

Chapter – One

Introduction to

Obligation

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Introduction to Obligation

- The Civil Code consists of 3,367 articles, divided into five books and twenty-two titles:
- – Book I: Persons
- – Book II: Family and Successions
- – Book III: Goods
- – Book IV: Obligations
- – Book V: Special Contracts

Cont`d

- Book IV (obligations) is divided into three titles: contracts in general, extra-contractual liability and unlawful enrichment, and agency
- Book V is divided into eight titles:
 - ✓ contracts relating to the assignment of rights (sale, donation, loan of money and other fungibles things)
 - ✓ contracts for the performance of services (contracts of employment, hiring of intellectual work, medical or hospital contracts, contract of innkeepers, and publishing contracts);
 - ✓ contracts for the custody, use, or possession of chattels

Cont`d

- ✓ contracts relating to immovable
- ✓ administrative contracts
- ✓ compromise and arbitral submission; and
- ✓ provisions dealing with law repealed by this code and
- ✓ transitory provisions
- ❖ Contract is one source of obligation under Ethiopian Civil Code, which fall under the category of the law of obligations. So, Before dealing with contracts lets say something about obligation for the better understanding of the concept.

Obligation Defined

- o No single and universally acceptable definition of Obligation
- o origin – ancient roman law `lat` & Roman lawyers defines it as;
 - an undertaking or legally binding relationship with respect to when one party promises the other party to perform some acts or to do some thing.
- Gay, wrote ` obligation meant a personal claim brought against an other in order to force him before us to give us or to do something for us or to render rights to us so as we are able to exercise our right.

- Pavael, understood obligation as an undertaking by non – Roman citizens regarding to give, to do, or to render some rights to Roman Citizens.
- It is also unilateral in character and discriminatory in nature
- In Institute of Justinian – define obligation in the aspect that the roman citizens to carry out.
- - Godeme – define obligation as a paramount related to the development of economic relation. So, obligation means a `debt` in terms of law and `debt` is an obligation in terms of economics

Cont`d

Art.1101 of French Civil Code define it in the aspect of contracts in general i.e.

Contract is an agreement to establish, vary or extinguish rights and obligation of the parties.

From this judges define obligation as legally binding relations when one party in relation to another party is obliged to give, to do or not to do.

- The definition of obligations establishes the unilateral act of the debtor either to give, to do or not to do as a patrimonial obligation. It means that the debtor has the obligation while the creditor has its rights.

Cont`d

- The same is true under Ethiopian Civil Code, though Book IV titled as `obligation`, no where defined. But
- Art. 1675 cum 1712 defines obligation in the aspect of contract, as its mother source did.
- A contract is an agreement whereby two or more persons as between themselves create, vary or extinguish obligation of a proprietary nature.
- Basically under the CC obligation is the object of the contract i.e. obligation to give, to do, not do. Art.1712 CC.

Natures of Obligation

From the definitions of obligation given above we can pin point the following essential defining elements of an obligation, so one can mouth fully speak about the existence of obligation

- a) An *active subject*, who has the power to demand the presentation, known as the creditor or obligee;
 - b) A *passive subject*, who is bound to perform the presentation, known as debtor or obligor.
 - c) An *object or the presentation* which may consist in the act of giving, doing or not doing something.
 - d) The *vinculum juris* or the juridical tie between the two subjects by reason of which the debtor is bound in favor of the creditor to perform the presentation.
- It is the legal tie which constitutes the source of obligation
 - the coercive force which makes the obligation demandable.

Juridical Tie

Debtor $\xrightarrow{\quad}$ To give, to do $\xrightarrow{\quad}$ Creditor
Or Obligor or not to do or
Obligee

- Example:

Gebre enters into a contract of sale with Tola who paid the purchase of a Samsung refrigerator. Gebre did not deliver the refrigerator. Gebre is the passive subject or debtor and Tola is the active subject or creditor. The object or presentation is the Samsung refrigerator and the obligation to deliver is the legal tie or the vinculum juris which binds Gaya and Tito.

