

Law of Contract I

Teaching Material

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CHAPTER ONE

OBLIGATIONS IN GENERAL

1.1 Introduction

This chapter is intended to introduce the students to the basic notions of obligations and contracts that are crucial to understand the chapters that follow. Here, the chapter will discuss the concept of obligations, the sources of obligations, types of obligations, the meaning of contracts, the historical development of contracts and contract law, as well as brief discussion on economic analysis of contract law.

1.2 The concept of obligation

The conceptual foundation of obligation traces as far back to ancient Roman law which defines obligation as a means of an undertaking or legally binding relationships where one party promises the other party to perform some acts or to do something. Ancient well-known Roman lawyers defined obligations based on their personal opinion, which as a result has developed the concept of obligation.

Year Gay, a Roman jurist, defines obligation as 'a means of personal claim brought against another in order to force him before us to give us so as to we are able to enforce our rights. Gay also classifies obligation in terms of contract, quasi-contract, delict, and quasi-delict

Pavel year also understood obligation as an undertaking not by Roman citizens to perform some acts or to do or to give or to render rights to non-roman citizens regarding to give, to do, or to render some rights to roman citizens.

The concept of obligation by both classical legal scholars was unilateral in character and discriminatory in nature since it imposes obligation to do, to give or to render rights only on non-roman citizens not the Romans.

However, the institute of Justinian defines obligation as a legally binding relations when Roman citizens undertake to perform certain acts or to do something in accordance with the Roman law.

Obligation defined in the institute of Justinian, differed from the obligations defined in the classical Roman jurists in that the institute defines obligation in the aspect that Roman citizens to carry out.

In general the concept of obligation can clearly be expressed as;

- a) Obligation to give or not to give
- b) Obligation to do or not to do
- c) Obligation to render rights to others to do something.

1.3 Definition of Obligations

Black's law dictionary defines obligation as 'a legal duty or moral duty to do or not to do something'. Common-law scholars such as Fredrick Pollock defines obligation in its popular sense as merely synonym for 'duty'. In its legal sense derived from roman laws 'an obligation is the bond of legal necessity or *vinculum juris* which binds together two or more determinate individuals'.

John Salmond (year) defined obligation in its more general acceptation as 'something the law or morals command a person to do a command that is made effective by the imposition of sanction if a person failed to comply such a command'

In the modern legal systems and currently existing legal materials, there is no exact or single whole definition of obligation. However, some scholars define it based on their own legal system For instance French judges define the term obligation as a legally binding relations to another party is obliged to give or to do or not to do something.

Likewise the Ethiopian civil code, in the book IV of the code uses the term obligations with out defining what it means. However, like French judges who define obligations indirectly from article 1101 of the French civil code of the term contract as an agreement whereby two or more persons as between themselves create, vary or extinguish obligations of proprietary nature.

1.4 Sources of obligations

According to Gay, Roman jurist, the fundamental source of obligation can be classified into two:

- a) Contract
- b) Beyond the contract

Those obligations, which arises beyond the contract, are divided into unjust enrichment (quasi-contract), unlawful acts (delict) and causing physical injure to the person or causing damage to property of person (quasi-delict).

In modern time, the laws of different countries clearly express the sources of obligation. For instance, French civil code classifies the source of obligation as;

- i) Obligation that arises from contract
- ii) Obligations that arise beyond the contract
- iii) Obligation that arises from the unlawful acts
- iv) Obligations that arises from the causing of physical injure or causing material damage
- vi) Obligations arising from law

In Ethiopian legal system, there are no clearly stated classifications of sources of obligations. But Art.1675 of Ethiopian civil code generally expresses obligations as arising from contractual agreements.

However, the close readings of the provisions of the civil code show that there are other sources of obligations-like those arising from non-contractual relationships (from Art.2027-2178), obligations arising from unlawful acts or obligation that arises from the causing of physical injure or obligation arising from the causing of material damage (fromArt.2027-2161) and finally, obligations arising from unjust enrichment (from Art.2162-2178).

In so far as an obligation arising from the law is concerned, it happens in situations when law imposes obligations on persons to give or not to give, to do or not to do some acts recognized in almost all-legal systems.

Obligation arising from the law is a unilateral obligation imposed on citizens or contracting parties without their consent. It includes among other things

- Obligation to pay income taxes
- Obligation to render military services
- Obligations of creditors
- Obligation of debtors
- Obligations of families to their children, etc.

1.5 Types of Obligations

Obligations can be classified based on the nature of activities, and the number of parties legally bound by the obligation. Accordingly, they can be classified into:

1) Divisible obligation

This is one whereby a party undertakes to perform its obligations by dividing into parties. For instance, if A and B owed C 1,000 BIRR such parties to the obligation perform or discharge the obligations by paying half (part) of the debt to C, which is 500 each.

2) *Indivisible obligations*

In this type of obligation, the performance of the obligation undertaken cannot be divided into parts. Hence, in this type of obligation partial performance is impossible given the conditions and circumstances of its formation, which does not allow the performance of obligation by dividing into parts.

3) *Positive obligation*

This is a situation where a person's obligation is to do or to give some thing to another. It requires an action from the debtor.

4) *Negative obligation.*

This is a situation where a person's obligation does not to do some thing or it refrains from doing some thing. Such obligations are also called obligations not to do.

Example, company A may agree with company B in which company A under takes an obligation not to produce or sell certain goods in the same market.

Based on the number of parties legally bound, obligations can be classified into unilateral, bilateral, and multilateral obligations.

- a) Unilateral obligation arises from contract in which two parties are participate. However, only one of the parties is legally bound by the contract for the benefit of the other contracting party. Example, donations
- b) Bilateral obligation arises from a contract entered into by two parties in which these contracting parties are bound legally to each other on equal terms. Accordingly, there are two promisors and two promises.
- c) Multilateral obligation. This is a case where more than two persons undertake to perform an obligation. Such obligations can be classified into three:

- 1) Simple joint obligation

- 2) Joint obligations
- 3) Several and joint obligations

1) Simple joint obligation.

In this type's obligation, parties who are bound by such obligation are not jointly liable for the total debts, but each debtor is liable for its own share with the exception of Art.1917 of the Ethiopian civil code

2) Joint obligations

It arises from the contractual obligation in which more than two parties participate and debtors are jointly liable for the debt secured as a result of the obligation entered into with the creditor or creditors.

3) Several and joint obligations.

In this kinds obligations the co-debtors shall be jointly and severally liable unlike joint obligation where the debtors are jointly obliged to under take a given obligation, in the several and joint obligation, the creditor may require all the debtors or one of them to discharge the obligation in whole or in part.

1.6 The meaning of contract/contract law

Though the questions 'what is contract?' and "what is contract law?" are of paramount importance, it is difficult to give a definitive answer to either. But one may say contract law is most obviously the law relating to agreements or promises. It is primarily concerned with agreements in which one party, or each party, gives an undertaking or promise to the other. It governs such questions as which agreements the law will enforce, what obligations are imposed by the agreement in question and what remedies are available if the obligations are not performed. Thus contract law is the law based on liability for breach of promises. However, 'Contract law' is also used to mean the whole collections of rules, which apply to contracts, and these includes many rules, which are not contractual in the sense of being based on a promise to do something. For example, if

one party induces the other to enter a contract by fraud or misrepresentation, the innocent party may avail himself of certain remedies based on the rules of misrepresentation (fraud). There are certain conceptual differences on whether such rules are part of contract law or tort.

Contract law is primarily concerned with supporting the social institution of exchange. However, it is not as broad as the institution itself. An enormous proportion of our life is carried on the basis of exchanges that are in some sense agreements, but many of them are not governed by what is usually thought as contract law. Some agreements, such as domestic arrangements, are not governed by law at all.

What is a contract? In Anglo-American legal systems defines contract as a promises or set of promises for the breach of which the law gives a remedy or the performance of which the law recognizes in some way as a duty. However, not all promises give rise to contracts. For instance, if you agreed to keep the house tidy while your parents are away on holiday you would not expect to find yourself in the court of law being sued for the breach of contract if you failed to do so. So, what kind of agreements does the law recognize as creating enforceable rights and duties? To answer this, we need to look in the rules of each legal system, which provide their own specific definitions of the term contract and its elements. For instance, the French civil code defines contract in article 1101 as an agreement to establish, vary, and extinguish rights and obligations of the parties. When we come to the Ethiopian legal system, we find the definition of contracts (enforceable agreements) under Article 1675 of the Ethiopian Civil Code. As such contract is defined as;

“An agreement whereby two or more persons as between themselves create, vary or extinguish obligation of proprietary nature”.

This definitional article plus Article 1678 on elements of contract tell as in general the type of agreements enforceable by the law of contract in Ethiopian legal system. In the next chapters, you will study the details.

1.7 The purpose and scope of contract law

1.7.1 Purpose of the contract law

Contract law is primarily concerned with supporting institutions of exchange, which is an enormous part of our life carried on the basis of that are in some sense termed as agreement. Contract law has many purposes but the central one is to support and control the millions of agreements that collectively make up the market economy, and hence operates in the context of dispute resolution mechanism. Besides it empowers the parties to make agreements that the law will enforce. It also enables parties to the contract to make exchanges that might otherwise carry too great risk whether of disruption by some contingencies or default by the other party. Accordingly, contract law in this respect is the most important which creates smooth functioning of business transaction by creating certainty, predictability, and enforceability.

In this context, it is also important to note the different approaches to contract law determine its role. In the nineteenth century, at least in common law legal systems, the courts seemed to place great emphasis on freedom of contract. During this period the courts tended to reduce the numbers of rules controlling contract power. They see the role of contract law as enforcing the agreement of the parties. There are still writers who suggest that the law should enforce any agreement which was ‘freely made’ between the parties provided it has no adverse effect on others. These “libertarians” see the individual as the best judge of his or her own interest and consider that what was freely agreed is by definition, fair. Any attempt to use contract law to influence substantive outcomes (e.g. to try to produce a fairer distribution of wealth in society, or even to maintain the previous distribution) is both illegitimate and misguided.

Others take a less extreme position. They agree that individuals should be free to pursue their own self-interest but they recognize that in some cases ‘the market’ may not operate efficiently. For example, in cases where there is some kind of monopoly or where one party does not fully understand the contract, the law may need to intervene. Many such

writers would say the contract law, whether we like it or not, does affect the distribution of wealth in society and that this should be recognized. A few writers go further and argue that it is no longer adequate to describe the law of contract as primarily concerned with supporting voluntary exchange in the market and correcting occasional abuses or market failures. In their view another transformation has taken place and the modern law's prime concern is with controlling domination and promoting fair exchange and co-operation. When you deal Ethiopian law of contract, you need to assess which approach is adopted in the Ethiopian legal system.

1.7.2 Scope of Contract Law

The scope of contract law varies from country to country and from legal system to legal systems depending on the types of obligations they govern. Unlike non- contractual obligations in which a person undertakes an obligation not to wrong another by conduct that the law of tort establishes as wrongful, contract law governs contractual obligations which arises from agreements made between two or more persons which puts the promisor under the obligation to perform his or her promises under the sanction of an action against him for breach of the contract.

A contractual obligation implies the existence of an 'obligor'-the person who is legally under the obligation and the 'obligee' for whose benefit the obligation exists. This feature of contract distinguishes contract law from criminal law obligations.

Moreover, contract law may have a general or special application depending on the nature and origin of contractual undertakings at a given time. Therefore, based on the scope of application of contract law contract laws may be dissected in to two areas of applicability complementing each other. For instance, article 1676(1) of the Ethiopian civil code stipulated the application or scope of general contract to apply to contracts regardless of the nature thereof and the parties thereto. Thus, the general rules of contract law apply to all contracts. However, the provision also recognizes that special provisions, as laid down in Book V of the Civil Code and the Commercial Code, may be applicable

to certain contracts. The law also stipulate that the relevant provision of the Civil Code, Book IV title XII, shall apply to obligations notwithstanding that they do not arise out of contract. Accordingly, contract law may be applicable to extra-contractual obligations, unlawful enrichment obligation and so on. However, the scope of application of this law does not affect the special provisions applicable to certain obligations by reason of their origin or nature (Art. 1677(2)).

1.8 Historical development of contract law

This section provides a very brief account of the historical development of contract law. The historical development of contract law can be understood in terms of the conceptual foundations of obligations, which was traced back to ancient and classical Roman law. However the foundation of the present day law of contract were laid in the 19th century. This period in history saw the rapid expansion of trade and industry inevitable resulting in the increments in the volume of commercial disputes as a result people turned to the court of law for solutions. Gradually, there developed a body of settled rules which reflected and of the disputes from which they arose and the prevailing belief of the time. However, this rules and belief are affected by the dominant economic philosophy, the so called the laissez-faire individualism-the view that the state should not meddle in the affairs of business and that individuals should be free to determine their own destinies. This philosophy was mirrored in the law of contract by two assumptions-freedom of contract and equality of bargaining power. According to freedom of contract theory it is assumed that every one is free to choose which contracts they entered into and the terms on which they wish to do so. According to equality of bargaining power theory, the parties were deemed to have equal power to bargain on their business and deemed to be of equal bargaining strength.

These theoretical foundations of contract law produced an acceptable legal framework for the regulation of business transaction that resulted in the crystallization or codifications of contract laws across the world. The two theories did also define the role of the courts. Courts were required to enforce the agreement of the parties, as it was with out questions

its fairness etc. Over years the freedom of contract theory though maintained at present is subjected to different limitations. The theory of equality of bargaining power had brought certain unnecessary results because parties to a contract do not necessarily have equality. For example, employers and employees, producers and consumers, lenders and borrowers do not have equal power in the negotiations. Employees, for example, did not have equal bargaining power with employers, and as a result entered in to contracts the terms of which were more favorable to the employers (employees were supposed to work for as long as 16 hours per day & more, less wages etc). Courts were simply required to enforce such terms. This led to dissatisfaction, riots, unrest etc calling for government intervention. Thus, governments do lay down the minimum conditions for enforceable employment contracts. To day, we find the law of contract providing the conditions for the making and enforcement of contract. However, we should note that the theory of freedom of contract and equality of bargaining power are still the foundations of contract law in many legal systems.

1.9 The Economic Analysis of Contract Law

This section is intended to introduce students to an emerging discipline of law and economics as applied in contracts. The economic analysis of contract law provides a new paradigm into contract law in terms of both defining the concept and the economic function of contract & contract law. As the subject is vast to cover in this material, we have opted to consider some of the concepts and assumptions suggested by leading scholars (Look 'Economics of Contract Law' by Kronman and Posner (1979) for further understanding).

One fundamental economic principle is that if voluntary exchanges are permitted-if, in other words, a market is allowed to operate-resources will gravitate towards their most valuable uses. The exchange will make not only the parties better off but will also increases the wealth of the society, assuming that the exchange does not reduce the welfare of nonparties more than it increases the welfare of the parties. The existence of the market-locus of opportunities for mutually advantageous exchanges-facilitates the

allocation of the good or service in question to the use in which it is most valuable, thereby maximizing the wealth of society.

It is assumed that individuals are rational maximizers of their own self-interests. That is, they will respond to other people and to events in a way that increases their own utility. It is this, which lies behind the notion that individuals will trade resources until the resources reach the people who value them most highly. Economists express the idea that something may be worth more to one person than to another by saying the first will be prepared to pay more for it than the second. However, they use the word “utility” rather than ‘wealth’ because the theory does not assume that every one is selfishly pursuing greater personal wealth. Individuals may well like to see other individuals made better off and be prepared to give some of their own wealth to achieve that. An economist fits this into his general theory by saying the donor’s ‘utility’ is increased by seeing the donee made better off.

The basic economic function of contract law is to provide sanction for renegeing, which, in the absence of sanctions, sometimes tempting where the parties’ performance is not simultaneous. During the process of an extended exchange, a point may be reached where it is in the interest (though perhaps short-run interest) of one of the parties to terminate performance. If A agrees to build a house for B and B pays him in advance, A can make himself better off, at least if loss of reputation (which, depending on A’s particular situation, may be unimportant to him) is ignored, by pocketing B’s money and not building the house. The problem arises because the non-simultaneous character of the exchange offers one of the parties a strategic advantage, which he can use to obtain a transfer payment that utterly vitiates the advantages of the contract to the other party. Clearly, if such conduct were permitted, people would be reluctant to enter into contracts and the process of economic exchange would be retarded. Hence, the basic function of contract law to provide a sanction for breach of promises.

A non instantaneous or extended exchange creates not only strategic opportunities that parties might try to exploit in the absence of legal sanction, but also uncertainty with

regard to the conditions under which performance will occur. This uncertainty exposes the parties to the risk that the costs and benefits of their exchange will turn out to be different from what they expected. An important function of contract law in this regard is to enforce the parties' agreed upon allocation of risk.

A related function is to reduce the costs of the exchange process by supplying a standard set of risk allocation terms for use by contracting parties. Many substantive rules of contract law are simply specifications of the consequences of some contingency for which the contract makes an express provision. If the parties are satisfied with the way in which the rules allocate the risk of that contingency, they have no need to incur the expense of writing their own risk allocation rule in to the contract.

CHAPTER TWO

FORMATION OF CONTRACTS

Introduction

Consent is a declaration of intention to be bound by an obligation. A person has to express his willingness to create an obligation on himself, or give up some or all of his proprietary rights. In modern times individuals have relative freedom to decide on their own rights especially property rights without the interference of a state or another person. So individual can not lose his property right unless he himself wants to lose it except by expropriation. Contract is one of the major areas of law that recognizes autonomy of individuals. The 17th Century John Locke's theory of **social contract** and Adam Smith's **laissez-faire** gave political and economic justification for individual autonomy. Such individual autonomy is expressed through consent i.e. an individual can determine his own fate (freedom of contract).

So in a contract, a person should know the obligation he is going to carry out and the benefit he is going to get / or lose. Knowledge is not enough, he should also agree to such obligation/ benefit. Agreement is not still enough. The person should also agree that if he fails to meet his obligation as agreed the state machinery may be used to force him to carry out his obligation.

Unless a person clearly knows what rights and obligation are to be created, varied, or extinguish it is impossible to claim that he has agreed.

That is what is provided under art 1679. The parties have to know means they have to define their obligations (undertakings). Moreover they have to agree to be bound. Therefore; contract can not be imagined without consent of the parties i.e. contract is dependent on the consent of the parties.

Non-Binding Agreements

Mere domestic or social agreements are not usually intended to be binding and, therefore, are not contracts. E.g. A father told his son that he (father) will reward 10,000 Birr if the son scores 4.00 points in his first semester exam.

A binding contract is usually in the nature of a commercial bargain, involving some exchange of goods or service for a price. In considering whether sufficient intention to create a binding contract is present; two situations are possible:

- a. Where the parties expressed by denying the intention (***for commercial agreement***).
e.g. A written commercial agreements described itself merely as an “honorable pledge and stated expressly that it was not “to be subject to the jurisdiction of any court.
- b. Where the parties do not expressly deny intention to create legal relation. It is in each case a question of construction for court to decide as to whether a contract is intended.

Thus, in commercial agreements, there is a refutable presumption that a contract is intended but in social or domestic or family agreements there is a refutable presumption that no contract is intended. (But note that in each case the presumption is refutable by evidence to the contrary.)

Eg₁. C. Persuaded her sister, p to sell her own house and come and live in C's on condition that C would give her house to P by donation. After sometime C injected P from the house and refused to honor the donation. P claimed damage for breach of donation contract. Is P correct?

Eg₂ B and O habitually ride in each others cars. While in O's car, B was injured due to O's negligence and sued for damage under Ethiopian law of carriage. B claims that

there was contract of carriage between him and O since he (B) contributed to the petroleum cost. Is “B” Correct?

Eg₃. Hawassa University and SNNPR Supreme Court entered into the following agreement.

Memorandum of Understanding

This memorandum of understanding is signed on this day of 25th February between Hawassa University & SNNPR Supreme Court. By this agreement;

1. The Court agrees to make internet service available for the Law Faculty students of the university.
2. The University agrees to make conference rooms available to any need of the court.
3. The university agrees to give free library and internet service to any judge of the court.

So, what is the student asker?

Generally, the mere existence of agreement to be bound by defined obligation does not necessary make Contract. It is necessary to identify whether the parties intended only moral obligation or legal obligation, if parties agree to be bound morally only, the agreement is not a contract since it cannot be enforced by state backing. For a contract to exist parties must agree that any violation of the obligation would be punished by using state machinery. Therefore; the phrase “...**agrees to be bound thereby**...” in Art. 1679 implies the parties’ intention to take any controversies in relation to obligation to court thereby allowing the court to interfere in their relation.

Meeting of Mind (Art.1680)

Contract occurs when the minds of the offeror and offeree meet upon common object of the contract. This meeting of mind is called *consensus ad idem* i.e. consent to the matter. The declaration of both parties must relate to the same matter. This is what Art 1680(1)

provides. However, since meeting of mind is inferred from offer and acceptance made by the parties, the law is often concerned with the objective appearance of the offer and acceptance than the actual fact of the intention of offeree or offeror. The person is bound whatever his real intention may be if a reasonable man would believe that he was assenting to the terms proposed by other party and upon such belief he enters into a contract with him. Parties are to be judged not by what is in their mind but by what they have said, written or done. So no body could be bound by an intention (estate of mind) which is not included in the offer or acceptance i.e. a person cannot claim to avoid a contract by citing reservations or restrictions that has not been made clear to the other party through offer or acceptance (Art 1680(2)). When the law in forces the intention (consent) of the parties it does so, so that the parties' reasonable expectation is protected.

Any intention of a party not included in the offer or acceptance never forms part of the contract. Therefore, obligation that one of the parties wants to be included in the contract never binds the other party unless such party knew and agreed to be bound by it. In short Art 1680 is a repetition of Art 1679 and hence may even be deleted from the code.

Formation of contract involves the criteria that the state uses in order to determine whether or not it has to execute agreements of persons between themselves. In other words, the state uses the following yardsticks to check whether or not persons have made a law that binds them.

- A) Capacity**
- B) Consent**
- C) Object,**
- D) Form, if any**

All contract involve the element of capacity, consent and object i.e. contract can not be imagined without capacity, consent, and object. However form is required for few contracts only.

2.1 Capacity

Although human beings are subject to rights and duties from the moment of birth, to death some may not be entitled to exercise such rights and duties. Still others may exercise only some of their rights. Minors and judicially interdicted persons cannot enter into a contract. However; when a legally interdicted person enters into a contract which he was prohibited from such is not limited to incapacity but also extends to illegality as per Art 1716. The same holds true for special incapacities indicated under Art. 194. The detail of incapacity has already been discussed under law of person.

2.2 Consent (Art.1679-1710)

2.2.1 Communication of Consent (Art. 1681)

Consent is expressed either in the form of offer or acceptance Offer and acceptance are ways of communicating one's own intention to be bound by an obligation. Therefore; offer or acceptance is declared to another person by ordinary ways of communication .These ways of communication are oral, written, signal and conduct.

2.2.1.1. Offer

Offer is laying down contents of would be contract i.e. indicating the respective obligation of each would be parties to the contract and informing the same to them with the expectation of response from them. Moreover, offer contains the intention of the person making it to be bound by the content of the offer. In short offer contains three important elements, the content of the contract, the agreement of an offeror to be bound and request of the offeror to the offeree to be bound by the offer. The person making the offer is called offeror. The offeror has autonomy to choose any of the four ways of communication (Oral, written, signal and conduct). He /she may even choose the ways

that the offeree shall use to give a response (Art. 1681(2)). So Offer may be made in writing, orally, or by signs or conduct (Art.1681 (1)).

Written declaration of offer is when all the elements of offer are reduced in writing on a paper or electronics and delivered to the offeree. Then the offeree understands the intention of the offeror by reading the paper or the electronics containing the offer. So, if the offeree cannot read for whatever reason there must be some one who reads it to him. For example, if the offeror sends his offer through email or fax such is written communication of an offer.

Oral communication of an offer is when the offeror uses voice to tell to the offeree the contents of the offer and the offeree uses hearing (ears) to know what the offeror is communicating to him. So using telephone, telegram e.t.c to communicate an offer is oral communication of offer. In short the offeror uses his mouth and the offeree uses his ear for communication.

Signal communication is of two types: gesture and object placed to give information. Gesture is one of the four ways of communication. Mute or/and deaf people use such way of communication. Such person makes an offer by using signal communication. *Nodding head, shaking hands and hammering down in an auction sale* are also communication by gesture. Objects may also be used to express an intention. For example in a commodity exchange market, objects are utilized to indicate intention to be bound.

Communication of offer by conduct is when the offeror performs partly or wholly the obligation that he will perform if the contract is entered into. Earnest is the best example of offer by conduct (Art.1883). In this case the offeree uses the combination of his sight or/and ear and mental intellect to know and understand intention of the offeror. Offer by conduct is an implied offer because the offeree is forced to infer the offer from the conduct of the offeror. Offeree may infer different obligation from what is intended by the offeror. So care must be made by the offeror that his conduct is clearly understandable to the offeree.

In principle, an offer is binding on the offeror only if it is addressed to a specified person (Art 1687- 1688). The reason why the offeror is expected to know the offeree and address his offer to him may be to make sure that the offeror has intended to be bound by his offer and to avoid the possibility of multiple acceptances for a single contract.

The person may want to advertise his product or service without any intention to be bound by the content of the advertisement. The person advertising a product or service may not have the product or service at his disposal and he may be making a market study i.e. he may want to know the demand for his product. This means although he states the type of product or service he wants to supply and the price he expects he might not intend to be bound.

E.g. A certain college releases the following information on Addis Zemene Newspaper. “our college is going to open Degree Program in Business Management. Tuition free is birr 500 per month. It takes only 30 months to complete B.A. the program any person who has completed preparatory or has Degree in any other field is invited to apply soon.”

A person may also release the idea moving in his mind to a friend or even to the public either to ask advice or to know public opinion so that he can decide whether or not he has to make an offer. Therefore, if a person “does not make his intention known to the beneficiary of the declaration” such declaration shall not be taken as an offer (Art 1687 (a)).

E.g. Abebe told his mother, Alemitu, that he is happy if his father, Belachew accepts his Mercedes Benzes, 2007 model as donation. Alemitu told the same fact to Belachew.

Moreover, if offer is communicated to the public, many may come to accept the contract. This creates inconvenience of choosing a person whose acceptance should be binding on the offeror. So the easiest way out of such inconvenience is to consider the declaration that become the source of such controversy as non- binding. In such case ultimate goal of

the declaration of intention shall be advertisement of the product or service. Therefore; the following declaration of intention are not offer but advertisement.

