promulgated in 1965 as opposed to the Civil Code which was promulgated in 1960, is overriding. This point of interpretation was also raised by the Court in the Kudan Singh case.

Would the approach of interpretation that follows the hierarchy of laws be of help in the context under consideration because of the fact that the seemingly contradictory legal provisions appear in different types of legislations i.e., Arts. 3325-3346 in a Proclamation whereas Art. 315(2) of the Civil Procedure Code appears in an Imperial Decree?

IV. OTHER SUBSTANTIVE LAW PROVISIONS INDICATIVE OF ARBITRATION

Yet still, the main problem in relation to arbitrability in Ethiopia, however, seems to emanate from the confusion created by the Civil, Commercial and Maritime Codes' express provisions for arbitration in certain respects and their silence otherwise. Family disputes arbitration dealt with in the Civil Code is, I think, a compulsory arbitration[8] rather than it is consensual. In other respects, the 1960 Civil Code of Ethiopia for instance, expressely provides for arbitration under Articles 941, 945, 969(3), 1275, 1472ff, 1534(3), 1539, 1765, 2271[9] and it is silent otherwise.

The Commercial Code expressly provides for arbitration under Articles 267, 295 and 303 by way of reference to Articles 267, 500(1) 647(3) 1038, 1103(3) and the Maritime Code's only provision wherein it is expressely mentioned about arbitration is in Article 209.

---

[8] Starting 1977, disputes between state-owned Enterprises were also made (rendered) as compulsorily arbitrable in Ethiopia by virtue of a directive No. 2756/ሐ1ሀ/20 issued on Hamle 14, 1969 (July 21, 1977) by the then Prime Minister, Ato Hailu Yimenu.

[9] However, it is good to note that it is doubtful if Article 2271 of the Civil Code may be taken as a provision indicative of arbitration in the sense of Article 3325 of the same code. Where a seller and a buyer, refer the determination of a price to a third party arbitrator, it doesn't mean that the parties submit a dispute to be resolved. 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 binding as an award is in case of arbitration proper.

In the labour legislation we had for the last two decades, i.e. Proclamation No 64 of 1975,[10] the possibility of submission of a collective or individual trade dispute to arbitration was provided for in Article 101(1). In sub-article (3) of the same provision, arbitration, in fact, seems to have been envisaged as obligatory with respect to disputes arising in undertakings which do not have trade dispute committee.

In the new Labour Proclamation i.e Proclamation No. 42 of 1993,[11] it is provided in Article 143 that "parties to a labour dispute may agree to submit their case to their own arbitrators...."

Now, therefore, it would be appropriate if one asks the question doesn't the fact of the existence of such express provisions for arbitration by the Codes mean that all other matters are inarbitrable? What was it that necessitated express provisions for arbitration in certain cases only? Was it just an endeavour to bring the possibility of arbitration to the attention of the parties concerned as an alternative dispute resolution mechanism or as an alternative to court actions? Or was it meant to clear out doubts from people's minds that disputes arising from those situations for which the codes mention arbitration may be submitted to arbitration although the Codes' provisions, including those mentioned under Articles 3325-3346 of the Civil Code, do not mention what is not arbitrable as a matter of Ethiopian public policy except what is stated under the Civil Procedure Code Article 315(2)?

In some jurisdictions, there are well defined areas of matters which, as a matter of public policy, are designated as not arbitrable. For example, the German Civil Procedure Code Article 1025a provides: "An agreement to arbitrate disputes on the existence of a contract referring to renting rooms is null and void. This does not apply when reference is made to section 556a paragraph 8 of the German Civil Code."[12]

The French Civil Code Article 2060, on the other hand, provides:

> One may not submit to arbitration questions relating to the Civil status and capacity of persons or those relating to divorce or to judicial separation or disputes concerning

---

[10] Negarit Gazeta, 35th Year, No. 11.

[11] Negarit Gazeta 52nd. Year, No. 27.

[12] Reproduced in Ottoarndt Glosner, Commercial Arbitration in the Federal Republic of Germany. Kluwer, 1984, p. 42.