Cont`d

- This is also known as a unilateral obligation, that is, the obligation of the debtor to fulfill or comply his commitment, in this case, the delivery of the refrigerator.
- On the other hand, if Gebre, delivered the refrigerator and Tola did not pay, then Tola becomes the debtor who is bound to pay while Gebre is the creditor who has the right to demand the presentation.
- Distinctions between Obligations and Contracts:
 - Obligation is the only source of contract, while obligations have other sources like law, quasi-contracts, delicts or quasi-delicts;
 - Contract is a bilateral obligation while obligation is a unilateral obligation;
 - All contracts are obligations while not all obligations are contracts.
 - We can not think of contract without obligation, but the reverse is possible

Cont`d

Civil obligations as distinguished from Natural obligations (Non-legal norms)

- Civil obligations derive their binding force from positive law; Natural Obligation derives their binding effect from equity and natural justice.
- Civil can enforced by court action of the coercive power of public authority;
- Natural – the fulfillment cannot be compelled by court action but depends on the good conscience of debtor.
- ▮ There is no the judicial tie element of obligation
- ▮ There performance is totally up on the good will of one of the debtor

Source of Obligation

Obligations arise from:

- **Law;**
- **Contracts;**
- **Quasi-contracts / obligation that arise beyond the contract/ tortuous act;**
- **Acts or omissions punished by law /delict/; and**
- **Quasi-delicts. /causing physical injury or material damage**

On the sources of obligation, the main sources are really Law and Contracts. The other sources are also established by law.

Cont`d

1. **LAW as a source of obligations -**

These are legal obligations or obligations imposed by specific provisions of law, which means obligations arising from law are not presumed and that to be demandable must be clearly provided for, expressly or impliedly in the law.

Examples:

- It is the duty of the Spouses to support each other. (Art. 49, of RFC)
- Obligation to render military service;
- And under the National Internal Revenue Proclamation, it is the duty of every person having an income to pay taxes.

Cont`d

2. **Contract as a source of obligations**

- Contract as defined in Art. 1675 & 1679 is the meeting of minds between two person whereby one binds himself with respect to the other,
- Obligations arising from contracts have the force of law between the contracting parties because that which is agreed upon in the contract by the parties is the law between them, thus, the agreement should be complied with in good faith. (Art. 1731(1)).
- Although contracts have the force of law, it does not mean that contract are over and above the law. Contracts are with the limitations imposed by law Art. 1711 & ff [object of contracts], of the CC, states that the contracting parties may establish such stipulations, clauses terms and conditions as, they may deem convenient, provided that are not contrary to law, morals, good custom, public order or public policy.

3. **QUASI-CONTRACTS as a source of obligations**

The 'quasi' literally means 'as if'.

- Quasi-contract is the juridical relation resulting from a lawful, voluntary and unilateral act which has for its purpose the payment of indemnity to the end that no one shall unjustly enrich or benefited at the expense of another. (Art. 2162 - 2178, CC) [unjust enrichment]
- - Undertaking without the consent of the other /unauthorized agency/ (Art. 2257)

Contracts and quasi-contracts distinguished:

- in a contract, consent is essential requirement for its validity while in quasi-contract, there is no consent as the same is implied by law;
- contract is a civil obligation while quasi-contract is a natural obligation, but the other party to whom the obligation is voluntarily assumed has the duty to reimburse all the expenses that the volunteer has incurred

Kinds of Quasi-contracts

1. *Solutio Indebiti* (Payment by mistake)

It is the juridical relation which arises when a person is obliged to return something received by him through error or mistake.

Example-

Abebe owed Lema the sum of 1, 000.00\$. By mistake, Abebe paid 2, 000.00\$ Lema has the obligation to return the 1, 000.00\$ excess because there was payment by mistake.

2. *Negotiorum gestio* (management of another's property) /When aids are rendered in Emergency/

It is the voluntary management or administration by a person of the abandoned business or property of another without any authority or power from the

Example-

Victor, a wealthy landowner suddenly left for abroad leaving his livestock farm unattended. Ramon, a neighbor of Victor managed the farm thereby incurring expenses. When Victor returns, he has the obligation to reimburse Ramon for the expenses incurred by him and to pay him for his services. It is bases on the principle that no one shall enrich himself at the expense of another.

Acts or omission punished by law is known as Delict or Felony or Crime.

- While an act or omission is felonious because it is punished by law, the criminal act gives rise to civil liability as it caused damage to another.