Sending price lists or tariffs (Art 1687 (b))

Here, the price list or tariff may be sent to specified address or a specified person but still such act should not be taken as an offer because of the following reasons.

Dedication to be bound is missing. Such price list/ tariff alone never indicates the intention to be bound. The document sent contains the price list/tariff which may be taken as content of the contract but the declaration of intention to be bound is missing. Such is, therefore; neither a written nor oral offer. Signal communication is using body gesture or identified object as an expression of one's intention but sending of price list /tariff does not fulfill such requirement. Offer by conduct is beginning to perform would be obligation but not sending price list.

Price list/ tariff never indicate all terms of the contract such as due date, place of performance, quantity , etc. So it is not complete even if the person to whom it is addressed responds positively (Art. 1695(1)).

Customarily sending of price list/ tariff is taken as an advertisement

The price list/tariff might have sent to many creating the problem of multiple acceptance.

E.g.¹ Moha Bottling PLC has recently started producing beverage in the Hawassa and it prepared the following and sent it to Taddesse Hotel “Moha is ready to supply the following Pepsi products” with the corresponding price

Product	Unit price
Pepsi cola	0.8birr
Mirinda	0.75birr
Sprit	0.6 birr
Mirinda tonic	0.9 birr

E.g.2 General Garment PLC distributed the catalogue of its services to Graduating students of Addis Ababa University.

Posting up price list/tariff and catalogue in a public place

This declaration of intention is not an offer mainly because there would be multiple acceptances if the declaration of intention is to be considered an offer. Everybody may have an access to the declaration. Posting is announcing to a public by using – all possible means such as press, radio and television. It also includes affixing a notice on board, wall, poles, and car or on any other object.

Eg₁ commercial Bank of Ethiopia published the following information in Ethiopian Herald “Commercial Bank of Ethiopia is intending to employ any person having LL.B degree. Work place is Hawassa, salary is birr 3500 per month .Employment is permanent. Interested applicant should submit his CV until 20 Jan 2008 ”

Display of goods for sale to the public

Almost all sales are sale at open market. Every person passing by can have a look at the goods and can easily infer that the goods are ready for sale .But there may be multiple acceptance and the content of the contract is also incomplete .Display of goods does not include some of the contents of the contract such as performance date and place and quantity. Display of goods could utmost contain the type of goods and their prices (see example given by G. Krzeczunowicz).

Sale by Auction (Art.1688)

It is inviting possible offeror to come and make an offer. Many may come and make an offer and the person who invited such offer may freely determine which to accept there by rejecting others. The invitation may either be to buy or to sale. (See auction sales from news paper and report to your Instructor in a class, Read also Art 2403-2407.)

Public Promise of Reward (Art 1689)

As stated above, a declaration of intention to be bound by specified obligation becomes an offer only if it is addressed to an identified person. An exception to this principle is **public promise of reward**. Public promise of reward is notifying the public that whosoever performs a certain act indicated in the notice will be given benefit of proprietary nature by the promisor. It is a reward that is promised to be given for an extraordinary performance or coming across an object lost or person hidden. The promise is public because it addresses to all which performs the required act. No discrimination is made on those who may benefit from the promise.

If a promise of reward is to a specified person or group of persons it becomes an **ordinary offer** if it is made to be known to such a specified person or group of persons. In such case, the promisor can use any means to communicate his intention to the specified person or group of person. It is enough to prove that the promisor has really intended his declaration of promise to reach the specified persons or group of person. Such intention can be ascertained from the circumstances and especially from the means that the promisor uses. For example, if the promisor uses public media such as press, radio, Television, electronics and etc to which the specified person or group may have access, the declaration of intention may be taken as an offer if the specified person/group of person has come to know such declaration.

In case of public promise of reward the media of declaration never matter and the person who performs a specific act in the promise need not know the promise (Art 1689). In short, a public promise of reward is special offer.

Exercises

Identify public promise of reward and ordinary offer.

1. Sir Alex Ferguson gave the following press release in 2007 “If Christiano Ronaldo scores 30 goals in English premier league 2007/2008 , I will give him a large amount of money ”

2. The Government of USA publicized the following information in internet
“Whosoever reports the whereabouts of Bin Laden shall be rewarded one million Dollar ”
3. The following declaration of intention was broadcasted in Ethiopian Television.

“Our Father, Ato Ekubaye Berhe left home on Dec 12, 2007 and has not yet returned. Ato Ekubaye is 49, , tall very handsome, bold and dressed white gabardine suit on the day he left home Whosoever, reports to us the whereabouts of our father , will be rewarded . His sons, Bekele and Zelalem”

Please give at least four other similar examples.

Effects of Offer (Art.1690, 1691, 1693(1), 2055)

This is the effect the offer is to bind the offeror. Once the offer is made, it means one side of the parties to the contract (the offeror) has agreed to be bound. Offer contains would be obligation i.e. the content of would be contract is defined by offer. This indicates that the conclusion of a contract is partly completed. The party making an offer cannot change his opinion. That is why it is necessary to distinguish an offer from mere declaration. A person making mere declaration of intention can change its declaration at any time it wants for whatsoever reason without any legal liability for unreasonable and arbitrary change of its intention. It is obvious that if declaration of intention is not an offer, it is full autonomy of the person who declared such intention to live up to his declaration or change his intention for whatsoever reason. However, an offer cannot be changed by the offeror for unjustified reason. An offeror who changes his offer partially (make some modification to the content of his offer) or totally (refusing to be bound by his offer) is liable for any material damage on the offeree.

If offer is binding, where does it begin to be binding? There might be time gap between the offeror’s release of the offer and the offeree’s reception of the same. This is true

especially when written form or conduct is used to communicate an offer. For example, an offeror may use letter or fax to reach the offeree. So the offer begins to be binding at earliest from the moment the offeree knew its content. Any declaration of intention to be bound by a contract may not even be considered as an offer for the sole fact that it has not yet reached the offeree (Art 1687). So the offeror can freely change the content of his offer or totally withdraw it before it reaches the offeree (Art 1693(1)). The offeror can make his offer not to reach the offeree by informing the offeree that change has been made to the content of the offer or that it has been withdrawn. This has to reach the offeree before he receives the offer or at latest before the offeree takes decision that affects his material interest on the assumption of the offer (Art 1693). This means an offer may be withdrawn or modified as far as the offeree has not incurred expenses with a view to concluding a contract with the offeror. So what is crucial is not the time when the offeree received the offer but the decision he has taken due to his knowledge of the offer. The offeror can change or withdraw his offer at any time before the other takes decision that affects his interest. So the burden of proving that the offer is changed or withdrawn after he takes decision that affects his material interest is on the offeree. Changing or withdrawing an offer is a fault (Art.2055).

Change or withdrawal of an offer is not a fault when it is withdrawn or changed.

- a. before the offeree knows the offer or
- b. at the time the offeree know the offer or
- c. at any time before acceptance for justified reason

Even if modification or withdrawal is made contrary to the above precondition, the offeror may be liable only if the offeree proves that the offer is the cause for his loss.

How Long does the Offer Bind? As we see above offer is binding from the moment the offeree knows its existence. Such tells us the time than the offerbegin to produce effect. If it begins it must also end somewhere. Everything that has beginning must also have end. The offeror should be given an opportunity to be released from his offer or else how long will he wait for acceptance. The offeror may himself determine how long the offer

remains binding. For example an offeror may indicate in his offer that acceptance be made within ten days from the moment the offeree knows the offer. After expiry of such ten days the offeror can change, modify or withdraw his offer for whatsoever reason and without any liability to the offeree (Art 1690).

In case the offeror fails to fix time limit for acceptance, the offer remains binding for **reasonable period** only (Art 1691). Reasonable period indicates the time that the offeree needs to understand the offer and decide to accept or reject it. So if the offeree remains or unable to decide within such reasonable time the offeree will no longer be bound by his offer. But the crucial issue is “how long is a reasonable period” The length of reasonable period should be the **average time** that the **average person** may need to determine on the offer. The circumstance of the offeree should not be taken into account to determine the length since contract is not a charity and the offeror is running for gain and has no legal or moral obligation to sacrifice for subjective weaknesses of the offeree. However, objective criteria such as the existence of current price for the subject of contract, market stability, and complication of content of the contract should be taken into account. For example if offer is made for sale of coffee in Ethiopia, the offeree may be expected to respond in hours and a response coming after days may be taken as not coming within a reasonable period. On the contrary an offer for a construction may be reasonably binding for weeks. Market stability is also very important to determine the reasonableness of the period since in case of market instability price changes now and then thereby affecting the decision of both the offeror & offeree. So when there is market instability reasonable period should depend on the frequency of price change. For example in Ethiopia price of fuel is revised every three months and such revision probably affects the advantage of either parties. So court should consider such other similar facts affecting market price.

Whenever the court is not convinced that the period is reasonable, it should conclude that the period is unreasonable since any doubt should benefit the defendant (Art. 1738,); whosoever, claims the right has a burden to prove the existence of such right.

We have to bear in mind that if the acceptance reaches the offeror after expiry of reasonable period the offeror has a duty to inform the offeree the lateness of the acceptance by using the speediest medium of communication available. Such medium should at least be as speedy as the medium used by offeree to send his acceptance. Using the speediest medium is not enough, the response should be made at the moment the offeror receives the acceptance. So if the offeror fails to reject the acceptance immediately the offeree has the right to claim that the acceptance was given within reasonable period and hence contract was concluded (Art 1691(2)).

The third ground that terminates the effect of an offer is the offeree's rejection of the offer (Art 1690(2)). Rejection of an offer is, either making modification to the content of the offer or sending a "no" answer to the offeror. Offer is deemed to be rejected "where acceptance is made with reservation or does not exactly conform to the term of acceptance" (Art 1694). Art.1690 (2) expressly provides rejection of offer as a cause of termination of offer where the offer contains fixed period of time for acceptance. The same should apply to cases under Art.1691. There is no logic for offeror to wait for an expiry of reasonable period once the offeree rejects the offer. Even one can argue that once the offeree rejects the offer, it shows that the reasonable period has already expired since reasonable time is the time that is sufficient for the offeree to respond. But since reasonableness should not depend on the subjective situation of the offeree we may still say that rejection of offer may be made before expiry of reasonable period. But still the rejection releases the offeror because there is no justification for the offeree to get time to revoke his rejection and claim to accept the offer simply because the objective reasonable time has not yet expired. There is a less possibility that an offeree who once rejected an offer could come to accept the same and forcing the offeror to wait such change of mind is fooling him and inequitable..

2.2.2. Acceptance (Art 1681-1685, 1689(1), 1694) (1893(3))

Acceptance is a positive response to an offer i.e. it is a declaration of intention to be bound by each and every contents of an offer. In short acceptance is a “Yes” answer to all the contents of the offer. Any slightest modification made to the content of the offer is considered as rejecting the offer and making, an alternative offer (Art.1694). So the offeree must take care in giving response to an offer. He has three alternative answers to an offer, the “yes” answer which means accepting the offer as it was made; the “No” answer which means totally rejecting the offer or “acceptance with reservation” which means having reservation or alternative proposals for some of the contents of the offer. So “where acceptance is made with reservation or does not exactly conform to the terms of the offer” the offeree must remind himself that he is taking the position of the offeror and the offeror then becomes an offeree (Art. 1694). That means the offeree (the current offeror) is bound by the new offer he makes until the time limit he fixes for acceptance expires (Art. 1690(1) or until he reasonably expects the other party to decide on the new offer (Art.1691(1)).

Eg.1 Abebe wrote the following e-mail message to Tuffa”

“Dear Tuffa, how are you doing? I am very fine, I am going to sale my Toyota Land cruiser, 99 model automobile to you to birr 30,000. Delivery and payment date is on January 20, 2008 In Addis Ababa”

Tuffa may respond in any of the three ways.

“Thank you, I am lucky to buy your car.”

“Thank you for your concern, but I do not need any automobile now!”

“Thank you. I am very much happy to buy your car but the delivery place should be in Awassa”

Acceptance How acceptance is Made

Since acceptance is communication of intention, like an offer, it can be made in all possible ways of communication. So, the offeree can use writing, oral, sign or conduct as

a means of communication. The medium of communication never matters. The offeree may use letter, press, telex, email, etc to communicate his acceptance in writing. He may also use telephone, telegram, video, radio, television etc as a medium of oral communication. Signal communication is showing certain publicly known physical gesture such as shaking the hand of the offeror, nodding head or using certain objects publicly used to indicate intention(Art.1688(2)). Signal communication usually requires the physical presence of both the offeror and the offeree at the same time and at the same place.

Communication of acceptance by conduct means performing partly or fully the obligation proposed by the offer or benefiting from the rights proposed by the offeror.

E.g₁ If a person who is offered to buy a certain goods comes and takes some or all of the goods or if he pays part or all of the price of goods, such act may be interpreted as an acceptance by conduct.

Generally, an acceptance can be given provided the offeree knows the existence of the offer. Acceptance is declaring agreement which presupposes knowledge of the obligation for which the agreement is given. However; if the offer is public promise of reward the offeree is not known to the offeror; hence whosoever performs the promise is considered as if he accept by conduct *regardless of his knowledge of the existence of the offer* (Art. 1689(1)).

Incidentally Art.1689 lacks clarity and may be rewritten as follows:

Art. 1689 Public Promise of reward

- 1) A Promise published in any manner to reward a person who will find an object which has been lost or who will perform certain act shall be an offer.***
- 2) Such offer shall be accepted where a person brings the object back or performs the act, notwithstanding that he did not know the offer.***

Duty to Respond (Art. 1682 -1685)

The offeree does not have a duty to give response to the proposal of the offeror. He can respond negatively or positively only if he wants to respond otherwise he may for example read an offer and simply throw it in a dust basket or tear it off by reading only the address of the letter. That means the offeree has the right to remain silent; no one is allowed to disturb his peace. Moreover; if the offeree remains silent there is no assurance that the offer was brought to his attention; he might have not known the existence of offer. Therefore silence shall not amount to acceptance (Art. 1682). It should not be taken as a signal indication of acceptance.

However, in the following cases the offeree has a duty to respond a “no” answer if he does not want to be bound by an offer, otherwise his silence may be taken as a sign of acceptance by the offeror.

a. **Duty to accept:** - sometimes a law or contract may impose on the offeree the obligation to accept offers made to it. This is mainly when the offeree is a monopoly supplier of goods or provider of services. Some public enterprises are established by law to provide goods and services to the public, hence they are duty bound to accept an offer from the public. For example, Ethiopian Electric Power Corporation, Ethiopian Telecommunication, Water & Sewerage Authorities are expected to accept offer for electric use, telephone line and pipe line. If they do not want to be bound by the offer they have to notify with in time specified in the offer, if any (Art. 1690(1) or within a reasonable time (Art 1691(1). Otherwise their silence is considered as an acceptance (Art.1683).

Private Business Enterprises may also have a contractual relation with state agency to supply certain goods or provide services to the public (see Art.3207-3243 which provides about contract of concession). In such case the concession (the contract between the business Enterprise and state organ) may lay down the content of the contract that will exist between the Business enterprise and the service seeker.

E.g. Addis Ababa City Administration and Cleaner Private Limited Company agree as follows;

Art. 1 Addis Ababa City Administration shall pay Birr 2,500,000 to the Company at the beginning of each fiscal year.

Art.2 The Company shall give toilet service at a distance of 1km in every Asphalted road.

Art 3. The Company shall provide toilet papers to the service seekers.

Art.4 The Company may charge only ten cents for one time use of the toilet service.

This contract may be taken as a concession contract as it defines the obligation of the company and the service seekers in advance. So, the offer of the service seeker is limited only to declare his intention to be bound by the contract whose object was already defined, by the government. In short the offer of the service seeker contains only his intention to be bound and his request to the offeree to agree to be bound. So if such offer is made the silence of the offeree will be taken as an acceptance.

In addition to those bound by law or concessions, a person may have a contractual obligation to accept an offer made to him as per his contractual obligation. This is in line with Art 1711 and Art. 1957. So in such case also silence is taken as acceptance. So such offeree has an obligation to respond to the offeror if he does not want to be bound by the offer.

N.B. The literal meaning of Art.1683 is that once offer is made, acceptance is automatic. Sub Article 1 declares that when a party is bound by law or concession to accept “no acceptance shall be required”. This is further strengthened by sub – art 2 which states that “the contracts shall be complete upon the receipt the offer” thereby implying that the offeror can claim performance of the contract once the offer is delivered to the offeree.

However; such interpretation seems to be illogical for the following reasons:

Contract depends on agreement of contracting parties. There is no contract without consent. The level of consent may be highly limited but should not totally be avoided. So the offeree should at least be given the chance to study whether or not the offer has been made as per his legal or contractual obligation. So the mere reception of the offer may not complete the contract and the offeree should be given the chance to say “ok” or “No” for the offer. So Art. 1683 (2) indicates date of conclusion of contract only so far as the offer was not rejected.

The offeree may lack resource to accept the contract. For example, many customers may apply to Ethiopian Telecommunication to get telephone line but the corporation may not have resource to meet the demand..

The offeree may have legal or contractual or legal authority to stream line offerors. In principle, Ethiopian Electric Power Corporation has to supply electric power service to every person who demands the service. But when offerors are many, the Corporation may give priority to investors.

The offeree can refuse to perform his contractual or legal obligation In such case the offeree may be responsible for breaking its legal or contractual obligation for not accepting the offer but it is difficult to conclude that it automatically accepts offer declared to it.

Therefore Article 1683 should be understood as imposing an obligation to respond to an offer. Such conclusion is in line with Art. 1682 and 1684 i.e. Art 1683 is an exception to the right to remain silent. So Art.1683 should be amended as follows.

Art. 1683-2 Duty to Accept

Where an offeree has legal or contractual duty to accept an offer the offer shall be deemed to have been accepted unless the offeree rejects the offer with in time specified in the offer or where no time is specified within reasonable period.

B .Preexisting Contractual Relation Silence may also amount to acceptance where

- i) *the content of the offer is to vary, supplement or complement preexisting contractual relation (Art. 1684 (1)).* Variation of a contract means changing, modifying or avoiding some of the provisions of the contract. Variation of contract itself is a contract and hence needs consent of parties. So, one of the parties may offer such variation. For example, in a sale contract, the buyer may offer to change the delivery date. Supplementary or subsidiary contract is a contract that may exist independently but that help to facilitate the implementation of preexisting contract. E.g. you bought a cloth and the seller offers you to tailor the cloth; you bought goods and the seller offers you to provide transport service; Photocopier proposes to bind the paper it has photocopied; a contractor who builds the house proposes to construct a fence for the same building. Completing a contract means some of the issues not settled in the preexisting contract be agreed up on again. For example parties in a sale contract agreed to be bound by the sale (Art 1695) but not determined place of delivery. Any party to such contract may make an offer concerning place of delivery. If the offer is accepted it complements or completes the preexisting contract. Complementary contract is subordinate on the main preexisting contract.
- ii) *the offer is made in writing.* In principle offer can be made orally, in writing, by sign or conduct depending on the preference of the offeror. But silence can be interpreted as acceptance only if the offeror uses written form of communication that is addressed directly to the offeree (Art 1684(2)).
- iii) *the offer should be written on special document (Art 1684 (2)).* The document that contains the offer should contain nothing else than the offer. So offer written on the back of an invoice should not be deemed to have been accepted by silence (Art.1685). Moreover, offer should be written on a paper. E-mail is not a document.

- iv) *The offer contains warning that silence amounts to acceptance.* The offeror should also expressly indicate in his offer that he considers the **silence** of the offeree as acceptance after expiry of time limit indicated in the offer Art. (1690(1) or reasonable period (Art.1691 (1) (Art 1684 (2)

So if the above four conditions are fulfilled both the offeree and offeror can claim that silence amounts to acceptance

Exercise

Check the missing element, if any in the following examples

E.g.₁ Prof Mackintosh was employed as a professor in Addis Ababa University for the 2006/2007 Academic Year. At the end this academic year Mackintosh wrote the following letter to the University “Dear Sir, I want to continue to serve in your esteemed institution for 2007/08 academic year”.

Eg.₂ Biset agreed to construct a dwelling house for Belay and while constructing the house Belay has e-mailed the following letter to Biset “Dear Biset, You know that I myself have been providing construction material. But I am happy if you provide the same for birr 300,000. Please give response or else I consider it as accepted.”

N.B The offeree’s freedom of choice of means of communication may be limited either by the offeror (Art.1681 (2) or by the law (Art.1689 (1)).The offeror may choose any of the four ways of communication and inform the offeree to use only such chosen means. If the offeree uses another means than chosen by the offeror the acceptance is defective since it does not exactly conform to the offer (Art.1694 (1). Public promise of reward is accepted by conduct only.

Effect of Acceptance

In general, it can be inferred from Art 1679 and 1693(2) that once an offer is accepted the offeree is bound by his word. Once we know that acceptance is binding the question that comes to our mind is “the moment at which acceptance begins to be binding.” In other words “does acceptance begin to be binding at the time the offeree says “yes!” to the offer or at the time such “Yes” answer is received by the offeror”. Such question becomes relevant when acceptance is communicated in writing or by conduct since in such case the time the offeree writes the acceptance or begins to perform the obligation stipulated in the offer may differ from the time the offeror knows such fact. For example, Alemu offered to Abebe to buy his villa for birr 500,000 and Abebe wrote letter of acceptance on January 26, 2008 but such letter reached Alemu on March 20, 2008.

Art 1692(1) of the code has answer for this. It provides that acceptance becomes effective from the moment the offeree sends it to the offeror. Here it is not from the moment an offeree writes a letter of acceptance but from the moment he put it in a post office or if it is email, from the moment he clicks the “send” button of his email box. Therefore; the consent element of contract is fulfilled at the moment the offeree accepts the offer regardless of the knowledge of the offeror. This means an offer can be accepted even after the death of the offeror unless the heirs withdraw such offer in accordance Art. 1693(1)

However; the acceptance must reach the offeror or his heirs before expiry of time limit specified in the offer (Art. 1690) or reasonable per (Art.1691 (1). If the acceptance does not reach the offeror cannot know whether or not contract is concluded between him and offeree. If he has not received acceptance within Art. 1690(1), 1691(2) he can presume that his offer was rejected. In short acceptance begins to produce effect from the moment the offeree sends it to the offeror provided it reaches the offeror within time specified under Art. 1690(1) or 1691(2)

The offeree may abort the contract by withdrawing his acceptance (Art.1693 (2)). He can freely withdraw his acceptance before the offeror knows such acceptance through the medium the offeree uses to communicate the acceptance to him i.e. if the offeror knows the acceptance earlier than the offeree expects from a friend or other sources; the offeree can still withdraw his acceptance regardless of the knowledge of the offeror. For example, in response to an offer made to him by Bacha, Alemu wrote a letter of acceptance to him and send it through post office. While sending the letter, Alemu got Gifawosen, a friend of Bacha, and told him that he (Alemu) is sending letter of acceptance to Bacha's offer... Gifawosen told to Bacha that Alemu accepted the offer. Alemu can withdraw his acceptance until Bacha receives the letter unless it is proved that Alemu requested Gifawosen to inform such acceptance.(see also Art. 1687(a) which provides that declaration of intention is considered an offer only if the offeree knows it from the sources the offeror uses to reach the offeree). For more detail discussion on this point please see our discussion on effects of offer (Art 1693(1)).

General Terms of Business No party can be assumed to be bound by general terms of business which he did not agree to be bound with (Art 1685). General terms of business are internal rules of a party that may have direct relevance to the obligation of the other parties. Such general terms are frequent in employment contract and other big institution which are monopoly suppliers of goods or service. The University Senate legislations are best examples of these general terms of business. Denying legal effect to general terms of business is one means of customer protection. However if these general terms of business are proclamation, regulation or directives issued by competent authority they are treated as law as far as they do not contradict with superior law (Art 1986).

To be bound by an obligation one has to know it and agree to be bound (Art 1679). So any annexes to main contract never bind a party who has not known its content and not agreed to be bound. Knowledge about the existence of the annex is not enough. For example, an instructor might have known the existence of senate legislation which provides more obligations than in the contract he signs. Such knowledge is not sufficient to be bound by such senate legislation. He must be informed that such senate legislations

are part of the contract before he signed such contract. Otherwise he can treat the senate legislation as a morally binding instrument with no legal effect. Moreover, if the instructor accepts such legislation without knowing its content, he should not be bound since he did not participate in defining the object of such subordinate contract (Art 1679).

Negotiation vs. Consent (Art.1695) Negotiation is when one party proposes to the other some of the contents of would be contract leaving the remaining to be completed or proposed by the latter. The latter may also propose some and still leave others undetermined and sends them back. Here both parties may use all possible moral and legal techniques to persuade the other party to accept the proposal or to come up with more favorable offer. So in short negotiation is a discussion made between parties intending to shape the content of would be contract. Therefore any proposal made during negotiation is not binding on the party making the proposal i.e. a party may withdraw from the negotiation at any time (Art 1695 (1). However; if the negotiation is completed (content of the contract is determined) and both parties agree to be bound by the negotiation then it ends up becoming a contract (Art 1695 (1). In negotiation, it is very difficult to know the party who made an offer. However; we may take as an offeror the party who proposes the content of the contract last.

Parties need not reach agreement on all contents of the contract. They may expressly agree to be bound by contents of the negotiation there by leaving detail to be completed by the law (Art 1695 (2). For example, parties may negotiate sale of 500 quintals of coffee and agree to deliver on Oct. 25 but fail to reach agreement on price but the coffee is delivered. The delivery will be taken as implied consent and the price will be determined by law (see Art. 2306).

2.2.3 Defect in Consent (Art 1696 – 1710)

If the consent expressed in the form of offer and acceptance does not indicate what the offeree or the offeror really intended then there exists defect in consent. The cause of defect in consent is either wrong information (mistake, false statement, fraud) or threat

(duress, reverential fear, threat to exercise rights) or lesion. Defect in consent may be a cause for invalidation of contract (Art 1696). However, the existence of defect in consent does not necessarily lead to the invalidation of contract. Firstly defect in consent can invalidate a contract only if a party who agreed to be bound because of information or threat demands invalidation (Art 1808). Secondly in some cases the party whose consent was defective may not be entitled to claim invalidation (1708, 1709, and 1710).

2.2.3.1 Defect of Consent due to Wrong Information

Mistake, fraud, and false statements may lead an offeror or offeree to have wrong knowledge about the content of the contract i.e. a person is passing a decision to be bound on the basis of wrong information. Let us see each of these causes of wrong information in some details.

