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ADJUDICATION AND ARBITRABILITY OF GOVERNMENT CONSTRUCTION DISPUTES

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Introduction

The construction industry in Ethiopia is regulated by various legislative enactments which mainly come under two different domains; namely, *civil construction laws*, and *government construction laws.* The former laws apply where a private individual or company usually referred to as 'employer' (otherwise known as 'owner' or 'client') enters into a construction contract with a contractor. And the latter involves a government department which intends to have construction works carried out on behalf of the government for public interest. Thus, depending on whether the construction contract involves a private civil/business-to-business engagement or a government-to-business, separate set of rights and obligations apply in the construction industry.

Disputes usually arise in the process of the performance of contractual obligations under construction contracts. When and if construction disputes come to the fore, litigations take years; costs may skyrocket; speed and efficiency give way to drawn out and tedious proceedings resulting mainly in the mismanagement of public fund that should have been otherwise spent on the expansion of public infrastructure. This is unaffordable for the government department and the taxpayer. And, on the other side, hard-won reputation and good will of construction contractors are damaged. In fact, the loss of or damage to the good reputation in the market place will tax the contractor's business heavily due to loss of confidence in the eyes of potential employers, be it private investor or government employer. There is thus the imminent need for an *effective, economic, and efficient* means of settling such disputes.

This article first introduces the legal framework and the role of adjudication, as a new Alternative Dispute Resolution (ADR) method, in resolving government construction disputes, and, secondly, it examines the place of arbitration, i.e., by addressing the issue whether arbitration can validly be

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used in resolving government construction disputes in Ethiopia. Section 1 discusses the reason why construction claims and disputes abound in the construction industry. In Section 2, attempt is made to show some attributes that the government construction contracts law, as part of the administrative contracts law, would share in common. Sections 3 and 4 deal respectively with the commonly used ADR and arbitral clauses in construction contracts in Ethiopia and the role that an adjudicator and the civil engineer play in resolving construction disputes. The issue of arbitrability of government construction contracts is analyzed, in Section 5, at greater length in light of recent court decisions and the relevant laws. The Article, finally, concludes by suggesting some points on what can be done to settle the contentious issue of arbitrability of government construction contracts in Ethiopia.

1. Construction Claims and Disputes

Inherent and pervasive uncertainties and risks involved in the construction industry are the factors behind the frequent construction claims and disputes. The substantial portions of the disputes are settled through extra-judicial dispute settlement methods and, thus, go unnoticed. Moreover, the sanctity of the principle of confidentiality in international commercial arbitration coupled with their sensitivity to the reputation of the construction companies keeps many international construction contracts muffled with a view to minimizing their adverse impact. In effect, the numbers of published cases in construction disputes (domestic and international) are minimal as compared to the magnitude of the problems and construction disputes.

A multitude of reasons can be alluded to as the sources of the disputes. Suffice it to mention the following as being a few of the sources that are of the interest to the construction lawyer.

Firstly, disputes may arise due to some negligent behavior on the part of the contractors who fail to give proper and due attention to the tender/ bid and other contract documents at the contractual and post-contractual stages. The following anecdote by a construction lawyer illustrates the point:[1]

> 'A contractor [colleague of his] was complaining about the horrible conditions of contract that he was being asked to sign which essentially made him responsible for Acts of God and of the Consulting Engineer, the two things being equivalent for him: "If this is so horrible, why do you insist on signing the Contract?" And he took a big sigh and said: "You know contractors have to be optimists. I am convinced that if a contract document said: 'The suc-

[1] Nael Bunni, The FIDIC Form of Contract: the Fourth Edition of the Red Book, 2nd ed., (London: Blackwell Science Ltd., 1997), at 337, citing D.E Cullivan to have told the anecdote in a seminar held in Jakarta in Oct. 1984.

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> cessful tenderer will be hanged by the neck as soon as the contract is signed, you would not lack for competitors!' He continued: "They would think, well, perhaps I can negotiate my way out of it. Secondly, I am sure my lawyer will find a clause that will protect me. And failing that, may be, the rope will break."

The story chips in here a bit of a sense of fun. It should be realized, however, that the extreme delays, pervasive below-standard completion and, at times, abandonment of construction projects perhaps tip it a bit of a grain of truth in our country, too.

Second, the apparent technical intricacies and the bundle of a spectrum of legal and technical documents that need to be treated, etc render most construction contracts far flung from the courts and lawyers to the extent that the construction industry is nicknamed by many as 'the closed industry' thereby inhibiting the process of synthesis to come up with workable and coherent construction legal principles.

Third, as George Marcus and Paula Marcus have precisely put it:

> "Construction Contract documents often consist of hundreds, if not thousands, of pages of General and Special Conditions and addenda to those conditions that eliminate, change, or add important language. Government and quasi-government agency rules and regulations are incorporated into the contracts. Furthermore, there are technical specifications describing materials, construction methods, and requirements. To this are added 50 to 100 or more plans detailing the building and its many services. To complicate matters, the plans and specifications are often changed before bid time by addenda that sometimes describe plan changes by word rather than by revised drawings. It is impossible to avoid contradictory and erroneous information in this mass of documents."[2]

Fourth, the construction industry is a breeding ground of disputes as a result of construction claims not only on the basis of variations or modifications throughout the construction period due to the inextricable geological and sub-soil uncertainties but also from the fact that multifarious areas of law have to converge to interplay in a site[3]- i.e., government procurement, contracts, sub-contracts, environmental impact, sanitation, labor, tort, suretyship, intellectual property, property, etc.

Fifth, the fact that many developing countries do not yet have or are yet striving to have efficient, transparent, fair and competitive public procure-

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[2] George Marcus and Paula Marcus, *Fact-based Mediation for the Construction Industry*, The Arbitration Journal, Vol. 42, Part 3 (Sept. 1987), at 6.

[3] Charles Molineaux, *Moving Towards a Construction lex mercatoria*: A *lex constructionis*, 14 J. Int. Arb. 1March 1997, at 57.

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ment system[4] is also a major factor in the rise of construction disputes. Worse still, this is at many instances compounded by the blatant poor draftsmanship of construction contracts.

Sixth, the absence of comprehensive construction laws in many developing countries is also one reason among the many in the multiplicity of construction disputes.[5]

Finally, in international construction contracts, the continued engagement (sometimes confronted with conflicting interests) of the parties involved (for instance, the employer, the consulting engineer or architect, contractor, subcontractors, quantity surveyors, funding agencies, insurance companies, suppliers, electrical and mechanical engineering companies, *etc*) at a construction site from different countries with different legal orientations and even different legal systems could turn the site into a Tower of Babel,[6] so to say. In connection to this, John Sykes wrote:[7]

> For many employers, the first foray into construction is the only one, and a good or bad reputation is of little concern provided the work is done correctly, on time and the price is as low as possible. To a contractor, however, a good reputation …is a most valuable trading asset, albeit one which can be easily and quickly lost by careless or misguided behavior.

Thus, Sykes advises that employers and contractors should refrain from becoming "embroiled in a public litigious dispute, the aftermath of which could tarnish their reputations and damage future work prospects."[8] In this regard, the Ethiopian approach is no different. It is unequivocally stated, in Government procurement of construction contracts, that, "a consistent history of litigation or arbitration award against the Applicant or any partner of a Joint Venture may result in *disqualification*".[9] [Emphasis added].

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[4] See Victor Mosoti, *Reforming the Laws on Public Procurement in the Developing World: The Example of Kenya*, ICLQ, Vol. 54 (3), July 2005, at 642.

[5] Charles Molineaux, *Supra* note 3, at 55.

[6] 'And the Lord said, "… *Come let us go down and then confuse their language that they may not understand one another's speech*".' Genesis 11:7

[7] John Sykes, Construction Claims, (London: Sweet and Maxwell, 1999), at 161.

[8] *Ibid*, at 160

[9] Section 3 of The Federal Standard Bidding Document for the Procurement of Works issued by the Public Procurement Agency (PPA), January 1, 2006. The author, however, hopes that the phrase "consistent history of litigation…" should not in any way implicate a contractor who involves himself in the *bid protest (review) processes* because it would otherwise paralyze effective combat against procurement corruption in Ethiopia. For a discussion on the efficacy and necessity of litigation as a procurement oversight mechanism, see generally Steven Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM.U.L.Rev.627 (2001).

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2 . Government Construction Contracts: As part of Administrative Contracts

According to Art.3244 (1) of the Civil Code :

> A contract of public works is a contract whereby a person, the contractor, binds himself in favor of an administrative authority to construct, maintain, or repair a public work in consideration of a price.

