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Administrative Contracts

General Overview

- The term administrative contract is unique concept
- administrative contract is never dealt in Civil Codes
- Administrative Contracts are contracts beyond the civil code's purview
- The Civil Code of Ethiopia, however, has chapter on Administrative contracts

General Overview

- Why such anomaly to the Ethiopian legal system then?

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General Overview

- Government agencies are there to serve public interest የመንግስት አካላት ዋነኛ ዓላማቸው የህዝብን ጥቅም ዋስጠበቅነው። ጥያቄው እስከምን ድረስ ሂደው ያስጠብቃሉ የሚለው ነው።
- It was necessary to make distinction between contract by public authorities/agencies from those of private individuals/entities. የህዝብ ጥቅም ደግሞ ከግለሰብ ጥቅም የሚለይበት አለ
- This is the case when the contracts have the characteristics of *administrative contracts*.

General Overview

- In some countries, they have special administrative courts/tribunals entertaining cases on administrative contracts – e.g. French
- *French administrative contract law is based on cases from administrative contracts.* የፈረንሳይ የአስተዳደር ህግ የሚመነጨው ከአስተዳደር ውሎች ነው እንጅ እንደኛ ራሱን የቻለ ህግ የላትም።
- It is not codified into the *Code Civil* or any other statute

General Overview

- In some countries, they have special administrative courts/tribunals entertaining cases on administrative contracts – e.g. French
- French administrative contract law is based on cases from administrative contracts.
- It is not codified into the *Code Civil* or any other statute

General Overview

- In Ethiopia there is no administrative court entertaining administrative contracts
- The option was then;
  - Include rules of administrative contracts in the Civil Code
  - ~~No such rules on the civil code and face great uncertainty~~

General Overview

The choice was obviously, in favor of incorporating the law of administrative contracts into the Civil Code

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General Overview

- Because of the increased function of state and its administrative authorities, administrative contracts have become very important. የመንግስት ሚና ከጊዜ ወደ ጊዜ እየጨመረ ስለመጣ አስተዳደራዊ ውሎች አስፈላጊዎች ናቸው።
- Its more true in developing countries like Ethiopia; የካፒታል እጥረት አለብን
  - Countries development should be aided by concessions to domestic and foreign enterprises
  - It will require more public works
  - የኢንፎርሜሽን ቴክኖሎጂ ዝርጋታዎችም የስፈልጋሉ

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General Overview

- Developed market democracies have abandoned these functions long ago.
- This is however treated differently under Ethiopian law
- This was owing to absence of trained lawyers and trained personnel in the government that necessitated the need for administrative contracts በዘርፉ ያለው የሰው ኃይል አናሳ በመሆኑ በተለይ የውጭ አድቨርሳሪ ከባድ ስለሆነ በህግ መገደብ ተገቢ ነው። የግልግል ጉዳይ
- It was decided that rules on administrative contracts be included in the Civil Code

General Overview

- Rationale for having the rules
  - Certainty and predictability - *it would lead to a security in contractual relations with the government that would enhance the country's development* ምንድን ነው የሚገጥመን የሚለውን በግልፅ ለማዎቅ ያስችላል።
  - Clarification of the rules on administrative contracts would help attract foreign enterprises and capital to Ethiopia ይህም ግልፀኝነት ኢንቨስትመንትን ለመሳብ ያግዛል።

General Overview

- Options ምርጫዎቹ ሁለት ነበሩ።
  - To include provisions in the “General Contract” chapter አንደኛው በአጠቃላይ ውል ማካተት
  - Clear and coherent system of rules applicable to administrative contracts only ሁለተኛው ደግሞ ግልፅ የሆነ ድንጋጌ በህጉቹ ውስጥ ማስቀመጥ ነው።
- *The option chosen was the second one.*

Administrative Contracts Provisions

- The Title on Administrative Contracts has the following parts;
  - Chapter One - *General Provisions (3131-3206)*
  - Chapter Two - *Concession of Public Service (3207-3243)*
  - Chapter Three - *Contract of Public Works (3244-3296)*
  - Chapter Four - *Contract of Supplies (3297-3306)*

- የልማት ድርጅቶችና የግዥ አዋጁ ብዙ ነገር አሻሽሎታል። ነገር ገን ምንም እንከን ብዙ ነገር ቢሻሻልም አወዛጋቢ የሆነው አስተዳደራዊ ውል ማለት ምን

Applicability ተግባራዊነቱን ስንመለከት

- Contracts concluded by state or administrative authorities shall be governed by General or Special contracts laws provisions በመንግስት ወይም በመንግስት አካላት የሚገቡ ውሎች በአጠቃላይ የውል ህግ ወይም በልዩ የውል ህግ ይመራሉ።
- The provisions of administrative contracts shall play role of supplementing or replacing such general and special contracts law provisions. ስለዚህ አስተዳደራዊ ውሎች እነዚህን አጠቃላይ የውል ህግ ወይም ልዩ ህግ በመደገፍ ወይም በመተካት ያገለግላሉ

Definition

How do you define administrative contracts?

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Definition

- A contract is administrative contract where;
  - It is expressly qualified as such by law (Art. 3132(a)) fore example
    - Concession of public service
    - Contract for public works
    - public supplies contracts – electricity, water, etc.
- This requirement is mandatory. Those designated contracts should always be administrative contracts.