Civil liability arising from delicts:

- Restitution – which is the restoration of or returning the object of the crime to the injured party.
- Reparation – which is the payment by the offender of the value of the object of the crime, when such object cannot be returned to the injured party.
- Indemnification – the consequential damages which includes the payment of other damages

Illustration:

- Maru was convicted and sentenced to imprisonment by the Court for the crime of theft, the gold wrist watch, of Reta. In addition to whatever penalty that the Court may impose, Maru may also be ordered to return (restitution) the gold wrist watch to Reta. If restitution is no longer possible, for Maru to pay the value (reparation) of the gold wrist watch. In addition to either restitution or reparation, Maru shall also pay for damages (indemnification) suffered by Reta.

5. QUASI-DELICTS as a source of obligations

- Concepts of Quasi-Delict –

- Quasi-delict:- is one where whoever by act or omission causes damage to another, there being fault of negligence, is obliged to pay for the damage done. Such fault of negligence, if there is no pre-existing contractual relation between the parties. (Art. 2027 - 2161)

It may be off three kinds

- Liability arising from one`s own fault, Art 2028 – 2065

Example-

If Peter drives his car negligently and because of his negligence hits Jose, who is walking on the sidewalk of the street, inflicting upon him physical injuries. Then Peter becomes liable for damages based on quasi-delict.

Cont`d

- Liability in the absence of an offence /strict liability/ Art. 2066 – 2089.

It`s a liability for animals, buildings, etc. i.e. if a damage is caused by an animal or a building, then the owner of the animal/building will be liable for the damage.

- Liability for the action of others /Vacarious liability/ Art.2124 – 2161.

In this case the act is not done by the debtor himself but by the third party. However, he may be required to pay compensation. For instance, the guardian and tutor will be liable for the act of their minor children; the employers will be liable for the act of their employee, etc

Definition & Nature of contract

Approaches to contract

- The existence of **different approaches** to contracts has made the task of defining contract more complicated

1. Economic Analysis

- It tries to criticize the rules of contract law in terms of their economic efficiency and consequence.
- Ex. Strict liability of producers may need to introduce strict quality control provisions and taking out insurance and the costs of this measures will be added to the price of the good. If there is an increase in price there will be a decrease in the demand then it will lead to low production and productivity.
- So, cost of greater consumer protection is higher price. The same is true in the case of:

Cont`d

- Transaction costs:- standard form contracts are more economically efficient than individually negotiated contracts. But contract law discourages standard contracts.
- Adjudication Cost:- fixed rule of law are more economically efficient than giving judges a discretionary power

2. Socio - political Analysis

- We all have some political assumptions in the back ground, even if we are looking at contract cases purely within their own terms. Ex. `Freedom of contract` which is a political concept.
- The other is the **political ideology** of the state, capitalism, Marxist, or whatever, should be made explicit.
- There may be different ideologies that underpin the decision of the court,

3. Formalism

A court may be said to adopt a formalist approach if it feels obliged to follow rules established in earlier cases, even if it does not agree with them, or feels that they do not produce the most satisfactory result on the facts before the court.

4. Consumer-welfarism

individuals may be in a weak position as regards dealings with large organizations. Hence, rules of contract need to be developed and applied so as to protect them

Cont`d

5. Market individualism

gives freedom of contract the heights priority and leaves the parties to their bargaining, even if it happens to operate harshly on one side

6. Empirical Research:

- It approaches contract from the bottom rather than the top. Meaning instead of looking at decision of the appellate courts, and rules which they have developed, the focus could be on how contract law operates in peoples day-to-day lives.

Definition of contract Under the general jurisprudence

- The French Civil Code defines contract as follows:
 - "A contract is an agreement by which one or several other persons bind themselves in favor of one or several other persons, to give, to do or not to do something"
- Anglo-American legal systems defines contract as
 - a promises or set of promises for the breach of which the law gives a remedy or the performance of which the law recognizes in some way as a duty
- Louisiana Civil Code defines a contract as
 - an agreement between parties that creates, modifies or extinguishes an obligation.
 - ❖ **Contract is a combination of agreement and obligation**

Definition of contract under the Ethiopian Legal System

- Article 1675 of the Ethiopian Civil Code defines contracts as;
“an **agreement** whereby **two or more persons** as **between themselves** create, vary or extinguish **obligations** of a **proprietary nature** “
- *From this definition of a contract we can single out the following defining elements;*

1. Contract is an Agreement

To constitute a contract there must be an agreement. An agreement is composed of two elements-offer and acceptance. The party making the offer is known as the offerer, the party to whom the offer is made is known as the offeree. Thus, there are essentially to be two parties to an agreement. They both must be thinking of the same thing in the same sense. In other words, there must be consensus-ad-idem.