The foregoing is not only a circuitous definition but also fails to specifically indicate what really 'public works' are. For a better definition, therefore, one can allude to Art.2 (c) of the Federal Public Procurement Proclamation No. 430/2005:[10]

> "Works" means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, road, or structure, such as site preparation, excavation, installation, of equipment and materials, decoration, as well as services incidental to works, if the value of those services does not exceed that of the works themselves and includes build, own, operate and transfer contracts.

The Civil Code of Ethiopia of 1960 introduced into the Ethiopian legal system the concept of administrative contracts law.[11] The injection of the administrative contracts provisions into the legal system empowered government departments to choose between two types of contracts: a private law contract or a public law contract (administrative contract). Thus, contracts that are concluded by Government Departments are not necessarily administrative contracts. According to Art.3132 of the Civil Code:

> A contract shall be deemed to be an administrative contract where:
> a) It is expressly qualified as such by the law or by the parties, or
> b) It is connected with an activity of the public services and implies a permanent participation of the party contracting with the administrative authorities in the execution of such service, or
> c) It contains one or more provisions, which could only have been inspired by urgent considerations of general interest extraneous to relations between private individuals.

Whether or not a contract that is concluded by a government department is an administrative contract is to be determined in light of the criteria set under Art.3132 of the Civil Code. The law categorizes some contracts as administrative contracts, *ipso jure*, as per Art.3132 (a). These are:

[10] The Federal Procedures of Public Procurement and Establishing its Supervisory Agency Proclamation No.430/2005, *Federal Negarit Gazeta*, 11th Year, No. 15, pp.2949-2982, 2950.

[11] See also Rene David, *Administrative contracts in the Ethiopian Civil Code*, Journal of Ethiopian Law, Vol. 4, No.1, pp.143-153.

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i) Government concession contracts: Arts.3207- 3243,
ii) Public construction contracts (Public works contracts): Arts.3244- 3296, and,
iii) Government supplies contracts (Public supply contracts): Arts.3297-3306.

Thus, Art. 3131 of the Civil Code defines the scope of applicability of the administrative contracts provisions. It provides thus:

(1) Contracts concluded by the State or other administrative authorities shall be governed by the provisions of this Code which relate to contracts in general or special contracts.
(2) The provisions of this Title shall supplement or replace such provisions where the contract is in the nature of an *administrative contract*. [Emphasis supplied].

The scope of this article does not allow us to delve into an in-depth discussion of the administrative contracts law regime beyond a brief overview. It is to be noted private contracts are the expression of the free will of the two contracting parties who stand on an equal footing. In public law, however, the private individual is opposed by the state, the representative of the public interest. Put simply, the core-essence or central tenet of the administrative contracts law has been that public interests prevail over private interests.[12] As a result, the government department is placed to be in a special legal position and is granted special rights or privileges in order to fulfill its public functions. Accordingly, the government department is entitled to such privileges as to increase, diminish or put an end to the obligations of the contracting party regardless of the terms of the contract. [13]

For the lawyers with the Common Law experience, the difference may not resonate at all. Many lawyers from the continental legal system, on the other hand, must have been long pondering at such concepts as Acts of Government (*théorie de Fait du Prince*),[14] *theorie de l'imprévision*,[15] the non-applicability of the doctrine of *exceptio non adimpleti contractus*,[16] the doctrine of *causa*[17] *(cause:* absence of *cause or cause illicite)*, supervision,[18]

[12] See also Brick Dickson, Introduction to French Law, (Pitman Publishing., London, 1994), at 60.
[13] Arts. 3172-3206 of the Civil Code of Ethiopia of 1960 (Hereinafter the Civil Code) particularly establishes the exorbitant clauses that an administrative contract may be entitled to.
[14] Arts.3190-93 of the Civil Code.
[15] Arts.3183-89 of the Civil Code.
[16] Art.3177 of the Civil Code.
[17] The Doctrine of *causa* (*cause*), for instance, was ingeniously crafted to attenuate its role so as to avoid the import of its intricacies (prevalent in its French progeny) onto the General Principles of Contracts (GPC) in the Ethiopian Civil Code whilst it was fully made to retain its enhanced role in the Administrative Contracts Law regime in the Civil Code as it is in the French *contrats administratiff.*
[18] Arts.3179-383 of the Civil Code.

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clause exorbitante du droit commun,[19] etc. These are concepts alien to ordinary civil contracts.[20] The concepts had been introduced to the Ethiopian legal system by Professor Rene David as he drafted the Civil Code of Ethiopia. It is saddening to learn, however, that whilst the French *contrats administratif* has been continuously refined and developed under the case law of the French *Conseil d'Etat*, the Ethiopian Administrative Contracts Law has been perhaps the most marginalized and stagnant area of law.

Under French law, contracts can be governed by administrative contracts or private law contracts. An administrative contract is characterized by the provision of a public service or a contract which gives the administration exceptional powers not found under private law contracts. The latter powers are called "*clauses exorbitantes du droit commun*" meaning contractual provisions not found in the ordinary law of contracts. An example would be permitting an administration a unilateral right of cancellation. The term public service is expounded by case law but includes such activities as the provision of gas to a city. The unique feature of the administrative contract is to give protection to the public interest.

Under the doctrine of "*fait du prince*" an act of the administration may affect the rights of the other party under a contract. This cannot be objected to by the other party but may entitle it to monetary compensation. The theory of "*imprevision*" (unforeseeability) imposes (on the administration) the duty to pay compensation to a contractor who encounters unforeseen supervening circumstances under a government contract which would otherwise make it excessively onerous for him to continue. The private person contracting with the administration my not derive benefit from performing his part but may be entitled to compensation for his/her loss.

It is noteworthy, therefore, that administrative contracts law is regulated separately from the civil contracts in Ethiopia. It is against this backdrop that the divide between civil and administrative contracts in the Civil Law countries must be looked into. This is so important in light of the fact that government departments can also conclude civil contracts.

To be specific, as indicated earlier on, public works contracts (also referred to as construction contracts for public works or public works of civil engineering construction) are classed, *ipso jure*, as falling into the administrative contracts legal regime. A look into construction contracts for public works that are concluded by a number of the government departments (public bodies), shows a 'qualifying clause' by the parties in the absence of which it would all the same remain to be an administrative contract.

[19] Art. 3132 (c) of the Civil Code.

[20] *Supra* note 17

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3. Adjudication and Arbitral Clauses in Public Construction Contracts

We have tried to explain the reasons why multitudes of disputes arise in the construction industry. If all these disputes should have the light of the day in the courts, it would have proven itself unbearable to the contracting parties, as it is costly and time-consuming to litigate every construction claim and dispute. Therefore, it is of paramount importance to devise proper methods of settling the disputes. Thus, in an attempt to resolve disputes without resorting to court litigations, contracting parties more often than not incorporate specific ADR [21] and/ or arbitral clauses in their contracts.

The following clauses are used in a significant number of government construction contracts as major dispute settlement clauses:

1. ZemZem Plc and Zonal Educational Bureau of Illubabor used the following clause.[22]

   Article 24:

   Disputes between the contractor and the employer, including the Consultant acting under the employer's authority, *shall be* resolved amicably by *informal negotiations.* If no amiable solution can be found after 30 days from the commencement of negotiations, either party *may require* that the dispute be referred to a *3rd party for adjudication or arbitration* in accordance with Ethiopian law. [Emphasis added].

   Article 25:

   The contract shall be interpreted in accordance with Ethiopian law.

2. The following dispute settlement clause, for example, is used in the construction contract concluded between the Educational Bureau of Tigray and Ato GebreTsadik Hagos:

   24.1 If the Contractor believes that a decision taken by the Project Manager

[21] The author is of the view (as many authors in the Continental legal system would share it) that arbitration should be considered as a separate dispute settlement method, and that ADR methods are alternative not only to litigation but also to arbitration. Basically, ADR methods include negotiation, conciliation/ mediation, adjudication, rent-a-judge, mini-trial, and their varieties. Although it is not easy to come by with an over-arching definition encompassing all the aforementioned ADR methods, the fact that the parties retain full control of their outcome and that the compromise agreement that is reached at can only have biting teeth on the full blessing of its terms by the parties, unlike litigation and arbitration, can be a distinguishing hallmark.

[22] The Clause giving rise to the *ZemZem PLC* V *Illubabor Bureau of Education*, Federal Supreme Court, Cassation Division file No. 16896, Tikmt 16,1998 E.C, Addis Ababa (On file with the Author).

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was either outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to the *Adjudicator* within 14 days of the notification to the Project Manager's decision.