> public collectivities and public establishments and more generally in all areas which concern public policy.[13]

In Italy, parties may have arbitrators settle the disputes arising between them excepting those provided in the Civil Code Article 409 i.e, those concerning labour disputes and those provided in Article 442 concerning disputes relating to social security and obligatory medical aid.[14]

Some other jurisdictions have adopted different approaches from that of Germany and France. The Swedish Arbitration Act of 1929 (as amended and in force from January 1, 1984) for instance, provides in section 1 that:

> Any question in the nature of a civil matter which may be compromised by agreement, as well as any question of compensation for damage resulting from a crime may,when a dispute has arisen with regard thereto, be referred by agreement between the parties to the decision of one or more arbitrators.[15]

The Swiss Intercantonal Arbitration Convention of March 27/August 29, 1969, on the other hand, provides in Article 5 that "the arbitration may relate to any right of which the parties may freely dispose unless the suit falls within the exclusive jurisdiction of state authority by virtue of a mandatory provision of the law."[16]

Coming back to Ethiopian law, wherein we don't have provisions limiting the kind of question that may or may not be submitted to arbitration except for what is stated under Article 315(2) of the Civil Procedure Code, how should we go about deciding what's arbitrable and what's not? Especially, how should the approach taken by the Codes to have here and there provided for arbitrable matters be viewed? Can we argue a contrario that the rest, i.e., those numerous matters for which the Codes do not expressely provide for the discretion to arbitrate, save of course those matters for which the Civil Code imposes obligatory arbitration, are

---

[13] Reproduced in Jean Louis Delvolve, Arbitration in France,The French Law of National and International Arbitration, Kluwer, Deventher, The Netherlands, 1982, p. 61.

[14] Articles 806 of the Italian Code of Civil Procedure, reproduced in course material prepared by School of International Arbitration, Centre for Commercial Law Studies, Queen Mary College, 1987-88, p. 91.

[15] Ibid, p. 99.

[16] Ibid, p. 109.

inarbitrable? Or can we by way of argument settle on the test of arbitrability that is close to the Swedish test that bases itself on the provisions of Article 3326(1) of our Civil Code and say "any matter which relates to any right which the parties can dispose of without consideration" is arbitrable in Ethiopia? This test becomes a fallacious one the moment one reads the provisions in sub-Article (1) of Art. 3327 that goes: "the provisions of Article 3326 shall not apply where this Code provides for arbitration." It, therefore, follows that if the capacity to dispose of a right without consideration is not needed when the Codes expressely provide for arbitration, the test that "any matter which relates to any right which the parties can dispose of without consideration is arbitrable in Ethiopia" fails to be an always working criterion.

Added to the above, the very approach taken by the legislator i.e., considering the situations where the Codes provide for arbitration and where they don't, tells us that matters not expressely provided for in the Codes may as well be made subjects of arbitral adjudication. The Swedish approach, therefore, doesn't, I think, work for the present Ethiopian reality and the test that's similar or identical to their's should be seen cautiously if not totally dismissed. The line of thought that persues the idea that the matters not expressely provided for by the Civil or other Codes are inarbitrable also fails automatically because of the above-mentioned argument. Hence, it could be said that the Codes' express provision for arbitration here and there is meant to hint to the parties involved pertaining to matters provided for, that arbitration is an alternative to judicial proceedings or to encourage them to submit to arbitration.

Except for what is stated under Article 315(2) of our Civil Procedure Code, the approach taken by the German, Italian and French Arbitration laws also doesn't seem to fit into the existing Ethiopian legal reality.

V. ARBITRABILITY AND THE HIGH COURT'S EXCLUSIVE JURISDICTION

The provisions of Article 15(2) of the Civil Procedure Code may also be worth considering at this stage to see if there is in anyway the possibility of arguing that those matters provided for under Article 15(2) (a-i) could be taken as not arbitrable. One thing clear from Article 15(2) of the Civil Procedure Code is that the High Court, in exclusion of all other courts, shall have an initial material jurisdiction to try cases the matters of which emanate from those areas enumerated (a-i). Does this, however, mean that the exclusion applies to arbitration as well? If the extension is appropriate to

speak in terms of tribunals does the exclusion apply to arbitral tribunals as well or is it limited to courts? Most important of all, could it be taken that those matters provided for under Article 15(2) of the Civil Procedure Code are meant to be inarbitrable?

Provisions of Article 15(2) of the Civil Procedure Code, coming under chapter 2 of Book I of the Code and dealing with material jurisdiction of courts, are meant to serve as an exception to the principle laid down under Article 12(1) as further expounded by the two articles immediately following and sub-article (1) of Article 15.