Definition

- It is connected with an activity of public service and implies permanent participation of the party contracting with the administrative authority - Art. 3132(b)
  - This is about the object of the contract – public service

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Definition

- It contains one or more provisions which could only have been inspired by urgent considerations of general interest extraneous to relations between private individuals - Art. 3132(c)
- አስቸኳይ ለጠቅላላው ጥቅም አስፈላጊ በመሆናቸው እና ግለሰቦች በሚዋዋላቸው ውሎች የማይገኙ ከሆነ

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Definition

- Administrative contracts can be distinguished from other ordinary contracts with their object – public service.

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Definition

- Public service can be understood to mean
  - Any activity which a public community has decided to perform for the reason that it to be necessary in the general interest and considered that private initiative was inadequate for carrying it out የግሉ ሴክተር የማያረካው፣ ለጠቅላላው ጥቅም ሲባል የሚደረግ ነው።
  - There is the requirement of necessity
  - Inadequacy of initiative on the part of the private sector በግሉ ሴክተር ያለው ተነሳሽነት አናሳ መሆን ወይም የግሉ ሴክተር ሳለ መሟላት ያለባቸውን የህዝቡን ፍላጎት ማርካት አለመቻል ነው።

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Definition

- Three Classical administrative contracts under Ethiopian law
  - concession of public services
  - public works contracts
  - public supplies contracts

  have been ordinarily incorporated within the Civil Code as administrative contracts

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Definition

- How is that understood by tribunals?

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Definition

Authority (Ethiopia) vs Consultant (UK)

Facts

- There was a research and consultancy service agreement between a Government agency and foreign firm
- Ethiopia argued it is administrative contract
- Consultant argued its not administrative contract

Definition

The tribunal/sole arbitrator states the following;

“it is denied that the Contract is an administrative contract under the provisions of Article 3132 of the Ethiopian Civil Code. This is clear from the plain words of Article 3132. In particular;

Definition

clear from the plain words of Article 3132. In particular:

(a) *As to Article 3132(a), the Contract is expressly described as a 'consultancy service of tax revenue potential study and gap analysis'. It is not designated or qualified, by the law or by the parties, as an administrative contract.*

(b) *As to Article 3132(b), the Claimant, in providing technical consultancy services for a specific period of time to the Respondent to enable the Respondent to more effectively carry out its duties in collecting taxes in Ethiopia, does not imply a 'permanent participation' of the Claimant through the Contract in the execution of a 'public service'. This sub-article contemplates and is concerned with an entity 'stepping into the shoes' of an administrative authority to carry out a public service on the administrative authority's behalf. An example would be if a private company was contracted to carry out social services provision.*

(c) *As to Article 3132(c), there is nothing in this Contract for consulting services that could have been inspired by urgent considerations of general interest extraneous to relations between private individuals. The Contract is an ordinary contract for consultancy services.*

Definition

- *Tribunal further stated that "Since the jurisdiction challenge depends upon the Contract being an administrative contract, the challenge is fatally flawed."*
- *The tribunal assumed jurisdiction on this basis.*

Definition

- What do you think of this decision?
- What is the implication on ከናንተ ተቋም contracts?
- Can the purchase of medicine and pharmaceuticals ወይም ሌላ ዕቃዎች be considered administrative contract as per the tribunal's analysis?

Administrative Contracts

- To acquire a status of administrative contracts
  - The contract be expressly qualified as administrative
  - that the contract reserves exceptional powers to the administrative authorities - it contains *clauses exorbitantes du droit commun – derogating clauses of ordinary law*

Administrative Contracts

- Administrative contracts are generally said to have the following three elements
  - One of the contractors must be an administrator (government) or any public law entity አንደኛው ተዋዋይ የመንግስት አካል መሆን አለበት። አዋጅ ቁጥር 649/2001 ትርጉም
  - The contract must be geared towards regulating and facilitating public utility; or የህዝብ ጥቅም
  - The contractors must choose public law provisions which are different provisions than those found in private law ልክ እንደ አስተዳደራዊ ህግ

Administrative Contracts

- One of the contracting parties needs to be an administrative agency.
- Where it is regarded as administrative contract by operation of the law, such should be governed by law of administrative contracts, like contracts for public service, public works

Administrative Agency

What is administrative agency? What makes it different from public enterprises?

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Administrative Agency

- *Public body (administrative agency) means any public body, which is partly or wholly financed by Federal Government budget, higher education institutions and public institutions of like nature* (Art. 2(6)) - *Proclamation No.649/2009*

Administrative Agency

- For a certain agency to be said administrative, the following should be fulfilled:
  - It should be partly or wholly financed by the Federal Government budget.
  - Should have legislative power which will enable it to issue a directive,
  - Should have judicial power for speedy resolution of disputes and cases ተጫራቾችን የማገድ ለተወሰ ጊዜ

Administrative Agency

- Administrative agency is different from public enterprises – PEs are established for commercial/gain purposes.
  - “Enterprise means a wholly state owned public enterprise established pursuant to the PE Proclamation to carry on for gain manufacturing, distribution, service rendering or other economic and related activities” .proc.no.25/92
  - Public enterprises finance themselves ራሳውን ይደግፋሉ ተብሎ ይታሰባል
  - Their objective is not public service but fill market failure and assist in development activities በመርህ ደረጃ ዓላማቸው ለትርፍና እድገትን መደገፍ እንጅ ትርፍ አይደለም።

Administrative Agency

- Three things can make an entity administrative
  - source of income of the entity – wholly or partly from the government
  - Legislative or judicial power
  - Nomenclature
    - Ministry
    - Authority
    - Commission
    - Bureau etc.

