

The fundamental source of obligation can be classified into two:

a) Contract

b) Beyond the contract: divided into **unjust enrichment** (quasi-contract), **unlawful acts** (delict)

& causing physical injury to the person or causing damage to property of person (quasidelict). (

Tort)

Types of Obligations: Obligations can be classified based on the nature of activities, and

the number of parties legally bound by the obligation.

Divisible obligation

Indivisible obligations

Positive obligation ; person's obligation is to do or to give some thing to another.

Negative obligation; obligations not to do

Based on the number of parties legally bound, obligations can be classified into;

Unilateral obligation; only one of the parties is legally bound by the contract while

two parties are participate in the contract Example, donations

Bilateral obligation arises from a contract entered into by two parties in which these

contracting parties are bound legally to each other on equal terms.

Multilateral obligation; more than two persons undertake to perform an obligation.

Such obligations can be classified into three:

1) Simple joint obligation; parties who are bound by such obligation are not jointly

liable for the total debts, but each debtor is liable for its own share with the exception of Art.1917 (indivisibility).

2) Joint obligations; debtors are jointly liable

3) Several and joint obligations; the co-debtors shall be jointly and severally liable

unlike joint obligation where the debtors are jointly obliged. In several and joint

obligation, the creditor may require all the debtors or one of them to discharge the

obligation in whole or in part.

Contract law is the most important which creates smooth functioning of business transaction by

creating certainty, predictability, and enforceability.

The law, under Art.1677 (1), also stipulate that the relevant provision of the Civil Code, Book IV

title XII, shall apply to obligations notwithstanding that they do not arise out of contract.

Accordingly, contract law may be applicable to extra-contractual obligations, unlawful enrichment obligation and so on. However, the scope of application of this law does not affect the special provisions applicable to certain obligations by reason of their origin or nature (Art. 1677(2)).

The basic economic function of contract law is to provide sanction for reneging, which, is in the absence of sanctions, sometimes tempting where the parties' performance is not simultaneous.

the basic function of contract law to provide a sanction for breach of promises. Otherwise, people would be reluctant to enter into contracts and the process of economic exchange would be retarded. An important function of contract law is also to enforce the parties' agreed upon allocation of risk.

A related function is to reduce the costs of the exchange process by supplying a standard set of risk allocation terms for use by contracting parties. If the parties are satisfied with the way in which the rules allocate the risk of that contingency, they have no need to incur the expense of writing their own risk allocation rule in to the contract

CHAPTER TWO

FORMATION OF CONTRACTS

Consent is a declaration of intention to be bound by an obligation. Consent is a declaration of intention to be bound by an obligation. Art.1679 the parties have to agree to be bound. Mere domestic or social agreements are not usually intended to be binding and, therefore, are not contracts.

A binding contract is usually in the nature of a commercial bargain, involving some exchange of goods or service for a price. Thus, in commercial agreements, there is a rebuttable presumption that a contract is intended but in social or domestic or family agreements there is a rebuttable presumption that no contract is intended.

Generally, the mere existence of agreement to be bound by defined obligation does not necessarily make Contract. It is necessary to identify whether the parties intended only moral obligation or

legal obligation, if parties agree to be bound morally only, the agreement is not a contract since it cannot be enforced by state backing. For a contract to exist parties must agree that any violation of the obligation would be punished by using state machinery. Therefore; the phrase "...**agrees to be bound thereby**..." in Art. 1679 implies the parties' intention to take any controversies in relation to obligation to court thereby allowing the court to interfere in their relation.

Meeting of Mind (Art.1680)

Contract occurs when the minds of the offeror and offeree meet upon common object of the contract. This meeting of mind is called *consensus ad idem* i.e. consent to the matter.

The person is bound whatever his real intention may be if a reasonable man would believe that he was assenting to the terms proposed by other party and upon such belief he enters into a contract with him. Parties are to be judged not by what is in their mind but by what they have said, written or done. So nobody could be bound by an intention (estate of mind) which is not included in the offer or acceptance i.e. a person cannot claim to avoid a contract by citing reservations or restrictions that has not been made clear to the other party through offer or acceptance (Art 1680(2)).

ELEMENTS OF CONTRACT

A) Capacity: Minors and judicially interdicted (Insane & infirm) persons cannot enter into a contract. However; when a legally interdicted person enters into a contract which he was prohibited from such is not limited to incapacity but also extends to illegality as per Art 1716. The same holds true for special incapacities indicated under Art. 194.

B) Consent: (Art.1679-1710) /Remark; it will be discussed below/

C) Object: Object of a contract is what parties have actually agreed to undertake. It is the obligation of both parties to the contract. Object of contract differs from subject matter of contract. For example In contract of sale of house; the obligation of the seller is to transfer ownership and possession to the buyer and the obligation of the buyer is to pay

price. the house is subject of the contract. Moreover; object of contract differs from
penalty clauses of contract (see Art. 1886-1895).

D) Form: if any (**Art 1719 - 1730**): contract may exist either in written form or oral form.

Limitation of freedom of form means denying the parties the option to make their
contract orally.

The reason for such limitation may be;

Evidentiary value

Recalling content of contract

Indication of intention to create legal relation: If a contract is made in writing,

there remains little doubt that there was no intention to be bound. If a contract is

to be made in writing, a party thinks twice before he gives his final consent to be

bound. Firstly, the person thinks to give consent and secondly he thinks when he

is required to sign

The following contract shall be made in writing

A/ contracts required by the law to be made in writing:

Contract relating to immovable: - all contracts that affect a right on an immovable

except lease must be made in writing. In a case Rented Houses

Administration Agency

vs. Sosina Asfaw in a file No15992 presented on Hamle 19, 1997 to it the Federal

Supreme Court Cassation Division ruled that renting house need not be made in writing.

Contract with public administration (Art 1724): Any contract to which a government

agency is a party, including any type of employment contract, should be made in writing.