25.1 The Adjudicator shall give a decision in writing *within 28 da*ys of receipt of a notification of a dispute;

25.2 The Adjudicator shall be paid by the hour at the rates specified in the Bidding Data and Contract Data, together with reimbursable expenses of the types specified in the Contract Data, and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be *final and binding.*

3. The Standard Conditions of Contract for Construction of Civil Work Projects published by the Ministry of Works and Urban Development (MOWUD) in May 1994 also reads as follows:

Clause 67: Settlement of Disputes-Arbitration

If any dispute or difference of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract, or the execution of the Works whether during the progress of the work or after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall, in the first place, be referred to and settled by the Engineer who shall, within a period of ninety days after being requested by either party to do so give written notice of his decision to the Employer and the Contractor. Subject to appeal to MoWUD or its Authorized Representative, as hereinafter provided [sic], such decision in respect of every matter so referred shall be final and binding … (and) the Employer and … the Contractor … shall proceed with the execution of the Works with all due diligence whether the Employer or Contractor requires arbitration as hereinafter provided, or not. If the Consultant has given written notice of his decision to the Employer and the Contractor and no claim to appeal has been communicated to him by either the Employer or the Contractor within a period of ninety days from receipt of such notice, the said decision shall remain final and binding upon the Employer and the Contractor. If the Engineer (fails) to give notice of his decision, as aforesaid, within a period of ninety days after being requested as aforesaid or if either the Employer or the Contractor be dissatisfied with any such decision then and in any such case either the Employer or the Contractor may within ninety days after receiving notice of such decision or within ninety days after the expiration of the first named period of ninety days, as the case may be required [sic] that the matter or matters in dispute be referred to MoWUD or his Authorized Representative hereinafter provided. All disputes or differences in respect

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of which the decision, if any of the Engineer has not become final and binding as aforesaid shall be *finally settled by MOWUD* or his Authorized Representative. The decision of the *Ministry* or his Authorized representative shall be final and binding.

4. The dispute settlement clause embodied in Article 67.1 of the FIDIC (1987) Red Book Form of Contracts also reads as follows:[23]

If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with or arising out of the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. No later than the eighty -fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.

If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty-fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.

[23] Guide to the Use of FIDIC Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition, FIDIC 1989, at 36-36.

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> Where notice of intention to commence arbitration as to a dispute has been given in accordance with Sub-Clause 67.1, the parties shall attempt to settle such dispute amicably before the commencement of arbitration. Provided that, unless the parties otherwise agree, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of intention to commence arbitration of such dispute was given, even if no attempt at amicable settlement thereof has been made.

And According to Article 67.3 of the FIDIC (1987) Red Book Form of Contracts:

> Any dispute in respect of which:
>
> a) *the decision, if any, of the Engineer* has not become final and binding pursuant to Sub-Clause 67.1, and
>
> b) *amicable settlement* has not been reached within the period stated in Sub-Clause 67.2
>
> shall be finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce *by one or more arbitrators* appointed under such Rules. The said arbitrator/s shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute…

4. The role of the adjudicator and the Civil Engineer in resolving Government Construction Disputes

Reading from the afore-mentioned 'dispute settlement clauses' (1-4 in Section 3), the *consulting engineer, the adjudicator*, and *the arbitrator* feature in resolving Government Construction Disputes. Needless to say, the amicable settlement methods, particularly negotiation and conciliation/ mediation also play their role. As the latter dispute settlement methods are commonly used for resolving any compromisable dispute, this article will focus on the dispute settlement methods that are of particular interest to construction contracts; namely, the role of the consulting engineer-as a quasi-arbitrator, adjudication, and arbitration.

4.1- Adjudication

It should be underlined here that "adjudication"[24] is meant to refer to a disparate pre-arbitral dispute settlement method in the construction industry; it is commonly used in a technical sense. In the construction industry, 'adjudication' can be defined as:

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> …a process whereby an appointed neutral and impartial party is entrusted to take the initiative in ascertaining the facts and the law relating to a dispute and to reach a decision within a short period of time.[25]

'Adjudication', as a first tier in dispute resolution, was introduced in the UK by the Latham Report of 1994 and incorporated in the Housing Grants, Construction and Regeneration Act of 1996.[26] This Act provided that in all construction contracts, the dispute is first submitted to adjudication as a condition precedent to the bringing of arbitration or litigation. [27] We are not sure of when and how it was introduced to the Ethiopian construction contracts; it can be safely said, however, that it has become important in the resolution of construction disputes for quite some time now.

According to Art. 34 of the Federal Standard Bidding Document for the Procurement of Works, the adjudicator is required to act as an impartial expert to resolve disputes between the parties as rapidly and economically as is reasonably possible. The Bidding Document further expounds the role of the adjudicator as "to include, but not limited to, requiring and examining any relevant documents and written statements, making site visits, using his own specialist knowledge and holding a hearing". Furthermore, the Adjudicator's decision should "reflect the legal entitlements of the Parties and his fair and reasonable view of how the dispute should be resolved". The Adjudicator's decision is binding on the parties unless challenged within a specified period and then varied in an arbitration or litigation depending on the terms of the contract. If the decision is not challenged within the specified period, it then becomes final and binding.

Whether the role of the adjudicator should be played by a professional lawyer or engineer begs the question. It is true that the construction industry is replete with many technical intricacies making it beyond the easy reach of

[24] See a brief but excellent discussion on adjudication (in Amharic) by Michael Gunta, **የኮንስትራሽን ውል ገድታዎች**፤ Ethiopian Bar Review, Vol. 1, No. 1, 2006, pp. 131-145, at pp. 141-145. Also similar discussion by Eyvind Finsen, The Building contract: A commentary on the JBCC Agreements, 2nd ed., (Cape Town: Juta & Company Ltd., 2005), at pp.222-229. The Addis Ababa Chamber of Commerce and Sectoral Associations (AACCSA) Arbitration Institute has adopted its own Rules of Adjudication as of Sept.14, 2007. So far, two construction disputes have been resolved under the Rules of Adjudication, and, according to Ato Yohannes Weldegebriel, the number is recently increasing as currently "… virtually most construction contracts designate the Institute as the adjudicator appointing body". E-mail from Ato Yohannes Weldegebriel, Director, AACCSA Arbitration Institute to this Author (Feb. 9, 2009). (On file with the Author).

[25] Nael Bunni, *supra* note 1, at 437

[26] Keren Tweeddale and Andrew Tweeddale, A Practical Approach to Arbitration Law, (London: Blackstone Press Limited, 1999), p. 85

[27] *Ibid*, at 84.

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many legal scholars. It should also be admitted, at least in theory, that the civil engineer or architect must have a general knowledge of the law. To be sure, administration of construction contracts requires a certain minimum amount of knowledge of the law.[28] Thus, the role-players in the construction industry- particularly the civil engineer, the architect, the contractor and the quantity surveyor will be better off if they are equipped with certain minimum knowledge in law. This, however, may or may not be sufficient expertise to qualify them to serve as adjudicators in complex construction contracts. Worse still, it will be too ambitious to look to find a professional who combines both professions in Ethiopia. Thus, an issue would arise whether a lawyer can be an adjudicator, assisted by a civil engineer or architect when and if the dispute at hand is entangled with construction technicalities. It is to be noted that adjudication in disputes involving construction contracts entails a careful and close understanding not only of the complexity of the particular construction project at hand but also the legal intricacies that may potentially arise.

4.2- The Consulting Engineer: As a quasi-arbitrator

The role of the Consulting Engineer to act as a quasi-arbitrator in the settlement of construction disputes is imported to the Civil Law Countries through the FIDIC Standard Form of Contract (The Red Book). For a general understanding, the FIDIC Standard Form of Contract merits a brief discussion here.

As Nael Bunni noted:

> "In the commercial activities of today's highly complex society, standard forms of contract have become an essential part of the day-to-day transactions of most agreements. The majority of standard forms have been developed by commercial organizations for the purpose of efficiency, to build on the experience gained from the repeated use of these forms, but most of all for the optimum protection of one or both parties' interests. Standard forms of contract developed for construction activities, however, have mostly been drawn up by independent professional organizations, rather than by one or other of the parties to the contract, in order to establish or to consolidate a fair and just contract." [29]

The Conditions of Contract (International) for Works of Civil engineering

[28] The reality may, however, be different as, for example, the author knows that no law course is offered to the engineering students at Mekelle University except the senior industrial engineering students who were offered a 2 Credit-hour course on 'Law for Engineers' which unfortunately phased out a couple of years back. (It is believed that the curriculum is similar in all public HEIs)

[29] Nael Bunni, *Supra* note 1, at 3.

