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**ADDIS ABABA UNIVERSITY**

**SCHOOL OF LAW**

**ARBITRABILITY OF DISPUTES EMANATING FROM ADMINISTRATIVE  
CONTRACTS UNDER THE ETHIOPIAN NEW ARBITRATION AND CONCILIATION  
LAW**

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OF MASTER OF DEGREE OF LAWS /LL.M/**

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## **DECLARATION**

I, the undersigned, declare that the thesis is my original work and has not been presented for a degree in any other university and that all sources of materials used in the thesis have been duly acknowledged.

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## STATEMENT OF CERTIFICATION

This is to certify that this research paper entitled “**Arbitrability of disputes emanating from administrative contracts under the Ethiopian new arbitration and conciliation law**” is the work of Abera Amare. It complies with the regulations of the university and meets the accepted standards concerning originality and quality. It is submitted in partial fulfillment of the requirement of a Master of the degree of laws (LL.M) in business law.

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## Approval Sheet

We the undersigned board examiners, certify that we have examined this thesis “Arbitrability of disputes emanating from the administrative contracts under the Ethiopian new Arbitration and conciliation Law”, and hereby recommend the College of Law and Governance Studies, School of Law to accept it as requirement for the award of Masters of Laws: L.L.M Degree in Business Law.

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## **ACRONYMS**

AACCSA Addis Ababa Chamber of Commerce, and the Sectorial Association Arbitration Institute

ADR Alternative Dispute Resolution

ECCA Ethiopian Center of Conciliation and Arbitration

FDRE Federal Democratic Republic of Ethiopia

FIDIC International Federation of Consulting Engineers

HOPRs The House of Peoples' Representatives

ICC International Chamber of Commerce

LCIA London Court of International Arbitration

SIAC Singapore International Arbitration Center

UK United Kingdom

USA United States of America

## **ABSTRACT**

*Because of absence of legal certainty, arbitrability or otherwise of disputes resulting from administrative contracts in Ethiopia had been a topic of debate among academics and practitioners. However, since the country has recently adopted the Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 that governs arbitration of disputes through arbitration, this paper therefore is intended to examine the arbitrability or otherwise of disputes arising from administrative contracts in light of the new Proclamation. Regarding the methodology, since it is doctrinal legal research, the researcher employed qualitative research approach. Data are collected from primary and secondary sources through interview and document analysis, and analyzed using thematic analysis. Accordingly, the findings of the study reveal that the new Law is more restrictive in permitting arbitrability of administrative contract disputes. Furthermore, the findings show that the new Law has opportunity in attracting foreign investment; besides, the Ethiopian administrative contract law is outdated in many aspects. As a result, the study recommends the Ethiopian parliament to amend the new Law to permit such disputes to be arbitrable in principle and to be non-arbitrable exceptionally. And to amend the administrative contract law.*

**Keywords:** *Arbitrability, Administrative contracts, Alternative Dispute Resolution, policy justification*

# CHAPTER ONE

## INTRODUCTION

### 1.1 Background of the Study

As defined in Black's Law Dictionary, Dispute is, "A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other."<sup>1</sup> Regarding the resolution of disputes, regular courts, in other words, public dispute resolution or litigations have a significant role in resolving those disputes that arise between various members of society. However, experience and literature tell us that the task of settling disputes cannot be properly administered by the regular courts alone.<sup>2</sup> As a result, other dispute-resolving mechanisms which are in other words known as private dispute-resolution mechanisms or alternative dispute resolutions (ADR) are playing a very significant role in resolving disputes have emerged. There are various forms of private dispute-resolution processes, including negotiation, mediation, conciliation, and arbitration.<sup>3</sup>

The following aspects about the nature of those kinds of dispute-resolution processes might be briefly mentioned. One of the alternative dispute resolution methods is negotiation, in which the parties themselves attempt to resolve their conflict without the use of an impartial third party. In mediation, which is essentially a negotiation process, the parties strive to resolve their differences with the aid of a mediator who is an impartial third party. Arbitration is, on the other hand, a process by which a private third-party neutral render a binding decision over disputants' respected disputes.<sup>4</sup> Black's law dictionary also defines arbitration as:

*"A process of dispute resolution in which a neutral third party (the arbitrator) renders a decision after a hearing at which both parties have an opportunity to be*

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<sup>1</sup> Henry Campbell, *Black's Law Dictionary* (6th edn, West Publishing Co. 1990) 472.

<sup>2</sup> Aron Dogol, 'Note on Arbitrability Under Ethiopian Law' (2011) 5 *Mizan Law Review* 150, 150.

<sup>3</sup> Mulisa Mergo Bulto, 'Arbitrability of Administrative Contracts under Ethiopian Legal System: Critical Appraisal' (2021) 105 *JL Pol'y & Globalization* 7, 7.

<sup>4</sup> *Ibid.*

*heard. Where arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision ...”<sup>5</sup>*

Although arbitration is a technique for resolving disputes other than through litigation, not all disputes can be resolved by arbitration. This is because each country has a different public policy, and as a result, each country decides based on its public policy considerations which disputes should be addressed through arbitration and which cannot.<sup>6</sup> In the case of Ethiopia, many laws dealing with arbitration have been adopted since 1960. Some of these laws that can be mentioned here are the Civil Code<sup>7</sup> and the Civil Procedure Code.<sup>8</sup> So, looking at articles 3325 to 3346 of the former, we can see that arbitration has been incorporated into the legal system of the country. At the same time, we can see in article 315 and subsequent articles of the Civil Procedure Code that procedures for resolving disputes through arbitration are outlined. Furthermore, articles 350 to 354 and 355 to 357 were enshrined in the Civil Procedure Code to govern appeals emanating from arbitral awards and applications to set aside arbitral awards respectively.

Arbitrability of disputes arising from administrative contracts in Ethiopia, on the other hand, has been a source of debate among academics and practitioners. However, before going into detail about the arbitrability of those disputes in the country, it seems appropriate to briefly, discuss the definition and nature of administrative contracts. So, in Ethiopia, a contract must be expressly qualified as an administrative contract by law or by the parties to the contract; or it must be connected with a public service activity and imply permanent participation of administrative authorities in the execution of such services, and so on.<sup>9</sup> Administrative contracts, in general, are those that are expressly designated by law as such, such as public service concessions, public supply contracts, and public works contracts. In other words, administrative contracts are contracts concluded between parties in which one of the parties is an administrative authority to carry out public service activities. The objective of administrative contracts in Ethiopia, as stated

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<sup>5</sup> Campbell (n1) 105.

<sup>6</sup> Mergo (n3).

<sup>7</sup> Civil Code of the Empire of Ethiopia, 1960, Proc. No. 165, Neg. Gaz., year 19, no. 2 (hereinafter, the Civil Code).

<sup>8</sup> The Civil Procedure Code of the Empire of Ethiopia, 1965, Proc. no. 52, Neg. Gaz., year 25, no. 3 (hereinafter, the Civil Procedure Code).

<sup>9</sup> The Civil Code, Art. 3232.

in articles 3131 to 3306 of the Civil Code, is to improve public domain goods, provide public services, complete public works, and engage in public procurement.

When we return to the above-mentioned debate on the issue of arbitrability of administrative contract disputes, we can observe that different academicians argued in different ways. The primary reason for this is because article 315(2) of the Civil Procedure Code states that no arbitration may be undertaken on administrative contracts as defined in article 3132 of the Civil Code or in any other circumstance where it is banned by law. For example, Zekarias Kenea argued that disputes emanating from administrative contracts are arbitrable.<sup>10</sup> On the other side, Tecele Hagos argued that the arbitrability of disputes arising from administrative contracts is prohibited by article 315(2) of the civil procedure code.<sup>11</sup> Likewise, the case in practice was similar to the academic aspect. As a result, there were differences in how courts interpret and implement the rules governing the arbitration of disputes that emanate from administrative contracts. For instance, in the case of ZemZem PLC and Illubabor Bureau of Education, though the Oromia Supreme Court had given a judgment that a dispute arises from an administrative contract not be arbitrable; the Ethiopian federal Supreme Court Cassation bench ruled that the dispute be arbitrable in reversing the judgment of the former.<sup>12</sup> Later on, the federal Supreme Court cassation bench reversed its previous stand in the Tana water Well Drilling and Industry Ltd. and Dire-Dawa Administration water and sewerage Authority case in which the former justified that disputes that arise from administrative contracts are not arbitrable.<sup>13</sup>

Taking into account the preceding arguments, Ethiopia recently ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Ratification Proclamation No. 1184/2020 (hereinafter, Foreign Arbitral Awards Recognition and Enforcement Proclamation) and approved the Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 (hereinafter, the Proclamation), both of which are intended to address the issue. Accordingly,

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<sup>10</sup> Zekarias Kenea, 'Arbitrability in Ethiopia: Posing the Problem' (1994) 17 J Ethiopian L 116, 119.

<sup>11</sup> Tekle Hagos, 'Arbitrability of Government Construction Disputes' (2009) 3 Mizan Law Review 1, 27.

<sup>12</sup> Zem Zem PLC v Illubabor Bureau of Education, (Fed. Sup. Ct. Cassation Bench, 2005, Civil Cassation, No. 16896) (unpublished).

<sup>13</sup> Tana Water Well Drilling and Industry Ltd. v Dire-Dawa Administration water and sewerage Authority (Fed. Sup. Ct., Cassation Bench, 2017), J. Eth. L Vol. 22, p. 1-7.

article 78(1), (2) of the Proclamation has repealed nearly all of the provisions of the Civil Code and Civil Procedure Code that govern the resolution of disputes through arbitration. Aside from that, sub-article (3) of the preceding provision, which provides as, “Other law or customary practices inconsistent with this Proclamation shall not be applicable concerning matters provided for in this Proclamation,” appears arguable. The researcher of this paper has therefore taken the initiative to look into changes made to the issue of the arbitrability of disputes arising from administrative contracts under the Proclamation.

## **1.2 Statement of Problem**

As previously stated in detail, the arbitrability of disputes arising from administrative contracts in Ethiopia had been a topic of debate among academics and practitioners due to article 315(2) of the Civil Procedure Code, which provides, “no arbitration may take place concerning administrative contracts as defined in Art. 3132 of the Civil Code or in any other case where it is prohibited by law.” But these are all about the previous laws that do not touch on the Proclamation that Ethiopia has recently adopted. Under the new Proclamation, the arbitrability of disputes arising from administrative contracts are supposed to be regulated with exceptions.<sup>14</sup> Thus, in light of the aforementioned debates, the researcher has systematically investigated the arbitrability of administrative contract disputes under the new Law.

## **1.3 The objective of the Research**

### **1.3.1 General Objective**

The main purpose of this research paper is to examine the arbitrability of disputes that arise from administrative contracts under the Ethiopian legal system, particularly under the Arbitration and Conciliation Proclamation.

### **1.3.2 Specific objective**

1. To assess the unique features of administrative contracts from the other ordinary or private contracts in the context of Ethiopian laws;
2. To analyze the scope of arbitrability of disputes that emanate from administrative contracts; and

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<sup>14</sup> Arbitration and Conciliation Working Procedure Proclamation, 2021, Art. 7(7) Proc. No. 1237, Fed. Neg. Gaz., year 27, no. 21 (hereinafter, Arbitration and Conciliation Proclamation).

3. To assess the potential benefits and challenges of the new law on the arbitrability of disputes resulting from administrative contracts.

## **1.4. Research Questions**

### **1.4.1 Central question**

Does the Arbitration and Conciliation Proclamation address the previous controversial issue of the arbitrability of disputes arising from administrative contracts? Or, what are the developments made in the recently adopted Law on the mentioned issue?

