Legalizing the Illegal: Ethiopian Arbitration Law towards a New Jurisprudence (A Case Comment on Zem Zem PLC V. *Illubabor* Zone Education Department)

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Abstract

Even with its faults, arbitration is one of the most popular methods of dispute resolution. The laws for various policy justifications provide exclusionary clauses for some selected issues from the ambit of arbitration. One such area is the administrative contract. Oddly enough, the Cassation Bench renders a decision although it actually contradicts with the clear provision and spirit of the law. The author argues that the decision of the Cassation Bench is logically unsound and legally baseless; therefore, calls for revision of this position.

1. The Case[1]

This case began in the High Court of *Illubabo*r Zone. The current respondent was a plaintiff before the High Court of *Illubabo*r Zone suing both the current applicant and Nile Insurance Company to pay compensation of ETB 184,559.26 (one hundred eighty four thousand five hundred fifty nine birr twenty six cents) in consequence of non-performance of the contract. The current applicant, however, raised an objection on the grounds that the court has no jurisdiction to entertain this case for the reason that, as per Article 24 of the agreement, if any dispute arises in relation to the contract, it will be entertained by an arbitrator. Furthermore, the current applicant informed the High Court that with a view to getting arbitrators appointed, it had filed an application before the First Instance Court of *Illubabor Zone*.[2] The High Court, however, rejected the objection and ruled in favor of the current respondent. As a result, it awarded ETB 31,111.40 (Thirty one thousand one hundred eleven birr forty cents) and three hundred birr for the cost of litigation.

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[1] *Zem Zem vs. Illubabor Zone Education Department*, Federal Supreme Court Cassation Bench File No. 16896(1998 E.C.)

[2] As provided under Article 3334(1) of the Civil Code, if the parties failed to appoint an arbitrator as they agree, the court will appoint.

The current applicant appealed to the Regional State Supreme Court which then confirmed the decision of the lower court.

1.1. Holding of the Cassation Bench

The Cassation Bench framed the issue of whether assumption of jurisdiction by court disregarding the term of the contract to submit a dispute in relation to contract to arbitration is appropriate or not?

The Cassation, reversing the decision of the lower court reasoned that the parties to the contract can agree on any matter as far as it is not prohibited by law. This is clearly stipulated under Article 1731 of the Civil Code. Any valid contract will have a binding effect on the contractual parties. Sub-art.1 of the same Article provides that a contract is a law between contractual parties and they should abide by the terms and conditions of the contract. One of the terms stipulated under Article 24 of the contract states that if there is any disagreement arising out of the contract, it will be entertained by an arbitrator. Accordingly, since the jurisdiction of the court is ousted by this agreement, the case must be brought before an arbitrator.

2. Comment

As defined under Article 1675 of the Civil Code, a contract is an agreement whereby two or more persons between themselves create, vary or extinguish obligation of a proprietary nature. From this definition, it is possible to infer four core elements.

1. In principle, there must be two or more parties.[3]
2. The presence of two parties or more must be supplemented by agreement. Therefore, there must be an agreement with a serious intention to be legally bound.
3. The agreement must be either to create, vary or extinguish an existing obligation or future; and,
4. The agreement must be of proprietary nature.

For a contract to be valid and enforceable before the court, it should meet the four requirements put in place under Article 1678 of the Civil Code. These are consent, capacity, lawfulness or possible and form if any. The absence of one or more of these requirements may lead the contract to be void or

[3] The exception is an agent acting on the name and behalf of the principal may conclude a contract with himself for the obvious reason that he has the capacity to represent the principal on one hand and himself on the other. See infra note 7.

voidable. Therefore, not all contracts may be valid due to defects or vices which might render the contract susceptible to invalidation.[4]

A void contract is an act in which the law reckons to have no existence or to be no contract at all; i.e. a nullity from the very beginning. Conclusion of void contract does not change the position of "contractants".[5] Moreover, a void contract is jurisprudentially understood as unborn to the parties' agreement.

A voidable contract, on the other hand, is binding until it is invalidated by the option of the party whom the law protects. It is a "sick contract" that may be "cured" or "killed" depending upon the option that may be exercised by the victim of the defective agreement.[6] Therefore, a voidable contract has defect; but it is possible to rectify that problem and perpetuate its legal effect until it is invalidated.

As it is easily noted from the reading of Article 1808 (1) of the Civil Code, a defect in consent and capacity will lead to invalidation of a contract. Therefore, if the defect is related to capacity or consent, that will be a voidable contract.

On the other hand, a defect in the object of the contract[7]; be it unlawful[8], impossible or immoral makes it void *ab initio.*[9] The same holds true for non-compliance with legal form.

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[4] Lantera Nadew, Void agreements and voidable contracts the need to Elucidate Ambiguities of their effects, Mizan Law Review, Vol. 2, No. 1 (2008), p. 1.

