THE EXISTING CONFUSION AND NEW DEVELOPMENTS OF ARBITRABILITY OF ADMINISTRATIVE CONTRACTS IN THE ETHIOPIAN LEGAL SYSTEM

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Abstract

This article claims the existence of inconsistencies under the old Ethiopian laws regulating the arbitrability of administrative contracts and the confusion among legal scholars and practitioners because of the inconsistent stipulations of the old legislation. It also shows the reader the improvements made by the New Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 to resolve those inconsistencies and confusions. Further, the article indicates how far the new arbitration proclamation goes to find solutions to the existing confusion and to influence the current practice of adjudicative bodies in Ethiopia. By using a descriptive qualitative data analysis method, the study has revealed the existence of major improvements in resolving the existing confusion on the arbitrability of administrative contracts under the new proclamation, which prohibits arbitrability of administrative, contracts unless specifically allowed by law, and repealed all pre-existing legislation that confused the subject matter and made it difficult for implementation. Finally, the study has also given special focus to the discretion given to the legislators to allow arbitrability of administrative contracts through special legislation and it is recommended that this discretion should be used only with a sufficient justification, such as where the public interest and investment flow-related reasons require doing so.

Keywords: Arbitration, Arbitrability, Administrative Contracts, Ethiopia

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1. Introduction

Arbitration is one of the out of court dispute settlement mechanisms existing in today's global business environment. The business community's interest in an arbitration proceeding has increased over time. Parties to a given contractual transaction may refer their case to an arbitration dispute settlement institution either based on their contractual arbitration clause or arbitral submission. When a party to a contract wants to utilize an arbitral process for their dispute settlement proceedings, one of the major issues that come to mind is the arbitrability question. Arbitrability is the arbitrator's jurisdiction to adjudicate a given case.

In an administrative contract, to which at least one contract party is a public body, arbitrability is one of the contending issues in the legal jurisprudence due to the state's involvement in the contract and therefore the representation of public interests. In Ethiopian jurisprudence, administrative contract arbitrability continues to be an unsettled issue between legal scholars and judicial practitioners. There has been confusion in the interpretation of rules incorporated in the civil code and the civil procedure code.

The civil code has mentioned nothing about arbitrability, while the civil procedure code explicitly categorises administrative contracts as non-arbitrable subject matter with a rule that restricts the civil procedure code rules from affecting the rules of the civil code, which has mentioned nothing about non-arbitrability. By taking this as a basis of argument, scholars in the area of Ethiopian arbitration law and Ethiopian courts have regularly argued about the non-arbitrability of administrative contracts. This was a big question for both the academics and the practitioners.

Now Ethiopia has a new comprehensive arbitration and conciliation, working procedure proclamation intended to resolve the defects of existing legal arrangements in the area. This article addresses the concept of administrative contracts, the confusion created by Ethiopian law regarding the arbitrability of

administrative contracts, and the improvements achieved by the promulgation of the new Arbitration and Conciliation, Working Procedure Proclamation.

2. Administrative Contracts and Contracts in General in the Ethiopia Legal System

2.1.Contracts in General

The term 'contract' refers to an agreement between two or more persons that creates legal obligations to give, to do, or to refrain from doing something.[1] Furthermore, for contracts to have legal effect, all validity requirements for the formation of the contract should be fulfilled. The most common validity requirements for the formation of a valid contract are consent, capacity, objects, and form.[2] The law, which governs contracts, can be broadly classified as general contract law and special contract law.[3] The general contract law provisions are equally applicable to all types of contracts, while special contract laws apply only to a specific type of contract for which purpose the legislation is designed.[4] In the Ethiopian contract law regime, under the civil code of Ethiopia, about five special types of contract have been recognized. These include agency contracts, sales contracts, contracts for custody, contracts relating to immovable and administrative contracts. Except for administrative contracts, all are forms of civil contracts.

[1]Civil Code of the Empire of Ethiopia Proclamation, 1960, *NegaritGazeta Gazette Extraordinary*, Proclamation No. 165/1960, 19th Year No.2, Art 1675.
[2]Ibid Art 1678-1730.
[3]Ibid Art 1676.
[4]In Ethiopian law, the general contract provisions from Art 1675 - Art 2026 have equal applicability for all forms of contracts unless special contract provisions govern the issue differently. When there is a discrepancy between the two, Ethiopian law gives preference to special contract law provisions. The general contract law also applies in non-contractual matters when the relevant law does not provide a solution.

