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## JOURNAL OF ETHIOPIAN LAW

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## CASE REPORTS

## ARTICLES

1. The Formation, Content and Effect of An Arbitral Submission under Ethiopian Law. By Ato Bezzawork Shimelash
2. Arbitrability in Ethiopia: Posing the Problem. By Ato Zekarias Keneaa
3. The Doctrine of Election and Rights of Creditors in the Ethiopian Law of Successions.

By Ato Tilahun Teshome

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We inform all subscribers and readers that Vol. 10 of the Journal had come out as Vol. 11 due to error as a result of which there is no Vol. 10

The editors encourage all interested persons to submit to us any manuscript which would be suitable for publication in the Journal such as scholarly articles, comments on court decisions and commentaries on legislations.

| Our address is: | The Editor-in-Chief <br> Journal of Ethiopian Law, <br> Faculty of Law, <br> P.O.BOX 1176 <br> Addis Ababa <br> Ethiopia <br> Tel. 11-65-69. |
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From The Editors

The Journal of Ethiopian Law is a scholarly publication addressing itself to all members of the legal profession. In publishing a particular article, the Board and editors do not wish to convey the impression that it is defintitive on any proposition for which it may stand although the quality of the article is an important consideration in determining whether it should be included in the Journal. When, in the opinion of a Board member or an editor, a judgment is of interest and raises an important issue of law, or there is reason to believe that aspects of the decision are contestable, or the result reached by the court is not clearly the only supportable conclusion, it may be published in the Journal.

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Divorce - constitution of family arbitration council jurisdiction of the Kadis and Naibas Councils and the Court of Shariat - repeal of laws - effect of administrative directives on judicial proceedings - precedence - res judicata and priority.

Civil Code Arts. 662, 3325 et seg, 3347(1); Civil Procedure Code, Preamble Art. 3, Arts. 5, 7, 315-319; Proclamation No. $62 / 1944$.

On appeal from a decision of the High Court denying the appellant her request to constitute a family arbitration council which would hear and decide on the marital dispute that arose between herself and the respondent.

Held: Decision quashed.

1. Judges may not be guided by any other authority than that of the law in the discharge of their functions.
2. The law has provided a common standard for all citizens and any party who moves to dissolve his/her marriage or who petitions for a review of his/her marital problems should bring the case to family arbitrators.
3. Objections based on priority and on res judicata may be raised oniy when cases have been heard and finally decided by courts whose legal status is uncontestable.

Megabit 29. 1982**
Judges: Atsedewoin Tekle Tilahun Teshome Mahteme Solomon

Appellant:
Woiz. Sahiba Kerelia
Respondent:
Hadji Abdella Nur
Having examined the file, we hereby render the following decision.

## Decieion

The present appeal is lodged against the decision of the Addis Ababa High Court rendered on Hamle 21 , 1981 under file No. $168 / 81$.

The dispute is marital in nature and we have gone through its background in detail. The appeliant and the respondent had concluded marriage in 1974 and lived together until 1978.

When a marital dispute surfaced between the two in 1978, four people who claimed to have been authorized by the kebele administration to mediate between the spouses, after alleging
they could not reconcile them in three different attempts, pronounced divorce on Nehassie 5, 1978. They further ordered the respondent to pay a three-month alimony amounting to Birr 450 which, they said, was in accordance with the precepts of the Islamic faith.

As the present appellant did not agree with what these people have decided, she took her case before the High, Court by way of appeal.

She contended that these persons are not family arbitrators appointed in accordance with the law; that their number is also four; and that they do not have any power to pronounce the divorce.

The present respondent pleaded res fudicate and argued that the case has been heard and finaily decided by the second Naiba Court on 23/11/78 under file No. 351/78.

The appellant, on the other hand, argued that as the respondent himself was present in person when the case was considered by the four persons whose decision is now being reviewed, he is not in a position to plead res fudicata.

In its decision given on Hamie 13, 1979 under civil case No. 159/59, the High Court nullified the decision of the elders by stating that they are not family arbitrators appointed in accordance with the law since both parties did not accede to their competence. It also advised the litigants to present their case before a duly constituted family arbitration council which, arnong other things, will consider the objections based on priority and res judicata.

The present appeilant took a further appeal against this decision but the records under civil appeal case No. $110 / 80$ show that it was dismissed on 29/03/80 without calling on the respondent to appear.

Afterwards, the appellant presented the case before the Awraja court for the Second time where the respondent once again argued that the case has been heard and finally decided by the Naiba Court. Thé Awraja Court simply dismissed the case by alleging that a directive has been issued which precludes regular courts from adjudicating a case that has already been presented before the Naiba Courts.

The Addis Ababa High Court before which a further appeal against this decision was presented affirmed the decision of the Awraja Court by stating that:-
". Courts of Shariat are institutions of justice set up under the Ministery of Justice. Although they have not showed growth, since they have not been declared nonoperational, this court cannot accept the argument that they are not courts of law the decisions of which may be pleaded by the defence of res judicata.

The present appeal is lodged against this decision of the High Court.

The main oral and written arguments of the appellant and her pleader raised throughout the litigation could be sumnerized as follows:

1. The decision that is alleged to have been rendered by the Naiba Court in my absence is one that violates my civil rights, undermines the diginity of marriage and against the established jurisprudence of settling marital disputes.
2. The Naiba Court would have been comptent to try and decide on the case only if both of us had acceded to its jurisdiction. Lest, it is not the right body to adjudicate the case simply because one party who alleges to have dissoived the marriage has presented his case before it.
3. Even the respondent himself did not wholeheartedly accept its competence since he presented his case to the arbitrators after the Naiba Court rendered a dectsion in his favour.
4. As the conditions under which a marriage is to be dissolved are the same whatever its form of celebration, the decision rendered by the Naiba Court is an improper one.

The points of contention of the respondent, on the other hand, are:-

1. Since both of us are followers of the Islamic faith, it was proper for the case to be tried and decided by the Naiba Court.
2. The Naiba Courts are organs for the administration of justice which are set up by Proclamation No. 62/1994 and have been discharging their functions since then.
3. In a similar case, the Panel Division of the Supreme Court has ruled under civil appeal case No. 1376/74 that a case which has been presented before a Naiba Court should not be taken to a regular court.
4. As the appellant did not have the decision of the Naiba court reversed on time, it is still valid.

Given this background of the case, the main issue to be resolved by this court is the effect of the decision of the Naiba Court on the present appellant.

The argument of the appellant is since the jurisdiction of Naiba courts has been rescinded by the Civil procedure code and the civil code, a decision rendered by a court to which she has not submitted her case and which was given in her absence should not be demed to have any bearing on the dispute.

Cases of this nature have long been subjected to controversy in light of the law in force and the generally accepted judicial practice.

Of course, the Naiba Court was established by the Kadis and Nalbas Councils Proclamation No. 62 of 1944. Since then, the Naiba and Kadis Councils and the Court of Shariat have been functioning at the central and regional levels with a budget and personnel aliocated to them by the Government. As stated in the Proclamation, they have been given the power to adjudicate:
> "2(a) any question regarding marriage including divorce and maintenance, guardianship of minors, and family relationship, provided that the marriage to which the guestion related was concluded in accordance with Moharmedan law or the parties are all Mohammedans;"

Furthermore, it has been clearly prescribed in this same Proclamation that these organs have jurisdiction on matters pertaining to succession, Wakf gift, and wills along with questions regarding the payment of costs incurred in any suit concerning these matters.

On that basis, the Naiba and Kadis Councils and the Court of Shariat had been hearing and deciaing on cases that were brought before them by the followers of the Islamic faith until 1952. Their judicial power had never been questioned until then.

In 1952, the civil code was promulgated under Proclamation No. 165 of 1960 . In this code, rules were laid down governing marriage, succession, wills and other civil (private) rights and obligations without any distincition on religious grounds. In particular, the provision that deals with the status of pre-existing laws, Art. 3347(1), has this to provide:-
"unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this code shall be replaced by the Coce and are hereby repealed."

In as much as the status, hierarchy and jurisdictions of courts were concerned, the preamble to the Civil Procedure Code issued as Decree No. 52/1965, Art. 3, also provides:-
"All rules, whether written or customary, previously in force concerning matters provided for in the Civil Procedure code of 1965 shall be replaced by this code and are hereby repealed."

The courts which have been duly recognized and established by this law of procedure are the woreda, Awraja, High and Supreme Courts. This could be noted from Arts. 13-15, 18, 31, and 321.

The repeal provisions of the two codes contain the phrase "unless otherwise expressly provided" but no where in the laws is it stated that the existing religious courts that adjudicate cases between followers of the Islamic faith can continue in their functions.

The controversial issue is, however, the factual situation in which these courts have kept on administering justice until now despite such laws. More often that not, parites to cases have been observed contesting or affirming the jurisdiction of these courts weighing the possible advantages they may derive or disadvantages they may suffer if their cases are presented before such courts.

As has been provided in the Constitution of the Republic and as is accepted by the well developed jurisprudence, judges may not be guided by any other authority than that of the law in the discharge of their functions, and it is on the basis of this principle that this_ court considers the case presented before it.

As a divorce proceeding, the case is to be considered in light of the provisions of the Civil code pertaining to divorce. The code; after recognizing the civil, religious and customary forms of marriage, provides under Art. 662 that the causes and effects of dissolution of marriage shall be the same whatever the form of celebration and that no distinction is to be made on the basis of its form.

The law has thus provided a common standard for all citizens, and any party who moves to dissolve his/her marriage or who petitions for a review of his/her marital problems should, in accordance with Art. 662 and the following provisions, bring the case to family arbitrators.

In the case under consideration, however, the respondent did not comply with this procedure. What he did was to petition the Second Naiba Court for a certificate of divorce alleging that his wife had desserted him. The court granted the divorce certificate to the respondent stating that he had proved he could not serve the court summons on her as her whereabouts was unknown. [Refer to the decision of the second Naiba Court dated Hamle 23, 1978 given under file No. 351/78]

On our part, we shall examine the effect of this decision of the Naiba court on the appellant and on the marriage in light of the cited provisions of the law. We have seen the legal status of the court hereinabove. One of the parties has also contested its jurisdiction.

What finally comes out as an important issue is, therefore, the wiscom of resolving the conflict when the legality of decisions rendered by these courts is challenged. This court has tried to see the variows chapters of the civil Code with a view to providing a satisfactory solution to the problem, but in vain.

The closest provisions of the law to the case are Arts. 3325 et seg of the Civil code on arbitraral submission and Arts. 315-319 of the Civil Procedure Code on arbitration. Even then, the Naiba court would have been competent to try and decide on the case if both parties had entrusted the solution of their dispute to it. But this is not the case, as the appellant is alleging the contrary.

She is rather praying for the constitution of a family arbitration council so that it may hear and settle the dispute in accordance with the law. This being the true state of affairs, the ruifings of the lower courts that rejected her plea by simply stating that the case has been heard and finally decided by the Naiba Court (in her absence) are not sustainable in the eyes of the law.

As a matter of principle too, objections based on priority under Art. 7 and on res judicata under 5 of the Civil Procedure Code, may be raised only when cases have been heard and finally decided by courts whose very legal status is uncontestable.

