

INTERPRETATION OF CONTRACTS UNDER ETHIOPIAN CIVIL CODE: SUBJECTIVE OR OBJECTIVE METHOD?

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Introduction

Formation and interpretation of contracts are influenced by the objective and subjective theories of contracts. Objective theory of contracts gives emphasis to the contractual assent that is “determined by analyzing external evidence” rather than the subjective or internal intention of the contracting parties.¹ This theory regards contract formation on the basis of communication, and not cognition. On the other hand, the subjective theory of contract holds the view that “subjective assent has little to do with external perceptions, but rather is concerned with whether the parties each subjectively intended to make the contract.”²

Interpretation of contacts plays a crucial role in the domestic and international business transactions. However, the legislatures, courts, and the legal academies of different countries of the world present considerably diverging views on the issue of the intent of the parties in the process of interpretation. For instance, in the European Union, the courts in the common law countries (the UK, Ireland) have voiced a preference for relying on objective manifestations of the parties’ intentions (objective method of interpretation); while in the other Member States (Germany, Austria, France, Italy) the doctrine of the subjective interpretation takes precedence.

The Ethiopian legal system is characterized by its reception of substantial elements from continental law and common law legal systems. Though there are many concepts from the common law legal system particularly incorporated in the procedural laws, it has been pictured for its zealness to the

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¹ Wayne Barnes, *The French Subjective Theory of Contract: Separating Rhetoric from Reality*, (Works-in-progress presentation, Texas Wesleyan University School of Law, August 26, 2008), p.5

² Ibid

continental law legal system due to the fact that its substantive laws have been mainly transplanted from this legal system. Nevertheless, since the two legal systems currently are mixed or at least mixing, it is difficult to conclude that the substantive laws, mainly Civil Code, of Ethiopia are solely influenced by continental legal system. One has to conduct the empirical research to reach genuine conclusion, particularly, whether subjectivist civil law's theory of contract solely influence the formation and interpretation of contracts under Ethiopian Civil Code or whether there is influence of the objectivist common law theory of contracts.

The purpose of this essay is to examine the extent to which the rules of contract interpretation under the Ethiopian Civil Code are influenced by the objective and subjective theories of contracts. With the view to substantiate the theoretical aspect with the practical reality in light of contract interpretation in Ethiopia, the essay will examine the approach followed by the Federal Supreme Court in deciding one of the cases involving contract of sale of immovable presented before it.

1. Theories of Contract Interpretation: An Overview of Conceptual Framework

1.1 Contract Interpretation Defined

It is important to define the term 'interpretation' as is used in this essay. Corbin defines 'interpretation' as "the process whereby one person gives a meaning to symbols of expression used by other person."³ Ordinarily, the symbols of expressions are consisting of spoken or written words. They also consist of acts and forbearances. Therefore, interpretation is the process of finding the meaning of symbols of expression and has to do with understanding the ideas conveyed by language in its broadest sense. It is worth noting that interpretation relates not only to the terms given in a contract, but also it has to do with the process by which a legally binding agreement is reached.⁴ This process involves offer and acceptance in the parlance of contract law.

³ Arthur L. Corbin, *Corbin on contracts: A comprehensive Treatise on the Rules of Contract Law*, Vol. 3, (St. Paul, Min., West Publishing Com., 1951) p.2

⁴ *Id*, p.8

Offer and acceptance generally consist of oral or written words or signs normally in use or conduct with clear intention to inter into legally binding agreement.⁵ Where the symbols of expression do not show the offeror's definite intention to inter into legally binding agreement, there is no legally operative offer.⁶ It may only be an invitation to the addressee to make an offer and may not produce any legal effect in itself. The same holds true with acceptance in that there is no acceptance where the symbols of expression used by the offeree contradict the terms of the offer in anyway. Hence, the determination of question as to whether or not the ideas conveyed by the symbols of expression used by the offeree conform in all respects to those of the offer may call for interpretation.