2.2.Administrative Contracts

In modern state theory, a state and its administration now play a wider role in the provision of public service than was the case in the past.[5] The provision of public service and fulfillment of public needs have become the major functions of the government, especially in developing economies like Ethiopia.[6] The role of the state in the provision of public goods and services and its relations with individuals has increased over time.[7] Most of the state's relations with companies are affected by contracts.[8] In such contracts, the freedom of contract of the administrative bodies might be affected by certain conditions or restrictions specifically provided by law.[9]

These contracts concluded by the state for its affairs with private or public enterprises can be referred to as '*public contracts'*.[10] In different jurisdictions, public contracts may have their peculiar characteristics and system of regulation.[11] In some countries, all public contracts are set in the same category and are subject to similar treatment where as in other countries, public contracts may be classified into two different categories. The first category is the category of public contracts that have similar treatment to private contracts, i.e. contracts between any two private (non-public) parties, and they are not subject to special rules and procedures. The second category constitutes public contracts (*administrative contracts*) that receive different treatment than private contracts and are subject to special rules and procedures.[12]

[5]Khalifah Alhamidah, '*Administrative Contracts And Arbitration, In Light Of The Kuwaiti Law Of Judicial Arbitration No. 11 Of 1995*', *Arab Law Quarterly*, Vol. 21, No. 1 (2007), 35-36.
[6]Ibid (Emphasis Added By The Writer)
[7]Dr. FarouqSaber Al-Shibli, '*The Disputes Of Administrative Contracts: The Possibility Of Using Arbitration According To The Jordanian Arbitration Act 2001'*, *Journal Of Legal, Ethical And Regulatory Issues*, Philadelphia University, Volume 21, No. 2, (2018) 1-17.
[8]Ibid
[9]Sabin I. SUBEV, '*Arbitration Clause In A Contract For Public Procurement, International Conference Knowledge-Based Organization'*, "VasilLevski" National Military University, Veliko Tarnovo, Bulgaria Vol. XXI No 2, (2015), 517-519
[10]Id
[11] Khalifah Alhamidah (n5), 36-38
[12]In the US public contracts are defined concerning public funds as "any contract in which there are public funds provided through private persons may perform the contract and the subject of the contract

The distinction between these two forms of contract emerged within the French legal system in its administrative law '*the Conseil d'Etat*'.[13] Unlike private contracts, administrative contracts laws treat parties to the contract unequally.

In Ethiopian law, the Ethiopian Civil Code of 1960 introduced the concept of administrative contract. Before the enactment of its civil code, Ethiopia had no clear law on public contracts.[14] Rene David, the main drafter of the Ethiopian Civil Code, has transplanted the concept from the French legal system. Ethiopian legal scholar Mulugeta M. Ayalew in his book on Ethiopian contract law described this scenario in the following manner:

> *"The French distinction between administrative contracts and civil contracts is imported into the Ethiopian legal system by the Civil Code. In France, administrative contracts are governed by administrative law and civil contracts are subject to the provisions of the French Civil Code. In Ethiopia, civil and administrative contracts are governed by the Civil Code and are adjudicated by the regular courts. However, administrative contracts are one of those specific contracts having special provisions for regulation provided*

may ultimately benefit private person". In England, even though there is no private–public contract law distinction, there is a position held by the state that, the administration can't be involved in contracts restricted to its discretionary power. Whereas, in civil law countries two categories of contracts in which the state administration involves itself exist. The first consists of those contracts which provide for the purchase of goods and services for public purposes. The second consists of those which are used to govern the relationships between public services and individuals. While contracts in the first category are governed by private laws such as; civil or commercial laws the second category contract will have special Rules and Procedures. This distinction as mentioned before backs from the French legal system administrative law. In the French legal system the distinction between these two contracts does not end within a statutory stipulation it also extends to differences in the courts of adjudication. The French legal system established ordinary courts for private matters or criminal trials, and administrative court cases involved public administration. They also have differed in legal instruments incorporated. Administrative contracts law has been constituted in the French administrative law, not in the privacy laws pack.

[13]Yosri Alassar, *'The Arbitration In Administrative Contracts In Egypt, France, And Kuwait', Journal Of The Union Of Arab UniVersities* Vol.13, No.14, (2001), 3-88.

[14]The Civil Code, (n1), Art. 3131–3306

> *in the Civil Code. Accordingly, Articles 3131–3306 provide rules applicable to administrative contracts. In drafting the part of the Civil Code on administrative contracts, Rene David relied on French administrative law, and hence there is not much difference between Ethiopian law and French law as far as the substance of the law governing administrative contracts is concerned."*[15]

Articles 3131 - 3306 of the Ethiopian Civil Code are not the only law governing the administrative contract. Other sources are the statutes establishing administrative agencies, the new procurement proclamations, the civil procedure code, and other relevant laws, which should be assessed before deciding on a particular administrative contract issue. The civil code of Ethiopia clearly defines the administrative contract in Article 3132.[16] In this definition, Ethiopian administrative contract law, like French law, specifically determines the scope of administrative contracts and creates a boundary between public or government contracts considered private contracts and administrative contracts that are treated differently, so, where this paper refers to administrative contracts, they should be understood within their meaning provided under Article 3132 of the Civil Code.