Furthermore, the facts of the case reveal that the respondent, after having obtained a declaration of divorce by the Naiba Court on Hamle 23, 1978, has again secured another declaration of divorce on Nehassie 5, 1978 by the four elders who are said to have been constituted for this same purpose by the kebele Administration. It is, in fact, the authority of these elders to grant the divorce, which was challenged by the appellant, that has become the basis for the present
litigation. If, as the respondent now says, he had accepted the jurisdiction of the Naiba Court, he need not have undergone through the process of convening the kebele elders.

We have also considered the argument raised by the pleader for the respondent in which he said the Supreme court has ruled under file No. 1376/74 that a case heard and finally decided by the Naiba Court may not be reviewed by regular courts.

Actually, our legal system does not adhere to the rule of precedence in which a previous decision by a similar or a Higher court would bind other courts in similar cases. But this does not, however, mean that previous decisions do not have any bearing at all in the disposition of subsequent similar cases.

Nonetheless, our scrutiny of the said case, a succession dispute between Sheik Mohammed Kassa and Ato Walelign Yimer, does not support the claim of the present respondent. It is rather the reverse.

In the first place, while the present dispute is that of divorce, that one was that of succession. Sheik Mohammed Kassa was declared an heir and brother of the late woiz. Tiru kassa by her father's side by a decision of a Kadi Court while Ato Walelign Yimer too was declared an heir and brother of the deceased by her mother by another decision of an awraja court.

Afterwards, Sheik Mohamed petitioned the : :adi Court so that the case of succession be adjudicated by this same court as both parties were followers of the Islamic faith. But Ato walelign strongly opposed this move and argued that the case must be settled in the ordinary courts.

It was not without reason that pot: insisted on their respective stands: in acridance with the Shariat law, the consanguinal brother wout, $\therefore$ ve beer entit led to five-stxth of the estate of the deceased while the uterus brcther would only clam one-sixth. But the distinction and entitles both to the moiery of the inheritance.

When the controversy reached a dirficult stage, the Ministry of Justice referred the case to the Supreme Court so that it may give its opinion on the issue.

The Panel Division of the Supreme Court elaborately examined the case and decided that the two litigants should equally share the inheritance--a decision that was made on the principle that whenever there arises any conflict of jurisdiction, the law which accords equal treatment to citizens should be upheld.

When we come back to the case at hand, the decision of the Awraja Court that dismissed the petition of the present appellant on the ground that there was an administrative directive on the subject matter, is not appropriate, for courts, in the disposition of cases, are to be guided not by directives but by the law. Nor is the decision of the High Court that dismissed the case on the basis of res judicata appropriate.

In conclusion, we have found the decisions of both the Awraja and the High Courts unacceptable and we hereby quash them pursuant to Art. $348(1)$ of the Civil Procedure code.
Let the parties bear their respective costs and/or expenses. The file is returned to the archives.

# Signature of Judges 

Atsedewoin Tekle
Tilahun Teshome
Mahteme Solomon
Editors Note
Translation by Ato Daniel Wubishet and Ato Melaku Geboye.
"Unless expressly mentioned otherwise, all dates in the case are according to the Ethiopian (Julian) Calender.

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Civil Appeal Case No. 511/82*
Filiation - acknowledgement of paternity - waivable rights under Civil Law - res iudicata matters that have been heard and finally decided.

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Civil Code Art. 747 Civil Procedure Code Art. 5.
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On appeal from the judgment of the figh court where the appellanc's petition to obtain a declaratory relief of paternity in favour of her son was rejected on the ground that the issue has been heard and finally decided when the alleged father of the child was alive.

Held: Judgment reversed by majority opinion.

1. Procedurally, objections based on final judgment may be sustained provided the circumstances upon which such judgment has been given remain unchanged.
2. As a decree holder is at liberty to avail himself of the circumstances or rights created by the judgment, so is he at librety to wave them.

Sene 11, 1982**

| Judges: | Atsedewoin Tekle <br> Tilahun Teshome <br>  <br>  <br> Mahteme Solomon |
| :--- | :--- |
| Appellant | Woiz. Elizabeth Mengistu |
| Respondent | Woiz. Abeba Gonitz |
| We have examined the file and rendered judgment |  |

## Judqment

The judgment delivered by the High Court in Civil file No. $1988 / 80$ on Tikimt 16,1982 gave rise to the lodging of the present appeal.

The litigation concerns the acknowledgement of a child born out of wedlock and the background of the case is as follows.

The appellant presented a petition to the High court to obtain a declaratory judgment for the filiation of a child called Zekarias by alleging that he was born of a certain Ato Afework Tesfamariam out of wedlock. since Ato Afework, when summoned and asked, denied he was not the father of the child, the plaintiff summoned witnesses to prove her case, and the High Court ruled that Ato Afework was the father of child Zekarias by a decision given under Civil File No. $1238 / 69$ on Tikimt 16, 1970

Ato Afework Tesfamariam secured a reversal by an appeal lodged to this Supreme Court against that decision in Civil Appeal File No. $301 / 70$ by a judgment given on Guenbot 17, 1970.

Ato Afework Tesfamariam then died in 1980 after which incident the appellant filed a de novo application to obtain a declaration that the deceased Ato Afework Tesfamariam was the father of child Zekarias. The appellant, together with her application, submitted:

1. A family form filled in by the deceased and signed by him in 1974 wherein he declared his paternity when the child was admitted to a school;

2 The child's school Grade Report Card wherein the deceased affixed his signature as the child's father in 1977;
3. A written testimony tendered in 1980 by the deceased's father and brothers evidencing the paternity of the deceased to the child.
4. A list of witnesses who are said to be familiar with the case.

When a notice of the application filed by the appellant and an invitation to objectors was publicized in a newspaper, the respondent appeared with her memorandum written on Tikimt 24, 1980. In her memorandum she stated that she was a spouse lawfully married to the deceased; she bore a female child for him; the fact of her being the spouse of the deceased and the filiation of her child had already been established by the Awraja Court; and that the appellant's application filed to establish the paternity of the deceased while he was still alive had been turned down by the Supreme Court and as such contended that she, the appellant, could not resuscitate a litigation because of Article 5 of the Civil Procedure Code.

Together with her grounds of objection, the respondent also submitted a copy of the judgment of the supreme court, her record of marriage, and a declaratory judgment given by the Awraja Court recognizing her as a widow of the deceased.

The appellant, in a reply filed on Hidar 28, 1982, having admitted that the respondent got married to the deceased in 1976, she bore him a female child, and that the deceased earlier denied his paternity to her own child, further stated that in a suit to establish paternity to her own child the High Court ruled that the deceased was the father which decision was reversed by the Supreme Court. She however, contend that:

[^0]brothers; he also signed as a father of the child on a school form provided by the Bira Biro Kindergarten where the child was enrolled, that the decision of the Supreme Couxt was rendered when the child was one year, two months and ten days old, but the picture of the deceased with the child on his shoulders was taken after he was four."

In addition, the appellant raised that the deceased signed on the space provided for parent's or guardian's signature on the school transcript of the child and that this evidences his acknowledgement of paternity per Article 747 of the Civil Code; that Article 5 of the Civil Procedure Code was cited improperly; that the deceased, after having secured a favourable judgment, waived it and acknowledged his child; and that he was at liberty to do so and she prayed that the objection of the respondent be struck out.

Further, the appellant, after her request to amend her pleading was granted, submitted an amended version of her petition on Tahsas 15, 1981 wherein she restated the previous points and the only new fact she added wás that the deceased did pose for a picture together with the child and his parents.

The respondent, in her reply written on Tir 8, 1981, came up with arguments that consolidated her previous points of litigation.

As the litigation proceeded, the demonstrative evidence of pictures of Ato Afework Tesfamariam with child Zekarias and other person, and the School form filled out by the deceased as a father to have the child enrolled at the Bira Biro Kindergarten, together with the signature of the deceased appearing on the school Grade Report of the child were examined. Since the respondent denied that the signatures were that of the deceased, an order was given to the effect that the signatures be sent to the Police Laboratory for verification.

Pursuant to the above order, the contested signatures that appear on the School enrollment form of the Bira Biro Kindergarten and the one that appears on the School Grade Report of the child were submitted to be verified against the signatures of the deceased that appear on his Record of Marriage and on an application written by the deceased to the Ethiopian Domestic Distribution Corporation on Tir: 13, 1980. The result of the technical verification submitted by the central Laboratory and Identification Department of the People's Police Force, as stated in expert investigation and vertification document No. VI/124/81, showed that the contested signatures were similar to the signatures submitted for verification taking features such as bends, twists, letter formations and others into account.

After all the above, it is because the High Court rejected the petition of the appellant on the ground that the case had previously been heard and finally decided
and that the issue of filiation of child Zekarias couldn't be raised again that the matter has been brought to this court for a second time.

In the proceedings conducted in this Court, the parties, through their pleadings, consolidated their previous points of argument. Based on that, we have examined their arguments against the law. In this case, the main issue that needs to be resolved is "How are the deeds that were performed by Ato Afework Tesfamariam; after he had obtained a judgment that he was not the father of child Zekarias, to be reconciled with the present request for establishment of paternity?"

The present appellant's contention is that the deceased, after having obtained a favourable court judgment tha: he was not the father of the child, committed acts that prove to the contrary and by those acts he waived his right in the court ruling that established ne was not the child's father, and that he did create new circumstances which he could do.

The respondent's strong arguments, based on the provisions of Article 5 of the Civil Procedure Code, focus on the point that the filiation of child Zekarias had been a matter directly and substantially in issue in the previous suit and, as it had already been heard and finally decided, cannot be raised again.

According to the procedural provision cited, i.e., Art. 5 of the Civil Procedure Code, if a matter which has been in issue has been heard and finally decided, that same matter which has been in issue cannot be relitigated between the same parties or those having rights from them. For the matter has been finalized and is dead and because litigation has to be brought to an end at a certain stage.

This procedure has gained acceptance in our country and in the legal systems of many others. In the case under consideration, however, the history and background of the case shows that the point worth considering is not limited to res iudicata. The relationship of the parties to the litigation that was heard and finally decided was not brought to an end by the decision. Post the final judgment, there have been created other juridical circumstances between the then litigants. Those new circumstances merit to be briefly mentioned here for they have useful bearing on the relationship that may be drawn between the former judgment and the present litigation.

The circumstances may be stated as follows:
In Civil appeal file No. $301 / 70$, the decision that pronounced that Zekarias was not the child of Ato Afework was rendered on Guenbot 19, 1970. Nevertheless, the deceased didn't sit back and relax as a true and honest decree holder, for he, deep in his heart, knew that he won the case merely because the required legally acceptable form of evidence couldn't be produced by his
opponent, as days passed by, however, and as the matter continued pricking his conscience, the deceased went into introducing to his parents and relations the child whose paternity he had been denying and on which matter he had obtained a favourable judgment. Ato Afework, beyond introducing the child to his parents, posed for pictures together with the child and his relations. His acts were not only those above-mentioned. Three and a half years aftex he had finally won the case by judgment, he himself, by his own handwriting, filled out forms as the child's father, signed them and had the child enrolled at a Kindergarten. Six years after the judgment, on February 2l, 1985 G.C. he also affixed his own signature at a space provided for the signature of parent or guardian on the child's school grade report. Those signatures, although denied by the respondent. that they were not that of the deceased, have, however, been proved to be his by expert verifications.