Mistake (Art 1996- 1703) is when a party makes misunderstanding on the content of the contract or on the identity of the other contracting party. The person might have committed such misunderstanding either because of his own poor inference from given facts or false statement or deceitful practice of others person. Please see the following examples

E.g.₁. a buyer purchased a bracelet believing that it is 21 carat gold and latter on found out that it is 14 carat gold. A seller says nothing to the buyer about the quality of the bracelet.

E.g.₂. Kebede informed Belay that a certain tablet can cure hair fungus and Belay bought such tablet and discovered latter that Kebede was lying and the tablet is contraceptive pills.

E.g.₃. Zenitu locally produced edible oil from corn and packed it in the container of internationally produced edible oil.

One can invalidate or avoid his obligation on the basis of mistake if the following two conditions are cumulatively fulfilled (Art 1997, 1998).

A/ mistake must be fundamental (Art 1998) – A mistake is fundamental when a person misunderstands the object of the contract or the person with whom he has entered into the contract. Art 1698 defines “fundamental mistake” in a very vague manner there by inviting interpretation. The clue for such interpretation is the clause “elements of the contract which the parties deem to be fundamental” found in the same article. The phrase element of contract under Article 1678 indicates consent, capacity object and form of contract but such meaning does not apply to Art 1698. paragraph 1 of title 12 (Art 1979 - 1695) also talks about elements of consent to indicate offer and acceptance so from the above two we can understand that “elements” indicates requirements, parts or contents of something. So elements of a contract should mean “content or object of a contract”.

It is nothing but the content/ objects of the contract that both parties to the contract consider as important or relevant to their relation. In a contract the primary concern of the parties is mainly to keep their obligation to the possible minimum and keep their benefit to the possible maximum. So their primary attention is an object (rights & duties of parties to the contract). Therefore, the element of the contract which the parties deem to be fundamental is the object of the contract. This is also impliedly included in the heading and contents of Art 1699 which takes about nature or object of contract. Mistake relating to the identity of a contracting party is also fundamental mistake. In short a mistake is fundamental when it related to the **object** or **nature** of a contract or **identity** of the contracting parties. Nature of contract refers to types of contract. For example, a person intended sale contract but in fact entered into service contract, or agency is mistaken for employment contract or usufruct for lease, loan for donation etc.

E.g.¹. Abebe bought a shoe believing that it is Italian product although it is Turkish product.

E.g.2. Shewaye bought a house from Alem for 100,000 dollar although Shewaye thought that the price was indicated in Euro.

E.g.3. Ashagre employed Shegrawaw as his lawyer believing that Shegrawaw is the one who defended genocide cases in Tanzania before international tribunal but this Shegrawaw is the one who was recently graduated from private college as junior lawyer.

The law also attempts to indicate what “fundamental mistake” means by telling us non fundamental mistake (Art. 1701). Mistake of the motive of a party or arithmetic mistake are non-fundamental. In contract it is presumed that the immediate and important motive of the parties is to make object of the contract favorable to them. Any other motive is secondary and hence non-fundamental. The direct cause of the contract is presumed to be the economic benefit that the parties derive from the contract. Such motive is clearly observable from offer and acceptance and is expressed as an object. Moreover; motive not expressed to the other party is not binding (Art 1680 (2)). So any motive not observable from offer and acceptance is not an element of a contract (Art 1698 cum. 1701)1).

Arithmetical mistake is taken as non- fundamental mistake because it can be easily corrected (Art 1701(2)). This happens when both parties accept the arithmetic mistake. But if the arithmetic mistake is claimed by one party only, it may be fundamental mistake. For example, Abebe signed a check believing that it orders a payment of 50,000 birr although the check indicated birr 500,000 which the payee read and accepted. In this case, the payee accepted the check believing that it carried an order of 500,000 birr but Abebe believed it to be 50,000 birr.

A mistake is arithmetic when amounts, numbers or even provisions are missed or improperly typed due to clerical error regardless of the common intention of the parties expressed in the form of offer and acceptance. For example buyer and seller agreed that the sale price is birr 10,000 but the secretary wrote it to be 1000 and parties sign the contract with out noticing such error. Generally it is editorial error and may also be

applied to any other editorial error such as missing of provisions that indicate rights and obligation of the parties e.g. in a contract of sale, the phrase dealing with place of delivery is missed although the parties consented that it be in Addis Ababa. Such mistake is not an arithmetic mistake. This mistake happens when the contract needs to be made in writing and committed at a stage of translating offer and acceptance in written form and hence it is not defect in consent.

B/ *the mistake must be decisive*: the mistake is decisive when the mistaken party proves that a rational person in his position would not have entered into such contract had it not been for the mistake (Art 1697). The decisiveness of the mistake should be determined by court taking into account the surrounding circumstances and subjective conditions of the mistaken party. Art 1699 (b) also encourages the court to consider subjective condition of the mistaken party. According to this provision a mistake is decisive where “the mistaken party had undertaken to make a performance substantially greater or to receive a consideration substantially smaller than *he intended*’. Art. 1697 also provides subjective criteria requiring him to establish that he would not have entered into the contract had he known the truth. Generally the purpose is searching the intention of the mistaken party since contract is binding only when the person knows his rights and obligation and agrees to be bound. However, knowing intention of such mistaken party is possible only by putting oneself in his position i.e. ‘*what would I do as a rational person, had I been in his condition*’. Remember the golden rule “*Do unto other what you want others do unto you*”.

Exercise

Identify mistake that can invalidate the following contracts.

Example:-

1. Abebe and Alemu agreed that Abebe sales a product of Alemu in Awassa town and the monthly payment was birr 5000. Alemu thought that such contract was employment contract but it was in fact agency contract.

2. Abebe and Sindu entered into lease contract whereby Sindu agreed to ensure to Abebe the use of her house in Awassa for one year and Abebe agreed to pay birr 18,000. Abebe entered into this contract believing that his employment contract provides Hawassa as his work place but he discovered that his work place is in Arbaminch.
3. Zuber was a graduate of Hawassa University, Faculty of Law. He applied for vacancy in Africa Beza College as civic and ethical education teacher. The college employed him without properly examining his curriculum vitae. Later on the college discovered that Zuber was law graduate and the college employed him believing that he was political science graduate.
4. Sirabezu agreed to work as attorney in commercial bank of Ethiopia for gross salary of birr 3500 believing that he will be paid birr 250 as housing allowance but he came to know that housing allowance is paid only for those who are working outside of their permanent work place.

Good Faith of Mistaken Party (Art.1702) The party mistaken must be ready to be bound by the contract if the other party agrees to be bound as per the intention of the mistaken party. He should not use his mistake as a pretext to be out of the contract.

Reparation (Art.1703) a mistaken party is not without liability. He is accountable for any damage that may be caused to the other party (Art 1703). So invalidation of contract on ground of mistake entails payment of damages. A mistaken party can escape such liability only if he proves that the other party knew or should have known such mistake (Art. 1703)

Recommendation This writer proposes that Art 1697, 1698 and 1701 be deleted so that the meaning of Art. 1699 & 1700 would be clear. The above three articles overshadow the message of Art 1699 & 1700. Moreover talking about arithmetic mistake is misleading.

Fraud (Art 1704) Fraud is an intentional act of preparing false information or changing or modifying the content of the subject matter of the contract in a manner that cannot be noticeable by ordinary observation. Fraud does not mean telling untruth or for bearing from telling the truth it rather mean making things or document to give wrong information. Such act is done in order to obtain consent of a person to a contract. The practice of mixing up banana with butter, red ash with pepper, milk with water, Adaa teff with teff from other place are fraudulent act. Fraudulent act may be accompanied by false statement.

A defrauded party can demand invalidation of contract where:

A/ the fraud led him to commit decisive error (Art 1704(1)). Fraud is a way of making a person to have misunderstanding either about the content of the contract or identity of the other contracting or motive of entering into the contract. Here the error or mistake need not be fundamental. **It is enough if it is decisive.** For example, Alemu told Challa, a broker, that he will buy a house in Awassa if he is employed in Hawassa University. Alemu already applied to Hawassa University for interview and has been waiting response. One day when he opened his post office box he got a letter that was written to him from Hawassa University. The heading of a letter contains “Hawassa University” and emblem and it was signed and stamped by the university authority. By looking at the letter Alemu believed that he got employment into the University. Being happy of such he bought a house for birr 500,000 through the brokerage of Challa. Then he went to the University to apply for duty and learnt that the letter was a fraudulent letter.

B the fraud was committed by the party to the contract or he knew or should have known the fraud or derived undue benefit.

The defrauded party should also prove that the party himself commits the fraud or knew or should have known the existence of the fraud or he derived undue benefit. E.g. Ethiopian National Bank was once defrauded by gold suppliers. The suppliers painted a ‘balestra’ a golden paint and supplied it as though it was gold. If the bank resells the

“balestra” without discovering the fraud, the buyer may claim that the bank should have properly examined the thing. Generally whosoever sells goods under its control (possession) need to know what he / she is possessing. Failure to know is negligence. A person should have known the existence of the fraud means had it not been for his own personal negligence, a reasonable person in his position would have known the fraud. Moreover, whosoever sells a good in his possession has a duty to warrant against defect in the thing (Art 2287, 2289). So besides the invalidation of the contract, a party may be liable to pay damages.

A person is generally under no duty to disclose all facts in his possession to the other contracting party. Each must protect his own interest unaided by another party. The rule is “buyers beware” (*caveat emptor*). Keeping silent therefore, is generally not actionable even though it causes damage to the other party. However, as an exception to this rule, a contracting party should reveal fraud whenever possible.

Even if there is no act of fraud by the party or he had not and should not have known the fraud a contract may be invalidated if he has got undue advantage on the defrauded party due to the fraud. This is in fact can be sufficiently proved if the decisiveness of the mistake (fraud) is proved.

N.B A party who is unable to prove Art.1704 may resort to proving existence of mistake although practically proving mistake is more stringent than fraud. Notice that Amharic version and English version of Art 1704 (2) seems to convey different meaning but by final analysis they convey the same meaning.

E.g.1 Abebe sold a T-shirt to Ayele. But the package of the T-shirt was damaged and Abebe repacked the T-shirt and sold it as if its original pack was untouched.

E.g.2 Due to problems in shipping, the paint of car was damaged, and the car dealer painted the damaged part of the car. So that it was not possible to distinguish the repainted car from others. Abebe bought one of these cars believing that the painting was

original but he later on discovered that a certain part of the body of the car had been repainted.

E.g.3 Shaka bought shoes, which has trade mark of *Anbesa* shoe Factory and resold it for the same price to Shemsu. Shemsu latter on discovered that the person who sold the shoe to Shaka fraudulently use trade mark of *Anbesa* shoe factory for a shoe he produced at home.

E.g.4 Zelalem parked his second hand automobile in a sales shop of Moenco. Azerefegn bought such car from sales shop believing that it was first-hand but Moenco's sales person or Moenco knows the fact and connived with Zelalem.

False statement (Art 1705) false statements is untrue statement made

A/ knowingly (intentionally) or

B/ with out give being indifferent whether it be true or false (reckless) or

C/ negligently (Art 1705)

Misleading conducts or silence may also amount to false statement (Art 1705(2)). For example, if a buyer of Bajaj asks a seller whether or not the fuel consumption of the Bajaj is more that 40 km per liter and the seller remains silent, such may be a false statement. In principle telling a false statement cannot lead to invalidation of contract. A party can lie as much as possible unless his morality, religion and reputation matters him. In a free market economy it is believed that neither party owes any duty regarding voluntary information to other nor is he entitled to rely on the other. Each party must study the situation, examine the subject matter of the contract, assess the general current and future market possibilities, and rely on his own source of information and judgment. He can take advice consult experts, buy information from third parties. The only general limitation is that no one can resort to fraud. In Ethiopia also there is an Amharic saying *a trader never makes profit unless he lies*. So a contracting party is free to lie about the thing he sells or service he renders. He is not accountable as far as the thing or service is

what it appears to be. For example, a buyer bought a CD player that cannot be repaired once damaged. But the seller told him that the CD player is repairable.

However: false statement can be a ground for invalidation of contract where

A/ there is a special relationship between the liar contracting party and the mistaken party. Here the special relation should be a legally recognized relation which creates duty to trust one another. But the duty to trust may be either legal or moral. This is because, firstly it is very difficult to identify a relationship that gives “rise to a special confidence and commanding particular loyalty”. Secondly, if we go beyond legal relationship it is difficult to prove the existence of the claimed relation. For example if we take friendship, it may be difficult to claim the existence of loyalty on matters of economic interest between friends. Moreover, it is difficult to prove whether or not the disputants were friends or not since there is not standard definition for friendship. Thirdly, Art. 1706 (1) itself provides about “special confidence” and “particular loyalty” and such “special confidence” or special loyalty” is expected if there is “special or particular” relationship; such special or particular relation should not be left to the parties or witnesses or even courts so that subjectivity would be minimized. Example of legally recognized special relationship is husband-wife, patient-doctor client-lawyer citizen-government. For example if any of the municipalities in Ethiopia lies to those to who buy condominiums the purchaser may invalidate the contract because of false statement.

B) Such special relation ship led the mistaken party to believe the statements of the other party. False statement made by third party to the contract can not be the cause of invalidation of contract.

2.2.3.2 Defect in Consent due to Threat (Art.1706-1709)

A person may be threatened physically or psychologically to make an offer or to accept an offer made to him. In such case the person is declaring his intention to be bound as an alternative means of avoiding the effect of the threat. In principle parties enter into a

contract for purpose of deriving economic benefit but in case of threat, both or at least one of the party is entering into a contract to avoid a possible risk that has been directed against him, his relative, his property interest. So had it not been for the threat, the person would not have declared to be bound i.e. intention to be bound is lacking.

Duress (Art.1706 1707) Duress is warning the party that unless he enters into a certain contract certain harm will be done to him. One can raise duress as a cause of invalidation of contract if the following conditions are cumulatively fulfilled.

1. ***There is a threat or warning to cause harm.*** The person must be told expressly that he has to choose either suffering the certain harm or entering into a contract. He should not infer the threat of harm from the behavior or identity of the parties. For example, if three shifta or gangsters come at a home of certain rich man and remained in seat for an hour without giving any instruction to him he cannot claim duress if he writes them a check of 500,000 birr and made them to leave his house.
2. ***The harm is on the person himself, spouses or his ascendant or descendants.*** The existence of threat can not be a ground of invalidation of a contract unless it is directed on the party himself or his spouse or his ascendants and descendant. If the threat is on collaterals such as brothers, sisters, it cannot be a cause of invalidation.
3. ***The harm is on person, life, property, and honor.*** Harm on person is when the threat is to cause bodily damage to any of the above stated person. For example, a gangster come to A's house and made the following statement. "Mr. A, you shall either sign me a check of birr 200,000 or I am going to cut the breast of your daughter". Harm to a life is when the threat is to kill any of the above persons. Harm to honor is when the threat is to commit a certain act that negatively affects the reputation or public image of any of the above person i.e. threatening to release information which the threatened person wants to keep secret. For example, Abebe asked Shewakena, his friend, for a loan of birr 200,000. When Shewakena refused. Abebe told him that he (Abebe) will tell to Shewakena's colleague that Shewakena is eunuchs.

Ethiopian law recognizes duress on property. However, care should be taken in case the threat is to harm property. Since here the choice of the party is making choice between similar interests; the person is ordered to enter into contract (Property interest) or loss certain property. The threat on property should be penal offences; a threat to break any contractual obligation should not be taken as duress.

E.g. Asfaw, a ringleader, warned Belay to make an offer to sale his house in Dire Dawa to Asfaw's brother, Dingamo; or else the house is to be burnt.

4. ***The party believes that the harm will happen if he does not consent to the contract.***

That means the party would not have entered into the contract had it not been for the threat. Whether or not there existed duress depends on the subjective mentality of a party. Therefore; it is enough if the threat is apparent to a party, although there was no real threat. For example the fact that the pistol used to threaten a party was artificial does not matter; it is enough if he believed that the pistol was the true one.

5. ***The threat should be serious:*** - the threat is said to be serious when the harm to be caused is greater than the obligation that a party enters into. For example, a simple kissing on a lip or slap on a face are not serious harms.

6. ***The harm is imminent*** that is the harm is going to happen soon and a party does not have time to think of another option to avoid the happening of the harm except by consenting to the contract. For example, if a lady receives a letter that warns her to sign a contract or face rape. Such threat is not immanent. The person or property threatened should be under the control of the threatening party and the threatening party will cause the damage at the moment a party refuses to consent.

E.g.₁ three gangsters came to Shura's house and put him and his wife under control and order Shura to sign contract of donation to legally registered political party under the pain of having his wife raped by them.

E.g.₂ Abesha and Belete kidnapped Zerihuin's daughter, and made a telephone call to him that he either make an offer to sell his share in Access Bank or they will rape his daughter

7. ***The threat must impress a reasonable person.*** The law does not expect a citizen to be a hero who can have courage to resist any threat. The law also does not want us to be cowardice. Citizen should have some courage to resist some threats. So the law punishes cowardice by denying the opportunity to invalidate contracts if the threat was such that any ordinary person would have resisted it. For example, the law does not accept a healthy man of 35 to claim that he was threatened by a young girl of 12. In determining the cowardliness, the court should take into account the health, sex, age and position of the person threatened and threatening. Normally, males may be expected to defend themselves better than women. Adults are also expected to defend themselves when compare to a person of early 20's or late seventies. Moreover; health, education and other psychological factors are also important to determine whether or not the person was cowardice or had reason for failure to resist the threat.

Duress by third Party (Art.1707) Duress may be committed by contracting party or third party to the contract. The right of a party to claim invalidation is absolute i.e. he can claim invalidation no matter who threatened him to enter into a contract (Art 1707 (1). Moreover; the other party cannot raise his unawareness of the duress as a justification to avoid invalidation. Such justification may, however; be a ground to claim damage from a party who got the contract invalidated (Art 1707 (2). For example, if Letamo went to Sisay's house and pointed a gun at his daughter's front head and said "Ato Sisay make a call to my brother Shumete and offer him the sale of your business for birr 500,000 or else I am going to change your daughter into corpse". Being threatened by the statement Sisay made calls and made an offer to Shumete and Shumete happily accepted the offer. Sisay can claim invalidation of the contract without being required to prove the knowledge of Shumete about the threat. But Shumete may claim damage caused to him due to such invalidation. This is one of the differences between duress and fraud. (See Art 1704(2))

A Threat to Exercise a Right (Art 1708) Under Art 1706 physical violence is used as a means to compel a person to enter into contract. But under 1708, right is used as a means

to compel a person to enter into a contract i.e. a person is made to choose either to perform/undergo certain legal obligation or to enter into a contract.

E.g. Abebe entered into a construction contract with Welchafo. In the contract, Abebe agreed to complete the G+1 of Welchafo within six months. The contract further provides that if Abebe fails to complete the construction, he pays 25,000 as penalty and the contract be cancelled. Abebe failed to complete the construction and Welchafo warned him that Abebe shall either agree to construct a fence of a building for free or Welchafo cancels contract and claim the payment of the stated penalty. Abebe agreed to construct the fence.

In the above example, Abebe has been forced to make a choice between paying penalty and constructing the fence for free but it is very difficult to conclude that he was forced. Life is always full of alternative forcing us to choose one and lose the other. In a word of economists, every thing has an opportunity cost. Hence such type of choice is normal especially in a free market economy. A person may use his rights to derive excessive advantage but even in such case it is very difficult to invalidate the contract since a right is a bargaining power. However; if the right is used abusively and unfairly by taking advantage of the want of the other party the concept of lesion (Art 1710(2)) or law of unfair trade practice may be applied.

Notice that Art. 1708 applies when some one has a right and uses it to obtain a proprietary interest in excess of what he deserves. However; the threat may be directed against the person from whom the threatening person does not have any right. For example, B. borrowed birr 10,000 from Dashen Bank but failed to pay on time. The manager of the bank wrote a letter to B's brother, L that court action is to be taken against B unless L guarantees the debt. For fear of the court action against his sister, L entered into contract of guarantee with the Bank.

Where a person threatens to violate a law or his obligation Art.1708 does not apply. For example, an employer threatens his employee to terminate the employment contract

unlawfully unless the employee agrees to work in another locality than the place his contract provides. However, one may argue that if law invalidates a contract for abusive use of right for a stronger reason it would invalidate the contract entered into to avoid violation of one's own right. So Art.1708 may also apply in case of threat to violate another person's right. However such interpretation goes against the meaning of Art 1706. So the best thing to do is to repeal Art. 1708 so that matters not governed by Art 1706 be governed by Art 1710.

Illustration

1. A has stolen B's bicycle and demand B to employ him so that A would return the bicycle. B employed A to get his bicycle
2. Belay and Hawassa University have had a contract that Belay renders cafeteria service to Hawassa University students at a rate of birr 120 per head per month for two years until January 2009. However, in January 2008 due to price inflation Belay has lost profit from the cafeteria Service and wrote the following letter to the university "if the university does not agree to pay 200 birr per head I terminate the contract within the following three days". Threatened by the letter university officials entered into contract of variation.
3. In case 2 above, does it matter if Belay went to the president office and said "Sir if you do not promise me to raise the payment to 200 birr per head I will terminate contract from this moment on wards."

Reverential fear (Art 1709):- this is a psychological threat. The threatening person is playing against the psychological (mental) feeling of the threatened person. It is a psychological intimidation that if the person does not give his consent to be bound by the contract he will be belittled by some one or the public in general. It is in short the fear of opinions. Reverential fear is also called undue influence (see Art. 868 civil code). Under common law, undue influence includes playing on victim's superstitions for example; if a person make donation because witch told him that unless he make, such donation his daughter dies. However; Ethiopian law does not accept superstitious threat as a reverential fear.

Under Ethiopian law the fear is limited to the opinion of ascendants or superior whose opinion can have observable and direct consequence on the future interest of the threatened person (Art 1709). For example, if an ascendant has bad opinion he/she may significantly reduce the share of the person in succession and may also stop or reduce any financial support she/he has been making. The superior may also under evaluate the subordinate which may have a consequence on promotion or scholarship.

However; the mere existence of reverential fear of ascendant or superior is not enough to invalidate the contract. The reverential fear must make the person to lose certain advantages i.e. his bargaining power was reduced; he was not free to bargain properly so that the other contracting party get excessive advantage from the contract. For example, Abebe bought a car from Challa for birr 200,000 but his boss, Bula offered Abebe birr 205,000 Abebe accepted the offer although he did not want to sell the car. So even if a person enters into a contract which he did not want, he must prove financial loss to invalidate contract on the basis of reverential fear.

Proving financial loss is not yet enough. That financial loss must go to the benefit of the person who is the source of reverential fear.

In short only contracts entered into with superior/ascendant can be invalidated on basis of reverential fear provided such ascendants/superior derived excessive advantage. Whether the advantage is excessive or not should be determined case by case by taking into account the economic position of both parties.

Reverential fear is presumed. The ascendant/superior need not expressly state the opinion he will have if the descendent/subordinate fails to agree. The fact that superior/ascendant made an offer is enough to prove the existence of undue influence. The offeree should be presumed that he entered into such substantially disadvantageous contract because of reverential fear. However; the superior/ascendant can disprove such presumption by any means.

2.2.3.3 Defect in Consent Due to Lesion (Art 1710)

Contract depends on the concept of free market economy where the parties can freely determine their obligation. Parties are bargaining at arms length. This presupposes that both parties to a contract are equal. However, such equality may be affected by individual want, simplicity and business inexperience thereby giving the other party the opportunity to exploit such weakness. The following is taken from George Krzeczunowicz, Formation and Effects of Contracts in Ethiopian Law, 1983 P. 52-55)

2.3 Objects of Contracts (Art 1711-1718)

2.3.1 Object Defined

Object of a contract is what parties have actually agreed to undertake. It is the obligation of both parties to the contract. The obligation may be to do something or to refrain from doing something or to give something to someone. So, object of a contract is the agreement of the parties to act, not to act, or to give. The object of employment contract, for example, is the employers' agreement to pay wage and employees' agreement to do certain thing. In contract of sale of house; the obligation of the seller is to transfer ownership and possession to the buyer and the obligation of the buyer is to pay price. Object of contract differs from subject matter of contract. For example, in the above case, the work and the house are subjects of the contract.

Moreover; object of contract differs from penalty causes of contract. Penalty causes provide a remedy or solution if a party fails to carryout his obligation (see Art. 1886-1895 of civil code). A combination of object and penalty causes gives us content of the contract.

2.3.2 Freedom of Contract

As stated under Art 1679, parties are the ones who define the content of their contract. They are free to determine what each party is bound to perform, where and when to perform and may also specify penalty for non performance. They are free to enter into any type of obligation, obligation to do “not to do” or “to give” (Art 1712(1). Obligation “to give” or “not to do” is clear enough; one can clearly know what the other party gives or restrains from doing. Subjectivity of a party to a contract is less visible. But in case of obligation to do the personal nature of the person who agrees to do” matter very much on the benefit that the other party derives from the contract. For example, A agreed not to fence” his land (not to do”) and B agrees to sell his cow and C agrees to teach law of contract. In case of “not to do” or “to give” whosoever and in whatsoever he performs the contract, the benefit of the other party is the same. But in case of obligation to do the qualification and the diligence of the doer has great effect on the quality of the work. So in case of obligation “to do” parties should determine the criteria of evaluating the quality of the work done (Art 1712 (2)).

However; parties may fail to specify all the possible contents of the contract. It is practically impossible to imagine all the possible disputes that may arise between parties. The best way to fill such gaps is to follow the golden rule of “**do unto others what you want others do unto you**”. (Art 1713). Accordingly; parties are presumed to have agreed to benefit from the contract fairly and equitably. So for disputes that are not clearly settled in the contract, court could refer to good faith, equity and custom and law. For example, in a certain case, a College employed Mr. X as a mathematics teacher. Later the college wants to make Mr. X an academic dean. When the instructor refused to take the position the college dismissed him and the instructor instituted court action; the college was defending on the ground that it is customary for instructor to take position in academic administration and won the case.

Generally parties should expressly and clearly define content of contract. On any matter which parties did not expressly agree, they are presumed to have left the matter to be

governed by law, custom, equity and good faith. So, in order to settle disputes court should first refer to contractual provision and if they are found to be insufficient, then to legal provisions and if still the matter is not resolved, to customs and at the end good faith and equity be applied.

However; law, custom, equity and good faith merely supplements the contract. If there is no contract, law, custom, equity cannot by themselves create contract (Art 1704 (1)). Therefore, parties must at least indicate the main obligation. One must be able to understand the object of the contract by referring to the contract itself without referring to law custom, equity or good faith (Art 1714(2) i.e. before going to interpret the contract, the court should be able to speak of at least the obligation of one parties by referring to the agreement of the parties only. For example, in a sale contract, the court should at least know obligation of a seller and then it can refer to the law to determine its price (See Art 2305-2307). So contract is interpreted only if it is sufficiently clear so that such sufficiency be completed.