[5] Guest, A. G (ed.) *Anson's Law of Contract,* 26th ed, Oxford. University Press, (1981), p. 17 as quoted by Lantera Nadew cited above.

[6] Supra note 4, p. 2.

[7] The object of a contract must be differentiated from its subject. The subject of a contract is the thing over which the parties are contracting. The object of the contract is, however, the respective obligation of the parties. See Mulugeta M. Ayalew "Ethiopia" in international Encyclopedia of laws contracts Kluwer Law International (2010), p. 92.

[8] As stated under Article 2 of Proclamation. No. 454/05 decision of Cassation will have binding effect. In its well reason decision cassation stated that there is difference between unlawful and illegal contract. Unlawful contract means contract which is prohibited by law for example slavery which is prohibited by both national and international instrument to which the country is a party. These leads the contract void *ab initio* or null and void and there is no period of limitation for this. However, illegal contracts are those not fulfill the criteria stipulated under the general provision of contracts or other laws. By this well-funded analysis it is possible to say that arbitration clause in Administrative contract is illegal but not unlawful. Please see Federal Supreme Court Cassation Bench, File No 43226 Mohammed Abedela Vs. Dire Dawa Ethio- Djibouti Railway(2000 E.C).

[9] It is important to note that the code preferred to use "no effect", which has a similar legal effect with "void *ab initio.*

The Civil Code of Ethiopia has dealt with the issue of special contract under Book V. Title XIV; Article 3136-3306 is devoted to administrative contracts. As to why the administrative contract is dealt with separately from general law of contract, Rene David had the following to say:

Because of the peculiarity of administrative Contracts and the importance of providing a clear and coherent system of rules for them, it was apparent that like contracts relating to immovable, they should be dealt with in especial title.[10]

What is meant by administrative contract is defined under Article 3132. Pursuant to this provision, there are three separate conditions, which make a contract administrative. These conditions are:

1. When it is expressly qualified as such by the law or by the parties or
2. 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
3. It contains one or more provision which could only have been inspired by urgent consideration of general interest extraneous to relations between individuals.

As we can see from the first condition above, if either the law or the parties expressly qualify their agreement as administrative contract, then it will be governed by the special provision of administrative contract, *ipso jure*. The law designates some contracts as administrative contracts. These are public concession contracts,[11] public construction contracts[12] and public supplies contracts.[13]

It is necessary to look at Article 3244(1) of the Civil Code to have a good understanding of what is meant by public construction. As per this provision, "a contract of public works is a contract whereby a person, the contractor, binds himself in favor of an administrative authority to construct, maintain or repair public work in consideration of a price." Article 2 (c) of the federal public procurement has clearly defined what "work" means.[14]

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[10] Rene David, Ethiopian Administrative Contracts, *Ethiopian Journal of Law*, Vol. 4, No. 1 (1967) p. 145.

[11] Article 3207-3243 of the Civil Code.

[12] Article 3244-3296 of the Civil Code.

[13] Article 3297-3306 of the Civil Code.

[14] Works means all works associated with the construction, reconstruction, demolition, repair or renovation of a building road or structure, such as site preparation, excavation, installation, of equipment and materials, decoration, as well as series incidental to works if the value of those services does not exceed that of the works themselves and includes

The contract concluded between *Zem Zem PLC* and *Ilubabo*r Zone Educational Department was to build a primary school in *Alegesayi Wereda.*[15]It clearly falls under the ambit of administrative contract; more particularly, a contract of public work. The contract was to construct a primary school in *Illubabor*, which is in line with the definition set forth above.

As mentioned under Article 3131(1) of the Civil Code, an administrative contract will be governed by general and special laws of contract. However, the general law of contract is limited to playing a gap filling role for special provisions of administrative contract. If there are any special provisions which handle the matter, the primacy shall be given for such provision. However, if there is a lacuna, we shall resort to general provisions of contract.

There is no specific provision in the law of administrative contract to deal with the issue of validity requirement of an administrative contract. It necessarily follows that Article 1678 of the general provision of contract will have a gap filling role. Therefore, any administrative contract must comply with the validity requirement put in place under general law of contract. As stated above, the defect in some requirements will lead the contract to be voidable while some others will lead the same to be void *ab initio*. Unlawful object turns out to be good instance for making the contract void *ab initio*.

As it is clearly stipulated under Article 315 (2) of the Civil Procedure Code "*No arbitration may take place in relation to administrative contract as defined in Article 3132 of the Civil Code or in any other case where it is prohibited by law*". By virtue of this provision, an administrative contract is not within the ambit of arbitration. Moreover, the issue of administrative contract is non-arbitrable for the following reasons:

Firstly, by arbitrability, we mean that the agreement must relate to subject matter capable of being resolved by arbitration. This is known as objective arbitrability or arbitrability *ratione materiae*. Secondly, by arbitrability, we mean that the agreement must be concluded by parties entitled to submit their disputes to arbitration. This is known as subjective arbitrability or *arbitrability ratione personae*.[16]

building, own, operate and transfer contract see, Federal public procurement proclamation, Proclamation No. 430/2005, *Federal Negarit Gazetta*, 2005.