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Construction was prepared by the *Fèdèration Internationale des Ingènieurs Conseils* (the International Federation of Consulting Engineers, FIDIC) and the *Fèdèration Internationale du Bàtiment et des Travaux Publics* (the International Federation of Building and Public Works, now known as the International European Construction Federation, FIEC).[30] As its cover was printed in red, it became to popularly known as the 'RED BOOK'.[31] FIDIC is the international Federation of duly elected associations of consulting engineers representing the profession in their respective countries.[32]

Since 1913, the *Fèdèration Internationale des Ingènieurs Conseils* (FIDIC) has produced the contract forms used in the majority of all transnationally financed civil engineering projects carried out in the developing world.[33] Of the various contract forms introduced by FIDIC, the FIDIC Fourth Edition has claimed an unparalleled success throughout the world today and this success is also owed to the World Bank.[34] The World Bank,[35] the largest financing agency in the international field, produced the first edition of its standard bidding documents for the procurement of works of civil engineering construction ("SBDW").[36] The use of SBDW was made a *conditio sine qua non* for contracts financed in whole or in part by the World Bank for construction works estimated to cost more than USD 10 million and it is submitted that the SBDW is almost entirely based upon the FIDIC Red Book.[37]

According to Bunni "The adoption of the Red Book by the World Bank in its SBDW is a major vote of confidence and an endorsement of the FIDIC Red Book." [38] Nael Bunni, added that " …in view of the importance of the World Bank as a financing agency for works of civil engineering construction in the developing countries, the use of the Red Book has escalated considerably."[39]

The British model "allots a high degree of authority to the project consulting engineer that appears to have offended developing country governments, contractors, civil law proponents and common law lawyers".[40] The consulting engineer may provide services such as counseling services, preinvestment studies, design, preparation of documents and supervision, project management, etc. Under the FIDIC Red Book, however, "the engineer must also resolve most of the day-to-day differences of opinion which frequently

[30] *Ibid*, at 6.

[31] *Ibid.* See similar background discussion at Robert Knutson, FIDIC: An Analysis on International Construction Contracts (edited by Robert Knutson), (The Netherlands: Kluwer Law, IBA, 2005), p. xiii.

[32] *Ibid*

[33] M. Beth Lyon, *The Role of the Consulting Engineer in Developing Country Construction under the FIDIC Form Contract*, 26 Law & Policy Int'l Business, 1994-1995, at 273.

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occur in multi-million or multi-billion dollar projects involving years of works by multiple sub-contractors. It is this broad spectrum of decisional powers, binding both the contractor and the employer, which makes "the FIDIC engineer uniquely strong and independent." [41] The consulting engineer, who is the agent of the employer in the particular project, is entitled to the pre-arbitral decision-making process whose non-acceptance by the parties will lead to the initiation of arbitration. This decision-making power may even apply to disputes relating to the engineer's own design, specifications or instructions handed down to the contractor on the employer's behalf.

In response to the severe criticism, FIDIC came up (in November 1996) with a document entitled '*Supplement to Fourth Edition 1987*-Conditions of Contract for Works of Civil Engineering Construction-reprinted 1992 with further amendments.'[42] This document was aimed at providing, *inter alia*, an alternative to clause 67 of the Red Book for the '*settlement of disputes*', i.e., offering an option to the quasi-arbitrator consulting engineer with a 'Dispute Adjudication Expert or Board" that gives decisions on any dispute referred to it, subject to further referral to arbitration.

In connection with this, it is worth to note that construction projects that are partly or wholly funded by the World Bank are treated differently. The World Bank's SBDW provides for the use of the three-member Dispute Review Board (DRB) for the construction contracts with the estimated value exceeding USD 50 million. For other contracts under the SBDW, the employer will be free to choose from the DRB, a one-member Dispute Review Expert (DRE), or the independent consulting engineer under clause 67 of the FIDIC Red Book.[43] It should be noted here that, it is being widely used notwithstanding the irreconcilable divergence between the FIDIC Form and the existing construction principles (especially principles of public works contracts) in the Civil Law Countries.[44]

[34] *Ibid*, at 274.

[35] In this Article, the World Bank refers to the International Bank for Reconstruction and Development (IBRD) and the International Development Agency (IDA) as the procurement procedures for both institutions are the same. The 'World Bank Group' normally also refers to the three more institutions: the International Financial Corporation (IFC), The Multilateral Investment Guarantee Agency (MIGA), and the International Center for Settlement of Investment Disputes (ICSID).

[36] *Ibid*

[37] Nael Bunni, *supra* note 1 at 466. The document is officially referred to as Standard Bidding Documents for the Procurement of Works- Major Contracts (over US$ 10 Million); The World Bank, Washington D.C., January 1995.

[38] *Ibid*, at 467

[39] *Ibid;* it can be said that it has pervasive applicability in Ethiopia, too.

[40] Lyon, *Supra* note 33, at 273.

[41] *Ibid*, at 276.

[42] Nael Bunni, *supra* note 1, at 15

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At this juncture, it is noteworthy that Clause 67 of the MoWUD Standard Conditions of Construction Contracts (1994 Edition), as presented verbatim above, empowers the consulting engineer to act as a quasi-arbitrator. This clearly indicates the fact that the idea of appointing the consulting engineer to serve as a quasi-arbitrator has already had a foothold in Ethiopia. Construction lawyers need to closely examine if this scheme conforms to the Ethiopian principles of agency in light of the powers and duties of the consulting engineer as embodied under Clause 2 of the afore-mentioned Standard Conditions and the BATCoDA Standard Conditions of Consulting Services for Design and Supervision of Construction Works (The January1990 edition). It can nevertheless be easily observed that the MoWUD Standard Conditions of Contract has been dominated by an unchecked influx of the Common law contract principles; arguably, it seems a rehash of the FIDIC Red Book Form.

The afore-said Standard Conditions of Contract, under Clause 67, stipulates that any dispute or difference in respect of which the Engineer failed to give a decision or has given a decision and either party is dissatisfied with is to be referred to MoWUD for final settlement through arbitration. Although it is not unusual for parties to nominate a neutral third party (physical or juridical) who is entrusted with appointing (an) arbitrator(s), it is unusual to appoint a juridical person as arbitrator. To begin with, why would MoWUD be an arbitrator in the face of the fact that the dispute or difference involves a Government Department (including, if not in majority cases, MoWUD itself) and a private Contractor (international or national) and that the award rendered at the hands of MoWUD would be 'final and binding'? It simply flies in the face of one of the basic natural justice tenets: *nemo judex in causa sua*. Yet again, one is left in limbo as to why the Standard Conditions, under Clause 5(1)(b), stipulated that, "… [The] Courts of Ethiopia shall have exclusive jurisdiction over any matter arising out of or in connection with this Contract." It sounds hardly plausible for Clause 5(1)(b) to sit comfortably with Clause 67.

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[43] Recently, however, the World Bank and eight other Multilateral Development Banks (MDBs) issued mandatory contract conditions for all infrastructure work financed by those institutions, entitled, "The Conditions of Contract for Construction, MDB Harmonized Edition, 2005, or otherwise known as *"The Harmonized Edition, 2005"* wherein a 'Dispute Board (DB)' is adopted rather than Dispute Adjudication Board (DAB). For further discussions on the issue, see Armando Ribeiro de Araujo, Red Book Onside: Harmonization of Procurement Procedures in developing countries, *Construction Law International*, Vol.1, No.1, (2006), pp.21-22.

[44] See the brief mention, for example, of those principles in the Ethiopian Administrative Contracts Law above in Part II.

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5. The Arbitrability of Government Construction Disputes

Arbitration has been widely accepted and used as a means of settling construction disputes. The scope of this article does not allow us to delve into the details of arbitration procedures. One key issue that should be properly addressed and which has been a bone of contention in the Ethiopian arbitration law and practice, however, is whether administrative contract disputes can be validly submitted to arbitration.

The issue of arbitrability is very crucial. Redfern and Hunter wrote:[45]

> The concept of arbitrability is, in effect, a public policy limitation upon the scope of arbitration as a method of settling disputes. Each state may decide, in accordance with its own public policy considerations which matters may be settled by arbitration and which may not. If the arbitration agreement covers matters incapable of being settled by arbitration, under the law of the agreement or under the law of the place of arbitration, the agreement is ineffective; it will be unenforceable. Moreover, recognition and enforcement of an award may be refused if the subject matter of the difference is not arbitrable under the law of the country where enforcement is sought.

Disputes or differences arising from or relating to a specific legal relationship, be it civil or commercial, can be classified into two categories: *arbitrable* and *non-arbitrable*. It is worth mentioning, *en passant*, that parties to international commercial arbitration need to know what are arbitrable:

i. Under the arbitration laws of the seat of arbitration (*Lex Loci arbitri*);

ii. Under the laws of the state to which the parties would like to refer to as governing their arbitration (*lex electionis*) other than the *lex loci arbitri*, if any, and;

iii. Under the laws of the state in which recognition and enforcement may ultimately be sought (*lex executionis*).