Article 15(1) in other words, confers jurisdiction on the High Court irrespective of whether or not the amounts involved in the suits springing from matters listed (a-i) are worth either 5,000 Birr or below for suits not regarding immovable property or the amount involved is 10,000 Birr or less in a suit, for instance, relating to expropriation and collective exploitation of an immovable property.

The clear message in Article 15(1) of the Civil Procedure Code is that the High Court has jurisdiction to try cases involving those matters listed (a-i) by virtue of the law itself ousting the material jurisdiction of the Awraja and Woreda Courts. The clarity of the message of the Article, however, doesn't seem to have ready answers to querries like: What if the parties to a contract or even to a dispute agree to oust the jurisdiction of the High Court by conceding to submit their future or existing disputes in relation to those matters mentioned under Article 15(2) of the Civil Procedure Code to arbitration? Should such an agreement be regarded as illegal or unenforceable? If parties knowingly or unknowingly agree to submit an existing or future dispute emanating from one of those areas mentioned under Article 15(2) of the Civil Procedure Code to arbitration, and there arises some sort of disagreement as to the formation of the tribunal; should the court whose assistance is sought in appointing an arbitrator decline to do that on the strength of the provisions of Article 15(2) of the Civil Procedure Code? What about a tribunal duly constituted either by the parties themselves or through the assistance of a court, should it decline jurisdiction in favour of the High Court or should it assume jurisdiction, proceed and give an award? At the enforcement stage, would such an award be recognized and be given effect by the court to which an enforcement application is filed? These and other related questions may be raised in relation to Article 15(2) of the Civil Procedure Code and arbitrability.

Would figuring out the rationale behind the giving of exclusive jurisdiction to the High Court regarding suits springing from those matters provided for under Article 15(2) (a-i) be an answer to the questions raised above? Could the purpose behind Article 15(2) be the public policy to make sure that the matters provided for in that sub-article are tackled by the court of high position that is staffed with highly trained and or experienced judges? Or could the purpose be more serious than that? Was the intention behind the conferring of exclusive jurisdiction on the High Court in suits regarding those areas to single out certain areas of importance in Commercial and Maritime relations and other sensitive areas, to give emphasis to same and to thereby ensure certainty in the way of interpretation of the laws involving those areas which in turn would help develop the jurisprudence of the laws in those areas?

The rationale behind Article 15(2) of the Civil Procedure Code may be to facilitate trials of the suits arising from those matters by (highly) trained and experienced judges, or judges that have specialized in dealing with those matters. If that is the case, the submission to arbitration of disputes emanating from those matters might have not been intended to be excluded altogether because in the modern world arbitrators are, generally, qualified enough to deal with all sorts of complicated matters. Incidentally, the provision of Civil Code Article 3325(1) makes it clear that arbitrators "undertake to settle disputes in accordance with the principles of law." And if arbitrators have to resolve disputes in accordance with the principles of law, then it follows that arbitrators should, of necessity, be legal professionals of some sort whether trained or those who have managed to acquire the expertise through practice and/or experience.

On the other hand, if the intention behind Article 15(2) of the Civil Procedure Code was to ensure certainty and, may be, predictability in the way in which the areas of law dealing with those matters are interpreted, then the argument that those matters provided for under Article 15(2) may not be submitted to arbitration could, generally speaking, hold true.[17] Nevertheless, even if the disputes arising from those matters are submitted to arbitration, in certain respects, it could be argued that it doesn't make a glaring difference because in Ethiopia arbitrators are appointed to resolve

[17] It is good to note, however, that after all, there is no duty on lower courts in Ethiopia to stay by the decision of the higher courts.

disputes according to principles of law anyway.[18] It should, however, be noted that in accordance with the provision of Article 317(2) of the Civil Procedure Code, arbitrators may, where the parties at dispute have agreed to that effect, decide without giving regard to the "principles of law." The authorization given to arbitrators by disputing parties to decide without being bound by the strict application of the law is referred to as amiable composition or ex aequo et bono. The arbitrator(s) who is (are) authorized to proceed in amiable composition is (are) called amiable compositeur(s).

If parties in their agreement to arbitrate existing or future disputes empower their arbitrator(s) to proceed as amiable compositeur, that would be tantamount to ousting the provisions of Article 15(2) of the Civil Procedure Code, unless it is arguable that parties cannot contract out the exclusive jurisdictional power of the High Court vested in it by virtue of the said provision. Unless the existence of Article 15(2) of the Civil Procedure Code is taken as a prohibition (to meet the requirement of the last part of Article 315(2) of the same Code), not to submit to arbitration disputes emanating from any one of those areas, there is no convincing reason, I would say, why parties cannot submit disputes of at least some of those matters to arbitration.

