Ethiopia

by
Mulugeta M. Ayalew
University of Surrey

The contents of this monograph have been reviewed by the author and are up-to-date as at August 2010.

2010

Wolters Kluwer
Law & Business

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

The monograph *Ethiopia* is an integral part of *Contracts* in the *International Encyclopaedia of Laws* series.

Printed on acid-free paper.

ISBN 978-90-654-4941-2
Contracts was first published in 1993.

Ayalew, Mulugeta M. 'Ethiopia'. In *International Encyclopaedia of Laws*: *Contracts*, edited by J. Herbots. Alphen aan den Rijn, NL: Kluwer Law International, 2010.

The Author

Mulugeta M. Ayalew studied law at Addis Ababa University (Ethiopia) from 1996 to 2001. He obtained a Master of Laws in European and Comparative Law in 2004 from the University of Ghent (Belgium). He also obtained a Master in Law and Economics from Erasmus University of Rotterdam (The Netherlands), University of Ghent and University of Manchester (UK). He taught law at Mekelle University (Ethiopia) from 2001 to 2006. Currently he is writing up his PhD dissertation at the University of Surrey (UK), where he is also an Associate Lecturer in the School of Law and a teacher in the International Study Centre.

The Author

Acknowledgments

In the preparation of this monograph I have received assistance from a number of individuals. I would like to thank all of them. I am particularly grateful to Mekdes Libasie, Liku Worku, Getaneh Agegn and Bethelhem Getachew.

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General Introduction

§1. General Background

I. Geography and Cultural Composition

1. Ethiopia is a landlocked country located in the Horn of Africa. It shares borders with Eritrea to the north, Djibouti to the northeast, Somalia to the east, Kenya to the south, and the Sudan to the west. Its population was estimated in 2007 to be about 75 million.[1] Its size is about 435,071 square miles (1,126,829 km^2), equal to the United Kingdom, France, and Germany combined.

Ethiopia is ethnically diverse. There are more than eighty different ethnic groups speaking different languages. The largest ethnic groups are the Oromo, Amhara, Somali, and Tigre.

1. Population Census Commission (Ethiopia), Summary and Statistical Report of the 2007 Population and Housing Census: Population Size by Age and Sex (2008).

II. Political System

2. Ethiopia had its first written constitution in 1931. The term 'written' here is used to imply a codified constitution. The 1931 Constitution was not therefore the first constitution. There were several other written documents and traditions that had constitutional functions.[1] None of these documents and traditions can, however, be considered to have had introduced 'constitutionalism' in the true sense of the term. They were designed mainly to provide legitimacy to the claims of kings. Almost all kings trace their ancestors back to King Solomon and Queen Sheba. This legend, supported by the Ethiopian Orthodox Church, served as a source of legitimacy for the unlimited power of emperors.

The 1931 Constitution was replaced by another constitution in 1955. The 1955 Constitution incorporated a set of human rights. It provided for a legislature consisting of elected representatives and an independent judiciary. It failed, however, to significantly restrict the power of the emperor. Members of the upper house of the legislature, judges, ministers, military officers, and local administrators were all appointed by the emperor. The 1955 Constitution 'rather maintained and enhanced the central control over regional forces that (the emperor) has institutionalized through the 1931 constitution'.[2] In 1974 the military regime suspended the 1955 Revised Constitution and ruled until 1987 with no constitutional structure.

In 1987, another constitution was adopted that proclaimed Ethiopia as a peoples' democratic republic. This was short lived. In 1991, the military government was toppled by a rebel group, the Ethiopian Peoples Revolutionary Democratic Front, which established a commission, charged with drafting a constitution. In 1995, representatives of the 'nations, nationalities, and peoples of Ethiopia' adopted a constitution that remains in force.[3]

1. For a discussion of these documents and traditions, see A. Jembere, *An Introduction to the Legal History of Ethiopia* (Münster: LIT, 2000).
2. L. Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience* (Bergen: Chr. Michelsen Institute, 2002), 51.
3. See Proclamation No. 1/1995, Constitution of the Federal Democratic Republic of Ethiopia.

