Calming the Waters in Cooperative Societies.

By Yohannes Woldegebriel

Cooperative societies are special kinds of business organizations that are established primarily to solve the collective economic problems of their members. Often, they claim to provide benefits for their members that cannot be individually achieved. Although engaged in business activities, cooperatives are established by a special legislation and provided with favourable treatment from other kinds of business organizations.

Thus, in Ethiopia, cooperative societies are entitled to income tax exemption if members pay income tax on their dividends, acquire land as determined by regional or city governments, and receive a host of other assistances from federal and regional government and city administrations. Support to cooperative societies is indeed substantial for those established in cities as one can ascertain from the relevant proclamation, which includes land that is becoming a scarce resource in urban areas, and possibly also the supply of industrial products by publicly owned factories.

The proclamation issued in 1998 to govern cooperative societies is one of the few legislations that provide for mandatory arbitration of disputes. This proclamation enumerates several kinds of disputes that are required to be resolved by arbitration where parties to the dispute failed to resolve them through conciliation. It appears, however, that not all disputes pertaining to cooperative societies are subject to mandatory arbitration. The law limits the scope of such disputes to certain areas of the organization, management or operations of the societies as are listed down in the proclamation (Article 49).

Disputes that are required to be legally referred to and resolved by arbitrators, irrespective of the will of the parties, are mainly related to controversies between members, former members, heirs of members, any officers' representatives, management committees, agent, or employee of the societies. The list evidently indicates that the jurisdiction of the arbitrators on dispute within the cooperative societies is mainly on their internal affairs.

Although disputes between one cooperative society and another cooperative society may be required to be submitted to arbitration under the proclamation on any issue, including their contractual relationship, it is still narrow in so far as it involves only cooperative societies. Therefore, where disputes arise between members or former members of the cooperatives on matters affecting their interest; or one cooperative society with another cooperative society on their contractual or non contractual relationships, the dispute would have to be submitted to arbitration regardless of any agreement by the disputing parties.

It is easier to speculate the legislative intent behind the compulsory submission of certain disputes within and between cooperative societies to arbitration. Disputes involving members of the cooperatives societies should be resolved amicably by such informal and less formal procedures as conciliation and arbitration in order to ensure good relationships and prevent unfolding hostilities. It seems it is also in the best interest of the state that disputes pertaining to members and among members of cooperative societies are solved out-of-court. This guarantees their survival and sustainability, for the state has stakes by making substantial legislative and administrative concessions.

Apart from this, conciliation and arbitration are the most friendly, less costly, speedy, confidential, specialized, flexible and convenient means of settling disputes for all business related issues and more so, for cooperative societies.

The cooperative societies' establishment proclamation, however, is not limited in introducing a rare concept of mandatory arbitration in the Ethiopian legal system. The proclamation also stipulated special legal provisions that marks major departure from the national arbitration act and mandated federal, regional and city authorities established for organizing, registering, giving training, conducting research and providing other technical assistances to cooperative societies.

To begin with, this proclamation has predetermined the number of arbitrators required in resolving cooperative dispute by arbitration. It comprises three persons of "high reputation and impartiality."

Ironically, this provision is in direct conflict with the civil code, which leaves the decision on the number of arbitrators to the agreement of the parties. The arbitration rule under our civil code envisages the appointment of one or several arbitrators to resolve a given dispute by arbitration depending on the choice of the parties. I would argue this is more logical and proper.

Consequently, though our arbitration law is relatively old, it appears to me far more advanced and modern than the provisions of the proclamation issued in 1998 for the following reasons: Number of arbitrators is often determined by "the legal and factual complexity of the case; any features peculiar to the parties, be they natural persons or legal entities; any counterclaim that may have been made and the amount of claim in dispute," according to the arbitration practice by the International Chamber of Commerce (ICC).

The cooperative proclamation defies any possibility to resolve a dispute by a sole arbitrator on account of the foregoing reasons. It requires parties to submit their cases before an arbitration panel of three. As a result, even though the amount of claim in an arbitration dispute is too small to justify the appointment of a single arbitrator, parties would have to comply with the mandatory legislative requirement that has an avoidable cost implication. It does not permit different arrangement by the agreement of the parties.