Further, the deceased's brother, Ato Bernane Tesfamariam before the death of his brother, having certainly declared that the deceased was the child's father and having submitted the deceased's photograph and having filled out school registration form and signing the form on behalf of his deceased brother, had the child enrolled at the Lideta Evangelical Church Mekane Yesus Kindergarten on 03-01-76.

After the child's father has passed away, the deceased's father and his three brothers had, on Nehassie 26. 1980, given the appellant a written and signed declaration that they surely knew that the child had the deceased Ato Afework Tesfamariam as his father

The main issue in front of us is, therefore, how, given the relevant law and equity, all those circumstances that surfaced themselves up or were made public after the final judgment are to be evaluated by a judging conscience.

In this respect, the question that deserves to be examined in depth is: "What shall be the status of a previous judgment were somebody, who is involved in a Civil suit as a defendant or respondent or in any other capacity, wins the case but, forfeiting the judgment, furnishes evidence that he is liable or responsible for a claim or allegation for which he had obtained a favourable judgment?"

Procedurally, objections based on final judgment may only be sưstained provided the circumstances upon which the final judgment has been given remain unehanged. As a decree holder is at liberty to avail himself of the circumstances or rights created by the judgment, so is he at liberty to waive a right he obtained by it. He may not be told that on matters covered by the judgment, he cannot create other new rights or obligations after having obtained the judgment.

The crux of the case under consideration is related to this latter point. Because of reasons known to him, the deceased earlier denied that he was not the father of the child. Since the child was born out of wedlock, the appellant lost the case at the first time due to her inability to meet the written paternity acknowledgement standard of proof required by the law. The deceased waived this right of his and introduced the child as his own to his kins. Aware or unaware of the future
consequences of his act, he did furnish the written evidence of acknowledgement of paternity required by the law when he enrolled the child in a kindergarten, and all these show that the deceased did properly acknowledge his paternity of child Zekarias after he won the case by a final court judgment.

Observing all these circumstances. it is not proper for us to reach a conclusion that once it has been decided in the deceased's favour that the child is not his, he cannot subsequently acknowledge the child as his. Therefore, since the deceased, while still alive, waived the rights he had obtained through a final judgment, on our part we cannot accept the objection that Zekaria's patermity has been a matter in issue of a final court judgment.

This is not the objective of the law either. proof of filiation, being a matter that emanates from private and often secret affairs between the mother and the alleged father of the child, in the absence of a legally recognized relation between the man and the woman, the law requires that paternity be proved by a written acknowledgement tendered by the father of the child. This legal requirement is not without reason. It is intended to guard men who may be victims of circumstances against the possibilities of calculated acts of women who, considering the financial status, prestigious social position or any other merit of the men they allege to be fathers of their children, may succeed in establishing paternity by pooling together witnesses close to them,

Since judges do not have divine power of checking the veracity of the testimony of deceitful witnesses, the law had to impose a rather strict burden of proof on the party alleging the existence of paternity. It was because the present appellant could not meet this standard of proof that the Supreme Court decided against her in 1970.

This, however, doesn't invalidate those respective acts of the deceased in acknowledging and in proving his paternity by waiving the rights he obtained by the judgment. It is not right to make Zekarias fatherless, the child whose filiation the deceased nad accepted with regret.

To finalize, we have, pursuant to Article $348(1)$ of the Civil Procedure Code, quashed the decision of the High Court that was based on the doctrine of res judicata, and, by majority, recognized that Zekarias, the guardian tutrix of whom is the appellant, is the child of the deceased Ato Afework Tesfamariam. Let the disputants bear their respective expenses and/or costs.

Signature of Judges

Tilahun Teshome Mahteme Solomon

## The Minority Opinion <br> Judge: Atsedewoin Tekle

I whose name is mentioned as the first judge in caption, have hereunder given the reasons why i dissent from the decision rendered by the majority.

The respondent's argument that has been presented against the points of appeal of the appellant was that the case to establish filiation of the child, i.e. that child Zekarias is the son of Afrework Tesfamariam had already been litigated upon and finally decided by the Supreme Court in Civil Appeal file No. $301 / 70$, the crux of the decision being that Article 5 of the Civil Procedure code prohibits the retrial of finally decided suits. The High Court has, accordingly. struck out the suit after having accepted the objection of the respondent.

The appeal in front of this court is based on the above point.

Article. 5(1) of the Civil Procedure Code states:
No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, and has been heard and finally decided.

As long as the fact that the issue of filiation of child Zekarias had been litigated and finally decided is not denied; then the above cited Article of the Civil procedure Code precludes the appellant from bringing a new suit for the establishment of the filiation of child zekarias. The adducing of the evidence of hugging of the child by the deceased Ato Afework Tesfamariam could only be permissible if and when there was reason not to accept the objection raised. Since the objection is relevant and acceptable, there is no reason why the High Court's decision may be criticized.

Signed: Atsedewoin Tekle
Editor's Note
Translation by Ato Zekarias Keneaa.
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## Civil Appeal Case No. 1408/83*

Filiation - acknowledgement of patemity - proof of paternal filiation by possession of status - action to disown a child conflict of laws - new facts and arguments on appeal - time of appeal - contents of a memorandum of appeal.

Civil Code Arts. 389(1), 748(1). 750, 769-73, 782-83; Civil Procedure Code Arts. 327 (1) (b) (e) and (f). 329 (1)

On appeal from the decision of the High Court in which the plea of the appellant for the determination of paternal filiation of her child was rejected on the ground that it cannot be proved by the testimony of witnesses where the child is born out of wedlock.

Held: Decision confirmed.
I. Where a child is born out of a relation provided for by the law, there was no possession of status of his filiation from the very inception and the law does not provide for proof of a status which was not in existence by the testimony of witnesses.
2. As it is improper to render children to be fatherless, it is equally improper to attribute paternity of a child to a man who has denied it simply because a piece of evidence which does not meet the standard of proof laid down by the law has been presented against him.

Gunebot 27, 1984**

| Judges: | Tilahun Teshome <br> Mahteme Solomon <br> Kirubel Haile Mariam |
| :--- | :--- |
| Appellant: | Woiz. Guenet Abraham |
| Respondent: | Mr. Enricho Sampieri |

Having examined the case, we have rendered the following decision.

## Decision

This appeal was presented before this court because the High Court rejected the petition of the appellant in which she prayed to have the paternal filiation of her child to the present respondent determined. She stated the child was born out of a marital wedlock. The case was tried under civil case No. 1679/82 and decided on Tir 22, 1983.

In the written and oral arguments presented during the hearing of the appeal, the appellant and her pleader attack the validity of the decision of the High court by raising the following points:

- the court has erred in refusing to give weight to the testimony of the witnesses in contravention of a clear provision of the Civil Code;
- interpretation of law becomes imperative only when a provision of the law is ambiguous or one provision contradicts with anocher;
- if need be, the alleged father could have made use of his right to disown the child;
- since the rationale behind proving one's filiation by the testimony of witnesses is resemblance of a child and the alleged father and, as the child whose paternal filiation has become an issue in the present dispute looks like his alleged father, the court may order the presence of the child to verify the same;
- the lower court did not consider that the paternal filiation of a child born out of a wedlock may be proved by the contestable mode of proof unlike the one born in wedlock;
- because there is no legal system that encourages children to remain fatherless, the case must be considered in light of existing Italian laws by making use of general principles of Private International Law;
- just as it is not proper to make a person the father of a particular child there being no legal reason for so doing, it is not proper to render a child fatherless when his paternal filiation has been duly proved.
Prior to tackling the substantive merits of the appeal, the pleader for the respondent raised two points of objection which are procedural in nature. In the first objection, he contends that the appeal was brought after the expiry of the time provided by the law to lodge an appeal. The second refers to non-observance of formalities in the memorandum of appeal which is said not to have complied with Art. 327 (1) (b) (e) and (f) of the Civil Procedure code.

With respect to the merits of the appeal, the pleader for the respondent raised the following contentions:

- since the appellant was allowed to summon her witnesses pursuant to Art. 773 of the Civil Code and had in fact done so, the allegation that the lower court denied her of the right to present her witnesses is without any ground;
- to prove paternal filiation, one needs to produce evidence which may presuade the trier of fact in light of the standard of proof prescribed by the law;
- the legal standard of proof is the presumption of paternity which springs from a relationship provided
for by the law between the mother of the child and the person who is said to be his father, but no such relationship exists between the appellant and the respondent;
- as neither marriage nor irregular union existed between the two litigants, the respondent is not expected to initiate an action to disown the child as per Art. 782 of the Civil Code;
- the physical resemblance of the child and the alleged father was not an issue at the court of first instance, and even if it were, it is not upto the standard of proof provided for by the law;
- since the appeliant did not prove the existence of a relationship provided for by the law between herself and the respondent, the analogy she drew between possession of status and filiation is not appropriate;
- the point raised by the appellant so that the case be considered under Italian laws in line with general principles of Private International Law was not an issue at the court of first instance; and, moreover, the child is not an Italian national;
- as there is no 1 aw in Ethiopia which governs conflicts of laws, it is stated under Art. 389 (1) of the Civil Code that foreigners shall be fully assimilated to Ethiopian subjects as regards the enjoyment and exercise of civil rights;
- even if we look at the case from the perspective of equity, we cannot entertain requests of Women who spend their time in hotels with different men but who petition courts to have men of their choice be declared as fathers of their children without complying with the mode of proof provided for by the law.

Let us first consider the procedural objections raised by the pleader for the respondent.

The decision against which the present appeal is taken was rendered on Tir 22, 1983. On that very day, the pleader for the appellant submitted an application to the High court to obtain copy of the record of the preceedings so that he could submit his appeal to this court. The said copy was given to the appellant on Yekatit 11,1983 as is evidenced by the covering letter submitted to us. The appellant presented the record to the Registrar of this court on Megabit 20, 1983 and this is two days ahead of the expiry of the sixty days period provided for by the law. Even this is without regard to the decision of the second plenum of this Supreme court wherein it was agreed that the time spent during the copying of the record of the proceedings of the lower court should not be included in the sixty days period prescribed by the law. If this decision is to be considered, the appellant would have been presumed to have submitted her appeal nineteen days ahead of the expiry of the time limit. We have realized that the
pleader for the respondent raised this objection because the summons of this court served on him is dated $27 / 1 / 84$ which is not imputable to the appellant. As a result, we decline to sustain this objection.

The second point of procedural objection has the provision of Art. 327(1) (b) (e) and (f) to vouch for. Letter (b) of the provision makes it a point for a memorandum of appeal to contain the address of the respondent. Of course, this was not done on the memorandum. The rationale for this requirement is convenience of service of process. However the appellant has served the summons on the respondent who has now appeared with his pleader and filed his reply. As a result, at this stage of the litigation, the objection has no bearing on the outcome of the case. Furthermore, it is rather the court Registrar, and not the pleader for the respondent; who has already appeared with his reply, who would have raised this question.

The last point of objection raised as per letters (e) and (f) of Art. 327 of the Civil Procedure Code is the allegation that says the memorandum does not contain the grounds of appeal and the nature of the relief sought. But we feel this objection too. is not sustainable. The ground of appeal is the position taken by the High court when it decided to reject the petition of the present appellant and the issue considered was the paternal filiation of her child to the present respondent. As is stated in the memorandum, the nature of relief sought by the present appeal is reversal of the decision of the High Court.

