# LECTURE NOTES ON THE LAW OF CONTRACTS

# ON SOLIDARY OBLIGATIONS

*Tilahun Teshome (Prof.)*

## I. INTRODUCTION

### a. Scope of solidarity obligations

i. **Ks as foundations of debtor/creditor relationship, plurality of actors. Art. 1675. Expressions such as obligor/obligee and promisor/promisee are also employed to designate the same ideas.**
ii. **In all commutative k's both parties may be called debtors and/or creditors depending on the level of performance of the k at any given time.**
iii. **In most k'ual dealings, the parties are a single debtor and creditor. Bilateralism.**
iv. **But this is not always the case as it is perfectly lawful for any contract to have several debtors and/or creditors in as much as it is for a single debtor and/or creditor. Multilateralism.**

### b. Terminology

i. **Joint and several liability and/or debtors**
ii. **Solidary obligations and/or obligors**
iii. **Joint and several promise and/or promisors**
iv. **Joint and several right and/or creditors**
v. **Solidary right**
vi. **Solidary claim**
vii. **Simple joint obligations**
viii. **Subscription contracts**

### c. Principles of solidarity

i. **Solidary obligations arise from the existence of several debtors that are obliged by a single obligation/promise. The debtors are bound to the creditor/creditors on the same obligation/promise that is normally created under a single instrument.**
ii. **Solidary rights stem from the prevalence of several creditors in a single right/claim. The creditors are entitled to the single right/promise that is normally created under a single instrument.**
iii. **Simple joint obligations arise in a situation where a single instrument contains several debtors in which each one of the debtors is only liable to his/her part of the debt.**
iv. **In case of solidary obligations and/or rights, there is a two-sided legal relationship.**
    1. **The relationship between the solidary debtors on the one hand and the creditor on the other; or in the event of solidary rights, the relationship between the solidary creditors on the one hand and the debtor on the other. This is the primary relationship where the rule of solidarity perfectly operates.**
    2. **The relationship amongst the solidary debtors and/or creditors themselves. This is the secondary relationship in which the rule of solidarity does not normally operate.**
v. **Simple joint obligations and/or rights constitute a one-sided relationship only. That is, the relation between the simple joint debtors individually and that of the**

**creditor; or the relationship between the simple joint creditors individually and that of the debtor. A single debtor does not answer for the debts of other debtors; and a single creditor does not claim the shares of other creditors.**

**vi. The higher the number of debtors and/or creditors in solidarity, the more complex the relationship becomes. But this is not the case in simple joint obligations/rights.**

**d. <u>Modalities of plurality</u>**

**i. Solidary**

**1. Several debtors v. the creditor.**

**2. Several creditors v. the debtor.**

**3. Several debtors v. several creditors.**

**ii. Simple: Same as in the case of solidarity but with different options for recourse.**

**e. The <u>driving principle</u> of solidarity is convenience of the creditor in the realization of his/her claim from the debtor/debtors.**

## II. <u>SOLIDARY DEBTORS (Civ. C. Arts 1896 – 1909)</u>

**a. Solidarity between debtors consists in the fact that the creditor is entitled to initiate legal actions for the recovery of his claim from any one, some or all of the debtors until such time that the obligation is fully discharged. A debtor may not avail himself of the defense of <u>benefit of division</u> available for simple joint debtors.**

**b. The creditor has as many actions of recourse as there are debtors including the number of possible combinations between the debtors in whole or in part.**

c. **The principle of presumption of solidary obligations has it that unless the instrument expressly provides otherwise, joint debtors are always solidarily liable. Art 1896. Not all legal systems even within the Civil Law legal family do, however, subscribe to the rule of presumption of solidarity. Art. 1202 of the Civil Code of France, for example, specifies that there is no presumption in favor of solidary obligations.**

d. **Because the extent of liability of each co-debtor is not limited to his share of the debt, there is an implied guarantee between the co-debtors as far as meeting the claims of the creditor is concerned. For his share of the debt, each co-debtor is regarded as a principal debtor while he is regarded as joint guarantor with no recourse to the defense of benefit of discussion for the shares of the other shareholders.**

e. **Sources of solidary obligations.**

   i. **Contract where there is multiplicity of debtors in a single performance.**
   ii. **The law. E.g. Joint tortfeasors, co-offenders, persons bound by negotiable instruments, joint heirs, debtors jointly liable for maintenance.**
   iii. **Acts of third parties. E.g. Charges in wills**
   iv. **For operation of the rules of joint and several liability in some other areas of Ethiopian law, see the following provisions. Civ. C. Arts. 323-326, 458,507-515, 714, 919, 2086, 2126, 2129, 2130,**

