Performance

- Is discharging of resultant obligations by a party
- It's the most common & desirable way of extinctions of obligations
- It is also an effect of contracts

Standards of Performance

- Satisfactory/complete performance:
  - where the obligation can be perfectly and completely performed.
  - Some kinds of obligations can be performed to the highest degree of perfection in this case
  - Example: Payment of Money debts, delivery of documents, delivery of goods
- Substantial performance:
  - some obligations are difficult to perform them perfectly due to their nature and the ability of human beings.
  - There will be slight deviation in what was promised and what is performed.
  - It is a performance short of complete performance in minor aspects but will not deprive the *promisee* the material part of the consideration.
  - Example a building that deviates slightly from the specifications
- Breach of contract:
  - is the case where the promisor fails to reach the degree of perfection the other party is justified in expecting it under the circumstances
  - the *promisee* is entitled to bring action based on non-performance.

- **Who should pay?**
  - Logically, performance should be by the party who undertakes to perform a certain obligation.
  - Contracts may impose variety of obligations on the debtor and this variety will lead us to make a distinction when personal performance is necessary for the creditor or not.

- The debtor or someone authorized by the debtor, court or law
- Peculiar to Ethiopian law/not common in other civil law systems
- Exceptionally the debtor may be required to perform his obligation if:
    - this is essential to the creditor: performance by some one else is not equivalent. These kinds of contracts are entered in consideration of a person
    - has been expressly agreed:
- This personal performance is dependent up on whether the obligation is an obligation of means or that of result
    - Obligation result: it is not essential whether it is performed by the debtor or a third party. Personal performance exists in obligations of result when it expressly agreed.
    - Obligation of means: personal performance is essential to the creditor and performance by some other person may not be equivalent to performance by the debtor.

- **Who is qualified to Receive payment?**
    - Logically, payment should be to the creditor.
    - The law says payment should be to:
        - creditor or
        - third party authorized by the creditor, court (Arts. 213, 950) or law (204, 947)
    - Performance to the creditor may not always be valid. Example when the creditor is incapable (minor) performance will be valid only to the extent the creditor benefited.
    - Payment to unqualified creditor is not valid but exceptionally it can be valid. Such cases include:
        - The payment benefits the creditor: A owed B 50,000. In another transaction B owed C 50. If A pays C 50,000 that benefits B.
        - The creditor confirms existence of payment: (Arts. 2190, 2192)
        - Payment to apparent creditor: this is payment to a person with valid title
            - Certificate of heir annulled after payment

        - Documents evidencing power of agency revoked but not collected
        - Holder of negotiable instrument
    - In all the above cases the debtor should be in good faith. If he is warned not to pay but do so, he will bear the risk.
    - When there is a doubt as to the creditor the debtor may refuse to pay. If there is a doubt as to the creditors, then the debtor pays one of them at his own risk.
    - Article 1744 should be interpreted in light of Articles 1780-1783

What Constitutes Performance

- What must be given is what was promised. What must be paid is what was agreed at the making of the contract.
- A contracting party cannot deliver something else than the one agreed even if the thing delivered is of a greater quality than the promised thing. Example: A agreed to deliver 10 bottles of Ethiopian Acacia Wine to B. But A delivered South African Wine with superior quality. B can refuse payment.
- This is reaffirmation of the principle of *pacta sunt servanda* (Article 1731)
- The court does not have power to authorize the debtor to deliver something else than agreed at the making of the contract

- **Partial Payment (Article 1746)**
    - The creditor may refuse part payment when its fully due and liquidated.
        - *Due*: Matured
        - *Liquidated*: certain as to the amount
    - Accepting part payment is a simple possibility open for the creditor.
    - The idea is the creditor may not be forced to give an extended delay for non-performance. This is because it may have adverse effects on the creditor. Example: the creditor will lose surety as in the sense of Article 1928(2) if it gives extended period for performance without being authorized to do so.
    - When part of the debt is contested, the debtor shall pay such part of the debt the creditor is willing to accept. This will avoid a kind of blackmail exercised by powerful debtors.
        - Example: Salary (wage), maintenance

Fungible Things

- Fungibility is a criterion of interchangeability. It implies the two things are identical in specification where individual units of a commodity or a good can be mutually substituted.
- It assumes everyone values all goods of that class the same.
- Fungible goods are goods that are indicated in the contract by using generic terms such as pasta, teff, wheat, barely, corn, sugar etc.
- When fungible things are due the debtor has to deliver a thing of average quality
- The right to choose is the right of the debtor unless agreed otherwise
- When fungible things are due the contract is not express enough but it can be interpreted in favor of the debtor and the debtor will choose the thing to be delivered
- Example: 100 quintals of *teff* and nothing is mentioned as to its quality, then average quality should be delivered.
- Article 1747 is a gap filling provision to evade the supreme sanction of nullity of a contract based on insufficient definition of object of the contract as in the sense of Article 1714.