Coming back to the substantive merits of the appeal, we shall now examine how sustainable the contention of the appellant is in the eyes of the law.

Certainly. the appellant has presented her witnesses before the High Court to substantiate her allegation. The most important point to be considered, however, is not the compatibility of the testimony of the witnesses with the allegation of the appellant. But rather its sufficiency in light of the strict standard of proof the law prescribes with regard to paternal filiation.

The summary of the testimony of the witnesses is as follows:
"The appellant used to earn her living as a prostitute. In the course of her. engagement - prostitution, she met the respondent in one of the hotels she used to spend her time and resumed sexual affair with him. They started spending three nights a week at the house of a certain Woiz. Asrat Gebre by paying the daily rent for a room. After this relationship continued for few months, the appellant told the witnesses that she was impregnated by the respondent. She also told them that the respondent gave her Birr 500 so that she might abort her pregnancy, Owing to the misunderstanding that ensued afterwards between the two, they were finally forced to go their own ways."

The law provides that paternal filiation results when a relation provided for by the law has existed between the mother and the alleged father at the time of the conception or of the birth of the child; or it has been proved that the mother was either raped or abducted at the time when the foetus could have
possibly been conceived, or where the man who claims to be the father of the child has given an acknowledgement of paternity. Proof of paternal filiation is thus a mode of proving the determination of paternity only in any one of the aforementioned ways.

Unless it is established that the two litigants were either married or were engaged in an irregular union, it cannot be alleged that there existed a relation provided for by the law between them. Nor was any mention of rape or abduction.

Because the child was born out of wedlock, his paternal filiation is to be determined by an acknowledgement given either by the man who is alleged to be his father or by his ascendants. As per Art. 750 of the Civil Code, ascendants may give such an acknowledgement only when the alleged father is no longer alive. Since the alleged father is alive, this provision is of no relevance to the case at hand.

Hence, the only acceptable mode of proof in this case is production of evidence in which the respondent has acknowledged the child to be his; and this is not something to be established by mere testimony of witnesses. The law limits the form and proof acknowledgement under Art. 7.48(1) of the Civil Code by stating that it shall be of no effect unless it is made in writing.

The other line of argument to be examined in this context is the contention of the appellant which was made by invoking the provision of Art. 770 et seg of the Civil Code. These provisions regulate circumstances whereby filiation is to be proved in default of a record of birth. Art. 770 is to be understood in the context of Art. 769 which specifies that "both the maternal and paternal filiation of a person are proved by his record of birth."

A person who may make use of this provision to prove his filiation is one that possesses the status by being born in a relation provided for by the law that existed between his father and mother. Where there exists no institution to draw his record of birth, or where the record of birth has been kept but could not be produced for one reason or another, he may prove his already determined filiation by witnesses.

As we do not, as yet, have the institution or office of Civil status, it is hardly possible for anyone in this country to produce his record of birth which shows his paternal or maternal filiation and his date of birth. Therefore, it is a common knowledge that one's filiation is proved by the testimony of witnesses. Hence a person who succeeds in proving that there existed either a marriage or an irregular union between his parents at the time of his birth may show his status as their child. Such is the case in many of the applications that are submitted to the Awraja Courts, almost everyday, with respect to the subject matter under consideration.

But where a child is born out of a relation provided for by the law, there was no possession of status of his filiation from the very inception and the law does not provide for proof a status which was not in existence by the testimony of summoned witnesses.

As regards disowning, the pleader for the appellant has argued that the respondent ought to have initiated an action to disown the child if he had intended to deny his paternity. To begin with, this contention was not made at the court of first instance. Even if it were raised there, it would not have been tenable for the simple reason that it is to be raised by the person to whom the law attributes the paternity of the child. The law presumes paternity only when it is shown that the alleged father was either married to the mother of the child or was engaged in an irregular union with her.

Since physical resemblance is not a mode of proof of filiation, we cannot grant the request of the appellant in this regard.

We have also dwelt upon the plea of the appellant in which this court was asked to adjudicate the case by making use of Italian laws in line with general principles of Private International Law. As this point too has not been made an issue by the parties at the court of first instance, we decline to consider it here as per Art. 329 (1) of the Civil Procedure code.

Finally, we shall look at the argument of the appellant raised from the perspective of equity and social justice in which she contended that no legal system must encourage children to remain fatherless.

For one thing, a court, in the disposition of a case, resorts to equity only were no clear provision of the law applicable to the issue exists. But in the case at hand, there is a clearly specified mode of proof and this court does not have any excuse to embark upon the avenue of equity.

For another, sure enough, it is improper to render children to be fatherless. But it is equally improper to attribute paternity of a child to a man who has denied it simply because a piece of evidence which does not meet the standard of proof laid down by the law has been presented against him.

To sum up, as we have not come across any legal ground to alter the decision of the High Court, we hereby confirm it in accordance with Art. $348(1)$ of the Civil Procedure Code.

Let the parties bear their own costs and/or expenses. The file is returned to the archives.

> Signature of judges

Tilahun Teshome Mahteme Solomon Kirubel Haile Mariam

## Editor's Note

Translation by Ato Tilahun Teshome
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# THE FORMATION, CONTENT AND EFFECT OF AN ARBITRAL SUBMISSION UNDER EHHIOPIAN LAN 

Bezzawork Shimelash"

## INTRODOCTION

Despite the fact that the Ethiopian society had been traditionally using arbitration through the system of referring disputes to a third person called "shimagle"iand 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.
"LLB, LLM, International 'Business Law Consultant and Attorney, Addis Ababa.
${ }^{1}$ Thomas Geraghty, People, Practice, Attitudes and Problems in the Lower Courts of Ethiopia. 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 SDBMISSION

A. Definition and Nature of an Arbitral Submiseion

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 and also that the arbitrator could be one or several. ${ }^{8}$ As a contract, arbitral submission is sukject, 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:
"Harrap's Mini Pocket French and English Dictionary.
${ }^{5}$ Civil Code Art. 3328 (See the title) Maritime Code, Art. 209.
${ }^{5}$ Assefa Desta, Arbitration in Cunstruction 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.
J. Eth. L.. Vol. XVII، 1994
"...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. ${ }^{19}$
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.

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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 py one party is accepted by the other
${ }^{10}$ 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 nomally 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 EmJMEX 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. "IE

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 arbittration. ${ }^{n}$

The reply of ETIMEX did not confirm to the terms of the offer and hence was deemed to be a. rew offer 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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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. ${ }^{\text {a }}$

## C. THE CAPACITY OF RABYTHS TOMMFE AN ARBITRAL AGREMAENT

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 eariier 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 Anharic version, "without price"

[^8]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. ${ }^{25}$

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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.

24Art. 2205, C.C.
${ }^{25}$ Arts. 313(10); 347(2); 363(1), Commercial Code.
${ }^{2}$ The subject of submitting arbitrable and non-arbitrabie disputes will be discussed separately below.
${ }^{27}$ Axt. $394, \mathrm{C.C}$.
${ }^{28}$ Petroleum Operations Proclamation, No. 295/1986, Art. 25.
${ }^{29}$ Joint Venture Council of State Special Decree, No. 11/1989, Arts, 4(1), 36.

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Regarding the capacity of public authorities and pubiic 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 subrnit 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 reguired by law for disposing without consideration of the right to which it relates."

[^9]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 if 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 imovable 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

[^10]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, subnission to arbitration can be made orally. although, as Schmitthoff has rightly said they are rare in practice and "import...an element of incertainty 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. ${ }^{46}$

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 submissior as a clause (called an arbitration clause) of the main contract."

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

[^11]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. l. 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 Comerce (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 Comerce (ECC); and b) inequality of parties during appointment.
a) APPOINTMENT UNDER THE BCC. 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:
${ }^{50}$ 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)

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"to settle; when the parties so request, by way of
arbitration, disputes arising out of business
transactions."54
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The power of issuing regulations and directives necessary for the proper implementation of the Proclamation rests with the Minister of Trade 5 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 axbitration 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 ascextained, 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.
${ }^{54}$ 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 POFER OF THE ARBITRATOPS

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 amything about this because the arbitrator, once he is appointed, shall settle the dispute, i.e., hear evidence and delivet 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 ar widen his power than what is adready provided by law, The struations 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 camnot, 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 cther 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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"When making the contract or thereafter, the parties may agree to refer to an arbitrator any decision relatirig to tariations which. .". ought to be made in the contract, should certain c rcumstances occur which woinld modify the economic hasis of the contract:"

As can be observed from the afticte, the power to vary gr modify a contract is different from the ordinarypower in that "the arbitsator wth such power would dect de onsand regulate the future reqationship of the parties concerned. $3 \cdots$ The power of the trikunal. to deside on 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 requixed to decide whether the arbitral submission is or is not valid." 5

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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## C. SPECIFYING 'AREITRABLE' DISPDILSS

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 "uniless 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"broàd 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 formilation 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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"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. ${ }^{776}$

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 ${ }^{67}$ 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 $X X$ 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
${ }^{75}$ 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. $3132, \mathrm{C} . \mathrm{C}$.
${ }^{78}$ 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.
${ }^{90}$ art. 328 - 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 arbitrai 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 submit.ted 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 quescion of whether the Civil Procedure Code or the Civil Code is overriding. ${ }^{23}$ 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. " ${ }^{84}$
${ }^{31}$ Robert A.Sedler, Ethiopian Civil Procedure (H.S.I.U., 1968) p.l.
${ }^{82}$ 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.)

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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 ${ }^{11}$ 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. ${ }^{32}$ In Bolivia, disputes arising from an act of government are excluded from arbitration. ${ }^{3}$ 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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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 settiement by arbitration. But the strength of these inferences can only be tested by future court decisions and jurisprudence which at present are lacking.

## PRRT 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 therim and it shall be enforced as though it was law. 4 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 actior 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 ox 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 guestion."

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 arbitretion. This is what the courts do in practice as well. In the case

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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. SORE ERECONDITIONS

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"9 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 agreenent 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 Deve iopment 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 ARETTRATION
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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## Arbitration

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 ai "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
> Any disputes, difEMENT OF DISPUTES
> between the buyer and the of (sic) questions arising construction and as to any matters 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 pravision. 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" tie 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 occurr, the court, after ascertaining the nature of the dispace involved, will, no doubt, reach the conclusion (just a:

[^18]J. Eth. L., Vol. xVII, 1994

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
APPLICABLT LWM TO THE AGREEAG:NF
A. SCR PRTLIMIXARY REMARES

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 isometimes 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:

[^19](a) Our arbitration laws seem to be basically
designed for domestic disputes:
(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.

Also in another case it was held (Fer 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. "ill
${ }^{106}$ Robert Allen Sedler, The conflict of Laws, in Ethiopia, Addis Ababa. Faculty of Law, Haile Sellassie I University. 1965, p.4.
${ }^{107}$ Ibid.
${ }^{108}$ 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.
J. Eth. L., Vol. XVII, 1994

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. BEFPORE ARBITRAI 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:

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"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) "123
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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 recomended by Mr. Sedler is that the 'proper law' of the contract/arbitral agreement should govern. ${ }^{14}$ This is in preference to other rules like lex 10ci contractus, in which the law of the place where the parties entered into the contract is governing, ${ }^{115}$ or the Iex loci solutionis in which the law of the place where the contract is to be performed is governing. ${ }^{166}$ 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
${ }^{112}$ R.David, Arbitration in , p. 217
${ }^{113}$ Ibid, p. 220.
: ${ }^{14}$ Sedier, The conflict ., p. 98.
${ }^{115}$ Ibid, p. 91.
${ }^{116}$ Hamlyn V Talisker Distillery, Encyclopedia. , Sec. 3.2.1.