Cont`d

- **Agreement= Offer+Acceptance.**
- Before there can be an agreement between two parties, there must be **consensus ad idem (meeting of minds)**. This means that the parties to the agreement must have agreed about the subject -matter of the agreement in the same sense and at the same time . Unless there is consensus ad idem, there can be no contract
- An agreement may be a social agreement or a legal agreement. **If A invites B to a dinner and B accepts the invitation, it is a social agreement.**
- A social agreement does not give rise to contractual obligations and is not enforceable in a court of law. It is only those agreements which are enforceable in a Court of law which are contracts.
 - E.g. An acts of courtesy or gentlemen agreement is excluded

- To conclude:

Contract= Agreement + Enforceability at
law

Thus, all contracts are agreements but all
agreements are not necessarily contracts

Agreement vs Contract

- An agreement is a promise or set of promises (s). A contract is essentially an agreement, i.e., a promise or set of promise (s).
- Differences
- *Enforceability* –
 - An agreement may or may not be enforceable at law. For example, social agreements are generally not enforceable while business agreements are enforceable at law.
 - A contract is an agreement which is enforceable at law.
- *Effect* –
 - An agreement is not always a binding on the concerned parties.
 - A contract is always concluded and binding on the concerned parties,
- *Scope* –

Cont`d

2. Plurality of parties /contract is not a unilateral legal instrument/

- At least there has to be two persons, it may either natural or legal person
- One can not conclude a contract with him self
- A man can't be under legal obligations to himself

Q. What about contracts concluded by a single person with different capacity/ contracts with one self Art. 2188/

an agent can conclude a contract with himself;

- On his behalf

□

On behalf of third party

- **Self - dealing:-** where the agent concludes a contract with himself on his behalf
- **Dual Agency:-** where the agent concludes the contract with himself in the name of a third party
- These are the exceptional circumstances

Cont`d

3. The agreement should be between themselves

- It is the reflection of the principle of relative effect of contract, Art. 1952
- Contract can't produce any effect on third parties, in other words, the contract take effect only in between the parties.
- Art. 1952(1) cum 1957, provides the exceptional circumstances;
 - ▢ When the code to this effect and;
 - ▢ Stipulations for the benefit of third parties, like contract of insurance

4. The effect of the contract is to create, vary, or extinguish an obligation

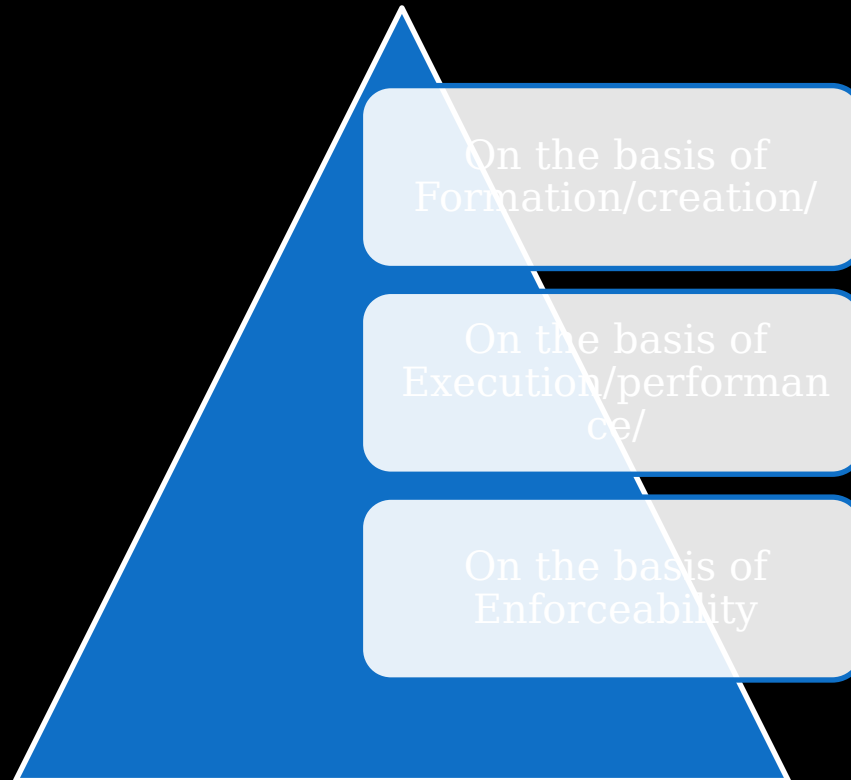
- The purpose of the contract has to be to establish, change, amend, or cease the effect of already existing contract
- the obligation of the parties is the object of the contract
- The object of the contract is what we call it `the Legal tie`