Off hand, what is it, for instance, that prohibits the submission of disputes arising from insurance policies (Article 15(2) (c)) of the Civil Procedure Code to arbitration? I wonder if there is any public policy reason that precludes insurance disputes from being submitted to arbitration. If the provision of Article 15(2) (c) of the Code is to be construed as showing the inarbitrability of insurance disputes, then those arbitration clauses in a number of the standard policies that have been in use and are currently in use by the Ethiopian Insurance Corporation[19] are to be taken as contrary to the spirit of the above-mentioned provision, and hence are not to be given effect. The clauses may, as well, be taken as an evidence showing circumstances of opting out the application of Article 15(2) (c) by parties to insurance contracts, thereby waiving their right to initially submit their disputes to the High Court and only to it. True, the legislator might have

---

[18] Civil Code of Ethiopia of 1960, supra note, 4, Article 3325(1).

[19] See for instance condition No. 14 of the Workmen's Compensation Policy, Condition No. 11 of the Housebreaking Insurance Policy (Forcible and violent Entry Cover), Condition No. 11 of All Risks Policy, Condition No. 8 of the Money Policy etc.

had it in mind that consumers (insurance policy holders) and insurers usually are unequal parties and hence might have thought that policy holders need to be given the backing of state courts, in fact that of the High Court right from the initiation stage of their cases.

One also wonders if there is a public policy reason why suits relating to the formation, dissolution, and liquidation of bodies corporate (Article 15(2) (a) of the Civil Code cannot be submitted to arbitral adjudication. Could the legislative worry that triggered this specific provision be the protection of interests of individual third parties so that there won't be miscarriage of justice when arbitrating disputes between giant big business monopolies or trusts and individuals? If that is the case, does it imply that third parties interests cannot be protected through arbitral adjudications? Or is it because the formation, dissolution and liquidation of bodies corporate could as well be applicable to the so-called "administrative bodies" which category includes the "State, Territorial subdivisions of the state, Ministries and Public Administrative Authorities?"[20] Though it may be understandable why suits pertaining to the State, Its Territorial subdivisions, Ministries and Public Administrative Authorities may not be arbitrable; one but can't help wondering why suits regarding the formation, dissolution, and liquidation of private bodies corporate, for instance associations, may not be submitted to arbitration.

As mention has already been made,[21] French law prohibits arbitration in a number of specific areas among which "disputes concerning public collectivities and public establishments" constitute one category. Mr. Carbonneau is of the opinion that it should be emphasized that disputes falling in the latter category "in which arbitration agreement are prohibited has been interpreted to entail lack of capacity of the state and its entities to arbitrate disputes in which they are involved."[22]

---

[20] Civil Code of Ethiopia, Supra note 4, Articles 394-397.

[21] See supra page 123.

[22] Thomas Edgar Carbonneau, "The Elaboration of a French Court Doctrine on international Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity", 55 Tulane Law Review, 1980, p. 9.

It is also true that in many countries matters relating to patents and trade-marks are excluded from being arbitrable.[23] Bankruptcy is also regarded not arbitrable matter in quite a number of states.[24] But I wonder if Article 15(2) (b) and (d) of the Ethiopian Civil Procedure Code were formulated with the objective of excluding those matters from the purview of arbitrability.

It is also difficult to understand why maritime disputes or suits arising from negotiable instruments are put out of arbitral adjudication. If Article 15(2) of the Civil Procedure Code in general, and Article 15(2) (b) in particular is to be construed as indicating inarbitrable matters, I wonder as to what construction should be given to Article 209 of the Maritime Code of Ethiopia[25] wherein it is stated that parties to Bills of lading may insert Arbitration clauses and hence agree to adjudicate their future disputes by way of arbitration as long, as they (the parties) do not, give power of amiable composition to the arbitrator. In England, Maritime arbitration is a very specialized arbitration and for that matter Londoners have a kind of specialized association, the London Maritime Arbitration Association (LMAA) just to arbitrate maritime disputes.