Administrative Contracts vs General Contracts

- Administrative contracts can be similar to other types of contracts as to their;
  - Formation
  - Validity, and
  - the form

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Administrative Contracts vs General Contracts

- But they can be different in their;
  - Formation
  - Content
  - Execution/performance

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Administrative Contracts - common law vs civil law

There are some major differences in the approach towards government contracts and between common law and civil law countries.

Administrative Contracts - common law vs civil law

- English Law – there is no such a thing called administrative contracts
  - English law treats administrative contracts like any other ordinary contracts
  - Parties will be treated as equal members
  - There is no prerogative for administrative agencies/authorities
  - Consequently, the common law requires no new or special law governing administrative contracts

Administrative Contracts - common law vs civil law

- French law – there is a distinction between administrative contracts and civil contracts በአስተዳደራዊና በፍትሐብሄራዊ ውሎች መካከል ልዩነት አለ።
- This distinction is based on; ልዩነቱ መሰረት የሚያደርገውም
  - Identity of the parties
  - The intentions of the parties
  - Objectives of the contract በውሉ ላይ በተጠቀሰው የተዋዋይ ወገኖች መብትና ግዴታ

Administrative Contracts - common law vs civil law

- Hence perspective change is observable under the civil law system, including ours, where
  - parties to administrative contracts are unequal,
  - administrative agencies enjoy different prerogatives,
  - their case will be governed by a special regime of law
  - they are adjudicated by special tribunals (i.e. administrative tribunals). This is specially the case in France.

Administrative Contracts - common law vs civil law

- The general principles of French Law governing formation of contracts are the same for administrative contracts although there may be a special formality, such as approval by higher authorities. በፈረንሳይ ውል ሲመሰረት ከሌላው ውል የተለየ አይደለም ወይም ለብቻው የተወጣ ህግ የለም። ምናልባት የተለየ ፎርም ማዕደቅ ከሌለው በስተቀር ማለት ነው።
- It is, however in the enforcement of and execution of the terms of the contract that administrative law has worked out special principles, which stem mainly from the *underlying idea of the need to recognize the predominance of public interest.* ዞሮዞሮ ግን አፈፃፀሙ ላይ የህዝብ ጥቅም የሚባለው ነገር ታሳቢ ይደረጋል።

Principles & Doctrines

What are those principles and doctrines that makes administrative contracts different from ordinary contracts?

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Principles & Doctrines

- Administrative contract law has principles and doctrines that are different from other contracts
- These are;
  - Doctrine of *imprévision*
  - Principle of *fait du prince*
  - Doctrine of supervision
  - Non- applicability of '*exceptio* non *adimpleti contractus*
  - Doctrine of cause
  - Non-applicability of specific performance
  - Non-arbitrability

Principles & Doctrines

- **Doctrine of *imprévision***
  - if supervening circumstances have arisen the private party will not be allowed to resign from the contract. የሁኔታዎች መቀየር ተዋዋይ ወገኑን ውሉን እንዲያቋርጥ አያስችለውም
  - This is applicable in the absence of clear agreement ግን ይኸ ተግባራዊ የሚሆነው ግልፅ የሆነ ስምምነት ከሌለ ብቻ ነው።
  - Private party will be still compelled to perform it where public interest demands its performance
  - The supervening event is not related to acts of the parties የተፈጠረው ነገር ግን ከፓርቲዎቹ ድርጊት ውጭ መሆን አለበት
  - Similar doctrines are found under Ethiopian law
    - See Arts. 3183-3189

Principles & Doctrines

- **Doctrine of *imprévision***
  - This theory is based on the *rebus sic stantibus* principle, which is the venerable principle limiting the “sanctity of contract” theory (*pacta sunt servanda*) 3183- materially possible. አፈፃፀሙ በመሳሪያ ረገድ የሚቻል ሆኖ ሲገኝ
  - the doctrine that allows a contract/treaty inapplicable because of the change of circumstances

Principles & Doctrines

- **Doctrine of *imprévision***
  - *Imprévision* and force majeure are exceptions to pacta sunt servanda

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Principles & Doctrines

Doctrine of *imprévision*

- Elements of Unforeseen supervening eventualities; the event must be
  - exceptional/infrequent/irregular
  - Unforeseeable
  - general in character: the event affects a number of people or a certain category of people በሁሉም ላይ የሚስተዋል መሆን አለበት
  - the event should occur during performance, and,
  - One of the parties must be exposed to *excessive economic difficulties*

Principles & Doctrines

Doctrine of *imprévision*

- Under Ethiopian law the doctrine is not there to maintain the balance of the contract
- It is merely to cover losses as a result of the supervening event በኢትዮጵያ ግን ዓለማው ኪሳራዎችን ከመሸፈን አንፃር እንጅ ባላንስን ከመጠበቅ አንፃር አይደለም።

Principles & Doctrines

- **Principle of *fait due prince***
  - *Also known as Act of Government*
  - the doctrine of *fait du prince* is involved when the *economic basis of the contract is upset by the act of the public body itself.*
  - This is a doctrine similar to the act of state under general contracts.
  - There is a similar principle under Ethiopian Law as stated under (Articles 3190-3193:

Principles & Doctrines

Principle of *fait due prince*

- There is a similar principle under Ethiopian Law
- *where the provisions of the contract becomes more onerous by the acts of the government like regulations and laws, the other contracting party is at duty to perform its obligations but can claim the difference in price later on as an indemnity.*
- For this, however, *the act of the government should have effect on the economic balance of the contract*.
- See Articles 3190-3193

Principles & Doctrines

Principle of *fait due prince*

- The intervention measure can be of general or particular applicability
- Such measures of general applicability by state agencies can;
  - directly modify the contractual terms,
  - prevent the enforcement (application) of some of the contractual terms, or
  - prematurely put an end to the contractual performance.

