

Formation and Effects of Contracts in Ethiopian Law¹

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PREFACE

1. As shown by common experience, a *contract* is an indispensable instrument for exchange of goods, services and money between persons (physical or corporate) in *any* developed or developing economy, whatever its political regime. Non-recognition and/or non-enforcement of contracts can only lead, in a free economy, to anarchy and, in a State-planned economy, to failure of the plans. Only primitive “subsistence economy” communities, living on their own produce and hand-to-hand barter, can do without the kind of agreements we call “contracts” (art. 1675 Civ. C.).

2. This was well understood by the codifiers of Ethiopian law, who consecrated nearly half of the Civil Code and the Commercial Code to contracts. This codification in 1960 was made necessary by a growth of internal and external trade and credit, and a beginning of industrialization. The provisions on “Contracts in General” are contained in Title XII Civil Code, of which the initial chapters on, respectively, *Formation* and *Effects of Contracts* are the core: this core constitutes the main subject of the present *Commentary*, which hopefully will provide a starting point for jurists writing on other parts of Contract law.

3. Since Ethiopia has been, since 1974, a *socialist* country, we invite our readers in advance to peruse this book’s ADDENDUM on Contracts in Socialist Legal Systems, and Fasil Nahum’s “Socialist Ethiopia’s Achievements as reflected in its Basic Laws” (*Journal of Ethiopian Law*, Vol. 11, 1980, p. 83). The adaptation of Ethiopia’s pre-revolutionary Civil Code to the new situation is being considered by the Ministry of Justice Law Revision Commission. In the field of Contract law, the Commission’s Committee No. 2 (hereinafter referred to as *Law Revision*), dealing with Books IV-V of the Civil Code, has recommended (in its 1976 circular) only a *few minor amendments*. Though their ultimate fate is as yet unknown, we briefly mention them in this Commentary. In the future, Contract law may have to be supplemented in Ethiopia, as it has been in other socialist legal systems, by special regulations concerning “social turnover” contracts, i.e. contracts between public enterprises. Incidentally, it is an open question whether the Civil Code’s Title (XIX) on “Administrative Contracts” should be adapted or repealed (see ADDENDUM, A, 2, c).

4. In selecting legislative solutions appropriate for Ethiopia in order to satisfy, among other needs, that of filling the quasi-empty area of Contract law, the expert draftsman of the Ethiopian Civil Code of 1960 (Rene David) resorted primarily to the following *sources*: the civil codes of Egypt, France, Greece, Italy, and Switzerland. The principal source used by David in drafting the Book on Obligations (the bulk of which concerns contracts) was the Swiss Civil Code. Second in importance were the French Civil Code and French doctrinal works. Moreover, some Contract law provisions were inspired by the Common Law (see René David, “Les sources du code civil éthiopien”, *Revue internationale de droit comparé*, 1962, No. 3). In the present

work, we will refer to such materials concerning the above sources as are at hand and may be of assistance in the clarification of the legal provisions commented upon.

5. . In recent years, the only commentary available to students of Ethiopian Contract law was Ren6 David's *Commentary on Contracts in Ethiopia* (Addis Ababa, 1973, hereinafter cited as *David*). This title is misleading, since the work concerned is but a pamphlet-size English translation of David's hasty French commentary *written in 1954* on his *preliminary* French draft of what is now only a part of the Civil Code's Title (XII) on "Contracts in General". Its value is further reduced by certain statements that later became inaccurate through the addition of a detailed Book on Special Contracts, and through some ultimate changes in the Code's draft. The incomplete attempts of the translating editor (M. Kindred) to curtail David's comments on discarded draft provisions, and to signal the absence of comments on the new or changed provisions, were hardly able to prevent quite a few puzzles or inconsistencies from arising. If, in 1973, the time was judged ripe for publication of David's preliminary comments (which, some years earlier, were deemed confidential), then they should have been published (in their original language plus translations) together with the preliminary drafts commented on, as instructive documentary sources of Ethiopian legal history. This is what is done abroad in similar situations (e.g. in the exemplary Egyptian *Pro jet de code civil revise*, Le Caire, 1942). As things stand we must, where hereinafter referring to *David*, point out the defects, where any. As to reasons for the present Commentary, they are derived from the expert draftsman's own wise words:

"...the Code may be too schematical and abstract... it ought to be quickly completed by doctrinal works... helping Ethiopians to understand the meaning of technical expressions and

"A number of judges are disoriented by the new codes ... It is necessary ... [to expound] the system followed by these codes to prevent one from devoting himself to the letter of dispositions considered separately without considering their context."*

6. In our two preceding textbooks (see ABBREVIATIONS), we have mentioned and explained the several obstacles facing commentators of the Ethiopian Civil Code. See, in particular, the "Methodological Introduction" in *Krzeczimowicz I* (p. 56 with fn3-4) and the "Preliminary" in *Krzeczimowicz II*. These obstacles are still with us. The most hampering are the following:

- a. The distortions in the English version of the Civil Code, which is but a *poor translation* of the French master-version. See our Foreword to Section 4 of Chapter 2 below, justifying our full re-translation of this Section (arts. 1771- 1805) in the Appendix.
- b. The continuing lack of published *case reports*, of subject-indexes in the courts' filing systems and of clear trends in adjudication. Prospects of gradual improvements in these regards emerge too late to affect the present work, which primarily purports to provide the profession with analytical tools (and brief illustra

*Ren6 David, "A Civil Code for Ethiopia" *Tulane Law Review*, 1963, No. 2, p. 190.

tions) for ascertaining the meaning of contract law provisions in the Code's context. Where pertinent, we add references to comparative law (see 4, above). In due time, a case book supporting or qualifying our exegetic comments should of course be produced. Incidentally, procuring an English translation of the case cited below under article 1776 took us a year.

7. The best tool for a comparative analysis of the Ethiopian law of contracts will probably be Volume VII of the *International Encyclopedia of Comparative Law*. At the time of writing, of the 17 Chapter-instalments of this huge Volume, only Chapters 3 and 16 have appeared. Chapter 16 has been used in this work in connection with Section 4 of Chapter 2 and its Addendum. In order to avoid or reduce the burden of footnotes, the main works cited are referred to by the abbreviations listed hereunder. The selection of the works referred to was based on the following criteria: (a) their illuminating value, (b) their availability on the spot, and (c) where there was a choice, preference for the English language. For example, *Walton* satisfies these three criteria, despite the work's being outdated.

Lack of assistance and time-limitations have affected the quality and the scope of this work (which was originally intended to cover the whole of Title XII Civil Code). We nevertheless trust it will be serviceable.

ABBREVIATIONS

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PART ONE INTRODUCTION

1. Rules of law are either mandatory (imperative), or permissive (suppletory). Public law is, as a rule, mandatory. As to Private law, such of its rules as are mandatory are also called rules of “public order”. They must be obeyed because public interest is involved. The laws of Status and those of Property are mostly *mandatory*, of public order, because Personality, Family, Property, are institutions whose imperative regulation is in the public interest. Obversely, the principle underlying this Title on Contracts is “freedom of contract” (arts. 1711, 1763). Consequently, most legal rules of contract are *permissive*-, they only supplement the contract, “presuming” what the parties would have intended if they had adverted to the minor problems left unsolved. The parties are free to disregard such presumption-based rules through expressly mentioning everything they want. They thus lay down their own contractual “lex specialis”, which may derogate from the permissive legal provisions. Further explanations on this topic will be connected with article 1731 on Effects of Contracts.

2. The following commentary by articles covers Chapters 1-2 of this Title (Formation and Effect of Contracts). *It presupposes* knowledge of the nature of “obligations”, their place in the Civil Law, the difference between rights of obligation and rights of property, the sources and objects of obligations, natural obligations (see *Walton I*, Chapter I). In the German Civil Code, the rules common to all obligations from whatever source precede the law of Contracts. The Ethiopian legislator uses the opposite technique. He *starts with* the main source of obligations, i.e. the *Contracts*, but the Law of Contracts in General shall, where relevant (art. 1677), *apply to all obligations* from whatever source. This method is less abstract than the first-mentioned one. The following three articles (1675-1677) give an introduction to “Contracts in General”:

ART. 1675. CONTRACT [of obligation] DEFINED

A CONTRACT IS AN AGREEMENT WHEREBY TWO OR MORE PERSONS AS BETWEEN THEMSELVES CREATE, VARY OR EXTINGUISH OBLIGATIONS OF A PROPRIETARY¹ [patrimonial] NATURE.

It is instructive to compare this comprehensive *definition of contract* with the multifarious definitions used in the U.S.A. *according to Corbin* (Sec. 3), the simplest

1. “Proprietary” is a gross mistranslation of the French masterversion’s “*patrimonial*” (having a pecuniary value). Note: in quotations, words in square brackets are ours. So are emphases.

of which reads “agreement enforceable at law”.² For the purpose of analysis, we shall now dissect the Ethiopian definition:

/ “A contract is an agreement...”

The contract being an agreement, it is not the paper on which it may be written and signed. Such paper is a means of proving that agreement was expressed (art. 1680(1)).

2. “... whereby two or more persons...”

There must not be only one person: one cannot contract with oneself. This seems obvious, but is not always so: see article 2188 of the Title on Agency.

3. “... as between themselves...” (see art. 1952(1))

The contracting persons can bind and entitle only themselves, not outsiders. This seems obvious, but is not always so: see article 1957 of the Section on “Promises and Stipulations concerning Third Parties”.

4. “...create, vary or extinguish obligations...”

The French Civil Code (art. 101) says instead: “...bind themselves to give, to do or not to do something.” These words define “obligation” rather than contract (cf. *Walton I*, p.1). The Ethiopian definition of “contract” is more fitting, it is also more complete, as it includes agreements varying or extinguishing obligations (e.g. under arts. 1825,3307), which the French Code does not do. On “Obligation”, see article 1712 (1).

5. “... obligations...”

This excludes creation etc. of real rights. Formal contracts creating or transferring real rights on immovables (art. 1723) or any acts (e.g. delivery: art. 1186) creating or transferring real rights on movables, are called conveyances. Conveyances are often preceded by contracts of obligation (e.g. sale) promising to effect them. Obversely, conveyance and obligations may result from the same act (see *Chitty*, No. 8).

6. “... of a proprietary (patrimonial) nature.”

This excludes contracts of “status”, such as betrothal, marriage, adoption (arts. 560, 577, 796), which create obligations of “status” pre-defined by law, of a primarily lion-patrimonial nature and, except for betrothal, not susceptible of being freely varied or extinguished.

At 5 -6. A contract, in its wider sense of any legal agreement, may concern matters other than patrimonial obligations. E.g., a contract of marriage (status) may contain both a sale of wife’s house to husband (obligation)and its formal conveyance to husband (property); so that if claims arise under all these headings their settlement shall involve the Code’s books on Family, Property, Obligations, Special Contracts (sale). But the Law of Obligations has a predominant position in that it may apply

2. *Corbin* (Sec. 4) suggests that “barter” is not a contract, since it leaves no duties to be enforced. In Ethiopian law, it is a contract which creates the obligations referred to by articles 2408 (1) and 2409 (e.g. the warranties).

also in the areas of status, succession, property, wherever these areas contain no special provisions to deal with a point for which a provision of the law of Obligations appears appropriate (analogy). This may concern, e.g., certain aspects of alimentary duties (art. 807), which are really “obligations of a proprietary [patrimonial] nature” arising out of status. Another example: provisions about defects of consent in contracts of obligation may have to be applied, by analogy, to conveyances or even to testaments (arts. 867, 877), but not fully to contracts of status governed in this respect by special provisions (e.g. arts. 590-591).

ART. 1676. PROVISIONS APPLICABLE TO CONTRACTS

Art. 1676, sub-art. (1)

THE GENERAL PROVISIONS OF THIS TITLE SHALL APPLY TO CONTRACTS REGARDLESS OF THE NATURE THEREOF AND THE PARTIES THERETO.

This Title on Contracts in General applies to any contracts whatever their nature e.g. sale or hire, and whoever the parties, e.g. natural (physical) persons or artificial persons (company, State). Its provisions are common to all contracts, including those governed by the Commercial Code.

Art. 1676, sub-art. (2)

NOTHING IN THIS TITLE SHALL AFFECT SUCH SPECIAL PROVISIONS APPLICABLE TO CERTAIN CONTRACTS AS ARE LAID DOWN IN BOOK V OF THIS CODE AND IN THE COMMERCIAL CODE.³

This Title on Contracts in General applies to special and commercial contracts insofar only as it does not conflict with special provisions on them. The latter are contained in Book V on Special Contracts and in the Commercial Code’s rules on certain contracts. This sub-article (2) is merely an application of the basic Latin maxim *specialia generalibus derogant*, its free translation being “special rules derogate from the general rules”. It would be impossible to lay down general rules of law if special (particular) provisions dealing with more special (particular) problems could not then or later, apart from completing the general rules, derogate from them. The maxim is effective as between legal rules of the same rank A statute may not derogate from the constitution, neither may an order derogate from a statute. But a statute may derogate from a statute, that is, a special statutory or code provision, where diverging from the general one without repealing it, effects an exception from it for the limited field it covers (if the divergence is illimited, i.e amounts to general incompatibility, it will effect an abrogation of the prior rule)

So if, under sub-article (1), we said that genera] provisions apply to contracts of any nature (sale, hire, etc.), this is true insofar only as the special provisions of, say

3. LAW REVISION recommends: a) before “in 1b; Commercial Code”, omit “and”; b) after “in the Commercial Code”, omit period and add “*andii other laws.*”

the law of Sale, do not derogate from them. The practical consequence of it is that, if a lawyer has to deal, with, e.g., a disputed contract of sale, he has first to look to the special provisions of the law of Sale, and solve by the general provisions of “Contracts in General” only what remains to be solved for lack of solution in the special law of Sale. Now, the special law of Sale may constitute general law in respect to special rules of sale of cattle (art. 2368 ff.), which is a special kind of sale; in such case the points in issue may travel through three sets of rules, each set eliminating the following one, except for what remains unsolved: (1) rules of cattle-sale, (2) rules of sale, (3) rules of contract (in general).

We must not forget that the basic maxim *specialia generalibus derogant* applies also to cases not covered by sub-article (2). Among the general provisions themselves there may exist, to the untrained eye, a seeming contradiction due only to the fact that one of the seemingly conflicting rules covers less general (more particular) situations, and therefore does not cancel the more general provision, but only derogates from it. Examples of this abound. In fact, sub-article (2) itself may be regarded as a special provision in relation to sub-article (1), from which it “derogates”!

It must finally be mentioned that, since particular provisions are always easier to apply, academic study is centred on the more difficult and abstract general rules, which have such a wide scope that their sense and purpose are often not easy to gauge.

NOTE: We call *nominate* all contracts named in Book V on Special Contracts and/or in the Commercial Code. Most contracts, as for example lease, deposit, sale, hire, loan, partnership, are “nominate”. A “mixed” contract may contain a number of these “nominate” transactions, each governed by separate rules of law. For example, the innkeeper’s contract with his hotel guest (art. 2653 ff.) contains “nominate” elements of lease (room), deposit (luggage), sale (food), hire (services). On the other hand, under our “freedom of contract” system, human ingenuity sometimes produces contracts hardly fitting into any of the named descriptions. We call them *innominate* or unnamed contracts. The common feature of the “innominate” contracts is that, there existing no special provisions to govern them, we have to solve their problems exclusively with the law of “Contracts in General” (unless there is close “analogy” with some special contract). E.g., a banker agrees with a merchant to give him an opinion on the commercial standing of another merchant. Is it hire of service, sale of opinion, or mandate to give it? Many lawyers prefer to qualify such agreement as “innominate”, thus submitting it only to the law of “Contracts in General”.

ART. 1677. SCOPE OF APPLICATION OF THIS TITLE Art.

1677, sub-art. (1)

THE RELEVANT PROVISIONS OF THIS TITLE SHALL APPLY NOTWITHSTANDING THAT THE OBLIGATION DOES NOT ARISE OUT OF A CONTRACT.

As alluded to before, the effect of this text is to make of the title “Contracts in General” a general part for the whole law of Obligations. The words “notwithstanding that the obligation does not arise from contract” must be taken to mean “not

withstanding that the obligation does arise from sources of obligations other than contract”, e.g. from tort, or unlawful enrichment, or family law (e.g. art. 807). The qualification “relevant” excludes provisions which, by rules of logical relevancy or, to put it simply, by sheer common sense, cannot apply to non-contractual obligations, e.g. the provisions of Chapter 1 on formation of contracts. On the other hand certain rules of Chapter 2 on performance and non-performance of contracts may relevantly apply to performance and non-performance of non-contractual obligations, while under Chapter 3 rules of extinction of obligations through remission of debt, novation, set off, merger, limitation, may properly apply to the extinction of non contractual obligations.

As shown in comment at 5-6 under article 1675, the law of Obligations is a subsidiary source of law for the whole Civil Law (or even Public Law, e.g. for fiscal obligations). Therefore, the far-reaching importance of the title on Contracts in General, which contains not only provisions common to all contracts, but also provisions common to all obligations, is obvious. It is to provisions of this Title, when relevant to the problem at hand, that we shall turn in case of doubt not only in the field of obligations, but also, with due caution, in other fields of Civil Law. Such subsidiary resort to *analogy* is not prohibited by the Civil Code (obversely, resort to analogy is prohibited by Art. 2 Penal Code). For example, suitable provisions of contract law on defects in consent (art. 1699 ff.) may apply also, *mutatis mutandis*, to one-sided juridical acts (even public acts). (Incidentally, public international law was developed by civilian jurists.)

Art. 1677, sub-art. (2)

NOTHING IN THIS TITLE SHALL AFFECT THE SPECIAL PROVISIONS
APPLICABLE TO CERTAIN OBLIGATIONS BY REASON OF
THEIR [non-contractual] ORIGIN OR NATURE.

Here the maxim *specialia generalibus derogant* comes back into its own. Sub article (1) has widened the scope of this Title to embrace all obligations. Sub-article (2) narrows its scope to exclude affecting the special provisions which apply to obligations of non-contractual origin and nature (see Title on Extra-Contractual Liability and Unlawful Enrichment). Contradiction? No. Our title remains applicable insofar as the lawyer faced with a sale problem has first to look up his law of sale, so the lawyer faced with a tort problem will first look up his law of tort, before resorting, if necessary, to the Title on Contracts in General. Incidentally, within the law of tort itself, he shall proceed in the same way, from below, from the particular rules of the “nominate” tort involved (e.g. art. 2038 ff.) up to the more general rules. Controversial cases are often those for which particular provisions provide no ready solution, so that more general rules have to be consulted.

POSTSCRIPT. After all that has been said about the maxim *specialia generalibus derogant*, it seems desirable to stress that it is the application and completion of the general rules, and not derogation from them, that remains the main purpose of special provisions. The latter relieve the lawyer from the headache about *how to apply* a general principle to particular kinds of cases. They also contain detailed rules

supplementing the general law in a particular field. On the other hand, any special provision of uncertain meaning should be *interpreted* in the light of the general co text (art. 1736), so that, where two meanings are possible, the one not derogating frc general rules shall be preferred. Therefore, general provisions must be studied before the special ones can be correctly understood and applied.

CHAPTER 1

FORMATION OF CONTRACTS

Every contract is an agreement, but not every agreement is a contract. The introductory article below enumerates the requisites for a valid contract. Except for "capacity", which is governed by the law of persons, these requisites will be analyzed in Sections 1,2 and 3 of this Chapter (Consent, Object, Form).

We recommend the Schlesinger-edited 2 volumes on Formation of contracts (see Abbreviations) as a general comparative-law reference work on this, subject (no specific references will be made).

ART. 1678 ELEMENTS OF CONTRACT

NO VALID CONTRACT SHALL EXIST UNLESS:

- (A) THE PARTIES ARE CAPABLE OF CONTRACTING AND GIVE THEIR CONSENT SUSTAINABLE AT LAW.
- (B) THE OBJECT OF THE CONTRACT IS SUFFICIENTLY DEFINED AND IS POSSIBLE AND LAWFUL;
- (C) THE CONTRACT IS MADE IN THE FORM PRESCRIBED BY LAW, IF ANY.

Therefore, the following are the requisites for the existence and the validity of contract, dissected for the purpose of analysis:

(a) Consent

1. "the parties are capable of contracting.

The capacity to contract is included in the general capacity to act in law. The latter is governed by title II Civil Code, dealing with "Capacity of Person" (art, 192 ff.).

2. (...and give their consent.

This passage is concerned with whether consent was given, i.e. with the existence of consent. The elements of the existence of consent, of whether consent was expressed, will be examined in section 1, paragraph 1 of this chapter. Where no consent is given, no contract exists.

3. "...sustainable at law;"

Consent may be given and exist outwardly under the rules of paragraph 1 of section 1, but may nevertheless contain defects and not be bilaterally valid under the rules of the following paragraph 2. As a result, the contract exists, but is not sustainable at law by the other contractant. The contractant who give a defective consent may choose to "invalidate" (avoid) the contract (art. 1808 (1)). A similar effect is

attached to consent vitiated by incapacity to act in law (to perform juridical acts): see *I.*, above.

(b) Object

1. “the object of the contract...”

Since the meaning of the term “object of contract” is controversial, we shall use it only in the sense conveyed by Section 2 of this Chapter. The content or object of a contract is the obligations it creates or varies (or extinguishes). In turn, the object of these obligations is some giving, doing, or not doing. By legal shorthand we sometimes skip over the link “obligation” and call the obligation’s objects, i.e., some giving, doing, or not doing (art. 1712), objects of contract. The object is what answers the question: “What do you owe?”

2. “... is sufficiently defined and is possible and lawful;”

A contract is of no effect, has no existence, unless its object (the obligations it creates) is defined, possible and lawful; these requirements are examined in Section 2 of this Chapter.

NOTE. The French Civil Code requires, apart from an object, a lawful *cause* for the creation of a contract. The cause is what answers the question: “*Why* do you owe?” But the respective meanings of the terms “cause of contract” and “cause of obligation” are disputed. In most contracts (the “reciprocal” ones), it is your obligation with its object that is the cause (reason) of your contract partner’s obligation and vice versa. E.g., in a sale, his owing the goods to you is the cause (reason) for your owing the price to him. The object he owes is the cause (reason) of your owing, and the object you owe is the cause (reason) of his owing. This, and the skilful drafting of articles 1714-1716 (“or one”) in Section 2 of this Chapter, has enabled the Ethiopian legislator to dispense with adding a separate requirement of “lawful cause” (a feature of French law). The German and Swiss Codes also dispense with it. The result is simplification.

(c) Form

1. Form may be prescribed for proving the contract (*ad probationem*), or for validly making it (*ad validitatem*). The cited passage does not refer us to the provisions which, in Chapter 7 of this Title, prescribe written form for proving certain contracts. It refers to the provisions which, in Section 3 of this Chapter, prescribe form not for proving, but for validly making a contract. Form is here a condition not of proof, but of existence of the contract. This distinction is important.

2. “...if any.”

“If any” denotes that form is not, normally, an essential element of contract. Normally, contracts can be made on basis of consent and object only. There is freedom of form “unless otherwise provided” (art. 1719 (1)) by any special rule.

POSTSCRIPT. Jurists distinguish between (1) non-existent, (2) null, i.e. void, (3) annulable, i.e. voidable, (4) unenforceable contracts. The wording of the Ethiopian Code enables us to simplify this classification. For all practical purposes, the terms

“null and void” and “non-existent” shall mean the same. As to voidable and unenforceable contracts, they exist, but have a defect. For the voidable ones, the defect lies in the consent; for the unenforceable ones, primarily in the proof (or “limitation of action”). The subject-matter of proof and enforceability being reserved for later study, our problem here boils down to distinguishing between null and annulable, in other words between void (non-existent) and voidable contracts. Contracts lacking consent (Paragraph 1 of Section 1) or not fulfilling the requirements of object (Section 2) or form (Section 3) are void (null), while those involving only a defect in the consent (Paragraph 2 of Section 1) are voidable (annulable). But even here, the practical consequences of such distinction amount to so little in the Ethiopian system that the legislator was able, in this article 1678 on elements of contract, to enumerate jointly the conditions of existence and those of bilateral validity of contract, and also was able, in Section 1 of Chapter 3, to use the term “invalidation” for both avoidance of a voidable contract and declaration of nullity of a void one. Differences between void and voidable contracts result from the wording of articles 1808, 1811, 1814. But the effects of an invalidation decree obtained on either ground of invalidity (contract void or voidable) are the same in the Ethiopian system, for which see articles 1815 to 1818. This is a simplification in comparison to several foreign systems.

SECTION 1 CONSENT

Paragraph 1. Elements of Consent

NOTE: In order to create a contract, consent there to must be expressed effectively, that is, in a way according with the rules of this paragraph,

ART. 1679 CONSENT NECESSARY

A CONTRACT SHALL DEPEND ON THE CONSENT OF THE PARTIES WHO DEFINE THE OBJECT OF THEIR UNDERTAKINGS, AND AGREE TO BE BOUND THEREBY.

1. “A contract shall depend on the consent of the parties.

This passage re-emphasizes the paramount importance of “consent” in a contract. We may add that contractual promises are sanctioned by law (*pacta sunt servanda*) because morals require it and the social order needs it.

2. “...who define the object of their undertakings...”

Not only the making of the contract, but also the object (content) of the under-taken obligations must be consented to.

3. .and agree to be bound thereby.”

At this point, the previous passages (1-2) of this article appear superfluous. They say nothing that does not already result from article 1678. obversely, the passage “and agree to be bound” is truly significant: there must exist and *intentio obligandi*, and intention to be obliged, bound. The parties must not only agree, but also consent to be bound by their agreement. Their consent to be bound need not be given expressly, but may result from the circumstances. In relation to “offer”, the Swiss Obligations Code (art. 7) puts it this way: “*An offerer is not bound where he so stipulates or where his intention not to be bound results from the circumstances or nature of the transaction*” (on English law see Chitty, No. 42-47).

An agreement not intended to bind may be simulated, or real. A simulated, pretended contract does not bind the parties, because they secretly agree not to be bound by it. Simulation is proved by producing the separate, bidden agreement not to be bound by the pretended contract. See article 1994 on the protection given creditors of a party to a simulated contract.

How shall we ascertain the *intentio obligandi* in a real agreement of proposal? Using the terms of the Swiss Obligations Code just quoted, a person “is not bound where he so stipulates”. A so-called “gentlemen’s agreement” may result from an open stipulation. It may contain a special clause stating that the agreement is not

“actionable” but only lays down, for remembering, what the parties really intend, in honour, to do for one another. Such an agreement is not a contract, precisely because it is not actionable. Similar exclusion of the intention to be bound may result, before any agreement, from a proposal labelled “offer without engagement, prices subject to change”, or other words to that effect, which prevent a proposal becoming a true offer.

The *intentio obligandi*, where not expressly excluded as in above examples, is often presumed to exist subject to the defendant proving that, as the Swiss Code puts it, “... intention not to be bound results from the circumstances...”, etc. The burden of proving such circumstances may be laid on defendants denying the intention to be bound, since to require claimants to prove the intention every time would obstruct everyday transactions. Though our article 1679 does not lay down the aforementioned presumption, the judges are free to apply it, by common sense, as a presumption “of fact”, whereby an ordinary contract may be taken, *prima facie*, to include the intention to be bound, which then need not be proved by the claimant but must be disproved by the defendant. Now, what kind of circumstances may be invoked by defendants as disproving the *intentio obligandi*? We may quote no better illustrations than those provided by *Walton* (Vol. I, p. 82):

“There may be an agreement which has all the outward marks of a contract, but it will not be enforced by the courts because the parties who made it did not intend thereby to affect their legal relations. An invitation to dinner may be made and accepted in the most formal way, but if the guest does not appear at the time appointed, he will not be liable in damages, however glaringly disingenuous his excuse.” - (Under Ethiopian art. 1675 Civ. C.C. the guest would perhaps have an additional defense: his engagement was of “non- proprietary” nature.) - “In a Belgian case an official was asked by his superior officer to do some extra work. The superior told him he would see that he got special remuneration for it. The official failing to get this remuneration brought an action against both his superior and the government, and it was held that he had no legal claim against either. The government had made no contract with him at all, and the superior officer had not intended to bind himself but had meant only that he would recommend payment for the work...”.

A non-binding agreement can also result from the nature and circumstances of good-neighborly relations. Neighbors agreeing to help each other in certain ways on the occasion of harvest, cultivation, etc., do not usually intend to be bound in law by such agreements, and pointing to such circumstances may be a valid defense throwing the burden of proof back on the claimant, who will then lose his case unless he produces evidence that an actionable agreement was intended.

All above considerations apply, where relevant, not only to completed agreements but also to proposals preceding them. With regard to the latter, this Paragraph lays down certain presumptions of law (“deemed”) in its articles 1687 and 1688.

ART. 1680. AGREEMENT OF THE PARTIES

Art. 1680, sub-art. (1)

A CONTRACT SHALL BE COMPLETED WHERE THE PARTIES HAVE EXPRESSED THEIR AGREEMENT THERETO.

There must be *expressed* a full agreement in the sense of article 1695(1). Deviating from the French theory “of will”, the Ethiopian law follows the Swiss theory of “declaration of will” (see *GuU*, p. 80) whereby a contract is made, completed, not by agreement of wills, but by agreement of declarations of will (see *David*, p. 10; for USA see *Corbin*, sec.9). So if there is discordance between declaration and true will, the contract exists nevertheless, but, if such discordance amounts to “fundamental mistake” (art. 1698), the contract may be invalidated, subject, however, to the damages due under article 1703. The contract existed and a legal consequence (art. 1703) remains (under the theory “of will”, there never was a genuine contract, and damages are due only in case of tort). Expressed agreements may also be invalidated under other defects of consent (Paragraph 2), and are subject to the rules of interpretation of Chapter 2, Section 1: the rule of article 1733 reflects the theory of “declaration” of will. Agreement which is not expressed is of no effect. Concordant declarations without true agreement create (complete) the contract, but may be open to avoidance. Applications:

I buy “your horse”, thinking it is the one I see you riding on every day. Your horse is another horse. The contract is complete, subject to the rules of Paragraph 2.

Mr. Brown signs a contract without reading it, or fully reading it. Or he signs a foreign language document without obtaining its translation, or full translation. He is bound, subject to the rules of Paragraph 2. Were the defect Mr. Brown’s mistake only (no fraud, duress, etc.), some followers of the “declaration” theory would deny him an invalidation of the contract, maintaining that, if an experienced person signs without reading, he shows acceptance of the content, whatever it be. This seems an exaggeration. In Ethiopian law, such a contract may be invalidated if a fundamental mistake (art. 1698) is proved.

Completely different is signing a paper in blank to be filled in later by your trusted friend. Article 1680 (1) does not apply. You are bound only if the subsequent filling in of the blank accords with a prior oral agreement. Your problem is to prove that you signed the paper prior to its filling in. Your friend’s problem thereafter is to prove concordance of the filling in with a prior oral agreement.

NOTE. The aforementioned theories “of will” and “of declaration” (or “of reliance”) are based, respectively, on moral or social grounds. The moral requirement is that a man should not be tied to an agreement he did not will. The social argument is that there can be no order, no trade, etc., if men cannot *rely* on expressed declarations. The Ethiopian system is a compromise: declarations alone create the contract, but defects of consent may invalidate them, subject - for mistake - to damages.

Art. 1680, sub-art. (2)

RESERVES OR RESTRICTIONS INTENDED BY ONE PARTY SHALL NOT AFFECT HIS AGREEMENT AS EXPRESSED WHERE SUCH RESERVES OR RESTRICTIONS WERE NOT COMMUNICATED TO THE OTHER PARTY.

The underlined translation from the French master-text is our own, while the erroneous part of the official English translation is left out.

This sub-article is only a consequence of sub-article (1). Since contracts are not agreements of interior wills, but of expressed declarations, they can never be made of what is not expressed. So-called reservations *Mentalis* (Mental reservation), or any other restrictions stated but not communicated to the other party, remain of no avail. Mr. Brown cannot, in court, put off Mr. Smith by saying, “Yes, I promised you this lease, but I did not mean to deliver the upper part of the compound, witness my neighbours, whom I told all about it, as you have heard.” Since this intended restriction was not communicated by Mr. Brown to Mr. Smith, its proving will be barred as irrelevant.

Art. 1681. FORM OF OFFER AND ACCEPTANCE

Art. 1681, sub-art. (1)

OFFER OR ACCEPTANCE MAY BE MADE ORALLY OR IN WRITING OR BY SIGNS NORMALLY IN USE OR BY A CONDUCT SUCH THAT, IN THE CIRCUMSTANCES OF THE CASE, THERE IS NO DOUBT AS TO THE PARTY’S AGREEMENT.

NOTE: Article 1719(1) in Section 3 sanctions “freedom of form” (unless otherwise provided) for contracts. Consequently, freedom of form applies to each declaration preceding or completing the contract.

1. “offer and acceptance.

The terms “offer and acceptance” do not cover (a) Simultaneous agreements which, however, are of rather theoretical interest since, in practice, agreements consist of successive offers and acceptances; (b) unilateral declarations not being offers or acceptances, e.g. termination notices (art. 1820) which, however, may be deemed covered by analogy.

2. “...maybe made orally or in writing...)

The oral form and the written form of declaration are the most common and evident. But declarations that appear written may have been made orally and later only confirmed or evidenced in writing.

3. “...or by signs normally in use...”

A sign generally in use at an auction may be raising the hand by the participant offering to buy, and knocking the hammer down by the auctioneer accepting such offer (art. 1688). Certain markets have their local customary signs. At a stock market

acceptance may be some nod or finger-sign, at a village market a handshake. The will is validly expressed if the meaning of the sign is clear from continuous general or local usage.

4. "...or by conduct such that, in the circumstances of the case, there is no doubt as to the party's agreement."

Examples of "offer" by conduct:

- (1) Keeping an automatic distributor of goods on public premises.
- (2) - a householder who calls a medical doctor to attend a person living in his house makes an implied offer to pay for the medical service, unless he informs the doctor that he will not be responsible (Walton, 2nd Ed. [1923], p. 119). In the case cited, the caller was the householder and the patient was a member of his household, the householder's conduct expressed and offer to hire the doctor's services. (For Ethiopian law see the qualification under art. 2644 (a).)

Examples of "acceptance" by conduct:

- (1) throwing a coin in an automatic distributor;
- (2) giving medical service to a patient;
- (3) bringing the lost object, pursuant to article 1689;
- (4) a merchant or workman receiving an order for goods or work need not accept it in words-he may accept it by conduct, through timely delivery of the goods or performance of the work. See also article 2382.

NOTE: Generally speaking, words, writing, signs or conduct will suffice, as long as the dilatat's will is thereby clearly expressed (art. 1680(1)). Whatever his true will may be.

Art .1681,sub-art.(2)

THE PARTY WHO MAKES AN OFFER MAY STIPULATE A SPECIAL FORM OF ACCEPTANCE.

Pursuant to article 1719(3). parties may agree to prescribe a special form for their contract. Pursuant to this sub-article, one party may, prior to any agreement, prescribe a special form (mode) for the acceptance by the other party.

Illustration: Borders goods fro C, stipulating that there shall be not contact unless the goods are delivered at X time and Y place. It means that the special form (mode) of acceptance prescribed is delivery at X time and Y place. C's letter accepting B's order is not a valid acceptance (David, p.l 1, at 2).

Where an offer requires and acceptance by telegram, clearly and accepting letter shall be of no avail. But the converse is also true. Where acceptance by letter is prescribed, even immediate telegram is of no effect, since we must respect the offerer's will with regard to the stipulated form of acceptance.

ART. 1682. SILENCE - 1. PRINCIPLE

SILENCE WHERE AN OFFER IS MADE SHALL NOT AMOUNT TO ACCEPTANCE.

1. “Silence where an offer is made...”

What is silence? In ordinary language, silence, where an offer is made, would mean not answering it in words. In legal language, silence, where an offer is made, means not answering it either in spoken or written words, or by any sign or conduct amounting to acceptance under the rules of the preceding article.

2. shall not amount to acceptance.”

He who keeps silent does not consent. Theoretical justification: answering all offers would make many an active man's life unbearable. Silence is not acceptance. Nobody needs to bother answering offers. Even where samples or goods (e.g. newspapers) are sent with the notice that, if they are not returned within a certain period, the offer shall be deemed accepted, there is no acceptance unless the offeree answers at least by conduct such as using the goods offered. But the principle that silence is not acceptance suffers *exceptions* by virtue of the four following articles (cf. *Corbin*, Sec. 72-75).

ART. 1683. - 2. DUTY TO ACCEPT

Art. 1683, sub-art. (1)

NO ACCEPTANCE SHALL BE REQUIRED WHERE A PARTY IS BOUND BY LAW, OR BY A CONCESSION GRANTED BY THE AUTHORITIES TO ENTER INTO A CONTRACT ON TERMS STIPULATED IN ADVANCE.

1. “No acceptance shall be required...”

This is a deviation from the preceding article, since “no acceptance” means that no answer whatever (by word, sign or conduct) is here required.

2. “... where a party is bound by law or by a concession granted by the authorities...”

Certain “public utility” undertakings, whether state-owned or not, are largely regulated by law or by the particular terms of the administrative concession granted them. Such undertakings often comprise (1) vital services to the community, such as postal and telegraphic transmissions, public transport, etc., or (2) vital supplies to the community, such as supplies of light, water, etc. An extensive regulation of these undertakings is justified by two reasons: the vital character of the services or supplies involved, and the monopolistic situation that the concerned undertakings tend to enjoy and to abuse, if not strictly regulated.

3. “...to enter into a contract on terms stipulated in advance.”

The undertaking is bound to enter into a contract proposed by any member of the public on terms stipulated in advance by the respective law, order or concession- grant. These terms usually fix the scale of prices to be charged and the limitations on the undertaking's liability for non-performance (art. 1887). These terms are not

necessarily favorable to the public, as is obvious from, e.g., the Post Office Department's published terms of business. But the main advantage remains acquired by all of us: the public utility undertaking may not refuse to serve anyone insofar as the respective facilities are available. The contract is imposed by law.

Art. 1683, sub-art, (2)

IN SUCH A CASE, THE CONTRACT SHALL BE COMPLETED UPON RECEIPT OF THE OFFER.

Since no acceptance, no answer, no breaking of silence by the offeree is here required, it becomes necessary to determine at what particular moment the contract is completed. Our solution is simple. Receipt of offer makes the contract, which exists from that time onwards. The offer alone creates the contract and makes it enforceable by the offerer against the offeree. For a simple example concerning "bailment in distress", see article 2801(1), which, however, includes the proviso "without good cause".

ART. 1684. - 3. PRE-EXISTING BUSINESS RELATIONS

This article constitutes another exception from the principle of article 1682 that silence is not acceptance. The exception covers the cases below, in which a business relation in the form of a contract already exists between the parties.

ART. 1684, sub-art. (1)

AN OFFER TO CONTINUE OR VARY AN EXISTING CONTRACT OR TO ENTER INTO A SUBSIDIARY OR COMPLEMENTARY CONTRACT MAY BE ACCEPTED BY SILENCE.

1. "An offer to continue or vary an existing contract..."

Examples:

- (1) You write to your landlord asking for continuation of your lease or it is the landlord that writes to you in such matters.
- (2) You write to your insurer requiring continuation of your insurance, change of premiums or coverage, etc., or it is the insurer that makes such requests.
- (3) Your newspaper offers to continue your subscription or change its terms.
- (4) You propose termination of a contract in accordance with article 1819(1). This example is doubtful: does "variation" include "termination"? A negative answer seems preferable.

2. "... or to enter into a subsidiary or complementary contract..."

Example of a "subsidiary" contract: you propose or require a security for the existing contract. Example of a "complementary" contract: you offer to settle certain accessory questions which were left unanswered in the principal contract, e.g. as to the exact time and place of delivery, the maximum tolerance of impurity in the goods to be delivered, etc.

3. . . may be accepted by silence."

Justification for this subject to the further requirements set forth below, such silence will normally be understood by the parties as expressing agreement. Another justification: good faith (art. 1752) requires that parties to a pre-existing contractual relation show a minimum of loyalty in making known their attitude as to further points to be settled.

Art. 1684, sub-art. (2)

SUCH SHALL BE THE CASE WHERE THE OFFER IS MADE IN A SPECIAL DOCUMENT INFORMING THE OTHER PARTY THAT THE OFFER SHALL BE, REGARDED AS ACCEPTED IF NO REPLY IS GIVEN WITHIN A REASONABLE PERIOD OF TIME.

In order that offers made in conformity with the preceding sub article be capable of acceptance by silence, certain format requirements have to be fulfilled, whose purpose is forcibly to draw the attention of the offeree to the gravity and consequences of the offer.

1. "Such shall be the case where the offer is made in a special document..."

Such shall not be the case where such offers are made in documents bearing on matters other than such offer. A special document is one dealing exclusively with the offer concerned. It happens that, after completion of contract, the parties exchange certain printed clauses at the head, foot or back of these documents. Such clauses may deal with the attribution of jurisdiction to certain particular tribunals or arbitral bodies, with limitation of liability in accordance with articles 1887 or 1888(1), etc., such additional clauses, not being proposed in a special document to that end, but in other correspondence where they may be overlooked, shall remain of no consequence whatever. The principle applies to any of the examples given under the preceding sub article. E.g., a newspaper's printed circular (instead of a special letter), informing the subscribers that their subscription shall be considered renewed if they do not give contrary notice, is of no avail, although the newspaper continues to reach the former subscriber.

2. "...informing the other party that the offer shall be considered as accepted if no reply is given..."

The offer must not only be made in the form of a special document. Its contents must formally include a warning clause, as above, destined to make the offeree clearly aware of the grave consequences of not answering.

3. "... within a reasonable period of time..."

The offer must stipulate a period of time, the lapse of which without reply shall amount to acceptance by silence. The time given must be "reasonable", in the sense that parties should not be rushed into immediate answer to a possibly unexpected proposal. What is a reasonable period of time is to be considered by the Court for each case in the light of its particular circumstances. Clearly such "reasonable period"

shall be less in the case of experienced merchants involved in a current transaction. And more where e.g., an increase of house rent is demanded from a resident tenant.

POSTSCRIPT. Certain cases of acceptance by silence are not subject to the formal requirements of article 1684(2), but are governed by special provisions, such as those governing lease. A tenant who overstays his time on the premises without the landlord breaking silence and protesting is taken to have obtained an extension of the lease. In this case, the lessee's offer to continue the lease- far from being written in a special document with a warning clause-is by conduct, while the lessor's acceptance is by silence (art2968

(1)). A peculiar exception from article 1682 is provided by article 1825: a simple remission of debt-the released debtor remaining silent-extinguishes the obligation. The justification of these solutions is expediency in the case of lease, while in the case of remission of debt the debtor's silence can safely be presumed to mean acceptance, since he has an interest whatever in refusing a release, which, if a fool, he may still expressly, refuse. In contracts of work, acceptance by silence is envisaged by article 2612.

ART. 1685.-4. INVOICES

PARTICULARS ENTERED BY A PARTY IN AN INVOICE SHALL NOT BIND THE OTHER PARTY UNLESS THEY CONFORM TO A PRIOR AGREEMENT OR HAVE BEEN EXPRESSLY ACCEPTED BY THE OTHER PARTY.

1. "particulars [clauses and mentions] entered by a party in an invoice shall not bind the other party..."

An invoice is a document computing sums due on the basis of existing contracts. It is already clear from the preceding article that offers additional to an existing contract can bind the other party without his expressed acceptance only if made in a special document. An invoice, even if containing the warning that some additional clause shall be regarded as accepted if no reply is given, does not fulfill the first formal requirement of article 1684(2): it is not a distinct special document directed exclusively to that end. Both for that reason and by virtue of the present article, clauses (translated as "particulars") limiting liability for non-performance, etc., which merchants are wont to insert at the head, foot or back of invoices, are of no effect whatever.

2. . .Unless they conform to a prior agreement.

This goes without saying, since in such case it is the prior agreement that binds, and not its repletion by the invoice clause. Nevertheless, if there was any attempt at prior agreement in such matters, and unwilling offeree will do well to reject the clause expressly, since a beginning of oral evidence in the officer's favor may induce the judges to regard the fact of non-replaying as corroborating circumstantial evidence for the veracity of the clause. Its express rejection is especially advisable where, after mentioning inaccurate prices, the invoice says, "as agreed", or contains other words suggesting conformity with, or confirmation of, a prior agreement.

3. . .or have been expressly accepted by the other party."

POSTSCRIPT. Article 1685 on invoices is hardly indispensable: it makes no change in the law as given by article 1684. It helps non-lawyers to understand it.

ART. 1686. - 5. GENERAL TERMS OF BUSINESS

GENERAL TERMS OF BUSINESS APPLIED BY A PARTY SHALL NOT BIND THE OTHER PARTY UNLESS HE KNEW AND ACCEPTED THEM, OR THEY WERE PRESCRIBED OR APPROVED BY PUBLIC AUTHORITIES.

1. “General terms of business applied by a party shall not bind the other party.

General business terms are such as are uniformly applied to an undertaking’s customers in general. Particular proposals are then understood to be made within a fixed frame of general terms. Where the contract consists mostly of such general terms, tariffs, etc., prepared and printed in advance by one party, it is called a contract “of adhesion” (from the Latin *adhaesio*), since the other party may only adhere to it, take it or leave it, without free discussion of the terms. But whatever the proportion of general terms in a contract, the law looks upon them with suspicion precisely because these terms are not open to free negotiation. Printed forms of contract used by great undertakings often contain a summary of such general terms.

Neither invoice clauses nor general business terms bind an unwilling party. But an invoice is a document posterior to the contract (though it may repeat its general terms), while general terms are those in some way published or included in contract forms before the contract is made.

2. “... unless he knew and accepted them...” (in which case they bind)

Under article 1680(1), a party is bound where he expressed agreement. The above passage goes further - with respect to general terms a party must not only have expressed agreement, but also have actually agreed (*known and accepted* them). Whether he has known the general terms is a question of fact for the court, which shall examine whether they were sufficiently brought to his notice. A large poster in the office where the contract was made may be enough. A minutely printed clause in an unobtrusive corner of the contract form may not be enough. Where the customer is obviously lacking in literacy, the above mentioned poster is not enough, etc., etc. It all depends on the circumstances.

3. “... or they were prescribed or approved by the [public] authorities” (in which case they bind).

Here the legislator takes away with one hand much of what he has just given with the other. Many undertakings of great size or of public utility have their general terms of business prescribed or approved by the authorities. Where the general terms are so prescribed they are stipulated in advance and often connected with the “duty to accept” of article 1683(1), so that the examples given for the above article (post transport, light, water) hold good for this one. But sometimes, where public utility is less involved, general terms are officially approved without the “duty to accept” being imposed.

Illustrations: When you buy a railway ticket, your offer creating the contract under the railway company's duty to accept takes place before boarding the train or reading any general business terms. Although you never knew nor accepted such terms, they bind you, since they are prescribed by the authorities. Small excerpts from them may be written on the back of your ticket or be posted where you pass after ticket purchase, but it is now too late to withdraw. The railway may be exonerated from liability for delay or for loss or damage to baggage or persons by fault of the employees (art. 1888). The railway's terms may fix in advance high penalties (art. 1889) for rashly stopping the train or for breaking a window. All this would be quite different in case of unregulated private carriers, with regard to which non-approved terms do not bind even if printed on the back of tickets, unless they were brought to the customer's notice at the time of purchase.

ART. 1687. DECLARATION OF INTENTION

Art. 1687, sub-art. (a) (re-translated)⁴

THERE IS NO CONTRACTUAL OFFER WHERE A PERSON DECLARES HIS INTENTION TO GIVE, DO, OR NOT DO SOMETHING WITHOUT COMMUNICATING THIS INTENTION TO THE BENEFICIARY OF THE DECLARATION.