When one thinks of disputes relating to or arising out of negotiable instruments, one necessarily wonders why such disputes or matters pertaining to negotiable instruments cannot be submitted to arbitration. Starting from the Geneva Protocol of 1923, arbitrable matters (at least for international arbitration) were formulated as limited to "... Commercial matters or to any other matter capable to settlement by arbitration."[26] If this is the yardstick, there seems to be no reason, why disputes relating to negotiable instruments cannot be arbitrable. After all, negotiable instruments are,

---

[23] Rene David, Arbitration in International Trade, Kluwer Deventher, Netherlands, 1985, p. 188. See also Redfern and Hunter, Supra note 1, p. 106; Craig, Park and Paulson, International Chamber of Commerce Arbitration, Oceana Publication, Inc., 1986 Vol. 1 Part II, Chapter 5, section 07.

[24] Craig, Park and Paulson, International Chamber of Commerce Arbitration, Oceana Publications Inc., 1986, Vol. I Part II, Chapter 5 Section 07.

[25] The Maritime Code of Ethiopia of 1960. Article 209, Proclamation No. 164, Negarit Gazeta (extra-ordinary), Year 19, No. 1.

[26] Redfern and Hunter, Supra Note 1, p. 104.

typically, commercial in their very nature.[27] Or if according to Article 715(2) of the Ethiopian Commercial Code some negotiable instruments fail to qualify to be in the category of "Commercial" like, "documents of title to goods" or "transferable securities" , could it be argued that the latter two categories of negotiable instruments are not "Commercial" in their very nature? I personally doubt. True, "transferable securities" or "documents of title to goods", do not, as such, carry "unconditional order(s) or promise(s) to pay a sum certain in money",[28] a typical characteristic of Commercial negotiable instruments under Ethiopian Law. Minus the requirement of carrying unconditional order(s) or promise(s), however, transferable securities are generally understood as "evidence of obligations to pay money or of rights to participate in earnings and distribution of corporate, trust and other property and are mere choses in action. Nevertheless, in modern commercial intercourse, they are sold, purchased, delivered and dealt with the same way as tangible commodities and other ordinary articles of commerce..."[29] Being evidences of debt, of indebtedness or of property, transferable securities usually include bonds, stock (share) certificates, debentures and the like.[30] In other literatures dealing with negotiable instruments, it is good to note that the term "securities" is usually preceded by "investment" and documents known as "transferable securities" in our Commercial Code are referred to as "Investment securities."[31]

"Documents of title to goods" from legal point of view, though they may as well have other meanings, may be generalized as written evidences that enable the consignee to dispose of goods by endorsement and delivery of the document of title which relates to the goods while the goods are still

---

[27] That is why, presumably, they are dealt with in the Commercial Code in Ethiopia, and are in fact known as "Commercial Papers", for instance, in the United States of America.

[28] The Commercial Code of Ethiopia of 1960, Article 732(c), 735(b), 823(b) 827(a), Proclamation No. 166, Negarit Gazeta, (extra ordinary), Year 19, No. 1.

[29] 79 Corpus Juris Secundum, Security, Securities, p. 946.

[30] Ibid p. 945.

[31] See, for instance, the Uniform Commercial Code and Literatures related thereto.

in the custody of the carrier or in transit.[32] Documents of title to goods may as well be evidences as to the title of the person claiming the status of a consignee of the goods.

The generic expression of documents of title to goods in modern business, includes Bills of Lading, Airway and Railway Bills, depending on whether goods represented by the document of title are carried by sea, air or by rail.

In so far as documents of title to goods are very much related to international sale, purchase and carriage of goods, it is hard for one to categorize such documents as falling outside the purview of commercial transactions and/or relationships. As transferable securities and documents of title to goods, the other two categories of negotiable instruments given recognition by the Ethiopian Commercial Code, are not, function wise, away from business activities, there seems to be no reason why disputes arising from or suits relating to negotiable instruments irrespective of whether the instruments fall in the category of Commercial, transferable securities or documents of title to goods may not be submitted to arbitration.

What about those matters stated under Article 15(2) (e) and (f) of the Civil Procedure Code? Should matters that pertain to "expropriation and collective exploitation of property" be excluded from being seen as matters capable of being arbitrated in Ethiopia? In as far as expropriation results from an act of a competent public authority,[33] and in as much as an "authority" is to be taken as an "administrative body[34] there may be the possibility of arguing that matters relating to "expropriation" are inarbitrable. The private person whose interest is affected by expropriation, it seems, may apply to a competent court of law where he/she thinks is expropriated outside the spirit of the relevant constitutional provision, if any, or without due process of law. Otherwise, disputes arising out of a competent authority's appropriate decision to expropriate and the dispute

---

[32] See Clive M. Schmitthoff, The Export Trade the law and Practice of International Trade, Stevens and Sons Ltd. London, 6th ed., 1975, et passim.