Contract of guarantee (Art 1725 (a))

Contract of insurance (Art 1725 (b))

Contract of marriage

Partnership contract

Pledge for a loan exceeding 500 birr (Art 2828 (2))

Sale and mortgage of business (Art 152, 177 (2) comm. code)

Promise of sale and preemptions (Art 1412)

Agreement prohibiting assignment or attachment of a certain thing (Art 1430)

B/ contracts required to be made in writing by the parties, Art 1726.

C/ Preliminary contract (Art 1721): a contract that intends to lead to another contract shall be

made in writing if the contract to which it leads is required to be made in writing either by the law or the parties. The best example is agency contract. If the agent's power is to enter into a contract in writing he should be conferred with such power in writing (Art 2200(1)).

D/ Variation of contract made in writing (Art 1722).

N.B The law provides form for creation and variation of a contract but it is silent about form for extinguishing a contract. However, these writers are of the opinion that when parties intend to extinguish contractual obligation that exists between them, they shall make the extinguishing contract in special form if the contract to be extinguished was made in special form.

Effects of form: When the parties or the law requires the contract to be made in writing, failure to comply with such requirement make the contract a mere draft (Art. 1720). The contract never exists until the formality requirement is fulfilled. However, failure to pay stamp duty or registration fee never affects the effect of the contract (Art. 1720(1)). Some contracts need to be registered. Such registration is normally intended to make third parties to be aware of the existence of such contract. Registration may also be intended to have deposited documents in a relevant place. Therefore, such registration does not have any relationship with form of the contract. That means even if the legal requirement of registration has not been fulfilled, the contract can still be enforced between parties. Registration can affect the validity of contract only when the law expressly states that failure to register the contract shall make the contract non-existent (Art.1720 (3)). However, it is expressly provided that mortgage contract and partnership agreement do not produce any legal effect if they are not registered (Art 3052 and art 177(2), Art 222 commercial code). The person who arbitrarily abandons his offer or acceptance may be extra contractually liable (Art. 2055).

In short, written form for Ethiopian contract law means any special document containing content of a contract signed by parties to the contract and at least two witnesses, Art.1727.

Consent: (Art.1679-1710)

Consent is expressed either in the form of offer or acceptance. Offer and acceptance are ways of

communicating one's own intention to be bound by an obligation.

Communication of offer / &

acceptance can be done through different means of communications; **oral,**

written, conduct (when

the offeror performs partly or wholly the obligation that he will perform if the contract is entered

into.) & **signal** (gesture and object placed to give information).

Offer: In short offer contains three important elements, the content of the contract, the agreement

of an offeror to be bound and request of the offeror to the offeree to be bound by the offer. The

offeror may choose the ways that the offeree shall use to give a response (Art. 1681(2)). In

principle, an offer is binding on the offeror only if it is addressed to a specified person (Art 1687-

1688). The person may want to advertise his product or service without any intention to be

bound by the content of the advertisement (declaration of intention, but not offer). If a person

"does not make his intention known to the beneficiary of the declaration" such declaration shall

not be taken as an offer (Art 1687(a)).

The following declarations of intention are not offer but advertisement:

Sending price lists or tariffs (Art 1687 (b)); the price list or tariff may be sent to specified

address or a specified person but still such act should not be taken as an offer because of the

following reasons; *it never indicates the intention to be bound, Price list/ tariff never indicate*

all terms of the contract, Customarily sending of price list/ tariff is taken as an advertisement,

The price list/tariff might have sent to many creating the problem of multiple acceptance.

Posting up price list/tariff and catalogue in a public place: if it is considered as offer there

would be multiple acceptances. Example; Vacancy announcement.

Display of goods for sale to the public: Almost all sales are sale at open market. Every

person passing by can have a look at the goods and can easily infer that the goods are ready

for sale. But there may be multiple acceptance and the content of the contract is also

incomplete such as performance date and place and quantity.

Sale by Auction (Art.1688): It is inviting possible offeror to come and make an offer. Many

may come and make an offer and the person who invited such offer may freely determine

which to accept there by rejecting others.

Public Promise of Reward (Art 1689): As stated above, a declaration of intention to be bound

by specified obligation becomes an offer only if it is addressed to an identified person. An

exception to this principle is **public promise of reward**. If a promise of reward is to a specified

person or group of persons it becomes an **ordinary offer** if it is made to be known to such a

specified person or group of persons. In short, a public promise of reward is special offer.

Effects of Offer (Art.1690, 1691, 1693(1), 2055)

An offer cannot be changed by the offeror for unjustified reason. An Offeror who changes his

offer partially or totally is liable for any material damage on the offeree.

The offeror can freely change the content of his offer or totally withdraw it before it reaches the

offeree (Art 1693(1). The offeror can make his offer not to reach the offeree by informing the

offeree that change has been made to the content of the offer or that it has been withdrawn. This

has to reach the offeree before he receives the offer or at latest before the offeree takes decision

that affects his material interest on the assumption of the offer (Art 1693).

This means an offer

may be withdrawn or modified as far as the offeree has not incurred expenses with a view to

concluding a contract with the offeror. So what is crucial is not the time when the offeree

received the offer but the decision he has taken due to his knowledge of the offer. The offeror

can change or withdraw his offer at any time before the other takes decision that affects his

interest.

How Long does the Offer Bind? The offeror may himself determine how long the offer remains

binding. In case the offeror fails to fix time limit for acceptance, the offer remains binding for

reasonable period only (Art 1691). Reasonable period indicates the time that the offeree needs

to understand the offer and decide to accept or reject it. if the acceptance reaches the offeror after expiry of reasonable period the offeror has a duty to inform the offeree the lateness of the acceptance by using the speediest medium of communication available. if the offeror fails to reject the acceptance immediately the offeree has the right to claim that the acceptance was given within reasonable period and hence contract was concluded (Art 1691(2). The third ground that terminates the effect of an offer is the offeree's rejection of the offer (Art 1690(2). Offer is deemed to be rejected "where acceptance is made with reservation or does not exactly conform to the term of acceptance"

Acceptance (Art 1681-1685, 1689(1), 1694) (1893(3))

it is a declaration of intention to be bound by each and every contents of an offer.

Duty to Respond (Art. 1682 -1685): The offeree does not have a duty to give response to the proposal of the offeror.