1.2 Theories of Contract Interpretation

Most literatures in the field of contract law mention two apparently contradicting approaches to the problem of interpretation. They are the Subjective and the objective approaches. The courts in the common law countries (such as UK) have voiced a preference for relying on objective manifestations of the parties' intentions (objective method of interpretation); while in the continental law countries (such as Germany, Austria, France, Italy) the doctrine of the subjective interpretation takes precedence.⁷ In the following discussions, the differences and similarities (if any) between the two approaches in relation to interpretation of contacts will be examined.

1.2.1 Subjective Theory of Contracts

The Subjective theory, which is said to be represented by the French Legal System "is concerned with the actual meeting of the minds or literal intentions of the parties."⁸ Both parties had to actually assent to an agreement for there to be a contract and external manifestations of assent are taken merely as

⁵ Art.1681 (1) of Civil Code, (Unless Specifically mentioned all Articles referred to in this Essay are those of the Ethiopian Civil Code)

⁶ Article 1687(b) of Civil Code

⁷ Pawel Moskwa, *Interpretation of Commercial Contracts in the Future European Civil Code -Objective or Subjective Method?* ELSA SPEL 2004 (1). Available at http://www.elsa.org/fileadmin/user_upload/elsa_international/pdf/spel/spel_04_1_moskwa.pdf (Last visited on October 28,2011)

⁸ Barnes, *Supra* note 1

evidence of the actual intent of the contracting parties.⁹ Proponents of this theory only wish to bind those who clearly and subjectively intended to be bound and accordingly promote the freedom of contract above all other principles.¹⁰ They repose on the contention that individuals need not be compelled to perform an obligation to which they haven't given their consent.

In the interpretation of contracts, this theory requires that efforts to be directed towards discovering the actual intention of contracting parties although it necessitates correction of imprecise terms.¹¹ It calls for an inquiry into what their genuine intention was when they used a term which turned out to be equivocal.

The main rules followed by the French courts when interpreting a contract are stated in Articles 1156-1164 of the French Civil Code of 1804. Article 1156 the Code Civil declares a general principle that the meaning of a contract should be determined according to the common intention of the parties. When the intention is not clear, the courts will rather look to the true state of mind of the parties and not to the external appearance of the contract.¹² To determine the real state of mind of the parties, the courts will examine all available extrinsic evidence. Because of the adoption of subjective method of interpretation, the French civil law gives a special importance to the theory of "defects of consent" (in particular to mistake).¹³ On several occasions,¹⁴ courts declared agreements null because of one or both parties' mistake, after establishing the real intentions of the parties.

⁹ Ibid

¹⁰ Ibid

¹¹ Rene David, *Commentary on Contracts in Ethiopia*, (Translated by Micheal Kindred, Faculty of Law, AAU, 1973), p.36

¹² B. Nicholas, *French Law of Contract*, (London, 1982), p. 46

¹³ Arts 1109 and 1110 of the French Civil Code

¹⁴ See e.g., Orleans 21.1.1931, DH 1931, 172; Tribunal de grande instance of Paris 13.12.1972, D 1973.410: cited in http://www.elsa.org/fileadmin/user_upload/elsa_international/pdf/spel/spel_04_1_moskwa.pdf visited on October 28, 2011

1.2.2 Objective Theory of Contracts

This theory examines “the external evidences of the parties’ intention as the only relevant consideration.”¹⁵ Because of its logical pragmatism and vindication of many policy-oriented concerns of contract law, this theory has been well established in Anglo-American systems and most of other major jurisdictions of the world.¹⁶ It maintains that interpretation of ambiguous and uncertain terms are made by examining what the parties said, wrote or did and not what they actually intended to say, write or do.¹⁷ Therefore, it requires a court to apply an objective test to the determination of what meaning should be given to terms that are susceptible of ambiguity. So, under this approach, the intention of the parties is to be expressed objectively as a matter of general rule.