Insofar as the arbitrability of administrative contract disputes is concerned, scholarly writings have been divergent on the issue.[46] In the same vein, Ethiopian courts have been addressing the question from diverse perspectives. The following cases demonstrate as to how our courts have been deal-

[45] Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration, 1st ed., Sweet and Maxwell: London, 1986, p.105. Also see a discussion on the issue of 'Arbitrability' by Zekarias Keneaa, *Arbitrability in Ethiopia: Posing the Problem*, Journal of Ethiopian Law, Vol. XVII (1994), pp.116 -136.

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ing with the problem of arbitrability (or non-arbitrability) of administrative contracts disputes.

5.1- *High Way* v *Solel Boneh Ltd* [47]

The holding of the Court in this case was the following:

> Although by Art.3194(1) of the Civil Code, a court may not order administrative authorities to specifically perform their obligations, a court is not thereby precluded from ordering specific performance of an agreement to submit disputes to arbitration.

As Tilahun Teshome noted:[48]

> A suit to enforce an arbitration clause or a separate submission to arbitrate is a special proceeding and is considered as an action for the specific performance of an agreement to arbitrate.

Specific performance is defined as: "…a process whereby the creditor obtains as nearly as possible the actual subject matter of his bargain, as opposed to compensation in money for failing to obtain it".[49] Can we then invoke specific performance to arbitrate against an administrative body? Art.3194, under the heading of compulsory performance of contracts, states thus:

1. The court may not order the administrative authorities to perform their obligation.
2. It may, however, make an order for the payment of damages unless the administrative authorities prefer to perform their obligations.

In its decision, the Supreme Imperial Court reasoned that, "… according to art. 3194(1) of the Civil Code, the Court cannot order administrative authori-

[46] Bezzawork Shimelash, *The Formation, Content, and Effect of an Arbitral submission under Ethiopian Law*, Journal of Ethiopian Law, vol.xvii, 1994, pp.83-86, arguing, mainly on the substantive/ procedural laws dichotomy, in favor of the arbitrability of administrative contracts disputes; Ibrahim Idris, arguing against the arbitrability as cited by Bezzawork, pp.83-84; See also an in-depth discussion on the issue by Zekarias Keneaa, *supra* note 39, pp.119-121; Also a brief discussion on the issue by Tilahun Teshome, *The legal Regime Governing Arbitration in Ethiopia: A Synopsis*, Ethiopian Bar Review, Vol. 1, No.2, pp.125-127.

[47] Supreme Imperial Court of Ethiopia, May 14th, 1965 published at The African Law Reports, Vol. 1, 1966, pp. 41-44.

[48] Tilahun Teshome, *supra* note 46, p.136

[49] Mahdi Zahraa and Aburima Abdulllah Ghith, *Specific Performance under the Vienna Sales Convention, English Law and Libyan Law*, Arab Law Quarterly, [2000], Kluwer Law international, The Netherlands,p.305.

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ties to perform their obligations, but that it can order specific performance in procedural matters".[50] The ramification of this ruling was far-reaching; it is believed that this decision triggered the inclusion of the "prohibitive clause" under Art.315(2) of the Civil Procedure Code.

5.2- Ethio Marketing Ltd. v Ministry of Information [51]

The decision of the Ethiopian Supreme Court reads:

> A contract concluded pursuant to the provisions of the Civil Code is law between the two parties. The Appellant and the Respondent having, on the basis of the Civil Code, agreed to resolve the dispute between them by arbitration, the Civil Procedure Code should not prevent the enforcement of this contractual agreement.

Simply put, the Court's decision is based on the argument that procedural laws should neither limit nor extend substantive rights. We think this argument is too difficult to maintain. Suffice it to mention the words of the famous Italian procedural lawyer, Prof. Mauro Cappelletti and American Prof. Bryant Garth:

> For more than a century lawyers and scholars have tried to distinguish between "procedural law" and "substantive law", only to find that it is impossible to draw a clear line between the two. If one tries to argue that procedure becomes substance when it determines the particular "outcome" of a legal dispute, then it appears necessary to concede that almost everything is substance. On the other hand, if procedure is confined to the methods by which legal claims are initiated and proved, there is little doubt that much of the substantive law governs procedure.[52]

Perhaps, the procedural/ substantive law dichotomy must have been a perplexing issue for those of us, academicians and practitioners alike, who attempt to specialize in the area of private international law (PIL).[53] On top of that the investment of any or some disputes exclusively to the courts' jurisdiction could not have been better positioned anywhere else in Ethiopia than the Civil Procedure Code. Traditionally speaking, procedural laws not only

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[50] *Ibid*, p.42. In its dictum, the Court, in fact, committed an error in believing that, under art.3194, damages must be awarded if specific performance is not granted; and if no damages can be assessed for failing to perform an obligation, as in arbitration, specific performance should be granted.

[51] Ethiopian Supreme Court decision of March 29, 1975, Cited by Jeremy Winter, *International Arbitration under public works contracts*, Baker and McKenzie, June 1, 1998, pp.175-183, p. 180; See also similar substantive/ procedural laws arguments by Bezzawork Shimelash, *supra* note 46, pp. 69-94.

[52] Mauro Cappelletti and Bryant Garth, *Civil Procedure*, International Encyclopedia of Comparative Law, Vol. XVI, p.13.

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confer jurisdictional powers upon the courts, but also divest or deprive, if need be, the jurisdiction of any judicial proceeding from the courts or any tribunal. This is exactly what procedural rules do as in the case of Art.315 (2) which allocates the power to resolve disputes arising from or related to administrative contracts exclusively to the courts.

5.3- Gebre Tsadik Hagos v Tigray State Bureau of Education [54]

The Tigray State Supreme Court's holding in *Gebre Tsadik Hagos* v *Tigray State Bureau of Education* [55] has the following:

> We have concluded that article 315(2) does not permit Government organs to settle their disputes through 'gilgil' [sic] [arbitration]…and, thus, legal prohibitive clause cannot be derogated from via any working procedures, manuals or directives issued by the Government organ. [Author's translation]

Despite the obvious contractual agreement to settle disputes between the parties first through adjudication and, then, arbitration, the Tigray Supreme Court reversed the decision of the Mekelle Zonal Court that gave the deference to the arbitration agreement. The Tigray Supreme Court, thus, remanded the case to the Zonal Court so that the latter can hear the merits of the case. What was most unfortunate about this case was the fact that the parties had to litigate their case for about a year and a half to reach a similar decision as that of the Project manager whose decision the parties agreed will be binding if not referred to an adjudicator within 14 days of the notification of the decision. The Contractor failed to refer it to the adjudicator within the agreed time frame and it should have become final and binding. Instead, the Con-

[53] See George Panagopoulos, *Substance and Procedure in Private International Law*, Journal of Private International Law,Vol. 1 (2005), pp. 69-92, wherein various efforts are deployed in an attempt to classify specific issues into substance and procedure, particularly limitations of actions, remedies, and equitable rights. See also Janeen M. Carruthers, *Damages in the Conflict of Laws- The Substance and Procedure spectrum* : *Harding* v *Wealands*, Journal of Private International Law, Vol. 1,(2005),pp. 323-334; Robert Allen Sedler, The Conflict of Laws in Ethiopia, (HSI University, Faculty of Law: AA, 1965), pp.148-155, generally supporting the assertion made above (in ft note 52) by Profs. Mauro Cappelletti and Bryant Garth. The author would like to note that while it is an inveterate doctrine in PIL that matters of procedure are governed by the *lex fori* and that matters of substance are governed by the *lex causae*, it has always been far easier to state it than to apply.

[54] Tigray State Supreme Court, Civil Appeal file No. 962/96 (10/06/96 E.C, Mekelle), (Unpublished), p.1 (On file with the author.

[55] Tigray State Supreme Court, Civil Appeal file No. 962/96 (10/06/96 E.C, Mekelle), (Unpublished), p.1 (On file with the author)

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tractor instituted an action in the Zonal Court and the Zonal Court ruled that the parties should submit the dispute to arbitration as requested by the Bureau of Education. As discussed above, however, adjudication is an ADR method for settling construction disputes that is a condition precedent to arbitration. The clause [56] conveys in no uncertain terms the message that the parties had this in mind at the time of making of the contract.