However, in the following cases the offeree has a duty to respond a "no" answer if he does not want to be bound by an offer, otherwise his silence may be taken as a sign of acceptance by the offeror.

Duty to accept: The literal meaning of Art.1683 is that once offer is made, acceptance is automatic. Sub Article 1 declares that when a party is bound by law or concession to accept "no acceptance shall be required". This is further strengthened by sub - art 2 which states that "the contracts shall be complete upon the receipt the offer" thereby implying that the offeror can claim performance of the contract once the offer is delivered to the offeree.

However; such interpretation seems to be illogical for the following reasons:***Contract depends***

on agreement of contracting parties, The offeree may lack resource to accept the contract, The offeree may have legal or contractual or legal authority to streamline offerors (when offerors are many, Ethiopian Electric Power Corporation give priority to investors), ***The offeree can refuse to perform his contractual or legal obligation***

Therefore Article 1683 should be understood as imposing an obligation to respond to an offer.

Such conclusion is in line with Art. 1682 and 1684 i.e. Art 1683 is an exception to the right to remain silent. So Art.1683 should be amended as follows.

Art. 1683-2 Duty to Accept

Where an offeree has legal or contractual duty to accept an offer the offer shall be deemed to have been accepted unless the offeree rejects the offer within time specified in the offer or where no time is specified within reasonable period.

Preexisting Contractual Relation Silence may also amount to acceptance
Effect of Acceptance

In general, it can be inferred from Art 1679 and 1693(2) that once an offer is accepted the offeree

is bound by his word. What is “the moment at which acceptance begins to be binding.” Art

1692(1) of the code has answer for this. It provides that acceptance becomes effective from the

moment the offeree sends it to the offeror. However; the acceptance must reach the offeror or his

heirs before expiry of time limit specified in the offer (Art. 1690) or reasonable per (Art.1691

(1). In short acceptance begins to produce effect from the moment the offeree sends it to the

offeror provided it reaches the offeror within time specified under Art. 1690(1) or 1691(2). The

offeree may abort the contract by withdrawing his acceptance (Art.1693 (2)). He can freely

withdraw his acceptance before the offeror knows such acceptance through the medium the

offeree uses to communicate the acceptance to him i.e. if the offeror knows the acceptance

earlier than the offeree expects from a friend or other sources; the offeree can still withdraw his

acceptance regardless of the knowledge of the offeror.

General Terms of Business No party can be assumed to be bound by general terms of business

which he did not agree to be bound with (Art 1685). To be bound by an obligation one has to

know it and agree to be bound (Art 1679). So any annexes to main contract never bind a party

who has not known its content and not agreed to be bound. Knowledge about the existence of the

annex is not enough.

Defect in Consent (Art 1696 - 1710)

If the consent expressed in the form of offer and acceptance does not indicate what the offeree or the offeror really intended then there exists defect in consent. The cause of defect in consent is either wrong information (mistake, false statement, fraud) or threat (duress, reverential fear, threat to exercise rights) or lesion. Defect in consent may be a cause for invalidation of contract (Art 1696). However, the existence of defect in consent does not necessarily lead to the invalidation of contract. Firstly defect in consent can invalidate a contract only if a party who agreed to be bound because of information or threat demands invalidation (Art 1808). Secondly in some cases the party whose consent was defective may not be entitled to claim invalidation (1708, 1709, and 1710).

Defect of Consent due to Wrong Information

Mistake, fraud, and false statements may lead an offeror or offeree to have wrong knowledge about the content of the contract. **Mistake** (Art 1996- 1703) is when a party makes misunderstanding on the content of the contract or on the identity of the other contracting party. One can invalidate or avoid his obligation on the basis of mistake if the following two conditions are cumulatively fulfilled (Art 1997, 1998).

A/ ***mistake must be fundamental*** (Art 1998) – A mistake is fundamental when a person misunderstands the object of the contract or the person with whom he has entered into the contract. the element of the contract which the parties deem to be fundamental is the object (rights & duties of parties to the contract) of the contract. In short a mistake is fundamental when it related to the **object** or **nature** of a contract or **identity** of the contracting parties. Nature of contract refers to types of contract. For example, a person intended sale contract but in fact entered into service contract, The law also attempts to indicate what “fundamental mistake” means by telling us non fundamental mistake (Art. 1701). Mistake of the motive of a party or arithmetic mistake are nonfundamental.

B/ ***the mistake must be decisive***: the mistake is decisive when the mistaken party proves that a rational person in his position would not have entered into such contract had it not been for the mistake (Art 1697). Art. 1697 also provides subjective criteria requiring him to establish that he would not have entered into the contract had he known the truth.

Good Faith of Mistaken Party (Art.1702) The party mistaken must be ready to be bound by the contract if the other party agrees to be bound as per the intention of the mistaken party.

Reparation (Art.1703) a mistaken party is not without liability. He is accountable for any damage that may be caused to the other party (Art 1703). So invalidation of contract on ground of mistake entails payment of damages. A mistaken party can escape such liability only if he proves that the others party knew or should have known such mistake (Art. 1703)

Fraud (Art 1704) Fraud is an intentional act of preparing false information or changing or modifying the content of the subject matter of the contract in a manner that cannot be noticeable by ordinary observation. Fraud does not mean telling untruth or for bearing from telling the truth it rather mean making things or document to give wrong information. Fraudulent act may be accompanied by false statement. Such act is done in order to obtain consent of a person to a contract.

A defrauded party can demand invalidation of contract where:

A/ ***the fraud led him to commit decisive error*** (Art 1704(1). Fraud is a way of making a person to have misunderstanding either about the content of the contract or identity of the other contracting or motive of entering into the contract. Here the error or mistake need not be fundamental. **It is enough if it is decisive.**

B/ ***the fraud was committed by the party to the contract or he knew or should have known the fraud or derived undue benefit.***

False statement (Art 1705) false statements is untrue statement made

A/ knowingly (intentionally) or

B/ without give being indifferent whether it be true or false (reckless) or

C/ negligently (Art 1705)

Misleading conducts or silence may also amount to false statement (Art 1705(2)). In principle telling a false statement cannot lead to invalidation of contract. However: false statement can be a ground for invalidation of contract where **A/ *there is a special relationship between the liar contracting party and the mistaken party.*** Here the special relation should be a legally recognized relation which creates duty to trust one another. But the duty to trust may be either legal or moral.

