Inarbitrability of administrative contracts.

Despite the fact that Arbitration offer flexibility, speed and confidentiality in the disposition of the case, Specialized tribunals that have appropriate training and knowledge to resolve dispute, the Ethiopian Civil Procedure Code prohibit very clearly, under article 315(2), the submission of disputes pertaining to administrative contracts by arbitration. As a result, the law maker consciously bans arbitration as a means of resolving disputes. Parties to an administrative contract cannot opt to arbitration for dispute resolution and any reference to arbitration will be void even if the conventional court system is inappropriate, unsuitable or judges of state courts are not conversant with the issues of the dispute.

Government administrative organs and other public agency run their businesses from allocated federal and regional state budget. Accordingly more than 80% of procurement for goods, services and works are reported to be made by public bodies. Therefore, although there are some exceptions, most contracts made with public bodies under Public Procurement and Property Administration Proclamation are "administrative contracts" and hence not amenable to arbitration.

The ban imposed on the arbitrability of administrative contract however is not unique to the Ethiopian legal system. There are similar provisions in the Algerian (prior to the reform introduced in 1993) and still, in the Egyptian legal systems to mention some of the countries. Although the prohibition for the submission of state bodies in administrative contracts became outdated following the adoption of its arbitration law in 1997, Egypt still requires the approval of the competent Minister with respect to any arbitration clauses in administrative contract. Arguments in favor of inarbitability of public bodies is put forward on the ground that "…[On] important policy implications, states desire to preserve the jurisdiction of their own courts of law: this preference is based on the assumption that an arbitral tribunal would not be able or willing to apply the law as accurately as the judicial court would" and arbitrators "pay more attention to the will of the parties, rather than to the rules of

national law." Indeed, arbitrators pay strong attentions to find out parties intention as expressed in the contract and relevant laws that complement the contract in light of parties will and interest in the course of resolving the dispute.

Legal systems that espouse the inarbitability of public bodies further contend that "the [inarbitability] rule is meant to preserve the jurisdiction of the courts of law in certain areas of the law that are deemed to deserve a particularly accurate application of the law. This affects particularly, areas of law with public policy implications where the public interest is deemed to prevail against the freedom of the parties to regulate their own interest. The legal system does not consider private mechanisms of dispute resolutions as sufficiently reliable in this context and wishes to maintain the jurisdiction of its own national courts of law."

Furthermore, the International Convention on the Recognition and Enforcement of Foreign Arbitral Award or the New York Convention accept the refusal by the competent authority "the recognition and enforcement of foreign arbitral award" where the dispute "is not capable of settlement" or "would be contrary to the public policy of that country."

Despite the fact that the issue of inarbitrability of administrative contract is well recognized in foreign jurisdictions, it has been the subject of intense debate between local lawyers and academicians. The comment by Assistant Professor zekarias and Ato Bezawork Shimelash were published in the Journal of Ethiopian laws. These lawyers have divergent views regarding inarbitrability of administrative contracts.

Bezawork maintains a very liberal interpretation of the issue of arbitrability administrative contracts. He particularly argued that article 315(2) of the Civil Procedure Code which provides for the inarbitrability of administrative contract, does not prevent submission of cases to arbitration. Therefore although he recognized certain laws that prohibit submission of cases to arbitration, he concluded that

"administrative contracts or disputes that arise from them are capable of settlement by arbitration."

On the other hand, Professor Zekarias, having treated the issue of arbitrabilty concluded that "it may be said that subject to [inarbitrability] provisions of articles 3325-3346 of the civil code *any matter that is not specifically prohibited* and that arises from valid contracts or other specific legal relationships seems to be arbitrable."

In Zem Zem PLC V Illubabur Zone Education Department, the Federal Supreme Court, Cassation Division file no 16896, considered the issue of arbitrability. The contract between the parties concerns a classical type of administrative contract that is covered under article 315(2) of the Civil Procedure Code. Notwithstanding prohibition of arbitration in such cases, the court decided that;

> "…contracts duly established in accordance with the relevant rules of the law impose rights and obligation upon parties and serves as laws under article 1731(1) of the Civil Code. Since the *contract for the construction* of a primary school between the present applicant and the respondent clearly indicate that disputes shall be settled by arbitration, the lower court has made fundamental error of law to interpret the provision of the contract as it deems fit"

Accordingly, it decided that the case should be submitted to arbitration. Neither Bezawork's nor Zekarias analysis of the arbitrability or inarbitrability of administrative contracts appears to have influenced the interpretation of the Cassation Division. In fact the analysis of the court is by itself self-contradictory and distinctly different from the analysis of both writers or any other legal analysis this writer could possibly find and examine. It is not clear whether the Cassation Division of the Federal Supreme Court is interpreting article 315(2) of the Civil Procedure

Code either. In the opinion of this writer, article 315(2) is not ambiguous and does not call for court interpretation.

Having examined the content of the court's decision, one writer aptly concluded that this interpretation and decision of the supreme court cassation division "…advertently and inadvertently either nullifies or contradicts itself with the much talked about art 315(2) that has been evoking heated discussions as to whether disputes arising from administrative contracts are arbitrable or non-arbitrable." The same writer underscored that "the Federal Supreme Court through the Cassation Decision has stripped Art.315 (2) of the Civil Procedure Code of 1965 of its luster and hammered the last nail in its coffin and that henceforth, any arbitral clause or submission in an administrative contract is enforceable."

This writer fully concurs with the argument of professor Zekarias and believes that rules providing the inarbitrability of certain contracts including administrative contracts and other legal relationships are results of public policy.

Administrative bodies are the largest procuring bodies in Ethiopia. Approximately 80% of procurement is said to be made with public bodies. The private sector supply goods, services and works overwhelmingly to state administrative bodies. This scenario is not likely to change for the coming few years. In fact recent trend is abundantly toward increased intervention and role of public bodies since the "developmental state" policy has started to expand its several projects and even in import businesses of basic commodities that curtailed private businesses. Accordingly, the issue of arbitrability will remain to be a taxing issue to administrators and actors of ad hoc and institutional arbitration. It will be very difficult to decide what position to maintain in respect of the issue of arbitrability in view of article 315(2) and the interpretation of the Cassation Division of the Federal Supreme court.