[15] It is stipulated under Article 1 of the contract.

[16] Ching- Lang Lin, Arbitration in Administrative Contract: comparative law perspective, University of Paris, PhD dissertation. 2014. p. 19.

No matter how carefully we frame a contract, it is impossible to avoid conflict because words are susceptible to different interpretation. When there is dispute, one way of resolving it is through arbitration. There are two types of arbitration submission. These are *act de compromise* and *clause compromissuive.* In the latter, submission is considered to be a separate contract within the broader contract. So, it is a contract within a contract. This is the reason why many accept that an arbitration clause is severable from the main contract of which it forms a part.[17]

As per Article 315(2) of the Civil Procedure Code, an administrative contract is beyond the ambit of arbitration. The type of contract excluded turns out to be the administrative contract. Thus the law takes administrative contract away from the ambit of arbitration based on subject matter but not based upon the capacity of contractants. The government as a contractant can submit its dispute with another party to arbitration. However, the government will be prohibited from submitting its dispute to arbitration in case the subject matter is an administrative contract. The government, given Ethiopia's situation, has a huge role in the market; hence, it may engage in various contracts other than administrative contracts. Therefore, in that case it is possible for government to submit its dispute to arbitration. All in all, the type of arbitrability envisaged under Article 315 (2) is that of subjective arbitrability or *arbitrability ratione personae.*[18]

There is a strong and unsettled academic debate regarding arbitrability of administrative contract[19] prior to this Cassation decision. I submit that the Cassation Division's decision on this matter should be criticized for the following major reasons:

1. It is one of the cardinal rules of interpretation that if the law is clear, there is no need for interpretation unless it has absurd

[17] Infra note 48 p. 120.

[18] It is clear that in practice administrative contracts are submitted to arbitration. It is impossible to bring the practice as a justification to legalize the arbitrability of administrative contracts.

[19] See Zekarias kenena, Arbitrability in Ethiopia: posing the problems, *Journal of Ethiopia*, Vol. 17, No.17, (1994), Tecle Hagos Adjudication and Arbitrability of Government Construction Disputes, *Mizan Law Review*, Vol.3, No. 1, (2009) Bezzawork Shimelash, The Formation, Content and Effect of an Arbitral submission under Ethiopia Law, *Journal of Ethiopia law*, Vol. 17, No.17, (1994), Tilahun Teshome, The legal Regime governing Arbitration in Ethiopia: A synopsis, *Ethiopia Bar Review*, Vol. 1, No. 2, (2000) and Ibrahim Idris, Administrative Contracts and the Law of Arbitration in Ethiopia, senior essay paper, Addis Ababa University , 1979.

consequence.[20] The courts' function is not to say what the legislature meant but to ascertain what the legislature has said it meant. The court cannot proceed on the assumption that the legislature has made a mistake. Even if there is a defect, it is not for the court to add to or amend the words of a statute or to supply a *casus omissus*. That is for the legislature. When the language is clear, it is the duty of the court to give effect to it without calling in aid and outside consideration to ascertain the intentions of the legislature. Statutory provision cannot be whittled down by general principle of equity, justice and good conscience; nor can they be avoided on the ground of hardships or inconvenience when the meaning of parliament is enacting the statute or its wisdom.[21] Therefore, we need interpretation only when the law is vague and ambiguous. In the absence of ambiguity or vagueness of the law, courts are supposed to apply the law as it is. The amendment proclamation to proclamation No. 25/96 i.e. Proclamation. No. 454/2005, which empowers the decisions of Cassation Division to be of precedential value for lower court states under Article 2(1) that "Interpretation of a law by the Federal Supreme Court..." Here the law is talking about interpretation. As mentioned above, interpretation presupposes the existence of vague or ambiguous provision.

Article 315 (2) of the Civil Procedure Code is too clear to invite any interpretation disregarding this; however, the Cassation Division has misinterpreted the clear provision of the law. By doing so, it has violated one of the cardinal rules of interpretation thereby going beyond its power.

2. The second reason is highly interlinked with the first one. There is no apparent contradiction as some authors claim.[22] There is clear provision as to prohibition of arbitrability of administrative contract in the Civil Procedure Code[23]. However, there is no clear provision

[20] For better understanding on rule of interpretation please see George Krzecucurrenticz, Statutory Interpretation in Ethiopian, *Journal of Ethiopia Law*, Vo.l 1, No. 2(1964).

[21] Mulla, The Code of Civil Procedure: Act V of 1908, 16th ed., Butterworth Publisher, (2001), Volume 1, p. 4.

