BAHIR DAR UNIVERSITY
LAW FACULTY
DISTANCE PROGRAM



LAW OF CONTRACTS I

(Laws-311)

PREPARED BY Balew Mersha
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INTRODUCTION

It is long before, that mankind has passed through continuous exchange of goods and service. This exchange of goods and services was made through agreements of the members of the society, though we can't call them " contracts" in the sense we are using the term today.

When mankind started to produce more than that he needs for this subsistence, the remaining product was subject to exchange for another product. This exchange was made through contract as we conceive that concept today. However, the term contract may have different ways of conception or technical difference in widening or narrowing in different periods and legal systems.

This fact has been clearly elaborated by Krzeczunowicz as follows: as shown by common experience, a contract is an indispensable instrument for exchange of goods, service and money between persons (...) in any developed or developing economy, whatever its political regime.... Only primitive " subsistence economy" communities, living on their produce ... can do without the kind of agreement we call " contracts".

Contracts are necessary instruments, in any country in whatever kind of socio-economic system they may be found: socialist or capitalist; developing or developed. Whatever system of economy- planned or free market economic system, they are applying; the need for recognition and enforcement of contracts is vital as the existence of the society itself. It is due to the fact that contracts are instruments of exchange that they are recognized in every legal system. The Ethiopian Civil Code, which is highly influenced by the continental legal system, and Ethiopia being one of the developing countries in the society of nations, the above stated facts also hold true under Ethiopian conditions.

The Ethiopian Civil Code deals with contracts in general under Book Iv, TITLE XII. In line with the arrangement of the Civil Code, the law of contracts part one will be treated in four modules.

Module one deals with the nature of civil obligations, the meaning, purpose, classification and scope of application of contracts in general provisions.

Module two focuses on the prerequisites for the formation of valid contract. In the subdivisions of this module, capacity, consent, object and form as a validity requirement are elaborated.

Once a valid contract is made, its effect is dealt in module four of this material. It tries to pinpoint the issues related to the interpretation, performance and variation of contracts.

The last module talks about the effects of non-performance of contracts. These are forced performance, cancellation and damages.

However, before discussing such remedies I try to see the issues related to default notice.

Balew Mersha Desta

MODULE ONE

DEFINITION, CLASSIFICATION, PURPOSE AND SCOPE OF APPLICATION OF CONTRACTS

Introduction

The development of the law of contract can be broadly summarized in three stages. In ancient days where democratic (and individualist) conceptions are at their dark days the role of individual to create his own rights and obligation through his free will was unknown. A person's rights and obligations are predominantly determined by his status in the society he lives. If he is a slave he will have rights and duties of the salve. If he is a married person, he will enjoy the per-determined rights and duties of married people. The same will hold true if he is among the privileged section of the society.

In the second phase of the development of contract law more individualistic theories dominated the period. Individuals were left free to enter into any transaction they want and to be bound by the rights and duties emanating there from. The law of contract, and the judge as an umpire, were there to enforce such agreements with out a need to look in to whether the terms are unfair or unjust.

In the third level of development due to the manifest growth in inequality of bargaining power associated with the growth of monopolies and contracts of adhesion there from and the emergence of other factors which deteriorated free will and then the need to protect consumers called for state intervention. Since those days on wards the state’s role extended and the state by making stipulations

in the terms of the contract accomplishes varying social policies. Moreover, contracts are used as the major sources of civil obligations.

In this module the nature of civil obligations and contract will be discussed. on top of this the classification, purpose and scope of applications of contracts will be elaborated.

Module Objectives

At the end of this module, the student will be able to:

- Describe the nature of civil obligation;
- Define contract;
- Explain the different types of contracts;
- Identity purpose of contracts;
- Explain the scope of application of contracts.

Unit One: Nature Of Civil Obligation

Introduction

There are lots of duties imposed on the society such as moral, religious, legal, and social duties. Among the legal duties, civil obligation is the one. This type of obligation is compulsory unlike other duties. It has a legal backing in case where it is not performed by the one who assumed it. However, moral and social duties don't have legal backing and as a result they are not compulsory or binding on persons who agreed to perform them.

Unit objectives

At the end of this unit you will be able to:

- Discuss the nature if civil obligations;
- Identify the source of civil obligations.

Dear learners, before reading the next paragraphs, please try the following questions.

1. What is civil obligation?

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2. What the sources of civil obligations?

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When we see the nature of civil obligation, it is a legal link between two or more persons following which one of them the creditor may require of the other, the debtor, the performance of an obligation, or on the contrary, an abstention. Planiol, a French scholar who wrote a book titled, Civil Law Treatise, also defines civil obligation as a legal bond by which one person is constrained towards another to do or not to do some thing. In a similar fashion, Amos and Walton defines civil obligation as a legal bond between two persons in virtue of which one of them is bound, in favor of the other, to do a certain act, or to abstain from doing an act so as to create a right over a thing or to transfer the ownership of a thing.

In this regard, all scholars agreed on the nature of civil obligation as it requires the existence of at least two persons in which one of them, the creditor is required to give, to do or not to do something for the other, the debtor. For instance, the person who has loaned money may request the repayment of the sum lent. The buyer may require the delivery of the thing sold and the seller may require the payment of the purchase price. Also, the victim of a car accident may require the reparation of the prejudice suffered by the driver who has caused it.

The last situation is a sort of civil obligation but not a contractual one. It illustrates the binding obligation which civil law may impose upon some one outside any contractual relationship; essentially in order to force him to compensate for damage he has caused to another person. However, the first two examples illustrate civil obligation that arise from contract, which is the subject for the following discussion.

Thus, in general, we can conclude that the sources of civil obligation may be:

contractual and non-contractual.

The contractual obligation is when the obligation arises from the agreement of the parties. As this will be discussed in detail it is better to leave here. While the non-contractual sources of obligation may be:

1. Law – This is to mean the obligation directly arises from the laws enforced in the country. For example, payment of tax, payment of custom duties, severance payment and others.
2. Acts of the tortfeasor- In this regard, when the debtor commits an act and sustained damage on the other, he will be forced to pay compensation. For example, payment required by the victim from the driver in car accident.
3. Act of the third party- In this case, the act is not done by the debtor himself but by the third party. However, he may be required to pay compensation. For instance, the guardian and tutor will be liable for the act of their minor children; the employers will be liable for the act of their employee, etc. This type of liability is called vicarious liability.
4. Unlawful enrichment- when a person has derived a gain from the work or property of another without just cause, that is unjustly enrich himself at the expense of another, he shall indemnify the person at whose expense he has enriched himself to the extent he has benefited from his work or property.

Unit Two: Definition of Contracts

Introduction

Giving definition for a concept is the heart of any subject. Thus, it is better to define the concept of contract though it is not a futile work. Moreover, there is no unanimous definition given by scholars about contract. Different legal systems have their own definition. There is also a definition given for contract in Ethiopian legal system. These will be discussed in the following unit.

Unit Objectives

At the end of this unit you will be able to:

- Identify the meaning of contract from the perspective of different legal systems;
- Explain the meaning of contract under Ethiopian law.

Section One: Definition of Contracts in other Legal Systems in General

Before we discuss the definition provided under our law, it would be better to examine first the definition in general as provided in other legal systems. The French Civil Code defines contract as follows: " A contract is an agreement by which one or several other persons bind themselves in favor of one or several other persons, to give, to do or not to do something. In other wards, contract is an agreement (convention) that binds one party to another to give, to do, or not to do something. From this Amos said there are two basic component

parts of a contract, namely agreement of the parties and obligation, which springs directly from agreement.

On the other hand Clark defines contract in the following manner. ' A contract... may be defined as an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others. This definition reveals the same elements, i.e., agreements and obligation as components of contracts. It is clear from the definition that it is an implied fact that the parties should possess the necessary capacity and intention to create legal obligation. Thus an agreement, ..., is not a contract unless it relates to a matter of juridical interest.

In the same fashion, under the Restatement (Second) of Contracts, contract is defined as a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as duty. It is often said that contracts are the product of a consensual relationship between the parties to the agreement, that is, the parties themselves enter into a bargain setting the terms of their obligations to one another. It is also frequently said that for a contract to exist, the parties must have a meeting of the minds. Thus, contract law is sometimes characterized as "Private law", where in the parties rather than the courts or legislature are the sources of the duties governing the relationship. The above two definitions are the ones which have got wide acceptance in common law legal systems.

According to civil law systems, a contract is an agreement where by one party is bound to another. The cornerstone of the contract is the will of each party. But the agreement must concern something that is valuable, because a contract involves an economic relationship

between the partners. Thus, the Italian Civil Code provides that contractual obligation necessarily has an economic value and contract creates or extinguishes an economic relationship.

Also, the Louisiana Civil Code defines a contract as an agreement between parties that creates, modifies or extinguishes an obligation. According to the German Civil Code, a contract is necessary to create an obligation if the obligation is wanted. This is in accord with the concept of " *acte juridique*", which is, in essence, a willful act that is enforceable by the law.

In socialist legal system too, it is defined as follows: " contracts are ... agreements by which one person called the debtor is bound to perform a given action for the benefit of another person, called the creditor, or on the contrary to refrain from some defined action. The creditor is being entitled to require the debtor to perform his duty.

Dear my student, what would you infer from the above definitions?

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In general, what we could infer from the definitions given in different legal systems is that, contracts are agreement between persons to do or not to do something. Hence, a contract in this sense results from the combination of the two ideas: " agreement" and " obligation". It is there fore agreement or meeting of minds, which directly

contemplates and creates an obligation; and the contractual obligation is that form of obligation, which springs from agreement. Therefore, generally speaking there can be no contract with out agreement and obligation.

Section Two: Definition of Contracts under Ethiopian Legal Systems

Article 1675 of the Ethiopian Civil Code defines contracts as "21agreement whereby two or more persons as between themselves create, vary or extinguish obligations of a proprietary nature". In order to understand the definition clearly, it would be better to break down the definition into its component parts. The elements embodied in the definition are:

a) A contract is an agreement. This agreement is one of the major characteristics, which differentiate, the law of contracts from other laws. An agreement is a manifestation of mutual assent by two or more persons to one another. In other words, it is the expression by two or more persons, either by words or by conduct, of a common intention. It is when the parties to the contract manifest their common intention that we say there is an agreement. Moreover, the contract being an agreement it is not the paper on which it may be written and signed -such paper is used only as a means of proving that agreement was made expressly. However, a contract is different from non-compulsory exchange of consent. For instance, an act of courtesy or gentlemen agreement for a gratuitous action, free performances of services are not contracts even if they are based on agreement between two or more persons because such manifestation of assent are not intended to be legally binding, Thus, every contract is an agreement, but every agreement is not a contract. In other wards, one may conclude that any agreement which does not have as its object

either the formation, variation or extinction of obligations of patrimonial nature can't give rise to a contract.

b) Contract is not a unilateral legal instrument, which is the expression of a single person's desires. In order that be an agreement enforceable at law, i.e. contract, at least two parties are necessary. There may however be more than two parties but not less than that. This is because a person cannot enter into a contract with himself, for such contract cannot operate to affect his legal relations with someone else. In other words, a man can't be under legal obligations to himself ... It is a first principle that, in whatever different capacities a person may act, he never can contract with himself, nor maintain an action against himself. He can in no form be both obligor and obligee.

It is an accepted principle that a man cannot contract with himself. This does not mean, however, that a person cannot make a contract with himself if he acts in different capacities. Under Article 2188 of the Civil Code an agent can conclude a contract with himself acting on his own behalf or in the name of a third party. In the former case the agent is a party to the contract; in the latter case the agent comes out of the picture after he makes the contract. The case where the agent concludes a contract with himself on his own behalf is known as self-dealing. On the other hand, where the agent contracts with himself in the name of a third party there is what is known as dual agency. In both cases, the principal is given the privilege either to cancel or ratify the contract pursuant to the provisions of art. 2188(1) & (2) of the Civil Code. The rationale behind such privilege to the principal is to avoid the danger of divided loyalty and conflict of interests.

However, the agreement should be between persons only. This shows that, the contracting parties must be either physical or legal persons. In any case, a person can't contract with either a thing or an animal.

As to the existence of at least two persons for an agreement, for instance, a will drawing an order succession, the acknowledgement of a natural child, the dismissal notice sent by the lesser, resignation made by an employee, all these are unilateral expressions of a person's intention to generate obligations of a civil nature. But they don't mean that any agreement has taken place.

c) The agreement should be as between themselves. This shows that the agreement is between the contracting parties only, since, there will be a reciprocal common intention between the two persons. In other words, contract takes effect only between the parties concerned. Hence, contract cannot, as a general rule produce any effect upon third persons that are not parties to the contract. This fact is clearly stated under Art. 1952(1) of the Civil Code. This article reads, " Except in cases provided in this code contracts shall produce effects only as between the contracting parties". Therefore, it is only where the code exceptionally provides that the contract would have effect on third persons that are not parties to the contract. For instance, in accordance with Art.1957 of the Civil Code, parties to a contract may stipulate that one of them shall perform an obligation for the benefit of a third party. Although this principle of relative effect of contracts may experience many exceptions, this principle is still at the core of contractual freedom.

d) The effect of contracts is to create, vary or extinguish obligations. Obligation is a legal bond whereby constraint is laid upon a person or group of persons to act or forbear on behalf of another person or

group. Amos and Walton defines it as a legal bond between two persons in virtue of which one of them is bound, in favor of the other, to transfer the ownership of a thing, or to create a real right over it, or to do a certain act, or to abstain from doing a certain act. While under the Ethiopian law of obligations, obligation is defined as "… an undertaking to procure to the other party a right on a thing or to do or not to do something.

An obligation may arise from agreement, tort, and breach of contract or the law. Rene David says on this point that obligations are created both by the law itself and by contracts and other juridical acts of individuals. There is no real opposition between these various sources, however, since in a broad sense even the obligatory force of contracts depends on the law, which regulates them and ensures their enforcement.

An agreement not enforceable creates no obligation, and therefore, cannot result in contract. An agreement resulting in a contract is that form of agreement, which directly contemplates and creates an obligation, and the contractual obligation is that form of obligation, which springs directly from agreement. In other words, the obligation of the parties is the object of a contract. When one party enters into a contract with another it is one of the parties who delivers a thing or renders service or refrains from doing a certain act to the other, when offer is made by one person and accepted by another, so that one consents to intend, and the other to expect the same thing, and the result of this agreement is a legal tie, binding the parties to one another is respect to some future act or forbearance. Hence, one can safely say, the effect of contracts is to create a new or non-existing obligation, or to vary or change or amend the terms of an old contract, or to extinguish the existing obligation.

e) The agreement should relate with something proprietary. This is to show that the agreement should relate with goods, physical or intellectual service, and this, as Krzeczunowicz said, " excludes contract of status, such as betrothal, marriage, adoption which create obligation of status predefined by law; of a primarily non patrimonial nature. However, it doesn't mean that certain patrimonial obligations do not derive from such status bound situations such as the payment of alimony. But they are not governed by the law of contracts in all situations.

Dear student, if you understand the definition of contract in the Ethiopian legal system, please compare this definition with other legal systems' definition of contracts.

In general, the above-cited definitions provided in the Ethiopian Civil Code is complete and wider than the other. For instance, it is more

complete as it includes agreements varying or extinguishing obligations, which the French code does not do.

In relation with contractual matters, the drafter of the Civil Code has established the theory of the autonomy of will. This theory is derived from the philosophy of economic liberalism, and carries three major consequences.

1. Contractual freedom: there is no obligation to conclude a contract, the contracting parties are free to define the scope of the contract and in principle there is no special form for contracts, because consent is sufficient.
2. Enforceability of contracts: a contract has the force of law between parties to the contract. The contract is also compulsory for the judge himself.

3. The relative effect of contracts: In principle, contract has no consequence or produce effects on third parties. The effect of contract is, in principle, limited to the contracting parties themselves.

Unit Three: Classification of contracts

Introduction

Classifying contract is not an easy task. However, different scholars try to classify from different perspectives. In this unit an attempt is made to discuss different categories of contracts though there is an overlap among one category of contract on the other.

Unit Objectives

After you have completed this unit, you will be able to

- Explain the basis for classification of contracts;
- Distinguish bilateral and unilateral contracts, considerable and gratuitous contracts, express and implied contracts, aleatory and commutative contracts, and contract of adhesion and contract of consultation.

There are many types of contracts. The categories into which contracts are placed involve legal distinctions as to formation, enforceability and or performance. The best method of explaining each type is to compare one type with another. Without pretending to be exhaustive, here follows a certain number of illustrations, and of course, a given contract may fall into several categories.

1. Bilateral versus Unilateral contracts

Every contract involves at least two parties whether it is a bilateral or a unilateral. Whether the contract is classified as unilateral or bilateral depends on what the offeree must do to accept the offer and to bind the offerer to a contract. The two parties are the offeror who is the party making the offer and the offeree who is the party to whom the offer is made.

If to accept the offer the offeree must only promise to perform, the contract is a bilateral contract. In bilateral contract, both parties have an obligation to discharge in respect of the other. Hence, a bilateral contract is a " promise for a promise". Bilateral contract is also termed as synallagmatic contract. No performance, such as payment of money or delivery of goods, need take place for a bilateral contract to be farmed. The contract comes in to existence at the moment the promises are exchanged.

In contrast, if the offer is phrased to that the offeree can accept only by completing the contract is a unilateral contract. It can be said that only one party assumes an obligation, such as the repayment of a loan. Therefore, a unilateral contract is a "promise for an act". Contests, lotteries, and other prize-winning competitions are also examples of offer for unilateral contracts. If a person complies with the rule of the contest such as by submitting the right lottery number

at the right place and time a unilateral contract is formed, binding the organization offering the prize to a contract to perform as promised in the offer.

2. Express versus Implied Contracts

An express contract is one in which the terms of the agreement are fully and explicitly stated in words, oral or written. A contract that is implied from the conduct of the parties is called an implied in fact contract or implied contract. This type of contract differs from an express contract in that the conduct of the parties, rather than their words, creates and defines the terms of the contract. In the common law legal system, three steps should be established for the existence of an implied in fact contracts: the plaintiff furnished some service or property; the plaintiff expected to be paid for that service or property and the defendant knew or should have known that payment was expected by using the objective theory of contracts; and the defendant had a chance to reject the services and property but did not.

Dear student, is there an implied contract in the Ethiopian legal system?

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3. Solemn (Formal) versus Consensual (Informal) contracts

Solemn (formal) contracts are contracts that require a special form or method of creation (formation) to be enforceable or valid. It means those types contracts that should be made in a certain formality

requirements are solemn contracts. The important point that should be given due consideration at this juncture is that the special formality requirement is serving as a means for validity not a means for proof. Where as consensual /informal/ contracts are contracts in which no special form is required as the contracts are usually based on their substance rather than their form. As long as capable contracting parties give their consent, which is sustainable at law that will be enough for such kinds of contracts.

4. Contract of Adhesion Versus Contract of Consultation (Freely Negotiated Contracts)

In some types of contracts, the terms of the contract are dictated by a party with overwhelming bargaining power and the signer must agree to those terms or go without the commodity or service in question. Such contracts are often referred to as adhesion contracts. An adhesion contract is written exclusively by one party (the dominant party) and presented to the other party (the adhering party) who has no opportunity to negotiate. Adhesion contracts usually contain copious amounts of fine print disclaiming the maker's liability for everything imaginable. In other words, standard form contracts often contain fine print provisions that shift a risk naturally borne by one party to the other. Such contracts are used by a variety of businesses and include insurance policies, lease contracts, loan agreements and others.

In such types of contracts the mass produced character of the arguments results in cost savings but raises contractual assent where, as is usual, the insured, for instance doesn't read the policy and is not otherwise adequately informed of the terms because the insured simply accepts what the insurer dictates.

In present day commercial life the standardized mass contract has given wider coverage. It is used primarily by enterprises with strong bargaining power and position. In other words, such standardized contracts have been described as those in which one predominant party will dictate its law to an undetermined multiple rather than to an individual. There resemble a law rather than a meeting of the minds. No bargaining is engaged in with respect to it. It means there is no freedom of contract in standardized form of contracts. When the adhering party reads the terms and agreed, there will be a contract. If he didn't agree, he could leave the contract.

In case of contract of consultation /freely negotiated contracts), where as, contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole. The parties freely bargain for their respective rights and duties. They freely negotiate on the terms and conditions of the contract.

5. Aleatory versus Commutative Contracts

Aleatory contract is a type of contract in which one party's performance depends on some uncertain event that is beyond the control of the parties involved. For instance, in case of contract of life insurance, the insured has to pay the premium as the time of formation of insurance contract but the insurer will pay the indemnity when the insured dies.

A commutative contract, where as, is the type of contract where the contracting parties are required to perform their obligations

simultaneously. There is no advance time given to one of the contracting parties.

Dear student, do you understand the different classification of contracts and their basis? These are not the only types of contracts. We have other types of contracts in which you are required to dig out them.

Unit Four: Purposes of contract Law

Introduction

The principles governing the law of contracts have evolved over many years and those principles have been designed to serve many purposes. There are policy objectives behind contract principles. This unit emphasizes on the different purposes the law of contracts try to achieve.

Unit Objectives

At the end of this unit the student will be able to:

- Discuss the different purposes behind contract principles;
- Distinguish the various theories behind the purposes of contracts such as consent theory, will theory, promise theory, reliance theory, utilitarian economic theory and critical legal studies theory.

Without purporting to be an exhaustive list of possible purposes behind principles of contract law, the following purposes are frequently identified.

A. ***Consent theory*** In this theory, by manifesting their intention to be legally bound promissors and promissees have consented to a legally enforceable agreement, contract. Contract law should be designed to impose individual responsibilities on those who make such promises /promissors)
B. ***Will theory.*** According to this theory, contract law should be designed to foster individual liberty, private autonomy, and freedom of transaction in the private sector, subject to minimum controls in the name of collective or public interests. Courts should indicate the intentions of promissors and promissees who willingly exercise this "freedom of contract". Even though a contracting party should be bound for his promise as long as he gave his will, it should not be against public policy or public interests of the society. That is why there are mandatory provisions in the law of contracts in which the contracting parties may not derogate from them.
C. ***Promise theory*** Contract law is necessary to uphold moral values, by recognizing the sanctity of promise. In this theory, when a promissor invokes the norm of promising, he or she

should be held to his commitment. I think this goes with the Amharic saying 'yetenagerut kemitefa yewoledut yitfa'

D. Reliance theory Based in this theory, contract law should be designed to protect promissees and their reasonable expectations. When promissees act in reliance upon others' promises, country should protect them from injury due to broken promises to avoid injustice. Once a promise has reasonably expected something out of a contract from the promissor, his expectation or reliance should be given due consideration.

E. Utilitarian Economic Theory This theory, as the name indicates, relates contractual principles with economic transactions. The first four purposes of contract law are associated with the traditional consensual, " freedom of contract" model of contract law. However, the utilitarian economic theory has become increasingly influential in recent years and is championed by a number of academics and jurists associated with the "law and economics" movement.

According to this theory, the principles of contract law should be designed to maximize the potential gains from transactions by facilitating the process of voluntary trade. Contract law should be utilitarian (to maximize utility) and based on free market principles.

F. Critical legal studies Theory. The view in this theory emanates from development in philosophy and literary criticisms frequently characterized as " post modernism"; its proponents in legal academia are known as the "critical legal studies" movement. The proponents of the critical legal studies theory believe that contract law based on any or all of the foregoing principles is not " value neutral", as some of the proponents of the foregoing principles would have us believe. From its inception, contract law has been designed to protect and promote particular vested interests and privileged classes, the "haves" at the expense of the " have nots". Thus, private law, including contract law, should be deconstructed and then reconstructed to serve altruistic, societal interests in the pursuit of social justice, rather than the venal interests of individuals.

Dear student, please discuss those theories in your words and evaluate the prevailing theory in your opinion.

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Unit Five: Scope of Application of the Provisions on Contracts in General

Introduction

Dear student, when we see the definition of contract under article 1675 of the Civil Code, obligations of proprietary nature should arise from agreement. Nonetheless, the provisions of contract in general may be applicable for other types of civil obligations irrespective of the source of obligations. In this unit the scope of application of contracts in general will be treated.

Unit Objectives

At the end of this unit you will be able to:

- Explain the scope of application of contracts in general on special contracts
- Explain the scope of application of contracts in general on non contractual obligations

Article 1676/1/ of the Civil Code clearly states that the title on contracts in general (Articles 1675-2026 of the Civil Code) from the general law of Ethiopian contracts, the provisions of which are intended to cover all types of contracts whatever their nature like contract of sale, sale of immovable, administrative contract, contract of compromise and arbitration, contract of transportation, contract of sale of business and irrespective of the parties, e.g. natural (physical) persons or artificial /legal/ persons bound by them. In other words, such provisions are common to all special contracts under book V of the Civil Code and those contracts governed by the commercial code.

However, the title on contracts in general applies to special and commercial contracts in so far as only as it does not conflict with special provisions of them. (See Article 1676 (2) of the Civil Code). It is a modern rendering of the traditional Latin maxim specialia generalibus derogant, which is translated as special provisions are an exception to general ones or special rules derogate from the general rules. In other wards, Articles 1675-2022 of the Civil Code offer general rules which will be departed from if special ones are provided else where. 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 ones, derogate from them. Thus, the general provisions of the contract will assume a suppletory role, and will only come into play in the event of a lacuna or difficulty with the special provisions.

On the other hand, the scope of Articles 1675-2026 of the Civil Code may be extended beyond the general law of special contracts generally to cover obligations, which do not necessarily arise out of a contract (see Art. 1677(1) of the Civil Code). The words " notwithstanding that the obligation does not arise from contract" must be taken to mean notwithstanding that the obligation does arise from sources of obligations other than contract e.g. from tort, or unlawful enrichment, or family law. The qualification "relevant" under Article 1677(1) of the Civil Code excluded provisions, which, by rules of logical relevancy or, by sheer common experience, can't apply to non-contractual obligations e.g. the provisions on formation of contracts. On the other hand, certain rules on performance and non-performance of contracts may relevantly apply to performance and non-performance of non-contractual obligations, while rules of extinction of obligations through remission of debt, novation, set off,

merger, limitation of actions, may properly apply to the extinction of non-contractual obligations.

However, Article 1677(2) of the Civil Code narrows its scope to exclude provisions affecting the special provisions, which are applied to obligations of non-contractual origin and nature. Here, the maxim specialia generalibus derogant, translated as special provisions derogate from general provision comes back again. It means the provisions of law of contracts in general (articles 1675-2026 of the Civil Code) are applicable to non-contractual obligations where no special provisions are applicable to them. For instance, a lawyer faced with a tort problem will first look up provisions from law of tort, before resorting, if necessary, to the title on contracts in general.

MODULE TWO

FORMATION OF CONTRACTS

Introduction

For the existence and validity of a contract, certain essential elements are needed. Those essential requirements for a validity of a contract are capacity, consent, object and form. Without these elements, the contract is not valid. This module will discuss the nature of these elements and their treatment as a prerequisite for the formation of a valid contract.

Dear student, since formation stage is the foundation stage to the others, we have to read it critically.

Module Objectives

At the end of this module, you will be able to:

- Describe elements of a valid contract in other legal systems in general;
- Discuss the treatment of capacity, consent, object and form as validity requirements under Ethiopian legal system.

Unit One: Elements of a valid contract in General

A contract in order to be enforceable at law must be valid in the sense that the parties must be capable of giving a sustainable consent; the object of the contract must be defined, lawful and possible; and formal requirements if any, must be complied with. (See Article 1678 of the Civil Code.) These essential elements are those with out which there can be no contract.

Where all of the elements coexist, a valid contract is the result. If any one of them is absent, the agreement is in some cases merely unenforceable, in some voidable at the option of one of the parties, and in some absolutely void.

However, the essential elements of a contract are not identical in every legal system. For instance the elements of a valid contract under French law, according to Aubrey and Rau are: the concurrence of the consent of the parties, their capacity to the contract, a certain object, and finally, a lawful cause of obligations.

While the essential elements of a valid contract under the common law legal system are:

a. There must be a distinct communication by the parties to one another of their intention, or an offer and acceptance;

b. The agreement must possess the marks, which the law requires in order that it may affect the legal relation of the parties, and be an act in the law. Therefore-
    i. It must be in the form required by law
    ii. There must be consideration, when required by law

c. The parties must be capable in law of making a valid contract;
d. The consent expressed in offer and acceptance must be genuine;
e. The object, which the contract purports to effect, must be legal.

Under Ethiopian law, the essential elements of a valid contract are provided under Art. 1678 of the Civil Code, without the existence of these elements there can be no valid contract. These elements are: " ... a) the parties are capable of contracting and give their consent sustainable at law; b) the object of contract is sufficiently defined and is possible and lawful; c) the contract is made in the form prescribed by law, if any." Thus, the prerequisites for the formation of a valid contract under Ethiopian law is an agreement exempt of any vice between parties who have the capacity to contract, an object which is sufficiently defined, possible and lawful, and a certain form where it is imposed under pain of nullity.

Unit Two: Capacity as a Prerequisite for the Formation of a Valid Contract

Under Ethiopian law, capacity to contract is included in the general capacity to act in law. Capacity to act in law is not governed by Title XII of Book IV, rather by Title II of Books of the Civil Code dealing with " capacity of persons". Under Article 1678 of the Civil Code, a person to be able to enter into contractual agreement, he must be capable in the eyes of the law. Capacity is the aptitude of a person to perform acts of civil life. Article 192 of the Civil Code provide that every physical person is capable of performing all acts of civil life unless he is declared incapable by law. Besides the capacity of a person is presumed as provided in Article 196 of the Civil Code. Thus, from the cumulative reading of Arts 192 and 196, one may conclude that capacity is the rule and incapacity is the exception.

A question may arise as to who are incapable under Ethiopian law. The clause ".... unless he is declared incapable" under Article 192 of the Civil Code implicates that there are certain category of people who are excluded from engaging themselves in certain juridical act. Accordingly, the code provides for two kinds of incapacity: namely, general disability and special disability.

Therefore, according to Ethiopian law of persons, capacity of persons is presumed, consequently, there must be an explicitly declaration of

the law to that effect before some one can be considered incapable. If a person is considered as incapable under the law, he cannot enter into obligations of his own acts according to his own volition. It must be noted in this respect that incapacities are never absolute: there is always a limited sphere, which remains with in the powers of this incapacitated persons. So, once a person has been declared to be incapable by the law, the extent of his incapacity is also defined by the law. In respect of those acts, which are allowed by the law, the incapacitated person has full capacity in the same as normal person. The need for the requirement of contractual capacity is highly related with consent of the parties. To put it in the words of Jurado, " the capacity of the contracting parties is, in effect an essential element of a contract, or to be more exact, it is an indispensable requisite of consent. Since it is so intimately inter-woven with the latter as an antecedent is to a consequent, and since it is impossible in law to speak of an effective consent with out presupposing the capacity to give it." It is due to the above reason that, article 1678 requires parties to the contract to be competent in the eyes of the law to create a valid contract

However, if a person is incapable by law his incapacity may fall in one of the disabilities (general or special disability)

A. General Disability

Pursuant to Article 193 of the Civil Code general disabilities are those, which depend on the age, mental condition of persons or on sentence passed up on them.

One of the grounds of general incapacities is minority. A minor is a person of ether sex who has not attained the full age 18 years. The source of incapacity of a minor is lack of full age. This is because a

person under 18 years of age is supposed not to possess a mature mind and intellect to know the nature and consequence of his acts. For this reason he is debarred from entering into juridical acts. But when the law incapacitates a person from performing juridical acts, it is not to deprive him of his right. But rather it is to give him protection. In this respect, the law protects the minor by devising a mechanism through which he could enjoy the exercise of his rights. thus, a minor is accorded protection in two ways: as regards the proper care of his person, he is placed under the authority of a guardian and in matters concerning his pecuniary interest and the administration of his property he is represented by a tutor.

If, despite of this protection, a minor happens to engage himself in juridical acts in the excess of his powers, the contract is of no effect. Accordingly, the minor, his representative or his heirs may demand the nullity of such contract. The phrase " ... of no effect" under Article 306 of the Revised Family code is misleading as the contract, which the minor conclude, is not null abinitio. the contract is enforceable against the minor until the moment he applies for its invalidation.

The second one is insanity and infirmity. " An insane person", as defined under Art. 339 of the Civil Code" is one who as a consequence of his being insufficiently developed or as a consequence of mental disease or his senility is not capable to understand the importance of his action". On the other hand, infirm persons are those who as a consequence of a permanent infirmity are not capable to take care of themselves or administer their property. Juridical acts performed by an insane person, at the time and in a place in which his state of insanity was notorious; or, juridical acts performed by an infirm person, where the infirmity which renders such person unfit to take care of himself and to administer his property is apparent, can be

impugned by the person himself, by his representative or by his heirs as per Article 343 of the Civil Code.

Thus, insane and infirm person must comply with the requirement of the law in order to benefit from the protection of the law. That is to say, they have to submit themselves to the procedures for judicial interdiction. The consequence of not submitting oneself to the procedure is that such persons are not granted the protection of the law. According to Art. 347 of the Civil Code juridical acts performed by a non-notorious insane person cannot be impugned on grounds of his insanity. Because as the person doesn't fulfill the requirements of the law, the law "... tends to grant more protection to the public than to the incapable when the latter prefers to remain free from interdiction".

The only exception to this rule is sub article 2 of Art. 347 of the Civil Code which states that the insane person can obtain the annulment of his act if he can show that he was not in a condition to give a valid consent at the time he performed his act. Once, however, the insane person submits to the procedure for judicial interdiction and the court has declared his interdiction, he cannot exercise his rights and duties by himself. Thus pursuant to article 358 of the Civil Code the judicially interdicted person is accorded with all the protective measures granted to a minor.

On the other hand, unlike the incapacity of a minor and insane person, the incapacity of a legally interdicted person is not based on the assumption that the legally interdicted person doesn't have sane mind to know the consequences of his acts. As the word itself shows, the legal interdiction of a person is not to be determined by courts, but rather it is the law that provides for legal interdiction of an individual.

In accordance with article 380 (2) of the Civil Code the legal interdiction of person is to be pronounced by criminal laws. Thus a person is said to be interdicted by law when as a consequence of criminal sentence passed upon him the law withdraws the administration of his property. (See article 380(1))

B. Special Disability

Special disabilities are prescribed by law by reason of the nationality of persons or to functions exercised by them. These are provided under articles __ of the Civil Code.

Unit Three: Treatment of consent as a Validity Requirement for the Formation of a Valid Contract

Introduction

It was discussed here in before, that, agreement is one of the component parts for the definition given to contracts. This agreement is the manifestation of common intention or mutual assent by two or more persons to one another. therefore, consent means the meeting of ideas or minds. The most important element, which constitutes the very heart and soul of contracts, is unquestionably, the consent of the contracting parties. It may be defined as the concurrence of wills of the contracting parties with respect to the object and the cause, which shall constitute the contract. That is why article 1678(a) of the Civil Code requires consent sustainable at law as a requirement for validity of contracts.

However, consent may be given and exist outwardly... but nevertheless contain defects and not be bilaterally valid ... As a result, the contract exists, but is not sustainable at law by the other contractant. Then, whether the consent is alone, or whether it is accompanied by another element, it must always exist, and have certain qualities of intelligence and of liberty, in the absence of which it is considered as vitiated. Thus, if the parties to the contract have given their consent by mistake or under deceit or duress, the contract will be invalidated for lack of free consent. These are the areas that are covered in this unit.

Unit objectives

At the end of this unit, you will be able to:

- Explain the necessity of consent
- Identify the elements of consent;
- Identify the theories on exchange of consent;
- Discuss the nature of offer and acceptance
- Explain the grounds of termination of an offer and acceptance.
- Distinguish between valid acceptance and defective acceptance
- Distinguish between the grounds of defect in consent such as mistake, fraud and duress
- State and analyze defects in consent and the effect of such vices

Section One: The Role of consent

Dear student, as we have seen before, consent is the basis for the creation of a contract, without the consent of the parties one cannot imagine the existence of a contract. The source of the provisions of a contract is the consent of the parties to the contract. In turn the provisions of such a contract have a binding effect upon the parties, as though they are law, enacted by a legislature upon its citizens. Thus, consent is an indispensable element for the existence of valid contract as log as it is procured freely. If the consent is absolutely destroyed by whatever cause, the contract has not existence; nothing has been done, that which exists is only a vain appearance.