There are different type of contracts. A contract shall be deemed 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 services and implies permanent participation of the party contracting with the administrative authorities in the execution of such service, or

[15]Ayalew, Mulugeta M. '*Ethiopia'. In International Encyclopaedia of Laws: 'Contracts', Edited By J. Herbots.*
Alphen Aan Den Rijn, NL: Kluwer Law International, 2010.
[16]The Civil Code, (n1), Art. 3132.

(c) It contains one or more provisions, which could only have been inspired by urgent considerations of general interest extraneous to relations between private individuals. Furthermore, a contract whereby a contractor binds himself in favor of an administrative authority to construct a public work in consideration of a price is also an administrative contract.

Ethiopian administrative contract law recognizes only three forms of remedies for the other party: revision of the contract, termination of the contract, and compensation remedies. Unlike the remedies under the Contract and the Civil Code, these remedies have strict conditions to be met in the interest of the Contractor.

(a) A revision of the contract should be justified by the general public interest.

(b) Termination: The party who has contracted with the administrative authorities may require the termination of the contract where intervention by the administrative authorities has its effect to upset the general economy of the contract.

(c) Compensation claims for obstruction of the contract due to the administrative authorities' intervention or an unforeseeable event can be provided, but they should be limited to the actual loss incurred.

The administrative authority, on the other hand, can unilaterally terminate the contract if it can be justified by the general public interest. The non-performance of the obligation by an administrative authority entitles the other party neither to fail to perform his obligations under the contract unless such non-performance makes performance impossible nor to invoke non-performance to suspend the performance of a contract.

3. The Concept of Arbitrability and Administrative Contracts

3.1. Arbitrability

The core of this article is jurisdiction in case of a dispute between parties to an administrative contract. The conclusion of contracts is not an end in itself as contractual relationships are about parties' efforts to perform agreements, under the contract drafted to that end.[17] When the parties to the contract fail to meet their obligations, a dispute may arise between them. In due course, they may need an independent organ to entertain their case and award a final decision. In ordinary cases, ordinary public courts are the primary institutions to adjudicate disputes and give binding decisions.[18] Due to court procedures, the associated costs, and the time it takes to entertain cases, ordinary courts are not the primary choice for adjudicating disputes in today's business world.[19]

An important consideration can be that parties may agree to keep arbitral proceedings confidential, while dispute resolution before an ordinary court is public. Under Ethiopian law, contracting parties have the right to determine an institution that entertains their case, unless limited by special reasons, i.e., public interests or policy.[20] Thus, parties may agree to refer their dispute to arbitrators instead of ordinary courts. Particularly, parties to an administrative contract may stipulate in the contract that disputes are to be submitted to a specified arbitration institution but may also jointly decide at the time of the dispute to refer their case for Ad hoc resolution by institutional arbitrators.[21]

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[17]Michael F. Hoellering, '*Arbitrability Of Disputes'*, *The Business Lawyer*, American Bar Association, Vol. 41, No. 1, (1985), 125-144.

[18]Aron Degol, notes on arbitrability under Ethiopian law, *MIZAN LAW REVIEW*, Vol. 5 No.1, (2011), 150.

[19]Asam Saud Alsaiat, '*Disputes In Administrative Contracts And The Possibility Of Utilizing; Arbitration To Solve Them'*, Public Policy And Administration Research, Vol.5, No.6, (2015), 45-48

[20]Ibid

[21]Ibid

If well managed, arbitration can save time and money as well as provide a range of additional benefits. Arbitration is the best-known alternative to court litigation. The WIPO arbitration center guideline has defined arbitration as "a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute."[22] In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court. The principal characteristics of arbitration include its consensual nature; the parties' freedom to choose arbitrator(s), the forum, seat, and venue of arbitration; its neutrality and potential to avoid home court advantages; the confidentiality of the whole procedure; the finality of the award given by arbitrators; and ease of enforcement with the support of the New York Convention, to which more than 165 countries are parties.

The question of arbitrability, i.e. whether or not a dispute can be brought before arbitrators, will come into mind in different circumstances including during contract negotiations, when the arbitrators assess their jurisdiction, upon execution of an arbitral award before an ordinary court, and in appeal. There are substantive and procedural conditions that must be fulfilled for disputes to be arbitrable, i.e. to allow parties to refer a case to arbitration[23]. These substantive and procedural requirements may differ from jurisdiction to jurisdiction. Arbitrability can be broadly categorized into streams: substantive/objective arbitrability and procedural/subjective arbitrability.[24] Substantive arbitrability depends on the question of whether the arbitrator has the authority to decide on the underlying substantive issue.