[22] See the above works specially Bezzawork Shimelesh.

[23] Article 315 (2).

that allows arbitrability of administrative contract in the Civil Code.[24]

True in civil matters, where the law is silent on a certain subject matter and where there is no clear stipulation to the contrary, the silence of the law would amount to an implied incorporation of the matter in issue. In our case, however, in order to invoke the above principle of interpretation one should at least be able to indicate a provision that deals implicitly with the issue of arbitrability. But we do not find such matter under provisions of Article 3325-3346 of the Civil Code.[25]

As stated under Article 722 of the Civil Code, "Only the court is competent to decide whether a betrothal has been celebrated or not and whether such betrothal is valid." Therefore, the court has exclusive jurisdiction in this matter. Zekarias, in confirming this, states that it is only the court, in exclusion of all other alternative dispute settlement mechanisms and tribunals including arbitration, which can make decisions over 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.[26] If the law, under the same code, prohibits arbitrability of a valid marriage, it is possible to argue, for a stronger reason, that it also prohibits arbitrability of administrative contract, where the public interest is at stake.

Furthermore, the legislation is presumed to be prudent enough in selecting and using words in legal provision. It is, therefore, necessary to interpret words of a provision in any legislation to give effect instead of nullifying its meaning.[27]In interpreting the provision of a statute that construction should be adopted, would give effect to all parts thereof, and would not render any of them meaningless or inoperative. It is not a sound principle of construction to brush aside words in a statute as being inapposite, surplus sage if they can have appropriate application in circumstance conceivably within the statute.[28] If we follow this principle, it is possible to conclude that the administrative contract is non-arbitrable under Ethiopian law.

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[24] Article 3325-3348.

[25] Yodit Gurji, Arbitability of Administrative Contract, Senior Essay Paper, Addis Ababa University, 1997. p. 20

[26] Zekarias kennea, Arbitrability in Ethiopia: Posing the problem, *Journal of Ethiopia Law*, Vol. 17, No.17, (1994) p. 117-118.

[27] Positive rule of interpretation.

[28] Supra note 20.

3. One of the core principles in arbitration is equality of parties. However, the special nature of the administrative contract in effect creates a special right and obligation towards the parties. The basic reason that gives rise to the peculiarity of administrative contract is that of inequality of interest.[29] This ultimately leads to inequality of parties. Thus the very nature of the administrative contract is incompatible with the core principle of arbitration. For instance, if the government is the litigant party, it may be difficult to access evidence by virtue of Article 145 of the Civil Procedure Code. This is because submission of such crucial and important evidence will determine the output which the government might not want. As a result, such sort of instances will no doubt affect the equality of party and ultimately will have great repercussions in the outcome of the case.
4. It should be a matter of common knowledge that Ethiopian Civil Procedure Code was transplanted from French and Indian legal system. Looking into the same laws of those countries, therefore, plays a significant role in interpreting the actual intention of the drafter. Under French law, as per Article 2060, disputes involving pubic organizations and public institutions are secluded from the ambit of arbitration.[30] And in Indian law, the administrative contract is non-arbitrable.[31] It necessarily follows that the Ethiopian civil procedure, which is transplanted from French and Indian law, does not allow the arbitrability of the administrative contract.
5. One of the cardinal principles of interpretation, in a case where there is contradiction, is to see the maturity date of the law. The legal maxim *lex posterior derogat priori* or posterior law prevails over (derogates from) prior law when the two laws have the same status

[29] George Langrod, Administrative Contract, *America Journal of Comparative Law*, Vol, 4, No.3, (1995) p. 325.

[30] Generally in French it is prohibited for territorial public collectives (including the country, region, provinces, and communes) and public establishment to become parties in arbitration procedure. See supra note 16 p. 58.

[31] Any Commercial matters can be referred for arbitration but public policy prohibited submission of issues like insolvency and anti-competition to be referred to arbitration. Thus, if the law prohibited arbitrability of insolvency, for stronger reason we may argue that it also prohibited arbitrability of administrative contracts. Sumeet Kachwaha and Dharmendra Rautray, Arbitration in India; an overview, p. 4 available at https://www.scribd.com/document/348016476/Arbitration-in-India, last accessed on 10 June, 2016.

or hierarchy. This is because the legislator who made a new law, that contradicts an old law of the same hierarchical position, is presumed to intend to repeal the old law by implication. In other words, the new or more recent law must be applicable, thereby giving the old law no effect.[32] Both the Civil Code and Civil Procedure Code are placed on the same rung of the ladder. Therefore, the two laws have equal hierarchy.[33] The Civil Code came into force in 1960, while the Civil Procedure Code came into force in 1965. Therefore, if there is any contradiction between these two laws, the Civil Procedure Code should be applicable instead of the Civil Code due to the cardinal principle, "The later prevails over the former."