The possible rationale behind the importance of consent is that, parties must be bound by what they have willed freely. This is, firstly, to establish smooth, continuous and secured daily business transactions, which is a condition for a stable and healthy economic order. Secondly, one must, morally, respect his promise as though it is a rule of law (*pacta sunt servanda*).

When all the necessary free consents are obtained, and manifested in the legal form, the contract is formed; the lien of the law is tied. Accordingly, the function of consent is to create a contract; and a contract in turn gives rise to obligations. Similarly Art. 1679 of the Civil Code states the fact that consent creates contract. It reads, "A contract shall depend on the consent of the parties.... " However, it is obvious that consent alone doesn't create a contract. The absence of other elements of a valid contract defeats the formation of a contract. It is rather to show that consent is the basis upon which rests the entire law of contractual obligations. That is why Art. 1679 of the Civil Code in its French version is titled as " fund mental importance of consent".

Hence, the general rule is that, there can be no contract in the true sense in the absence of the elements of agreement, or of mutual assent of the parties. The agreement of the parties can be deduced when they consented to the terms of the contract. This is reflected under Article 1679 of the Civil Code, as it requires the parties to agree as to the scope of their undertakings.

Besides for agreement to end up in forming contracts, there are requisites to be fulfilled. " An agreement, to be recognized as such by the law, so as to constitute a contract must be on the face of the matter, capable of having legal effects... It must have reference to the assumption of legal rights and duties, as opposed to engagements of a social character and engagements of honor." So, when the parties enter in to a contract, the agreement should refer to legal relations, i.e. to the assumption of rights and obligations. The agreement of the parties to give birth an obligation so as to constitute contract, the

consequences of agreement must affect the parties themselves. That is why it is said that " contracts must not be the sports of an idle hours, mere matters of pleasantry ... never intended by the parties to have any serious effect whatsoever." Thus, an agreement, in order to be binding upon the parties, it must be made with intention of creating legal consequences. It means, the agreement must purport to produce a legally binding result as opposed to engagements of a social character.

The other parallel to the assumption of legal relations in agreements to be contract is that the requirement of the parties to agree to be bound by the terms of their contract. In this regard, Article 1679 of the Civil Code underlines a double element with in the consent given by the parties: the parties have to agree as to the scope of their a undertakings and agree to make it binding. The last element is in Latin known "*intentio obligandi*" literally means intention to be bound by the force of the contract.

When this double condition is present, the affectivity of the binding nature of the obligation is guaranteed by the law. In other words, the private parties who undertake to conclude a contract can count on the force of the law, represented by the authority of the judge and the enforceability of judgments, to have the obligations agreed upon being implemented. The intention to be bound will often have to be identified by the judge as deriving from the circumstances: there is no fixed expression needed to prove its existence. The burden of proving that there was no intention to be bound will be on the party who disclaims any binding nature of the agreement.

However, certain agreements are not binding at law. Such are the cases when the undertaking is on "one's honor," or when a proposal is

made stating precisely that it will not be binding, or when the agreement is simply to assist a neighbor, as is often the case in rural communities. One often quotes the example of an invitation to dine at a restaurant. Also, certain commercial formulations, such as " letters of understanding", " agreement on principles", "gentlemen's agreement" only have this in common that the parties precisely wanted to avoid the binding force of contract: they are usually in the nature of preparatory actions designed to support the negotiation prior to the contract. Moreover, an agreement is not legally binding either if it is a simulation, that is to say if it is only a cover or a pretext for a real, hidden contract. If the real contract is proven, it will be enforced between the parties, and the simulated one will have no effect. Because of the above reasons all agreements are not contracts but all contracts are agreements.

The other issue worthy treating is the means of knowing whether the contracting parties have agreed on the terms of the contract or not. The normal test for determining whether the parties have agreed on the terms of their contract is to ask whether there is communication of the common intention as between themselves. Agreement further imports that there would be a mutual communication between the parties of their intention to agree for, without this neither could know the state of the other's mind.

There are basically two theories concerning the expression of consent, namely the ***theory of will*** and ***the theory of declaration***. According to the theory of will, the internal intention is the one which gives rise to the formation of contracts. In other words, it is the intention of the parties, which has to be taken into consideration, when one is going to determine whether a contract is concluded, or not. The justification given to this theory is a moral one that a man should not be tied to an

agreement he did not will. A writer said, " in a period which regarded the private will as the essential factor in the creation, modification and extinction of right and obligations, it was natural that a subordinate role should be attributed to the declaration. The will is the kernel of the juristic act ... The basic inquiry as to the formation of a contract was whether there was an agreement of wills, a consensus ad idem; the declaration merely served to bring the internal will to the knowledge of third parties."

Thus, per theory of will, it is the internal intention of the parties which is needed to form contracts, i.e. its external manifestation is no more important than the psychological or interior consent of the parties. If the declared will is found to be contrary to the real intention, it is the real intention that prevails over the declared will and the contract is to be considered as if not formed.

On the other hand, the declaratory theory says agreement is not a mental state but an act, which is a matter of inference from conduct. The parties are to be judged, not by what is in their mind, but by what they have said or written or done. It is the expressed not the intended will that forms a contract. It is believed that "courts should give effect to the declaration of the parties; the only question was how the declaration was or should have been understood. A juristic act was valid provided that the declaration itself was willed, though it did not reflect the true content of the internal will. The juristic act resulted from a declaration of will, not from the internally entertained will.

Thus, in accordance with this theory, once the parties make an accord on the declared will, even if the real intention is found to be contrary to the declared will during the performance of the contract, it is the declared will that remains binding, no matter what the real intention

of the parties is found to be. The justification given to support this theory is, the social argument, that, there can be no order nor trade, if men cannot rely on expressed declarations.

The Ethiopian law, pursuant to article 1680 of the Civil Code, follows the declaratory theory as opposed to the theory of will. In accordance with this article, the contract shall be completed where the parties have expressed their agreement thereto. Reserves or restrictions intended by one party shall not affect his agreement as long as the other party was not informed of such reserves or restrictions. Per this article the actual declaration of will is what the judge has to check, rather, as in French law to search what was the actual will, subjective state of mind of a party. The contract exists even when there is no real will, if a declaration of will is established. This solution is designed to simplify the work of the courts and to restrict the number of disputes.

However, even if the declaration theory is the rule, there is an exception under Ethiopian law. If the declared will is found to be contrary to the real intention during the performance of the contract, the contract shall remain valid; but if such discordance amounts to be decisive and fundamental mistake, according to the standards as set under Arts 1992 & 1698 of the Civil Code, the contract may be invalidated subject to the damages due under Article 1703 of the Civil Code, for instance.

Section Two: Offer and Acceptance as a Mechanism of Declaring Consent

1. In General

We have said that parties must declare their wills in order to conclude a contract. Whether or not the parties have declared their wills is examined from the negotiations they have made through the mechanism of offer and acceptance. In other words, before the agreement of the parties is effected there is a bargain, which involves negotiations back and forth. In this sub section an attempt will be made to explain offer and acceptance as a mechanism of expressing a party's consent.

2. Nature of Offer

In defining an offer, a writer says, " the simple word "offer " as it is used in describing the bargaining process is a compendious term. It means that: a) the offeror has proposed the making of a transaction to which he and the offeree would be parties; b) he has defined what each party would give and what each would get in making the proposed transaction; and c) he has enacted his consent of enter such a transaction. Others have defined it to mean, the offer is an expression of willingness to contract made with the intention (actual or apparent) that it shall become binding on the person making it as it is accepted by the person to whom it is made.

To put it differently, an offer is a firm and precise proposal to conclude a contract under specific conditions, so that the simple acceptance is sufficient for the formation of the contract. An offer is firm when the offerer has the effective intention of being bound by the offer. Should he use for instance an expression such as " subject to

confirmation", his communication to a would be contractual partner cannot be deemed an offer; on the reverse, the addressee is put in the position of answering by stating an offer to contract. For instance, a job vacancy is not strictly speaking an offer to conclude a contract of employment. It seems evident that the prospective employer reserves himself the right to reject any application he considers unsuitable.

On the other hand, an offer is deemed precise where at least the essential elements of the future contract are précised. Since, it is the terms of an offer that would become the terms of a contract upon acceptance, it is a mandatory requirement of the law under Article 1714(1) of the Civil Code that the terms of an offer be defined sufficiently. If the terms of an offer are too vague to understand, no valid contract can exist.

Accor5dingly, if these elements are not present, the offer is incomplete and cannot be accepted in this situation. This rule is sanctioned by article 1695 of the Civil Code, which imposes the perfection of the contract. Thus, offer is a mechanism of expressing a party's consent proposed to deal on defined terms with the other party with an eye to concluding a contract if the offeree agrees to the proposal which is made to him.

Having seen what an offer is, it would be important to examine the essential characteristics of a legally sufficient offer.

Firstly, the offer must first of all be distinguished from simple invitations to negotiate. The latter only intended to rouse the interest of a potential contracting party and are not binding as such because, precisely, it is too early to conclude a contract. Such invitations to negotiate are covered by two contradictory principles one is free to

break them off, as they do not amount to an offer. On the other hand, extra-contractual damages may be due if such invitations were made in bad faith.

Secondly, in order for an offer to ripen into a contract by acceptance, it must be completed by the act of communicating it to the other party. An offer, which is not communicated to the offeree, is not an offer in the legal sense of the words, but it is a mere declaration of intention. This conclusion is in accordance with article 1687(a) of the Civil Code which states that a person shall not be deemed to make an offer where he declares his intention to give, to do or not to do something but does not make his intention known to the beneficiary of the declaration. Accordingly, emphasizing the importance of communication one writer comments: the necessity for the communication of the offer and for its consequent acceptance, would also seem to be the reason why two identical cross offers do not make a contract. Two manifestation of a willingness to make the same bargain do not constitute a contract unless one is made with reference to the other.

To put it differently, the offer must be made to a specific person, failing which this is a simple statement of intention or an invitation to discuss. For the offer to come to existence, one has to state the offer to the prospective beneficiary. One will immediately note that this requirement is only imposed in respect of offers, and not of acceptances, which may be made without stating the identity of the offerer.

Thus, if an offer is not made known to the beneficiary, it remains a mere declaration of intention. In this respect, Ethiopian law recognizes three declarations of intention that do not create a power

of acceptance, as they are not made with serious intent and a binding offer.

The first situation is provided under Article 1687(a) of the Civil Code. This is discussed in the previous paragraphs. The second one is those publications provided under Article 1687(b) of the Civil Code. This provision states that whosoever sends to another or posts up in a public place tariff, price lists or catalogues, or displays goods to the public shall not be deemed to make an offer. The purpose of this article is that such publications are not in themselves offers creating the power of acceptance, they are meant to excite people to offer. Moreover, if we take the requirement of an offer that it should be sufficiently precise, such publications leave unexpressed many terms that are essential to the making of a contract. For instance, they leave among other things, unexpressed the amount to be sold, the time and place of delivery or the terms of payment.

Thus, a proposal made by an advertisement does not aim a specific person, but the general public. If a restaurant advertises the price of meals on its door, it doesn't consider a precise person, but a person who happens to walk past the sign. The businessman who sends a printed catalogue, even with a precise address, is not making a specific offer. He is trying to gain attention, and to invite the potential buyers to come and discuss his proposals. In the same vein, the grocer exposing a pile of oranges to the public on the street, even with the indication of a price per kilo, is not making an offer in the sense of the Civil Code. In short, such proposals ask for offers, which makes the prospective client the offerer and the proposer the offeree.

The third situation is the case of auction, which is another form of declaration of intention and doesn't amount to an offer. The purpose

of auction being the solicitation of the highest possible price, the auctioneer simply invites offerers and no contract results until the auctioneer brings down the hammer upon the last bid being made. In other words, when a person offers a thing for sale by auction, he is requesting buyers to submit bids. It is the bid that ripens into a contract upon acceptance by the auctioneer. There fore, the auctioneer can withdraw the declaration at any time if he feels that he did not get the desired price.

In this regard Article 1688 of the Civil Code states that a person who puts some thing up for sale at auction is only deemed to make a declaration of intention and not an offer. A sale by auction should be construed as an appeal for offers to buy as opposed to a public tender for bids, which is an appeal for offers to sell. This rule protects the seller against bids, which would be too low, as he is not bound by such bids. But it does not preclude the existence of a tortuous liability where the seller inconsiderately withdraws a thing from a public auction. (See Articles 2055 and 2028 of the Civil Code.) The conclusion of the contract is however not linked to the acceptance by the seller of a bid, but, as Article 1688(2) of the Civil Code says, the contract is completed " When the thing is knocked down upon the last bid made ": the conclusion is in the hammer of the auctioneer.

However, Article 1689 of the Civil Code settles an exception situation, that of the rewards promised to the public at large for the discovery of a thing lost or for the performance of a given action (for instance the participation in a competition to win a prize). Typically, the offerer promises a sum of money for the return of lost or stolen property, for information leading to the apprehension of a fugitive, for the actual apprehension of a fugitive, for information about a missing person, for getting drugs for HIV AIDS etc.

In this regard there is no uniformity of opinions as to whether public promise of a reward should be communicated to the offeree for a contract to come in to existence upon his acceptance. There are two theories as to the nature of public promise of a reward. According to the contract theory prevailing in common law and in French law, public promise of a reward is regarded as an ordinary offer. Hence no distinction is made between ordinary offers and public promise as to the requirement of communication.

According to the unilateral act theory public promise of a reward "... is not an offer which would require acceptance in order to ripen into a contract, but is a unilateral jural act which as such is effective and binding without acceptance". In the legal systems adhering to this theory the promisee is entitled to recover in accordance with the terms of the promise: since the promise is treated as an offer and no acceptance is required. It is irrelevant whether the promisee has acted with reference to the promise.

According to the contract theory which regards public promise of a reward as an ordinary offer "... logic seems to require an acceptance, i.e. manifestation of assent by an offeree who knows the offer". Other commentators hold that "... from the point of view of the offerer it seems immaterial whether the acceptor knew of the offer or not. The offerer has already got what he asked for and there seems no reason in justice why he should not pay for it."

Concerning the position of Ethiopian law, per article 1689 of the Civil Code, one can conclude that it adheres to the unilateral act theory, because under the above article the promisee is entitled to get the promise irrespective of his knowledge of the promise. In short, the

promise is considered accepted when the promisee performed the act or found the lost object without his knowledge of the offer. Thus, Article 1689 of the Civil Code is an exception to Article 1687 (a) of the Civil Code, which requires communication of offer for the creation of a contract by acceptance.

Here, the contract is concluded when the thing is returned or the action is implemented. The interesting thing to be noted is that this exception operates whatever the mode of publicity used to announce the promise of a reward. For instance, offers of a reward may be made through the public media such as newspapers, television and radio or it may be made through internet. However, the delay to perform will be indicated (article 1690 of the Civil Code) or must be reasonable (Article 1691 of the Civil Code). In this regard it has been commented that "a simple oral declaration, however, even if it is made before a fairly large group of people is not sufficient to constitute a public promise if a " means of publicity" is not used.

Dear student, do you agree with this comment?

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_____

The other difficulty may be when several persons answer or perform in accordance with the prescriptions of the promise as in the case of several winners of a cross-world competition.

Dear student, how the money (promise) be paid to those winners?

_____

_____

_____

_____

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The third characteristic of an offer is the non-existence of restrictions as to the form of offer. Article 1681 of the Civil Code does not impose a special form for offer. It can be oral (a proposal made by a client in the market place), or in writing (a letter), or by signs (the merchant shows the client a shamma in his shop; or in various usages or customs, such as the tasting of honey or katikala before buying) or even a behavior (a taxi stops in front of a person waiting on the pavement or putting tele coin box by telecommunication corporation). The only requirement is that there must be no doubt as to the intention to initiate the conclusion of a contract. If there is a doubt, we are faced with a simple declaration of intention.

Fourthly, an offer provides a period of time with in which the offerer is bound with his offer and the offeree may exercise his power of acceptance. An offer continues until lapse of time specified in the offer or if no time is so specified, by the lapse of a reasonable time.

The offerer is at liberty to make as many requirements or conditions to the exercise of the power of acceptance as he chooses, among which may be acceptance with in a specific time. The stated time is the duration of the offerer and acceptance after such time is too late to close the contract. For instance, the stated time in the offer may be September 20,2006, or the 1999 E.C. Christmas with in which the offeree has respond /accept/ the offer.

Although the rule that the power of acceptance must be exercised with in the time specified in the offer seems to present no difficulties, there are problems when the offerer uses ambiguous or indefinite language in limiting the time. For instance, an ambiguity exists where the offerer requires acceptance with in a limited number of days, weeks or months such as with in fifteen days, three months andwith in three weeks. From what date are the days to be counted, the date of the letter containing the offer or the date such letter is received by the offeree.

Dear student, please write your opinion in the following blank spaces.

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As far the solution to this problem is concerned two diverging arguments may be made. First, one can argue that where the offer names only the stipulated time limit for acceptance, the offeree must assume that the offerer intended the time to start running from the date of the letter bearing his offer, since the naming of a time is made in the interest of the offerer.

The other argument is: when we speak of the duration of an offer we mean the time with in which the offeree can exercise his power of acceptance. Usually an offer must be communicated to the offeree before it can create a power of acceptance. An offer, which is not communicated, is not a true offer in the legal sense of the word but a mere declaration of intention. It becomes a legally operative offer as

from the time the offeree learns of it. Thus, when we speak of duration of an offer, it must be understood to mean the time that the offeree has to exercise the power of acceptance and such time must begin to run from the date the offer is received. In this argument, a question arises at what exact moment does the offeree's power of acceptance come in to existence: at the moment when the letter containing the offer arrives at his destination, or when the offeree takes cognizance of the offer from the letter?

However, the Civil Code does not provide a clear-cut solution to such problems.

Dear student, I will ask you again, which argument is convincing in your opinion?

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As we said earlier, where there is time limit, the offer remains valid until expiry of such a time limit. There is however a problem in fixing the time with in which the offerer remains bound where the offer fails to specify the time within which the power of acceptance must be exercised. According to article 1691 of the Civil Code the offerer is held to his offer for a reasonable time if he has not communicated a specific time limit. The offer is maintained until the moment when "reasonably" the beneficiary of the offer is in a position to express his answer: rejection or acceptance.

A question here may arise as to what is a reasonable time. A possible answer to this question is that when the law makes an offer to be binding until the lapse of a reasonable time, the presumption is that the offeree must exercise his power of acceptance with in a time that a reasonable man in his position would believe to be satisfactory to the offerer. Thus reasonable time depends on circumstances like the nature of obligation, the preexisting relation between the offerer and offeree, the form of transmission of the offer and acceptance, the common usage in the precise sector, the distance involved. For instance, it may be several weeks (for a house, because the buyer will have to value the house, assess repair costs, discuss a loan with several banks...), it may be a few days (to buy a cow or horse), it may be a few hours (fresh produce, flowers, fruits...) Thus, reasonable time should be decided on case by case basis.

When the acceptance is considered as being too late, the offerer is supposed to inform the other party immediately that he does not intend to be bound. Does this mean that the contract can't be concluded, or simply that the issue remains debatable? What is evident is that, by a contrario, the offerer who does not react "forth with" or immediately will be sanctioned. What would be the sanction: simple damages or conclusion of the contract? The second solution seems probably the best. Of course, it remains a question of fact for the court to settle in practice what is meant by "forth with". For instance, subject to problems of proof, one may thus contend that when an acceptance is given by telephone, the offerer should immediately answer that the acceptance is too late, in the course of the very same telephone conversation.

3. Termination of Offer

Dear student, unto know we have seen the different characteristics of offer, the next discussion is about the termination of an offer. Take a time and discus the grounds of termination of an offer with your friend and write them down.

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If an offer is not closed into a contract by acceptance it may be terminated in the following ways: rejection by the offeree, lapse of time and withdrawal of offer by the offerer.

One of the ways of termination of an offer is rejection of the offer by the offeree, which destroys the efficacy of the offer. There is rejection of an offer when pursuant to the provisions of Art. 1690 (2) of the Civil Code the offeree rejects the offer before the expiry of the time limit or when according to article 1694 of the Civil Code the acceptance is defective. The result of these two articles is that it is no longer open to the offeree to change his mind and accept the offer unless the offerer renews it.

The second way of terminating an offer is lapse of time. If the offerer stipulates a time during which acceptance must be made and the offeree does not accept with in such time, the offer is terminated. (see Art. 1690(1) of the Civil Code). If no specification of time limit is communicated to the offeree, the offer may terminate by the passage of a reasonable time as per Article 1691(1) of the Civil Code.

The third way of terminating an offer recognized under Article 1693(1) of the Civil Code is withdrawal (revocation) of an offer by the offerer. A withdrawal of an offer is possible as long as it has not come to the attention of the offeree or where he is in the process of discovering its existence. In other words, there is revocation of an offer when the offerer revokes his offer before the offeree knew or at the time when he knows of the offer. A withdrawal is therefore impossible after the moment the offeree has gained knowledge of the offer. There is often in this respect a problem of proof of the moment when the offer was made aware to the offeree.

We have earlier said that an offer becomes binding when it comes to the knowledge of the offeree. Until the offeree knows it remains a mere declaration of intention not amounting to an offer. Thus, practically speaking what is revoked, in the case of revocation of an offer before the offeree knew the offer, is not a true offer but a declaration of intention. The revocation of an offer is deemed to be timely if it is made simultaneous to the offeree's knowledge of the offer.

However, the contract theory and unilateral act theory have conflicting views regarding revocation of public promise of reward. According to the contract theory public promise is regarded as an ordinary offer and with regard to revocation no distinction is drawn between ordinary offer and public promise.

On the other hand, the legal systems adhering to the unilateral act theory have special rules concerning revocation, which may not be identical with the rules existing in the same system as to revocation of ordinary offers. If we take for instance, the English system, which

adheres to the contract theory, public promise can be revoked, if the withdrawal is given in the same notoriety as the offer, even through it does not in fact come to notice of all persons who know of the offer. Similarly, under French law, that follows contract theory, public promise cannot be withdrawn if the requested act is performed. On the other hand, revocation of public promise is possible before the accomplishment of the requested act on the condition that there is good cause to the revocation and the revocation is made public in the same way that the public promise was made. In German, law, which follows unilateral act theory, a public promise may be withdrawn so long as the requested act has not been performed and the revocation is effected by the same public medium by which the original promise was announced or by a medium having the same publicity.

In those legal systems we have considered, ordinary offers could be two types as regards revocation, that is, those which are expressly stated to be revocable and expressly stated to be irrevocable. If we take the English legal system, if an offer is expressly stated to be revocable, " ... it is still capable of acceptance although it can be revoked at any time before acceptance." If there is no stipulation as to whether the offer is revocable or not, the offer is deemed to be revocable. The same is true in the French legal system.

In German and Swiss laws, the offer once known by the offeree cannot be revoked. However, if the parties stipulate the revocability of the offer, the offer is revocable on the condition that the offeree is informed of the revocation.

As we can see from the reading of Article 1693 of the Civil Code, Ethiopian law does not make a distinction between revocable and irrevocable offer. It adopts the principle that an offer can be revoked

provided that the offeree knows the revocation before or upon his knowledge of the offer, a principle which is more or less similar to the position taken by German and Swiss laws. However unlike the German and Swiss laws, which allow parties to stipulate the revocability of an offer even when it comes to the knowledge of the offeree, Ethiopian law does not permit an offerer to revoke his offer once the offeree has heard of it.

With regard to revocation of public promise, Prof. Rene David, the drafter of the Civil Code comments: when a person states his intention to reward whosoever does a particular thing and makes his intention public by using means of publicity such as posters, news papers, advertisements, or radio or television announcements, he is bound by his offer for the period specified in articles 1690 and 1691 of the Civil Code.

Accordingly, it can be argued that, under Ethiopian law, public promise can't be withdrawn until the time set under Article 1690 and 1691 of the Civil Code lapses. In other words, the provisions of article 1693 (1) do not apply in the case of public promises. The rationale behind making public promise irrevocable is engross in the public a sense of sincerity and honesty by rewarding persons who find out lost objects, make scientific inventions or who set new records in sports.

Dear student, in the next discussion, we will see those situations that will serve as grounds for termination of offer in certain legal systems. These are the death, incapacity, bankruptcy of the offerer and supervening illegality. However, the Ethiopian Civil Code does not address the question of the fate of an offer when the above situations happen.

Whether an offer can be terminated by death or incapacity of one of the parties has given rise to conflicting theories. According to subjective theory of contracts the fundamental aspect of a contract is the meeting of internal wills. If insanity or death of the offerer intervenes before the making of acceptance, the offer is terminated for the will of the offerer has died out with its author. Thus, since the assent of the offerer can no longer be presumed to continue, no contract can result even if acceptance is made for death of the offerer has supervened and making impossible the meeting of the parties will.

According to the objective theory of contract, the issue is not "the meeting of minds." The issue rather is whether the offer is made *intuitu personae* (i.e. whether it contains a personal element) or not. In French, German, and Swiss laws an offer, which would involve a personal performance on the part of the offerer, becomes void upon the death or insanity of the offerer. If, however, the offer does not contain a personal element the offer stands despite the death of the offerer. In other words, the offer was a sort of autonomous existence once it is made, and that it may be validly accepted.

Dear student, the issue to be considered here is whether death or insanity or bankruptcy of an offerer before acceptance terminates an offer under Ethiopian law. Discuss the issue with your friend and which theory is applicable in Ethiopia?

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The other one is about the fate of an offer when the offer becomes illegal after it is made. If the offer is already illegal at the time it is made there is no offer at all since no power is created in the offeree to make the offer binding in law (see Article 1716(1) of the Civil Code). But an offer, legal when made, may be changed in legislation supervening before the power of acceptance is exercised, be made unlawful. The point is that: does such supervening illegality terminate an offer under Ethiopian law? It is believed that as the object of the contract stated in the offer becomes illegal which will be a ground of cancellation after the contract is made and a ground of invalidation as the contract is void, supervening illegality cannot create a power of acceptance.

4. Acceptance

In the preceding discussion we have dealt with offer as a mechanism of expressing a party's assent. In this part we will be dealing with acceptance as an essential element in the making of a contract.

An acceptance is the pure and simple agreement given by the offeree to the offerer. Acceptance forms the contract. According to Art. 1694 of the Civil Code acceptance is deemed to be defective where it is made with reservation or does not exactly conform to the terms of the

offer. In other words, if there is a discrepancy between the terms of an offer and acceptance or if the acceptance is not final, but conditional, the offer is deemed to be rejected and a new offer is deemed to be made. Thus, in order that an offer ripens into a contract by acceptance, the acceptance must be unconditional and made in accordance with the stipulations laid down in the offer.

Just as for the offer the acceptance does not call for any special formality. (See Article 1681(1) of the Civil Code.) The only requirement is, as for the offer, to have no doubt as to the intention to undertake an obligation. However, under article 1681(2) of the Civil Code an offerer may stipulate a special form of acceptance. This means at the time when he makes an offer, the offerer has full control of its terms, of the mode of acceptance and of the length of time with in which the power of acceptance must be exercised. Therefore, an offer is consummated into a contract by acceptance, when the acceptance is made in accordance with the stipulation of the offer. In this case where an offer requires an acceptance by telegram, clearly an accepting letter shall be no avail.

However, the silence kept by an offeree does not constitute acceptance. Silence in the legal meaning of the word has to be defined. It should not be confused with the simple absence of verbal or written expression, because an outward behavior rather than speech can be equivalent to a tacit acceptance. An offer may be accepted for instance when the offeree performs the contract without any reservation. In other words, silence is the total absence of any form of expression, be it verbal, written or behavioral.

Thus, the rule is that silence can't be a means of consummating a contract. This is a deviation from the old maxim, which goes *quine dit mot consent* (he who does not speak assents). Under Ethiopian law this deviation is incorporated under Art. 1682 of the Civil Code, which reads, "silence where an offer is made shall not amount to acceptance". The rationale behind this article is that silence taken by itself does not show the state of mind of the offeree. Where the offeree keeps silent there are at least two ways of understanding his mind: one, he is silent because he does not want to accept; two, he may be silent because he may not have knowledge of the offer.

Even, the offerer cannot impose upon the offeree to expressly reject in whatever form of rejection. If so, this would be against the principle of silence as not acceptance. It would also make life unbearable for all of us, who are constantly subjected to a stream of unsolicited offers. It would place the burden of evidence of rejection on the client and be unreasonable. Besides, to protect contractual freedom - which also includes the freedom not to contract- the rule states that silence cannot amount to acceptance and that some form of outward expression is needed. In any case, since the offerer has no right to force the offeree to speak when the latter is silent, all the offerer has to assume is that the offeree does not, want to accept his offer.

In spite of this, however, the principle that silence does not constitute acceptance suffers the following exceptions. Articles 1683 and 1684 of the Civil Code provide two exceptions to the general rule that silence does not constitute acceptance

Article 1683 of the Civil Code talks about the case of persons who are required by law or by the terms of a concession granted to them by the government to conclude certain contracts on terms stipulated in

advance with anyone who makes an offer. In certain cases the government will grant an economic operator the exclusive right to manage a given activity /bus services, electricity supply, water resource, telephone lines, and public utilities generally/. Because this right is exclusive and often answers a public necessity or as the undertaking are entrusted with the management of public services that are necessary to the life of the community, it is out of the question that the operator may refuse a client. For instance, when a person asks for a telephone connection to his house as an offerer, since the telephone company has the privilege of being the only operator authorized to connect the telephone, it will not be allowed to refuse such offer. Under such circumstance silence when an offer is made amount to acceptance. Hence no communication of acceptance is required since it is the offer alone that closes the contract.

Such privilege may be granted by a special law (as in the case of an establishment proclamation) or it may be granted by a special contract between the state and a private company. The latter is called contract of concession.

The protection of the public lies in the fact that the terms of the contract (price of connection to water services or telecom line, price of cubic water, tariff for electric power...) are fixed in advance by the relevant law or contract of concession. However, this is a clear case where the freedom of the parties to negotiate is restricted. It is a contract of adhesion for the client, and an imposed contract for the supplier of the service. One will also note that although the supplier of the utility is forced to accept clients, the terms of the contract may not necessarily be profitable for the client, especially where taxation income is levied through this technique.

In this regard, the moment at which the contract is formed is upon receipt of the offer as specified in article 1683(2) of the Civil Code. This article is inspired by the nature of "public service" or " Public utility" which derives from the modern conception of the duty of the state to supply services to citizens (eventually through the intermediary of a private company).

Article 1684 of the Civil Code provides a second exception to the general rule that silence does not constitute acceptance, when it addresses " pre-existing business relations." This concerns contracting parties who have pre-existing or ongoing business relations and have already concluded a contract. One of them proposes to the other the renewal of an expired contract, the modification of an existing contract or conclusion of a second contract supplementing the first. The justification provided by Krzeczunowicz are "silence will normally be understood by the parties as expressing agreement and good faith requires that parties as to preexisting contractual relation show a minimum of loyalty in making known their attitude as to further points to be settled." parties

Silence amounts to acceptance as between parties where:

a. a clear contractual relation has already been established, which enables to believe that the parties are aware of the extent of the obligations;
b. a clear proposal for a variation or extension of the contract has to be made;
c. the proposal is for making a subsidiary or complementary contract; A subsidiary contract is the one which supports the previous contract, where as " complementary" contract is the one which addresses a locuna or omitted element from the first contract.

d. the proposal must be made in a special document, and stating that the offer will be considered accepted if no rejection is made with in a specific and reasonable period of time. This requirement should be construed as imposing the observance of certain formalities if the exception to the rule that silence is not acceptance is to be granted. A special document is a document which is special or specific to the contract and to the party concerned, and can not be a general document sent to every one every time. It also imposes the sending of a cautionary notice, which will necessary have to be crystal-clear in its wording.

In connection with silence, there is an issue that is raised in relation to invoice. An invoice is a list of goods with prices and charges sent to a purchaser from the seller to settle accounts on the basis of an existing contract. Article 1685 of the Civil Code addresses the issue of invoices where the seller who has delivered the goods sends after wards to the buyer an invoice which states a certain number of clauses the parties had not agreed upon. For example, the invoice may include a limitation of liability clause, a clause-attributing jurisdiction to a specific court, an arbitration clause... Pursuant to this article an invoice even if it contains a warning that some additional clause shall be regarded as accepted if no reply is given does not bind the person to whom it is addressed. In other words, the above clauses inserted by the one who prepared the invoice are ineffective because they are only acceptable: if they conform to a prior agreement, or if they have been expressly approved by the other party.

Very often a trader drafts his terms of business for all future contracts by using a special prewritten form, stating limits as to liability, the tariff applicable, the conditions of delivery, the existence of a

contractual rate of interest in the case of delay in payment, to quote but a few common provisions. For instance, dear student, take an air ticket or a laundry ticket and read those provisions that are written at the back of them. There are specific clauses, which he wants because they are in his interest. Conversely, such clauses are not at the advantage of the other party, who is not necessarily a trader. Such contract of adhesion frequently gives cause for suspicion. Therefore, article 1686 of the Civil Code lays down the rule that such clauses are not admissible, unless: a) they are expressly known and approved, or b) they are prescribed or approved by the public authorities.

The other points worthy consideration are withdrawal of acceptance and defective acceptance. Article 1693 (2) of the Civil Code opens the right for the accepting party to withdraw his acceptance along the lines set for the withdrawal of offers by article 1693(1) of the Civil Code. Art. 1693(2) provides that acceptance shall be deemed not to have been made where the offerer knows that it is withdrawn before he knew or at the time when he knows of the acceptance. According to this article an offeree cannot withdraw his acceptance after the offerer has got knowledge of the acceptance of his offer.

One must bear in mind that there is a distinction between withdrawals of acceptance and offer. In the event of the timely withdrawal of an offer, or mere declaration the contract was never concluded, because no acceptance was given. On the contrary, the timely withdrawal of an acceptance amounts to destroying a contract, which was validly formed.

According to the theory of dispatch (read the discussion on contracts between absent parties in the next topic) a contract between corresponding parties is formed as soon as the letter of acceptance is

put in to the post. The revocation after the letter of acceptance is put in to the post is in effect avoiding concluded contract. Thus the purpose of Articles 1693 (2) and 1692(1) of the Civil Code together shows that they are completely at variance with each other. Under Article 1692 (1) of the Civil Code the contract is deemed to have been made at the place and the moment the acceptance was sent to the offerer. Under Article (1693(2) of the Civil Code, however, it is provided that withdrawal of acceptance can be made if the revocation is made before the offerer knew or upon his knowledge of the acceptance. In this case, one could say that the theory of reception is reborn in respect of withdrawal of acceptance.

If one examines the two articles separately, Article 1692(1) does not allow the withdrawal of acceptance, since the contract is already formed when the letter of acceptance is put in the course of transmission. Thus, it would be logical to say that if at all there is a withdrawal of acceptance it must be before the letter of acceptance is put in to the post. Otherwise the spirit of Article 1692(1) of the Civil Code would be defeated. However, if one is to maintain this position Art. 1693 (2) may again be rendered purposeless.

Krzeczunowicz suggests a way of reconciling the two articles. " The only theoretical explanation we can supply for the Ethiopian system is that the sending of acceptance completes the contract, on the 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. In practice, however, since the two theories represent two different theories, they cannot be reconciled.

Commenting on Article 1692 (2) of the Civil Code Rene David says, " Carried to its logical conclusion, the theory of emission would require

that both the offer and the acceptance produce their full effects from the moment they are sent. For practical reasons Article 1693 (2) of the Civil Code avoids these logical consequences in some circumstances, as do great number of legal systems ... Acceptance is revoked if the revocation reaches the offerer before or at the same time that he learns that his offer has been accepted; the offerer cannot validly argue that the contract was irrevocably concluded at the moment the acceptance was late."

Based on these statements some argued that Art. 1693 (2) should prevail over Article 1692 (1) of the Civil Code. The reason is to give equal opportunity to the offeree to revoke his acceptance just as the offerer revokes his offer.