Substantive arbitrability is based on general criteria such as public interests and other policy considerations. This may mean that a dispute regarding a topic of public interest may not be resolved in arbitration but can only be brought before a public

[22] WIPO ADR, Guide to WIPO Arbitration, 8.

[23]A. Redfern, And M. Hunter, '*Law And Practice Of International Commercial Arbitration*, London, (1986)

and David, Rene, '*Arbitration In International Trade*', Kulwer Law And Taxation Publishers, Netherlands, (1985).

[24] Michael F. Hoellering, (n17), and Aron Degol, 2011, (n18)

court. Procedural arbitrability however focuses on the procedural aspect of exercising arbitration agreements. Procedural non-arbitrability may arise from a waiver of arbitration rights, time limits and laches, termination or expiration of contracts, or/and other similar factors.[25]

Ethiopian law also distinguishes between arbitrable and non-arbitrable subject matters. As Aron Degol mentioned in his article, civil matters such as family, succession, property, and extra-contractual disputes, labor disputes, maritime and commercial disputes, and criminal matters punishable upon complaints are arbitrable subject matters in Ethiopian jurisprudence.[26] He further stated that matters which are not clearly stated in the law as arbitrable subject matters should be categorized as non-arbitrable subject matters.[27] Aron also classifies administrative contracts as arbitrable subject matters according to Ethiopian jurisprudence, but in practice, the arbitrability of administrative contracts under Ethiopian law was a contending issue amongst legal scholars before the enactment of the new conciliation and arbitration procedure proclamation.

3.2. Arbitrability of Administrative Contracts

Arbitrability of administrative contracts is one of the hot issues in international and national arbitration law jurisprudence. Different writers in the area discussed the issue from different perspectives.[28] Two opposing ideas must be considered; the first idea supports the arbitrability of administrative contracts and tries to define the benefits of arbitration. The second idea supports the non-arbitrability of administrative contracts and tries to identify the risk of subjecting administrative contracts to arbitration.[29] Besides these two divergent theoretical positions, countries

[25]Id
[26]Aron Degol, (n18), 51-157
[27]Ibid
[28]Kahlifah Alhamidah (n5), 11
[29]Asam Saud Alsaiat, 'Discussion About Advantage And Disadvantages Of Arbitration' (2015), 46-47

also have to oppose, partly political aims in rendering administrative contracts arbitrable or non-arbitrable.[30]

4. Past Experiences on Arbitrability of Administrative Contracts in the Ethiopian Legal System

In Ethiopian jurisprudence, the question of the arbitrability of administrative contracts is an unsettled issue among scholars and judicial practices. The existence of contending views in the area between legal scholars and courts stems from the incompatibility of the legal provisions designed to deal with the issue.[31] In Ethiopian law, the civil code, the civil procedure code, and procurement proclamation No. 430/2005 are the appropriate legal documents to investigate the legality or otherwise of arbitration in administrative contracts. These legal documents contain confusing stipulations on the arbitrability of administrative contracts.

Art 315(2) of the civil procedure code proposes, "*No arbitration may take place in relation to administrative contracts as defined in article 3132 of the civil code or in other cases where it is prohibited by law*." In the same provision, under sub-article 4 the civil procedure code contains a confusing stipulation as it reads *"Nothing in this chapter*[32] *shall affect the provisions of Articles 3325 – 3346 of the Civil Code*". Meanwhile, the civil code provisions[33] referenced by sub-article 4 are silent about the arbitrability or otherwise of administrative contracts. The procurement proclamation also says nothing about the arbitrability question.[34]

This silence of the civil code provisions from Art 3325-3346 divides scholars and judicial practitioners on the arbitrability of administrative contracts in the Ethiopian

[30]Yorsi Alassar, (n13).
[31]Civil Procedure Code Decree, NegaritGzeta, Decree No. 52/1965, 25th Year, No. 3, Art 315(2) And (4) and The Civil Code, (n1), Art. 3325-3346.
[32](Including The Art 315(2) Stipulation)
[33]The Civil Code, (n1), Art 3325 – 3346
[34]Determining Procedures of Public Procurement and Establishing Its Supervisory Agency Proclamation, 2005, Federal NegaritGazeta, Proclamation No. 430/2005, 11th Year No.15.

legal system. Some of the below quoted legal scholars argued the silence of the civil code should be interpreted positively and arbitration of administrative contract disputes should be allowed. Moreover, some others considered the civil code silence negatively and by connecting with the civil procedure code prohibition argued in favor of administrative contracts non-arbitrability under Ethiopian law.