The Civil Code is silent as far as arbitrability of administrative contract is concerned. Even though that silence of the Civil Code is said to amount to acceptance, it is repealed by subsequent law; i.e. Article 315(2) of the Civil Procedure Code. The law makers of Civil Procedure Code, well aware of the existence of Civil Code, put clear stipulation as to non arbitrability of the administrative contract.[34]

6. Some argue procedural law is a means to an end; it is there to deal with the issue of how rights, privilege and duties are enforced. The argument goes if this is what is meant by Civil Procedure, then, it should not defeat the right guaranteed under substantive law; in our case, the right of arbitrabality of the administrative contract in Civil Code.[35] However, this argument is not tenable since the procedural

[32] Tesfaye Abate, Material on Introduction to Law and Ethiopian Legal System, Justice and Legal System Research Institute, (2008) p.160.

[33] Some argue that Civil Procedure Code has the status of decree which is less than proclamation. However it is wrong and Tesfay has the following to say legislation by Emperor Cum parliament under Articles 88-90 or by imperial decree under Article 92 constitutes the ordinary law between the constitution above and non-sovereign Administrative enactment below. There is hardly a difference in effect, between legislation proclaimed pursuant to Arts 88-90 and legislative, decreed based on Article 92. Ibid p. 114 He also goes to state that the only difference between decree and proclamation at the time were decree promulgated by emperor when the parliament is not recession but proclamation promulgated by parliament and approved by emperor. p. 82.

[34] Supra note 30 p. 102.

[35] Bezzawork argues that Procedural law should neither limit nor extend substantive rights that are definitively dealt with in the substantive laws in this case, the civil code. Bezzawork Shimelash, The Formation, Content and Effect of an Arbitral Submission under Ethiopia Law, Journal of Ethiopia Law, Vol 17, (1994) p. 8. This is based on the assumption that there is clear demarcation between procedural law and substantive law. However procedural law may determine the right per se. like *res juridicata*. Whereas, the substantive law may provide

law is as important as substantive law. Moreover, arbitration is a mere procedure and procedural law is appropriate to deal the issue.

It is quite a mistaken assumption that civil procedure deals only procedural matters. Sometimes even civil procedure can provide substantive rights; a case in point is the appointment of trustees and dissolution of partnerships.

Article 308(1) of the Civil Procedure Code stated that if the court is satisfied that there is good cause, it may appoint a provisional director, trustee or liquidator. This is substantive right which also duplicated in substantive parts of the law. Under bankruptcy provision, for instance, under Article 994 the issue of appointment of trustees is handled.

The same holds true for dissolution of partnerships. Under Article 311(1) of the Civil Procedure Code, the court may order the dissolution of a partnership or body corporate or even for termination of an endowment. It is quite clear that such matters are substantive rights (for instance the same issue is dealt under Article 258 of the Commercial Code) all the same it is dealt with under procedural law. As a result, it is emphatically correct and sound for the law to deal with the issue of arbitrablity in Civil Procedure Code.

Above all, the court, by ruling that administrative contracts are subject to arbitration, violates the very policy justification behind non arbitrability of the administrative contract. Redfern and Hunter emphasize that being arbitrable or non-arbitrable of a subject-matter is the matter of public policy.

> *The concept of non-arbitrability is in effect 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 as to which matters are incapable of being settled by arbitration under the law of the place of agreement or of arbitration. Moreover, recognition and enforcement of an award may be refused if the subject-matter and if the difference is not arbitrable under the law of the country where enforcement is sought.*[36]

There is no conclusive evidence which shows the policy justification for taking the administrative contract out of the ambit of arbitrability. Even a reference to administrative contract provisions in Civil Code and its legislative

procedural matters like period of limitation. Thus there is no clear cut difference between these two parts of laws.

[36] Infra note 33.

background doesn't have any help.[37] In the absence of this, it is for everyone to presume the possible public policy justifications. The following public policy justifications can be thought of behind the prohibition of arbitrability of the administrative contract:

1. The first justification lays in the very nature of the administrative contract. Unlike other contract in which there are only two private parties or government at individual capacity, in the administrative contract, the two parties are an individual party and a sovereign body i.e. the government or between two government or sovereign bodies. The government, as a body which stands for the benefit and on behalf of the people, has the obligation to do things in transparent and accountable manner. Furthermore, the public at large has the right to know what the government does. Apart from a few exceptions, court proceedings in principle take place in public. Any person interested in a given case has the right to attend the trial. However, the opposite works for arbitration. In arbitration, proceedings, in principle, take place in a closed session; that is, they are confidential.[38]The tribunal, the parties and their representatives are the only persons allowed to participate in the proceeding unless the parties and the tribunal agree otherwise. A witness may be required to give evidence to the tribunal but that testimony is only heard by those persons allowed to be present. The public has no right to attend a hearing before an arbitral tribunal.[39]In other words, in arbitration, the public at large is not allowed to attend the proceeding. Thus, the government's acts are not transparent and accountable which will be in contradiction with government's obligation to be transparent.[40] It also deprives the public at large of the right to know the deeds and misdeeds of the government.