### **1.4.2 Specific questions**

1. What are the unique features of administrative contracts that distinguish them from the other ordinary or private contracts under the laws of the country?
2. To what extent are disputes that emanate from administrative contracts arbitrable?
3. What are the potential benefits and challenges of the new law on the arbitrability of disputes resulting from administrative contracts?

## **1.5 Significance of the research**

This research could help lawmakers to enact a law that explicitly addresses the issue of arbitrability of disputes that arise from administrative contracts in compliance with the New York Convention and the contemporary phenomenon on the subject. It could also help academicians and law school students conduct further research on the issue. The study may also help Ethiopian federal supreme and high court judges, arbitrators, and renowned attorneys concentrate on the described issue so they may play a part in helping to solve it.

## **1.6 Methodology of the Study**

### **1.6.1. Research approach:**

The study employed doctrinal research type since its purpose is to investigate and analyze whether disputes resulting from administrative contracts are arbitrable under Ethiopia's new Proclamation. Also, since the research deals with content, qualitative research approach has been employed. In addition, primary and secondary data that have been collected through interviews, analysis of relevant laws, and relevant literature have been used for the study.

### **1.6.2. Sources of Data**

- a. Primary Sources of data:** Laws that describe arbitration in general and arbitrability of administrative contracts, in particular, such as the Arbitration and Conciliation Proclamation, the Public-Private Partnership Proc. 1076/2018, the Civil Procedure Code, the Civil Code, etc., have been used for the research paper. The FDRE House of Peoples' Representatives'(HOPRs) minutes on the draft proclamation and Resolution No. 6/2013 of the House's Standing Committee on Justice and Democracy (hereinafter, the Standing Committee), as well as the Office of the Prime Minister's justifications for the draft proclamation and the New York Convention (1958) ratifying proclamation, have all been used in the study. The study also used data collected through interviews with specific lawyers.
- b. Secondary sources of data:** incorporated such as books and other literature that discuss the laws and practices on arbitrability of disputes that emanate from administrative contracts have also been used for the research paper. Those data are collected from the library of the university and from google by downloading.

### **1.6.3. Methods of Collecting Data**

**Interview:** Six lawyers were interviewed about the new Law's opportunities, policy justification, and prospected challenges.

### **1.6.4. Sampling technique**

In terms of sampling technique, the researcher employed purposive sampling technique because the layers have in-depth knowledge and skills on the subject matter. Accordingly, two arbitrators, two legal experts, and two federally licensed attorneys have been interviewed for the study.

### **1.6.5. Data analysis**

The paper has applied thematic analysis to analyze the documents and interviews that have been collected through the above-mentioned technique.

## **1.7 Literature Review**

There are some kinds of literature written concerning the arbitrability of disputes arising from administrative contracts. Among them, an article written by Bezawork Shimellash under the title

of 'The formation, content, and effect of arbitral submission under Ethiopian law' can be mentioned here. Accordingly, despite article 315(2) of the civil procedure stipulates that no arbitration may take place about administrative contracts as defined under article 3132 of the Civil Code or in any other case where it is prohibited by the law, Bezawork Shimellash argued that there is no any provision in the Civil Code that restricts administrative contracts disputes from being arbitrable. He also stated that the Civil Code's legislators never intended such restrictions on arbitrability, which he claims would have been included in the Civil Code because it affects the parties' freedom.<sup>15</sup> According to Bezawork, even though article 315(2) of the Civil Procedure Code restricts what matters are not subject to arbitration, the Civil Code contains no such restriction or even an inference to that effect. So, for Bezawork, disputes arising from administrative contracts are arbitrable.

Prof. Zekarias Keneaa likewise argued that there is no provision in the Civil Code prohibiting arbitration in the context of administrative contracts, as defined in article 3132 of the same Code. Furthermore, he argued that because nothing in Chapter 4 of the Civil Procedure Code affects the provisions of Articles 3325-3346 of the Civil Code, and nothing in Articles 3325-3346 of the Civil Code mentions whether or not matters arising from administrative contracts are arbitrable, Article 315(2) of the Civil Procedure Code could not apply.<sup>16</sup>

Tecele Hagos, on the other hand, argued that Art.315 (2) of the civil procedure prohibits the arbitrability of administrative contract disputes.<sup>17</sup> He also advocated for the repeal of Art. 315 (2) of the Civil Procedure Code, as this could allow the legal system in general, and the Government Contracts legal regime in particular, to benefit from the knowledge of specialist arbitrators.<sup>18</sup> Furthermore, Tecele stated that, even though Art.315 (2) of the civil procedure prohibits the submission of disputes arising out of administrative contracts to arbitration, some individuals have argued that the provision has become obsolete.<sup>19</sup>

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<sup>15</sup> Bezawork Shimellash, 'The formation, content, and effect of arbitral submission under Ethiopian law' (1994) 17 *Journal of Ethiopian Law* 69, 83.

<sup>16</sup> Kenea (n10) 117.

<sup>17</sup> Hagos, 'Arbitrability of Government Construction Disputes' (n11).

<sup>18</sup> *Ibid* 31.

<sup>19</sup> Hagos, 'Conflicting Legal Regimes Vying for Application: The old Administrative Contracts Law or The Modern Public Procurement Law for Ethiopia' (2017) 4 *African Public Procurement Law Journal* 1, 23.

Apart from the above, Mulisa Mergo on the other side argued that the provision of Article 315(2) of the Civil Procedure Code doesn't prohibit disputes emanating from administrative contracts from being arbitrable. For Mulisa, if article 315(4) of the same code is interpreted strictly, there is no prohibition of settling disputes from administrative contracts through arbitration or similar to that provided under the provisions of the Civil Code dealing with arbitration.<sup>20</sup> On top of this, the argument made by Aron Degol on the subject matter seems the same as that of Mulisa's argument. This is apparent from the former's explanation, which indicates that administrative contract disputes are arbitrable.

As it can be noted from the above explanations, what the mentioned writers have tried to address in article 315(2) of the civil procedure is the issue of arbitrability of disputes emanating from administrative contracts. On the other hand, the writers did not discuss the arbitrability of disputes emanating from administrative contracts under the new Proclamation. The main reason for this may be because the kinds of literature were written before the Proclamation has been adopted by the parliament. Article 7(7) of the Proclamation, which states that disputes arising from administrative contracts shall not be brought to arbitration except as permitted by law, has therefore been the main issue that has been investigated by the study paper. Apart from this, other related laws to the issue have been analyzed in light of the above-mentioned provision. Furthermore, this study has addressed it and provided new findings that would eventually close the gap as no study has yet been done on the new Law regarding the arbitrability of administrative contract disputes.

### **1.8 Scope of the Research**

The study's main focus is on arbitrable disputes arising from administrative contracts under Ethiopia's new Arbitration and Conciliation Law. The study also focuses on the nature and object of administrative contracts regarding arbitrability. As a result, the study's scope is confined to the laws governing the arbitration of disputes emanating from administrative contracts and administrative contracts.

### **1.9 Limitation of the Research Paper**

Initially, the researcher had intended to explore the arbitrability of disputes resulting from administrative contracts under the Arbitration and Conciliation Proclamation using a

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<sup>20</sup>Mergo (n3) 11.

combination of doctrinal and non-doctrinal research methodologies. However, since no dispute is arbitrated as well as adjudicated by a court per the new Law, the empirical part of the study could not be carried out. As a result, judges could not be interviewed, and at the same time, courts' cases and arbitral awards could not be analyzed. So, this has been taken as a limitation.

### **1.10 Organization of the Research**

This research paper is organized into four chapters. The first chapter is about the introduction part. In this part, the proposal including the background of the paper, the statement of the problem, and the existing literature review have been discussed. In the second chapter, an attempt has been made to discuss the concept of arbitration in general and the arbitrability of disputes arising from administrative contracts in particular. Also, the basic features of administrative contracts have been dealt with in this chapter. The third chapter has mainly dealt with the arbitrability of administrative contract disputes under the new arbitration Law of Ethiopia. Also, the content of administrative contracts and their limitations in the Ethiopian legal system context has been dealt with in this chapter. In the last chapter, chapter four, the conclusion and recommendation parts have been discussed accordingly.

## CHAPTER TWO

### ADMINISTRATIVE CONTRACTS AND ARBITRATION

#### 2.1 Administrative Contracts

An administrative contract, like any other ordinary contract, is an agreement between two or more persons that creates an obligation to do or not do a particular thing or an obligation to give something. Or it is a set of promises for the breach of which the law provides a remedy, or the performance of which the law recognizes as a duty in some way.<sup>21</sup> However, unlike the ordinary contract, in an administrative contract, it is obvious that the one party to the contract is required to be an administrative agency.<sup>22</sup> So, the concept, definition, nature, object, and effects of the administrative contract, as well as the causes and nature of administrative contract disputes will be discussed below in detail.

#### 2.1.1 Theory and Concept of Administrative Contracts

The theory of administrative contracts emerged in modern French law as a creation of Council of State case law, which was later adopted and developed by French administrative doctrine.<sup>23</sup> As a result, the concept in this type of contract is related to the public interest, in which performance of the contract is expected for public service and the parties intend that all rights and liabilities be governed by especially applicable rules.<sup>24</sup> Consequently, contracts entered into by the administration with individuals to work collaboratively to meet public interests are known as administrative contracts.<sup>25</sup> When the concept of the administrative contract was first introduced; however, there were disagreements among jurists, particularly those from the common law legal system, who disagreed that an administrative contract exists as a distinct concept from a private law contract.<sup>26</sup> But, at present, because the administrative contract has become distinct from the private one, such arguments are no longer acceptable. To put it in another way, nowadays, an

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<sup>21</sup> Campbell (n1) 322.

<sup>22</sup> Gabriela Shalev, 'Administrative Contracts' (1979) 14 Isr L Rev 444, 446.

<sup>23</sup> Adriana Magdalena Sandu & Maria Sofia Pagarin, 'Study on Administrative Contracts' (2012) 4 Contemp Readings L & Soc Just 903, 904.

<sup>24</sup> Alan W. Mewett, 'The Theory of Government Contracts: *Government Contracts*' (1959) 5 McGill LAW JOURNAL 222, 222.

<sup>25</sup> Sandu & Pagarin (n23).

<sup>26</sup> Mewett (n24).

administrative contract cannot be treated the same as a contract between private individuals who are solely concerned with their profits.<sup>27</sup>

On the other hand, when we examine some laws and literature written in the field, we can get different kinds of definitions that are provided for administrative contract. As a result, an administrative contract can be defined by its legal nature as well as the persons involved. According to its legal nature, an administrative contract is a contract or an instrument for expressing the parties' mutual will that is considered within the sphere of private law. Based on the characteristics of the parties, an administrative contract is a contract in which one of the parties is required to be a public administration while the other one is an individual or a corporation. Apart from that, the contract is expected to include clauses granting the government special powers in the management of these projects, such as contract supervision and control, the ability to impose penalties on contractors who fail to meet their obligations, and the power to modify the clauses of the contract.<sup>28</sup>

### **2.1.2. The Distinct Nature of Administrative Contract**

Any type of contract, whether it is an ordinary or an administrative contract, it has to be regulated by law. Nevertheless, the laws that regulate administrative contracts and ordinary contracts, are not the same. As a result, while the former is mostly regulated by public law; namely, administrative law, the latter is regulated by private law<sup>29</sup>. For instance, in France, Ordinary contracts as well as administrative ones are recognized in the country's legal system and are referred to as Contrat "de Droit civil (Droit price or Droit commun) and Contrat administratif", respectively. So, if the contract does not follow the rules for determining whether it is an administrative contract, it is a Contrat de Droit civil and is subject to the same rules as any other private contract.<sup>30</sup>

Contrary to civil law countries, where administrative and ordinary contracts were initially regulated by private contract law, common law countries had no particular laws, namely

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<sup>27</sup> Ibid 223.