Dear student, how do you see the above assertions?

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As we have said earlier acceptance makes the contract. However, there are acceptances that are defective. Acceptance is supposed to answer in the form of a single declaration of will the entire scope of the relevant offer. A very long and detailed contract will be deemed accepted entirely when the accepting party simply agreed on it. In other words, it is not necessary for the acceptance to be directed to each and every detail or clause of the agreement.

Sometimes the acceptance will not be a pure and simple " yes" but more like a "yes but". The offeree accepts the good, but does not agree with the price; or he wants the delivery to take place at another

place or another moment than specified in the offer. In other words, his acceptance does not conform exactly to the terms of the offer.

Article 1694 of the Civil Code gives the answer that the offer is deemed rejected. But if he proposes his own proposal, it is not a simple rejection; it is in fact a different proposition, a new offer called counteroffer. So here we have a reversal of the qualities of the parties: the offeree becomes the offeror and the initial offeror becomes the offeree. This is not without consequence. If the initial offeror accepts the counter-offer, the place and moment of conclusion of the contract are determined by the letters of acceptance. However, the counter-offer has to have a nature of an offer. For instance, the Ethiopian coffee exporter who lives in Jimma sends an offer to the German importer. If the latter accepts the offer but asks for a 10% price discount, he is making a counteroffer. If he sends a letter stating this position to the Ethiopian trader, and the latter sends his acceptance, the contract is deemed concluded in Jimma and the law applicable is the Ethiopian law unless otherwise agreed.

Thus, if there is only rejection without proposing his own by the offeree, the contract shall not be completed, as the contract requires agreement on all the terms to negotiate on as per article 1695(1) of the Civil Code. In other words, if there is disagreement between an offerer and offeree in one of the terms of the negotiation, for instance, in the date of delivery, there is no contract between the parties. The principle is that the agreement of the parties is necessary for all the terms of the contract.

In some instances, though there is no disagreement on the terms of the agreement, the terms are rarely perfect. The parties may have implicitly referred to previous stages of the negotiation, or they

simply did not foresee all the terms necessary for the contract. For instance, they did not specify the precise date and place of delivery, the competent court in the event of a dispute, the penalty paid in case of failure, the liability restrictions ... It would be impractical to be too rigid in this respect, or else it would be too easy for a party to evade the performance of a contract by seizing on the smallest of pretexts. Article 1695 (2) and (3) of the Civil Code settle the problem that where the parties through their behavior show they intended to conclude this contract, the contract is deemed concluded even if all the detailed terms have not been expressly agreed upon. In such a case the suppletive provisions of the Civil Code will apply to remedy the deficiencies as per Article 1695 (3) of the Civil Code.

The rationale for this expression is evident: the objective of the civil law is to ensure that contracts are effectively implemented. It is in the interest of the economy and legal security that encourages investors to invest, and prevent certain parties from trying to evade contracts in bad faith. But of course, the provisions of article 1695 (2) and (3) only concern secondary aspects of the contract. Should there be insufficient precision as to the obligations of the parties, article 1714 of the Civil Code comes in to play to lead to the nullity of the contract.

Professor Krzeczunowicz gives a very useful list of legal provisions available to the parties and to the judges to " round of " contractual deficiencies. These are:

- Where the quality of fungible things is not determined, the quality due is the one chosen by the debtor and should not be below average quality (see art. 1747 of the Civil Code);
- Where the rate of interest on money is not fixed, the legal rate is 9% per annum (see Art. 1751 of the Civil Code);

- Where the place of payment is not determined, such place is the debtor's residence or the location of the definite thing due (see Art. 1755 of the Civil Code);
- Where the time of payment is not fixed, payment may be made or required forthwith (see Art. 1756 of the Civil Code);
- Where the encumbrance of the costs of payment is not determined, the debtor shall bear such costs. (See art. 1760 of the Civil Code.

5. Contract Made Between Absent Parties

Where the declaration of acceptance is made orally, or in writing or by sign or by conduct, in the presence of the offerer, the contract is concluded when the offerer perceives of the declaration. But very often the two or more contracting persons are not physically in presence one of another. In this case the issue of determination of place and time of formation of contracts arises if the parties who conclude their contract by correspondence fail to stipulate the place and time of formation of the contract.

To put it differently, the previous developments were examined on the basis of a situation where the offerer and offeree are present to each other, as a merchant and a client on a market or in a shop. In this case offer and the acceptance are made a) simultaneously and b) in the same place.

But very often the two or more contracting persons are not physically in presence on of another. For instance, they may be talking on the telephone and be separated by thousands of kilometers. Or offer may be made some time before the offeree hears of it; this is the case of contracts correspondence when the seller sends an offer in a letter, which will arrive a few days later at the address of the offeree. The issue of the place where the contract is concluded is also a difficulty. is the contract concluded at the offeror's residence or at the offeree's

domicile or place of business? Or may have the two situations at the same time, where the parties are separated in time and space following example may further illustrate the problems underlined.

More systematically, the issues that are linked to the place of conclusion of contract are the territory jurisdiction of the court, the form of the contract and the type of law applicable. The issues linked the moment of the conclusion of the contract are the rate and amount of contractual interest, the nature of the law applicable (transitory and repealed provisions), the burden of risk, the possibility of revocation of offer or acceptance, the transfer of ownership, the issue of limitation, amongst others

As to the place and time of formation of contracts, five possibilities are theoretically open:
1- the moment and place where the offerer makes the offer,
2- the moment and place where the offeree receives the offer,
3- the moment and place where the offeree send his acceptance,
4- the moment and place where the offerer receives the acceptance,
5- the moment and place where the offerer is cognizant of the acceptance

The first possibility is not practical because there is no acceptance yet. The same is true for the second possibility since the offeree has not yet expressed his will. The fifth possibility may be a long time after the moment of acceptance.

There are three major theories respecting the question at which place and time does acceptance make the contract when the parties fail to stipulate.

The first theory is *theory of emission /dispatch theory/.* According to this theory the contract is made at the moment when and place where the letter of acceptance is put in the course of transmission, that is, as

soon as the latter of acceptance is posted. Under this theory, the risk of being bound without knowing of it is on the offerer, if the declaration of acceptance is lost or delayed in the course of transmission. However, the offeree must take every necessary measure to bring the message on its way to the offeror.

Accordingly, one will note that the time and place of conclusion of the contract is where the offeree sends his acceptance, which is a different attitude to that of receiving of even drafting the acceptance. The verb "sends" is used because the law wants to seize a materials expression of the will of the offeree - and ease the proof of his acceptance. The date of the contract will be the date of expedition of the acceptance. This position is adopted by the English, French and American civil laws.

Certain legal systems prefer the reception by the offerer. This is the *theory of reception.* According to this theory the decisive moment for the formation of the contract is the reception of the letter of acceptance by the offerer. Thus, the risk of loss or delay of declaration of acceptance in the course of transmission is on the offeree.

The last theory is *theory of information*. According to this theory the contract is formed when the offeror receives actual knowledge of the letter of acceptance. However, the offeror is preserved to have taken notice of acceptance as soon as it has reached him. Under this theory, nevertheless, the offeree may revoke his acceptance until the offerer has known of the acceptance.

One will also have noticed that the solution of the theory of emission advantages the accepting party because in case of a dispute, it will be his local court and his local law, which will be applicable.

Of course the place and time an offer is dispatched and received by the offerer has never been the subject of controversy. An offer, which the offeree did not receive, has no legal consequence.

The main controversies in relation to distance dealing pertain to the moment of dispatch of acceptance by the offeree and receipt of the acceptance by the offeror. Similarly, choice has to be made between the place an offer is dispatched and received to make the place contract is created. In fact determination of the place of contract will also determine time of contract.

Some authorities argue that the place where the offeree has dispatched his acceptance shall be considered. Others insist for the place the acceptance is received by the offeror to mark the place of the contract. There are arguments for warded by either authorities.

Individuals who opt for place of the offeree (.e. place where the acceptance is dispatched) argue that since the offerer has no opportunity to subject the formation of contract up on his receipt of acceptance in his offer it is appropriate to recognize the rule of dispatch. Secondarily, they suggest that if the offerer fails to receive an answer and if the matter is important to him he can inquire of the offeree. Thirdly, proponents of the dispatch theory suggest, if the offeree is expected to learn about the acceptance before he is bound by the acceptance, the offeree, too should not be bound until and unless he learns of the receipt of the acceptance by the offerer since the offer might have been revoked before receipt of acceptance. This approach treats post office as the agent of both parties.

There are other authorities that argue that the dispatch theory should not be applicable in cases postal regulations entitle the offeree to

withdraw his letter. Because, according to such view depositing the letter in the postal office has not put the mail/post beyond the reach of the offeree and he can recall it back. Strict adherents to the dispatch theory counter argue that in view of common practice, in view of difficulties involved in the interception and in view of the decisions and printed discussions dealing with acceptance by post the power to recall the letter should not prevent the acceptance from being operative upon receipt. The acceptance will be operative even if recalled back.

In effect since the problem as regards dealings at a distance is failure to mark concurrent knowledge of assent, a choice has to be made between the two places. In either case one of the two parties will be bound by contract with out being aware of that fact. If the dispatch theory is adopted, the offerer may change his position in ignorance of the acceptance. This is because even if he waits for a reasonable time, the letter might be delayed, lost or destroyed. If, on the other hand, the rule reception is employed, the offeree will be subjected to the some problems of delay, loss and destruction. Until new communication is accepted by him, he can not know that his letter is received.

The theory of dispatch is said to have advantage of closing the deal so quickly and enabling performance more promptly. In majority of instances loss or delay does not happen and promptness of action is of importance. Moreover, since it is the offeror who invited the acceptance, he better bear the risk.

Opponents of the dispatch rule say that the delay between mailing and delivery can be avoided by modern means of communication. The

counter argument is that even today such delay is not beyond possibility.

The other justification forwarded in favor of the dispatch theory is that offer constitutes expression of assent to terms of the contract and depositing a letter in post constitute “overt” act of assent by offeree. The counter argument is that why are other equally “overt” acts like signing the contract (but putting in one’s pocket) not been equally considered?

Moreover, supporters of the dispatch theory suggest that in average case an offeree who has deposited a letter in post starts to rely on the contract and hence, should be treated so. Moreover, they argue offerers are seldom injured by slight delay in knowing it is accepted as compared to the offeree who, if the other rule is to be adopted, will wait both the transmission of the acceptance and notification of its receipt before he relies on the contract.

Proponents of the receipt theory, on the other hand, argue that forbidding the offeree to withdraw his acceptance scant hours it was deposited but days before he knew of it is unjust and unacceptable. Moreover, they say, the offeree if he likes, can avoid revocation by purchasing option.

In the face of the above arguments, the Ethiopian law under art 1692 of the Civil Code has opted for the dispatch theory. But the Ethiopian situation seems less controversial. The length of the above arguments is partly attributed to the possibility of revocation of on offer until acceptance.

But when we come to the Ethiopian situation offerer cannot revoke/withdraw his offer after the offeree has learnt about the offer even though there is no acceptance. Therefore, there is no room for offeree in the Ethiopian legal context to remain in uncertainty about the possible revocation after the mail is dispatched. Therefore, the dispatch theory is more justified in Ethiopia than other systems, which extend the power of revocation, by offerers up to the moment of acceptance.

But the problem with the Ethiopian system is that after adopting the dispatch theory, speaks of the possibility of revocation of acceptance before or at the time the offerer learns about the acceptance (Art.1693 (2). It is not paradoxical to let the offeree revoke his acceptance after contract is already formed? Refer back the previous discussion.

In the Ethiopian system it is the offeror than the offeree who is threatened by revocation. The scope of revocation of offer is narrower in Ethiopia because it cannot be undertaken once the offeree has come to learn about it. In fact the offeror may be in state of uncertainty until he receives the acceptance because during this period the acceptance may be revoked. However, such uncertainty is insignificant in light of his commitment to enter in to a contract, the less likelihood of delay or destruction of the letter, and exceptional records of the revocation of the acceptance by the offeree.

In general, by opting for the dispatch theory (the place of the offeree), the Ethiopian legislature accomplishes the objective of facilitating contractual transactions (business) by promoting reliance. Therefore, an offeree who has dispatched a mail of acceptance can rely on the contract and incur expenses.

Accordingly, unlike the German and Swiss law legal systems, which adhere to the theory of reception, Ethiopia adopts the theory of dispatch per Article 1692 (1) of the Civil Code. Under Ethiopian law, however the theory of reception can be accommodated through the mechanism of Articles 1681(2) and 1692(3) of the Civil Code. Under article 1681 (2) the offeror is at liberty to stipulate the forms of acceptance. Say, if he stipulates the place and time of acceptance to be at his residence or office, the acceptance must conform to this order in order to close the contract. Also, the parties are at liberty to adopt the theory of reception or the theory of information pursuant to article 1692(3) of the Civil Code.

We have to recall here article 1690 (2) of the Civil Code, where the offer is not binding on the offerer when it is rejected by the offeree before expiry of the time limit. This is another illustration of the theory of emission. Thus, we have to combine article 1692 (1) with 1690 and 1691 of the Civil Code. The acceptance certainly makes the contract perfect, but provided that it is made a) within the time limit imposed by the offeror or b) within a reasonable time from the moment of the offer. So the offeror is not completely in the hands of the other party.

This rule is easy to enforce when the acceptance is formulated in writing by the offeree, generally stating with his signature the date of the expedition. This last document will be an excellent proof in the hands of the offerer, when he has received it; it will be proof of acceptance through the signature and proof of the date of acceptance through the date of letter or the date stamped on the envelope. Such proof will be most relevant in the case of an offer made with a time limit, for instance.

But, in many cases, the acceptance will be expressed in another way than in writings; for instance, it can be by telephone. Article 1692 (2)

of the Civil Code states that the contract shall be deemed to be made at the place where the person was called. Three remarks can be made at this stage: article 1692 (2) gives a simple rebuttable presumption, as witnesses the verb "deemed". Furthermore, the place chosen is not the place from where a party sends his acceptance (as in the case of a letter for instance), but the place where he was called (i.e. the place chosen by the caller). This can be either the seat of the business, the personal residence, or any other place where the party happens to be. Finally, and this may be important, the article does not refer the offeror or offeree in the event of an agreement by telephone, but the caller and the person called. Generally the person called will be the offeree, but this is not necessarily so, for instance when the offeree is the caller to inform the offeror of his acceptance.

Example: an Ethiopian coffee grower telephones a German importer to make him an offer. The German trader accepts verbally but does not send a letter to confirm his acceptance. Article 1692 (2) fixes the place of conclusion of the contract in Germany. On the other hand, if the Ethiopian coffee grower sent a written proposal, upon which the German importer telephones him from Germany to accept the offer, the contract will be deemed to be made in Ethiopia because the person called is the Ethiopian grower.

Since the drafting of the Civil Code, new means of communication have appeared, but the difficulty remains often the same. The solutions suggested by article 1692 of the Civil Code will be implemented, taking into account the specific techniques employed. Today, enormous volumes of business transaction are made by fax. But what is a fax, technically speaking? It is a document made by the sender, kept by the sender, which is transformed into a telephone message, and reprinted on the fax machine of the addressee. Which is the valid document, the one sent, or the one received? Where is the proof of time or place of sending? Such mentions are on the document, but they are printed either by the sending machine for the sender, or by the receiving machine for the addressee; in other words

neither has serous probative value. Each machine is in the hands of a party, and can easily be tampered with. In terms of weight of the evidence, it does not guarantee a better quality of proof than a telephone conversation. In other words, for a fax, it is argued that it would be better to implement the rules of article 1692 (2) for telephone calls.

Internet is very much like a fax from the technological point of view. The message, even if it is composed by a computer and decoded by a receiving computer, goes through ordinary telephone lines. Here again the uncertainties are such that the person claiming the existence of a contract will have difficulty in proving it - article 1692 (2) is applicable. However, the 196o drafter of the Civil Code could not imagine the possibility of electronic signatures. Billions of dollars' worth of transactions are made every day by the Internet. They are secured by an electronic code, which is special and secret to the buyer. The offerer cannot invent the code, so if he *c*an prove he has it, it shows necessarily that the offeree has given it to him: there was a valid acceptance.

Dear student, in your opinion, when and where is the contract deemed to be made if the negotiation is through fax or Internet?

Pending legislation on the recognition of coded electronic signatures, chambers of commerce have developed a relatively simple technique for securing the proof of the date and contents of a contract between traders. The chamber of commerce offers to have every transaction to pass through a computer, which is located in its premises. This computer is simply a point of passage, and nothing is added to the exchange between the parties. But should a dispute arise as to when and who sent a document to the other, the computer records kept by an independent, impartial authority - in the latter example, the chamber of commerce - will be a strong proof. For the modest cost of a yearly subscription, traders are thus guaranteed speed, flexibility (these are computer/fax relations), and legal security (good source of proof and prevention of disputes). It remains that such systems are generally only open to the members of the relevant chamber of commerce.

The discussion generated by the previously considered articles tends to be focused on two contracting parties only, the offerer and the offeree. But one should not forget that things might be far complicated. Contracts may frequently involve several parties, who may be offerers, offerees or even both in respect of different partners. When many people are involved, negotiations are probably going to be longer and more complicated. In the event of a dispute, evidence of who contracted with whom, on what basis, at what time and where, may be extremely hard to establish.

Example: an Ethiopian company decides to buid buses in Addis-Ababa. It imports an Italian-made engine, and contracts a firm in Dire-Dawa for the construction of the bodies form sheet metal it produces itself. A fourth firm will be responsible for the interior equipment of the buses.

The negotiations will be complicated and in several cases involve more than two parties.

Finally, article 1692 (3) states that the parties may legally draft contrary provisions to those specified under article 1692 (1) and (2) of the Civil Code. In other words, article 1692 (1) and 2 are "suppletive" provisions, which the judge uses if the absent parties did not decide explicitly of the conditions of the conclusion of the contract. But, for instance, if the offer states that the contract will only be valid when the offerer receives the acceptance at his place of business (theory of reception), the contract will only be deemed concluded in such conditions. Here the problem will be for the party who claims that there was an agreement to modify the legal conditions to prove the agreement of the parties.

Section Three: Defects in Consent

As we said earlier offer and acceptance are mechanisms of expressing consent. Thus, for the coming into existence of a valid contract it is necessary that neither the offer nor the acceptance be tainted with vice as the consent should be sustainable before the law. There are three major vices, which vitiate a party's consent: mistake, fraud and duress per Article 1696 of the Civil Code. If a party proffers or accepts an offer by mistake or under the influence of fraud or duress, the contract is susceptible of invalidation at the request of a party who invokes a defect in consent separately. Thus, we will deal with such defects in consent separately.

At the end of this section the student will be able to:

- Explain the defects in consent in general;
- Distinguish between mistake and fraud;
- Distinguish between fundamental and non fundamental mistakes;
- Discuss the nature of fraud as a ground of invalidation of contract;
- Explain the nature of duress for the invalidation of contracts;
- Define the effects of defects in consent: mistake, fraud and duress.

The theory of the vice of consent has to answer a double, and to a certain extent contradictory requirements. Its objective is to insure justice by avoiding the contractual obligations assumed by persons that are trapped against their wills. On the other hand, it is necessary to ensure that contracts concluded do remain secure a too liberal

approach of the possible defects of contracts would bring about a great measure of legal uncertainty.

1. Mistake

A party can invoke mistake as a defect in consent if there is discordance between the real will and the declared will of a party. A mistake in common language is the erroneous belief that a situation is true or real, when in fact it is not. In the legal context only certain types of mistakes will be admissible in order to avoid too much contractual insecurity.

In most of the legal systems, there is classification of mistake of law and mistake of fact. There is a mistake of fact when a party or both parties " … believe in the present existence of a thing material to the transaction which does not exist, or in the past existence of a thing which has not existed." To put differently, a mistake of fact is said to occur when one or both of the contracting parties are ignorant of the existence or non-existence of a certain set of facts. The Ethiopian Civil Code, though it has not labeled the mistakes as such, constitutes of several examples of mistake of fact. These are mistakes as to the object of contract -either performance in whole or in part, identity of the object or parties or motive of the parties.

A mistake of law on the other hand exists when a person knows the factual circumstance but does not comprehend their legal consequence. In other words, it is an error where a party is accurately informed, either actually or constructively, of the facts but reaches at

an erroneous conclusion with respect to the legal rights growing out of those facts.

However, Ethiopian law does not recognize the distinction between mistake of law and mistake of fact. Whether it is mistake of law or mistake of fact all the party-invoking mistake has to do is to establish that the mistake is decisive and fundamental. In other words, to be considered a vice of consent, a mistake must have double, cumulative nature: It must be decisive and it must carry on a necessary element of the contract, i.e. it must be fundamental.

Article 1697 of the Civil Code provides that the person invoking mistake must prove that he would not have given his consent to the contract had he known the truth. It is a reason linked to the personality of the client himself a subjective requirement but does not suffice to avoid the contract. An objective requirement, which is embodied under Article 1698 of the Civil Code must be satisfied that is, the mistake must not only be decisive but must also relate to an element of the contract which the parties deem to be fundamental having regard to good faith and circumstances in which the contract was made.

Where the parties in a contractual agreement make an element a condition of the contract, it would be deemed to be fundamental. Thus, they may make any term of the contract, however trivial, vital to the existence of their agreement. It means the element is fundamental if it relates to a point, which has special importance for one contracting party and has been tacitly accepted by the other party as an element of the contract.

The Ethiopian Civil Code in applying this test of fundamentality resorts to both the objective and subjective theory of fundamental fact. Article 1698 by its phrase, " … which is fundamental having regard to good faith and to circumstances in which the contract was made", incorporates the objective test attaching more importance to what the parties have said to each other when they finalize their terms and not to what they privately think, expect or believe. The yardstick for doing so is what reasonable men would understand as intended from the words or conduct of the parties. The words of the parties shall mean what objectively or conventionally they may be taken to mean. Accordingly, conditions or facts that a reasonable person may consider to go to the very root of contract are facts related to: identity or special qualification of the parties, existence and identity of the subject matter (object), and nature of the entire transaction.

Here the implied assumption of the parties or the parties' respective motivation should not be taken into account. A stress should, however, be laid upon objectivity by way of viewing situations as they would appear to a reasonable observer placed under similar position with that of a contracting party.

Conversely, the same provision adopts the subjective theory by its phrase, " … which the parties deem to be fundamental …" From the wordings of this phrase, fundamental is one which whether expressed or generally implied constitutes the underlying assumptions which, had the parties deemed it otherwise they would not have concluded the contract. Such approach of determining fundamental fact places great importance upon the assumption and expectations of the parties as opposed to the objective approach which laws emphasis on their expressions. Thus, it seems the subjective approach tries to suggest

that the problem of fundamental fact be treated as case of implied condition.

Rather than adopting the classification of mistakes as mutual and unilateral mistake, and mistake of law and mistake of fact, the Ethiopian Civil Code preferred to adopt a classification of mistake as fundamental and non-fundamental mistake. Thus, it is worthy of treating them separately.

Though there is no express definition for it a fundamental mistake can be said to be a material mistake as to the subject matter of the bargain or a mistake of fact going to the essence of the contract. It is an error with respect to some matter, which the parties have made a condition of their agreement. But this does not mean that the condition must necessarily be expressed in words. The act of the parties and the expressed terms of the bargain may define the condition with sufficient clarity to render an error with regard to it fundamental.

Certain factual circumstances to which the mistake refers are laid down, which the code considers to be fundamental. These are mistakes related to the legal nature of the transaction, the quality and identify /content / of the object, and identify or qualification of either of the parties.

Firstly, an error as to the very nature or type of transaction being entered into will render it voidable under Article 1699(a) of the Civil Code. A mistake in the nature of legal transaction concerns a mistake in relation to the nature of the contract and is ground for the invalidation of a contract. Examples to illustrate the point are:

- One who intended to buy a house and believing he is doing it in reality signs a lease.
- Signing a bill of exchange in the belief that one is confirming a statement of account.
- Subscribing a guarantee in the belief that one signs as a witness.

Since there are several kinds of legal transactions, i.e. loan, sale, deposit, donation etc, mistaking one sort of transaction for another is possible. However, it is always negligence not to read a document before signing it when one is able and is not prevented from doing so by the other party. If a party cannot read, it is incumbent upon him to ask someone to read the document to him, and to listen attentively whilst this is being done.

The second category of fundamental mistake recognized in the Civil Code is mistake as to the object of the contract. The rule is that parties are at liberty to determine the object of a contract. If there is a mistake with respect to the object
of a contract, there is no valid contract because in the words of Article 1679 of the Civil Code parties have not defined the object of their undertaking and have not agreed to be bound there by. The concept of object will be dealt in greater detail in module two. For this purpose object of contract is parties' obligations to do, to give or not to do something.

Regarding mistake as to the object of a contract Article 1699 (b) of the Civil Code states “… the mistaken party has undertaken to make performance substantially greater or receive consideration (counter performance) smaller than he intended.” Thus, we have two kinds of mistakes as regards the object of a contract ”mistake as to the quality

of the object (error *in substantia*) and mistake as to the identity of the object (*error in corpore*).

Mistake as to the quality of the object takes place when parties mistakenly understood the quality of the subject matter. By the quality of a thing is meant that combination of characteristics, which are peculiar to the thing, and distinguish it according to general opinion from things of any other kind. For instance, the set or combinations that make a silk are different from rubber. However, there are instances where two things may resemble in many respects like flour and chalk while they are different things. A mistake, thus, as to be substantial shall consist in mistaking a thing of one kind for a thing of another kind. A TV set, for instance, is always a TV set, and a Sony TV set of 14 inches differs from the one with a Sony 24 inches not in kind but only in quality. A suit is always a suit, whether it is a blue one or a brown one. The purchaser who bought the TV set or the suit will not be released from his bargain because he is able to show that he had in mind a thing of different quality from that which has been delivered to him. In the case of suit, there is no mistake as to the substance. It will of, course be otherwise when he specially stipulates for a certain quality, or when he can prove that the seller fraudulently concealed the truth. Save this situation, however, a mistake as to the quality or the size of a thing can never be a mistake, which is fundamental. The approach, which the Civil Code has resorted to in this regard, is the objective theory approach, in which the act of the mistaken party is judged by the conduct of a reasonable man whether the lacking characteristics are sufficiently fundamental to permit invalidation. If they are, the error becomes substantial.

Qualities are to be considered, in the words of a certain writer, as substantial, if they comply with the following descriptions:

a) When the qualities determine the species of a thing, i.e., its falling into one category or another, for example, the man who buys plated ring in mistake for a gold ring, gets a ring it is true, but a ring which according the common understanding, is of a different class,
b) A quality which by usage is treated as substantial and is presumed to have been so regarded by the parties, and
c) A quality on account of the special circumstances of the contract has been made substantial by the parties.

From what has been stated above, one can safely conclude qualities of an object are not substantial enough for the purpose of invalidation of the contract unless they are made a condition by the parties.

Again where the quality under consideration relates to the value of the object, and where such value is regarded essential in the eyes of ordinary transaction, for example a person rents a villa with the belief that it includes a bathroom or a water well or supply which it does not, such mistake of substantial quality would inevitably affect the peculiar property of the villa which was taken to constitute the essential characteristic of the transaction. Thus such mistake becomes a ground for invalidation as per Article 1699 (b) of the Civil Code. Otherwise, a mistake as to the value of what you give or receive is, in itself, not a ground for invalidation of the contract. If it were, it would block business transactions, which are precisely based on who shall better guess that value. A mistake as to money value is only a mistake as to motive in the sense of article 1701 (1) of the Civil Code, which is non-fundamental.

The other type of fundamental mistake on object relates to mistakes as to the identity of the object. There is *mistake in corpore* where there is a misunderstanding as to the identity of the object. For

instance if "A buys a fertilizer sulphur thinking that he is buying pharmacy sulphur" it is clear enough that the parties had different object in mind. To any reasonable man, who tries to find the sense of the transaction, it is quite clear that there is a sufficient ground for invalidation for if parties declare their intentions toward different objects they can scarcely be said to have agreed at all. No contractant shall be forced to take an object, which he has not bargained for.

The last type of fundamental mistake recognized in the Civil Code is mistake as to the identity or qualification of either party. A mistake relating to the identity or qualification of a party may be a ground of invalidation of a contract having regard to good faith and circumstance of the case. Explaining mistake relating to the identity of a party Krzeczunowicz writes: mistake as to a persons identity may relate to a physical identity, where you take one person for another, or to civil identity where you mistake a person's name or parentage or an element of civil identity where you think a married man to be a bachelor. In order to show a mistake of identity, the mistaken party will have to say that he confused the party with whom (alone) he intended to deal. According to Art. 1700 of the Civil Code mistake relating to the identity of a person invalidates a contract if the identity of the person is a fundamental element of the contract in the general opinion or having regard to the circumstances of the case.

However, claims for invalidation of contracts based on such mistakes would hardly be raised. One reason for this might be that a businessman does not, normally deal in goods in consideration of a particular person, especially in cases of cash sale. Another reason is that mistake of identity does affect a limited area of contractual agreement, namely contracts concluded *intuitu personae*. These are gratuitous contracts such as donation, remission of debts, free loan;

insurance contracts; promise of credit in sale agreement and giving of a free guarantee.

Moreover, if the mistake is one, which related to the quality of a party, the contract is subject to invalidation. When a party requires qualification such as doctor, lawyer, artist… and these are deemed to be fundamental fact of the contract in the opinion of the parties or having regards for the circumstances of the case, mistakes on such qualification will be ground of invalidation. Where the parties themselves fully indicate, how exclusive or fundamental their personal qualifications are meant to be, the case would be quite simple and clear. But where a statement to such effect is absent we have to resort to conventional wisdom (taking into consideration circumstances of the case). To give a simple instance, one can bring a successful claim for invalidation against a contract if the client wants his portrait painted by a famous artist and he discovers that the contracting party has the same name but nothing to do with the famous artist.

However, a contracting party who made a mistake cannot base his defense on it in a manner contrary to good faith pursuant to article 1702 of the Civil Code. That means the mistaken party should be in good faith. The contract remains unaffected, should the other party wish to have the contract implemented: the bad faith of the mistaken party is thus most appropriately sanctioned. For instance, A thinks he is buying a house, whilst the contract is only a lease. If the lesser finally decides to sell the house rather than rent it out, A is obliged to buy the house, and can not avoid for entering into a contract of sale.

On top of this the mistaken party who requires invalidation of a contract has to pay damages to the other party deprived of his contract. Articles 1703 of the Civil Code states that, the party who

invokes the defense of mistake to avoid the effect of a contract shall compensate the damage arising out of the invalidation of the contract. Thus, the defense of mistake is double edged: the mistaken party can have the contract invalidated, but at a cost.

Thus, invalidation is no bar to an action for damages. Under Ethiopian law, the mistaken party is liable for loss suffered by the other party, independently of his own fault. This rule renders the sphere of damages very wide, since the mistaken party is to pay damages in every case where the contract is invalidated by him, unless the other party knew or should have known of the mistake. This will probably serve as a deterrent against frivolous claims of commission of mistake. On the other hand, the party who entered the contract in good faith has the right to be indemnified for losses sustained by him in believing that the transaction was valid. The said losses may include incidental expenditures such as drawing up the contract, travel expenses in connection with its conclusion and other similar losses which would not be suffered by the other party, has he not relied on the offer of the mistaken party. Thus, the other party must be restored to the financial position, which would have been if the contract has never been made.

Dear student, up to now we have discussed fundamental mistakes and their effect but we will see the non-fundamental mistakes which normally cannot lead to nullity of the contract.

A non-fundamental mistake is a mistake in respect of some matter collateral to the bargain. It may affect the reason for entering into the contract, or touch some matter of inducement, but it leaves untouched the subject matter or essence of the agreement itself. Thus, mistakes, as to the motive or calculation, are classed as non-fundamental

mistakes, because they touch neither the existence nor identity of the thing sold, nor the basis of the transaction. Art. 1701 of the Civil Code deals with non –fundamental mistakes under two classifications, namely, mistake as to the motive of the parties and mistake as to the calculation.

The word motive is defined as meaning an inducement, reason, cause or incentive, for the doing of an act. Thus motive is the reason, which induces a man to do the act, which he intends to do, and actually does. The existence of motive is therefore a presupposition or an " undeveloped condition" of the contract or it is the interior will of the parties and not the expressed declarations. All the same, as far as the case of contractual mistake is concerned, a mistaken motive is immaterial to affect the validity of a transaction. The Ethiopian Civil Code as well is not concerned with the motives of the parties nor with the reasons, which influenced their action. For instance a traveler buys an air ticket from Ethiopian Airlines to fly to Lalibela, because he thinks that lake Tana is in Wollo and he wants to see that lake. His motive is unknown to the Airline, which delivers precisely what he asked for: a ticket to Lalibela. Accordingly, the contract may not be invalidated because of his motive to visit lake Tana.

Some times when a verbal contract has been completed and is reduced to writing, there is an opportunity for a mistake to occur in writing. One of such mistakes may be arithmetical mistake. Arithmetical or calculation errors offered no legal ground for relief pursuant to Article 1701/2/ of the Civil Code. It is believed that such mistakes do not affect the very basis of the contract i.e., the offer and acceptance. Thus, mistake one commits in calculating one's costs, e.g. an error in the addition of one's expenses, shall be corrected and the

contract be put into force. *An error in calculi* thus may not impair the validity of the transaction

Dear student, is there any classification of mistakes as mistake of law and mistake of fact under our law?

Discuss fundamental mistake and non-fundamental mistake**.**

2. Fraud

Fraud is another vice of consent, which invalidates a contract. The term fraud is a generic one which is used in various forms. There can be no embracing definition for it. Nevertheless the following definitions are provided in literatures.

- All deceits practiced at the time of conclusion of a juridical act.
- Any species of artifice, maneuvers, or ruses, employed by a person in order to deceive another person.
- Those insidious words or machinations employed by one of the contracting parties in order to induce the other to enter into a contract, which without then, he would not have agreed to.
- An action of a mere affirmative evil nature, such as proceeding or acting dishonestly, intentionally, and deliberately, with a wicked motive , to cheat or deceive one party to a transaction with respect to the situation or operation, or such as an action which result, to his damage or loss and to the advantage or gain of the other party.
- A false representation of a material fact made with knowledge of its falsity, or inculpable ignorance of its truth, with the intention that it be acted on by the party deceived, and inducing him to contract to his injury.
- An action or an omission whereby a mistake is committed by the other party, which determines him to enter the contract vitiated.

Coming to Ethiopian law, the concept of fraud is not explicitly defined in the Civil Code. Article 1704 of the Civil Code simply puts fraud as a ground of invalidation of a contract. Where a party resorts to deceitful practices so that the other party would not have entered in to the contract, had he not been deceived, constitutes fraud under Ethiopian law of obligations.

The essential elements to constitute fraud under Article 1704 of the Civil Code are deceitful practice, reliance and fraud of the contracting party.

It is obvious that, a mere intent to commit a fraud, which has not resulted in any act injurious to the person intended to be defrauded, is not sufficient to constitute fraud. The intent must be accomplished by overt acts done for the purpose of materializing the desired intent. In other words, there must be a deceitful practice, which is a trick used by a party to encourage or force the other to conclude the contract, to constitute fraud.

In Anglo-American legal system, if deception is accomplished, the form of deceit or the means by which the fraud is done is immaterial. They consider fraudulently producing a false impression upon the mind of another person to be the gist of deceit. Accordingly, where this is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant.

Coming to our law, unlike the above legal systems, the means of perpetration has of a great value and without which there can be no fraud at all. As Rene David states, the concept of fraud dealt with in Article 1704 requires that practices have been utilized by one person in order to invoke an error on the part of another and to influence him to enter into to a contract. Thus, the utilization of deceitful practice is very important to establish fraud under the Ethiopian legal system unlike the French and Swiss legal systems, which intentional false statement alone constitutes fraud. So our law is concerned with the means by which fraud is committed. Therefore, unless and otherwise deceitful practice is utilized to create false impression upon the mind of victims, there can be no fraud as a ground of invalidation of the

contract. The rationale behind this requirement of deceitful practice seems that parties should take necessary care when entering into business transaction not to be deceived by false statements of a counter party. The law comes to the help of the deceived party only when the counter party resorts to deceitful practices in addition to his false assertion.