Compare article 1680 (2), by virtue of which there is no valid restriction to an expressed agreement where it was not communicated to the other party. Pursuant to the present sub-article, there is no valid offer where the declaration was not communicated to the beneficiary. Such declaration remains one of intention; it is not binding.

Examples:

11) Mr. Brown solemnly declares at a public meeting that he will give Birr 10,000 to a Charity Fund. The Fund cannot accept such a declaration, which was not directed to it. Result: no offer, no acceptance, no claim.

(2) B sends to C an offer which does not reach him; it is lost in the post C accepts, producing, instead of the offer, witnesses that it was sent. C has no claim, as it is not B that informed him of the offer. There exists no true offer: B succeeded in sending it, but not in making it known to C (it is others who made it known to C). B is not bound by C's acceptance of information from outsiders.

It must be emphasized that the above rules applying to intended offers do not apply to intended acceptances. An acceptance sent to an absent offerer need not be made known to him. By virtue of article 1692(1), it is enough for it to be sent to the offerer, whether it reaches him or not.

4. Retranslated from the French master-text. We retranslate the latter when the published English version is obviously inaccurate.

Art. 1687, sub-art. (b) re-translated

THERE IS NO CONTRACTUAL OFFER WHERE A PERSON SENDS TO ANOTHER OR POSTS IN A PUBLIC PLACE [any place open to the public such as a street, station, waiting-room, shop premises, newspaper column] TARIFFS, PRICE LISTS OR CATALOGUES. OR DISPLAYS GOODS FOR SALE TO THE PUBLIC.

In comment 3 under article 1679, we have stressed that an ordinary agreement is in fact often presumed to include the declarant's consent to be bound by his declaration. This sub-article lays down an opposite presumption of law for declarations made in tariffs, price lists, catalogues, and shop windows, etc. such declarations are deemed to be non-binding declarations of intention, not offers but invitation of offers from the addressees and the public, so that "acceptance" of any of them does not create a contract.

Tariffs are a variety of price lists. Catalogues are normally more descriptive than simple price lists. Both usually contain general terms of business intended to attract the public, some such lists add the mention "not binding" or similar words, but in Ethiopian law they are in any case not binding (cf. Corbin Nos. 25-28).

Justification for this sub-article: he who publishes tariffs, catalogues, etc. is not, as a rule, definitely decided on concluding with anyone in any circumstances. Sometimes even the objects of his proposal cannot be ascertained with sufficient precision in the sense of article 1714(1). A bus tariff does not propose to a precise person to carry him on such a day to such a place. A price list does not offer a definite man a precise quantity of goods at a given time and place. Only proposals of sufficient precision as to be accepted by a "yes", or a performance, usually amount to offers in law. How can you answer, "yes" to a tariff or catalogue? The latter are usually only intended to invite orders, i.e. offers to buy, hire, etc. the clear rule of this sub-article prevents wasteful disputes on these points.

Example:

- (1) A Volkswagen owner, Mr. Black, receives a catalogue declaring that Volkswagen spare parts will be available to the public. Mr. Black has no claim for a spare part.
- (2) Mr. Brown reads a poster announcing the timetable and tariff of a carrier. Mr. Brown cannot enforce its terms before the carrier accepts his order to carry him or his goods accordingly.
- (3) Mr. White finds a bargain article in a shop or market-stand, marked five ten. The merchant says he now will not sell for less than ten birr. Mr. White has no claim.

POSTSCRIPT. The principles of article 1687 suffer two exceptions. One is provided by the provision of article 1689, "public promise of a Reward". Another results from the "self-acting" nature of automatic distributors of goods, which rebuts the otherwise applicable presumption that a display of goods for sale is not an offer (but cf. Daepfen, P.23, 2).

ART. 1688. SALE BY AUCTION

Art 1688, sub-art. (1)

WHOSOEVER OFFERS A THING FOR SALE BY AUCTION SHALL BE DEEMED TO MAKE A DECLARATION OF INTENTION AND NOT AN OFFER.

The preceding article dealt with declarations of intention. Offering something for auction is another instance of declaration of intention not amounting to offer in law, whatever it be called in life. The purpose of auction is to reach a high price. When, because of the buyers' collusion or weak markets, the highest bid is still below the expected level, or for any other reason, the auctioneer or his agent remains free to reject such a bid. Some auctioneers expressly preserve their freedom to reject bids, or they state a minimum "reserve" price. Ethiopian law protects them even without such precautions: they remain free to withdraw, but in such a case the auctioneer may, in tort, owe his costs to the highest bidder suffering from an inconsiderate rejection of his bid (art. 2055 with 2028).

A legal analysis of what is, basically, auction in Ethiopian law shows that it is a special solicitation of offers to buy, with a view to accepting the highest offer, if satisfactory. Conversely, advertising for tenders is a solicitation of offers to sell, with a view to accepting the lowest or best, if satisfactory (art. 3147).

Examples:

- (1) B auctions his house with a "reserve" price of Birr 30,000. No bid reaches that sum. No sale.
- (2) B auctions his house without reserve price. C's highest bid of Birr 29,000 is not accepted by B. No sale, but B owes C his cost of travel to the auction.

Art. 1688, sub-art. (2)

IN SUCH CASE THE CONTRACT SHALL BE COMPLETED ONLY WHERE THE THING IS KNOCKED DOWN UPON THE LAST BID BEING MADE.

This solution results from the preceding one. If auction proposal is not offer, then bids are offers. If bids are offers and cancel previous lower bids, then the auctioneer's knock upon the last bid is acceptance and completes the contract.

ART. 1689. PUBLIC PROMISE OF A REWARD

Art. 1689, sub-art. (1)

A PROMISE PUBLISHED BY POSTERS OR IN ANY OTHER MANNER TO REWARD THE PERSON WHO SHALL FIND AN OBJECT WHICH HAS BEEN LOST OR WHO SHALL PERFORM A CERTAIN ACT SHALL BE DEEMED TO BE ACCEPTED WHERE A PERSON BRINGS THE OBJECT BACK OR PERFORMS THE ACT, NOTWITHSTANDING THAT HE DID NOT KNOW OF THE PROMISE.

In contrast to public proposals made in tariffs, catalogues, etc. (art. 1687(b)), public promises of a reward are binding offers. They can be accepted by conduct.

1. “A promise published by posters or in any other manner...” The phrase “any other manner” means, e.g., in a newspaper or by radio.

According to *David* (p. 15), this does not include simple oral announcements even if made at Public meetings. The latter view is disputable. Swiss commentators on analogous problems hold the opposite view (e.g. *Engel*, No. 45 B).

2. “...to reward the person who shall find an object which has been lost shall perform a certain act...”

Examples:

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 - (5) The Ministry of Justice circulates notices offering 50 birr to which finds a certain fugitive from justice.
 - (6) The Ministry of Finance promises a percentage of fines to be collected from tax defaulters to whoever will denounce them.
3. “... shall be deemed to be accepted where a person brings the object t¹ or performs the act notwithstanding that he did not know of the promise.

In all the above examples, the doing of what is to be rewarded constitutes¹ acceptance of the promise *by conduct*. Public promises of a reward are binding of stipulating a special form of acceptance pursuant to article 1681(2). They derogate from the rule of article 1678 (a), whereby there is no offer unless the proposal is communicated to a given beneficiary. Since public promise of a reward is, in our system, true offer, it cannot be withdrawn, and it binds the offerer of the reward within stipulated delay of article 1690(1), or the reasonable delay of article 1691(1).

What happens if more than one person perform as required by the promise, e.g. five solve the crossword puzzle, three beat the national record, four catch flu? There is no rule. The promiser may have intended to give the reward (a) to the first in time (b) to all in equal shares, (c) fully to each. He will do well settle this point advance.

Art. 1689. sub-art. (2)

THE PROMISOR SHALL GIVE THE PROMISED REWARD.

This is self-evident. Since the doing of what is **to be** rewarded amounts to acceptance of the promise (sub-art. (1)), the contract is complete. Since it is complete, the promisor is bound even without this sub-article.

ART. 1690. OFFER WITH TIME LIMIT FOR ACCEPTANCE

Art. 1690, sub-art. (1)

WHOSOEVER OFFERS TO ANOTHER TO ENTER INTO A CONTRACT AND FIXES A TIME LIMIT FOR ACCEPTANCE SHALL BE BOUND BY HIS OFFER UNTIL THE TIME LIMIT FIXED EXPIRES.

This means that in Ethiopian law the option time (time for acceptance), once offered, is binding and irrevocable. In English law the offerer can revoke such an offer, unless the option time was “purchased” by the offeree (see *Chitty*, No. 84).

Art. 1690, sub-art. (2)

HE SHALL NOT BE BOUND WHERE HIS OFFER IS REJECTED WITHIN THE TIME LIMIT FIXED

In the light of article 1694, this is true *a fortiori* without need to state it here. This superfluous sub-article replaces a useful draft provision commented on in *David* (p. 15 *in fine*), which has disappeared late in the codification process. See our comment under article 1692(1), para. 4.

ART. 1691. OFFER WITHOUT TIME LIMIT

Art. 1691, sub-art. (1)

WHOSOEVER OFFERS TO ANOTHER TO ENTER INTO A CONTRACT AND DOES NOT FIX ANY TIME LIMIT SHALL BE BOUND BY HIS OFFER UNTIL THE TIME WHEN HE CAN REASONABLY EXPECT THE OTHER PARTY TO DECIDE ON THE OFFER.

It seems sensible for the offerer to fix, whenever desirable, a time limit for acceptance (see the preceding article), so as to know exactly how long he is bound to maintain it. But since many offerers cannot or will not do it, the law has to provide a solution for them. Contrary to the French and the English Law, by which, as a rule, an offer without time limit does not bind and may be revoked at any time before acceptance, Ethiopian law follows Swiss and German solutions in providing that such an offer binds, that is, it cannot be withdrawn after the offeree learns of it (cf. art. 1693), and it remains open to acceptance during a time of reasonable expectation. Traders, etc., should be able to rely on offers. But how can we determine how long they may rely on them? Basically, we must distinguish what happens (A) between parties corresponding; (B) between parties conversing.

A. Parties corresponding. For current transactions between absent traders, we usually compute the “reasonable” period by adding: (a) the normal time needed by the letter or telegram to reach the offeree, and (b) about a day plus any holiday for the offeree to decide and send the acceptance by means of similar rapidity. We do not add the acceptance’s travel time, since the contract is already made (completed) by the act of sending the acceptance (art. 1692 (1)).

The above “standard”¹ reasonable time admits of reductions (1) or extensions (2-4):

- (1) Where a telegram offer is received before noon, it is reasonable to assume that acceptance should be sent on the same day by means of the same rapidity.
- (2) Where, as, e.g., between client and habitual supplier or artisan, usual acceptance is by conduct (delivery, repair) after a longer delay, the latter is the “reasonable” one.
- (3) Where a partner offers to quit the partnership at certain conditions, this may require a month for study.
- (4) Where a bankrupt debtor makes a compromise offer, the reasonable delay includes the delay needed to notify all his creditors, etc.

B. Parties conversing. Where the offer is conversational, e.g. between persons present or connected by telephone, the “reasonable time” is very short: in order to bind, acceptance must be given before the conversation is over. A later acceptance of the conversational offer by letter is of no effect. But a later letter only confirming one’s prior conversational acceptance is a different thing: if there is any beginning of evidence (e.g. a witness linked into the acceptor’s telephone receiver), the judges may consider the fact of not replying to a confirming letter as corroborating evidence of prior oral acceptance. So a prudent businessman, instead of writing “I accept”, will write “I confirm my oral acceptance.”

Art. 1691, sub-art. (2)

WHERE ACCEPTANCE IS LATE, THE OFFERER SHALL FORTHWITH INFORM THE OTHER PARTY WHERE HE DOES NOT INTEND TO BE BOUND.
[Otherwise he is bound.]

Thanks to this provision, most of the aforementioned difficulties in determining the “reasonable” delay will never arise, because:

- (1) Where the offerer does not refuse the acceptance, the acceptance is good, though it may have been late;
- (2) where he refuses it on grounds of lateness, but the offeree takes no steps, the acceptance is inoperative, though it may have been timely;
- (3) it is only where the offerer refuses the acceptance and the offeree contests its lateness that cases may arise in court.

Illustrations:

- (1) B’s offer to C reaches C late because of interruption in the postal services. Consequently, C’s acceptance, though quick, is sent abnormally late after the

time when the offer was sent. B gives no answer. B is bound because he did not reject the late acceptance: he did not forthwith inform C that he shall not be bound.

(2) In a similar case B sends an immediate refusal of the acceptance. B is not bound.

(3) C receives the offer and sends the acceptance in time, but the acceptance reaches B one month late because of postal delays. B is bound. If B rejects the acceptance, C may sue him and win the case by invoking article 1692(1), since a contract between absent persons is complete on sending the acceptance, which need not reach the offerer. (See below.)

ART. 1692. CONTRACT BETWEEN ABSENT PARTIES

Art. 1692, sub-art. (1)

A CONTRACT MADE BETWEEN ABSENT PARTIES SHALL BE DEEMED TO BE MADE AT THE PLACE WHERE AND TIME WHEN THE ACCEPTANCE WAS SENT TO THE OFFERER.

Acceptance makes the contract. But where and when does it make it? In a contract *inter presentes* (between present parties), questions as to place and time of contract do not arise. Both parties are at the same place, and the times of “sending” the acceptance and of its “reaching” the present offerer are also the same, there being no significant interval between them.

The difficulties as to “where and when” acceptance made the contract arise with regard to absent parties. But why should we bother about the place and time of contract? Because this problem has practical implications. The place of contract may determine which court has jurisdiction. The place of an international contract may determine the form prescribed for, or the law applicable to, the contract. As to time, the date of the contract may start the running of interest on loans. Also, it is from such a date that any behaviour inconsistent with the contract shall create liability for breach (non-performance). Also, it is the date of the contract that opens the period of risk from delay in the transmission of the acceptance. (See below.)

Inter absentes (between absent parties), there is a time interval between the sending and the receiving of the acceptance. The parties can themselves agree at which time and place the contract is made. But the address and date which an acceptor alone puts on the acceptance letter is irrelevant for that purpose. There are four theories concerning the question “At which particular time and place does the acceptance make the contract, where the parties give no indication on this point?” We shall examine only the two principal theories.

By the theory of reception, it is *reception* of the acceptance through its reaching the offerer’s postbox, residence or office that makes (completes, perfects) the contract. Any offerer may choose the above system, and condition the completion of the contract on the reception of the acceptance. He can do it expressly (art. 1681(2)), but not implicitly through merely fixing a time limit for the acceptance, since David’s

much-needed draft provision to that effect has disappeared (a fact overlooked by his editor): see our comment under article 1690(2).

It is where the offerer has not prescribed a system other than the following that our suppletory law steps in to say that the contract is made (completed) at the time and place of the sending of the acceptance. *Sending* means, normally, *dispatch* (expedition) of the acceptance by post or telegram. The sending by private messenger is equivalent to it where normally used, but is not advisable for important business, as it makes the acceptor responsible in tort for the choice of a bad or slow messenger.

Let us now examine the respective weaknesses of each theory. Argument against our theory of dispatch: Why should an innocent offerer be bound unless he knows of the acceptance? Argument against the theory of reception: Why should an innocent acceptor performing the contract lose it because of transmission lapses? The law has to choose its victim between two innocents. Germany adopts the reception theory; France, England, U.S.A. and Ethiopia the dispatch theory. The dispatch theory has also a practical justification: security of commerce requires that traders should be able to rely not only on the “reasonable delay” of article 1691(1), but also on the contract accepted within that delay, whatever happens in the transmission. There are also theoretical justifications, but these can be safely omitted here. (See discussions in *Walton I*, p. 199 ff., *Chitty* No. 77 - 80, *Corbin* sec. 78.)

We have mentioned above that, under article 1681(2), the offerer may prescribe that completion of contract shall occur later than the dispatch of acceptance. Obversely, there are special rules which imply a completion of contract earlier than or without dispatch of acceptance. There is no sending of acceptance, indeed no active acceptance at all, in the “silence” of articles 1683(1), 1684(1) and 2381(1).

Finally, within the normal cases themselves - those of completion of contract through sending the acceptance - it may be difficult neatly to distinguish offers from acceptances in complicated correspondence negotiations. But this difficulty must be left mainly to the common sense of the courts. It is the final declarations that matter. In a contractual instrument with several signatures, and without an agreed mention of place and date, the latter are those of the last signature (the perfecting acceptance).

One example will suffice to illustrate the practical consequences of the theory of dispatch: B sends to his insurer C a letter accepting the offered policy of fire insurance for his house. After B posted the letter, but before C received it and learnt of the acceptance, a fire broke out in the house, which was destroyed. C refuses to pay the indemnity, invoking his ignorance of B’s acceptance of the insurance. The court rejects C’s defence and holds him liable on ground of article 1692(1). (On cases involving mistake, see *Walton I*, p. 263 ff.)

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Telephonic contracts are conversational contracts between absent parties. Similarly to such contracts between present parties, telephonic contracts present no

1. “A promise published by posters or in any other manner ...” The phrase “in any other manner” means, e.g., in a newspaper or by radio.

According to *David* (p. 15), this does not include simple oral announcements even if made at public meetings. The latter view is disputable. Swiss commentators on analogous problems hold the opposite view (e.g. *Engel*, No. 45 B).

2. “...to reward the person who shall find an object which has been lost or who shall perform a certain act...”

Examples:

- (1) Mr. Brown loses his watch and promises, in the *Ethiopian Herald*, 10 birr to whoever will bring it,
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much-needed draft provision to that effect has disappeared (a fact overlooked by his editor): see our comment under article 1690(2).

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A CONTRACT MADE BY TELEPHONE SHALL BE DEEMED TO BE MADE AT THE PLACE WHERE THE PARTY WAS CALLED.

Telephonic contracts are conversational contracts between absent parties. Similarly to such contracts between present parties, telephonic contracts present no

difficulty as to the time of contract, due to the fact that the times of sending the acceptance and of its reaching the telephonic offerer are the same, there being no significant interval between them. Obversely, the problem of fixing the place of a telephonic contract presents difficulties. The rule of sub-article (1), that contracts are made at the place from which acceptance was sent, would present too many incertitudes in case of a telephonic contract, where it may be impossible neatly to reconstruct and distinguish offers and acceptances. Our law simplifies everything through fixing the called party's place as the place of contract. This will in most cases agree with the rule of sub-article (1), since the telephone caller is usually the offerer and the called party is the acceptor (sender of the acceptance over the telephone). Cf. *David*, 17 (at 3.).

ART. 1693, WITHDRAWAL OF OFFER OR ACCEPTANCE

Art. 1693, sub-art. (1) (retranslated)

AN OFFER SHALL BE DEEMED NOT TO HAVE BEEN MADE WHERE THE OFFEREE LEARNS THAT IT IS REVOKED BEFORE OR UPON LEARNING OF THE OFFER.

We already know that there is no offer before the intended offer is communicated to its addressee. So what you really revoke under this sub-article is not a true offer, but the declaration of intention of article 1687 (a), which you thus prevent from becoming the binding offer of article 1690(1) or 1691(1). The revocation is timely if previous to, or at least simultaneous with, making known the offer. E.g., Mr. Brown revokes, cancels his epistolary offer by a "timely" telegram, because he has found better opportunities elsewhere. This offer: is then "deemed not to have been made". It was never made known without its cancellation, which prevented its birth in law.

Art. 1693, sub-art. (2)

THE PROVISIONS OF SUB-ART. (1) SHALL APPLY WHERE ACCEPTANCE IS WITHDRAWN.

This sub-article presents a problem. It contradicts article 1692(1) through applying sub-article (1) to withdrawal of acceptance with the following effect: "Acceptance shall be deemed not to have been made where the offerer learns that it is withdrawn before or upon learning of the acceptance." The contradiction lies in that, by virtue of article 1692(1), the contract is already made, completed by the sending of the acceptance. Practical reasons have induced the legislator to borrow the rules of revocation of acceptance from the "reception" theory, in which such revocation is logical, since no contract exists before reception of the acceptance. The only theoretical explanation we can supply for the Ethiopian system is that the sending of the acceptance completes the contract, on condition that the offerer does not learn (e.g. by telegram) that the acceptance is revoked before or upon his learning that it is made. Only in this way can we reconcile article 1692 (1) with article 1693(2). A revocation of offer only prevents its birth in law, while a revocation of acceptance destroys a born valid acceptance and a completed contract. Where not so destroyed, the contract is effective as from the date of the sending of the acceptance.

What about unilateral declarations not being offers or acceptances, such as the termination notices of article 1821 ? Can they also be revoked? The answer is yes, by analogy. A termination notice can be withdrawn before or upon the addressee's learning of it. This allows us thus to summarize the rules on revocation: any declaration in law - whether offer, acceptance, termination notice or other - can be revoked by notice before or upon the addressee's learning of it.

ART. 1694. DEFECTIVE ACCEPTANCE

THE OFFER SHALL BE DEEMED TO BE REJECTED AND A
NEW OFFER SHALL BE DEEMED TO BE MADE WHERE THE
ACCEPTANCE IS MADE WITH A RESERVATION OR DOES NOT
EXACTLY CONFORM TO THE OFFER.

Where the acceptance is not total but adds to, restricts, or modifies anything in the offer, this amounts to lack of exact conformity with the terms of the offer, which is thereby rejected and the offerer freed. On the other hand, the defective acceptance is deemed to be a new offer (counter-offer) and so binds him who makes it. If the offerer is countered even in the smallest detail, he has not met with acceptance but with a counter-offer, which frees him but binds the counter-offerer.

Illustrations:

(1) There is a negotiation. B offers to C a house at Birr 10,000. C first accepts at Birr 9,999 and then says "All right, let it be Birr 10,000". Even this is not an acceptance, but a new offer to buy at Birr 10,000, which B is free to accept or not, while C is no longer free to accept B's old offer to sell at Birr 10,000.

(2) Let us now suppose that C accepts the offer to buy at Birr 10,000, but his acceptance is sent to B one day after the time limit fixed pursuant to article 1690(1). B is not bound.

(3) Any acceptance modifying general terms, quantities, qualities offered, forms prescribed pursuant to article 1681(2), etc., also amounts to rejection of the offer.

Theoretical justification of article 1694: under a "freedom of contract" system, no offerer should be bound except by exactly what he willed. Practical justification: if the courts were permitted to uphold defectively accepted contracts, it would still be impossible for them consistently to determine the exact extent of deviation from terms offered that will not invalidate acceptances. If the law is to be certain, our system should be maintained.

Art. 1695. COMPLETION OF CONTRACT Art. 1695.

sob-art. (1)

A CONTRACT SHALL NOT BE DEEMED TO BE COMPLETED UNLESS THE
PARTIES HAVE EXPRESSED THEIR AGREEMENT TO ALL
THE TERMS OF THE NEGOTIATION.

This sub-article supplements the preceding article on defective acceptance. There must, of course, be no declared disagreement as between offer and acceptance, but

the parties' declared agreement must also cover all the terms mentioned (reserved) for discussion and not withdrawn by a party in connection with the intended contract. None of them may remain unsettled if there is to be a contract. A completed contract presupposes expressed agreement on all such *terms of the negotiation*.

Example: B sells a ton of candies to C. Their sale agreement is written down in full detail, except for the colour of wrappings to be discussed. Later B rejects all colors proposed by C. There is no contract, and C has no claim in our law. Swiss law is less extreme, in that it enables the courts to uphold a contract whose essential terms only are settled. But attractive wrappings might well seem more essential to the candy merchant than to his judges!

Art. 1695, sub-art. (2)

A CONTRACT SHALL BE DEEMED TO BE COMPLETED WHERE THE PARTIES SHOW THAT THEY INTEND TO BE BOUND NOTWITHSTANDING THAT THEY HAVE NOT EXPRESSED THEIR AGREEMENT ON ALL THE TERMS OF THE NEGOTIATION.

This sub-article provides an exception from the preceding one for the case when the parties themselves show that they want to be bound, despite not yet having settled all the terms. The principle of freedom of contract overrides here the postulate of completeness of agreement. But the parties must at least have expressed agreement on essential terms, without which there is no defined object under article 1714. E.g., no insurance contract shall be effective without fixing the premiums or indemnities. As to non-essential secondary terms, such as quality of fungibles, interest, place and time of payment, liability for non-performance, etc., the parties may have agreed to postpone their discussion without postponing the binding contract. Contracts are often concluded by telegram (or telephone), and the parties start performing them before settling the secondary terms by letter, because they trust each other and there is urgency. In such a case their intention to be already bound may be shown expressly in the telegram or implicitly by the acts of performance. The telegram may say that the agreement is binding or executory. More often, the telegram only mentions the details left for correspondence, and the parties start performance, which amounts to the same, namely, showing their will to be bound.

NOTE: Whenever even a minute term of the negotiation (e.g. the colour of wrappings) is left unsolved, it is enough for the defendant to invoke sub-article (1), without the need to prove that he did not intend to be bound by the main agreement. It is then for the claimant to prove, invoking sub-article (2), that a binding contract was intended in spite of the point left unsolved.

Art. 1695, sub-art. (3)

IN SUCH A CASE, THE LAW SHALL REMEDY ANY DEFICIENCY IN THE AGREEMENT OF THE PARTIES.

As we know from the preceding comments, a contract incomplete as to details may be binding and completed in law: (a) because the parties so decided, expressly

or implicitly, or (b) because such details were not mentioned for discussion. If they remain undetermined, the deficient contract must be “rounded off” by the law. Below, we enumerate certain typical contractual lacunae (gaps, deficiencies) in order to show how the section on effects of contracts as to performance (Ch. 2, Sec. 2) or other sections remedy them:

- (1) Where the quality of fungible goods (e.g. coffee, teff, wine, nug, oil, etc.) is not determined, the quality due is the one chosen by the debtor not below average quality (art. 1747).
- (2) Where the rate of interest on money is not fixed, nine per cent yearly is due (art. 1751) by the debtor.
- (3) Where the place of payment is not determined, such place is the debtor’s residence or the location of the definite thing due (art. 1755(2-3)).
- (4) Where the time of the payment due is not fixed, payment may be made or required forthwith (art. 1756 (2-3)).
- (5) Where the incumbence of the costs of payment is not determined, the debtor shall bear such costs (art. 1760).
- (6) Where the liability for non-performance is not determined under articles 1886-1889, such liability in damages shall exist even without fault but excluding cases of *force majeure* (arts. 1791 - 1792), etc., etc.
- (7) Many other suppletory provisions for filling incomplete contracts are found in Book V on “Special Contracts”.

Paragraph 2. DEFECTS in Consent

In order that an existing contract be fully valid, the consents expressed therein must be free from the defects set out in this Paragraph.

ART. 1696. INVALIDATION OF CONTRACT

A CONTRACT MAY BE INVALIDATED WHERE A PARTY GAVE HIS CONSENT BY MISTAKE OR UNDER DECEIT OR DURESS.

As said in connection with article 1680(1), when there is discordance between declaration and true will, the contract exists nevertheless, but if such discordance amounts to “fundamental” mistake (art. 1698), or to a mistake induced by fraud (art. 1704(1)), or there is duress (art. 1706), etc., the contract may be invalidated at the request of the party whose consent is defective (art. 1808 (1)). In other words, a contract completed under the rules of Paragraph 1 on Elements of Consent may be invalidated under the rules of Paragraph 2 on Defects in Consent. This Paragraph’s underlying moral postulate is that consent should be *true* (no basic mistake or fraud, etc.), *free* (no duress, fear, want, etc.) and *conscious* (see in part art. 1710; see the law of Persons on incapacities). Save for unprovoked basic mistake, invalidation normally presupposes a contractant’s immoral misleading (fraud, etc.), threatening (duress, etc.) or exploiting (art. 1710) the other party, and so contributing to vitiate his consent.

ART. 1697. MISTAKE MUST BE DECISIVE

THE PARTY WHO INVOKES HIS MISTAKE SHALL ESTABLISH THAT HE WOULD NOT HAVE ENTERED INTO THE CONTRACT, HAD HE KNOWN THE TRUTH.

Mistake is a false belief, a belief in something untrue. The false belief must be firm, and not merely a probable assumption or supposition. A party proving his firm error must establish in addition that such a mistake has determined him to contract, that he would not have contracted otherwise. This requirement is common to invalidation claims-grounded on fraud (art. 1704 (1)), and those grounded on mistake not induced by fraud. But mistakes not induced by fraud must not only be “decisive”, they must also be “fundamental” in order to amount to a ground of invalidation. Examples cannot be given before we analyse the subsequent article 1698. Further provisions on mistake will be discussed under article 1699-1703.

ART. 1698. MISTAKE MUST BE FUNDAMENTAL

A DECISIVE MISTAKE MAY INVALIDATE THE CONTRACT [retranslation] WHERE IT RELATES TO AN ELEMENT OF THE CONTRACT WHICH THE PARTIES DEEM TO BE FUNDAMENTAL OR WHICH IS FUNDAMENTAL HAVING REGARD TO GOOD FAITH AND TO THE CIRCUMSTANCES IN WHICH THE CONTRACT WAS MADE.

1. “A decisive mistake may invalidate the contract...”

As mentioned before, the decisive mistake of article 1697 is not in itself sufficient to invalidate a contract. It shall become sufficient where it relates to an element of the contract, and such element appears fundamental to the concerned parties or to the average man in their position, as shall be explained below at 2,3 and 4.

2. “... where it relates to an element of the contract...”

The normal elements of a contract mentioned by article 1678 are (a) capable consenting parties (*persona*), (b) a content or object (*corpus*). Another element is the legal “nature” of the contract, i.e. the “kind” of legal transaction (*negotium*) originated by it: sale, or hire, or loan, or deposit, or donation, etc.

The mistake must relate to one of the aforementioned elements, that is to the *negotium*, *corpus*, or *persona*. Mistakes as to the legal nature of a contract (*error in negotio*) or as to its object or contents (*error in corpore, in substantia*) will all be examined under article 1699, while errors as to the contracting persons (*error in persona*) will be considered under article 1700.

3. “... which the parties deem to be fundamental ...”

The parties deem an element to be fundamental where they make it a condition of the contract. This they can do expressly through calling it a condition, or using words to that effect. In such case there is no need for invoking this article, since the existence of the contract will depend on the fulfilment of the condition under the rules of Section 2 of Chapter 4. For instance, a long lease of a small plot of land may be made on condition that it shall be possible to build a mechanic’s workshop on it.

On the other hand, the parties may have made it not an express condition, but an implicit one, through mentioning in the letters or interviews leading to the contract or in the document of lease itself that a party rents the plot for putting up a workshop on it. Later it is discovered that the plot lies across the border of a restricted area where a workshop may not be built. The contract may be invalidated, since the parties have shown that they *deem* the possibility to put up a workshop on the plot to be a fundamental element, an implicit condition of the contract. Were only one party (the lessor) aware of the workshop-building purpose, such a possibility would not have become an element of the contract but would have remained a mere decisive (art. 1697) motive, of no effect, pursuant to article 1701(1). The parties' mistake as to the possibility of building the workshop relates to an eventual quality of the element "object" (the land): the quality of its being capable to be built upon in a special way, which an average man would not have contemplated.

The above example also aptly illustrates the fact that this Paragraph does not except mistakes of law from the operation of its rules on mistake. The parties are ignorant of the law forbidding the buyer to build a workshop on the plot. Such ignorance of the law may allow the lessee to avoid the contract, although it would not allow him to avoid tort liability if he had built there in disregard of the law (art. 2035). In the law of contracts, *ignorantia iuris excusat* (ignorance of law is a valid excuse) if it amounts to a decisive and fundamental mistake, so that there is no basic distinction between mistakes of law and mistakes of fact.

4. "... or which is fundamental having regard to good faith and to the circumstances in which the contract was made."

The preceding point 3 bears on elements appearing fundamental to the parties concerned. But a mistake may also bear on something which was neither expressly, nor implicitly in the way above described, made a condition of the contract by the parties. In such a case it is not enough that his own mistake seems fundamental to a possibly capricious claimant. It must also *be* fundamental, that is, it must appear fundamental to an average man put in his position and paying regard to good faith and circumstances. Examples of what an average man - speaking through the mouth of the court - considers to be a fundamental mistake in relation to the mentioned elements of contract (nature, object, parties) are given under the two articles below (1699,1700).

ART. 1699. MISTAKE AS TO THE NATURE OR OBJECT OF THE CONTRACT

A CONTRACT MAY BE INVALIDATED ON THE GROUND OF MISTAKE *WHERE*:

- (a) THE MISTAKE RELATES TO THE NATURE OF THE CONTRACT, OR
- (b) THE MISTAKEN PARTY HAS UNDERTAKEN TO MAKE A PERFORMANCE SUBSTANTIALLY GREATER OR TO RECEIVE A CONSIDERATION [counter - performance] SUBSTANTIALLY SMALLER THAN HE INTENDED.

fa) (Nature)

“... the mistake relates to the nature of the contract, .

Mistake as to the legal nature of the contract (error *in negotio*) is a ground for invalidation in all cases, without any restrictions comparable to those imposed below on invalidation connected with the so-called *error in substantia*. A man intending a sale may not be bound by a donation, neither may a man intending a deposit be bound by a loan, etc. Here are some illustrations:

- (1) “One who intends to buy a house and, believing he is doing it, in reality signs a lease ... A Quebec case where an illiterate man signed a paper which he believed to be an order for goods and it was really a promissory note” (*Walton*, p. 162).
- (2) Signing a bill of exchange in the belief that one is confirming a statement of account.
- (3) Subscribing a guarantee in the belief that one signs as a witness (*Guhl*, p. 98).
- (4) A person who, believing that he is signing a petition in favour of some charitable institution, in reality subscribes to an undertaking to make annual money contributions to such institution (*David*, p. 27).

Incidentally, wherever deceit is used in such cases, article 1704 on fraud can provide an alternative and better remedy.

(b) (Object)

“... the mistaken party has undertaken to make a *performance* substantially greater or to receive a consideration [counter-performance] substantially smaller than he intended.”

As follows from our earlier comments on article 1678(b) at *I*, the object of a contract is the obligations “to perform something” which the contract contains, or, in legal shorthand, such performances or the things they concern themselves. It follows that this passage deals with mistakes as to the object or content of the contract. Such mistakes can be of two kinds: mistakes as to the identity of the object, or as to its qualities.

The mistake as to the *identity* of the object (error *in corpore*) is generally put on the same level as the mistake as to the legal nature of the contract (error *in negotio*) - it is a ground of invalidation in all cases, since it is always considered to be fundamental by the average man. Examples:

- (1) I buy “your horse”, thinking it is the one I see you riding on, and it is another horse (cf. our comments on article 1680(1)).
- (2) A person buys fertilizer sulphur, thinking that he is buying pharmacy sulphur.
- (3) A person sells his real diamond, thinking he is selling another, artificial one.

Claims for invalidation founded on such mistakes need not be based on this article, so it need not be proved that the object mistaken for another (the horse, the sulphur, the diamond) involves much greater or smaller performance or consideration. The general rule of article 1698 (comment 4) is sufficient to ground such claim! where the claimant had contemplated simply something else (another object).

Completely different is the position where the mistake concerns only certain characteristics of the object, such as its *qualities or size*, the latter not being in accordance with the claimant's original belief. In such case the average man, speaking through the mouth of the court, will have to say whether the lacking characteristic is sufficiently fundamental to permit invalidation. If they are, the error becomes¹ substantial (error *in substantia*). By both common sense and legal provision, the error is substantial where the mistaken party is to give a much greater performance or to receive a much smaller counter-performance (called consideration by the translator than what he thought was due under the contract).

Let us first exemplify cases where a performance much greater than the contemplated one was promised:

- (1) A creditor releases his debtor under article 1825 for the full amount of his debt, while he intended a remission of only the current instalment.
- (2) A person sells a house which turns out to have much more m² living-space than he believed it to have.

As results from our comments on article 1678 *in fine*, the so-called consideration or cause for a party's owing a performance is what he receives or is to receive in exchange from the other party. This consideration or counter-performance received or to be received from the other party may be a ground for invalidation if much smaller than intended. Mistakes as to consideration (counter-performance) are more frequent than those as to performance, as usually a person knows less about what he is to receive than about what he is to give. By way of illustration we can simply "reverse" case (2) above, supposing that a person buys a house with much less m² living-space than he believed. The case of remission of debt cannot be so "reversed", as it involves no consideration (no counter-performance). Further examples:

- (1) A person believes in a much higher insurance indemnity than he is in fact promised (*Daepfen*, p. 54, 3).
- (2) A person buys another's inheritance in the belief that it contains more things than it does.
- (3) A person rents a villa in the belief that it includes a water well or supply, which it does not.

Examples of cases where invalidation of contract cannot be granted because the performance due is not much greater or the counter-performance owing is not much smaller than the mistaken party intended it to be:

- (1) A life insurance company committing a one-year mistake as to the age of the person insured.

(2) Any of the previously cited examples, supposing that the performance due is not much greater or the counter-performance owing not much smaller than the intended one.

It must be emphasized that it is the very performance due or counter-performance owing that must be substantially greater or smaller than intended and *not* its *value*, which, unless made a condition by the parties (art. 1698 at 3), is irrelevant for the purpose of invalidation of contract. In the above examples, the value of the house, inheritance, lease, etc., is irrelevant in itself. There must be more or less m² living- space in the house, things in the inheritance, water supply in the villa leased, etc. Only in mistakes as to money elements of performance, e.g., the money amount of the remitted debt, of the insurance indemnity, etc., is the error as to the size of performance necessarily co-extensive with the error as to its money value. Otherwise, a mistake as to the value of what you give or receive is, in itself, not grounds for invalidation of contract. If it were, this would block business transactions, which are precisely based on who shall better guess that value! A mistake as to money value only is a mistake as to motive in the sense of article 1701(1): it is non-fundamental and irrelevant. But where the parties guarantee some value, and thus make it an element of the contract, it becomes fundamental for the purposes of article 1698.

ART. 1700. MISTAKE AS TO THE PERSON

A CONTRACT MAY BE INVALIDATED ON THE GROUND OF MISTAKE WHERE SUCH MISTAKE RELATES TO THE IDENTITY OR QUALIFICATIONS OF THE OTHER PARTY (AND SUCH IDENTITY OR QUALIFICATIONS ARE A FUNDAMENTAL ELEMENT OF THE CONTRACT IN THE OPINION OF THE PARTIES OR HAVING REGARD TO THE CIRCUMSTANCES OF THE CASE).

We have put in parentheses the second part of the above provision. This part, if correctly translated (correct “qualifications” to read “qualities”) is a redundant shorter version of the general requirement of art. 1698, that any element of the contract (nature, object, person) - if it is to ground an invalidation based on mistake - must be deemed fundamental by the parties or must be fundamental, having regard to good faith and circumstances.

The first part of this article indicates that the “error *in persona*” may relate not only to the *identity*, but also to the *qualities* of the other party, just as the “error *in substantia*” of article 1699(b) was related to the qualities of the object. Mistakes as to a person’s identity may relate to physical identity, where you take one person for another, or to civil identity, where you mistake a person’s name or parentage, or to an element of civil identity, where you think a married man to be a bachelor. It is in marriage compacts creating the status of marriage that the distinction between mistakes as to identity and those as to quality is of special importance, because identity mistakes invalidate any marriage (art. 591(a)), while errors on the qualities of the spouse invalidate marriage only in the exceptional cases contemplated by article 591 (b - c).

In the law of contracts as defined by article 1675, the above distinction is of little importance, because neither identity nor quality errors *in persona* shall invalidate certain kinds of contracts (e.g. a cash sale), while either may invalidate contracts concluded *intuitu personae* (in consideration of the person), such as

- (1) Gratuitous contracts (donation, remission of debt, free loan, free guaranty);
- (2) certain insurances;
- (3) hire of qualified services (of a clerk, servant, painter, doctor, etc.);
- (4) partnership;
- (5) promise of credit in a loan or sale agreement, etc.

Examples (cf. *David*, p. 22 at 4):

- (a) B engages C as accountant. B does not know that C had been convicted for forgery of accounts. For an accountant, this amounts to lack of an essential quality, and B may avoid the contract.
- (b) In the same hypothesis, C had been convicted only for imprudent homicide, which is irrelevant to his accounting performances, and the contract holds good.
- (c) Were the forgery-convicted C engaged not as accountant but as manual labourer, such circumstances would prevent invalidation, since his quality as accountant is irrelevant to his quality as manual labourer,

Invalidating mistake as to juristic persons is possible, but mainly in regard to their civil identity, since such persons possess neither physical identity nor human qualities. It remains to be seen what kinds of “error *in persona*” are usually not deemed fundamental:

- (1) Mistakes as to the solvency of a person are inherent in current business risks. Solvency is not a quality of a person but a state of his affairs, whether or not caused by any of his qualities. Mistake as to solvency alone is not, normally, a ground for avoidance of contract.
- (2) Mistakes as to a person’s (e.g. your professor’s) professional degrees and qualifications for the concerned job are clearly relevant for invalidation purposes. But mistakes as to his factual talents, morals, etc., are, as a rule, not considered fundamental. Estimating a prospective employee’s factual ability and character involves a normal business risk.

Finally, it must be stressed that many current business transactions admit of no invalidation on ground of “error *in persona*”. A businessman does not normally deal in goods in consideration of a particular person.

ART. 1701. NON-FUNDAMENTAL MISTAKES

The mistake is never “fundamental” (never invalidates the contract),

- (1) where it does not relate to an element of the contract, but *only* relates to the facts motivating its conclusion, or

- (2) where there is only an appearance of mistake and the contents of the contract are, in fact, unmistakable:

Art. 1701, sub-art. (1)

A CONTRACT MAY NOT BE INVALIDATED ON THE GROUND OF MISTAKE WHERE SUCH MISTAKE ONLY RELATES TO THE MOTIVES WHICH LED TO THE MAKING OF THE CONTRACT.

A mistake as to an element of the contract is reflected in an unintended discordance between the true will and its contractual declaration. On the other hand, a will quite truly declared may be induced by untrue *external* points which motivate the party's decision to contract. Such a mistake does not relate to the contract but to the motives which led to its conclusion. Mere motives are irrelevant in contracting and need not be enquired into. Examples:

- (1) I buy a house because I want to install my son there on his marriage. This marriage is my motive; it is not a contractual element but an irrelevant external fact. A cancellation of the expected marriage shall not affect the contract.
- (2) I buy a new mule on the news that mine is dead, which turns out to be untrue. My mule's supposed death was an extra-contractual motive, so the contract is maintained.
- (3) I hire a house in Addis Ababa for three years, believing that my work will be here. Unexpectedly, I am transferred to Assab. Contract maintained.
- (4) I buy a picture, being motivated by the belief that it was painted by Afework Tekle. This feature becomes in law an element of the contract where the seller shares my belief and mentions it, thereby making Afework's authorship an implied condition of the contract under article 1698 (comment 3.). He is now no longer selling "a picture" but an "Afework picture". My mistake now relates not "only" to the motives, but also to a contractual element.

A mistake as to motive can become an invalidating mistake *if* the parties expressly or implicitly condition their contract on the supposed facts, thus made elements of the contract. Example of implicit condition: the picture case above. Example of express condition: officials stipulating that they conclude a lease "subject to no transfer" (on condition of not being transferred).

On the other hand, a mistake as to motive can support invalidation *if* it is induced by fraud (art. 1704) or by the statements contemplated by article 1705. For example, if I guarantee somebody's debt because his creditor has deceived me into believing that there are also other guarantors for this debt, I can invalidate my guarantee.

Art. 1701 sub-art. (2)

ARITHMETICAL MISTAKES IN A CONTRACT SHALL NOT AFFECT ITS VALIDITY AND SHALL BE CORRECTED.

Here there is only an appearance of mistake, and the contents of the contract are, in fact, unmistakable. The parties have agreed on the prices of the particular items

sold and have committed an error *calculi* only, e.g. an error in the addition which is to be corrected. An acceptance confirming all the items of an offer and miswriting the sum due, because of a calculation error or a slip of the pen, is not a defective acceptance in the sense of article 1694, but a true acceptance exactly conforming to the offer.

A similar problem is posed by “clerical” or typing mistakes, which also are not true mistakes. They shall be corrected by interpretation through the context in the sense of article 1736 (1). For instance, where the whole contract is about buying monkeys, and in one place it says “donkeys”, the latter word shall mean “monkeys”, in accordance with the context.

Arithmetical or calculation errors in the contract should not be confused with such mistakes outside the contract. Mistakes one makes in calculating one’s costs before the contract are irrelevant mistakes relating to motive. A will quite truly expressed in the contract may be based on false motives deriving from an inaccurate computation of the costs of performance.

ART. 1702. GOOD FAITH OF THE MISTAKEN PARTY Art. 1702, sub-art. (1)

THE MISTAKEN PARTY MAY NOT INVOKE HIS MISTAKE IN A MANNER CONTRARY TO GOOD FAITH.

A mistaken party is also called, for short, from Latin, the *errans* (the person in error).

The requirement of “good faith reappearing throughout the law”, is not capable of precise definition and is best illustrated by what amounts to its opposite, to such bad faith as deprives the *errans* of his remedy. For instance, a buyer may not invoke Article 1699 (b) for invalidation of a sale where the seller had refused to guarantee the supposed substantial quality of the thing sold or to make it a condition of the contract (*Daepfen*, p. 57 *in fine*). The buyer’s further belief in such quality (e.g. the sold horse’s pedigree) is at his risk. Invoking it would be contrary to good faith.

dishonest.

Art. 1702. sub-art. (2)

HE SHALL BE BOUND BY THE CONTRACT HE INTENDED TO MAKE WHERE THE OTHER PARTY AGREES TO PERFORM SUCH CONTRACT.

This rule is a consequence of the preceding sub-article on good faith. Example: B rents C’s flat No. 1. thinking he rents C’s bigger flat No. 2. C says “All right, let it be flat No. 2.” B cannot refuse by saying “I was mistaken, and I now want neither flat from you.”

ART. 1703. REPARATION OF DAMAGE

WHOSOEVER INVOKES HIS MISTAKE TO AVOID THE EFFECT OF A CONTRACT SHALL REPAIR THE DAMAGE ARISING OUT OF THE

INVALIDATION OF THE CONTRACT UNLESS THE OTHER PARTY KNEW OR SHOULD HAVE KNOWN OF THE MISTAKE.

I. “Whosoever invokes his mistake to avoid the effect of a contract shall repair the damage...”

The Roman jurists used to bar invalidation of a contract where the claimant’s error was not “just” and excusable (see *Lee*, No. 527). Also English law upholds a contract through “estopping” the claimant where his mistake was caused by his own fault, e.g., his own exhibiting a wrong sample of the goods sold (see *Walton* /, p. 270). In such a case the Ethiopian law would support invalidation in spite of the *errans*’ fault, as it nowhere requires the error to be excusable. Instead of upholding such a contract, our law only makes the *errans* pay damages to the party deprived of his contract.

What about cases where the *errans* is innocent of any fault of negligence, and his mistake is fortuitous? In such cases the law may have to choose its victim out of two innocents. The French and the Swiss law (art. 26 Obligations Code) victimize the other party, who gets no damages. The Ethiopian law prefers to victimize even an innocent *errans* invoking invalidation of contract, as the loss caused to the other party is due to the *errans*’ act if not fault-he is the first cause of the trouble. “Whosoever [whether or not at fault] invokes his mistake ... shall repair the damage...” The term “whosoever” dispenses Ethiopian courts from difficult enquiries as to whether the mistake was negligent - enquiries that French and Swiss courts have to make in order to decide on damages, or English courts in order to decide on “estopping” the claim for invalidation of contract.