3. The 1995 Constitution is a departure from the past in many regards.[1] One such regard is the introduction of a federal form of state structure.[2] It envisages two layers of government: federal and regional.[3] There are about nine regional and two city governments.[4] Government powers and functions are divided between the regional states on the one hand and the federal government on the other. As can be seen from the preamble of the Constitution, power is not given to regional governments.[5] It is rather given to the federal government. The federal government has an exhaustively enumerated set of functions and powers. These are listed in Article 51 of the Constitution. These include: establishment and implementation of national standards and basic policy criteria for public health, education, science and technology, as well as for the protection and preservation of cultural and historical legacies; enactment of laws for the utilization and conservation of land and other natural resources, historical sites, and objects; formulation and implementation of foreign policy; negotiation and ratification of international agreements; determination and administration of the utilization of the waters or rivers and lakes linking two or more states or crossing the boundaries of national boundaries; and regulation of inter-state and foreign commerce. Although it appears from Article 51 that the powers and functions of the federal government are exhaustively listed, there is a mechanism for the transfer of some powers from the states to the federal government when the House of Federation decides so.[6] In addition, some powers of the federal government can be delegated to the states. The state governments have residual power; anything that is not given to the federal government alone or the federal and regional governments concurrently is left to regional governments.[7]

1. See, for detailed discussion of the salient features of the 1995 Constitution, F. Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect* (Asmara: Red Sea Press, 1997).
2. Article 1 of the Constitution reads: 'This Constitution establishes a federal and democratic state structure. Accordingly, the Ethiopian state shall be known as The Federal Democratic Republic of Ethiopia.'
3. Article 50(8) of the Constitution reads: 'Federal and state powers are defined by this Constitution. The states shall respect the powers of the federal government. The federal government shall likewise respect the powers of the state.'
4. Article 47(1) of the Constitution lists Member States of the federation. It should be noted that the Constitution contains a right of self-determination, including the unconditional right of secession. As a result of secession, internal or external, the number of Member States could either increase or decrease. The city governments are that of Addis Ababa and Dire Dawa, which are accountable to the federal government.

5. It appears from the preamble that the federal government is constituted by the Member States; it is not the central government that has constituted the Member States.
6. See paras 5 and 6 for a discussion relating to the House of Federation.
7. Article 52 of the Constitution enumerates the powers and functions of regional states by way of illustration. This is, of course, subject to the constitution of each regional state.

4. The 1995 Constitution is unique because not only has itestablished a federal state, but the constituent units of the federation are also demarcated mainly on the basis of ethnicity; the Constitution establishes a structure usually referred to as 'ethnic federalism'. Ethnic federalism has been a point of contention among constitutional scholars and politicians. One commentator, for example, writes: 'The particular form of federation established by the new Ethiopian Constitution not only lacks the essential attributes of successful federations, it is riddled with those undesirable features that will doom the federation as still born and perhaps trigger the disintegration of Ethiopia into mini-tribal entities in perpetual warfare against one another.'[1] To this charge, one of the drafters of the Constitution replies: 'This rather unusual constitutional approach has been hailed, on the one hand, as a stroke of genius that will uplift Ethiopia from its age-old backwardness and, on the other, as the sign of the first cracks for disintegration. Could both be correct in that the outcome depends on how the instrument is employed, just as the atom, as a fantastic source of energy, can be used either to greatly benefit mankind or to send it to its doom?'[2]

1. M. Haile, 'The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development', *Suffolk Transnational Law Review* 20 (1997): 1.
2. F. Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect* (Asmara: Red Sea Press, Inc., 1997), 51.

5. The other unique characteristic of the 1995 Constitution relates to the second house of the federal parliament: the House of Federation. A comparative constitutional study suggests that this is a unique government structure with a unique set of functions and powers.[1] As far as its composition is concerned, it is somehow similar to the Senate of the United States. In its functions and powers, however, it is different from many second chambers of parliament. It is a political as well as a judicial organ of government. It is political organ to the extent that it is involved in the lawmaking process and composed of politicians.[2] It is judicial to the extent that it is involved in the interpretation of the Constitution and resolution of disputes among Member States of the federation.