However, there is no rule for determining what acts to be deceitful practices to constitute fraud. Nonetheless, it seems that the power is given to the court to determine it according to the circumstances of each case. But we can say that, the utilization of deceitful act means the use of forged certificate to get an employment, the use of forged recommendation to join an educational institution, use of manipulated odometer to sell a car, etc. These instruments should be utilized to induce the mistaken party to give his consent in order to constitute deceitful practice.

Therefore in case of fraud it is not the persuasive power of word that induce the defrauded party to give his consent but the production and utilization of instruments of persuasion. But in the case of false statements (article 1705 of the Civil Code), it is the persuasion of words and the presence of special confidence that induces the mistaken party to give his consent.

What article 1704 requires is not only the utilization of deceitful practice, but also, the fact that party who is victim of the fraud would not have entered into the contract had he not been deceived. Hence, in order that a person to be entitled to rescind the contract for fraud, the practice utilized against him must have been such a serious character, that without which the contract would not have been made. In other words, Art. 1704 refers to the kind of principal or causal

fraud, i.e., to those deceptions of a serious nature or character employed by one party and without which the other party would not have entered into the contract. It means the deceitful practice utilized must be the determining cause of the contract on the party frauded.

In any case, a deceitful practice, to constitute fraud, must actually be decisive, that is, it must be relied on by the other party and must induce him to act to his prejudice. If the party disregards and not relied upon the deceitful practice, there is no fraud in its legal sense. Moreover, the test of reliance is the individual who was the recipient of the deceitful practice and not the average man.

On top of this, the principle embodied in article 1704 (1) of the Civil Code is that, the deceitful practice in order to vitiate consent and to be a ground of invalidation of contract must be employed by one of the contracting parties. In other words, fraud, in order to be a ground for avoidance of contract, must be the short of the party to the contract. However, in so far as the admissibility of the action in for nullity is concerned, fraud committed by an agent of one of the parties, is considered as if it had been committed by the party himself. Because, the act of an agent for the benefit of another person with in his scope of power are deemed to have been made by the party himself.

Finally, the general rule is that, a deceitful practice by which a third person induces one of the parties to contract, and to which the other party remains foreign and ignorant, can not be ground to demand invalidation of the contract. But as an exception to this rule, fraud of third person can be a ground for annulment of the contract.

In this regard, Article 1704 (2) of the Civil Code deals with the validity of the contract, if the fraud is the work of third party. As a general rule, this article reflects that, a contract cannot be set aside because of the fraud of a third person. Even without this rule, it is a logical corollary to the principle embodied in article 1704(1), that says, in order to vitiate consent, the fraud must be employed only by one of the contracting parties.

A deceitful practice by which a third person induces one of the contracting parties, and to which the other party remains foreign, can not be a ground for demand in nullity of the contract but it gives rise to an action for damages against this third person. In other words, if the author of the fraud is a third person, the party deceived is relegated to an action for damages against such third person, and the contract remains standing.

However, there is an exception to the above general rule, when the other party is aware of the fraud of third person. In accordance with Article 1704(2) of the Civil Code, if the other party knew or should have known the fraud of third person in the making of the contract, and took advantage thereof, the defrauded party can invalidate the contract, notwithstanding that the fraud originated from a third person. If the party knowing of the artifice practiced by a third party for the purpose of inducing the other party to contract fails to communicate this information to the latter, it is considered as having participated there in. Therefore, fraud committed by a third person can be a ground for annulment of the contract, only when the other party knew or should have known the fraud.

It is evident from the article that, knowledge of the contracting party upon the fraud is required to be on the making of the contract. This

implies that, if knowledge of fraud comes to the other party only after completion of the contract, such knowledge could not serve as or taken as a ground for invalidation of the contract by the deceived party. In addition to this requirement, fraud of third person in order to be ground for invalidation, the other party necessarily has to get advantage from the contract based on the fraud made by a third person. Apart from this exceptional case, the validity of a contract is not affected when the fraud is the work of third party.

What would be the rationale for retaining this rule, since the consent of one of the parties is surprised by fraud? The assumption in here is that, a party can not use or rely on act of a third party to effect his freedom of will, more specifically, it would be clearly unjust to visit upon a contracting party the disastrous effect of nullity simply because the other contracting party has indiscreetly reposed his confidence upon a third party. In the second place, the annulment of the contract, when the fraud emanates from a third person, is unjust because it would penalize the innocent party who is free from fraud.

Whoever committed the fraud, the idea of fraud involves the violation of good faith dealing with the contract and intentional deception, and i.e. there is no fraud without intention to deceive. The moral aspect of fraud is basically concerned with the state of mind of the party who utilizes the deceitful practice to induce the other party to conclude a contract by mistake. Such party not only utilizes deceitful practice but also must possess the intention to do so. Therefore, in order to constitute fraud there must be moral turpitude on the part of the person so charged.

However, fraud, which is present or employed at the time of formation of a contract, may be divided into principal fraud and incidental fraud in certain legal system. Principal fraud refers to those deceptions of a serious nature employed by one party or factors causing the act to be entered into and without which the other party would not have entered into the contract.

Incidental fraud refers to those deceptions, which are not serious in character and without which the other party would still have entered into the contract. It is to say that, such fraud did not raise only one of the parties the intention to conclude the contract but merely to cause one of the parties to accept more onerous conditions, so that, without the fraud the contract would have been performed, but under better conditions. Hence the effect of such fraud is not to render the contract voidable, it rather renders the party who has employed it liable for damages.

Dear student, would you see any classification of fraud as principal and incidental fraud under Ethiopian law?

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It is already stated above that false statement alone does not constitute fraud under the Ethiopian legal system. Nevertheless, as provided in article 1705 of the Civil Code there are special cases where false statement constitutes fraud: a) where the author of the

false statement asserts it in bad faith or by negligence and b) where there is a special pre-existing trust between the parties which call for a particular loyalty between them.

Accordingly, mere utterance of false statement without bad faith made between two parties who do not have a particular bond of trust is not a fraud opening a right to invalidation of the contract. The relationship could be as between employee and employer, father and son, master and servant, principal and agent, etc. i.e., contracts which need utmost good faith.

To make it more clear, in order to take false statement as a ground for invalidation of contract, firstly, it has to be committed in bad faith or negligently, in the alternative to intention. Secondly, there must exist a special fiduciary relationship between the contracting parties that gives rise to special confidence commanding particular loyalty. Though the Civil Code does not define confidential or fiduciary relationship, it is defined in other legal systems as: "… fiduciary relationship exists as a fact, in which there is a confidence reposed on one side and a resulting superiority and influence on the other. The relation required among the parties need not be of a legal character but may be moral, social, domestic, or merely personal.

Hence, the rule embraces both technical fiduciary relations and those informal relations, which exist wherever one man trusts in, and relies upon another. The origin of confidence is immaterial." Hence we can say that, the term confidential relationship embraces every relationship of trust and confidence irrespective of its origin as long as there is confidence on one side and resultant domination and influence on the other.

In Anglo-American legal system, a breach of duty of such relationship constitutes constructive fraud. Accordingly constructive fraud often exists where the parties to a transaction have a special confidential or fiduciary relation which affords the power and means to one, to take undue advantage of , or exercise undue influence over the other.

Thirdly, the special confidence that command particular loyalty must exist prior to the conclusion of the contract and not created by it. In other words, the fiduciary relationship is a condition precedent for the formation of a defective contract. The reason seems to be, that, the special confidence existed between the parties impose special duty to take care of each other against any harmful act, the non complying of which entails sanction, in this case the invalidation of the contract.

Pursuant to the provisions of Article 1705 (2) of the Civil Code, in alternative to mere utterance of false statement, silence can be ground for avoidance of a contract, where the party who has influence remains silent and as a consequence of this the other party believes a fact which was untrue. In accordance with this provision, the duty to speak or disclose material facts to the contract arises where one contracting party reposes trust and confidence in the other.

To sum up, false statement and non-disclosure of material facts under conditions, where there is confidential relationship between the contracting parties can be accepted as a fraud, where there is abuse of such confidence, or the influence is exerted to obtain an advantage at the expense of the confiding party.

Would you please, dear student, discuss the forms of fraud with examples?

3. Duress

Duress is the third vice which can affect the consent of a contracting party. Both continental and common law legal systems recognize this type of vice so that a person cannot be said to be free to contract when he is forced to do so.

In contractual matters duress is the constraint of party to give his consent to contract by threatening with a serious and imminent danger to life, person, honor or property of the contracting party himself, one of his ascendant, descendants or his spouse. (See Article 1706 of the Civil Code.) As the other defects in consent, the ground for the invalidation of a contract concluded under duress is because of the lack of real consent.

In order to take duress as a ground of invalidation, firstly, there must be an act of coercion. Any term of constraint or compulsion improperly exercised, and in fact, compelling the victim’s consent to a contract, which he would not otherwise have made, may be sufficient means of coercion to constitute duress, as in the case of threats overcoming a volition. It is also provided in the French legal system that every contract is subject to annulment where one of the parties has been constrained to give his consent by physical violence or threats sufficiently grave to inspire in him fear of exposure of his person or his fortune to a considerable and imminent evil. Thus, we can understand that the constraint or the compulsion should be so as to inspire in the victim fear that he will suffer to a considerable and imminent evil.

Under Article 1706 (1) of the Civil Code, there is duress if the person has been led to believe that he is threatened. Here the requirement is the belief of the victim as to the reality of the threat. Thus, it is not needed that the act be real. For instance, a person may have signed a contract while an unloaded pistol was pointed at his head. In this case it is sufficient that he believed it to be loaded.

Thus, the thing that we have to know is that such threat should be serious and imminent. When the law provides that the danger should be imminent it means that the danger is at the point of happening or likely to be materialized immediately at the moment of the contract. So, a distant or future danger does not qualify, nor a danger that is passed in time.

The issue of eminency is related with the time that should exist between the victim's signing the contract and the possibility of the materialization of the threat. This gap should be very short so that the

victim is unable to avert the danger by other means other than concluding the contract. In other words, there must be so little time left between the threat of injury, and its impeding realization that the threatened persons decision to contract cannot be safely postponed. The same approach is reflected in French law. In this regard, Planiol says " the law does not confine itself to saying that the fear with which the victim of the violence is threatened must be considerable, It adds that it must also be "present" … what must be present, therefore, is the fear inspired, but the harm feared is necessarily fortune".

However, the danger is not only imminent but also it must be serious. The court will have to decide what is a "serious " danger. Is it a danger for life, of being wounded, or losing property, is it a danger in proportion to the amount of the contract? Article 1706 (1) in fine says that this danger is for the life, person or honor or property of the plaintiff. So, the scope is very wide, from physical danger to the danger of loss of property, and to a moral danger ("honor"). But it remains that the court will have to rule on the "seriousness" of the danger.

Finally, the danger is not only against the contracting party's life, person, honor or property but also against his ascendants', descendants' or spouse's life , person, honor or property.

Dear student, what if the serious and imminent danger is directed against a person not included in this enumeration such as brother or sister, intimate friend etc? What will be the effect of contract if it is also against the adoptive child or adoptive parents of the contracting party?

As we have said, the existence of danger, which is serious as to its extent, and possibility of realization as to imminent danger are the underlying element of duress. The issue to be considered at this point is how should it be determined whether the danger threatened with is under the circumstances of serious and imminent?

According to Article 1706 (2) of the Civil Code it is the reasonable man standard that is to be employed in the determination of the issue of gravity and imminency. When we say a reasonable man, it is a fictious body and it is up to the judge to put himself in the position of the compelled person and determine whether the danger was serious and imminent. A person who takes fright easily, or very young adult, or an insane person are not good references. Rather the judge is going to make an abstract, objective evaluation of the situation, comparing the attitude of the victims with that of an imaginary average person.

According to article 1706 (3) of the Civil Code, the law seems to have adopted another yardstick. Pursuant to this article the nature of the danger is determined by having regard to the age, sex and position of the parties concerned. In other words, the degree of seriousness is variable in respect of the identity of the victim of duress. The duress is differently appreciated having regard to the age, sex and condition of the person.

Thus, when we examine Article 1706 of the Civil Code the yardsticks that we employ in determining the nature of the danger are objective standard (*abstracto* approach) as per Article 1706(2) and subjective standard (*concreto* approach) as per Article 1706 (3). Hence, since these two sub articles refer us to different criteria, it appears that the two sub articles are different.

In this regard some argued that Article 1706 (2) should be deleted. While others argued that rather than deleting sub article 2 of Article 1706, the court must try to interpret the two sub articles together. It means if the courts are to decide by taking the subjective standard age, sex and social position of the parties, they should take what a reasonable man will do in that category of age, sex and social position. Still others argued that it is a more subtle position to take subjective standard rather than objective standard. They elaborate their position by example. In the event of a young person, the judge is called upon to compare the situation with what a reasonable person of that age would have done, because a) it is not easy to appreciate *in concerto* the degree of maturity of each individual, and (b) the possibility to invalidate contracts should remain restricted in the interest of legal security, thus an *abstracto*, objective criterion, would be better than a subjective, *concreto*.

Dear student, which position is correct in your opinion?

Under Article 1706 we have seen that duress is a cause for the invalidation of a contract it the consent of either parties is procured through the employment of duress by one of the parties to the contract. Like direct duress, which may be exercised by the contracting party himself for the enjoyment of material benefit, duress exercised by a person strange to a contract is also a cause for the invalidation of a contract even if the person who has exercised duress does not benefit thereby as per Article 1707 (1) of the Civil Code. It immaterial, whether the party who was not compelled knew or should have known of the duress, to invalidate the contract when it is committed by a third party. This approach is also the same in French legal system.

However, this is not true in the common law legal system. In this legal system, duress exercised by a third person does not affect the right of an obligee who does not participate in it or know of it, and who is not deemed to know of it. In other words, in order to invalidate a contract on the ground of duress exercised by a third party in common law jurisdictions, the other contracting party who benefited from the

contract must know or should have to know about the duress exercised by the third party.

Different reasons are given to justify the stand taken by the Ethiopian and French laws. These are:

1. One could not require the victim of the violence to designate its author, because he often did not know his name;
2. The authors of acts of violence are almost always people without resources, and that the recourse open against them alone (when the violence is the work of a third party) would be illusory, being directed against an insolvent;
3. Duress, whoever committed it is dangerous to the social order.

Article 1707(2) of the Civil Code however puts a limitation to this rule, where the contracting party who benefits from the duress did not know, and could not know that the third party was exercising duress on his partner. This provision gives an equitable supplement to the other innocent party benefited from the contract. Therefore, if the benefited party did not know or should not have known about the duress exercised by a third party, the victim should made good the other party for the damage he suffered out of the invalidation of the contract.

To determine whether the one who has benefited from the contract has known or should have known of the duress exercised by the third party against the victim party is problematic. One possible way of knowing may be taking into account the relationship existing between the third party and the beneficiary. We may assume that the beneficiary should have known about the duress if there is a relationship between him and the third party who exercised the duress, which may justify our assumption. Prof. Krzeczunowicz gives

instance to this effect by saying that " … in case of servant's or relative's duress in favor 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.

In our law, there are certain forms of threat, threat to exercise right and reverential fear that are not in principle taken as grounds for invalidation of contracts.

Pursuant to Article 1708 of the Civil Code, a threat to exercise a right is not a ground to invalidate a contract. In this case, the person uses a legitimate right to force the other to conclude the contract. This is entirely logical because the principle is that where a person has a right to exercise, he should be presumed to use it legitimately. For instance, if an employer threatens his employee whom he caught while stealing valuables with a penal charge and so induce him to renounce his employment; or if a father is induced by threat of prosecution against his son to pay the cheques forged by the son, or when a husband is induced by threat of a suit against his wife a guarantee of his personal debts, they will not have a ground to invalidate a contract since it is a threat to exercise a right.

However, this is not the case, if the right is abused to gain undue advantage from the circumstances, as stated in the last phrase of article 1708. In other words, if the threat is used with a view to obtain an excessive advantage; the threat to exercise a legal a right can be a ground to invalidate a contract. Obtaining excessive advantage means getting an advantage that exceeds the weight of the right threatened that amounts to duress.

Similarly, under French law, a threat to exercise a legal right does not amount to violence to invalidate a contract. In order to say that threat in exercising legal right amounts to violence, there should be a desire to obtain an illegal advantage.

In certain situations, also, a person has a great respect for another: this is “reverential fear”, for instance vis-à-vis an ascendant or superior. A mere reverential fear towards one’s ascendant or superior does not invalidate a contract where no duress is exercised. (See Article 1709 (1) of the Civil Code.) Thus, the mere fact of concluding a contract between an ascendant and a descendant or a superior and an inferior can not alone be a ground for invalidating a contract amounting to duress though there may be moral coercion. In this case there is no extortion of consent which tantamount to duress besides such “… influence of parents and that of good superiors may even be beneficial to the persons concerned.

Nevertheless, the contract entered by those persons can be invalidated, if the victim has proved that the person inspiring the fear has benefited excessive advantage from the contract by virtue of Article 1709(2) of the Civil Code. In other words, if the person to whom deference is due gets an excessive advantage out of the contract, the injured party can seek invalidation. Therefore, 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 the latter’s excessive advantage in terms of value.

However, if the contract is made between a descendant or inferior with a third person by inspiring ascendant or superior, unless the

victim proves duress, the contract will not be invalidated based on the *acontrario* reasoning of article 1709(2) of the Civil Code.

In the same vein, under French law, the fear of an ascendant cannot be a ground for invalidation of contract, which amounts to violence. When a person decides to consent to a juridical act for fear of displeasing his ascendants or one of them, he cannot attach it as tainted with violence for that reason alone. …

Under the common law jurisdictions, what they strictly call undue influence is reverential fear. If the parties were in a particular relationship of confidence with each other at the time of the transaction, undue influence is presumed. This presumption arises in relations of parent and child, guardian and ward, or, between solicitor and client, and fiancé and fiancée in certain cases, medical man and patient, a religious advisor and a person to whom he give advice. Therefore, in this legal system fear is not restricted, unlike French legal systems and ours, only to ascendants and superiors but also includes other categories of relationship.

Dear student, what are the possible justifications for not incorporating reverential fear as a ground of invalidation of contract in our law?

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4. Unconscionability

The rule is that a contract may not be invalidated on the ground that there is a substantial disproportion in the value of performance owed by the parties to each other. In other words the fact that the terms of the contract are more profitable to one party is not considered as a cause for the invalidation of the contract lest the security of business transaction be endangered. Nevertheless, the contract may be invalidated if the consent of the injured party was obtained by taking advantages of his want, simplicity of mind, senility or manifest business inexperience and when justice requires for the invalidation. In such a case, before the person invoked his want, simplicity of mind, senility or business inexperience he has to prove at first that there is a substantial disproportion in the performance of the contract owed by each party at the time of contracting.

Accordingly, There are situations where by express contractual terms may be unaccepted by the law on the ground that a party has extracted extortionate and grossly unfair bargain in some unfair manner. Such is so when a party has greater bargaining power to the extent of nearly coercing the other party.

The Ethiopian law is no immune to such consideration. Article 1710(1) of the Civil Code stipulates that a contract may not be invalidated on the ground that its terms are substantially more favorable to one party than to the other party. Thus, the law is acknowledging the likelihood of inequality of bargaining power. Usually in free

competitive markets such inequality is inevitable. If we are to invalidate a contract merely because it is highly profitable for one party than the other, security of trade will be jeopardized.

But sub-article (2) of 1710 creates a room in which contract is invalidated on grounds of unconscionability where the consent of the injured party was obtained by taking advantage of his want, simplicity of mind, senility or manifest business inexperience. Such is so when justice so requires.

That is if it is shown that the substantially disproportionate terms are as a result of the situations listed under sub-article (2) the judge may invalidate the contract if he feels in just to maintain such. This shows how the law opens a room (how narrow it may be) for interference into (private) agreements of parties. The basic justification for the state to step in to individual contract in such instance seems to be the need to help a person (with such diminished bargaining role) in contract.

Unit Four: Object of Contract as a Validity Requirement

Introduction

Object is one of the requisite elements for the formation of a valid contract in addition to consent, capacity and form, if any. Without an object one cannot talk about the existence of a contract. Object is an indispensable element of a contract without which creation, variation and extinction of the contract is impossible. Although it is the most indispensable element for the formation of a contract, the only existence of object is not enough; it should fulfill certain requirements. It has to be possible for execution, precisely or sufficiently defined, lawful and should not be immoral.

Unit Objectives

At the end of this unit, the student will be able to:

- Discuss the concept of object in relation to contracts;
- Explain object as a prerequisite for the formation of valid contract;
- Define, identify and analyze elements of and defects in object and its effects
- Identify the precise, possible, lawful and moral object of a contract.

Section One: Definition

The Ethiopian Civil Code does not define object of a contract. Instead, Art 1678 (b) of the Civil Code states as the second necessary element of a valid contract an object which should be sufficiently defined, possible and lawful. It means in order to have a valid contract, the object of the contract should be precisely and sufficiently defined, should be possible for execution, should be lawful and should not be immoral, leaving the definition of the concept object of contract.

The problem of not defining the concept “object of contracts” is not unique only for the Ethiopian legal systems but also for the Civil Codes of Egypt, France, Louisiana and Mexico. The Civil Code of France, for instance, simply enumerates things, which constitute the object of a contract: Such as a thing which one party binds himself to give, to do or not to do, things, which are objects of commerce, and things of future

However, the concept of “object of contract” has been defined by some writers. While commenting the provisions of “Ethiopian contract law”, Krzeczunowicz defined “object of contract “ as obligation to perform some thing. In other words, the object of a contract is an obligation the contract produces. And it is this obligation that

interests persons so as to conclude a contract because it changes their previous position, i.e. it creates new relation between them.

Similarly, the object of contract is treated by Jurado as: "… of all the requisite elements of a contract, the object is, if not the most fundamental, the most indispensable in order to have at least the shadow of a contract. Without a cause an agreement is possible, although inexplicable, without consent it is possible at least to have the appearance of a contract, but without an object there is nothing." This quotation shows the overriding importance of object for validity and existence of contract. Concerning the existence of defects in consent at the time of formation of contracts a merely vitiated contract can exist, has certain effects but is not fully and bilaterally valid, since the victim can choose to confirm and enforce it instead of invalidating it. But if there is no object there could exist no contract. Moreover, unlike the case where there is a vitiated contract (due to lack of capacity and defects in the consent), if the object of a contract does not possess the necessary qualities (object's being defined, possible and lawful) for the existence and validity of a contract, the victim cannot choose to confirm and enforce it instead of invalidating it.

Therefore, every contract requires an object, which is performance for which both parties engage towards one another. The performance may consist in the delivery of a thing or in the fulfillment of any other affirmative or negative act susceptible of pecuniary evaluations. It means those things or doings to which the obligation relates should be the one whose value is to be determined in monetary forms.

Planiol suggested that every obligation has as its object an act, which a person can exact on another. Such an act can take different

characteristics, according to the nature of the case. This act, which is the "object of an obligation", can be positive (performance) or negative (forbearance). Thus, Planiol has dealt with the object of obligation not the ‘object of the contract’.

There are different writers who treat the ‘object of a contract’ and the ‘object of obligation’ as being either identical or different. For instance, the French Civil Code uses the term ‘object of obligation’ and some times ‘ object of contract’ which is not the case in the Civil Code of Egypt that uses only the term’ object of obligation’.

On the other had, the Civil Code of Ethiopia, Louisiana and Mexico lay dawn some sort of modification on the French Civil Code by stating in their codes the concept ‘object of a contract’ only rather than using the object of a contract and object of an obligation alternatively.

When we see the French Civil Code, it lays down that the object of a contract is a thing to be given and an act to do or not do something. Similarly, Planiol said that the obligation to give has a thing as its object, while the object of an obligation to do or not to do is an act. But according to Rene David, the object of a contract is the obligations undertaken by the parties, not the thing to which these obligations relate. For instance, the object of a contract of sale of a house is the seller’s obligation to transfer to the buyer the ownership of that house and the buyer’s obligation is to play the price to the seller; the object of a contract of employment is the service by the employee against the salary paid by the employer. Therefore, the thing sold, whether movable or immovable, is not the object of a contract. Hence, this David’s understanding of 'object of contract ‘ contradicts the idea of object as used by Planiol. However, it is the

opinion of Rene David that is incorporated in the Ethiopian legal system.

Under the Ethiopian contract law, the object of a contract is the obligation to be undertaken (performed) by the contracting parties, not the thing to which these obligations relate. In other words, the term object of contract used the Ethiopian Civil Code covers the performances sanctioned by obligations undertaken by the parties in a given category of contract. Even the drafter of the Civil Code, Rene David, used the concept of 'object of contract' rather than using the 'object of obligation'. This is clearly provided under the provisions of our Civil Code, arts 1714-1718 of the Civil Code.

Under these provisions, we can see that a contract shall be of no effect where the obligations of the parties… can not be ascertained with sufficient precision; are impossible, are unlawful or immoral. Hence, it is the obligations of the parties that is the 'object of a contract'; not the things to which such obligation relate. Moreover, we cannot speak of things being defined, possible and lawful or not immoral. For instance, in a contract of sale of an ox, we cannot say that the ox must be defined, possible, lawful and not immoral.

One thing that should be clear is that object is different from motive of contract. Motives answer the question "why does a party conclude a contract." For instance a party buys a given house because he wants to live in Bahir Dar, or because it is the proper size to open a restaurant; and employer recruits a housemaid because he has not time to clean up on his office, or because the full-time employee is sick. Moreover, the motive is deemed indifferent in respect of the lawfulness or the morality of the undertaking.

As the object of the contract is the obligations undertaken by the parties towards one another, it would be better to discuss those types of obligations. Our Civil Code enumerates three kinds of obligations: namely obligation to give, to do or not to do something pursuant to Art 1711 of the Civil Code.

Planiol said that obligation to give is a positive obligation and it is an obligation to transfer the ownership of a thing, whether movable or immovable, or the obligation to convey real right. The obligation of giving, under French law, imparts that of delivery of the thing that makes the creditor owner of the thing and of preserving it up to delivery, under pain of damages and interests towards the creditors. Similarly, Art 1907 of the Louisiana Civil Code lays down that: the obligation of giving includes that of delivering, and of keeping it safe, until the delivery of it, the person who contracts to give being liable on failure, to pay damages to the person with whom he has contracted.

Article 1712 (1) of the Civil Code states that party may undertake to procure to the other party a right on a thing or to do or not to do something Thus, the obligation to give under Ethiopian law includes delivery of a thing, for the fact that one can not liberate himself from his obligation without delivering the thing to be given.

The other type of obligation, obligation to do includes all obligations the object of which is an act, which the debtor has bound himself to perform. Obligation to do like obligation to give is a positive obligation. Obligation to do, where a party undertakes to act in the way required by the other, is divided into two subcategories. Article 1712(2) of the Civil Code provides that the party who undertakes to

do something may undertake to procure to the other party a specified advantage to do his best to procure such advantage.

Thus, such obligation to do may be obligation of result or obligation of means. In case of obligation of result, the undertaking is compulsory for the party, who has an obligation to do, to achieve the intended result. For instance, the transporter of goods undertakes to carry the good to its destination, or the carpenter has to make a table, which he agreed. However, in case of obligation of means, the party only promises to do his best or efforts, and does not guarantee the result. For instance, a doctor will do his best but cannot guarantee that his patient shall be cured, nor an advocate guarantees his client shall win the lawsuit.

Obligation to do may arise without contract, which means it may be created by law solely. For instance, there are obligations to do that arise from family law imposed on wife and husband. There is also an obligation to do on the ground of public order or for the interest of the public at large. This is the case where the law obliges every body to lend aid to a person in an imminent and grave peril of his life, person or health. There fore, obligation to do arises both from a contract and the law as the ease may be, though our concern is contract.

On the other hard, there is an obligation not to do which includes those obligations in which the debtor is bound to abstain from doing an act, which otherwise he could have a right to do. The object of the agreement, therefore, is an abstention instead of an act, as it is a negative obligation. The parties may agree to restrict their not to do something. For instance, the seller who sold his bakery may agree not to construct another bakery around the previous one.

However, obligation not to do may arise from the law like obligation to do. For instance, neighboring owners owe certain negative obligation to one another, such as that of not using their property so as to become nuisance.

Whether the object of the contract is an obligation to give, to do or not to do, it has to be freely determined by the contracting parties. The first use of the notion of object of contracts is to affirm the principle of contractual freedom in the choice of the object of the contract. The parties are free to determine the obligations which each of them decides to be bound by subject to the mandatory provisions of the law as per Art 1711 of the Civil Code. Parties have the right to define the nature and scope of the obligations they subscribe. This highlights the existence of a liberal economy, which leaves ample space for individual initiatives.

Nonetheless, the objects of a contract, i.e., obligations of the contracting parties, which are freely determined, by the parties have to be sufficiently defined, possible, lawful and moral. Thus, it is essential that these requisites must occur for the validity of a contract.

Section Two: Requirements for Having a Valid Object of Contract

Firstly, in order to have a valid contract, the object of a contract should be sufficiently defined. “To constitute an obligation enforceable in law, the rights and liabilities given and imposed must be definite. In other words, it must relate to definite acts and forbearances. The freedom of the person bound by an obligation is not curtailed generally, but is limited in reference to some particular act or

forbearance. If the thing to be done is so indefinite or uncertain the court can not enforce the agreement."

Thus, we cannot talk about the existence and validity of contract unless its object is defined. By defined object of a contract, it is to be understood that the objects should be certain so as to enable courts to enforce the performance of the obligation of the parties. Under Ethiopian law, contracting parties are given the right to define the object of their contract, as to its kind, quantity and quality. In other words, no one other than the contracting parties can define the object of a contract entered into by the parties.

Concerning the kind of the thing to be delivered, unless the contracting parties specifically ascertained the kind of those things, problems may arise when the time of performance is due. For instance, in a contract of sale of an "animal", a problem may arise at the time of performance because we do not know whether it is a horse or a dog. Similarly, in a contract of sale of cereal, since we do not know as to which kind, whether it is wheat or maize, the contract is void for want of defined object. Furthermore, even if the parties defined as to the kind of the animal, their contract shall be of no effect, unless the parties specifically ascertained its specific character. Thus in a contract of sale of a horse, unless its specific character like black or white, is defined by the parties, their contract shall be of no effect.

Similarly, ascertaining the quantity of the thing to be delivered is the right given to the contracting parties. Nonetheless it is possible that the contract may, without fixing the quantity at once, provide means to ascertain it later, in which case the object is considered as defined. For instance, A entered in to a contract to supply teff for a certain

hotel where by the quantity of teff shall be determined in accordance with the normal needs of the hotel. Art 2416(1) of the Civil Code lays down that where the quantity to be supplied has not been fixed, the supplier shall supply such quantities as corresponds to the normal needs of his contracting party, having regard to the time when the contract was made. Here the determination of the 'normal needs' is the discretion given to the court. Thus, we can say that in exceptional cases courts are empowered to determine the quantity of the thing to be delivered by one of the contracting parties.

In addition to ascertaining the kind and quantity of the thing to be delivered, the right to determine the quality of the thing is also the right given to the contracting parties. However in some jurisdictions, where the parties failed to determine the quality of the thing to be delivered, courts have a discretionary power to determine it. For instance, under French law courts have the discretion to determine the quality of the thing to be delivered even if it is an animal. If one sells a horse without further determination as to its quality, then he must deliver a horse of "average quality".

On the contrary, Ethiopian law does not recognize and give effect to the sale of an animal whose kind, quantity and quality, has not been ascertained by the parties. It is only as to the quality of fungible things that the Ethiopian Civil Code gives effect for the contract though there is no agreement on their quality. Art. 1747 (2) of the Civil Code lays down that the debtor may not deliver a fungible thing below average quality. It means the debtor is bound to deliver the fungible thing of at least average quality.

The parties should also determine the price of things, time of performance and other obligations. The certainty of object also

includes the parties of a given contract. In other words, the parties to an obligation must be definite, both those having the right to exercise and those bound. Due to this fact, a man cannot be under obligation to the entire community, nor the whole community under an obligation to him.

Generally speaking, the object of a contract should be reasonably and adequately defined, meaning the obligation of the parties should be ascertained with a sufficient precision. Thus, where the obligations of the parties or one of them cannot be ascertained with sufficient precision, the contract has no effect, and produce nothing as per Art 1714 of the Civil Code.

However, even if a contract is very detailed, it is very unlikely that it will provide for all the obligations. There will be lacuna or gaps in the obligation set by the parties. The lacunae as to the objects of a contract can be filled in through a reference made to custom, good faith, and equity pursuant to Art 1713 of the Civil Code and of course through suppletory provisions of the Civil Code.

Secondly, the object of the contract must be possible for execution in order to have a valid contract. Pursuant to Art 1715(1) of the Civil Code the object of a contract must be possible in the sense that its performance must not be absolutely impossible. In other words, if the object of the contract is impossible, the contract shall be of no effect. It is even nonexistent.

The impossibility of the object of the contract must for instance be considered at the time of the contract: the thing considered must for instance be in the state required to be the object of the obligation. If the object of a contract becomes impossible after the conclusion of

the contract or in the course of performance of the contract, other solution is applicable. This situation opens the right to apply for unilateral cancellation pursuant to Art 1788 and 1790 of the Civil Code, or to implement the rules applicable where the restoration of the previous position is impossible according to Art 1817 of the Civil Code. But present existence is not what is contemplated here if the parties intended simply to concern themselves with a future thing or undefined fungibles. In other words, the object of the contract should exist at moment of the celebration of the contract, or at least, it can exist subsequently or in the future.

Moreover, the impossibility must exist in itself, and not depend on a party. In other words, the impossibility is objective, and calls for the judge to appreciate it in *abstracto*. The impossibility is deemed to be the same for any person finding himself in the same position. It has to be noted also that the provision specified clearly that the impossibility be not necessarily in respect of both contracting parties; it is sufficient to be impossible for one of them.

Regarding impossibility of object of contract dear student, read the following quotation carefully. " The performance by the parties, or by one of them must not be impossible in itself… it must not result from the special situation of the debtor, but must exist without regard to the person involved: the performance of the contract would be impossible even if some one other than this particular debtor were obligated."

Finally, the impossibility which annuls the contract should be an absolute and insuperable (insurmountable), not a relative impossibility. In other words, if the obligation of one of the parties is absolutely and insuperably impossible, the party is not legally bound

to perform. An absolute impossibility is one which is general, and not simply in relation to a given contract. Insuperable or insurmountable impossibility is some thing, which is completely impossible for any body to overcome.

According to Art 1715 (2) of the Civil Code, the absolute and insuperable impossibility may relate to a thing or a fact. There is an impossibility relating to a thing when the object of the contract does not exist at the time of contracting. This impossibility occurs in obligations to give when the specified thing to be given does not exist in a merchantable state at the time of contracting. In other words, where it is not susceptible of appropriation and transmissible from one person to another, then such impossibility is said to be relating to a thing. Impossibility, which arises from the non-existence of the subject matter of a contract, avoids its validity, because both parties concluded a contract on the assumption that the subject matter does exist. For instance, A entered in to a contract to sell his ox to B. But the ox has already been dead which is unknown to both parties. In this case, neither of the parties committed fault. In this case, since it is impossible to deliver non-existent thing, their contract is void for want of existing thing.

On the other hand, impossibility of a fact is related to obligations to do in which case one of the parties engage himself in an obligation, which he cannot do as a matter of fact. For instance, A entered into a contract to sell a moon to B or assuming an obligation to swim across Red sea and to cross it. This agreement is void for want of possible object. Also, if a person promises to transport goods from Bahir Dar to Dessie by train, this is impossible because there is no railroad between Bahir Dar and Dessie.

Thus, a contract is not void, if the obligation of one of the parties is relatively impossible. This is deductible from the provision of the Art. 1715(2) of the Civil Code which states that a contract shall be of no effect where the obligations of the parties or one of them relate to a thing or fact which is impossible and such impossibility is *absolute* and *insuperable* (emphasis added). However, this type of impossibility is sometimes called 'impossibility in fact' which arises from the circumstances of the case. For instance, in some cases there is practical impossibility of payment of 10,000 Birr as there is excessive or unreasonable cost for a poor.

