Getahun Walelgn Dagnaw
LL.M International Business Law (CEU)
LL.M International Economic Law (Kyushu University)
Bachelor of Laws (LL. B) Haramaya University

Formation of Contracts

- Formation involves criterion or yardsticks which state uses in order to determine whether it has to enforce the agreement of parties. The state will check whether the parties have made a law that binds them.
- The essential validity requirements for the formation of a valid contract are:
  - Consent
  - Capacity
  - Object and
  - Formal requirements
- Capacity:
  - Is the ability to enter into juridical acts.
  - Article 1: a human person is subject of rights and duties from birth to death. But cannot exercise the rights and discharge duties from that moment.
  - Article 192: Capacity is the rule and incapacity is the exception
  - Article 198: Minority
  - Articles 339 & ff: Judicially Interdicted persons
  - Articles 380 & ff : Legally interdicted persons
- Consent: 1679 & 1680
  - A true and free will of a party to enter into a contract/transaction
  - It should be free from any of the vices of consent
  - The basis of contract law should be based up on the free agreement of the parties
  - A contract should be free from behaviors that may take away the free judgement of the parties to that transaction.
  - These behaviors are mistake, fraud, duress, reverential fear, threat to exercise a right, undue influence etc..
  - Terms and conditions of the contract:
    - An agreement on every detail of the contract is required
      - Price
      - Obligations of the parties
      - The time the contract will have effect
      - Dispute resolution mechanism
- **Meeting of mind**: there should be meeting of mind: "*consensus ad idem*" the minds of the *offeror* and the *offeree* should meet up on the common object of the contract.
  - there should be objective appearance of offer and acceptance.
- **Intention to be bound by:** there should be an intention to be bound by the promise

- any intention of a party that is not intended will never form part of the contract.
- Meeting of mind coupled with *intention obligandi* differentiates legal contracts from social contracts/simulated contracts.

❖ Article 1679: emphasizes the overriding importance of consent.
❖ There are no legally binding contract in the case of simulated contracts or where the declarations are not intended seriously.
  - Man promises to give his wife money monthly for household expenses
  - Father promises his son for award if he scores good grades
❖ Articles 1680 and 1695:
  - There are two theories with regard to declaration of intention:
  - Theory of will:
    - Search for the real intention of the parties
    - Known as French theory
    - Moral grounds: a man should not be tied to an agreement for which he didn't do it by his free will.
    - We have to search for the real intention of the party and not what he has expressed.
  - Theory of declaration of will:
    - A contract is made, completed, not by agreement of wills, but by agreement of declaration of wills.
    - in order to decide the cases brought before the court, the court must look, first of all, at the parties' expression.
    - Based on social grounds: there cannot be contract, trade or order if men are not cannot rely on their expressed declarations.
    - This is Swiss Theory
    - According to this theory, one should not discover what one of the parties internally desired: the external manifestation of his intentions, are what are legally significant. Only such external signs or manifestation are considered in order to determine whether or not a contract has been formed.
    - Ethiopian Law follows this theory.

Do you think this expressed consent has to be on each and every detail of the contract?

  - See Article 1695(2): only declaration of intention on the most important elements of the contract is necessary.
  - So under Ethiopian Law declaration of intention or manifestation of will is legally significant and one shall not try to discover the internal desire of the party. Article 1733 confirms the theory too.

But what if there is a discordance between true will and declared will of the parties? Is there a valid contract?

- Theory of Declaration of will: Still there will be a contract but the same can be invalidated subjected to Article 1703 and or can be subjected to interpretation as in
- Theory of Will: there never was a genuine contract and damages are due only in case of tort.

What if someone signs on a blank paper later to be filled by a trusted friend?

- Do you think Article 1680 be applicable? NO
- The person signing should prove that he has signed prior to the filling.
- The other party: prove that the filling is in accordance with prior oral agreement.