<sup>28</sup> Farouq Saber Al-shibli, 'The disputes of Administrative Contracts: The possibility of using Arbitration according to the Jordanian Arbitration Act 2001', (2018) 21 Journal of Legal, Ethical and Regulatory Issues, issue 2, 7.

<sup>29</sup> Sandu & Pagarin (n23) 906.

<sup>30</sup> Mewett (n24).

administrative laws that govern administrative contracts. That is, since Dicey's vehement attack on the *Droit administratif*, there has been a trend to see administrative law, as it is known in England and the United States, as a subset of the law concerned with corrective remedies. It has also been believed that private rules, such as those governing tort law or contract formation, compose the majority of administrative law's substantive content. However, due to the reasons described below, this tendency did not last long. To begin with, there is no procedural law that does not affect a person's rights and obligations or regulate his behavior, so the distinction between substantive and procedural law is mostly fictitious. Second, several laws have been passed, particularly recently, that place the government in a position that differs from that of the individual in terms of rights and obligations.<sup>31</sup>

Another characteristic that distinguishes an administrative contract apart from an ordinary one is its object. For example, in Ethiopia, the object of an administrative contract is related to a public service activity and entails the permanent participation of the administrative authorities in the execution of such service.<sup>32</sup> Also, the primary objective of administrative contracts with individuals is to meet public or general interest that is subject to the administrative system. Furthermore, administrative contracts serve as a legal instrument through which some authorities and institutions of the public administration system carry out their duties in enforcing the law, in connection with the administrative act.<sup>33</sup>

The other factor that distinguishes administrative contracts from other types of contracts, such as commercial or ordinary contracts, is the identities of the contracting parties. So, while the one party to the contract is not necessarily required to be a government organ in other types of contracts, in the case of administrative contracts, however, the involvement of such a body of administration is a precondition for such contracts to have legal effect.<sup>34</sup> In summary, one of the parties in an administrative contract must always be a public authority or an agent thereof acting under powers bestowed by law to achieve public interest or the use of the public domain.<sup>35</sup>

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<sup>31</sup> Ibid 233.

<sup>32</sup> The Civil Code, Art. 3132(b).

<sup>33</sup> Sandu & Pagarin (n23).

<sup>34</sup> Ibid.

<sup>35</sup> Ibid 905.

Another criterion that makes administrative contracts distinct is the unequal treatment of the parties to such contracts. It is self-evident that in a private contract, each party is primarily concerned with his or her interests; one party may prefer money, while the other prefers a specific object; one may have work to do, while the other may have services to sell. In a public contract, the contractor also represents his interests, because he will only sign the contract if he believes it will benefit him in some way. However, by entering into such a contract, the administration stands to gain or lose nothing; instead, the latter represents the interests of the public or, of society as a whole, rather than its own.<sup>36</sup> Consequently, the administration, as the party to administrative contracts, is given the authority to control the contract, which includes the potential to adjust the terms of the contracts, amend or terminate them, and so on.<sup>37</sup> Therefore, the unequal treatment of parties to an administrative contract is one characteristic that distinguishes it from an ordinary one.

### **2.1.3 Objects of Administrative Contracts**

The primary goal of administrative contracts with individuals, as discussed in the preceding section, is to meet public or general interest that is subject to the administrative system. Furthermore, in connection with the administrative act, administrative contracts serve as a legal instrument through which some authorities, bodies, and institutions of the public administration system carry out their duties in enforcing the law.<sup>38</sup> Thus, it is self-evident that government administrators are tasked with representing and defending the public interest, and whether acknowledged or not, they are in a position different from private individuals.<sup>39</sup> In other words, while attempting to distinguish between administrative and private contracts, we can see that all distinctions stem from the administrative contract's core object. As the result, the administration is believed to be the guardian of the public's interests in whatever contract it enters into.<sup>40</sup>

As previously stated, the administration, as a party to administrative contracts, is granted the authority to control the contract, including the unilateral power to alter contract terms, amend or

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<sup>36</sup> Mewett (n24) 223.

<sup>37</sup> Ibid 225.

<sup>38</sup> Sandu & Pagarin, (n23).

<sup>39</sup> Rene' David, 'Ethiopian Administrative Contracts' (1967) 4 Journal of Ethiopian law 143, 143.

<sup>40</sup> Mewett (n24) 225.

cancel them and so on. This as mentioned above, eventually makes administrative contracts distinct from ordinary contracts.<sup>41</sup> Therefore, it is because of the object of an administrative contract that the administration has been granted extensive unilateral power to do many things under the contract based on the public interest.

## **2.2 Arbitration**

### **2.2.1 The Concept of Arbitration**

The concept of arbitration can be expressed as an adversarial process whereby an independent third party, after hearing submissions from the disputants, makes an award binding upon the parties.<sup>42</sup> Additionally, arbitration can take a number of different forms, much like other conflict settlement procedures. As a result, it may occur in contractual arbitrations or by the agreement of the disputants in their contract. Also, it may take place either before or after a dispute arises for settling the disputants' dispute through final and binding arbitration.<sup>43</sup>

When we look at the history of arbitration, we can see that it emerged as a result of merchants' demand for it in commerce because it is quick and secret, allowing them to keep their disputes private.<sup>44</sup> Some writers also attempt to describe the concept of arbitration, which is one of the institutions designed to serve as an alternative dispute resolution mechanism that is essential in dispute resolution. Arbitration is thus a process in which a private, neutral third party renders a binding decision on a disputed matter.<sup>45</sup> On the other hand, it makes sense to define arbitration as a voluntary and hetero-compositive dispute-resolution mechanism wherein arbitrability is constructed in relation with the specific legislative texts governing the fields in which arbitration works.<sup>46</sup> Black's law dictionary also defines arbitration as: "A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputant parties and

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<sup>41</sup> Sandu & Pagarin (n23) 905.

<sup>42</sup> Arno Lodder and John Zeleznikow, *Enhanced Dispute Resolution through the use of information technology* (Cambridge University Press 2010) 4.

<sup>43</sup> Michael L. Moffitt and Robert C. Bordone, *The Handbook of Dispute Resolution* (1<sup>st</sup> edn, Jossey-Bass 2005) 318.

<sup>44</sup> Ching-Lang Lin, 'Arbitration in Administrative contracts: Comparative Perspective' (Thèse IEP de Paris, Institut d'Etudes Politiques de Paris 2014) 3.

<sup>45</sup> Moffitt and Bordone (n43).

<sup>46</sup> Alexandra Molina Dimitrijevic, 'Arbitration as a Dispute-solving Mechanism in Public Procurement: A comparative view between Peruvian and Spanish Systems' (unpublished) 4.

whose decision is binding”<sup>47</sup> Apart from that, the theorists define it as a conflict-solving instrument where the parties, by common agreement, decide that a third party, which is not the judiciary, will decide on a controversy.<sup>48</sup>

On the other hand, we can observe that arbitration can be classified into two: namely, ad hoc arbitration and institutional arbitration. The former, which is in other words known as non-administrated arbitration is the type of arbitration that temporarily requires establishment by disputant parties; at the same time, its proceedings are controlled by the disputants.<sup>49</sup> On the other hand, an institutional arbitration or administrated arbitration is an entity that has its own rules which guide it in a proceeding and rendering arbitration awards. Unlike ad hoc arbitration, arbitral proceedings as well as other related issues in institutional arbitration are required to be managed by the institution.<sup>50</sup> For the latter type of arbitration, among the many that can be mentioned here are the International Chamber of Commerce/ICC/, the London Court of International Arbitration/LCIA/, Singapore International Arbitration Center/SIAC/, the Addis Ababa Chamber of Commerce, and the Sectorial Association Arbitration Institute/AACCSA/, and so on.

### **2.2.2 The Salient Features of Arbitration**

The distinctive features of arbitration, as described below, are a result of two factors: first, it resembles litigation in that it has a binding effect and is adversarial; second, it resembles mediation is arranged by the parties and by its very nature it is a private dispute resolving mechanism. The arbitration hearing also takes place in a private conference room as opposed to a public courtroom. Due to the limited discovery in arbitration, it is also less expensive than litigation, similar to mediation.<sup>51</sup> So, unlike mediation, arbitration is a decision-making process. As a result, the arbitrator, like a judge, makes a decision based on the case's merits. Furthermore, in arbitration, the parties do not create their agreement; rather, the arbitrator imposes a resolution

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<sup>47</sup> Henry Campbell, *Black's Law Dictionary* (9th edn. West Publishing Co. 2009) 119.

<sup>48</sup> Dimitrijevic (n46) 3.

<sup>49</sup> Almaw Wolie, *Ethiopian Construction law* (Mankusa Printing Press 2022).

<sup>50</sup> Ibid 470.

<sup>51</sup> Moffitt and Bordone (n43).

on the parties, limited only by the terms of the parties' agreement.<sup>52</sup> Apart from this, arbitration is an adversarial process in which an independent third party, after hearing the parties' arguments, makes a binding award. Regarding the qualification of arbitrators, in some countries such as France and India, the arbitrators are required to have a legal background in some jurisdictions. Arbitrators may, on the other hand, be chosen based on their specific expertise in the subject matter, such as that of an engineer or accountant. Besides, the arbitration process may be the closest thing to a judicial decision.<sup>53</sup> Therefore, arbitration is a reference of a dispute to an impartial person or persons, called arbitrators or arbitrators, for an award to be delivered by the latter based on evidence and arguments presented by the disputants. In addition, unlike litigation, arbitration has different advantages as it is more flexible and adaptable as well as quicker as and more efficient than litigation.<sup>54</sup>

### **2.2.3. The Notion of Arbitrability**

Arbitrability is a concept that refers to the legality of an arbitration agreement or process. Public policy, on the other hand, refers to the laws or standards that the arbitration agreement or arbitral award may or may not violate. As a result, arbitrability and public policy are frequently at odds in arbitration practice; in some countries, a violation of public policy may render a contract arbitrable.<sup>55</sup> Thus, because public policy differs from one country to another, the arbitrability of a particular dispute is likely to differ significantly from one jurisdiction to another.<sup>56</sup> As a result, each state may decide, based on its public policy considerations, which matters may and may not be settled through arbitration. Thus, if the arbitration agreement covers matters that cannot be resolved through arbitration, either under the law of the agreement or the law of the place of arbitration, the agreement is ineffective and unenforceable. Furthermore, if the subject matter of the difference is not arbitrable under the law of the country where enforcement is sought,

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<sup>52</sup> Ibid.

<sup>53</sup> Lodder and Zeleznikow (n42).

<sup>54</sup> Allan Redfern and Martin Hunter, 'Law and Practice of International commercial Arbitration' (1986) 17, cited in Zakarias (n10) 116.

<sup>55</sup> 'Comment' (1990-1991) 65 Tul L Rev 1661, 1663.

<sup>56</sup> Patrick M. Baron and Stefan Liniger, 'A Second Look at Arbitrability, Approaches to Arbitration in the United States, Switzerland and Germany' (2003) 19 Arbitration International 27, 27.

recognition and enforcement of an award may be refused.<sup>57</sup> Insolvency proceedings in Germany, for example, are arbitrable in principle<sup>58</sup> whereas bankruptcy judgments in Ethiopia are not arbitrable at all.<sup>59</sup>

So, when we investigate some countries' legal systems regarding the arbitrability of administrative contract disputes, we can observe how their laws regarding their respective policy justification address the issue. Accordingly, if we look at the German legal system, we can understand that matters of antitrust claims, securities, claims, Intellectual Property Rights, Insolvency proceedings, and so on are arbitrable.<sup>60</sup> At the same time, the USA legal system is not different from that of Germany regarding arbitrable matters.<sup>61</sup> In addition, it can be learned from certain literature that disputes which emanate from administrative contracts disputes are arbitrable matters in the Jordanian legal system.<sup>62</sup>

#### **2.2.4 Merits and Shortcomings of Public Law Arbitration**

It is common to expect advantages and disadvantages from public law arbitration or the arbitrability of disputes that arise from administrative contracts. Accordingly, the followings are some of the merits that are mentioned below.