**2155, 2156, 2195 and 2225. Comm.C. Arts. 255, 280, 286, 301, 308, 309, 342 and 366.**

## III. EFFECT OF SOME LEGAL DEFENSES ON SOLIDARY OBLIGATIONS.

a. ***Res judicata*** **(Civ. C. Art. 1898 and C.P.C. Art. 5). Proceedings instituted against one debtor may not prohibit the creditor from resorting to other creditors.**

b. **Notice: Placing one debtor in default amounts to placing all others in the same. Art. 1899 *cum* Arts. 1772 1775. All effects such as computation of interest, transfer of risk and interruption of period of limitation do hold good for other co-debtors in as much as they do with the one on whom notice is served.**

c. **Nullity: Art. 1900 *cum* Art. 1808. If the contract is void, all co-debtors may avail themselves of the defense of nullity and may refuse performance; if is voidable, though, only those debtors affected by the vice may do so.**

*d.* **Payment and limitation: Art. 1901 *cum* Arts.1740 – 1762 and Arts. 1845 – 1856. All co-debtors may invoke defenses based on full or partial performance or on limitations of actions.**

e. **Remission of debt: Art. 1902 *cum* Art. 1825. Remission of one co-debtor amounts to remitting all unless made specifically in favor of that debtor. In this case, the share of the debt of the other debtors is reduced to the extent of the amount remitted in favor of that**

**particular debtor. (See the Amharic version, the English is not correct.) Unless there is an agreement to the contrary, shares are presumed to be equal.**

**f. <u>Novation:</u> Art. 1903 –*cum* Arts. 1826 -1830. Same as in Remission.**

**g. <u>Set-Off:</u> Art. 1804 *cum* 1831 -1841. Co-debtors may invoke the defense of set-off against the creditor only to the extent of the amount of their indebtedness. Again, the Amharic version is much better in terms of clarity.**

**h. <u>Merger:</u> Art.1805 *cum* 1842 -1844. The share of the co-debtor whose interest is merged with that of the creditor may be reduced from the total debt. Again the English version has a problem.**

## IV. <u>RELATION BETWEEN THE CO-DEBTORS. - Arts. 1906 -1909.</u>

**a. A co-debtor should refrain from acts that increase the liability of other co-debtors.**

**b. A co-debtor who has paid more than what he was actually supposed to pay as his share has the right to seek contribution from the other co-debtors.**

**c. For the claim of the co-debtor, however, there is no presumption of solidarity as each debtor is only liable to his share of the debt.**

d. **If one of the co-debtors cannot pay his share, his part shall be apportioned amongst the other co-heirs.**

e. **Unless agreed otherwise amongst the co-debtors, shares in the debt are presumed equal.**

## V. SOLIDARY CREDITORS – (Arts. 1910 -1916)

a. **Solidarity between creditors consists in the fact that any one of the several creditors may proceed against the debtor/debtors to realize the whole claim. It is also possible for some or all of the creditors to jointly proceed against the debtor/debtors. A debtor against whom an action is instituted for the recovery of the whole claim by one or some of the creditors may not avail himself of the defense of benefit of division so that the creditor divide the claim and proceed only for his share.**

b. **The number of recourses available for creditors is dependant on their number, their combinations and their totality put together.**

c. **Unlike solidary obligations, solidary rights are not presumed. The instrument that created solidarity of creditors is always required to clearly show prevalence of solidarity in order for the creditors to enjoy this right. Art. 1910.**

d. **Because the right of each creditor in solido is not limited to his share of the total claim, there is an implied mandate between co-creditors in as far as their right to claim against the debtor is concerned. For his share of the claim each**

**co-creditor is regarded as the principal creditor and for the chares of the other creditors he is considered as an agent.**

e. **Performance/payment made in part or in whole to one of the creditors is effective against all the other creditors.**
f. **Unless expressly instructed by one or some of the creditors otherwise, the debtor is at liberty to pay/perform to any one of the joint creditors. Arts. 1911(3) *cum* Art. 1743, C.P.C. Art. 293.**

g. **Sources of joint and several right are mainly contracts and sometimes testamentary legacies. But no instances of the law being source of a solidary right unlike in the case of solidary obligations.**

h. **A Solidary right is the less common phenomenon of the two.**

i. **Effects of some legal provision on solidary rights:**
    i. **Interruption of statute of limitation – Art. 1912 *cum* Arts. 1851 and 1852. Interruption by one creditor benefits all.**
    ii. **Remission of debt made by one co-creditor does not affect the others, Art. 1913.**
    iii. **Novation by one co-creditor does not affect the rights of other co-creditors. Arts. 1914.**
    iv. **Set-off by the debtor against one co-debtor does not affect the other co-creditors. Art. 1915.**

j. **Relationship between co-creditors.**

i. **Presumption of equality of shares unless agreed otherwise.**
ii. **A creditor who received more than his shares shall account for the excess to the other co-creditors.**
iii. **There is no solidarity between the other co-creditors in their claim against the receiving co-creditor.**