On the other hand, most cases of mistake in which the parties are innocent happen in the transmission of offer or acceptance. The Swiss Obligations Code (art. 27) makes the sender clearly responsible for transmission errors. Here are some examples:

- (1) A telegraphic offer to buy 10 tons of goods is transmitted as 100 tons.
- (2) A circus purchase order for “monkeys” is transmitted as “donkeys”.
- (3) “Send the goods by rail”; “rail” is transmitted as “sail”.
- (4) B offers to sell C fifty donkeys. C’s defective acceptance (new offer under art. 1694) for “three” donkeys is transmitted as “the” donkeys. B sends him “the” fifty donkeys.

Usually in such cases both parties are innocent (exceptionally, even the telegraph agents may be blameless, e.g. where the transmission error is due to a storm). Will Ethiopian law, following Swiss law, impose damages on the sender who was the innocent first cause of the trouble? The answer is no, *not* in such *transmission error* cases, as here the whole matter does not belong to the Paragraph on Defects in Consent, but to the preceding Paragraph on Elements of Consent. Since the contract was never completed, there exists nothing susceptible of the “avoidance”’ kind of invalidation which could provide grounds for damages. It is the “declaring the contract void” kind of invalidation that is competent for these cases. The sender need not

invoke a mistake he did not commit. In cases(1)-(3),his original intended offer never became a true one, since it was never made known to the other party (art. 1687 (1)). In case (4), the true new offer was never sent; it is a false acceptance that was transmitted to the offerer. The sender of any declaration later disfigured in the transmission should not invoke a defect of consent but its non-existence under art. 1687(1) or 1692

(1) . Practical consequence: he will owe no damages.

There is one case where, though a true error *in substantia* has been committed by the party himself (not the transmitter), he should beware of invoking the “mistake” defect. Illustration: B unknowingly subscribes to a small-print “standard” contract clause excluding C’s liability for faults of his employees (art. 1888(1)). The *errans* B should not invoke article 1699(b), as this involves damages to C (article 1703). B should invoke art. 1686, whereby he was never bound by his subscription to such unknown general terms.

2. “... arising out of the invalidation of the contract ...”

Damage arising out of the invalidation of a contract differs from damage arising from its non-performance. In the first case the other party, through relying on the contract, has incurred expenses and, maybe, has lost other business opportunities. Such damage must be made good, and the other party must be restored to the financial position which would have been his if the contract had *never been made* (art. 1815). In the second case, the damages are those caused by non-performance (art. 1790(1)), and the other party must be put in the financial position which would normally be his were the contract performed.

3. “... unless the other party knew or should have known of the mistake.”

The only defence open to the *errans* against a counterclaim for damages is not showing that he himself is free from fault, but showing that the other party is at fault in that he knew or should have known of the *errans*'s mistake. That the other party knew can be proved by witnesses or writings. That he should have known is presumed from the circumstances. This brings us to the matter of proof. Both proof of an invalidating mistake, and of its knowledge by the other party which makes invalidation worthwhile (no damages), are so difficult that sometimes the court will have to presume everything from one fact. For instance, an artificial diamond worth Birr 1 is sold at the price of a true one (Birr 1,000). This single fact shows

(1) a decisive mistake, as no man in his senses would buy an artificial diamond at Birr 1,000;

(2) a fundamental mistake under article 1699(b);

(3) the seller’s fault, as he should have known of the buyer’s mistake.

Evidence at (1) and (3) is *prima facie*. We conclude from a known fact to an unknown one. It is a presumption of fact open to rebuttal by contrary proof, but the latter is hardly imaginable here.

ART. 1704. FRAUD

Art. 1704, sub-art. (1)

A CONTRACT MAY BE INVALIDATED ON THE GROUND OF FRAUD WHERE A PARTY RESORTS TO DECEITFUL PRACTICES SO THAT THE OTHER PARTY WOULD NOT HAVE ENTERED INTO THE CONTRACT, HAD HE NOT BEEN DECEIVED.

- I. “A contract may be invalidated on the ground of fraud where a party resorts to deceitful practices ...”

Fraud is a ground of avoidance based on mistake provoked by deceit, by cheating. Why should we create this additional ground of invalidation of contract, seeing that an *errans* may already dispose of the remedies based on mistake even unprovoked? There are three reasons:

- (1) It is much easier to prove deceitful practices than to prove an *errans*'s state of mind;
- (2) even an innocent *errans* grounding invalidation on mistake may owe damages under article 1703, while even a negligent *errans* grounding invalidation on fraud can claim damages in tort instead of owing damages;
- (3) errors *in substantia* not sizeable enough in the sense of article 1699(b), and mistakes non-fundamental because they do not relate to elements of contract but to outside motives (art. 1701), may become grounds for avoidance of contract where induced by fraud.

Now what are these “deceitful practices” which amount to fraud? In French case-law and in Swiss law (art. 28 Obligations Code), intentional false statement may amount to fraud; not so in Ethiopian law, where the term “deceitful practices”, as interpreted by *David* (p.25), excludes false statements unless accompanied by other “practices” making such statements plausible, or else inducing mistake in roundabout ways (cf. *Walton* /, pp. 308-311). Examples from *Fick* (notes under art. 29):

- (1) A man knowing himself sick obtains a life insurance through showing a health certificate.
- (2) A locksmith behaving as if he were an architect obtains a building contract.
- (3) An employee obtains a high salary through altering and increasing his previous job's salary chits.
- (4) A false balance of accounts induces a loan based on supposed solvency.
- (5) B overpays a house bought from C, who deceived him into believing that D offered a higher price or that the insurance valuation is higher.
- (6) Deceitful presentation of the yield and goodwill of the firm sold.
- (7) Making factitious bids through a friend at one's own auction, in order to push up the true bids.
- (8) Deceiving a person into believing that the loan he guarantees shall be for productive investment, etc.

Under the Ethiopian system there must exist, in all above cases, “practices’ amounting to something else or something more than a bare false statement (if we accept David’s interpretation of this sub-article).

2. so that the other party would not have entered into the contract had not been deceived.”

Fraud can have a threefold aspect:

- (1) a contract aspect (art. 1704), leading to invalidation;
- (2) a tort aspect (art. 2030), leading to damages (art. 2028);
- (3) a penal aspect (art. 656 Penal Code), leading to punishment.

From the *contractual* point of view, frauds are of two kinds. *Dolus principalis* or principal or decisive fraud is such that, without the fraud, the *errans* would not have thought of entering into the contract. *Dolus incidem* or incidental fraud is such as has not determined the *errans*, who, even knowing the truth, would have thought of contracting, but at less onerous terms. *Dolus incidem* is irrelevant for the purposes of invalidation of contract, but it is relevant in tort. The action for damages in tort is independent of the action for avoidance of contract. An *errans* may renounce invalidation under article 1811(1), and at the same time claim damages in tort. He may also claim damages where there is only a *dolus incidens* giving no right to invalidation of the contract. Example: B deceives C into believing that the villa leased has underground water enabling C to drill a second well at small cost, which is not true. C would have contracted without it, but would have offered a lower rent. In awarding damages in tort, the court can apply them in reduction of the rent.

The decisive character of a fraud is proved by any means and is appreciated subjectively. A gross clumsy fraud which could not have induced an average reasonable man to contract may have induced an illiterate or feeble-minded person to contract, in which case invalidation shall be granted. But there is no fraud without intention to deceive, e.g., a seller of “charms” or magic objects may honestly believe in their efficacy.

Art. 1704, sub-art. (2)

A PARTY WHO HAS BEEN DECEIVED BY A THIRD PARTY SHALL BE BOUND BY THE CONTRACT UNLESS THE OTHER CONTRACTING PARTY KNEW OR SHOULD HAVE KNOWN OF THE FRAUD ON THE MAKING OF THE CONTRACT AND TOOK ADVANTAGE THEREOF.

1. “A party who has been deceived by a third party shall be bound by the contract...”

Examples:

- (1) A labour exchange agency, in order to earn its commission, deceives an employer into believing that the prospective employee is younger and has a better knowledge of languages than is true. For the ignorant employer this is third-

party fraud. The employer cannot avoid the resulting employment contract. As to the agency, it will owe tort damages to the employer (cf. *Fick*, note 68 under art. 28).

(2) A guarantor cannot avoid his contract with the creditor on grounds of the debtor's fraud not known to the creditor. The debtor's deceit (e.g. about availability of other securities) is a third-party fraud in relation to the contract between creditor and guarantor (cf. *Daepfen* p. 63, V 2.).

7 “ unless the other party knew or should have known of the fraud on the making of the contract and took advantage thereof.”

To illustrate this, it is enough to adapt the preceding two examples, supposing that (1) the employee or (2) the creditor, respectively, knew or should have known of (1) the agency's or (2) the debtor's fraud. In such cases the errans (employer or guarantor) can invalidate the contract, notwithstanding that the fraud originated from a third party (agency or debtor). That the other contracting party knew of the fraud can be proved by witnesses or writings. That he should have known is presumed from the circumstances. A corroborating circumstance may be the fact that the third-party deceiver is a relative or an associate of the other party.

on the making of the contract ...” implies that if knowledge of the fraud comes to the other party only after completion of the contract, such knowledge is not grounds for invalidation of the contract by the deceived party. The latter can only use the third-party deceiver for damages in tort.

ART. 1705. FALSE STATEMENTS The tort aspect

In the Code's chapter on Extra-Contractual Liability (for torts), art. 2059(1) provides that whoever, intentionally or negligently, supplies false information to another person, commits a fault (mistranslated as “offence”) where he knows that the latter will act upon the information and thereby suffer damage.

In civil law, false statements can have a two-fold aspect:

- (1) a tort aspect, leading to damages in certain cases as above;
- (2) a contract aspect leading to invalidation in certain cases as below.

The action in tort is independent of the action in contract. The action in tort is especially useful where the invalidation of contract is not admissible (absence of confidential relationship).

Art. 1705, sub-art. (1)

A CONTRACT MAY BE INVALIDATED WHERE A PARTY IN BAD FAITH OR BY NEGLIGENCE MADE FALSE STATEMENTS AND A RELATIONSHIP GIVING RISE TO SPECIAL CONFIDENCE AND COMMANDING PARTICULAR LOYALTY EXISTED BETWEEN THE CONTRACTING PARTIES.

I- “A contract may be invalidated where a party in bad faith or by negligence made false statements *and* ...”

This means that, without the “and” plus what follows (see 2. below), a contract *cannot* be invalidated on ground of false statements. As mentioned under article 1704 (1) at 1, an intentional false statement without additional “practices can amount to fraud in foreign legal systems. In English law it can be grounds for invalidation under the heading “fraudulent misrepresentation”. The Ethiopian contract law, for reasons unknown, provides no general remedy against contract-inducing false statements, which seem excluded from the operation of article 1704 by the definition of fraud as deceitful “practices”. French lawyers were long confronted with a similar difficulty. At present, French courts happen to include intentional false statements in the notion of fraud through an interpretation *contra tēgem* of the term *manoeuvres* (“practices”). If we accept David’s interpretation of “practices” (*David*, p. -5), we cannot do the same for Ethiopia. In Ethiopian law thus viewed, the only contract remedy open to a victim of false statements is an eventual action based on fundamental mistake if any, *unless* the victim is related to the other party in the special way explained below:

2. “... a relationship giving rise to special confidence and commanding particular loyalty existed between the contracting parties.

Incidentally, there is no express requirement for the false statement to be decisive, but we can deduct it *a fortiori* (with stronger reason) from article 1704(1), so that an “incidental” false statement not decisive for the *errans* may only ground an action in tort for damages, if any. But where the false statement was decisive for him, and the aforementioned *confidential* relationship existed, the *errans* can avoid the contract, regardless of whether his mistake was, or was not, objectively important.

Invoking the other party’s false statements is useful for at least two reasons:

- (1) it is much easier to prove a mere false statement than to prove an *errans*’s state of mind or even a fraud;
- (2) proving false statements excludes the damages of article 1703, and may include damages in tort (art. 2059).

What we call in short a “confidential” relationship is, in the words of this article, “a relationship giving rise to special confidence which “existed at the time of contracting, and which “commands particular loyalty from the parties to it. The verb “existed”, in the past tense, shows that the relationship must exist prior to the challenged contract and not be created by it: in the contract, words such as “I place my special confidence in you” are irrelevant. It must be a continuous relationship which, in the eyes of common opinion, “commands a particular loyalty”. The following are illustrations, based largely on a comment by *David* (p. 25), as to what kinds of relationship can be deemed confidential:

- (1) Family relationship at least up to the second degree or in the same household. Custom may extend these limits.

- (2) Membership of a close religious community.
- (3) A position of subordination created by Private law {e.g. pupil and guardian), or Public law (e.g. subject and government agent).
- (4) A position of subordination created by contract (e.g. master and servant, employer and employee).
- (5) Client and advocate (or other professional adviser), the lay client often having no choice but to rely on his information; doctor and patient, confessor and penitent.

Examples:

- (1) B is C's employer. B sells to C certain shares, praising them as valuable, while in fact the concerned share company is already insolvent. C can invalidate the contract.
- (2) All the cases of mistake as to motive mentioned under article 1701(1), *if* the mistake was induced by false statements made within a "confidential relationship".

In the above cases it is rarely necessary to prove that the false statement was made in bad faith, since a statement negligent in the sense that its veracity could be checked, but was not checked, is enough to ground invalidation of the contract concerned .

Art. 1705, sub-art. (2)

THE PROVISIONS OF SUB-ARTICLE (1) SHALL APPLY WHERE A PARTY, BY SILENCE, CAUSED THE OTHER PARTY TO BELIEVE A FACT WHICH IS UNTRUE.

Here the false statement is "made" by silence or, to define this correctly, the mistake is induced by silence. Example: B sells his cattle at a very low price to Administrator C, who governs the local province. This happens after a banquet at which B was falsely informed that his cattle are liable to requisition, while C listened in silence which induced B to believe this. B can invalidate the sale.

Commercial law regulates certain contracts in which a party has a positive duty to disclose material facts to the other party; the latter can invalidate the contract where the first party kept silent over such facts (e.g. in insurance: art. 668 Comm. C • cf. *Chitty*, No. 310 ff.).

ART. 1706. DURESS The

tort aspect

Duress can have a threefold aspect:

- (1) a contract aspect leading to invalidation;
- (2) a tort aspect (art. 2030 with 2028) leading to damages;

(3) a penal aspect leading to punishment (extortion or blackmail, arts. 668- 669 Penal Code).

The action in tort for damages is independent of the action in contract for invalidation. Damages can be claimed while invalidation is renounced under article 1811.

Art. 1706, sub-art. (1)

A CONTRACT MAY BE INVALIDATED ON THE GROUND OF DURESS WHERE THE ACTS OF DURESS LED A PARTY TO BELIEVE THAT HE, ONE OF HIS ASCENDANTS OR DESCENDANTS, OR HIS SPOUSE, WERE THREATENED WITH A SERIOUS AND IMMINENT DANGER TO THE LIFE, PERSON, HONOUR OR PROPERTY.

In contract law, ‘duress’ is the compelling of a party to consent to a contract by *threats* of grave imminent harm to such party *or* his ascendants, descendants or spouse. The danger threatened with must be *serious* (grave) as to its extent and likelihood. The fear of a small or unlikely injury is not enough.

The danger threatened must be *imminent*. There must be so little time left between the threat of injury and its impending realization that the threatened person’s decision to contract cannot be safely postponed. It is not enough that he was told, “If you don’t sign, I shall burn your or your son’s next year’s crop”; this gives the threatened person time to make a later decision or demand judicial protection.

That the danger threatened must be serious (extensive and likely) and imminent does not mean that it must be real: a person may have signed a contract while an unloaded pistol was pointed at his head. It is sufficient that he believed it to be loaded. But the danger must look real and be likely. It must not be, e.g., a weak woman’s threat to beat up a strong man.

The impending danger may relate to person or property. The danger to a person may concern his life, health, liberty, personal rights, honour or morals, of which only life and honour are expressly mentioned by this sub-article. Duress may consist in threatening the other party with a penal offence against the person, examples of which can be found in Book V of the Penal Code. Duress may also consist in threatening the party with a penal offence against property, some examples of which can be found in Book II of the Penal Code. The danger threatened may also be devoid of any penal consequences, as in the “duress of goods”, which involves only a willful refusal to supply vital goods, made in breach of contract, in order to induce its amendment. Obversely, threatening with a penal offence need not amount to duress, e.g., menacing a restaurant holder with being unable to pay for one’s dinner (Penal Code, art. 813), in order to get a price discount. Here the danger is not “serious” enough to invalidate the discount granted.

Art. 1706, sub-arts. (2) - (3)

(2) DURESS MUST BE SUCH AS TO IMPRESS A REASONABLE PERSON.

(4) THE NATURE OF DURESS SHALL BE DETERMINED HAVING REGARD TO THE AGE, SEX AND POSITION OF THE PARTIES CONCERNED.

Just as with any other defect of consent, in order to support invalidation of the contract, duress must be “decisive”, i.e., it must have determined the other party to contract. A man’s mind being inscrutable, we are often bound to presume this from the circumstances, in which task we are to be assisted by the above sub-articles. Unfortunately, they are contradictory. Sub-article (2) sets an *absolute* standard, while sub-article (3) sets a *relative* one. Both are literally borrowed from the French Civil Code (art. 1112), which, in turn, borrowed them from an old authority, *Pothier* (No. 25). It is strange how, after a century of criticism in France - where none of the controversial theories trying to reconcile the two opposite rules has proved quite satisfactory, and where the courts have solved the difficulty chiefly through disregarding the first rule and applying the second - the same two contradictory rules found their way into the Ethiopian Civil Code. By way of comment, it may be best to quote *Walton I* (p. 292) on this problem:

“There is a certain confusion between an absolute and a relative standard ... But when the French code qualifies it [the absolute standard] by saying that in judging of violence [duress] we must have regard to the age, sex and position of the parties, there is not much left of the rule that it must be sufficiently serious to influence a reasonable person. A man of ordinary firmness of character and experience of affairs will not be heard [by the court] to say that he was terrified by threats which his common sense might have told him were absurd, but an inexperienced countryman or a person of naturally weak and timid character, or one enfeebled by age or disease, will much more easily show that his consent was extorted from him by fear.”

One of the two things, either the nature of duress, in order to support avoidance of contract, must be such as would objectively impress the average reasonable man (objective or absolute or abstract standard), or else the nature of duress, in order to justify avoidance, must be such as could in fact have impressed the particular child (age), woman (sex), sick person (position) or illiterate person (position) in the subjective circumstances of his case (subjective or relative or concrete standard). In Ethiopian law we propose to disregard the first rule, and retain the second, for the following reasons:

- (1) it is written after the first;
- (2) it is more explicit and “special”;
- (3) it is more equitable;
- (4) this may rid us of futile theoretical controversies about how to reconcile the two rules.

Concluding on article 1706, we submit the following examples of “duress”:

- (1) A strike or lock-out in breach of an employment contract, in order to extort its amendment.

- (2) A person, in order to obtain an interest-free loan, threatens another with smearing his reputation in the eyes of his fiancée (Penal Code, art. 669).
- (3) A doctor or bad priest threatens to abandon the undertaken care of a sick person's body or soul unless the latter makes a certain donation.
- (4) A water-supply agency threatens a householder with unlawful stoppage of his water supply unless he agrees to pay the arrears of his predecessor (a situation not unheard of in Addis Ababa).
- (5) A son threatens to kill himself, and so induces his mother to give him money.
- (6) A father threatens to keep his daughter under lock and key unless and until she consents to a contract.
- (7) A merchant suspends the due delivery of some vital spare-parts due (duress of goods) until the other party agrees to increase the contractual price.
- (8) A caravan-leader threatens to abandon his customer's family or goods in the desert, and thus extorts a double remuneration for carrying them (cf. art 483 of the 1930 Penal Code).

***RT. 1707. DURESS BY THIRD PARTY Art.**

1707, sub-art. (1)

A CONTRACT MAY BE INVALIDATED ON THE GROUND OF DURESS NOTWITHSTANDING THAT DURESS WAS EXERCISED BY A PERSON OTHER THAN THE PARTY WHO BENEFITED FROM THE CONTRACT.

This rule is contrary to that of article 1704(2), whereby "fraud" by a person other than the parties (a third party) is no ground for invalidation (unless the other contracting party knew, etc....). Duress by anybody is grounds for invalidation of contract. Justification: duress is dangerous to the social order. Were it not for this rule, it would be too tempting for any powerful person to exercise duress through his over-eager followers, and to try to invoke in defence that he was unaware of their acts of duress.

***rt. 1707, sub-art. (2)**

THE PARTY WHO INVOKES DURESS TO AVOID THE EFFECT OF A CONTRACT SHALL REPAIR THE DAMAGE ARISING OUT OF THE INVALIDATION OF THE CONTRACT, WHERE DURESS WAS EXERCISED BY A THIRD PARTY AND THE OTHER CONTRACTING PARTY DID NOT AND SHOULD NOT HAVE KNOWN THEREOF.

This is an equitable supplement to the preceding sub-article. In view of the excellent possibility that the benefiting party is innocent, the rule granting invalidation to the victim of third-party duress is tempered by a qualified possibility of granting damages to the other party. But in cases of a servant's or relative's duress in favour of a master or parent, we can assume that the master or parent "should" have known of the duress and therefore shall get no damages.

The damages, where awarded, are here limited to those arising “out of the invalidation”, in the way explained under article 1703 at 2.

ART. 1708. THREAT TO EXERCISE A RIGHT

A THREAT TO EXERCISE A RIGHT SHALL BE NO GROUND FOR INVALIDATING A CONTRACT UNLESS SUCH THREAT WAS USED WITH A VIEW TO OBTAINING AN EXCESSIVE ADVANTAGE.

1. “A threat to exercise a right shall be no ground for invalidating a contract...”

Duress must be unjustified. As a rule, a threat to exercise a right cannot be complained of.

Examples:.

- (1) An employer catches his employee stealing valuables. He threatens the employee with a penal charge and so induces him to renounce his employment.
- (2) A father is induced by threats of prosecution against his son to pay the cheques forged by the son.
- (3) A husband is induced by threats of a suit against his wife to guarantee her personal debts.

2. “... unless such threat was used with a view to obtaining an *excessive* advantage”.

Obtaining an advantage which, e.g., notably exceeds the weight of the right threatened with, is an abuse of right amounting to duress, and such excessive transaction is open to invalidation. Adapting and adding to the preceding examples will provide illustrations:

- (1) The employer extorts a large sum from the employee-thief as the price of his silence.
- (2) The creditor extorts from the father Birr 1000 above the amount of the cheque forged by his son.
- (3) The husband, finding his wife with a married seducer, extorts from both an excessive compensation with the threat of a scandal-involving charge.
- (4) A dairyman obtains a remission of all the debts he owes to the milk- farmer by threatening him with official denunciation of one adulterated milk delivery.

ART. 1709. REVERENTIAL FEAR

Art. 1709, sub-art. (1)

FEAR OF AN ASCENDANT OR A SUPERIOR SHALL BE NO GROUND FOR INVALIDATING A CONTRACT WHERE NO DURESS WAS EXERCISED.

A person may be induced to contract by reverence and respect for the known wishes of his parents or superiors. As long as the latter have not threatened him,

there can clearly be no duress. Reverential fear alone is normally insufficient to support invalidation of contract. The influence of parents and that of good superiors may even be beneficial to the persons concerned, and it is only where its consequences are excessive that relief shall be granted under the next sub-article:

Art. 1709, sub-art. (2)

THE PROVISIONS OF SUB-ART. (1) SHALL NOT APPLY WHERE THE CONTRACT WAS MADE WITH THE PERSON INSPIRING THE FEAR AND SUCH PERSON DERIVED AN EXCESSIVE ADVANTAGE FROM THE CONTRACT.

Reverential fear becomes grounds for invalidation only when, instead of merely inducing a contract with a third person, it induces a contract with the ascendant or superior himself and brings him an *excessive* advantage (cf. art. 1708 at 2.). *David* affirms (on p. 27) that this provision is borrowed from *English* law and its theory of “undue influence”. But the latter theory is quite different in at least two respects:

(1) It applies not only to revered ascendants or superiors but also to other “confidential relations” (in the sense of art. 1705(1) at 2.), including those between man and wife, doctor and patient, advocate and client, confessor and penitent, etc.

(2) It does not apply the quantitative test of “excessive advantage”, but merely creates a presumption of unfairness, throwing on the defendant the burden of proving that the transaction was fairly conducted as if between strangers; this proof may validate even seemingly excessive advantages (see *Jenks*, art. 191 with case-references; see also cases in *Walton* /, p. 306).

In Ethiopian law, whoever invokes invalidation of contract under this sub-article has the burden of proving (?) the relation of reverential fear in regard to the other party (ascendant or superior), and (2) the latter’s excessive advantage in terms of value. For instance, the respected superior of a monastery who induces its member, without threats, to sell to him (or to the monastery he represents) some cattle at a price one half below their value, is exposed to the risk of seeing the sale invalidated at the instance of that member (cf. *David*, p. 27).

ART. 1710. UNCONSCIONABLE CONTRACTS (LESION⁵)

The tort aspect

Unconscionable contracts can have a threefold aspect:

- (1) a contract aspect leading to invalidation;
- (2) a tort aspect leading to damages;
- (3) a penal aspect leading to punishment, where the unconscionable contract is connected with *usury*, as defined in the Penal Code (art. 667).

The action in contract for invalidation is dependent on the question of tort damages, since it can be estopped by the exploiter “offering to make good the injury” (art. 1812).

5. *LESION* is the term of the French master-text mistranslated here, but correctly used in the related article 2887.

Art. 1710, sub-art. (1)

A CONTRACT MAY NOT BE INVALIDATED ON THE SOLE GROUND THAT ITS TERMS ARE SUBSTANTIALLY MORE FAVOURABLE TO TO THE OTHER PARTY.

A substantial disproportion in the value of the performances respectively owed is necessary but not sufficient to justify an invalidation of the contract. Security of trade would be endangered were we to allow invalidation merely because the contract is much more profitable for one party than for the other. But before being allowed to prove under the following sub-article that his consent is vitiated by an unconscionable contract, the victim must first prove this disproportion. It is estimated by calculating the value which the performances respectively promised had at the time of contract. (Later changes in value are irrelevant.)

Gratuitous contracts do not fall under the operation of this sub-article. There is no point in assessing the mutual advantages in gratuitous contracts, which are precisely intended to be in favour of only one party. But wronged donors may find protection in the special provisions of the law governing donations (art. 2439).

The disproportion between the performances owed must be "substantial". The following are examples of what has been considered by Swiss courts (Swiss law is similar to ours on this point) as terms excessively favourable to one party (cf. *Guhl*, p. 48):

- (1) a loan at 37% interest in the absence of a legal maximum limit on interest;
- (2) a contract whereby a worker renounces any further compensation for the loss of three fingers against reimbursement of his hospital costs only;
- (3) exorbitant fees stipulated percentage-wise by advocates or other agents.

Incidentally, in sale a disproportionately small price (price not just) may be distinguished from its practical absence (price not true). A price so small that it is not serious is equivalent in French doctrine to its lack, and the concerned transaction is void, since a party's obligation to pay only a nominal mock-price has no serious object (there is no true sale) unless a donation-purpose is proved. Example: A fi house is sold for Birr 20. Although the above doctrine finds no clear support in Ethiopian law, a mock-price may enable a party or his creditor to prove "simulation" (art. 1994; see, above, art. 1679 at J.).

Art. 1710, sub-art. (2)

WHERE JUSTICE REQUIRES, SUCH CONTRACT MAY BE INVALIDATED AS UNCONSCIONABLE WHERE THE CONSENT OF THE INJURED PARTY WAS OBTAINED BY TAKING ADVANTAGE OF HIS WANT, SIMPLICITY OF MIND, SENILITY OR MANIFEST BUSINESS INEXPERIENCE.

Article 1696 does not expressly enumerate "unconscionable contract (lesion)" among the defects of consent. This shows that this remedy is exceptional and should

be applied with great caution, lest the security of trade be injured. This remedy is subsidiary and may be used where the circumstances vitiating the consent do not amount to an invalidating mistake, fraud or false statement, duress or reverential fear, or incapacity. (See notes under art. 1696.)

“Where justice requires” means that the court is free to refuse this remedy on grounds of equity, e.g., where the victim is rich and the transaction insignificant.

The lesionary contract can be invalidated as “unconscionable” (contrary to conscience) where the immoral behaviour of the exploiter amounts to determining the victim’s consent through *taking advantage of* his want, simplicity, senility, inexperience. It is not enough to prove that the victim was in a state of want, simplicity, senility, inexperience. It must also be proved that the other party knew and successfully exploited the inferior condition of the victim. This can be shown by circumstantial evidence.

What is *want* ? The first meaning of the term “want” covers such cases of destitution or impecuniosity as compel (see notes under sub-art. (1)) (1) the debtor to accept a 37 % rate of interest; (2) the worker to accept bare hospital costs in the “three fingers” case; (3) the litigant to promise exorbitant advocate fees. But probably the term “want” can also be understood to cover other states of distress or necessity:

(a) If somebody offers a million dollars to have his life saved from a sea storm or fire by a hard bargaining rescuer, there is, strictly speaking, no “duress”, since nobody’s “act” has threatened him. The immoral rescuer only takes advantage of the victim’s distress.

(b) Where people, fearing confiscation by an enemy, sell out their belongings, other people exploit their distress by paying them trifling prices.

As a matter of policy, should not some of the resulting contracts be revised rather than invalidated? This is done for salvage contracts by the Maritime Code. As a rule, however, Ethiopian courts have no power to vary (revise) a contract (art. 1763). But the “exploiting” party can, in fit cases, prevent invalidation of the unconscionable contract by “offering to make good the injury” (art. 1812) sustained by the exploited party.

What is *simplicity of mind*? It is the kind of mental deficiency which impairs the victim’s judgement without resulting from lack of years or amounting to such insanity as would cause a general incapacity of the victim. In short, “simplicity of mind” can be invoked in cases not amounting to incapacity by reason of minority or insanity, which is governed by special provisions (of the law of Persons). Example: a country girl, mature and not insane but of simple mind, buys a glass necklace at several times its value. There was no fraud and no error as to object or substance of the contract. The girl’s error as to value is irrelevant (art. 1701(1)). But the big disparity between price and value is circumstantial evidence for showing that the merchant has taken advantage of her mental simplicity, which forms grounds for invalidation under this sub-article.

Senility is a mental deficiency resulting from old age and not amounting to insanity. Old age as such does not entail general incapacities. Indeed old age often carries with it greater wisdom than that possessed by younger people. So it is not enough to prove the plaintiff's old age, without proving the senile deficiencies accompanying it, in certain cases of reduced consciousness exploited by the other party. Example: A senile lady agreeing to sell her very valuable jewels against a meagre life annuity or maintenance. Contract invalidated on proof of (1) high disproportion between the values exchanged; (2) the seller's senile condition; (3) its exploitation by the buyer.

Business inexperience implies a lack of familiarity with business transactions. It can hardly ever be invoked by merchants whose very profession presupposes the required experience. Non-merchants can invoke their business inexperience in general, or in fields outside their particular activities. Illiteracy and general lack of instruction may often (but not always) amount to business inexperience. The simple-minded girl overpaying for her necklace might also have invoked her business inexperience. But the latter must be "manifest", that is, not only known to the other party, but also obvious to the average man in his position from the dress, behavior, language and other circumstances pertaining to the victim. Examples:

A 37 % interest on a loan, or a 30% advocate fee, might have been agreed to by a peasant under no hardship ("want"), but because of his obvious business inexperience. The same remark is relevant in the case of the worker who might accept bare hospital costs in the "three fingers" case under no hardship, but because he is inexperienced and ignorant of his rights.

English and French laws give no general relief for "unconscionable lesion". The Ethiopian law has created this remedy after the example of Swiss law (art. 21 Obligations code). Its great potential usefulness in Ethiopia is obvious, but is so far little heeded by civil law practitioners. It is inapplicable to immovable's (art. 2387).

POSTSCRIPT to arts. 1708-1710.

An excessive advantage or excessive disadvantage (lesion) to a party is never in itself sufficient to supply grounds for invalidation of the contract in the Ethiopian system. In Ethiopian law one must always prove something more: the threat to exercise a right (art. 1708), or the reverential fear (art. 1709(2)), or the unconscionable exploitation (art. 1710(2)). *Moral* considerations, rather than mere disproportions of value, stand in the foreground of this system.

SECTION 2

OBJECT OF CONTRACTS

Introductory Note

The lack of an object or an *effective* (defined, possible, lawful) object prevents the formation of contract, makes it non-existent, of no effect, null and void, fully invalid, in the same way as lack of a consent effectively expressed under the rules of Section 1, Paragraph 1. Obversely, as shown before, the consequence of “defects” of consent (Section 1, Paragraph 2) is loss radical: a merely vitiated contract exists, has certain effects, and is not fully and bilaterally invalid, since the victim can choose to confirm and enforce it instead of invalidating it (art. 1811); neither is it fully and bilaterally valid, since the other party cannot sustain it at law (art. 1809). In this connection, compare our comment at (a) 3, under article 1678.

An effective object is, after effectively expressed consent, the second and last permanent requisite for the formation and existence of contracts. “Form” is an exceptional requirement, and “cause” is not a requirement in the Ethiopian system: see our comment at (h) 2, under article 1678, and the articles 1714-1716 below.

What does the term “object” mean? As is shown by our comment at (b) 1, under article 1678, the objects of a contract are obligations to perform something. Where a horse is sold, it is the seller’s obligation to convey the horse to the buyer, (and the latter’s obligation to pay), that is an object of the contract; but, in short form, the object is the conveyance of the horse and, by still more shorthand, it is the horse. (Strictly speaking: (a) the obligation is the object of the contract, (b) the conveyance is the object of the obligation, and (c) the horse is the object of the conveyance.)

ART. 1711. DETERMINATION OF OBJECT

THE OBJECT OF A CONTRACT SHALL BE FREELY DETERMINED BY THE PARTIES
SUBJECT TO SUCH RESTRICTIONS AND PROHIBITIONS AS ARE PROVIDED BY
LAW.

This article lays down the basic principle of “[*freedom of contract*]” explained at 1, in the introduction to this work. The rule allowing the parties freely to determine the contents of their contract also means that they are not limited to concluding any of the “nominate” contracts specifically named in Book V on Special Contracts (sale, hire, loan, etc.) and in the Commercial Code, but are free to conclude also any “innominate” transactions not so named (cf. our final note on art. 1676(2)).

Concerning prohibitions restricting the parties’ freedom to determine their objects see article 1731(2). Only mandatory (imperative) provisions, as distinguished from the permissive (suppletory) ones, provide restrictions or prohibitions limiting

the contractual freedom of the parties. Examples of such imperative provisions are given by articles 1714-16 and 1718 below. That the legislator meant these articles to

be mandatory is evident from the use of such categorical terms as “shall be of no effect”, “must”, “shall not order”.

ART. 1712. OBLIGATION TO GIVE, TO DO OR NOT TO DO

This article makes no change in the law, since the parties can anyway freely determine their contractual undertakings pursuant to the preceding article. The provisions of this article are neither mandatory, nor suppletory (filling gaps in the contract). They are *illustrative*, and destined to induce the parties to be explicit as to which kind of obligation they intend to undertake. Our law of contract contains several such illustrative provisions which do not change the law as given by the context, but only remind the parties of the alternatives open to them.

Art. 1712, sub-art. (1)

THE PARTIES MAY UNDERTAKE TO PROCURE TO THE OTHER PARTY A RIGHT ON A THING, OR TO DO OR NOT TO DO SOMETHING.

A clear perception of this distinction between the obligations “to give”, the obligations “to do” something, and those “not to do” something, helps to understand the “forced performance” remedies of articles 1776-1778. Basically, obligers always have either “to do” or “not to do” something. But one kind of obligation to do is considered separately because of its special importance: it is the obligation *to give*, i.e. to procure a right on a thing, a right of property. The obliger's undertaking is here to convey to the obligee the ownership of, or a lesser real right (e.g. art. 1309) in, a thing. On “conveyances”, see our comment 5, under article 1675.

Art. 1712, sub-art. (2)

THE PARTY WHO UNDERTAKES TO DO SOMETHING MAY UNDERTAKE TO PROCURE TO THE OTHER PARTY A SPECIFIED ADVANTAGE, OR TO DO HIS BEST TO PROCURE SUCH ADVANTAGE.

Obligations “to give” and those “not to do” are meant to procure a result, a conveyance or an abstention. The obliger is normally liable if the result is not attained. The case is different with obligations *to do*. The latter are *subdivided* into obligations to procure a specified result, and those to do one's best to procure it. This subarticle invites the parties to specify which kind of the obligation “to do they have”, in mind, lest the courts be left in doubt as to which article, 1791 or 1795, to apply in assessing liability for non-performance. Where the parties give no indication, usage or the suppletory provisions of the Book on Special Contracts or of the Commercial Code may supply a clue:

In hire of work, contracts of carriage (see Commercial Code) are usually to procure the result of safe and timely carriage to the agreed place, while, e.g., advocates or physicians normally only undertake to do their best to win the suit or heal the patient (*cf. Mazeaud*, No. 21). They are not liable for losing the suit or the patient's

life if they acted diligently, i.e. committed no fault (art. 1795), while a carrier is liable even without fault for non-performance (art. 1791).

How are we to ascertain whether an obligation to do is one *of result* or only *of diligence*? In the absence of a pertinent contractual or legal provision, or a usage, we have to look at whether the result hoped for is normally attainable or not. It is attainable, in the case of carriers. It is not in the case of physicians or advocates, because the element of chance - God's or court's intervention - plays so great a role that all a physician or advocate usually means to promise is mere diligence and doing his best in view of the desired result. He does not guarantee saving the patient's life or winning the suit, even when he makes his fee depend on it. In certain contracts the problem is solved by their very nature - they are basically not concerned with a determined result, but with diligent doing of whatever the master or employer orders to be done within limits by the servant or employee: obviously the obligations arising from such hire of "service" (art. 2512) are "of diligence" only.

Examples of obligations "of result" in hire of "work" (art. 2610): the carrier's (see above), the painter's, the sculptor's, the builder's, the publisher's. Here, as a rule, a determined result is aimed at and is normally attainable. In hire of "things", a lessor's obligation of result is to procure their possession to the lessee (art. 2727).

Incidentally, in the law of tort we also distinguish between liabilities arising from lack of diligence (fault) and those arising from not reaching the result of safety required by law (defendant's fault irrelevant). But while, in the law of contract, it is obligations "of result" that are the rule (art. 1791), and it is for the defendant to prove, in case of doubt, that his obligation was one "of diligence" only (art. 1795), in the law of tort a mere duty of diligence to avoid harm is the rule (art. 2028 ff.), and it is for the claimant to prove, in case of doubt, that the defendant was bound by law to procure the result of safety from harm (art. 2066 ff.).

ART. 1713. CONTENTS OF CONTRACT

THE PARTIES SHALL BE BOUND BY THE TERMS OF THE CONTRACT AND BY SUCH INCIDENTAL EFFECTS AS ARE ATTACHED TO THE OBLIGATIONS CONCERNED BY CUSTOM, EQUITY AND GOOD FAITH, HAVING REGARD TO THE NATURE OF THE CONTRACT.

1. The above curtailed and inept official translation from French will be better understood if we try to *retranslate* the French master-version of this article, viz.: "The parties are bound *not only by the expressed terms* of their contract, *but also by incidental effects attached* to the concerned obligations, according to their nature, by usage, equity and good faith."

The terms of a contract can be expressed or implied. Some authors call oral or written agreements "express" and others "implied" (e.g. from conduct or silence). But we can also say that a consent by conduct or (sometimes) silence is, if not "express", at least validly "*expressed*" under the rules of Section 1 Paragraph 1; and "implied" is only what remains to be included by suppletory law, custom, equity and good faith. Suppletory legal rules - where not "set aside" by the parties - are part of

the contract pursuant to article 1731 (3) (terms implied by law). Under the present article we deal with other implied terms: the content or object of the contract include such incidental terms as are attached to the concerned obligations by usage, equity and good faith, which we shall examine in turn. Before we do this, it must be stressed that the contract's meaning is ascertained by interpretation. Consequently, this article; should be analyzed in conjunction with article 1732, which prescribes interpretation of contracts in accordance with good faith and business practice (usage). So while the present article incorporates the requirements of custom and good faith in the contract article 1732 reminds the judge of these requirements in his interpretation of the contract.

2. "... custom..."

The French master-text's term "usage" shows that the English version's "custom" must here be understood in the wide sense of "usage" and business practice.

Usage may be applied to the interpretation of terms ambiguously expressed in the contract, a matter which belongs to our future comments on article 1732. Usage may also be referred to for the purpose of implying customary clauses entirely omitted by the contractants. The usages of a community or profession are often implied in its members' contracts (cf. art. 2304). In the photographic trade, it is often customary: that a photographer cannot exhibit a photo portrait to the public without the concerned client's consent (cf. arts. 27-30). In many countries it is customary that a lessor may not modify the use of the premises in a way which the lessor cannot reasonably be deemed to have contemplated, e.g., the tenant may not use a residence as a shop, workshop, stable, inn or hotel (cf. *Walton* /, p. 378). Where special supplementary provisions regulate such matters, it is controversial whether and when they override the custom or vice versa. The question is as to which of the two, custom or supplementary law, shall have priority in filling contractual gaps. Continental decisions in certain cases allow custom to override supplementary rules (the *desuetudo* of Roman law). Conversely, in Ethiopian law, supplementary "not set aside" provisions (art. 1731 (3)) prevail over customary practices. So custom, in Ethiopia, has no clear precedence over supplementary rules, unless it can be reasonably assumed from the circumstances, pursuant to article 1734, that the common intention of the parties was to include custom in their contract, or unless our courts choose to hold that the notoriety of a relevant custom is a circumstance sufficient for presuming the parties' intention to "set aside any incompatible supplementary law."

3. "... equity and good faith."

The requirement of good faith is implied in all contracts. We have shown in article 1702(1) how lack of good faith deprives an *errans* of his remedy, and in article 1702(2) how the requirement of good faith implies an *errans*' duty to conclude the first-intended contract. Where mandatory law, the expressed terms of the contract, supplementary law, and custom, in that order, leave a contract issue unsolved the court may imply in the contract what the parties should equitably have intended on that point.

Most obligations implied by the requirement of good faith are of the "not do" variety. The court may, e.g., restrain unfair competition through ordering

abstention. Example: a grocer having sold his business as a going concern must **not re-open** a grocery **next** door, thus enticing his old customers, who will **stick to their** old connection with him rather than remain clients of the sold business now run by a new man. Good faith implies the seller's incidental obligation to abstain from **unfair** competition, and this abstention should have been, **in** equity intended by parties (cf. *David*, p. 30).

The requirement of good faith also implies that a party must do nothing that would disable him or the other party from performing their contractual obligations. Here is an example: A merchant undertook to sell a manufacturer's goods and ^ his end in view, was introduced to the latter's customers. Instead, the merchant persuaded them to buy similar goods from another manufacturer. This disabled the merchant from efficiently performing his contractual duty to sell the first manufacturer's goods: a breach of the implied obligation of good faith.

French courts are wont to order abstention from disclosing another's commercial secrets in a way amounting to breach of faith, or from "making improper use of information obtained in the course of confidential employment" (*Walton I* - citing *Cassation* 2 Jan. 1901, D/19Q1/1/24).

ART. 1714. OBJECT MUST BE DEFINED

Art. 1714, sub-art. (1)

A CONTRACT SHALL BE OF NO EFFECT WHERE THE OBLIGATIONS OF THE PARTIES OR OF ONE OF THEM CANNOT BE ASCERTAINED WITH SUFFICIENT PRECISION.

- I. "A contract shall be of no effect where the obligations of the parties or **if** of them cannot be ascertained..."

"Of no effect" is equivalent to non-existent, null and void, fully invalid (See our Introductory Note before art. 1711). The whole contract is of no effect if only one party's obligations cannot be ascertained. This simple formula, analogically reproduced in articles 1715-16 below, makes it unnecessary to use the concept of cause or consideration in our theory of formation of contract: see comment 2 at (b) under article 1678. In contracts producing not one-sided but bilateral, reciprocal obligations, the latter are interdependent (cause of each other), and it is sufficient to there is no effective (defined, possible, lawful) object on one side for the whole contract to be void. In a sale, for instance, if the price cannot be ascertained the thing is not due (or vice versa), and the contract is not formed. This interdependence of bilateral (reciprocal) obligations not only may prevent the formation of the contract (arts. 1714-16), but also may suspend the performance (art. 1757), or justify the cancellation (arts. 1788-89), of a formed, completed contract. Bilateral obligations condition each other at all stages: in the contract's formation, performance, cancellation.

Now what will happen to unilateral, one-sided undertakings with effective object, such as to pay a defined sum of money? A reasonable inference from articles 1714-16 is that, since such contract contains no obligation without an effective object, the one-sided obligation is unconditionally effective without the need to show any

cause (reason) for it. This inference is confirmed by article 2019(1-2), whereby (contrary to English law), where a promisor undertook a payment, the promisee need **not** prove a valid reason (payment for goods, loan, gift) justifying it; a “cause” is presumed to exist.

2. “... with sufficient precision.”

The parties’ obligations are ascertained, by means of the interpretation rules of Chapter 2 Section 1, from the terms expressed in the contract, and by implication from suppletory law, custom, equity and good faith. Where, in spite of it, a party’s obligations cannot be sufficiently ascertained, the object is not defined and there is no contract (see *Corbin*, sec. 95-100).

In obligations “to do”, a mere undertaking “to be of assistance” is not sufficiently defined, neither can law or custom supplement such an utterly vague promise. But if one says “I shall help you with your harvest”, intending to be bound (see comment i under art. 1679), the extent of his obligation may be ascertained with the help of local custom (usage), if any.

As to obligations “to convey,” they may concern a specific thing, e.g. this horse, that house, or a specified lump of things, e.g. “all my stock in trade” or “all my standing harvest”, in which cases no further defining is necessary. What about promising such undefined things as “a horse” or “an animal”? Clearly a promise to convey “an animal” is void, since there is no means of finding out whether it is to be a valuable elephant or a worthless flea, and there are no “average” animals. French law (C.Civ. art. 1129 and *Mazeaud* No. 237) admits the possibility of selling, e.g., “a horse”, which term at least denotes the kind of animal concerned, its quality being fixed by a suppletory rule at “not below average”. In Ethiopian law the position is different; our article 1747, also fixing the *quality* due at not below average, applies only to “fungibles”, that is, goods interchangeable by weight or measure such as corn, coffee, wine, oil, gold, etc. “A horse” not being a fungible, such a sale is void with us, unless some local custom helps to define the horse’s quality.

So much as to ascertaining quality. Now how are we - in obligations to convey things - to determine their *quantity* ? The latter is obvious when we say “so many tons or cubic metres”. It is incapable of determination when we promise just “oil” or “com”. But the contract may, without fixing the quantity at once, provide means to ascertain it later, in which case the object is considered as defined. Examples:

- (1) A purchase of so much liquor as I shall require for my banquet, at your current prices.
- (2) A sale of so much fuel as your sugar factory will require for the season, at market prices.
- (3) A man promises his mistress “a yearly sum for the education and maintenance of our child”. A French tribunal has considered the “yearly sum” as

ascertainable through assessing the costs of such maintenance and education as accords with the parents' station in life (Orleans 2 mars 1881, D. 82. 2.244, cited in *Walton* /, p. 77).

What about a promise, by words or conduct, to pay “a remuneration”? Here the contract provides no such means for ascertaining the quantity as were given by the words “for education and maintenance” in the case above, and the normal result is nullity. But in certain cases we can uphold such contracts through invoking articles 1713 and 1732 to the effect that it is possible to ascertain the amount on the basis of custom (usage) and business practice. When you consult a doctor or advocate, such conduct implies, in current usage, the promise to pay the average fee practised in his profession or branch of the profession. When you place an order with a tradesman or artisan, you undertake, by usage, to pay the price current in his trade. In cases where no such usage or practice can be ascertained, the contract is void, but, in proper circumstances, the claimant who carried out your order can invoke “unlawful enrichment” (art. 2162). Incidentally, see articles 2306-07 and 2646.