[37] Allan Redfen and Martin Hunters, Law and Practice of International Commercial Arbitration, Sweet and Maxwell, (1936) p.47.

[38] For instance Article 25 of the then Ethiopian Arbitration and Conciliation Center (EACC) stated that unless the parties agree otherwise or the law provides to the contrary, the hearing and ruling of the tribunal shall remain confidential. No one other than the arbitrators, the parties or their lawful representative and the required personnel of the center may be allowed to be present during the proceeding. In reality not only the proceeding but also the output is confidential. Please see Report of Arbitral Award, Vol .1(2008) introduction part.

[39] John Sutton, John Kendall and Judith Gill, *Russell on Arbitration*, 21thed, Sweet and Maxwell Limited, (1997), p. 5.

[40] Infra note 43 Article 12.

2. If the administrative contract is allowed to arbitration, then both substantive and procedural provisions of Civil Code and Civil Procedure Code will be applied. One of the provisions is Article 317(2) of the Civil Procedure Code, which states that unless the parties agree to have the dispute resolved on equity, awards are to be made on the basis of the law. Moreover, the parties may relieve the arbitrators from deciding according to the law. According to Zekarias Kenna, it is possible to agree to solve dispute through extra legal means; that is, justice and equity.[41] These, in turn, have two drastic effects. First, the prerogative power of administrative organs will be sold out by way of agreement. The agreement will exclude the application of relevant law, which in turn will compromise the public interest. Second, there will not be resort to Federal Supreme Court Cassation Bench since the power of Cassation is to rectify basic and fundamental error of law only. If, however, the parties exclude the application of relevant law and replace it with justice and equity, the Cassation will be excluded. That will in no doubt compromise public interest.[42]

3. If we allow government authorities to solve disputes of administrative contracts through arbitration, they will select an arbitrator. Unlike judges[43], for a person to be appointed as an arbitrator, there are no qualifications to be met.[44] Furthermore, unlike judges who are governed by various laws of the country, arbitrators, once they accept

[41] Rene David expresses his regret for codification commissioner not discussion with him on administrative contract provisions. The task of the commission was often facilitated by an *expusedesmotif* that I submitted the text of the preliminary draft. This procedure was not followed, however, for the title dealing with administrative contracts. The title Administrative Contracts was one of the last that I drafted for submission to the codification commission and was not accompanied by an *expuse des motif*. Rene David, Administrative contract in the Ethiopian civil code, *Journal of Ethiopian Law*, Vol 4, No. 1 (1967) p. 46.

[42] Interview with Associate professor Zekarias Kenna, Lecture, Department of Law, Addis Ababa University (18 October, 2016).

[43] Judges are expected to be honest, impartial, independent, and diligent in their work, for instance The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, *Federal Negarit Gazetta*, (1995), Article 79.

[44] Article 316(2) of Civil Procedure Code only prohibited judge from being an arbitrator. Other than this there is no restriction. Theoretically an illiterate person can be an arbitrator. However from partial point of view it is possible to uphold that arbitrators are very much qualified and man of integrity. From overview reading of report of arbitrational awards we find people like Professor Tilahun Teshome, Asso. Professor Zekarias Kenna, Tamiru Wendemagegn, Mekebe Tsegaw and others.

the appointment, they will conclude a contract called "*receptum arbitri"* with the disputing parties and they will be governed by this contract. This, in turn, greatly affects the public interest since the supervision in case of a privately appointed arbitrator may turn out to be less strict than that of a judge.

4. If there is a possibility of appeal,[45] from the decision of arbitrator, then there is no purpose other than adding one layer to the existing court structure. In the current judicial hierarchy, we have three tiers of court. Now, with the addition of arbitration, there will be fourth rung of court. That is time consuming which may hinder the speedy disposition of cases. Since public interest is involved, administrative contract disputes must be resolved as speedily as possible. Thus, an appeal from the decision of arbitration award will compromise public interest for the reason that it is a time consuming procedure.
5. It seems that there is a general consensus that proceedings of arbitration are less costly than normal court proceeding. However, the reality is that arbitration proceeding is more costly when seen in comparison with that of courts.[46]

An arbitrator's fee in general is expensive. This is for two reasons. First, they are generally experts in a certain area and consequently demand high amount of fees. Second, they are very few in number.[47] Nowadays, it is an open secret that an arbitrator's fee is much higher than an attorney's fee.

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[45] Article 350- 354 of the Civil Code. According to Robert Allen Sedler on the following three grounds it is possible to apple:

a. The award is inconsistence, uncertain or ambiguous on its face, wrong in law or fact
b. The arbitrator omitted to decide matter referred to him
c. Certain irregularities or improper conduct on the party of the arbitrator have occurred. Please see Allen Sadler Ethiopia Civil Procedure, Oxford University Press, (1968), p. 389.