Principles & Doctrines

Principle of *fait due prince*

- In such cases the contractor is entitled for compensation unless the measure states otherwise
- The state intervention can impact the contract by
  - By making the performance impossible – *remedy* - cancellation
  - Rendering the performance excessively onerous or more difficult – *remedy* - Act of Government doctrine

Principles & Doctrines

Principle of *fait due prince*

- According to this principle, the “measure of general application” may impact the contract by either;
  - tampering with the content (provisions) of the contract, - compensation
  - simply disturb the situational circumstances for performing the contract present at the time of making the contract - *does not give rise to compensation*

Principles & Doctrines

Principle of *fait due prince*

- If the intervention is of particular applicability, the effect is different
- The measure can be from;
  - the procuring entity itself - entitles compensation if the measure makes performance excessively onerous
  - any other agency – no compensation

Principles & Doctrines

- **The doctrine of Supervision**
  - closely related to *imprévision*, is that the public body has at all times the right to enforce performance in that the contract is properly performed in accordance with public interest. የህዝብን ጥቅም መሰረት አድርጎ እየተሰራ መሆኑን
  - In addition to this the public body is entitled to vary or modify the terms, paying an indemnity or addition to the contractor when it is proper to do so. ለስራው አስፈላጊ ሲሆን ውሉን የማሻሻል
  - The government can direct and supervise the performance of the contract at each stage and every aspect of the obligation, በየትኛውም ደረጃ ላይ ቢሆን ስራውን የመከታተል ኃላፊነት አለበት

Principles & Doctrines

The doctrine of Supervision

- The administrative agency may also order performance of the obligation in a manner suitable to it at each stage of the administrative contract. የስራ ትዕዛዞችን መቀነስ መደመር ወዘተ ይሰጣል
  - *See Art. 3252 of the Ethiopian Civil Code*

MINISTRY OF JUSTICE

Principles & Doctrines

Non-existence of Exceptio non adimpleti contractus **the right to withhold performance where reciprocity exists**

- *Exceptio non adimpleti contractus* is a defense that can be raised to refuse performance in reciprocal contract. ካልፈፀምክ አልፈፅምም
- The principle in private law contracting is that in commutative contracts you can suspend your performance if the other party is not performing his obligation. አንደኛው ወገን አልፈፅምም ካለ ሌላኛው ወገንም ማቆም ይችላል
- In public law contracting, however, in order to ensure the continuity of providing public service or utility, a contractor cannot stop the performance on condition of being fully compensated for any loss suffered በአስተዳደር ውል ግን ሌላኛው ወገን አለመፈፀሙን ምክንያት አድርጎ ማቆም አይችልም።

Principles & Doctrines

Non-existence of Exceptio non adimpleti contractus

- The doctrine simply is a right entitling a party in reciprocal/simultaneous contract to refuse to perform his obligation where the other contracting party has not performed or offered to perform his part of the obligation
- It is non-existent in administrative contracts owing to the public interest issue in such contracts

Principles & Doctrines

Non-existence of Exceptio non adimpleti contractus

- Thus, this doctrine does not apply in public law contracting; the contractor is duty-bound to continue to perform its remaining obligations, notwithstanding that the procuring entity is way behind in discharging its obligations
- It has to continue performing and, thereby, enabling the public service to remain undisturbed and unabated.

Principles & Doctrines

Specific Performance

- Under general contracts specific performance is a remedy በውሉ ጠቅላላ ክፍል ውልን በግድ ስለማስፈፀም ተደንግጎ የሚገኝ ሲሆን በአስተዳደታዊ ውል ግን አይቻልም።
- This is particularly true in obligations that are not entered in consideration of the person.
- In administrative contracts, specific performance cannot be ordered on the procuring entity. But the administrative agency can demand specific performance አስተዳደራዊ አካሉ ግን መጠየቅ ይችላል።
- The contracting entity can only request for damages. ተዋዋይ ወገኑ መጠየቅ የሚችለው የጉዳት ካሳ ብቻ ነው።

Formation of Administrative Contracts

Remember Article 1676?

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Formation of Administrative Contracts

Hence,

- Rules of formation of general contract law apply
- Special requirements applicable to administrative contracts only are also envisaged

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Formation of Administrative Contracts

Consent

- Consent inferred from the form of contract - Article 3134

  “… The conclusion of a contract by the administrative authorities implies an express manifestation of will on their part”

- NB: The law requires administrative contracts to be in writing and the contract be deposited before the Court, notary (DARA), or the agency

Formation of Administrative Contracts

- At times consent could mean approval by higher authority. ፈቃድ ሰጠ የሚባለው በከፍተኛ አመራር ተቀባይነት ሲያገኝ ነው
- consent might mean approval where by no consent shall be expressed unless "… such approval is given. በግልፅ መሰጠት አለበት
- In the case of late approval the contractor can release himself by giving notice - Art. 3145 መዘግየት ካጋጠመ ማስጠንቀቂያ በመስጠት ውሉን ማቋረጥ ይቻላል

Formation of Administrative Contracts

Capacity

- Is about the proper establishment/registration of an entity በህግ የተቋቋመ
- The capacity is conferred by the law establishing the administrative agency
- Generally, capacity is either legal or technical
- Administrative agency should have
  - legal capacity – should be constituted by the proper legal instrument በተገቢው ህግ የተቋቋመ
  - Fiscal capacity – has to assert its financial capacity የገንዘብ ምንጭ

Formation of Administrative Contracts

What if the administrative agency does not have funds at the making of the contract? Will it affect the validity of the contract?