- **Article 1748**
  - is where insufficient quality and quantity is provided or where the quality/quantity is not what is agreed by the parties. Under Article 1694 lack of concordance between offer and acceptance prevents formation of contracts but once a contract is formed based on such concordance the same is not required during performance of the obligation.
  - Hence once the contract is created the performance is not required to conform exactly to what was promised.
  - When the thing delivered, or performed is of higher quality than agreed there is no problem. Its only problem when lesser quantity and quality is delivered.

- Either different circumstances or the limited capacity of human beings may result in discordance between what has been promised and what actually is performed. In such cases the creditor may not refuse to take delivery of fungible things on the ground that it does not exactly conform to what has been promised in the contract unless he can show that it is essential for him or expressly agreed in the contract.
    - Example: A agreed to deliver 100-liter alcohol with 98% alcoholic concentration to B, but delivered 95 liters with 95% concentration. Here the creditor cannot refuse it where it is no essential for him.
    - In order to refuse he has to prove special interest and the burden of proof is on him. His motive for refusal may be price decline
    - Special interest: the alcohol is for medical research and application and a 1% deficiency will have substantial impact on the result from the use of the alcohol.
    - When it has been expressly agreed, the creditor can refuse non-conformity. Even he can base his actions based on Article 1745 stating that it is not what was agreed.
- This provision should be read with Article 1713. Commercial usage often indicates the maximum amount of deficiency that can be tolerated. Example 5% impurities in coffee market
- The sanction for this non-conformity is proportionate reduction of the price when it was not paid or damages when it is paid
- Rational behind of Article 1748 is that the law seeks to ensure that maximum number of contracts should be performed. The law discourages the parties from taking as a pretext the smallest nonconformity to avoid contracts.
- Articles 2287 & ff, Law of Sales, states minor and negotiable defects will not be a ground to avoid the contract.
- Generally, Article 1748 is intended to cover small non-conformities and avoids sever sanction of contracts through invalidation like in cases of Articles 1694 & 1745 when there is non-conformity. And in fact, it is a very good judicial policy.

Variation of Contracts

- Variation is making amendments to the provision of the contract.
- Variation normally becomes necessary when there are change of circumstances.
- The problem of variation of contract addresses the situation where there is a change I the balance of the parties' contractual obligations after the contract was concluded.
- This change leads to obligations which are not performed as a party thought they would be more expensive or more difficult to discharge.
- This party cannot claim a ground for annulment or cancellation of the contract by basing his defense on the ground of vices of consent nor the existence of force majuer.
- The contract is legally speaking without defect. In practice, however, the case appears where in the course of the contract, the parties' obligation become too heavy or unfair, at least in the opinion of that party.
    - Example: Abdu, a farmer around Haramaya town, enters into a contract with Aziza cafeteria, for the delivery of 10 liters of milk per a day for a price of 2.00 birr per unit. The contract is to last for three years. But there appears a rate of 50% inflation in the first year of performance apart from the increase in the price of fodder for the cows of Abdu. Can Abdu ask for an increase of the price by 50% to 3.00 birr per liter, or obliged to stay with the price of 2.00 birr?
- Here there is no fault on the part of the farmer, but he is severe economic advantage besides, the cafeteria is profiting from the situation. Can the court make or allowed to vary the contract to make it fairer or equitable?
- In all these situations the court cannot modify or vary the contract or alter its terms.

- This is an echo of the prohibition to amend the object of contracts under the guise of interpretation as in Arts. 1714(2), 1733. The same guideline is given for the judge under Article 1710.
- So, the contract will not be invalidated (Art.1710) or varied (1763 & 1764).
- So the rule is that only parties themselves can vary the contract.