One of the advantages of public law arbitration is its procedural expediency in comparison to administrative court proceedings, which can sometimes border on denial of justice due to excessive delay. As a result, arbitration emerges as a supportive institution of administrative justice, enabling the judiciary to operate more effectively by relieving some of its burdens, with the ultimate goal of improving the rule of law.<sup>63</sup> Another significant advantage of public law arbitration is that it satisfies the demand for a more participatory public administration to

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<sup>57</sup>Allan Redfern and Martin Hunter, *Law and Practice of International commercial Arbitration* (1<sup>st</sup> edn, Sweet & Maxwell 1986) 105.

<sup>58</sup> Baron and Liniger (n56) 42.

<sup>59</sup> The Arbitration and Conciliation Proclamation, Art. 7(4).

<sup>60</sup> Baron and Liniger (n56) 36 – 42.

<sup>61</sup> Ibid 53.

<sup>62</sup> Al-Shibli (n28) 2.

<sup>63</sup> Dimitrios I. Sideris, 'The Subsumption of Administrative Disputes Under Arbitration Within the Greek Legal Order' (LLM Thesis, International Hellenic University 2008) 15.

modernize its structure and function. In this light, reducing traditional government unilateralism is seen as an important step toward the consolidation of a civil service system that is more receptive to citizens' wishes, and thus more compatible with the principle of individual protection.<sup>64</sup> Furthermore, arguments about the simplicity and speed of the proceedings before the arbitral tribunal in comparison to the formal and complicated court proceedings, which cause significant delays and often higher costs, are added to the advantages of public law arbitration. Besides that, the confidentiality principle that underpins arbitral proceedings attracts contracting parties with a strong market reputation because it ensures that sensitive financial data and other confidential company information will not be made public. Aside from that, because a state court is seen as a state apparatus and the State's counterparty feels more secure before an arbitral tribunal, the arbitration of disputes may also help the parties reach a settlement that would be even more profitable solution owing to psychological considerations.<sup>65</sup>

The other benefit of arbitrability in administrative contract disputes is that the government loses its official status and has no special privileges during the arbitration process, as it is treated on an equal footing with the other disputing party. As a result, opponents of using arbitration in government contract disputes argue that the removal of extraordinary powers violates one of the fundamental principles of administrative contracts.<sup>66</sup> Furthermore, providing investors with the option of resolving potential disputes through an impartial process that treats both parties equally is an effective way of safeguarding their interests. Allowing administrative contract disputes to be arbitrated can thus be seen as a factor that helps in attracting investment.<sup>67</sup>

Another advantage of arbitration is the freedom to select arbitrators. As we all know, disputant parties in public litigation do not have the freedom to select a court or judge, whereas, in arbitration, the parties are free to select an arbitrator to resolve their disputes.<sup>68</sup> On the other hand, it is obvious that, unlike court judgments, arbitral awards are final and binding in many legal systems; as a result, it is advantageous in terms of time savings.<sup>69</sup> In general, the merits of

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<sup>64</sup> Ibid.

<sup>65</sup> Ibid 16.

<sup>66</sup> Al-Shibli (n28).

<sup>67</sup> Ibid.

<sup>68</sup> Wolie (n49) 472.

<sup>69</sup> Ibid 473.

settling administrative contract disputes through arbitration stem from the general benefit of alternative dispute resolutions.

On the other hand, resolving administrative contract disputes through arbitration has demerits. As a result, since arbitral proceedings are not *ab initio* faster than court proceedings, and because delay may affect arbitral tribunals in the same way it affects state courts, especially in cases where the exact time for the maximum duration of arbitration is not agreed upon in advance between the parties, or in cases where a party seeks to purposefully delay the issuance of the arbitral award for personal gain. Furthermore, in terms of the decision-making body's impartiality, it could be argued that, in comparison to an administrative court, an arbitral tribunal does not bear *ipso facto* more elaborate guarantees of impartiality.<sup>70</sup> A major drawback of public law arbitration compared to administrative litigation refers to the means that the private individual has to achieve the provisional suspension of the force of the administrative act which relates to the arbitrated dispute. The applicant is capable of successfully filing a claim for interim relief, i.e., a suspension request, before the administrative court under certain conditions; however, in some countries, there is no such provision among the arbitral tribunal's competencies.<sup>71</sup>

On the other aspect, a counter-argument to the use of arbitration in administrative contract disputes is that it does not provide the same guarantees as judicial proceedings, particularly because arbitrators are not always lawyers.<sup>72</sup> Also, the possibility to make contradictory awards is another limitation of arbitration. As mentioned in the advantage part above, the proceedings in arbitration are conducted based on confidentiality; as a result, there is a possibility of conflicting awards on the same issues.<sup>73</sup> Moreover, while arbitral awards are by their very nature final and binding, and are widely regarded as a benefit of the dispute-resolution process, they can sometimes result in injustice when unfair awards are made because the right to appeal is limited. As a result, arbitration's exclusion of the right to appeal could be a disadvantage.<sup>74</sup>

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<sup>70</sup> Sideris (n63) 16.

<sup>71</sup> *Ibid* 18.

<sup>72</sup> Al-Shibli (n28) 8.

<sup>73</sup> Wolie (n49) 474.

<sup>74</sup> *Ibid* 475.

In some circumstances being expensive is also the other shortcoming of arbitration. In addition, since most arbitral awards aren't made public, it's not always possible to learn from the experience and avoid similar disputes in the future.<sup>75</sup> In a nutshell, the disadvantages of arbitrating administrative contract disputes stem from the general detriments of alternative dispute resolution.

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<sup>75</sup> Al-Shibli (n28) 8.

## CHAPTER THREE

### ARBITRABILITY OF ADMINISTRATIVE CONTRACTS DISPUTES UNDER THE NEW LAW

#### 3.1. INTRODUCTION

Before delving into the details of the arbitrability of disputes arising from administrative contracts, it is worth taking a look at the Ethiopian administrative contracts law. The laws that regulate administrative contracts have different natures than other types of laws that govern ordinary contracts.<sup>76</sup> Administrative contracts are distinct from ordinary contracts by the fact that the former are governed by special laws that grant powers to administration.<sup>77</sup> Objects of administrative contracts that are mostly stated in the laws are also the distinguishing features of such contracts from the other ones. Therefore, the object of administrative contracts is mainly to meet the public interest.<sup>78</sup> Furthermore, in Ethiopia, the clarification of the rules on administrative contracts was intended to attract foreign firms and capital to the country.<sup>79</sup> On the other hand, the rules which govern administrative contracts in Ethiopia have historically evolved from French administrative law.<sup>80</sup>

Apart from that, it can be generally noted that the provisions on administrative contracts included in Articles 3131-3206 of the Civil Code are used to enunciate the general governing principles of administrative contracting. Also, the provisions of such contracts listed from Arts 3207-3243, Articles 3244-3296, and Articles 3297-3306 in the Civil Code are dedicated to laying down detailed rules on the three classical types of administrative contracts: concessions of public services contracts, public works procurement contracts, and public supplies contracts, respectively.

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<sup>76</sup> Sandu & Pagarin (n23) 906.

<sup>77</sup> Mewett (n24) 225.

<sup>78</sup> Sandu & Pagarin (n23) 905.

<sup>79</sup> David (n39) 145.

<sup>80</sup> Hagos, 'Conflicting Legal Regimes Vying for Application' (n19) 7.

On the other hand, arbitrability is a matter of national public policy. So, because of public policy consideration,<sup>81</sup> the arbitrability of disputes emanating from administrative contracts differs from country to country. Taking this into consideration, Ethiopia has again adopted a new Law<sup>82</sup> that regulates the arbitrability of disputes that include administrative contract disputes. Therefore, the nature of administrative contracts in Ethiopia, as well as the limitations of the rules that regulate them will be addressed in-depth in this chapter. This chapter will also go through the arbitrability of disputes arising from administrative contracts under the new Proclamation.

### **3.2.1 Administrative Contracts in the Ethiopian Law**

As an attempt is made to discuss in chapter two of this paper, the concept of an administrative contract is related to the public interest, in which performance of the contract is expected for public service and the parties intend that all rights and liabilities are governed by special rules.<sup>83</sup> When we look at the concept of administrative contract in Ethiopia, we can see that it was introduced in an arbitration case brought by a French company called ‘*Societe Riblet*’ against the then Imperial Government of Ethiopia at the end of the 1920s.<sup>84</sup> Following this event, in the 1950s, the late Professor Rene David, a leading comparative lawyer at the time, was tasked with drafting a modern Civil Code for Ethiopia. As a result, the French Professor felt compelled to include some provisions in administrative contracts law, which were drawn heavily from the French administrative contracting system.<sup>85</sup>

The Ethiopian Civil Code defines a contract in general as, “an agreement whereby two or more persons themselves create, vary, or extinguish the obligation of a proprietary nature.”<sup>86</sup> In addition to that, contracts in general, are required to comply with the requirements of consent, capacity, object, and form, if any.<sup>87</sup> Also, it is stated under sub-article 1 of article 3131 of the Civil Code that administrative contracts are supposed to be governed by the provisions of this Civil Code which relate to contracts in general or special contracts. Therefore, since an

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<sup>81</sup> Baron and Liniger, (n56).

<sup>82</sup> The Arbitration and Conciliation Proclamation.

<sup>83</sup> Mewett (n24).

<sup>84</sup> Hagos, ‘Conflicting Legal Regimes Vying for Application’ (n19) 1.

<sup>85</sup> Ibid.

<sup>86</sup> The Civil Code, Art. 1675.

<sup>87</sup> Ibid Art. 1678.

administrative contract is, a contract that shares all of the elements of the general contract which are defined above, for a strong reason, the former is required to comply with those requirements mentioned above.<sup>88</sup> However, this does not negate the fact that administrative contracts must meet additional criteria in addition to the ones listed above to be classified as such. That is to say, the requirements of an administrative contract go beyond those outlined above, as evidenced by provisions of the Civil Code dealing specifically with administrative contracts. Accordingly, the definition for administrative contract is provided as “a contract shall be deemed to be an administrative contract where it is expressly qualified as such by law or by the parties; or it is connected with an activity of the public service and implies permanent participation of the contracting administrative authorities in the execution of such services.”<sup>89</sup> From the preceding definition, it can be noted that if parties to the contract expressly qualify it as an administrative contract, such contract is assumed to be an administrative contract. Also, for a contract to be qualified as the administrative contact, it should contain one or more provisions that could only have been inspired by urgent consideration of the general interest extraneous to relations between private individuals.<sup>90</sup>

Therefore, what can be inferred from the preceding explanation is that the Ethiopian Civil Code provides the yardsticks that help us to differentiate an administrative contract from ordinary contracts. As mentioned above, the three classical types of administrative contracts which are enshrined in the Civil Code are concessions of public services contracts, public works procurement contracts, and public supplies contracts. Under the rules that regulate such kinds of contracts, there are specific principles that differentiate them from ordinary contracts. So, unlike ordinary contracts, in an administrative contract, to ensure the continuity of providing public service or utility, the private part of the contract cannot stop the performance on the condition that the administrative authorities do not perform their obligations.<sup>91</sup> In ordinary contracts,

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<sup>88</sup> Mergo (n3) 8.

<sup>89</sup> The Civil Code, Art. 3132 (a), (b).

<sup>90</sup> Ibid Art. 3132(c).