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Formation of Administrative Contracts

- Law of Administrative contracts does not require such fund to be available and it states the contract is valid irrespective of the availability of the fund.

A contract concluded by an administrative authority shall be valid notwithstanding that such authority has not received the necessary credits for the performance of the contract ገንዘብ ባይኖረውም የተዋዋለው ውል ይፀናል።

Art. 3142 ገንዘብ አለመኖር

Formation of Administrative Contracts

- But the Financial Administration Law – Proclamation. No. 648/2009 prohibits Heads of Agencies from contracting when they don't have the necessary funds.

No contract or other arrangement requiring payment shall be entered into by any public body unless there is a sufficient unencumbered balance from the budget to discharge any debt that will be incurred during the fiscal year in which the contract or other arrangement is made. ገንዘብ ከሌለው መግባት አይችልም

Art 32(2) with 70(4)

Formation of Administrative Contracts

- Hence, the Civil Code provision seems inapplicable as it will be illegal act by the Head of the agency. ተሻሽሏል

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Formation of Administrative Contracts

Object - የተዋዋይ ወገኖች መብትና ግዴታ ነው።

- General contract law provisions apply (1711 – 1718) ስለ ውል ጉዳይ በዚህ ክፍል የተደነገገው ለአስተዳደር ውሎችም ይሰራል።
- An administrative contract requires defined and lawful object. በግልፅ የተቀመጠና ህጋዊ የሆነ የውል ጉዳይ ያስፈለጋል
- Administrative contracts have objects determined by administrative agencies – Art. 3135
- The contract should have *cause and the cause should not be impossible and illicit* መነሻ የሚቻልና ግልፅ መሆን አለበት።

Formation of Administrative Contracts

- The contract shall be null on the ground of lack of cause where attainment of the result is impossible – Article 3170 ጉዳዩ ህጋዊ ካልሆነ እንደሌለ ይቆጠራል
- A contract shall be null and void on the ground of unlawful cause where its made with unlawful object in view – Article 3171

Formation of Administrative Contracts

- Form
  - Form requirements under General Contract Law applies
  - The form for administrative contracts is;
    - Written form በፅሁፍ መሆን አለበት
    - Registered with the Court, DARA or Administrative Agency በሚመለከተው አካልም መመዝገብ አለበት።

Formation of Administrative Contracts

- Modalities of Formation of Administrative Contracts
  - In principle the modality is by competitive tender በመርህ ደረጃ በጨረታ ነው
  - the civil code provisions seems to give the discretion to administrative agencies ነገር ግን ህጉ የመምረጥ ስልጣን የሰጣቸው ይመስላል።

Article 3147

- *Administrative contracts may be concluded by the procedure of allocation by tender.*
- *They shall be concluded by this procedure under the pain of nullity, whenever the law imposes such obligation.*

Formation of Administrative Contracts

- The provision of the Civil Code on tender seem that they are repealed by the Procurement Proclamation No. 649/2009 የፍትሐብሄር ስነ-ስርዓት ህጉን አሻሽሎታል።
- There is no express repeal but Proclamation No. 649/2009 better addressed the issue and Civil Code provisions are, I think, repealed by disuse በግልፅ አላሻሻለውም
- The Proclamation clearly states that any contract by administrative agencies should through *competitive tender and procurement.* ሌሎች ግዥዎች አለ። ነገር ግን በምርጫ ሳይሆን በመስፈርት ነው።
- The Civil Code provisions – contrary to this rule, and hence inapplicable. (see Article 79(2) of Procurement Proclamation No. 649/2009

Effect of Administrative Contracts

- under general contracts, the due effects of contracts deals with issues of;
  - Interpretation
  - Performance
  - Variation/revision
  - Non-performance
  - Remedies of non-performance
- Hence, the logical consequence of the formation of contracts is its effect. የውል መመስረት አንክዮ ውጤቱ ነው። በተዋዋይ ወገኖቹ ላይ ያለው ሚና

Effect of Administrative Contracts

- In administrative contracts, effect is also an important issue.
  - Performance
  - Non-performance
  - Revision
  - Variation

  ...are issues that can be discussed under effect of administrative contracts

Effect of Administrative Contracts

- Performance
  - The first provision dealing with performance of administrative contracts is Art. 3172 ስለ ውል አፈፃፀም የሚያስቀምጠው አንቀፅ ነው።
  - It states that Contracting parties shall perform their obligations in a manner provided in the contract". በውሉ በተቀመጠው አግባብ መፈፀም አለበት
  - They shall perform the contract in a correct manner deemed to be satisfactory according to the rules of art prevailing at the time and kind of activity
  - This is a reference to Art. 3135 – 3138 (conditions, specifications, standards, etc. drawn by the administrative agency) በውሉ በተቀመጠው መግለጫዎች አግባብ

Effect of Administrative Contracts

- Two tests of performance; ሁለት የአፈፃፀም መለኪያ
  - Quality ጥራት
    - the contract shall be performed according to the specifications and general conditions fixed at the making of the contract. በውሉ አግባብ
    - These are relevant for for interpretation and execution purposes

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Effect of Administrative Contracts

- Time ውሉ የተፈፀመበት ጊዜ
  - this is the time provided under the contract. ውሉ በውሉ በተቀመጠው ጊዜ ውስጥ መፈፀም አለበት
  - There is performance where the contract is performed in accordance with time limit provided for it. ሊኩይዴት ዳሜጅ
  - But as it is not always the case that the contract will be performed exactly within the time limit provided for performance በተቀመጠለት ጊዜ ግን መፈፀም የተለመደ አይደለም
  - slight deviation of time is excusable and will not amount to non-performance – usually this is managed in the contract የተወሰነ ጊዜ መጨመር ችግር የለውም። የተወሰነ ጊዜ ምን ያህል ጊዜ ነው?