Art. 1714, sub-art. (2)

THE COURT MAY NOT MAKE A CONTRACT FOR THE PARTIES UNDER THE GUISE OF INTERPRETATION.

This is only a consequence of sub-article (I) at 2. Where, in spite of applying the rules of interpretation of Chapter 2, Section 1, to expressed terms, and implying terms (if any) from supplementary law, custom, equity and good faith (art. 1713), the contract's objects (the parties' obligations) cannot be defined, the court is strictly forbidden from “making” a contract for the parties under the pretence of interpretation. Dictates of “equity alone” may not produce contracts, which by definition (art. 1675) repose on agreement. Contracts may not be imposed from outside. This sub-article should be read in conjunction with article 1733 on limits of interpretation, whereby the court may not, pretending interpretation, change a contract whose terms are clear. The court can neither do this nor make a contract for the parties by filling it with an object: where a party promised “to be of assistance” or to convey “corn”, the court may not fill such a promise with an object, through deciding, on grounds of mere equity, that it should be “a week of domestic assistance” or “100 kg. of corn”. An exception, outcome of labour policy, is provided by article 2535(3).

ART. 1715. OBJECT MUST BE POSSIBLE Art,

1715. sub-art. (I)

THE OBJECT OF A CONTRACT MUST BE POSSIBLE

The contract's object, that is the contractual obligations or, in short, the giving, doing or not doing to which they relate, must be humanly possible to perform. An impossible obligation is no obligation: *impossibiliim nulla obligatio*, as the Latin maxim has it.

Art. 1715, sub-art. (2)

A CONTRACT SHALL BE OF NO EFFECT WHERE THE OBLIGATIONS OF THE PARTIES OR OF ONE OF THEM RELATE TO A THING OR FACT WHICH IS IMPOSSIBLE AND SUCH IMPOSSIBILITY IS ABSOLUTE AND INSUPERABLE.

This sub-article is a consequence of the preceding one. For the meaning of or of one see our comment on article 1714(1) at 1. The whole contract is void if one party's obligations relate to something impossible.

1. Impossibilities relating to a thing.

These impossibilities occur in obligations to convey when the specified thing to be conveyed does not exist in a merchantable state at the time of contracting. If I sell you an ox which just died, the sale is void, for it is impossible to convey an ox which does not exist (only meat and bones exist). If I knew or should have known that the ox was dead, such intentional or careless fault may make me liable in tort for damages (e.g. the buyer's travel expenses), if any. *David* (p. 31) cited the case of a specified cargo-load of cotton which sank before the time of its sale, and grounds the impossibility to convey on the non-existence of the load. This is not strictly correct; the load of cotton exists but not in a merchantable and deliverable state (impossibility). In a French case, specified beetroots were sold on terms that the vendor was exempted from the legal warranty against defects (law of sale) - in a state of total but hidden rot due to frost. There being no warranty, the court had to rule that a contract has no object where the latter is not in a "merchantable state". The beetroots were sold as foodstuff, but they were no longer foodstuff, since they were wholly rotten. Partial rot would not have been enough. On the other hand, a loss or rot, even total, but occurring after the contract's date, is immaterial here (see 3, below). See *Cassation* 5 fevr. 1906, D. 1907.1.468 (cited in *Walton I*, p. 68).

Of course, in sales of future things or unspecified fungibles to be producep or procured, their existence is immaterial as long as it is humanly possible to produce or procure them (cf. art. 2270(2)).

So far we have been dealing with physical impossibilities of conveyance due to the thing's (merchantable) "non-existence". But there may be cases of "legal" impossibility not amounting to the unlawfulness envisaged by article 1716(1). This is where you buy, perhaps unknown to both parties, your own thing. Instead of avoiding the contract on grounds of mistake under article 1699(b) (consideration nil), thus risking incurring the damages of article 1703, you should maintain that the contract is non-existent for lack of object, since a conveyance of your own thing to you is a legal impossibility.

2. Impossibilities relating to a fact.

These impossibilities concern mainly obligations "to do". Familiar examples: to swim across the Atlantic, to go to the planet Mars, to construct a *perpetuum mobile* (perpetual movement). Such impossibilities may vary with the progress of science. Impossibilities "to do" occur rarely in contracts because of the considerations set out below at 4.

3. "... which is impossible..."

The verb “is” implies that, in order to prevent the formation of the contract, the impossibility must exist *at the time* of contracting. An impossibility supervening later (*impossibilitas superveniens*) is immaterial here, but is relevant in Chapter 2 Section 4 on Non-Performance, for which see articles 1788 and 1791 (2) - 1792(1). The latter articles include legal impossibilities, as when the promised act has become unlawful (art. 1793(b)). But in our Section on Object of Contract, unlawful obligations are more fittingly discussed under article 1716(1).

4. “... and such impossibility is absolute and insuperable.”

In order to prevent the formation of the contract, the impossibility must be *absolutely* insuperable by anyone in the promisor’s stead. A relative impossibility which is insuperable only in relation to the particular promisor is of no avail. *Walton* /, p. 79, illustrate this principle with the case of a person who, without any knowledge of music, promises to create an opera within a certain period, or else to pay a penalty. Opera-writing not being impossible for competent composers, the contract is valid and the penalty will be due. But in case the other party knew of the relative impossibility, this circumstance may, if there is no penalty clause, support a defense that the agreement was not seriously intended to bind (art. 1679 at J.). Another example: A truck-owner undertakes to carry goods, not knowing that his only truck has just broken down. The contract is not void, as it is not absolutely impossible to hire another truck for the performance, [f he cannot do this, he may have to pay damages where the other party sustains any and chooses to sue on the contract.

ART. 1716. UNLAWFUL OR IMMORAL OBJECTS

Art. 1716, sub-art. (1)

A CONTRACT SHALL BE OF NO EFFECT WHERE THE OBLIGATIONS OF THE PARTIES OR OF ONE OF THEM ARE UNLAWFUL OR IMMORAL.

For the significance of “or of one” see our comment on article 1714(1) at *I*. As to unlawful and immoral obligations, they must be examined in turn. “Illicit” means either.

1. Obligations unlawful.

“Unlawful” obligations are such as are contrary to Public law or to mandatory rules of Private law, and never such as are only contrary to the latter’s suppletory provisions, which may be lawfully set aside by the parties (art. 1731(3)).

We shall first examine the problem of unlawful object in obligations to convey rights on *things*. If the latter are not *in commercio*, that is, are made non-transferable (non-conveyable) by law, the obligation is clearly unlawful. Illustrations:

(1) In most contemporary legal systems, including the Ethiopian, man is not *in commercio* and, strictly speaking, is not a “thing”. Not only are others unable to own and convey him, but he himself may not sell his life, body or part of the body (cf. arts. 18-19). However, a person can include, for money, such limited risks to his life or physical integrity as are normal in his undertaking,

e.g., a racing-car driver or a test-pilot risks his life in a way normal for his profession (cf.art. 9(2)). Also valid but revocable (art. 19) may be, e.g. the sale of one's blood for transfusion purposes (art. 18(2)).

(2) Goods excluded from private commerce on grounds of public health, such as poisonous matters or dangerous drugs except on doctor's prescription.

(3) Things excluded from private commerce for other reasons, e.g. public domain property (art. 1454) and, in Ethiopia, all land (Proc. No. 31 of 1975).

In obligations "to *do*", the variety of forbidden "doings" is so great that it is pointless to give many examples: Penal and Administrative law is full of them. The less obvious examples are found in the law of contract where, suppletory provisions being prevalent, the relevant mandatory ones must sometimes be determined by court interpretation. Two easier examples: article 1855, article 1879.

Where a party has knowingly concluded an unlawful contract with an unknowing party, he may owe damages in tort (art. 2030 with 2028).

2. Obligation *immoral*.

It is clearly more difficult to determine what is immoral than what is positively unlawful. Were all moral precepts part of the law, there would be no need for a separate class of "immoral" obligations. The French master-version does not speak of "immoral" obligations, but of those contrary to *good morals* or moral customs (the *boni mores* of the Roman law), which is not the same. We should not be concerned here with all the fine distinctions of pure morality, but with such a minimum of morality in contracts as may be required by common opinion as to what is decent conduct. The interpreters are the Ethiopian courts, for which we are not entitled to infer any precise rules in this matter.

Some legal systems of Christian origin consider as immoral (6th commandment) a man's promise to pay money to a woman against her undertaking extra-marital sexual intercourse. Both promises are of no effect, and the man and woman are left without a claim, because one of the two obligations had an immoral object (the intercourse). But this must be carefully distinguished from a promise made not for obtaining new intercourse, but with the "parting" intention to compensate the woman for past relations. Such contracts contain only one obligation, whose object (paying money) is perfectly licit. Where the above intention is not expressed, a licit cause (reason) for the promise is presumed to exist (art. 2019(1-2)). Even if expressed, it would not denote a purpose of inducing immoral relations (art. 1718(2)), but only a purpose of repairing the prejudice caused to the woman by past relations, so that the promise expressing such a reason merely transforms the moral obligation to make reparation into a civil and actionable one. Incidentally, is hire of a woman's domestic services invalid only in its "immoral" part, if any (art. 1813)? (This is an open question.)

An undertaking to violate a foreign state's customs taxes, even though not prohibited by Ethiopian law, may or may not be deemed void as having an immoral object: Is loyalty to a foreign state a moral duty?

Several countries, including Ethiopia, consider exaggerated contractual restraints on one's freedom of trade and occupation as both contrary to good morals and undermining the legal principle that such freedom is *extra commercium* (art. 16 with 9). These exaggerations may concern the time, space or extent of the restrictions, as in the hypothesis of a contractual prohibition to compete through practicing professional photography in all Ethiopia, or for too many years, or extending to every kind of such photography.

Art. 1716, sub-art. (2)

A CONTRACT SHALL BE OF NO EFFECT WHERE IT APPEARS TO BE UNLAWFUL OR IMMORAL THAT THE OBLIGATIONS ASSUMED BY ONE PARTY BE RELATED TO THE OBLIGATIONS OF THE OTHER PARTY.

There are contracts where each party's obligations, considered in their objects, are perfectly lawful and not immoral. But it appears contrary to "good morals", or to special legal provisions, that they be related, interdependent. Here will fall at least some of the contracts which the French Civil Code article 1133 calls contrary to "public order" ("public policy" in England). It is contrary to good morals or public order to contract obligations which, without infringing the dictates of law or morals when taken separately, yet if taken jointly elude the basic purposes of the legal order and endanger the soundness of its institutions. For instance, paying a sum of money or resigning an official position is neither unlawful nor immoral, but paying money *for* resigning office is either immoral, or even unlawful under special legal provisions. The following is an illustration by *Walton* (/, p. 303) which is excellent, though grounded exclusively on the French concept of public order. Contrary to the latter are contracts "by which a public official undertakes to resign his office on receipt of a sum of money, to be paid to him by a private individual. Public offices are not to be made the objects of private bargains. The purpose of such contract being to create a vacancy in order that the other party to the contract or some 'protege' of his may obtain the position, it tends to interfere with the choice of the best candidate. ... If the agreement is that A is to resign and that B, if he is appointed, shall pay to A a proportion of the salary, ... this is against public interest on another ground. Government salaries are supposed to be fixed on a scale sufficient to enable the official to maintain his position suitably. This purpose would be frustrated if officials were under obligations depriving them of the use of a part of their salaries. It would be unfortunate for the public service if the holders of offices were impecunious dummies who had to pass over a great part of their salaries to persons behind the scenes. Such officials struggling with inadequate incomes might be tempted into dishonesty" (a problem affecting, in particular, non-affluent countries). Cf. article 424 Penal Code.

Further illustrations: It is lawful to promise money, and it is lawful to release a kidnapped child, and each of these undertakings, taken separately, is not immoral, but it is immoral that money should be owed by parents to the kidnapper *for* such release, which is his legal duty. Promising the money or performing the legal duty are flawless in themselves, but may not be related to each other. A reward offered for recovery of stolen goods is void in relation to the thief and accomplices, whose duty

was anyway to restore them. A reward for “not stealing” is also challengeable. A promise to reward a public servant for performing his duty to deal with a case cc request according to law is void both as immoral and as unlawful in consequence of article 423 Penal Code. Public order and good morals require that people should not exact payments for doing their legal duty. English law is here similar, though its technique is different (failure of “consideration”: see *Chitty*, No. 127).

POSTSCRIPT to arts. 1714-16. The contract’s object must not only be defined: possible and licit, but also be a “proprietary” (patrimonial) nature. This fourth requisite of an effective object is not mentioned in this section, as it results from the very definition of contracts of obligation in article 1675 (comment 6.). The contract must contain some promise of a patrimonial nature; so that a creditor suing on it is able to prove, in accordance with rules of procedure, an interest capable of being estimated: in money. Otherwise, how could the court award damages for non-performance? On opposite trends in French case law, see *Walton* (*I*, p. 80).

ART. 1717. MOTIVE. 1. PRINCIPLE

THE MOTIVE FOR WHICH THE PARTIES ENTERED INTO A CONTRACT SHALL NOT BE TAKEN INTO ACCOUNT IN DETERMINING THE UNLAWFUL OR IMMORAL NATURE OF THEIR OBLIGATIONS.

It has been shown hereinbefore how article 1701 (!) excludes invalidations based on mistake, where a will truly declared is only induced by untrue external facts which motivate the decision to contract. Such mistake is not related to the contract but is in the motives which led to it. Similarly, the present article excludes declarations of nullity where quite licit undertakings are only induced by illicit *ex term*, purposes which motivate the decision to contract. Such illicit purposes are not in the contract, but are in the motives which led to it, so that the contractual obligations are neither illicit (unlawful or immoral) in themselves under article 1716(1) nor in their interrelation under article 1716(2). Motives - whether mistaken or illicit are normally irrelevant in contracting and need not be enquired into. Man’s mind is a jungle, and it is not convenient currently to explore its motives unless the illicit purpose is shown by the contract itself or a pertinent document (art. 1718). Where the illicit use of a conveyed object is not a term of the contract, which does not bind a party to commit the intended illicit acts, but only facilitates them, the contract is not void. If I sell a knife to a man whose purchase is, to my knowledge, motivated by an extra-contractual intention to murder somebody with it, the contract is valid. Two more illustrations follow:

- (1) A loan to a contrabandist, knowing or hoping that his unlawful use of the loan for contraband will enable him to repay it with interest: contraband f intended, but not undertaken in the contract, which remains valid.
- (2) Contract supporting the establishment or exploitation of a house of prostitution: lease or sale of premises, of furniture, of supplies. The lessors or sellers know or hope that the immoral use of their ware will allow of their

payment. Immorality is intended, but not undertaken in the contract remains valid.

In the above cases the object of the contract - as defined in the third of our Introductory Note to this Section-is legally irreproachable. The interrelations of article 1716(2) are also irreproachable: there is nothing illicit in the premises or furniture being connected with payments of price or rent, or with repayments of the loan.

Extra-contractual motives are often inscrutable, and the legal system recognizing their relevancy experience inconvenient difficulties as to evidence.

ART. 1718. MOTIVE. 2. EXCEPTION⁶

[Nevertheless,] THE COURT SHALL NOT ORDER A CONTRACT PERFORMED:

(a) WHERE THE TERMS OF THE CONTRACT DENOTE THAT PARTIES OR ONE OF THEM HAVE AN UNLAWFUL OR ILLEGAL PURPOSE IN VIEW;
OR

(b) WHERE THE PARTY WHO REQUIRES THE PERFORMANCE OF A CONTRACT PRODUCES A DOCUMENT DENOTING SUCH PURPOSE.

It is the practical difficulties as to evidence, together with the need for trade, that make us reject the relevancy of motives in ascertaining the illicit contract. All these reasons vanish where an illicit purpose appears in the contract itself or in documents supporting it. With reference to the preceding examples; must distinguish two possibilities:

(1) If the seller or lessor or lender has to produce a contract or showing that the other party undertakes to use the thing for murder band or prostitution, clearly the latter's obligation is unlawful and/or in its object, and the contract is void under article 1716(1).

(2) If the contract or document shows only the non-binding intention not amounting to a term or condition) of such illicit use, the illicitness the motives without affecting the object, and only the present article invoked to refuse performance. The document produced by the claimant may be a letter confirming the contract in its business part, and denoting, external purpose (the motive) in its private part not bearing on the contract. This is enough to bar the action for performance of the contract.

Our system seems derived from the extinct old French doctrine of "intrinsic" proof of illicit motives, which barred their proof by evidence external to the contract or its supporting documents. On later trends in France, see *Walton* (pp. 61-62)

6. This EXCEPTION was added late in the codification process: see *David*, Editor's note '.

It is not quite clear why, in this article, the legislator starts with the words “the court shall not order the contract to be performed”, while in articles 1714-16 he says that the contract “shall be of no effect”. In the latter case the parties are normally reinstated in their previous position under article 1815(1). But where the rule is not that the contract is of no effect, but merely that the court shall not order its performance, this seems to derive from the Latin maxim *ex turpe causa non oritur actio* (no action where cause immoral) - the court entertains no actions revealing the claimant’s moral turpitude in his motives. In Ethiopian law, this maxim seems to apply only where the moral turpitude is denoted by the contract or documents produced by the claimant. Illustration: The court will, in such a case, enforce neither the aforesaid loan to the contrabandist, nor its repayment by him. The court will simply stop the proceedings as soon as the contractual claimant's vile motives appear from his documents.

SECTION 3
FORM OF CONTRACTS

ART. 1719. FORM OF CONTRACTS

Art. 1719, sub-art. (1)

UNLESS OTHERWISE PROVIDED, NO SPECIAL FORM SHALL BE REQUIRED AND A CONTRACT SHALL BE VALID WHERE THE PARTIES AGREE.

Already article 1678(C), through using the qualification "if any", implies that form is not, normally, an essential element of contracts. The present sub-article expressly shows that, save under sub-articles (2) - (3) below, there is *freedom* of form, and the contract exists by mere agreement, that is, as soon as the parties have expressed a consent effective under Section 1 Paragraph 1, towards an object effective under Section 2. A similar freedom of form is provided by article 1681(1) for declarations preceding and completing the contract.

The two sub-articles below are exceptions "providing otherwise".

Art. 1719, sub-art. (2)

WHERE A SPECIAL FORM IS EXPRESSLY PRESCRIBED BY LAW, SUCH FORM SHALL BE OBSERVED.

The significance of this sub-article lies in the qualification "*expressly*". This term indicates that form-prescribing rules must be construed restrictively - the word "expressly" excludes extensive interpretations aimed at requiring form for contracts only analogous to those for which it is prescribed (e.g., only similar to insurance). In case of doubt, the principle (freedom of form) prevails over the exception (requirement of form): on the underlying theory, see the Postscript under article 1577(2),

Art. 1719, sub-art. (3)

THE PARTIES MAY STIPULATE THAT THE CONTRACT SHALL BE MADE IN A SPECIAL FORM.

The freedom-of-form principle of sub-art. (i) can be abandoned through the parties themselves providing otherwise.

Pursuant, to article 1681(2), an offerer may, prior to any agreement, unilaterally stipulate a special form for the other party's acceptance. Pursuant to the present subarticle the negotiating parties may, by common agreement, prescribe a special form for their intended contract; the effects of this will be discussed under article 1726 on "agreed form".

ART. 1720. EFFECT OF PROVISIONS AS TO FORM

Art. 1720, sub-art. (1)

WHERE A SPECIAL FORM IS PRESCRIBED BY LAW AND NOT OBSERVED,
THERE SHALL BE NO CONTRACT BUT A MERE DRAFT OF A CONTRACT.

This sub-article supplies a sanction for the provision of article 1719(2). Indeed, the significance of this sub-article lies in the words “there shall be no contract”, which sanction the non-observance of form prescribed by law with full invalidity according to the maxim *forma dat esse rei* (form gives existence to the transaction). Such a formless contract is not merely unenforceable (see the Postscript under art. 1678fc)), but is of no effect, null and void, in the same way as in the case of absence of expressed consent or effective object. So whenever we meet a legal provision only requiring the observance of a form, we must, by virtue of this sub-article, understand it as prescribed for validly making the contract (*ad validitatem*), and not simply for proving a made one (*ad probationem*) (see David, p. 33). A practical consequence: such a contract cannot be validated by confirmation (art. 1811(1)) or proved by conduct (performance), and anything delivered under it can be recovered. Examples of such form-prescribing provisions: articles 1723-25 below.

What if the form is prescribed not by law but by the parties? The consequence is similar: the formless contract is not “completed”, i.e. does not exist (art. 1726).

Art. 1720, sub-art. (2)

A CONTRACT SHALL BE VALID NOTWITHSTANDING THAT FISCAL
PROVISIONS, SUCH AS PROVISIONS RELATING TO STAMP DUTY OR
REGISTRATION FEE, HAVE NOT BEEN COMPLIED WITH.

This sub-article provides an exception from the preceding one. It is specially important for international contracts, where the foreign party is often not in a position to know the Ethiopian fiscal provisions.

“Stamp” duties depending on the money value or sum involved in the contract are widely known. The fiscal stamps are usually affixed on written contracts or contract-confirming invoices. The normal sanction for omitting the stamps is not nullity but payment of a fine. This protects customers of duty-bound firms who are unaware of the necessary duty.

At the time of writing, we have no complete information as to what contracts will be subject in this country to fiscal “registration” fees. In France, contracts of donation are subject to them. The sanction is not nullity but unenforceability; such contracts are barred from being proved in French courts unless and until the fiscal registration is carried out (an incentive for the donee to do it).

The words “such as” denote that stamp duty and registration fee: are only examples, so that other fiscal provisions also do not affect the validity of contracts in Private law.

Art. 1720, sub-art. (3)

UNLESS OTHERWISE PROVIDED, A CONTRACT SHALL BE VALID NOTWITHSTANDING THAT PRESCRIBED MEASURES OF PUBLICITY HAVE NOT BEEN COMPLIED WITH.

We are here concerned, before all, with measures of publication of contracts in certain public registers. They are publicity measures prescribed by Private law, at not fee-collecting measures prescribed by Fiscal law. The purpose of registration prescribed by Private law is not levying taxes but increasing the contract's probative and executive force, while at the same time providing interested third parties with means of ascertaining the existence and scope of the contract. In this very section, fit example is supplied by article 1723. Further examples can be found in this Code (and other legislation (e.g. on registration of sales of motorcars). Where the registration is prescribed and not observed, the contract remains valid between the parties but cannot prevail over a later but registered contract raised by a third party.

"Unless otherwise provided" means that special legal provisions may sanction non-observance of certain publication requirements with nullity of the contract. Such is the case, in French Company law, with non-registered constitution of companies by shares - the sanction is nullity. Under the Ethiopian Commercial Code article 223 provides a similar solution for "business organizations".

We can now illustrate the maxim *specialia generalibus derogant* by citing several articles in the order of their successive derogations from each other: -1719(1)- 1720(- 1720(3) - Commercial Code article 223 (see also art. 1724 below).

ART. 1721. PRELIMINARY CONTRACTS

PRELIMINARY CONTRACTS SHALL BE MADE IN THE FORM PRESCRIBED IN RESPECT OF THE FINAL CONTRACTS.

The following are illustrations of contracts that are "preliminary", i.e., they are both earlier than and related to the contract for which a form is prescribed (by law or agreement).

Under article 1675 at 5, we have mentioned that acts or contracts of conveyance may be preceded by contracts of obligation (e.g. sale) promising to effect the conveyance. But such contracts must, pursuant to this article, be made in the form (if any) prescribed for the conveyance. So if I promise to sell you my house on condition of your marrying my daughter, your marriage will not vest the house in you, unless a promise was itself made in the form prescribed under article 1723 (1).

Another illustration: Authority to represent a person in contracts subjected (by law or agreement) to a form, must itself be given in the form prescribed, for the contract to be concluded. So whenever you conclude, for instance, a contract subject to the written form of article 1727, never agree to deal with the other party's agent on his "authority" is not conferred on him in the same form (art. 2200(2)). This, of course, does not affect legal representatives, whose powers do not flow from a preliminary contract but from the law or a judicial decision.

ART. 1722. VARIATIONS

A CONTRACT MADE IN A SPECIAL FORM SHALL BE VARIED IN THE SAME FORM.

“Varied” (modified) does not include “extinguished” (*David*, p. 34). Consequently, the requirement of “the same form” does not apply to extinction (rather than mere variation) of the contract (on extinction of obligations, see Chapter 2 of this Title). In other respects, this self-explanatory article requires no comment.

ART. 1723. CONTRACTS RELATING TO IMMOVABLES

(1) A CONTRACT CREATING OR ASSIGNING RIGHTS IN OWNERSHIP OR BARE OWNERSHIP ON AN IMMOVABLE, OR A USUFRUCT, SERVITUDE OR MORTGAGE ON AN IMMOVABLE, SHALL BE IN WRITING AND REGISTERED WITH A COURT OR NOTARY.

(2) ANY CONTRACT BY WHICH AN IMMOVABLE IS DIVIDED AND ANY COMPROMISE RELATING TO AN IMMOVABLE SHALL BE IN WRITING AND REGISTERED WITH A COURT OR NOTARY.

Since all land in Ethiopia is now owned by the State and is inalienable, *Law Revision* has proposed to substitute “building” for “immovable” in this article.

Lack of registration with a court or notary of the written contracts contemplated by this article does not affect their validity between the parties (art. 1720) (3). But rights on a building purported to be granted to a party by a non-registered contract cannot prevail over incompatible rights granted to a third party by a later but registered contract, unless special legislation, or the “customary” rules referred to by the transitory provisions under arts. 3364-65 and 3367, provide otherwise. Reason: although Title X Civil Code is suspended (art. 3363), its art. 1645(1) can apply by analogy where registration of immovables is already “customary” even although it is carried out, as in Addis Ababa, at the Municipality rather than “with a court or notary”.

ART. 1724. CONTRACTS MADE WITH A PUBLIC ADMINISTRATION

ANY CONTRACT *BINDING* THE GOVERNMENT OR A PUBLIC ADMINISTRATION SHALL BE IN WRITING *AND* REGISTERED

WITH THE COURT, A PUBLIC ADMINISTRATION OR A NOTARY, “Registered” means filed with a public officer, whether judicial, administrative or notarial, empowered to and responsible for keeping special records to that end. In practice, he is often an official of the contracting administrative body itself. The implication that this body’s contracts do not bind before their registration is much clearer in the French master-version of this article.

ART. 1725. CONTRACTS FOR A LONG PERIOD OF TIME

THE FOLLOWING CONTRACTS SHALL BE IN WRITING:

- (a) CONTRACTS OF GUARANTEE; and
- (b) INSURANCE CONTRACTS; and

T/I

(c) ANY OTHER CONTRACTS IN RESPECT OF WHICH SUCH FORM IS
PRESCRIBED BY LAW.

This article prescribes the written form of article 1727 for contracts of guarantee and those of insurance. The provision at (c) leaves the door open for prescribing written form for other contracts. The general purpose, as implied by the title of this article, is to protect parties entering into certain long-term contracts against failures of their own and their witnesses' memory as the time passes.

Among agreements that shall be in writing if the proposals of *Law Revision* are accepted, note, in particular, the "agreement of penalty (penalty clause) entered into under art. 1889". and "any contract involving a sum [or value?] exceeding Eth. \$. (Birr) 500". Compare article 2472(1).

ART. 1726. AGREED FORM

A CONTRACT WHICH THE PARTIES AGREE TO MAKE IN A SPECIAL FORM
NOT REQUIRED BY LAW SHALL NOT BE DEEMED TO
BE COMPLETED UNTIL IT IS MADE IN THE AGREED FORM.

Where the parties agree that their contract shall be, for instance, in the written form (art. 1727), it is not valid, completed, until such form is observed. If they subsequently agree on all essentials and all terms of the negotiation, but do it by letter or in a document certified by only one witness, there is no contract (compare art. 1720(1)).

David states (p. 35) that this article is borrowed in substance, *inter alia*, from art. 16 Swiss Obligations Code. In fact, the latter is quite different in that it contains only a presumption that the parties prescribe the form *ad validitatem*; this presumption can be rebutted through performing the formless contract, and thus showing that the special form was prescribed not for validity of but for proof of the contract (where not performed). Cf. *Fick* (art. 16, notes 5-7).

ART. 1727. WRITTEN FORM

Art. 1727, sub-art (1)

ANY CONTRACT REQUIRED TO BE IN WRITING SHALL BE SUPPORTED BY
A SPECIAL DOCUMENT SIGNED BY ALL THE PARTIES
BOUND BY THE CONTRACT.

Peculiar to our system is the fact that a contract required to be in writing must be contained in a special document signed by every party bound by it. This, together with the need for witnesses, excludes - where writing is prescribed - the usual correspondence contracts by exchange of written offer and acceptance. Contrary to most foreign systems, bilateral contracts by exchange of letters do not satisfy the "written form" requirement in our law.

A contract required to be in writing must be signed by all the parties *bound*, and only by them. Consequently, in unilateral contracts binding merely one party, only the latter has to sign: a mere contract of guarantee (art. 1920) has to be signed only

by the guarantor and the witnesses. Modern law doctrines often include a general principle thus stated in the Egyptian Civil Code (art. 98): “Failure to reply [silence] is equivalent to acceptance ... when the offer is for the exclusive advantage of the offeree.” Under this principle, a creditor receiving the written guarantee without refusing it is presumed to accept it, just as the debtor who, under the Ethiopian article 1825, is presumed to accept his release through non-refusal. The latter provision, together with our dispensing with signatures of parties who are not bound, would have received logical completion if our legislator had inserted an article, similar to the Egyptian one, among the exceptions from the rule that silence is not acceptance (arts. 1 C8~84). If the courts will not “imply” such an exception, practitioners will do well to obtain the “unnecessary” signatures of the creditors on the contracts of guarantee, in order to ensure an express proof of their acceptance.

Art. 1727, sub-art. (2)

IT SHALL BE OF NO EFFECT UNLESS IT IS ATTESTED BY [and signed in front of] TWO WITNESSES.

The words in brackets indicate here an addition proposed by *Law Revision*. They are obviously inserted in the wrong place: “signed in front of” should precede “attested by”

The peculiar requirement of attestation by witnesses is intended to make up for the present lack of public authentication facilities, and of familiarity with them, in many areas of this country. It is far from giving a contract the probative and executory force resulting from its authentication by a court or notary. It nevertheless enhances the contract’s evidential value, through article 1730(1): it is more difficult to deny one’s signature or to allege alterations in or mistakes as to the terms of the contract where it is attested by witnesses.

ART. 1728. SIGNATURE

Art. 1728, sub-art. (1)

ANY. PARTY BOUND BY A CONTRACT SHALL AFFIX HIS HANDWRITTEN SIGNATURE THERETO.

This absurd mistranslation should read: *The required signatures must be handwritten*. The term “handwritten” excludes signatures by mechanical means (such as those allowed on bank-notes by special provisions). It also excludes mere “seals”, which in olden times had to be used because most non-clergy people were illiterate, and which in modern times have survived as an anachronism in, for instance, English Company law.

It is the signatures that validate the text. Swiss case-law (*Funk*, art. 13 at 2) requires continuity in the text preceding the signatures; if the document has several pages, they must be numbered, or denote continuity through the same phrase going on. Any separate addition to the continuous text should be separately signed. The document’s continuity may be broken only by the so-called incorporation of col

lateral documents (e.g. maps, powers of attorney, etc.) which are unmistakably referred to and precisely identified in the main document. As long as the signatures are genuine they may be of a name, surname, nickname, or merely denoting a precise relationship, e.g., “your father”, “your eldest brother”. But these precedents, though followed, have only a “persuasive” authority, and the problem of a document’s continuity and genuineness remains a question of fact for the courts.

Art. 1728, sub-art. (2)

WHERE A PARTY CANNOT WRITE, HE MAY AFFIX HIS THUMB- MARK.

Before the enactment of the Civil Code, the affixing of thumb-marks for identification purposes was used primarily in criminal or administrative proceedings. This scientific method is clearly superior to the traditional drawing of a mark of the cross in lieu of signature.

Art. 1728, sub-art. (3)

THE SIGNATURE OR THUMB-MARK OF A BLIND OR ILLITERATE PERSON SHALL NOT BIND HIM UNLESS IT IS AUTHENTICATED BY A NOTARY, A REGISTRAR OR A JUDGE ACTING IN THE DISCHARGE OF HIS DUTIES.

“Authenticated” means “certified” by a judge, or some other public officer empowered to do it and acting in the discharge of his duties.

“Shall not bind *him*” denotes that the blind or illiterate person alone is protected, and the other party remains bound if the deficient party chooses to maintain the non-authenticated contract, which is not bilaterally invalid. His position is thus similar to that of a person who gave defective consent, under Section 1, Paragraph 2.

ART. 1729. WITNESSES 1. CAPACITY

Art. 1729, sub-art. (1)

WHERE WITNESSES ARE REQUIRED BY [civil] LAW OR AGREEMENT, THEY SHALL BE OF AGE AND NOT JUDICIALLY INTERDICTED, UNLESS OTHERWISE EXPRESSLY PROVIDED.

Comment superfluous: e.g., article 199(3).

Art. 1729, sub-art. (2)

SEX OR NATIONALITY SHALL NOT BE CONSIDERED IN DETERMINING THE CAPACITY TO ACT AS WITNESS.

In other words, women and foreigners may act as contractual witnesses. Since they are nowhere deprived by law of such capacity (art. 192), they could so act even without this provision, which is superfluous.

ART. 1730. WITNESSES 2. DUTIES

Art. 1730, sub-art. (i)

WHERE NECESSARY, THE WITNESSES SHALL CERTIFY THAT THE CONTRACT WAS MADE AND THE TERMS THEREOF.

The witnesses' evidence is inadmissible where not *necessary*. The necessity required is defined by article 2003 (which makes the above sub-article superfluous):

WHERE THE LAW REQUIRES WRITTEN FORM FOR THE COMPLETION OF A CONTRACT, SUCH CONTRACT MAY *NOT* BE PROVED BY WITNESSES OR PRESUMPTIONS *UNLESS* IT IS ESTABLISHED THAT THE DOCUMENT EVIDENCING THE CONTRACT HAS BEEN DESTROYED, STOLEN OR LOST.

Art. 1730, sub-art. (2)

UNLESS THEY ACT EXPRESSLY AS GUARANTORS, THE WITNESSES SHALL NOT GUARANTEE THE PERFORMANCE OF THE CONTRACT.

Any guarantee must anyway be expressed in the form prescribed by article 1725 with 1727: a witness purporting to become guarantor must give his guarantee in a special document attested by two distinct witnesses. The above sub-article is therefore superfluous.

POSTSCRIPT to arts. 1729-1730. According to this writer's recollection, these superfluous provisions were added by the Imperial Codification Commission late in the codification process, without the expert draftsman's assistance. Moreover, these redundant articles are misplaced: they should have been fitted in the chapter on proof of contracts (cf. *David*, Editor's note 10).

POSTSCRIPT to SECTION 3. Where a party knowingly omits a requirement of form unknown to the other party, e.g. in order to remain free to withdraw from the contract, he may be liable in tort (fault under art. 2030) for any damage thus caused (art. 2028). In such a case, damages may be awarded to the party who, for example, innocently relied on a formless guarantee.

PART TWO

CHAPTER 2

EFFECTS OF CONTRACTS

After having analyzed the FORMATION of contracts, we now turn to the study of their EFFECTS. This chapter starts with defining the basic consequence of contracts (art. 1731). Thereafter it deals, in four consecutive sections, with the interpretation, performance, judicial variation and non-performance of contracts. The due effects of the contract are ascertained by interpretation, fulfilled by performance, changed (exceptionally) by judicial variation, and sanctioned by the rules on nonperformance.

ART. 1731. PRINCIPLE Art.

1731, sub-art. (1)

THE PROVISIONS OF A CONTRACT LAWFULLY FORMED SHALL BE BINDING ON THE PARTIES AS THOUGH THEY WERE LAW.

Contracts “lawfully formed” are those made pursuant to the rules of Chapter 1: where these rules have been satisfied, that is, there has been expressed a consent effective under Section 1, Paragraph 1, towards an object effective under Section 2, in a form effective under Section 3, the contract is lawfully formed and, in consequence, becomes the law of the parties (binds them as, though it were law). On the other hand, the defects in consent of Section 1, Paragraph 2, create an abnormal situation: as explained before, the victim of the defect may enforce the contract, while the other party has no such right and can be defeated by an invalidation (arts. 1808(1) and 1809). Such contract’s binding force is one-sided.

Art. 1731, sub-art. (2)

THE CONTENTS OF THE CONTRACT SHALL BE DETERMINED BY THE PARTIES SUBJECT TO THE MANDATORY PROVISIONS OF THE LAW.

This sub-article restates the rule of article 1711 whereby the parties can freely determine the contents, i.e. objects of their contract. It also adds precision, through showing that the legal “restrictions and prohibitions” of article 1711 must be understood to mean only such provisions as are mandatory (imperative).

Art. 1731, sub-art. (3)

THE PROVISIONS OF THIS TITLE SHALL APPLY TO ALL CONTRACTS WHERE SUCH PROVISIONS ARE OF A MANDATORY NATURE, OR [where] THEIR APPLICATION HAS NOT BEEN SET ASIDE BY THE PARTIES.

The rules of contract law apply to contracts only where they are mandatory, or are not set aside by the parties (cf. *Fick*, notes under art. 19):

1. “The provisions of this Title shall apply to all contracts where such provisions are of a mandatory nature,…”

This passage restates the gist of the preceding sub-article: if contracts are subject to mandatory provisions, then obviously the latter must apply to them. Since mandatory provisions cannot be set aside, they limit the parties’ freedom in contracting. But how are the courts to determine which legal provisions are mandatory? Some are mandatory because they expressly prohibit agreements to the contrary. Some are considered mandatory because they use categorical phrases or terms such as “must” or “shall”. The term “shall” alone is no sure guidance, since the translator uses it indiscriminately. The courts will also have to consider whether it flows from the implicit purpose (e.g. morality, public interest) or from the logic of a provision in its context that it should be mandatory. For example, the present article is clearly mandatory. So are the provisions on defects in consent.

2. “... or [wh^ere] their application has not been set aside by the parties.”

Where a rule of contract law is not mandatory, it is permissive (suppletory), i.e., it applies only if not set aside through the parties providing otherwise. As explained in the introduction to this Title at 1, suppletory provisions only supplement the contract, “presuming” what the parties would have intended, had they adverted to the problems left unsolved. The parties are free to overrule the permissive legal provisions by providing their own solutions for all possible incidents of their contracts. Under article 1695(3), several examples were given of how the law remedies deficiencies in the agreement of the parties, and fills incomplete contracts. As we know, contracts contain not only terms that are expressed, but also terms that have to be implied. This is done, in the first place, by application of the suppletory rules of law. For implying, where necessary, further terms, article 1713 refers the courts to custom (usage), equity and good faith.

But how^r are the courts to determine which legal provisions are permissive? Some are expressly made suppletory (permissive) through including the phrase “unless otherwise agreed” or words to that effect. Others are deemed suppletory wherever they are not mandatory in the sense explained at /., above. Just as some doctrines of property define only immovable’s, “everything else” being movables, so we can distinguish mandatory provisions as those formulated accordingly or required to be mandatory by their nature and purpose as determined by judicial policy, all other rules being suppletory (=non-mandatory). Since judicial policy cannot be foreseen in advance with regard to all legal provisions, students may find controversial entertainment in discussing their respective character: mandatory or permissive.

This Title on Contracts in General contains mostly suppletory provisions. But the bulk of them is found in the Book on Special Contracts. Each special (nominate) contract contains certain *essentialia* (essentials) without which it cannot exist {*Funk*, art. 1, at 1.) In sale for instance, these essentials are a thing and a price (art. 2266), which are necessary to ground a contract of sale. Usage and the many suppletory rules on Sale, providing for the various problems which may possibly arise in connection with sale, constitute its *naturalia*, i.e. natural terms implied by law or custom.

Replacing them or adding to them provides the contract with its *accidentalia* or accidental terms “made to measure” by the parties for the particular sale in view (price instalments, special warranties, details of packing and delivery, etc., etc.).

The following section deals with interpreting any such terms, whether “essentia or “accidental”, as are expressed by the parties in their contract. Of course the law and custom-implied *naturalia* (natural terms) provide for what the parties have not expressed.

SECTION 1 INTERPRETATION OF CONTRACTS⁷

ART. 1732. INTERPRETATION IN ACCORDANCE WITH GOOD FAITH

CONTRACTS SHALL BE INTERPRETED IN ACCORDANCE WITH GOOD FAITH, HAVING REGARD TO THE LOYALTY AND CONFIDENCE WHICH SHOULD EXIST BETWEEN THE PARTIES ACCORDING TO [usages and] BUSINESS PRACTICE.

This article reminds the interpreting judge of the requirements of custom and good faith which are incorporated in the contract by article 1713, and have been analyzed under that article.

The draftsman considers the present article as an affirmation of the moral principle that the parties should interpret their contract loyally (*David*, p. 37), rather than as a strict command to the judges who, pursuant to the subsequent article, may not search for the parties' genuine agreement where the expressed one is clear.

But what David fails to emphasize, and the English translator to retain, is the word "*usages*" (see text in brackets) and its significance here. Under article 1713 usages are referred to for the purpose of implying customary clauses omitted by the contractants. Under the present article, usage and practice shall be resorted to for the interpretation of clauses not omitted but ambiguously expressed in the contract. The actual words of the contract must have their meaning ascertained, where necessary, by reference to local practice and settled usage. But there may be a problem as to which usage is to be applied: that of the place where the contract was made, or that of the place of performance? This is a question of fact lying in the discretion of the courts, who look to the parties' intention in this respect (art. 1734), so we can supply only two tentative illustrations.

In sales by measure or weight, courts sometimes apply the usage of the place of delivery. So in a contract made in New York, delivery in London, the "bushel" of the wheat sold might mean as much wheat as is ascribed to it in London, not in New York. Similarly for coffee sales made *infrazulas* or other customary units of measurement, the content of which varies from place to place, the usage of the place of delivery may supply its meaning to the unit.

ART. 1733. LIMITS OF INTERPRETATION

WHERE THE PROVISIONS OF A CONTRACT ARE CLEAR, THE COURT MAY NOT DEPART FROM THEM AND DETERMINE BY WAY OF INTERPRETATION THE INTENTION OF THE PARTIES.

This article should be read in conjunction with articles 1732, 1680(1) and 1714(2): Under article 1732 we have stressed that the principle of "good faith" interpreta-

7. Compare G. Krzeczunowicz, "Statutory Interpretation in Ethiopia", *J. Eth. L.*, Vol. I, No. 2 (1964).

tion recommended to the parties does not strictly bind the judges, who, on the contrary, by virtue of the present article, may not search for the parties' genuine agreement v/here the expressed one is clear. Security of trade and the theory of declaration of will (art. 1680(1)) justify this prohibition. Courts can neither make a contract for the parties through filling it themselves with an object where it is not defined (art. 1714(2)), nor can they, using arbitrary interpretation, change a contract clearly termed. Quoting *David's* own comments (p. 37): "... priority must be given to what has been said over what was intended in fact"; "... the judges should not stray, in the name of good faith, into enquiries of intention amounting to pure conjectures..."; "The judge may interpret a contract only where it calls for interpretation"; "The judges may not distort a contract through making it say, under the guise of interpretation, something else than what a reasonable man knowing the circumstances of the case would understand it to mean. Where the contractual terms are clear, the judge must necessarily give them effect. The remedy open to a party who pretends, in such case, that his will was wrongly expressed, is to claim avoidance on ground of mistake. ... Judges cannot be permitted to vary a contract and thus impose on the other party a contract which he never accepted."

To sum up:

1. - A plain contract means what it says by the objective standard of what the average reasonable man understands it to say (which need not necessarily agree with dictionary meanings). It is only where contractual provisions are ambiguous that the parties' subjective joint intention may be enquired into under art. 1734.
2. - This does not leave without remedy a party who proves that his true will differed from the clearly expressed one; but, even in the case of an avoidance of contract grounded on mistake, the security of trade remains protected by article 1703 on damages.

One French case will suffice to illustrate the basic principle under study. An insurance company engaged an agent, on terms that it may revoke him at any time without notice or reason and without compensation. The agent having been suddenly dismissed, without justification, after having won permanent customers for his company, a lower court awarded him damages on equitable grounds, contrary to the above terms. The court of Cassation quashed the judgement on the following grounds: "... to permit the judges to substitute the parties' pretended contractual intention in lieu of a term neither obscure nor ambiguous would be clearly to give them powers to alter and change the character of the contract." This the court of Cassation did, notwithstanding that the French doctrine, based on the theory "of will", cannot avail itself of a provision similar to our article 1733. It is even better to have this article on the books (*Cassation* 10 nov. 1891, D. 92.1. 406, *Walton* /, p. 362).

ART. 1734. COMMON INTENTION OF THE PARTIES

- (1) WHERE THE PROVISIONS OF A CONTRACT ARE AMBIGUOUS, THE COMMON INTENTION OF THE PARTIES SHALL BE SOUGHT.

- (2) [For this purpose] THE GENERAL CONDUCT OF THE PARTIES BEFORE AND AFTER THE MAKING OF THE CONTRACT SHALL BE TAKEN INTO CONSIDERATION.

After having set limits for interpretation (which is excluded where the contract is clear) the legislator commands us to enquire into the parties' joint intention where the contract is ambiguous. Such enquiries of intention on basis of articles 1734-37 may be unsuccessful and bring no determined results, in which case we may have to apply the hard and fast rules of articles 1738-39.

Sub-article (2) prescribes considering the parties' conduct in the search for their common intention. Their conduct is shown by what they wrote, said or did in connection with the ambiguous terms. Their conduct after the contract can also consist in the performance of the disputed provision in a certain sense, which may bar them from claiming another sense for it. In Canada, where an area of land is sold with its boundaries obscurely traced, and a problem arises whether a particular plot is included in the sale, evidence as to precedent negotiations may help to solve the difficulty. Otherwise, the buyer's claim that the plot is so included can be supported by evidence that the vendor has allowed him to occupy and keep it (1896, Canadian Supreme Court Reports, 102). The vendor's post-contractual conduct of performing the disputed terms of a contract in a certain way is good evidence of his initial contractual intention.

Incidentally, the translator's verb "shall", indiscriminately used throughout this section on interpretation of contracts, should not be understood as invariably denoting rules that are mandatory for the judges (although, of course, the parties cannot set them aside). Rather, rules of interpretation present the court with a choice of methods and lead to presumptions which may remain open to contrary proof. But the provisions of article 1733 ("may not") and article 1734(1) seem to be strictly mandatory.

ART. 1735. GENERAL TERMS

A CONTRACT SHALL BE DEEMED TO RELATE TO SUCH MATTERS ONLY ON WHICH IT APPEARS THAT THE PARTIES HAVE INTENDED TO CONTRACT, HOWEVER GENERAL THE TERMS USED.

A term is not always clarified by mere reference to its literal dictionary meaning. An average reasonable man may understand general terms in a sense limited to the objects in negotiation.

Examples: 1. You insured your Addis Ababa house on the basis of a declaration that you never had *any* fires before. The defendant insurer discovers that twenty years ago you had a fire in your Wolisso farmhouse. Evidence of intention and insurance-usages may show that the terms "never had any fires" should be restricted to mean "... in my insured house" (see cases cited in Walton /, p. 368).

2. B sells *all* his "movables" to C, who claims on the basis of legal dictionaries that the term "movables" includes B's money in the Bank. B proves, producing a list of furniture, etc., annexed to the contract, that his money was not contemplated in this bargain.