Bezzawork, in his most cited article on '*the formation, content, and effect of an arbitral submission under Ethiopian law*', takes a position in favor of the arbitrability of administrative contracts.[35] From the beginning, he disregards the stipulation of the civil procedure code about arbitrability. He argues that deciding on the arbitrability of administrative contracts is the subject matter of the substantive laws and it should not be constituted in the procedural law. Therefore, the civil procedure code incorporation of specific rules on the arbitrability of administrative contracts is the drafter's mistake. If that is the case, we should rely only on the civil code provisions and the silence should be understood as *"anything that is not prohibited is presumed to be permitted."*[36] He further mentions that:

> *"Even if one holds the contrary view that disputes arising from administrative contracts are not capable of settlement by arbitration under Art. 315 (2) of the c.p.c., in practical terms it is of minimal effect. This is so because many administrative authorities that 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: the Ministry of Mines and Energy, the Marine Transport Authority, the Civil Aviation Authority, the Ethiopian Transport Construction Authority, the Ethiopian Water Works Construction Authority, and the Ethiopian Building Construction Authority. The argument that can be forwarded is that these establishment proclamations, by empowering the above state bodies to settle*

[35]Bezzawork Shimelash, '*The Formation, Content, And Effect Of An Arbitral Submission Under Ethiopian Law'*, *Journal Of Ethiopia Law*, Vol. 17, (1994), 83-85.
[36]Ibid

disputes by arbitration, have impliedly amended the ·prohibitive Civil Procedure Code provision."[37]

Zekarias Kenea also after concluding the existence of confusion between the civil procedure code provision and the civil code stipulation implied alternative solutions to avoid the confusion.[38] Zekarias questions "*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 arbitrable is mentioned in 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?*"[39] While he suggested the latter prevail over the former rule and thus the laws' hierarchy as a solution,[40] he left the issue without answering all questions. Aron Degol also categorized administrative contracts in the arbitrable subject matters group in the Ethiopian legal system. He strongly argued that; "*If there were restrictions to the type of disputes to be submitted to arbitration, surely the legislator would have stipulated them in the substantive law, i.e. the Civil Code. The legislator, however, did not provide any restriction."*[41]

Tecle Hagos Batha recommends that to have a clear stand on arbitrability, the country must establish an administrative court, or repeal Art 315(2) of the civil

[37]Ibid P. 85 Para. 2
[38]Zekarias Keneaa, Arbitrability in Ethiopia: Posing the Problem, *Journal of Ethiopia Law*, Vol. 17, (1994), 119-121.
[39]Ibid.
[40]Ibid.
[41]Aron Degol, (n18), 154-155.

procedure code.[42] Even though Tecle does not state his position clearly, he seems to favor the non-arbitrability of administrative contracts in Ethiopia's legal regime. Ibrahim Idris another Ethiopian law scholar, cited by Bezzawork, is also in favor of non-arbitrability. His thinking on Article 315(2) is on the contrary position of Bezzawork. Indiris notes that the stipulation under Article 315(2) is not a substantive issue rather it is a procedural rule, enacted to incapacitate arbitrators to adjudicate administrative rules. He further believes that deciding on arbitrability is a matter of procedural law and not of substantive law.[43] Moving on from an academic viewpoint, the following assesses the Ethiopian courts' diverging opinions on the issue of administrative contract arbitrability.

As Zekarias writes, in a case between *Water and Sewerage Authority Vs Kundan Singh Construction Limited*, the high court decided that Art 315(2) is sufficient to exclude arbitration tribunals from adjudicating administrative contract issues.[44] Moreover, the court argued that since deciding arbitrability or otherwise of the case is a procedural issue; the civil procedure code provision under sub-article 4 of Art 315 can't be affected by excluding arbitration tribunal from entertaining administrative contract disputes. Still, with substantive matters, the civil code provisions can have an overriding role {emphasis added by the writer}.