A certain writer presents the case of relative impossibility as follows: " A relative impossibility is not enough. If a man binds himself to do something, which is a possible thing to do, although he is not able to do it, there is no reason why he should not pay damages for entering into a foolish contract. If a man who does not know a note music undertakes to write an opera within a week or to pay a penalty there is no reason why he should not be held to his contract." This quotation underlines the fact that impossibility with regard to a particular person is not material element. The impossibility must be absolute with regard to all the members of a given society.

Thirdly, the object of a contract should be lawful pursuant to article 1716 of the Civil Code. Even if the parties define the object of the contract, which is possible, it would have no effect unless the object is lawful. Hence, it is when the object of a contract is lawful that we can have a valid and enforceable contract in addition to a defined and possible object.

A contract is unlawful if the obligation of one or both of the parties is prohibited by law. In other words, contracts, the object of which are

not contrary to the law or public order, such as constitutional law, administrative law, criminal law, family law, and mandatory provisions of private law are lawful. For instance, A agrees to sell to B the watch he owns lawfully for a reasonable price. Here, the object of the contract i.e., A's obligation to transfer the watch to B and B's obligation to pay the price is lawful. However, if A and B conclude a contract of sale of public domain property (such as road) the contract is void by virtue of Art 1454 of the Civil Code because under this article it is provided that public domain is inalienable. Similarly, a contract for a deliberate commission of a crime is obviously unlawful. In addition to commit a crime, there is also a contract to commit a civil wrong such as contract to assault or defraud a third party.

Lastly, it is only when the object of a contract is not immoral that the contract is said to be valid. Art. 1716 (2) of the Civil Code states that the object of a contract must not only be unlawful but also it must not be immoral. For instance, the money given to a prostitute can not be a basis for an enforced performance, should she refuse, nor can she sue for it, should she have performed a sexual action without getting paid before hand. This is because the object is immoral, in the form of sexual relations perfumed against payment of money. The determination of the lawfulness or the unlawfulness of the object of a contract is not a difficult thing for there are explicit provisions of the law, which declare what object of contracts is lawful and what is not.

The problem becomes more difficult when one deals with the determination of morality. It is crystal clear that morality does not have a general yardstick for what is moral or immoral in one place may not be in another place. Hence it is up to the court to know the morality if the jurisdiction in which it sits in dealing with questions of

morality. Morality refers the judge to cultural values or society's traditional values, which vary in time and space.

But the our Civil Code makes one thing clear, that is, a contract is unlawful or immoral where the obligations assumed by one party relate to the obligations of the counter party. In other words, in certain cases each obligation taken separately is valid in itself. But the combination of the two becomes immoral or unlawful. For instance, A works for the immigration agency and his duty is to deliver visas. If B offers to pay a sum of money to A for the Visa, the contract is unlawful. It is lawful for A to deliver visas; it is in fact his duty. It is not unlawful for B to pay sum of money. But when the two are combined, we are in front of a case of civil servant's corruption. Also, if A enters into a contract with B stipulating that B will not Kill C and for this A would pay B certain amount of money, the obligation assumed by A is related to the obligation of B. Thus the obligation of A is unlawful as well as immoral, because every body has legal and moral obligation not to kill another; hence one should not be entitled to get money in discharging his legal duty by having some one obligated to him. In this example, when we see the obligation of the parties separately, they are perfectly lawful and moral. Not killing another is legally and morally an acceptable conduct. Besides, there is nothing unlawful or immoral with giving or receiving money. Nevertheless, if the obligations of the parties are taken jointly, they go against the legal and moral norms of our society.

There last point that should be discussed in relation to object of contract is unlawful or immoral motives for the formation of contract. The principle stated in Art 1717 of the Civil Code is that the motives

of a party to enter a contract are not taken into account to determine whether the object of the contract is unlawful or immoral. The provisions of this article says the motives for which the parties entered into a contract shall not be taken into account in determining the unlawful or immoral nature of their obligations.

Motives are the purposes of the operation for a party; they are private to him, and therefore difficult to ascertain. The practical problems of proving a party's motives at the time of the contract are the principal reasons for deciding against referring to them to appreciate the unlawful or immoral character of the object of the contract. The motives are considered in respect of one party only, but the rule also applied if both have unlawful or immoral motives. Motives are furthermore exclusively of relevance if they were prior or contemporary to the contract. One has an echo of this refusal to take motives into consideration under Art 1701(1) of the Civil Code in respect of admissible mistakes. For instance, if a person buys a bus to carry illegal immigrants over the border, the contract of sale is valid, even if the motives of the buyer are unlawful. Also if a person buys a kitchen knife to kill his neighbors, the contract will not be invalidated.

However, Art 1718 of the Civil Code enumerates two exceptions to this rule, in fact, when conclusive proof is available as to the unlawful or immoral motive; where the illegal or unlawful purpose is disclosed in the contract itself and where the unlawful or immoral motive is apparent from a document drafted by the contracting party asking for the performance of the contract. For instance, if in the sale of a house where the buyer wants to install prostitutes, the contract mentions that the rooms are specially designed for sexual relations, one can infer from such wording that it will be clearly place of destination. In

this case, the court cannot be asked to lend a hand to enforce the contract.

In general, in order to have a valid contract, the object of a contract should be sufficiently defined, possible for execution, lawful and not immoral. If the object of the contract lacks these, the contract shall be of no effect or null and void. (See articles 1714, 1715 and 1716 of the Civil Code.)

Unit Five: Form as a Prerequisite for the Formation of Valid Contract

Introduction

Form is meant some peculiar solemnity attaching to the expression of agreement for the inclusion or exclusion of certain subject matter. It is the outward appearance of the contract, and to the way that the declaration of will becomes apparent. It is not the agreement itself but the solemnity, which is attached to the agreement or attached to the expression of offer and acceptance that reveals the agreement of the parties.

In Ethiopia form is not a mandatory requirement for every types of contracts. Rather it is an exception where the law expressly provides and the contracting parties agreed. This unit emphasizes on meaning and source of forms, the advantages and disadvantages of forms, the type of contract that requires special form, and the effects of non-observance of formality requirement.

Unit Objectives

At the end of this unit, you will be able to:

- Analyze the meaning of form and source of forms
- Discuss the advantages and disadvantages of forms
- Identify the type of contract that requires special form
- Explain the requirements of form
- Discuss the effects of non observance of formality requirement

Section One: Definition of Form

For a better understanding of what is meant by “form” we can take the definition given to formality. Formality is defined as “the conditions, in regard to method, order, arrangement, use of technical expressions, performance of specific acts, etc., which are required by the law in the making of contracts… to ensure their validity and regularity.”

The term “form” has to be distinguished from its ordinary meaning. When we say “form of contract” it is not to mean a kind or type of contract such as contract of sale. Rather it is to mean to make a contract “in writing” in the laws of Ethiopia and England, while to make a contract in ‘notarial act’ in the laws of France.

Secondly, the term is employed to refer to forms that should be complied with in the making of valid contract. It does not refer to the requirement of writing of contract for the purpose of evidence.

Therefore, formality (form) should be understood to mean conditions that are required by law for making valid contract by being attached to the agreement of parties. The conditions serve to make valid contract rather than referring to those conditions of proof.

Forms may be prescribed for proving the contract (*ad probationem*) or for validly making it (*ad validitatem*). But form here is a condition not of proof, but of existence of the contract or form as an element of a valid contract. Form as proof of contract, on the other hand, has nothing to do with the validity of contract. In other words, the contract exists though the form required for proof is not complied with.

It is because of this fact that Art. 1678 (c) of the Civil Code expressly states form as conditional element for valid contract. It reads as follows " *no valid contract* shall exists … unless the contract is made in the form prescribed by law, *if any*. (Emphasis added). Hence, form if prescribed, is necessary element for the making of a valid contract.

Section Two: Sources of Forms

Dear student, please explain the meaning of form from your personal knowledge.

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As a general rule no formalities are required for the conclusion of contract in English law. A contract may be concluded by writing, by word of mouth, by conduct, or by a combination of two or three of these methods. In other words, the parties to a contract have freedom of form for making contracts. But this principle holds exceptions: where the form is required by law and where parties want to give solemnity to their contract. Hence we have two sources, the law and agreement of parties, of forms under the English law.

Similarly, under French law the general rule is that, excepting for certain types of contracts which are required to be in writing, no writing is necessary to execute a valid contract. A contract is formed by an exchange of consents. In addition, a contract may be inferred from the conduct of the parties, thus, the source of form is the law in France.

In the same vein, Art 1719 cum 1678 (c) of the Civil Code establish the principle that there are no formal requirements for the conclusion of a contract the agreement of the parties is sufficient to form (conclude) a contract. Agreement of parties is sufficient to conclude a contract unless form is expressly required.

This principle, however, is set-aside in two cases: where the law requires as per Art 1719(2) of the Civil Code that a particular contract be put in a special form, and where the parties themselves have provided as per Art. 1719 (3) of the Civil Code that their contract will be concluded in particular form. Thus, we have two sources of forms under Ethiopian law of contract: the law and the agreement of the parties. It would be better to see these sources one by one.

Special form required by law is one of the exceptions to the principle of freedom of form under the law of Ethiopia. It has mandatory nature, and hence cannot be overruled by agreement of controlling parties, rather it should be observed. This is one of the sensitive territories the state's intervention in private contracts is revealed.

The term "expressly" under Art 1719(2) of the Civil Code is of interest in relation with forms required by law. This term assumes the existence of clearly stated provisions that show the need of form for a given contract. We can take, for example, contracts relating to immovable, contracts with public administration, contract of guarantee, insurance contracts pursuant to Arts 1723-1725 of the Civil Code. These contracts are required to be made in writing, as the form is expressly stated in the respective provisions. The term "expressly" indicated the form- prescribing rules must be constructed restrictively. Thus, in case of doubt, the principle (freedom of form) prevails over the exception (requirement of form).

Therefore, we are not legally obliged to apply form to a contract that is analogous (similar) to that for which the law prescribed form. To make this clear we may take contracts of mortgage and pledge. Pursuant to art 3045 (1) of the Civil Code a contract creating mortgage has to be made in writing. In order to secure claim, like mortgage, pledge is given as a security for a creditor. However, there is nothing stated about the form of making of contract of pledge, but only question of evidence is laid down under art 2828 of the Civil Code. However, we should not say, as both contracts are made to secure debt, contracts of pledge have to be made in writing.

Secondly, we are not legally obliged to apply form where the law requires evidence of a contract be in writing. If a law provides a given

contract be proved in writing, it deals with evidence rather than of making a contract. In other words, if the law expressly provides to prove allegations in writing, it does not mean that the contract should be made in writing. For instance contract of loan that exceed 500 Birr will not be made in writing for its validity. (See Arts. 2472.) If there is no express provision to make the contract in writing and there is doubt as to the requirement of form, we have to apply the principle of freedom of term by avoiding the formality requirement for making valid contract.

Accordingly, the existence of the term “expressly” serves two functions: limiting the application of forms for said contracts rather than applying them to analogous contracts and prohibiting application of forms to contracts that are needed to be proved in writing.

Special form required by parties is the second exception to the principle of freedom of form. But what do we mean by “special form” under art 1719 (2) and (3) of the Civil Code?

“Special form” under Art 1719 (2) of the Civil Code refers to the necessity of writing a contract upon satisfying Art 1727 of the Civil Code. Words have the same meaning in legal instruments, unless otherwise provided. Being this situation, the phrase “special form” as used in Sub Art (3) of Art. 1719 has no other meaning than it has under sub Art 2 of Art 1719. Prof. Rene David has dealt with sub Art (3) of Art 1719 when he comments Art 1720 and he says that if the law or an agreement of the parties provides that the contract must be concluded in a particular form, the failure to observe this form result in the invalidity of the contract. The concept “particular form” refers to both. Consequently, the concept “special form”, under art 1719 (3), means to agree to make a contract on forms laid down under the law.

In other words, the special forms stipulated by contracting parties has the same meaning with special form required by law.

Dear Student, there are two questions that deserve treatment: when do we say the parties have stipulated a contract be made in special form? And, what sort of contracts is able to be stipulated by parties?

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As regards the first question three contending arguments can be raised. The first is that the mere writing of a contract is enough to hold the contract is made by stipulated form. The second argument is that agreement of parties that is concerned with the stipulation has to be made in writing since the subsequence contract is to be made in writing. In other words, this contract is preliminary contract, and hence, it has to comply with art 1721 of the Civil Code. The third argument is that the mere writing of a contract is not enough. There should be express agreement of the parties to make their contract in special form that is made in whatever form. If, however, they agreed to make the contract in writing, the writing has to be made separately from the subsequent contract, because the subsequent contract has to be made in special document. The courts have to ascertain, before all, whether the contract is made in writing due to agreement of the

parties rather than taking for granted every written contract as contract made by agreement of parties.

Stipulations of forms by contracting parties under Art 1719(3) is made by agreement of the parties concerned. The mere written contract, without any requirement by law, reveals only the contract the parties entered into. It does not show the agreement of the parties, which is concerned with making the contract in special form. In the absence of any agreement that reveals the stipulation of forms, we should not hold any written contract as a contract made by stipulation of contracting parties. Rather we have to be guided by the principle of freedom of form agreed by contracting parties. Then, the tenability of the first argument is questionable.

The problem that is connected with the second argument is the absence of “final contract,” that has to be made in special form, at the time of agreement on form by the contracting parties. To make preliminary contracts in writing, the “final contract” has to be a contract that is required to be in writing. In the absence of “final contract”, at the time of agreement on form which requires form, we could not take the agreement on form as preliminary contract and hold this agreement be in writing. Hence, the second argument becomes questionable.

The other argument is that the law, under Art 1719 (3) does not require any form for the agreement that stipulates form. What is required is to expressly agree for making the contract in a special form. Thus, the third argument seems tenable.

Dear student how do you see the above arguments?

When we resort to the second question, according to art. 1719 (2) of the Civil Code, special form required by law has to be observed. Then there is no need to stipulate form by parties for those contracts required by law to be made in special form. Secondly, the special form stipulated by parties or required by law, as we have seen, is making a contract in writing. Hence as a result of the mandatory nature of Art 1719 (2) and the similarity of the form, in spite of their difference in source, special form can be stipulated by parties only for those contracts that do not require form by law.

Section Three: Functions of Form

In ancient Roman law a contract could ohm be formed where ritual expressions where used. However, modern systems based on consent have taken their distances. In other words, the assumption of contracts on form and consent are opposite because consensualism based the contractual obligation in the partners consent which can be purely tacit but must be true to their subjective state of mind, whilst formalism will only acknowledge a contract where an exterior, visible sign was made, but then even to the point were the actual will of a party becomes secondary and sometimes irrelevant.

The major advantage of consensulism is to stress the individual person’s freedom to contract. In this way is a from of human rights. It is also cheap, fast, simple, the expression of a society of equals. On the other hand excessive formal requirements in contracts can become cumbersome, costly, expensive because they call for the intervention of legal professionals or experts or generate administrative fees and taxes. They can also be abscessed by parties acting in bad faith who try to exploit formal defects when they have no substantive defenses to propose. Forms can also be an expression of a state control and thus a limit on civil liberties.

However, formalism offers advantages. One of the advantages of form is evidentiary function, The presence of form is used as conclusive evidence to solve a controversy that could emanate from a given contract. The form used as evidence he could be that which is already designed to be used for as evidence or for validity of a contract. Form is a good prevention against disputes if the contract is well and clearly drafted.

The second function of from is cautionary function. It has a cautionary or deterrent function by acting as a check against inconsiderate action. The use of form for contracts makes some one to sufficiently consider what he is going to bear up on non-fulfillment of his side of obligation and what he is going to gain up on compliance with the terms of the contract made in a given form. A person may hesitate longer before executing a deed than before he would make an oral promise.

In other words, form protects parties from acting too fast, without thinking about their commitments.

Thirdly, form has channeling function. The use of a certain form may help to distinguish one type of transaction from another.

Fourthly, form promotes certainty. A requirement of writing simplifies the problem of ascertaining the contents of the agreement.

Fifthly, form has a protective function. It protects the weaker party to a contractual relationship by ensuring that he is provided with a written record of the terms of the contract.

Lastly, form has a function of facilitation of judicial diagnosis. Formal requirements save time in the judicial diagnosis in that it helps the judge by simply looking into the observance or non observance of formalities decide on whether a legal transaction was entered into between the parties in front of him.

The Ethiopian Civil Code requires the use of certain forms for certain types of contracts. Dear student, what are those types of contracts that are to be made in a special form?

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Section Four: Types of Contracts to be made in Special Form

The first area the law injects requirement of form is as regards preliminary contracts. That is, as seen in Art 1721 of the Civil Code preliminary contracts should be made in the form prescribed for the final contract. The simplest illustration is that of Art 2200 of the Civil Code where, if the act to be performed by agent is under a prescribed formality requirement, the agency itself should be in that form. The purpose of legislative intervention in such circumstances seems to strengthen the evidentiary value of the preliminary contracts thereby. Serving the role of supplementing any doubt in the principal contract on the basis of which environment it is made. Otherwise, if the preliminary contract is orally made while the principal is in writing, it is difficult to confront written terms with oral ones.

The same justification holds true for variation of a contract made in a given form. Unless the variation is in the form the contract is made, it

is difficult to show the varied terms. Hence, art. 1722 of the Civil Code clearly provides that a contract made in a special form shall be varied in the same form.

Dear student, what is the fate of the written subsequent contract, which is made by the help of preliminary contract that is made not in a special form?

Also, what would be the fate of the prior contract and the varied contract when the variation is not made in special form?

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The third type of contract that should be made in a special form is contracts related to immovable. As regards immovable, Art. 1723 of the Civil Code requires that contracts relating to such objects should be in writing and registered with court or notary. This is because as dealings on such objects are usually for long periods, it becomes imperative to make such contracts in a reliable form. Moreover, given the importance of such objects for the country (currently only house) the state wants to regulate dealings on such objects for socio-economic and political purposes.

Art. 1723 (1) of the Civil Code deals with contracts creating a right of ownership or transferring ownership, in full or in part. This will be the case for the sale of the bare ownership of an immovable, a contract setting up a usufruct, a servitude or encumbrance, or the contract granting a mortgage. Art 1723 (2) of the Civil Code on the other hand is dealing with contracts of partition (division) or transaction /compromise/ relating to immovable. All these contracts have to be made in writing and registered with the court or notary.

Fourthly, contracts made with public administration should be in a special form. Art. 1724 of the Civil Code provides that any contract binding the government or a public administration shall be in writing and registered with a court, public administration or notary. It simply means any contract creating obligations for the state or a public administration have to be in writing and registered with the court or a notary, or at the seat of a public administration. This is dictated by the public policy that public funds should not be expended without a measure of formality, in order amongst other things to fight corruption.

In this regard, there may be a question that which public administration will register the contract? There is an argument that it would seem better that such kinds of contracts be registered with in an independent administration authority, such as Addis Ababa city Government Acts and Documents Registration office in Addis Ababa and Regional Justice Bureaus in regional states.

Finally, what the Civil Code called long term contracts have to be made in writing. Art. 1725 of the Civil Code puts those contracts as contract of guarantee, the insurance contract and any other contract described as such. These contracts have to be in writing but not

necessarily be registered. The objective here is to ensure a minimum of security for the parties who commit themselves for a long period of time.

Section Five: Formal Requirements to be fulfilled for Written Contracts

Those contracts that we have discussed require writing and registration especially contracts related to immovable and contracts made with public administration. Others may be made only in writing.

According to art 1727 of the Civil Code a contract required to be in writing needs satisfaction of three elements: special document, signature of parties bound and attestation by witness. We would like to discuss the element of writing under the Ethiopian law of contract in turn.

One of the elements of writing is the requirement that a contract be supported by a “special document”. But what does special document mean? Would it mean a document that holds various matters including the contract? Or, should it be a document that deals with a single contract? If a document deals with various matters, it will lose the essence of specialty. Thus the document has to be special in that it should not deal with matters other than the contract. The term “Special“ excludes the inclusion of other matters whether these matters are contracts or other than them. Hence, the document has to be an instrument that is exclusively concerned with a single contract due to the qualifier “Special”.

Signature is the second element of writing. A contract required to be in writing has to be signed by the parties bound by the contract. The issue related to signature is whether or not both parties to a contract are required to sign the contract as embodied in the special document.

The answer leads us to art 1727 (1) of the Civil Code which states that formal contract has to: "… be supported by a special document signed by all *the parties bound by the contract*." (Emphasis added). Thus, in case of bilateral obligation, both parties have to sign the contract for making a valid contract as they are bound by the contract. Where as, in case of unilateral contract, it is only promissor who is required to sign as the obligation of the contract rests on him. Commenting on art. 1727 (1) of the Civil Code, Krzeczunowicz states " a contract required to be in writing must be signed by all the a parties bound, and only by them. Consequently, in unilateral contracts binding merely one party, and only this party has to sign." for instance in caser of contract of guarantee the guarantor is the only person that should sign, and the creditor is not duty bound to sign since the guarantor is the only person who is bound by the contract.

Regarding signature, the Ethiopian law of contracts recognizes two types of signatures: hand written signature and thumb-mark. Pursuant to art 1728 of the Civil Code, the hand-written signature is affixed by a person who can write and thumb –mark signature is affixed by a contracting who can not write as implied from the provision of art 1728 (2) of the Civil Code. The term 'hand written' excludes signature by mechanical means or other artificial means of affixing signature, such as a seal, a wet stamp, a paper imprint, and generally any means by which a signature can be duplicated.

What is not provided for in the recent development of electronic signatures, in the form of computer codes for credit cards for instance, or coded references for commercial transaction over Internet. Would they be acceptable?

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For blind and illiterate persons, a special protection is organized, pursuant to Art 1728 (30) of the Civil Code, the signature of blind person or thumb mark of illiterate person shall not bind him unless authenticated by a notary, a registrar or a judge acting in the discharge of his duties. The question is what does ‘ shall not bind” and “ authenticated “ mean? ‘Authenticated ‘ means ‘ certified’ by a judge or some other public officer empowered to do it and acting in the discharge of his duties. Thus, the signature or thumb-mark of blind or illiterate person has to be effected by as being true by a judge, notary or registrar in the discharge of his duty. It is then to be made in the presence of notary or judge or registrar in discharging his duty.

“Shall not bind” shows one party is not bound while the other is bound. The word “him” refers to blind or illiterate person that is party to a contract and entered into a contract without presence of notary, judge or registrar. The party who is not bound to the contract is then the blind or illiterate contracting party, while the other is bound. In line with this Krzeczunowicz states “ 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".

The third element in writing is the requirement of witness. Art 1727 (2) of the Civil Code clearly provides that the contract required to be writing has to be attested by two witnesses other wise the contract shall be of no effect. But what does attestation mean? Does it require the signature of the witnesses?

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Regarding these questions there are two opposing views. one view hold that attestation does not include signature and the other view is that it has to include the signature of witnesses.

Taking the first position, there are arguments that are raised to support the non-requirement of witnesses' signature for the validity of a contract if the contract is to be made in writing. Firstly, it is clearly provided under Art 1727(1) that the contract has to be signed by the contracting party who is bound by the contract. Thus, the person who is not bound by the contract is not required to put his signature in the contract. If the law requires the signature of witnesses, it will put clearly that the witnesses have to sign like the parties bound by the contract. Besides these witnesses are not contracting parties and then by *afortiori* they are not required to sign. The other reason is that the

term attestation connotes the affirmation of the contract as being true or genuine. It assumes the presence of witness at the time of conclusion of the contract so that they are able to know the terms of the contract as contained in the document. Moreover, the peculiar requirement of attestation by witnesses is intended to make up for the present lack of public authentication facilitates, and of familiarity with them, in many areas of this country which makes the signature of witnesses unnecessary.

On the other hand, there are persons who argued that the contract should be signed by witnesses. Firstly attestation means certification of a document. then, when one certify a document, it is obvious that he has to sign it. Similarly since the witnesses are required to attest a contract, they should sign other wise it is difficult to know whether they were certifying those terms stated in the contract or not. The other reason is that since the witnesses are substituting the public authorities that can attest the contract, they have to sign like the public authorities. More over, attestation enhances the contracts evidentiary value, through art 1730 (1) of the Civil Code: 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 that include their signature.

Thus, witnesses have to certify, where necessary, the making of the contract, the terms there in pursuant to art 1730 (1). They are credible evidence because they were present at the time of the making of the contract and their presence is reflected in their signature. In other words, the probative value of the contract is increased by their certification, which includes signature. Thus, some believed that witnesses who attest the contract should sign.

However, their number may be greater than two as art. 1727 (1) puts the minimum number of witnesses.

Dear student, which argument is convincing and achieve the purpose of the law?

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The capacity requirement of witnesses calls for attention. The witnesses should be of age and not judicially interdicted as per art 1729(1) of the Civil Code. Also, they should not be minors since minors may not perform Juridical acts except those provided by law. Then the statement, which asserts the witness has to be of age, is superfluous. Moreover, the witnesses should not be deaf-mute, blind, insane or other persons who cannot govern themselves or administer their estate, and as a result of any one of such state of facts their interdiction is judicially declared.

Article 1729(2) states the state of facts that do not affect the capacity of being witness. They are sex and nationality. The purpose of this provision is like minority superfluous.

Coming to the sanction for non-compliance with formality requirement, it is already provided under art 1720 and 1726 of the Civil Code. According to art. 1720(1) there is no contract but a mere draft of contract unless the contract that requires special form is

made in that form. Art. 1726, on the other hand, provides the contract "shall not be deemed to be completed " unless it is made as agreed.

Thus, if the law (Art. 1720(1)) or the agreement of the parties (art. 1726) calls for a given form, there is no contract until this form is respected. The contract is inexistent; it is a simple draft of a contract. So this seems to postulate the maximum sort of sanction possible, that of the non-existence of contract. The sanction of the violation of form shows that in the meaning of such provisions, the forms prescribed or agreed upon are deemed to have been imposed for the validity of the contract- *advaliditatem*-and not for the simple requirement of evidence and probation

However, the non-compliance with fiscal provisions and publicity measures does not affect the validity of contracts, as there are not as a rule a formal requirement and cause of nullity of contracts. But the term "unless otherwise provided" denotes, under Art. 1720 (3), the possibility of existence of provisions that sanctions non-observance of publicity measures with in validity of the contract.

Review Questions

1. The record of the case discloses that the cause of action of the present plaintiff-appellant was that the first defendant sold her /his land situated in Addis Ababa for a sum of Birr 10,000 including registration expense. She alleged that the seller undertook the sale with knowledge that the piece of land was already designated under an alignment plan for a public road prior to the making of the contract and that the second defendant (present respondent), in disregard of its duty to verify that the land was not in any way allotted for a public road or for any other public purpose prior to authenticating and registering the contract, procured an undue

   Advantage for the first defendant by accepting and registering a contract the object of which is impossible by virtue of Article 1678(q), (b), and (c) of the Civil Code. It was alleged that second defendant did this with knowledge that the said piece of land had been allotted for a public road. Plaintiff therefore prayed the court to invalidate the contract in accordance with Article 1808,1809,1818 and 1824 of the Civil Code and to order the first defendant to compensate her pursuant to article 2131, 2061 and 2064 of the Civil Code for the unjust enrichment he derived through a voidable contract with interest running from the day he received the money until he pays the full amount, and compensation for costs she incurred in the litigation.

   The first defendant appeared in court and argued that because the plaintiff had not adduced evidence in support of her claim, her action could not be sustained. This contention was countered by

the plaintiff's production of a written document. After this no further defense has been entered by the first defendant.

Counsel for the second defendant, on the other hand, submitted the defense that the plaintiff and the first defendant had agreed between themselves that neither of them would use the other or the Municipality if in the future the land is found to be larger or smaller than the area specified in the contract, or if the land should be expropriated for public roads or squares. In this regard, the Municipality is only responsible for registering the agreement of the two parties, and it is up to the seller and buyer before they conclude their contract to have the land surveyed. He therefore urged the court to dismiss the case against him and to award him compensation pursuant to Article 2928 of the Civil Code for damages suffered from a vexatious claim. The record further shows that the first defendant had produced as evidence the contract concluded between him and plaintiff her.

In order to clarify the matter the high court order the engineer of the Municipality to appear with the plan of the land despite the objection rose by counsel for first defendant. Accordingly t6he engineer appeared but failed to give satisfactory answer to the questions posed by the Court. Thereupon, the court ordered the appearance of the engineer who designated the land for a public road. Consequently, said engineer appeared and explained that the land was designated for a road under a general map prepared for the city of Addis Ababa and not by an engineer appointed to survey the particular land in dispute. This being the case, he said, it is impossible to tell exactly who drew up the plan and he added that no road has yet been constructed pursuant to the plan. He stated that he acquired this knowledge in his capacity as an official of the

planning Department. Finally he promised to reduce his statement to writing, which he did as shown in the record of the case.

After receiving the parties' statement and hearing the evidence the High court, by majority vote, rendered a decision in favour of the defendants. Since the land had not been properly measured and surveyed, the parties , in the contract they concluded, agreed not to bring suit against each other or against the Municipality if the land was found to be larger or smaller than what was stated in the contract or if it should be expropriated for contracting parties the terms or a contract are binding as though they were law and citing Article 1733 of the Civil Code, which states that courts cannot by way of interpretation very the terms of a contract, dismissed the petition of the plaintiff for the invalidation of the contract.
The appeal is lodged against this judgment

The minority opinion, on the other hand, after stating that the Municipality has no power to make the parties sign an agreement which obliges one of the parties to assume the consequences resulting from the sale of land which has already been appropriated for a public purpose, pointed out that the adoption by the Municipality of such practice would not only encourage fraudulent and deceitful acts but also adversely affect the country's development by making contracts relating to the sale of the city's insecure and unreliable. The opinion concluded by stating that the Municipality's registration of the contract, when it knew of the existence of serial photographs in which the land is designated for a public road, was illegal and consequently the plaintiff should be reimbursed.

After reviewing the record we also find the Municipality's authentication of this contract to be improper. Prior to authenticating the agreement, it should have clarified the matter by an enquiry form the Planning Department. The suit is a direct consequence of this failure of the Municipality to ascertain facts by an enquiry from its planning section before registering an agreement. This being the usual practice of the Municipality, it is therefore explicit that the Municipality's authentication of the contract in dispute disregarding this practice was mean too obtain an undue advantage for the seller and adversely affect the buyer. It is also clear in the agreement that the buyer's undertaking not to sue the Municipality and –or the seller in case the land be appropriated for a road or a square is limited to what may happen after she bought the land and not to what had already taken place before the conclusion of the contract. It is clear enough from the surrounding circumstances that the buyer bought the land in good faith believing that it was free from any kind of alignment plan for a road. In its judgment the High court has cited the provision, which attributes to an agreement the force for law as between the parties. But the Article applies only if the agreement of the parties had not been vitiated by a defect in consent as envisaged by Articles 1696 and 1697, 2 that is to say if the consent of the parties had not been given under deceit or fraud as provided by article 1704 (1).

The next issue to consider is whether the buyer knew before buying the land that it was designated for a road. It is hard to hold that she knew. The fact that she sought the invalidation of the contract, which she concluded by mistake, and the restitution of her money as soon as she realized the true nature of the facts clearly indicates that she did not know.

Therefore, we have reversed the majority opinion of the High court because it is contrary to the purpose of the provisions cited above and we affirm the minority opinion invalidating the contract because it was concluded under deceit and fraud. The first defendant is ordered to compensate the plaintiff for what he interest running from the date this action was instituted until the whole debt is discharged. The second defendant shall return to the plaintiff the money she paid for authentication by the Municipality. Each of the defendants must pay the plaintiff E. $100 by way of damages. The first defendant shall pay court fees and other expenses incurred in the litigation.

Note: ***This judgment was given at a time when land used to be owned by private individuals. Although that is not true now, assume for the purpose at land that hand can be sold.***

Questions

1. As the judgment shows, the plaintiff has cited several articles of the Civil Code to support her claim made to the lower court with respect to the invalidation of the contract. Considering the issue of invalidation raised by plaintiff, do you think she is right in citing those Articles? Why or Why not?
2. What would have been the legal basis for suing the second defendant?
3. The lower court has raised in its decision two questions in connection with the interpretation of contracts and their binding force on contracting parties. How are these question related to the issue of invalidation of a contract?
4. Did the lower court respond correctly to the issue of invalidation? Why or why not?

5. Do you think the judgment of the appeal court is correct? Why or Why not?

2. Ato Lemma was so sick, but could not visit his doctor, as he had no money to pay for medication. He offered to sell his only ox to Ato Selamu. Ato Selamu, a wealthy farmer, offered Birr 500. The actual value of the ox is Birr 2000. There is no one in the locality that would purchase the ox. Ato Lemma has no helper to take the ox to the market. Ato Lemma is sure that he would die otherwise. He knows the effect of typhoid. He has to visit his doctor immediately. His doctor in matters of money is so serious and does not know credit medication. Ato Lemma sold the ox to Ato Selamu and visited his doctor.

   After a week he become normal and sought invalidation of the contract.

   Would he succeed? Why or Why not?

3. W/ro Selamawit engaged in supplying teff to hotels in Bahir Dar. One day, she entered into a contract of sale with Papyrus Hotel to sell 50 quintals of teff at Birr 390 each quintal. Selamawit usually purchases a teff to be supplied after entered into a contract. Accordingly, after the contract, she went to East Gojjam, Amber, to purchase the teff. Surprisingly the price of the teff rose to Birr 450 per quintal. She came back without purchasing even a single quintal. In her disappearance on the date of delivery, Papyrus Hotel gave default notice. Selamawit told the Hotel the entire happening and asked to vary the initial terms of the contract intending to supply the said teff not at Birr 390 but at Birr 480 per quintal claming the changed market situation. Papyrus Hotel

ignoring Selamawit's proposal, approached you for a piece of legal advice.

What would you advise the Hotel and Selamawit?

4. Mintesnot, who normally resides in the United States of America, has recently been in Bahir Dar on a visit. One day he read an announcement in one of the local newspapers, Mahitot, where it was stated that a certain Ato Tigabu had the intention to sell a house located in Kebele fifteen for Birr 700,000.00. With out wasting time, Mintesnot immediately responded to buy the house for Birr 500,000.00. Tigabu, however, replied that he wouldn't sell his house for Birr 500,000.00. Finally, Mintesnot agreed to buy the house for Birr 700,000.00

Is there a binding contract between Mintesnot and Tigabu? Why or why not?

5. Elias and Samuel are brothers who left their country in December 1996 G.C while they were 8 and 10 years old respectively, and are now living abroad with their uncle. Their father had a business, which he organized later into a private limited company in which he and his other two sons owned an equal number of the shares of the company. The father died some time after their departure, upon which the two sons took over the management and control of the company.

As partial successors to their father's interest in the company and hence partial owners, Elias and Samuel are entitled to getting periodic reports from the company and dividend, if any, at the end of each financial year, but did not do so for the last five years. As a

result, Elias and Samuel have decided to sell their shares to their brothers managing the company, who very gladly and immediately accepted the offer. As the law (Article 522 of the commercial code) requires that any transfer of shares must be made in writing, Elias and Samuel drew up a contract of sale, signed it and sent two copies to the buying brothers whom they requested to sign same and send one copy back to them.

The buying brothers now want to make sure if the intended share transaction as proposed in the draft contract satisfies all requirements of the law. Assume you are their lawyer and in possession of a copy of the draft contract to which a short profile of the company and some information about the shareholders is attached.

Write a legal memorandum to your clients on what should be done before they sign the contract.

6. Discuss

   5.1 "Theory of Dispatch" and" Theory of Reception" and their application in our law.

   5.2 The validity of the maxim, "risk is at the hand of the owner".

   5.3 The validity of the statement, debts are fetchable but not portable.

   5.4 The situations that make payment valid though it is paid to unqualified persons.

7. The prospective purchaser, Abebe, lived in Addis, phoned, on October 10, 2006 the owner of a laptop computer, Belachew, “ Will you sell me the computer? Tell me lowest cash price.” Belachew, lived in Bahir Dar, owner, replied, “lowest price for the computer is

9,000 Ethiopian Birr." Shortly thereafter, Abebe, on October 12, 2006, phoned, " I agree to buy the computer for the sum of 9,000 Birr asked by you." However, Belachew refused. Is there any contract between Abebe and Belachew? Why or why not? If your answer is yes, where and when the contract is deemed to be made?