<sup>91</sup> Ibid Art. 3177.

however, correlative obligations are due for performance, and either of the parties may abstain from the performance of his obligations if the other party does not perform his obligations.<sup>92</sup>

On the other hand, it can be understood from Articles 3179-3193 of the Civil Code that the government has several rights that it can exercise in its contractual relations with private contractors. As a result, the administrative agency has the power to vary those administrative contracts when such variations justify the public interest.<sup>93</sup> Additionally, even if the private parties are not at fault, the agency may terminate the contracts if they are useless to the public service.<sup>94</sup> Furthermore, there should be two prerequisites for state action to amend contractual terms: there should be no contractual clause barring the administrative agency from doing so, and there should be a change of circumstances that necessitate a contractual adjustment in the public interest.<sup>95</sup> The administrative authority, on the other hand, cannot be relieved from responsibility for carrying out the aforementioned measures; as a result, it owes compensation to the private party that is a party to the administrative contract.<sup>96</sup> There are also some other prerogatives given to the administrative authorities that they can exercise in their contractual relations with private contractors. In nutshell, the above explanations show that the object of administrative contracts is the most important factor that distinguishes them from ordinary contracts.

Also, when we examine whether public enterprises are included in the definition of an administrative agency or not, we may go to the federal government for guidance in setting public procurement procedures and establishing a supervisory agency proclamation.<sup>97</sup> Accordingly, a procuring entity is a government agency that is partially or entirely funded by the federal government's budget.<sup>98</sup> Under the Ethiopian Federal Government Procurement and Property Administration Proclamation No.649/2009” that has repealed the above mentioned proclamation,

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<sup>92</sup> Ibid Art. 1771(1).

<sup>93</sup> Ibid Art. 3179.

<sup>94</sup> Ibid Art. 3180.

<sup>95</sup> Hagos, ‘Conflicting Legal Regimes Vying for Application’ (n19) 12.

<sup>96</sup> The Civil Code, Art. 3181.

<sup>97</sup> Federal government determining the procedures of public procurement and establishing its supervisory agency proclamation, proc. No.430, 2005, Federal Negarit Gazette, 11th year, No.15, 2005.

<sup>98</sup> Ibid Art. 2(f).

public body is defined as any public body, which is partly or wholly financed by the Federal Government budget, higher education institutions and public institutions of like nature. Therefore, if these institutions enter into a contract with private persons, the contract is to be classified as administrative contract.

### **3.2.2 Shortcomings of the Law of Ethiopian Administration Contracts**

In many countries, the laws that regulate administrative contracts are public.<sup>99</sup> For example, in France, the law of administrative contracts is different from privacy laws and is categorized under public law.<sup>100</sup> The reason for this is object the contract; thus, the object of administrative contract is, the performance of some service in the public interest.<sup>101</sup> When it comes to the Ethiopian context, we can see that the Civil Code contains the rules that govern administrative contracts. Accordingly, the rules governing the formation and performance of such contracts are found in articles 3131 to 3306 of the Civil Code. As a result of this fact, in incorporating rules of administrative contracts, Ethiopia appears to be distinct from other civil law countries.<sup>102</sup> Based on this fact, David argued that the incorporation of the rules governing administrative contracts in the Civil Code was improper.<sup>103</sup> The Ethiopian Civil Code, on the other hand, is a product of French legal science in terms of its organization, concepts used, style of rule formulation, and method of interpretation and application; however, it differs from the latter in terms of the content of the rules it contains. So, the rules that regulate administrative contracts in Ethiopia are in many ways different from that of French administrative law.<sup>104</sup>

Another drawback in the rules of administrative contracts is that Rene David's preliminary draft did not go through a discussion with Ethiopia's Codification Commission. So, unlike the enactment process of other laws, the preliminary document automatically became a proposal for the Commission without any changes, and it had also been adopted by the parliament without any changes.<sup>105</sup> As a result, the problems described below have occurred. One of the

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<sup>99</sup> Sandu & Pagarin (n23) 906.

<sup>100</sup> Mewett (n24).

<sup>101</sup> Ibid 225.

<sup>102</sup> David (n39) 145.

<sup>103</sup> Ibid 143.

<sup>104</sup> Ibid 146.

<sup>105</sup> Ibid.



are also supposed to govern administrative contracts. So, it is in special circumstances that the provisions outlined in articles 3131 to 3306 of the Civil Code should then apply to administrative contracts.<sup>108</sup> It is clear from this discussion that the rules governing administrative contracts are not only enshrined in private law but also dominated by it. Apart from that, it is self-evident that administrative contracts have become more important in recent years in all countries as a result of the increased functions assumed by a state and its administrative authorities<sup>109</sup>; however, because the rules governing administrative contracts were enacted 62 years ago, and the country's feudal government was not oriented as such at the time, it is possible to expect that the rules have flaws. Furthermore, because the concept of the administrative contract was a new phenomenon in Ethiopia at the time the rules were adopted<sup>110</sup>, and because its dynamism is not the same as it was, it is easy to conclude that the rules incorporated in the Civil Code for regulating administrative contracts are riddled with flaws.

### **3.3. Arbitrability of Administrative Contracts Disputes in Ethiopia**

#### **3.3.1 The Laws**

Before going into the specifics of the arbitrability of disputes resulting from administrative contracts under Ethiopia's new Arbitration and Conciliation Law, it is important to have a general overview of arbitrability in Ethiopian laws. In the country's legal history, it could be noted that the Civil Code has for the first-time enshrined rules that govern arbitration. So, if we try to see articles 3325 to 3346 of the same Code, we could understand how the matters of arbitrations were regulated accordingly. At the same time, some provisions are also included in the Civil Procedure Code that was supposed mainly to govern the procedural aspect of the arbitration proceedings.<sup>111</sup> However, it is evident that currently, the above-mentioned rules are almost repealed by the new Arbitration and Conciliation Law.<sup>112</sup> As a result, the issues of

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<sup>108</sup> The Civil Code, Art. 3131(2).

<sup>109</sup> David (n39) 144.

<sup>110</sup> Hagos, 'Conflicting Legal Regimes Vying for Application' (n19).

<sup>111</sup> See, Arts. 315 - 319 and 350 - 357 of the Civil Procedure Code that state the proceedings of hearing in arbitration, and the procedure in an appeal from the arbitral award respectively.

<sup>112</sup> Arbitration and Conciliation Proclamation, Art. 78(1)(2).

arbitration are now mainly regulated by the new Law, and the discussions made below are also mainly based on this Law.

Though arbitration is generally voluntary in the Ethiopian legal system, a few laws do make it mandatory on rare occasions. For instance, Article 62(1) of the Cooperative Societies Proclamation No. 985/2016, states that disputes involving cooperative societies that are not resolved through conciliation must be referred to arbitration. However, in most cases, the option to choose or not to choose arbitration is left to the disputant parties. In the settlement of disputes arising out of a marriage and irregular union, for instance, arbitration is used as an optional mechanism for resolving those disputes.<sup>113</sup> Furthermore, under article 15(3) of the Chambers of Commerce and Sectorial Association Establishment Proclamation No. 341/2003, Regional Chambers of Commerce and Sectorial Associations are given the authority to resolve disputes arising from business transactions between members through arbitration if the parties so request. Disputes arising from collective labor disputes, such as issues of wages and other benefits not determined by work rules or collective agreements; establishment of new working conditions; procedures for employment and promoting workers; and so on, are also, arbitrable matters if the parties choose arbitration.<sup>114</sup>

On the other hand, there are currently some cases in Ethiopia that are expressly prohibited by law from being arbitrated. Therefore, among the entirely non-arbitrable matters under the Proclamation are all land cases, including leases, criminal cases, tax cases, bankruptcy judgments, decisions on business organization dissolution, and so on.<sup>115</sup> It is also for the first time that the afore-mentioned substantive Law prohibits those matters from being arbitrable.

When we come back to the arbitrability of disputes emanating from administrative contracts, previously, Article 315(2) of the Civil Procedure Code was the key provision that has been a source of debate among academics and practitioners. So, as the mentioned provision states that arbitration may not take place in relation to administrative contracts, as defined in Civil Code article 3132, or in any other circumstance where it is banned by law, different academicians had

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<sup>113</sup> See for example Art. 82(2), and articles 119 -122 of the Revised Family Code Proclamation No. 213/2000 that infer arbitration of disputes emanating from marriage and irregular union are permissive.

<sup>114</sup> Labor Proclamation, 2019, Art, 144(1), Proc. No.1156, Fed. Neg. Gaz., year 25, no. 89.

<sup>115</sup> Arbitration and Conciliation Proclamation, Art. 7.

argued in different ways. Zekarias Kenea for example argued that disputes emanating from administrative contracts are arbitrable.<sup>116</sup> The argument of Mulisa Mergo<sup>117</sup> in the same issue is also, not different from the position of Zekarias. On the contrary, Tecle Hagos argued that arbitrability of administrative contract disputes is prohibited by Article 315(2) of the Civil Procedure Code.<sup>118</sup>

Apart from this, the Federal Supreme Court Cassation Bench itself has taken the two opposite positions in interpreting Article 315(2) of the Civil Procedure Code. As a result, in the case of ZemZem PLC and Illubabor Bureau of Education, the Bench's stand was towards the arbitrability of administrative contracts dispute.<sup>119</sup> However, the Bench changed its position in rendering judgment on the case Tana Water Well Drilling and Industry Ltd. and Dire-Dawa Administration water and sewerage Authority, by saying that disputes that arise from administrative contracts are not arbitrable.<sup>120</sup> Thus, the scholarly arguments and courts' judgments were implying that what matters in determining whether disputes emanating from administrative contracts are arbitrable or otherwise is the interpretation of article 315 of the Civil Procedure Code and articles 3325-3346 of the Civil Code. However, since the above-mentioned rules are repealed by the Proclamation,<sup>121</sup> the issue of arbitrability of disputes resulting from administrative contracts will be dealt with by the latter.

As mentioned above, it is the Proclamation that nowadays governs the issues of arbitrability of disputes arising from administrative contracts. As stated in the preamble, one of the Proclamation's purposes is to offer a general framework for identifying arbitrable matters, managing arbitration proceedings, and carrying out decisions while taking into account the country's objective conditions. As has been in detail discussed below, these objectives are also reflected in the HOPRs' minutes of the draft proclamation as well as in the succinct justification of the Office of the Prime Minister provided on the draft.

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<sup>116</sup> Kenea (n10) 119.

<sup>117</sup> Mergo (n3) 11.

<sup>118</sup> Hagos, 'Arbitrability of Government Construction Disputes' (n11).

<sup>119</sup> ZemZem PLC (n12).

<sup>120</sup> Tana water Well Drilling and Industry Ltd. (n13).

<sup>121</sup> Arbitration and Conciliation proclamation, Art. 78(1), (2).



disputes in Ethiopia is the Ethiopian civil aviation proclamation.<sup>122</sup> According to article 10(18) of the same proclamation, the Ethiopian civil aviation authority has the power and duty to enter into contracts, sue or be sued in its name, and refer disputes to arbitration when they arise. On the other hand, the authority is an autonomous government agency having its legal personality whose accountability is to the Ministry of Transport and Communications<sup>123</sup> now called the Ministry of Transport and Logistics. So, a contract that is entered into with this government authority and a private party is an administrative contract. As a consequence, since the authority has the power to submit a dispute arising from such a contract to arbitration, it is possible to conclude that disputes which arise from certain administrative contracts are arbitrable. On the other hand, if we look at the proclamation that was enacted to establish an agency for government houses,<sup>124</sup> and, again has been respectively named and established as “The Federal Housing Corporation and public enterprise”<sup>125</sup>, we can note that a similar provision is included therein. Accordingly, the provision of the Agency for Government Houses law confers the power and the duty to own property, enter into a contract, sue, and be sued in its name including settlement of disputes through arbitration for the Agency for Government Houses. On the other hand, the authority is an autonomous government agency having its legal personality whose accountability is to the Ministry of Work and Urban Development.<sup>126</sup> So, like the civil aviation proclamation, the Agency for Government Houses Establishment Proclamation has also enshrined a provision that indicates the possibility of arbitrarily disputes that emanate from administrative contracts.