❖ An agreement which is not expressed is of no effect. Concordant declarations without true agreement create (complete) a contract but may be open to avoidance. Examples:
  - I buy “your car” thinking it is the one you are driving every day. Your car is another car. The contract is complete subject to paragraph two.
  - Signing a contract without reading it or signing a contract in a foreign language without translation. The contract is complete subject to paragraph two.

❖ From the above example: Ethiopian law is a compromise between the two theories. Declarations alone can create a contract but the contract may be invalidated on the grounds of different vices of consent.

Article: 1680 (2): Reserves and restrictions…

❖ Contracts are not agreements of interior wills, but of expressed declarations, and they can never be made of what is not expressed.
❖ Reservations or restrictions stated but not communicated to the other party, remain of no avail.

Communication of Consent

❖ When a dispute arises there two things the court will consider.
  - Is there a contract?
  - If there is a valid contract, what are the terms of the contract?

❖ The rationale: contract law is based on the idea of enforcing agreements that the parties made freely.
❖ For this offer plays an important role.
❖ One party makes an offer or arrangement and the other accepts. This can be called a 'concurrence of wills' or 'ad idem' (meeting of the minds)

Offer

- Manifestation of will to enter into a contract
- The question what amounts to offer is important for several reasons:
  - If there is no offer there is nothing to be accepted
  - To know what are the terms of the offer
- Offer has to be:
  - Certain
  - Communicated
    - Specific person
    - Group of persons
    - Public
      - What if more than one person performs the act?
        - First in time
        - To all in equal shares
        - Fully to each
  - Unconditional
  - Distinguished from an invitation to treat

Form of Offer & Acceptance

- Offer/acceptance can be made in any form
  - Orally
  - In writing
  - By sign normally in use: 1688
  - Conduct: Public Phone, city bus stopping at a “Bus Stop”, Coca Cola auto retailer
- There should not be any doubt as to the party’s agreement/it should be unequivocal
- Exception to the freedom of form
  - Offer may stipulate special form, then the other should adhere to that.
  - Law provides special form

Offer distinguished from Invitation to treat

- An offer is different from a mere invitation to treat.
- Example sending price lists is not an offer:
  - No intention to be bound by
  - It doesn't indicate rights and obligations
  - In practice it is advertisement
  - Creates a problem of multiple acceptance

Acceptance

- Is positive response to the terms of the offer
- It could be:

- Orally
- In writing
- By sign: auction
- Conduct: performing the act

❖ Defective Acceptance

❖ Silence as an Acceptance:

- Basis of contract law is voluntary agreement of the parties
- The law requires some affirmative indications of assent from the offeree
- An *offeree* is not allowed to word his offer in such a way that the offeree has to act to avoid being bound
- Silence is not acceptance, in principle:
  - Legal relationship cannot be established on equivocal terms
  - It is not certain whether the offeree is accepting it or rejecting it and that shouldn't be considered as tacit acceptance
  - Ethiopia is following theory of declaration
  - Answering all offers would make any active man’s life unbearable.
  - Nobody needs to bother answering offers.
- Exceptions to the rule:
  - When it is duty to accept by the law: a person is bound in advance by a concession granted by authorities to enter into a contract on terms stipulated in advance.
    - Vital services and
    - Vital supplies to the community (water, electricity, telephone,
    - Rationale:
      - the vital nature of the services and supplies involved
      - monopolistic situation that the concerned undertakings tend to enjoy and to abuse, if not strictly regulated.
  - Pre-existing business relationship
    - Pre-existing relationship
    - A proposal to continue or vary an existing contract
    - The offer is made in a special document
    - Warning that the contract is deemed accepted if no reply is given in reasonable period of time

Invitation to treat

❖ Mere declaration of intention

- Price lists, catalogues,
- Auction

Time of Offer

- Offer with time limit:
  - Shall wait till the time set in the offer expires
  - Do not have to wait if receives rejection earlier
- Offer without time limit:
  - Offer is bound to wait for reasonable period of time
  - This time is determined having regard to:
    - Current price
    - Market stability
    - Complicated nature of the contract