8. In early January 2006, Dagnachew bought 200 quintals of Teff from a farm in Gojjam. While he was looking for a way to transport the teff to Awasa, he met with Abdu who has a business, which is engaged in transportation. Abdu agreed to transport the teff for the sum of Birr 1,500. Dagnachew paid the money to Abdu on January 10,2006, and according to the agreement, the Teff was to be transported to its destination within 15 days.

   Abdu was unable to go to Gojjam until January 25,2006, because his truck needed to be repaired and was in a garage. On January 30, 2006 Abdu's truck started its journey to Awassa. On the way back, the brakes of the truck failed suddenly, the truck overturned completely, and all the teff was ruined because it has been raining.

   a. If Abdu and Dagnachew approached you for legal advice individually, how would you advice them to proceed? And what would be the legal basis for the recovery of 1500 Birr and the price of the Teff, if any?
   b. If things are going proper and Abdu delivered the teff on the agreed date to Dagnachew's brother, as he was absent in Awassa, would the payment be a valid one?
   c. Let's assume also that as Abdu was unable to perform his obligation, the unauthorized Getachew transported the teff from Gojjam to Awassa and delivered the teff to Dagnachew.

What would you advise Abdu in case where Dagnachew did not accept the validity of the payment?

9. Two bidders participated in an auction for sale of old photocopy machine by the Ministry of Education. Ato Fasil was declared to be the winner of the auction. However, the concerned department head refused to approve the auction result for non-fulfillment of the required number of bidders pursuant to the prevailing regulations. The winner of the auction wants to proceed against the Ministry. Can he succeed? Otherwise, what measures can he take?

MODULE THREE

THE EFFECTS OF CONTRACTS

Introduction

In module two we have discussed the elements for the formation of valid contract. These are: capacity, consent sustainable at law, possible, defined, lawful and moral object and form, if the law requires or the contracting parties agree. Once a valid contract is concluded the next question is the possible effect of such valid contract. In this module we will see the effects of lawfully formed contracts.

Module Objectives

At the end of this module, the student will be able to:

- Distinguish the different techniques of interpretation of contracts
- Identify who and for whom the obligation be performed
- Analyze how the contract be performed
- Identify the time and place of performance of contracts
- Identify the ways of transfer of risk
- Know the contracting party who bear the costs of payment

Effects of Contracts: The Principle

Article 1731(1) of the Civil Code states that, the contract lawfully formed, in accordance with the previously examined articles on consent, object and form, is the law of the parties. A contract legally formed becomes law for those who agreed on the terms of the contract. This reflects, the traditional Latin maxim, "*pacta sunt servanda*", which contracts must be performed.

One can compare with article 1952, which lays down the rule of the relative effect of contracts. A contract shall only produce its effects as between the contracting parties. In other words the contract is everything for the parties, but for the parties exclusively. It is only in exceptional situations that contract will produce effects on third parties.

Being the law of the parties, article 1731 (2) provides that the contents of the contract shall be determined by the parties, subject to the mandatory provisions of the law. In other words, legal provisions can only be made to prevail over the express terms of the contract

where they are of a mandatory nature. This means they have to be analyzed and interpreted as such before any attempt at application by the court. Here lies an echo of article 1711 on the determination of the object of the contract: only mandatory, i.e. imperative rules can be analyzed as being the restrictions or prohibitions put by law to the object of the contract. In other words, where the mandatory nature of the legal rule is not demonstrated, contractual freedom should be the norm enforced by the judge.

Moreover Art.1731 (3) of the Civil Code provides that the rules analyzed in this title on the effect of contracts will be applicable either because of their mandatory nature, or because the parties did not decide to set them aside. One will also reserve the case of the special provisions set out in specific types of contracts, such as the contract of sale, or the contract of lease. The mandatory nature of the rule is not only when the text of the provision says so, but also when its imperative character can be determined from the vocabulary employed: such will be the case when the text uses the verb “shall”, provided it is not a mistranslation. A careful examination of the text is necessary. Where the provisions are not mandatory, they will be deemed suppletory or “permissive”, until they are set aside by the agreement of the parties.

To conclude, one may say that the principle stated in article 1731 is nothing but on the legal plane the illustration of the moral rule that a man’s word is his bond or *pacta sunt servanda.*

UNIT ONE: INTERPRETATION OF CONTRACTS

Introduction

Where the contract is not drafted precisely enough, it may become a source of dispute between the parties. This is especially true where a different interpretation of an article or a clause or even a word leads to important financial consequences. Lay parties rarely master legal vocabulary and it is furthermore rare that they have provided for

every possible problem. It is further debatable that they should try and solve in advance every possible occurrence: not only is this probably impossible, it also leads to imposing the intervention of legal professionals in every contract, and raises the costs of economic activity, especially in a developing economy where access to competent lawyers is difficult and expensive.

Sometimes doubt may exist as to the legal qualification of the contract as a whole. One may hesitate between a donation and sale, between a lease and a loan, for instance. The judge has to give its exact qualification to the contract through its interpretation. To this effect there are different rules of interpretation.

Unit Objectives

At the end of this unit, you will be able to**:**

- Define interpretation of contracts
- Identify the time when the court is empowered to interpret contracts
- Distinguish among the different techniques of interpretation of contracts such as positive interpretation, contextual interpretation, contracting parties' intent based interpretation, interpretation in favor of the debtor

Section One: Rules Governing the Interpretation of Contracts

In General

Interpretation is the process whereby uncertainties or ambiguities in the words of a contract are resolved. However, where the provisions of a contract are clear, the court may not resort to interpretation. Professor Rene David gives an enlightening explanation as to the

basis of the choices made by the Ethiopian code in respect of rules of interpretation.

> *"English and French laws approach the problem from theoretically conflicting points of view. The English approach says that contracts are to be interpreted strictly, looking only at what the parties have said; interpreting their words as objectively as possible and giving them the meaning they would have for a "reasonable man". The French approach, on the other hand, is to search for the real intention of the parties, correcting imprecise terms or incorrect figures where necessary. The English approach is primarily concerned with the economic utility of contracts, while the French stresses their moral basis.*
>
> *Although the contrast between these two approaches definitely has practical consequences, it is clearer in theory than in practice. Rules of equity in English law allow some correction of contracts to take into account the true intention of the parties, whilst discovering this true intention, on the other hand, leads the French judge to give primary attention to the declarations of the parties.*
>
> *No doubt the real for the contrast between English and French law is that French law speaks primarily to the contracting parties themselves, while in English law is conceived of primarily as directives to the courts.*
>
> *In England as in France, one would recommend that the contracting parties conduct themselves properly and thus act according to what they really intended rather than to the letter of the contract. But if one considers the courts' problems in*

interpreting contracts, one will inevitably pay more attention to what was actually said and much less to what may have been intended.

… One must beware lest the judges go astray, in the name of good faith, on a search of intention that can easily become pure speculation."

The principle in respect of the interpretation of contracts is derived from such considerations. Article1733 of the Civil Code states this quite clearly: the court may not depart from the terms of a contract when they are clear. It bears repeating that the judge has no right of interpretation when the contract is clearly drafted. All the following provisions are conditioned to this first fundamental requirement: there has to be a problem of interpretation. Failing which the judge is violating the freedom of contracts, and also most probably showing that he is partial to a party's particular position as the court is the maker of the contract. Be it even out of grounds of compassion, such an attitude on the part of the judge is a violation of his duties. He would thus impose on the other party a contract to which he never agrees. One can compare with article 1714 (2) of the Civil Code, which expresses a similar rule where the object is not precisely defined. The judge must resist the temptation to redraw the contract, either because it would seem in better conformity with the law, or because he would like to make fair things for a party. This is the temptation of judging in equity, which is not in the civil law tradition. The judge must avoid any risk of imposing his own views arbitrarily to the parties.

In this regard, thus, the judge's approach is to say it is a subjective one: he will look for what the parties intended and of course for their

intention. But in the absence of sufficient elements as to this subjective intention of the parties, the judge will choose the objective approach, that is refer to what a reasonable, abstract person would have stipulated, in consideration of good faith, customs (specially in business disputes) or equity (what the sense of justice requires).

In fact, both the subjective and the objective methods will often be used in a complementary fashion in the court's reasons.

To solve this type of interpretation problem, the parties can thus bring the case to the court. The court has several avenues to explore. It will probably start by looking for a clarification of the meaning intended by the parties: the keyword here will be the common intention of the parties (article 1734), and not of course the intention of one party only. But there may be no element allowing for the identification of such a common intention where the contract is completely silent. The judge will have then to have a creative approach and for this the law gives him the guidelines that are going to be discussed below.

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Let us recall again that the following rules of interpretation may only be used where the terms of the contract are not clear (article 1733), as the maker of the contract is the contracting parties themselves, but not the courts.

1. Interpretation in Accordance With Good Faith

In every contract, there is an implied covenant that neither party shall do any thing, which will have the effect of destroying or injuring the right of the other party to receive the fruits of contract. Article 1732 of the Civil Code reaffirms what was already set out under article 1713 of the Civil Code, the requirement of good faith, together with the added guideline of the loyalty and trust, which should govern

business relations, for interpretation of contracts. Such indication is based on an objective approach of interpretation guidelines: one assumes that the parties have intended to see their contractual relations governed by reference to the good faith expected of the abstract “reasonable man”, and by making use of such exterior suppeltory norms as the usages of business.

Good faith is indeed the basic attitude in business relations. Because of the speed of commercial transactions, great deals of contracts are not strictly written out, even for important amounts, because the parties rely on the reputation of honesty and good faith between traders. But more generally, good faith must be understood having regard to the loyalty and confidence (or better, trust), which should exist between the parties. “Good faith” is a concept drawn from the civil law tradition, and is as such not to be found in the common law tradition, which tends to push much further the practice of literal interpretation, as stated above in the words of Professor David.

Good faith is traditionally presumed and, in the area of interpretation of contracts, the rule means that this concept may only be resorted to where proof of bad faith in the interpretation can be brought. Therefore, in case of doubt, one cannot prefer one or the other of two competing interpretations on the basis of good faith. The good faith required is that of the parties, but it is also a guideline to the judge, who is not allowed to interpret the provisions “in bad faith” himself, and thus to advantage one or the other, for instance by not allowing an adversarial debate.

But reference is to be made to business usages, does this mean that article 1732 is only designed for traders or that trader’s usages are to be extended to ordinary private parties? This is unclear. At any rate,

the reference to usage implies of course that such usages be identified in the course of the dispute, in respect of their content, their territorial applicability as well as the applicability in time, and their applicability in respect of certain categories of persons. The usages of coffee growers in Jimma might not be the same business practices as those followed by tailors in Addis Ababa's Merkato. Finally it must be provided that parties have been given the opportunity to discuss such usages in an adversarial manner before the judge makes use of them to give a solution to the dispute.

2. The Common Intention of the Parties

A contract is to be enforced according to its terms. The court must examine the contract to determine what the parties intended. The court must give effect to their intentions. It is the intention of the parties as expressed in the contract that must prevail. The impression or a secret intention of one contracting party has no effect. Article 1734 of the Civil Code clearly refers the judge to identify the common intention of the parties, in reminder that consensualism is the basis of contractual commitment. Such a reference means that there should be no rigidity in the interpretation of the contract, especially in business matters. The principle of consensualism rests on the real or exact will of the parties. This may be badly expressed through the use of an imprecise word, or a word inappropriate in the context. In this sense, it would be wrong to enforce a literal provision where the common intention of the parties is proved to be different.

The common intention of the parties is an intention, which is precisely that: common. It is clearly prohibited for the judge to label a 'common' intention, which is only identifiable as being that of one party alone. The search for the common intention is the illustration of the subjective approach to problems of interpretation. Such a search

is sometimes prohibited by special legal provisions. This is the case where the law requires for instance that an express consent be given. One can quote as illustrations article 1922 (2) in respect of the guaranteeing of a surety ship, or article 1828 in respect of novation. In these cases, by definition, if interpretation is called for, this means that the consent was not clearly expressed. The defect may not be cured by the judge's interpretation. On the contrary, the latter will establish the unclear nature of the consent and order the appropriate sanction; for instance, decide the nullity of the surety ship or the absence of novation.

The provision of article 1734(1) has to be construed as mandatory. It is the principle guideline for the judge's role. According to 1734 (2), the judge may deduct this intention from the general behavior of the parties, both before and after the making of the contract.

Example: If the contract is drafted in the form of a lease, stating the amount of a monthly rent, after the parties have exchanged discussions on the amount of the lease, where the lessee has behaved as a temporary occupant, leaving the other party to repair major leaks in the roof of the house, paying a monthly sum, can he suddenly come and claim there is a sale of the house, because for instance the title of the contract is "house sale"? Here the behavior seems clearly to lead to conclude to the existence of a contract of lease and not a contract of sale.

The type of element taken into account here will be something, which is outside the contract strictly speaking. Here one can be surprised that the law takes into account behaviour after the conclusion of the contract in order to identify what the parties decided to agree upon before the contract. This is aimed at the situation when the contract has begun to be performed by a party, thus giving useful illustrations

as to what was intended. But under this paragraph one will also be able to consider pre-contractual documents, for instance tentative offers, correspondence, prior agreements between the parties, pre-existing business relations or drafts of the contract. However, all these documents have to be manipulated with precaution because precisely they are not the contract, and may contain tentative stipulations or suggestions that one party expressly refused.

Article 1735 of the Civil Code states a specific application of the principle that the judge has a duty to seek the parties' intentions. In certain cases, the use of words or expressions which are very general are in fact the sign of an imprecision or ambiguity.

For example, if A, an Ethiopian, states in a contract made in Germany that he sells “all his property” to B, a German citizen living in Germany. Does this mean that he sells his properties in Germany, or all the properties he has in the whole world, and especially in Ethiopia? The sentence seemed clear in fact it is ambiguous. Here, the judge is going to investigate how the contract was concluded to identify the common intention of the parties. In this example, the judge may deduce that a German contract, made in Germany with a German nation, will only concern property in Germany, but the parties’ intention must nevertheless clearly be discussed.

Prof. Krzeczunowicz gives the following example in respect of article 1735. You insured your house in Addis Ababa on the basis of a declaration that you never have any fire before. The defendant insurer discovers that twenty years ago you had a fire in your Gondar 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”.

Example (in fact a lawyer's joke): a person buys a box of 25 very rare and expensive cigars, and has them insured against fire. Could he claim that the insurance company should indemnify him of a succession of 25 fires, which destroyed the cigars insured – in fact when he smoked them? The reference to the common intention of the parties should clearly show that the insurance covered accidental destruction by fire, not the willful lighting up to smoke them.

3. Contextual Interpretation

The common intention of the parties may also be determined by the internal context of the contract. Article 1736 (1) of the Civil Code shows that clauses have to be interpreted through one another, and each provisions has to be given the general meaning of the contract. Logically, if an interpretation leads to a contradiction between two or more clauses of the contract, it cannot reflect the common intention of the parties. This rule of interpretation is also a guideline for the judge: he is not allowed to "cut up" the contract into separate parts to achieve a given interpretation, for this would be a form of distortion. Things are different if the clauses of the contract are clearly separable one from another. Thus, interpretation of contractual terms from the context of the contract as a whole is the other technique of interpretation of contracts.

Article 1736 (2) of the Civil Code clearly addresses the issue of context: where a word is liable to be interpreted in two different ways, one has to prefer the one which is the more likely in respect of the subject matter of the contract. Contextual ambiguity is often the consequence of bad drafting or of a lacking mastery of the technical vocabulary used.

Article 1734 (2), 1735 and 1736 of the Civil Code are to be construed as simple rules of advice and are not in any way to be prioritized. The judge may freely resort to any one of them, as required for the solution of the case.

4. Principle of Positive Interpretation

Art.1737 of the Civil Code states a rule of good sense and a different form of interpretation. If an interpretation of a rule is meaningless, it cannot be the good one. The judge must try to give effectivity to all the clauses of the contract, however badly drafted.

Example "In case of non-payment, the contract is not paid" is a meaningless sentence, if you simply adhere to words: it seems a simple repetition. But what the parties mean in fact is "in case of not-payment, the contract is not performed", which gives it a sense.

This article encourages maintaining contracts, even when they are badly drafted, rather than void. It is in the general interest of the economy, once more, that contracts be implemented rather than open too many cases where they made are rescinded. In principle it is also generally much easier to try and bring a contractual agreement to its end rather than try to reinstate parties in their previous position prior to the conclusion of the contract.

A correlated question is whether the judge can reconstruct or rebuild a clause, which is badly drafted, in order that it has a meaning. The answer is no, because the judge would then be overstepping his jurisdiction: he cannot make a contract, even less enforce it, by putting himself in the place of the parties. This is clearly laid out by article 1763.

5. Interpretation in Favor of the Debtor

In case of doubt says article 1738 (1) of the Civil Code, the interpretation must be in favor of the person who assumes an obligation, because he is the one binding himself. On the contrary, the person who stipulates the obligation (i.e., the drafter of the unclear obligation) should not be favored – may able he was unclear on purpose, to "trap" the other party. Note here that the reference to the party "who assumes an obligation" can be either party in a synallagmatic contract, where each one is both debtor and creditor of obligations or unilateral in case one of the contracting parties assumed the obligation.

Of course these rules are not applicable if the contract is clear. But this precondition of a doubt is to the meaning of the contract also means that the previous methods of interpretation have failed to identify the common intention of parties. It follows that article 1738 is a subsidiary provision to that doubt, because doing so would deprive the search for the common intention of the parties of any kind of usefulness. The objective criterion resurfaces here, because the subjective one failed.

Example: A rents his house and garden to B who assumes to pay the price of the rent. If there is an ambiguity as to the possibility to pick the fruit of the fruit-trees in the garden, the judge has to first search the common intention of the parties. If this common intention cannot be found and a doubt remains, the judge then, in a second stage, will decide in favour of B, the lessee.

What is the nature of the "doubt"? Prof. Krzeczunowicz qualifies it as being a "reasonable" doubt.

A special situation is considered under 1738 (2) of the Civil Code, concerning the pre-drafted contracts, forms or models. The danger

here is that the party drafting may have put an ambiguity in this form, which will be detrimental to the other party. This approach is in line with consumer protection; and designed to protect the economically "weaker" party (contracts of adhesion: insurance or loan contracts made by banks or insurance companies….). Thus, the contract should be interpreted in favour of the other party who does not prepare the contract.

The judge should also be lenient with the party who assumes obligations from which no advantage is derived as per article 1739 of the Civil Code. The presumption is that this party is generous enough without having to suffer any excessive obligation because of the ambiguity of the contract. Thus his obligation has to be construed narrowly or restrictively.

Example: A agrees to look after B's house when B is away. No compensation is provided for A. A will be required to care for B's property as if it were his own but no to use greater diligence than he shows in his own affairs.

Professor Krzeczunowicz calls articles 1738 and 1739 of the Civil Code "hard and fast rules" which tends to show he considers them excessive in the favor they grant to the debtor or to the party acting gratuitously.

Discuss the different techniques of interpretation of contracts with examples

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UNIT TWO: PERFORMANCE OF CONTRACTS

Introduction

So long as the there is a valid contract made between the parties, the contracting parties are required to perform their obligation as the contract is not gentlemen agreement rather a binding one. However, during performance of contracts there are lots of issues to be discussed. The various issues concerning the performance of contracts may be summarized as follows:

1. Who must perform?
2. To whom ought payment to be made?
3. What constitutes performance?
4. To what obligations does a given payment apply?
5. When and where is a payment due and performed?
6. Who bears the costs of payment?

7. What is admissible proof of payment?

Note the word “payment” means here the performance of any obligation, not just the obligation to pay money. In this general sense it is synonymous “with performance”. In the same sense “debtor” and “creditor” must be construed in a broad sense and not strictly in the idea of a money debt.

Unit Objectives

At the end of this unit, you will be able to:

- Identify the person who should perform the contract
- Identify the person for whom the contract be performed
- Discuss the type performance that constitutes a valid one
- Analyze the appropriation of payments
- Identify the place and time of performance of contracts
- Discuss the costs of payment and the person who bears such costs.

1. Who Must Perform the Contract?

Related to this issue, it has to be remarked that Article 1740 of the Civil Code English translation is not satisfactory. The original draft can be translated as “The obligation shall be performed personally by the debtor when, because of its nature, the creditor has an interest for it to be performed by the debtor himself, or when it was thus expressly agreed”. The rendering “where this is essential to the creditor” is therefore too restrictive.

Quite logically, the answer to the question “who must perform”, must be answered in the way that “the person who undertook the obligation”. In the majority of cases, this does not create any problem. However one question may arise: May a third person perform the contract, in the absence of any agreement of the parties?

Article 1740 of the Civil Code states that a) where it is expressly provided for in the contract or b) where the personal qualifications of the debtor are important, the obligation must be discharged by the debtor himself and no one else. The burden of proof of the “special interest” is of course on the creditor. In other cases it does not matter.

Examples: 1) A buys five quintals of Dutch seed potatoes from B. It makes little difference to A whether the potatoes are delivered by B or C. B can have C to discharge this obligation. 2) A deposits some valuable objects with B. It is important to A that the bailee be B, whom he knows personally or who has guaranteed solvency, and not C, any other person. B cannot give over to C the valuables that he has received by virtue of his contract of bailment with A.

In the second example, one sees that the identity of the contractual partner is important to the person entering the contract. This is the category of contracts concluded “intuitu persona”, by consideration of the person. They are of course far more frequent where the obligation is an obligation to do a certain thing or to perform a specialized service, than in an obligation to deliver a fungible, as in the first example.

Apart from the express agreement assumed by the debtor or the nature of obligations that requires personal performance, the obligation can be performed by some other person than the debtor, for instance either his delegate or someone authorized by the courts or by the law pursuant to Art.1740 (2) of the Civil Code. But it stands to reason that the delegate must hold a valid delegation, failing which the performance will not be deemed to have extinguished the obligation in the meaning of article 1806. Amongst the situations

where the law provides for a substituted performance, one can mention article 1896, as a consequence of the presumption of joint debt between a pluralities of debtors, article 1920 for the guarantor having granted a surety, or the rule governing unauthorized agency (articles 2257 to 2265).

Dear student, what will be the effect of performance if it is performed by a third party who is not authorized by the debtor, court or law?

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2. To Whom Ought Payment To Be Made?

Once the issue of who must perform the contract is resolved the next one may be for whom the obligation be performed. The answer for this question is clearly provided from Articles 1941 to 1744 of the Civil Code. The principle provided under article 1941 is that a payment must be made to the creditor or to a third party authorized by him, by the court (for instance see article 950 for succession liquidators) or by law (for instance articles 204, 210 and 947 of the Civil Code).

In the event of incapacity of the creditor, such as minority, or a judicial interdiction for an insane person, article 1742 of the Civil Code provides for a payment to a person designated by the court or by law. If the debtor makes a payment directly to the incapable creditor, the payment is not valid. So a second claim for the same amount is

possible except the debtor can prove that his payment benefited this incapable creditor. In this case the rules governing unlawful enrichment and undue payment may come into play (articles 2162 and following) when the second payment is demanded.
Example: A owes 1,000 Birr to B, a person judicially declared insane. Rather than pay directly this amount to B, A should pay it to his legal representative, C. If A nevertheless pays B, the payment is not valid and C may ask for the full payment of the sum. But if B wastes 600 Birr and invests the remaining 400 in shares that increases in value and are worth 1,000 Birr when B (or his legal representative) sues A, A does not have to pay anything more. B is in fact enriched by the amount of the original debt because of A's payment, it is irrelevant that A wasted 600 Birr.

However, if the payment is made to an unqualified person, i.e., to persons that are not stated under article 1741 of the Civil Code, it is not valid per article 1743 of the Civil Code. This is the same principle as above. The exceptions to this rule are where: the payment benefited the creditor, which a practical enrichment or increase of his estate, not just any advantage; the creditor confirms the existence of the payment; and if the payment was made in good faith to a person who appears without doubt to be creditor. To illustrate this last point, the example can be that of a person who has unlawfully taken possession of a bearer note and demands payment of the note at maturity: the true creditor has recourse only against the person who has improperly used his note.

This issue of the payment made to the creditor's creditor is debatable. French case law admits it on principle because it benefits objectively the creditor's estate by diminishing his liabilities. It also encourages speedy payment. But one could object that the creditor is in a way deprived of managing his estate as he wishes, and that is a form of

preferential payment, which might be suspicious in the context of an impending bankruptcy. It is a question of policy to eventually be settled by the lawmaker.

Nevertheless if there is a doubt as to the creditor, the debtor may refuse to pay: he then is released by deposition the amount due with court (payment into court) pursuant to article 1744 of the Civil Code. Also, if there is a dispute between alleged creditors, the debtor pays at his own risk any one of these creditors. If he is mistaken, he will not be considered as having paid his debt because he paid to the wrong creditors. Finally, one of the creditors may require the debtor to deposit the amount due. The classic situations are where a succession is disputed between several heirs of the creditor, or where a case is pending and a debt becomes due in the meantime.

Article 1744 (1) has to be interpreted in light of articles 1780 to 1783, which develop more in detail the conditions of the deposit the debtor may resort to.

3. What Constitutes Performance?

The other issue related to performance of contracts is how the contract be performed. In other words, what things, goods or services are to be delivered or how a contract be performed in order to constitute a valid performance. Article 1745 of the Civil Code underlines the requirement of the identity of the object with what was agreed in the contract. In other words the contract should be performed as per the agreement of the parties. It is an illustration of the general rule set out under article 1731: contracts are laws for the parties, and they must perform what they promised to perform. In other words, a contracting party cannot discharge his obligation by offering his creditor something else than what he promised even if the other thing is of an evident greater value than the thing promised. A

similar rule is provided by article 2288 (b) of the Civil Code for the contract of sale.
Example: A buys from B a case of champagne of X brand. B delivers a case of champagne of brand Y, saying that he does not have any more bottles of brand X in his storeroom at the moment, but that brand Y is better and that, as a special favor, he will give A the bottles of brand Y at the price of brand X in order to keep his promise. In doing this, B is actually offering to modify the contract; he is not performing the contract that was concluded. A can refuse the delivery tendered by B. Also, the payment is not a valid one if the debtor delivers two grams of gold instead of two grams of silver if the contract requires delivering two grams of silver.

In the same vein, Article 1746 (1) of the Civil Code sets out the logical consequence that a creditor may refuse a part payment. It is a simple possibility, which is open to him. It is grounded on the idea that the creditor may not be forced to grant the debtor an extended delay for performance, which is what in fact is asked of him. But it is advisable for the debtor to use the Amharic saying 'belt lij eyebela yaleksal'. This provision is only applicable however the debt is liquidated and fully due; where id does not have these characteristics, an anticipated part payment is possible. It remains to be seen whether the creditor may refuse on the basis of this provision such an anticipated payment. Articles 775 and 859 of the commercial code state however the opposite rule that the holder of a bill of exchange or the holder of a cheque cannot refuse part payment.

Of course, the scope of the part payment may be so small as to amount to a non- performance of the contract, which then opens the options considered under article 1771. Article1746 (2) of the Civil Code rules the situation where part of the debt is contested. The debtor must pay the non-contested part, and cannot delay its payment

until the dispute is resolved, nor impose upon the creditor to drop a court suit against him in exchange of the payment of this non-contested part.

Examples: 1. A sells three cases of champagne to B and only delivers two cases. B can refuse to accept this performance.

2. A and B are discussing the amount that B owes to A. A claims it is 1300 birr and B claims it is only 1100 birr. A writes to B send me 1100 birr now; we will settle our dispute later. B must send the 1100 Birr.

To put it differently, article 1746 (2) of the Civil Code prohibits a form of blackmail exercised by the debtor upon a creditor who may be in dire need of payment. It remains that in real life, this sort of play might be very frequently used to pressurize creditors who are economically weaker than their debtors

The exceptional situations that compromise performance of contracts as per the agreement of the parties is related to performance of contracts on fungible things provided under articles 1747 and 1748 of the Civil Code. Article 1747 of the Civil Code explains who has the right to select the thing that the creditor will receive when a fungible thing is due. In principle it will be an agreement between the parties. Where there is no agreement, the choice is given to the debtor. However, the goods to be delivered by the debtor should have at least an average quality. Article 1747 (2) is a completive provision which enables to evade the supreme sanction of nullity because of the insufficient definition of the object of the contract, deriving from article 1714.

Article 1748 of the Civil Code rules the situation where there is an insufficient quantity, or where the quality is not strictly the quality expressed in the contract. There is no problem where the quality delivered is higher than specified in the contract- but the delivering

party cannot claim an increase in the price to pay. But where the quality is less, can the creditor refuse the performance? Or must he accept it with an indemnity or compensation? If the exact performance is of special interest to him, he may refuse, if not he must accept performance with compensation. But the burden of proof of this essential character is on him and it is very difficult to prove – most of the time he will have to accept. The sanction of course will be either a proportional reduction of his own performance or, if he has performed, the granting of damages (article 1748 (2)). The rationale behind this provision is clear: the code seeks to ensure that a maximum number of contracts are performed in the interest of a dynamic economy, and, conversely, that parties avoid taking the pretext of the smallest non-conformity to rescind contracts.

The solution is different if the contract provides expressly that the creditor is entitled to refuse performance in this situation of a thing of lesser quality than promised. In this case the creditor will not be obliged to resort to the courts to prove he has a special interest

Another solution again, in case of non- conformity is to plead the goods are not in fact what was promised and has one's action on article 1745 of the Civil Code rather than article 1748 of the Civil Code. In this case, the creditor does not have to prove a special interest to justify his refusal. The difficulty is to assign their respective scope to these two articles. It seems that article 1748 tends to address the problem of small non- conformities or differences with what was promised: it is therefore very much a question of fact to be decided by the court. The court in turn will be guided by the general requirement of facilitating business by smoothing out minor defects on the basis of article 1748, and eventually on the basis of article 1713 by referring to usage, equity and good faith, rather than

sanctioning too severely by taking the payment as not a valid one on the basis of article 1745 of the Civil Code.

When we see Article 1748 and article 1746 of the Civil Code, the latter governs part performance, which can be a part performance in quantity, whilst 1748 concerns a performance, which the debtor deems complete. The sanction of the creditor in this last case is different: in the first case he has a full right to refuse performance, in the second; he will have to prove either that he has a special interest or bases his action on the terms of the contract. In the same way, article 1747 (2) has to be interpreted in light of article 1748, when a question of quality of the good is raised. Also, Art.1747 and 1748 are dealing with fungible goods.

Examples: 1. B sells A 100 liters of olive oil to be delivered in Addis – Ababa. When B's shipment comes to A. it contains only 97 liters. A cannot refuse the shipment. 2. The contract specifies that the oil must be of a particular quality. The quality delivered is slightly inferior. A must still accept the shipment, unless he specified that he would have the right to refuse anything not satisfying the contract specifications or can prove that the difference in quality is sufficiently important that the delivery is not of value to him. 3. A specifies that he is buying olive oil of a certain brand. B delivers 100 liters of olive of a different brand. Here it is not just the quality of goods, but their identity, which is involved. A can refuse the shipment (article 1745).

Moreover, the payment of money debts are stated under articles 1749 to 1750 of the Civil Code. Money debts are discharged in local currency that is to mean in the currency of the country where payment is to be made, even if the amount is another currency (unless the contract provides for the contrary). Article 1749 (1) of the Civil Code considers specifically the issue of payment, which may be difference from that of the place of conclusion of contract, the

jurisdiction of courts, the law applicable or the place of delivery of the thing or of performance of the contract generally.

The price may be determined by reference to an index made up of the price of certain goods or services without indicating a specific amount of currency (see article 1749 (2) of the Civil Code). This is an interesting and frequent technique, which enables to take into account monetary instability and inflation. But it seems evident that the index referred to should not be in the hands of one of the parties, for fear of manipulation.
Examples: 1. A owes B. 300 Birr payable in Dire Dawa. A cannot discharge his debt by paying the equivalent in Egyptian currency of 300 Birr. He must pay in birr, coins or other means of payment labeled in Ethiopia Birr. 2. A asks for a loan from B, a bank. The rate of interest of the loan cannot be fixed by reference to an index fixed by the bank itself. For instance the evolution of its basic rate of interest and operation costs.

Where the currency fixed in the contract does not have legal tender status, in other words, where it is not compulsory it as a means of payment, the debt may then be paid in local currency, unless the contract provides the contrary by using expressions such as “actual value” or any other expression underlining that the parties agreed on a literal performance of the contract.

The issue of legal interest in the payment of money debts is clearly provided under article 1751 of the Civil Code. Article 1751 simply states the rate of the interest that is to be paid, when the parties have omitted to lay it out expressly in the contract, is nine percent per annum. It thus defines the legal rate of interest. This is therefore a typical suppletory provision. It should be compared to the rules

governing the contract of loan fixed by article 2479 of the Civil Code, where, if the contract provides for a rate of interest higher than 12% or does not fix the rate of interest, the rate is the legal interest of nine percent.

The question is open as to whether this last article's scope may be extended beyond the contract of loan in the way it sanctions usury. What do you think? How do you see also in relation with article 1803 of the Civil Code?

Of course, the legal rate of interest will only be applied by the court where no interpretation is possible as to the intention of the patsies. The legal rate of interest is also found under article 1803, here to sanction delay in performance.

Article 1751 does not allow the judge to supplement the moment from which interest is due, the place of payment. It does not specify either whether it is an ordinary or compound rate of interest.

4. To What Obligation Does a Given Payment Apply?

This problem arises in the case of partial payment and in the case of several debts, if an insufficient payment is made. It is then necessary to determine to which debt the payment should be applied. The appropriation of payments in case of partial payment, which is accepted by the creditor, is provided under articles 1752-1754 of the Civil Code.

Article 1752 of the Civil Code lays down the rule that a part payment is used to cover first costs, then the interest due and, finally, the principal debt. The logic here is clear. If a reverse order was used, and the principal of the debt repaid by priority, the amount of interest would be less and cost remains fixed. So the solution is intended to be favorable to creditors, by having the accessory elements of the debt paid, then the debt itself. The debtor on the other hand may be in the difficult position where his repayments only cover interest, for instance, and there fore never manage to begin paying off the principal debt. This sort of situation is created for in contemporary French legislation for over-indebted debtors.

From the combination of articles 1753 and 1754, we can see that where there are several debts for a single creditor the debtor may indicate which debt he intends to discharge first. This right of the debtor is subject to the prohibition of part payments derived from article 1746 of the Civil Code. He may not impose upon the creditor a proportional reduction of debts, for instance, which would amount to allowing part payment. If the debtor does not specify which debt has to be paid first, the creditor indicates in his receipt to which debt he decides to appropriate the payment. But the debtor, when he receives

the receipt, can declare immediately his opposition to his destination of the money.

As usual, this sort of provision, the burden of proving both his opposition and his speedy reaction is on the debtor. Failing such proof creditor's decision is final, another instance where silence amounts of acceptance.

If the parties provide nothing, the law sets out a precise order of appropriation pursuant to article 1754 of the Civil Code which the courts are called upon to implement. Payments are applied in succession: first, to the debts that are due; failing a debt due, to the debt with the closest date of payment, which is form of payment by anticipation; second, amongst debts that are due, or between debts not due but with the same date of payment: the payment is then imputed to the debt the debtor has the greatest advantage in paying first. This will be the debt with the highest rate of interest, or a secured debt, for instance. This is a matter of court appreciation. A problem may arise when debts are due at the same day but not at the same moment, which in an age of electronic transactions may create a big difference. The logic will be to repay the earliest exigible debt, reasoning by analogy. Third, amongst debts of the same nature, payment is proportional. The debts considered would be those debts where the debtor has not special advantage in paying one more than the other.

5. Where and When Is a Payment Made and Due?

The moment and place of payment is often the subject of special contractual clauses, which are governed by the rules on terms and conditions of contracts and which will be examined lower under articles 1755-1757 and 1759 of the Civil Code.