Limitations to Freedom of Contract However, parties' freedom of contract is not absolute (Art 1711). No freedom on earth is absolute. Human being is a social animal where the absolute freedom of one necessarily violates freedom of another. A contractual freedom is limited to attain social justice, peace and tranquility. The major causes for limitation of freedom of contract are:

- a) **Social protection:** Freedom of contract at the end of 19th century was seen as a centre of the exploitation of the proletariat. The labor force was large due to rural-urban migration and the capitalists were few. There was severe exploitation of the poor laborer by big capitalist. Such exploitation led to the development of Marxist theory which in turn led to the establishment of international labor organization in 1919. Moreover; exploitation of the tenants by the land owners was also the centre of discussion. So laws were begun to be issue prohibiting certain types of contract and imposing terms into contract. This process also continued right through twentieth century. Thus there has developed a whole network of institutions

designed to act as a safety net for individuals, to protect them from extremes of commercial and industrial life. Such system includes national insurance, National Health Service statutory recognition of trade unions, and Compensation scheme for those made redundant and a whole battery of legislation to protect tenant from the excess of land lords. Some communist countries even went to the extent of reducing freedom of contract to nil. For example, the Ethiopian revolution of 1974 brought about nationalization of private properties and land there by in effect abolition freedom of contract. Freedom of contract is less relevant without freedom of property.

- b) **Consumer protection:** There has also been recognition of the danger of concentration of economic power. Hence, restrictions on the growth of monopoly power such as market segmentation and quota has begun to be prohibited. Moreover, the mass production of industrial revolution brought about freedom of choice and goods of complexity which could not be known to an ordinary person. So legislators began to impose conditions on the parties to contract. Specially, sellers of goods were required to comply with certain basic standards.
- c) **Public order or morality:** - under the guise of freedom of contract parties are not allowed to go against the public order and morality.

Generally, under Ethiopian law; freedom of contract is limited by the following:

- a) **Clarity of objects** (Art 1714) as stated in our earlier discussion; the object of a contract should be sufficiently clear; otherwise the court concludes as though parties did not exercise freedom of contract. Clarity of object is therefore; not limitation of freedom of contract rather it is parties failure to exercise freedom of contract.
- b) **Possibility of object** (Art 1715). Parties' freedom does not allow them to bind themselves to perform humanly impossible things. The law wants to protect the public from superstitious believe. For example, if a person agrees to raise a dead body; to duplicate money by mystery, to bring audio visual image of dead body; to

make a person very rich etc the object of the contract is impossible. Impossible obligation is the obligation whose performance is beyond the nature of human being. For example, a certain Ethiopian peasant may agree to cure HIV/AIDS. Such is currently impossible for human being. However, if the peasant agrees to invent HIV/AIDS drug although such is relatively difficult for Ethiopian peasant; inventing a drug is something within the limit of human nature.

- c) **Legality of the object** (Art 1716(1) no person can be bound by contract to violate any law of the country since such is contradiction in terms. For example, if a person is forbidden to commit abduction, it is illogical to allow a person to bind himself by a contract to abduct someone or help another person in committing abduction. So nobody can bind himself to violate criminal law of the country.

N.B restriction and prohibitions indicated under Art 1711 differ from legality of object. Restrictions and prohibition indicate the concept of social and customer protection where as legality indicates concept of public order. Restrictions and prohibitions are mainly found in labor law and trade practice law. They are also found in commercial code and civil code. Limitation on exercise of constitutional rights (Art.9 (2), 12(3), 16(3), 17, and 18), excluding extra contractual liability (Art, 2147), revocation of authority (Art.2183), commissoria lex (Art.2851, 3060), issuer's guarantee of payment of negotiable instrument (Art.743 comm. code) are some of the examples of restrictions and prohibitions. Restrictions and prohibitions are intended to protect the individual contracting party whereas legality is intended to protect the public. So legality of the object is determined by referring to criminal law whereas restrictions and prohibitions are to be found in the private law area.

- d) **Morality of Object** (Art.1716 (1) Society wants to perpetuate itself. For the society to perpetuate, individual members of the society have to have certain standard of conduct generally known as morality. Otherwise, individuals consume one another thereby bringing an end to the society. As a means of self defense the society punishes those who violate morality. Law is the part of morality that is entrusted by the society for its enforcement. The remaining part of morality is to be enforced by

the society itself by means of public opinion. However; even though the state does not have a duty to enforce such morality it should refrain from indirectly assisting the violation of morality. Therefore any immoral obligation cannot be enforced by court or executive (Art.1716 (1)).

The obligation may not be contrary to criminal but it may be contrary to morality. For example, if a man agrees to pay money to get sexual gratification from a woman such contract is not illegal but immoral. So the man or the woman cannot get state assistance to have the contract performed.

E.g. Abebe, a resident of Addis Ababa, agreed with Belete that Abebe eats donkey's meat in the presence of friends and Belete agrees to pay 5000 birr. Abebe did what he agreed to do but Belete refused to pay and Abebe begs the court that Belete be forced to pay the agreed money.

e) **Motives of the Parties.** Parties are expected to know content of their contract only (Art 1679). A party is not bound by restriction or reservation of the other party. If a party cannot be bound by restrictions and reservations of another party, equally he should not benefit from such restrictions and reservations. Moreover; motives are mostly *hidden agenda of parties* and knowing these motives is very difficult. In such situation allowing a part to avoid his obligation is therefore, allowing him to interfere in the private life of another contracting party in search of information and evidence necessary to prove such motive. Furthermore; motive is a mental element and everybody has a freedom of thought. Freedom of thought is the only absolute constitutional right. Still further, there is no clear indication that the motive will be carried on into practice; there is high possibility that the person may himself drop his bad motive. Even though we may argue that entering into a contract is a preparatory act, preparatory act is a crime only in a exceptional cases and in such case the act (obligation) will be illegal since it amounts to assisting the commission of the crime(the preparatory act). Therefore **motivate of the parties are irrelevant to determine the legality or morality of the object (Art 1717).**

E.g.₁ Cain is butter dealer. He bought many kilograms of banana from Enoch and agreed that delivery and payment be on April 20, Enoch came to know that Cain wanted the bananas to mix it up with butter and sell it to the public. Enoch cannot refuse to perform the contract.

E.g.₂ Saul agreed to lease his houses to Satnael for birr 1200 per month. They agreed that the contract remain effective for 12 months. Saul later on came to know that Satnael has planned to use the house as a head quarter for terrorist activities in East Africa. Saul cannot claim the invalidation of contract. The only option he has is to inform the case to police.

However; if the illegal or immoral motives of a party is understandable from the content of the contract itself i.e., the illegal criminal motive is indicated as one of the content of the contract, such contract may not be enforced although it has nothing to do with the objects of contract. For example, the illegal or immoral motives of a party may be indicated in the introductory (preamble) part of the contract or it may even be mentioned in the main body without having binding nature.

E.g.₁ “Me, Abebe, agree to lend birr 10,000 for Alebachew. Incidentally I wish him the best in his business so that he may appreciate my effort to assist him. I know that contraband business is a risky business. May God help him.”

“Me Alebachew, appreciate the loan. May God help me to make favor to Ato Abebe”.

Notice that Art 1718 (1) never talks about invalidation. The courts never invalidate a contract even if the illegal or immoral motive is clear from the contract itself. What the court should rather do is to refuse to enforce it. The court neither enforces nor invalidates the contract, the court becomes neutral towards the contract, and court rejects both claims for invalidation and enforcements of the contract. Courts refusal to invalidate does have

legal effect since there would not be reinstatement so the court never touches what has already been performed and never help the completion of performance (Art. 1815).

Art 1718 (1) applies to both written and oral contracts. In the case of oral contract, the content of contract which indicates the illegal/immoral motive of a party is proved from words of a witness brought either by the plaintiff or defendant. For example a plaintiff witness may testify as follows. "I know that the defendant agreed to lend birr 20,000 which the plaintiff intended to use as down payable to parents of children who he intended to take to Addis Ababa." Moreover; the admission of illegal or immoral motives as a content of the contract by the party claiming performance can also be indication of the content.

Finally, if the immorality/illegality of motive is not included in the content of contract such immoral illegal motives cannot be proved by any other means except by a written document presented by party claiming **performance**. A defendant or even the plaintiff cannot employ oral witness to prove motive that has not been content of the contract. In oral contract if the immoral/ illegal motives was known to both parties at the time of conclusion of contract we can say that it was made content of a contract, otherwise it was not a content of the contract. It is less likely for a court to refuse performance on the basis of motive which was not made content of a contract since such motive is to be proved by document presented by a party claiming performance. In normal circumstances the party claiming performance (plaintiff) cannot prove the existence of illegal motive since such is defeating him. More surprisingly, he himself has to prove by written document there by reducing the possibility of obtaining evidence from the plaintiff. Although there may be a possibly that hostile witnesses may be presented by plaintiff but there is little possibility for plaintiff to present hostile documentary evidences. Finally the writers are of the opinion that Art 1716 (2) seems to overlap with Art 1718(1). This might be because Art 1718(2) was introduced by drafting commission with out the knowledge of the drafter and the commission might have not noticed the relationship between the two articles. Let us try to see the similarity of the two articles by examining examples given by G. Krzeczunowicz and Rene David.

Eg.1 A agrees to pay birr 5000 for Melaku if he resigns from the judgeship which he is currently occupying. Here; we can clearly see the motive of the parties i.e. using one's own public position for financial gain and removing peoples from office by using one's own financial power. This motive is illegal or at least immoral.

Eg.2 A parent agrees to pay birr 25000 so that the kidnapper releases a child. Here also the kidnapper's motive of using his illegal act as a means of earning money is clear from the contract.

Eg.3 a reward offered for recovery of stolen good by the thief and accomplice is also the same.

E.g.4 A undertakes to pay B a sum of money in order that B not commits a crime. Here also the motive of B is to get money by threatening A to violate a law.

Finally, the writers are of the opinion that any threat that does not fulfill the criteria of duress under Art. 1706 may be evaluated against the criteria of 1716 (2). However, Art 1706 is about defect in consent whereby a person scarifies his freedom not to contract; he was bound by force to enter into a contract. Such a person is a reasonable person and the society never condemns him for doing so. He may even be condemned if he refused to enter into a contract and as a result the threatened harm materializes. For example, what if a person leaves his daughter to death for not signing a check of 10,000 for the murderers? However, a person under Art 1716(2) has another alternative to save his right. A citizen has a moral duty not to cooperate with wrong doer and must even fight them by using all possible legal mechanism. Failure to do so may amount to immorality. Even more doing any act that may encourage the wrong doers to continue with their act is immoral. For example, a person should not negotiate with thief to get stolen property back. If a person does this it is very difficult to argue that he was bound to enter in to contract. Rather, such a person is selfish and always gives priority to his own short sighted interest without giving any attention to the public interest. Hence under Art

1716(2) there is no defect in consent but the motive of one or both of the parties is illegal/immoral. Generally, Art.1716 (2) applies to cases where one or both of the parties are intending to benefit from their own immoral or illegal act. For example, A, friend of B agrees to sell his house to B for birr 200.00 which is by 30% less than its actual price so that B would not rape the daughter of D who burnt his (B) house. D'S daughter was under B's custody.

2.4. Form of Contracts (Art 1719 – 1730)

2.4.1 Definition

It is the way in which the content of the contract exists or appears to others. It answers the question as to how third parties such as court could know the agreement of parties. Therefore, contract may exist either in written form or oral form. When contract is in written form, a court or third parties know the agreement by reading a paper on which it was written (Art 2003). Otherwise, the court can know the agreement of parties from oral testimony of the parties themselves or witnesses (Art 2002). In an case offer and acceptance was given orally, by conduct or by sign and not reduced into writing the contract is said to be made orally since it is to be proved by oral witnesses. Moreover, when part of the agreement is written while the remaining is unwritten, such contract should be taken as oral form and the written part could only be used as corroborative evidence to oral testimony.

2.4.2 Freedom of Form (Art 1719)

Most non-lawyers believe that for a contract to be legally binding, it must be made in writing and signed at least by the parties to contract. But these people forget that they have entered into so many contracts in their life without following written forms. However, the law gives freedom to the parties to choose either written or form. So contract can be valid if consent, object and capacity requirements are fulfilled.

Limitation on Freedom of Form Art.1719 (2, 3)

Freedom of form is not absolute. The freedom may be limited by law or the offeror. An offeror has a freedom to determine the form of acceptance (Art 1681 (2)). Similarly he can propose written form. If the written form is accepted then parties agree to limit their freedom of form (Art. 1719(3)). If the written form is rejected then the offer itself is rejected (Art 1694). Limitation of freedom of form means denying the parties the option to make their contract orally.

The reason for such limitation may be;

Evidentiary value: Sometimes we may feel insecure when we make contracts orally especially when the contract involves considerable property interest. The insecurity is not unreasonable since we may be in a very difficult position to get witness to prove the contract if a person with whom we enter into contract denies the contract. The insecurity is further exacerbated by high mobility of people. This creates shortage of information to properly know the personality of the individual we are contracting with. The disintegration of social life also contributes to our insecurity since there is less possibility to use public opinion to punish the people who dishonor his words. So to reduce such insecurity people may prefer to make their contract in written form.

Recalling content of contract: There is an Amharic saying “things in mind can be forgotten; things in writing can be recalled.” ህግ ላይ ማረጋገጫ ማለት ማለት ነው። This means if contract is in oral form, there is high possibility that its content be forgotten both by parties and witnesses specially when the content of a contract is a complex one and remains effective for a relatively longer period. For example, contract of marriage is mainly justified on this basis since spouse dishonor his words rarely but most of the time he/she forgets the promise he/she has made to a partner before marriage. Contract of marriage made in writing therefore, helps spouses to recall their lovely promises.

Indication of intention to create legal relation: If a contract is made in writing, there remains little doubt that there was no intention to be bound. If a contract is to be made in writing, a party thinks twice before he gives his final consent to be bound. Firstly, the person thinks to give consent and secondly he thinks when he is required to sign the written document. Between the consent and signature, there is a time gap. During such time gap, whatever its length, the person can get a chance to thoroughly think and decide to change or affirm his previous decision. Moreover, when one party proposes written form the other party may understand that the contract is being taken seriously by proposer of the form. Generally, written form makes parties to be conscious of the effect of the contract. So, written form may be taken as an indication of intention to create legal relation.

2.4.3 Contracts made in Written Form (Art 1721 – 1726)

The following contract shall be made in writing.

A/ contracts required by the law to be made in writing

Some of the contracts that the law expressly requires to be made in writing are:

Contract relating to immovable: - all contracts that affect a right on an immovable except lease must be made in writing. Therefore, sale, usufruct, servitude, mortgage, antichresis partition, compromise and even arbitration agreement concerning house or land should be made in writing. For example, if heirs partition an immovable among themselves, such partition agreement must be made in writing. Moreover; if disputants on an immovable want to refer such dispute to arbitrations, they have to make their agreement in writing (Art 3326). Notice, however; that lease or rent relating to immovable need not be made in writing. In a case Rented Houses Administration Agency vs.Sosina Asfaw in a file No15992 presented on Hamle 19, 1997 to it the Federal Supreme Court Cassation Division ruled that renting house need not be made in writing. The fact of this case was that the appellant sued the respondent in Federal First Instance Court for birr 234,576.57

of house rent arrears. The respondent argued before that court that the house rent contract was void since it was not made in writing. The court accepted the argument and the appellant appealed Federal High Court where the appeal was rejected. Then the appellant went for cassation and finally got a decision that house rent contract need not be made in writing.

Contract with public administration (Art 1724): Any contract to which a government agency is a party, including any type of employment contract, should be made in writing. In public administration, officials do not stay in office indefinitely rather they may leave their office by election, removal or resignation. Once they leave their office it is difficult to ascertain the content of the contract entered into during their stay in office but that continues to be effective even after they leave their office. Moreover, oral contract opens a room for corruption since keeping information is difficult.

- *Contract of guarantee* (Art 1725 (a))
- *Contract of insurance* (Art 1725 (b))
- *Contract of marriage*
- *Partnership contract*
- *Pledge for a loan exceeding 500 birr* (Art 2828 (2))
- *Sale and mortgage of business* (Art 152, 177 (2) comm. code)
- *Promise of sale and preemptions* (Art 1412)
- *Agreement prohibiting assignment or attachment of a certain thing* (Art 1430)

B/ contracts required to be made in writing by the parties

Even if the law has not expressly provided written form as a mandatory requirement for validity of contract, parties may themselves provide written form. Once the parties agree to make their contract in writing, then contract will not be completed until such form is fulfilled. (Art 1726). No party can require the performance of the contract until it is made in writing. Even if the parties have begun to perform the contract, the court does not help them to have the performance completed unless they comply with their prior agreement to make the contract in writing. This means parties cannot change their prior agreement

impliedly by performing the contract. This is probably because the prior agreement has been made expressly either in writing or orally and parties should not be presumed to have an intention to extinguish such express agreement by conduct (implied agreement). In short express agreements cannot be changed by implied agreement.

However, parties can change any express agreement by another express agreement. So, any agreement to be a contract in writing may be changed in a manner it was made. If the agreement was made in writing its change should also be made in writing (Art. 1722). Similarly express oral agreement should also be changed by another express oral agreement or written agreement. Therefore, if one of the parties proves that they have expressly changed their agreement to make their contract in writing, they should not be required to stick to their original agreement and they can make contract in oral form. For example, C and D agreed that C will prepare a teaching material on Ethiopian constitutional law and D pays birr 30,000 upon completion of the work and they further agreed that the content of the contract shall be written down in detail on April 20. On April 25 C and D meet and agreed that the contract is effective without any need of written form.

C. Preliminary contract (Art 1721)

A contract that intends to lead to another contract shall be made in writing if the contract to which it leads is required to be made in writing either by the law or the parties. The best example is agency contract. If the agent's power is to enter into a contract in writing he should be conferred with such power in writing (Art 2200(1). The other example, provided by Rene David and G.Krzeczunowicz (David .p. 28, G.Krzeczunowicz P.73.) is promise of sale of a house which is also governed under Art 1412. The other possible contract the writers are able to imagine is an agreement to enter into compromise provided the parties agree to make the compromise in writing. However, an agreement to enter into compromise is not binding since compromise itself is a contract and a party may refuse to make a compromise although he may claim that he is ready for compromise (1879 (1) cum. 3307). If Art. 1721 was intended to cover case of agency and

promise of sale, it becomes redundant because agency and promise of sale are expressly stated under special provisions to be made in writing (see Art 2200 (2) 1412). So, the relevance of Art.1721 remains obscure.

D/ Variation of contract made in writing (Art 1722)

Variation of contract is a contract itself (Art. 1675). So, if such contract relates to contracts indicated under Art. 1723, 1724 and 1725, it should necessarily be made in writing. However, in case of a contract made in writing by parties' agreement, parties and courts may feel that such contract can be varied by any form. To guard against such possible interpretation, the law expressly provides that variation of a contract made in writing shall be made in writing. For example, C and D entered into lease contract in writing. In their contract they agreed that the contract begins to be effective from April 20 and any party who fail to meet his obligation shall pay birr 10,000 as penalty after the contract was concluded. C made a telephone call to D and proposed that effective date be on May 20 and D accepted the variation. No variation is made.

N.B The law provides form for creation and variation of a contract but it is silent about form for extinguishing a contract. The drafter also expressly states that provisions dealing with form of contract do not include extinction of contract (David.p.28). He rather claims that the formality requirements of extinction of contract are provided under chapter dealing extinction of obligation (David. 28). Here the drafter must have been mistaken since the above stated chapter has nothing to do with formal requirements (forms of extinction of contract) rather it governs causes of extinction of contract (Art 1807). Even in case of remission of debt and novation (contractual causes of extinction of contract) the law never provides the form of remission or/and novation of contractual debt. What is provided is that remission and novation are contractual causes of extinction of contract (Art. 1825, 1226). The same mistake must have also been committed by G.Krzeczunowicz since he also claims that extinction is covered under the chapter referred to by David.

However, these writers are of the opinion that when parties intend to extinguish contractual obligation that exists between them, they shall make the extinguishing contract in special form if the contract to be extinguished was made in special form. This is because;

Extinction of contract is a contract itself- When we say contract we mean either creation or variation or extinction of obligation. So, when the law provides that contract with government be made in writing, it includes extinction since extinction is a contract. The same logic, therefore, applies to all other contracts which the law requires to be made in writing. For example, C and D entered into a sale contract the sale contract provides that C seller shall sell his house to D and D shall pay birr 20,000. C and D can extinguish such contract if they want since everybody has a freedom to contract (extinguishing, creating, or variation of obligation). However, they have to make their contract in writing since contracts relating to sale of house should be made in writing.

Intention to create legal relation can be clear. If parties agree to extinguish written contract orally and the other party later on claims that he did not intend the agreement to create legal effect, his argument may be acceptable. As we stated in our discussion on justification for written form, in case of written form, a person thinks twice before he binds himself. If he thinks twice to create an obligation he should also be given the same chance to extinguish such obligation. That is why Art. 1726 provides that agreement to make a contract in writing shall not be changed by implied declaration of consent (conduct). So a person should be presumed to have changed his previous stand only when he uses the same way of declaration of intention as he used earlier.

Probatory value of written instrument (Art. 2005) A written instrument is a conclusive evidence to prove obligation. It cannot be challenged by witnesses except by the oath of the defendant (Art. 2006 (1)). Therefore, it is very difficult to prove that a written contract has been extinguished by a later oral contract. This means a remission or novation of contractual obligation should be made in writing if the obligation to be remitted or novated arose from written contract.

2.4.4 Effects of form (Art. 1720)

When the parties or the law requires the contract to be made in writing, failure to comply with such requirement make the contract a mere draft (Art. 1720). The contract never exists until the formality requirement is fulfilled. As can be understood from Art.1726 and the phrase “a mere draft” (Art. 1720(1), the parties can complete the contract at any time by putting down its content in writing. But until such formality is fulfilled, no party can claim the enforcement of the contract.

However, failure to pay stamp duty or registration fee never affects the effect of the contract (Art. 1720(1). The person can pay such stamp duty or registration fee at any time and claim the enforcement of the court. Paying stamp duty or registration fee is as easy as fueling a car and a car which does not have any mechanical problem can immediately give the service intended once fueled. So form is like a mechanical problem of a car that needs the assistance of mechanic but stamp duty and registration fee is like a fuel that needs money only.

Some contracts need to be registered. Such registration is normally intended to make third parties to be aware of the existence of such contract. Registration may also be intended to have deposited documents in a relevant place. Therefore, such registration does not have any relationship with form of the contract. That means even if the legal requirement of registration has not been fulfilled, the contract can still be enforced between parties. Registration can affect the validity of contract only when the law expressly states that failure to register the contract shall make the contract non-existent (Art.1720 (3). For example, although Art 1723 provides that contract relating to immovable be registered, it does not state that failure to register shall make the contract non-existence. Therefore, according to Art.1720 (3), contract relating to immovable remains valid even if the registration requirement is not fulfilled. This is further clarified under Art 2877 and 2878 which govern sale of immovable. The two provisions provide that failure to make the contract in writing makes the contract non existence but failures

to register the contract does not. The same logic applies for contract of marriage and contract with government.

However, it is expressly provided that mortgage contract and partnership agreement do not produce any legal effect if they are not registered (Art 3052 and art 177(2), Art 222 commercial code).

N.B. when the contract is to be made in writing it will not be binding until the written form is fulfilled. This means, if contract is to be made in written form, offer and acceptance do not have legal effect. One can withdraw one's consent at any time. However, the person who arbitrarily abandons his offer or acceptance may be extra contractually liable (Art. 2055).

2.4.5 Written form (Art 1727-1729)

Although in our discussions on page 46 we said that form of contract is either written form or oral form, the law simply states "special form" without defining what it mean by special form(see Art 1719 (2,3) 1720 1726 1721-1725). More over; there are forms other than written form. Let us see the definition given by the law to a written form so that we may be able to guess other forms that are imagined by the law.

A contract is said to be in writing where (Art. 1727)

- The content of a contract is **written** i.e. the content is readable.
- The writing is made on a **special form**. Special form means any pure paper that is intended for a specific contract only. Therefore; if a paper contains another contract or other things such paper is not a special document. Moreover; writing on electronics does not fulfill the requirement of special document.
- Parties to the contract **sign** the special document. Parties sign by putting hand written mark on the special document (Art 1728). Here, two things are interesting firstly the law does not allow the use of mechanical process such

as stamp; secondly, thumb mark never binds unless it is made in the presence of notary, registrar or a judge acting in discharge of his duty(Art-1728 (2)

- At least two persons sign the special document as **witnesses**.

The witnesses should have contractual capacity (Art.1729 (1) (Here Krzeczunowicz claims that Art. 1729 and 1730 are redundant (see G. Krzeczunowicz P. 77-78). Although this writer agrees that art 1729 (2), and 1730 are superfluous Art 1729(1) is very much relevant and gives guidelines whether or not minor and judicially interdicted persons can sign juridical acts as a witness. Art 199 (3) forbids minors from entering in to juridical act that binds them. Becoming a witness does not mean performing juridical act since witness cannot ever be bound by mere fact of signing as a witness (Art 1730 (2).

In short, written form for Ethiopian contract law means any special document containing content of a contract signed by parties to the contract and at least two witnesses.

2.4.6 Other Special Forms

Let us now examine other types of special forms. It is true that there are special forms other than written forms. The question is **What are these other special forms?** These other special forms should contain contents of the contract in **a readable manner**. But the thing on which the readable content is found may be a special document, scrape of paper, electronics or any other thing. Moreover; both parties may sign or only one of them sign or none of them may sign. There is no need of witness to sign. The best example of such special forms is commercial instruments. Signing or issuing a commercial instrument is concluding a contract. Such contract should be made in a special form (see Art 735, 748, 761, 767 of commercial code for example). Parties may also agree that the content of contract be concluded when both parties write a letter signed and sealed. They may also agree to reduce their contract in writing and signed by them without any need of witness. They may also determine the number or identity of witnesses. Therefore; when the parties agree to make their contract in special form; they should clearly define what that special form means.