ART. 1736. INTERPRETATION IN ACCORDANCE WITH THE CONTEXT Art.

1736, sub-art. (1)

THE PROVISIONS OF A CONTRACT SHALL BE INTERPRETED THROUGH ONE ANOTHER AND EACH PROVISION SHALL BE GIVEN THE MEANING REQUIRED BY THE WHOLE CONTRACT.

Since the principle of interpretation through the *context* applies to both contracts and statutes, illustrations are provided throughout this Commentary, which repeatedly reminds the reader of the necessity to read certain articles "in conjunction" with other articles or sections of the Code. The sense of an obscure term is best collected *ex antecedentibus et consequentibus*, that is, from the antecedent and subsequent provisions of the same text; that is, from the context.

A first contractual example for this is provided by case 2 under the preceding article, where the claim that the term "movables" includes money was defeated by the context, containing a list of movables without money items (defence based on both art. 1735 and art. 1736). Another example: In a loan of 100 Birr, with capital repayable in 100 monthly installments of 100 Birr, the latter number may be construed through the context to mean 10 Birr. Sometimes things and persons are ambiguously described. Where a contractant (or, by analogy, a testator), repeats the words "my Fiat car" and "my brother John", and only once says "my car" and "my brother", it may be clear from the context that, although he also has another car and another brother, the ambiguous terms refer to his Fiat car and his brother John.

Interpretation through the context bears also on the so-called qualification of contracts. The court may be faced with the necessity to qualify a contract, that is, to give it its legal name in order to know whether to imply the "natural" (legal and customary) terms of, say, sale rather than lease (see Book on Special Contracts). This legal baptism of the contract is independent of what the parties call it, but depends on anything they put into the context which may make it fit into the legal frame of the law of Sale, or Lease, etc. For instance, lease is a contract giving the lessee, for rent, the use of a thing (arts. 2727, 2896), which shall not be consumed but must be returned at the end of the lease (arts. 2728(1), 2936). But the so-called mining leases on a royalty basis are, in fact, sales, since the mineral is taken away and consumed (and does not grow again in the earth). Consequently, the law of lease does not apply, and the so-called lessor (in fact vendor) has no lessor's right of retention (art. 2924) on the mining equipment as a security for the royalty due, once the royalty is not a rent but a price-installment (art. 2384) (see cases in *Walton I*, p. 370). Of course, the contract or the mining laws may nevertheless create special securities on the equipment.

Art. 1736, sub-art. (2)

AMBIGUOUS TERMS SHALL BE GIVEN SUCH MEANING AS IS THE MORE
LIKELY, HAVING REGARD TO THE SUBJECT MATTER OF THE CONTRACT.

A sense different from the ordinary may be assigned to a word from the special subject-matter containing it. We can say, repeating a judicial dictum cited in *Odgers* (p.33): “If the language be technical or scientific and it is used in a matter relating to the art or science to which it belongs, its technical or scientific must be considered its primary meaning...”. And *Odgers* thus illustrates the dictum: “Frequent examples of this occur in patent cases, where the court has often to determine the nature and scope of an alleged invention and expert witnesses are called to inform the court as to the meanings used in the specifications under consideration. So with regard to Lady Hewley’s trusts ... evidence was admitted as to the meaning of ‘poor and godly preachers of Christ’s holy gospel’, and what religious sects are included therein” (the subject-matter being religious).

Apart from expert witnesses, technical or scientific or religious or other relevant dictionaries may be used in evidence of the non-ordinary meaning of the words or phrases relating to such special subject-matter. Garage specifications for car-repair and maintenance contain familiar examples of a markedly technical language: a garage owner selling “nurses” is not a slave-trader!

ART. 1737. POSITIVE INTERPRETATION

PROVISIONS CAPABLE OF TWO [or more] MEANINGS SHALL BE GIVEN A
MEANING TO RENDER THEM EFFECTIVE RATHER THAN A MEANING
WHICH WOULD RENDER THEM INEFFECTIVE.

As the old maxim goes: *Actus interpretandus est ut valeat* (acts should be interpreted in favour of effectiveness). This rule is based on the presumption that, when the parties stipulate something in a contract, it is usually with the intention to obtain a certain effect, rather than to practise useless eloquence. But this presumption can, of course, be displaced by contrary evidence under the preceding articles. The choice between the particular presumptions of intention - flowing from reference 1. to usage, 2. to conduct, 3. to restrictive construction of certain general terms, 4. to the context and its special language, 5. to positive interpretation - is within the court’s discretion, with greatest attention paid to the context.

A clear, though controversial, illustration for the “positive interpretation” principle is provided below by the “garage notice” case under article 1738(2). Also, see our positive interpretation of article 1739.

ART. 1738, INTERPRETATION IN FAVOUR OF DEBTOR

Art. 1738, sub-art. (1)

IN CASES OF DOUBT, A CONTRACT SHALL BE INTERPRETED AGAINST THE PARTY WHO STIPULATES AN OBLIGATION AND IN FAVOUR OF THE PARTY WHO ASSUMES IT.

The expression “*in cases of doubt*” shows that the court may resort to this rule only after the preceding methods of interpretation, aimed at discovering the presumable joint intention of the parties, have been unsuccessful, and the doubt still remains. This sub-article is a logical consequence of the principle that “the burden of proof is on him who demands performance of an obligation” (art. 2001(1)). Where he has not succeeded in proving the debtor’s obligation beyond reasonable doubt, despite applying the above methods of interpretation, he has not discharged his burden of proof, and the debtor remains less bound or more free, the presumption being in favour of freedom (cf., e.g., art. 2275(1)).

Terminology: creditors “stipulate” obligations which debtors “assume”. As the old maxim goes, *verba contra stipulatorem interpretanda sunt* (words are to be interpreted against the stipulator). The Egyptian Civil Code (art. 151) says simply, “In case of doubt, the interpretation shall be in favour of the debtor.”

Applications of this principle are made, e.g., in cases where the contract is written in as many originals as there are parties, which is a commendable procedure providing everyone with proof. But it happens that some discrepancy is discovered between the first original and its duplicate or triplicate, while the parties’ joint intention remains undiscoverable by the usual methods and the contract is complete under article 1695(2). In such a case, preference is given to that copy which burdens the concerned debtor less. In a lease, these differences may be as to the exact amount of the rent, the right of notice, etc.

In another field, a French case, as resumed by *Walton* (I, p. 395), affords the following illustration: “A bill of lading contained a clause that the goods w’ere to be delivered as quickly as possible and ‘without interruption’....The ship owners wished to discharge the goods during the night. The consignees maintained that they are not bound to take delivery during the night; when this was intended it was usual to say expressly ‘day and night’. The Court of Douai held that the clause, being obscure, must be interpreted against the stipulator and, therefore, it upheld the contention of the consignees.” In Ethiopian law, w’e would first have tested articles 1732 (usage) and 1735 (general terms), which would perhaps have pointed towards a similar solution; but any remaining doubts would have been dispelled by the present article.

Art. 1738, sub-art. (2)

[Nevertheless,] STIPULATIONS INSERTED IN GENERAL PROVISIONS, MODELS OR FORMS OF CONTRACTS PREPARED BY ONE PARTY SHALL BE INTERPRETED IN FAVOUR OF THE OTHER PARTY.

Reason for reinserting the French master-text’s essential word “nevertheless”: it shows that this sub-article prevails over the preceding one, in relation to which it is a

special provision. The words “general provisions” denote the general terms of business of article 1686. The words “prepared by one party” refer to the contracts of “adhesion” explained under article 1686 at 1 (the reference is much clearer in the French master-text).

The principle under study is frequently applied in cases where carriers, insurers, etc., stipulate such exemptions from liability as would be interpreted in their (the debtors’) favour under the preceding sub-article, were it not for the present subarticle. In an English case, where a bill of lading’s general terms exonerated the shipowner from liability for loss by thieves, the court found that this covers only thefts by persons who get into the ship from outside and not thefts by the crew (see cases in *Walton I*, p. 395). Similarly, in standard insurance contracts covering certain risks, provisions exempting the insurer from liability will be narrowly construed (restrictively interpreted) in favour of less exemption rather than of more. Finally, a controversial example is afforded by the following general notice in a garage: “Clients’ cars are driven by our staff at their risk.” In case the drunken garage-driver smashes a client’s car, is this notice a valid exemption from the garage-owner’s liability (art. 1888(1)), or may the notice be considered as not sufficiently clear (art. 1733), so that the court may interpret it in favour of the adhering client? It is a question of fact for the judges, who have first to check by the previous methods, where relevant, whether the parties’ joint intention was not otherwise revealed. In particular, the “positive interpretation” rule of article 1737 favours the garage-owner, since the only way to give the words “at their risk” an effect is to construe them as exempting the garage-owner from liability. On the other hand, a customer is not bound by this notice unless he knew and accepted it (art. 1686) - it must at least have been distinctly displayed in a prominent place (acceptance is shown by entrusting the car). So the court’s decision will depend on all the circumstances of the case.

ART. 1739, GRATUITOUS CONTRACTS

THE OBLIGATIONS ASSUMED BY A PARTY WHO DERIVES NO
ADVANTAGE FROM THE CONTRACT SHALL BE CONSTRUED
MORE NARROWLY.

This article does not basically change the law, and is almost superfluous, since the “benefactor” party is the only debtor, and he thus automatically falls under the rule of article 1738(1) as to interpretation in favour of debtors. But under the “positive interpretation” principle (art. 1737), which applies also to statutes, we must try to give this article at least some effect by interpreting the word “more” to imply: “construed even more narrowly than in the case of ordinary debtors”. So, for example, in a bailment, the gratuitous depositary’s obligation of custody is construed more narrowly than if he is paid: *David* considers that a gratuitous depositary need not give more diligence to the custody than he uses in his own affairs (p. 39). This view is reflected in article 2722(2).

POSTSCRIPT to SECTION 1

Judicial discretion

The rules of interpretation are not easy to grasp, and may sometimes seem contradictory. In order to convey a clear view of them we must repeat that, with the

Exception of articles 1733 and 1734(1), they are not strictly mandatory for the judges, who must exercise their common sense in the effort to ascertain the parties' contractual intention, where the particular methods of interpretation appear inadequate or give divergent results. It is only after no sufficient clarification has been attained in this way that - if the contract does not remain ineffective by virtue of article 1714-we can resort to definitely choosing the meaning favouring the debtor, or the adhering party, or the gratuitous debtor.

Non-expressed terms

We must re-emphasize that this Section's rules refer to ambiguous terms and not to non-expressed terms. After the contractual terms have been found clear (art. 1733), or have been properly interpreted under this Section, when there is any pertinent issue left unanswered, then we must apply the contract's *natural* terms, namely, the suppletory legal terms (see art. 1731(3), note 2) and the customary terms (see art. 1713, note 2). In current contracts the expressed terms are often clear and require no interpretation proper, but, where disputes arise, several non-expressed terms may have to be implied. So where a clearly termed contract of sale is disputed, the court will simply have to fill its gaps through applying the suppletory rules of the law of Sale and of Contracts in General and, where relevant, article 1713.

SECTION 2

PERFORMANCE OF CONTRACTS

The due effects of a contract, whether plain or ascertained by interpretation under Section 1, are fulfilled by performance. If performance is in accordance with the contract as supplemented by the rules of the present section, it extinguishes the obligation under article 1806. - A contract may of course derogate from the present section's suppletory provisions.

This section will answer the following problems:

- ✓ Who shall pay? (art. 1740);
- ✓ to whom he shall pay, viz., who shall receive payment? (arts. 1741-1744);
- ✓ object of payment (arts. 1745-1751);
- ✓ appropriation of payments (arts. 1752-1754);
- ✓ place of payment (art. 1755);
- ✓ time of payment (arts. 1756-1757, 1759);
- ✓ cost of and receipt for payment (arts. 1760-1762);
- ✓ transfer of risks (misplaced art. 1758).

The word "payment", which, in common language refers to money, is used by this code in the wider sense of "performance" of anything due under the contract.

ART. 1740. PERFORMANCE BY WHOM MADE Art.

1740, **sub-art.** (1)

THE DEBTOR SHALL PERSONALLY CARRY OUT HIS OBLIGATIONS UNDER THE CONTRACT WHERE THIS IS ESSENTIAL TO THE CREDITOR OR HAS BEEN EXPRESSLY AGREED.

Under article 1700 we have seen how consideration of the person may affect the validity of a contract. We shall now see how it affects its performance (c/. *Engel*, No. 164. B).

"Personally" means by the debtor himself with the aid, where necessary, of assistants under his personal control.

The wording of this sub-article denotes an exceptional provision. Performance must be *personal* only in cases where the creditor shows that this is essential to him, or is expressly agreed. In all other cases we apply the rule of sub-article (2) that a third person may be authorized to perform the debtor's obligations. It is now necessary to show when the courts consider personal performance as essential:

1. They must consider it essential where the contract or the suppletory (and not derogated) legal provisions governing hire of service, agency, partnership, etc., deem it essential. In this case the creditor need only invoke the provision in question.

2. They may consider it essential where factual circumstances support such an opinion. For instance, a painter will not be discharged from his obligation through another painter performing for him, and a depositary may not transfer the custody of the thing deposited with him to another person. People order a portrait in consideration of the personal capacities of the artist concerned, and they effect a deposit in consideration of the personal honesty and carefulness of the depositary concerned. So it is normally essential to them that the portrait be painted or the custody performed personally. As mentioned, the term “personally” includes some assistance under control, but such assistance will be more liberally admitted in deposits than in portrait- painting, where too much assistance, even under control, might obviously spoil the picture! The appreciation of such circumstances lies in the court’s discretion.

This sub-article on how consideration of the person affects the due performance of the contract should be read in conjunction with article 1776 on how it affects the sanctions for non-performance,

Art. 1740, sub-art. (2)

IN ALL OTHER CASES, THE OBLIGATIONS UNDER THE CONTRACT
MAY BE CARRIED OUT BY A THIRD PARTY SO AUTHORIZED BY
THE DEBTOR, BY THE COURT OR BY LAW.

“*In all other cases*” means “normally”, i.e., unless an exception is supported by the wording of sub-article (1). Such normal cases include, for instance, obligations to convey or deliver goods or money.

In these normal cases, third parties may be *authorized by the debtor* to pay (perform) for him; see article 1976. But what will happen if the payer is not so authorized? Under most continental systems anybody may pay for the debtor without showing an interest in, or an authority for the payment (French Civ. C. art. 1236 al. 2. Egyptian Civ. C. art. 323 al.2). As *Walton II* puts it (p. 446), “If the debtor cannot or will not pay his own debt, the least he can do is to allow his creditor to take payment where he can get it,” whereafter the payer may recover from the debtor to the extent of the latter's enrichment (see art. 2162) (cf. *Engel*, No. 164 C.).

Our present sub-article contains no general rule allowing anybody to pay for the debtor. So the third-person payer, if not authorized by the debtor (e.g. under art. 1976), must at least be authorized by the court or by special provisions of the law. If he is not so authorized, he theoretically does not extinguish the debtor’s obligation (art. 1806), unless his payment is connected with a release of the debtor under article 1825. But several special provisions of *the law* allow or even force a third person to pay for the debtor when he has an interest in the performance, as, for example, if he is bound with the debtor (co-debtor: art. 1896) or for the debtor (guarantor: art. 1920). Other legal provisions, instead of demanding that the payer be interested, rest satisfied with the creditor’s consent (e.g. in payments with subrogation - art. 1968).

Still other provisions (Commercial Code) allow anybody to pay a dishonoured bill of exchange. If no special provisions are found, the third party can still be authorized to pay by *the court*, where the latter thinks fit to allow it. But why all these complications where, e.g., a relative or friend wishes to pay for the unwilling or insolvent debtor? Such payment is anyway valid where properly made under the rules of “unauthorized agency” (art. 2257-65).

De lege ferenda (in proposed legislation), we submit that, in cases falling under this sub-article, payment by a third party should generally be authorized and be barred only in the unlikely case of a joint opposition by the creditor and the debtor.

ART. 1741. PAYMENT TO WHOM MADE

PAYMENT SHALL BE MADE TO THE CREDITOR OR A THIRD PARTY AUTHORIZED BY THE CREDITOR, BY THE COURT OR BY LAW TO RECEIVE IT ON BEHALF OF THE CREDITOR.

While, as we suggested, it is desirable to change article 1740(2) in order to authorize anybody to make payment in lieu of the debtor, it is clearly not desirable to authorize anybody to receive payment in lieu of the creditor. The person qualified to receive payment should be and is only the creditor, or somebody authorized by him or by the court or the law. Where this accords with usage, the creditor so authorizes anybody to whom he gives a receipt for the prospective payer. The court so authorizes judicial tutors (art. 213), or succession-liquidators (art. 950), etc. The law so authorizes legal tutors (arts. 204,210) or succession-liquidators (art. 947), or joint creditors (art. 1910), etc. (cf. *Engel*, No. 165).

ART. 1742. CREDITOR INCAPABLE

PAYMENT TO A CREDITOR INCAPABLE OF RECEIVING IT SHALL NOT BE VALID UNLESS THE DEBTOR CAN SHOW THAT SUCH PAYMENT HAS BENEFITED THE CREDITOR.

The preceding rule that, in the first place, “payment shall be made to the creditor ...” does not apply to incapables. A creditor incapable of receiving payment is, for instance, a minor, or a person who is incapacitated because of insanity or bankruptcy. Payment to the incapable is invalid unless he benefits by it in the following sense: the payment’s validity does not depend on its advantage to the incapable at the time he received it, but depends on whether it turns to his estate’s advantage (on whether he remains enriched) at the time a second payment is demanded by, e.g., his tutor (who should have received the first payment). The principle that the paid incapable may not unjustly profit by what turns to his benefit is a consequence of the doctrine of unjust enrichment (art. 2162). Compare Title II Civ. C. on Capacity of Persons, articles 316-317.

Suppose that debtor B pays Birr 1000 to his creditor C, who is a minor (*David*, p. 42), and examine the following alternatives:

1. - **C remits this sum to his tutor. When used for a second payment, B wins the case by proving that the first payment actually reached the authorized tutor.**
2. - **C spends the full sum on “necessaries”, that is, simple food, clothing, shelter** and perhaps basic education. He thus preserves his health and increases his earning power. Who is thus enriched ? Either the parents, who, as a result, have spent less for the support of C, or C if he supports himself. In the second case, B’s payment is certainly valid. The first case is open to students’ debate ...
3. - C spends all the money on things unnecessary (e.g. drinks, gambling); C’s tutor or C himself on reaching majority sues B for a second payment and wins, since B cannot maintain that the first payment has turned to C’s benefit.
4. - C wastes Birr 500 on luxuries, and with the other 500 buys a lot of coffee. When B is sued for a second payment, he is able to prove that C’s lot of coffee is now worth Birr 900. The payment of Birr 1000 turns to C’s advantage and is valid to the extent of Birr 900, so that B must repeat the payment of only Birr 100.

ART. 1743. PAYMENT TO UNQUALIFIED PERSON

Art. 1743, sub-art. (1)

PAYMENT TO A PERSON UNQUALIFIED TO RECEIVE ON BEHALF OF THE CREDITOR SHALL NOT BE VALID UNLESS THE CREDITOR CONFIRMS IT OR SUCH PAYMENT HAS BENEFITED HIM.

The unqualified person is one who is not authorized to receive payment pursuant to article 1741. Such person can become authorized by the creditor’s confirmation posterior to the payment. But the invalid payment can also become valid where it turns to the creditor’s advantage and thus enriches him (cf. art. 1742). The unqualified person may be one of the creditor’s staff or relations who was not authorized to receive the payment, but invests the money received in the creditor’s property. If he does it with the creditor’s knowledge and tolerance, this amounts to confirmation, so that the payment becomes valid even if its use was not advantageous. If he does it without the creditor’s knowledge and tolerance, the money invested validates the payment only to the extent that it has turned to the creditor’s benefit at the time he sues the debtor for a second payment.

The debtor may have paid the unqualified person because he wrongly supposed him authorized by the creditor to receive the payment. If such payment is not confirmed by the creditor, the debtor can claim recovery from the unqualified person under the rules of undue payment (art. 2164). But the creditor’s claim can be opposed by the debtor only to the extent of the creditor’s enrichment (if any) due to the undue payment (see above).

French courts and doctrine (e.g. *Mazeaud*, No. 833) consider B’s payment to B’s creditor’s creditor as normally valid because necessarily turning to B’s creditor’s

benefit: B's creditor's own debt would be extinguished or reduced without cause and he would be unjustly enriched (see art. 2162), were he still allowed to claim from B. What about a similar argument in Ethiopian law ?

Art. 1743, sub-art. (2)

PAYMENT SHALL BE VALID WHERE IT IS MADE IN GOOD FAITH TO A PERSON WHO APPEARS WITHOUT DOUBT TO BE THE CREDITOR.

The word “appears” means not “appears to the debtor” but “appears objectively”. Even so, this rule would be dangerous without the words “without doubt”, which make it of infrequent application.

The cases illustrating this rule are found mostly in the field of succession. The debtor can validly pay to the deceased creditor's heir apparent. The latter maybe: 1. A person taking under a testament which is cancelled by another testament discovered later. 2. A person taking under the rules of intestate succession, which is later upset by the discovery of another entitled relative, or of a testament. Such heirs (sometimes judicially “certified”: art. 996) are called “apparent” precisely because they appear without doubt to be the creditors by succession to the original creditor. Payment made in good faith to them is valid by virtue of the present sub-article. Such a payment extinguishes the true heir's initial claim, and creates his claim for recovery of the enrichment from the heir apparent. Compare Title V Civ. C. on Successions, article 1001.

ART. 1744. DOUBTS AS TO THE CREDITOR Art.

1744, sub-art. (1)

WHERE THERE IS A DOUBT AS TO WHO IS QUALIFIED TO BE PAID, THE DEBTOR MAY REFUSE TO PAY AND RELEASE HIMSELF BY DEPOSITING THE AMOUNT DUE WITH THE COURT.

This sub-article should be read in conjunction with articles 1779-83 in the Section on Non-Performance. Articles 1779-80 deal with problems partly similar to but covering more ground than this sub-article. This sub-article shows that where there is doubt as to who should be paid, the debtor's refusal to pay, coupled with “depositing” the amount due, constitutes a proper performance whereby he releases *himself*. Obversely, pursuant to article 1782 he is released only where *the court* finds the deposit valid. In case of “doubts as to the creditor” (mentioned also under art. 1780), which solution shall prevail? Or, can we (doubtfully) assume that the present article applies only to money debts (see “amount’ ’) ? These questions remain unsolved.

Art. 1744, sub-arts. (2-3)

(2) THE DEBTOR SHALL PAY AT HIS OWN RISK WHERE HE IS AWARE OF LITIGATION AND PAYS TO ANY OF THE PERSONS WHO HOLD THEMSELVES OUT TO BE CREDITORS.

(3) WHERE A CASE IS PENDING AND THE DEBT IS DUE, ANY OF THE PERSONS WHO HOLD THEMSELVES OUT TO BE CREDITORS MAY REQUIRE THE DEBTOR TO DEPOSIT THE AMOUNT DUE.

Cases where the debtor pays to an unqualified person are covered by article 1743(1). But the above provisions (borrowed from art. 168 Swiss Obligations Code) refer more particularly to the cases where there is litigation between alleged creditors, usually about an inheritance including the claim concerned. There is no doubt as to the deceased creditor, but there is a dispute as to who succeeds to him. Before he is aware of such a dispute, the paying debtor may in a fit case be protected by the provision of article 1743(2) in its application to heirs apparent. If he pays after he becomes aware of the litigation, he does it at his risk in the sense that, if the payee turns out to be the wrong one, the debtor will have to pay again to the true heir (but he can sue the wrong heir for recovery of the undue payment: art. 2164) (cf. *Engel*, No. 165 D).

Less often, something other than an inheritance causes litigations as to who is the creditor. Let us suppose a contract in which, instead of selling a corporeal thing, you sell a claim, effecting its “assignment” to the buyer (art. 1962). Your consent was defective and your suit for invalidation of the assignment (art. 1808) is pending. If, in such a situation, the debtor pays you or the assignee, he does it at his own risk. But either you or the assignee can require him to make the court-deposit authorized by sub-art. (1). Incidentally, if made before the assignment’s defect is known, the debtor’s payment to the apparent creditor (the assignee) is protected by article 1743(2).

ART. 1745. IDENTITY OF OBJECT

THE CREDITOR SHALL NOT BE BOUND TO ACCEPT A THING OTHER THAN THE THING DUE TO HIM NOTWITHSTANDING THAT THE THING OFFERED TO HIM IS OF THE SAME OR OF A GREATER VALUE THAN THE THING DUE TO HIM.

In short, the creditor need not accept a thing other than the one due, although it may be of equal or greater value. I need not accept Harrar coffee where Jimma coffee is due. But I may of course, at my choice, refuse or accept the other thing.

This article logically results from article 1731(1), providing in effect that lawfully formed contracts are the law of the parties. Judges shall not, without the creditor’s consent, help a hard-pressed debtor through allowing him to give something other than what was promised (unless this constitutes a judicial variation of the contract, e.g. pursuant to article 1766). Compare article 2288(b) of the law of Sale.

If, after the creditor’s refusal to accept something else than his due, the debtor persists in non-offering the “identical” object (identical with the promised one), this dispenses the creditor from doing his part (art. 1757(1)), and gives him further remedies under the Section on Non- Performance (art. 1771 ff.).

For “fungibles” to be delivered, article 1748 below allows small deviations from the quantity or quality promised within the limits of the agreed kind: the “kind” delivered must be identical with the promised kind, which is sometimes quite narrowly defined as, for example, “red table wine produced by Makanissa Co. from Guder grapes of the 1971 harvest”.

ART. 1746. PART PAYMENT

Art. 1746, sub-art. (1)

THE CREDITOR MAY REFUSE PART PAYMENT WHERE THE DEBT IS LIQUIDATED AND FULLY DUE.

Justification: it is more difficult for the creditor to preserve and reinvest parts of than all of his capital (*Mazeand*, No. 887. In a socialist economy, this argument is questionable).

Of course, special legal or contractual provisions may derogate from this sup-pletory rule. For instance, the law of bills of exchange and cheques compels certain creditors to accept part payments of a fully due debt (Comm. C. arts. 775, 859).

“Liquidated” means (in this context) certain as to amount. For instance, a debt in damages may be due, but is not liquidated before the parties or the court exactly determine its amount. “Fully due” means that the creditor may not refuse part payments where they fall due separately, unless they are outstanding when the debt is already fully due, as at the end of a loan when the creditor can refuse to accept arrears of interest offered separately from the capital due or vice versa. In simple transactions, this rule means, for instance, that you need not accept 10 bottles of *tej* on account of the 20 bottles due. If your contract, law of the parties, does not provide for part payments, you cannot be compelled to accept them, but you will often do it for practical reasons (better a part than nothing).

Art. 1746, sub-art. (2)

WHERE PART OF THE DEBT IS CONTESTED, THE DEBTOR SHALL PAY SUCH PART OF THE DEBT AS IS ADMITTED AND AS THE CREDITOR IS WILLING TO ACCEPT.

The rule allowing the creditor to refuse part payment does not prevent him from enforcing such part payment where the other part of the debt is contested. The debtor must not condition the payment of the admitted part of his debt on a full discharge from further liability. In serious cases, such conduct may amount to the duress of goods mentioned under article 1706(1) (*in fine*), and the discharge so obtained may be invalidated.

Illustration (cf. *David*, p. 43). - The sum due from C to B is disputed. B claims that the sum due is 500 Birr, C that it is 400 Birr. B writes to C, “Send me meanwhile the 400 Birr admitted as due, and we shall later convene our respective accountants to

reconcile the contested balance.” By virtue of the above rule C must pay the admitted 400 Birr, and, therefore, may not condition his payment on obtaining a receipt in full discharge from further liability.

ART. 1747. FUNGIBLE THINGS: 1. - QUALITY DUE

- (1) UNLESS OTHERWISE AGREED, THE DEBTOR MAY CHOOSE THE THING TO BE DELIVERED WHERE FUNGIBLE THINGS ARE DUE.
- (2) THE DEBTOR MAY HOWEVER NOT OFFER A THING BELOW AVERAGE QUALITY.

As explained under article 1714(1) at 2 *in fine*, where the quality of the “fungible” due is not mentioned, the object is still definable by virtue of the present article. The debtor’s choice (not below average quality) specifies the fungibles due, transforms them into something ascertained.

In context, “below” means “significantly below” average quality (see next article). “However” denotes that sub-article (2) operates only in relation to sub-article (1), that is, applies only to “fungible” things.

ART. 1748. 2. - INSUFFICIENT QUANTITY OR QUALITY

THE CREDITOR MAY NOT REFUSE FUNGIBLE THINGS ON THE GROUND THAT THE QUANTITY OR QUALITY OFFERED TO HIM DOES NOT EXACTLY CONFORM TO THE CONTRACT, UNLESS THIS IS ESSENTIAL TO HIM OR HAS BEEN EXPRESSLY AGREED.

Pursuant to article 1694, lack of exact conformity between offer and acceptance prevents the formation of a contract. But once a contract is created on basis of such conformity, the latter is no longer so exactly required in the performance of what was promised. Where B accepted that he would deliver 100 litres of alcohol of 90% concentration, and delivers instead 99 litres of 89 % concentration, common sense and commercial usage require that the creditor does not refuse them where this is not essential to him. (His true motive for refusing may be a price-decline, non-conformity being a pretext.) This rule should be read in conjunction with article 1713 (at i.). The present sub-article is indeed an application of the principle of good faith to the case of delivery of fungibles. It is for the creditor to prove that exact conformity is essential to him, through showing, for instance, that the alcohol was ordered for medical or chemical purposes, where a 1 % concentration-deficiency makes an essential difference. Small deficiencies due to climate (evaporation), transport, etc., are sometimes unavoidable. Often (commercial) usages implied in the contract by the same article 1713 indicate the maximum deficiency tolerated for certain fungibles (e.g. 5% of impurities for coffee). Apart from such customary tolerances, the words “not exactly” allow of only small deficiencies.

We must be careful to distinguish the above cases from those falling under article 1745. When I offer you 12.8 degree red wine instead of the 13 degree red wine prom

ised, this small deficiency may fall under the present article. But if the promise was for Sarris red wine and I offer you Mekanissa red wine, this is non-identity under article 1745, and you may reject the delivery. The defect lies here not in the quality, but in that another brand of wine was stipulated. There are degrees in fungibility. Sarris red wine is a fungible (is interchangeable) only within its specified kind “Sarris” and not outside it.

Let us also draw a line between the present article and article 1746. Is not deficiency in quantity a part payment, so that allowing it would contradict or derogate from article 1746? Not at all. There is part payment where another part is left due. There is deficiency in quantity where a little less is offered in full payment, without further deliveries left due. Only the latter cases fall under the present article. Incidentally, see the criteria of the law of Sale (art. 2275) for quantities fixed approximately.

Art. 1748, sub-art. (2)

WHERE THE THING DOES NOT EXACTLY CONFORM TO THE CONTRACT, THE CREDITOR MAY PROPORTIONATELY REDUCE HIS OWN PERFORMANCE OR WHERE HE HAS ALREADY PERFORMED, CLAIM DAMAGES.

This sub-article is simply a consequence of the interdependence of bilateral obligations. Where one party delivers less (lesser quantity or quality) in full payment, the other party must obviously be allowed to do the same or be compensated.

ART. 1749. MONEY DEBTS

Art. 1749, sub-art. (1)

A DEBT CONSISTING IN A SUM OF MONEY SHALL BE PAID IN LOCAL CURRENCY.

Although money is a *fungible* (interchangeable) thing, its special character (measure of value of and means of exchange for other things) justifies *special* rules applying to money alone. One feature distinguishing it from other fungibles is that it does not admit of variations in quality, so that article 1747 is irrelevant in relation to money. For instance, paper money is of equal quality, whatever the paper’s deterioration, as long as it can be identified, e.g., by the National Bank’s serial number and signature. Article 1748 is irrelevant with regard to money insofar as deficiencies in “quality” are concerned. But a small deficiency in the (nominal) “quantity” of the money offered in full payment, e.g. by a debtor in. difficulty, seems admissible where the creditor’s counter-performance in goods or services can be proportionately and easily reduced.

“Local” currency is the currency of the place of payment. “Currency” is such money as is legal tender in virtue of the law. *Legal tender* money is such as cannot be refused when offered in discharge of money debts, which it has the power to extinguish. Legal tender money (“Birr” in Ethiopia) does not include cheques which, **as a rule**, can be refused by the creditor (cf. *Funk*, art. 84 at 2.). If accepted by the creditor,

the cheque discharges the debt conditionally on being honoured by the delegated debtor (arts. 1976-1977), who usually is the debtor's bank.

A creditor's obligation to accept payment in local money does not include any obligation to give change - it is for the debtor to supply it (except when paying to the National Bank or other governmental banks).

What is the *legal nature* of "money" - how define it in legal terms? This difficult question has given rise to a sizable and controversial literature. It would be pointless fully to expose it to students having no advanced knowledge of both law and economics (see *Mann*). The following is a rough short-cut outline. In past times, money was a corporeal movable usually made of more or less precious metals (gold, silver, bronze). When paper money was first introduced, bank-notes embodied the bank's obligation to pay a specified weight or unit of gold (or silver) on demand. Thus, payments became assignments to the bearer of legal claims for precious metal. Later the emitting banks were dispensed from this obligation, and nowadays the paper-money's value reposes merely on the State's mandatory legal tender legislation and on the emitting bank's factual ability to prevent inflation and depreciation of its notes. Nowadays money is neither a corporeal movable containing valuable gold or silver, nor does it embody an incorporeal "claim" for gold or silver. Nevertheless "legal tender" notes (see the face of "Birr" notes) are still mandatory means of payment. And jurists still happen to put them in the "promissory notes to bearer" category. But what do they promise to the bearer? U.S. dollar notes merely carry the mention "redeemable in lawful money" (in new notes of the *same* denomination). Even this mention does not figure on Birr notes....

Art. 1749, sub-art. (2)

THE SUM OF MONEY OWED BY A PARTY MAY BE FIXED BY REFERENCE TO THE PRICE OF RAW MATERIALS, GOODS OR SERVICES OR ANY OTHER ELEMENT WHOSE VALUE CAN BE ASCERTAINED.

While the state's support of the national currency by legal tender legislation is not lacking, so that its legal quality does not change, its economic quality (its purchasing power) changes constantly. As long as these variations are small, people pay little attention to them. But when they notice that, e.g., the Birr which once bought them two meals or two ties now buys them only one meal or one tie, they hesitate to offer long-term loans, leases, supply-contracts, etc., without making sure that they will not lose by a depreciation of the incoming payments. But why should we have this special sub-article to the effect that the sums due need not be determined as long as they are determinable through being fixed by reference to future prices? Doesn't this possibility already result from freedom of contract (arts. 1711, 1731(2)) and from our comments on article 1714(1) at 2 (ascertainable object)? It does, but in view of the fact that, for example, French courts had questioned this possibility on ground of public order, our legislator has preferred expressly to allow such sum-fixing by reference to prices. Such fixing seems, as yet, not much used in Ethiopia (partly because

of imperfect statistical data), except by reference to the “US dollar”, to which the Birr is “pegged” at official rates of exchange (cf. art. 1750 below).

We must not forget that in times of war, crisis, etc., the government may decide to devalue the money, while forbidding certain sweeping price-reference clauses tending to endanger the new money-parity. But the “contracts in general” provisions of our Code, destined to last, edict basic rules for normal times and situations, whatever be the derogations by special laws limited in time or scope (*David*, p. 46).

ART. 1750. CURRENCY NOT LEGAL TENDER

WHERE UNDER THE CONTRACT A DEBT IS TO BE PAID IN A CURRENCY WHICH IS NOT LEGAL TENDER AT THE PLACE OF PAYMENT, THE DEBT MAY BE PAID IN LOCAL CURRENCY AT THE RATE OF EXCHANGE ON THE DAY WHEN THE DEBT FALLS DUE, UNLESS THE CONTRACT CONTAINS THE WORDS “EFFECTIVE VALUE” OR ANY OTHER PROVISION OF THE SAME NATURE IMPOSING LITERAL PERFORMANCE OF THE CONTRACT.

In consequence of article 1749(1) and in derogation from article 1745 (identity of object), local currency may be offered in discharge of a debt stipulated in any other money. Pursuant to the present article, stipulating local payments in foreign currency merely amounts to fixing the sum of the local money due by reference to the foreign money’s price in the sense of article 1749(2) *in fine*. To ensure specific payment in foreign currency, the contract must include the words “effective value” or other words to similar effect, such as, e.g., “actual US dollars”.

ART. 1751. LEGAL INTEREST

THE ANNUAL RATE OF INTEREST SHALL BE OF NINE PERCENT WHERE INTEREST IS DUE AND THE RATE HAS NOT BEEN FIXED.

This provision obviously does not mean that 9 % is due where the parties omitted to consider an interest. It applies to cases where parties stipulate that the sum due will bear an interest without saying how much, and thus presumably referring to the legal rate of 9%. It also applies to the cases where interest is due by defaulting debtors under article 1803(1). But since the practised rates of interest are higher than the legal rate, the latter is insufficient to induce defaulting debtors to pay rather than speculate with the creditor’s money.⁸

The legal interest rate does not apply where another rate has been fixed either directly by the contract or by legal or perhaps even customary rules (e.g., **between** merchants). On the other hand, we must distinguish between this article’s legal **interest** rate and the higher “maximum” rate fixed by article 2479(1) for loans.

8. The inducement may wholly disappear if the *Law Revision 2* modification of this article is enacted. The new wording would, in effect, prohibit any interest except where otherwise “specified in a special law”. Article 1803, though left unchanged, is not a “special law”!

ART. 1752. APPROPRIATION OF PAYMENTS: -1. COSTS, INTEREST, PRINCIPAL

WHERE A DEBTOR IS TO PAY COSTS AND INTEREST IN ADDITION TO THE PRINCIPAL, ANY PART PAYMENT MADE BY HIM SHALL BE APPROPRIATED FIRSTLY TO THE COSTS, SECONDLY TO THE INTEREST AND EVENTUALLY TO THE PRINCIPAL.

The rules of appropriation of payments contained in articles 1752-1754 are similarly expressed in several other countries and are ultimately derived from Justinian's *Digesta* (46. 3.1)). Their practical application is in the field of money debts, although it is theoretically possible to apply them to where several debts in non-monetary fungibles of the same kind are concerned.

This article's rule of appropriation relates to part payments of a particular debt and thus depends, in accordance with article 1746, on the creditor's willingness to accept such part, after which the payment is logically applied to discharge arrears in costs (e.g., those of suing the debtor) and interest before the capital debt is itself reduced.

ART. 1753. - 2. CHOICE BY THE PARTIES

- (1) WHERE A DEBTOR OWES SEVERAL DEBTS TO THE SAME CREDITOR, HE MAY SPECIFY THE APPROPRIATION OF ANY PAYMENT MADE BY HIM.
- (2) WHERE THE DEBTOR DOES NOT SPECIFY THE APPROPRIATION OF A PAYMENT, SUCH PAYMENT SHALL BE APPROPRIATED TO THE DEBT SPECIFIED BY THE CREDITOR IN THE RECEIPT UNLESS THE DEBTOR FORTHWITH OBJECTS TO SUCH APPROPRIATION.

This article does not deal (as does the preceding article) with part payments of a particular debt with its accessories (costs, interest), but with payment of one or more out of several debts due. The choice lies primarily with the debtor, who declares, at his pleasure, which debt he decides to discharge. In such case the debtor can require that the receipt due under article 1761 indicate the debt he discharges. But the debtor's choice is not so free if the sum he pays covers only one of the debts fully, since the creditor may then refuse appropriations in part payment (art. 1746) of any other debt, and thus induce the total discharge of the fully covered debt.

If the debtor did not bother to exercise the choice, it passes to the creditor on condition that he indicates it on the receipt and that the debtor does not object. This is another exception from the principle that silence (art. 1682) is no acceptance. The present rule implies that the debtor's silence carries acceptance of the creditor's appropriation.

A receipt indicating the appropriation made - whether at the debtor's request or with his silent consent - is often called an acquittance, since it "acquits" (discharges) the debt indicated up to the amount paid. The words currently used are: "I confirm receipt of ... in discharge of..."

ART. 1754. - 3. APPROPRIATION BY LAW

- (1) WHERE NO APPROPRIATION IS SPECIFIED IN THE RECEIPT, THE PAYMENT SHALL BE APPROPRIATED TO THE DEBT WHICH IS DUE, OR, WHERE NO DEBT IS DUE, TO THE DEBT WHICH SHALL FIRST BECOME DUE.
- (2) AS BETWEEN DEBTS DUE, OR DEBTS WHICH SHALL BECOME DUE ON THE SAME DAY, THE PAYMENT SHALL BE APPROPRIATED TO THE DEBT WHICH IT WAS TO THE GREATEST ADVANTAGE TO THE DEBTOR TO PAY.
- (3) WHERE THE ADVANTAGES TO THE DEBTOR ARE EQUAL, THE PAYMENT SHALL BE APPROPRIATED PROPORTIONATELY.

If the receipt is not an acquaintance (shows no appropriation) and the debtor's specification under article 1753(1) is not otherwise expressed (e.g. by conduct where, owing a 800 Birr debt and a 913.25 Birr debt, he pays exactly the latter sum), the law presumes that his intention, in accordance with his interest, was as follows:

- (1) He discharges the debt already due or which will first be due rather than the other debts.
- (2) On the one hand as between all debts already due regardless of their maturity dates, on the other hand as between later due debts of simultaneous maturity (due on the same day), the court's appreciation as to what was to the debtor's best advantage will dictate the appropriation. Of course, as between unsecured and secured debts, the latter will first be discharged. As between low and high interest-bearing debts, the latter will first be extinguished. But cases in which the choice is, e.g., between a secured debt bearing low interest and an unsecured one bearing high interest, call for enquiry as to which choice was to the debtor's best advantage at payment time.
- (3) The advantages may be equal where, e.g., debts bearing the same interest are either unsecured, or identically secured. The appropriation is then indifferent, since its practical consequences, whatever the choice, are similar. But the law must supply a general solution, and has no other means of doing it than by providing for proportional part payment of all such debts.

ART. 1755. PLACE OF PAYMENT

- (1) PAYMENT SHALL BE MADE AT THE AGREED PLACE.
- (2) WHERE NO PLACE IS FIXED IN THE CONTRACT, PAYMENT SHALL BE MADE AT THE PLACE WHERE THE DEBTOR HAD HIS NORMAL RESIDENCE AT THE TIME WHEN THE CONTRACT WAS MADE.
- (3) UNLESS OTHERWISE AGREED, PAYMENT IN RESPECT OF A DEFINITE THING SHALL BE MADE AT THE PLACE WHERE SUCH THING WAS AT THE TIME WHEN THE CONTRACT WAS MADE.

Ascertaining the place of payment is important for the following reasons: 1. **The place** of payment shows who bears the forwarding costs. 2. Offering the **due payment**

at the wrong place is a kind of non-performance carrying the consequences of article 1771. 3. Under article 1749(1) the place of payment determines the currency to be used. 4. In certain matters it may determine the court's territorial jurisdiction, etc.

(1) - The parties can freely agree, expressly or implicitly ("usage"), about the place of payment. For instance, a lender can stipulate that the thing lent is to be returned at his residence, or office, or storehouse, the insurer that the premium is payable at his bank. In such case, sub-articles (2) and (3) do not apply. On the other hand, they do not apply where incompatible with a special rule of, for example, the law of Sale: see art. 2309(2-3).

(2) - Sub-article (2) reflects the principle of interpretation in favour of the debtor (art. 1738(1)). Payment at the debtor's normal residence usually preserves him from bearing forwarding costs. As a French practitioner would say, payments are not "portable" (by debtor to creditor) but "fetchable" (by creditor from debtor). In insurance, unless otherwise agreed, the client cannot be in default for not paying the premium until his insurer calls for it not merely by letter, but at his residence (cf. art. 1772). Conversely, the client can collect the indemnity only at the insurer's office (business residence). Similarly, a lessee cannot be in default for not paying rent before the lessor calls or sends for it. On the other hand, if the debtor changes his normal residence after the contract is made, this will not relieve him from paying at his original residence; e.g., your Asmara debtor may not pretend to repay his loan in Jimma because he transferred himself there.

(3) - Also sub-article (3) favours the debtor, who can wait for the creditor to fetch the definite thing from where it happens to be at contract-time. "Definite" denotes things specific (horse, table) and those specified (a particular cask of wine, lump of wood, lot of coffee, etc.).

ART. 1756. TIME OF PAYMENT

- (1) PAYMENT SHALL BE MADE AT THE AGREED TIME.
- (2) WHERE NO TIME IS FIXED, PAYMENT MAY BE MADE FORTHWITH.
- (3) IT MUST BE MADE AS SOON AS A PARTY REQUIRES THE OTHER PARTY TO PERFORM HIS OBLIGATIONS [translation corrected].

(1) The time of payment may be agreed expressly or be implied from established usage: where you order a suit to measure, usage and good faith (art. 1713) may allow the tailor a couple of weeks for performance.

(2-3) If no time was mentioned or implied by usage, the debtor may pay at once, but is bound to pay only after he is required to do so by the default notice of article 1772 (cf. chapter on Sale, arts. 2276 and 2311).

The next article derogates from the present article's rules on time of payment.

ART. 1757. SIMULTANEOUS PERFORMANCE

Art. 1757, sub-art. (1)

ONLY A PARTY WHO BENEFITS BY A TIME LIMIT HAVING REGARD TO THE TERMS OR NATURE OF THE CONTRACT, OR WHO HAS PERFORMED OR OFFERED TO PERFORM HIS OBLIGATIONS, MAY REQUIRE THE OTHER PARTY TO CARRY OUT HIS OBLIGATIONS UNDER THE CONTRACT.

Bilateral obligations are *interdependent* and conditioned on one another: 1. in their formation, for which see, e.g., the words “or of one” in articles 1714-16 and “or one” in article 1718(1 a); 2. in their performance under the present and the next sub-article; 3. in their revision under article 1769 ;4. in their cancellation under articles 1784-89.

Despite its poor rendering of the French master-version, the clumsy formula of this sub-article at least implies that a non-performing party who has no benefit of time cannot require the other party to carry out his part. The other party can therefore *suspend* his own performance. He has no such suspension-right where the requiring party has the benefit of time because other than simultaneous performance was agreed, as, for instance, in purchases prepayable (advance payment) or post-payable (credit). In the first case payment, in the second case delivery cannot be suspended. Simultaneous performance is the salient feature of cash sales (no advance, no credit, art. 2278). It is impossible in “unilateral” contracts, whose very “nature” excludes the co-existence of basic “bilateral” obligations. Such are, e.g., loan for use (art. 2767) or bailment [deposit] (art. 2779). Obviously, delivery of an object cannot be “suspended” until its restitution is effected pursuant to article 2718(1) (cf. *Engel*, No. 188).

The debtor *suspending* his performance under this (but not the next) sub-article can, if sued, raise the defence “contract not performed by the creditor”, also called, in Latin, *exceptio non adimpleti contractus*. An unusual example: the expulsion from a bathing establishment of a lawful customer who refuses to show his season-ticket (as bound to by its general terms) may be deemed a rightful suspension of the establishment’s own performance. More usual examples are found in the law of Sale: see articles 2278(2) and 2398(1) (3).

Partial non-performance by the other party without his ready offering of the outstanding part is sufficient ground for suspending your own performance, but the small deficiencies contemplated by article 1748(1) do not, ordinarily, justify such a suspension (but see last sub-sentence). Non-offering a receipt (art. 1761) is not a small deficiency and justifies a suspension of payment.