5.4- Zemzem PLC v Illubabor Zonal Dep't of Education [57]

This case relates to a dispute arising out of a contract concluded between Illubabor Zonal Department of Education and ZemZem PLC for the construction of an elementary school to be built within the Illubabor Zone of the Oromiya State. The Illubabor Zonal Department of Education, as an organ of the Oromiya State, is an Administrative Body whose contracts of Public Works would fall under Art.3244 *et seq*. This enables the contract of public works that was concluded between the two parties to be qualified as an Administrative contract. At this juncture, we will be confronted with basic questions: Is an arbitration clause inserted in a public works contract valid? If so, should the court give deference to it whether or not the parties invoke it?

The ADR clause (Article 24 of the contract) used in the construction contract between Zemzem PLC was cited under Section 3 above. It is cited again for the purpose of convenience:

> Disputes between the contractor and the employer, including the Consultant acting under the employer's authority, *shall be* resolved amicably by *informal negotiations*. If no amiable solution can be found after 30 days from the commencement of negotiations, either party *may require* that the dispute be referred to a *3rd party for adjudication or arbitration* in accordance with Ethiopian law. [Emphasis added].

Moreover Article 25 of the contract reads "*The contract shall be interpreted in accordance in Ethiopian law.*" A fundamental question one would raise is: What was the intention of the parties by inserting the ill-drafted clause 25 in their agreement? Moreover, various issues capture our attention. Is the contract being given an international flavor and that a conflict-of-laws rule being devised? If so, why does it dissect a limb of the total contractual relationship, i.e., the interpretation, and subject it to the Ethiopian rules of interpretation? Which law would, then, govern the validity, the performance, breach of performance, consequence of nullity of the contract, capacity of the parties, etc? There is also no need of incorporating such a clause when the construction contract does not have a foreign element.[58]

[56] The contractual clause is reproduced *verbatim* above in Part III of this Article.

[57] *Supra* note 22.

[58] The author witnesses a plethora of such clauses being used in public works construction contract documents.

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The Federal Supreme Court's Cassation Division ruled in its holding that the term of the contract is clear and does not need interpretation. The Court also added that contractual agreements entered into by parties are laws among the parties and are binding as between the parties by virtue of art.1731 of the Civil Code. The Federal Supreme Court did not make any reference to the term 'adjudication' in its dictum; it simply stated that according to art.24 of the contract, if negotiations fail, parties should settle their disputes through arbitration or '*begelagay dagninet'*. Thus, the Federal Supreme Court reversed the decision of the Oromiya Supreme Court and ordered the Illubabor Zonal Bureau of Education to go about settling its disputes with the appellant through arbitration.

The Oromiya Supreme Court's holding was that the contractual clause only stipulates that either party can either proceed in the 'court of law' or through arbitration (*behig weiym beshimglina*). The Court, thus, concluded that their agreement does not require the parties to settle their disputes solely through arbitration. Hence the Court had failed to distinguish between 'adjudication' and 'litigation'.

The point is, however, whether the afore-mentioned dispute settlement clause is bereft of any irregularities and tamper-proof as claimed by the Federal Supreme Court. In other words, does the wording of Art.24 engender the need for interpretation? The author believes there are, at least, some simple but key issues that should have necessitated the intervention of the Federal Supreme Court's Cassation Division for the proper determination of the parties' rights and obligations under the contract:

a) Does the clause imperatively impose the duty to arbitrate on the parties?

b) Would the Illubabor Zonal Department of Education be compelled to arbitrate, article 315(2) notwithstanding?

c) Does it settle, once and for all, the hitherto controversial issue of whether administrative contract disputes are arbitrable or non-arbitrable, taking into account the fact that the decision was rendered by the Cassation Division of the Federal Supreme Court which is 'binding' on all Federal and State Courts? [59]

Primarily, from the wording of the second paragraph of the afore-mentioned ADR clause, one can easily understand the fact that adjudication is not used by the parties to mean litigation as they are deliberately choosing and deploying the terms as follows: *...either party may require that the dispute be re-*

[59] Art.2(1) of the Federal Courts Proclamation Re-amendment Proclamation No.454/2005, *Federal Negarit Gazeta*, Year 11, No.42, June 2005.

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ferred to a 3rd Party for adjudication or arbitration... [Emphasis added]. This is to say that the parties were cognizant of the fact that be it "adjudication" or "arbitration", it is to be referred to a 3rd party. At least, one can safely expect that the parties, assisted by construction experts, would not commit such a clumsy bungle to refer the sovereign-appointed judges as "a 3rd party".

Secondly, a careful reading will enable us to note the stark contrast in choosing and deploying the words by the parties in the first and second paragraphs of the clause. Arguably, the parties might have intended that negotiation, as a dispute settlement method, should of necessity be resorted to by carefully choosing and deploying the imperative phrase 'shall be'! In contradistinction, the parties have been selective of their terminologies when using the word "may" (in the second para.).

Hence, it could mean that the parties stipulated an optional clause whereby the parties could either continue further negotiating on the dispute or, failing that, either party has the possibility of resorting to adjudication or arbitration, without making it imperative on the parties. In other words, it may be concluded that the parties left the door open for adjudication and/ or arbitration without entirely overruling litigation. This enables the parties to make an informed choice of the most cost-effective dispute resolution scheme in the event of a dispute.[60]

Thirdly, the parties made it abundantly clear that the submission of their disputes, be it to adjudication or arbitration, is to be made *in accordance with the Ethiopian Law*.[Emphasis supplied]. The Ethiopian Law, which the parties laid down as governing, manifestly prohibits the submission of administrative contracts disputes (construction contracts for public works for that matter) to arbitration proceedings; thereby making the submission by the parties null and void. The Federal Supreme Court, in its cassation decision, streamlined the foregoing assertion by holding that, "*subject to what the law prohibits or limits, parties can enter into agreements and be bound by it as per Art.1731 of the Civil Code"*. [Author's translation]

The crux of the matter is whether the Federal Supreme Court was "oblivious" of the obvious "prohibitive clause" of the arbitrability of Administrative Contracts disputes under Art.315(2) of the Civil Procedure Code? Or

[60] Such modalities are not uncommon in the construction industry. In fact, even the United States Courts tolerate "Unilateral" or "Discretionary" ADR and Arbitral clauses that effectively give only one party the right to choose between arbitrating or litigating certain disputes. For more discussion on the issue, see Adam Nahmias, The Enforceability of contract clauses giving one party the Unilateral Right to choose between Arbitration and Litigation, *The Construction Lawyer*, Vol. 21, (2001), pp.36-38.

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could it be that the parties' agreement to refer to a 3rd party for arbitration was permitted by law?

The far-reaching consequence of the Federal Supreme Court Cassation Division's decision in the case is that the Court, advertently or inadvertently, either nullifies or contradicts itself with the much-talked-about Art.315(2) that has been evoking heated discussions as to whether disputes arising from administrative contracts are arbitrable or non-arbitrable. It may be argued that the non-arbitrability of any subject matter should be raised by the party against whom the arbitration agreement is invoked. This conveys the message that the Court, *sua motu*, will not raise the issue of non-arbitrability. Indeed, reading from the dossier on the case, there is nothing that indicates the invocation of Art.315(2) of the Civil Procedure Code by the Zonal Bureau of Education. Nevertheless, this belief is simply erroneous in that the arbitrability and non-arbitrability of any dispute is a public policy issue and must be maintained at any cost.

The critical question here is whether we can take the above ruling of the Federal Supreme Court's Cassation Division at its face value? The decision does not seem to settle the issue once and for all because of the following reasons. Firstly, each State has the legislative power not only to form and organize its own governmental structure but also to determine the responsibilities and duties of each of its organs according to its Constitution. Corollary to it, each State determines the substantive and procedural rules that each of its administrative bodies should adhere to. The conclusion, therefore, is that each State has retained the power to legislate specific enactments on 'Administrative Contracts Laws' if it chooses to continue to apply it, or even to reject altogether the Civil Contracts/Administrative Contracts dichotomy. Second, it is understood that the determination or allocation of the jurisdiction of each of the State courts that it establishes is left to its own discretion. No doubt, therefore, that the States determine the procedural rules employed by the respective courts of each State.

Thus, States also retain the power to enact the Civil Procedure Code for their respective courts. It should, thus, be quickly added to it that the existing Civil Procedure Code of 1965 couldn't be considered to have been a Federal one so as to bind both Federal and State courts. Indeed, it is incorporated *de jure* under Article 11 of the Federal Courts Establishment Proclamation No. 25/96 [61] to have the force of law in the Federal courts. It is, however, not clear whether it has been *de jure* incorporated similarly in each of the States or *de facto* applied. [62] It is clear, though, that it is being applied in all the

[61] Federal Courts Establishment Proclamation No. 25/96, *Federal Negarit Gazeta*, 2nd Year, No.13, A.A, Feb.15, 1996.

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States because of the blessing that State Councils granted to the law in their respective territory.