## VI. SIMPLE JOINT OBLIGATIONS (NON-JOINT OBLIGATIONS).

a. **Plurality of debtors and creditors alone does not always bring about solidary obligation and/or rights. Contracts having plurality of parties with separate and defined obligations/rights may not be regarded as having joint obligations/rights even if made in one instrument. Arts. 1918 and 1919.**

b. **In simple joint obligations, there are as many contracts as there are debtors or creditors despite the fact that these contracts stem from the same instrument.**

c. **Each debtor is only liable to his corresponding debt and so is each creditor. These kinds of contracts are sometimes known as prescription contracts.**

d. **A debtor sued for more than his share in the contract has the right to invoke the defense of benefit of division.**

e. **The creditor may initiate an action by joining the debtors in accordance with the relevant provisions of the C.P.C. but in doing so he is**

**required to show the debt of each defendant separately. Joinder of actions but not unity of obligations.**

f. **Where the nature of the obligation is indivisible by operation of the law or by the nature of the debt, simple joint obligations may sometimes be regarded as joint obligations. Art. 1917. These are what are sometimes known as indivisible obligations, e.g. the obligation to construct a house or to deliver a horse on the basis of a simple joint obligation.**

# LECTURE NOTES ON THE LAW OF CONTRACTS

# ON SURETYSHIP

*Tilahun Teshome (Prof.)*

## I. THE NEED FOR AND MEANING OF SURETYSHIP

a. **The general principle in the law of obligations has it that the property of a debtor is the pledge of his creditor. See Civ.C Art. 1988(1) and C.P.C. Arts. 151 and 154. But in the real world, this is not always the case due to the following and similar other reasons.**
   i. **Insolvency/bankruptcy of the debtor**
   ii. **Multiplicity of creditors**
   iii. **Improper conducts of the debtor**

**b. In business and economic terms suretyship is a risk management device. Normally the risk of insolvency of a debtor is to be borne by the creditor. But in suretyship, risk is mitigated by bringing in some other person into the obligation. In legal parlance, it is a subsidiary contract stemming from the principal contract. It is also referred to as personal guarantee.**

**c. Other modes of security devices in the Civ.C include pledge, mortgage and antichresis. See Arts. 2825 – 2874 for pledges, Arts. 3041 – 3116 for mortgages and Arts. 3117 - 3130 for antichresis.**

**d. Distinction between insurance, warranties and suretyships.**

**i. Insurance is an independent contract between the insurer and the client to cover the insurable interests of the insured or a third party for whose befit the contract is concluded; whereas a suretyship is a subsidiary contract the validity of which by and large depends on the validity of the main contract.**

**ii. Warranty is just a term in a contract between the parties to it that would provide an additional protection for the performance of the contract; while in suretyship the additional protection is provided by another contract that brings in the surety to the relationship.**

**e. Suretyship is thus an undertaking whereby a person obligates himself to stand for the debt of another in the event of the latter's failure to**

**pay. In the words of M. Pothier, the 18th Century jurist whose ideas were largely incorporated in the 1804 *Code Civil* of France, suretyship is :**

> ***a contract, by which a person obliges himself on behalf of a debtor to a creditor, for the payment of the whole, or part of what is due from such debtor, and by way of accession to his obligations.***

**f. The undertaking assumes <u>two obligations</u> and <u>three parties</u> (a triangular K). The <u>primary obligation</u> is the one between the creditor and the principal debtor, while the <u>secondary one</u> is that between the creditor and the surety. The parties are the <u>creditor, the principal debtor and the surety</u>.**

**g. <u>The source</u> of the principal obligation may be contractual or extra-contractual while that of the suretyship is always contractual. The Difference between <u>suretyship and bail bond</u> in criminal law is also an issue to take note of.**

**h. The law of suretyship thus attempts to provide answers to such questions as <u>for whom, in whose favor, for what kinds of obligations and in what manner</u> the contract of suretyship is to be concluded. It also regulates the relationship between the creditor and the surety, the surety and the principal debtor and relations between several sureties, if there are any.**