## Arbitration

of the transaction*such as where the contract was made, where it was performed, where the arbicration was taking place, and where the parties did their business, 7

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
3. 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. ${ }^{18}$ Many confusions and uncertainties would no doubt be reduced as a result. Not letting parties to choose the applicable tlaw would create inhibitions in international trade and investment, and hence would be contrary to the public incerest 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 limitarions 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. BEFORE COURTS

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 deferidant 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

[^20]J. Eth. L., Vol. XVII, 1994
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. ${ }^{221}$

PART V
ARBITRATION, A BETYER MRCHANISM YOR THE SETTLEMENT OF BOSINESS DISPOTES

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. ${ }^{133}$ 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.

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\({ }^{221}\) Art. \(3325(1), ~ C . C\).
\({ }^{122}\) Art. 3332 (2), C.C.
\({ }^{123}\) Information derived from the Statistics Department Ministry of Justice.
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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.


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1 Allan Redfern and Martin Hunter, Law and Practice of International commercial Arbitration, Sweet and Maxwell, London, 1986 18 17.

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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, $1980 \mathbf{1 K}^{\mathbf{9 n}}$

























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24 Craig Park and Paukon, International Chamber of Commerce Arbitration, Oceana Publication Inc., 1986, Vol. I part II, chapter 5, Sertion 07.






























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43 Cheshire and North, Private lnternational Law $11^{\text {th }}$ ed., Butterworths, London, 1987 7K 168:

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# ARBITRABILITY IN ETHIOPLA: 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

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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 jossibility 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 adjucication.

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 märriage 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 :he 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 Givil 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 probibited 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

[^26]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 prohioition 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 provisi ns on Administrative Contracts in our

[^27]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. 33253346 in a Proclamation whereas Art. 315(2) of the Civil Procedure Code appears in an Imperial Decree?

## IV. QTHER 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 $941,945,969(3), 1275,1472 \mathrm{ff}, 1534(3), 1539,1765,2271^{9}$ 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.

[^28]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 556 a 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 dispules concerning

[^29]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 sociat 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 s:e 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 ( $\mathrm{a}-\mathrm{i}$ ). 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 juriseliction 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 (ai) 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 proxisions 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 3.325 (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 Civ! 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) mav 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 c.vuld be argued that it doesn't make a glaring difference because in Ethiopia arbitrators are appointed to resolve

[^30]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. ${ }^{23}$ Bankriptcy 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, 1 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.

2979 Corpus Juris Secundum, Security, Securities, p. 946.
${ }^{30}$ Ibid p. $945^{\prime}$.
${ }^{31}$ 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

[^31]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 pluriparties 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 ail 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; Redferi and Hunter supra note 1, pp. 1t0-111. Craig, Park and Paulson, supra note 2+ 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 L, p, 19,
${ }^{38} \mathrm{It}$ 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 subarticle, 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 legat status. ${ }^{41}$

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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. 174175.
${ }^{40}$ The state, it is submitted, is 's 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.

## 4436 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 16752026 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 s ccessfui puity for which the latter has to (if the losing party fails to comply with the uxard), necessarily apply to the local courts and the losing party opposes the recognition and enforcement argaing 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 Nricie $3328(3)$ is '...specific legal obligation" but: I think the expressio: "specific legal relationships" bette" represcots the intended legistative feeling.

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# THE DOCTRINE OF 

ELECTION AND RIGHTS OF CRTDITORS IN THR HTHIOPIAN LAN OF SOCCESSIONS

By Tilahun Teshome*


#### Abstract

The tributes and debts which are imputable to the deceased should be paid from the estate. If the. property left is not sufficient to pay off the debts, the heir shall not pay the debt and the loan if he does not take the inheritance. If the heir accepts the inheritance, he must keep it separate, put. the amount in writing, and show the amount to the creditors; he shall give to each in proportion to what is due to him. And if he accepts the inheritance and spends it by giving it. away or in some such way; or if he hides it and does not reveal desirous that the other creditors remain deprived of their belongings; or if he has given them half of it, then the must pay all that is due to them, after the debt is ascertained by a reliable witness. ${ }^{1}$


I
When a person dies leaving property interests behind, his patrimony is set aside to be administered by a person or a group of persons whom the law refers to as liquidators. Liquidators may be appointed by a will as testamentary executors. They may assume the office by operation of the law where a person dies intestate or where a person dies testate but did not appoint executors in his will. In this latter case, the mere fact of being an heir or a legatee by universal title suffices to claim the status of liquidator. A judicial liquidator may also be appointed where the heirs of a deceased person are unknown, or all the heirs-at-law have renounced the succession, or do not want to liquidate it, or where there are no heirs of the deceased and his succession is taken by the State. The other possibilities of appointing judicial liquidators are where the deceased has appointed an executor in his will but there is doubt regarding the authenticity of the will or where there are several liquidators who are not in agreement on the administration and liquidation of the succession, or
*Assistant Professor of Law, Addis Ababa University, Former Judge of the Supreme Court of Ethiopia. ${ }^{1}$ The Fetha Nagast, The Law of the Kings, Translated from the Geez by Aba Paulcs Tzadua, Haile Sellassie I University, Addis Ababa, 1968, Fart two, Chapter 42, Section I, p. 235.
where there are persons who, for one reason or another, are not in a position to look after their interests. ${ }^{2}$ The process of liquidation in the Ethiopian Law of Successions ${ }^{3}$ covers the activities to be undertaken by the liquidator starting from making arrangements for the funeral and commemoration services of a deceased person, all the way to the determination of persons entitled to succeed him, collection and preservation of property forming part of the estate of the deceased, taking inventory and making valuation of such property, payment of certain, due and liquidated debts of the inheritance, and handing over of bequests ordered by the deceased person to legatees by singular title.

The scope of this work is, however, limited to just a single aspect of this lengthy process; i.e. treatment of the relationship between heirs of the deceased and creditors of the inheritance in the disposition of successoral property.

## II

In the ordinary course of events, persons who may have claims on the inheritance of a deceased person are heirs at law, legatees by singular or universal title and creditors of the deceased, preferably mentioned as creditors of the inheritance. ${ }^{4}$

The law provides that heirs and legatees are at liberty to make an election. As applied to the law of successions, the doctrine of election refers to the option of an heir or a legatee to make a choice between two alternative and, sometimes, conflicting rights. The 'no necessary heir' rule adopted by the Civil Code of Ethiopia prescribes that "no heir is bound to accept the succession or legacy to which he is called. "5. This rule, which is employed in both the Civil and common law systems, is ". ibased on the equitable ground that

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a person cannot be permitted to claim inconsistent rights with respect to the same subject matter. "6 and that he who accepts the bounty of a deceased must be bound by the obligation the acceptance may bring about since one cannot enjoy its benefits and evade its burdens.

The right of election of an heir or a legatee, in this respect, is strictly personal to him and no other person can exercise it on his behalf so long as he is alive.? Without prejudice to their right of recourse by invoking the Paulian Action, ${ }^{8}$ even creditors of the heir have no right to dictate the latter's election.

The heir makes the election by either accepting or renouncing the succession in toto.9 Under the equitable doctrine of election, if a person accepts the succession for one purpose, it amounts to acceptance for all purposes and the renunciation of all rights and claims inconsistent therewith. ${ }^{10}$

Although the Ethiopian Civil Code of 1960 seems to have chosen a different approach to the problem of election, both the Civil and common law systems provide for:-

1. the simple and unconditional acceptance, in some literatures referred to as 'acceptance pure and simple':
2. acceptance with the benefit of inventory; and
3. renunciation of succession.
${ }^{6}$ Corpus Juris Secundum, a complete restatement of the entire American Law, Volume 97, wills, Section 1237, p. 8 .
${ }^{7}$ Civil Code, Arts. $977(1), 853$.
${ }^{8}$ Ibid. Art. 993 cum Art. 977 (2) and (3). The Paulian action in this respect is a remedy available to creditors of an heir who, to their prejudice and with fraudulent intent, renounces a succession devolving upon him. For a discussion on this point see Amos and Walton's Introduction to French Law, Second ed., Calrendon Press, Oxford, 1963, pp. 243 247.
${ }^{9}$ Civil Code, Art. $989(1)$
${ }^{10}$ Note, however, that a person who renounces a succession in his capacity as a legatee may still accept it in his capacity $t s$ an heir and vise versa. See Art. 989(2)and (3) of the Civil Code.

The simple and unconditional acceptance is recommended when an heir is certain that the inheritance is free from encumbrances by creditors of the deceased or, at least, when one is certain that it is solvent. Acceptance with the benefit of inventory, on the other hand, is believed to be ". the best choice when there are doubts about the solvency of the succession. The benefit protects the heir against creditors' actions and still leaves him with a hope of gain if some surplus assets are left."11

Under the simple and unconditional acceptance, if a person accepts to take the benefits of a succession, be it testate or intestate, he must assume any burden annexed thereto even though it turns out that the burdens are greater than the benefits. ${ }^{12}$ The heir who has so elected is given the ownership title of property forming the inheritance. Unconditional acceptance, in this context, brings an end to the estate of a deceased person as a distinct entity ${ }^{13}$ and merges it with other personal property of the heir Creditors of the inheritance do not have to require the taking of inventory of the inheritance since they have a right to initiate proceedings even against the personal property of the heir

Acceptance with the benefit of inventory offers two advantages to the heir. For one thing; the liability of the heir to the debts of the inheritance is limited to the extent of the vaiue of property or the amount of money he has received or will have received. For another, so long as the process of liquidation is not brought to its final conclusion, the personal assets of the heir do not merge with the estate of the deceasec person. The property which forms the estate is the common pledge of all creditors of the inheritance. The heir is required to make a duly probated document ir which inventory of the inheritance is drawn up.

As pointed out above, although the Ethiopian Civil Code of 1960 does not make an express reference to the phrase "acceptance with the benefit of inventory" before closure of liquidation, the liability of an heir to the
${ }^{11}$ Planiol, suprä, note 5, Vol. 3, part I, p. 613.
${ }^{12}$ Corpus Juris Secundum, Supra, Note 6, Section 1285 .
${ }^{13}$ As a distinct entity the estate is not a juridical person known to the law. It is merely a name to indicate the sum total of assets and liabilities of a deceased person whose succession is opened.
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debts of the inheritance does not extend beyond what he has received. But the effect of such a liability is sometimes distributed between two phases.

Before the process of liquidation is wound: up. property of a deceased person constitutes a distinct estate in which the undivided interest of creditors of the inheritance and that of the heirs is represented. ${ }^{14}$ Creditors of the inheritance are preferred to personal creditors of the heirs in so far as their claim over the estate is concerned. ${ }^{15}$ Claims of heirs for partition of their shares in the succession is satisfied only after creditors of the inheritance who have made themselves known, persons entitled to maintenance, and legatees by singular: title are paid their dues in the order established by the law. ${ }^{16}$ Where all the property constituting the inheritance has been disposed of during the liquidation process, newly arrived creditors of the inheritance have no right of recourse against the heirs as it is clear that nothing has gone to them form the succession.