Cont`d

5. The Agreement should relate with something proprietary

- the agreement should relate with; goods, physical or intellectual service
- So, it excludes contract of status; betrothal, marriage, adoption
- But, it doesn't mean that there is no propriety obligation that arise from such type of relationship.

Classification of contracts



Cont`d

- But these basis of classification of contract and the respective types of contract that fall in each category are not the same in different legal systems
- No watertight classification
- The one that we categorized under formation may be categorized under performance in other country
- Hence, just simply comparing each types of contract with their respective counter part, is a best way to understand the different types of contract

I) On the basis of formation/creation/

1) Express Vs. Implied Contracts.

- Express: terms of contract are set forth either in writing or orally.
- Implied-in-Fact: based on *conduct*.
 - Plaintiff furnished service or product.
 - Plaintiff expects to be compensated.
 - Defendant had a chance to reject and did not.

2) Formal/solemn/ vs. Informal /consensual/ Contracts.

- Formal contracts require a special form or method of formation to be enforceable. Formal contracts include contracts under seal, which are writings with a special seal attached.
- All other contracts are informal contracts, or simple contracts. For these, no special form is required (except for certain types of contracts that must be in writing).

Cont`d

3) Contract of Adhesion Vs. Contract of Consultation (Freely Negotiated Contracts)

- **Contract of Adhesion:**

- the **terms of the contract are dictated by a party** with overwhelming bargaining power and the signer must agree to those terms or go without the commodity or service in question

▢ An adhesion contract is written exclusively by one party (the dominant party) and presented to the other party (the adhering party) who has no opportunity to negotiate

▢ Ex. Insurance policies, lease contracts, loan agreements

- **Contract of Consultation:**

- Here, the contract is the result of **free bargaining of parties** who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality.

II. On the basis of /Excision/ Performance/

- 1) **Bilateral Contracts Vs. Unilateral Contracts**
- **Bilateral Contracts;**
 - Offeror and Offeree exchange promises to each other.
 - A contract is formed when Offeree promises to perform.
- **Unilateral Contracts:**
 - Offeror wants performance in exchange for his promise.
 - Contract is formed when Offeree *performs*.
 - Contests and lotteries are examples.
 - Revocation of Offer: modern view is that offer is irrevocable once the Offeree substantially performs.

Cont`d

- Every contract involves at least two parties: an offeror and an offeree. The offeror promises to do or not to do something.
- Whether a contract is unilateral or bilateral depends on what the offeree must do to accept.
- A bilateral contract is a **promise for a promise**; if the offeree need only promise to perform, the contract is bilateral.
- A unilateral contract is a **promise for an act**; if the offeree can accept only by complete performance, the contract is unilateral.
- A unilateral contract's offer becomes irrevocable once substantial performance has been completed.

More on Bilateral & Unilateral....

Bilateral contracts

- A promise by one party in exchanged for a promise by another party
- A one to one contract

Offeror or Promisor

The person who make the offer



Offeree or Promisee

The person to whom the contract was made

Example : Sale of goods contract

- The Buyer promises to pay the price
- The Seller promises to deliver the goods

Unilateral contracts

- A promise by one party in exchanged for an action by another party
- A one to all contract

**1
Offeror**



**Many
Offeres**

Example :

X promises a reward to anyone who will find his lost wallet. X binds himself to the promise, but no one is bound to search for the lost wallet. But if Y, having seen the offer, recovers the wallet and returns it, he is entitled to the reward.

Cont`d

2. Executed Vs. Executory

- **Executed Contract:** It is a contract where both the parties to the contract have fulfilled their respective obligations under the contract.
- **Executory Contract:** It is a contract where both the parties to the contract have still to perform their respective obligations.
- **Partly executed and partly Executory contract:** Where one party has fulfilled his obligation and the other party has still to perform his obligation.