In another case, between *High Way v Solel Boneh Ltd*,[45] the Federal Supreme Court within the task of interpreting Art 3194(1) was tacitly addressing the issue of arbitrability of administrative contracts by holding that; "*Although by Art.3194 (1) of the Civil Code, a court may not order administrative authorities to specifically perform their obligations, a court is not thereby precluded from ordering specific*

[42]Tekle Hagos Bahta, '*Adjudication and Arbitrability of Government Construction Disputes*', *MIZAN LAW REVIEW* Vol. 3 No.1, (2009), 27.
[43]Bezawerk Shimelash, (n35), 83.
[44]Zekarias Kenea, (n38), and Water And Sewerage Services Authority Vs Kundan Singh Construction Limited, High Court Civil File No. 688/ 79 (Unpublished).
[45] Supreme Imperial Court Of Ethiopia, May 14th, 1965 Published At The African Law Reports, Vol. 1, 1966, Pp. 41-44 As Cited By Tecle H. Bahta

performance of an agreement to submit disputes to arbitration."[46]In a case between *Ethio Marketing Ltd. v Ministry of Information*[47], also the Ethiopian Supreme Court decides on the possibility of making arbitral clauses or submissions by relating its argument with the substantive/procedural dichotomy and by taking the civil procedure prohibition as the drafters' mistake. In another case between *Gebre Tsadik Hagos v Tigray State Bureau of Education*[48], the Tigray Supreme Court was making a decision that precludes administrative contracts from arbitral submission. In awarding this decision, the court supported its arguments with the clear prohibition of Art 315(2) of the civil procedure code.

In the case between *Water Resource Ministry Vs Siyoum & Ambaye General Contractors*,[49] the federal Supreme Court decides in favor of non-arbitrability. In making the decision the court was holding that; "*the appellant's argument that the matter should not be referred to arbitration is based on the theory that the matter, though contractually arbitrable, is inarbitrable in law as it relates to an administrative contract. But, the referred contract does not qualify as an administrative one in respect of which Art 315 (2) of CPC prohibits arbitration. Accordingly, disputes arising out of it may be referred to arbitration according to the contractual stipulation.*"[50]

In the case of *Zemzem PLC Vs Illubabor Zonal Dep't of Education*[51], also the federal Supreme Court cassation division decides on arbitrability of administrative contracts. However, as Tecle Hagos mentioned when the court made this decision,

[46]Tekle Hagos Bahta (n42), 18

[47]Ethio Marketing Ltd. V Ministry Of Information, Ethiopian Supreme Court Decision, March 29, 1975,(Unpublished), Cited By Tecle Hagos Bahta, (n42), 19.

[48]Tigray State Supreme Court, Civil Appeal File No. 962/96 (10/06/96 E.C, Mekelle), (Unpublished)

[49]Water Resource Ministry V Siyoum&Ambaye General Contractors, Federal Supreme Court, Civil Appeal Case No.19659/1997

[50]Hailegabriel G. Feyissa, 'The Role Of Ethiopian Courts In Commercial Arbitration', *MIZZAN LAW REVIEW* Vol. 4 No.2, (2010), 314

[51] ZemzemPLC Vs Illubabor Bureau Of Education, Federal Supreme Court, Cassation Division File No. 16896, Tikmt16,1998 E.C, Addis Ababa

it wasn't taken into consideration the confusing provisions in the civil procedure code under articles 315(2) and (4). The decision was made simply by looking at the parties' agreement and in a poor analogy of their agreement with the general contract law provision Art 1731(contracts are laws between the parties). Nevertheless, this decision has a binding role in other federal and regional courts.

In general, previous experiences with the arbitrability of administrative contracts have caused some dismay among scholars and legal practitioners. They have adopted opposing stands, citing differences in provisions set under Ethiopia's civil code and civil procedure code. Those in favour of administrative contract arbitrability have considered the clear stipulation of non-arbitrablity under Article 315(2) of the civil procedure code, while those in favour of arbitrability have considered the stipulation made under Article 315(4) of the civil procedure code that restricts the civil procedure code rules from contravening the civil code rules on arbitration, as well as the civil code's silence on administrative contract arbitrability. Such confusions have been among the reasons for revising the Ethiopian laws on arbitration and enacting a new comprehensive law governing the area. Currently, Ethiopia has a new arbitration law that regulates the arbitration procedure and other out-of-court dispute settlement mechanisms. Those rules regulating arbitrability under the civil procedure code and the civil code that have been confusing readers are now clearly repealed by the new law and replaced by the rules of the new law.

5. New Improvements in the Arbitrability of Administrative Contracts in Ethiopia

Until April 2, 2021, the arbitration and conciliation-related issues were based on those scattered rules in the civil code, the civil procedure code, and other specific laws. These scattered laws had a limitation in properly regulating the area and surrounded it with a lot of confusing specifications. One of the confusions was revolving around the issue of arbitrability of the administrative contract as briefly mentioned before. Now Ethiopia has a comprehensive conciliation and arbitration

working procedure proclamation, which finds a solution to the difficulties and questions in the old legal arrangement. This law has repealed the provisions of Articles 3318 to 3324 of the Civil Code which deals with conciliation and the provisions Articles 3325 to 3346 of the Civil Code which deals with arbitration, and the provisions of the civil procedure code from Articles 315 to 319,350,352,355-357 and 461 which deals about arbitrator.