N.B This writer is of opinion that the controversy that has arisen in Ethiopian courts on form of insurance contract is because of confusion between written form and other special form. The civil code provides that insurance contract shall be made in written form (Art. 1725 (b) and has to fulfill the requirement of Art 1727. But the commercial code simply requires that the insurance contract be supported by insurance policy. So the commercial code refers to special forms other than written form. For the commercial code, it is enough if the content of the contract is written down without any need of signature of witnesses. Partnership agreement may also face the same challenge as insurance. Contract of partnership agreements (memorandum of association, articles of association) shall be made in writing (Art.1725(c) and commercial code Art 214). One may argue that partnership agreement shall, therefore; be attested by witnesses. But such argument is contrary to practice and may also be unreasonable imposition. It is better to conclude that partnerships agreement is to be made by other special forms which could be valid if signed by parties to the contract only. Generally, the civil code dealing with form of contract shall be reviewed and distinction should be made between written form and other special forms.

2.5 Effects of Elements of Contract (Art, 1808-1818)

As discussed earlier, elements of contract are consent, object, capacity and form. Generally a contract that misses any of these elements is either **void** or **voidable**. Void and voidable contracts have differences and similarities. Let us first discuss the differences and then come to similarities.

2.5.1 Difference between void and voidable contracts (Art, 1808-1814)

Definition: The deference between void and voidable contract emanate from the definition given to each of them. Void contract is a contract which parties intend to produce binding effect but does not actually have any legal effect. The obligation intended by the parties does not exist from the beginning. So, it is called *void abinitio*. But voidable contract is a contract that has begun to produce effect intended by the parties carrying with itself certain birth defects that may destroy the effect it has produced. Void contract is like the sperm cell meeting egg cell but unable to fertilize it. Parties made offer and acceptance but no fertilization. A void able contract is like a defective pregnancy. In such case fertilization has taken place and the embryo is growing but there is a possibility that the defect may lead to abortion unless such defect is removed medically or by any other means. If there is no fertilization the only option of the parties is to try the second chance but in case of defective pregnancy medical assistance may be sought without any need to attempt the second chance. Similarity, void contract cannot be cured but voidable contract may be cured by agreement of both parties to the contract (Art.1811).

Cause: A contract is said to be void when the object or form element are missed. The object is either immoral or unlawful/impossible or unclear. Or the special form required by the law or the parties has not been complied with. In short a contract is void if any of the Art 1711-1729 are violated (Art 1808 (2)). But voidable contract is due to defect in consent or lack of capacity (Art.1808 (1)).

Plaintiff: - Here, plaintiff indicates the person who brings void or violable contract to the attention of court. Anybody, including public prosecutor, can bring void contract to the attention of court (1808(2)). But in case of void able contract only a person whose consent was defective or the person who was lacking capacity at the time of conclusion of the contract can bring the case to the attention of the court(see Art.33 of Ethiopian Civil Procedure Code). For example, if E and D enter into contract of prostitution, either E or D or public prosecutor may bring such contract to the court's attention. But if C threatened F to sign a contract or G, a minor, bought a bicycle from H, only F and G can bring the contract to court attention (Art 1808 (1))

Relief Sought this indicates what a person demands by bringing the contract to the court's attention. In short it answers the question "what is he intending to get by alleging that elements of a contract are missed?" In case of void contract, the person is not intending to have the contract invalidated since there is nothing to be invalidated. Therefore, he wants either to make sure that the contract is void or wants the court to stop parties from violating the law/moral standard of the society under the guise of performance of contract. A person who is not sure whether or not the contract is void may want to get such assurance from a court. If the contract is found to be valid he may be liable to pay damage for non performance. Moreover, a good citizen or public prosecutor may also apply to court to stop the parties from performing illegal or immoral act. But in such later case the best thing to do is to report the case to police. Finally a person may apply to court to get back any thing he has given believing that the contract was valid.

Therefore, a party who is sure that the contract was void and has made no payment need not go to court and shall refuse to perform the contract (Art 1809). Any party claiming that the contract fulfills object or form can bring the case to court for performance and the missed object or form can be raised as a defense.

Therefore, Art 1810 which provides about action for invalidation cannot apply to void contract. Firstly void contract is contract that does not exist; something which never exists cannot be destroyed. Secondly, the cause that made the contract void cannot disappear unless new laws are issued (David P 73, Tilahun P. 155). Incidentally, although invalidation does not exist, a person must claim reinstatement within ten year from the time date of conclusion of void contract (David, P 73, Art. 1845).

On the other hand, voidable contract is a contract that has produced effect. Therefore, the relief sought is to have such contract declared **void**. Voidable contract produces legal effect unless the party whose consent was vitiated or incapable at he time of conclusion of contract challenges its validity (Art. 1808 (1). The contract will be cured where.

A. Invalidation is not claimed within two years. A party whose consent was vitiated loses his right to invalidate the contract unless he brings court action within two years from the moment he knew the fraud or mistake or from the moment the duress disappears (1810(1)). The right will be absolutely barred if he has been unable to know the existence of defect in consent or the duress has not disappear within ten years from date of conclusion of the contract (Art 1845: Tilahun P. 155). In case of lesion the period of two years begin to count from date of conclusion of contract; not from the date a person knows the existence of lesion (Art 1810 (2)). Notice that a contract affected by incapacity need to be invalidated within two year from the date the person became capable (Art 1810 (1) Tilahun P. 155).

B Contract is confirmed a person whose consent is vitiated may waive his right to demand invalidation. Such waiver is a contract and has to be made in same form as the main contract (Art 1811(2)). Notice here that the Drafter Rene David must have not been aware of the inclusion of Art 1811(2) in the civil code since he provided contrary to what is stated in the law (David, p .74).

C The injury is made good. A contract vitiated by lesion remains valid if the party taking undue benefit agrees to return such benefit (Art. 1812).

D. The vitiated provisions of the contract are avoided. Contract may be invalidated partially provided the valid one is independent of the invalid one (Art 1813).

This is like a surgical operation on human or animal organ. Incidentally; if a contract contains both lawful/moral and immoral/unlawful obligation, the immoral/unlawful obligation shall be considered as if not written and the remaining should be give effect, provided it is clear and meaningful.

E.g. C and D agreed that D shall serve as a maid servant and she shall also make herself ready for sexual intercourse twice a week with C and C shall pay birr 400 per month (G.

Krzeczunowicz P. 66) Here the part dealing with sexual intercourse should be considered as if not written or (does not exist).

The fact that voidable contracts are invalidated by the claim of the party affected by defect in consent or capacity may affect the security of the other contracting party since he is not sure whether or not the affected person will exercise his right of invalidation and if so, when he may claim invalidation. Art 1814 provides a solution to such insecure party so a party who does not have the right to invalidate the contract can, however, have the right to know whether or not the other party claims invalidation (Art. 1814 (1). If such party fails to respond within reasonable time the contract is deemed to be invalidated (Art 1814 (2). Notice that the word “cancelled” in Art. 1814(2) should be replaced by “invalidated”.

E.g. Abebe sold a bicycle to Solo, a boy of 14, in this example Abebe cannot claim the invalidation of the contract but he can ask Solo’s tutor whether he intends to confirm or invalidate the contract. If the tutor fails to give answer to Abebe, Abebe can presume the failure as invalidation.

Notice also that Art 1814 does not apply to void contract since void contract cannot be invalidated.

2.5.2 Similarities between Void and Void able Contracts (Art 1815-1818)

As we have said void contract is devoid of any legal effect by its very nature and violable contract is devoid of legal effect by court decision only. So the following are similarities of void and voidable contract.

Unable to Produce Legal Effect on the Parties like void contract voidable contract is also considered as void abolition once it is invalidated. Invalidation of voidable contract has a retroactive effect thereby denying the contract to produce any obligation from the moment of its inception. Contract is invalidated means the embryo is aborted. A mother

who failed to conceive and a woman who aborted the pregnancy are in effect equal, since both have not borne a baby, and they have to try their second chance. Exactly the same is true for void and voidable contract.

E.g. Abebe and Bekele entered into contract of sale of a house but did not make the contract in writing. And Shemsu was threatened by Belay, because of such threat Shemsu sold his house to Bacha, the contract was made in writing and signed by both parties and two witnesses. In both cases, the parties do not have obligation i.e. agreement is of no effect provided the court has declared the contract between Shemsu and Bacha void.

Reinstatement (Art 1815-1818): Void contract and voidable contract that is invalidated do not produce obligation but parties might have made payment believing that the contract was valid i.e. such payment was made unduly or improperly. So a party who receives such undue payment shall give it back. Such giving back is called **reinstatement** Art 1815 (2). A contract was void or was made void does not mean that those who made undue payment will be without remedy (Art 1815 (2)).

Eg1. A sold a house to B for birr 300,000. and received the price but did not transfer ownership to B. if A refuses to transfer ownership of the house to B on the ground that a contract was not made in writing. he has to return the money he has received.

Eg. 2. Assume that C agreed to lend birr 350, 000 to D with interest at a rate of 12% per annum but further provided that contract shall be made in writing. However, C gave the money to D before the contract was made in writing. After a year C claims the payment of the money back with interest. Here D can refuse to pay interest since the contract was void but D has to pay back the 350.000 birr.

Reinstatement is made either by returning back the payment (thing) received or by paying appropriate compensation for the thing that cannot be returned. In principle, the parties, to void contract (including that was made void), shall return the payment they received since such payment does not give any right to a person who received the payment (Art

1815 (1). For example, if A sells his horse to B because A was threatened by D to sell the horse, B cannot become the owner of the horse upon receiving delivery. In short, any delivery of a thing on the basis of void contract transfers neither ownership nor possession. Moreover, any transfer of ownership on the basis of void contract is also considered as if not done. So the title deed received on the basis of invalid contract does not entitle the holder to become the owner of the immovable (Art.1196(C)).

In short, reinstatement is returning the thing that one has improperly received. Reinstatement presupposes performance. However, in its decision of Tikmt 29, 1998, File No.15551 in a case Ethiopian Technical Equipment Company vs. Ethiopian Motor and Engineering Company Federal Supreme Court Cassation Division erred in reasoning. The fact of the case was that the applicant bought a car from the respondent for birr 177,184.23 and paid the price. As a result the respondent transferred the car to Custom Authority warehouse from Djibouti port for custom clearing purpose. However; the Custom authority confiscated the car on the ground of illegal importation. Then the buyer lodged a claim in Federal First Instance Court for invalidation of the sale contract on the basis of illegal object. The court accepted the claim and ordered the seller to pay back the money he received. The defendant appealed against the decision of Federal High Court. The Federal High Court partially amended the decision by ordering the return of the car to Djibouti port. Appeal was brought to Federal Supreme Court and was rejected as unfounded. Finally the case was taken to Federal Cassation Court by the buyer. Although the Cassation Division properly affirmed the decision of Federal First Instance Court, it wrongly referred to Art.1817 (1). In the case at hand the seller has not yet delivered the car to the buyer and hence he cannot raise issue of reinstatement. Even if we assume that the car was confiscated after the buyer took delivery such confiscation amounts to non-performance on the part of the seller (see Art. 2343). So the seller (Ethiopian Motor and Engineering Company) did not have the right to claim reinstatement.

However returning the thing (payment) may be difficult. Therefore, in the following cases, reinstatement may be made by paying compensation.

When Ownership of the Thing is transferred to Possessor in Good faith

According to Art. 1161 whosoever, obtains possession of corporeal chattel for consideration intending to acquire ownership will become an owner of such chattel if he believed that he bought the chattel from the true owner. So a person who lost his property on the basis of invalid contract cannot claim it from such good faith possessor (Art 1164, 1167 cum. 1816). For example, Shaka threatened to rape Dagla's wife unless Dagla sells his valuable house furniture to him. Dagla sold his furniture and delivered to Shaka. Shaka then sold the furniture to Bedilu, who did not know how Shaka got the furniture. In this case therefore, although Dagla can get the sale contract invalidated for duress he cannot claim the furniture from Bedilu.

The same logic should also apply where a person obtains ownership title on immovable. For example, A sold his house in Hwassa to B for birr 350,000 since B provided a fraudulent letter of employment in Addis Ababa. Further assume that B was able to obtain transfer of ownership and title deed was issued in his name. B immediately sold the house to G for birr 450.000 and transferred ownership to G. Once G becomes an owner of the house by obtaining title deed A cannot claim the house from him since he become owner in good faith and for consideration.

The other question in relation to Art.1816 is donation and rights other than ownership such as lease right, pledge and usufruct. We can argue that the only condition under Art. 1816 is good faith. Therefore, whosoever obtains right in good faith shall retain the right regardless of the nature of the right. However, while the interest of third party in good faith is a temporary right on the things returning such thing to the real owner is possible after such right is terminated.

In short, if reinstatement of a thing is not possible because of right of third party in good faith, reinstatement shall be made by paying appropriate value of the thing at the time of execution of court judgment declaring the reinstatement.

Loss or damage of the thing by fault of receiver

In principle, risk of loss or damage of a thing is born by the owner. Risk follows ownership. Ownership is transferred by delivery (Art 1186(2)). But as indicated under art 1815(2) delivery does not transfer ownership to the receiver. Therefore; if the thing is lost or damaged, the receiver has no duty pay damage. For example, A sold his house to B for birr 350.000; A received 350,000 and B obtained possession and title deed, But the house was consumed by fire and B demanded the repayment of 350,000 on the ground that the sale of house was made orally. Here: B can get repayment of 350, 000 even if A cannot get his house back.

However, the receiver should be responsible for a damage or loss due to his fault (Art 2028). The receiver has a duty to preserve and maintain the thing under his holding (Art - 2321 (1)). Failure to preserve and maintain the thing is, therefore; a fault (Art 2035). For example, A bought a cow from B for birr 5000 and the contract is void because of mistake but the cow died while in A's holding because of A's failure to take the cow to a veterinarian. A is liable to pay compensation. Moreover; if in the above example A's daughter of 14 gives toxic food for the cow and it died A is still liable.

Obligation “to do” or “not to do”

In these two types of obligation, there is no transfer of ownership or holding. The contract requires the parties to perform certain intellectual or physical (labor) activities that benefit the other or to refrain from exercising certain property rights. So the concept of reinstating the parties by returning the thing does not work since there was nothing delivered. However a person can definitely lose certain economic advantage. For example A agreed to construct G +2 of E for birr 200.000, A and E agreed that contract becomes binding when made in writing. But A started construction by receiving all necessary construction materials from B. Before the construction is completed, B informed A that the contract is void. In this case, A has to stop construction but should be

paid for the percentage he constructed. In short, *acts done in performance of contract shall not be invalidated where such invalidation is not possible* (Art 1817)

Transformation of the thing: - The receiver may substantially change or alter the thing he has received. In such case, returning the thing *would involve serious disadvantage or inconvenience* (Art. 1817(2)). For example, Abebe sold 500 quintals of cement to Shemsedin for birr 100,000. Shemsedin received the cement and used it for construction. If Abebe got the contract invalidated on the ground of defect in consent Shemsedin cannot return the cement. Moreover, if the above construct is a sale of iron bar for construction and Shemsedin took delivery of the iron bar and cut it into pieces making it ready for construction he cannot return the iron bar since it is serious disadvantages to both Abebe and Shemsedin, Abebe may be unable to get market and Shemsedin also made expense to cut the iron bar, Therefore, where the thing is transformed, the receiver shall pay the price of the thing (Art 1817 (2)).

Returning the thing is uneconomical: The thing may not have been transferred, damaged, lost or transformed, but repayment expense may be high. In such case, the court should not order the repayment of the thing. Rather, it should order payment of compensation. For example, Mesobo Cement Factory sold 500 tons of cement to Hawassa Apartment P.L.C. The cement was transported from Mekele to Hawassa. Declaring such delivery as of no effect is uneconomical to both seller and buyer.

In short, if the contract is invalid, any performance made on the basis of such contract becomes invalid. This means the receiver shall return the thing he received (Art 1815). However, if returning is not possible for whatsoever reason, an appropriate compensation shall be paid (Art 1817).

Incidentally, this writer is of opinion that Arts 1815-1818 can be said redundant since they deal with issues covered under unlawful enrichment, especially under payment (Art 2162 – 2178). Such redundancy creates vagueness on the meaning of void and voidable

contract. Once the contract is invalid, any relation between the parties is extra contractual and, therefore, Art 1815-1818 should be deleted.

Further Reading Materials

Books

- Richards, Paul Law of Contract 7th ed.2006 P.3- 301
- Trietle, G.H the Law of Contract 11th ed. 2005
- Sujan, M.A. Interpretation of Contract 2nd Ed. 2000 P 1- 208
- Kreczunowicz, George Formation and Effects of Contracts in Ethiopian Law 1983
- David, Rene, Commentary on Contract in Ethiopia an English Translation by Michael Kindred
- Sujan, M.A. Concise Law of Government Contracts 1999 p.69-103

Laws

- Civil Code Art.1675-1771, 1808-1818
- Commercial Code
- FDRE Constitution Art. 40- 44
- Labor Proclamation
- Unfair Trade Practice Proclamation

Court Cases

- Rented Houses Enterprise vs. Sosina Asfaw, Federal Cassation Court, File No.15992, Hamle 19, 1997
- United Technical Equipment Company vs. Ethiopian Motor & Engineering Company, Federal Cassation Court, File No.15551, Tikmt 29, 1998

Problems and Questions on Formation of Contracts*

Problem case 1

When Lemma was 15 years old, he and his father, Tefera decided that he should go to a special school in Addis Ababa. This school charged tuition fee of \$75 per year, which Lemma could not afford. Tefera could have paid for the school but he thought Lemma would work harder in school if he had to pay for it himself. Tefera, therefore, contacted his friend, Yilma, who was willing to loan Lemma \$75 per year for his schooling. Tefera, thereupon, authorized Lemma to borrow the money Lemma and Yilma drew up the contract, which provided that Yilma would loan \$75 per year and that Lemma would pay this amount back, with interest, within two years of the time after he finished school.

Lemma received the money and went to school in Addis Ababa. After finishing school he got job, but refused to pay the money back. He claimed that he had been a poor student, that the money he borrowed, therefore, was of no use to him and that had he been older he would never have borrowed money. Yilma sued Lemma for recovery of the money.

Questions: Should Yilma's action succeed? Be sure that you have understand the facts and then isolate and state precisely the various legal problems presented. Finally, decide what the answers to the legal issues are and what legal provisions are applicable.

Problems case 2

15 year old Lemma often bought school supplies in the neighborhood stationary store. Sometimes, his father, Tefera, would be with him and once he told Yilma, the store owner, to let Lemma manage his own everyday affairs. After some time, however, Tefera discovered that Lemma was wasting money on gambling with his friends, and he advised him not to spend his money again until he was older. Lemma did not agree to this and, after taking some money from his father pants one night, bought an expensive book from Yilma. When Tefera discovered this, he was very angry and took the book, which was slightly damaged by then, back to Yilma, and demanded that the money Lemma had paid be returned. He based this demand on the argument that Lemma was a minor and that the contract was, therefore; subject to invalidation.

Questions: Was Tefera's claim legally well based? Isolate the issues and respond to them on

Problems case 3

The basis of specific code provisions. Yosef went to Auto Company and asked to buy an automobile. Yosef had been the victim of a childhood disease and had grey hair and the general appearance of an old man. But in fact he was only thirteen years old. Yosef agreed to pay one-half of the purchase price of E\$30000 immediately and the rest of the price at the end of the month. Auto Company delivered the car and the first time Yosef drove it he smashed it into a building. The automobile was demolished and was only worth E\$5000 as scrap.

Yosef's tutor thereupon sued Auto Company in court, demanding that the \$15000 paid by Yosef be repaid. Auto Company filed a counter – claim for the \$ 15000 that still remained to be paid for the car.

Questions: Will the claim or the counter – claim succeed? Why or why not?

Problem case 4

Seventeen year old Bekelech was hit by an automobile driven by Mebratu and was injured. As a result, the court ordered Mebratu to pay Bekelech \$750 as compensation for the damage she suffered in the accident, and he paid it. Bekelech used that money to go to East African on a tour. When she returned, she had reached the age of eighteen and went to court and requested an order directing Mebratu to pay her \$750 more in satisfaction of the Judgment.

Questions: Should Bekelech's request be granted? Why or why not?

Problem case 5

Assefa and his brother Gebre wanted to buy soccer uniforms and so went into the Novice sport shop and asked to buy one uniform each. The storekeeper asked how old they were and they both answered, "Eighteen years old, sir." The Storekeeper said. "You're being eighteen?" "Yes sir" said the boys. The storekeeper sold the uniforms to them, since they seemed to be at least eighteen, but in fact Gebre was 16 and Assefa was 17.

In the first soccer game they play, Assefa's and Gebre's uniforms were badly torn. They took them back to the Novice sport shop and asked for their money back on the grounds that they lacked capacity to make a contract.

Questions: Must the Novice sport shop return their money and take back the torn uniforms? why or why not? Would the result have been any different if Assefa had bought the two suits and if, instead of telling the storekeeper he was 18, he had had Gebre say that he, Assefa, was 18?

Problems case 6

When Bekele was 17 years old, he borrowed money from his friend's father of a friend. In spite of his youth, Bekele was a mature and experienced person, well able to take care of his own affairs. Nevertheless, he spent the money foolishly and then refused to pay it back on the grounds that he was a minor when he took the loan and that he, therefore; was not obligated to pay it back.

The lender went to court and sued Bekele, invoking Articles 314 and 1702 of the civil code. In response, Bekele cited Article 344 emphasizing that the French and Amharic versions of the civil code must be consulted along with the English. Who should prevail? Why?

Problem case 7

Tadesse was the son of a wealthy man. From his birth he had obvious mental defects. He could hardly speak. His father died when he was 5 years old and he inherited all of the property his father had owned, including a large herd of cattle. Tadesse was always uncomfortable with the people and preferred to go up in the hills with the cattle. Tadesse was married with the permission of the family council when he was 14 years old, and was divorced two years later. When he was seventeen, he was approached in the hills by a traveler who admired his cattle and offered to buy his prize bull for \$ 400. The bull was worth 3 times that much, but Tadesse liked the stranger and sold the bull to him for the price offered.

Questions: Have Tadesse and the stranger made a valid contract why or why not?

Problem case 8

Mekonnen was mentally deficient and his brother Haile feared he would do something to his prejudice. Haile, therefore: applied to the local Wereda court for a declaration of interdiction. After due investigation, the court gave the declaration. Haile asked that an entry be made in the proper registry of interdicted persons. The judge replied that there was no such record but that everyone would soon know about the decision. But the decision was not made known to the public. Sometime later Mekonnen entered into a disadvantageous contract.

Questions: Was the contract valid? Why or why not?

Problem case 9

Ato Assefa and his friend Blatta Beyene went to the Mercato in Addis Ababa, where they admired some fine clothe in the shop of Ato Yoseph. Ato Assefa particularly liked one piece and told Ato Yoseph that he thought it was very beautiful. Ato Assefa then went on to the next shop, thinking he would come back and buy Ato Joseph's cloth. Meanwhile

Blatta Beyene stayed in Ato Joseph's shop and finally said to Ato Yoseph, "I know Ato Assefa will buy that cloth. Consider it sold to him"

Ato Assefa saw some cloth in Ato Eyassu's shop that he liked better than that in Ato Joseph's shop and bought it from Ato Eyassu, When he returned to Ato Yoseph's shop, Ato Yoseph asked him to pay for the clothe that Blatta Beyene had said could be considered sold. Ato Yoseph said to Ato Assefa, "we have a contact."

Question: Was Ato Yoseph correct? Be sure you understand the facts of the problem case.

Problems case 10

On another day, Ato Assefa looked at the cloth in Ato Yoseph's shop. Ato Assefa liked one piece particularly well and said to Ato Yoseph, "I will buy that piece for \$16/ consider it sold." Ato Yoseph said "agreed." As Ato Assefa made his offer, he thought silently to himself that "I must first consult with my wife. If she does not like it, I will not buy it."

Ato Assefa then left, saying he would return immediately; when he returned, he was accompanied by his wife, who had come to see the cloth. She disliked it very much. Ato Assefa then told Ato Yoseph that he did not want the cloth and that he has not meant what he said earlier. Ato Yoseph, however, insisted that Ato Assefa pay for cloth, saying that there was a contract between them. Ato Assefa denied that there was a contract and based his argument on the fact that he had not intended to bind himself irrevocably by his earlier statements.

Question: Advise Ato Assefa as to what to do regarding Ato Yoseph's demand that Ato Assefa must pay the price of the cloth.

Problem case 11

Ato Gebre owned a fine white mule, he was very proud of the mule and valued him highly. In fact, he has often been offered as much as \$100 for the mule. One day Ato Gebre was riding his mule to church when it slipped, thus making Ato Gebre miss church. Ato Gebre was very angry with his mule and stated that it was worthless animal. Ato Mekonnen, a friend of Ato Gebre, overheard this statement and tried to comfort Ato Gebre. Ato Gebre, however, insisted that his mule was a worthless creature and said, "I would sell him to anyone who would pay me \$ 10 for him." "Even me?" said Ato Mekonnen. "Of course," said Ato Gebre, "but I know you are so afraid of this mule that you would never buy him" Ato Mekonnen answered. "I will accept your offer" and took out \$ 10 to give to Ato Gebre. Ato Gebre was surprised at this and said "Don't be silly! I was only joking." Ato Mekonnen insisted that the mule was his for \$10.

Questions: Has Ato Gebre bound himself contractually to give up his mule? Are there any code provisions that solve this problem? How would you solve the problem if Ato Gebre has never said that he would sell the mule to Ato Mekonnen?

Problem case 12

Ato Mesfin went to a goldsmith in the Piazza and made arrangements to buy a gold bracelet for his wife. The goldsmith agreed to make the bracelet and have it ready in eight days. Ato Mesfin agreed to pay \$75 for the bracelet. At the end of eight days, the price of gold had risen and the goldsmith refused to give the bracelet to Ato Mesfin for less than \$90. The goldsmith argued that since no written agreement had been concluded, Ato Mesfin has no contact.

Question: Is the goldsmith correct?

Problem case 13

Ato Haile lost a very valuable ring and put up a sign saying that he would pay \$100 to anyone who found the ring and returned it to him. Ato Adenew saw this sign and began hunting for the ring. The next day, Ato Haile took down the sign. Two days later, Ato Adenew found the ring and took it to Ato Haile. He asked to be paid \$100, but Ato Haile replied that he had withdrawn the offer.

Questions: Do Ato Haile and Ato Adenew have a contract? If so, when was it completed? Is Ato Haile's defense a good one? Why or why not?

Problem case 14

Assume the same factual situation as in problem **case 5** except that Ato Adenew did not know that Ato Haile has lost the ring or that he was willing to give a reward. Assume also that Ato Haile did not take the sign down until after Ato Adenew returned the ring to him. He found the ring, recognized it as belonging to Ato Haile and returned it. Ato Adenew did not find out about the reward until several days later. When he discovered it, he went back to Ato Haile and asked for the reward. Ato Haile refused to pay and Ato Adenew sued him in court.