[46] For instance for the case involves 200,000 Birr the arbitration fee according to the Addis Ababa Chamber of Commerce and Sectoral Association arbitration institution the revised arbitration rule it will be 20,000 Birr (15,000 Birr+15% of the amount above 100,000) for the same case the court fee according to Legal Notice No. 177/52, it will be 4,315 ((200,000-100,000)*1.5/100+3,315 Birr).

[47] For instance the numbers of arbitrators registered in Addis Ababa Chamber of Commerce and Sectoral Association is only 45 interviews with Ms. Mister Mohammed, Chief Registrar at Addis Ababa Chamber of Commerce and Sectoral Association(December 15,2017). However the number of attorney registered in Federal Attorney General is 4385 as of December 25, 2017 Interview with Mr. Birehanu Tadesse, Deputy General Attorney (December 25, 2017).

In addition to the above mention reasons, the Cassation was in default in citing and applying Article 1731 of the Civil Code. Article 1731 of the Civil Code stated that a valid contract is a law between and among contractual parties; that is, the principle of *pacta sunt servanda.* Let me directly cite Article 24 and Article 25 of the agreement with it equivalent translation to show the fallacious reasoning of Cassation:

አንቀጽ 24፦ አለመግባባቶች አፈታት፦

በአስሪና በስራ ተቋራጭ እንዲሁም አሰሪውን ወክሎ ባለው አማካሪ መካከል ስለሚነሱ አለመግባባቶች በተቻለ መጠን አርስ በአርስ በሚደረግ ውይይት ለመፍታት ሙከራ ይደረጋል። ነገር ግን በ30 ቀናት ውስጥ መፍትሄ ካልተገኘ አንደኛው ወገን ለሌላኛው ወገን እንዲመራለት ወይም በኢትዮጵያ ህግ መሰረት ለግልግል እንዲመራ ሊጠይቅ ይችላል።

Article 24- Dispute Resolutions:

Disputes between the contractor and the employer, including the consultant acting under the employer's authority, shall be resolved amicably by informal negotiations.

If no amiable solution can be found after 30 days from the commencement of negotiations, either party may require that the dispute be referred to a 3rd party for adjudication or arbitration in accordance with Ethiopian law.

አንቀጽ 25፦ **የሚዳኝበት ሕግ፦ ይህ ውል በኢትዮጵያ ሕገ መሠረት የሚታይ ይሆናል።**

Article 25- Arbitrable law: The contract shall be interpreted in accordance with Ethiopian law.

Therefore, as per Article 24 of the agreement, in case there is dispute, the party must negotiate to solve the dispute. Negotiation is the precondition for the case to be brought before arbitration. If and only if the negotiation fails, the parties will resort to arbitration. However, the *Zem Zem PLC* failed to solve the dispute by negotiation. Therefore, the Cassation should not allow arbitration even if as per the agreement the parties failed to resolve their dispute through negotiation.

As per Article 25 of the agreement, the applicable law to the contract in resolving the dispute is Ethiopian law. Therefore, pursuant to this provision, the parties bring the law into the terms and conditions of their contract. By doing so, the contractual parties are abided by the term and condition of the contract and provision of the law stipulated under various laws, one of which is Article 315(2) of the Civil Procedure Code. Thus, it is possible to say that the parties have agreed to apply Article 315(2) and make their contract, which is administrative, non-arbitrable.

From this, it should be clear that administrative contracts are not within the ambit of arbitration. Cassation has, however, ruled in contradiction to this, thereby subjecting administrative contracts to arbitration. In the words of

Tecle Hagos, "the Federal Supreme Court, through the Cassation decision, has stripped Article 315 (2) of the Civil Procedure Code of 1965 of its luster and hammered the last nail in its coffin and that hence forth any arbitral clause or submission in an administrative contract is enforceable."[48]

Concluding Remarks

The issue of arbitrablity of the administrative contract is one thorny legal issue. Despite its clear meaning and purpose of the law, the Cassation has been misinterpreted and opens Pandora's box which can be rectified by it only. In *Illubabor Zone Educational Department v. Zem Zem PLC*, Article 24 was not in line with what Ethiopian law provides; that is, Article 315 (2) of the Civil Procedure Code. If a contract does not observe the lawfulness requirement, it will be null and void. By virtue of theory of separability, what the Cassation should have done was to nullify Article 24 of the agreement and enforce the contract. However, the Cassation Division of the Federal Supreme Court approved the unlawful contract and legalized it and hence clearly deviated from the law and public policy behind it.