B) *Such special relationship led the mistaken party to believe the statements of the other party.*

False statement made by third party to the contract cannot be the cause of invalidation of contract.

Defect in Consent due to Threat (Art.1706-1709)

A person may be threatened physically or psychologically to make an offer or to accept an offer made to him. In such case the person is declaring his intention to be bound as an alternative means of avoiding the effect of the threat. In principle parties enter into a contract for purpose of deriving economic benefit but in case of threat, both or at least one of the party is entering into a contract to avoid a possible risk that has been directed against him, his relative, his property interest. So had it not been for the threat, the person would not have declared to be bound i.e. intention to be bound is lacking.

Duress (Art.1706 1707) Duress is warning the party that unless he enters into a certain contract certain harm will be done to him. One can raise duress as a cause of invalidation of contract if

the following conditions are cumulatively fulfilled:

There is a threat or warning to cause harm.

The harm is on the person himself, spouses or his ascendant or descendants

The harm is on person, life, property, and honor

The party believes that the harm will happen if he does not consent to the contract: For

example the fact that the pistol used to threaten a party was artificial does not matter; it is

enough if he believed that the pistol was the true one.

The threat should be serious: - the threat is said to be serious when the harm to be

caused is greater than the obligation that a party enters into

The harm is imminent that is the harm is going to happen soon and a party does not have time to think of another option to avoid the happening of the harm except by consenting to the contract.

The threat must impress a reasonable person.

Duress by third Party (Art.1707) Duress may be committed by contracting party or third party to the contract. The right of a party to claim invalidation is absolute i.e. he can claim invalidation no matter who threatened him to enter into a contract (Art 1707 (1)). Moreover; the other party cannot raise his unawareness of the duress as a justification to avoid invalidation. Such justification may, however; be a ground to claim damage from a party who got the contract invalidated (Art 1707 (2)).

A Threat to Exercise a Right (Art 1708) Under Art 1706 physical violence is used as a means to compel a person to enter into contract. But under 1708, right is used as a means to compel a person to enter into a contract i.e. a person is made to choose either to perform/undergo certain legal obligation or to enter into a contract. Notice: Art. 1708 applies when someone has a right and uses it to obtain a proprietary interest in excess of what he deserves. However; the threat may be directed against the person from whom the threatening person does not have any right. For example, B. borrowed birr 10,000 from Dashen Bank but failed to pay on time. The manager of the bank wrote a letter to B's brother, L that court action is to be taken against B unless L guarantees the debt. For fear of the court action against his sister, L entered into contract of guarantee with the Bank. Where a person threatens to violate a law or his obligation Art.1708 does not apply. For example, an employer threatens his employee to terminate the employment contract unlawfully unless the employee agrees to work in another locality than the place his contract provides. However, one may argue that if law invalidates a contract for abusive use of right for a stronger reason it would invalidate the contract entered into to avoid violation of one's own right. So

Art.1708 may also apply in case of threat to violate another person's right. However such interpretation goes against the meaning of Art 1706. So the best thing to do is to repeal Art. 1708

so that matters not governed by Art 1706 be governed by Art 1710.

Reverential fear (Art 1709):- this is a psychological threat Reverential fear is also called undue influence (see Art. 868 civil code). Under common law, undue influence includes playing on victim's superstitions. However; Ethiopian law does not accept superstitious threat as a reverential fear.

Under Ethiopian law the fear is limited to the opinion of ascendants or superior whose opinion can have observable and direct consequence on the future interest of the threatened person (Art 1709).

However; the mere existence of reverential fear of ascendant or superior is not enough to invalidate the contract. The reverential fear must make the person to lose certain advantages i.e.

his bargaining power was reduced; he was not free to bargain properly so that the other

contracting party get excessive advantage from the contract. Reverential fear is presumed. The

fact that superior/ascendant made an offer is enough to prove the existence of undue influence.

The offeree should be presumed that he entered into such substantially disadvantageous contract

because of reverential fear. However; the superior/ascendant can disprove such presumption by any means.

Defect in Consent Due to Lesion (Art 1710): Contract depends on the concept of free market

economy where the parties can freely determine their obligation. This presupposes that both

parties to a contract are equal. However, such equality may be affected by individual want,

simplicity and business inexperience thereby giving the other party the opportunity to exploit such weakness.

Effects of Elements of Contract (Art, 1808-1818)

Generally a contract that misses any of the four elements is either **void** or **voidable**.

Void contract is a contract which parties intend to produce binding effect but does not actually

have any legal effect. The obligation intended by the parties does not exist from the beginning.

So, it is called *void ab initio*. But voidable contract is a contract that has begun to produce effect intended by the parties carrying with itself certain birth defects that may destroy the effect it has produced. void contract cannot be cured but voidable contract may be cured by agreement of both parties to the contract (Art.1811).

A contract is said to be void when the object or form element are missed.

The object is either

immoral or unlawful/impossible or unclear. Or the special form required by the law or the parties

has not been complied with. In short a contract is void if any of the Art 1711-1729 are violated

(Art 1808 (2). But voidable contract is due to defect in consent or lack of capacity (Art.1808 (1).

Anybody, including public prosecutor, can bring void contract to the attention of court (1808(2).

But in case of void able contract only a person whose consent was defective or the person who

was lacking capacity at the time of conclusion of the contract can bring the case to the attention

of the court (see Art.33 CivPro.C).

Since, there is nothing to be invalidated. Art 1810 which provides about action for invalidation

cannot apply to void contract. Incidentally, although invalidation does not exist, a person must

claim reinstatement within ten year from the time date of conclusion of void contract .