Effect of Administrative Contracts

- On the part of the administrative agency
  - The payment of price shall be made in accordance with rules of finance and accountancy law የሚጠበቅበትን ክፍያ መክፈል አለበት
  - The non-performance by administrative agency will not entitle the contracting party to suspend his performance – exceptio non *adimpleti contractus* (Art. 3177) the right to withhold performance (eg. payment) where reciprocity exists contractually in terms of the performances by each party. ከአስተዳደር ውል አይሰራም።
  - Contracting party cannot ask for set-off ታክስ (fisical debts) 3178

Effect of Administrative Contracts

- Revision የተቋሙ ስልጣን ነው።
  - This is the power of administrative authority
  - They may unilaterally impose on the other party certain modifications of the contract የብቻቸው ሊቁኑ ይችላሉ። ነገር ግን የተወሰኑ ገደቦች አሉ።
  - This power is qualified with …where *change of circumstance justifies such modification in the general interest.*
  - *The administrative authority can also terminate the contract …where the contract has become useless*
  - *There has to be good reason for this* ውሉ ጠቃሚ አይደለም ብለው ካሰቡም ሊያቋርጡት ይችላሉ።

Effect of Administrative Contracts

- Remedy for the Party contracting with administrative authority
  - Compensation ካሳ
  - When the termination is;
    - Lawful – indemnity ዋስትና
    - Unlawful – indemnity + profit

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Effect of Administrative Contracts

- Nonperformance of Administrative Contracts
  - Non performance is when the contract is not executed as agreed እንደውሉ ካልተፈፀመ
  - In the case of non-performance, the court cannot order the administrative agency to perform its obligation – no specific performance አስተዳደራዊ ተቋሙ ተገዶ ፈፅም ሊባል አይችልም
  - Court can order damages against the administrative agency ነገር ፍ/ቤቱ እንዲፈፅም ሊያዝ ይችላል።
  - Court can also cancel measures taken by administrative authorities

Effect of Administrative Contracts

- Nonperformance of Administrative Contracts
  - The court can order the other contracting party specific performance
    ሌላኛው ወገን እንዲፈፅም ሊገደድ ይችላል።
  - Interests can be due by administrative authority within the meaning of Article 3196 & 3197 (See Cassation No. 95797)
    ስለ ወለድ
  - Cancellation of administrative contracts
    ውልን መሰረዝ

Types of Administrative Contracts

- There are three types of administrative contracts under the Civil Code;
  - Concession Contracts
  - contract for public works
  - contract of public supplies

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Concession Contracts

What is concession?

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Concession Contracts

- A **concession** is a business operated under a contract or license associated with a degree of exclusivity in business within a certain geographical area. በውሉ ወይም በተወሰነ ቦታ ላይ ፍቃድ በመስጠት የሚከናወን ከአያንዳንዱ ግለሰብ ጋር ውል ባይኖርም ሰው ተቀብሎታል
- For example, sports arenas or public parks may have concession stands
- The lease gives the contracting party to operate and maintain the public utility or facility
  - Examples: Addis - Adama Express Road, Ethiopian Airlines parking places

Concession Contracts

- Under Ethiopian law, concession is defined as;
  - *Any activity, which the public community has decided to perform for the reason that it has deemed it to be necessary in the general interest and considered that private initiative was inadequate for carrying it out, shall constitute public service.* ለህዝቡ አስፈላጊ በመሆኑ እና የግሉ ሴክተር ሊያከናውነው ስለማይችል መንግስት ራሱ የሚከውነው ውል ነው
  - *The concession of public service is the contract whereby a person the grantee, binds himself in favor of an administrative authority to run a public service getting remuneration therefore by means of fees received on the use thereof.* ከአንድ የመንግስ ተቋም ጋር የሚደረግ ውል ነው

Article 3207

Concession Contracts

The concession of a public service, therefore, is the contract where by a grantee, binds himself in favor of an administrative authority to run a public service getting a remuneration to that effect by means of fees received on the use thereof.