[33] Civil Code of Ethiopia, supra note 4, Article 1460.

[34] Ibid, Articles 394-397.

/disagreement/ ensuing because of resistance of the interested owner to such a decision, cannot be submitted to arbitration on the ground of sovereign immunity.[35] Nevertheless, it is worthwhile to note that though disagreements relating to expropriation per se are inarbitrable, matters of compensation due by expropriating authorities to the owner of an expropriated immovable and possibly the claims of third parties against the expropriating authority may be submitted to arbitration.[36]

What about disputes pertaining to "collective exploitation of property"? Would there be a valid public policy reason(s) why such disputes may be regarded as inarbitrable? Why should, in particular, disputes arising from "collective exploitation" be termed to be inarbitrable where all the parties concerned have freely consented to arbitrate? One possible reason why such disputes may be seen as inarbitrable might be because of the plurality of the parties involved, lest it might be difficult to justiciably safeguard the interests of all of them. Imaginably, the interests of the pluri-parties concerned could be quite complicated and such multiple interests and the ensuing complication it creates may, as well, constitute sufficient public policy reason not to submit such disputes to arbitration. Moreover, an arbitral tribunal generally doesn't have the power to order the consolidation of actions by all parties involved even if this would seem to benecessary or desirable in the interests of justice.[37]

With respect to suits relating to "the Liability of public servants for acts done in discharge of official duties" (Art. 15(2) (f) of the Civil Procedure Code), it could be argued that the exclusion of such suits from the ambit of arbitrable matters may be justifiable based on the widely known reasoning of sovereign immunity again. Under Article 2126 of the Civil Code,[38]

---

[35] See Rene David, supra note 23 pp. 175-180; Redfern and Hunter supra note 1, pp. 110-111, Craig, Park and Paulson, supra note 24 Vol. I Part VI Chapter 36, Section 03.

[36] Civil Code of Ethiopia, supra note 4, Article 1467(3) cum Article 1472ff.

[37] Redfern and Hunter, supra note 1, p, 19,

[38] It is worthwhile to note that arbitration, save in situations it is imposed by law, arises from contract. Doubts may, therefore, be expressed whether tort cases are, generally, arbitrable. As to the non-arbitrability of suits arising from contracts to which the state or its territorial sub-division is a party, and may be the liability of officials involved in state contracts, Art. 315(2) of the Civil Procedure Code is the only authority available.

whose title reads: "Liability of the State," particularly in the second sub-article, it is provided:

> Where the fault is an official fault the victim may also claim to be compensated by the state, which may subsequently recover from the public servant or employee at fault.[39]

The above quoted provision shows that the state, almost certainly, becomes a party to literally all suits instituted on the basis of this provision.[40] Article 2128 further states that the provisions of the two immediately preceding Articles apply to the liability of public servants or employees of a territorial sub-division of the state or of a public service with legal status.[41]

Those suits emanating from sub-sub-articles (g) nationality; (h) filiation and (i) habeas corpus of Article 15(2) of the Civil Procedure Code may be said, fall outside the purview of arbitrable matters. Suits relating to these matters are instituted based on specific legal provision(s) and usually for the personal protection and interests of the person(s) filing them.[42] The state and the public at large would, normally, have interest in the final outcome of cases pertaining to these matters as well. Nationality "represents a man's political status by virtue of which he owes allegiance to some particular country."[43] This, without more, can be taken as indicative of the interest of the state in nationality suits and which may constitute a sufficient public policy reason why nationality suits should not be submitted to private adjudication.

---

[39] Revised Translation by Professor George Krzeczunowicz, appended to his book The Ethiopian Law of Extra-Contractual Liability, Addis Ababa, Faculty of Law, 1970, pp. 174-175.

[40] The state, it is submitted, is presumed to be financially better off than an official, employee, or public servant that causes damage by his fault.

[41] Cf. Articles 394 ff of the Civil Code, supra, note 4.

[42] True, sometimes petitions relating to these matters may be filed through others but those others would only be pleading in the name and on behalf of the concerned individuals.

[43] Cheshire and North, Private International Law, 11th ed., Butterworths, London, 1987 p. 168.