[48] A tribunal may derogate from strict application of the law if it is of the opinion that such a way of decision of the dispute would lead to just outcome. See Tilahun Teshome, The legal Regime Governing Arbitration in Ethiopia, A synopsis, *Ethiopian Bar Review*, Vol. 1, No. 2 (1999) p. 138.

በመጀመሪያ ደረጃ የክፍያውን አፈፃፀም መሠረት በማድረግ ብቻ የወር ተከፋይ በሆኑን እና የወር ተከፋይ ባልሆኑት መካከል ምክንያታዊ ያልሆነ ልዩነት በመፍጠር የወር ተከፋይ ያልሆኑት ለበዓል ቀን ክፍያ እንደማይፈ*ም*ላቸው በማድረግ ከወር ተከፋዮች ጋር በዕኩልነት የመታየት ህገ-መንግሥታዊ መብታቸውን የሚጥስ ይሆናል። በሁለተኛ ደረጃ በሣምንት የዕረፍት ቀናት እና በህዝብ የበዓል ቀናት ክፍያ እንዲፈጸምላቸው በህጉ ላይ የተቀመጠበት ዋና ምክንያት ሠራተኛው ህይወቱን ተገቢ በሆነው መንገድ (decent life) እንዲመራ ለማስቻል ነው። መሠረታዊ ዓላማው ይህ ከሆነ ምክንያቱ ለወር ተከፋዩ ብቻ ሳይሆን በተመሳሳይ ሁኔታ ለቀን ተከፋዩም ተፈፃሚ የማይሆንበት ምክንያት የለም። ይህ ብቻም አይደለም። በሶሺዮ ኢኮኖሚክ ኮቬናንት በአንቀጽ 7 ላይ ሠራተኞች በበዓል ቀናትን ክፍያ የማግኘት መብት እንዳላቸው የተደነገገ እና ኢትዮጵያም የዚህ ኮቬናንት ፈራሚ አገር በመሆኗ በስምምነቱ ተገዳጅ ነች። ስለሆነም ህገ-መንግሥቱን፣ የአሠሪና ሠራተኛ ህጉን እና ኮቬናንቱን በማገናዘብ አስተሳስረን ስንመለከተው ህግ አውጪው ከዚህ ስሜት በመራቅ የወር ተከፋይ ያልሆኑ ሠራተኞች በስራ ውላቸው ወይም በህብረት ስምምነት ክፍያ እንዲፈጸምላቸው የሚፈቅድ ድንጋጌ ከሌለ በቀር ለበዓል ቀን ክፍያ አይፈጸምላቸውም ብሎ አቀዋም እንደወሰደ ማሰብ አይቻልም። እንዲያውም ድንጋጌው ብዙ ጊዜ ከሠራተኞቻቸው ጋር በድርድር የጎበረት ስምምነት ለመፈጸም የማይፈልጉ አሠሪዎችን የህብረት ስምምነት እንዲኖራቸው የሚያተጋ መሣሪያ ተድርጎ የሚወሰድ ነው። ከዚህ ያለፈ ትርጉም ሊሰጠው አይችልም። ስለሆነም የወር ተከፋይ ያልሆኑ ሠራተኞች ከአሠሪያቸው ጋር በሥራ ውል ወይም በህብረት ስምምነት የሚወስኑት ከፍ ሲል በተጠቀሱት ምክንያቶች የክፍያውን መጠን ብቻ ነው። በህብረት ስምምነት ወይም በሥራ ውል የተወሰነ የክፍያ መጠን ከሌለ ግን ማንኛውንም ሠራተኛ በቀን ስምንት ሰዓት እንደሚሰራ ታስቦ በመርህ ደረጃ የተጠበቀለትን ክፍያ የማግኘት መብት ተግባራዊ ሊሆንለት ይገባል። ስለሆነም የሥር ፍርድ ቤት ተጠሪዎች ለበዓል ቀናት ክፍያ ይገባቸዋል በማለት የሰጠው ፍርድ የሚነቀፍበት ምክንያት አላገኘንም። ስለሆነም የሚከተለውን ውሳኔ ሰጥተናል።

ውሳኔ

አመልካቾች ለሳምንት የዕረፍት እና ለበዓል ቀናትን ክፍያ ሊፈጸምላው ይገባል በማለት የሰጠው ፍርድ መሠረታዊ የሆነ ህግ ስህተት ያልተፈጸመበት ስለሆነ አጽንተነዋል።

ኪሣራና ወጪ ይቻቻሉ።

ትዕዛዝ

የባህር-ዳር ከተማ ወረዳ ፍርድ ቤት ውሳኔው የጸና መሆኑን አውቆ በጸናው ውሳኔ መሠረት እንዲያስፈጽም ታዟል። ግልባጩ ይተላለፍለት። ይጸፍ።

የተሰጠ ዕግድ ካለ ተነስቷል። ይፃፍ።

መዝገቡ ተዘግቷል። ወደመዝገብ ቤት ይመለስ።