Concession Contracts

- Elements in the definition of concession;
  - Grantee - *One of the contracting parties, a private individual that enters in the activity of providing a public service.* ተቋራጭ ሲሆን አገልግሎቱን ለማቅረብ ከመንግስት ጋር የሚዋዋል የግል ድርጅት ነው።

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Concession Contracts

- Grantor: *It is the administrative authority that undertakes to control the grantee and supervise the work of the same.* አስተዳደራዊ ተቋም ኃላፊነቱን የሚሰጠውና ስራውን የሚቆጣጠረው ነው።

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Concession Contracts

- Public service: *is the reason that necessitates government's intervention in its provision.* ለህዝብ የሚሰጥ አገልግሎት በመኖሩ ነው መንግስት ጣልቃ የሚገባው።
  - *It is one of the reasons why we have administrative contracts.* የአስተዳደራዊ ውል መኖር መሰረታዊ አስፈላጊነት
  - *The inadequacy of private initiative emanates from different reasons.* የግሉ ተነሳሽነት ብቁ የማይሆንበት
    - *Lack of infrastructural capital, expert management and exposure to externalities can be mentioned as reasons.*

Concession Contracts

- **Remuneration -** *It is not for free that the grantee will bind himself in favor of administrative authorities.* ትርፍን መሰረት ያላደረገ ክፍያ ያስፈልጋል
  - *basic idea behind concession contracts is not profit.*
  - *Still one cannot say that the grantee should run the service for free*
  - Unlike other business undertakings the grantee is not as free as ever to set discriminatory prices. እንደሌላው ቢዝነስ የተለያየ ዋጋአይተመንም
  - The public should equally benefit from the prices set by the parties.ህዝቡ እኩል መገልገል አለበት

Concession Contracts

- Rights of the Administrative Authority የአስዳደር አካሉ መብቶች
  - The right to control the good running አገልግሎቱ በጥሩ ሁኔታ እየተከናወነ ስለመሆኑ
  - Grantee shall render an account of his management ባለኮንሲዮኑ ኮንሲዮኑን ለሰጠው ስራው ያለበትን ሁኔታ ገልፆ ማስረዳትና ለቁጥጥር አመች ሁኔታን መፍጠር አለበት
  - Control of the grantee shall be organized In accordance with law and contract ቁጥጥሩ በውሉና በህጉ መሰረት ነው
  - Control by the administrative authority shall be limited ፍፁም የሆነ መብት የለውም
    - It shall not alter the nature of such concession የባለኮንሲዮኑን ሁኔታ ሙሉ በሙሉ በመቀየር በአስተዳደር መስሪያ ቤቱ የሚመራ መምሰል የለበትም
    - The whole activity of the grantee shall not be subject to preliminary approval ባለኮንሲዮኑ እያንዳንዱን ነገር እያስፈቀደ መስራት የለበትም። በውሉ የተወሰነው እንደተጠበቀ ሆኖ አፈፃፀሙን ባለ ኮንሲዮኑ እንደመረጠው ይፈፅማል። የቢሮክራሲ ሰለባ ሞን የለበትም።

Concession Contracts

- **Variation and Revision of contract of concessions** ኮንሴሽን የሚቋቋመው በውልና
  - Variation clause may be provided the concession – with a predetermined formula ለውጥ በውሉ በግልፅ በተቀመጠ ቀመር ወይም
  - it may also provide revision clauses – for prices and tariff without establishing the base for revision መሰረተን ሳያስቀምጡ ይሻሻላሉ በሚል ቀመር

Concession Contracts

- **Variation** የማሻሻያ የውል ቃል
  - variation is conditional on changes occurring in the prices of certain materials, commodities or services. ማሻሻያ ሁኔታዎችን ተከትሎ በሚመጣ የዕቃዎች ወይም የአገልግሎቶች ዋጋ መጨመር ምክንያት ነው የሚፈጠር ነው።
  - Not all variations in prices matter but only changes in certain materials, commodities or services.
  - There should be a close relationship between the service provided by the grantee and the variable prices in materials, commodities or services. በሚሰጠው አገልግሎትና በሚጨምረው ዋጋ መካከል ግንኙነት መኖር አለበት
  - The changes should affect the prices of the public service. የተፈጠረው የዋጋ ለውጥ አገልግሎቱ ላይ ሚና ሊኖረው ይገባል።
  - New prices should be proportional to the change in the other prices.

Concession Contracts

Revision

- The determination depends on the specific condition of the time.
- The underlining element in the determination of the magnitude of the economic change must be the very implication of the change on the service.
- Changes in the prices of important raw materials, without which it is impossible to provide the service and the increase of which cannot be reasonably foreseen should entitle the grantee to have revision of the contract.

Concession Contracts

- Prerogatives of Administrative Authority
  - Unilateral modification 3216 with 3179, 3283-3285
  - Only the clause concerning the service may be modified
  - Authorities may increase or decrease the extent of the service

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Concession Contracts

- Modifications
  - Fit for proper operation – the authority is responsible for the good running of the service
  - Improvement of the service – improvement is always welcome
- Limitations
  - Only service related modifications
  - The nature of the service and the potential of the grantee
  - Financial interest of the grantee
  - Upon compensation to the grantee

Concession Contracts

- Redemption
  - Termination of concession by the authority prior to its actual date
  - Rationale can be anything but except to replace the grantee by another grantee.
  - Effect of redemption is winding up and settlement of accounts

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Concession Contracts

- Administrative authority have also power to;
  - Withdrawal order - 3238
  - Sequestration – 3241
    - Effects
      - Temporary suspension of rights
      - Management of the expenses and works of the grantee

Contract of Public Works

የመንግስት ስራዎችን የመቋረጥ ውል አሁን ላይ የማንባታ ውል

- A contract of public works is one special type of Administrative contract
- It involves the carrying out of public works by a person in favor of the public body to;
  - construct,
  - maintain, or
  - repair public works in consideration of a price.
  - Government authorities
  - Public enterprises

Contract of Public Works

- Performance
  - Administrative authorities have the right of supervision of performance
  - Determine the Rhythm of the work ስራውን በሚፈልገው
  - Right to direct the work
  - Right to demolish the work