A. Where is the payment due?

The identification of the place where payment- in the sense of performance of an obligation or in the meaning of payment of money- to be made is an issue, which entail many consequences. It will determine the jurisdiction of courts, the issue of who bears transport or customs costs, the currency applicable (article 1749), and even the law applicable where no specific agreement or legal provision sets out otherwise.

According to article 1755 of the Civil Code, if the parties determine the place of payment, one has naturally to respect their agreement, which is nothing but another illustration of contractual freedom.

If the parties provided nothing in their contract as to the place of performance of the contractual obligations, the payment is to be made at the place where the debtor has his “normal” residence, which is generally that of his principal residence pursuant to article 1755(2) of the Civil Code. This rule is stated in favor of the debtor: one goes to pick up the payment, and cannot impose to bring payment to the creditor. in other words, there is a maxim that debts are fetchable but not portable. What is the scope of this suppletory provision in respect of a custom or usage that would be contrary?

In other words, how does the judge combine the rule set out under article 1755 and the existence of a contrary custom advanced by a party on the basis of article 1713 of the Civil Code? The first reaction

is to consider that the lawmaker should have priority. The second is to remember that the issue will most probably be raised where the parties disagree as to the scope or validity of the custom, which therefore makes it hazardous for the judge to use it.

The “normal residence” might be a bit obscure in the case when the debtor is juridical person. One can assume this will be its seat of business. The code’s choice is obviously geared to a physical person. May be the provision should be tailored to set as a priority the place of business for a trader for instance, rather than his private residence, or allow to the creditor to pay at any ordinary residence of the debtor.

The rule is further précised by stating that payment is made at the place of residence of the debtor at the moment of the conclusion of the contract. However, this may be difficult, for instance in long tem contract where the debtor has had time to change residence several times over the years. Hence another interest of providing for the current place of business comes. As a general remark, the drafting should be geared to avoid opening doors for irritating litigation issues to bad faith litigants.

For specific, i.e. non-generic, things the place of payment is where the thing was when the contract was made, subject to contrary contractual provisions. The parties are supposed to known where it was when they contracted which might also be a difficulty if there is a dispute on this point and it is not stated in the contract.

Note that article 2309 (2) and (3) set out different rules specifically for the contract of sale.

B. When is payment due?

Article 1756 of the Civil Code addresses three situations as to the time of performance of contracts. Firstly, the contract has to be performed on the agreed time if there is. In other words, as for the place of payment or performance, the time when payment is normally due is to be fixed by agreement between the parties.

Secondly, where no time for payment is fixed in the contract, the parties may normally be required to perform their obligations immediately. The same remark in respect of custom and of the reference to article 1713 of the Civil Code in respect of the place of performance may be made at this stage.

Thirdly, failing the previous situations, performance will have to be made as soon as the other party gives the other contracting party a notice of default in the manner prescribed under article 1772 of the Civil Code.

Article 1757 (1) of the Civil Code considers the issue of simultaneous performance. Normally, the performance of each party should take place simultaneously with that of his partner. This means that if one of the parties requires the other to perform the contract he should have himself performed his own obligation, or should have offered to perform it, unless the contractual terms or nature allow him a later time for performance. Therefore, a suspension of one’s performance amounts generally to a non-performance.

Here again special provisions are set out for the contract of sales under articles 2310 and following.

On the other hand, Article1757 (2) of the Civil Code, gives two exceptions to this principle of simultaneous performance where a

party realizes that the other party either: will not perform or, is in a situation of insolvency established by the court (a bankruptcy normally, for a trader).

It would indeed not be reasonable to force someone to perform an obligation, which will be without a counterpart. For instance, the seller of a car may refuse to deliver where he learns that the buyer has not obtained the loan he had asked for to be able to pay. To force delivery on the seller in these circumstances would make run a very serious risk of never getting paid. He is therefore granted a right to initiate a legitimate anticipatory breach of contract. Of course, this defense is possible between two correlated obligations within the same contract: it is not possible to pretext a failure to perform in a contract of lease, for instance, to refuse performance in a contract of sale binding the same parties.

This article can also be read as allowing a simple suspension of performance, and not a breach of contract. It would then allow scope for negotiations and for the original contract to be considered final. No specific requirement is imposed to bring evidence of the partner's failure, but the burden of proof is on the party who interrupts or suspends his performance.

Article 1759 nevertheless comes as a logical consequence of sub 2 of article 1757 of the Civil Code. Here, the refusal to perform is not legitimate any more; if the other party shows sufficient guarantees that, he will indeed perform. In the example given above, the buyer of the car may prove that he has obtained a guarantor, a pledge, a mortgage, or that another bank is going to lend him the money. One returns then to the initial situation of simultaneity of performance as organized under sub 1 of article 1757 of the Civil Code.

6. Transfer of Risk

The issue of transfer of risk relates to destruction, spoilage, etc of the thing, which is the subject of contract. Article 1758 of the Civil Code settles the question of who has to bear the risk of destruction or degradation or loss of the things by stating that the debtor held to deliver it will bear the risks of its loss of deterioration until thing is delivered to the creditor. The logic here is to follow the possession of the thing, which is not necessarily the transfer of the ownership of the thing. The possessor, who physically holds the thing, is the person most suited to ensure its protection. Therefore, the rule linking the burden of risk to the delivery is perfectly logical. It means risk is transferred up on delivery. In Latin terms there is a principle called res perit domino literally the risk is at the hand of the owner.

The same rule applies where the person who has to take delivery is given a default notice to take the thing: here, even if the possession remains with one party, the transfer of risk operates nevertheless. This is a sanction of the party who unduly refuses delivery (article 1758 (2) of the Civil Code)

7. Who is to bear the costs of payment?

This question of who is going to bear the costs of payment is settled by article 1760 of the Civil Code, which puts them at the debtor's expense, subject of course to contrary contractual precisions. it is only when the contract fails to determine the person who should bear the costs of payment that the debtor will pay costs of payment by operation of the law. One will remind again the reader that the word payment covers performance of the contract generally, and not only the payment of a sum of money.

Such costs will have packaging, transport, agency costs, fees generally, taxes, custom duties, etc. Nothing eventually prevents the parties from sharing them out between themselves.

8. What is admissible proof of payment?

The issues related to receipt or proof of payment is treated under Articles 1761 and 1762 of the Civil Code. These provisions give indications as to the proof of contracts. Generally, the recipient of the performance will give a receipt to the party who has performed. However, the code also settles the issue of the loss of the creditor's title deed.

The principle provided under sub 1 of article 1761 is that the debtor is entitled to a receipt for his payment, and if the debt is fully discharged, he may also obtain the delivery or the cancellation of the instrument, that is to say the document supporting the debt. This has the consequence of establishing a presumption of payment as stated under article 2020 of the Civil Code. Generally, one will refer here to the section on proof of obligations considered under articles 2003 of the Civil Code and following. This right of the debtor to be given a receipt for his performance amounts to a specific obligation for the creditor. This means therefore that the debtor may suspend his own performance if a receipt is not forthcoming from the creditor.

The first difficulty is where the debtor only pays part of the debt. He is entitled to a receipt, but this will only carry proof of this part payment as per article 1761 (2) of the Civil Code.

The second difficulty is where the instrument not only states the debt, but also is proof of additional rights of the creditor. If he hands over or destroys this instrument, he may lose all proof of these additional

rights. Therefore, the creditor keeps the instrument, but the debtor is entitled to have a mention entered on this instrument showing that he has paid, on top of the receipt itself.

On top of this, Article 1762 of the Civil Code gives solution at the time of Loss of instrument. If the creditor loses the instrument proving the existence of the debt, the debtor is allowed to force him to grant him a certificate (an affidavit) stating that the instrument is cancelled and that the debt is extinguished. Article 2003 of the Civil Code on the other hand, admits the proof to be brought by witnesses, which helps to solve this type of problem

UNIT THREE: VARIATION OF CONTRACTS

Introduction

In principle, in course of a change in the circumstances to the accomplishment of an obligation the parties can modify it by their agreement entered in to during the conclusion of the contract or after the conclusion of the contract at any time, but not by court. The only way of variation of a contract in such a condition is the consent of the two contracting parties.

Thus, courts are not allowed to vary or alter any contract. In the words of Mr. Planiol: " not only is a party unable to revoke a contract of the own accord, but he can not obtain its revocation, nor even its simple modification by the judge, unless there is some cause of nullity or for resolution envisaged by the law". In other words, neither one party alone nor the court, in principle, brings about variation of contracts. Therefore we will see the situations in which variation of contracts by the parties and the court is possible.

Unit Objectives

At the end of this unit, students are able to:

- Discuss the situations that are grounds for variation of contracts by the parties
- Identify the grounds of variation of contracts by the court

Section One: Variation of Contracts in General

The problem of the variation of contracts addresses the situation where there is a change in the balance of the parties' contractual

obligations, after the contract was concluded. This change leads to obligations, which are not executed as a party thought they would be, because they are more expensive or more difficult to discharge, for instance. But, on the other hand, this party cannot claim annulment or cancellation of the contract, such as the existence of a vice of consent, or an indetermination of the object of the contract, nor the existence of force majeure. The contract is legally speaking without defect. In practice, the case appears where in the course of the contract, a party's obligations become too heavy or unfair, at least in that party's opinion.

Example: A farmer enters a contract for the delivery of 1,000 liters of milk to a cheese factory everyday, at the price of 2 Birr per litre. The contract is to last for three yeas. But there is a rate of 50 % inflation in the first year of performance of the contract. Can the farmer ask for an increase of the price by 50 % to 3 Birr per liter, or is he obliged to stay with the price of 2 Birr, which on the other hand reduces the real costs of supply for the factory by half? Although there is no fault of the farmer, he is suffering severe economic disadvantage, whilst the dairy is profiting from the situation. Is the judge allowed to vary the contract to make it fair, more equitable?

The principle is no: the judge cannot modify the contract, except in the cases set out by the law (article 1763 of the Civil Code). The contract is the law of the parties and remains in force, even where the performance has become more difficult or onerous for one party (see article 1764 of the Civil Code). This is but a new statement of the binding force of contracts set out by article 1731 of the Civil Code.

The question can further be extended to the situation of contracts, which were inequitable from the outset, with the underlying assumption that one party managed to organize the contract to his better advantage.

Article 1763 of the Civil Code provides that “ 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”. The reading of the article reveals that the principle of pacta sunt servanda is predominanat under our law. A contract may be inequitable from the origin or it may become inequitable due to certain reasons after its conclusion. However, courts are not empowered to revise such contract except under situations permitted by law. In other words, courts may vary a contract on the ground of equity when such cases are expressly provided by law.

Thus, seen from the side of court activity guidelines, the judge's duty is to enforce contracts as they were freely drawn up by the parties, and he is not allowed to modify them. This is an echo of the prohibition to amend the object or meaning of contracts in the guise of interpretation, which was already examined under articles 1714(2) and 1733 of the Civil Code. The same guideline for the judge is set out under article 1710(1) of the Civil Code in respect of unconsciounable contracts, where the principle is that the contract cannot be invalidated simply because it is substantially more favorable for one party. Thus one cannot hope to appeal to the judge's sense of equity or fairness. The party who suffers should have taken precautions, especially when the contract is a long one.

If the contract becomes more difficult to perform, one has to consider it is the expression of the normal taking of risks in the course of business operations within the framework of a free market. Another reason is to avoid opening scope for endless litigation in courts, where parties would try all the time to modify what they have agreed upon.

So the rule is that only the parties themselves may vary the contract they made initially according to article 1764 (2) of the Civil Code, or they can agree to resort to a third party arbitrator per article 1765 of the Civil Code to decide upon the possibility of the modification of the contract. The rules governing arbitration are set out under chapter 2 of title XX of the Civil Code. Rene David underlines in his commentary that the code has a "positive attitude" in respect of a voluntary variation of the contract by the parties themselves, and seems to encourage a culture of negotiation.

Section Two: Grounds for Variation by the Court

As we have said earlier, courts are not entitled to revise such contract except under situations permitted by law. In other words, courts may vary a contract on the ground of equity when such cases are expressly provided by law. Article 1766 and the following of the Civil Code state the four exceptions to the prohibition of judge's interventions to vary the contracts.

1. Special Relationship Between the Parties

Article 1766 of the Civil Code enables the judge to vary the contract in the event of special relationship between the parties. Such is the case between parents by blood or marriage relations, as between persons between whom there is a special relation of trust, a situation that compels them to deal with each other in all equity. It can be compared in scope and nature to the special relationship considered under article 1705 (1) of the Civil Code. For instance, all the family employees who are in close relations with the family for years should be treated with equity.

Example: Mamite is employed for 15 years by the same family and is still paid the same salary as when she begins. A nephew who usually

sells Teff to his great aunt but who feels he cannot ask her the increase price it sells at because of inflation.

One will note that this article only states a simple possibility and not an obligation for the judge. The latter will be careful to check there is a real and important change in circumstances, and whether it is true that the special relationship exists and was the cause of the imbalance. Thus, the judge has three cumulative conditions to identity before granting variation of contracts. Professor Krzeczunowicz rightly states that the article may be too wide in scope and might create a risk for the certainty of contractual obligations.

2. Contracts with a public administration

In addition to the above situation, Article 1767of the Civil Code provides that contracts with an administrative body may be varied by the courts. The administrative bodies concerned will be those who are entitled to enter administrative contracts: the regional states, ministries, autonomous authorities and, of course, the State itself. The reason here is that public bodies enjoy a special position, because they can amend through a change in laws, regulations or bylaws the conditions of performance of contracts and make them more onerous for their private partners. For instance they may raise the taxes linked to the contract or even make the contract impossible to perform, if they for instance prohibit the import or sale of certain goods. This does not necessarily mean that the administrative body wishes to change the conditions of performance of a given contract, but that it may objectively be so in the pursuit of a more general administrative policy, which happens also to affect the contract considered. This is not the point to develop the notion of administrative contracts. It is sufficient to note that the courts are thus granted the right to restore the balance, by deciding eventually against the public body, which may even be a decision made by government. This is all the more remarkable because it will mean

deciding against a decision, which is normally, supposed to be taken in the public interest.

Example: A private transport company concludes a contract of transport for school children with the Ministry of Education, at 10 Birr per day, per child. This contract is subject to services tax of 10%. If the Government raises services tax to 25% for the entire economy, it will also affect the balance of the contract of transport of schoolchildren. In this case the court may vary the contract

Any act of the Government or subdivision of the State (regions, municipalities ...etc), or administrative services (hospitals, ministries, public schools), should be taken in to account.

Professor Krzeczunowicz underlines the very real problem of the conflict, which seems to exist between article 1767 (1) of the Civil Code and the provisions of article 3191 of the Civil Code which seems to have priority over it both because it is a special law and because article 1767 (2) organizes this priority. Baissus has the view that, although difficult, the conciliation of the two texts does not seem impossible however. Article 3191 of the Civil Code prohibits a right to compensation, whilst article 1767 governs a variation in performance; article 3191 is concerned with measures of general application whilst article 1767 addresses act of government or acts of the public authority; article 3191 only envisions the situation where performance is made more difficult or onerous, whilst article 1767 also settles the case when performance becomes impossible. He concludes that, it may be claimed that article 1767 does retain an interest and that it may be considered to radical to strike out of the code. It remains that the whole issue should be clarified. This is all the more true when one thinks that since the drafting of the code, the administrative bodies have more and more often resorted to the flexibility of private contracts for he operation of public policies.

1. Partial impossibility of performance

Variation of contracts by the court because of partial impossibility of performance is provided under articles 1768 and 1769 of the Civil

Code. To maintain the balance of the contract, the judge may also reduce the obligations of one party where the other's obligations have become impossible in part, and where the impossibility does not lead to the simple cancellation of the contract on the basis of article 1788 of the Civil Code.

The preservation of the balance of the contract as an objective for the court is expressly stated under article 1769 of the Civil Code, but only in respect of articles 1767 and 1768 of the Civil Code, which tends to mean that this is not required for a variation based on the special relationship between the parties, as defined by article 1766 of the Civil Code.

Example: A carpenter promises to make 6 chairs out of ivory. But after making three chairs, the Government implements an international convention prohibiting the use of ivory. The part performance by the carpenter will be deemed satisfactory. The buyer will of course only be obliged to pay in proportion of the work done, but will not be able to ask for the invalidation of the contract, which would be very detrimental to the carpenter.

4. Period of grace

A last way for the judge to vary the contract is to give time to the defaulting debtor, which is called grace period, according to article 1770 of the Civil Code. The provisions of this article allow the court to grant such a period of grace. But several strict conditions are put to this power of the court: a) It must be justified by the position of the debtor, i.e. serious economic difficulties, for which he is not himself responsible; b) It must be dictated by equity or requirement of justice, which means that both the situation of the debtor and that of the creditor have to be considered – the judge cannot simply focus on the debtor; c) The court must exercise "all necessary care", or "a great deal of restraint" in the granting of a period of grace – in other words, it should be exceptional. d) The maximum term allowed is six months, which in turn prohibits a fractioned payment.

Nonetheless, the parties themselves may prohibit this power to be exercised by the judge pursuant to article 1770 (3) of the Civil Code. In other words, the court may not grant grace period if the parties agree not to give a grace period after the debt is due.

Prof. Krzeczunowicz suggests restricting the power to grant a term of grace to purely private transactions, and to exclude from business transactions between professional traders. This would support the certainty of contracts up to a certain degree, but such traders are the ones most likely to resort to arbitration and are generally used to flexibility. The issue is one of policy. He is much more radical in suggesting the suppression of the last paragraph, in order presumably to extend the possibility for the judge to grant periods of grace despite any provision to the contrary.

In this sense Prof. Krzeczunowicz is probably more in line with modern legal thinking. Prof. David stresses in his commentary that this provision was only very hesitantly inserted in the code. The hesitation is evident from the accumulation of conditions under article 1770 of the Civil Code. Today, such a hesitation would not be justified any more. Contemporary legislations are far more consumers oriented, at least in Western Europe, and have taken into account such issues as over-indebt ness, abusive contractual clauses and the discrepancy in economic power that exists generally between contracting parties. Judges are granted nowadays much larger variation powers. They can extend much longer periods of grace, they can reduce or even eliminate contractual interests, and they may devise new installments plans for the refund of a loan, and so forth. The modern trend is therefore to wards an enlarged freedom of judges to vary contracts, but this rests on a great level of

professionalism, in order to steer clear of the risk of unbalancing contractual agreements and eventually entire sectors of the economy.

How do you see the above assertions? Should the court be given a wider discretion to vary contracts?

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Finally, it must be stressed that the extension of a period of grace also carries compensation for the creditor as he is forced to wait for an extra period of time, and this may create a certain number of difficulties for him.

MODULE FOUR

EFFECTS OF NON-PERFORMANCE OF CONTRACTS

Introduction

As is well known, the recognition of rights by itself cannot avoid infringement of rights. The law, in addition to recognizing rights, should set the way by which the recognized rights will be enforced. In other words, when certain rights are recognized under the law, mechanisms of enforcement of such rights should also be provided together. Otherwise the purpose of recognizing rights, which is giving protection for those rights, will not be achieved. Similarly, in the law of contracts there are remedies available in case where contracts are not performed as per the agreement of the parties.

Remedies for nonperformance of contracts consist of forced (specific) performance, as where debtors are obliged by courts to perform the contract; cancellation of contracts (judicial or unilateral cancellation) and/or damages for the injury sustained. Where a party does not perform his obligations, the creditor of this obligation may either ask for the enforcement of the contract, or ask or declare himself, in the cases considered under articles 1786 to 1789 of the Civil Code, the cancellation of the contract according to article 1771 (1) of the Civil Code.

But in any case, the creditor of the obligation can ask for damages to compensate the prejudice suffered, whether the contract is cancelled or upheld. Also if damage is suffered from non-performance or from belated performance, even if the creditor does not have to resort to the sanctions of enforcement or cancellation, he can require payment of damages. However, the creditor, in principle, has to give default notice to the debtor before resorting to such remedies available for nonperformance of contracts. In this module we will discuss these effects of non-performance of contracts.

Module Objectives

At the end of this module, you will be able to:

- Identify the remedies available for the creditor in case where there is nonperformance of contracts

UNIT ONE: DEFAULT NOTICE

Though there are different remedies available for the creditor at the time of nonperformance, in principle he has to put the debtor in default. It means one of the effects of nonperformance of contracts may be invoked by the creditor only when he has given default notice

to the debtor. But the points under consideration are the nature of default notice, elements of default notice, the legal effects of default notice.

At the end of this unit, you are able to:

- Distinguish notice from other types of notices
- Analyze the elements of default notice
- Identify the legal effects such default notice have on the relationship of contracting parties

Section One: Meaning of Default Notice

The phrase " default notice " is composed of two terms ' default' and 'notice'. Notice may be defined as a formal or informal warning or intimation of something; or a warning, announcement or intimation given in a specified time before the event to take place; or a communication of intelligence or of a claim or demand after required by statute or contract and prescribing the manner of giving it. From this definition notice can serve three purposes. Firstly, it can be used to pass information as to some fact to an interested person. Secondly, it can be a warning transmitted to the right person so that he can take proper action to safeguard his interests. Thirdly, it can also be a communication of a claim or demand to a party so that he will fulfill such claim as required.

The word default refers to failure or an omission or failure to perform a legal duty, to observe a promise or discharge an obligation or to perform an agreement. It also embraces act of is dishonesty and wrongful act. Planiol indicated that 'default' is the name for the tardiness of the debtor when the law takes it into consideration in determining his responsibility. It refers to the tardiness or delay of

such party in discharging his obligation which is taken in to consideration by the law for the purpose of determining the contractual liability of a failing party.

When we come to Ethiopian law, we don’t find a clear definition of the term. However, in most the provisions in which ‘default’ is used it seems to refer to its application under art. 1772 of the Civil Code; i.e., the core article dealing with default notice. We can cite also Articles 1758 (2), 1798 and 1803 (1) of the Civil Code. As applied in these provisions default seems to refer to the delay of the party in performing his obligation. This argument is more strengthened when we see that in most instances the Civil Code uses phrases like “ does not carry out”, “has not performed”, “failing to perform” etc to indicate to the inability or failure of a party to perform his obligation instead of using the term default.

There is one concept i.e. putting in default, worthy consideration before defining default notice. It is a demand made by a creditor against his debtor that the latter carry out the contract they have agreed upon. In other words, putting in default refers to calling the attention of a non-performing party to the fact that his obligations are due and also the sanctions he may incur it he does not perform them. Also, the mechanism to put some one in default may be formal or informal.

Thus, default notice can be taken as a formal or informal means of putting a non-performing party in a legally recognized delay or as the communication of a creditor's claim or demand to a debtor for the latter to carry out his obligation. This is clearly provided under article 1772 of the Civil Code that requires a creditor to place a debtor in

default by demanding the latter to carryout his obligations before he can invoke non-performance.

Section Two: Elements of Default Notice

For a default notice to be acceptable before the law, it should be made by fulfilling the necessary elements: the person giving and receiving the notice, the time to give the notice and the manner or the form the notice should follow.

The basic rule as to who is to give. Default notice is clearly provided under Article 1772 of the Civil Code, which states that " A party may only invoke non performance … by the other party after having placed the other party in default " /emphasis added/. Since the term 'party' can apply to both creditors and debtors it can easily be used to refer to the creditor when he is placing the debtor in default or vice versa. Thus both parties, the creditor and the debtor, can give default notice to one another. Thus, the law imposes the serving of a notice by the creditor of the obligation to the defaulting party, asking him to perform the obligations promised, before the creditor may claim the non- performance of the contract.

However, the creditor who is to put the debtor in default should discharge his own obligation as per Article 1757 (1) of the Civil Code. Otherwise, it will read to a situation where a party who has failed to perform his obligation is able to put another party, who is no more at fault than himself, in default. Thus for the purpose of fairness the degree of performance on the side of the party giving default notice should be higher from that of the party for whom notice is given.

But as an exception there is a possibility for a party to give default notice without performing the obligation on his party. The first possibility is when such party has the ‘benefit of time' pursuant to art. 1757 of the Civil Code which is an exception to the simultaneous discharging bilateral obligations. The second possibility is provided under articles 1992 and 1993 of the Civil Code which states that inorder to prevent the right of a debtor from getting extinct for whatever reasons, the creditor may be authorized by court to take actions to preserve that right on behalf of the debtor if its extinction is prejudicial to his own interests in his relation with his debtor.

Coming to the second element of default notice, if there is a requirement to give default notice, as a general rule, such notice is to be given when or after performance is due. No notice can be given before this time. The reason behind can easily be deduced from the nature of non-performance itself in that for non-performance to exist because of delay the debtor should fail to discharge his obligation on the agreed date. Until such time the question of non-performance and any other cases that come at the time or after non performance will not be considered. Our Civil Code Article 1773 (2) clearly states that notice may not be given unless the obligation is due. There is no problem with this rule if the time of performance is clearly fixed and known.

The problem arises, however, if there is no time specified for performance. The rule, which applies in the absence of a fixed period of performance, is the one stated under article 1756 (2) and (3) of the Civil Code. The provision states that where there is no time fixed for performance, the obligation shall be carried out forthwith or immediately, i.e. as soon as the other party demands performance. In this case the demand for performance and default notice will become

synonymous because the demand will put the debtor in default. Thus the word 'forthwith' in the above article should be interpreted in light of the action of default notice.

A question that can be asked here is whether or not there is any possibility of giving default notice before the due date for the performance of the obligation. The only instance is provided under Art. 1789 (1) and (2) of the Civil Code. According to this provision a party can cancel a contract where the other party unequivocally refuses to perform his obligation. But before canceling he shall place the other party in default although the time for performance of the obligation is not yet due. However, in order to apply this provision the unequivocal refusal should be in a form or manner other than in writing. This is because pursuant to Articles 1789 (3) and 1775(c) of the Civil Code default notice is not necessary when there is a refusal in writing.

The last element of default notice relates to the formality requirement of putting the debtor in default. Article 1773 (1) of the Civil Code states that " notice shall be by written demand or by any other act denoting the creditor's intention to obtain performance of the contract." Dear student there is an argument to the effect that Ethiopian law approves of only written demand for notice. But this is not so. It is because what is required in our law is that 'the other act' should clearly indicate the creditor's intention to obtain performance of the obligation. Also, 'the other act' is not required to be 'equivalent ' to written notice. Thus we can conclude that as far as the message is transmitted as to the creditor's intention, the debtor can be placed in default either by written demand, orally or by conduct of the creditor.

It follows naturally that the notifying party has the burden of proof of having sent such a notice. If is therefore advisable for him to make it in writing, in the most official way possible, by registered mail, for instance. This is clearly what is specified under article 1773(1) of the Civil Code with its requirement of a summons, even if a physical gesture (sign or a shout, for instance) is not excluded. The only reservation is of course that one has to wait for the obligation to fall due before sending the notice as per article 1773(2) of the Civil Code. Thus, No special form is necessary for the default notice. The contents of the notice must be clear, but it does not have to be made in a comminatory tone, or to mention the sanctions, which will be imposed, or the probable behavior of the creditor if the debtor does not react to the summons. It is sufficient that the attention of the defaulter is drawn to the absence of performance. But should the message be unclear, the default notice will be invalid and not consequences may be derived from it.

Another controversial issue that comes out of the above argument is that if the only requirement in the formality of a default notice is for it to indicate the creditor’s intention to obtain performance, can we say that a suit for non-performance can serve as a default notice? Would the creditor sue directly for a judicial cancellation of the contract or payment of damages rather than sending a default notice?

There are two arguments regarding this issue some argued that a suit for non-performance could serve as a default notice. Since courts are overburdened this solution will be the most time consuming of all. A default notice and the provision of a well-drawn penalty clause open the opportunity of avoiding any risk of judicial delay. Also, as it is well

known, upon the institution of the creditor's suit, the debtor will be informed of his intention to performance when he is served with a judicial summons to appear before the courts. It means since the suit indicates the creditor's intention to obtain performance, it has to serve as a default notice. It is also argued that since a mere written demand and any other act are considered as default notice, as long as they indicate the creditor's intention to obtain performance, a suit for non-performance should serve as a default notice for stronger reason.

On the other hand, others argue that a suit for non-performance could not serve as a default notice. It is argued that a party may only invoke non-performance upon placing the other party in default. The term non-performance gives the impression that default notice should precede any suit for non-performance. Then a suit or notice of suit cannot serve as a default notice.

The last element of a default notice relates to the time limit requirement. According to article 1774 of the Civil Code the creditor in his default notice may set a reasonable time limit after the expiration of which he will not accept performance. Upon the expiry of the reasonable time the creditor will have the right to insist on the cancellation of the contract and the payment of damages. The existence of such time will, on the other hand, enable the debtor to avoid possible consequences that may arise it his breach of contract is established by giving him a chance to perform his obligation after his initial failure.
To put it differently, the creditor may decide in the notice, although the debtor is already in default, to give him an extra period of time to perform the obligation, and stating that upon the expiry of this time - limit no performance in kind will be accepted. The only limitation is that the delay granted for performance should be reasonable (article

1774 (2)), with the usual proviso that "reasonableness" will be a question of circumstances supervised eventually by the court.

Section Three: Unnecessary of Default Notice

In general, the Civil Code requires as a rule, with the exception studied lower, that the default be clearly established. The law enumerates situations under which the giving of default notice is not necessary. As stated under article 1775 of the Civil Code a creditor need not give default notice. Thus, in all these circumstances, the debtor is said to be in default. Apart from these situations, however, default notice is required in all other cases of non-performance.

Article 1775 of the Civil Code lists the four cases where a notice is not necessary:

1. Parties agree in their contract to set a side the need for default notice i.e. to presume default from the mere expiry of the time set for performance. In other words, The contract may specify itself there is no need for a special notice, and that the debtor is automatically in default from the simple fact of non-performance.
2. The obligation is to refrain form doing something (obligation not to do) but the obligor or debtor has not retrained so. Example: the contract of sale of a business states the prohibition to open the same type of business with in one kilometer and three years from the date of the sale.
3. The nature of the obligation is such that it should be accomplished with in a fixed period of time and the debtor lets this period to expire without performing. In other words, where the performance has to take place with in a precise period of time, article 1755(b) draws the conclusion from the fact that there is no interest in asking for the performance of the obligation if that period of time is passed. This provision may be distinguished from the first one examined in as much as it allows to dispense with a specific clause in the contract as to the sanction of the violation of a precise time -limit, and can be

based on the implicit time- limit derived from the analysis of the economy of the contract.

4. Finally, notice is not necessary when the debtor himself supplies the written document stating he will not perform his obligation. He recognizes himself that he is in default.

Section Four: Legal Effects of Default Notice

Though the creditor has the right to get performance of contract, cancellation by the court or by himself, indemnity for the damage sustained in case the promise is not performed, these rights are not always automatic. To put differently, the above rights will not be applied immediately after or simultaneously with the non-performance. Rather the creditor is required to put the non-performing debtor in default before he can assert or enforce some of his rights emanating from that nonperformance.

However, the requirement of default notice is only in the civil law legal system not in the common law legal system. In the common law once a contract is validly made all the consequences arising from it will be determined in accordance with the terms of the contract stated expressly by the parties while in the civil law it is not wholly left to the terms of the contract but also to provisions of the law related with them. But it is possible to agree otherwise in the two legal systems as they recognize the freedom of contract. Parties under the common law can expressly agree for giving default notice while in the civil law legal system they can agree to disregard for serving default notice.

Coming to the effects of default notice, one of the effects of default notice on the relationship of contracting parties is serving as a means of transfer of risk. As it is provided under Article 1758(2) of the Civil

Code the risk will pass to the creditor where he is in default for not taking over the thing. The creditor is said to be in default of not taking delivery if he has been communicated to get performance from the debtor by a default notice. Thus, one of the results of default notice is that it puts the thing at the risk of the creditor.

The other basic effect of default notice is reflected in its relation with the invoking of non-performance. It is clearly stipulated that no one can invoke the non-performance of a contracting party without first putting that party in default. It means a creditor can't demand any remedy for any kind of non-performance, without putting his debtor in default. This is because a party invokes non-performance only when he is seeking some remedy for the prejudice or damage he has sustained because of that non-performance. However, the prior putting in default to invoke non-performance requirement of article 1772 shall not be interpreted as precluding the institution of suit without default notice. In as far as the creditor is not intending to claim damages for what he has suffered during the delay in performance, the giving of default notice will be a useless formality.

This leads to the third effect of default notice, which serves to require payment of damages. If the creditor fails to give default notice, the consequence is that he cannot claim the payment of damages since he has not complained of his suffering. Pursuant to Arts 1790 and 2091 of the Civil Code, a party who has failed to perform his obligation is liable to pay damages to the extent that the victim /creditor/ has suffered because of the failure. In case of delay in performance then the law will award the creditor an amount of damages as to the existence of which it recognizes by the declaration of the creditor.

Fourthly, the effect of default notice relates to force majeure. A person or a party to a contract is said to be liable to his non-performance and also to pay damages that arise from this liability. He can only escape from the payment of damages only if he can prove that he was prevented from performing by a cause on which he has no control pursuant to article 1791 of the Civil Code. But this will not apply if the cause, which prevented such party from performing his obligation, occurred after he was placed in default per Article 1798 of the Civil Code since default notice is to be given on or after the due date for the performance of the obligation.

The last effect of default notice relates to unilateral cancellation. In accordance with Article 1787 of the Civil Code, when a creditor puts his debtor in default and provided a time limit per article 1774, upon the expiry of which he will not accept any performance, the law grants him a unilateral right of cancellation. Had he not been given the notice and provided a time limit he would have to seek a judicial order to cancel the contract.

Moreover, pursuant to article 1789 of the Civil Code, although the other party has clearly refused to perform his obligation the creditor cannot depend on this declaration to cancel the contract forthwith. He will have to put the refusing debtor in default and then wait for fifteen days to give a chance to the debtor to produce securities that will guarantee the performance of the obligation. After the lapse of the fifteen days period he cancel the contract by himself.

UNIT TWO: FORCED (SPECIFIC) PERFORMANCE

Introduction

Where a party doesn’t perform his obligations, there are solutions available for the creditor. He may either ask for the enforcement of

the contract or ask or declare himself the cancellation of the contract as per article 1771 of the Civil Code. Thus, one of the remedies available at the time of nonperformance of contracts is forced performance, which requires performance of contracts as per the agreement of the parties. From the perspective of a party who requires this remedy it will be a best remedy for the objective of the contract will be accomplished. However, there are conditions to be fulfilled before ordering specific performance.

Unit Objectives

At the end of this unit, you will be able to:

- Discuss the nature of forced performance
- Identify the preconditions for granting forced performance
- Explain the creditor's right of self help
- Elaborate the right of the debtor when the creditor refuses to accept performance unlawfully

Section One: Granting of Forced Performance

Forced performance is the first option of the creditor on the basis of Article 1771 of the Civil Code. This kind of remedy calls for the performance of the act promised in the contract. But Article 1776 of the Civil Code immediately imposes two conditions in order to grant specific performance. Such an enforced performance may only be ordered where there is a special interest in the performance for the creditor, and it must not affect the personal liberty of the debtor.

When we see Art. 1776 of the Civil Code, its stipulation is making forced performance exceptional. It clearly provides that specific performance shall not be ordered unless…. It means such remedy will be available only when the creditor has a special interest and the performance of the obligation doesn’t affect the personal liberty of the debtor. So, the normal remedy is payment of damages or cancellation

and in special situations specific performance may be awarded by the court. The creditor has the burden of demonstration of the special nature of the interest. In cases of doubt as to the existence of a " special interest", forced performance will not be granted by the court. One can mention the example of an obligation to give a specific thing or a specific performance, which only the debtor can provide.

As George Krzeczunowicz puts 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) by a monopolistic entity, which excludes the possibility of getting served or supplied elsewhere. In this case, it should be presumed that the creditor has special interest on such service.

Also, for the determination of special interest it is better to use by cross-reference articles 2329 and 2330 of the Civil Code. It means when a sale relates to a thing in respect of which a purchase in replacement conforms to commercial practice is impossible or such purchase can be effected with great inconvenience or considerable income, the creditor has a special interest. For instance, if the goods are so unique that money damages will not enable a buyer to obtain substantially identical substitutes in the market, there is special interest.