As to filiation, which is "primarily the relation of parent and child,"[44] it would, I think, be possible to argue that such suits (filiation suits) are inarbitrable. The society would definitely be interested in the final outcome of filiation cases, and the law wouldn't want, as far as practicable, that children be left without fathers or mothers.[45] From family matters, filiation seems to be the only aspect that may have been envisaged as inarbitrable, for other family disputes particularly divorce cases and those related ones are compulsorily arbitrable in Ethiopia.[46]

Generally, matters relating to status, like filiation, nationality, etc. are regarded as inarbitrable.[47] Family disputes are not regarded as arbitrable in quite a number of jurisdictions,[48] and ours in that respect is an exception that came about, presumably, because of tradition.

Suits (actions) relating to habeas corpus, for sure, cannot be arbitrable. Robert Allen Sedler, based on Article 177 of the Civil Procedure Code argues that, habeas corpus suits are actions for a writ usually sought by persons in custody on a charge of having committed a penal offence, and that the action to obtain the writ is considered a civil action"[49] Often it is expected that the official to whom the writ is addressed might refuse to obey to "bring the body" to court and it is in that respect that the compelling power of the High Court for the public official in question comes into play. So, it may be said that it is understandable if actions for suits of habeas corpus are said to fall outside arbitrable matters.

---

[44] 36 Corpus Juris Secundum p.404.

[45] See the presumptuous Articles of the Civil Code. (supra, note 4) Articles 741-745.

[46] Cf. Articles 725-737 of the Civil Code. However, note that disputes relating to irregular unions are inarbitrable pursuant to Art. 730 of the Civil Code.

[47] Carbonneau, supra, note 22, p. 9; Redfern and Hunter, supra, note 1, p. 105; Rene David, supra, note 23, p. 187.

[48] Redfern and Hunter, supra note, 1, pp. 105-106; Rene David, supra, note 23, p. 187.

[49] Robert Allen Sedler, Ethiopian Civil Procedure, Faculty of Law, Haile Sellassie I University, 1968, p. 28 ftn. 36.

VI. ARBITRABILITY AND OBJECTS OF A VALID CONTRACT

Finally, in the absence of provisions supplying us with adequate guidelines of arbitrability in Ethiopia, we should, I think, make some further interpretational endeavours. Except for the provisions of Article 315(2) of the Civil Procedure Code and in situations where the law provides for a compulsory one, arbitration arises from contracts whether it is an agreement to submit existing or future disputes to private adjudication. If arbitration emanates from contracts, it is, by virtue of Article 1676 of the Civil Code, subjected to the general provisions of contracts i.e., Articles 1675 2026 of the Civil Code and without prejudice to the application of the special provisions of Articles 3325-3346 of the same Code and probably Articles 315-319 and 461 of the Civil Procedure Code. If arbitration is subject to the general provisions of contracts, then the requirements laid down under the provisions of Article 1678 viz:

No valid contract shall exist unless:

a) The parties are capable of contracting and givetheir consent sustainable at law;

b) The object of the contract is sufficiently defined and is possible and lawful;

c) The contract is made in the form prescribed by law,if any

apply to arbitration. From among those elements mentioned under Article 1678, the requirement that the object of a contract must be sufficiently defined, must be possible and lawful for it to validly exist in the eyes of the law, are quite pertinent to the subject of arbitrability. It may be debatable whether those three strict requirements do squarely apply to the arbitration agreement per se. Nevertheless, they definitely do apply to the underlying contract for the enforcement, variation, or interpretation of which parties agree to submit their disputes to arbitration. It could, therefore, at least be said that disputes arising from illegal or immoral underlying contracts cannot be arbitrable. Problems are bound to arise when an arbitral tribunal constituted to adjudicate a dispute arising from contracts having illegal or immoral objects seeks the assitance of the court of the place where it is seated. Problems might as well arise when recognition and enforcement of

the award is sought by the successful party for which the latter has to (if the losing party fails to comply with the award), necessarily apply to the local courts and the losing party opposes the recognition and enforcement arguing that the underlying contract was tainted with illegality or immorality.

VII. CONCLUSION

Let me conclude by a querry. Could it be said that subject to the provisions of Articles 3325-3346 of the Civil Code any matter that is not specifically prohibited and that arises from valid contracts or other specific legal relationships[50] seems to be arbitrable in Ethiopia?

[50] Note that the expression employed by the Civil Code's Article 3328(3) is "...specific legal obligation" but I think the expression "specific legal relationships" better represents the intended legislative feeling.