**i. The Civil Code makes use of the terms <u>suretyship and personal guarantee interchangeably</u>, while there are some differences between the two in other legal**

**systems. At common law, for example, the surety is jointly and severally liable with the principal debtor while a guarantor is one who is secondarily liable in the event of default of the principal debtor.**

## II. MAIN FEATURES OF SURETYSHIP

a. **Suretyship is a benefactory contract. The surety does not normally require consideration from the principal debtor. The fact that a surety may be given with or without the consent or the knowledge of the principal debtor (Art. 1921) is an indication of this fact. But the surety and the principal debtor may, at their pleasure, agree to provide some kind of consideration for the surety although such agreements do not in any way affect the right of the creditor against the surety. Such agreements create two separate rights in favor of the surety.**
    i. **To claim from the debtor what he has paid to the creditor.**
    ii. **To claim the value of the consideration for the surety.**

b. **Suretyship is an accessory obligation. Its existence and validity is dependant on the existence and validity of the main contract. (Arts. 1923/1 and 1926/1). The extinction in any form of the primary obligation extinguishes the obligation contained in the suretyship. There are, however, exceptions to this general rule where the primary obligation is voidable as is the case under Arts. 1923/3 and 1926/6.**

c. **It is required to be clear and unequivocal as the obligation of suretyship is not presumed. This shows that the standard of proof in the event of surety is much stronger than other forms of contract. It shall also be made in writing, express and should not be meant to go beyond the contractual limit which again is necessary to be stated in the contract. (Arts. 1922, 1725/a and 2003). At Common Law too, suretyship is a form of obligation required by the Statutes of Frauds to be made in special form. It is what is termed as "a special promise to answer for the debt, default or miscarriage of another person".**

d. **Suretyship is an obligation that is not more onerous than the primary obligation. It should not be made on terms that are more burdensome than the latter. Where such is so, the excess is reduced to the limit of the primary obligation. After the making of the contract, the creditor and the principal debtor may not conclude a contract that would increase the liability of the surety. Even the time agreed for performance of the obligation may not be changed or elongated without the express consent of the surety. (Arts. 1924 and 1928)**

e. **Suretyship pertains to a specified amount of obligation. It is invalid unless such amount is clearly stated in the instrument that created the surety. Even if it is given for future or conditional obligations, it is of no effect unless the maximum amount of the surety is expressly stipulated. If the time for the duration of the liability is not stated in the contract, the surety**

**may bring an end to his obligation so long as performance of the obligation is not due. (Arts. 1922/3 and 1925).**

**f. Suretyship is <u>an undertaking specifically given by the surety to the creditor</u>. No other person may avail himself of this right unless the creditor has validly assigned the same to this third person. (Art. 1920)**

## III. <u>RELATIONS BETWEEN THE CREDITOR AND THE SURETY</u>

**a. <u>Traditional defenses.</u> The surety may invoke all the defenses that are personal to the principal debtor such as statute of limitation, benefit of time, payment, nullity of the primary obligation, notice and remission of debt made in favor of the debtor. He may also invoke grounds that would make the very suretyship null and void. These are known as <u>traditional defenses.</u> See Arts. 1923, 1926 and 1927.**

**b. <u>The benefit of discussion (*beneficium ordinis seu excussionis)*</u> (Arts. 1934 -1937)**

- **i. The surety may require the creditor to first proceed against the debtor prior to resorting to him.**
- **ii. The right to the defense of benefit of discussion is, however, a matter that requires to be pleaded by the surety as he is proceeded against. If it is not invoked at the time of the suit, it is deemed waived. (Art. 1935) This is similar to points of preliminary objection under Art. 244 of the C.P.C.**

iii. **Surety is also required to <u>adequately describe</u> the assets of the principal debtor against which the creditor may take actions. The assets to be discussed are likewise required to be unencumbered by other creditors and not to be out side the judicial jurisdiction of the court. In addition, the surety is duty bound to advance sufficient money to <u>cover the cost of the discussion</u>.(Art. 1936)**

iv. **The two advantages of discussion. (Art. 1937)**
   1. **Deferral of judgment against the surety.**
   2. **Failure by the creditor to adequately describe the assets of the principal debtor is within the risk of the creditor.**

c. **<u>The benefit of division *(beneficium divisionis*</u>). Art. 1951.**

i. **Benefit of division presupposes the existence of <u>several sureties</u> for the same obligation and to the same debtor. It is applicable when one of the sureties is sued for the whole or more than a pro rata share of the primary obligation.**