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The parties in the work contracts

- The parties, unlike other contracts the parties involved in the construction contract are numerous
- The employer
- The contractor
- The consultant
- Subcontractors

Relationships between this parties

- The consultant is the representative of the employer and does things on the behalf of the employer.
- If there is restriction, there should be stated in the contract. The consultant also has not an absolute power, unless it clearly is stated in the contract it shall not have an authority to relieve the contractor of any of his obligations under the contract.
- The power of the consultant is determined on the contract between the two
- The subcontracting is between the contractor and with other third person
- Should be in written and get the approval of public body
- The contractor is responsible for the acts, defaults, or negligence of the contractor

Modifications and change of orders

- The engineer shall have the power to order any modification to any part of the works necessary for the proper completion and/or functioning of the works. These modifications and changes can be addition or omission, or both.

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Discussion

- **Does the Engineer or the public body modify and change the contract without any limit?**

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Discussion ---

- Pursuant to the procurement directive addition is limited to a certain amount but not omission.
- Addition not more than 30% of the total value. **Why?**

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Changes in law and regulations

- If such change affects the completion of date and or the contract price, the increased or decreased of the contract price and adjusting the completion date is based on the agreement of the parties. **Which one is beneficial for the government?**

Taxes and duties

- Take a look the tax laws
- Based on the agreement of the parties

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Settlement of disputes

- Dispute is inevitable but what matter are the measures that we take afterwards.
- Amicable settlement- negotiation between the parties.
- Appoint senior representative
- Arbitration, and court.

Performance security

- Provided within 15 days from the signing the contract
- For any loss resulting from the contractors failure to complete his obligations under the contract.
- Art. 16.25.3 Confiscate in whole such security.
- Based on the ascertainment of the procurement of endorsing committee performance security

Advance payment

- not exceeding 30%
- For both advance payment and performance security should be received in the form of certified cheque or unconditional bank guarantee.
- Exception for domestic contractors and manufacturers of pharmaceutical products, they can provide it from reputable insurance company

Liquidated damage

- The public body may without prejudice to all other remedies under the contract, deduct from the contract price as liquidated damage.
- 0.1%, total 10

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Retention monies

- 25.5 b 5% shall be retained from payment indicated.
- 50 % released upon completion of works and issuance of provisional acceptance certificate
- The remaining 50% shall continue to be retained for one year period of warranty.
- However, such sum may be released on condition that the supplies submits unconditional guarantee valid for 12 month.

Price adjustments

- 16.14 of the directive,
- In principle prices remain firm and do not vary during the validity period of the bid and throughout the performance of the contract.
- But exceptionally price adjustments are allowed in respect of works contracts, after 12 months from the effective date of such contracts. 3 months for frame work agreements.
- Has/should have its own formula in the

Termination by the fault of the contractor-consquence

- What kind of claims we possibly raise

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Possible claims

- Additional costs to finish the work
- Auction expenses
- As built etc

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Extension time

- Causes of extension time
- Force majure

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Contract on supply of good

- Delivery – incoterms
- Specifications and standards
- Packing, marking, and documents
- Inspection of goods

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Arbitration of Administrative Contracts

- Arbitration is one of the prevalent dispute settlement mechanisms
- It is a rule in international business & commerce
- The same is true for investment disputes

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Arbitration of Administrative Contracts

What is arbitrability?

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Arbitration of Administrative Contracts

- Arbitrability is whether a particular dispute can be submitted to arbitration?

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Arbitration of Administrative Contracts

- National decision-makers (legislatures or courts) have essentially been left to their own discretion in defining the disputes that can be settled by arbitration.
- Countries have traditionally been reluctant to allow arbitration in spheres where there is a *strong public interest at stake*, i.e. in areas regulated by mandatory rules of law designed *to protect important public interest.*

Arbitration of Administrative Contracts

- Civil law countries rely largely on *legislation* to mark the borderline between what is – and what is not – arbitrable.
- The touchstone in this legislation is often the distinction between claims that are, and those that are not, *within the free disposition of the parties.*

Arbitration of Administrative Contracts

- In both civil law and common law jurisdictions there are disputes in certain areas that cannot be submitted to arbitration.
- These dispute areas are regulated by mandatory law and such law is designed to protect important public interest.
- These are;
  - *anti-trust or competition law issues,*
  - *securities laws, intellectual property,*
  - *damages for unilateral termination of distributorship agreements,*
  - *political embargos,*
  - *bankruptcy,*
  - *administrative contracts, etc.*
- These are generally understood to be non-arbitrable matters in most jurisdictions, civil law or common law. But the general trend in this regard is limiting the non-arbitrability doctrine.

Arbitration of Administrative Contracts

Are administrative contracts arbitrable under Ethiopian law?

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Arbitration of Administrative Contracts

- Administrative contracts are non-arbitrable under Ethiopian law
- Relevant provisions states

"No Arbitration may take place in relation to Administrative Contracts as defined in Article 3132 of the Civil Code

But

In practice administrative contracts are being submitted to arbitration.

Arbitration of Administrative Contracts

- The new arbitration and conciliation law has maintained this approach
- Article 7 states, the following shall not be submitted for arbitration: በግልግል አይታዩም ብሎ ካስቀመጣቸው ጉዳዮች አንዱ
  - Administrative contract, except where it is not permitted by law; (7(7))
    - Ministry of Mines, ERA, are some of admin agencies that are allowed to solve their disputes through arbitration



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For Law, Justice, Equity!