Questions: Be sure you understand the facts of this problem. What legal issues are presented by it? State them carefully and precisely in writing. What are the answers to these issues? After answering all legal issues, you should be able to answer whether Ato Haile or Ato Adenew should prevail. Would the result be different if the sign has been taken down as it was in problem case 5? Would the result be different if the sign had simply said "I have lost my ring. Please return it to me if you find it."

Problem case 15

Ato Essayas posted a sign in Ras Mekonnen Hall at the University campus stating that he would pay anyone \$5 who would jump off the steps leading up to the flagpole from of

Ras Mekonnen Hall. Some time later, while the sign was still up, a group of five boys were joking with each other and one dared the other to jump off these same steps. After much laughter three of the boys, one after another, jumped from the steps and suffered injuries that hospitalized them. None of the boys knew of Essayas's offer.

Questions: Is Essayas obligated to pay \$5 to any, or all, of these boys?

Problem case 16

On Tekemt 4, Ato Yohannes posted a notice in the newspaper which said, "I here by to sell one large tractor for \$ 1200. This offer will be good for 15 days." On Tekemt 25, Ato Teshome wrote to Ato Yohannes and said, "I accept your offer of Tekemt 4. Enclosed is \$ 1200. I will pick up the tractor in a few weeks." When Ato Teshome went to get the tractor at the end of Hadar, Ato Yohannes said, "I am sorry, but I decided not to sell the tractor. Here is your money back." Ato Teshome went to court and claimed that he had a contract with Ato Yohannes.

Questions: Is there a contract? Why or why not?

Problem case 17

Assume the same factual situation as in problem case 8 except that on Tekemt 6 Ato Yohannes put a second notice in the newspaper, saying "I herby withdraw my offer to Tekemt4" and Ato Teshome delivered a letter of acceptance on Tekemt 8.

Questions: Is there a contract? Why or why not

Problem case 18

On Ter 5, Ato Mebratu wrote to Ato Fasil that "I hereby offer you 50 kilos of teff at the price of 5 birr per kilo." The next day he sent another letter saying "I here by withdraw

my offer of Ter 5." After receiving both of these letters, Ato Fasil wrote back to Ato Mebratu that "I here by accept your offer of Ter 5."

Questions: Is there a contract? Why or why not? Would the answer be different if Ato Fasil had not answered until after 10 days? Would the answer be different if Ato Mebratu had sent his second message by special messenger so that it arrived before the first message?

Problem case 19

Ato Seyoum advertised in the news paper that he would sell his Fiat for \$10,000. Ato Tefferi Abebe saw the advertisement and telephoned. Ato Seyoum told him to come over and see it that day. Ato Tefferi Hailu also saw the advertisement and he went to Ato Seyoum's house about one hour after Ato Tefferi Abebe had telephoned. Tefferi Hailu walked up to the door of Ato Seyoum's house and said, "Hello, I am Ato Tefferi. I would like to buy your car but I can pay \$ 800 only." Ato Seyoum presumed that this man was Tefferi Abebe and said, "Well, all right, I'll sell it for \$8000."

As Tefferi Hailu drove out the gate in the Fiat, Tefferi Abebe came in and said, "But Ato Seyoum, I am Tefferi Abebe. I will pay you \$11000, for that car." "Oh, what a terrible mistake I have made," cried Ato Seyoum.

Questions Can Ato Seyoum go to court and have his contract with Ato Tefferi Hailu invalidated? Why or why not?

Problem case 20

Ato Tsegaye was a sportsman and wanted to win the Addis Ababa horse jumping competition. He went to a local horse dealer and looked at his horses. He thought one of

them looked very nice and jumped beautifully and so bought that horse. He later discovered that in fact the horse had suffered from a broken leg and was in danger of breaking it again if he jumped, although he was still perfectly suited to normal riding. Ato Tsegaye would like to return the horse and get his money back.

Questions: Is Ato Tsegaye legally entitled to get his money back? Why or why not? Would it make a difference if Tsegaye had mentioned to the seller that he was a sportsman? That he likes to jump horses? That he was looking for a jumper?

Problem case 21

Assume the same fact as in problem case 2, except that the horse Tsegaye bought was perfectly suited for jumping and that Ato Tsegaye was mistaken in thinking that there would be an Addis Ababa jumping competition that year.

Questions: could Ato Tsegaye ask for the invalidation of the contract on the ground that he had made a mistake? Assume that Ato Tsegaye would not have bought the horse if he had not made the mistake.

Problem case 22

The Modern Building Co. needed a large quantity of cement for a new ministry they were building. They negotiated with the Ethiopian cement company and agreed that they would buy 5000 bags of cement at a price of 1 birr per kilo. The typist for the cement company typed up the agreement and the representatives of both parties signed it. Unfortunately, the secretary typed 2 birr per kilo instead of 1.

After the cement was delivered, the cement company asked the building company to pay \$250,000 or 2 birr per kilo for 5000 bags of cement, each bag having contained 50 kilos of cement. In the meantime, the market price of cement had gone up to 2 birr per kilo and

the building company went to court and asked the court to invalidate the contract on the grounds that a fundamental mistake had been made in the contract.

Questions: Should the Modern Building Co's request be granted? why or why not? Is the cement company's claim to payment at the rate of 2 birr per kilo well-founded? Why or why not?

Problem case 23

Ato Mengesha held two 10 Gasha farms near Adama and advertised in the newspaper that "I have a 10 Gasha farm near Adama that I want to lease," Ato Tesfaye read this advertisement in Addis Ababa and wrote to Ato Mengesha, asking how much he was asking for the farm. The parties finally reached an agreement on the price and concluded the contract one day when Ato Mengesha was in Addis Ababa. The contract said that "Ato Mengesha hereby leases his 10 Gasha farm near Adama to Ato Tesfaye."

Ato Tesfaye later went to Adama and was quite disappointed with the farm that Ato Mengesha said he had rented. He then learned that Ato Mengesha had had two farms and so he claimed that Ato Mengesha was obligated to transfer to him the possession of the other one, which in fact was much more valuable.

Questions₁ Can Ato Tesfaye insist that he has leased the better of the two farms? Is either party obligated to the other in any way? Give reasons for all your answers.

Questions₂ What would the legal situation have been if in fact Ato Mengesha had not owned any farm near Adama at all?

Problem case 24

Abebe was a 75 year old scholar and a lover of fine things. One day he was sitting serenely in an ancient church admiring some beautiful paintings. An old priest came up and sat down next to him and said "Dear sir, we need money to build a school here for the village children would you be interested in buying one of those paintings for \$ 20,000 the amount we need to build the school."

Abebe was enchanted by the idea of having such a painting in his house and so signed a contract of sale, agreeing to pay \$ 20,000 for a specified painting. In fact, however, Abebe had only \$3000 and earned only \$ 400 per month, all of which was necessary to his daily existence. He could not pay what he had agreed to pay and so asked to be released from the contract. The priest refused to release him and Abebe went to court and asked that the contract be declared invalid because it was impossible to pay the price.

Questions Can Abebe succeed in his action? Why or why not? Upon the meaning of what word does the answer to this problem depend? What is the legal meaning of the word in this context? Is it at all legally relevant?

Problem case 25

The owner of a large citrus fruit farm made a contract with an Addis Ababa canning factory in which the farmer agreed to supply all of the factory's requirements of oranges for a period of five years. The contract stated a price of 2 birr per kilo, which was slightly below the market price of oranges in Addis Ababa at the time the contract was made. After the first three years had passed, the requirements of the factory for oranges rose very rapidly and so did the market price of oranges.

Questions Can the farmer refuse to perform the contract on the ground that the quantity to be delivered was insufficiently specified in the contract? Why or why not? Be sure to consult both the relevant general rules and those that relate particularly to the kind of contract present in this case what kind of a contract is this in terms of the civil code classification?

Problem case 26

Kassaye was a notorious gambler and organizer of house of prostitution in major Ethiopia cities. One day he approached Shimelis, and Shimelis was well aware of Kassaye's profession but was swayed by the high rent offered for the house. He therefore rented the house to him of a three-year lease at \$ 4000 per month. Kassaye immediately organized prostitution in this house and as the months passed Shimelis began to suffer from the scorn of the community. Meanwhile, rents were generally rising and the \$ 4000 figure seemed to be too low rather than too high. Finally, from shame and greed Shimelis went to court and asked that the lease be declared to be of no effect.

Questions Should the court grant Shimelis's request? Why or why not?

Chapter Three

Effect of Contract (Art. 1731 -1805)

3.1 What Does Effects of Contract Mean? (Art.1731)

The two major principles of contract are freedom of contract and sanctity of contract. Sanctity of contract indicates that parties are bound by their agreement. To make a serious promise certainly involves a moral duty to keep it. There is Latin saying “*pacta sunt servanda*” which means that a person is bound by his words. There is also an equivalent Ethiopian proverb, ‘*failure to keep a word is worse than losing a descendant*’ /የተናገሩት ከሚጠፋ የወለዱት ይጥፋ/. However, contract is binding not only morally but also legally. Any agreement which parties did not intend to create legally binding obligation is not a contract (Art 1679). Therefore, once a contract fulfills the requirement of Art 1678, it becomes a law. Law is enforced by executive and interpreted by the judiciary. For a contract, the law makers are mainly parties but the executive is always the state and the judiciary is also normally a state (see Art.3325-3346 and Civil Procedure Code Art. 315-345 that provides about enforcement of arbitral awards). As law makers, parties to the contract, can repeal or amend the contract law must be implemented i.e. contract should be performed, violating a law entails punishment i.e. non- performance of contract leads to payment of damages.

So, effect of a contract implies that it becomes the law of the nation in the sense that the executive has a constitutional duty to implement it and the judiciary has a constitutional duty to interpret it. Moreover, since it is a law it is modified (amended) by the law maker only (either the parties themselves or the legislative). So, effects of contract are interpretation, performance, court’s inability to vary contract and effects of non-performance.

3.2 Interpretation of Contract (Art 1732 -1739)

Since a contract is a law, it may be interpreted. A law is interpreted when it is vague, silent, illogical, ambiguous, and contradictory. So interpretation is giving meaning to the provisions of the contract. If the provision of the contract is clear, there is no need to interpret (Art 1733). Law is an express intention of the legislators. Interpretation is, therefore, searching the intention of the parties (Art. 1734(1)). In a case Ethiopian Development Bank vs. Abdurahman Telisa, file No. 15662 presented to it on Megabit 13, 1999 Federal Supreme Court cassation Division properly ruled that whenever the provision of the contract is clear court should not depart from clear meaning even if such clear meaning is unfair. The fact of the case is summarized as follows. Ato Abdurrahman and Ethiopian Development Bank signed a loan contract and in the loan contract it was provided that the Ethiopian Development Bank was to pay the loan to a person from whom Ato Abdurrahman was to receive mill stone. The loan further provides that Ato Abdurrahman receives millstone from a person specified by the bank. After the loan contract was signed, the bank wrote a letter to Selam Technical Training Center and ordered it to deliver one of the millstones it has ordered to be imported.

Accordingly the Abdurrahman received the millstone. (Nothing is known from the case whether or not the bank released the money to Selam Technical Training Center.). After some time Abdurrahman reported to the bank the defect of the millstone and on the basis of such report the bank requested Selam Technical Training Center to correct the defect. Although the defect was not corrected the bank required Abdurrahman to pay the loan. Then Abdurrahman pleaded to Special Wereda Alaba High Court for the invalidation of the contract on the basis of fraud. The court held that the bank improperly exploited its own good will (public trust to government enterprises) and the business inexperience of Abdurrahman to have him to sign sale contract under the guise of loan contract. The court invalidated the contract of loan and ordered reinstatement. The Federal High Court affirmed the decision on the same line of argument. However the Federal Supreme Court reversed the decision claiming that the loan contract was clear and lower courts should not have departed from its clear content. This writer also agrees with the reasoning and

ruling of the last court. But Abdurrahman had two alternatives for the defect of the millstone; to sue the bank (as a seller if he can show that Selam Technical Training Center was the agent of the bank) or Selam Technical Training Center .Claiming invalidation of the loan contract is not a proper way.

3.2.1 Searching Intention of Parties

A. Presumption of Good Faith

While searching the intention of the parties we have to presume that parties entered into a contract in good faith (Art. 1732). Good faith should mean that no party to the contract intends to deceive the other party by intentionally making the provision of the contract vague, ambiguous, silent or contradictory. In short, interpretation is necessitated without need and expectation of all parties to the contract. Had any party known the problem at the time of conclusion of contract, such problem would have been solved then and there. Moreover; parties might have not thoroughly examined each provision the and words in the contract believing that controversies would not arise i.e. they trusted each other that none of them would attempt to avoid the effect of contract (Art. 1732). In short good faith means that at the time of conclusion of a contracts each party believes that everyone in the contract intends to get his own fair benefit without harming another party and interpretation becomes necessary either because parties were not able to imagine the dispute, or words are imprecise by their nature, or errors are committed in formulating contract. No party wanted the problem of interpretation to arise but because of the above imperfections, interpretation becomes necessary.

B. How to Search Intention of Parties (Art. 1734-17387)

Having the presumption of good faith in mind, the court uses the following techniques to arrive at the probable **common intention** of parties **at the time of conclusion of the contract**.

a) Conduct of the parties

Conduct is one way of communication of consent (Art. 1681). So a conduct of a person may be taken as a means of ascertaining what he was intending and what the other party understood from such conduct. The conduct may be shown before, during or after the conclusion of the contract (Art 1734(2)).

E.g.¹ Abebe leased a house to Challa for birr. 3000. Before the contract was concluded, Abebe himself was gardening the premises of the house but later on he stopped doing so and Challa is claiming that Abebe should continue to garden. Challa's claim is correct.

b) Context of the contract

As much as possible the meaning of a contract should be searched from the contract itself since there is a possibility that one provision may indicate the meaning of another provision or word in the contract. (Art. 1736(1))

E.g. In the following provisions of sale contract Art.4 may be used to limit the meaning of the word **immovable** found in Art. 1.

Art.1 Abebe, the seller, hereby sells his immovable to Belachew for birr 3000,000

Art.4 The title deeds of the immovable are registered in Addis Ababa , Adama, Bahir Dar and the buyer shall pay expenses that the seller may incur in attempt to transfer ownership in these towns.

c) Business practice

As indicated under Art. 1713 and 1732 business practice is part of contract. So if there is no clear provisions that excludes it, it will be used to give a meaning for ambiguous or vague (general) terms (Art. 1735, Art. 1736 (2)).

E.g. Hawassa University employed Belay as a lecturer. Belay specialized in constitutional Law. But the University assigned him to teach Logic to Lawyers. Belay refused the assignment. Belay is correct; the word lecturer should be given limited meaning. Universities never assign a constitutional law lawyer to teach Logic to Lawyers.

d) Good faith

Here good faith indicates the innocent expectation of a party from a contract (Art. 1735). This is in accordance with the golden rule, “had I been in the position of my opponent what would I have expected from the contract?”

e) Equity

f) Positive interpretation

Parties are presumed to have entered into a contract expecting certain result. So every provisions of a contract should also be given effect.

3.2.2 Interpretation in Favor of Debtor

As mentioned early, the main objective of interpretation is searching for the intention of the parties. But the court may not always succeed in searching the intention. Therefore, if the court is unable to know the intention, the law guides the court to interpret the controversial provision or word in favor of the debtor (Art 1738(1)). This is in line with the principle under procedural law that whosoever, claims a right has to prove its existence. So the creditor has to prove the existence of a claim or else the court presumes that the debtor should not be expected to perform an obligation which the creditor is unable to prove.

Even more; if the contract is gratuitous, the court may even limit itself on the clear provision without attempting to impose an obligation on the debtor by searching the intention of the parties. In short in gratuitous contract, court should not impose obligation

on the debtor by interpretation. This is in accordance with Amharic saying ‘if your friend is honey do not take it all’ (Art. 1739).

However, an exception to the principle of interpreting in favor of the debtor is contract of adhesion (Art. 1738(2)). If a contract is a contract of adhesion, the court shall interpret the provisions or words in the adhesive contract against the party who prepared such contract (Art. 1738(2)). In this case, the stipulator of the adhesive contract may be debtor but he cannot benefit from the dispute on the meaning of provisions or words in a contract since he should have prepared the contract free of any defect. He cannot benefit from his own fault. Moreover, a stipulator of general terms, models or forms is mostly monopoly supplier or big companies that greatly influence the bargaining process. Most probably the other party did not have an alternative except entering (adhering) to the stipulation. So interpreting such contract against the stipulator even when he is a debtor has customer protection in mind.

3.3 Performances of Contracts (Art. 1740-1762)

Performance of contract means fulfilling one’s own obligation as agreed. If the obligation is to “do”, doing what was provided in the contract exactly in the same way as provided, if the obligation is “not to do” forbearing from doing what is forbidden by contract and if the obligation is to “give” delivering the thing with its accessories on the agreed date and place is called performance of a contract.

So the major questions during performance are ‘Who perform contract?’ To whom should contract be performed? What should be performed, When and where should it be performed? Art 1740-1762 can be taken as interpretation of a contract by legislator since these provisions are supplementary or complementary to parties’ agreement.

3.3.1 Who Performs Contract (Art. 1740)

The contract can be performed by the debtor, his agent or by person authorized by court or law (Art. 1740(2)). The persons authorized by law are tutors, liquidators, trustees and person authorized by court is either a curator or an interested creditor who wants to save the rights of the debtor by performing his obligation. However; the law never mention about performance of a contract by a third party not authorized by debtor, court or law.

However; we can easily argue that if the creditor accepts the payment, the debtor has no right to stop third party from performing the obligation since the creditor has a right to assign his right to a third party without the consent of a debtor (Art. 1962). In such case, if the debtor insists on paying the debt, he can pay it to the person who paid the creditor (Art. 1824). The law refrains from including unauthorized third party in the list of Art 1740(2) since assignment of a right is a contract. A creditor is not duty bound to receive payment from a person not authorized by debtor or court or law, he is free to accept or reject such payment without any effect on his right against the debtor.

However; the creditor may sometimes insist that debtor himself should perform the obligation (Art. 1740(1)). This is when the contract or law expressly provides that the debtor shall perform the contract personally. For example, Ethiopian labor law provides that the employee should perform the contract personally. So, if certain construction company employees A as a daily laborer, he cannot authorize his son or brother to carry out the labor work and the company can refuse to accept A's son or brother and dismisses A from work.

Moreover, the second case where personal performance becomes necessary is when the creditor proves that personal performance is essential to him. The creditor can be able to prove such only when the obligation is obligation to "do" of a professional nature or art. For example, a lawyer, or a doctor can not authorize a duty which he agreed to do. Moreover, a musicians, painters, Poet, actor, dancer etc cannot authorize someone to perform his obligation.

Generally, creditor should accept performance either from the debtor, his agent or person authorized by the court of law unless he proves that personal performance of the contract is essential to him or contract law expressly provides personal performance.

3.3.2 Who May Receive Payment (Art. 1741-1744)

Payment should normally be made to the creditor or his agent (Art. 1741). However; payment may be made to a tutor, liquidator, or trustee (Art. 1741). Failure to perform contract to a liquidator or trustee is non-performance.

Payment to Incapables (Art.1742)

If the creditor is a minor or judicially interdicted person, payment should not be made to such creditor (Art. 1742). E.g. Abebe, a minor, bought bicycle for birr 1500 from Beshadu. Beshadu shall not deliver the bicycle to Abebe. She should rather deliver it to his tutor. Incidentally, Art.1742 has some redundancy with Art. 1815, 2162 and Federal Revised Family code Art. 302. So Art. 1742 shall be framed as follows;

Art.1743 Creditor Incapable

. ***A debtor may not make payment to an incapable creditor.***

Payment to Unqualified Creditor (Art.1743)

Another issue in relation to creditor is payment to unqualified person. In principle, payment to unqualified person is invalid. But in the following case, such payment is valid (Art. 1743);

a) Payment benefited the real creditor

The creditor is benefited when the debtor pays the debt of the creditor. For example, Challa borrowed 50,000 birr from Legese. Legese bought a car from Balew for birr

505,000. If Challa pays to Balew thereby releasing Legese from paying sale price, the payment will benefit Legese. Notice that such payment may be paid either without the knowledge of creditor or even against his express opposition.

b) Payment confirmed

Here even if the creditor did not benefit from the payment, he may confirm the payment. Such confirmation has the effect of ratifying an act done without authority (Art. 2192, Art. 2190). However; the creditor cannot be willing to confirm unless he benefited from the payment. When confirmation is because of benefit such confirmation does not have legal importance. The possibility of getting confirmation without benefit emanates either from good faith or from fear of prosecution against relatives who might have received the payment (sees Art. 1708). For example, a debtor paid the debt to a daughter of a creditor who used the money for enjoying herself in big hotels. A father creditor may confirm such payment.

c) Payment to a person with a valid title

Here the holder of the title is legally entitled to claim payment although he is not the real creditor. The document gives an apparent right to the holder. The payment made to an apparent creditor is valid even if the document is invalidated later on. However; such payment to an apparent creditor never releases the debtor if the debtor knows that he is paying to apparent creditor. The examples of apparent creditor are;

- i. *Certificate of heir annulled after payment is made* (Art-1996-1998) E.g. Abebe applied to court and got a certificate of heir. Abebe collected money deposited by the name of the deceased in a bank (Art. 947). But later on a son of deceased applied and got Abebe's certificate of heir annulled. The son does not have any claim against the bank since the bank paid to a person holding valid title at the time of payment.
- ii. *Document evidencing power of agency*: a principal might have revoked the agency power but he may fail to collect the document from the agent and the

agent may use the document to collect principal's claim. E.g. Mennen was authorized to collect the salary of Shenkute, her boy friend. But due to dispute between them Shenkute informed Mennen that he revoked her authority and also got such revocation registered with government authority but failed to collect the document from Mennen. Mennen then collected Shenkute's salary. Payment made to Mennen validly releases Shenkute's employer.

iii. *Holder of Negotiable Instruments (Art. 716 Art. 751 of comm. code)* A debtor who paid to a holder of negotiable instrument in accordance of the rules of transfer of negotiable instrument is released from his obligation. E.g. Bilisuma issued a check to Gebru and thief stolen the check from Gebru's pocket and received payment from Dashen Bank. Bilisuma is released by such payment.

N.B In all of the above case, the debtor should be in good faith. For example if the real creditor warns the debtor to forbear from paying the debt, the debtor is liable if he pays against such warning.

Doubt as to the Creditor (Art.1744)

Sometimes two or more persons may independently claim the payment of a debt. This mainly arises when the original creditor dies and heirs and creditors are claiming payment. The debtor is not a court and cannot settle such dispute, hence, he shall refuse to pay to any of them. If he wants to release himself from obligation, he can deposit the debt in court of law as per Art. 290 – 293 of the civil procedure code (Art. 1744 (1). If he is not willing to deposit his debt, any claimant may require him to deposit in court (Art.1744 (3). In short when the debtor is unable to know the real creditor he shall deposit the debt in court either by his own initiative or by the request of the claimants. For example, a bank received a notice that a check held by Emru is void. On the other hand Emru is claiming payment. In such case the bank should refuse to pay Emru and can deposit the amount in court either by its own initiation or at the request of Emru or a person who gave notice to it.

Incidentally these writers believe the Art. 1744 (2) has no better role than exemplifying Art. 1743 (2)

3.3.3 What to Perform (Art. 1745 – 1751)

What to pay (perform) answers the question relating to identify, quality or quantity of the thing to be delivered. To properly answer such question we will classify things into definite thing, fungible things and money debts. Incidentally, Art.1745–1751 do not seem to apply to obligation “to do” or “not to do”.

Definite Thing (Art. 1745 – 1746)

The debtor shall deliver the thing agreed (Art. 1745). The creditor may however, accept things of different identity if he wants. If the creditor accepts the new thing offered to him by the debtor, it means that they agreed to vary or modify contract. Such variation may need to be made in a special form (Art. 1722) when necessary. So rather than the quality of the alternative thing delivered what is important is the consent of the parties. Nobody is bound by what he did not consent to be bound.

E.g.₁ Abel agreed to sell Adaa teff to Gebru. But since Abel is unable to get Adaa teff he supplied Menjar teff of the same quality. Gebru can refuse the delivery.

E.g.₂ Alemu ordered a goldsmith to prepare bracelet from 21 karat gold but the gold smith prepared the bracelet from diamond, Alemu can refuse such bracelet.

E.g.₃ Abebe bought ox Z from B but since ox Z died before delivery, B offered to deliver ox Y but Abebe may refuse such delivery.

N.B Definite thing is a thing that can easily be identified from similar things of the same species. In short definite thing has its own peculiar identity. Animals and immovable are most prominent examples of definite things. If a thing is definite thing, we can not find its

replicate in the world. However, for contract law definiteness of a thing simply indicates that a thing which is a subject of sale is indicated in the contract in its own specific name. For example if the sale is white teff the thing is definite in relative to the generic term teff. However; when we come to groups white teff itself is indefinite thing since white teff is of different variety.

The creditor has also a right to refuse part payment. He has also a right to claim part payment and bring court action for the remaining part or give grace period for such part payment (Art 1746).

Fungible Goods (Art. 1747–1748)

Fungible goods are goods that are indicated in the contract by using generic terms such as pasta, teff, wheat, barely. In such case since the thing is not expressly indicated in the contract, the contract is interpreted in favorer of the debtor (Art. 1738 (1) and the debtor can freely determine its quality (Art. 1747). However, the quality should not be less than the average (Art.1747 (2). For example, if a seller agreed to sell five hundred quintals of teff. He can deliver teff of average quality. Delivery of insufficient quantity or quality (when the quality was already agreed up on) does not necessarily lead to the cancellation of the contract unless it is declared to be fundamental breach of contract (Art. 1748 (1) cum. 1785 (2). Incidentally, the phrase “... essential to him...” under Art.1748 (1) should be given equivalent meaning with the phrase “... fundamental provisions of the contract.” under Art.1785 (2). Moreover; even if the quantity /quality is not essential or fundamental to the creditor, the contract may provide unilateral cancellation if such quality or quantity is violated (Art. 1786 cum. 1748 (1).

Money Debts (Art. 1749–1751)

If the debt is money debt, payment should be made in local currency of place of payment (Art. 1749 (1). For example, if the place of payment is in USA, payment should be made in US Dollar for two reasons. Firstly, the debtor may not be able to get the foreign

currency in the place of performance. For example, in Ethiopia only importers are allowed to purchase foreign currency in the market. Secondly, it may be illegal to carry foreign currency for more than a certain time limit. For example, in Ethiopia any person who carries a foreign currency for more than forty – eight hours is criminally liable.