Where B has “offered to perform” his obligation, C (the other party) can no longer suspend his performance if B’s offer is not merely “verbal”, but is “material” in accordance with usage. For example, B must point out to C the objects due as conforming to the contract and ready for his inspection and disposal at the agreed or lawful place.

Art. 1757, sub-art. (2)

A PARTY MAY [provisionally] REFUSE TO CARRY OUT HIS OBLIGATIONS UNDER THE CONTRACT WHERE THE OTHER PARTY CLEARLY SHOWS THAT HE WILL NOT PERFORM HIS OBLIGATIONS OR WHERE THE INSOLVENCY OF THE OTHER PARTY HAS BEEN ESTABLISHED BY A COURT.

It may be in order to begin with an illustration. If I sign a “teacher’s contract” with our University, whereafter, without informing it, I sign on with another Institution or publicly declare (e.g., in an academic paper or meeting) that I will not carry out the teaching promised, this is sufficient grounds for the University to *suspend* any advance payment owed me. Since I enjoy the benefit of time (e.g., my teaching is to start after 2 months) and an advance payment is not “simultaneous” in the above explained sense, it may be suspended (provisionally refused) only by virtue of the present sub-article. My conduct is called “anticipatory breach” of contract, allowing the University to *suspend* the payment which is ow’ed me before my teaching is due. The University may thereafter cancel my contract if it can satisfy the requirements of article 1789.

Aside from the other party’s present non-performance (sub-art. (1)) or his anticipatory breach of the contract, there exists yet another ground for suspending one’s own performance: this is the other party’s established insolvency. The words “by a court” exclude insolvencies by reputation and those that consist, e.g., in the mere fact of not paying one’s creditors. An insolvency is judicially established by a decree in bankruptcy or by the levying of a fruitless execution by a creditor of the insolvent. In such a case the insolvent’s non-performance of his obligations falling due later can already be “anticipated.”

Your right to suspend the performance of your obligation applies only where the obligation breached (sub-art. (1)) or anticipated to be breached by the other party arises out of *the same* contract. You cannot suspend your delivery of the horse sold (retention) because the buyer is also in breach (present or anticipatory) of another contract made with you. It is necessary to emphasize this point, which parties are prone to overlook.

ART. 1758. TRANSFER OF RISKS⁹ Art.

1758, sub-art. (1)

THE DEBTOR BOUND TO DELIVER A THING BEARS THE RISK OF LOSS OF OR DAMAGE TO [deterioration of] SUCH THING UNTIL DELIVERY IS MADE IN ACCORDANCE WITH THE CONTRACT.

This article applies only to *determined* things (an undetermined thing obviously cannot be lost or deteriorated). A debtor’s obligation to deliver a determined thing is

9. This *Transfer of Risks* article figures in the wrong place (between arts. 1757 and 1759), which is incongruous. It was intended to precede article 1747: see hints in *David*, Editor’s note 20 *cum* note 15.

normally an obligation of result as explained under article 1712(2). The determined thing can be specific (this horse) or specified (this cask of wine, that sack of grain).

In simplest terms, the theory of risk answers the following question: Who of the two, creditor or debtor, stands to lose by an unpreventable *loss or deterioration* of the thing? If the debtor, he shall not be paid. If the creditor, he shall pay the debtor despite the loss. Accordingly, the risk is the debtor's (Ethiopian system) or the creditor's (French system). (See under art. 1758 for creditor as "debtor".)

For the translator's inaccurate terms "damage to", we substitute, in square brackets, the French master-text's "deterioration of". This is because the theory of "risk" answers a problem entirely different from that of liability for damage, which is governed by Section 4 on Non-Performance. The liability of a debtor of an obligation of result is governed by articles 1791-93, which release him from liability for damage in cases of *force majeure*. So if it is *force majeure* that prevented the debtor from delivering the thing, or the thing in its initial condition, he incurs no liability for damage. But though not liable for damage, he loses his claim for payment (counter performance), which is what the words "bears the risk" (of loss by *force majeure*) mean. Even where the thing affected by *force majeure* is not lost but has substantially deteriorated, the risk-bearing debtor will be neither paid (art. 1788) nor liable for damage. (If the deterioration is slight, the case may fall under art. 1768, payment only reduced.)

The above rule as to the debtor's risk, also expressed in the Latin maxim *res perit debitori*, is logical enough. (On the partly opposite rule of French law, see *Mazeaud*, No. 1116.) In bilateral contracts to transfer ownership, for instance in sale, the seller may have to deliver a specified thing. Until delivery of the chattel, such seller-debtor both bears the risk and remains owner (art. 1186), so that the maxim *res perit debitori* (the risk of loss is with the debtor) agrees with the maxim *res perit domino* (the risk of loss is with the owner). Consequently, where the horse I sold died or broke a leg *before* delivery, I cannot claim the price under Ethiopian law. The *a contrario* effect of this rule - on the buyer - *after* delivery - is spelt out in article 2324(1) *cum* 2323 of the law of Sale.

An example not involving ownership: where the house leased or its roof is destroyed by an unpreventable storm between contract-time and delivery, the prospective tenant can refuse to take possession and pay rent, but he cannot claim damages.

The logical and sensible principle of this sub-article suffers an important and necessary exception provided by sub-article (2) below.

Art. 1758, sub-art. (2)

THE RISK SHALL PASS TO THE CREDITOR WHERE HE IS IN DEFAULT FOR NOT TAKING OVER THE THING.

The creditor is "debtor" of the obligation to take delivery of the horse owed him. If he is late in taking delivery, that is, in default by virtue of a notice to take delivery (arts. 1772-73) (see also arts. 1779-80), the risk passes to him before delivery,

in derogation from the rule of sub-article (1). So if the horse dies from an unpreventable cause after the unheeded offer of delivery, the creditor has to pay the price in spite of not getting the horse, as the risk of loss was already his. This consequence is clearly spelt out in the French master-text of article 2325(1) of the law of Sale.¹⁰

Since the debtor is creditor of the other party for the latter's obligation to take delivery, his offer of delivery satisfies the requirement of notice "by any other act" in article 1773(1)

Incidentally, the rules on transfer of risks are suppletory (based on the parties' presumed intention), so that the parties may "otherwise agree," although this is not expressly stated by the present article. A similar observation is valid for other rules of this Section on performance of contracts.

ART. 1759. LIMIT OF RIGHT TO REFUSE [suspend] PERFORMANCE

NOTWITHSTANDING THE PROVISIONS OF ART. 1757(2), A PARTY SHALL CARRY OUT HIS OBLIGATIONS UNDER THE CONTRACT WHERE THE OTHER PARTY PROVIDES SECURITIES SUFFICIENT TO GUARANTEE THAT HE WILL DISCHARGE HIS OBLIGATIONS AT THE AGREED TIME.

This provision figures in the wrong place (after the "Transfer of Risks" provision). Since it directly qualifies sub-article (2) of article 1757, it should have been inserted immediately thereunder. Moreover, in its heading, "suspend" (provisionally refuse) is mistranslated as "refuse". In light of the correct heading and of article 1757(2), the present article denotes that the party guilty of an "anticipated" breach of contract or the insolvent party can *defeat* the other party's right to *suspend* his performance by providing securities (mortgage, pledge, guarantor) for the future performance of his own obligations.

FOOTNOTE to [disjointed] ARTICLES 1757 and 1759

Suspension of performance is a provisional remedy derogating from the time of payment rules of article 1756. It may induce the other contractant to perform (or resolve to perform) what is (or will be) due by him. But it may also happen that the other contractant does not react to the suspension. In such case the parties often do not bother to take further steps. What is the legal consequence of this? Such a contract is only "dormant", and either party can "awake" it and invoke its existence. But such dormant contract can finally *lapse*, without action, in two ways: 1. when the parties' conduct shows their agreement to terminate the contract under article

10. But it is truly incredible how the expert English translator of *article 2325(1)* could distort the master-text's words *take delivery* ("prise de livraison") to read "paying the price" (the Amharic version is better), and how such absurdities, which are legion, can stand non-corrected since the Civil Code's enactment in 1960. Among the buyer's obligations, that of taking delivery is provided in the law of Sale by article 2313, wherein "taking" is nonsensically mistranslated as "completing the". We respectfully submit that, instead of being paid, the expert translator should have been sued for damages pursuant to article 2636 with 1771(2).

1819(1) (e.g., when they conclude further contracts which imply abandonment of the dormant contract); or 2. when the limitation period of article 1845 or another relevant article has run its course.

Where the terms of a contract are profitable to a party, he will often not rest satisfied with suspending his performance, but will sue the other party under Section 4, choosing between the contract's enforcement or cancellation, with damages (art. 1771). For instance, I suspend my delivery of the jewel sold, for which you did not pay (art. 1757(1)), or will not pay, or cannot pay (art. 1757(2)), and offer no security. In all three cases I can transform my provisional suspension of performance into cancellation or enforcement of the contract *cum* damages. Incidentally, in the third case (insolvency), choosing forced performance may obviously be unwise!

ART. 1760. COSTS OF PAYMENT

UNLESS OTHERWISE AGREED, THE DEBTOR SHALL MEET THE COSTS OF PAYMENT.

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 article 1755 (2-3) is agreed (a frequent case). Costs of payment comprise 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 costs of the deed and its registration.

In the law of Sale, compare articles 2315-2316, remembering that the buyer is debtor in that he must pay the price, and the seller in that he must deliver the thing, which is also a “payment” (performance) in the Code’s terminology.

ART. 1761. RECEIPT

- (1) THE DEBTOR MAY ON PAYMENT DEMAND A RECEIPT AND, WHERE THE DEBT IS FULLY DISCHARGED, THE DELIVERY OR CANCELLATION OF THE DOCUMENT SUPPORTING THE DEBT.
- (2) IN CASES OF PART PAYMENT OR WHERE THE CREDITOR HAS ADDITIONAL RIGHTS SUPPORTED BY THE SAME DOCUMENT, THE DEBTOR MAY ONLY DEMAND A RECEIPT AND THAT THE PAYMENT BE MENTIONED ON THE SAID DOCUMENT.

(1) By virtue of article 1757(1), the debtor may not only demand the receipt but also suspend payment until he gets it. The debtor is also protected against the possibility of losing his receipt through his right to recover or demand cancellation of the document “of title” (supporting the debt), if any, also called the debt’s instrument (e.g., cheque cashed is instrument returned; the law of cheques foresees no separate receipts). Article 2020 presumes the debt’s discharge from a mere “handing over of the document of title to the debtor”.

The word “payment” has so far been used to denote any performance of an obligation. But pursuant to custom (art. 1713), certain performances, such as those of continuous service, create no right to demand continuous receipts for the services rendered, although the corresponding salary is paid against receipts. The very nature of most obligations of “mere diligence” (art. 1712(2) *in fine*) excludes the practicability of receipts for their performance.

(2) For obvious reasons, where a part of the debt remains unpaid, or debts other than the debt paid are supported by the same document of title, the latter need not be delivered or cancelled as under sub-article (1), but a receipt and the payment’s mention on the document is all a debtor is entitled to. Article 2021 presumes the payment from such a mention alone, even where it is not signed (cf. *Engel* No. 185).

ART. 1762. LOSS OF DOCUMENT SUPPORTING THE DEBT

WHERE THE CREDITOR ALLEGES THAT HE HAS LOST THE DOCUMENT SUPPORTING THE DEBT, THE DEBTOR **MAY** DEMAND THE DELIVERY OF AN ATTESTATION TO THE EFFECT THAT THE DOCUMENT SUPPORTING THE DEBT IS CANCELLED AND THE DEBT EXTINGUISHED.

The creditor can prevent the application of article 1761(1) on the delivery or cancellation of the document of title through alleging that he has lost it. On the other hand, article 2003 admits proof by witnesses precisely where the document’s loss, destruction or theft is established. The paying debtor must therefore be protected against such a possibility by the creditor’s attestation that the lost instrument is cancelled and the debt extinguished.

SECTION 3

VARIATION [REVISION] OF CONTRACTS

The due effects of a contract (Chapter 2), plain or ascertained by interpretation (Section 1), should be fulfilled by performance (Section 2), unless varied under the present Section (3) in derogation from the principle of article 1731(1), which provides that contracts lawfully formed bind the parties.

ART. 1763. POWER OF THE COURT

THE COURT MAY NOT VARY A CONTRACT OR ALTER ITS TERMS ON THE GROUND OF *EQUITY* EXCEPT IN SUCH CASES AS ARE EXPRESSLY PROVIDED BY LAW.

This article basically reaffirms the principle of article 1731(1) on the binding effect of lawful contracts, through providing that there is to be no judicial variation of contracts except where expressly provided by law.

The term “vary” should be read in conjunction with article 1714(2), which forbids the court to “make” a contract for the parties, while the term “alter” points more particularly to article 1733, which forbids the court to alter clear contractual provisions.

A contract may be originally inequitable (e.g., where you buy an object **at three** times its value), as in the situation envisaged by article 1710(1), *or* it **may become** inequitable through a later unbalancing of the contract, the situation **which is contemplated** by article 1764. In neither case may the judges revise **a** contract on **grounds** of equity, which alone is insufficient unless expressly supported by an **exceptional** legal provision. (We use the terms *revise* and *revision* to denote judicial, **as different** from agreed, variation of contracts.)

Examples of *exceptional* rules authorizing a revision of originally **inequitable** contracts:

Article 1766 on Special Relationships.

The law of Agency (art. 2219(2)), which allows the court to reduce **excessive** fees due, e.g., to advocates or other agents.

The law (art. 2635) which allows the court to reduce the excessive **remuneration** due for “intellectual work”.

The Maritime law of Salvage (see Maritime Code), which allows the court to reduce excessive salvage dues.

Save for such exceptions, a contract which is originally inequitable *cannot*, as a rule, be revised. This does not mean that the contractual victim of initial inequity

must (save for the said exceptions) always be left without remedy. Certain inequitable **contracts** **can** be challenged under the Section on Defects in Consent (Chapter 1), but **then**:

- (1) the basis for action is not equity, or not equity atone, but vitiated consent, as shown by the following quotation from our footnote to articles 1708- 1710: “...moral considerations, rather than mere disproportions of value, stand in the foreground of our system”;
- (2) even where consent is vitiated the courts are not competent to revise the contract, but only to declare its invalidation (art. 1696).

ART. 1764. MODIFICATIONS IN THE BALANCE OF A CONTRACT

Art. 1764, sub-art. (1)

A CONTRACT SHALL REMAIN IN FORCE NOTWITHSTANDING THAT THE CONDITIONS OF ITS PERFORMANCE HAVE CHANGED AND THE OBLIGATIONS ASSUMED BY A PARTY HAVE BECOME MORE ONEROUS THAN HE FORESAW.

Contracts may be originally equitable but *become* unbalanced through a later change of the circumstances on which performance depends. If the difficulty amounts to one of the *force majeure* impossibilities defined by article 1792(1) and illustrated under article 1793, then the debtor is released, pursuant to article 1791(2). But he is not so released if the changed circumstances only render his performance more onerous, **as** where, due to money depreciation, his long-term deliveries of goods cost him more and more, while the contractual price received for them remains the same: **see** article 1792(2).

Every contractant assumes the business risk of seeing the value of and balance between the respective performances changed through economic events, and no legislator ever thought of upsetting trade through relieving him of such risks. But some jurists advocate the revision of a contract where the change in its balance is sweeping and quite unforeseen (“impre vision”). In France the courts resisted the “revision of contract” doctrines even in the face of post-war monetary upheavals, while the legislator enacted only emergency measures, e.g., those increasing the rents due under long leases. Italy introduced a moderately revisionist doctrine in article 1467 of its Civil Code. English contract law stands midway, implying a contract’s termination (which is not the same as “revision’ ’) in circumstances amounting to the so-called “frustration of the adventure” (*Jenks*, art. 242 *in fine*). The revisionist doctrines had more success in International Law, where you will study the fortunes of the famous clause *rebus sic stantibus*; the problem is, Are international treaties made on the implied condition that the basic contingent circumstances will remain what they are?

Our present article admits *no revision* of contract even where the contractual anticipations are upset by unforeseen upheavals. Theoretically, this solution is justified by the parties’ presumed intention. Long-term purchasers precisely intend to be sheltered against unforeseen price-fluctuations (cf. *Planiol*, No. 1182A *cum* 1168A).

Obversely, a seller-manufacturer is free to resist this, demanding that the sums **due** him be fixed, e.g., by the methods of article 1749(2). Practical considerations: 1. With a broad principle of revision of contracts, there would be no clear limit to litigation; the courts would be submerged and paralyzed, and security of trade would be destroyed. 2. Judges, as lawyers, are not qualified for the “economic” assessments which such revisions would entail (cf. *David*, p. 52).

Illustration (Cassation, 18 janv. 1950, D.50): B ordered some machines from manufacturer C, who later refused to supply them to B at the stipulated price, because of a huge money-depreciation (price-rise) caused by an unforeseeable war. C considered this circumstance as amounting to *force majeure*, but lost his case under French law. He would also lose it under Ethiopian law, for the following reasons: although war may be a *force majeure* event (art. 1793(d)), in this case it is not, as it causes no impossibility, but only makes C’s performance more costly and onerous. C was not absolutely prevented from performing (art. 1792), and is thus not released under article 1791(2). On the other hand, since our law admits no revision in such case, B’s contract remains in full force pursuant to the present sub-article. Nationwide catastrophes may upset current contracts and ruin certain classes of citizen (e.g. rent or pension creditors). It is, however, not for the courts but for the legislator to take emergency measures in such cases. Cf. cases cited in *Walton (II)*; p. 307 ff).

Certain *exceptions* from the principle of non-revision of contracts will be discussed under articles 1766-1770:

- (1) Article 1766, which also concerns cases of “originally” inequitable contracts ;
- (2) Articles 1767-68, which provide special exceptions from the principle that a contract remains in force even where it becomes unforeseeably unbalanced, while article 1769 provides for the restoration of the balance in such cases;
- (3) The last exceptional article (1770) deals only with the time of payment.

Art. 1764, sub-art. (2)

THE EFFECT OF SUCH CHANGES MAY BE REGULATED BY THE
PARTIES, AND NOT BY THE COURT, IN THE ORIGINAL CONTRACT
OR IN A NEW AGREEMENT.

This sub-article, together with the next article (1765), are examples of provisions that are only illustrative. They do not change the law but remind the parties of what they can do on basis of freedom of contract (arts. 1711 and 1731(2)). The present sub- article suggests that, the judges being incompetent to give revision relief, the parties should themselves provide for neutralizing the effects on their contracts of unexpected economic changes. They can do this in their original contract through availing them' selves of the possibilities mentioned by another illustrative provision, namely that of article 1749(2) on sum-fixing by reference to prices. If they have not done it, they can still make a new contract readjusting the unbalanced one. Of course, the part;

favoured by the changes will rarely agree to the readjustment. If he agrees, it should not be forgotten that the new contract is a variation subjected to the formal requirement of article 1722.

ART. 1765. ARBITRATION BY THIRD PARTY

WHEN MAKING THE CONTRACT OR THEREAFTER, THE PARTIES MAY AGREE TO REFER TO AN ARBITRATOR ANY DECISION RELATING TO VARIATIONS WHICH OUGHT TO BE MADE IN THE CONTRACT, SHOULD CERTAIN CIRCUMSTANCES OCCUR WHICH WOULD MODIFY THE ECONOMIC BASIS OF THE CONTRACT.

Instead of themselves providing, in their original or new contract (art. 1764(2)), for readjustments in their relations, the parties can confide this task, in advance or later, to arbitrators. Arbitration is a convenient customary institution which reduces court litigation and should be encouraged. It is also useful among merchants where, e.g., arbitral submissions to the chambers of commerce are practised. Submissions to arbitration are governed by Chapter 2 of Title XX of this Code. Arbitration can bear on any dispute, but this merely illustrative article suggests it particularly for readjusting contracts which become economically unbalanced (art. 317(2) Civ. Pro. C.: see “exempted”).

ART. 1766. SPECIAL RELATIONSHIP BETWEEN THE PARTIES

THE COURT MAY VARY A CONTRACT WHERE THE PARTIES DO NOT AGREE AND A FAMILY OR OTHER RELATIONSHIP GIVING RISE TO SPECIAL CONFIDENCE EXISTS BETWEEN THE PARTIES AND COMPELS THEM TO DEAL WITH EACH OTHER IN ACCORDANCE WITH EQUITY.

This article provides a first exception from the general principle of non-revision of contracts. *David* offers only a passing comment on this potentially disruptive article. All he says (on p.53) is that the confidential relationships contemplated by **this** article are the same as those of article 1705(1). But under that article *at 2*, we **have** shown how widely the concept of confidential relationship can be construed (cf. *David*, p. 25). If there is no harm in using such a wide construction for the mere purpose of repressing false statements, using it generally would be very inconvenient. It would have sufficed to admit revision of inequitable contracts between close relatives or associates, excluding other confidential relationships such as those of mere subordination, which is included by *David* (p. 25, “superior-inferior”). One can easily **imagine** the dire results of free court-interference with contracts between, e.g., government **and** subject. (Incidentally, distinguish the wording of the present article from that of art. 1823 in the Section on “termination” of contracts.)

De legeferenda, we would welcome a legislative amendment restricting the operation of this article to a few well-defined relationships. In its present form, this article

should be applied with great restraint. We suggest that, for the purpose of revision of contracts, the courts should construe the concept of “special confidential relationship” as narrowly as possible, and give, wherever possible, preference to remedies based on defects in consent. The reasons for such an attitude are as follows:

- (1) The wording of this Section’s basic articles 1763-64 shows that the provisions authorizing judicial variation of contracts are exceptional and should, therefore, be narrowly construed.
- (2) In particular, the next article (1767) allows revision of contracts between government and subject only in very restricted cases. *A contrario*, this seems to imply exclusion of judicial variation of such contracts in other cases.
- (3) The above cited English version of article 1766 unduly curtails the French master-text: after “compels them”, it omits the words *with particular strength*, which support our restrictive view of the confidential relationships to which the judicial “variation of contract” powers may be applied.

ART. 1767. CONTRACTS WITH A PUBLIC ADMINISTRATION

- (1) THE COURT MAY VARY A CONTRACT MADE WITH A PUBLIC ADMINISTRATION WHERE THE CIRCUMSTANCES IN WHICH IT WAS MADE HAVE CHANGED THROUGH AN OFFICIAL DECISION IN CONSEQUENCE OF WHICH THE OBLIGATIONS ASSUMED BY THE PARTY WHO CONTRACTED WITH THE ADMINISTRATION HAVE BECOME MORE ONEROUS OR IMPOSSIBLE [mistranslation].
- (2) . THE PROVISIONS OF THE TITLE OF THIS CODE RELATING TO “ADMINISTRATIVE CONTRACTS” SHALL APPLY TO CONTRACTS MADE WITH A PUBLIC ADMINISTRATION (ARTS. 3191-3193) [mistranslation].

This provision calls for the following observations:

1. According to this writer’s recollection, the text of what is now sub-article (1) was drafted in the form of an article in 1954, well before the decision to include a lengthy Title on Administrative Contracts in the Civil Code (Title XIX) was taken. Later in the codification process, the proposed article was renamed sub-article (1) of article 1767, and was supplemented by sub-article (2). In the latter, “3191” (instead of 3190) reflects an obvious typing error to be corrected.
2. Both the old provision (now sub-art. (1)) and the added provision (sub-art. (2)) are distorted in the English version of the Code. From *Krzeczunowicz*, “Revised Translations” for Administrative Contracts class (Addis Ababa, 1974), we reproduce below a *corrected translation* (from the French master-text) of the whole article:

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- (2) THE PROVISIONS OF THE TITLE OF THIS CODE RELATING TO “ADMINISTRATIVE CONTRACTS” SHALL APPLY TO CONTRACTS MADE WITH A PUBLIC ADMINISTRATION (ARTS. 3191-3193) [mistranslation].

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2. Both the old provision (now sub-art. (1)) and the added provision (sub-art. (2)) are distorted in the English version of the Code. From *Krzeciunowicz*, “Revised Translations” for Administrative Contracts class (Addis Ababa, 1974), we reproduce below a *corrected translation* (from the French master-text) of the whole article:

Art. 1767. CONTRACTS WITH ADMINISTRATIVE BODIES.

- (1) THE COURT MAY VARY A CONTRACT MADE WITH AN ADMINISTRATIVE BODY WHERE THE CIRCUMSTANCES IN WHICH IT WAS MADE HAVE CHANGED THROUGH AN ACT OF GOVERNMENT MAKING THE PERFORMANCE OF HIS OBLIGATIONS BY THE CONTRACTANT MORE ONEROUS OR IMPOSSIBLE.
- (2) THE RELEVANT PROVISIONS OF THE TITLE ON “ADMINISTRATIVE CONTRACTS” (ARTS. 3190-3193) APPLY ON THIS POINT TO ALL CONTRACTS MADE WITH AN ADMINISTRATIVE BODY.

3. Pursuant to *sub-article* (2), the relevant provisions applicable to all contracts made with an administrative body are those of *the Acts of Government* sub-paragraph (arts. 3190-3193) of the Title on Administrative Contracts.

4. *Sub-article* (1) is incompatible with the special provisions (particularly that of article 3191) made applicable by sub-article (2). Sub-article (1) is therefore of no effect. Consequently, we need not trouble the readers with an analysis of its theoretical merits, which were discussed at length by the draftsman in his preliminary French Commentary on Contracts in General written in 1954. The latter was translated into English and published unchanged in 1973 (cited *David* in this work: see ABBREVIATIONS). In particular, David’s old comment on what is now sub-article

(1) of article 1767 is reproduced on pp. 53-56 in spite of the fact that, as shown above, the later addition of sub-article (2) has made sub-article (1) (and David’s comment) pointless. This sub-article is merely misleading and should be abrogated (*but* see ADDENDUM A, 2, c).

5. The proposed *abrogation of sub-article* (1) requires a corresponding *rewording of sub-article* (2) to form the following single provision:

ART. 1767. CONTRACTS WITH ADMINISTRATIVE BODIES

THE PROVISIONS OF THE TITLE ON ADMINISTRATIVE CONTRACTS CONCERNING ACTS OF GOVERNMENT (ARTS. 3190-3193) APPLY TO ANY CONTRACTS MADE WITH ADMINISTRATIVE BODIES.

Avoiding circumlocution, this single provision makes clear that in the Title on Administrative Contracts, *only* the “Acts of Government” sub-paragraph applies to both administrative contracts (as defined in art. 3132) *and* non-administrative con

tracts made with an administrative body. It will free the courts from the unnecessarily obscure dilemmas created by the whole present version of article 1767.

ART. 1768. PARTIAL IMPOSSIBILITY OF PERFORMANCE

THE COURT MAY REDUCE THE OBLIGATIONS OF ONE PARTY WHERE THE PERFORMANCE BY THE OTHER PARTY OF HIS OBLIGATIONS HAS BECOME PARTIALLY IMPOSSIBLE AND THERE IS NO GROUND FOR CANCELLING THE CONTRACT.

While the provisions of articles 1766-1767 are clearly exceptional (see arts. 1763- 64), the present article's rule is but a simple consequence of the interdependence of bilateral obligations. When a party's performance has become "impossible" in a degree not affecting the basis of the contract, the other party cannot require cancellation of the contract (see art. 1788, comment 4). If such minor partial impossibility is due to *force majeure*, the debtor is to this extent released (art. 1791(2)), and thus is not liable in damages. But of course the other party's payment must be proportionately reduced. (Compare the theory of risk explained under article 1758(1).) The debtor being excused, the court is not redressing a breach of contract, but is revising the contract in order to restore its balance (art. 1769).

Example: Contractor B undertakes to build a villa for C, including floors to be made of rare and costly local cedar wood (cf. *David*, p. 56, 2.). Due to unforeseeable third-party action (art. 1793(a)), all such cedar wood completely disappears from the market, and B has to use cheaper wood for the floors. B is excused, but C's payment will be proportionately reduced.

ART. 1769. BALANCE OF THE CONTRACT

IN MAKING ITS DECISIONS UNDER ARTS. 1767 AND 1768, THE COURT SHALL ENSURE THAT THE BALANCE OF THE CONTRACT IS PRESERVED.

Where, contrary to the principle of article 1764 and pursuant to the special rules of articles 1767 and 1768, the court is revising a contract whose original balance is upset by an act of government or a partial impossibility of performance, its primary task is to restore the original balance of the contract. In the cases arising under article 1768, this is done in the way illustrated under "Example", above. In the cases arising under article 1767, however, this must be done by application of the special provisions of Administrative Contracts law mentioned by us in comment 3 under the said article.

The present article purposely omits any reference to the revisions of contract made pursuant to article 1766, whose primary aim is not to preserve the original balance of the contract, but to revise it in accordance with equity.

ART. 1770. PERIOD OF GRACE

- (1) THE COURT MAY, WITH ALL NECESSARY CARE, GRANT A PERIOD OF GRACE FOR THE DEBTOR TO CARRY OUT HIS OBLIGATIONS UNDER THE CONTRACT, HAVING REGARD TO THE POSITION OF THE DEBTOR AND THE REQUIREMENTS OF JUSTICE.
- (2) THE PERIOD OF GRACE SHALL NOT EXCEED SIX MONTHS.
- (3) THE PARTIES MAY PROVIDE THAT NO PERIOD OF GRACE SHALL BE GRANTED.

The court may thus, exceptionally, derogate from the rules of article 1756 as to time of payment. But no provision allows the court to order part payments (e.g., so much per week or month) in derogation from article 1746 (1); thus, unless the creditor agrees, only the whole payment may be postponed within a maximum of six months' delay.

Being commanded to use "all necessary care", the court should construe the words "having regard to the position of the debtor and the requirements of justice" to mean, for example, that the debtor must be in good faith, unlucky, temporarily unable to perform his obligation through no fault of his, and must have prospects to improve his situation. The requirement of "justice" points also to the necessity of not injuring the creditor, who must be in a position to wait without being seriously harmed by the period of grace granted the debtor.

By virtue of sub-article (3), the parties may exclude the court's power to grant time to the debtor. *Law Revision* has proposed that this provision be repealed. But the mandatory effect (if intended) of its disappearance would be much clearer if sub-article (1) were made to start with the words "notwithstanding any agreements to the contrary"

To prevent insecurity in commercial dealings, we suggest that the courts' authority to grant "periods of grace" should somehow be limited to contracts other than business transactions between professional traders.

SECTION 4

NON-PERFORMANCE OF CONTRACTS

2

The Civil Code Articles so far discussed embody, with relatively few exceptions, a tolerable official translation of the Code's French master-text. Obversely, the English version of the section discussed below *distorts* the master-text¹¹ to an extent making a rational commentary largely impossible. The only choice available to us was therefore carefully to work out and use a non-official corrected translation, or discontinue the commentary. Because of our promise of a commentary given to both Faculty and students, we had to choose the arbitrary first alternative. And since linguistic and juristic justifications for every correction would by themselves require a book-size volume, we gamble on the probability that, even without them, our painstaking *re-translation* of this Section will better accord with the Code's master-text and the controlling Amharic version. We took a similar chance in our book on the Ethiopian Law of Extra-Contractual Liability (Addis Ababa, 1970), which does not seem to have been a failure.

For a methodological justification of this approach, see page 56 of the above-cited work and page 3 of our treatise on the Ethiopian Law of Compensation for Damage (Addis Ababa, 1977). Our discussion of *articles 1771-1805* will be based on their REVISED TRANSLATION in APPENDIX to this Section.

ART. 1771 - EFFECTS OF NON-PERFORMANCE

- (1) WHERE A PARTY DOES NOT PERFORM HIS OBLIGATIONS, THE OTHER PARTY MAY, ACCORDING TO CIRCUMSTANCES, REQUEST THE ENFORCEMENT OF THE CONTRACT OR, ON THE CONTRARY, REQUEST, OR SOMETIMES HIMSELF DECLARE, THE CANCELLATION OF THE CONTRACT.
- (2) HE MAY ALSO REQUIRE THAT THE DAMAGE CAUSED HIM BY THE NON-PERFORMANCE BE COMPENSATED.

A contract lawfully formed (Chap. 1) binds the parties as if it were law (art. 1731 (1)). Consequently, failure by a party to perform (see Section 2) his contractual obligations entitles the other party to invoke or apply certain legal remedies against the non-performing or improperly performing party. These remedies are provided by this introductory article and are specifically regulated by articles 1776-1805 of the present Section.

11. Apparently because of the "rush" to complete the Civil Code's English version in time for publication in the year of the Emperor's Coronation Jubilee (1960). *Le Code Civil de l'Empire d'Ethiopie* (Paris 1962), reproducing the Code's French master-version, was published at the request and expense of the Ethiopian Ministry of Justice (see "Note introductive"¹).

Comment on sub-article (1)

This sub-article provides the alternative remedies of enforcement *or* cancellation of the contract breached by the debtor. The creditor may request application of the one or the other remedy, but the final decision whether to grant it lies with the court (arts. 1776-1778 and 1784-1785), except in the circumstances envisaged by articles 1786-1789, where the creditor desiring cancellation may “himself declare it” (he can never “declare” forced performance).

Comment on sub-article (2)

Whichever of the above remedies may be applied in a case, the creditor may *also* require that the remedy of compensation for the damage, if any, caused him by the debtor’s breach of the contract be compensated. Moreover, the same compensation-relief is applicable as of right *even* “apart from enforcement or cancellation” (art. 1790 (1)), i.e., where neither of the latter is requested (e.g. by the creditor demanding only interests for delay under art. 1803), or where the requested remedy is disallowed pursuant to article 1776 or 1785 (2).

Organization of this Section

1. Articles 1772-1775 deal with *Default Notice*, the giving of which is, as a rule (i.e. subject to the exceptions of art. 1775), a necessary *prerequisite* for requesting application of any of the remedies for non-performance provided by article 1771.
2. Articles 1776-1783 deal with the remedy of *Forced Performance*, which may in certain cases be granted against a non-performing “debtor” (arts. 1776-1778) or applied to a non-performing “creditor” (arts. 1779-1783).
3. Articles 1784-1798 deal with the remedy of *Cancellation* of contract. As a rule, the cancellation is “judicial” (arts. 1784-1795) but, in the circumstances envisaged by articles 1786-1789 (or certain special provisions of Book V Civ. C.), it may be “unilateral”.
4. Articles 1790-1805 deal with *Compensation for Damage*: “when due” (arts. 1791-1798) and “amount due” (arts. 1799-1805).

Constant awareness of the above implicit subdivisions will facilitate the study of this Section.

ART. 1772-DEFAULT NOTICE NECESSARY

A PARTY MAY INVOKE NON-PERFORMANCE BY THE OTHER PARTY ONLY AFTER HAVING PLACED THE LATTER IN DEFAULT BY A NOTICE DEMANDING HIM TO PERFORM HIS OBLIGATIONS.

This article is largely self-explanatory; default notice is *demanding* the debtor to perform his obligations. Nevertheless, a lengthy elaboration is called for by errors in the expert draftsman’s enumeration of what he calls the four functions of the notification of default, i.e. of the default notice (*David*, p. 54, para. 4). The notice’s two “factual” functions (reminding the debtor and reducing litigation) are properly mentioned by David, but his perception of the notice’s legal requirements

(1) and effects (2) is erroneous:

- (1) David's comment that the default notice "*must* call the debtor's attention to the fact that his obligations are due and to the sanctions he may incur if he does not perform" (p. 57, lines 10-11 from top—cf. para. 4) is incompatible with the wording of the present article and the foreign provisions he cites (primarily art. 1139 French Civ. Code and art. 102 Swiss Obligations Code). A default notice *not* mentioning sanctions is therefore fully effective (cf. *Engel*, p. 464, B.).
- (2) David's comment (p. 57, para. 4) that, in obligations to give, the default notice *puts the risk* of loss of the thing on the debtor is *misleading*, since his reader will necessarily infer that the debtor is free from such risk before this notice. Pursuant to article 1758,¹² the opposite is true: the debtor in any case bears risk until delivery or until the creditor's default (see our comments under art. 1758). "Putting" the risk of loss on a debtor already bearing it is obviously impossible. Consequently, David's affirmation (p. 57, para. 3) that the Code does not require a default notice "where it cannot serve any of these ends" is inaccurate.

From the time of the default notice onwards (or from the time of default without notice in the cases envisaged by article 1775), the creditor may invoke the debtor's non-performance, i.e. raise the provisions of article 1771 against him. But the debtor may still perform his obligations and only the damages for "*delay*" in performance are due by him from the time of the notice until the occurrence of his voluntary or forced performance. (The special effects of "cancellation" will be discussed under art. 1790 (1).) If the debtor owes money, the damages for delay take the rigid form of interest on the sum due (art. 1803). Otherwise, recoverable damages for delay may consist in, for example, expenses in trying to obtain the overdue performance, loss of use of a motorcar repaired late, depreciation of the goods received late, etc. (cf. *Engel* p. 203, C. 3). No damages for delay (not even "demurrage" penalties for delay in unloading a ship? - see *Walton II*, p. 207 *in fine*) may be claimed for the period preceding the debtor's "default". In the Common Law jurisdictions, the debtor is not so protected. Default notices are not required; for England, see *Walton II*, p. 218.)

ART 1773 - FORM AND TIME OF DEFAULT NOTICE

- (1) DEFAULT NOTICE IS GIVEN BY SUMMONS OR BY ANY OTHER ACT DENOTING THE CREDITOR'S INTENTION TO OBTAIN PERFORMANCE OF THE CONTRACT.
- (2) IT MAY NOT BE GIVEN BEFORE THE TIME WHEN THE OBLIGATION FALLS DUE.

Comment on sub-article (1)

Default notice by summons ("sommation", mistranslated as "written demand", denote?" in France a "commandment" to perform delivered to the debtor by the

12. The preliminary version of article 1758 was different (*David*, Editor's note 15), but the need to exclude the above comment from David's 1973 edition by Kindred was overlooked.

creditor through a court officer called the “huissier”. In English law “summons” denotes an order to appear before the court. In the context of the present article, this term is both irrelevant and superfluous, since default notice may be given by “any other act denoting the creditor’s intention to obtain performance”, such as a written or oral declaration, or clear conduct (e.g. calling for the goods due in delivery van). However, for the purpose of preserving secure evidence of the default notice, it is of course desirable to send it by registered letter or telegram. Incidentally, an “invoice” does not necessarily denote a demand for prompt payment. The invoice should include such a demand if it is to have the effect of a default notice in starting the running of interests for delay (cf. *Engel*, p. 464 *in fine*).

Comment on sub-article (2)

The creditor may obviously demand only what is already due according to the contract. But he may not demand even a performance already due, if he is himself late in performing his contractual obligation: see our comments under Article 1757 (!)•

ART. 1774 - SETTING A TIME LIMIT

- (1) IN THE DEFAULT NOTICE THE CREDITOR MAY INDICATE A PERIOD OF TIME AFTER WHICH HE WILL NO LONGER ACCEPT AN ACTUAL PERFORMANCE OF THE CONTRACT BY THE DEBTOR.
- (2) SUCH PERIOD MUST BE REASONABLE HAVING REGARD TO THE NATURE AND CIRCUMSTANCES OF THE CASE.

Comment on sub-article (1)

Indication by the creditor in the default notice of a reasonable period of time after which he will no longer accept an actual performance by the debtor of his contractual obligations has the following *advantages*:

1. It may obviate the need for a judicial intervention under the “period of grace” provision of article 1770(1).
2. Upon lapse of the period of time granted by him in vain, the creditor can, without going to court, unilaterally *declare cancellation* of the contract (art. 1787). *Nevertheless*, unless his notice stated that, lacking performance within the period, he shall cancel the contract, the creditor remains free not to exercise this right when the period expires. He may then prefer, for example, to request application of article 1777 instead of article 1787 (only in a *sale* is the contract cancelled “as of right”, i.e., automatically where the seller does not perform within the reasonable period granted him by the buyer: article 2338 (2-3)). David’s comment (top of p. 58) is not quite clear in this point, and the German Civil Code provision [art. 250] which he cites as his model for article 1774 does not fully accord with the latter. See *Encyclopedia, Treitel*, sec. 149.

Comment on sub-article (2)

The period of time envisaged by the preceding sub-article must be “reasonable”. The criterion of reasonability provided by the present sub-article is vague, since the “nature” and “circumstances” of the case vary infinitely. In current transactions between merchants, the “reasonable” period (depending on usage) may be quite brief. Conversely, the “reasonable” time in a construction contract may be long. A Swiss court rightly disregarded a 24-hour time limit granted to a defaulting builder for the construction of a stable (case cited in *Pick*, note 21 under art. 107). Rather than set such absurd time limits, a creditor unwilling to wait longer should, if satisfying the requirements, request a “judicial” cancellation of the contract, pursuant to articles 1785-1786.

ART. 1775 - WHEN DEFAULT NOTICE UNNECESSARY

DEFAULT NOTICE IS UNNECESSARY:

- (a) IN THE CASE OF OBLIGATIONS NOT TO DO SOMETHING; OR
- (b) WHERE THE DEBTOR ASSUMED AN OBLIGATION WHICH, PURSUANT TO THE CONTRACT, MAY BE PERFORMED ONLY WITHIN A FIXED PERIOD, AND HE ALLOWED IT TO LAPSE; OR
- (c) WHERE THE DEBTOR HAS DECLARED IN WRITING THAT HE WILL NOT PERFORM HIS OBLIGATION; OR
- (d) WHERE THE CONTRACT PROVIDES THAT, WITHOUT NEED FOR NOTICE, THE DEBTOR SHALL BE IN DEFAULT UPON THE LAPSE OF THE TIME FIXED FOR PERFORMANCE.

On grounds provided by the above sub-articles, certain contractual **debtors are “in default”** (for the purpose of the creditor’s right to invoke their non-performance under article 1771) without the creditor having to give them **the default notice** otherwise required by the general rule of article 1772. Below, we **discuss** the alternative grounds (see “or”) **in** a sequence more convenient (a, c, d, b) than **that used** by the Code.

Comment on sub-article (a)

Where the debtor’s obligation is “not” to do something, his *doing* it obviously **makes** a notice reminding him of his delay in performance pointless, since his breach (non-performance) of the obligation not to do has already occurred. Following **are some** example of obligations “not to do”:

- In a collective agreement, B undertakes not to employ workers not belonging to a trade union.
- Actor B undertakes not to perform in a theatre other than that of C.
- The seller of a shop undertakes not to establish another shop in the same street (see also *Walton I*, p. 19, and *David*, p. 58, illustrations 1-2).

Comment on sub-article (c)

The text of this sub-article is self-explanatory, but the following comparative illustration may nevertheless be of some use:

Under article 1757 (2), we have discussed the University's **right to suspend** the advance payment owed a professor who declares that he will not perform **his** teaching which (is not yet due but) is to start after two months. In such a case, the University may cancel his contract only according to the requirements of article 1789

(2) (default notice, etc.). Conversely, if the professor's advance *refusal* to perform was communicated *in writing*, the default notice becomes unnecessary, and the University may forthwith cancel his contract (art. 1789 (3)). If it does so, the professor has no longer any choice to withdraw his refusal, and he owes damages (art. 1771(2)).

Comment on sub-article (d)

This provision implements the "freedom of contract" principle of article 1711 (see comment thereunder); the parties are free to disregard the "permissive" provision of art. 1772 by stipulating in their *contract* that, from the exact time fixed for the performance of an obligation, the non-performing debtor shall be in default, "without need" for the creditor to give a default notice. The latter may immediately invoke article 1771 against the former.

Comment on sub-article (b)

This provision is less easy to apply. At first sight, it may seem to overlap, in effect, with the provision of sub-article (d). However, the principle of "positive" interpretation (art. 1737) requires us to search for a meaning making sub-article (b) effective rather than redundant. We submit the following construction: Subarticle (b) will apply where the *contract's* compelling expressions (e.g., "delivery must occur next June 1st at the latest") *or* its necessary implication (e.g., "B shall deliver the ordered cakes and drinks for my next December's Christmas party") must be taken as excluding a later performance. This dispenses the creditor from giving a default notice upon lapse of the time fixed, despite the fact that the contract includes no words to that effect. Incidentally, the meaning and function of subarticle (b) would be much clearer if it were inserted under sub-article (d), and started with the words "Even in the absence of such provision, there is no need for notice where...".

ART. 1776 - FORCED PERFORMANCE

FORCED PERFORMANCE MAY BE ORDERED ONLY IF IT IS OF
SPECIAL INTEREST TO THE CREDITOR AND CAN BE OBTAINED
WITHOUT AFFECTING THE PERSONAL LIBERTY OF THE DEBTOR.

A. Preliminary

Both the translator of the Civil Code and the translator of David's Commentary have repeatedly mistranslated "forced" (French "forcee") performance (which is not

always specific) as “specific” performance. “*Forced*” has been reinstated in the “Revised Translation” Appendix to this Section, but not in David’s booklet (pp. 58- 59), where the reinstatement may be made only by its readers.

The present article deals with performance directly imposed on the debtor through the execution process, while the next two articles deal with an authorized creditor’s “self-help” performance at the debtor’s expense.

The requirements for application of the present article are:

- (a) the creditor’s special interest, *and*
- (b) preservation of the debtor’s personal liberty. We shall discuss them in turn.

B. The creditor’s special interest

Such special interest typically exists in cases where a consumer is supplied with vital goods (e.g. water or electricity) or services (e.g. postal or telecommunication services) by a monopolistic entity, which excludes the possibility of getting served or supplied elsewhere. Where such a body cuts off the supply or service in breach of contract (or refuses to conclude such contract in breach of public law), the court may order performance of the supply or service required by the claimant (art. 400(1) Civil Procedure Code). Incidentally, since in Ethiopia such “public utility” bodies are governmental, the defendant authority may attempt to invoke article 3194(1) (mistranslated in the English version) against a forced performance order. To this, the consumer-claimant can in a fit case reply that the said article is inapplicable, since his contract with the body concerned does not fall within any of the definitions of “administrative contract” provided by article 3132.

A contractual creditor often has a “special interest” in the promised delivery of, or the promised transfer of a right in, a specific object (a horse, a house). Such delivery and/or transfer may in fit cases be enforced by appropriate application of articles 399, 401, 402 Civil Procedure Code (see also arts. 2329, 2892 Civ. C.).

C. Preservation of the debtor’s liberty

This requirement obviously excludes “forced” performance of his contractual promise by an artist, writer, or actor. What about ordinary employment contracts ? *David* (top of p. 59) makes the following statement: “Thus, a contract of employment cannot be the object of a judgment of forced performance”. This view is supported by article 2583, whereby wrongful (mistranslated as “unfair”) termination (mistranslated as “cancellation”) of an employment contract makes the party in breach liable (only) to compensate the other party. This implies that the remedies of forced reinstatement of a dismissed employee, or forced retention of a departing employee, are excluded in accordance with the principle of article 1776. It remains for us to show that this lofty principle is often honoured by breach *rather* than observance:

1. Pursuant to post-1974 labour and other legislation and/or policy, certain employers are forced to reinstate dismissed employees or even to retain them beyond termination of contract. On the other hand, some employees may not leave their work even if offering compensation. The related public law problems are beyond the scope of our work. In private law, see the (suspended) Supreme Court judgment which, in addition to compensation, has ordered reinstatement of a contractual foreign teacher: *Prof. E. Holan v. National University*, Sup. Ct. Civ. App. No. 969/67 (unpublished).
2. There is inconsistency between the present article and articles 400(1) with 389
(1) Civil Procedure Code, which foresee decrees for specific performance (actual performance by the debtor) of a contract or for an injunction, compliance with which may in fit cases be enforced by civil (see “without prejudice ...” in art. 400(1)), or penal (art. 433(c) Penal Code) imprisonment. This method of enforcement may be particularly useful where, for example* a defendant agent or manager refuses, in breach of his contract’s express or legal terms, to render accounts of his agency or management.
3. Articles 394,399,401 Civil Procedure Code provide good examples of “forced” performance *not* affecting the “personal” liberty of the debtor:
 - (a) a “decree for payment of money” against a defaulting debtor may be executed by attachment and sale of his property;
 - (b) a “decree for specific movable property” may be executed by its seizure against, e.g., a seller in possession who refuses to deliver it;
 - (c) a “decree for execution of a document” (which, e.g., is to transfer a property right) leads, subject to a special prior procedure, to the execution of the document by the execution officer against the promisor refusing to do it;
 - (d) *but* in the cases envisaged by article 402(1) Civil Procedure Code, “forcible” removal of a “person” (the person contractually bound to vacate an immovable) may become unavoidable.