I could not imagine why the number of arbitrators in cooperative disputes is legally determined. Neither can I speculate why it was not left to the decision of the parties or such appropriate body as the Arbitration Institute of the Addis Abeba Chamber of Commerce and Sectoral Association (AACCSA) that could be legally entrusted to appoint arbitrator. But I suspect that the legislative determination of the number of arbitrators under the proclamation is probably made recklessly as in most contracts drafted by lawyers and even non-lawyers based on the acts and documents registration office or elsewhere, and without making proper judgment on the necessity of several arbitrators.

The proclamation on cooperatives provides an even more difficult mandatory provision on the appointment of a presiding arbitrator.

"The third arbitrator who shall be the chairperson, shall be appointed by both parties," says a provision.

This provision presupposes no practical problem in the joint meeting of the parties' to select and appoint presiding arbitrator over a dispute. Although arbitration is a consensual process, it is seldom unrealistic to expect parties to appoint the chairman of a tribunal where particularly, one of the parties is dragged into the arbitration proceeding by the order of the court as a matter of legal or contractual obligation. More importantly, from the practical and legal point of view, it is very much preferable and convenient for co-arbitrators to select their chair that can best manage and coordinate their activities. This is not only prevalent in most legal systems, but also accepted in prestigious arbitration institutions such as the ICC.

The relevant provision of our civil code, though old in terms of age but still advanced in content, provides that, ". . . where there is an even numbers of arbitrators they shall, before assuming their functions, appoint another arbitrator who shall as of right preside the arbitration tribunal."

This provision requires co-arbitrators to select the chairperson. I find it in conformity with modern thinking and even with international practices engaged in providing arbitration services as authors in a book concerning ICC observed. "It is more common, however, for the parties to give the co-arbitrators the power to choose the third arbitrator, says Kluwer Law International, in its book on ICC Arbitration in practice. "This happens in almost half of ICC cases involving a three-member tribunal."

The proclamation on cooperative societies provides a provision for the appointment of the chairperson by "the appropriate authority" when the parties fail to reach an agreement. Presumably, this "appropriate authority" is also duty bound to verify the reputation and impartiality of the presiding arbitrator since only persons of "high reputation and impartiality" can be an arbitrator on cooperative disputes.

The appointment of an arbitrator is the inherent right of parties to the dispute. Often, parties misconstrue this right to mean appointing an arbitrator that promotes and protects the appointing party's interest. In fact, there are also many lawyers here that argue and maintain similar views. However, arbitration as an instrument of settling disputes primarily involves the issue of justice. It is, therefore, in the interest of justice for each arbitrator to be neutral, impartial and just in an arbitration proceeding. The practice of arbitration is not an agent of the appointing party.

The appointment of presiding or other arbitrators, on the other hand, is a difficult task that requires examining the relevant qualification, integrity, perseverance, experience and diligence of the arbitrator. When the AACCSA Arbitration Institute is designated as arbitrator appointing body as is the case in most commercial contracts of the city, there are even more rigorous requirements provided by the AACCSA arbitration rules to meet the expectation of justice far more than the interest of the parties. It is an established norm of the Arbitration Institute not to appoint arbitrators as a matter of patronage and favour.

It is not clear how the "appropriate body" under the Cooperative Societies Proclamation make the appointment of a presiding arbitrator nor the procedure for the appointment and the mechanism to verify the most controversial and subjective human attributes of "high reputation and impartiality" of an arbitrator.

The proclamation is one piece of modern legislation that has some rules of arbitration with special application to cooperative disputes that demonstrably derogate from the mainstream of national arbitration act and indeed widely recognized principles of arbitration.

Whether these arbitration rules of particular application are justified by the special nature of cooperative societies and best suited to attain the objectives stated under the proclamation could not be readily understood. The kind of arbitration envisaged under the proclamation is ad hoc arbitration. This type of arbitration has its own merits and demerits. It can be effectual where it is conducted mainly on voluntary basis.

In general, one can observe that the relevant arbitration provisions of the civil code are more realistic, proper and fair than the modern proclamation on cooperatives.