If payment is in a local currency, the issue that comes to our mind is the exchange rate. For example, if contract provides that the debtor pays birr 200,000 on April 29 in USA, the birr should be converted into Dollar. The question is “how much dollar is birr 200,000”. This is determined on the basis of exchange rate on the day of payment (Art 1750). But the law never answers the place that is to be used as a reference to determine the rate. For example the exchange rate of birr in dollar may differ in USA and Ethiopia on the same days. In USA one dollar on April 29 may be birr ten but in Ethiopia one Dollar may be birr thirteen. So if the debtor claims that the exchange rate should be determined on the basis of the exchange rate in Ethiopia, the amount of dollar that he pays is less than the amount of dollar he pays if US market is used as reference. If we see the above example, if the reference is US market the debtor pays 20,000 dollar but if the reference is Ethiopian market the debtor pays 15384.615 dollar. Although the law is silent on this point, the writers believe that the place where the currency indicated on the contract serves as medium of exchanges should be taken as a reference market to determine the exchange rate. For example, in the above case, Ethiopia exchanges market should be a reference market.

Another issue that is not solved is unavailability of exchange market. For example, what if the currency indicated on a contract is Birr and place of payment is Peru and Peru’s currency is not available in Ethiopian foreign exchange market and Ethiopian birr is not available in Peru’s foreign exchange market. In such case, the solution is to convert the birr into Dollar in Ethiopia and convert that Dollar into Peru’s currency in Peru’s exchange market. For example, if the debt is birr 1000, 000 and to be paid in Peru. We first convert the birr into dollar in Ethiopian market, and say one million birr is hundred thousand dollar in Ethiopia’s exchange market and we will convert such 100,000 dollar into Peru’s currency in Peru’s foreign exchange market.

Notice that parties may agree that payment shall be made in actual currency indicated on the contract (Art.1750).

Incidental to money debt are inflation of currency and interest rate. Parties may avoid inflation by determining the amount of money debt in reference to the price of a specified good. For example, a person who lends birr 200,000 to be repaid after ten years may say that the amount to be repaid shall be able to buy 50 tons of first quality Addaa teff. Art 1749 (2) is not a law since it imposes obligation on no party; it is simply reminding the parties the possible option of avoiding or reducing the consequence of inflation. The draftsman tried to give justification for the inclusion of such provision in the code (David p.45). He included such provision in order to avoid a doubt as to the legality of such provision (ibid). However; such justification may be contradictory to freedom of contract (Art. 1711 cum. 1731(2)). The parties can freely determine content of contract as far as it is not contrary to mandatory provisions of the law.

3.3.4 Appropriation of payment (Art. 1752-1754)

Appropriation of payment is important when the debtor pays only part of his obligation. Such payment has some effect on the rights of a creditor in relation to the remaining obligation. For example, in case of cost, interest and principal debt, the appropriation of payment matters when the debtor pay interest on the principal but does not pay such interest on cost and interests. In case of two or more principal obligations also some of these obligations may impose more burdensome obligation. Therefore, appropriation of payment is very important.

Principal Debts and its accessories (Art 1752)

If a person is unable to pay the whole debt (principal, interest and cost) at one time, the part payment made by the debtor shall be appropriated firstly to the cost; secondly to the interest; and finally to the principal (Art. 1752). For example, Belaynesh borrowed birr 100,000 in 2000 at a rate of 9% per annum and debt was to be paid after five years. But

Belaynesh failed to pay the debt, and the creditor brought court action and incurred cost of birr 10,000. So the principal debt is 100,000, interest, 72,000 and cost 10,000. Assume Belaynesh made a payment of 30,000; the apportionment is first to the cost so the cost is extinguished and the remaining 20,000 is apportioned to the interest. So the debt of Belaynesh is principal 100,000 and interest 52,000. The effect is that the interest continues to count on the total 100,000 birr.

Multiple principal Debts (Art. 1753-1754)

In case of multiple debts, choice is given to the parties and only if they fail to exercise their right of choice that the legislator chooses the debt to be paid first and the debt that follows.

Choice by the parties (Art.1753) unless the parties agree that choice should be made by the creditor, the law presumes that the right to choose is for the debtor (Art 1753 (1). This is in accordance with the principle of interpretation in favor of the debtor. The debtor may indicate his choice by opposing an appropriation made by creditor on receipt of payment (Art. 1753(2). However, if the debtor has failed to indicate his choice to the creditor and has not opposed the appropriation written on the receipt, the debtor is presumed to have given this chance to the creditor. So the choice of the creditor binds the debtor (Art. 1753) (2). For example, Abebe borrowed birr 500,000, he also bought a car for birr 300,000 from the same creditor. Then Abebe made a payment of 300,000 and indicated that he was paying the loan. In the same case if Abebe made payment without indicating the debt and the creditor gave a receipt for payment of sale, Abebe can immediately object the appropriation and indicate his own preference. The debtor should object as soon as he receives the receipt. Objection is not enough, he should indicate his preference, and otherwise the creditor could still continue to choose among the remaining debts.

Choice by the law (Art. 1754) When both the debtor and creditor fail to indicate the appropriation the law presumes the following appropriation.

Debts already due. Appropriation is to the debt which is most advantageous to the debtor (Art.1754 (2). For example the loan of 500,000 which imposes 12% interest rate and which was due on Jan 2, 2008 and sale price without penalty any payment made by the debtor shall be appropriated to the loan. (See also Art. 1754(3).)

Debts due vs. future debts: - Appropriation shall be made to the debt which is already due (Art. 1754(1).

Future debts Vs future debts: - appropriation is to the debt which becomes due earlier (Art.1754 (1)

Future debts having the same due date: to the debt which first appropriation benefits the debtor most (Art. 1754(2) but if the advantages are equal payment shall be appropriated proportionally (Art. 1754(3).

3.3.5. Place of Performance

Place of performance has an implication on cost of payment, currency for money debts and territorial jurisdiction of court (Girma, 2002, p 124).Therefore determining place of performance has a multifaceted consequences.

The civil code provides three alternatives; agreed place, residence of the debtor and place where the thing situates. Here we can notice that the law tries to determine place of performance by giving much emphasis to the intention of the parties. The law encourages the parties to determine place of performance in their contract. Contractually agreed place should include places that can be determined by reference to usage; equity and good faith (see Art.1713). But if they fail to mention place of performance the law then resorts to search the possible intention of the parties (implied agreement of the parties). By so doing it reached at the conclusion that in case of **definite thing** the parties should be presumed to have agreed to perform the contract at the place where such definite thing situate at the time of conclusion of contract.(time of conclusion of contract is to be

determined by reference to Art. 1692). We have to notice here that there may be difference between place of conclusion of contract and place where the definite thing situate at the time of conclusion of contract. Moreover, the place where a thing situate at the time of conclusion of contract and at the time of performance of a contract may be different i.e. the thing might have been shifted from the place where it was at time of formation of contract. Although it is presumed that parties had knowledge as to the where about of the definite thing at the time of conclusion of contract concerning such thing (since most probably the creditor/debtor does not agree with out seeing the thing and the place where he saw the thing and the place where it situate at the time of conclusion of a contract, most of the time, overlaps) lack of such knowledge never affect place of performance.

The last resort of the law is to rule of interpretation in favor of the debtor. Such interpretation leads to the residence of the debtor. By so doing the law exempts the debtor from transportation cost, inconveniences and waste of working hours. So delivery of fungible things should be made at the residence of the debtor (Art.1755 (2)).

However; the debtor may have more than one residence (Art 177(2)). In such case the place of performance is the principal residence and the adjective *normal* which is used by Art. .1755 (2) to qualify the noun residence should have the same meaning with the adjective *principal* which is used by Art.177(2) to qualify the same noun.

Generally Ethiopian civil code advises the parties to exercise their freedom of contract and determine place of performance. But if they fail to do so the law imports the old maxim, debt is not portable but fetchable i.e. the creditor has to go to either to the place where the definite thing situate or to the residence of the debtor. The claimant has to his claim and his claim never come to him.

Exercise

Determine place of performance in the following cases

Case 1 Abele and Mesnesh Law School P.L.C entered into an agreement that Abele gives lectures six hours per week to students of the Mesnesh Law School P.L.C. The lecture was to be given for sixteen consecutive weeks. They agreed that Abele receives birr 40,0000 at the end of the lecture period. They further agreed that the lecture should be given on weekends. The normal residence of Abele is Hawassa and Mesnesh Law School P.L.C. has a campus only in Shashemene , a town found 25 km north of Hawassa.

Case 2 Obang is a resident of Bishoftu town which is found 47 km south east of Addis Ababa. Once while Obang was visiting his fiancée in Addis Ababa he got Bokasa, who is a good mechanical engineer. Obang told to Bokasa that his car was seriously damaged and parked in Adama and he had been looking for an engineer. Bokasa offered to repair the car for birr 10,000 provided spare parts expenses are covered by Obang. Obang happily accepted the offer. However, they did not talk about place of performance. Bokasa has garage business in Addis Ababa only.

Case 3 Dr. Hunegnaw and W/ro Tamyesh entered into Medical Contract on January 23, 2008 at Dr. Hunegnaw's residential house located in Sendafa town 25 northeast of Addis Ababa. Dr. Hunegnaw agreed to do his best to cure W/ro Tamyesh from gastritis. The lady agreed to pay birr 15,000 including lodging and feeding expenses. But they did not raise any thing about place of treatment. Although Dr. Hunegnaw occasionally gives medical treatment at his home residence (Sendafa), he usually and normally treats patients in his clinic found in Addis Ababa. W/ro Tamyesh is the resident of Sendafa and she is expecting Dr. Hunegnaw to treat her in Sendafa whereas he is urging her to go to his clinic so that he can properly carry out his obligation.

Case 4(see G. Krzeczunowicz,1983,p.104) Yirgashewa bought property insurance against fire for his villa found in Debrebirhan town (about 130 km north of Addis Ababa) from

Ethiopian Insurance Company. Such insurance contract was concluded in Addis Ababa on April 12, 2008. The guaranteed amount was birr 350,000 and the premium was birr 250. The contract was to enter into effect starting from the date of payment of the premium and remain effective until April 12, 2009. Yirgashewa agreed to pay premium on April 25, 2008. The contract, however, does not mention place of payment of the premium.

Yirgashewa has been domiciled in Debrebirhan since 2005 and he has had no residence in Addis. Ethiopian Insurance Company has had no branch in Debrebirhan. When Yirgashewa called the manager of Ethiopian Insurance Company to receive payment of the premium in Debrebirhan the manager warned him to make payment in Addis. Yirgashewa refused to pay in Addis and the manager wrote two consecutive letters to his address on April 30 and June 2, 2008, the last one suspending the insurance contract. Although Yirgashewa received both letters he has been insisting that Ethiopian Insurance Company should receive payment in Debrebirhan. While the controversy was going on, Yirgashewa's house was consumed by fire on June 15, 2008.

3.3.6. Time of Performance

Time of performance is very important to determine transfer of risk (in case of contract that transfer ownership such as sales and donation see Art.1758), cost of maintenance and preservation (see Art.1779-1783) and most importantly to claim damage for non-performance. Although time is not the only cause for non performance, when we think of non-performance the first thing that comes to our mind is probably time of performance. Time of performance greatly affects the benefit parties expect to derive from the contract. This is especially true when there is market instability which has become the feature of modern economy. The importance of time also depends on the nature of the contract or obligation of the parties. Time of performance generally reminds us an Amharic saying which goes as follows; 'I am dying this evening but the harvest is in the coming summer.'

Like in place of performance, parties are advised to determine time of performance. So performance should be made at agreed time (Art.1756 (1)). However the law still plays the gap filling role. As indicated under Art. 1695(1) the law remedies the deficiency of the agreement of the parties. Therefore; where there is no contractually agreed time, contract should be performed when either the debtor Art.1756 (2) or the creditor demand performance (Art.1756 (3)). This means, once the contract is concluded, time of performance can be determined either by the debtor or creditor. If both of them determine date of performance the earliest date is performance date. The debtor demands earliest performance either to avoid cost of maintenance and preservation or to transfer risk or to relieve him self from psychological burden of debt. Earliest performance can also have its own advantages and disadvantages to the creditor. As indicated under Art. 1756(2) by the phrase *forthwith* the creditor must take delivery just at the time he is informed to take delivery. Otherwise the debtor may exercise his right under Art. 1779.

Notice that Art.1756 (3) does not contain the phrase *forthwith* (see Tilahun, 1989, p.99). Instead it contains the phrase *whenever* which is retranslated as *as soon as* by G. Krzeczunowicz (G. Krzeczunowicz 1983, p.104). This means the idea intended to be conveyed by Art. 1756(2) is different from that of Art 1756(3). Therefore; although the creditor may be required to receive payment just at the moment the debtor wants to make payment, the creditor is expected to give reasonable time to the debtor. A creditor never invoke non-performance without giving default notice (Art.1772) and in his default notice he may fix a reasonable period that enables the debtor to carry out his obligation (Art.1774). If he has not fixed time in his default notice or the time is unreasonable he may resort to the remedy provided under Art.1785.

In conclusion, time of performance is determined either by contract or unilaterally by any party to the contract and the mere failure to indicate time of performance never makes the contract incomplete. However in the following four cases the debtor may unilaterally postpone time of performance indefinitely (Art.1757 cum.1759, see also G. Krzeczunowicz 1983, p.108-9). This is to reduce the risk of non-performance by the

opposite party. As a result Art. 1757 and 1759 exclusively relate to bilateral contracts (see also Girma 2002, p130).

1. Simultaneous Performance

It is the corollary of unilateral declaration of time of performance. By exercising their right both side of the parties may determine time of performance and that time of performance may be coincided thereby implying simultaneous performance. Even in cases when time of performance for one side of the obligation has been fixed by contract time of performance for the other side of the obligation fixed unilaterally may coincide with contractually fixed time. For example, assume Abrehet and Yitayal entered into a contract of hiring whereby Abrehet agreed to give combiner and harvester to Yitayal for two months and Yitayal agreed to pay a lump sum of birr 5000. Further assume that time of delivery of the combiner and harvester and time of payment of the rent has not been indicated in the contract. Yitayal may demand the delivery of the combiner and harvester and Abrehet has to deliver soon. But Abrehet has also the right to claim payment of the rent at the time Yitayal claims delivery. So coincidence of time of payment is created leading to simultaneous performance. If time of delivery of the combiner and the harvester was contractually agreed to be August 24, Abrehet may unilaterally decide that payment the rent should also be made on August 24, which leads to simultaneous performance.

However, if time of performance of both sides of the obligation is contractually determined, there is no concept of simultaneous performance; both sides of the obligation should be performed on the date fixed by the contract (Art.1757 (1). For example, in the above case if the date of delivery of the combiner and harvester contractually fixed to be May 23 and date of payment agreed to be two months after delivery there is no concept of simultaneous performance.

2. Anticipatory Breach of Contract

It is when the debtor informs the creditor before the debt is due that he (debtor) will not perform his obligation (Art.1757 (2)). Such information may be implied from conduct of the debtor or from express statements addressed to the creditor (G. Krzeczunowicz, 1983, p.106). For example, if A and B entered into construction contract whereby A agreed to construct B's G +3 residential house in Awassa and B agreed to pay 25% of the total construction price one month before the construction starts. They agreed that the construction had to start on August 12, 2008. A won a big construction project in Mizan on July 12, 2008 and went there to start the work that takes a minimum of four years. Here A, by his conduct shown his intention not to start construction of B's residential house. So B is entitled not to make any advance payment. In short if there is a reasonable suspicion that one party may not honor his future obligation the other party is not bound to carry out his obligation. Anticipatory breach under Art 1757(2) is invoked when time of performance of both sides of the obligation has already determined by contract and the party claiming anticipatory is duty bound to perform his obligation earlier than the party who has intended to breach the contract. For example in the above construction contract case if B was not obliged to pay advance and if the date A had to start the construction of the residential house was not determined Art 1757(2) does not apply. In short anticipatory breach Under Art.1757 (2) is a justification to refuse performance whereas under Art.1789 it is used as a justification to cancel the contract. However; under Art.1788 anticipatory breach exist only where there is express declaration by the breaching party or in case of implied anticipatory breach the party intending to cancel the contract gives default notice. In short, under Art. 1788 conduct does not unequivocally indicate anticipatory breach.

However, the party has an option to claim performance by providing sufficient security that he will perform his obligation (Art.1759).

3. Insolvency

When a person is declared bankrupt, all his future debts mature on the day he is declared bankrupt (Art.1868). So, he has to pay all his future debts on the date he is declared bankrupt. Any payment after that day may be equivalent to non performance or breach of contract. So a person declared bankrupt loses benefit of time that he obtained by contract and cannot claim performance unless he himself is ready to perform his obligation (Art. 1757(2)).

Notice that under both Art.1757 (2) and Art. 1868, the type of bankruptcy should be legal bankruptcy. Factual bankruptcy never entitle the other party to refuse performance unless it amounts to anticipatory breach or the securities are damaged by the act of the debtor or act of God, provided there is no insurance for such loss.

4. Breach

Although breach of contract is discussed under chapter four , a party who violated his own contractual obligation does not have moral and legal basis to complain for breach of contract since the other party can have a counter claim or set-off(Art.1757(1)). Note that for the purpose of Art. 1757(1) breach of contract includes refusal to give receipt (G. Krzeczunowicz 1983, p.109)

3.3.7. Transfer of Risk

Transfer of risk is what logically comes to our mind after we discuss time of performance. Transfer of risk is dependent on time of performance. So it is logical that Art. 1758 comes immediately after Art.1757 (however; Art.1759) should have been sub-article 3 of Art.1757.).(See G. Krzeczunowicz 1983, p.106 foot note 9.); however transfer of risk is an issue only in contracts that involve transfer of ownership. It is not a common characteristic of all contracts. The relevant law to discuss transfer of risk is law of sales.

3.3.8 Cost of Payment (Art.1760)

Art.1760 applies when the court is unable to ascertain a party that should bear the cost of payment by reference to their contract or custom, equity and good faith as indicated under Art 1713. According to G. Krzeczunowicz;

Costs of payment are e.g. those of counting, measuring, weighing, packing etc. and not those of forwarding, unless a payment place other than that of Art.1755 (2-3) is agreed (a frequent case). Cost of payment (also) comprises those of the receipt that is in practice the amount of any stamp duty on it, to be reimbursed by the debtor. If the payment due consists in a formal conveyance e.g. of a house the debtor bears the cost of the deed and its registration. (G.Krzeczunowicz, 1983, p.109)

3.3.9 Debtor' Right to Receipt (Art.1761-1762)

Whenever required, the debtor has a duty to prove that he has properly discharged his obligation (Art.2001 (2)). One means that the debtor can use to prove the performance of the contract is by obtaining written evidence from the creditor (Art.2002). Moreover; an agent has duty to account to the principal all expenses made by him on behalf of the principal. Furthermore; government agencies and business organizations especially those working in the financial sector have legal duty to undergo internal and external auditing. Such accounting or auditing is possible only if the agent or the company is able to provide evidence for expenses it has made. Such evidence is also very important for calculation of tax obligation. Receipt is, therefore; such written evidence given by the creditor to the debtor. The debtor has a right to claim receipt and a creditor has an obligation to give receipt.

In addition to claim receipt the debtor has also the right to claim the cancellation or return of documents evidencing the obligation, provided he has fully discharged his obligation (Art. 1762). If the debt is partly performed such part performance has to be indicated on

the document evidencing the obligation. If the creditor alleges that the document is lost he has to give to the debtor another written document that contains his allegation.

The creditor has a duty to prove that there was a contract between him and the debtor (Art.2001 (1). If the contract was in written document he proves by presenting such written document (2003). If he returns he has no means to prove the obligation. Even if he uses other alternative means of prove, the debtor can show that he has performed the obligation by showing that the document evidencing the obligation was returned to him. Returning document evidencing obligation to the debtor raises the presumption that the debt has been paid (Art.2020). If partial payment was indicated document evidencing obligation the evidence to be presented by the creditor enables the debtor to prove that he has partly performed his obligation, including the extent of such part performance. If the document was destroyed the creditor has less chance to improperly claim second payment (but see Art.2003 which gives the room for witness testimony.)

Activity

A debtor can claim either receipt or the return of document evidencing the obligation but not both. Comment the validity or otherwise of this statement.

3.4 Variations of Contracts

3.4.1 Introduction

Variation is making amendments to the provisions of a contract. Variation makes change on the object of the contract. Variation of Contract is equivalent to amendment of law. Variation normally becomes necessary because of fundamental changes in circumstance that the parties or the legislator does not want to tolerate. Minor changes are always expected and may not lead to variation of Contract. Contract may be varied by the parties, legislator and judiciary.

Variation of a contract by parties is a contract itself (Art.1675). So, as far as the requirements of Art 1678 are fulfilled parties can modify their contract at any time for any reason. Since a contract is a law the legislator may also vary its contents either by a law issued prior to the conclusion of such contract or by a law that is issued to modify certain already concluded contracts. The former case can be exemplified by Art.1748 which forces the creditor to accept insufficient quantity or quality. For the later one the best example the foreclosure law issued in Ethiopia in 1998. As per that law any pledged or mortgaged property can be sold by the pledge or mortgagee bank and this law was to apply on all contracts including on those made before the issuance of the law.

Activity

Search for additional provisions of the law that modify contract.
Imagine circumstances that may necessitate the issuance of a law to modify the already existing contract.

The judiciary does not have inherent authority to amend a law. However; the legislator may also expressly delegate its authority to the judiciary. So the judiciary modifies contract not because it finds out that the provision of the contract is unfair but because the legislator orders it to do so. While delegating its power, the legislator should indicate the limit of the delegation and guidelines to exercise such delegation. Art163-1765 is intended to make clear to the judiciary that it does not have inherent power to modify contract. Inherent power to modify the contract belongs to the parties themselves or the legislator. Art.1766-1770 indicates the limits of delegation and guidelines to exercise such delegation.

Activity

Can variation of a contract be delegated to the executive by the legislative?

3.4.2 Judicial Variation of Contract

As indicated above, court may be delegated to vary a contract. The court is normally delegated such power when fundamental change in circumstance affects the object of the contract (Art.1766-1770). However; court may also vary a contract where there is undue influence or lesion that never leads to invalidation of the contract (see G.Krzeczunowicz, 1983, p111). Accordingly; in the following court may modify

➤ *contract between persons having Special Relation:*

Here the phrase special relationship must refer to relations that are recognized by the law such as spouses, relation by consanguinity and affinity, employer-employee, subordinate, lawyer-client, doctor-patient and agent principal, partners in Ordinary Partnership. (See Tilahun, 1989, p. 141). Even it may be argued that Art. 1766 should in practice be limited to family relation only since it is only in family relation that parties do not want to think seriously about the obligation they enter into. Family members normally live by financially supporting each other particularly in countries like Ethiopia. In other types of relation contract is normally entered into by arms length there is no possibility of financially supporting each other: no party can financially rely on opposite party. So cases other than family relations should either fail under defect in consent (undue influence, lesion) or under special provisions of the law (agency, Art.2219 (2), intellectual work, Art.2635 e.t.c). In short Art. 1766 applies when one side of the obligation become onerous than he foresaw due to change in circumstances. There is a Cassation decision that modified lawyer's service fee. In Aster Araya vs. Girma Wodajo case presented to Federal Supreme Court Cassation Division on Hamle 29, 1997, File No. 17191 the court ruled that although courts do not have the power to declare that a contract is non-binding it can reduce amount of fees to be paid.

➤ *Contract with public administration*

A government has legislative and policy making power that may enable it to change the balance of contract in its own favor. Especially in countries like Ethiopia which follow developmental state policy, the government has greater role to manipulate the market. So had it been for Art. 1767 entering into a contract would have been a very risky transaction. So now the government has to either refrain from taking measure that make the obligation of debtor more onerous or must cover the costs of its measure on the debtor.

E.g1 Aba Dagnew Construction P.L.C. entered into a construction contract with Ethiopian Road Authority to construct 180 km asphalt road for birr 360, 000,000(three hundred sixty million). At the time the contract was concluded asphalt used to be imported custom duty free but few months after twenty five percent custom duty taxes was imposed.

E.g2 Aba Tatek Construction P.L.C. and Addis Ababa City Administration entered into a construction contract in 2006 whereby Aba Tatek Construction P.L.C. agreed to construct ten thousand condominium houses at a total cost of birr 1,000,000,000(one billion).The construction was planned to be completed until October 2010. But in 2007 Ethiopian National Bank changed its Monetary Policy and devalued birr by 500%. As a result of such devolution cost of labor and construction material increased by 600%.

Notice that government includes any state agency both in the federal and state level having the authority to make policy or law. Such new policy or new law should not have been foreseen at the time of conclusion of contract. Fuel price revision in Ethiopia, for example, is something expected after every three months.

➤ *Partial Impossibility of Performance*

If obligation was partially impossible at the time of conclusion of a contract, the appropriate governing provision is Art.1813. Thus Art.1768 applies if impossibility occurs after the conclusion of contract and if such impossibility never leads to breach of fundamental provisions of the contract as indicated under Art.1785. For example in a contract of sale of 200 quintals of coffee if hundred of them are damaged the court may require the buyer to receive the remaining hundred and make proportionate payment. Notice that Art. 1748 is conformity with Art. 1768. Likewise the application of Art.1768 should be limited to fungible things so that it should not contradict with Art.1746.

➤ *Time of Performance*

Court may also extend time of performance for a maximum period of six month (Art.1770). This extension has to be given when contract does not exclude the court from giving grace period. Moreover; the court must make sure that such extension of time causes little influence on the creditor and such influence is financial compensable. In other words the court must conclude that cancellation of the contract and giving of grace period will have equivalent consequence on the creditor. The court must also make sure that there is high possibility that the debtor will perform his obligation within in grace period.

Notice that the creditor may deny the debtor to benefit from grace period by unilaterally canceling the contract. (See Art 1774, 1786, 1787)

The prominent example is land lease contract between government and an investor. The investor has to begin construction within certain period and complete it within specified period. Such investor may benefit from Art. 1770.