For illustrations from foreign legal systems, see *Walton II*, pp. 230-234.

D. References

On the difference between the broad meaning of “enforced” (or “forced”) performance and the narrower meaning of “specific” performance, see *Encyclopedia, Treitel*, sec. 9. Because of the planning system of their economies, *socialist* legal systems favour enforcement of “specific” (actual) performance of contracts: see *Encyclopedia, Eorsi*, secs. 190 and 212. Caution to readers: what our Code happens to call “cancellation” of contract is, in one and the same Chapter 16 of Volume **VII** of *Encyclopedia*, called “termination” by Treitel and “rescission” by Eorsi. **This** terminological diversity hampers comprehension.

ART. 1777 - OBLIGATIONS TO DO OR NOT TO DO

- (1) THE CREDITOR MAY BE AUTHORIZED TO PERFORM OR MAKE PERFORM THE DEBTOR'S OBLIGATION TO DO AT THE DEBTOR'S EXPENSE.
- (2) SIMILARLY, HE MAY BE AUTHORIZED TO DESTROY OR MAKE DESTROY, AT THE DEBTOR'S EXPENSE, WHAT WAS MADE BY THE DEBTOR IN VIOLATION OF HIS OBLIGATION NOT TO DO.

See article 1712(1).

Obligations “not to do” something are violated by *doing* it, those “to do” something by *not doing* it, those to “give” something (i.e. to procure a right on a thing, which is a kind of “doing”) by *not giving* it. Violations under these categories (there are no others) are sometimes remedied by a creditor authorized to help himself as follows:

- (a) he may (where this is possible) *destroy* what the debtor has already done in breach of his obligation not to do (art. 1777(2));
- fb) he may *perform* or make perform the non-doing debtor's obligation to do or to give, at the debtor's expense (art. 1777(1) *or* 1778).

In our comments below, we shall follow this convenient sequence, which differs from that of the Code.

Sub-article (2): obligations *not* to do

Strictly speaking, in an obligation “not to do” something (see our comment (a) under art. 1775), the debtor's “doing” it makes forced performance impossible, since the breach (non-performance) has already occurred. Only if the result of the prohibited “doing” is something capable of being destroyed, can the court-authorized debtor

- (a) destroy or make destroy that something (cf. art. 98(3) Swiss Obligations Code);
- (b) prevent further harm by obtaining a restraining court-injunction pursuant to article 2121, which is part of this Section on Non-Performance by virtue of article 1790(2).

A simple example for (a) and (b) is that of a contractual right of “free” passage through the debtor's compound, which is paralyzed by the debtor who builds a barrier across the passage. Its destruction by the creditor (at the debtor's expense) may be authorized, and an injunction against repeated obstructions by the debtor may be granted on pain of the sanctions of article 433(c) Penal Code. The term “may” denotes that the court has discretionary authority in such matters. If, instead of a barrier, the debtor erected a house across the passage, then in order to avoid waste

the creditor may have to rest satisfied with damages and/or the use of another pass- age-way.

Sub-article (1): obligation to do

In obligations “to do”, actual performance *by* the debtor cannot, as a rule, be enforced otherwise than by “affecting the personal liberty of the debtor”, contrary to the principle of article 1776. Above , we have mentioned the inroads on this liberty resulting from post-1974 labour legislation and policy, or from the fact that, in certain cases (concerning, e.g., obligations to render account, or to vacate a house) “forcing” the very debtor to “do” his duty by application of article 400(1) with 389(1) or 402(1) Civil Procedure Code becomes unavoidable. In certain other cases, the *creditor* may be able to himself perform or make perform the debtor’s obligation “to do”: in such a case, he may have it performed at the debtor’s expense if so authorized by the court.

The court may authorize such “self-help” at the debtor’s expense *if* this is “of special interest to the creditor” (art. 1776). Typically, this can happen where identical work may be done by persons other than the debtor (which is hardly the case with, e.g., an artist’s work), and where the creditor does not know how much the reparation of his prejudice by such other persons will cost. If he claims pecuniary damages, he may get less than what his loss will ultimately amount to. Example:

In breach of contract, garage-owner B refuses to repair your motorcar for the agreed maximum of Birr 1000. After putting B in default, you obtain a court authorization to repair it with garage-owner C. C’s price is based on Birr 5 per work-hour, plus the cost of spare parts. Because of local shortage, a heavy spare part has to be brought from Europe by air, and C’s ultimate bill is for Birr 2000. B must pay you Birr 1000 (without prejudice to further damages for delay).

The reader can easily imagine other illustrations. The lessee of a house does not even need court-authorization to (for example) have a leaking roof repaired at the lessor’s expense, where the lessor does not repair it without delay upon the notice of ; article 2917. The law itself authorizes the lessee to do it *and* directly to recover his costs with interest by retaining them from the due rents, pursuant to article 2920 (1) *cum* 1836, except where, as is now the rule, the lessor is the State (art. 1833 (b)).

ART. 177S - [Obligations to give] FUNGIBLE THINGS

WHERE FUNGIBLE THINGS ARE DUE, THE CREDITOR MAY BE AUTHORIZED TO BUY AT THE DEBTOR’S EXPENSE THE THINGS WHICH THE DEBTOR UNDERTOOK TO DELIVER.

See article 1712 (1).

An obligation to “give” (procure a right on a thing) can concern a specific thing (e.g. a given horse or house), or fungible things (e.g. a certain quantity in weight or measure of Harrar coffee). Only in the second case can the creditor be authorized to himself perform the debtor’s obligation to “give” by buying the *fungible* things at the debtor’s expense (but we submit that where the contract does not determine their

quality, the defaulting debtor cannot be responsible for the surplus cost **of things of** “above average” quality; argument inferred *a contrario* from article 1747 (2)). **In** commercial usage, such an operation is called *purchase-in-replacement* or **“cover”** purchase. Obversely, where the thing due is specified and is held by the debtor, **his** performance may be directly enforced by application of the Civil Procedure **Code** articles mentioned in our final comments under article 1776 (3, b - d).

Without any support in the wording of the present article, *David* (p. 60) affirms that the court authorization for the purchase-in-replacement (cover purchase) **of the** fungible things is unnecessary “if the things that were to be delivered are quoted on an exchange or have a market price”, as is usually the case with fungibles. **In note 26**, his editor explains this lapse by stating that this distinction was eliminated **from the** Code’s draft at a late stage in the codification process. But he wrongly concludes that court authorization is therefore necessary in all cases. This problem **concerns** only sale (see the words “to *buy*”). It should not therefore be dealt with by **the general** theory of contract, but should be and is adequately solved by the overriding **special** rules of the *law of sale*: see article 2330 (far from requiring authorization, **purchase-** in-replacement may even be a duty). Cf. article 2363 (purchase-in-replacement **shall** be considered in the calculation of damages). In the Administrative **Contracts Tide**, compare article 3304(2).

Incidentally, it should be borne in mind that the seller’s basic **obligation to** “give” includes *both* physical delivery (art. 2273 (1)) and procuring the right **of ownership** to the buyer (art. 2273(2)). But although the present article speaks only **of “delivery”**, in the Ethiopian system the transfer of “ownership” **of** movables (“chattels”), which most fungibles are, occurs simultaneously with the delivery of possession to **the** purchaser (art. 1186) by the selling owner or (as a rule) even non-owner (**art. 1161(2)**).

Purchase [without court authorization] in replacement of non-delivered **goods is** provided for in article 71 of the U.N. Commission’s on International **Trade Law** 1978 Draft Convention on Contracts for the International Sale of Goods: **see E. Farnsworth**, “Damages and Specific Relief”, *American Journal of Comparative Law*, Vol. 27 (1979), p. 248 (the underlying policy is “relief of the promisee” **rather than** “compulsion of the promisor”). (**In** the same issue, see the interesting articles **on force majeure** cancellation and passing of risk: pp. 231, 279, 291.)

ART. 1779 - REFUSAL TO ACCEPT DELIVERY

WHERE THE CREDITOR REFUSES WITHOUT LAWFUL CAUSE TO ACCEPT THE THING OFFERED, THE DEBTOR MAY DEPOSIT IT AT THE RISK AND EXPENSE OF THE CREDITOR IN A PUBLIC WAREHOUSE OR DEPOSIT BANK, OR IN ANY OTHER PLACE INDICATED BY THE COURT INSTEAD OF THE PLACE WHERE THE DELIVERY IS DUE.

ART. 1780. DELIVERY IMPOSSIBLE

THE DEBTOR HAS THE SAME RIGHT, WITHOUT NEED FOR DEFAULT NOTICE, WHERE THE CREDITOR IS UNKNOWN OR UNCERTAIN, OR WHERE DELIVERY CANNOT BE MADE FOR ANOTHER REASON PERSONAL TO THE CREDITOR.

A. Preliminary

As shown before, articles 1776 to 1778 deal with performance forced on the debtor, whether directly imposed on him (art. 1776), or performed at his expense (arts. 1779{1} and 1778, plus the incongruous art. 1777(2)). *Obversely*, articles 1779 to 1783 deal with the situations (a) where the debtor is ready and eager to perform his obligation to “give”, but the creditor prevents his performance by (without lawful cause - see arts. 1745, 1746) refusing to accept the thing due (art. 1779) (acceptance includes cooperation [cf, art. 2312], e.g. the promised sending of a van), *or* (b) where, for reasons personal to the creditor (e.g. his disappearance, incapacity, etc.), delivery is impossible (art. 1780). In the first case, the creditor must (unless his refusal is “written”) be placed in default for non-performance of his *duty to take delivery* (an obligation to “do”: cf. Chapter on Sale, mistranslated art. 2313). In the second case, even default notice is not a condition for the debtor’s right to “deposit” the thing. Articles 1779 to 1783 are primarily relevant to the law of *Sale*, in which they are wholly included by express reference under *article 2322* (with “*depositing*” mistranslated as “consigning”).

Despite being largely self-explanatory, articles 1779-1783 are the object of extensive comments and illustrations in *David* (pp. 60 to 63), to which our readers are referred.

To avoid redundancies, we will limit ourselves primarily to connecting these articles with related provisions in the context of the Civil Code or the Commercial Code.

B. The debtor’s choice

The debtor is not necessarily limited to the remedy of forcing the creditor to take delivery. (“Deposit”, and its equivalent under art. 1781, are substitutes for delivery.) Where faced by the definite refusal envisaged by article 1779, the debtor can decide to declare cancellation of contract under article 1789, (2) or (3). His choice between *deposit* and *cancellation* will depend on his interest. For example, the creditor (with a false excuse) may have refused the thing owed by the debtor because the thing’s value has decreased. The debtor may then choose to “deposit” the thing and sue for the price agreed. But if, for example, the creditor cannot be found and the thing’s value has not decreased, the debtor may prefer to require cancellation. (If the transaction is “*saJe*”, art. 2349 may or may not become applicable.)

C. Reference

On the special problems arising out of article 1780, in particular with respect to situations where the creditor is unknown or uncertain (“doubts as to the creditor”), see our prior comments under article 1744, sub-articles (1) and (2-3). Incidentally, compare articles 584-585 Commercial Code.

ART. 1781 - SALE OF THE THING

- (1) WHERE THE THING IS OF A PERISHABLE NATURE OR THE COSTS OF ITS DEPOSIT OR CUSTODY ARE DISPROPORTIONATE TO ITS VALUE, THE DEBTOR MAY, WITH THE COURT'S AUTHORIZATION, SELL IT BY PUBLIC AUCTION.
- (2) WHERE THE THING IS QUOTED AT THE STOCK EXCHANGE OR HAS A CURRENT PRICE OR WHERE THE COSTS OF THE SALE BY PUBLIC AUCTION WOULD BE DISPROPORTIONATE TO ITS VALUE, THE DEBTOR MAY, WITH THE COURT'S AUTHORIZATION, SELL IT BY PRIVATE AGREEMENT.
- (3) THE PROCEEDS OF THE SALE MUST IN SUCH CASES BE DEPOSITED WITH A PUBLIC DEPOSIT BANK.

This article is self-explanatory. It requires no comment. Some obvious "illustrations" are provided in *David* (p. 62; cf. art. 93 Swiss Obligations Code).

ART. 1782 - VALIDITY OF DEPOSIT

THE DEBTOR IS RELEASED WHEN THE COURT FINDS THAT THE THING OR THE PROCEEDS OF ITS SALE HAVE BEEN VALIDLY DEPOSITED.

Substituted delivery through "depositing" the thing due (arts. 1779 and 1780) or the proceeds of its authorized sale (art. 1781) releases the debtor effectively only when, at his request, it is declared valid by the court. The debtor may want to obtain this declaration in order to obviate the possibility of future contestations as to, e.g., fulfilment of the requirements of article 1779 or 1780, or conformity of the thing offered with the contractual provisions and the law. This will be checked by the court before finding that the deposit is valid. The debtor's request will be dealt with in accordance with the relevant rules of the Code of Civil Procedure. The creditor will be heard unless an *ex parte* hearing becomes unavoidable after, e.g., a "substituted summons" has been duly served on him without result (art. 105 *cum* 70 (1 a) Civ, Pro. C. , but see also art. 78(2-3)).

ART. 1783 - WITHDRAWAL OF DEPOSIT

- (1) EVEN AFTER THE DEPOSIT HAS BEEN FOUND VALID, THE DEBTOR MAY WITHDRAW THE THING OR MONEY DEPOSITED AS LONG AS THE CREDITOR HAS NOT DECLARED THAT HE ACCEPTS IT.
- (2) WHERE SUCH WITHDRAWAL OCCURS, THE CREDITOR'S CLAIM REVIVES.
- (3) HOWEVER, THE SECURITIES ATTACHING TO THE CLAIM DO NOT REVIVE IF THE DEPOSIT HAS BEEN FOUND VALID BY THE COURT.

A. Preliminary

What is the *legal nature* of the *deposit* contemplated by this article and the preceding four articles ? Since the deposit is made for the creditor, how does it

come about that it can be withdrawn by the debtor? This possibility implies that the deposit here envisaged is that provided by *article 2789* (note that, in the Chapter on Deposit, which includes this article, the French terms for “deposit”, “depositor” and “depositee” are mistranslated as “bailment”, “bailor” and “bailee”); a deposit made in the interest of a third person cannot be withdrawn by (“returned to”) the depositor (the debtor) after that person (the creditor) has accepted (“agreed to”) the depositing. The inference *a contrario* is that it can be withdrawn before. Public warehouses or deposit banks sometimes use special forms for receiving deposits of this kind.

B. Risk, ownership, withdrawal

Although the risk of loss or destruction of the thing deposited is on the defaulting creditor (who will owe the price despite such loss, if any - see comments under art. 1758(2)), he is not yet its owner. “Substitute” delivery by way of deposit does not satisfy the requirement for transfer of ownership provided by article 1186(1). The debtor remains owner and can withdraw the thing deposited despite the deposit’s validation by the court. The creditor takes possession (becomes owner) only when “accepting” the deposit, since from that time the depositee holds it exclusively for him (arts. 1140-1141).

Although, before the creditor’s acceptance, withdrawing a validated deposit is possible, it of course makes the creditor’s claim “revive”. But the debtor may be willing to risk the creditor’s suit (if any) if, for example, the thing’s market price has doubled since he deposited it. Incidentally, it is also in the social interest that goods “move”. (Their prolonged blockage on deposit is wasteful.)

ART. 1784 - JUDICIAL CANCELLATION OF CONTRACT

AT THE REQUEST OF A PARTY, THE COURT MAY CANCEL THE CONTRACT WHERE THE OTHER PARTY HAS NOT OR NOT FULLY PERFORMED HIS OBLIGATION WITHIN THE AGREED TIME.

Under articles **1776** to **1783**, we were discussing the remedies sometimes available to a party who wants to enforce performance of the contract breached by the other party. In cases where these remedies are not available, or for other reasons, the first may, instead, opt for *cancellation* of the contract. Such cancellations are *as a rule judicial* (arts. **1784-1785**). The court decides, after hearing the parties, upon the request for cancellation submitted by the aggrieved party.¹³ The *exceptional* cases where the aggrieved party may “unilaterally” (i.e. of his own motion) cancel the contract are provided by articles **1786-1789**, which will be discussed separately. Other exceptional articles of this kind are included in the Book on Special Contracts.

The term “*may*” denotes that the court is not “bound” to grant cancellation. Guidelines for the use of its discretion in this respect are provided under the next article.

13. The principle of “judicial” cancellation is of French origin. It is not prevalent in other major legal systems; see *Encyclopedia, Treitel*, secs. 147-154.

ART. 1785 - GOOD FAITH

- (1) IN MAKING ITS DECISION, THE COURT TAKES ACCOUNT OF THE INTEREST OF BOTH PARTIES AND OF THE REQUIREMENTS OF GOOD FAITH.
- (2) IT SHALL NOT CANCEL THE CONTRACT UNLESS A FUNDAMENTAL BREACH OF CONTRACT WAS COMMITTED.
- (3) THE BREACH IS FUNDAMENTAL WHERE THE VERY BASIS OF THE CONTRACT IS AFFECTED BY THE NON-PERFORMANCE AND, BECAUSE OF IT, IT IS REASONABLE TO HOLD THAT THE CLAIMANT WOULD NOT HAVE CONCLUDED A CONTRACT SO AFFECTED.

Sub-article (1)

1. The term “both” indicates that, in deciding on whether to cancel a contract, the court should not consider the creditor’s interest alone. We may infer that, where the latter is only a little affected by the debtor’s incomplete performance, while the debtor’s interests would be gravely affected by a cancellation of the contract, or vice versa, such factor should be taken into account.

2. In order to get a grasp of the meaning of the hardly precise expression “*good faith*”, see our comments under articles 1702 and 1713 (note 3.). Since “good faith” is the opposite of “bad faith”, which, roughly, is a synonym for dishonesty, the best meaning for “good faith” is *honesty*. Buyer B violates the requirement of good faith in this sense where he demands cancellation of his contract with seller C for incomplete performance (e.g. a sizable deficiency in quantity), when B’s true reason is that the market value of the goods he bought from C has fallen by half. Since the words “good faith” constitute the very heading of the present article, this requirement is overriding - the cancellation remedy may be available only to a party demanding it for straightforward reasons.

Sub-articles (2) - (3)

1. Although inserted after sub-article (1), sub-articles (2) and (3) provide the *starting* point for the reasoning leading to the court’s granting or, obversely, disallowing the cancellation of contract envisaged by article 1784.

2. Where non-performance (breach) of contract is *total* and irreversible, it is obviously ‘fundamental’, and cancellation (with damages if any) must be granted without need to consider sub-article (1). Example: B has destroyed the specific chattel sold to C, or has sold and delivered it (art. 1186(1)) to D after its sale to C. Even “unilateral” cancellation may be available in such a case (art. 1788), but if the creditor claims damages also, he will have to go to court.

3. Where performance is only *incomplete*, that is, partial (quantity) or defective (quality) or delayed (time), the question arises whether this “incompleteness” in point of quantity, quality or time is sufficient to amount to “non-per

formance”, and, if so, whether it is sufficient to support cancellation of the contract. Regarding the first question, see the problems discussed under the Section on *Performance* of Contracts, and the Section on *Variation* of Contracts: unless “exact” conformity to the contract was expressly agreed or is “essential” to the creditor, a small insufficiency in “quantity or quality” is not even a non-performance (art. 1748), so that *neither* cancellation nor a complementary performance may be required (but the creditor “may proportionately reduce his own performance...”). On the other hand, where performance remains possible but is only “delayed”, the court may, *instead* of cancelling the contract on ground of non-performance, grant the deserving debtor a “period of grace” (unless this is provided against by the parties-art. 1770).

4. In cases falling under this Section on *Non-Performance*, the issue of cancellation will, primarily (i.e., without prejudice to sub-article (1)), depend on the determination whether the given breach (non-performance) of the contract is or is not “*fundamental*”. This adjective is vague. So is its somewhat tautological definition as “affecting the very basis” of the contract. *David* (p. 64, top) refers to the English concept of “frustration,” which (together with the German concept of “Geschäftsgrund- lage”) has allegedly inspired him in drafting this formula. But perusal of English treatises on Contracts shows that the “frustration” concept deals with a problem different from the above one (e.g., see *Jenks*, art. 242 *in fine*). Somewhat more helpful is David’s recommendation to see this formula “in connection with provisions concerning error in the formation of contracts”.

But most instructive is David’s obvious paraphrase of and reference to article 157 (2) Egyptian Civil Code, which simply provides as follows: “The judge may also reject an application for rescission (cancellation) when the part which the debtor has failed to perform is of little importance in comparison with the obligation in its entirety”. In the light of this provision, we submit that the Ethiopian definition of “fundamental breach” in article 1785 (3) would gain in clarity and facilitate application if reworded as follows:

“The breach is fundamental where, because of its importance in relation to the whole contract, it can be reasonably assumed that the claimant would not have concluded the contract had he foreseen such breach.”

Incidentally, it seems that the Code’s remedy for the psychological destruction of a confidence-based contractual relationship is not [retrospective] cancellation (*David*, p. 64), but termination: see article 1823 with article 1819(3).

5. Of the two *illustrations* for judicial cancellation given in *David*, the first (p. 64) is apt and instructive. The second (p.65) is wrong and misleading, because it overlooks the existence of the Chapter on Loan of Money in the Book on Special Contracts: B is not entitled to request cancellation of his 7 % 5 years’ loan of ES.3000 to A (who in such case would immediately have to repay the loan) on the ground of the latter’s failure to pay one of the three-monthly instalments of the interest due. Neither has the court any discretion to consider B’s demand in light of the several considerations set forth by David. This, because of the mandatory article 2488, the

effect of which is to bar cancellation (repayment) of the loan until A is (not 3 months but) over 15 months in arrears.

6. Where the court refuses to grant cancellation, this in no way affects the aggrieved party's right to compensation for the shortcomings in the performance of the contract upheld by the court (art. 1790(1)), or to reduction of his own performance pursuant to article 1748(2) where applicable.

ART. 1786 - UNILATERAL CANCELLATION OF CONTRACT:

1. CANCELLATION CLAUSE

A PARTY MAY DECLARE THE CONTRACT CANCELLED WHERE AN EXPRESS CLAUSE TO THIS EFFECT HAS BEEN INCLUDED IN THE CONTRACT AND THE CONDITIONS FOR THE APPLICATION OF SUCH CLAUSE ARE REALIZED.

A. Preliminary

Contrary to articles 1784-1785, which deal with the “judicial” cancellation of contract, *articles 1786 to 1789*, numbered 1 to 4, deal with the exceptional cases where *unilateral* cancellation of contract (not involving the court) by the aggrieved party is authorized by law. The policy reasons for introduction of these exceptions seem to be the following:

- (1) The rapidity of modern business, which requires quick solutions;
- (2) the need to avoid overloading of court dockets with cases that can be settled without judicial intervention;
- (3) the fact that, save for the cancellation clause (freedom of contract), these exceptions are practically limited to cases where cancellation would impose itself on the court if brought before it.

B. Cancellation clause

In the absence of mandatory prohibitions (such as that of art. 2488(3)), contractual clauses providing for unilateral cancellation of the contract on specified conditions would be effective, in virtue of the “freedom of contract” principle (art. 1711), even without the present article. But there is no harm in having it on the books. It is self-explanatory and requires no comment, save for emphasizing that the “condition” for cancellation may be the breach of a contractual provision which a judge would not have deemed important enough to justify cancellation in the absence of a contractual clause to that effect.

ART. 1787 - 2. EXPIRY OF TIME-LIMIT

A PARTY MAY DECLARE THE CONTRACT CANCELLED WHERE THE OTHER PARTY HAS NOT PERFORMED HIS OBLIGATIONS WITHIN THE PERIOD FIXED IN ACCORDANCE WITH ART. 1770, 1774 OR 1775(b).

'This article authorizes unilateral cancellation of contract “where the other party has not performed his obligations within the period fixed in accordance with

Arts. 1770, 1774 or 1775 (b)” (in legal parlance, such periods are called *compulsory periods*). These articles figure, respectively, in the Section on *Variation of Contracts* (art. 1770) and the Section on *Performance of Contracts* (arts. 1774 and 1775(b)). They have been commented on by us under those Sections. At this point, the reader is only asked to compare the qualifying provisions of the Chapter on *Sale* concerned with “expiry of time-limit” grounds for unilateral or automatic cancellation of contract:

- (a) Article 2337 extends the effect of article 1787 *cum* 1775 (b) by providing that any delivery date is deemed “compulsory” (for the purpose of unilateral cancellation) where “the thing has a market price”.
- (b) Article 2338 strengthens the effect of article 1787 *cum* 1770 or 1774: the cancellation follows automatically “as of right” without the need for the buyer to declare it.
- (c) Article 2339 modifies the effects of article 2338(2) *cum* 1774 by authorizing the seller, where the time limit set by the buyer is unreasonable (too short), to avoid its consequence by a prompt rejecting notice, failing which he is deemed to accept the buyer’s time limit. (This obviates any need for judicial intervention.)

David’s iUustations 1 and 2 on page 67 are simple and clear. Unfortunately, they are also wrong and misleading, because they overlook the existence of the Chapter on Loan of Money in the Book on Special Contracts:

At 1.: so far from the Code authorizing B to cancel his loan to A by unilateral declaration, its mandatory provision under article 2488 voids the very stipulation purporting to give B this power on terms contrary to sub- article (1): see sub-article (3).

At 2.: the court has no power to fix a period for A’s payment of interest to B shorter than that provided by sub-article (1) of the same mandatory article. A can appeal against this decision on ground of violation of article 2488. Compare our elaborate comment 5, under article 1785.

ART. 1788 - 3. PERFORMANCE IMPOSSIBLE

A PARTY MAY DECLARE THE CONTRACT CANCELLED, EVEN BEFORE THE OBLIGATIONS OF THE OTHER PARTY FALL DUE, WHERE THE PERFORMANCE OF THE CONTRACT BY THE OTHER PARTY HAS BECOME IMPOSSIBLE, OR WHERE IT IS DELAYED TO SUCH AN EXTENT THAT THE VERY BASIS OF THE CONTRACT IS AFFECTED THEREBY.

1. Impossibility of performance may exist at the time of the contract’s conclusion, or may occur thereafter. The first kind, called *original* impossibility, makes the contract void (of no effect) from the outset pursuant to *article 1715*, while the second kind, called *supervening* impossibility (whether or not due to fault), is the main ground

for unilateral cancellation of a valid contract under the *present article*. Instances of impossibility of performance given in our comment 1, under article 1715 (ox dies, cargo sinks, specified beetroots rot) can serve to illustrate also the present article, where the material facts occur after the contract's conclusion. The creditor entitled to the delivery of the goods lost can unilaterally cancel the contract (under the Code's theory of "risk", he shall not pay the price, and shall recover it if already paid: see our comments under art. 1758(1)). In addition, he is given the same right where the impossibility to deliver them sometime is not absolute, but delivery is (and/or will be) "*delayed*" to such extent that "the very basis of the contract is affected thereby". Fit examples of such a contingency are given in *David*, p. 67, illustration 3 (delay due to revolution, war or blockade of unpredictable duration). But because of the vagueness of the above-cited passage, the aggrieved party may sometimes be on safer ground if he simply serves the debtor with a default notice indicating a time limit for performance pursuant to article 1774, with a view to cancellation under article 1787. Incidentally, compare the present article with a like provision implementing it in the Chapter on Sale (art. 2352).

2. The above-mentioned cases of *physical* impossibility of performance should be distinguished from those of *legal* impossibility: the giving or doing of something contrary to a "mandatory" legal prohibition enacted after the contract's conclusion, e.g. a prohibition of importing the goods ordered by B from C, or prohibition of the hunting of Nyala antelopes booked by B from the "safari" firm C. In both cases B can unilaterally cancel the contract, and withhold or recover any advance on the agreed price.

3. Suppose that a uniquely gifted pianist engaged a year in advance for a concert, loses two fingers in an accident. The possibility of cancelling this contract or, where appropriate, other contracts *in anticipation* of their unavoidable non-performance at the due time (see "even before") facilitates the creditor's early planning of other transactions to replace the impossible one. Compare such "anticipatory impossibility" with the "anticipatory breach" discussed under article 1789, below.

4. Impossibility to perform the contractual obligation may be total or partial (e.g., only a part of the specified goods to be delivered is lost or rotten; the import of the goods ordered is only in part restricted; the hunting of the Nyala is only in part prohibited). *David* (p. 66, last para.) says that in a situation where a party can perform the contract only *in part* (or late), article 1788 "states explicitly" that the other party can cancel the contract if its very "essence" (an esoteric term used instead of "basis" by David's translator) is affected. We cannot but observe that, although this article deals with impossibility of (or prohibitive delay in) performance, it does *not* even mention partial impossibility of performance (perhaps it did in a preliminary version?). So in disputed cases of partial impossibility (see above examples), the aggrieved party cannot unilaterally cancel the contract, but must go to the court. If the court decides to uphold the contract (for reasons drawn by analogy from Art. 1785), it will adjust it, not under this Section on Non-Performance of Contracts, but under the Section on *Variation* of Contracts by (proportionately) reducing the aggrieved party's obligations pursuant to *articles 1768-1769* [see our comments thereunder].

ART. 1789 - 4. PERFORMANCE REFUSED [anticipatory breach]

- (1) A PARTY HAS THE SAME RIGHT WHERE THE OTHER PARTY CLEARLY INDICATES THAT HE WILL NOT PERFORM THE CONTRACT.
- (2) IN THIS CASE, HOWEVER, THE RIGHT TO CANCEL MAY BE EXERCISED ONLY AFTER GIVING A DEFAULT NOTICE, AND THE RIGHT IS LOST IF THE PARTY IN DEFAULT PRODUCES WITHIN FIFTEEN DAYS FROM THE NOTICE SECURITIES SUFFICIENT TO MAKE SURE THAT HE WILL PERFORM HIS OBLIGATIONS AT THE AGREED TIME.
- (3) DEFAULT NOTICE IS UNNECESSARY AND CANCELLATION MAY BE DECLARED FORTHWITH WHERE THE OTHER PARTY'S REFUSAL TO PERFORM HIS OBLIGATIONS IS COMMUNICATED IN WRITING.

The "provisional" consequence of a party's (non-performance or of his) clear indication *that he will not* perform his obligation, is the other party's right to "*suspend*" his own performance. This has been amply explained in our comments on articles 1757 and 1759 with footnote. Sub-article (1) of the present article enables the aggrieved party to transform this *provisional* "suspension" remedy (see case discussed under art. 1757(2)) *into a final* remedy by unilaterally declaring the contract cancelled before the refusing party's obligation falls due according to the contract. This the aggrieved party may declare either forthwith where sub-article (3) applies (compare art. 1775(c)), or pursuant to sub-article (2) after giving a default notice which can be defeated only by the refusing party's producing within 15 days "securities sufficient to ensure that he will perform his obligations at the agreed time". If, however, the aggrieved party prefers the remedy of forced performance (e.g. because the deal was profitable for him), he must wait for the "agreed time" to come and then request the court to, for example, authorize him to act pursuant to article 1777(1). The reader is invited to supplement the case discussed under article 1757(2) with facts illustrating this possibility.

ART. 1790 - THE DAMAGE CAUSED BY NON-PERFORMANCE

- (1) APART FROM ENFORCEMENT OR CANCELLATION OF THE CONTRACT, OR CONCURRENTLY WITH THESE REMEDIES, A PARTY MAY REQUIRE THAT THE DAMAGE CAUSED HIM BY THE OTHER PARTY'S NON-PERFORMANCE OF HIS OBLIGATIONS BE COMPENSATED.
- (2) SAVE AS OTHERWISE PROVIDED BY THE FOLLOWING ARTICLES, THE MODE AND EXTENT OF THE COMPENSATION SHALL BE AS PROVIDED BY THE CHAPTER OF THIS CODE RELATING TO EXTRA-CONTRACTUAL LIABILITY (ARTS. 2090-2123).

A. Preliminary

After having discussed a series of provisions dealing, respectively, with the remedy of enforcement (arts. 1776-1783) or cancellation (arts. 1784-1789) of a non

performed contract, we shall now turn to consider the remedy of compensation for the damage caused by non-performance to the party aggrieved (arts. 1790-1805). This remedy is available regardless of which or even whether one of the other two remedies is being applied (*contra, David*, p. 68, top). Indeed, unless forced by the other party to make his choice or else suffer cancellation (art. 1814; in the law of Sale cf. art. 2354), the aggrieved party may demand compensation for delay without yet making the final choice (see “apart from” in sub-art. (1)). See our comment and example under article 1771, sub-article (2).

B. Art. 1790(1) v. art. 1815

A difficult question: Is the *kind* of damage to be compensated the same in the case of, respectively, enforcement *or* cancellation of contract? Article 1790(1) makes no distinction - in *both* cases (see “concurrently with”), the kind of damage to be compensated is that caused by the defaulting party’s non-performance of the contract. Where *forced performance* is applied in either of the ways described by us under articles 1776 to 1778, damages for delay are recoverable, as are also enforcement costs under article 1776, or expenses for substitutionary performance under articles 1777-1778. Where such actual or substitutionary performance cannot be obtained, the creditor still ready to perform his part (or having validly “deposited” the thing due by him) will be compensated for the damage *caused by non-performance* of the contract by the defaulting party, that is, will *financially* be put *in the position he would be in, had the contract been performed*. Unfortunately, however, the provision of article 1790(1) granting *the same* remedy to a party who has obtained or declared *cancellation* of the non-performed contract is *inconsistent* with the provision of article 1815 on the effect of cancellation of contract: the purported effect is to put (“reinstate”) the parties “*in the position they would be in, had the contract not been made*” (recovery criterion including restitution and “reliance” expenditures), and not “had the contract been performed” (recovery criterion including loss of the expected performances). Unless they can somehow be reconciled (see *Encyclopedia, Treitel*, secs. 183-184), which of the inconsistent articles shall prevail? We suggest that article 2090 (1) should, for the following reasons:

- (1) Article 1790(1) figures in the very Section on Non-Performance of Contracts.
- (2) Article 1815 should not have equated the effect of cancellation of a valid contract because of its non-performance with the effect of invalidation of an originally defective contract (cf. *Engel*, p. 496 cc).
- (3) The predominant special contract is Sale. In a sale, damage caused by non-performance is recoverable ‘whether or not the contract is cancelled or upheld’; see article 2360 *cum* 2362(1). Reinstating the buyers and sellers “in the position they would be in, had the sale contract not been made” would obviously be absurd. They are released from their contractual obligations only “*subject to the compensation that will be due*” (art. 2355 (I), translation corrected). Cf. *Farnsworth* (cited under art. 1778) p. 249, top and fn. 4.

14. The words “they would be in” are mistranslated as “which would have existed”.

- (4) Practice seems to follow article 1790(1), unembarrassed by **its inconsistency** with article 1815. Incidentally, the cancelling party will not recover for **damage** from non-performance in the cases where he suffers none because he can **get** what was due by the debtor from other sources at the same or lesser cost.

See comparative law discussion in *Encyclopedia, Treitel*, pp. 31-40 (caution: Treitel uses the word “termination” for what our code calls “cancellation”).

- C. Reference to arts, 2090-2123.
(The comment in *David* is erroneous: see editor’s note 27.)

These provisions of the “Extra-Contractual Liability” Chapter, dealing with the “Mode and Extent of Compensation” (for damage from torts), are included by reference in this Section’s provisions on compensation for damage from breach of contracts. However, they apply only *where not otherwise provided* by the latter provisions (arts. 1791-1805) which therefore, where inconsistent with the first mentioned provisions (arts. 2090-2123), prevail over them, or *qualify* them to the extent of the inconsistency (for example, art. 1799 qualifies art. 2091). We shall only incidentally refer to articles of that group, study of which is beyond the scope of this Commentary on Contracts. Most of them were discussed briefly in *Krzecunowicz 1*, and extensively in *Krzecunowicz II* (which includes an introductory theory of “damage”).

D. Organization

In the remainder of this Section, articles 1791 to 1798 deal with the question “*when* compensation on ground of non-performance of a contractual obligation is due” (liability problem), while articles 1799 to 1805 deal with the question “*what* will be the *amount* of the compensation found to be due” (extent of liability problem).

ART. 1791 - THE COMPENSATION: WHEN DUE

- (1) THE COMPENSATION IS DUE FROM THE PARTY **WHO** DOES NOT PERFORM HIS OBLIGATION EVEN WHEN HE COMMITTED NO FAULT.
- (2) HE IS RELEASED ONLY IF HE CAN ESTABLISH THE PRECISE CAUSE OF HIS NON-PERFORMANCE AND THAT SUCH CAUSE AMOUNTS TO FORCE MAJEURE.

Pursuant to article 1790(1) with article 1791(1), the plaintiff in a contract action for compensation must affirm that

- (a) he suffered damage;
- (b) this damage was caused by the defendant’s non-performance of a contractual obligation (in most obligations of “result” [see below], nonperformance is necessarily inferred from lack of evidence of performance).

Assuming that affirmation (a) is proved, how may the defendant resist the liability attaching to affirmation(b) ? He can do it in one of the following ways (where pertinent) :

1. **Admission cum denial of liability** (art. 1791 (2))

The defendant may admit his non-performance while avoiding its “liability” consequence by:

- (i) establishing the precise cause of his non-performance (e.g., the horse to be delivered by the defendant was killed by a truck).
- (ii) showing that cause was a *force majeure* event within the meaning of article 1792 (the defendant could neither foresee nor prevent this event: the truck skipped over a ditch onto the grazing horse).

2. **Denial of non-performance** (art. 1795)

Here the defendant, rather than merely avoiding the “liability” consequence of the plaintiff’s claim, destroys its root. The defendant denies his very non-performance by showing that he did *not* undertake an obligation to reach the *result* aimed at for the plaintiff’s benefit, but only *to do his best* toward reaching it (art. 1795(1a)). He is therefore, in the first place, *not* guilty of any *non-performance* unless he committed a fault which, if any, remains to be proved. Obligations to “give” (procure a right on a thing) and obligations “not to do” are normally obligations of result, while obligations “to do” may be either of “result” or of mere “diligence” (doing one’s best). This distinction has been worked out by French legal writers (see *Mazeaud*, No. 21). For explanations and illustrations, see our comments under article 1712.

Exceptions

In sub-article (2), the term “only” must not be understood to exclude particular exceptions. Even in obligations “of result”, as in carriage of goods, special legal provisions may, in addition to *force majeure*, set up other grounds for relieving the debtor of liability: see, for example, article 591 Commercial Code.

ART. 1792 - FORCE MAJEURE

- (1) FORCE MAJEURE IS CONSTITUTED BY AN EVENT WHICH COULD NOT NORMALLY BE FORESEEN BY THE DEBTOR AND WHICH PREVENTS HIM ABSOLUTELY FROM PERFORMING HIS OBLIGATION.
- (2) AN EVENT DOES NOT CONSTITUTE FORCE MAJEURE WHERE IT COULD NORMALLY BE FORESEEN BY THE DEBTOR, OR WHERE IT ONLY MAKES MORE ONEROUS THE PERFORMANCE BY THE DEBTOR OF HIS OBLIGATION.

A. Definition

The expression *force majeure* is left in the French language by the translator. The French expression, in turn, is a translation of the Latin expression *vis maior* (“superior force”), which is still used in scholarly writings and denotes **an event making a performance impossible**. English lawyers speak simply of

“impossibility” of **performance** (see *Jenks*, arts. 239-248), without coining a single expression for the event creating it (depending on its kind, they **do or** did call it act of God, act of nature, restraint of princes, etc.) In *Ethiopian law*, *force majeure* stands on *two* legs; it must be an event which

- (a) could not “normally” be foreseen by the debtor (an *average* person would not have foreseen it), *and*
- (b) prevents him “absolutely” from performing his obligation (*no* person could have performed it).

Consequently, neither an event which makes performance absolutely impossible but should normally have been foreseen, nor one which was normally unforeseeable but only increases the difficulties and costs of the performance without making it absolutely impossible, are *force majeure* events releasing the debtor from liability in damages under article 1791(2).

B. Sources

In *David* (p. 69, para. 2), it is rashly stated that this strict approach to the debtor’s liability is inspired by article 1147 French Civil Code. However, this article is quite different from our article 1791: the French debtor remains liable “in all cases where he does not prove that the non-performance results from an external cause that cannot be imputed to him, despite the fact that he is not in bad faith”, a supremely vague formula. It is the next article of the French Code (art. 1148) that establishes the defence of *force majeure* without, however, defining it,¹⁵ which the Ethiopian Code aptly does in the present article. *David* further affirms (*ibid.*, para. 3) that this “strict” liability of the debtor is in conformity with a “policy which is also followed in the common law”. This affirmation does not seem to tally with the English doctrine of “frustration of the adventure” (*Jenks*, art. 242 *in fine*), which is mentioned in our comments under article 1764(1).

C. Art. 1788 distinguished

Since article 1788 deals with impossibility of performance, it seems necessary clearly to *delimit* its province from that of the present article:

- (1) article 1788 does not purport to release the non-performing party from liability in damages, but only to provide a ground for unilateral cancellation of contract by the aggrieved party;
- (2) accordingly, article 1788 applies, whether or not the impossibility to perform is due to *force majeure*, and whether or not it is due to the debtor’s fault: the ox, cargo or beetroots to be delivered may have been lost through the debtor’s fault, or he may himself have induced the legal prohibition of importing them. See our comments under art. 1788.

15. or defining the obscure addition “oucas fortuit” (“or fortuitous event”): see *Walton* //, pp. 288-293.

ART. 1793 - CASES OF FORCE MAJEURE

IT FOLLOWS THAT, DEPENDING ON CIRCUMSTANCES, THE FOLLOWING EVENTS MAY CONSTITUTE CASES OF FORCE MAJEURE:

- (a) THE UNFORESEEABLE ACT OF A THIRD PARTY FOR WHOM THE DEBTOR IS NOT ANSWERABLE; OR
- (b) A GOVERNMENTAL PROHIBITION PREVENTING THE PERFORMANCE OF THE CONTRACT; OR
- (c) A NATURAL CATASTROPHE, SUCH AS AN EARTHQUAKE, LIGHTNING OR FLOOD; OR
- (d) AN INTERNATIONAL OR CIVIL WAR; OR
- (e) THE DEATH OR AN UNEXPECTED GRAVE ACCIDENT OR ILLNESS OF THE DEBTOR.

The present article makes no change in the law. It merely, by way of illustration, enumerates events which *may* amount to “force majeure”, *depending on* whether the surrounding circumstances fit (not the judge’s whim but) the requirements of article 1792. In light of the latter, the following situations may be deemed *force majeure*:

- at (a): an irresistible armed robbery of the thing due, occurring in a **usually** safe town district.
- at (b): an unexpected legal prohibition, without time limit or with a remot* time limit, of importing the goods to be delivered;
- at (c) a flood in an unlikely area destroying the object due which could not be moved, or could not be carried away in time;
- at (d): an unexpected interruption of communications, due to an internal or external war, which makes a “carriage” obligation impossible:
- at (e): an unexpected disabling illness of the debtor *if* bound *personally* to perform a certain work, e.g., paint a portrait, write a book, make a sculpture, repair a watch, etc.

In such and other *force majeure* situations, the non-performing party is released from Liability for the resulting damage, while the other party relieves himself from doing his part by declaring the contract cancelled, pursuant to article 1788.

For further examples, read *David*, p. 70, with the following caution: since liability under article 1791(1) is not based on fault, David should not have mentioned fault in cases 2 (“badly chosen”) and 3 (“greater care”) as if it were relevant to A’s liability. (Incidentally, case 3 must be solved pursuant to art. 590 Comm. C.) As to case 5, it should have been argued in terms of *force majeure* as defined in article 1792. David’s comments on these cases fit article 1147 French Civil Code (quoted above under art. 1792, comment B) rather than Ethiopian law. With respect to foreign approaches to problems of or related to *force majeure*, there is a wealth of illustrations in *Walton U*, pp. 287-327.

ART. 1794 - ABSENCE OF FORCE MAJEURE

UNLESS OTHERWISE EXPRESSLY AGREED, THE FOLLOWING EVENTS SHALL NEVER CONSTITUTE CASES OF FORCE MAJEURE:

- (a) A STRIKE OR LOCK-OUT OCCURRING IN THE FACTORY OF A PARTY OR IN THE BRANCH OF BUSINESS IN WHICH HE PURSUES HIS ACTIVITY; OR
- (b) AN INCREASE OR REDUCTION IN THE PRICE OF RAW MATERIALS NECESSARY FOR THE PERFORMANCE OF THE CONTRACT; OR
- (c) THE ENACTMENT OF NEW LEGISLATION WHEREBY THE OBLIGATION OF THE DEBTOR BECOMES MORE ONEROUS.

Preliminary

After the non-exclusive enumeration, in article 1793, of events which *may* amount to *force majeure*, the Code gives us an exclusive enumeration of events which *shall never* constitute *force majeure*. However, the present article is not mandatory but permissive, as shown by the sub-sentence “unless otherwise expressly agreed”. This is an implicit reference to article 1887, which generally enables contracting parties to limit their liability to fault (except where a special legal provision prohibits such limitations, as under arts. 593(2) and 598(2) Comm. C.).

Sub-articles (b) and (c)

These sub-articles make no change in the law. The Code’s general definition of *force majeure* {art. 1792) suffices to rule out treating the events mentioned under these sub-articles as cases of *force majeure*. Their enactment seems to reflect lack of confidence in the courts’ proper grasp and application of general rules unsupported by illustrations.

Sob-article (a)

This provision makes a change in the law, and is unusual. In several foreign systems, a strike in the debtor’s works or business may or may not constitute *force majeure*, depending on whether it could or could not have been foreseen and prevented. On French practice as to strikes, see *Walton II*, pp. 314-315. The rigidity of our rule “strike or lock-out is never *force majeure*” seems to reflect lack of confidence in the courts’ judicious exercise of their discretion within the sole framework of article 1792.

ART. 1795 - PROOF OF FAULT

IN THE FOLLOWING CASES, A PARTY MAY CLAIM COMPENSATION ON GROUND OF NON-PERFORMANCE OF HIS OBLIGATION BY THE OTHER PARTY ONLY BY PROVING THAT THE DEBTOR HAS COMMITTED A FAULT:

- (a) WHERE THE DEBTOR HAS ONLY UNDERTAKEN TO DO HIS BEST TO REACH A CERTAIN RESULT FOR THE BENEFIT OF THE OTHER PARTY WITHOUT GUARANTEEING THAT HE WILL REACH IT; OR
- (b) WHERE SUCH AN EXCEPTION IS EXPRESSLY PROVIDED BY LAW FOR A SPECIAL CONTRACT.

A. Preliminary

The rule on “when compensation is due”, as expressed in article 1791 (and elaborated in arts. 1792 to 1794), is subject to the *exception* provided by the present article. Since in contract law obligations of result are the rule, in case of uncertainty it is for the *defendant* to establish the applicability of the exceptional provision of article 1795, which requires the claimant-creditor to prove the debtor’s fault. This the defendant-debtor may do by

- (1) referring to the special legal provision, if any, envisaged by sub-article (b) of this article, or
- (2) referring to the pertinent custom if any (art. 1713 cum 1733), and/or
- (3) using the basic arguments set out in our *comments* under article 1712(2).