ii. **The surety who is proceeded against may require the creditor to divide his share of the debt. Each individual surety is a principal debtor to his share and a guarantor to the individual shares of the other co-sureties. But only in the case of insolvency of another surety may a surety be obliged to cover the share of that other surety.**

iii. **In short, the plea of benefit of division converts the liability of the co-sureties from several to pro-rata.**
iv. **Of course, even in the case of several sureties, any one of them may always avail himself of the defense of benefit of discussion.**
v. **The defense of benefit of discussion is only <u>dilatory as it simply postpones</u> the action of the creditor, whereas that of benefit of division is <u>preemptory</u> as it determines the extent of liability of the surety.**

d. **<u>Summons to proceed. Art. 1938</u>**
   i. **This pertains to the right of the surety to demand the creditor to bring an action against the principal debtor where the obligation falls due.**
   ii. **The time limit for so doing under the Civ. C. is six weeks following the notice reminding the creditor to proceed against the debtor.**
   iii. **The surety shall be absolved of any liability arising out of his obligation if the creditor fails to do so, or if he fails to continue the proceedings with due diligence.**
   iv. **The rule is meant to protect the surety against collusion between the creditor and the principal debtor or against recklessness by the creditor.**

e. **<u>Tender of payment. Art. 1939</u>**
   i. **Where the debt is due, the surety may require the creditor to accept performance and/or payment.**

ii. **In so doing he may likewise require the creditor to hand him over all the documents and securities that would entitle him proceed against the principal debtor.**
iii. **Refusal by the creditor to do so may relieve the surety of any obligations to the former.**
iv. **This is a mechanism devised to protect the surety from further damages and costs resulting from procrastination of the creditor.**

## IV. RELATIONS BETWEEN THE PRINCIPAL DEBTOR AND THE SURETY.

a. **The right to indemnification by the principal debtor. Art. 1940. Normally a surety is one who pays for another and, as such, he has the right to get back what he pays from that other. Once the creditor is paid, the surety becomes the new creditor on the same debtor.**

b. **Scope of indemnification. The surety's rights extend to the principal debt, the interest thereon and the costs incurred thereto, in addition to whatever damages he has sustained on account of the debtor's failure to live up to his expectations. Arts. 1940(2)(3) and 1941.**

c. **Benefit of subrogation (Arts. 1944 and 1945). The surety steps into the rights of the principal debtor upon payment since his doing so extinguishes the contractual relationship between the creditor and the principal debtor. Another important point to take note of is the**

**fact that the benefit may not be contracted away in advance. The benefit of subrogation here is that of legal and not conventional.**

d. **Creditor is also bound to hand over all securities and documents of title to the surety under pain of loss of his right against the latter.**

e. **Distinction between a direct (chirographic) action (Art. 1940) and the benefit of subrogation (Art. 1944) in so far as they relate to the surety's right to indemnification.**
   i. **The direct action only entitles the surety to claim from the principal debtor.**
   ii. **Subrogation, however, goes beyond that and enables the surety to realize the security interests the creditor has over movables or immovables that were employed to secure the debt. Whether or not these securities belong to the principal debtor is immaterial.**

f. **When there exist several principal debtors in solido, he who became a surety to them has his remedy against each of them to the tune of the entire claim.**

g. **Second payment. (Art. 1943). Whenever the surety makes payment to the creditor, he is required to inform the principal debtor of this fact. Failure to do so may deprive him of his right of indemnification in the event the debtor settles accounts with the creditor without any prior knowledge of this payment. But the surety may demand reimbursement from the**

**creditor for the simple reason that one cannot be paid twice.**

h. **Failure by the surety to deliberately raise <u>defenses of the principal debtor</u> may result in the loss of the surety's indemnity claim. Such are what are known as <u>traditional defenses</u> of nullity, payment and extinction of obligations. (Arts. 1942 1nd 1926/3)**

i. **Rights of surety against the principal debtor <u>before payment</u>. These are known as anticipatory recourses of the surety. (Arts. 1948 and 1928)**
   i. **Where the creditor has served notice on the debtor.**
   ii. **Where the debtor is declared bankrupt.**
   iii. **Where the obligations of the surety are likely to become more onerous on account of financial losses suffered by the principal debtor.**
   iv. **Extension of the time given to the debtor by the creditor without the agreement of the surety.**

## V. <u>RELATIONS AMONG CO-SURETIES. Art. 1951</u>

a. **Co-sureties are persons who guarantee <u>the same debtor/debtors to the same debt.</u>**

b. **<u>Benefit of contribution.</u> One of several co-sureties who has paid the whole debt, despite his right to invoke the defense of benefit of division against the creditor, has the right to resort to the other co-sureties for contribution in as much as a co-debtor who has paid over and above his share of the debt to the creditor**