CHAPTER FOUR

Non-Performance of Contract & Its Remedies

4.1 Introduction

Under this chapter we will discuss, the meaning of non-performance and its remedies. Parties to a contract may provide their own sanctions for failure to discharge obligations. This kind of special terms of contracts will be discussed in Law of Contract II. Thus, the main concern of this chapter is the remedies available under the law. It will thus first with definition of non-performance and the general remedies recognized in most legal systems. Then it will discuss the pre-requisites for invoking the remedies of non-performance, particularly the giving of default notice. Finally, it shall discuss the specific remedies provided under Ethiopian law of contracts. For better and an in-depth understanding, Students are required to read the relevant topics in the reference materials annexed to the teaching material.

4.2 Meaning and General Remedies of Non-Performance

As stated under Article 1731 (1), a contract formed lawfully binds the parties as if it were law, which means that the parties shall perform (discharge) their obligations according to their contract and the law. The rules under Articles 1740-1762 regulate how performance should be made. If performance is made according to the contract and the law, it is deemed valid and releases a party (the debtor) from his obligation.

Thus, non-performance refers to parties failure to perform contractual obligations in conformity with the terms of the contract and the law. It is also called breach of contract. This failure/breach may be total, where a party totally fails to honor the terms of contract. It may also be partial, where a party has performed his/her obligations only partly. It may also relate to delay in performance. Offering performance at a place other than the place agreed up on (place fixed by law) also constitute non-performance. Delivering a thing that does not conform to the contract or delivering a defective thing also amount to

breach of contract. Generally any deviation by a party from the terms of the contract amounts to non-performance.

It is clear that breach by one party affects the interest of the other party, which usually is referred to as the “Victim party”. Thus, it is logical to provide a solution/remedy for the party affected by non-performance. As discussed elsewhere, one function of contract law is to enforce contracts. One way of doing that is to provide remedies for non-performance particularly by sanctioning failures. Otherwise parties would be reluctant to enter in to a contract. It is commented that the rules on non-performance are intended to avoid the deterrence effect of non- performance on contractants for fear that their contract may not be performed; or in other words it is intended to secure contractual transactions.

It is important at this junction to note that the parties may stipulate contractual remedies for breach, for example by incorporating penalty clauses. These kinds of remedies may be enforced by the law (see articles 1886-1895). However, the law of contract provides remedies even if there is no contractual provision to that effect. These are called legal remedies.

The legal remedies for non-performance protect the interest of the party that is affected by non-performance. The interest that is affected by non-performance of the contract is the benefit, which could have been gained, had the contract been performed. Accordingly, the remedies are supposed to put the victim party in the position he would have been had the contract been performed. As such, in most legal systems, the law of contract generally recognizes three remedies. The first one is the enforcement of the contract. This remedy is designed to satisfy the victim party by enforcing the terms of the contract. It may be done either by compelling the debtor (failing party) to perform his/her obligations or by authorizing the creditor (victim) party to perform the debtor’s obligation at the cost and expense of the debtor. The former is usually referred to as forced performance, while the latter is called substituted performance.

The second remedy available to the creditor is cancellation of the contract. This may take place either court judgment (judicial cancellation) or unilateral act of the victim party. Unilateral cancellation applies in exceptional circumstances. In all other cases, the victim party may apply to court for declaration of cancellation and it is the court that has the ultimate power to declare cancellation or not. The effect of cancellation is to put the parties the position which would have existed, had the contract not been made. Thus, the Victim party can claim back what he has paid or delivered. In addition to this, he may claim compensation.

The third remedy is damages (compensation). The victim party can claim compensation for the damage or loss he has incurred as a result of non-performance. This remedy may be claimed in addition to either of the above remedies or independently.

In applying any of or a combination of these remedies, one should take in to account not only the interest of the creditor (victim party) but also that of the debtor (failing party), for example the debtor can not be required to pay excessive compensation, or his liberty be deprived.

In addition, the law generally requires the party affected non-performance to fulfill certain criteria before resorting to the remedies of non-performance. The crucial prerequisite is that the victim party shall give default notice to the debtor, demanding the later to perform his/her obligations within a reasonable time. The purpose is to obtain voluntary performance before going top courts. Of course, there are certain circumstances, where the giving of default notice is not necessary.

With this general background, we will discuss the remedies provided under the general provisions of Ethiopian contract law as well as the pre-requisites for invoking these remedies.

4.3 General remedies of non-performance under Ethiopian law

The general provisions of Ethiopian law contract recognize three types of remedies of non-performance. These are stipulated under two sub-articles of Article 1771 as the effects of non-performance. It reads as follows

- (1) Where party dose not carry out his obligations under the contract the other party may, according to the circumstance of the case, require enforcement of the contract or the cancellation of the contract or in certain cases may himself cancel the contract.*
- (2) He may in addition require that the damage caused to him by nonperformance be made good*

Accordingly, the remedies of non-performance are (1) the enforcement of the contract, (2) Cancellation, and (3) Compensation /damages. As provided under the above provision, they are alternative remedies. So, the victim party may choose any of the remedies based on the circumstances. However, when we read this provision together with article 1790, we understand that the third remedy, i.e., compensation, can be claimed as independent remedy or additional remedy. Thus, damages may be claimed independently (for example where performance is delayed) or in addition to enforcement or cancellation. One crucial question is under what circumstances each of these remedies would be appropriate. Before addressing these issues, it is important to discuss the pre-requisites for invoking these remedies.

4.3.1 The pre-requisites for invoking the remedies of non-performance

As indicated earlier, before resorting to the remedies of non-performance, the victim party shall put the other party in default by giving him a notice. Following, we will discuss the application of this pre-requisite under Ethiopian law as covered under articles 1772-1775.

Article 1772 provides the general rule that the giving of default notice is a pre-condition for invoking the remedies of non-performance. It reads:

A party may only invoke non-performance of the contract by the other party after having placed the other party in default by requiring him by notice to carry out obligations under the contract.

As put by some commentators, this provision is self-explanatory. It clearly states that the giving of default notice is a necessary condition for invoking the remedies of non-performance. Default notice is demanding the debtor to perform his/her obligation within a certain time limit. It has a number of functions including that of reminding the debtor and reducing litigation. Though contested, it may also lead to the consequences stated under Article 1758, i.e., transfer of risk. However contested its functions may be, the giving of default notice is, as a matter of rule, a necessary pre-condition for invoking the remedies of non-performance stated under article 1771.

A very important questions in this respect are when should default notice be given and in what manner. Another question how much time should the victim give to the debtor to perform his obligations. These issues are addressed under Articles 1773 & 1774.

Art. 1773. – Form and time of notice

- (1) Notice shall be by written demand or by any other act denoting the creditor's intention to obtain performance of the contract.*
- (2) Notice may not be given unless the obligation is due.*

There is no formal requirement for default notice & it may be given in any form: in writing, orally or clear conduct. What is crucial is an unambiguous, clear communication/expression of the creditor's intention to obtain performance of contract.

Regarding time, sub article 2 says default notice cannot be given before the due date of the obligation. Normally, the creditor can demand performance only if the obligation is

due and it is logical to say that default notice can be given only in respect of such obligations.

Article 1774 stipulates that the creditor shall fix a period of time within which he accepts performance, or after the expiry of which he will not accept performance. And this period of time must be reasonable to allow the debtor to discharge his obligations. The Provision reads as:

- (1) The creditor may in the notice fix a period of time after the expiry of which he will not accept performance of the contract.*
- (2) Such period shall be reasonable having regard to the nature and circumstances of the case.*

One question that arises in this respect is What is the criteria to determine whether the time fixed in the default notice is reasonable or not? Such reasonableness shall be determined taking into account the nature and circumstance of the case. Such circumstance, in the case obligation of delivery, may include whether the thing to be delivered is in the hands of the debtor or whether it is to be manufactured in the future and the time needed for its manufacture.

Exceptions to the rule

As a rule, the law requires the creditor to give default notice to the debtor according to the rules of 1772-1774 in order to invoke the remedies of non- performance. However, there are exceptional circumstances where the creditor can resort to the remedies without giving default notice to his debtor. These circumstances are provided under Article 1775. The caption of article 1775 stated as “ notice when unnecessary” suggests that the remedies can be applied without default notice. Article 1775 reads as follows;

Notice need not be given where:

- (a) the obligation is to refrain from certain acts; or*
- (b) the debtor assumed to perform an obligation which the contract allows to be performed only within a fixed period of time and such period has expired; or*

- (c) the debtor has declared in writing that he would not perform his obligation;*
or
(d) it is agreed in the contract that notice shall not be required and the debtor shall be in default upon the expiry of the time fixed.

These provisions provide four cases where the creditor invokes the remedies of non-performance without giving default notice.

The first case indicated in sub (a) is where the obligation of the debtor is an obligation not to do, i.e., negative obligation. In this case, a non-performance results from the debtor's doing of the prohibited act. Since, the non-performance cannot be reversed /rectified by notice, the giving of default notice serves no purpose, and thus becomes useless/unnecessary.

The second case indicated in sub (b) is when the obligation of the debtor is such that it may be performed only within a fixed time and the debtor fails to perform within such time. Here the nature of the debtor obligation is a determining factor. It may be inferred from the contract that any performance after the expiry of the time fixed is useless for the creditor. The time may be the most essential element of the contract, i.e., creditor has entered into the contract expecting performance within the time fixed. Assume, you have ordered cakes and drinks for the celebration of your birthday, and the debtor has promised that he /she will deliver them on time for the celebration. Here time is crucial. The contract does not allow late performance. Thus, if the debtor fails to perform his obligation within the time fixed, the creditor need not give default notice simply because performance is no more necessary. The creditor may invoke the remedies of non-performance without giving default notice.

The third case indicated in sub (c) is when the debtor communicates his refusal to perform in writing. This is sometimes referred to as anticipatory breach of contract. It is important to distinguish between refusal communicated in writing and others. The debtor's oral refusal to perform does not relieve the creditor of his obligations to give

default notice. It is only when the refusal is communicated in writing that the creditor be relieved of the pre-requisite of default notice. What do you think is the reason?

The last case indicated in sub (d) when the parties have in their contract excluded the giving of default notice. This is a recognition and implementation of freedom of contract; the parties are free to disregard/exclude the provisions of article 1772, thus a non-performing party is in default as of the expiry of the time fixed for performance with out need for the creditor to give a default notice. Thus, the creditor may invoke the remedies of non-performance immediately.

To conclude, a party affected by non-performance shall put the debtor in default before he invokes the remedies of non-performance (1771) except in the four circumstances stated under article 1775. In the following sections we will discuss the remedies of non-performance outlined above. To remind you, these remedies are (1) enforcement of the contract, (2) cancellation of the contract, and (3) damages/compensation. These remedies are applied considering different circumstances. The circumstances, which determine the application of these remedies, have been provided in the preceding provisions starting 1776-1805.

4.3.2 Enforcement of Contract

The enforcement of contract is sometimes referred to generally as literal performance or specific performance. Enforcement takes place through court order. Its purpose is to allow the creditor the benefit he expects from performance of the contract. It may take place either through Forced performance or substituted performance. We shall discuss them separately.

Forced performance

The word ‘forced performance’ implies the compelling of the debtor to discharge his obligation. It refers to performance directly imposed on the debtor through the execution

process. Thus, it take place through court order/judgement. However, it is important to note that the court may not order forced performance merely because the creditor has requested. The court has the power to order forced performance or decline considering the requirements set by the law. Article 1776 provides the conditions for ordering forced performance or otherwise. It reads as follows;

Specific performance of a contract shall not be ordered unless it is of special interest to the party requiring it and the contract can be enforced without affecting the personal liberty of the debtor.

Pursuant to this provision the requirements for the application of forced performance are (1) the creditor's special interest, and (2) the preservation of the debtor's personal liberty. These requirements are cumulative not alternative.

The first thing that the court shall determine is whether performance is 'of special interest to the creditor'. The presence of special interest can be inferred from the importance of the obligation required to be discharged towards the creditor and its possibility of being discharged otherwise. If forced performance has no special advantage to the creditor, then the court may not order it.

Then, the court shall consider whether forced performance affects the personal liberty of the debtor. As discussed elsewhere contracts are to affect the proprietary interest of parties not their liberty. A person cannot be deprived of his liberty for failure to discharge contractual obligations. Thus, if forced performance affects the personal liberty of the debtor, the court shall not order it.

The two conditions must be fulfilled for the court to order forced performance. Here are some examples. Assume, a monopolistic entity which supplies vital goods (e.g water or electricity) or services (eg postal or telecommunication) to a customer cuts of its supplies. In this case the goods or services are so essential, and the customer cannot get them from other sources. Thus, it may be said forced performance is of special interest to the creditor, i.e., customer. At the same time, order the entity to provide these goods or

services cannot deprive the entities liberty (as only physical persons enjoy liberty). So, in this case the court may order forced performance. Another example: an artist who has agreed to present his songs on a certain occasion in consideration of payment fail to discharge at the agreed time. It may arguably said, the contract is entered in to in consideration of his talents and that his performance of the obligation is of special interest to the creditor. However, to order the artist to sing with out his will amounts to deprivation of his liberty. Thus, in such cases, forced performance cannot be ordered even if it is of special interest to the creditor

Substituted Performance

In addition to forced performance, the law provides substituted performance as a remedy for non-performance under articles 1777 and 1778. Substituted performance is made at the expense and cost of the debtor.

Art. 1777. –Obligation to do or not to do.

- (1) The creditor may be authorized to do or to cause to be done at the debtor's expense the acts which the debtor assumed to do.*
- (2) The creditor may be authorized to destroy or to cause to be destroyed at the debtor's expense the things done in violation of the debtor's obligation to refrain from doing such things.*

Pursuant to sub-article 1 the court may, upon creditor's application, authorize the creditor to do or to employ third person to do what the debtor has failed to do at the cost and expense of the debtor. Pursuant to sub-article 2 the creditor may be authorized to destroy or to employ third person to destroy the things done by the debtor in violation of his obligation not to do such things. The cost and expense of such destruction shall be borne by the debtor. Court authorization is, however, indispensable for substituted performance. With out such authorization, the creditor can not recover the costs and expenses from the debtor. Articles 2330 and 2333 on law of sales are in the same line with concepts under Arts.1776 and 1777(1). Under Art. 2330, the buyer may not demand forced performance in conditions where purchase in replacement is possible for the buyer. The same is true

for the seller when the buyer refuses to take delivery and pay the price. Here, the seller may not demand forced performance in circumstances a thing in respect of which a compensatory sale is imposed by custom.

Sub article (2) of this provision confirms substitute performance of obligation not to do. The creditor can destroy or get destroy the things made in violation of the obligation to refrain from doing such things with court authorizations at the debtors expense.

If for instance, Ato Belay fails to dig a well, the debtor can have dug the well by any one at Ato Belay's expense up on court authorization.

If Ato Belay's obligation was to refrain from erecting a building and fail to do so by erecting a building, the creditor can have the building destroyed or destroy himself. Such act shall be made upon court authorization at the expense of the debtor.

Article 1778 also deals with substituted performance in respect of obligation to deliver fungible things. It reads:

Where fungible things are due, the creditor may be authorized by the court to buy at the debtor's expense the things which the debtor assumed to deliver.

Where the fungible things are due the debtor may have substituted performance be made up on court authorization to buy the thing at the debtors expense.

If Mr. A fail to perform his obligation of delivering 500 quintal of sugar in due time, the creditor may buy the agreed amount of sugar from the market upon court authorization. The increased cost due to non-performance of the first contract of the sugar would then be covered by the debtor if any.

The provisions of Articles 1779-83 also are aspects of substituted performance but they apply in different circumsatances; when the debtor is ready to perform but unable to discharge his obligation either because the creditor refuse to accept performance or the

creditor is unknown or uncertain or where delivery cannot be made for any reason personal to the creditor. In all these situations, the debtor has no fault; ready to perform but prevented from performing. Thus, the law allows him to discharge his obligations by depositing the thing or money at such place as instructed by the court. This will relieve the debtor from his obligations. However, the deposit shall be made upon court order and the debtor shall obtain a court confirmation as to the validity of the deposit.

4.3.3 Cancellation

Cancellation is another remedy for non-performance. Cancellation brings an already existing contract to an end. What is the difference between invalidation and cancellation?

Cancellation may take two forms-judicial or unilateral. Normally cancellation results from court order. However, there are exceptional circumstances where the party affected by non-performance may unilaterally declare cancellation with out the need to go to court.

A) Judicial Cancellation

As a rule, cancellation of a contract can take place through court action. The party who claims cancellation as a remedy of non-performance shall bring an action to that effect. Articles 1784 and 1785 deal with the conditions under which a court may order the cancellation of the contract. Article 1784 reads:

A party may move the court to cancel the contract where the other party has not or not fully and adequately performed his obligations within the agreed period of time.

A party affected by non-performance may apply to a court requesting it to order the cancellation of the contract. However, it is important to note that a party has applied for cancellation does not necessarily mean that the court will order cancellation. The court may order the cancellation of the contract or not after her the parties and considering the circumstances of each case particularly in light of the conditions stated under Article

1785. This in short means that not all non-performances will lead to cancellation. Article 1785 reads:

The court does not cancel a contract when an action is brought to this effect for simply there is non-performance of a contract. The court has mandatory obligation to consider the good faith of the parties. Article 1785 has put the importance of good faith to guide the court in settling on either to order cancellation or not.

Art. 1785. – Good faith.

- (1) In making its decision, the court shall have regard to the interests of the parties and the requirements of good faith.*
- (2) A contract shall not be cancelled except in cases of breach of a fundamental provision of the contract.*
- (3) No contract shall be cancelled unless its essence is affected by non-performance and it is reasonable to hold for such reason that the party requiring cancellation of the contract would not have entered into the contract without the term, which the other party has failed to execute being included.*

This article instructs courts to consider a number of things before it render its decision. The court is required to consider good faith and the interest of the parties. The court is particularly prohibited from declaring the cancellation of the contract where the breach is not fundamental. The burden of proof rests on the party who requires cancellation. The party requiring cancellation shall establish that his interest is substantially affected by the failure of performance. Minor deviations from the terms of the contract may not be sufficient to cancel the contract. For example, the debtor's delivery of a quantity less than the quantity agreed up on might not always lead to cancellation. If the discrepancy is small, it is better to resort to other remedies than canceling the contract. In the same way, if the debtor who has delivered a defective thing agrees to deliver a thing free of defect, it would be a violation of good faith for the creditor to refuse to accept; and thus the court may decline cancellation.

B) Unilateral cancellation

Unilateral cancellation connotes cancellation of a contract by one party without going to court of law. The law recognizes & gives effect to the automatic right of parties to cancel contract in certain circumstances. The circumstances under which a party affected by non-performance can unilaterally cancel a contract are dealt with under articles 1786-1789. We have such four circumstances, and discuss them separately.

(a) The first case, as indicated under article 1786, is where there is a cancellation clause in the contract. Article 1786 reads as:

A party may cancel the contract where a provision to this effect has been made in the contract and the conditions for enforcing such provision are present.

This provision is a reaffirmation of freedom of contract. The parties can incorporate a cancellation clause in their contract. Thus, the law recognizes unilateral cancellation made according to the cancellation clause. It relieves parties from going to court and also avoids litigation and court workload.

(b) the second cases relate to cases where the debtor has failed to honor certain time limits. It is important to note that not all lapses of time limits would lead to unilateral cancellation. Article 1787 reads:

A party may cancel the contract where the other party has failed to perform his obligations within the period fixed in accordance with Art. 1770, 1774, or 1775 (b).

According to this provision, the debtor's failure to perform his obligations within the time limits set by the cross-referenced articles 1770 (i.e period of grace), 1774 (I.e period fixed in the default notice), and articles 1775 (b) (obligations that are such that they must be performed within the time fixed) would entitle the creditor the contract unilaterally.

(c) the third case is where performance becomes impossible. Article 1788 reads as:

A party may cancel the contract even before the obligation of the other party is due where the performance by the other party of his obligations has become impossible or is hindered so that the essence of the contract is affected.

This provision envisages situation where performance was possible at the time of the making of the contract but which becomes impossible afterwards. This is usually referred to as intervening impossibility, and different from that found under article 1715. The impossibility under article 1715 affects the validity of the contract and its remedy is invalidation. However, the impossibility under article 1788 occurs after formation but before performance, and as such affects performance, and its remedy is cancellation. Assume the debtor has agreed to deliver a specific object which existed at the time of the contract. However, the thing is destroyed beyond repair before the debtor delivers the thing. It now becomes impossible for the debtor to perform his obligation. Thus, the remedy for the creditor is to unilaterally cancel the contract. The creditor can do this even before the due date simple because there is no point in waiting the arrival of the due date. However, the impossibility shall affect the essence of the contract as in the example above.

(e) the last case where unilateral cancellation can be invoked is the case of anticipatory breach of contract. Article 1789 reads as;

- (1) A party may cancel the contract where the other party informs him in an unequivocal manner that he will not carry out his obligations under the contract.*
- (2) The party who intends to cancel the contract shall place the other party in default and the contract shall not be cancelled where the party in default produces with in fifteen days securities sufficient to guarantee that he will perform his obligations at the agreed time.*
- (3) Notice shall not be required and the contract may be cancelled forthwith where a party informs the other party in writhing that he will not perform his obligations.*

When one of the parties unambiguously communicates his refusal to perform, the other party may unilaterally cancel the contract if he chooses. However, the party intending to cancel the contract shall give default notice to the refusing party. The refusing party may prevent the cancellation of the contract by furnishing, within fifteen days, sufficient security to guarantee that he will perform his obligations as agreed. So, here we expect a change of mind of the debtor; but not mere change of mind but completed with the furnishing of securities. Nevertheless, if the refusal is communicated in writing, the party intending cancellation is not required to give default notice, and he may immediately cancel the contract.

To conclude, the Ethiopian law of contract provides cancellation-judicial or unilateral-as one remedy for the party affected by non-performance. By so doing, the contract comes to an end. What then is the consequence of cancellation? Articles 1815 and following provisions deal with this question. The most important consequence is that the parties shall be reinstated in the position, which would have existed, had the contract not been made. The implication is that what ever the parties have performed in pursuance of the contract has no effect, and what they have paid or delivered shall be returned. Thus, by canceling the contract, the party affected by non-performance may claim back what he has paid or delivered. However, this may not be sufficient to satisfy him because he may have lost a benefit he could have gained from performance. In this case, he may claim compensation in addition to cancellation.

4.3.4 Damages (Compensation)

Damages/Compensation is another remedy for a party affected by non-performance. The Ethiopian law of contract provides damages/compensation as a remedy under articles 1771 (2) and articles 1790-1805. The purpose of compensation for non-performance is to put the victim party in a position he would have been had the contract been performed.

The reading of 1771 (2) suggests that damages/compensation is an additional remedy. However, if we read this provision cum 1790, it becomes clear that under Ethiopian law

damages can be claimed as an additional or alternative remedy. Article 1790 dealing with damage arising out of non-performance reads as:

(1) Apart from or in addition to the enforcement or cancellation of the contract, a party may require that the damage caused to him by the other party failing to perform his obligations be made good.

(2) Without prejudice to the provisions of the following articles, the provisions of the Chapter of this Code relating to “Extra-contractual Liability” shall apply where the damage is made good under sub-art. (1) (Art.2090-2123).

Sub-article 1 of this provision clearly states that damage can be claimed as alternative to enforcement and cancellation or additional to them. In addition, the provision states that a party is entitled to compensation only if he /she has incurred loss or damage as a result of non-performance. The central notion here is no loss, no compensation. So, a party has to show that he has incurred loss/damage plus that this loss/damage resulted from non-performance. Sub-article 2 instructs courts to apply the relevant provisions of extra-contractual liability to cases where damages are claimed.

Article 1791 sub-article 1 provides that “ *the party who fails to perform his obligations shall be liable to pay damages notwithstanding that he is not at fault*”. This provision suggests that compensation shall be due where there is non-performance even if the debtor is not at fault. It is a very important provision because, the law says the absence of fault cannot be a defense against the claim for compensation (at least in principle). However, it shall be read in conjunction with sub-article 1 of article 1790, which suggests that not all non-performances lead to the award of compensation. The creditor must show that he has incurred loss or damage as a result of non-performance. If he shows that, he is entitled to compensation the amount of which shall be assessed according to the provisions of 1799-1805.

So, it will be important that defenses are available for the party required to pay compensation. He has basically two defenses. The first defense is the absence of fault. As a general rule, the absence of fault is no defense to the claim of compensation (see article

1791 (1)). However, there are certain exceptions to this. We find them under articles 1795 and 1796 where in the plaintiff has to prove fault or grave fault on the part of the debtor. This implies that if the plaintiff fails to prove that the debtor has committed fault or grave fault, as the case may be, he will not succeed in claiming compensation. The other defense for the debtor is force majeure. 1791 (2) states that “ [the debtor] *shall not be released unless he can show that performance was prevented by force majeure*”. The *acontrario* reading of this provision suggests that the debtor is released of payment of compensation if he can show that performance was prevented by force majeure. Article 1792 provides the criteria for determining what constitutes force majeure, while article 1793 provides list of specific cases that constitute force majeure. On the other hand 1794 provides list of specific cases that do not constitute force majeure. However, it is important to closely look at the extent to which the parties may include or exclude an event as force majeure. It is also important to note force majeure that occurs after the debtor is put in default cannot release him of his obligation to pay compensation (see 1798). In addition, the law imposes obligation on both parties to minimize the effects of non-performance (1797 & 1802).

To conclude, a party who has incurred loss or damage as a result of non-performance may claim compensation by showing his loss/damage and that this is the result of non-performance. The purpose of such damage is to put the victim party in a position would have been had the contract been performed. Normally, the creditor is not expected to prove that the debtor was at fault. However, in certain circumstances he has the duty to show the fault or grave fault of the debtor (see 1795 & 1796). If he fails to do that he will not succeed in claiming compensation. The crucial defense for the debtor is force majeure; however, force majeure occurring after being in default is no defense. In addition, the debtor may contest the amount of damages awarded.

Once, the liability of the debtor for damage is determined, the next question is to assess the amount of compensation (damages) to be paid to the creditor. Compensation is to be assessed according to the rules of Articles 1799-1805. The basic principle is that compensation shall be equal to the damage/loss which non-performance would normally

cause to the creditor in the eyes of a reasonable person (see Art.1799 (1)). Thus we have objective criteria for assessing damage, and the question not how much a particular creditor has lost but how much a reasonable person as a creditor would have lost as a result of non-performance. However, there are lots of exceptions in the provisions that follow.

A very important point to note is that in case of money debts, a creditor is entitled to compensation at the rate fixed under 1803 & 1804 without the need to prove the extent of loss/damage he has sustained as a result of non-performance. However, the creditor may claim more compensation if the compensation to be assessed according to 1803 & 1804 are not adequate for the greater damage/loss he has sustained (see Article 1805).

Further Reading Materials

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