B. Fault

What is “fault” ? The law of Contract contains *no general definitions* of fault, but only some particular definitions applying to special contracts such as agency (art. 2211), employment (art. 2524), intellectual work (art. 2636). What constitutes fault where no such particular definition is available? The Code’s only general definitions of fault are those supplied by Section 1, Para. 1 of the “Extra-Contractual Liability” Chapter (see Revised Translation in Krzeczunowicz I or II). They have been the subject of extensive comments and illustrations in *Krzeczunowicz I*, and some of them (primarily art. 2030, but obviously not its sub-art. (3)) may, in fit cases, be used by analogy for the purposes of the present article. This, however, must be done with due caution and discernment, since breach of a promise given a person to do something for him diligently (art. 1795(a)) essentially differs from the universal duty not to harm any persons by fault (art. 2028). The closest analogy concerns professional fault, the definition of which in article 2031 can evidently apply also to professional services promised in contracts (representation of competence): see *Krzeczunowicz, I*, p. 77.

C. Examples

In *David* (p. 71, bottom), *illustration 1* gives a fit example of an obligation of “diligence” in trying to reach a result which is not guaranteed: a surgeon performing an unsuccessful operation is not liable unless the complaining patient “proves” that the surgeon “committed a fault”. (Incidentally, this correct illustration does not tally with a passage on top of the same page, which reads: “if *he* [the debtor] proves that he ... committed *no* fault”.) The surgeon may have left some dressing in the patient’s belly, extracted a healthy tooth instead of the diseased one, prescribed the wrong drug, etc. His conduct will be assessed in the light of professional rules well known only to specialists; cf. article 2647(1).

D. A puzzle

Famous singer B, engaged by C for a “solo” concert, dies, on his way to the concert, in an accident caused by his *fault*. C had rented a theatre for the performance and sold tickets to persons he must now reimburse. From whom, if anybody, may B recover damages ?

ART. 1796 - GRAVE FAULT

WHERE THE CONTRACT IS MADE FOR THE EXCLUSIVE ADVANTAGE OF ONE PARTY, THE OTHER PARTY IS LIABLE TO PAY COMPENSATION FOR NON-PERFORMANCE ONLY IF HE HAS COMMITTED A GRAVE FAULT.

A. Meaning of “grave”

Where the debtor has undertaken something “for the exclusive advantage of the other party,” that is, gratuitously (cf. art. 1739), the scope of his obligation is less than under the preceding article. He is not liable even for fault, unless the latter is *grave*. Since this adjective is *not defined*, the judicial findings of the fault’s gravity are discretionary. In *David* (p. 72, *illustration 2*), it is affirmed that, for example, in the case of gratuitous deposit, “a grave fault will exist only where B [the holder] takes less care with the [deposited] suitcase than he would with *his* ok»”¹⁶ (and the argument continues with a “therefore” etc., which is not to the point). To this affirmation, our objection is twofold:

- (a) it finds *no* support in the text of the present article, which it is supposed to illustrate;
- (b) the criterion used is taken from sub-article (2) of article 2722 (of the Book on Special Contracts) where, however, it is *not* linked with the concept of “grave” fault. Indeed, a slight fault suffices to make liable a deposit- holder who is highly careful with his own belongings. For the above reasons, we tentatively suggest that a more useful meaning for “grave”

16. The *diligentia quam suis rebus* of the Roman Law: see *Lee*, No. 403.

fault may be the following (adapted from *Krzeczunowicz I*, pp. 70-71): intent to injure, or *reckless* negligence, i.e. disregarding the known probability that the fault committed may seriously injure the other party (cf. art. 59 (1) Penal Code).

B. Example

An advocate who accepts gratuitously the representation of a friend in litigation is not liable for professional fault (art. 2636) where he negligently fails to submit to the court material points of fact and law, unless he was *aware* of the Likelihood that his client may thereby lose the case. His awareness may be *inferred* from circumstances, e.g. from the fact that he is a seasoned old lawyer, who therefore obviously must have been so aware.

ART. 1797 - WARNING TO OTHER PARTY

- (1) THE DEBTOR SHALL FORTHWITH INFORM THE OTHER PARTY OF THE CAUSE PREVENTING HIM FROM PERFORMING HIS OBLIGATION.
- (2) HE IS LIABLE AS THOUGH THE NON-PERFORMANCE WERE ATTRIBUTABLE TO HIM FOR ANY DAMAGE SUSTAINED BY THE OTHER PARTY WHICH THE LATTER COULD HAVE AVOIDED, HAD WARNING BEEN GIVEN.

ART. 1798 - EFFECT OF DEFAULT

COMPENSATION IS OWING EVEN WHERE THE NON-PERFORMANCE IS DUE TO FORCE MAJEURE IF THE FORCE MAJEURE OCCURRED WHEN THE DEBTOR WAS IN DEFAULT.

A. Theory

The afore-discussed exceptions to the principle of liability without fault benefit the debtor: in derogation from article 1791(1), he is liable only for fault (art. 1795), or grave fault (art. 1796). Obversely, the above two *exceptions* to the rule that *force majeure* releases the debtor benefit the creditor: in derogation from article 1791(2), the debtor is not wholly released where he failed to warn the other party (art. 1797), or is not at all released if he was in default (art. 1798). In the “default” case, however, it might be more correct to say that the debtor’s non-release is due to the non-occurrence of *force majeure* as defined in article 1792 (1), since the impossibility to perform could have been “prevented” by timely (i.e. faultless) performance. But since this theoretical distinction makes no difference in practice, the Code’s formula applies without inconvenience.

B. Qualification of art. 1798

In other respects, articles 1797-1798 are self-explanatory, requiring no comments. It should only be noted that the provision of article 1798 is qualified in

relation to all the “Contracts for the Custody, Use or Possession of Chattels” enumerated under Title XVII Civil Code; pursuant to *article 2723*, the chattel- holder in default for not returning the chattel is *not* liable for its loss by *force majeure* if it would have been similarly lost (e.g. destroyed by the same flood or fire, or taken by the same requisitioning authority), had it been returned to the owner when due. A like result might be reached generally by affirming (cf. *David*, p. 74) that in such cases the owner suffers no damage (but see another opinion in *Krzeczunowicz II*, P- 30(g)).

ARTICLES 1799, 1800, 1801

(jointly quoted and commented on below):

ART. 1799. NORMAL AMOUNT OF DAMAGES

- (1) COMPENSATION IS EQUAL TO THE DAMAGE WHICH, ACCORDING TO THE *FORESIGHT OF A REASONABLE* PERSON. NON-PERFORMANCE WOULD NORMALLY CAUSE TO THE CREDITOR.
- (2) IN ASSESSING THE ABOVE, REGARD SHALL BE HAD NOT ONLY TO THE TYPE OF CONTRACT, BUT ALSO TO THE PROFESSION OF AND RELATIONS BETWEEN THE PARTIES AND OTHER CIRCUMSTANCES *KNOWN* TO THE DEBTOR, ON THE BASIS OF WHICH IT MUST BE ASSUMED THAT THE CONTRACT WAS MADE.

ART. 180 UvSstR DAMAGE

WHERE THE DEBTOR PROVES THAT THE DAMAGE ACTUALLY SUSTAINED BY THE CREDITOR IS LESS THAN THE ABOVE AMOUNT, HE SHALL BE LIABLE TO THIS LESSER EXTENT.

ART. 1801 - GREATER DAMAGE

- (1) COMPENSATION IS EQUAL TO THE DAMAGE *ACTUALLY* SUSTAINED BY THE CREDITOR *WHERE THE* DEBTOR, ON MAKING THE CONTRACT, WAS FOREWARNED BY THE CREDITOR OF THE PARTICULAR CIRCUMSTANCES OWING TO WHICH THE DAMAGE IS GREATER.
- (2) COMPENSATION IS EQUAL TO THE ACTUAL [greater] DAMAGE *WHERE* NON-PERFORMANCE IS DUE TO THE DEBTOR’S INTENT TO INJURE, OR TO HIS GROSS NEGLIGENCE OR GRAVE FAULT.

The convoluted provisions of the above three articles proved too unwieldy for articulate applications in Ethiopian decisional law. As will be shown, their rational simplification is desirable. The discussion that follows is a curtailed adaptation from *Krzeczunowicz II*, Part II, Chapter 3, Topic 5.

A. Introduction

While article 2091, concerning Tort law, does not limit compensation to such harms as were normally foreseeable, *article 1799 (1)*, concerning Contract law, restricts compensation for non-performance to *normally foreseeable* harms. Thus, of all *departures from the principle of equivalence* between damage and compensation (art. 2091), that enacted by article 1799(1) is the most general in both content and scope of application. Its content generally excludes compensation for damage that was not normally foreseeable. And, since this departure from principle figures in the “Contracts in General” Title, its scope of application includes all contract law.

In view of its generality, does this departure from principle amount to obliteration rather than qualification of article 2091 for the purposes of Contract law? The provision relevant to this question is *article 1790(2)* (discussed earlier), which reads as follows:

SAVE WHERE OTHERWISE PROVIDED BY THE FOLLOWING ARTICLES, THE MODE AND *EXTENT* OF THE COMPENSATION SHALL BE AS PROVIDED *BY* THE EXTRA-CONTRACTUAL LIABILITY CHAPTER OF THIS CODE (ARTS. 2090-2123).

The tort law of compensation for damage is thus incorporated by reference in the law of Contracts in General. Among the incorporated provisions (arts. 2090-2123) figures the basic principle of *equivalence* (in extent) between damage and compensation (art. 2091). Article 1799, therefore, coming after the incorporating provision, only *qualifies* this equivalence principle of article 2091 by basically restricting its application in Contract law to normally foreseeable damage.

In light of this context, the formulation of article 1799 and that of the following articles 1800-1801 are unnecessarily cumbersome. The latter articles, appearing as exceptions to article 1799 (itself exceptional despite its relative generality), in fact denote but a full return to the “equivalence” rule of article 2091. That rule remains in full force where the amount of damage is less than normal (art. 1800) and, in the circumstances set forth by article 1801, where it is more than normal. This finding seems incompatible with the following proposition of the Code’s expert draftsman (see *David*, p. 72):

“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 nonperformance caused the other party. One begins by asking, more abstractly, what injury one would *normally* expect from the failure to perform the contract”.

We respectfully submit that, after having incorporated the principle of equivalence between (actual) damage and compensation in contract law (see above), the draftsman was *no longer free* to say that, in order to decide on the extent of compensation, one need not start from the actual injury. He probably overlooked this when formulating articles 1799-1801. He affirms that the basic formula of article 1799(1) is inspired not by French law but “by the English rule derived from the case or *Hadley v. Baxendale*” (though not by all of its consequences). Even in England,

however, a plaintiff most often starts from his “actual” injury, whereafter his recovery is, where appropriate, cut down to “normally foreseeable” harm. But since in the Common Law of its time (1854) damages were largely left to the jury’s discretionary determination, the *Hadley v. Baxendale* rule could hardly be expressed in terms implying qualification of a prior “equivalence” principle, even though that rule was inspired by the French Civil Code. Article 1150 of this code simply provides as follows:

Where his non-performance is not intentional, the debtor is liable *only* for the damages that were foreseen or could be foreseen at the time of the contract.¹⁷ [Translation ours]

Regarding the gist of the first sub-sentence of this rule, *McCormick* (USA) has this to say: “Our rules should sanction ... the award of consequential damages against one who deliberately and wantonly breaks faith, regardless of the foreseeability of the loss when the contract was made. We shall then have completed the process, begun *piecemeal* in *Hadley v. Baxendale*, of borrowing *from the French*, Civil Code its theory of damages in contract.” See controversial discussion in *Encyclopedia, Treitel*. sec. 82 ff.

In the light of all above considerations, we would have preferred a simple formula, directly adapted from the above French provision, to the Ethiopian Code’s unwieldy formulations largely inspired by the *Hadley v. Baxendale* rule. We must nevertheless analyze these formulations, which are found in the above-cited articles 1799, 1800 and 1801 of the “Contracts in General” Title. We shall, where appropriate, refer to explanatory illustrations in *David*.

B. Reduction to “normal” damage (art. 1799)

Where a party does not perform all his obligations under a contract, the other party can claim compensation for the resulting damage (art. 1771(2)). Where the amount of his claim for actual damage is higher than the amount of “the damage which, according to the foresight of a reasonable person, non-performance would normally cause to the creditor” (art. 1799(1)), his recovery will as a rule be *reduced* to such a “normal” amount.

The “reasonable person” is a fictional figure whose presumable foresight adorns the judges’ own opinions. For the purposes of article 1799, *normal* damage from non-performance is such as, in common experience (as determined by the court), would more often than not result.

- (i) from a given type of non-performance (e.g. delay in delivery of a trunk) of a given type of contract (e.g. carriage by land) either in general, or
- (ii) in conjunction with any additional basic circumstances known to the contracting parties (sub-art. (2))

17. Article 361(1) Polish Civil Code is even simpler: the debtor “is liable only for the *normal* consequences” of his breach of contract. On the “normal” (adequate) causation theory, see *Krzyszczunowicz I* (p. 135 B) and II (p. 26 ff.).

Elaboration on the second point: to consider damage from a known additional circumstance as “normal” (therefore recoverable under sub-art. (1)), it must be possible to assume reasonably that such circumstance has been contemplated by the parties as a basic factor in the making of the contract. Justification: only such contemplation before the contract is finalized enables a prospective party to change his terms or withdraw, if the risk involved seems too heavy.

Below we reproduce the expert draftsman’s illustrations of article 1799 (*David*, p. 73). Their purpose is to “serve as a guide to the meaning of this article”. We supplement each of his illustrations with emphasis, parenthetical interpolations and a concluding note.

ILLUSTRATIONS:

1. “A is to deliver 10 tons of coal to B, a private individual, on 15 October. It is *normal* to foresee that, if B does not receive the coal from A, he will buy it from C. A owes B the difference between the price set in the contract and the (higher) price that B had to pay C.” (The word “had” points to B’s duty to limit the damage: art. 1802). NOTE:
 - (a) The expert draftsman seems to overlook the fact that the concept of “normally foreseeable” damage (art. 1799) is not needed for the solution of this case: the provision applicable is article 2363 of the law of sale, which *specifically* governs (to similar effect) “purchase in replacement” situations.
 - (b) If A’s coal does not reach B because it was stolen by tortfeasor D, D (arguably) is liable for unforeseeable damage from a grave cold caught at home by sickly B before he was able to heat his house with other coal. Incidentally, A (art. 1791) and D are jointly and severally liable for the foreseeable part of the damage (art. 2155(3)), without prejudice to A’s ultimate recovery from D (art. 2156).
2. “A sells 4000 kilos of coffee to B. (In view of such quantity) it is *normal* to think that B is a merchant and that he will resell the coffee at a certain profit. B will obtain as damages the amount of profit (if any) that the failure by A to perform the contract has lost him.” NOTE:
 - (a) The expert draftsman seems to overlook that the concept of “normally foreseeable” damage (art. 1799) must not be used for the solution of this case. The provision *specifically* applicable here is article 2362 of the law of sale. Depending on circumstances, this article may or may not lead to a result identical to that proposed by the draftsman.
 - (b) If the coffee does not reach B because of being stolen or destroyed by a tortfeasor, the latter is liable, as in case 1 (b) above, for additional damage, if any.
3. “A undertakes to transport B’s trunk to a particular destination. The trunk is lost. It is reasonable to think that it has a certain value in the light of its weight,

and that it contains personal effects rather than precious objects. The court will award as damages the value of the objects that one could reasonably expect to find in the trunk, or the value of the objects which B proves to have in *fact* put in the trunk,¹⁸ as long as it was not unreasonable for him to put them in without warning A especially.” (It is *not normal* to put in precious objects *without* such special warning which would enable the carrier to withdraw or raise his charges, or take out or require insurance. Cf. article 1801(1)). NOTE:

- (a) A statement of the nature, value, etc., of the trunk’s contents in a consignment note (arts. 571 and 577(1) (c) Comm. Code) is sufficient warning for the purposes of article 1801(1) or 1799(2).
 - (b) Where the trunk’s loss was caused by a tortfeasor, he is liable for the whole damage, whether or not he was aware of its abnormally valuable contents.
4. “A makes a contract with B for the repair of a turbine in a mill. It is normal to think that if the repairs are not made in time, A will be injured somewhat: he will have to use more expensive machinery or hire additional labourers. But it is *not normal* to think that the mill will be totally stopped and that A will be liable to third persons with whom he had contracted, who were in turn prevented from performing their obligations.” This holds true *unless* B was forewarned by A of these consequences of a delay in the repair of the turbine: article 1801
- (1) or 1799(2). NOTE:
 - (a) To have the effect contemplated by articles 1801(1) and 1799(2), such a warning (last sentence above) must be given not later than upon the contract’s conclusion. Policy reason: B must be given a timely opportunity to withdraw or change his terms in the light of the higher risks brought to his knowledge.
 - (b) Where the delay in the repair of the turbine is caused by a tortfeasor, he is, as in the preceding cases, liable for abnormal damage, whether or not foreseen by him.
5. The following illustration is ours:
- Where employee B, “without good cause” (arts. 2578-79 and 2582), breaks his contractual service to employer C (art. 2583), he is liable for “normally” foreseeable damage thereby caused to C. Where B is not a hard-to-get expert, it is *not normally* foreseeable that C will suffer continuing harm as a result of being unable to replace B. B is not liable for such harm under article 1799. But a tortfeasor who, in violation of article 2056, causes B’s desertion of C is liable to C for its abnormal consequences.

18. This seems somewhat inconsistent with David’s statement on the immediately preceding page (72), that in assessing damages “there is no need to start — from the *actual* injury—**”: see quotation under A, para. 3, above.

C. Digression on SPECIFIC criteria:

In restricting compensation for contractual non-performance to harms that were normally foreseeable, article 1799 necessarily leaves the particular applications of this general criterion to the courts. The vagueness of article 1799 is, however, occasionally remedied by special provisions which, although inspired by the “normal foreseeability” principle, deprive the judiciary of its discretionary powers by supplying SPECIFIC criteria for assessing certain damages. Such criteria primarily concern, on the one hand, all money debts regardless of their source, and on the other hand, the most widely used special contract, which is sale. In both instances these specific criteria were derived from business practices aimed at increasing legal predictability, and thereby preventing litigation and speeding up settlement of claims. We wish to stress the following points:

1. MONEY debts. - Unless the contract stipulates a higher interest (art. 1803(2)), “where a debtor is in default [arts. 1772-1775] for the payment **of a sum of money**, he owes interest for the delay at the rate fixed by law...” (art. **1803(1)**). Pursuant to article 1751, this legal rate is 9% per year. Contrary to **the rule of** article 1800, the interest is due even where the creditor suffers **no loss (art. 1803 (3))**. It is due alone where the loss is greater, except under the **provisions of** article 1805, which reproduce those of article 1801(see D, below).
2. SALE contracts relating to corporeal chattels (arts. 2266-2267):
 - (a) Where the sale is *not cancelled* but is enforced against the buyer (**art. 2333**), the damages due to the seller from the buyer for his delay in paying the price (a sum of money) consist of the interest at the legal **rate (art. 2361(2))**. This is but a particular implementation of the rule **of article 1803(1)** examined under 1, above.
 - (b) Where the sale is *cancelled*, the damages consist in the difference between the contract price and the price current at that time as determined under article 2362(1), or the price actually paid or obtained in pursuance of a purchase in replacement or compensatory sale (art. 2363(1)).
 - (c) 'What if the seller-creditor suffers a *lesser* damage than the amount due him under article 2362? This article is neither supplemented by a rule similar to that of article 1803(3), nor qualified by one similar to that of article 1800. The Code gives no explicit guidance on whether or not the seller's damages should be reduced in such case. We nevertheless suggest that article 1800 (of the section on non-performance of contracts in general) is not applicable to the special damages of article 2362. Reason: since the law of Sale's sub-paragraph on damages due upon cancellation of contract reproduces in article 2364 the provision of article 1801 on “greater” damage, it would have equally reproduced the provision of article 1800 on ‘lesser’ damage if the latter were intended to be applied to this sub-paragraph. (This contention is without prejudice to the concrete criterion of art. 2363(1), under which the⁴ damage recoverable on

the basis of an actual compensatory purchase or sale may or may not be less than the abstract “difference” indicated by art. 2362.)

D. Return to “actual” damage (arts. 1800-1801)

As shown before, article 1799 merely qualifies the compensation-equal-to- damage principle of article 2091, by restricting its application in contract to such damage as was normally foreseeable. Since the wording of article 1799 does not make this clear, articles 1800-1801, as shows by their headings (damage “lesser” or “greater” than normal), appear as exceptions to article 1799, which, however, is itself an exception to article 2091. Such superimposing of one exception upon another merely delays the interpreter’s discovery that this is, in effect, a full *return* to the principle of article 2091, as is implied by the words “*actually* sustained” (emphasis added) in both article 1800 and article 1801. We shall now discuss these two articles in turn:

LESSER damage (art. 1800).

The criterion of article 1799 does not apply where the creditor’s actual damage is demonstrably less than the “normally foreseeable” amount. Yet this fact will seldom be eagerly revealed by a creditor claiming “normal” damages under article 1799. Such claimant may, instead, stress the difficulty of ascertaining the exact amount of his damage in order to have it appraised according to “the ordinary course of events” (art. 2102), a standard which approximates that of “normal foreseeability”. But he will not succeed where the debtor is able to show that “the damage *actually* sustained by the creditor” is less than normal. EXAMPLES:

1. In the draftsman’s third illustration of article 1799 above, suppose that B pretends to lack evidence of the lost trunk’s allegedly normal contents (personal effects), in order to hide the fact that ⁷t only contained chipwood. If carrier C is able to prove this fact (the chipwood was leaking), his liability will be reduced to the extent required by article 2091.
2. “A is (bound) to turn an apartment over to B (or B’s agent) on October 1. He does not do it until November 1 (this normally would cause B a loss of rent or use for October). A proves that B (who was hospitalized in October) would have left the place unoccupied and would not have used it before November in any case. A is not required to pay damages (under article 2091, their extent is nil)” [David, p. 75, 2., words in parentheses added].

GREATER damage (art. 1801).

In the situations specified after the word “where”, in, respectively, the first and the second sub-article of article 1801, the damage recoverable by the creditor is that *actually* sustained by him. In the first of these situations (debtor “forewarned”), the amount recoverable can be called either “greater” than normal by-application of article 1801(1), or “normal” by application of article 1799(2)! Since this situation was illustrated above under B (3-4), we shall here discuss only that envisaged by *subarticle* 2 of article 1801.

Where the damage sustained by the creditor is greater than the “normally foreseeable” amount of article 1799(1), his recovery is, as a rule, reduced to that amount.

But such a reduction can be resisted and compensation for his actual, greater damage obtained by the creditor “where non-performance is due to the debtor’s intent to injure, his gross negligence or grave fault” (art. 1801(2)). As denoted by “or”, these requirements are alternative. We discuss them below:

1. “Intent to injure” is a clear criterion, but its existence is often difficult to prove.
2. Gross negligence, as construed by the expert draftsman (after French doctrine), means indifference to “whether or not the other party is spared this loss”, or disregard for “the injury that will be suffered by the other party”. The corresponding English term is *recklessness* (disregard for likely consequences of a conduct without intending them).
EXAMPLE:

On November 1, B undertakes to repair C’s taxicab by November 3. B is forewarned by C that this taxicab is booked for November 4 for an unusual trip to Jimma, worth Birr 200 to C. Disregarding the likely loss to C, B gives priority to less urgent work and delivers C’s car only on November 6. B is liable to C for the lost profit. Incidentally, B is liable to the same effect under article 1801

(1) or 1799(2). But only these latter provisions would apply if B’s failure to perform on time were due not to his recklessness but, e.g., a strike of his workers (see art. 1794(a)). Obversely, in the absence of a special forewarning or common contemplation of the Jimma project when the contract was made, only article 1801(2) would apply if a reckless B had “casual” knowledge of the project.

3. “Gross” or “grave” are words which have little significance in law, except where defined. “Gross negligence” is defined above. How does “grave fault” differ from it? In the context of an unrelated problem, the expert draftsman implies that “grave fault” is using less diligence with one’s obligations to another than with one’s own affairs {David, p. 72, 2. Cf. our comment under art. 1796}. But this implication is incompatible with the Code’s express definition of “grave fault” in a way reminiscent rather of “gross negligence,” as defined under 2 above: see article 2559(3) in the French/Amharic versions (the English is distorted). Thus, the two notions are artlessly fused into one.

E. Conclusion

Contract is the law of the parties (art. 1731(1)). Where the parties contract, they “impliedly consent” to be liable for only such damage from a non-performance (if **any**) as was foreseen or foreseeable. In order to clarify and simplify the wording of the law in the light of this (disputable but) convenient and sensible theory, we respectfully submit that articles 1799(1-2), 1800 and 1801(1-2) should all be abrogated **and replaced**, to similar effect, by a single sentence (plus heading) formulated as follows:

FORESEEN OR FORESEEABLE HARM

Where his non-performance is not due to his intent to injure or recklessness, the debtor is liable only for the resulting actual harms that were foreseen by the parties, or were “normally” foreseeable, when the contract was made.

In this sentence, the first sub-sentence makes article 1801(2) superfluous. The i-j-ds “actual harms” make article 1800 pointless. The continuation “that were seen by the parties” makes article 1801(1) with 1799(2) superfluous. The sub-sentence passage “or were normally foreseeable” needs no supplementation by the reference to a “reasonable person” now contained in article 1799(1); with or without such reference, judges consider themselves to be reasonable. Finally, the words when the contract was made” clarify an essential requirement that is not immediately obvious from the present wording of article 1799.

T. 1802 - DUTY TO REDUCE THE DAMAGE

- (1) THE PARTY WHO INVOKES NON-PERFORMANCE IS BOUND TO TAKE ALL MEASURES THAT CAN BE REASONABLY EXPECTED OF HIM IN ORDER TO REDUCE THE DAMAGE SUSTAINED.
- (2) WHERE HE FAILS TO DO THIS, THE OTHER PARTY MAY AVAIL HIMSELF OF SUCH FAILURE TO REQUIRE THAT THE COMPENSATION BE REDUCED.

1. The amount of compensation for non-performance which would otherwise be due by application of the preceding articles (1790-1801) will be reduced where creditor disregarded his duty to reduce the damage sustained by taking all “reasonable” measures to that effect (i.e. such measures as, in the court’s opinion, a reasonable person in his stead would have taken).

2. This provision, added late in the codification process (see *David*, Editor’s ; 29), is superfluous in that it makes no change in the law: *article 2097*, incorporated in contract law by article 1790, is to the same effect. It in addition expressly refers to the requirement of *good faith* explained by us under article 1713, comment on the examples given therein, we here add the following, aimed at illustrating the entire provision:

- (a) B undertakes to take C’s immobilized car for essential repairs, to be terminated in a week. After two weeks, overworked B has not even taken the car, despite C’s default notice to him. Instead of reducing his damage by going to another repairer, C, without forewarning B, hires a car at Birr 25 per day and, after 3 months, sues B for Birr 2250 in damages. What solution?
- (b) B, employed by G, suffers a work-misadventure. He refuses innocuous medical treatment, and thereby becomes disabled in a degree normally qualifying him for maintenance by C. B sues C. What solution ?

For analogous illustrations in tort contexts, see *Krzeczunowicz II*, pp. 121-122.

ART. 1803. MONEY DEBTS: 1. INTEREST FOR DELAY

- (1) WHERE THE DEBTOR IS IN DEFAULT FOR THE PAYMENT OF A SUM OF MONEY, HE OWES INTEREST FOR DELAY AT THE THE RATE FIXED BY LAW (ART. 1751) EVEN IF THE CONTRACTUAL RATE FOR THE PERIOD BEFORE MATURITY IS LOWER.
- (2) IF THE CONTRACT STIPULATES A HIGHER INTEREST, THE LATTER CONTINUES TO ACCRUE.
- (3) THE INTEREST IS DUE EVEN IF THE CREDITOR INCURRED NO LOSS.

This and the subsequent articles, respectively numbered 1, 2, and 3, deal with **the** consequences **of** delay **in** the performance of an obligation the object of which is **payment of a sum** of money. The legal nature of “money” has been discussed under **article** 1749(1). The provisions of the present article are *self-explanatory*. The policy **is to remedy** the vagueness of the “normal” amount of compensation criterion **of article** 1799 **by**, where possible and convenient, enacting specific criteria of compensation. **This** has been done both for money debts (on whatever grounds due) and for **Sale contracts, as was** explained under ARTICLES 1799-1801, division C, to which **we refer the reader**.

ART. 1804 - 2. PERIODIC PAYMENTS

- (1) WHERE THE DEBTOR OWES PERIODIC PAYMENTS WHICH CONSTITUTE A MERE INCOME FOR THE CREDITOR, SUCH AS RENTS, ARREARS OF LIFE OR PERPETUAL ANNUITIES, OR INTEREST ON CAPITAL, INTEREST FOR DELAY SHALL BE DUE ONLY FROM THE DAY ON WHICH PROCEEDINGS FOR RECOVERY ARE INSTITUTED, AND PROVIDED THAT THE DEBTOR IS ONE YEAR IN ARREARS.
- (2) THIS ARTICLE SHALL NOT AFFECT PROVISIONS RELATING TO CURRENT ACCOUNTS.

A. “Periodic payments”

In this article, the term “periodic payments” refers to a fixed sum *of money* (see “2” before the caption) (not of any fungibles, as under art. 2490) *recurrently* payable to the creditor at regular intervals and constituting a *mere* income for him. The qualification “mere” implies that what is meant are incomes accruing independently of his current business or work. This connotation is also supported by the following illustrations given in this article after the words *such as*:

- (1) *Rents* (from lease of house or land). Because of article 2952 and of the present legal status of immovables, it seems that there will be *no* opportunities for application of the present article to rents.

- (2) *Perpetual annuities*. They are no longer practised (and are no longer perpetual: art. 2496 ff.).
- (3) *Life annuities*. This term refers to the object of a person's right to periodic (e.g. monthly) payments of a fixed sum of money for the duration of his life. In Ethiopia, such an annuity was sometimes stipulated by an old parent in exchange for the transfer of his house or land to his child. Because of the present legal status of immovables, it seems that this transaction is *no longer* practised; neither do life annuities seem to be practised in the form of insurance (in art. 692 Comm. C. "annuity" is mistranslated as "interest"; the context is also mistranslated), because annuitants are notoriously injured by currency-depreciation over the years. But *pensions* are life annuities (due for past services), and fall under the present article insofar as not otherwise provided by public law.
- (4) *Interest on capital*, through last enumerated, constitutes in practice the main if not sole field of application for the present article.

The rule

The rule of the present article (sub-article 1) qualifies that of the preceding article, where by interest for delay in payment of money is due from the time when the debtor is in default. Where the money due is not the principal sum but the interest on it (or is a particular arrear of the other periodic payments noted above), the interest on interest (or on the arrear) does not run from the default but from the day when recovery proceedings are instituted (a court file opened) "and provided that the debtor is one year in arrears". A debtor-protecting policy is obvious here. It is also evident in the law of loans, which has a "mandatory" provision (art. 2481) whereby (except for current accounts) the parties cannot agree in advance that interest will produce interest (called *compound* interest).

The exception of sub-article (2)

The editor of *David* (see p. 77) overlooked that the expert author's brief comment on this sub-article bears not on its present text, but on some unpublished version perhaps originally envisaged by him. Pursuant to the present sub-article (2), provisions relating to current accounts remain unaffected by sub-article (1). These provisions figure under article 925 ff. Commercial Code. They reflect commercial usages. In particular, see article 934(1) and (4) Commercial Code.

Law reform

The few amendments proposed for Contract law by *Law Revision* include deletion of the present article (protecting the debtor) for reasons we are not competent to assess.

ART. 1805 - 3. GREATER DAMAGE

WHERE THE DAMAGE SUSTAINED BY THE CREDITOR EXCEEDS THE INTEREST FOR DELAY, THE DEBTOR MUST FULLY COMPENSATE SUCH DAMAGE IF, ON MAKING THE CONTRACT, HE WAS FOREWARNED OF THE RELEVANT CIRCUMSTANCES, OR IF HIS NON-PERFORMANCE IS DUE TO HIS INTENT TO INJURE OR TO HIS GROSS NEGLIGENCE OR GRAVE FAULT.

There is no need to expatiate on this article, which in effect borrows the rule of article 1801 (explained before) in order to make it applicable to non-performance of obligations to pay money. (*A contrario*, art. 1800 on Lesser Damage is not so applicable.) The following illustration seems sufficient:

Trader B is in default for non-repayment of the 20,000 Birr borrowed for 30 days from his friend trader C. Despite C's "forewarning", on making the loan contract, that C's creditors threaten him with bankruptcy proceedings, B retains the 20,000 Birr for his own business purposes. On ground of "grave fault" and/or of the forewarning, B is fully liable to C for any resulting damage exceeding the interest for delay.

APPENDIX

REVISED TRANSLATION OF ARTS. 1771-1805 CIVIL CODE
(Non-Performance of Contracts)

Art. 1771 - EFFECTS OF NON-PERFORMANCE

- (1) Where a party does not perform his obligations, the other party may, according to circumstances, request the enforcement of the contract or, on the contrary, request, or sometimes himself declare, the cancellation of the contract.
- (2) He may also require that the damage caused him by the non-performance be compensated.

Art 1772 - DEFAULT NOTICE NECESSARY

A party may invoke non-performance by the other party only after having placed the latter in default by a notice demanding him to perform his obligations.

Art. 1773 - FORM AND TIME OF DEFAULT NOTICE

- (1) Default notice is given by summons or by any other act denoting the creditor's intention to obtain performance of the contract.
- (2) It may not be given before the time when the obligation falls due.

Art. 1774 - SETTING A TIME LIMIT

- (1) In the default notice the creditor may indicate a period of time after which he will no longer accept an actual performance of the contract by the debtor.
- (2) Such a period must be reasonable having regard to the nature and circumstances of the case.

Art. 1775 - WHEN DEFAULT NOTICE UNNECESSARY

Default notice is unnecessary:

- (a) in the case of obligations not to do something; or
- (b) where the debtor assumed an obligation which, pursuant to the contract, may be performed only within a fixed period, and he allowed it to lapse; or
- (c) where the debtor has declared in writing that he will not perform his obligation;
or

- (d) where the contract provides that, without need for notice, the debtor shall be in default upon the lapse of the time fixed for performance.

Art. 1776 - FORCED PERFORMANCE

Forced performance may be ordered only if it is of special interest to the claimant and can be obtained without affecting the personal liberty of the debtor.

Art. 1777 - OBLIGATIONS TO DO OR NOT TO DO

- (1) The creditor may be authorized to perform or make perform the debtor's obligation to do at the debtor's expense.
- (2) Similarly, he may be authorized to destroy or make destroy, at the debtor's expense, what was made by the debtor in violation of his obligation not to do.

Art. 1778 - FUNGIBLE THINGS

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

Art 1779 - REFUSAL TO ACCEPT DELIVERY

Where the creditor refuses without lawful cause to accept the thing offered, the debtor may deposit it at the risk and expense of the creditor in a public warehouse or deposit bank, or in any other place indicated by the court of the place where the delivery is due.

Art. 1780 - DELIVERY IMPOSSIBLE

The debtor has the same right, without need for default notice, where the creditor is unknown or uncertain, or where delivery cannot be made for another reason personal to the creditor.

Art. 1781 - SALE OF THE THING

- (1) Where the thing is of a perishable nature or the costs of its deposit or custody are disproportionate to its value, the debtor may, with the court's authorization, sell it by public auction.
- (2) Where the thing is quoted at the stock exchange or has a current price, or where the costs of the sale by public auction would be disproportionate to its value, the debtor may, with the court's authorization, sell it by private agreement.
- (3) The proceeds of the sale must in such cases be deposited with a public deposit bank.

Art. 1782 - VALIDITY OF DEPOSIT

The debtor is released when the court finds that the thing or the proceeds of its sale have been validly deposited.

Art. 1783 - WITHDRAWAL OF DEPOSIT

- (1) Even after the deposit has been found valid, the debtor may withdraw the thing or money deposited as long as the creditor has not declared that he accepts it.
- (2) Where such withdrawal occurs, the creditor's claim revives.
- (3) However, the securities attaching to the claim do not revive if the deposit has been found valid by the court.

Art. 1784. - JUDICIAL CANCELLATION OF CONTRACT

At the request of a party, the court may cancel the contract where the other party has not or not fully performed his obligation within the agreed time.

Art. 1785 - GOOD FAITH

- (1) In making its decision, the court takes account of the interest of both parties and of the requirements of good faith.
- (2) It shall not cancel the contract unless a fundamental breach of contract was committed.
- (3) The breach is fundamental where the very basis of the contract is affected by the non-performance and, because of it, it is reasonable to hold that the claimant would not have concluded a contract so affected.

Art 1786 - UNILATERAL CANCELLATION OF CONTRACT:

1. CANCELLATION CLAUSE

A party may declare the contract cancelled where an express clause to this effect has been included in the contract and the conditions for the application of such clause are realized.

Art. 1787 - 2. EXPIRY OF TIME LIMIT

A party may declare the contract cancelled where the other party has not performed his obligations within the period fixed in accordance with Art. 1770, 1774 or 1775(b).

Art. 1788 - 3. PERFORMANCE IMPOSSIBLE

A party may declare the contract cancelled, even before the obligations of the other party fall due, where the performance of the contract by the other party has become impossible, or where it is delayed to such an extent that the very basis of the contract is affected thereby.

Art. 1789 - 4. PERFORMANCE REFUSED

- (1) A party has the same right where the other party clearly indicates that he will not perform the contract.
- (2) In this case, however, the right to cancel may be exercised only after giving a default notice, and the right is lost if the party in default produces within fifteen days from the notice securities sufficient to make sure that he will perform his obligations at the agreed time.
- (3) Default notice is unnecessary and cancellation may be declared forthwith where the other party's refusal to perform his obligations is communicated in writing.

Art. 1790 - THE DAMAGE CAUSED BY NON-PERFORMANCE

- (1) Apart from enforcement or cancellation of the contract, or concurrently with these remedies, a party may require that the damage caused him by the other party's non-performance of his obligations be compensated.
- (2) Save as otherwise provided by the following articles, the mode and extent of the compensation shall be as provided by the Chapter of this Code relating to Extra-Contractual Liability (Arts 2090-2123).

Art. 1791 - THE COMPENSATION: WHEN DUE

- (1) The compensation is due from the party who does not perform his obligation even when he committed no fault.
- (2) He is released only if he can establish the precise cause of his non-performance and that such cause amounts to *force majeure*.

Art. 1792 - FORCE MAJEURE

- (1) *Force majeure* is constituted by an event which could not normally be foreseen by the debtor and which prevents him absolutely from performing his obligation.
- (2) - An event does not constitute *force majeure* where it could normally be foreseen by the debtor, or where it only makes more, onerous the performance by the debtor of his obligation

Art. 1793 - CASES OF FORCE MAJEURE

It follows that, depending on circumstances, the following events may constitute cases of *force majeure*:

- (a) the unforeseeable act of a third party for whom the debtor is not answerable; or
- (b) a governmental prohibition preventing the performance of the contract, or
- (c) a natural catastrophe, such as an earthquake, lightning or flood : or
- (d) an international or civil war; or
- (e) the death or an unexpected grave accident or illness of the debtor.

Art. 1794 - ABSENCE OF FORCE MAJEURE

Unless otherwise expressly agreed, the following events shall never constitute cases of *force majeure*:

- (a) a strike or lock-out occurring in the factory of a party or in the branch of business in which he pursues his activity; or
- (b) an increase or reduction in the price of raw materials necessary for the performance of the contract; or
- (c) the enactment of new legislation whereby the obligation of the debtor becomes more onerous.

Art. 1795 - PROOF OF FAULT

In the following cases, a party may claim compensation on ground of non-performance of his obligation by the other party only by proving that the latter has committed a fault :

- (a) where the debtor has only undertaken to do his best to reach a certain result for the benefit of the other party without guaranteeing that he will reach it; or
- (b) where such an exception is expressly provided by law for a special contract.

Art. 1796 - GRAVE FAULT

Where the contract is made for the exclusive advantage of one party, the other party is liable to pay compensation for non-performance only if he has committed a grave fault..

Art. 1797 - WARNING TO OTHER PARTY

- (1) The debtor shall forthwith inform the other party of the cause preventing him from performing his obligation.
- (2) He is liable as though the non-performance were attributable to him for any damage sustained by the other party which the latter could have avoided, had warning been given.

Art. 1798 - EFFECT OF DEFAULT

Compensation is owing even where the non-performance is due to *force majeure* if the *force majeure* occurred when the debtor was in default.

Art. 1799 - NORMAL AMOUNT OF COMPENSATION

- (1) Compensation is equal to the damage which, according to the foresight of a reasonable person, non-performance would normally cause to the creditor.

- (2) In assessing the above, regard shall be had not only to the type of contract, but also to the profession of and relations between the parties and other circumstances known to the debtor, on the basis of which it must be assumed that the contract was made.

Art. 1800 - LESSER DAMAGE

Where the debtor proves that the damage actually sustained by the creditor is less than the above amount, he is liable to this lesser extent.

Art. 1801 - GREATER DAMAGE

- (1) Compensation is equal to the damage actually sustained by the creditor where the debtor, on making the contract, was forewarned by the creditor of the particular circumstances owing to which the damage is greater.
- (2) Compensation is also equal to the actual [greater] damage where the non-performance is due to the debtor's intent to injure, or to his gross negligence or grave fault.

Art. 1802 - DUTY TO REDUCE THE DAMAGE

- (1) The party who invokes non-performance is bound to take all measures that can be reasonably expected of him in order to reduce the damage sustained.
- (2) Where he fails to do this, the other party may avail himself of such failure, to require that the compensation be reduced.

Art. 1803 - MONEY DEBT:

1. INTEREST FOR DELAY

Where the debtor is in default for the payment of a sum of money, he owes interest for delay at the rate fixed by law (Art. 1751), even if the contractual rate for the period before maturity is lower.

- 0) If the contract stipulates a higher interest, the latter continues to accrue.

The interest is due even if the creditor incurred no loss.

- (2) - 2. PERIODIC PAYMENTS

- (3) Where the debtor owes periodic payments which constitute a mere income

Art. 1804 for the creditor, such as rents, arrears of life or perpetual annuities, or

- (1) interest on capital, interest for delay shall be due only from the day on which proceedings for recovery are instituted, and provided that the debtor is one year in arrears.

This article shall not affect provisions relating to current accounts.

1805 - 3. GREATER DAMAGE

(2) Where the damage sustained by the creditor exceeds the interest for delay, the debtor must fully compensate such damage if, on making the contract, he was forewarned of the relevant circumstances, or if his non-performance is due to his intent to injure or to his gross negligence or grave fault.

Art

ADDENDUM

CONTRACTS IN SOCIALIST LEGAL SYSTEMS

A. GENERAL REMARKS

- J. The essential similarity, among western and socialist legal systems,¹⁹ of the concept “contract” and of many technical rules governing the contract’s formation, effects, etc.. in no way denotes similarity of all rules and policies governing the use of this device. The latter are oriented - in *socialist* systems - towards *planned satisfaction of social needs rather than profit alone* (which is but a second criterion of efficiency) (*Encyclopedia, Edrsi*, generally). This attitude explains the differences between western (free market) and socialist (controlled market) approaches to contract law, which are noted below.
2. It would be presumptuous even to attempt a comparative description of “Contract in the Socialist Economy,” before the eagerly awaited publication of the expert work under this heading in *Encyclopedia*,²⁰ to which we in advance refer the reader. Nevertheless, the following tentative preliminary orientation may be in order. The concept of “contract,” developed from Roman law roots by European jurists (and reflected in the Ethiopian Civil Code), essentially stands on three legs:
- (a) *Freedom* of contract, i.e., the parties are free to make, fill, vary or unmake the contract (arts. 1675, 1679, 1711, 1819). This basic freedom of contract is somewhat restricted only by *mandatory* legal provisions, which exist in both the western and the socialist systems, but are notoriously more frequent in the latter.
 - (b) *Pacta sunt servanda*, i.e., contractual promises must be kept (art. 1731(1)). This is true of both the western and the socialist systems, but the latter - because of the exigencies of their State-planned economies - are much stricter in the *enforcement* and stimulation, in the prevalent public sector, of specific performances, by injunctions or compulsory contractual and administrative penalties (*Encyclopedia, Edrsi*, secs. 252(3) and 256¹¹). On forced performance in Ethiopian law, see our comments under article 1776. On contractual penalty, see art. 1889 ff., and comments in *Krzeczu- nowicz II*, pp. 243-246, which include remarks on Socialist laws.

19. This similarity is lesser in the Czechoslovak and the East German systems.

20. Vol. VII, Chap. 6.

21. *Edrsi* somewhat inexactly calls contractual penalty “liquidated damages”; the connotation of this English term of art is different (*leaks*, arts. 274-279).

- (c) *Equality* between the parties, i.e., no party may modify the contractual obligations without the consent of the other party or parties. This equality exists in both the western and the socialist systems, and applies also to contracts between State-owned enterprises (without prejudice to the superior authority of the State-owner, which in socialist systems is exercised largely through the State's planning and arbitration organs). Marked *inequality* between the parties (favouring the administrative party) exists in the field of the so-called *administrative contracts*, a branch of law conspicuous in *France*, and in *Ethiopia* (see primarily art. 3132 and art. 3179 ff.), which has adopted the French model. According to this model, administrative contracts law presupposes the existence in trade and industry' of a sizable private sector (in Ethiopia, only the sector of construction and that of "supplies" are "sizable" in this sense), which is hardly the case in East European socialist countries. The *reason* given by the Civil Code's expert draftsman²² for introduction in Ethiopia of this French model was that Czechoslovakian and East German models would not be suitable for Ethiopia, "since they were prepared for socialist countries, which by virtue of their economic structures and political philosophies are very different from Ethiopia". (Incidentally, the concept of "administrative contract" happens to be [but should not be] confused with that of "social turnover contract", which envisages relations of equality in contracts between State-owned or socialized enterprises not involving the private sector, if any.) The problem - arising from the disappearance of David's "reason" - of adjusting the Ethiopian Administrative Contracts law (see its 1974 "Revised Translation" by Krzeczunowicz) to the present political and economic regime of Ethiopia lies beyond the scope of this work. In practice, the existence of detailed administrative standard forms and conditions of contract in the two significant fields - construction and supplies - reduces or obviates the necessity to use, or at least directly to use, the Civil Code's now rather incongruous Administrative Contracts law.²³

^B CONTRACTUAL REMEDIES

The particular problem of "Contractual remedies [for non-performance] in socialist legal systems" is aptly treated in *Encyclopedia, Edrsi*, secs. 190-256, to which we briefly referred before. Rather than quoting from this work, we invite the reader to peruse the original, and to pinpoint any differences from or similarities to the trends of the Ethiopian Civil Code's provisions on nonperformance of contracts (arts. 1771 - 1805), and our foregoing comments on them.

22. R. David, "Administrative Contracts in the Ethiopian Civil Code" *Journal of Ethiopian Law* (Vol.

23. Nevertheless,¹ our textual comment 4 under art. 1767 had to be based on this law.

One policy aspect deserves immediate attention. The socialist preference for specific enforcement of contractual obligations (see 2(b), above) over the remedy of compensation has, apart from ideological reasons (socialist discipline for the common good), an overriding practical justification. One purpose of socialist economic planning is to reduce or obviate *shortages* in the supply of essential goods or services. Pecuniary compensation for non-performance neither promotes this task, nor helps, e.g., a buyer who, because of these shortages, cannot promptly effect a purchaser-in-replacement. For example, mere delay in delivery of a scarce spare part may paralyse a whole chain of industries. Compulsory penalties for delay deter such shortcomings.