**does. Such a co-debtor need not bring an action against the principal debtor before proceeding against the other co-sureties.**

c. **The fact that the suretyship is made <u>in one instrument</u> or not does not have any bearing in as far as the rights of the paying co-surety is concerned.**

d. **Unless there is an agreement to the contrary between the co-sureties, the shares of co-sureties are presumed to be equal.**

e. **A paying surety is duty bound to raise all defenses that would absolve the principal debtor of his liability under the contract under pain of losing his right to demand contribution from the other co-sureties in as much the same manner as he loses his right of indemnity in his relations with the principal debtor.**

f. **Distinction between the <u>counter-surety and the secondary surety</u>. Arts. 1949 and 1950.**
    i. **A counter-surety covers the risk of the surety, but he does not have any legal relationship with the creditor. His responsibility is to cover the damage caused to the surety on account of failure by the principal debtor to discharge his obligations. Where both the surety and the principal debtor cannot pay, the creditor does not have any recourse with the counter-surety.**
    ii. **A secondary surety is, however, liable to the creditor should the surety and the debtor fail to discharge their obligation. He is the last person in the line of**

**responsibility to the debtor. First the principal debtor; then the surety, and finally the counter surety.**

iii. **How may a counter-surety and a secondary surety exercise their right of indemnification?**

## VI. OTHER ISSUES IN RELATION TO SURETYSHIP

### a. Joint surety.

i. **Unless the agreement of suretyship expressly provides otherwise, suretyship under Ethiopian law is always simple. There is no presumption of solidarity between a principal debtor and a surety. Arts. 1934 and 1935.**

ii. **A joint surety, once this is established, is jointly and severally liable to the creditor. For this main reason, he can invoke neither the benefit of discussion nor that of division when he is proceeded against by the creditor.**

iii. **But when it comes to contribution, unlike co-debtors bound in solido, the ultimate responsibility of payment rests on the principal debtor. The joint debtor has all the legal backing to step into the rights of the creditor, including that of the benefit of subrogation, when he proceeds against the principal debtor.**

### b. Extinction of suretyship.

i. **The full performance by the principal debtor of his obligations is the most**

**important ground for extinction of suretyship. Arts. 1926(1) and 1927.**

ii. **Acceptance by the creditor immovables from the debtor liberates the surety even if the creditor is evicted afterwards.**

iii. **A suretyship may come to an end on grounds that are applicable to <u>extinction</u> of contractual obligations.**

# OBJECTS OF CONTRACTS

*Tilahun Teshome (Prof.)*

## I. PRELIMINARY POINTS

a. **The doctrine of freedom of K has it that parties have full measure of autonomy to determine the subject matter of their K. This is only subject to limited exceptions imposed by the law in consideration of the general public interest. See Civ. C. Art. 1711.**

b. **Questions such as: With whom to conclude a K? How to conclude? What its terms and conditions may be? In what ways should the obligations be performed? What additional means of guaranteeing performance should be ensured? What civil sanctions should be imposed on a recalcitrant? What form should communications of the parties assume? In what ways may disputes stemming from the K be resolved? And similar others are, by and large, left for the parties to regulate.**

c. **The purpose of the law is to lay down general guidelines that are meant to help parties when they contemplate of concluding Ks. The provisions of the law are mostly permissive in nature in the sense that they can be derogated from by the parties.**

d. **Some of these provisions are the ones that we find under Chapter Four of Title Twelve of the Code (Arts. 1857 – 1895), with separate sections on Terms, on Conditions, on Alternative Obligations, on Earnest and on Provisions as to Liability.**

## II. TERMS IN CONTRACTS (Arts. 1857 -1868)

a. **Terms of contract relate to the time span in which parties bound themselves to perform their obligations under a K. Term is thus generally a space of time granted to the debtor to perform his obligations.**

b. **It goes without saying that a K'ual obligation can be assumed with or without a term for discharging it. In most Ks that we conclude in our day-to-day lives, without even having the knowledge that we are doing so, the obligations of the parties are discharged simultaneously.**

c. **Where there is no term, both parties carry out their obligations when the transaction takes place. When there is a term, though, he who has not discharged his obligation fully or in part at the time of conclusion of the contract may avail himself of the benefit of time stipulated in the K. (Art. 1865) Either of the parties may be beneficiaries of term, depending on the level of performance of each one's obligations. Under exceptional circumstances, even the creditor may benefit from time. See Art. 1867.**

d. **Waiver of benefit of time. The debtor may perform the K even before the time set for so doing runs unless the K compels him not to do so in the interest of the creditor. But he cannot be forced to discharge it so long as his**