This approach draws its justification from economic considerations in that its main concern is to minimize uncertainty in business transactions. Its proponents claim that it provides security for trade and is said to be in line with the economic utility. They argue that “great uncertainty will be created if a person who appeared to have agreed to certain terms could escape liability by claiming that he had no real intention to agree to them.”¹⁸ One of the major consequences of disregarding the subjective intentions of the parties in the common law system is the presence of the Parole Evidence Rule, which states that if the parties have a final written agreement, no prior oral or written

¹⁵ According to this theory, Contract has nothing to do with the personal or individual intent of the parties. A contract is an obligation attached by mere force of law to certain acts of the parties, which ordinarily accompany and represent a known intent. See Barnes, *Supra* note 1, p.5-6

¹⁶ *Ibid*, p.8

¹⁷ Ewan Mckendrick, *Contract Law*, (Macmillan, 1990), p.15 &16, Howarth (1984) has argued that there are three different interpretations of the objective test which can be applied by the courts. The first is the standard of detached objectivity. This approach takes as its stand point the perspective of the detached observer or “the fly on the wall.” In other words, it asks what interpretation would a person watching the behavior of the contracting parties place upon their words and actions. The second possible interpretation suggested by Howarth is to interpret the words as they were reasonably understood by the promisee (‘promisee objectivity’). This is the standard which finds the greatest support in the case law. The third and final interpretation is the standard of reasonable person in the shoes of the person making the offer (promisor objectivity).

¹⁸ *Ibid*, p.11

negotiations or contemporaneous oral negotiations are admissible to add to, vary or contradict the writing.¹⁹ Very often, during the negotiations, the parties express their subjective intentions.

The courts rely on a presumption that the parties to the former agreements expect their contracts to be legally binding,²⁰ which “can be rebutted only by clear words included in the agreement.”²¹ Therefore, in the common law system, courts usually apply objective test to determine intentions of the parties. The meaning and the effect of the written agreement will be determined by the literal interpretation of the words.

1.2.3 Are the Two Approaches Mutually Exclusive?

The difference between the two approaches may manifest itself in the legal consequences flowing from them. As Rene David stated, “rules of equity in English law allow some correction of contracts to give effect to the true intention of the parties; while the difficulty of discovering this true intention, on the other hand, leads the French judge to give primary attention to the declaration of the parties.”²² Therefore, it is difficult to conclude that the two approaches are mutually exclusive in all circumstances.

At the common law, it is true that, in principle, the subjective understandings of the parties may not override their intentions as determined by objective assessment. Nevertheless, it stands contrary to reason to hold that parties are bound by a contract where neither of them agrees to the meaning which the court gave to its terms. To this end, Corbin stated that “the courts do not love an ‘objective’ theory of contract or apply it in the process of interpretation merely because it is ‘objective’. Rather, they apply only when they find in fact that one of the parties understood the words of agreement in harmony with such interpretation and that other party had reason to know that he did.”²³

¹⁹ E. Mckendrick , *Contract Law – Text, Cases, and Materials*, (Oxford 2003) p. 330: as cited in supra note 1

²⁰ R. Card, J. James, *Law for Accountancy Students*, (London 2002) p. 129: as cited in supra note 1

²¹ Supra note 7, p.54

²² David, supra note 11, p.36-37

²³ Corbin, supra note 3, p.53

The practical problem linked with the subjective approach could hardly be over emphasized in that judges are not endowed with divine power to know the intentions of the parties at the time of concluding their agreement. Furthermore, it is difficult to ascertain whether or not parties have changed the true intention they had after the making of contract. According to Rene David, the objective theory is adopted in English law mainly because the law speaks to the courts; and the subjective approach is adopted in the French legal system mainly because the law speaks to the contractants. In this regard, he claims that the Ethiopian Civil Code is designed to balance the two approaches,²⁴ as will be dealt with in the following sections.

2. Influences of Subjective and Objective Theories on Interpretation of Contracts under the Ethiopian Civil Code

Under the Ethiopian Civil Code, there are a number of provisions which show the influence of objective and subjective theories of contract.²⁵ The rules of interpretation of contract incorporated under the Ethiopian Civil Code are almost similar with those rules of contract interpretation incorporated under the 1804 French Civil Code.²⁶ However, this does not mean that there are no rules of common law related to contract interpretation in the Code. In fact, there are considerable Common Law rules of contract interpretation as are incorporated under Articles 1732-1739 of the Ethiopian Civil Code. Under this part, provisions related to interpretation of contracts in the Ethiopian Civil Code will be analyzed in light of subjective and objective theories.