If, on the other hand, heirs have received whatever remains from the inheritance after just and liquidated debes of the inheritance are paid, the assets they have so received merge with their personal property ${ }^{17}$ Creditors of the inheritance who appear after closure of liquidation have no better right than personal creditors of heirs. Even worse; because of the fact that personal creditors of heirs may claim the whole estate of the heirs as their common security while the postliquidation creditors of the inheritrance may only claim the value of property or the amount of money the heir has taken as his share of the succession. is

Hence it is possible to argue that the doctrine of "election with the benefit of inventory" operates in the Civil Code of Ethiopia where:

1. creditors of the inheritance and legatees by - Singular title have been paid their claims and bequests: there remains a residuary estate;
${ }^{14}$ Civil Code, Arts. 942, 943 (1):
${ }^{15}$ Ibid, Art. 943 (3)
${ }^{15}$ Ibid. Art. 1014, ion the order of payment) Art. 1052, (on closure of liqui lation)
${ }^{17}$ Ibid. Art. 1053.(1)
${ }^{18}$ Ibid., Arts. 1054, 1055.
2. such residuary has merged with the personal property of heirs or, where necessary. it is jointly owned by them; ${ }^{19}$
3. new creditors of the inheritance have appeared to claim payment of what is due to them.

The third possible option regarding election is, of course, renunciation of succession. It is an act by which a person called to a succession gives up his title. By so doing, an heir circumvents his liability on an obviously insolvent succession. ${ }^{20}$ It is also a wise choice to be made "when a person has received a substantial donation from the deceased (sic) which would be merged in the succession and lost. $n^{21}$ under the rules of collation in which a descendant is supposed "to bring into the succession the value of the liberalities which he has received from the deceased and which are not exempted from collation. "22 once a person renounces a succession, he is deemed to have never been an heir for all intents and purposes.

## III

There are also instances wherein one may be in a dilema as to whether or not to accept or renounce a succession. Let us consider the following situation.

A, in his will, gives $B^{\prime}$ s property to $C$ and at the same time A gives some of his property to B. Can B accept the bequest from $A$ and attack the part of the will in which the deceased had bequeathed his ( $B^{\prime}$ 's) property to C? If he renounces the succession, the part of the will referring to his property may be invalidated for reasons of nonenforcibility ${ }^{23}$. But it may be contended that he may not claim his bequest in the same will since there is no such thing as partial acceptance or renunciation. ${ }^{24}$ If B accepts the succession and receives the bequest made to him by $A$, it implies that he has
${ }^{29}$ Ibid. Art $1053(2)$ :
${ }^{20}$ Note, however, that as there is no such thing as simple and unconditional acceptance under Ethiopian law, this justification for renunciation is of no practical significance. Whether one accepts a succession or not, his liability is limited to the extent of the value of property he has received from the succession.
${ }^{21}$ Planiol, supra, note 5, vol. 4, Part 1, p. 613.
${ }^{22}$ Civil Code, Arts. 1065, 1067, 1068, 1073.
${ }^{23}$ Ibid., Arts. $865(2), 878$.
${ }^{34}$ Ibig., Art. 989 (1)
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waived his statutory right to attack the validity of the will. Thus $C$ can claim $B^{\prime}$ s property on the basis of the will.

In a similar case in England it has been heid that " $\therefore$ where the true owner of the property so given also receives a benefit under the same will, such owner is put to his election whether he will give up such benefit or will give effect to the disposition by the testator" ${ }^{25}$

Before making the election, however, an heir has to weigh the possible advantage he may derive by so doing in terms of the valme of his own property bequeathed to some other person and the value of the bequest made in his favour But some argue:
.. since this could hardly be fair where there is great disparity between the value of the two gifts, . the omner of the property be (sic). given the opportunity of retaining his gift under the will provided he compensates the beneficiary by giving him the value of the property of which he is disappointed. ${ }^{26}$

When considering the problem from the Ethiopian perspective, one may ask this question. Is it not possible for $B$ to attack the validity of the will and still claim his bequest without doing any disservice to the rule against partial acceptance under the civil Code? Arguably yes.

> That which one owns he can dispose of by will; but a testator can convey on 1 y such property or interest as he has. ${ }^{27}$

The postulate indicates that the subject matter of the bequest in a will must be capable of being disposed of by the testator As a matter of common sense too, a bequest made of an object that doesn't belong to the testator is of no effect. Even the testator's lack of knowledge regarding his title over the subject matter of the bequest is immaterial. This idea is explicitly provided in the Civil Code in which it is stated that "a
${ }^{25}$ W.J Williams, The Law Relating to wills - with precedents of particular clauses and complete willsp; third ed., London Eutterworths, 1967, p. 224.
${ }^{26}$ Ibid.
${ }^{27}$ Corpus Juris Secundum, s pra, note 6, Vol. 94, wills, Sectica - p. 782. Emphasis supplied)

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provision in a will shall be of no effect where it cannot be enforced. ${ }^{28}$ Arguably, one aspect of enforcibility is that the object of the will must be the true property or right of the testator which actually passes directly to his heirs after all the debts of the inheritance have been paid.

Therefore, $B$ may make use of this provision to have the part of the will in which his property is bequeathed annulled. But the nullity of this part of the will does not necessarily ". entail the nullity of other provisions ..." unless, of course, one establishes the existence of "... a necessary connection between the execution of the provision which is null and that of other provisions. " ${ }^{29}$

Once' $B$ succeeds in having that very provision in A's will annuiled, $C$ no longer has any claim on $B$ 's property bequeathed to him by A's will. The question to be asked in this respect is: does $\mathrm{B}^{\prime}$ s action for nullity of that particular provision in A's will amount to renunciation of succession? By no means. In the first place, renunciation has to be communicated to the liquidator in writing or in a declaration made in the presence of four witnesses. It must also be made in pure and simple terms. ${ }^{30}$ B's action for nullity is not directed against a bequest in which A had a valid title. It cannot be construed that $B$ was exercising his right of election when he was attacking the validity of that particular provision in the will. Thus, one may safely argue that B may accept the succession and claim the bequest made to him in A's will inspite of the fact that he has attacked part of the will in which his own property had been bequeathed to some other person.

## IV

Upon examining rights of creditors in succession, distinction needs to be drawn between the two classes of creditors: those of the heritance and those of the heirs.

Creditors of the inheritance have the property constituting the estate of the deceased "as their exclusive security", but do not have any right over personal property of heirs and legatees. ${ }^{31}$ On the other hand, personal creditors of heirs and legatees do not have any right over the estate constituting the inheritance pending liquidation. ${ }^{32}$

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Creditors of the inherdtance $1: 3 y$ be secured creditors, creditors with priority rigits under the law and ordinary creditors who have no special security and enjoy no privilege. As a rule, the debts;incurred by the deceased during his life time are enforced against his estate. Such debts cover not only liabilities stemming from the contractual obligations of the deceased but also debts:
.originating in torts and criminal acts. Hence, a penalty pronounced against the deceased (sic) can be claimed from his heirs. The principle of personal character of criminal penalties prevents only the adjudication against the deceased (sic) after his death. ${ }^{33}$

What actually matters is the fact that claims of creditors: must be based on some obligation of the deceased recognized by the law as valia and enforceable. on the contrary " claims which would be invalid, or illegal and void as against the deceased (sic) if living are not enforceable against his estate. ${ }^{34}$ As creditors are not, under normal circumstances, expected to seek specific performance ${ }^{35}$ of a debt arising from obligations of a deceased person since he is no longer alive to perform it, the standard remedy available for them is an action for damages to obtain a sum certain in money as an equivalent satisfaction to their claim. ${ }^{36}$ Where the obligation is some thing that does not require the personal qualities of the deceased, creditors have other remedies available to them. They may demand the liquidator to do or cause to be done the acts which the deceased assumed to do, they may be authorized to buy the things which the deceased assumed to deliver; they may. for good cause, refuse to accept the thing offered to them by the liquidator; and they may even move to cancel the contract that created the obligation where the deceased in his life time or the liquidator after his death has not fully and adequately performed it as agreed. ${ }^{37}$

Once creditors have established their valid claims against the estate, the mode of execution of their rights is in the domain of civil actions as prescribed in the code of Civil Procedure. If the decree is for the

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payment of money. it is to be executed by the attachment and sale of the property ${ }^{38}$ constituting the estate of the deceased unless, of course, the liquidator or one of the heirs makes cash payment or settles the account in any other appropriate manner ${ }^{39}$ If the decree is for delivery of a specific corporeal chattel, it may be executed by the seizure of the property from the estate and delivery thereof to the creditor ${ }^{40}$ If it refers to the delivery of imovable property, the creditor may be authorized to take possession of the property and, where necessary, any person who refuses to vacate the property may forcibly be evicted out of it. ${ }^{41}$

Even before the debt is liquidated, if creditors show that the liquidator or the heirs are about to dispose of property constituting the estate or any part thereof, they have the right to demand deposit of security for the production of property as may be sufficient to satisfy their claim. ${ }^{42}$ If such security is not furnished by the liquidator, creditors may demand attachment of the property forming the estate or any portion thereof. ${ }^{43}$ Similarly, when creditors show that any property forming the estate is in danger of being wasted or damaged by any party, they may apply for an order of temporary injunction to restrain such act or obtain a similar order for the purpose of conserving the property ${ }^{44}$ To this effect, they are entitled to request affixing of seals on the effects of the deceased or removal of such seals therefrom. They may also request the confection of an inventory, file an objection to impugn the order of partition proposed by the liquidator or the heirs, or demand separation of patrimonies. 45 What creditors of the inheritance have to show to ask for such measures is to
${ }^{38}$ Civil Procedure Code of Ethiopia, Negarit Gazeta, Extra-Ordinary Issue, 25 th year No. 3 . Decree No. 52 of 1965.
${ }^{39}$ Ibid., Art. 395(1): 396(1)
${ }^{40}$ Ibid.. Art. 399.
${ }^{41}$ Ibid., Art. 402. These three forms of seizure which vary with the nature of the property so seized are known as a saisie-arret, a saisie-execution, and a saisie- immobiliere under French laws. See Amos and Walton, supra, Note $8, p .240$ foot note No. 1
${ }^{42}$ Civ. Fro. Code, Art. 151 - See also Civil Code, Art. 1988.
${ }^{43}$ Civ. Pro. Code, Art. 152.
${ }^{44}$ Ibid., Art. 154; See also Civil Code, Art: 1992.
${ }^{45}$ For a concise remark on thas point see Aubry and Rau, Droit Civil Francais, VoI. 4 - 5th ea., Obligation, An English Translation By the Louisiana State Law Institute, 1965, pp. 124-25.
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Convince the trier of fact that there exists:
an imminent risk of the assets being dissipated or diminished in value and a money debt is prima facie due to them. The advantage of this procedure is to bring the deceased's (sic) property into the safe keeping of an officer of the law pending the ultimate decision by the Court upon the validity and amount of the debt. ${ }^{46}$

Other forms of remedy availabie to creditors of the inheritance, just as to all other creditors, are what are known as the oblique action and the Paulian action. Both are exceptions to the general rule that limits the effects of contracts only as between the contracting parties. ${ }^{47}$