Invalidation is not claimed within two years. A party whose consent was vitiated loses his

right to invalidate the contract unless he brings court action within two years from the moment

he knew the fraud or mistake or from the moment the duress disappears (1810(1). The right will

be absolutely barred if he has been unable to know the existence of defect in consent or the

duress has not disappear within ten years from date of conclusion of the contract, Art 1845. a

contract affected by incapacity need to be invalidated within two year from the date the person

became capable (Art 1810 (1).

a person whose consent is vitiated may waive his right to demand invalidation. Such waiver is a

contract and has to be made in same form as the main contract (Art 1811(2)).

The injury is made good. A contract vitiated by lesion remains valid if the party taking undue benefit agrees to return such benefit (Art. 1812).

The vitiated provisions of the contract are avoided. Contract may be invalidated partially

provided the valid one is independent of the invalid one (Art 1813).

Void contract is devoid of any legal effect by its very nature and violable contract is devoid of

legal effect by court decision only.

Similarities of void and voidable contract:

Unable to Produce Legal Effect on the Parties like void contract voidable contract is

also considered as void abolition once it is invalidated. Invalidation of voidable contract

has a **retroactive** effect thereby denying the contract to produce any obligation from the moment of its inception.

Reinstatement (Art 1815-1818): In short, reinstatement is returning the thing or pays

back the money that one has improperly received. Reinstatement is made either by

returning back the payment (thing) received or by paying appropriate compensation for

the thing that cannot be returned.

However returning the thing (payment) may be difficult. Therefore, in the following

cases, reinstatement may be made by paying compensation.

When Ownership of the Thing is transferred to Possessor in Good faith

Loss or damage of the thing by fault of receiver

Obligation “to do” or “not to do”: *acts done in performance of contract shall*

not be invalidated where such invalidation is not possible (Art 1817)

Transformation of the thing: - The receiver may substantially change or alter

the thing he has received. In such case, returning the thing *would involve serious*

disadvantage or inconvenience (Art. 1817(2)).

Returning the thing is uneconomical

In short, if the contract is invalid, any performance made on the basis of such contract becomes

invalid. This means the receiver shall return the thing he received (Art 1815). However, if

returning is not possible for whatsoever reason, an appropriate compensation shall be paid (Art 1817).

Chapter Three

Effect of Contract (Art. 1731 -1805)

The two major principles of contract are freedom of contract and sanctity of contract. effects of Contract are interpretation, performance, court's inability to vary contract and effects of non performance.

If the provision of the contract is clear, there is no need to interpret (Art 1733). Law is an express intention of the legislators. Interpretation is, therefore, searching the intention of the parties (Art. 1734(1). In a case Ethiopian Development Bank vs.Abdurahman Telisa, file No. 15662 presented to it on Megabit 13, 1999 Federal Supreme Court cassation Division properly ruled that whenever the provision of the contract is clear court should not depart from clear meaning even if such clear meaning is unfair.

Searching Intention of Parties

Presumption of Good Faith: While searching the intention of the parties we have to presume that parties entered into a contract in good faith (Art. 1732). Good faith should mean that no party to the contract intends to deceive the other party by intentionally making the provision of the contract vague, ambiguous, silent or contradictory. In short, interpretation is necessitated without need and expectation of all parties to the contract.

How to Search Intention of Parties (Art. 1734-1738)

Having the presumption of good faith in mind, the court uses the following techniques to arrive at the probable **common intention** of parties **at the time of conclusion of the contract:**

Conduct of the parties; The conduct may be shown before, during or after the conclusion of the contract (Art 1734(2).

Context of the contract

Business practice

Good faith; Here good faith indicates the innocent expectation of a party from a contract (Art. 1735).

Equity

Positive interpretation; Parties are presumed to have entered into a contract expecting certain result. So every provisions of a contract should also be given effect.
Interpretation in Favor of Debtor: The main objective of interpretation is searching for the intention of the parties. If the court is unable to know the intention, the law guides the court to interpret the controversial provision or word in favor of the debtor (Art 1738(1)).

However, an exception to the principle of interpreting in favor of the debtor is contract of adhesion (Art. 1738(2)). If a contract is a contract of adhesion, the court shall interpret the provisions or words in the adhesive contract against the party who prepared such contract (Art. 1738(2)). In this case, the stipulator of the adhesive contract may be debtor but he cannot benefit from the dispute on the meaning of provisions or words in a contract since he should have prepared the contract free of any defect. He cannot benefit from his own fault.

Performances of Contracts (Art. 1740-1762)

Performance of contract means fulfilling one's own obligation as agreed. the major questions during performance are „Who perform contract“? To whom should contract be performed? What should be performed, when and where should it be performed?

Who Performs Contract (Art. 1740): The contract can be performed by the debtor, his agent or by person authorized by court or law (Art. 1740(2)).

The law never mention about performance of a contract by a third party not authorized by debtor, court or law. However; we can easily argue that if the creditor accepts the payment, the debtor has no right to stop third party from performing the obligation since the creditor has a right to assign his right to a third party without the consent of a debtor (Art. 1962). In such case, if the debtor insists on paying the debt, he can pay it to the person who paid the creditor (Art. 1824).

The law refrains from including unauthorized third party in the list of Art 1740(2) since assignment of a right is a contract. A creditor is not duty bound to receive payment from a person not authorized by debtor or court or law, he is free to accept or reject such payment without any

effect on his right against the debtor.

Generally, creditor should accept performance either from the debtor, his agent or person authorized by the court of law unless he proves that personal performance of the contract is essential to him or the contract or law expressly provides personal performance.

Who May Receive Payment (Art. 1741-1744): Payment should normally be made to the creditor or his agent (Art. 1741).

Payment to Incapables (Art.1742); *not valid unless z debtor shows it benefited z creditor.*

Payment to Unqualified Creditor (Art.1743): *not valid unless z creditor confirms it or*

z payment benefited z creditor. But, valid when it is made in good faith to a person who

appears without doubt to be z creditor.

Doubt as to the Creditor (Art.1744): Sometimes two or more persons may independently

claim the payment of a debt. Hence, z debtor shall refuse to pay to any of them. If he

wants to release himself from obligation, he can deposit the debt in court of law as per

Art. 290 – 293 of the civil procedure code (Art. 1744 (1). If he is not willing to deposit

his debt, any claimant may require him to deposit in court (Art.1744 (3).