Furthermore, States have the legislative power to invest the determination of administrative contract disputes solely in their respective courts and prohibit the submission of same to arbitration. The Civil Procedure Code of Ethiopia, having the force of law *de jure* or *de facto* in all the States, hitherto affords deference to Article 315(2); thereby maintaining the prohibitive clause. The multitude of contractual clauses qualifying government contracts as administrative contracts, especially in construction contracts for public works in the states, are vivid testimonies of continued warm treatment being accorded to administrative contracts law.

Another issue that captures our attention is whether the Federal Supreme Court's Cassation decision nullifies the hitherto prohibitive clause in the States' Civil Procedure Codes because of the fact that Cassation decisions of the Federal Supreme Court are binding upon both the federal and state courts? This would not have engendered much of a problem if the proclamation is attempting to introduce the concept of *judicial precedence* and/ or doctrine of *stare decisis* to the Ethiopian legal system for the Federal courts. It would not be that easier, though, when and if the Federal Government is trying to levy federal laws over the states for which the Federal Government does not at all have the legislative power to do so. It would only be appropriate, therefore, if both the States and the Federal Government work within the ambit of their legislative power without stepping on the toes of each other.[63]

After all, can the Federal Supreme Court exercise power of cassation over clearly defined state matters? Well, it is difficult to find a ready-made answer. We may approach it from the point of view of the pervasive practical problems in most of the States. For this purpose, it worked, perhaps, well to operate on Article 87 of the FDRE Constitution. [64] The scope of the article does not allow us dwell on the argument. It is, however, proper to mention that empowering the Federal Supreme Court's Cassation Division to revise State matters and apply them uniformly based on judicial precedence and/ or

[62] For example, Art. 108 of the Proclamation to Pronounce the Coming into effect of the Revised Constitution of the Regional State of Tigray, *Negarit Gazeta Tigray*, 10th year, No. 2, Hidar 6, 1994, grants the *carte blanche* for the applicability of all laws, regulations, and directives previously in force insofar as they are not inconsistent with the Revised Constitution.

[63] For an in-depth discussion on the issue, see Tecle Hagos Bahta, *Federal and State legislative Powers in civil and commercial matters in Ethiopia: Striking the balance and maintaining it!,* Federalism and the Protection of Human Right in Ethiopia, Eva Brems and Christophe Van der Beken (eds), (Lit Verlag Gmbh & Co. KG Wien: Zurich, 2008), pp. 70-85.

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stare decisis is not only unacceptable but also a dangerous undertaking that can effectively but destructively be used to usurp in piecemeal on the legislative powers of the States. It should, thus, only be taken to mean that cassation decisions by the Federal Supreme Court will be binding on both the Federal and State Courts on cases or disputes arising from the federal laws on the basis of judicial precedence and/ or *stare decisis*. This, indeed, is an ingenious device to guarantee uniform interpretation of the federal laws to avoid differential treatment of citizens in the same case situations wherever the case is being seized. This furthers and guarantees certainty and predictability in the federal legal system; hence ensuring equality of citizens in judicial proceedings. However, the argument that the decision of the Federal Supreme Court's Cassation Division is also binding on state matters doesn't seem to be a strong argument because the Constitution maintains diversity depending on each State's policy considerations. It would, thus, be an unwelcome exercise for the Federal Supreme Court to claim to decide on the States' policy considerations.[65]

One cannot be certain as to what has been the impact of the decision of the Federal Supreme Court's Cassation Chilot in *re Zemzem PLC v Illubabor Bureau of Education* in the Self-Governing Federal Capital City of Addis Ababa and the Federal Enclave City of Diredawa where the Federal Courts sit and apply the Federal Civil Procedure Code.

The lesson we, arbitrators and academicians alike, draw from the decision is, however, clear. *One*: cutting the *circulus inextricablis*!: that the Federal

[64] The FDRE Constitution, *Federal Negarit Gazeta*, Year 1, No.1, A.A, 21st August, 1995; in this regard, resorting to historical interpretation of our Constitution may allow us, though still contentious, to read into Art.80 (3) the power of the Federal Supreme Court's Cassation Power over both Federal and State matters as presented, albeit vaguely, in the Minutes of the Ethiopian Constitutional Assembly, Vol.5, Hidar 21-24, 1987 E.C, A.A. However, it should be mentioned, in this connection, that historical interpretation has not been favoured by the EU European Court of Justice (ECJ) in Luxembourg; instead contextual and teleological interpretation methods have been frequently put in use. For an in-depth discussion on the issue, see Sionaidh Douglas-Scot, Constitutional Law of the European Union, (Harlow: Pearson Education, 2002), pp.199-224. In our case, lack of detailed, well-explained and consolidated documents of the *travaux preparatoires* of the Ethiopian Federal Constitution, one may argue, may militate against the use of historical interpretation and in favour of the contextual and teleological interpretation methods in the Ethiopian Constitutional interpretation processes, too.

[65] See also Muradu Abdo, *Review of State Courts over State Matters by the Federal Supreme Court*, Mizan Law Review, Vol. 1, No.1, 2007, pp.60-74, arguing *de lege ferenda* against the practice of the Federal Supreme Court's Power of Cassation over any state matter.

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Supreme Court through the Cassation Decision has stripped Art. 315(2) of the Civil Procedure Code of 1965 of its luster and hammered the last nail in its coffin and that henceforth any arbitral clause or submission in an administrative contract is enforceable. *Two:* the cure is worse than the disease: The Federal Supreme Court erred in holding the decision that is unequivocally against a clear policy consideration of the non-arbitrability of the administrative contracts disputes enshrined under article 315(2) of the Civil Procedure Code of Ethiopia of 1965.

Cutting the Gordian Knots: Conclusion

From the foregoing discussion, we can see that construction contracts for public works are part of the administrative contracts legal regime in Ethiopia and that administrative contracts, with all the privileges bestowed upon them, do exist in Ethiopia. It should also be underlined that more often than not administrative bodies do qualify their contracts as an administrative contract.

It should also be borne in mind that Art.315(2) does prohibit the arbitrability of disputes arising from administrative contracts. A sacrosanct policy consideration is manifestly expressed under Art.315(2) that invests any litigation on disputes arising from administrative contracts exclusively in the sovereign -appointed judges and expressly deprives party-appointed arbitrators of same!

The concern of the sovereign might have been, *inter alia*, the fact that states are deeply concerned in defending and tipping the scales in favor of public interest issues *vis-à-vis* the private interest. In France, for example, the administrative contracts law has been endeared [66] as ever mainly for four basic principles advancing the *services publics*:[67] the principles of continuity, equality, adjustment (adaptability), and priority. The arbitrators may not be sufficiently close to such national concerns and, it can be safely said, especially in international commercial arbitration, that they have a weaker allegiance to national laws; they are notoriously open to the application of international usages and rules of the trade.[68] This is exactly what happened in the case *re High Way Authority* v *Solel Boneh Ltd.* The case was followed by the embodiment of the much-talked-about Art.315(2) in the Civil Procedure Code that was promulgated just few months after the said Court ruling.[69]

[66] John Bell and *et al*, Principles of French Law, (Oxford University Press: New York, 1998), citing Braibant to have written: 'Whatever the new solutions and changes in the future, French administrative law must not lose its soul: the public service", at 167.

[67] Brice Dickson, Introduction to French Law, (Longman Group Ltd: London, 1994), p.70.

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John Sykes has also an equally valid concern: [70] "litigation before the court is essentially a public expression of the need of society to let justice be seen to be done" as opposed to the confidential proceedings in arbitration.

At times, the arbitrator may not be the ideal person to rely upon for some critical disputatious issues. Let us consider the following hypothetical example:

> A certain government department head found out that the construction contract recently concluded with a certain Sky-Limit General Construction (G.I) PLC to construct the 101 kms asphalt road (worth Birr 400 Million) from a city of *Delina* to another city of *Lelina* was an artificially created demand by a certain Road Engineering Section Head within the department. The department alleges that it was intended to specifically procure financial benefits to the contractor and a certain Space Consulting Engineers and Architects (G.I) PLC, which was also awarded for the engineering and architectural services of the project. The department now wishes to invalidate the contract invoking *absence of cause* or *illicit cause* pursuant, respectively, to Article 3170 or 3171 of the Civil Code. Assuming that the contract allows the submission of disputes to arbitration, the department would, it is submitted, submit its request for invalidating the contract to arbitration. Now, would the arbitrator, in his function of determining the validity of the contract, probe into the allegations that the department artificially created the demand and intentionally rigged the procurement procedures to award the multi-million-construction contract to the bidders who connived with the Section Head? Can the arbitrator determine on the existence of procurement corruption (corrupt, collusive, fraudulent, and coercive practices) so as to declare the

[68] The developments and trends in the philosophical perspectives and the rules of engagement in international commercial arbitration involving states and state agencies and a foreign contracting party, including international construction contracts disputes, have been so controversial and detaching itself from the national public policy issues of the arbitrability of disputes. The analysis of those developments and trends was not intended to be within the scope of this short article.