**obligation has not matured. Art. 1866. Payment made before the date stated in the K is not recoverable by the paying debtor since it brings an end to the K.**

**e. A term may be <u>express or implied</u>.**

**i. It is <u>express</u> when a clear stipulation to that effect is made in the instrument in which the K is drawn up.**

**ii. It is <u>implied</u> when the nature of the obligation assumed by one party or both is such that it requires a fairly reasonable time for its consummation.**

**f. A term may likewise be either <u>of right</u> or <u>of grace</u>.**

**i. It is <u>a term of right</u> when it is agreed that the contract will be carried out within a specified period of time.**

**ii. It is <u>a term of grace</u> when a creditor, the law or a judge gives the debtor additional time to discharge his obligations. See, for example, Civ. C. Art. 1770.**

**g. Insolvency of the debtor or other inappropriate acts committed by him may bring an end to his right to benefit from time.**

**h. For the different modes of computation of contract time see Arts. 1852 -1863.**

## III. <u>CONDITIONAL CONTRACTS</u>

**a. In the ordinary course of events, a conditional obligation is one the performance of which depends on the occurrence (<u>positive condition</u>) or the non-occurrence (<u>negative condition</u>) of**

**an uncertain event that is beyond the control of the parties. (Arts. 1869).**

**b. To constitute a condition, the fact must be future and uncertain. Uncertainty of the condition should not also be subject to the will of the parties to make it happen or to prevent its happening. If so it becomes potestive, or unbalanced, and nullifies the agreement on the condition and, at times, the K itself. (Art. 1879) See also the provisions of Arts. 916 – 919 for suspensive and resolutive conditions in a testamentary legacy.**

**c. As in all other aspects of K'ual objects, the condition should likewise be lawful, possible and should stand the society's test of morality. (Art. 1878).**

**d. Conditions are classified as conditions precedent and conditions subsequent under the Civil Code.**

**i. In a condition precedent, the condition must precede in order for the obligation to be performed. Condition precedent is also called suspensive condition since performance of the contract is suspended until such time that the uncertain event materializes. (Art. 1871) It is a condition that should be met to the vesting of any liability on the other party to perform his part of the K'ual obligation.**

**ii. In a condition precedent, the condition brings an end to the validity of the contract. Obligation is valid only until the occurrence or otherwise of the stipulated**

**condition. It is sometimes referred to as a <u>resolutive condition</u> as its occurrence or non-occurrence halts performance, thereby extinguishing the obligation. (Art. 1872). It is some fact or event other than performance itself which the K provides shall relieve a debtor of his obligation.**

**e. The place of good faith in conditional contracts. (Arts. 1870 and 1873). As conditions in a contract are treated as uncertain and future events, parties should not prevent the occurrence or otherwise of the events contemplated therein. Nor should they be responsible for their materialization. The party who does so will be responsible for the damages that the other party sustains as a result. Insurance contracts are typical examples in this regard.**

**f. Acts of management and acts beyond management. (Arts. 1874 and 1875). Unless done in good faith, such acts remain valid even if they are done prior to the occurrence of the condition.**

**IV. <u>ALTERNATIVE OBLIGATIONS</u> (Arts. 1880 – 1882)**

**a. Alternative obligations envisage situations in which the debtor may perform any one of several obligations. Unless the contract provides otherwise or the debtor himself waives this right, the choice is always left for him. Performance of any of them relives him of his responsibility in the contract.**

**b. But debtor cannot perform part of this and part of that obligation.**

**c. It can also be stipulated that the choice is to be made by the creditor or by a third party for whose benefit the contract is concluded. In that case, the creditor or the third party beneficiary has the same right the law accords on the debtor.**

**d. Where performance of one of the obligations is impossible, the debtor may perform the other unless he is at fault in which case the other party may claim damages for losses that he suffers as a result.**

## V. EARNEST (Arts. 1883 -1885)

**a. Although the law does not clearly provide that, earnest is a sum of money paid by a buyer to a seller to show his seriousness to consummate the transaction.**

**b. If the contract is concluded as earlier agreed, the earnest money is considered as part of the price.**

**c. But in K with earnest any one the parties may bring an end to it. The party who paid the money may do so by forfeiting the earnest sum to the recipient and the party who received the money may similarly do so by giving double the earnest sum to the payer. This is what differentiates earnest from a down payment. In the latter case, the K cannot be cancelled unless there are justifiable grounds for so doing.**