What to Perform (Art. 1745 - 1751)

What to pay (perform) answers the question relating to identify, quantity or quality of the thing

to be delivered. To properly answer such question we will classify things into **definite thing,**

fungible things and money debts.

Definite Thing (Art. 1745 - 1746): Definite thing is a thing that can easily be identified from

similar things of the same species. In short definite thing has its own peculiar identity. Animals

and immovable are most prominent examples of definite things. If a thing is definite thing, we

can not find its replicate in the world. However, for contract law

definiteness of a thing simply

indicates that a thing which is a subject of sale is indicated in the contract in its own specific

name. For example if the sale is white teff the thing is definite in relative to the generic term teff.

However; when we come to groups white teff itself is indefinite (fungible) thing since white teff is

of different variety.

In case of definite thing, the debtor shall deliver the thing agreed, (Art. 1745). Nobody is bound

by what he did not consent to be bound. The creditor has also a right to refuse part

payment, Art. 1746.

Fungible Goods (Art. 1747-1748): Fungible goods are goods that are indicated in the contract

by using generic terms such as pasta, teff, wheat, barely. In such case since the thing is not

expressly indicated in the contract, the contract is interpreted in favor of the debtor (Art. 1738

(1) and the debtor can freely determine its quality (Art. 1747). However, the quality should not

be less than the average (Art. 1747 (2)). Delivery of insufficient quantity or quality does not

necessarily lead to the cancellation of the contract unless it is declared to be fundamental breach

of contract or essential to the creditor (Art. 1748 (1) cum. 1785 (2)).

Moreover; even if the

quantity /quality is not essential or fundamental to the creditor, the contract may provide

unilateral cancellation if such quality or quantity is violated (Art. 1786 cum. 1748 (1)).

Money Debts (Art. 1749-1751): If the debt is money debt, payment should be made in local

currency of place of payment (Art. 1749 (1)). If payment is in a local currency, the issue that

comes to our mind is the exchange rate. This is determined on the basis of exchange rate on the

day of payment (Art 1750).

Incidental to money debt are inflation of currency and interest rate. Parties may avoid inflation

by determining the amount of money debt in reference to the price of a specified good. For

example, a person who lends birr 200,000 to be repaid after ten years may say that the amount to

be repaid shall be able to buy 50 tons of first quality Addaa teff. Art 1749 (2) is not a law since

it imposes obligation on no party; it is simply reminding the parties the possible option of

avoiding or reducing the consequence of inflation.

Place of Performance:

Place of performance has an implication on cost of payment, currency for money debts and

territorial jurisdiction of court. The civil code provides three alternatives; *agreed place*, *residence of the debtor* (delivery of **fungible things** should be made at the residence of the debtor at the time of conclusion of z contract Art.1755(2)) and *place where the thing situates* (it is in case of **definite thing** at the place where such definite thing situate at the time of conclusion of contract).

Generally Ethiopian civil code advises the parties to exercise their freedom of contract and determine place of performance. But if they fail to do so the law imports the old maxim, debt is not portable but fetchable i.e. the creditor has to go to either to the place where the definite thing situate or to the residence of the debtor. The claimant has to his claim and his claim never come to him.

Time of Performance :Time of performance is very important to determine transfer of risk, cost of maintenance and preservation (see Art.1779-1783) and most importantly to claim damage for non-performance. where there is no contractually agreed time, contract should be performed when either the debtor Art.1756 (2) or the creditor demand performance (Art.1756 (3). This means, once the contract is concluded, time of performance can be determined either by the debtor or creditor.

In the following four cases the debtor may unilaterally postpone time of performance indefinitely (Art.1757 cum.1759). This is to reduce the risk of non-performance by the opposite party. As a result Art. 1757 and 1759 exclusively relate to bilateral contracts.

Simultaneous Performance

Anticipatory Breach of Contract:It is when the debtor informs the creditor before the debt is due that he (debtor) will not perform his obligation (Art.1757 (2). Such

information may be implied from conduct of the debtor or from express statements

addressed to the creditor. However, the party has an option to claim performance by

providing sufficient security that he will perform his obligation (Art.1759).

Insolvency: When a person is declared bankrupt, all his future debts mature on the day he

is declared bankrupt (Art.1868). So, he has to pay all his future debts on the date he is declared bankrupt. Any payment after that day may be equivalent to non performance or breach of contract. So a person declared bankrupt loses benefit of time that he obtained by contract and cannot claim performance unless he himself is ready to perform his obligation (Art. 1757(2)).

Breach: a party who violated his own contractual obligation does not have moral and legal basis to complain for breach of contract since the other party can have a counter claim or set-off (Art.1757(1)).

Transfer of Risk : Transfer of risk is dependent on time of performance. however transfer of risk is an issue only in contracts that involve transfer of ownership. It is not a common characteristic of all contracts. The relevant law to discuss transfer of risk is law of sales.

Cost of Payment (Art.1760): Art.1760 applies when the court is unable to ascertain a party that should bear the cost of payment by reference to their contract or custom, equity and good faith as indicated under Art 1713. Costs of payment are e.g. those of counting, measuring, weighing, packing etc. and not those of forwarding, unless a payment place other than that of Art.1755 (2-3) is agreed.

Debtor' Right to Receipt (Art.1761-1762) : Receipt is, therefore; such written evidence given by the creditor to the debtor. The debtor has a right to claim receipt and a creditor has an obligation to give receipt. In addition to claim receipt the debtor has also the right to claim the cancellation or return of documents evidencing the obligation, provided he has fully discharged his obligation (Art. 1762). If the debt is partly performed such part performance has to be indicated on the document evidencing the obligation. If the creditor alleges that the document is lost he has to give to the debtor another written document that contains his allegation. Returning document evidencing obligation to the debtor raises the presumption that the debt has been paid (Art.2020).

Variations of Contracts

Variation is making amendments to the provisions of a contract. Variation of a contract by

parties is a contract itself (Art.1675). So, as far as the requirements of Art 1678 are fulfilled

parties can modify their contract at any time for any reason.