²⁴ David, *supra* note 11, p.17

²⁵ For instance, under Article 1695(1 & 2) both theories are incorporated. Article 1680(1 & 2) incorporates objective theory by stating that "parties should express their agreement in order contract is completed and reserves or restrictions intended by one party have no effect on the agreement if not informed to other party." There are also many Articles that incorporate the subjective approach in relation to contract formation and interpretation in the Civil Code (Arts 1695(1), 1696-1710, 1732-1739 etc)

²⁶ Compare Arts 1732-1739 of Ethiopian Civil Code with Arts 1156-1164 of French Civil Code

2.1 Guiding Principles

Under this part, two cardinal principles that should be kept in mind regarding rules of interpretation will be discussed. These are limitation on the judicial interpretation and common intention of the parties, which are also adopted by the Ethiopian Civil Code.

2.1.1 Limitation on the Judicial Interpretation

The need for interpretation comes into picture where there arises disagreement over the meaning of a contractual term between the parties and the meaning of such term reveals ambiguity.²⁷ Where terms of contract are clear, the court's duty is to determine the legal effects of the contract and not to interpret it. The Ethiopian Civil Code prohibits inquiry into the actual intention of the parties by the courts under the guise of interpretation where the terms of the contract are clear.²⁸ As professor Krzeczunowicz maintains, "Security of trade and the theory of declaration of will justify this prohibition."²⁹ Incidentally, this reflects the objective test used at common law. This principle is upheld even in the French legal system, where the subjective test is adopted in respect of interpretation of contractual terms.³⁰ Hence, courts are vested only with the power to ascertain contractual terms that are susceptible of ambiguity and not with the power to distort or amend terms that are plain and clear on the pretext of interpretation. Moreover, a party whose genuine intention is at variance with his expressed intention, under Ethiopian law, may invoke mistake for its invalidation, on the condition that he may be liable for the payment of damages to other party.³¹ This is a clear indication of the influence of the subjective theory of contracts under the Ethiopian Civil Code.

2.1.2 Common Intention of the Parties

Once the term of a contract is found ambiguous in litigation, the court is expected to interpret to find its meaning. There are at least two parties who

²⁷ David, *supra* note 11, p.37

²⁸ Article 1733 of Civil Code

²⁹ George Krzeczunowicz, *Formation and Effects of Contracts in the Law*, (Faculty of Law, Addis Ababa University, 1983), p.84

³⁰ *Ibid*

³¹ See Article 1697-1703 cum 1808(1) of Ethiopian Civil Code

play some roles in the formation and execution of contracts in most contractual transactions. Each of them chooses some of the symbols of expression and assigns to them meanings given by other.

At the common law, “usually the meaning that will be given to expressions used in contract transactions is the meaning that one of the parties in good faith gave to them, if the other party knew or had reason to know it.”³² In a bilateral contract, each one of the parties gives his/her own meaning to the promise made by other party, and as is maintained in this legal system, it is in reliance on this understanding that he or she assumes his or her part of the obligation.

In the continental legal system, the main object of interpretation is discovery of the common intention of the parties regarding ambiguous contractual terms, which conforms to the subjective approach that is prevalent in the system.³³ In principle, all surrounding circumstances by which parties to a contract are affected in giving meaning to its terms are relevant in quest for the common intentions of the parties³⁴, which should be admitted in evidence for the determination of meanings of ambiguous terms.

In this regard, the Ethiopian legal system follows the continental legal system (as it does in many other areas) and it provides that “where the provisions of a contract are ambiguous, the common intention of the parties shall be sought.”³⁵ Therefore, these guiding principles are not only the features of one approach to interpretation of contract but also the common features of both approaches, which are also adopted under the Ethiopian Civil Code.

2.2. Analysis of Rules of Contract Interpretation under the CCE³⁶ in light of Subjective and Objective Theories

The provisions of the Code prescribing rules of interpretation may be said to be of two kinds. The first category includes discretionary rules, which lay down methods of interpretation. The court may use any one of them for

³² Corbin, *Supra* note 3, p.34

³³ See Art 1156 of French Code Civil.

³⁴ David, *supra* note 11, p.38 & 39.