Apart from the above-mentioned laws, the Ethiopian water resource proclamation also contains an article indicating that administrative contract disputes should be resolved through

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<sup>122</sup> Civil Aviation Proclamation, 2008, Proc. No. 616, Fed. Neg. Gaz., year 5, no. 23. (Hereinafter, Civil Aviation Proc.)

<sup>123</sup> Ibid Art, 7.

<sup>124</sup> Agency for the Government Houses Establishment Proclamation, 2007, Art. 6(11), Proc. No. 555, Fed. Neg. Gaz., year 14, no. 2.

<sup>125</sup> Federal Housing Corporation Establishment Council of Ministers Regulation, 2017, Art. 2(1), Reg. No. 398, Fed. Neg. Gaz., year 23, no. 19.

<sup>126</sup> Agency for the Government Houses Establishment Proclamation, 2007, Art. 3, Proc. No. 555, Fed. Neg. Gaz., year 14, No. 2.

arbitration.<sup>127</sup> According to the proclamation, the supervising body, which is defined as the ministry of water resource or an organ delegated by the ministry in article 2(8) of the proclamation, is empowered to resolve disputes that may arise between it and the permit holder through arbitration if an agreement cannot be reached through negotiations.<sup>128</sup> According to Article 36 of the Council of Ministers Ethiopian Water Resources Management Regulations No. 115/2005, which was issued under Article 30 of the Ethiopian Water Resources Management Proclamation No. 197/2000, there are procedural activities that are supposed to be followed when conducting the arbitration process. In conclusion, the aforementioned proclamation and regulation demonstrate that disputes that result from administrative contracts are permitted to be submitted to arbitration.

The other law from which arbitrability of administrative contract disputes could be inferred is the Ethiopian Federal Government Procurement and Property Administration Proclamation No.649/2009. As per article 6(1) of this proclamation, if this proclamation conflicts with a duty of the Federal Government of Ethiopia arising out of an agreement with one or more other states, or with an international organization, the provisions of that agreement shall prevail. Therefore, any dispute that might arise from such agreements, regardless of other rules of the proclamation, that forbid it, is to be settled through arbitration if the Federal Government of Ethiopia decides in an agreement with one or more other states or an international organization that disputes arising from that agreement to be resolved through arbitration. As a result of the preceding justification, it is possible to conclude that administrative contract disputes are arbitrable under such circumstances.

Public-private partnership proclamation No. 1076/2018, is also among the other laws that permit the settlement of disputes resulting from administrative contracts through arbitration. As defined in article 2(12) of the same proclamation, a public-private partnership means: “a long-term agreement between a contracting authority and a private party under which a private party: undertakes to perform a public service activity that would otherwise be carried out by the contracting authority and so on.” On the other hand, while a contracting authority is defined as,

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<sup>127</sup> Ethiopian Water resource Management Proclamation, 2000, Art. 9(4), Proc. No. 197, Fed. Neg. Gaz., year 6, no. 25.

<sup>128</sup> Ibid Art. 9(3).

“a public body or public enterprise ...”<sup>129</sup>, a private party is defined as, “a party that enters a public-private partnership agreement with the contracting authority.”<sup>130</sup> Apart from this, the definition of a project agreement is provided as: “the public-private partnership agreement and other agreements entered into between the contracting authority or another public entity and the private party for the project.”<sup>131</sup> Based on the foregoing definitions, it is possible to conclude that public-private partnerships and project agreements are administrative contracts. As a result, if disputes arise between the contracting authority and a private party over these administrative contracts, they may be settled by arbitration, notwithstanding any provision in any existing law to the contrary.<sup>132</sup> Also, in other laws, there are provisions<sup>133</sup> that in the same manner as discussed above, permit arbitrability of disputes emanating from administrative contracts.

On the other side, in the construction sector where any government body or agency is a party, there is a clue where disputes that arise from a construction contracts/administration contract/ could be settled through arbitration. For example, if we examine the Ethiopian Roads Authority Regulation, we can infer that disputes that arise from administrative contracts could be submitted to arbitration.<sup>134</sup> That is to say, because the Roads Authority's chief executive is entrusted with the authority to resolve disputes that may arise about road constructions in which a private person is a party to the construction contracts outside of the courts, it is logical to assume that those disputes will be resolved through arbitration. Furthermore, as indicated in the Ministry of Works and Urban Development's Standard Conditions of Construction Contract (1994 Edition), there is a possibility that conflicts arising from administrative contracts may be submitted to arbitration. Before they are referred to arbitration, disputes that arise from construction contracts are required to be resolved by a consulting engineer who is assumed to act as a quasi-arbitrator.

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<sup>129</sup> Public-Private Partnership Proclamation, 2018, Art, 2(2), Proc. No. 1076, Fed. Neg. Gaz., year 24, no. 28.

<sup>130</sup> Ibid Art, 2(6).

<sup>131</sup> Ibid Art, 2(7).

<sup>132</sup> Ibid Art, 61(6).

<sup>133</sup> See article 76(2) of the Mining Operations proclamation No. 678/2010, article 38(b) of the Energy Proclamation No. 810/2013, and article 62 of Cooperative Societies Proc. No. 985 that impliedly permit disputes arising from administrative contracts to be arbitrable.

<sup>134</sup> Ethiopian Roads Authority Re-establishment Council of Ministers Regulation, 2011, Art, 10(2)(h), Reg. No. 247, Fed. Neg. Gaz., year 17, no. 81.

However, as stated in Clause 67 of the Standard Conditions of Contract, any dispute in respect of which the Engineer failed to give a decision or has given a decision, but either party is dissatisfied with it, is entitled to refer the case to the Ministry of Works and Urban Development for final settlement through arbitration. From the foregoing explanation it can be noted that administrative contract disputes can be resolved through arbitration. However, as the Conditions of Construction Contract suggested that a legal person, namely, the Ministry of Work and Urban development to be an arbitrator, it had a problem. This is because natural person, not legal person, mostly required to be an arbitrator. Article 2(6) of the Proclamation also states that natural person is to be an arbitrator in arbitration. The other problem of the mentioned Standard was that the party to the dispute was supposed to be an arbitrator for its disputes resolution which ultimately violates the principle of neutrality of and arbitrator. Almaj also opposes this kind of arbitration as it violates the principle of neutrality.<sup>135</sup> In addition to this, not giving an option to the other party for appointing arbitrator is another problem of the Standard. Aside from that, because the aforementioned Standard is eventually replaced by the 2011 PPA General Conditions of Contract, which omits the resolution of construction disputes by arbitration, nowadays, it seems useless to examine the arbitrability of administrative contracts in this sector. In a nutshell, arbitration of such disputes is not permissible under the existing Standard.

Thus, the review of the above-mentioned laws can show us that administrative agencies may use arbitration as a mechanism to resolve disputes that arise from the legal relationships they enter into with private parties. However, except for the Public-Private Partnership Proclamation, those laws that attempt for disputes resulting from administrative contracts to be resolved through arbitration appear to lack clarity. As it can be noted from the provisions explained above, each proclamation does not specifically address the arbitrability of administrative contract disputes. Moreover, the provisions discussed in detail above do not specify whether or not the anticipated disputes are administrative contract disputes. So, we could not explicitly find such expressions unless inferred from the context of the respected laws. For instance, if we look at article 6(11) of the Agency for Government Houses Establishment proclamation, it stipulates: “the Agency for Government Houses shall have the power and the duty to own property, enter into a contract, sue and be sued in its name, including the settlement of disputes through arbitration.” So, from this provision, we could not see an expression that explicitly specify about administrative contract

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<sup>135</sup> Wolie (n49) 508.

disputes and their resolution through arbitration. However, since the aforementioned government agency is authorized to enter into contracts and such contracts are generally considered as administrative contracts, at the same time, since the agency is empowered to let administrative contract disputes to be resolved through arbitration, it can be concluded that disputes arising from administrative contracts are arbitrable. Also, the other provisions of the aforementioned proclamations concerning the arbitrability of administrative contract disputes are not different from the justified one. Moreover, it is evident that the laws discussed above were all passed prior to the Arbitration and Conciliation Proclamation. As a result, we do not foresee improvement in the latter's arbitrability of administrative contract disputes. In contrast, the Public-Private Partnership Proclamation appears to be better in permitting administrative contract disputes to be arbitrated. A public-private partnership, as defined in article 2(12) of the Proclamation, is a long-term agreement between a contracting authority and a private party under which the private party undertakes to perform a public service activity that would otherwise be performed by the contracting authority, etc. As a result, such an agreement is typically referred to as an administrative contract. Furthermore, regardless of any provision in any existing law to the contrary, disputes arising from those administrative contracts are intended to be resolved by arbitration.<sup>136</sup> Therefore, it appears that this Proclamation is more explicit in terms of permitting administrative contract disputes to be resolved through arbitration.

On the other hand, even though disputes arising from administrative contracts are in principle prohibited from being arbitrable,<sup>137</sup> the policy justification for restricting those kinds of disputes from being arbitrable is not clearly or adequately stated in any document. In this regard, the study has made an effort to look at the Proclamation's minutes and brief justifications. As a result, the Office of the Prime Minister has delivered a short explanation about the importance of the draft proclamation in 2013 E.C. Page 4 of this document states that it is in the national interest to forbid arbitration of conflicts that were covered by article 6 of the draft, which ultimately became article 7 of the Proclamation. As a result, even though many disputes are exempt from arbitration under that clause, the policy's reasoning is insufficient. Additionally, the study made an effort to review the minutes that the Standing Committee took on November 9

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<sup>136</sup> The Arbitration and Conciliation Proclamation, Art. 61(6).

<sup>137</sup> Ibid Art, 7(7).

and 18 of 2013 E.C. during the time that the draft was made open to public discussion. However, there was no discussion of a policy justification for barring arbitrability of disputes arising from administrative contracts in principle, rather than discussing the general significance of ADR. Apart from this, no reason for limiting arbitrability of administrative contract disputes is provided in the Resolution drafted by the Standing Committee<sup>138</sup> except for correcting the misspelled Amharic version of sub-article 7 of article 7 of the Proclamation. The policy reason for restricting arbitrability of disputes that emanate from administrative contracts is therefore extremely general and highly limited; as well as, included within other non-arbitrable matters. In addition to this, for this subject matter, i.e., for prohibiting disputes emanating from administrative Contracts from arbitrability, the concept of "public interest", is not defined under the Proclamation. So, for that purpose the public interests and the critical ones that should not go to arbitration should have been defined and identified. Besides, as can be seen from the minutes, there is no explanation of the public's interest or national interest in this matter. Therefore, the Proclamation's failure to define public interest poses another problem concerning the arbitrability of administrative contract disputes.

Interviews made with some lawyers<sup>139</sup> also reveal that the policy justification of restricting arbitrability of disputes that arise from administrative contracts was not raised during the public discussion of the draft. As a result, Yohannes explained that despite he was participating in the drafting process of the Proclamation, the issue of public policy regarding the restriction of arbitrability of administrative contract disputes was not expressly raised in the discussion. However, he suggests that restricting the arbitrability of disputes that emanate from administrative contracts is proper. His justification is that an administrative contract is not the same as a private contract or a typical business-based contract or trade, as the latter is more concerned with profit than with public interest. So, according to Yohannes, because administrative contracts have a basic element of public interest, which includes sovereignty, national security, national interest, and other key national issues, limiting disputes that arise from such contracts is unavoidable; however, the restriction should be in exception and with a defined

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<sup>138</sup> FDRE Standing Committee of House of Peoples' Representatives, Resolution No. 6. 2013.