Cont`d

3. Aleatory Vs. Commutative Contracts

➤ **Aleatory contract:**

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

➤ **Commutative contract:**

- In this the type of contract the contracting parties are required to **perform their obligations simultaneously**.
- There is no advance time given to one of the contracting parties.

III. On the basis of Enforceability

1. Valid Contract.

- An agreement that **fulfill all the essential requirements** such as; agreement, Consideration, Legal Purposes, Parties have legal capacity.

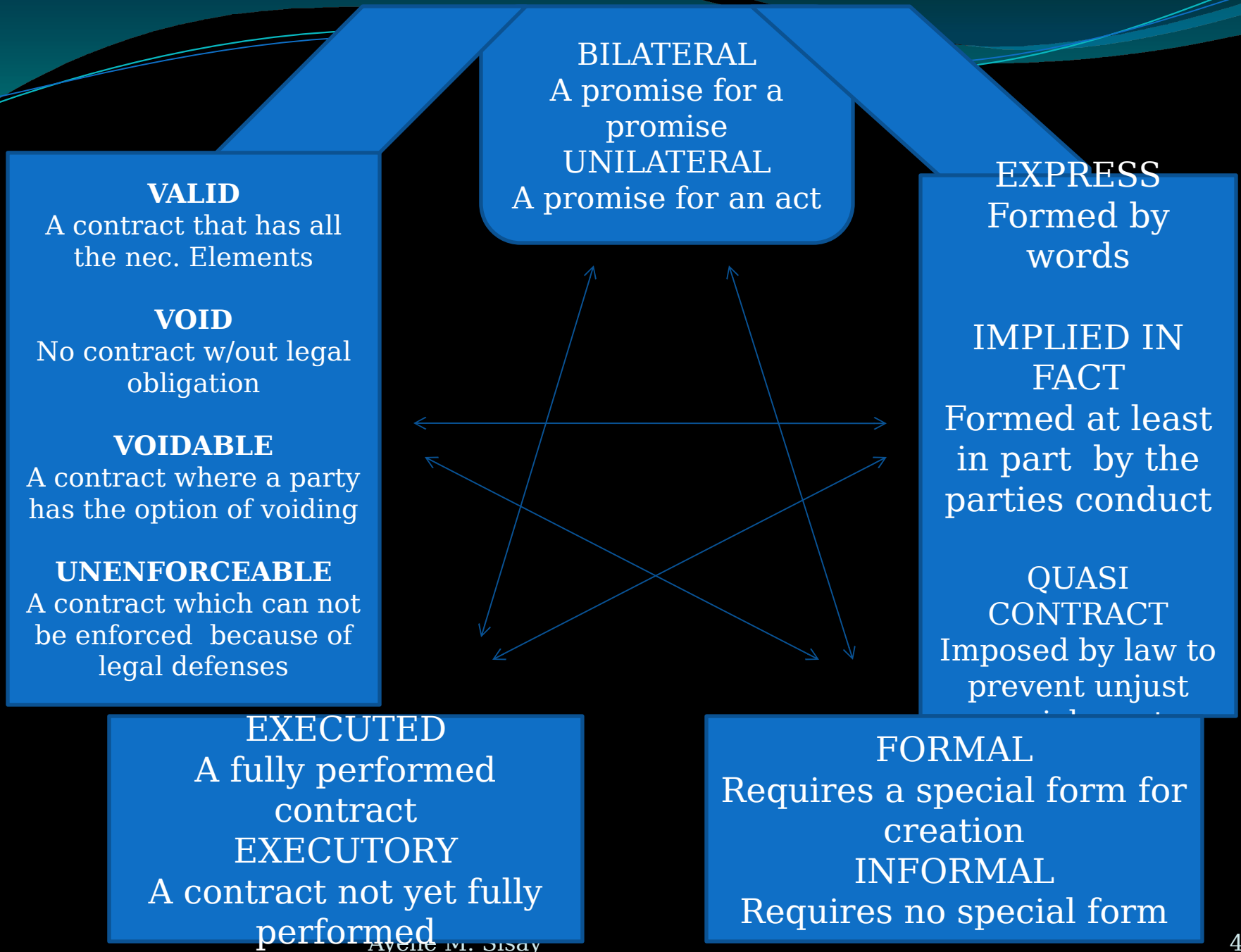
2. Void contract:

- **one that neither party can enforce**, usually because the purpose is illegal or one of the parties had no legal authority

3. Voidable Contract.

- Valid contract that is legally defective and can be avoided (rescinded) by one of the parties.
- An agreement made which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract. When the consent of a party to a contract is not free, the contract is voidable at his option.