³⁵ Article 1734(1) of Civil Code

³⁶ Civil Code of Ethiopia, 1960

finding the meaning of ambiguous terms as it thinks fit. Secondly, there are mandatory rules, which are intended to be applied in the event the solution is not found by the application of any one of the discretionary rules.

2.2.1 Discretionary Rules

Discretionary rules lay down methods of interpretation. The court may use any one of them for finding the meaning of ambiguous terms as it thinks fit. These rules include: Interpretation According to Context (Art.1736), Restrictive Interpretation of Certain General Terms (Art.1735), Interpretation by Reference to Usage and Custom (Art.1732), Interpretation by Reference to Conduct (Art.1734(2)), and Positive Interpretation (Art.1737).

Rene David claims that the Ethiopian Civil Code is designed to balance the two approaches.³⁷ He maintains that Article 1732 is formulated for the purpose of guiding the parties and adopts subjective approach, while Art.1733 addresses the courts and adopts the objective approach.³⁸

In examining Art.1732, which provides for interpretation by reference to *good faith and custom*, Rene David and Krzeczunowicz seem to hold somewhat differing views. The former, who is expert draftsman of the Code, maintains that the provision addresses the parties as such, reminding them of requirement of good faith in interpreting the terms of their contract (subjective approach).³⁹ On the other hand, the latter holds that the provision embodies a rule of interpretation of contract according to usage which should be applied by the courts (objective approach) in fitting situations.⁴⁰ In the opinion of this writer, this provision can be viewed from both objective and subjective approaches in that the part of the provision relating to good faith, loyalty and confidence concerns the parties (subjective approach), while that part relating to business practice applies to the courts (the objective approach).

³⁷ David, *supra* note 11, p.17

³⁸ See Article 1732: Contracts shall be interpreted in accordance with good faith, having regard to the legality and confidence which should exist between the parties according to the business practice; and
Article 1733: Where the provisions of a contract are clear, the court may not depart from them and determine by way of interpretation the intention of the parties.

³⁹ David, *supra* note 11, p.37

⁴⁰ Krzeczunowicz, *supra* note 29, p.83

The question as to which of two usages- the usage of the place of formation of contract or that of performance- should be given priority in determining an ambiguous term is treated differently in French subjectivist approach and in the common law objectivist approach. In French law, one should interpret such term according to the usage of the place where the contract is passed.⁴¹ At common law, it is the usage of the place of the performance and professor Krzeczunowick seems to support the common law Approach, although he admits that the matter is to be left to the discretion of the courts.⁴² This writer prefers the French law's approach, as the usage of the place where the contract formed is more relevant to ascertain the original intention the parties.

As far as *Interpretation by Reference to Conduct* is concerned, the Civil Code envisages that the general conduct of the parties before and after the making of the contract shall be taken into consideration.⁴³ What the parties did, wrote and said before or after the formation of contract may be helpful in finding the meaning of ambiguous terms. This is similar to what is called at the common law practical interpretation by the parties. It is the concurrence by both parties in the practical interpretation which party gave to a disputed provision of a contract which is material in common law.⁴⁴

Rule of *Positive Interpretation* is contained in Art.1737 of the Civil Code, which guides courts to interpret a provision in a way that renders it effective than ineffective where the provision is susceptible of two meanings. This rule is found both in the subjectivist-continental and objectivist-common law legal systems.

In French legal system, "if there are two equally suitable meanings, one should choose that by which the contract is susceptible of producing some effect, rather than whereby it would produce none."⁴⁵ Likewise, at common law, the presumption parties enter into contractual agreement with the intention to produce legal effect is relevant for the process of interpretation. Accordingly, if the terms of a contract have more than one possible meaning

⁴¹ Art. 1159 of French Civil Code: What is ambiguous shall be interpreted by what is in use in the region where the contract was made.

⁴² Krzeczunowick, *supra* note 29, p.83.

⁴³ Art 1734(2) of Civil Code

⁴⁴ Corbin, *supra* note 3, p.144.

⁴⁵ See article 1157 of French Civil Code

and one of these will produce the legal effects that the courts think they have in view, while others would not, the court adopts the first meaning.⁴⁶ Therefore, a close look at of the discretionary rules of contract interpretation analyzed above reveals the fact that both objective and subjective theories of contract have influence on the Ethiopian rules of contract interpretation.

