CHAPTER FOUR
Non-Performance of Contract & Its Remedies

Hand out

As stated under Article 1731 (1), a contract formed lawfully binds the parties as if it were law, which means that the parties shall perform (discharge) their obligations according to their contract and the law

- Articles 1740-1762 regulate how performance should be made

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

- Non performance may be total or partial
  - *This failure/breach may be total, where a party totally fails to honor the terms of contract. It may also be partial, where a party has performed his/her obligations only partly. 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*

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 contract ants for fear that their contract may not be performed; or in other words it is intended to secure contractual transactions

parties may stipulate contractual remedies for breach, for example by incorporating penalty clauses ,enforced by the law (see articles 1886-1895).

However, the law of contract provides remedies even if there is no contractual provision to that effect. These are called legal remedies . And it protect the interest of the party that is affected by non-performance.

Accordingly, the remedies are supposed to put the victim party in the position he would have been had the contract been performed. There are three remedies:-

1.ENFORCEMENT ;- is designed to satisfy the victim party by enforcing the terms of the contract.

. It may be done either by compelling the debtor (failing party) to perform his/her obligations(forced performance) or by authorizing the creditor (victim) party to perform the debtor's obligation at the cost and expense of the debtor (substituted performance).

2.Cancellation of contract:-

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. (Unilateral cancellation applies in exceptional circumstances)

The effect of cancellation is to put the parties the position which would have existed, had the contract not been made. Thus, the Victim party can claim back what he has paid or delivered. In addition to this, he may claim compensation.

3.DAMAGES (COMPENSATION):-

The victim party can claim compensation for the damage or loss he has incurred as a result of non-performance.

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

In addition, the law generally requires the party affected non-performance to fulfill certain criteria before resorting to the remedies of non-performance . That is the victim shall give default notice

4.3 General remedies of non-performance under Ethiopian law

- The general provisions of Ethiopian law contract recognize three types of remedies of non-performance
- These are stipulated under two sub-articles of Article 1771 as the effects of non-performance.
- Accordingly, the remedies of non-performance are

(1) the enforcement of the contract

(2) Cancellation

(3) Compensation /damages

when we read article1771 together with article 1790, we understand that the third remedy, i.e., compensation, can be claimed as independent remedy or additional remedy.

4.3.1 The pre-requisites for invoking the remedies of non-performance

- application of this pre-requisite under Ethiopian law as covered under articles 1772-1775.
- Article 1772 provides the general rule that the giving of default notice is a pre-condition for invoking the remedies of non-performance

Default notice is demanding the debtor to perform his/her obligation within a certain time limit.*(used as reminding the debtor and reducing litigation. Also may be* lead to the consequences stated under Article 1758, i.e., transfer of risk).

when should default notice be given and in what manner? & how much time should the victim give to the debtor to perform his obligations?

- *Art. 1773. – Form and time of notice:-* 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
- Time ;-the creditor can demand performance only if the obligation is due and it is logical to say that default notice can be given only in respect of such obligations.

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