The new comprehensive arbitration and conciliation, working procedure Proclamation No. 1237/2021 has come up with a clear-cut statement that can avoid the existing debates on the arbitrability of the administrative contracts. Article 7(7) of the proclamation reaffirmed the civil procedure code Article 315(2) articulation by citing the non-arbitrability of administrative contract, except where it is not permitted by law. The new proclamation also breaks the silence of the civil code rules on arbitration by providing a clear rule on the arbitrability or otherwise of administrative contracts. Now without making a reference to the scholars' debate, the federal Supreme Court cassation bench interpretations, and the general rules of interpretation we can simply conclude that administrative contracts are not arbitrable subject matter only by referring to the clear rules in this proclamation.

Both the national and international arbitration tribunals will not have jurisdiction to entertain cases which are containing administrative contract elements as defined under Article 3132 of the civil code of Ethiopia. However, the proclamation is not providing an absolute prohibition of taking cases involving administrative contracts into the arbitration tribunals rather it unlocks the door for the legislators to determine special circumstances in which case administrative contracts may be subject to arbitration proceedings. This indicates the possibility of referring administrative contracts to the arbitration tribunal when the law has permitted them to act accordingly in specific circumstances. This exceptional rule will have a paramount importance to resolve a practical problem that may highly necessitate using arbitration tribunals over the formal judicial outlets.

Specifically, multinational companies and foreign investors usually do not favor the domestic formal judicial arrangements and completely restricting the use of arbitration arrangements in all circumstances may discourage them in their undertakings with the government. In some selected circumstances and by looking at the benefits it can create for the state, legislatures may allow some areas of administrative contracts to be adjudicated by the arbitral tribunals upon the parties' agreement. The existence of this exceptional rule has also contributed to the permanency of the rule and in the accommodation of new developments without amendment of the proclamation.

For instance, under the Ethiopian Roads Authority reestablishment regulation, disputes that involve the Ethiopian Road Authority can be inferred to be resolved in out-of-court arrangements subject to the approval of the Director General.[52] The investment proclamation also includes a rule that allows the government to agree to resolve investment disputes through out-of-court arrangements, usually investment arbitration tribunals.[53] The public-private partnership proclamation has allowed the government to make an agreement with the private partners to resolve disputes through the dispute settlement arrangements as they agreed, including through arbitration.[54]

In accordance with the Mining Operation Proclamation, any dispute, controversy, or claim between the Licensing Authority and a licensee arising out of or relating to an agreement for reconnaissance, exploration, retention, or mining, or the interpretation, breach, or termination thereof, shall, to the extent possible, be resolved through negotiation. In the event that an agreement cannot be reached through negotiations, the case shall be settled by arbitration in accordance with the

[52] Ethiopian Roads Authority Re-establishment Council of Ministers Regulation, 2011, Federal Negarit Gazeta, Regulation No. 247/2011, 17th Year, No.81 Article 10(2(h).
[53] Investment Proclamation, 2020, Federal Negarit Gazeta, Proclamation No. 1180/2020, 26th Year, No. 28, Article 25.
[54] Public Private Partnership Proclamation, Federal Negarit Gazeta, Proclamation No. 1076/2018, 24th Year, No. 28, Art 61.

procedures specified in the agreement. An arbitral award shall be final and binding upon the parties.[55]

The Petroleum Operation Proclamation also sets a rule on any dispute, controversy, or claim between the government and the contractor arising out of it. Alternatively, relating to the petroleum agreement or the interpretation a breach or termination thereof shall, to the extent possible, be resolved through negotiations. In the event that an agreement cannot be reached through negotiations, the case shall be settled by arbitration in accordance with the procedures specified in the Petroleum Agreement.[56]

The public procurement proclamation also gives priority to the rules of the agreements with international organisations or states over the domestic rules to resolve controversies that may arise in projects funded by those entities or states.[57] It states that, to the extent that this Proclamation conflicts with an obligation of the Federal Government under or arising out of an agreement with one or more other states or with an international organisation, the provisions of that agreement shall prevail. Therefore, in our case, if the agreement has a specification about the arbitrability of disputes that may arise in those internationally funded disputes, the arbitral tribunals cannot claim the new proclamation to reject the case, or the courts cannot consider the non-arbitrability rules under the proclamation to assume jurisdiction.