2.2.2 Mandatory Rules

Mandatory rules of contract interpretation are intended to be applied in the event the solution is not found by the application of any one of the discretionary rules. They are not designed for finding the meaning of ambiguous terms; rather they are meant to provide for solution as a last resort. They include: Interpretation Favoring the Obligor (Art 1738(1) & 1739) and Interpretation Favoring Adhering Party (Art 1738(2)).

In relation to *Interpretation favoring the obligor*, the law requires that a contract be interpreted in favor of the party who assumes an obligation and against the one who stipulates it.⁴⁷ This rule has its counterpart in the French Code Civil (Article 1162). This is in accord with the old maxim that runs “*Verba Contra Stipulatorem Interpretanda Sunt* (words are to be interpreted against the stipulator.)”⁴⁸ The Civil Code appears to require that leniency be shown to a party who has assumed an obligation gratuitously.⁴⁹ That is, the contract should be interpreted more favorably for the obligor in case where he receives nothing in return for his performance than in the case where he assumes his obligation for consideration. At the common law, a similar method of interpretation goes by the name ‘*contra proferentem*’ rule, according to which the terms of a contract appear ambiguous interpreted in a manner least favorable to the party who relies on them, i.e. against the party who invokes them in his interest.⁵⁰

To sum up, as has been shown in the analysis of the rules above, the objective and subjective theories converge under the Ethiopian Civil Code. Due to Rene

⁴⁶ Corbin, supra note 3, p.92ff.

⁴⁷ Article 1738(1) of the Ethiopian Civil Code

⁴⁸ Krzeczunowick, supra note 29, p.88

⁴⁹ Article 1739 of Civil Code

⁵⁰ Corbin, supra note 3

David's intentional design of carefully selecting rules and because of the convergence of the common law and civil law rules in contemporary world, the rules of interpretation in CCE discussed so far have been influenced by the elements of both subjective and objective theories at the same time.

3. Case Analysis

Under this section, the essay examines the reasoning employed by the Cassation Bench of the Federal Supreme Court of Ethiopia in deciding the case between Gorfe Gebrehiwot vs. Abarash Dubarge et al (File No.21448)⁵¹ in light of the objective and the subjective theories. This case was concerned with contract relating to sale of immovable and the issue whether registration of contract of sale of immovable before concerned organ of government is mandatory formality requirement under the Ethiopian Civil Code. In this case,

⁵¹ This case was brought before the Cassation Bench of the Federal Supreme Court on the issue whether or not registration of contract of sale of immovable should be validity requirement. Although the lower courts decided that contract of sale of immovable made in writing cannot lose its validity due mere fact of not being registered before the court or notary public, basing their argument on the provisions of the Civil Code (Article 1723 (1) 2877 and 2878) that the purpose of the requirement of registration which is provided under the general part of contract provisions, i.e., Article 1723(1), is made clear under relevant special provisions, Articles 2877 and 2878, that registration is sought merely for the evidentiary purpose for the third parties who may have claims on the immovable subject to sale of immovable, the Cassation Division of the Federal Supreme Court reversed the decisions of the lower courts by arguing that what is required under Article 1723(1) is authentication and not registration and authentication is a validity requirement. The decision of the Cassation Bench has raised hot controversy among legal practitioners and judges. The legal practitioners such as Makkib Tsegaw have, for example, maintained that "registration is in no way a validity requirement." Likewise, writers on the issue including the draftsman of the Ethiopian Civil Code, Rene David, and George Krzeczunowick, in their commentaries on the Ethiopian contract law, argued that registration requirement in the Civil Code in relation to sale of immovable serves no validity requirement except for protection of third party creditors. See for example Mekkib Tsegaw (2007), 'Contracts relating to an immovable and Questions of Form', (in Amharic), Ethiopian Bar Rev. Vol.2. No. 1; a case comment on the controversial ruling of the Cassation Bench of the Federal Supreme Court in the case of Gorfe Gebrehiwot vs. Aberash Dubarge *et al.*