4. Unenforceable Contracts - An unenforceable contract is one which cannot be enforced in a Court of law because of some **technical defect** such as where the remedy has been barred by lapse of time.



Classification - Quick Study

Type of Contract	Description
Voidable	A contract enforceable by law at the option of one or more of the parties to the contract, but not at option of other or others .
Void	A contract which ceases to be enforceable by law.
Illegal	One which transgresses public policy, is illegal or criminal.
Unenforceable	One that cannot be enforced because of a technical defect or lapse of time.
Express	A contract in which the terms are stated in words.
Implied	One inferred from the circumstances or from conduct of parties.
Executed	Contract wholly performed by both parties.
Executory	Contract where promises by both parties are yet to be performed.

Objective, Importance & Purpose of Contract and Contract Law

- ◆ Definiteness in business transactions.
- ◆ To ensure realisation of reasonable expectation of the parties who enter into a contract.
- ◆ Of particular importance to people engaged in trade, commerce and industry as bulk of their business transactions are based on contracts.

Cont...

- Contract law is needed to ensure compliance with a promise or to entitle a non-breaching party to relief when a contract is breached.
- All contractual relationships involve promises, but all promises do not establish contractual relationships. Most contractual promises are kept; keeping a promise is generally in the mutual self-interest of the promisor and the promisee.

Purpose of contract

- There are different types of theories that justifies the purpose of law of contract
- **Consent Theory:** parties have consented to legally enforceable agreement, so the law of contract is designed to impose individual responsibility on the party who has failed to perform his/her obligation
- **Will Theory:** contract law should be designed to foster; individual liberty, private autonomy and freedom of transaction subject to public policies
- **Promise Theory:** contract law is necessary to uphold moral values by recognizing the sanctity of promise

Cont....

- **Reliance Theory:** contract law should be designed to promote
 - Promises and their reasonable expectation
 - when some one act in reliance upon other`s promises the gov`t should interfere to avoid injustice
- **Utilitarian Economic Theory:** contract law should be designed to maximize the potential gains from transactions by facilitating the process of voluntary trade
- Free market economy & maximizing utility
- **Critical Legal Studies Theory:** `post modernism` critics, contract law is not value neutral
- It has been designed to protect and promote

Jurisdictions on Contract Law in Ethiopia

- Book IV, Title VII of the civil code deals with contracts in general and it ranges Art. 1675 – 2026.
- Regarding its application Art. 1676 (1) provides that;

*"The general provisions of this Title shall apply to contracts **regardless** of the **nature** thereof and the **parties** thereto"*

- ▢ The **nature** of the contract may be sale of Business, immovable, contract of compromise & arbitration, administrative contract, or contract of transportation.
- ▢ **Parties** to the contract may be natural/physical/person or artificial/legal /persons but in all scenarios this general provision of contract applies.

- But this is not without exception, Art. 1776(2)
Nothing in this Title shall affect such special provisions applicable to certain contracts as are laid down in Book V of this Code and in the Commercial Code.
- This exception is a continuation of the general PP of;
Specialia generalibus derogant
Special prevail over the general
- So the general provisions assume a subsidiary role
- (1) sale of cattle [2368 ff]---(2) sale k [2266 ff]—(3) contracts in general[1675ff]

- The general provision of contract may also apply to young the general rules of special contract, generally to cover obligations which do not necessarily arise out of contract. Art. 1677(1);

*The **relevant** provisions of this Title shall apply to obligations **notwithstanding** that they **do not arise out of a contract***

- ❑ The term `relevant` excludes provisions which by rule of logical relevancy / sheer common experience/ can't be applied to non contractual obligations.
- ❑ Ex. Provisions of formation, performance and non-performance of contract may relevantly apply to performance/non-performance/ of non-contractual obligation
- ❑ The same is true in case of rules of extinction of obligation to non – contractual obligation

Cont...

- It's also only when there is no special provision applicable to them that this general provision of contract applicable to non-contractual obligation. Art. 1677(2)

Nothing in this Title shall affect the special provision applicable to certain obligation by reason of their origin or nature.



End
10 Q