The oblique action enables cxeditors to exercise all the rights and actions available to the liquidator and heirs except those rights in which the personal qualities of the deceased were the leading motives. Primarily, the right emanates from the inaction of the liquidator or the heirs to claim a debt due to the inheritance. Creditors may not preclude the liquidator or the heirs from exercising the rights and actions of the deceased. They are merely entitled to act where the liquidator or the heirs neglect the right or refuse to exercise it so as to jeopardise their claims. The action is to be employed only with the authorization of a court where the right is exigible, something more than an ordinary conservatory measure, where the liquidator, as a. personal representative of the deceased. fails to act, and where such inaction imperills the rights of the creditors. ${ }^{48}$

The Paulian action is an instrument of revocation available to creditors of an inheritance in which they may attack in their own name acts done by a liquidator or heirs in fraud of their rights. Before closure of liquidation, creditors may attack any fraudulent act done with the object of alienating property constituting the inheritance. ${ }^{49}$ Personal creditors of an heir who renounces a succession to which he is called may also avail themselves of the Paulian action by applying for nullity of such renunciation if it is prejudicial to them. ${ }^{50}$
${ }^{46} \mathrm{Amos}$ and Walton, supra, Note 8, p. 240.
${ }^{47}$ Civil Code Art., $1952(1)$ See also note 8 supra.
${ }^{48}$ Ibid., Art. 1993. see assu the discussion in
planiol, supra, note 5, VCl. 2, Fart 1, pp. 173-74.
${ }^{49}$ Civil Code, Art. 1995.
${ }^{50}$ Ibid., Art. 993

The action is a remedy the law provides for a creditor who may otherwise become a victim of bad faith of liquidators or heirs, or may be both "...as a debtor burdened with debts, who is threatened with suits, is naturally tempted to conceal his assets from his creditors."51 A liquidator or an heir may make use of different means to this end:

He can have an understanding with a third party, who will be reputed as having acquired the property by purchase or donation, and who will secretly recognize that he is not the real owner; he can liquidate the visible property, which would easily be seized and replace it by cash or other securities easy to conceal; he can even, from pure evil intent and without profit to himself, agree to transactions which enrich his relatives and friends and impoverish the creditor. Moreover, business transactions which exist between men and which are of an infinite variety, offer a thousand opportunities to defraud creditors, under forms which can neither be proved or determined in advance. ${ }^{52}$

An interesting point to dwell upon in this context is the exercise of the paulian action by personal creditors of a renouncing heir Creditors cannot make election on behalf of the heir. Neither can they compel him to do so as the act is strictly personal to the heir. Normally, their claim is limited to his personal assets. Only by showing the insolvency of the heir may they avail themselves of the Paulian action. If it can be shown that the heir has property enough to satisfy their claims, there is no reason why they should insist on making use of the Paulian action.

We may even take this idea further Fersonal creditors who have entered into dealings with a renouncing heir in anticipation of his succession may not invoke this remedy even if they show the insolvency of the heir For instance, anticipatory contracts"... relating to the succession of a person who is still alive. ." are of no effect in the eyes of the law. ${ }^{53}$ Let us consider this situation. A lends Birr 50,000 to B. In the contract, it is agreed between the two that $B$ would pay the money back to $A$ as soon as his father $C$, who, due to a serious illness, is on his death bed and has a bank savings account of Birr 500,000, dies and as soon as he gets his share of the succession. As expected,

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$C$ dies intestate. When the succession is opened and $B$ is put to his election, he renounces the succession in favour of his two brothers $D$ and $E$. Can $A_{\text {r }}$ invoke the Paulian action against. B's act of renuriation? Of course no!

When one contemplates rights of different classes of creditors of the inheritance, those with certain, due and liquidated claims do not have any problem in the collection of their claims amongst themselves as long as the assets of the estate are sufficient to satisfy all of them. But problems arise where it is obvious that such assets do not satisfy claims of all creditors. One may treat the problem from two perspectives.

The first is where the contending creditors are on an equal footing but the property forming the estate does not satisfy their claims. In this case, the rule of pro rata distribution is applied in which the estate is to be distributed between the creditors in proportion to the amount of claim each one of them shows. ${ }^{54}$

The other is where there are secured creditors and creditors who enjoy special privilege under the law. Secured creditors are those who possess what is known as 'real security' by way of a mortgage (hypothec) or a pledge. They have a right of preference over all other creditors and a right to follow the property which constitutes their security. Where it is mortgage, "the mortgagee may demand to be paid, out of the proceeds of the sale of the inmovable, in priority to any other creditor "ss If the immovable is sold without his consent by the mortgagor, the creditor (mortgagee) may attach it in the hands of the purchaser ${ }^{56}$ As an act creating priority right, a mortgage drawn up in favour of a creditor of an inheritance, secures him payment of the registered amount of claim in preference to other creditors. ${ }^{57}$ Similarly, a creditor who has secured his claim by a contract of pledge is to be paid out of the proceeds of the sale of the pledge before all other creditors to the maximum amount of his claim specified in the contract. ${ }^{58}$ Secured creditors, in addition, do have all the rights of ordinary creditors if proceeds of the sale of the mortgage or pledge does not satisfy all their claims. Apart from and in addition to their right over
${ }^{54}$ Civil Pro. Code, Art. 403. For a comment on the idea of pro rata distribut ion see also Robert filen Sedler, Ethiopian Civil Pxocedure, HSIU, 1968. pp. 283-285.
${ }^{55}$ Civil Code, Art 3059(I)
${ }^{56}$ Ibid. Art. $3059(2)$
${ }^{57}$ Ibid., Art. 3076.
${ }^{58}$ Ibid. Arts. 2857. $2858($ ).
the mortgage or the pledge, they may apply for attachment or sale of any other property constituting the estate, just like an ordinary creditor Also, they are not bound to limit their claims on the mortgage or the pledge prior to resorting to some other property

Creditors with special privilege under the law may be workers who claim payment arising from employment contracts Tax authorities may also have similar rights. Their claims have to be paid in priority to. other payments or debts. ${ }^{59}$

The other point worth mentioning when dealing with the rights of creditors during the liquidation phase of distribution of succession is the fate of creditors whose debts are not liquidated and those who have conditional claims over the estate. Such creditors may require deposit of securities from the liquidator or the heirs so that the latter pay their claims when the debts of the inheritance fall due or when the conditions for the claims materialize. ${ }^{67}$

## V

Once creditors of the inheritance who have made themselves known have been paid their claim, and legatees by singulax title, if any, are given their legacy, liquidation of succession comes to an end.' The residuary estate, if there is any may remain in common between the heirs and the legatees by universal, title forming a community of property and representing the undivided estate (masse indivise); or it may be converted into individual shares. Normally, both forms of partition bring an end to the estate of the deceased and merge the residue with other personal property of the heirs. ${ }^{52}$. If the property remains in common, its legal status changes from a distinct estate to that of a jointly owned property. ${ }^{63}$ If it is divided between the heirs, the abstract fraction of each heir in the state of indivision crystallizes into separate ownership of a particular object or a specified amount of money

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As we have seen above, the doctrine of election with the benefit of inventory operates after closure of liquidation where new creditors of the inheritance appear and claim payment of what is due to them from the heir. We have also noted that the liability of the heir is limited to the extent of the value of property or the amount of money he has received from the succession. This implies that post-liquidation creditors of the inheritance have no better claims on the value of property the heir has so received than his personal creditors. 64 The heir who is proceeded against by the post-liquidation creditors of the inheritance is expected to produce a statement showing what the succession was made up of and the value of property he has received. Where no inventory is taken or where the document purporting it cannot be produced by the heir, creditors may establish the property that constituted the estate and its value. ${ }^{65}$

If the creditors can show an act of concealment of property forming the inheritance by the heir, his bad faith is presumed. They shall be believed on their mere affirmation with regard to the value of the thing. If the heir contests the valuation, creditors may simply confirm on oath that their evaluation is made in good faith. The heir may also not be relieved of his liability by showing the loss of the thing or the deterioration of the value once it is established that he has received it as his share of the residuary estate. 67

Another problem worth mentioning is the manner of initiating proceedings by the post-liquidation creditors of the inheritance where there are several heirs of the deceased. Is a joint and several action feasible? Yes and no.

Yes; where the hereditary estate is held in common between the co-heirs as a joint property In so far as their relationship with the creditors of the inheritance is concerned, heirs who hold $a$, hereditary estate in common are co-debtors to the extent of the value of property they jointly own. Just as personal creditors of each heir may attach the share of his debtor, creditors of the inheritance who can show a valid claim on the jointly owned property may attach this particular property To this extent, co-heirs ane assimilated to co-debtors who shall be jointly and severally liable. ${ }^{68}$

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No; where the heirs have effected partition and thereby taken their respective shares. Creditors of the inheritance are supposed to divide their claim among the heirs in proportion to the value of the share received by each heir. But this does not imply that creditors are precluded from joining all the co-heirs in a proceeding. So long as the liability of each heir is stated in proportion to his share, the rule of joinder of parties contained in the Code of Civil Procedure may be employed by the creditors. ${ }^{69}$ Again, if all the co-heirs are proceeded against but some of them are insolvent, creditors of the inheritance have a right of recourse against the solvent ones. The portion of the debt of the insolvent heir shall be divided pro rata among the other ones. ${ }^{70}$

The rule of proportional allotment of debts of coheirs is not necessarily employed by creditors where the debt due to them is indivisible." Indivisible debt in this context refers to a right in rem in which the creditor can follow a particular piece of property. The heir who has received such property may not invoke this rule against the creditor so that he divide his claim among all the co-heirs. The remedy available to an heir who is evicted or dispossessed by creditors is recourse against his co-heirs. As co-heirs owe to each other the warranty which a seller owes to a buyer, he may demand that other co-heirs restore the amount he had paid more than the portion he was actually bound to pay ${ }^{7}$

An interesting issue to be taken up at this point is the position of a legatee by singular title vis-a-vis the post-liquidation creditors of the inheritance. Although bequests made to a legatee by singular title are themselves treated as debts of the inheritance during the process of liquidation next to claims of creditors and debts regarding maintenance, ${ }^{73}$ there is a possibility where such a legatee may be held liable to the debts of

[^43]the succession. Creditors may bring their claim against the legatee but his liability is limited to the extent of the value of his bequest. Furthermore, the action is to be brought only when the heirs fail to discharge their obligation. The legatee may compel creditors to bring an action against the heirs if they have not done so. For this purpose, he is assimilated to the status of a simple guarantor in the law of obligations. ${ }^{74}$ Hence, he may avail himself of any defence open to a guarantor as soon as he is proceeded against. He may invoke the defence of benefit of discussion and demand creditors to discuss the assets of the deceased that have gone to the heirs or realize their available real securities.

Even if he has not invoked this defence of benefit of discussion, a legatee by singular title may pay the liquidated claims of creditors and substitute himself for the creditors of the heirs. As a creditor, he may compel the heirs, who alone bear the ultimate burden of debt payment, to restore the sum he has paid.