<sup>139</sup> Interviews with Yohannes W/gebreal, Director of Addis Ababa Chamber of Commerce and Sectorial Association, (Addis Ababa, Ethiopia, 25 March 2022.), and Mister Mohamed, Senior Legal Expert of Addis Ababa Chamber of Commerce and Sectorial Association, (Addis Ababa, Ethiopia, 25 March 2022)

purpose, rather than in principle. As a result, as Yohannes points out, the Proclamation contains a flaw in this aspect. Mister Mohamed, on the other hand, regrets that, despite the Addis Ababa Chamber of Commerce and Sectorial Association issuing a recommendation letter for such disputes to be arbitrable, the Parliament or HOPRs were unable to consider it. She also said that, despite the fact that the Proclamation was expected to solve problems with existing laws, it was unable to do so. Mister also criticizes the Proclamation since it is unclear what problems it aims to address in the subject matter. As a result, Mister believes that the Proclamation has not resulted in substantial change because the policy justification is unclear and it does not expressly permit the submission of construction disputes to arbitration. Interviews with some other lawyers<sup>140</sup> similarly revealed that the restriction of arbitrability of such kinds of disputes is improper. For instance, Filipos argues that it would be disadvantageous to permit arbitration of administrative contract disputes in exceptions to general prohibitions since doing so would require a drawn-out and time-consuming legislative process that would ultimately prove ineffective. On the contrary, he suggests that allowing those matters to be arbitrable in principle while limiting in exceptions by enumerating the situations clearly and objectively in a single proclamation is critical because it provides a favorable atmosphere for arbitration. Filipos also believes that permitting administrative contract disputes to be arbitrated is more advantageous if the subject of such contracts is predominantly commercial. An Interview with Michael Teshome<sup>141</sup> on the other hand, reveals the narrow definition of an administrative contract under article 3132 of the Civil Code which was enacted six decades ago is another gap in settling disputes emanating from administrative contracts through arbitration. Additionally, he makes the argument that even if the administrative contract is dynamic, it is problematic not to redefine the law of administrative contracts. Mr. Michael, in contrast to Mrs. Mister, argues that the Proclamation has brought about change. The reason for this is that article 315(2) of the Civil Procedure Code, which prohibited arbitration of disputes arising from administrative contracts,

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<sup>140</sup> Interviews with Filipos Aynalem, Lawyer and Legal Counsel (Addis Ababa, Ethiopia, 26 March 2022), Aschalew Asfaw, Director of Legal Affairs of the Ethiopian Roads Administration (Addis Ababa, Ethiopia 04 April 2022) and Sintayehu Zeleke, Lawyer and Legal Counsel (Addis Ababa, Ethiopia, 28 March 2022).

<sup>141</sup> Interviews with Michael Teshome, Director of Ethiopian Mediation and Arbitration Center (Addis Ababa, Ethiopia, 06 April 2022).

effectively contradicting the principle of contract freedom, has been replaced by article 7(7) of the Proclamation, which permits arbitration of such disputes by special law.

Another flaw in the Proclamation, according to the interviewed lawyers, is the lack of a clear justification for restricting the arbitrability of disputes resulting from administrative contracts in principle. Therefore, the lawyers suggested that the prohibition on arbitrability of administrative contract disputes should have been an exception rather than in principle.

On the other aspect, we can observe that restricting arbitrability in administrative contract disputes appears to contradict the overall aim of the Proclamation. The purpose of the Proclamation as stated in the preamble is to provide a general framework for the identification of arbitrable cases and, to render efficient decisions by reducing the cost of the contracting parties and protecting confidentiality. From this stipulation, it can be therefore inferred that the goal of the Proclamation is to provide a viable atmosphere in which issues can be arbitrated. However, as Article 7(7) of the Proclamation restricts administrative contract disputes from being arbitrable, it appears that the latter is contradicting the general aim of the Proclamation.

Apart from that, the Foreign Arbitral Awards Recognition and Enforcement Proclamation makes it clear that Ethiopia has ratified THE NEW YORK CONVENTION (1958), which governs the recognition and enforcement of foreign arbitral awards. And as stated on page 8 of the Ratifying Explanation for the Convention on Recognition and Enforcement of International Arbitral Awards, the goal of this proclamation is to facilitate the transfer of technology, encourage foreign investment, and enhance investment flow. Additionally, as stated in the preamble, one of the goals of the Arbitration and Conciliation Proclamation is to help in the implementation of international treaties that Ethiopia has ratified and acceded to, one of which is THE NEW YORK CONVENTION (1958). However, because article 7 of the Proclamation prohibits the arbitration of several matters, it appears to be in conflict with the stated goal. It will also be difficult to recognize and enforce foreign arbitral awards because Article 7 of the Proclamation forbids the arbitration of numerous disputes. That is to say, as many matters are excluded from arbitration under the aforementioned provision, and most of those matters are arbitrable in other countries, foreign awards will not be accepted for recognition and execution when such recognition and

enforcement is requested in Ethiopia.<sup>142</sup> As a result, this will ultimately oppose the overall purpose of THE NEW YORK CONVENTION (1958).

It may also be difficult for other laws that have been discussed in this chapter to allow arbitration of administrative contracts disputes due to article 78(3) of the Proclamation which stipulates as, “Other law or customary practices that are inconsistent with this Proclamation shall not be applicable concerning matters provided for in this Proclamation are inapplicable.” For example, in the case of civil aviation issues, it is clear that the law<sup>143</sup> permitting arbitration of administrative contract disputes was enacted before to this Proclamation; consequently, the arbitrability of those disputes could not be applicable under the aforementioned provision. This is because the Proclamation does not acknowledge that civil aviation cases can be arbitrated. The same is true of the other laws that allow for the arbitration of administrative contract disputes. The preceding justification therefore, leads to the conclusion that Article 78(3) of the Proclamation is ambiguous, even when it comes to the arbitration of administrative contract disputes, as stated in Article 7(7) of the same Proclamation.

Above all, the Arbitration and Conciliation Legislation is the first substantive law that expressly prohibits the submission of many matters, including administrative contract disputes, to arbitration. Previously, the Civil Procedure Code<sup>144</sup> was the one that stated administrative contract disputes may not be arbitrated. However, as discussed in this paper, there were extensive debates among scholars and practitioners over the issue of arbitrability of disputes arising from administrative contracts. As a result, some scholars argued that disputes arising from administrative contracts may be resolved through arbitration. Courts were likewise passing judgment in the same way. There were also scholars’ arguments and courts’ judgments on the contrary. To put it another way, the procedural provision was open to all sides of the argument while the Arbitration and Conciliation Law’s provision<sup>145</sup> seems strict on the same issue.

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<sup>142</sup> See Art. 53(2)(e) of The Arbitration and Conciliation Proclamation that provides, “... a foreign arbitral award shall not be recognized or enforced only on the following grounds where the matter on which the award is rendered is not arbitrable under Ethiopian law ...”.

<sup>143</sup> Civil Aviation Proc., Art. 10(8).

<sup>144</sup> The Civil Procedure Code. Art, 315(2).

<sup>145</sup> The Arbitration and Conciliation Proclamation, Art. 7(7).

When we examine the Standard Conditions of Construction Contracts, as discussed above, clause 67 specifies the use of arbitration to settle disputes resulting from construction or administrative contracts. Nevertheless, because clause 5(1)(b) of the same Standard granted Ethiopian Courts exclusive jurisdiction over any matter resulting from a construction contract, it might be determined that this Standard is problematic in settling administrative contract disputes through arbitration. Moreover, as discussed in section 3.1.2 of this chapter, the rules that govern administrative contracts are outdated. One problem that might be mentioned in this regard is a flaw in defining administrative contracts and explaining their objectives properly. This occurred because Rene David's preliminary draft did not go through a discussion with Ethiopia's Codification Commission<sup>146</sup>. Second, as those rules that mainly govern administrative contracts<sup>147</sup> are outdated, they could not be compatible with the current dynamism of the notion of administrative contracts. As a result of these and other problems, settling administrative contract disputes through arbitration is expected to be difficult. In this regard, Almw<sup>148</sup> also believes that the Proclamation appears to be against the arbitrability of disputes involving administrative contracts, even though the current international and domestic arena on the subject matter is in favor of it. He also explains that it is for the first time in substantive law status which has prohibited arbitrability of administrative contract disputes. In essence, he seems to be arguing that the Proclamation is stricter on the arbitrability of administrative contract disputes than the earlier laws.

Therefore, since sub-article 7 of Article 7 of the Proclamation in principle prohibits arbitrability of disputes that arise from administrative contracts, on one hand, on the other hand, since most of the above-mentioned laws that indicate settlement of administrative contracts disputes through arbitration in exception seem not apparent, it can be concluded that Ethiopia's position is not clear in arbitration of disputes that result from administrative contracts. In addition, since other laws that are expected to allow administrative contract disputes to be submitted to arbitration exceptionally are not up to now adopted, promulgating arbitrability of such kinds of disputes<sup>149</sup> seems fruitless. Aside from that, despite the fact that Ethiopia ratified the United Nations

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<sup>146</sup> David (n39) 145.

<sup>147</sup> The Civil Code, Arts, 3131 – 3306.

<sup>148</sup> Wolie (n49) 486.

<sup>149</sup> The Civil Code, Arts, 3131 – 3306.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) and declares the importance of arbitration in the second paragraph of the preamble of the Arbitration and Conciliation Proclamation, limiting such initiation by article 7(7) of the same Proclamation makes Ethiopia more symbolic than functional in resolving disputes that arise from administrative contracts.

In general, while resolving disputes arising from administrative contracts through arbitration, as mentioned above, is becoming increasingly important for many countries; and is important for attracting foreign investments; settling such disputes through arbitration is also important for reducing costs, time, and the workload of courts, as well as maintaining friendly relationships and confidentiality between parties in disputes; Ethiopia, however, appears to be reluctant in adopting and using this mechanism.

### **3.3.2 Opportunities and challenges of the Arbitration and Conciliation Proclamation**

Normally, when a new law emerges, it is expected to have an effect either in opportunities or challenges. So, from the new Arbitration and Conciliation Proclamation, the same thing is to be expected. As far as opportunities are concerned, it is expected to create a conducive environment for investments, especially, foreign investments as well as to help the transfer of technology to the country. This expectation is stated in the first paragraph of the Proclamation's preamble. As a result, the Proclamation's goal is to help the sector expand by settling investment disputes through arbitration. At the same time, the minutes of the draft proclamation that The Standing Committee took on November 9 and 18 of 2013 E.C show that the main purpose of the government is, to attract foreign investments by creating an enabling situation where disputes are to be submitted to arbitration. Also, a justification was made in 2013 E.C by the Office of the Prime Minister on the draft proclamation indicating that the purpose of the same proclamation is, to increase investment flow. Interviews with Yohannes, Mister and Filipos also, show that after the Proclamation comes into an effect, foreign investors are coming to the Addis Ababa Chamber of Commerce and Sectorial Association for asking about the possibility of bringing their disputes if they invest in Ethiopia. In addition, as it can be seen from the New York Convention (1958) ratifying proclamation justification that has been made by the Office of the Prime Minister, the purpose of the government of Ethiopia in ratifying the Convention is to

increase the flow of investments in general and foreign investment in particular, as well as to scale up foreign trade and to enable the transformation of technology to the country.

On the other hand, irrespective of its limitation in arbitrating administrative contract disputes, promulgating the Proclamation has by itself many opportunities. So having a specific legislation that governs arbitration is by itself a virtue. Furthermore, having a particular and thorough law on the subject matter may in the future help for easily amending it in the way that fills its gaps. Apart from this, since the Proclamation permits arbitration centers to be established, either by the government or by a private person,<sup>150</sup> it is an essential step forward in facilitating those disputes to be settled by arbitration. Besides, since the Proclamation provides provisions<sup>151</sup> that regulate the appointment of arbitrators as well as give them the power to determine their jurisdiction, this is a good opportunity for those disputes to be resolved by arbitration. Also, since the Proclamation empowers arbitrators to issue order interim measures,<sup>152</sup> this by itself is another opportunity for the mentioned matter. Last, but not least, since the Proclamation declares arbitral award in principle to be final, or non-appealable,<sup>153</sup> this by itself is a positive development for the sector.