Judicial Variation of Contract

The court is normally vary a contract when fundamental change in circumstance affects the

object of the contract (Art.1766-1770). However; court may also vary a contract where there is

undue influence or lesion that never leads to invalidation of the contract.

Accordingly; in the

following court may modify

☐☐**Contract between persons having Special Relation:** Art. 1766 applies when one side of

the obligation become onerous than he foresaw due to change in circumstances. There is a

Cassation decision that modified lawyer"s service fee. In Aster Araya vs. Girma Wodajo

case presented to Federal Supreme Court Cassation Division on Hamle 29, 1997, File No.

17191 the court ruled that although courts do not have the power to declare that a contract is

non-binding it can reduce amount of fees to be paid.

☐☐**Contract with public administration** :A government has legislative and policy making

power that may enable it to change the balance of contract in its own favor.

So now,Because

of Art.1767, the government has to either refrain from taking measure that make the

obligation of debtor more onerous or must cover the costs of its measure on the

debtor.Notice that government includes any state agency both in the federal and state level

having the authority to make policy or law. Such new policy or new law should not have

been foreseen at the time of conclusion of contract. Fuel price revision in Ethiopia, for

example, is something expected after every three months.

☐☐**Partial Impossibility of Performance:**If obligation was partially impossible at the time of

conclusion of a contract, the appropriate governing provision is Art.1813.

Thus Art.1768

applies if impossibility occurs after the conclusion of contract and if such impossibility

never leads to breach of fundamental provisions of the contract as indicated under

Art.1785. For example in a contract of sale of 200 quintals of coffee if hundred of them

are damaged the court may require the buyer to receive the remaining hundred and make

proportionate payment. Notice that Art. 1748 is conformity with Art. 1768.

Likewise the

application of Art.1768 should be limited to fungible things so that it should not

contradict with Art.1746.

□□**Time of Performance**:Court may also extend time of performance for a maximum period

of six month (Art.1770)-period of grace. This extension can be given when z contract does

not exclude the court from giving grace period.Notice that the creditor may deny the debtor

to benefit from grace period by unilaterally canceling the contract. (See Art 1774, 1786,

1787)

CHAPTER FOUR

Non-Performance of Contract & Its Remedies

Non-performance refers to parties failure to perform contractual obligations in conformity with

the terms of the contract and the law. It is also called breach of contract.

This failure/breach may

be total or partial.It may also relate to delay in performance. Offering performance at a place

other than the place agreed up on (place fixed by law) also constitute non-performance.

Delivering a thing that does not conform to the contract or delivering a defective thing also

amount to breach of contract. Generally any deviation by a party from the terms of the contract

amounts to non-performance.

The rules on non-performance are intended to avoid the deterrence effect of non- performance on

contractants for fear that their contract may not be performed; or in other words it is intended to

secure contractual transactions.

The parties may stipulate contractual remedies for breach, for example by incorporating *penalty*

clauses. However, the law of contract provides remedies even if there is no contractual provision

to that effect. These are called *legal remedies*.

The legal remedies for non-performance protect the interest of the party that is affected by nonperformance.

The interest that is affected by non-performance of the contract is the benefit,

which could have been gained, had the contract been performed.

Accordingly, *the remedies are*

supposed to put the victim party in the position he would have been had the contract been

performed. As such, in most legal systems, the law of contract generally recognizes three

remedies:

1. Enforcement of the contract. It may be done either by compelling the debtor(forced

performance) or by authorizing the creditor (substituted performance) to perform the

debtor's obligation at the cost and expense of the debtor.

2. cancellation of the contract: judicial or unilateral cancellation. Unilateral cancellation

applies in exceptional circumstances. In all other cases, the victim party may apply to

court for declaration of cancellation and it is the court that has the ultimate power to

declare cancellation or not. *The effect of cancellation is to put the parties the position*

which would have existed, had the contract not been made. In addition to this, he may

claim *compensation*.

3. The third remedy is damages (compensation). The victim party can claim compensation

for the damage or loss he has incurred as a result of non-performance. This remedy may

be claimed in addition to either of the above remedies or independently.

General remedies of non-performance under Ethiopian law: The general provisions

of Ethiopian law contract recognize three types of remedies of non-performance

Art.1771. Accordingly, the remedies of non-performance are (1) the enforcement of the

contract, (2) Cancellation, and (3) Compensation /damages. As provided under the above

provision, they are alternative remedies. So, the victim party may choose any of the

remedies based on the circumstances. However, compensation, can be claimed as

independent remedy or additional remedy

A party may only invoke non-performance of the contract by the other party after

having placed the other party in default by requiring him by notice to carry out

obligations under the contract (Art.1772).

There is no formal requirement for default notice & it may be given in any form: in writing,

orally or clear conduct. What is crucial is an unambiguous, clear communication/expression of

the creditor's intention to obtain performance of contract. Default notice cannot be given before

the due date of the obligation. the creditor may fix a period of time with in which he accepts

performance, or after the expiry of which he will not accept performance. this period of time

must be reasonable to allow the debtor to discharge his obligations.

there are exceptional circumstances where the creditor can resort to the remedies of nonperformance

with out giving default notice to his debtor.

Article 1775, *Notice need not be given where:*

(a) *the obligation is to refrain from certain acts; or*

(b) *the debtor assumed to perform an obligation which the contract allows to be*

performed only within a fixed period of time and such period has expired; or

(c) *the debtor has declared in writing that he would not perform his obligation; or*

(d) *it is agreed in the contract that notice shall not be required and the debtor shall be in*

default upon the expiry of the time fixed.

Let's see z remedies & z different circumstances to be considered for their application

Enforcement of Contract

Enforcement takes place through court order. It may take place either through Forced

performance or substituted performance.

☐☐**Forced performance:** Pursuant to Art.1776 the requirements for the application of forced

performance are (1) the creditor's special interest, and (2) the preservation of the debtor's

personal liberty. These requirements are cumulative not alternative.

☐☐**Substituted Performance:** In addition to forced performance, the law provides

substituted performance as a remedy for non-performance under articles 1777 and 1778.

Substituted performance is made at the expense and cost of the debtor.