There are two limitations of his'right in this regard, however:
a) a legatee by singular title cannot compel heirs to pay over and above the value of property they have received even if he can show that he, for one reason or another, has done so; and
b) a legatee by singular title has no right of recourse against another legatee by the same title. ${ }^{75}$

VI
We have seen that after closure of liquidation personal creditors of the heirs have no lesser claim on the property which their debtors have received from the succession than creditors of the inheritance. ${ }^{76}$ If the property is held as a hereditary estate between the coheirs, creditors of an heir may apply for partition so that they may attach the share of the heir against whom they have a valid claim.? They may also invoke the Paulian action to impugn a partition made in fraud of their rights where they have made an application for partition earlier and where it took place without their knowledge or participation.?

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\({ }^{74}\) Ibid., Art. 1058, 1934, 935.
\({ }^{75}\) Ibid., Art. 1059.
\({ }^{76}\) Ibia.. Art. 1054 (2)
\({ }^{77}\) Ibid. . Art. \(1081(1),(12\) 0(2)
\({ }^{76}\) Ibid.. Art. 1109.
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## Successions

Once the property forming the residuary estate is partitioned among the co-heirs, personal creditors have a right of claim over the share of their debtor, jugt as they have a right of claim over other property of the heir.

One last point to be raised here is the fate of personal creditors of a renouncing heir who have come to invoke the Paulian action after partition but before the lapse of the two year prescription period under the law. ${ }^{79}$ If these creditors show the insolvency of the renouncing heir, his act is obviously prejudicial to them. But can they demand payment of their claim from the other coheirs in proportion to the benefit they have derived from the act of renunciation?

As a rule, the liability of co-heirs due to the insolvency of one of them is limited to the claims of creditors of the inheritance. But in this case the claimants are creditors of one of the co-heirs and not of the inheritance. One may argue that they are under no obligation to satisfy claims of personal creditors of a renouncing heir But a close reading of the law would seem to suggest otherwise. We have seen above that the Paulian action is a remedy available for creditors who may be frustrated by the bad faith of a debtor. So long as a creditor is not barred by limitation of actions, he may apply for nullity of the act of renunciation only up to the extent of what is due to him. The speedy effectuation of the partition process must not operate to his detriment. For the purpose of protecting the interests of personal creditors of such an heir, there is no reason why the court should not revoke the renunciation so that other heirs who have taken the share of the debtor satisfy claims of his creditors to the extent of the value of property or the amount of money they have so received.

To sum up, election under the 1960 Civil Code of Ethiopia, just as in many other legal systems, is the option available to heirs and legatees to make a choice between two alternative and, at times, inconsistent rights. Both alternatives have their own legal effects before and after the process of liquidation of succession is wound up. The beneficiary needs to weigh the possible advantages he may derive from his act of acceptance or renunciation prior to exercising his right of election. Likewise, the right of recourse available to creditors of the inheritance and those of the heirs, by and large, depends on the careful assessment of the option taken by the heirs and legatees.

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[^0]:    - Ato Afework T/Mariam, despite the fact that he won the case, regretted for what he did and acknowledged child Zekarias as his own son and started giving maintenance allowance for the kid. He took the child and introduced him to his parents and

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     U7＊TC 209＊
    
    

[^3]:    $42+\boldsymbol{+ c} 1725$ (1) ¢....
    中TC 1727 (2) $\boldsymbol{6}$.丸.
    *TC 134 PqUG A7:

[^4]:    49 trc 3328 ¢. \%.
    
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    *TC 33313343

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[^6]:    122
    +TC 3332 (1) f....

[^7]:    ${ }^{13}$ 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."
    17n International Chamber of Commerce".
    ${ }^{18}$ Art. 1694, C.C.

[^8]:    ${ }^{19}$ 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.
    ${ }^{2}$ 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 .

[^9]:    ${ }^{30}$ 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)
    ${ }^{35}$ Prociamation No. 217/1981, Art $8(16)$
    ${ }^{35}$ Proclamation No. 234/1982, Art $10(2)$ (C)

[^10]:    ${ }^{37}$ 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 , Conmercial Code.
    ${ }^{41}$ Art. 1725 (a), C.C.
    ${ }^{42}$ Art. $1725(b), C . C$.
    ${ }^{43}$ Art. $1727(2)$, C.C.

[^11]:    ${ }^{44}$ 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.

[^12]:    ${ }^{60}$ Art. 3325(1), C.C.; Arts. 317-318. C.P.C.
    ${ }^{61}$ see the discussion in R.Davic. p. 88, cited at Note No. 11.
    ${ }^{62}$ Art. 209 Maritime Code.
    ${ }^{63}$ Art. $317(2)$, C.P.C.
    ${ }^{64}$ See Sedier Ethiopian Civil rrocedure. , p. 387
    ${ }^{65}$ Art. $3325(2)$, C.C.

[^13]:    ${ }^{66}$ 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 transiated 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."
    ${ }^{59}$ C. Shmitthoff, p. 578.

[^14]:    ${ }^{70}$ Art. $3328(3)$, C.C.
    "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.Schmitthofef, p. 586.
    ${ }^{73}$ Art. 3344 (1) C.C.
    ${ }^{74}$ Insurance :Corp. V. Gebru A.Michael and Lemlem Abraha, Suprerie Court File No. 1386/79.
    ${ }^{75}$ See the U.N. Convention on the Recognition and Enforcement of Foreign Arbitra" Awards. Art. II, Para. 1.

[^15]:    ${ }^{85}$ 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, Axt. 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

[^16]:    ${ }^{94}$ Art. $1731(1), C . C$.
    ${ }^{95}$ Art. $3344(1), \mathrm{C} . \mathrm{C}$.
    ${ }^{96}$ R.David, Arbitration in $\quad$ pp. 210-211.

[^17]:    ${ }^{97}$ 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.

[^18]:    ${ }^{101}$ Astra Footwear Industry V.Harwyn International (U.S. District Court, 1978), from A. Von Mehren., p. 203.

[^19]:    ${ }^{102}$ 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

[^20]:    ${ }^{117}$ Sedler, The Conflicts. . . pp. 95, 98.
    ${ }^{118}$ Ibid. . p. 84.
    ${ }^{11}$ Art $461(1)$ (e), the provision on enforcement of foreign awards. C.P.C.
    ${ }^{120}$ Schmitthoff, p. 581.

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[^24]:    12 Ottoarndt Glosner, Commercial Arbitration in the Federal Republic of Germany Kluwer, 1984, nit 42 ie Ptm中nu

    13 Jean Louis Delvolve, Arbitration in France, the French law of National and International Arbitration, Kluwer, Deventher, The Netherlands, 1982, nf $61 \mathbf{1 R} \boldsymbol{P}+\boldsymbol{m p} \boldsymbol{A} \boldsymbol{u}$

    14 Italian Code of Civil Procedure $\boldsymbol{\$ T \boldsymbol { T }} 806$ School of International Arbitration, Centre
    
    

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    49 Robert Allen Secller，Eihiopian Civil Procedure，Faculty of Law，Haile Sellasie I
    

[^26]:    ${ }^{4}$ Civil Code, of Ethiopia of 1960, Article 736, Proclamation No. 165, Negarit Gazeta, (extra ordinary), Year 19, No. 2.
    
    

[^27]:    ${ }^{6}$ Water and Sewarage Services Authority Vs Kundan Singh Construction Limited, High Court, Civil file No. 688/79 (unpublished).
    ${ }^{7}$ Ibid.

[^28]:    ${ }^{8}$ Starting 1977, disputes between state-owned Enterprises were also made (rendered) as compulsorily arbitrable in Ethiopia by virtue of a directive No. 2756/L.1v/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.

[^29]:    ${ }^{10}$ Negarit Gazeta, 35 th 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.

[^30]:    ${ }^{17}$ 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.

[^31]:    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.

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    ${ }^{61}$ 71. h Tut trc 1052(1)*
    

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[^36]:    76 HK h70 * + TC. 1054(2)*
    77 H2 hatu* trc 1081(1) + 1260(2)*
    
    

[^37]:    ${ }^{2}$ See Arts. 946 - 951 of the Civil Code of Ethiopia Negarit Gazeta, Extra-ordinary issue, $19 t h$ year No. 2, Proclamation No. 165 of 1960 .
    ${ }^{3}$ Ibid, Title 5, Chapter 2, Arts. 942-1059
    ${ }^{4}$ Since a deceased person has no longer rights and duties:
    Ibid, Art. 1.
    ${ }^{5}$ Ibid., Art. 976; See also Art. 775 of the Civil Code of France which states that in nobody is bound to accept a succession devolved upon him" in Marcel planiol, Traite Elemetaire De Droit Civil, Translated by the Louissiana State Law Institute, Volume 3 Part 1, 1959, p. 616.

[^38]:    ${ }^{28}$ Civil Code, Art. 865.
    ${ }^{29}$ Ibid., Art. 878.
    ${ }^{36}$ Ibid., Arts. 979(1), 988.
    ${ }^{31}$ Ibid., Art. 943 (1) (2)
    ${ }^{32}$ Ibid., Art. 943(3).

[^39]:    ${ }^{33}$ Planiol, supra., Vol. 3, Part 2, p. 12.
    ${ }^{34}$ Corpus Juris secundum, supra, note 6, 34, Executors and Administrators, Section 367. p: 95.
    ${ }^{35}$ Civil Code, Art 1776.
    ${ }^{36}$ Ibid., Art. 1790.
    ${ }^{37}$ Ibid. A Ars. 1777-79, 174.

[^40]:    ${ }^{51}$ plamiol, Supra, note 5, Vol. 2, Part 1, p. 178.
    ${ }^{52}$ Ibid. . p, 178-79.
    ${ }^{53}$ Civil Code Art. 1114, "Any contract or unilateral undertaking relating to the succession of a person who is still alive shall be of no effect unless it is expressly authorized by law."

[^41]:    SLabour Proclamation No. 42/1993, Negarit Gazeta, 52nd year - No. 27. Art. 167. See aiso Legai Notice No. 197/55, Negarit Gazeta, l4ti Year No, 9. Art 2 (a)
    ${ }^{56}$ Civil Code. Art 1021
    ${ }^{63}$ Ibid., Art 1052(1)
    E2 Ibia., Art. 1053 (1)
    ${ }^{63 \text { Ibid. }}$ Arts 1053 (2), $1060(1)$ cum Arts. 1257-1277

[^42]:    64 Ibid. Art. 1054.
    ${ }^{65}$ Ibid., Art. 1055.
    ${ }^{66}$ Ibid. Art. 1056.
    ${ }^{67}$ Ibid., Art. 1057
    ${ }^{68}$ Ibid., Art. $1062(2)$ cum Frts. 1259, 1260, 1896.

[^43]:    ${ }^{69}$ Civ. Proc. Code, Art. 36(1) "All persons against whom the right to any relief is allaged to exist, whether jointly severally or in the alternative may be joined as defendants where, if separate suits were brought against such persons, any common question of law or fact would arise."
    ${ }^{70}$ Civil Code, Art. 1111.
    ${ }^{71}$ Ibid, Art. $1110(1)$
    ${ }^{72}$ Ibid., Arts. 1097 (I), 1113 cum Arts. 2281-2283.
    ${ }^{73}$ Ibid. See the heading of Title 5, Chapter 2 , Section 4 of the Code which says "Payment of the debts of the succession" and the place of a legacy by singular title in the order of payment under Art 1014 (e)

[^44]:    ${ }^{79}$ Ibia., Art. 993 (1)