In the sale of immovable, also, the buyer of immovable goods shall be deemed to have a particular interest in the specific performance of the contract. Then the buyer is given the power to request the forced execution of the contact (see Art. 2892 of the Civil Code).

The other requirement for restricting the award of forced performance is if performance of contract affects the personal liberty

of the debtor. This is mostly related with contract for personal service (contract of service). The condition of non interference on personal liberty presumable is based on the policy that it would be improper and against the debtor's interest which would produce a state of servitude as degrading and demoralizing in its consequences as a state of absolute slavery.

Specific performance for personal service contract that affects personal liberty should not be granted. The reasons fall into three overlapping categories.

1. It is undesirable to compel the continuation of a personal relationship after a dispute has undercut confidence and loyalty
2. The difficulties inherent in passing judgment on the quality of what frequently is a subjective performance are too great.
3. There are doubts about imposing what appears to be involuntary servitude.

In individually tailored personal service contract, courts will not order specific performance by the party who was to be employed because public strongly discourages involuntary servitude. Moreover, the courts do not want to have to monitor a continuing service contract if supervision would be difficult - as it would be if the contract required the exercise of personal judgment or talent. For example, 1.if you contracted with a brain surgeon to perform brain surgery on you, and the surgeon refused to perform, the court would not compel the surgeon to perform under those circumstances. A court can't assure meaningful performance in such a situation. 2. A person has promised to sell a watch, which had belonged to a famous writer to the son of this writer. The buyer has a special interest in having a memory of his father and forced performance will not affect his personal liberty, it will be granted by the court. 3. A painter has

promised to paint the portrait of a lady. Then he refuses because he finds that his style of painting is not compatible with portrait. the court can not force him to perform this very specific performance by an artist as it affects his personal liberty.

I think this kind of limitation, non-interference on personal liberty, is a justified limitation for granting forced performance. But as to the proof of special interest of the creditor, some legal experts have reservation. They argued that the aggrieved party who claims this remedy must not prove to the courts satisfaction that he has a special interest in the performance of the contract because as a matter of fact, we have to bear in mind that the creditor always has an interest in the performance of the contract. Unless he has interest for the performance of the contract, he will not enter into the contract. So, this condition should be suspended.

Moreover, as the law clearly provides, the provisions of the valid contract are considered as a law of the contracting parties. If this is so, where is its binding nature or lawfulness if the contracting party breaches as he wishes and he is not forced to perform it? Then the debtor should be forced to perform the contract whether the creditor has an interest or a special interest or not.

Therefore, specific performance should be taken as a principal remedy but not an exceptional remedy. This remedy should not be ordered only when it is impossible to perform the contract (factually or materially) and the nature of the performance affects the personal liberty of the debtor like personal service contract.

There are also other possible reasons raised to make specific performance as a principal remedy. Commercial transactions are secured in case of breach of contract when the contract is performed

or enforced according to its terms the parties agreed on. To secure business or commercial transactions the law should provide forced performance of contracts by laying down principles as to its implementation which it thinks are so indispensable for the proper and ordered conduct of business. Since the purpose of a decree of specific performance is to attain as fully and exactly as it reasonably possible the realization of the justifiable expectation the promisee, it is a justified mode of execution of the contract and be taken as a principal remedy.

Specific performance is awarded in order to achieve fairness between the parties to a contract because it is designed to equalize the position of the parties to the contract in accordance with the terms of the contract they have agreed.

This remedy is quite attractive to the non-breaching party, because it provides the exact bargain promised in the contract. It also avoids some of the problems inherent in a suit for the assessment of money damages.

To verify the discussion, specific performance solves completely the problem of compensation. In many cases damages actually are under compensatory. Except for problems caused by delay that would be relieved by damages, in the delivery of the goods or services giving the promisee what he was promised must, by definition, compensate the creditor. On the other hand, money damages can at best provide him with something of “equal value.” The money paid in damages may allow him to purchase another bundle of goods, which are equivalent in value to him as the promised performance but not the exact performance. Even though transactions are frequent and in expensive to find, it is difficult to say that actual damages are fully

compensatory. Therefore, promisee should in all cases, unless they affect personal liberty of the debtor, be allowed to elect specific performance because in thin markets specific performance insures full compensation (which damages might not provide), while in thick markets promisees will have no incentive to invoke specific performance, as the cover market provides more prompt recompense.

The other reason may be the quality of the cover market determines the ease with which a court may accurately estimate the expectation of the promisee. If courts systematically err in the estimation of expectancies, in efficient level of breach may arise. If the court underestimates the expectancy, a party will tend to break too often, while if it overestimates the expectancy the breach will occur too infrequently. So, in order to avoid such discrepancies, specific performance should be taken as principal remedy.

In general we can say that there are three possible reasons, in addition to the above once, for the attractiveness of the remedy of specific performance. Fist, the non-breaching party need not worry about collecting the money damages, which may be under compensatory. Second, the non-breathing party need not look around for another contract as he has an interest on such performance. Third, the performance is more valuable than the money damages.

Thus, the conclusion drawn from the above arguments is that our law should be amended and in corporate specific performance as a principal remedy. It should be granted only where performance of the contract affect the personal liberty of the debtor.

Section Two: Creditor's and Debtor's Self Help

The creditor's self help in case of obligations to do or not do is provided under article 1777 of the Civil Code. Article 1777 (1) of the Civil Code talks about where the contract's object is the performance of a specific obligation to do, the interest of the creditor is to get the practical, concrete performance, rather than a financial compensation. Here the obligation to do may be performed by any person indifferently, so the creditor will either perform himself or will go to another supplier, get the work done, but the cost will be supported by the defaulter. One has to suppose of course that the creditor has already performed his own obligation. If not, the defaulting party will support only the extra costs. Example: a person contracts with a carpenter to have a marble - top table made for 1,000 Birr. The carpenter then refuses to make the table. The client can go to another carpenter to have it made, and the price will be paid by the first carpenter, if the creditor already paid the table. If he has not, the creditor will only pay the price initially agreed and the defaulting carpenter any amount in excess required by the second professional.

In such a situation, in many cases, the creditor will be far more satisfied by the obtaining what was contractually promised initially than by the attribution of damages and a cancellation which may call for the search for a new partner and new negations. The option open by this article will translate only in a monetary obligation for the defaulting debtor any way, so the core of his personal freedom is not at stake.

Article 1777 (2) of the Civil Code illustrates the powers of the creditor in the event of a violation of an obligation not to do. The creditor may thus destroy or have the thing made or built by the debtor of the obligation at the latter's cost of course. The creditor may also petition the judges for a court injunction restraining the debtor from further violation (article 2121 of the Civil Code). Example: A sells a bakery to

B. The contract includes an obligation of non-competition. A opens a bakery despite his contractual promise not to establish himself in the same town again. The creditor is entitled to have the new bakery closed or even destroyed at B's expense.

But what should be stressed is that whether in the case of a substituted performance or that of the destruction of an illicit thing, the creditor cannot act of his own accord and must obtain prior authorization of the court. However, a provision such as article 1777 of the Civil Code can only hope to become useful if the courts are in a position to deliver speedy decisions in respect of such relatively simple contractual violations.

In the event of fungible things, the possibility of forced performance is not difficult to consider because the thing object of the contract is generic. Here, if the debtor of an obligation refuses to perform, it is easy to buy the same thing elsewhere, and to impose upon the defaulting debtor to pay any increase in cost. this issue is treated under article 1748 of the Civil Code.

Once more however, the code imposes upon the creditor to resort to a court decision before buying the thing to replace the one ones promised by the defaulter. And once more the remark will be made that such an option as that opened by article 1778 of the Civil Code will not be a realistic one until the courts have the means to give really speedy decisions.

Dear student, how do you see the provision of article 1778 with the provision of article 2330 of the Civil Code?
On the other hand the debtor has also the right of self-help in case where the creditor refuses to accept the thing without a legitimate

cause pursuant to articles 1779 and the following of the Civil Code. In certain cases, the creditor of the obligation may refuse to accept the delivery of the thing promised in the contract by his debtor. Why? This is probably because he wants to get out of the contract. He then refuses, with out a legitimate reason (with out "good cause" or lawful causes) to accept the delivery of the thing promised. In this case the question is to define what is a "good cause" Note that the risk is on the debtor who has the burden of proof. Conversely, the situation postulates that the debtor prefers to perform than require cancellation of the contract, which is also an option open to him, but cannot be forced upon him through his contracting partner's behavior.

If the creditor refuses to accept the thing without a legitimate cause, the debtor is entitled pursuant to article 1779 of the Civil Code to deposit the thing in a public warehouse or in any other place named by the court. Of course the defaulting creditor will pay the extra expenses for the storage.

The interest of the provision is that a court authorization is not necessary. Any abuse committed by the depositing debtor can easily be sanctioned by making him pay the cost of deposit and any damage deriving from the ensuing delayed performance. The only obligation is in fact to select a public warehouse or deposit, obviously because costs are supposed to be limited and the security of the things deposited ensured. No rule is fixed as to the locality of the warehouse or place of deposit: the assumption is that good faith dictates it to be chosen as close as possible to the normal place of delivery.

The costs of the warehousing or deposit will have to be advanced by the debtor. This will most probably encourage him to bring the case to court quite speedily in pursuance of article 1781 of the Civil Code.

Article 1779 speaks of a " thing" but a question may be raised as to the deposit of a sum of money. If this is the case, one can wonder if the sum produces interest, and who should benefit from such interest, if any, the debtor or the creditor.

There is a recommendation by a certain writer that the translation of this provision should start by " where the creditor refuses without a legitimate ground to accept the performance offered him..." and not the "thing". One can again take the example of a loan or that of a donation.

The same remark as to translation can also be made in respect of article 1780 of the Civil Code, which should be entitled "impossibility to perform" rather than "delivery impossible", which reifies excessively the issue dealt with.

The possibility to deposit the thing along the lines set out in the previous article is also open to the debtor, but here without having to make a notice, when the creditor is not known, or if there is a doubt as to who is the real creditor. This is for instance the case where the creditor is dead and there is a dispute between two persons who each claim to inherit the whole estate, or when the creditor becomes incapable through insanity. The problem was already addressed above in the event of a doubt as to whom payment should be made, under article 1744(1) of the Civil Code. One must realize here that the price for the thing has been paid, but for some reason delivery is not accepted.

In certain cases it is impractical or too costly to have the thing deposited for an uncertain length of time. So it is better for the debtor

to sell the thing -thus converting it in to money - and then to deposit the money. But this can only happen in two cases, when the thing is perishable, or where the expenses of the deposit or custody are disproportionate with the value of the good itself.

But one will note that this sale may only take place a) with the authorization of the court and b) by public auction, for obvious reasons of security of the transaction. The debtor cannot take this initiative on his own.

There are two exceptions to the sale by public auction, which are stated in article 1781(2) of the Civil Code where the thing has a stock market value or current price, and where the thing is of little value, which does not justify the cost of a public auction, so a private sale is preferable. The price obtained is then deposited with a public financial institution (article 1781(3)).

Article 1781 has only an interest in the cases provided by 1779 and 1780, to wit the refusal of performance or the impossibility to perform.

The fact of depositing does amount to actual performance of the debtor's obligation. Another person takes up the work of preserving the thing and the risk of deterioration or loss is transferred to the creditor- subject of course to the depositary' s specific contractual liability. There must be court proceedings, where the debtor will ask the court to decide that he correctly performed his obligation. There may be two judicial decisions, one after the other, one to authorize the deposit (but not necessarily) and the second to declare it a valid performance of the contract as per article1782 of the Civil Code.
The debtor may change his mind as to the idea of a deposit right until the moment the creditor has accepted the thing according to article

1783(1) of the Civil Code. The claim revives as soon as the deposit ends (see 1783 (2)), but not the securities (a guarantor, for instance), which were attached to it before the deposit was declared valid (1783(3)).

UNIT THREE: CANCELLATION OF CONTRACT

Introduction

The other remedy, to which the aggrieved party resorts, where the other party fails to perform his obligation according to the terms of the contract, is cancellation of the contract. Cancellation may take place either through judicial declaration or unilaterally by the aggrieved party, as provided under articles 1784-1789 of the Civil Code. However, cancellation, as a rule, can only be effected through judicial act.

Unit Objectives

At the end of this unit you will be able to:

- Identify the grounds of judicial cancellation
- Discuss the grounds of unilateral cancellation

Section One: Judicial Cancellation

A party who is not going to receive a counter performance he bargained for should be excused from performing his part, if he has not already performed it, provided that he is not the cause for the other party's non-performance. Where the party has already performed his obligation, he should be entitled to claim cancellation.

In the event of a total and definitive failure to perform a contract, the automatic cancellation of the contract seems more or less unavoidable. But this solution is not always suitable for cases of partial performance, defective performance or delay in performance.

Furthermore, the contract is law of the parties and the parties must do their best to maintain the contract, rather than demean it by being

able to escape its imperative provisions too easily. Finally, the economy probably needs the greatest measure possible of contractual stability, be it only in respect of the third parties, which might be concerned nevertheless by the contract. The non-performance of the contract must therefore be of some importance before it should result in the cancellation of the contract. These considerations explain that cancellations call as a rule for a judicial decision.

Thus, the real basis of judicial cancellation can better be explained with regard to the failure of the aim or purpose of the contract. This avoids the possibility that a party who requests cancellation may use as an excuse for canceling a contract the performance of which has ceased to be of interest to him for some quite different reason: for instance, if the market moved against him. It is recognized that a contract can not be cancelled merely because of the hardship imposed by its improvident character or because the contract has become more burdensome in its operation than was anticipated or because a party finds, in the light of changed conditions, that he has a bad deal, or because he finds the contract less profitable to him than he had anticipated when the contract was made. This shows that the policy governing the right to cancel and the basis of judicial cancellation is the actual failure of the performance and its serious effect in defeating the purpose of the plaintiff in entering into the contract.

The question is how the seriousness of the default (breach) be evaluated. What principle or principles guide judicial cancellation? This can best be done by considering a number of specific applications of the requirement of seriousness of default for the purpose of cancellation.

The serious breach, that may be a ground for judicial cancellation, may be frustrating or essential breach. Relatively little difficulty arises where the party in default wholly fails to perform his obligations. In such a case there is no doubt that the aggrieved party is entitled to cancel the contract. Total failure to perform a contract may, however, consist not only in complete inactivity in relation to the contract; or in contravention of an obligation to forbear but also in purported performance that is wholly different from that contracted for.

However, where some attempt at performance has been made by defaulting party, it is often difficult to determine, whether what he has done is “totally” different from what he contracted to do and be considered as serious breach. Where the breach is serious there is no doubt that the aggrieved party is entitled to cancel the contract.

But, in order to take the breach as a serious one, should the contract loose all interest to the party aggrieved? In other words, should the contract completely be of no interest to the party requiring cancellation? The drafter of the Civil Code, Prof. Rene David, gives negative answer to this question. The cancellation of the contract is not to be pronounced by the court if the non-performance by one of the parties is of little importance in relation to the whole contract. It is not required, on the other hand, that the contract has lost all interest for the person requiring cancellation.

Then, when do we say that the breach is serious? Article 1785 of the Civil Code states that the breach should affect the very essence of the contract to attain certain degree of seriousness. This article requires the following conditions:

(i) The court must consider the interest of the parties and the requirements of good faith (Article 1785(1)),

(ii) The breach of a fundamental provision of the contract must be established before cancellation can be ordered (Article 1785(2)).

Thus, for judicial cancellation, Firstly, the broken term shall be the term to which the parties would seem to attach greater importance; or they would consider to regard the term as a fundamental one. Secondly, the consequence that results from the default should affect the very essence of the contract; or defeat the very purpose of the aggrieved party in entering into the contract. In both cases the court has to find the decisive element either in the importance that the parties would seem to have attached to the term which has been broken or to the seriousness of the consequence that have in fact resulted from the breach.

Accordingly, the single principle that controls the remedy of cancellation is the requirement that the breach must attain certain degree of seriousness; and this so where the very essence of the contract is affected. The test of essentiality is where, it appears from the general nature of the contract considered as a whole or from some particular term or terms, that the promise is of such importance to the promissee that he would not have entered into the contract unless he had been assured of strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promiser.

In general, the breach of a contract is fundamental for judicial cancellation. The " fundamental" nature of a contractual violation is defined by article 1785 (3) of the Civil Code as a non-performance,

which affects the very basis of the contract, which would have led a reasonable person not to enter the contract.

Dear student, there is an argument that the definition of a fundamental breach could lead to think that where such a breach exists, sub article 1 does not have to be considered: for a contract a reasonable person does not want to enter in to is obviously against its interest. such an analysis would also mean that the two conditions are not cumulative, or, in other words, that the sole consideration of the parties' interests and the requirements of good faith would enable to order cancellation: this would be the rule of pure equity decisions. Whether these two conditions are cumulative or not is left to you for discussion.

Where the breach is not deemed fundamental, the court will base its analysis of the case on the provisions considered above in respect of the variation of contracts. It will check whether for instance one can identify the creditor's interest in the meaning of article 1740, or impose the remedy open by article 1748 in respect of minor deficiencies, or let the court operate corrections of the contractual balance of performances on the basis of article 1768 or grant a period or grace (article (1770).

The court shall evaluate these circumstances and decide whether or not the contract must be cancelled. The decision of the court should be justified based on the conditions required by article 1785.

Section Two: Unilateral Cancellation

Although the principle of certainty of contracts leads logically to grant primary authority for cancellation to the courts, there are situations where policy dictates that a party himself should be able to cancel the

contract. It must be stressed that such situation does not amount to allowing a party to break off the contract as he does not wish, nor does it mean it will be without consequences.

The right for a party to declare the cancellation without having to go before the court is provided under articles 1786-1789 of the Civil Code. Contract's cancellation can be declared unilaterally by one of the parties in four cases:

Firstly, where it is expressly stipulated in the contract that the contract can be cancelled by the contracting party himself in certain circumstances and if theses specified circumstances have occurred, there is a unilateral cancellation as per article 1786 of the Civil Code. This provision is an illustration of the principle that the contract is the law of the parties: they can decide what will unbind them in advance. The cancellation may be set out on the basis of a clause which the court would not have normally deemed to be a fundamental violation of the contract; the parties in effect decide what is fundamental or not for them. But such a clause does not prohibit the paying of damages by the defaulting party.

Secondly, where a fixed, rigid time for performance has been specified and performance has not taken place within this time, according to article 1787 of the Civil Code, contracts may be cancelled unilaterally. Three situations are considered here explicitly: non-performance within the period of grace granted on the basis of article 1770 of the Civil Code; non-performance despite the sending of a notice of default specifying a final time-limit for performance (article 1774 of the Civil Code); non-performance within the contractual fixed period of time, as stated under article 1775 (b) of the Civil Code.

All these provisions have in common the fact that the creditor or the court expressly stated the importance of having performance before the expiry of the time -limit considered. The violation of this duty of time -limited performance can only be sanctioned by cancellation, and generally, the allocation of damages.

Thirdly, article 1788 of the Civil Code addresses the case where the performance of one party's obligation has become impossible that will be a ground of unilateral cancellation. For instance, if the situation where a specific thing that was essential to the performance of the contract has perished like the house to be leased is destroyed by fire, or the animal to be delivered has died, the contracting party can declare the cancellation of the contract without going to the court. It is also the case where the contractual obligation is forbidden by a new law: it may be made illegal to manufacture or sell the product that one of the parties was supposed to manufacture for the other.

However, partial impossibility does not allow the creditor to attempt unilateral cancellation: he has to petition the court for a variation under article1768 of the Civil Code.

Dear student, would you see any difference between article 1788 and 1715 of the Civil Code? Discuss

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The type of impossibility occurs under article 1788 is after the contract was validly concluded, and article 1715 governs original impossibility.

Lastly, the contract may be cancelled unilaterally, if there is refusal by one party to perform his obligation, pursuant to article 1789 of the Civil Code. It is similar to that dealt with under articles 1757 (2) and 1759 of the Civil Code. The party can declare the contract finally cancelled rather than require the forced performance, or rather than contemplate a simple suspended performance on the basis of article 1757 of the Civil Code.

One has to note that a notice is always necessary except if the debtor declares in writing he won't perform his obligation (see article 1789(3) of the Civil Code). This last exception is the confirmation of the solution set out under article 1775 (c) of the Civil Code. Where a notice was given, the creditor right to unilateral cancellation will be open to be exercised within fifteen days-it is of course simply an option for the creditor, unless the debtor produces sufficient securities in that time-limit. The dire consequences of this limited period of time suggest that both the notice and the eventual submission of securities are made in a manner liable to be proven before a court. A court proceeding seems inevitable, and therefore the right to unilateral cancellation will logically be suspended, if there is a dispute as to the "sufficiency" of the securities offered.

UNIT FOUR: DAMAGES

Introduction

Both forced performance and cancellation can be insufficient remedies to non-performance. It is then proper to reestablish the contract balance upset by the failure to perform or the necessity to resort to forced performance. This is done by allowing damages to the other party and the rules governing the allocation of damages in the event of contractual non performance is set out in articles 1790 to 1805 of the Civil Code. In other words, damages can be allowed not only in the event of cancellation for non-performance, but also after forced performance.

Unit Objectives

At the end of this unit you will be able to:

- Identify the time when debts are due
- Explain defenses available to relieve the debtor from payment of damages
- Explain the ways of determining the extent of contractual damages

Section One: Payment of Damages as a Remedy in General

One of the remedies available for the creditor at the time of nonperformance of contracts is payment of damages for the prejudice sustained as per article 1771 (2) of the Civil Code. This remedy will be granted in addition to forced performance or cancellation. It will also be granted apart from forced performance or cancellation. This clearly provided under article 1790(1) of the Civil Code which states that in addition to or apart from enforcement of contracts and cancellation…. for contractual damages establishment of fault is irrelevant in principle.

Article 1791 of the Civil Code lays down the rule that damages are automatically due as soon as the obligation is not performed as anticipated, and notwithstanding that the party is not at fault. This is the major difference with extra-contractual liability, which rests on the preliminary demonstration of the existence of a fault committed by the person whose liability is sought. In the area of contractual liability, the creditor has only to prove a) the existence of a contractual obligation, b) the fact of the non-performance of this obligation c) existence of the damage sustained, and d) the relationship of the damage and nonperformance. This type of proof is of course much easier than what is required in extra-contractual liability. It is therefore as a principle not sufficient for the debtor to prove he did not commit any fault to evade his liability.

Section Two: Defenses Available Not to Pay Damages

in our law there are two defenses available for the debtor not to pay damages , that of force majeure (articles 1791 (2) and 1792 to 1794 of the Civil Code), and the denial of liability in certain cases where the creditor has to prove the existence of a fault.

When we see the defense of force majeure, article 1791 (2) of the Civil Code states that the party won't be released from his liability unless he proves that the non-performance is the result of force majeure.

Article 1792 of the Civil Code defines the force majeure by the existence of two cumulative elements: 1) the occurrence must be unforeseeable: any event that could not normally, reasonably, foreseen; and 2) the occurrence must be insurmountable: it must be absolutely, and not only normally, impossible to perform the obligation. Sub article of 1792 (2) of the Civil Code goes on to explain that force majeure is not established where it could have been foreseen by the debtor, or where the alleged force majeure event simply makes the performance of the obligation more onerous or more costly.

Here again, the courts must be aware of their primary and overruling duty of maintaining contractual obligations. It follows that the defense of force majeure should only be exceptionally accepted by the court. Such an approach is confirmed by the fact that the standard of reference will be the average person placed in the same situation as the defaulting party: the court will implement an in abstracto appreciation of the circumstances of the case on this point. Should this criterion be satisfied, it will move on to the second, cumulative criterion of force majeure: it will check if in fact, the performance was indeed impossible. The defending party will have to prove that no

other person could have performed in such a situation. This shows by the way that the cases of force majeure are a different issue to the problem of impossibility considered as a ground of unilateral contractual cancellation under article 1788. In this last case, the creditor has a right to seek unilateral cancellation but does not necessarily forgo damages: article 1792 applies and the requirements of absolute impossibility but even more so of unforeseeability have to be proved as a defense by the debtor.

In other words, where one of the conditions is not present, the defense of force majeure is not admissible. An event which makes performance impossible but was foreseeable, or a non-foreseeable but which does not generate an absolute an absolute impossibility, do not qualify as a proper defense.

Article 1793 of the Civil Code gives an illustrative and non-limitative list of cases of force majeure, with the proviso that these depend of circumstances and of the appreciation by the judges. These are: firstly, the unforeseeable action of a third party for whom the debtor bears no liability. This excludes employers for their employees and parents for their children for instance.

Secondly, the prohibition made by the government to implement the contract. This includes all the category of acts of Government.

Thirdly, a natural catastrophe, such as an earthquake, thunder, floods. There are however many discussions as to what constitutes a natural catastrophe. For instance, a prolonged period of drought, which desiccates the land, causes soil to retract and generates dangerous cracks in the insured building.

Fourthly, the existence of international or civil war. But this should be moderated by the territorial criterion. Only war zones may be affected normally, not the entire territory of the country at war.

Lastly, the debtor's death, or an unsuspected serious accident or illness. The courts will probably have to appreciate the seriousness of the illness or accident in light of the facts of the case, eventually with the help of an expert.

Conversely Article 1794 of the Civil Code gives a non-limitative list of cases where force majeure is never a defense, subject here, not to the appreciation of the courts, but to the existence of an express contractual stipulation.

These are: firstly, a strike or lockout occurring in the debtor's factory or within the business branch within which he discharges his activities,

Secondly, the increase or reduction in the price of the raw materials necessary for the performance of the contract,

Thirdly, the occurrence of a new law which makes the debtor's obligation more onerous. This is case is to be distinguished from the express prohibition by an act of Government, considered under the previous article.

However, there are exceptions to the admissibility of the defenses of force majeure. Articles 1797 and 1798 of the Civil Code state two exceptional cases where the debtor has to pay damages despite proving that non-performance is a result of force majeure. The other exception is provided under article 1886 of the Civil Code.

The first case provided under article 1797 of the Civil Code is where the debtor is negligent and does not inform the creditor of the reason why he cannot perform his obligation. The sanction is that the debtor-has to pay damages for the prejudice suffered by the creditor that could have been avoided if the creditor had been informed in time. Full damages are therefore not necessarily due, because the court has to identify precisely the damages deriving from the absence of information, up to the day when the information is finally imparted, for instance when the defense is raised within the framework of the contractual liability suit.

The second case is where the debtor was already in default when the force major event appeared. (See article 1798 of the Civil Code). If he had performed on time there would not have been a case of force majeure. So even if the event may legally be qualified as such, the debtor's default was already established and thus full damages are due on the bases of articles 1791 of the Civil Code.

Lastly, if there is the express contractual stipulation in the contract not to use the defense of force majeure per article 1886 of the Civil Code, where the contract may stipulate that parties are liable also in the event of force majeure.

As explained above, the major characteristic of contractual liability is that it is linked to the objective situation of non-performance of the agreed obligations, without any consideration of whether the debtor committed a fault or not.

The notion of fault is not defined in this part of the code. One may use the definitions given in respect of extra-contractual liability by

analogy, but with due caution, as well as the definition used by certain special contracts, such as in articles 2211 or 2636 of the Civil Code.

However, there are exceptional requirement of a contractual fault. Articles 1887, 1795 and 1796 of the Civil Code state cases where the severity of article 1797 of the Civil Code is attenuated, and which each require the demonstration of a fault committed by the debtor due to perform.

The first one is the express contractual stipulation as per article 1887 of the Civil Code, where the contract may stipulate that parties are only liable in the event of a fault.

The second one is related to obligations of means pursuant to article 1795 (1)) of the Civil Code. One must remember the distinction made between an obligation of result and simple obligation of means under article 1712 (2 of the Civil Code). A person who is held only by an obligation of means does not incur liability if he has acted in good faith and he has committed no fault that means he has done his best.

So, the rule stated in article 1791 of the Civil Code is only for obligation of results, where the result promised is not achieved. Here, the fault is presumed by the non-performance. Such is the meaning of article 1795 of the Civil Code, which only applies to contracts where a party simply promised to do his best and not to achieve a given result.

The third one is where proof of fault is required by law for certain special contracts.

The last situation is considered under article 1796 of the Civil Code where the contract is made for the exclusive advantage of one party, that is where the defaulting party probably undertook to perform

gratuitously. In this case, the liability is only incurred in case of commission of grave or serious fault by the debtor. A grave fault can be considered as the situation where a person exercises less precaution than a reasonable man would do for his own things.

Section Three: The Calculation of Damages

The Ethiopian Civil Code states a rule to arrive at a global amount of damages. It considers the question from the point of view of a reasonable person, who would then evaluate the normal amount of the compensation necessary for the damage suffered pursuant to article 1799(1) of the Civil Code. It is not an approach were the judge is asked to evaluate with extreme precision the prejudice suffered.

Nevertheless, the judge is not to invent an amount or show arbitrariness in his evaluation; article 1799 (2) of the Civil Code gives him practical directions to assist him in arriving at this “reasonable” appreciation. The judge will always refer to the normal expectations deriving from the performance of the contract, taking into consideration such elements as the type of the contract, the professional capacities of the parties, their pre-existing relations and other circumstances, provided they were known to the debtor. Thus the work of the court is far from finished when it has ruled on the exigibility of damages. It then has a duty to make an in-depth research of the facts of the case, eventually with the assistance of judicial experts, and of course always give reasons for his evaluation.

However, there may be variations from the normal amount damages. Article 1800 of the Civil Code opens the possibility to grant a lesser amount of damages, if the defaulting debtor manages to prove this lesser extent of what the creditor has suffered. But he of course shoulders the burden of proof.

Conversely, article 1801 allows for a greater amount of damages to be granted by the court, than what the implementation of the criterions set out under 1799 of the Civil Code call for. One has to understand that under article 1799 we have global evaluation of the damage, because it is seen through the eyes of an exterior person. But in certain cases, the actual prejudice may be far in excess of the amount obtained by applying the rule of article 1799.

In this case, the injured party may have the exact compensation of the prejudice, under the following conditions: on condition that the information was given at the time of the conclusion of the contract that special circumstances exist which could generate serious damage, or Where the person liable to pay damages committed a grave fault, gross negligence or had an intention to cause damage to the other party. This is to be compared of course with the grave fault required by article 1796 of the Civil Code.
Example 1: A promises to deliver coffee for 10,000 Birr to B in Djibouti. B wants to send this coffee to Europe. A does not deliver on time, so B cannot send the coffee. The reasonable amount of damages is the loss of profit, which B could have made by reselling the coffee to Europe (article 1799).

But suppose that B informed A, at the time of the contract, that it was vital for him to have the coffee on time and send it to Europe because a whole series of new contracts depends on this timely delivery. In this case, B will not only be allowed to claim the loss of profit, but also an amount to compensate all these other chances of making further contracts (1801 (1)). The same rule applies if A is grossly negligent and omits to send the coffee (1801 (2)).

But one has to keep in mind that to obtain this increased amount of damages, the injured party has the burden of proof of the information (1808 (1)) or of the negligence or fault (1801 (2)) committed by the other party.

At any rate, this provision does not allow for the “punitive damages” which can be imposed in common-law jurisdictions. The latter are damages in excess of the actual prejudice suffered, because the court wishes to punish the defaulting party. On the contrary, in Ethiopian law, the maximum allowed is always in relation with the effective prejudice suffered.

At the time of calculation of damages, the parties' duty to collaborate in the limitation of the extent of damages should be taken in to account according to article1802 of the Civil Code. Whatever the situation may be, whether the issue is to claim the normal or exact compensation of damages, the injured party has duty to cooperate with the defaulting party to limit the extent of damages. This cooperation consists of any step not entailing “inconveniences or heavy expenses” (English version), or which are reasonable measures to take (French version). The sanction is a reduction of the amount of damages. (See 1802 (2) of the Civil Code)

Example: A promises to deliver teff on time for B. The lorry breaks down halfway between Gonder and Bahir Dar. A informs B by telex immediately, so that B still has time to order teff from another supplier C, although at a slightly more expensive rate. B is negligent and does not cooperate: his damages will be reduced by the court.

There are also special rules for damages in the event of money debts provided under articles 1803-1805 of the Civil Code. The principle for the calculation of damages is to consider that in money debts these damages may be globally evaluated at the time the creditor has had to wait to get paid. In other words, the extent of the “reasonable” amount of damages (in the meaning of 1799, but here for money debts) is to say that the prejudice is equivalent to the interest produced by the principal debt during the delay considered. If no contractual interest is provided, or if the contractual interest is less than the legal interest, it is the legal interest, nine percent per annum (article 1751) that is applicable pursuant to article 1803 (1) of the Civil Code. If the contractual interest is higher than the legal interest, this contractual interest is applicable in accordance with 1803 (2) of the Civil Code. This interest is automatically due as soon as there is a delay, irrespective of the existence of a prejudice. (See article 1803 (3) of the Civil Code)

In the case of a prejudice which exceeds the amount of interest paid for simple delay, the debtor has to pay the compensation of the effective damage, if he was informed at the time of the contract of the special circumstances of an eventual prejudice, or if he committed a gross negligence, a grave fault, or showed his intention to cause damage as per article 1805 of the Civil Code. In other words this is the same rule exactly as damages paid under article 1801.

A special provision governs periodical payments. These periodical payments are also sums, which constitute for the creditor an income rather than a capital (rents, annuities, arrears….). In this case a favorable treatment is given to the debtor: interests only start to run from the day on which recover proceedings are initiated, rather than

from the day when he is put in default, as under 1803, and a full year in default is required before interest can be claimed.

Furthermore, article 1804 (2) of the Civil Code reinforces the protection by stating that compound interest never produces interest (rules governing current accounts).

The reasons for this favor is that it is presumed that the creditor is less in a hurry to get paid, and that there is a danger for the debtor to be facing the rapid of his debt because of the accumulation of compound interest.

Review Questions

7. One bright Saturday morning Ato Abinet parked his car by a roadside and went shopping. The car was really filthy after a trip outside Addis and badly needed washing. When Abinet came out of a store half an hour latter, his car was shiny clean. As he stood there wondering by what miracle that could happen a Youngman, with a bucket and a bundle of rags, approached him and told him that you owed me 5 Birr.

   Was there a contract? Should Abinet pay the young man? If not, does the Young man have an alternative remedy?

8. There are situations in which the debtor may not be relieved from payment of damages though the cause of non-performance is force majeure. Discuss those situations.

9. In early January 2006, Dagnachew bought 200 quintals of Teff from a farm in Gojam. While he was looking for a way to transport the teff to Awasa, he met with Abdu who has a business, who is engaged in transportation. Abdu agreed to transport the teff for the sum of Birr 1,500. Dagnachew paid the money to Abdu on January 10,2007, and according to the agreement, the Teff was to be transported to its destination after 20 days.

   Abdu was unable to go to Gojam until January 25,2007, because his truck needed to be repaired and was in a garage. On January 30, 2007, Abdu's truck started its journey to Awassa. On the way back, the brakes of the truck failed suddenly, the truck overturned completely, and all the teff was ruined because it has been raining.

   a. If Dagnachew brought action for damages against Abdu, and Abdu raised force majeure as a defence, who should succeed in the suit?
   b. If Abdu approached you for legal advice, how would you advice him to proceed?

10. A farmer (A) sold 1000 quintal of cotton to B, an owner of a ginning plant, for a sum of money, which B paid through his bank. Delivery of the cotton was agreed to be on Oct. 1/97 in a small town near A's farm.

    Before the date of delivery B arranged for a fleet of trucks to go to the place of delivery, take delivery of the cotton and transport it to his plant. But the trucks could not reach the place of delivery because of the collapse of the bridge across the river between B's plant and the small town, which was caused by over flowing of the river as a result of a heavy rain.

On the date of delivery A was ready to hand over the cotton to B as he (A) had already managed to have the cotton carried and deposited in a hired store in the small town, but B could not take delivery for the above mentioned reason, not even for many days after the due date. A was willing to wait for some time for B, but one day a fire broke out from the surrounding bush and consumed all the cotton in the stone.

1. B wants to get his money back, Can he? Why or why not?
2. Would there be any remedy available for A and B?