During the study, since the Proclamation has not come to complete implementation, it could not be possible to examine the practical challenges. This is because article 77(1) of the Proclamation stipulates that any arbitration agreement signed before the Proclamation comes into force, that is before April 2, 2021, is supposed to be governed by the previous laws. However, as disputes originating from administrative contracts are in principle barred from being arbitrated,<sup>154</sup> it can be predicted that there will appear different challenges. For instance, identifying those laws that in an exceptional way permit the submission of administrative contract disputes is going to be a challenge. Concerning this, since the rules that govern administrative contracts<sup>155</sup> are not updated and the definition of administrative contract<sup>156</sup> does not get an amendment in a manner

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<sup>150</sup> The Arbitration and Conciliation Proclamation, Art, 18.

<sup>151</sup> Ibid Arts. 11 – 19.

<sup>152</sup> Ibid Arts. 20 – 22.

<sup>153</sup> Ibid Art. 49(1).

<sup>154</sup> Ibid Art, 7(7).

<sup>155</sup> The Civil Code, Arts, 3131 – 3306.

<sup>156</sup> Ibid Art, 3132.

conforming to the current dynamism of administrative contract, it is obvious that challenges will take place during the full implementation of the Proclamation. Filipos also argues that the legal gaps which have been discussed under section 3.2.1 of this chapter are the main challenges of arbitrability of administrative contract disputes when the Proclamation fully enters implementation. Mrs. Mister similarly argues that as there is no significant change in the concerned laws, the existing challenges on the subject matter will be continued. Sintayhu's argument is also not different from the above-mentioned ones. So, since the Proclamation does not in principle allow administrative contract disputes to be submitted to arbitration, and those laws that impliedly permit arbitration in exception are scattered, the expected goal will not be significantly achieved. At the same time, since the provision is very general and does not try to provide any justification for that restriction, this is another challenge in resolving disputes that arise from administrative contacts.

## **CHAPTER FOUR**

### **CONCLUSION AND RECOMMENDATION**

#### **4.1. CONCLUSION**

Like any other ordinary contract, an administrative contract is an agreement made between two or more parties that impose obligations on them to do or not do something or to give something. However, in an administrative contract, the one party to the contract is necessarily an administrative agency, and with aiming at fulfilling the public interests.

In Ethiopia, it is mainly the Civil Code that has incorporated many provisions which regulate the unique characteristics of administrative contracts. So, as defined in article 3132 of the Code, administrative contract is deemed to be unique because it must be expressly qualified as such by law or by the parties, permanent participation of the contracting administrative authorities in the execution of such services and stipulates the interest of the public. Therefore, it can be noticed that the distinctiveness of an administrative contract exemplified there under the Ethiopian Civil Code. However, when we examine the modernity of the rules that govern administrative contracts in Ethiopia, we can note that there are several defects. This is because Rene David's preliminary draft did not go through a discussion with Ethiopia's Codification Commission, rather than becoming a proposal of the Commission without change and being adopted by the parliament without amendment. As a result, one of the shortcomings of those rules is the inconsistency between the English and Amharic versions of article 3132(b) of the Civil Code. As Mr. Michael argues, I agree that it is problematic not to redefine the six decades-old law of administrative contracts even though the administrative contract is dynamic. This is also another problem in determining the public interest which consequently affects the arbitrability of disputes arising from administrative contracts.

In Ethiopia, the rules that govern the settlement of disputes through arbitrations came into existence in the 1960s. Accordingly, articles 3325 - 3345 of the Civil Code were provided for resolving disputes through arbitration. The Civil Procedure Code also contains certain regulations, specifically, Arts. 315–319 and 350–357, which primarily govern the procedural part of arbitration as well as its effect. Apart from that, article 315(2) of the Civil Procedure Code, which prohibits administrative contracts from being arbitrated, was the main topic of debates

among scholars and practitioners. However, from the last year onwards, since article 78(1), (2) the Arbitration and Conciliation Proclamation repealed the above-mentioned rules, the issues of arbitrations in general, and arbitrability of administrative contract disputes, in particular are supposed to be governed by this Proclamation.

When we look at whether disputes resulting from administrative contracts can be arbitrated, we can see article 7(7) of the Proclamation regulates the dispute from administrative contract. Accordingly, the provision stipulates that administrative contract disputes are non-arbitrable unless they are permitted by specific laws. On the other hand, based on the Proclamation's preamble, which states that arbitration helps in rendering efficient decisions by reducing the cost of the contracting parties, protecting confidentiality, allowing the participation of experts, and using a simple procedure that provides freedom to contracting parties, Ethiopia appears to be open to arbitration. Additionally, as the Proclamation has replaced the scattered laws that previously governed arbitration matters, it can be observed that the initiative aims to modernize outdated rules and attract investment. This was also endorsed by the Standing Committee's Resolution No. 6/2013, which was passed to ratify the draft proclamation. However, if we observe article 7(7) of the Proclamation that permits disputes resulting from administrative contracts to be exceptionally arbitrable, we can understand as the provision appears to contravene the above-mentioned goal. In addition, it appears problematic to refer to other laws for the arbitrability of such disputes as no law has yet been passed that permits administrative contractual disputes to be arbitrated after the Proclamation enters into force. On the other hand, it should be emphasized that legislations that directly or indirectly allow the submission of administrative contract disputes to arbitration were passed before that Proclamation. However, other than article 61(6) of the Public-Private Partnership Proclamation, the other laws that have been in detail discussed under section 3.2.1 of Chapter - 3 of this paper, appear to lack adequate clarity in identifying the kinds of disputes and resolving them through that mechanism. So, since those laws do not specify whether or not the anticipated disputes are administrative contract disputes, it leads to interpretation to determine the type of disputes. For example, we could not find such expressions in article 6(11) of the Agency for Government Houses Establishment proclamation, which states that the Agency for Government Houses has the power and duty to own property, enter into contracts, sue and be sued in its name, and settle disputes through arbitration. On top of this, since those laws that allow arbitrability of administrative contract

disputes were adopted before the Proclamation, we cannot see any improvement from the new Law. Contrarily, though article 315(2) of the Civil Procedure Code, previously restricted the arbitration of disputes involving administrative contracts, there were numerous debates over this provision among academics and courts. As a result, some of them argued that it was not prohibitive. Therefore, it is acceptable to conclude that the current Law is more restrictive than the prior one when we compare the two laws in this regard.

Regarding the potential challenges and opportunities of the new Law, it is common for any new law to have opportunities and challenges. So, as far as opportunities of the Proclamation is concerned, it is expected to create a conducive environment for investments, especially, foreign investments. At the same time, it will help in transferring of technology to the country. As the first paragraph of the Proclamation's preamble states that resolving investment disputes through arbitration is supposed to make development in the sector, we can also observe that the intention of the law maker is towards the mentioned opportunities. Another sign of opportunity of the new Law is the fact that once the Proclamation takes effect, foreign investors are approaching the Addis Ababa Chamber of Commerce and Sectorial Association to inquire about the possibilities of presenting their disputes if they invest in Ethiopia. Apart from this, since the Proclamation empowers arbitrators to issue order interim measures, and declares arbitral award in principle to be final, these by themselves are opportunities of the Law.

Regarding the challenges, since article 77(1) of the Proclamation stipulates that any arbitration agreement signed before the Proclamation comes into force is required to be governed by the prior laws, and the study is being conducted during this transitional period, it could not be possible to examine the practical challenges. However, since disputes emanating from administrative contracts are in principle barred from being arbitrated, it can be anticipated that various challenges will surface. So, identifying those laws that in exceptionally permit the submission of administrative contract disputes is expected challenge. Also, since the rules that govern administrative contracts are not updated and the definition of administrative contract does not get an amendment in a manner conforming to the current dynamism of administrative contract, this by itself a challenge that will take place during the full implementation of the Proclamation. In addition, since article 7(7) of the Proclamation is very general and does not try

to provide any justification for that restriction, this is another challenge in resolving disputes that arise from administrative contracts.

In general, since sub-article 7 of Article 7 of the Proclamation in principle prohibits arbitrability of disputes that arise from administrative contracts, on one hand, on the other hand, since the above-mentioned laws that indicate settlement of administrative contracts disputes through arbitration in exception seem not be apparent, it can be concluded that Ethiopia's position in this regard is not friendly to arbitration. Therefore, while resolving disputes arising from administrative contracts through arbitration, as mentioned above is becoming increasingly important for many countries; and is important for attracting foreign investments; settling such disputes through arbitration is also important for reducing costs, time, and the workload of courts, as well as maintaining friendly relationships and confidentiality between parties in disputes; the case in Ethiopia appears to be to the contrary.

#### **4.2. RECOMMENDATION**

As repeatedly mentioned above, the adoption of the Arbitration and Conciliation Proclamation seems a good step for intending to be friendly to arbitration. However, since sub-article 7 of Article 7 of the Arbitration and Conciliation Proclamation in principle prohibits arbitrability of disputes that arise from administrative contracts, on one hand, on the other hand, since those laws that indicate settlement of administrative contracts disputes through arbitration in exception seem not apparent, it can be noted that Ethiopia's position is not clear in the subject matter. So, to say, the arbitrability of disputes that arise from administrative contracts is encountered with several shortcomings that are discussed in detail in Chapter 3 of this research paper.

On the other hand, the problems about the contemporariness of the Ethiopian law of administrative contracts that are explained in sub-section 3.1.2 of Chapter Three of this paper have their contribution to resolving disputes that arise from administrative contracts through arbitration. As a result of this, my recommendation goes to various bodies of the Ethiopian Government, in particular, the House of Peoples Representatives in the following details:

##### **A. To policymakers or council of ministers (under the policy making power):**

- To layout direction and to justify the purpose of non-arbitrable administrative contract disputes;

- To make change in their policy that disputes emanating from administrative contract to be in principle arbitrable; and
- To begin taking steps to update the outdated administrative contract law by providing policy direction.

**B. To the House of Peoples' Representatives:**

- To take initiative measure for amendment of the Arbitration and Conciliation Proclamation to include adequate provisions that expressly distinguish non-arbitrable administrative contract disputes by their character;
- To amend the Proclamation to permit administrative contract disputes to be in principle arbitrable and exceptionally non-arbitrable; and
- To amend the law of administrative contracts in line with the current dynamic concept of administrative contracts.

**C. To the Council of Ministers (under the regulation making power)**

- To issue a Regulation that specifies the generalities in the Proclamation which govern the arbitrability of administrative contract disputes and
- To distinguish and justify arbitrable administrative contract disputes from non-arbitrable ones under the supposed regulation.

**D. To scholars:**

- To undertake further studies on the subject in order to demonstrate the gap in the Proclamation and
- To exert influence on the government in order to address the gaps.

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## **Interview questions**

**Title: Arbitrability of Disputes emanating from administrative contracts under the New Arbitration and Conciliation law**

### **Questions:**

1. What changes has the arbitration and conciliation law/the Arbitration and Conciliation Working Procedure Proclamation No. 1237/202/ brought about in terms of arbitrability of disputes emanating from administrative contracts?
2. Does the arbitration and conciliation law bring significant change in arbitrability of disputes arising from administrative contracts in practice?
3. What are the legal gaps in relation to arbitrability of disputes that emanate from administrative contracts?
4. 4. What will be the potential challenges in practice when disputes arising from administrative contracts are submitted for arbitration?
5. What advantages could we gain from the arbitrability of administrative contract disputes under the arbitration and conciliation law?