# LECTURE NOTES ON THE LAW OF CONTRACTS ON THIRD PARTIES IN RELATION TO CONTRACTS

*Tilahun Teshome (Prof.)*

## I. THE PRINICIPLE OF RELATIVITY OF CONTRACTS.

a. **In the ordinary course events, Ks produce rights and obligations only on those who consented to their making. See Civ. C. Arts. 1675, 1731 and 1952. The classical theory of privity of contracts has it that a person not in privity (a party) could not sue or be sued on a K. It was thus held that no one may be entitled to or be bound by a K to which he is not an original party.**

b. **For practical reasons, however, this principle is subject to quite a good number of exceptions. Economic necessities, expediency of commercial interactions and societal needs in general may make it incumbent for the law to provide leeway for circumstances that give rise for strangers to be attracted to a K. these strangers are those whom the law refers to as third parties.**

c. **With this in view, the Civil Code recognizes several incidences in which third parties may be brought to and thereby assume rights and obligations that arose under a K in which they did not take part. The following are the most notable ones.**

## II. PROMISE FOR ANOTHER. (Civ. C. Arts. 1953 – 1956)

a. **This is an age old Roman law concept whose practical application is on the decline in modern business. Most major international contract instruments do not have much to say on it. But parties may make K'ual arrangements similar to these rules at their pleasure.**

b. **The Civil Code considers the problem in the following two ways:**
   i. **Declaration of command, Arts. 1953 and 1954.**
   ii. **Promise for third party, Arts. 1955 and 1956.**

c. **In both cases, the Ks are concluded for and on behalf of third parties. In a declaration of command, one of the parties may reveal that he will bring in some one to the K within an agreed period of time after which that third party shall become the real contracting party and assume all the rights and obligations therein. If the other party agrees to this condition, the K is concluded. The responsibility of the person declaring the command is to bring in the named third party to the K within the agreed time. In that case, he will be relieved of all his obligations in the K. If he fails to do so, he will continue as though he were the real K'ing party.**

d. **In promise for third party, the promisor undertakes to do or to refrain from doing an act on behalf a third party. If the third party**

**ratifies the undertaking, the promisor is relieved of his obligations. If not, the promisor either continues in the K as if he were its party or the K may be cancelled subject to the promisor's liability to make damages good to the other K'ing party. The promisor is considered as the agent of the third party if that third party ratifies the promise.**

## III. CONTRACTS FOR THE BENEFIT OF THIRD PARTIES.

a. **Where there is an agreement in a K that one of the parties shall perform a defined obligation to a non-contracting party designated therein, it is said that the contract is one made for the benefit of a third party. (Civ. C. Art. 1957) Under such a scenario, three parties are involved.**
   i. **The person assuming to perform the obligation, i.e. the debtor.**
   ii. **The one who agrees that his part of the right shall be performed in favor of another person, i.e. the stipulator.**
   iii. **The one in whose favor the obligation is to be discharged, i.e. the third party beneficiary.**

b. **Relative rights and obligations of the three parties:**
   i. **The stipulator. (Art. 1958)**
      1. **He is originally the creditor in the K and remains so until the third party beneficiary unequivocally accepts the benefit of stipulation.**
      2. **He may subject the benefit of stipulation to the choice of the third**

party or deprive the latter of the same.

3. He may require the debtor (promisor) to perform the K for him as long as the latter has not done so for the third party beneficiary.
4. He may designate another beneficiary in place of the original one.
5. He may reduce the benefit of stipulation or designate another to share the benefit of stipulation.
6. But this may be qualified by a separate agreement.
7. He cannot change his mind after the benefit is accepted by third party.

ii. The third party beneficiary. (Arts. 1959 and 1960)

1. He has the right to accept or to renounce the benefit of stipulation.
2. He steps into the rights of the stipulator to the extent of the scope of right stipulated in his favor.
3. He may require the heirs of the stipulator to abide by the benefit of stipulation if it is to be performed upon the death of the stipulator.

iii. The debtor. (Art. 1961)

1. He is liable to the third party beneficiary, upon the latter's acceptance of the benefit, to the tune of the stipulation.
2. He may refuse to tender performance if the stipulator withdraws the benefit that was not subjected to acceptance by the beneficiary.
3. He may not raise defenses of personal nature which he has against the

**stipulator once the beneficiary accepts the stipulation.**

4. **He may, of course, set up personal defenses that he has against the beneficiary.**

**c. Consideration and the stipulation for the benefit of third parties.**

**i. Donee beneficiaries**

**ii. Creditor beneficiaries**