Court

authorization is, however, indispensable for substituted performance. Without such authorization, the creditor cannot recover the costs and expenses from the debtor. Where the fungible things are due the creditor may have substituted performance be made up on court authorization to buy the thing at the debtors expense, Art.1778. The provisions of Articles 1779-83 also are aspects of substituted performance but they apply in different circumstances; when the debtor is ready to perform but unable to discharge his obligation either because the creditor refuse to accept performance or the creditor is unknown or uncertain or where delivery cannot be made for any reason personal to the creditor. In all these situations, the debtor has no fault; ready to perform but prevented from performing. Thus, the law allows him to discharge his obligations by depositing the thing or money at such place as instructed by the court. This will relieve the debtor from his obligations. However, the deposit shall be made upon court order and the debtor shall obtain a court confirmation as to the validity of the deposit.

Cancellation

Cancellation is another remedy for non-performance. Cancellation brings an already existing contract to an end. What is the difference between invalidation and cancellation?

Cancellation may take two forms-judicial or unilateral (without the need to go to court,

But it is allowed for exceptional circumstances).

□□**Judicial Cancellation:**As a rule, cancellation of a contract can take place through court

action. The party who claims cancellation as a remedy of non-performance shall bring an

action to that effect. Articles1784 and 1785 deal with the conditions under which a ourt

may order the cancellation of the contract.A party affected by non-performance may

apply to a court requesting it to order the cancellation of the contract.

However, it does

not necessarily mean that the court will order cancellation. not all non-performances will

lead to cancellation. The court does not cancel a contract when an action is brought to

this effect for simply there is non-performance of a contract. The court has mandatory

obligation to consider the good faith of the parties & z interest of z parties.

A contract

shall not be cancelled except in cases of breach of a fundamental provision of the

contract Art.1785. Minor deviations from the terms of the contract may not be sufficient

to cancel the contract.

Unilateral cancellation: We have four circumstances under which a party can unilaterally cancel

a contract without going to court of law, these are 1786-1789:

1. where there is a cancellation clause in the contract

2. where the debtor has failed to honor certain time limits(1787); not all lapses of time

limits lead to unilateral cancellation but, failed to perform obligations within the period

fixed in accordance with Art. 1770, 1774, or 1775 (b). Accordingly, the debtor's failure

to perform his obligations within the time limits set by the cross-referenced articles 1770

(i.e period of grace), 1774 (I.e period fixed in the default notice), and articles 1775 (b)

(obligations that are such that they must be performed within the time fixed) would

entitle the creditor to cancel the contract unilaterally.

3. Where performance becomes impossible: *"A party may cancel the contract even*

before the obligation of the other party is due where the performance by the other party

of his obligations has become impossible or is hindered so that the essence of the

contract is affected." (1778). This provision envisages situation where performance was

possible at the time of the making of the contract but which becomes impossible

afterwards.

4. Anticipatory breach of contract, Art.1789: When one of the parties unambiguously

communicates his refusal to perform, the other party may unilateral cancel the contract if

he chooses. However, the party intending to cancel the contract shall give default notice

to the refusing party. The refusing party may prevent the cancellation of the contract by

furnishing, within fifteen days, sufficient security to guarantee that he will perform his obligations as agreed. Nevertheless, if the refusal is communicated in writing, the party intending cancellation is not required to give default notice, and he may immediately cancel the contract.

What is the consequence of cancellation? The most important consequence is that the parties shall be **reinstated** in the position, which would have existed, had the contract not been made. However, this may not be sufficient to satisfy him because he may have lost a benefit he could have gained from performance. In this case, he may claim **compensation** in addition to cancellation.

Damages (Compensation)

1771 (2) and articles 1790-1805

is another remedy for a party affected by non-performance. Art. 1771 (2) cum 1790; damages can be claimed as an additional or alternative remedy.

The purpose of compensation for non-performance is to put the victim party in a position he would have been had the contract been performed.

Article 1791(1) provides that “ *the party who fails to perform his obligations shall be liable to*

pay damages notwithstanding that he is not at fault”. However, it shall be read in conjunction

with sub-article 1 of article 1790, which suggests that not all non-performances lead to the award

of compensation. The creditor must show that he has incurred loss or damage as a result of nonperformance.

If he shows that, he is entitled to compensation the amount of which shall be

assessed according to the provisions of 1799-1805.

defenses available for the party required to pay compensation:

1. The absence of fault: As a general rule, the absence of fault is no defense to the claim of compensation (see 1791 (1)). However, there are certain exceptions to this. We find the under articles 1795 and 1796 where in the plaintiff (creditor) has to proof fault or grave fault on the part of the debtor.

2. Force majeure, 1791 (2) states that “ [the debtor] *shall not be released unless he can*

show that performance was prevented by force majeure". The *acontrario* reading of this provision suggests that the debtor is released of payment of compensation if he can show that performance was prevented by force majeure. Note: force majeure that occurs after the debtor is put in default cannot release him of his obligation to pay compensation (see 1798).

To conclude, a party who has incurred loss or damage as a result of non-performance may claim compensation by showing his loss/damage and that this is the result of non-performance. The purpose of such damage is to put the victim party in a position would have been had the contract been performed. Normally, the creditor is not expected to prove that the debtor was at fault.

However, in certain circumstances he has the duty to show the fault or grave fault of the debtor (see 1795 & 1796). Once, the liability of the debtor for damage is determined, the next question is to assess the amount of compensation (damages) to be paid to the creditor. Compensation is to be assessed according to the rules of Articles 1799-1805. The basic principle is that

compensation shall be equal to the damage/loss which non-performance would normally cause to the creditor in the eyes of a reasonable person (see Art.1799 (1)). the question not how much a particular creditor has lost but how much a reasonable person as a creditor would have lost as a result of non-performance. However, there are lots of exceptions.

A very important point to note is that in case of money debts, a creditor is entitled to compensation at the rate fixed under 1803 & 1804 without the need to prove the extent of loss/damage he has sustained as a result of non-performance. However, the creditor may claim more compensation if the compensation to be assessed according to 1803 & 1804 are not

y7 V adequate for the greater damage/loss he has sustained (see Article 1805).