Damages (Article 1790)

- Damages are the principal remedies of non-performance under Ethiopian law.
- Both enforcement and cancellation can be insufficient remedies for non-performance. It is proper to reestablish the balance of the contract upset by the failure or the necessity to resort to forced performance by payment of damages.
- Are both independent and collateral remedies
- The scope is restricted to what is necessary to repair (to make good)

• When are damages due? (Articles 1791-1798)

- Whether at fault or not a party who failed to perform his obligation is liable to make damages.
- Ethiopian law follows irrespective of fault principle.
- That is what makes it different from extra-contractual liability which has fault as the major element. And the proof is easier in contracts than extra-contractual liability.
- Under contract law the aggrieved party has to show:
  - Existence of the contract
  - The fact of non-performance
  - Injury/harm

• **Force majeure:**

- The occurrence must be unforeseeable: any event that could not normally, reasonably be foreseen. If it can be foreseen, then force majeure cannot be invoked as a defense
- The occurrence must be insuperable/overwhelming: it must be absolutely and not only normally impossible to perform the obligation. Where performance simply becomes onerous or costly force majeure cannot be a defense.
- The standard of reference in both cases is 'average person placed in the situation of the defaulting debtor.
- The two elements are cumulative.

What is the difference between force majeure and impossibility?

- Impossibility is a ground of unilateral cancellation and the aggrieved party may resort to damages as well.

- 1792 is applicable not only for mere impossibility but unforseeability. So impossibility and unforeseeeability are cumulative requirements to raise the defense of force majeure.

- **Cases of Force majeure: Art. 1793**
  - illustrative but non-limitative list of cases of force majeure
  - Article 1794 absence of force majeure
  - Damages even in case of force majeure Articles 1797-1798)
    - Where the debtor is negligent and does not inform the creditor the reason why he di not perform his obligation. In this case the debtor has to pay the prejudice suffered by the creditor due t that failure to inform the situations for the creditor. Full damages are, therefore, not necessarily due coz the court has to identify the damages that arise from absence of information.
    - The second case where damage will be due even n case of force majeure is where the debtor is already in default and force majeure occurred after.

- **Contractual Fault (Articles 1795-1796)**
  - In contract law obligation of result is the rule and in case of uncertainties it is for the defendant (debtor) to establish the applicability of the exceptional provisions. And the claimant has to prove fault of the defendant (debtor).
  - In these two cases the creditor needs to prove the fault of the debtor.
  - These are cases of:
    - Obligation of means
    - Grave fault

Calculation of Damages (Arts.1799-1805)

- Once the liability for the debtor is determined the next question is the amount of compensation to be paid to the creditor.
- Two types of damages:
  - Direct Damages:
    - Damages a reasonable, ordinary, and prudent person would expect the non-breaching party to suffer from the breach.
  - Consequential Damages:

- Damages are those beyond direct damages.
- Usually are the big damages the victim party wants to get and the breaching party resists.
- Examples: loss of profit, loss of use of any work, loss of any contract because of delay and cancellation
- Reduced value because of design or quality

Hadley rule: (Hadley v Baxendale):

Facts

- Hadley (plaintiff) has a milling business. And Hadley's (plaintiff's) mill suffered a broken crank shaft and the business needed to send the broken shaft to an engineer so a new one could be made. In the meantime, the meal could not operate.
- Hadley (plaintiff) asked Baxendale (defendant) to carry the shaft to the engineer. Baxendale agreed and told Hadley that it would be delivered the next day if it received the shaft before noon.
- The delivery of the shaft was delayed by the negligence of Baxendale, so Hadley did not receive the new shaft as early as they should have. The business lost profits as a result.
- So, Hadley sued Baxendale for breach of contract and lost profits.

Decision of Lower Courts:

- Lower Court Jury: Awarded Hadley 25 pounds.
- The Court of Exchequer reversed and ordered new trial, award should not include lost profits.

Issues:

Under what Circumstances should the breaching party be held liable for consequential damages?

Holding:

After breach, the injured party may recover damages reasonably considered to arise naturally from the breach of contract or damages within the reasonable contemplation of the parties at the time of contracting.

So the Hadley Principle is stated as follows:

- When two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be *such as may fairly and reasonably have considered as either arising naturally, i.e. according to the usual/normal course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.* That is to say the debtor is only liable for the damages foreseen, or which might have been foreseen at the time of making of the contract.
- *If special circumstances under which the contract was made were communicated to the debtor, and thus known to both parties, the damages resulting from the breach of such contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from breach of contract under the special circumstances so known and communicated.*
- But if the special circumstances were wholly unknown to the breaching party, he, at the most, could only supposed to have had in his contemplation *the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.*
- *Thus, the loss of profits cannot reasonably be considered such as a consequence of the breach of contract as could have been fairly and reasonably contemplated by both parties when they made this contract.*

Ethiopian Law

- Ethiopian Civil Code got an inspiration for *Hadley rule* and is not based on French Law/theory of damage. “In order to decide how much must be paid as damages, there is no need to start, as one does in continental legal systems, from the actual injury that the non-performance caused to the creditor. One begin by asking, more abstractly, *what injury one would normally expect from the failure to perform the contract.” (Rene David).*

French Civil Code: Where his nonperformance is not intentional, the debtor is liable only for the damages that were foreseen or could be foreseen at the time of the contract.

George Krzeczunowick: Does not agree on Renpe David. Read Page: 149-150

- Article 1799: damage shall be equal to the damage which non-performance would normally have caused to the creditor in the eyes of a reasonable person.
- Therefore, the basic principle under Ethiopian Law 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.
- So the question is not how much the particular creditor has lost but how much a reasonable person as the creditor would have lost as a result of non-performance.
- A damage is considered “normal amount of damage” if it is possible to assume reasonably that such circumstance has been contemplated by the parties as the basic factor in the making of the contract.
- The rationale behind of this rule: Only such contemplation before the contract is finalized is enables a party to change the terms or withdrew if the risk involves seems to heavy.
- So the criterion is an objective one. What injury one would normally expect from the failure to perform the contract?
- In determining the amount several factors such as the professions of and the relations between the parties and any circumstance known to the debtor which surrounds the making of the contract shall be taken into consideration.
- Examples:
    - Employee (A), without good cause, terminates the contract of employment he had with the Employer (B). He is normally liable for what is foreseeable damages he has caused to (B). If A is not a hard-to-get type of expert, it is not normally *foreseeable* (B) will suffer continuing harm as a result of being unable to replace (A). So, A is not liable for this harm.
    - What is a is a rare expert and both parties knew that it is hard to replace him?

- In doing so damages under general contracts departs from the principle of damages in extra-contractual liability.
- Article 2091 of the Code on Torts states that *damages due by a person legally declared to be liable shall be equal to the damage caused to the victim by the act giving rise to the liability.* Accordingly, the provision does not limit the amount of damage to only foreseeable harms. In doing so Art. 1799(1) departs from the *principle of equivalence* adopted under Art. 2091 of the Code.
- But there are exceptions to this rule. these exceptions are a return to the principle of equivalence
    - Lesser damage (Art. 1800): Where the debtor can show that the amount calculated under Art. 1799 is greater than the damage caused to the creditor, then the debtor will be liable for lesser damage, the damage actually caused to the creditor.
    - Greater Damage (Art. 1801): the amount of damage shall be equal to the damage actually caused to the creditor when the debtor on entering into the contract was informed by the creditor of the special circumstances owing to which the damage is greater.
- 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).