[69] The case of *Ministry of Defense of the Republic of Egypt* v *Chromalloy Aeroservicies Inc.(USA)* is also, in this connection, a case in point wherein the arbitrators applied Egyptian civil law while the alleged contractual choice of law was the Egyptian administrative contracts law. Despite the arbitral award having been vacated (set aside) by the Cairo Court of Appeals, Chromalloy (the award-creditor) has succeeded in having it recognized and enforced both in France and the US. For further discussion on the case, See ICCA Yearbook, Commercial Arbitration, Vol. XXIV(a)-1999 (Kluwer Law International, 1999),pp.265-268. See also a brief discussion by Tecle Hagos Bahta, *Anomalies in the Labor Dispute Resolution Methods under the Ethiopian Labor Proclamation*, Jimma University Journal of Law, Vol. I, No. 1 (2007), pp. 111-132, in *Re Addis Ababa Water and Sewerage Authority* v *Salini Costrutori SpA.*

[70] John Sykes, *supra* note 7, p.214.

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> contract null and void? Can the arbitrator probe into the public procurement irregularities, such as bribing, bid rigging, abuse of confidentiality, bids rejection on frivolous grounds, specification-tailoring to fit a particular bidder, bid splitting, bid bundling, etc?

For the French, the concern is even more than that. The judges of the administrative courts are distinct by their recruitment and training from the civil and criminal judges in that "the administrative judge has a distinctive formation in administration and personal experience of how it works".[71] This is why the French administrative law system has at its epicenter the *tribunaux administratifs*, the *cours administratives d'appel,* and the *Counseil d'Etat.*[72] Unfortunately, the Ethiopian administrative law does not enjoy similar treatment as that of its progenitor.[73] This has left, as indicated earlier on, the Ethiopian administrative contracts law as the most marginalized and stagnated area of law.

Let us now pose the query: whether the parties [and the legal system] would be better off by submitting their disputes to arbitrators who, they believe, are experts on the area, given that there are no administrative courts to deal with them? To be sure, specialist rules require specialist judges!!

International construction contractors and funding agencies are pressurizing, in its strict sense of the word, the opening up of the restriction on the arbitrability of international construction contracts. For example, France, Belgium, and Egypt have opened up international construction contracts to arbitration.[74] So has Ethiopia partially but falteringly.

Currently, disputes arising out of public works construction contracts in Ethiopia are being arbitrated, domestically and internationally, because of any of the following three grounds:

a) The use of the funding agencies' standard bidding documents when and if they are approved by the legislature as concomitant conditions of grants and loans for projects;
b) The judges' passivity in raising, *sua motu*, the defense of non-arbitrability of disputes arising from the public works construction contracts; and,
c) The various legislative enactments (otherwise known as 'enabling

[71] John Bell and *et al*., *supra* note 65, 176-177.

[72] Brice Dickson, *supra* note 66, pp.70-72.

[73] It is hinted by Prof. René David that both the High Court and the Supreme Court in Addis Ababa used to contain a division that deals with Government cases; cited at René David, *Administrative Contracts in the Ethiopian Civil Code*, *Journal of Ethiopian Law*, Vol. IV, No.1 (1965), p.144.

[74] Jeremy Winter, *supra* note 51, pp.178-183; it is indicated *supra* note 67 that the dictates are not analogous.

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clauses') entitling the administrative bodies to settle their disputes out of court.

Yet, the 'enabling clauses' must be carefully trodden upon. Some of them are still dubious whether they allow for arbitration or not. Let us see two of them.[75]

i) the general manager may, with the specific permission of the Board, *settle disputes out of court;*

ii) the general manager shall *settle civil disputes out of court* in accordance with the directives issues by the Board. [Emphasis supplied].

It may well be argued that, insofar as arbitration of administrative contracts disputes are concerned, a prior express 'prohibitive clause' [Art. 315(2)] entails a posterior express 'permissive clause' to go against the former.[76] Thus, these provisions might have been intended to serve the purpose of partly freeing the general manager to engage in ADR methods (exclusive of arbitration) and reach at a compromise agreement.

This is because the administrative bodies are bound by the public procurement rules requirements that it may not be left to their own devices with a *carte blanche* to engage in compromise negotiations that involve the use of public money once the tender award is made.[77] At times, however, post-contractual renegotiations may enhance efficiency by allowing both parties to react to unanticipated contingencies; such contingencies being particularly rampant in construction contracts. Hence we cannot rule out the possibility that the new 'Enabling Clauses' might have been devised to offer a bit of a breathing space for the managers to engage in ADR and not in arbitration.

[75] Art.10 (3) of Ethiopian Roads Authority Re-establishment Proc. No.80/97, *Federal Negarit Gazeta*, 3rd year, No.43, A.A, 5th June 1997, and Art. 8(2)(f) of the Proclamation for the Re-establishment and modernization of Customs Authority, No.60/1997 respectively.

[76] See, for example, The Petroleum Proclamation No.295/1986 and the Mining Proclamation No.52/1993, wherein it is established that arbitration shall be used for settling any dispute, controversy or claims arising under the petroleum operations agreement and mining operations agreement, under Art.25 and 51 of the Proclamations respectively.

[77] For a discussion on whether the use of ADR in government contracts reduce the transparency of and accountability for the resulting settlements owing to the public's diminished access to and scrutiny of the negotiated settlements, see Steven Schooner, *supra* note 9, pp. 627-651. See also Robert Gomez, Mediating Government Contract Claims: How it is different, *Public Contracts Law Journal*, Vol. 32, (2002-03), pp. 63-98.

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Be that as it may, however, the administrative contracts legal regime lacks in one basic ingredient that its counterparts have greatly benefited from, i.e., the administrative courts. The basic infrastructure that, we believe, made the administrative contracts non-arbitrable is missing here. Thus, it is high time that the Federal and States legislatures realize this gap and unfalteringly take either of the following two mutually exclusive stricter measures.

The first option is to establish an administrative court with professionals and specialists on the area as it is, for instance, in France, Germany, Italy, Belgium, and Egypt. As observed by Mauro Cappelletti and Bryant Garth, the administrative courts in France, Germany, and Italy, not only are sufficiently specialized in the subject matter but also "…truly independent and impartial bodies, endowed with the prestige of judicial courts, and maintaining fundamental standards of procedural fairness." [78]

The second option can be to unequivocally [79] repeal Art.315 (2) of the Civil Procedure Code. This can possibly enable the legal system, in general, and the Government Contracts legal regime, in particular, avail themselves of the expertise of the specialist arbitrators!!

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[78] *Supra* note 52, at 21

[79] In this connection, mention should be made here of Art.47 of the Amhara State Public Procurement Procedure Determination Proclamation No.135/2006, *ZIKRE HIG*, 11th Year, No.20, June 15, 2006, Bahir Dar. Art.47 provides thus:

> "*Where a disagreement arises between the procuring entity and the supplier, such issue shall firstly be dealt with by arbitrators to be chosen by the two parties.*"

However, the legal provision still lacks in clarity: essentially, the use of the term "gilgil", as a title of the provision for 'arbitration' and 'gelagayoch' for the 'arbitrators' in stead of 'yegilgil dagnnet' or 'yeshimglina dagnnet' and 'yegilgil dagnoch' or 'yeshimglina dagnoch" respectively in the Amharic version renders the provision susceptible to some ambiguity. By the deployment of such terms in the Amharic version, the legislature may mean to refer to 'conciliation proceedings' rather than arbitration proceedings. The misuse of the word 'arbitration' to actually refer to conciliation proceedings is so pervasive in Ethiopia. For more discussion on this, see Tecle Hagos Bahta, *supra* note 68, at 120 (particularly ft notes 24-25). Furthermore, if it is meant to refer to arbitration proceedings *stricto sensu*, the role of arbitration only as a first instance dispute settlement method, as is clear from a reading of the provision, rejects the idea of *waiver* of appeal pursuant to art. 350 of the Civil Procedure Code. This is not, at least, in keeping with the trend in international commercial arbitrations demanding for the 'finality' of arbitral awards save by way of the 'set aside' recourse.

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These measures can indeed serve the purpose of effectively applying and achieving the 'sacrosanct public interest issues' as it should have been advanced under the Government (Administrative) Contracts legal regime. And, perhaps equally important, they can enhance certainty and predictability in the legal system.

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