the Federal Supreme Court Cassation Division held that a contract of sale of immovable properties can only be valid if both requirements as to writing and registration before a court or a notary are met with. The court bases its reasoning partly on the public policy considerations. It has, in so ruling chosen, to depart from settled practices. It argued that what is required under Article 1723(1) is authentication, but not registration in contradiction to the literal reading of the provision. It further argued that since authentication is mandatory requirement, registration requirement mentioned under Article 2878 covers different issue, that is, rights of third party concerned. Accordingly, the cannon of interpretation that goes "special prevails over the general" cannot not be applicable in the case at hand. Although the implication of the term "registration" under general provision (Article 1723(1)) and special provisions (Article 2877 and 2878) remains controversial, it is possible to analyze the approach in which the Cassation Bench interpreted the case and the arguments it has employed in light of subjective and objective theories of contracts discussed so far.

The purpose of this analysis is not to establish that registration should be a validity requirement of contract of sale of immovable under the Ethiopian Civil Code, rather to test whether contract exists in the eyes of objective and subjective theories of contract interpretation.

According to the *objective theory of contracts*, one has to examine the intention of the parties from the external evidences as communicated between them. In the case at hand, the parties made negotiations, wrote and signed the contract. They had exchanged documents, even if they did not register as it is required by law. Needless to state, before the passage of this ruling by the Cassation Bench, in Ethiopia contracts of sale of immovable made in writing were taken to be valid and enforced by the courts. So, objective test of intention of contractants shows that there is a lawfully given assent which indicates the existence of a valid contract between contracting parties. On the contrary, the invalidation of such contract increases uncertainty in business transactions while its enforcement provides security for trade and economic utility according to the Objective theory of contracts. Great uncertainty will be created since this decision enables potential individuals who appeared to have agreed to certain terms could escape liability by claiming that they had no real intention to agree to them. This fear seems reasonable given the sky rocketing prices currently witnessed in the housing market. The ruling of the court may embolden unscrupulous sellers to renege on contracts already sealed and even

disown transactions long considered closed. Moreover, the rule of interpretation used to determine the meanings of Article 1723(1), 2877 and 2878 is also inconsistent with rules of interpretation provided under Arts.1732-1739 of the Civil Code. Thus one may argue that Article 1723 (1) should be interpreted in light of special provisions (Arts.2877 and 2878) so that the contract of sale of immovable will be valid between the contracting parties as long as it is made in writing. Accordingly, this ruling of the Cassation Bench cannot be justified by the test of objective theory of contracts.

Now let's examine this decision in light of subjective theory of contracts. As it has been seen in the first part of this essay, the subjective approach, which is said to be represented by the French legal system, is concerned with the actual intentions of the parties while making the contract. In the present case, it is believed that the parties have freely concluded the agreement. This contract should be interpreted with good faith, taking into account the loyalty and confidence which should exist between the parties in accordance with business practice.⁵² When the parties in this case make the contract, they had relied on the good faith among each other and believed to give their real intention after negotiating on the terms of the contract. Even if one may argue that formal requirement is not fulfilled, the substance exists yet.

The invalidation of this contract greatly affects the principle of freedom of contract which is exalted by the subjective theory of contract. In the interpretation of contracts, therefore, this theory requires that efforts to be directed towards discovering the actual intention of contracting parties. Accordingly, the ruling of the court cannot be justified by test of subjective approach of contract interpretation.

⁵² See Article 1732 of Civil Code

Conclusion

Most literatures in the field of contract law mention two apparently contradicting approaches to the problem of interpretation. These are the subjective and the objective approaches, which discover the actual intention of contracting parties, and examines the external evidences of the parties' intention as the only relevant consideration, respectively. However, they are not mutually exclusive of each other in all aspects.

The rules of contract interpretation under the Ethiopian Civil Code are characterized by convergence of subjective and objective theories. This can be taken as one of many indications of the benefits that the Ethiopian Civil Code acquired during its codification by incorporating the best rules of the civil law and common law legal systems. Certainly, the selective reception of rules from different legal systems has bestowed the Ethiopian legal system to be highly flexible where the principles of freedom of contract or autonomy of will and the principle of economic efficiency are easily harmonized.