In such a circumstance, the law may specifically liberate administrative bodies to decide how they may resolve disputes after considering the practical circumstances. Therefore, the above proclamations are exceptions to the rule that administrative

[55] Mining Operations Proclamation, 20110. Federal Negarit Gazeta, Proclamation No. 678/2010, Article 76.
[56] Petroleum Operations Proclamation, 1986, Federal Negarit Gazeta, Proclamation No. 295/1986, Article 25.
[57] The Ethiopian Federal Government Procurement and Property Administration Proclamation, 2009, Federal Negarit Gazeta, Proclamation No.649/2009, 15th Year, No.60, Article 6.

contracts are not arbitrable because they fall within the clause "unless it is permitted by law". In other words, administrative contracts that fall within the scope of the above laws are arbitrable. The permission referred to under the proclamation made by the law is not limited to the above legislations; since it has not made a restriction, future legislations may incorporate a specific rule that allows a specific administrative contract issue to be referred for arbitration. In other scenarios, the general principle of non-arbitrability of adminstrative contracts stipulated in the proclamation under Article 7(7) will continue as the governing rule.

The current experience in the Ethiopian courts and arbitral tribunals shows this improvement in the area.[58] Since the enactment of the new proclamation, there has been no confusion about the non-arbitrary administrative contracts among/between the contracting parties and the professionals working in the adjudicative bodies. Disputes on the jurisdiction of courts on administrative contracts have dramatically decreased, and the arbitral tribunals are rejecting issues by affirming that it is out of their jurisdiction if they face cases involving administrative contracts. However, some administrative contracts, including those involving international funding institutions, contracts with the Ethiopian Road Authority, and construction contracts, are still being submitted and entertained by arbitration tribunals claiming the exceptional ground set under the proclamation.

6. Conclusion

Administrative contracts are those contractual undertakings usually involving the state and individuals as contracting parties. In this form of the contract, the state is always representing the public interest. The administrative contract laws are requiring the state to follow a strict procurement and contract mechanism to the benefit of larger good to the public. Likely, to the contracting and the procurement

[58] Interview with civil bench judges at Ledeta Federal First Instance Court and the legal professionals working at the Addis Ababa Chamber of Commerce Arbitration Tribunal.

periods, administrative agencies should have applied a strict procedure in the settlement of disputes that may arise in the meantime.

In the modern world, it is common to see contractual agreements on the dispute settlement arrangement that are concluded either before or after the arising of the dispute. Arbitration is becoming a preferable dispute settlement outlet in all countries. Investors, traders, and different stakeholders in this contemporary world are inclined to arbitral tribunals over courts in need of their overriding role.

The arbitrability of the administrative contract is one of the most debatable subject matters in the world of jurisprudence. There are various arguments made both in favor and against the arbitrability of administrative contracts. The arbitrability advocators try to persuade their readers by referring to the overall importance of making it arbitrable. On the other hand, non-arbitrability advocators indicate the risks that may endanger the public due to the misrepresentation of public officials in the arbitration process.

Based on the experience anddivergent views of the writer and Ethiopian civil bench court decisions, including the cassation bench are the main manifestation of continuing confusion on the arbitrability or otherwise of administrative contracts in the Ethiopian legal system. Since we had no clear-cut legal solution to avoid confusion in the area, in the preceding period scholastic argument and practical outputs have been concerned with justifying their findings with the merit or demerits of relating administrative contracts to arbitration.

The global views on the role of arbitration, the civil procedure code specifications, and the silence of the civil code rules on arbitration are the primary standing points to this scenario. Even there has been some confusion on the procedural or sustentative category of the idea of arbitrability. Some attempt to resolve the problem by considering the general-specific law principle; others prevail over the previous rule and through the instrument of the hierarchy of laws principle.

Unstable decisions of the federal Supreme Court cassation bench decisions in the area had also more complicated the confusion and until the promulgation of the arbitration and conciliation working proclamation, there was a tendency to refer to the cassation bench's latest interpretation as a background of arguments we are making in the area. By this time, it was difficult to simply exert the civil code and the civil procedure code drafter's intention while they are putting confusing rules in different instruments.

The new comprehensive arbitration and conciliation, working procedure proclamation No. 1237/2021 has come up with a clear blue-penciled solution to the confusion in the arbitrability of administrative contracts. Now, we have relatively a comprehensive arbitration law with a clear rule on the non-arbitrability of administrative contracts. The proclamation has further repealed those confusing rules that are regulating the subject matter for decades. The restriction of the new law on the arbitrability of the administrative contract is a reassertion of the civil procedure code specification. The non-arbitrability of administrative contract articulation of the proclamation does not constitute an absolute restriction. The legislators are free to define some areas of administrative contracts that can be subject to arbitration. This authorization will have its role in accommodating practical developments shortly, and contrariwise it may highly endanger the public interest if the lawmakers are uses this discretion to promote the individual interest. Therefore, the legislatures, when they decide in accordance with this discretionary power under the proclamation, should focus on its relevance to the public and contribution to the improvement of investment flow in the state.