1. See, for example, M. Haile, 'The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development', *Suffolk Transnational Law Review* 20 (1997): 82 ('This ridiculous arrangement for interpreting a constitution is hard to find elsewhere in the world'.); F. Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect* (Asmara: Red Sea Press, Inc., 1997), 59 ('The House of Federation, as the champion of the nations, nationalities, and peoples of Ethiopia, whose equality it promotes and whose unity based on their mutual consent it enhances, whose self-determination right it enforces and whose misunderstandings it seeks to solve, it is precisely this political institution that is vested with the power to interpret the Constitution'.)
2. See Arts 61 and 62 of the Constitution for the composition, powers, and functions of the House of Federation.

6. The drafters of the Constitution believed that the main political problem of past governments was the ethnic exploitation and oppression that they perpetrated. And, they argue, if Ethiopia is to continue as a democratic and developmental state, it must be structured in a way that gives guarantee for the various ethnic groups against oppression. Accordingly, they justify most provisions of the Constitution as essential safeguards of ethnic pluralism. Ethnic federalism, a parliamentary form of government, the right of self-determination (including the unconditional right to secession), and public ownership of land and natural resources are said to be safeguards of pluralism. These principles are embodied in the Constitution to make sure that they remain supreme and that they are not easily changed like other ordinary laws.

Article 9(1) provides: 'The constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this constitution shall be of no effect.' Whether a given law, customary practice, or decision contradicts the Constitution and hence is void is decided by the House of Federation. The House of Federation makes the final decision on constitutionality issues after considering the recommendations of the Council of Constitutional Inquiry (Articles 82–84). In addition to proclaiming their supremacy, most written constitutions provide an amendment procedure that is different from that followed to amend or pass ordinary laws. The Ethiopian Constitution is no different. It can be amended when the House of Peoples' Representatives and the House of Federation, in a joint session, approve a proposed amendment by a two-thirds majority vote and when two-thirds of the legislatures of the Member States of the federation approve the proposed amendment by majority votes (Article 105(2)). If the amendment pertains, however, to any of the fundamental rights and freedoms of the Constitution (including the right to self-determination and other rights), the proposed amendment must be approved by the legislatures of all the Member States of the federation (Article 105(1)).

7. The federal government is a parliamentary form of government: the political layer of the executive is part of the legislature (Article 45). There is separation of the offices of the head of state and the head of government. The president is the head of state and has mainly ceremonial functions (Articles 69–71).

The primary legislative organ of the federal government is the House of Peoples' Representatives. It has members elected based on a plurality system from single-member constituencies, with the exception of twenty seats that are reserved for minority ethnic groups (Article 54). The members are elected for a term of five years. In addition to passing laws on matters that are given to the federal government, the House of Peoples' Representatives proclaims a state of war on the basis of a draft law submitted to it by the Council of Ministers and approves the appointment of federal judges, members of the Council of Ministers, and other senior officials of the federal government (Article 55).

The executive branch of the federal government is formed by the political party that has the greatest number of seats in the House of Peoples' Representatives (Article 56). The highest executive powers of the federal government are vested in the Prime Minister and the Council of Ministers that are collectively responsible to the House of Peoples' Representatives (Article 72). In addition to exercising executive powers on matters falling under federal jurisdiction, the Council of Ministers

may be delegated by the House of Peoples' Representatives to make secondary legislation (Article 77).

Supreme federal judicial authority is vested in the Federal Supreme Court (Article 78). The anomaly regarding the Federal Supreme Court is its power to review final decisions of state courts on the basis of its cassation jurisdiction (Article 80). In addition, the Constitution empowers the House of Peoples' Representatives to establish and determine the jurisdiction of a High Court and first-instance courts (Article 78).

§2. The Ethiopian Legal System Is Mixed

8. Different people characterize the legal system of Ethiopia differently. Some argue that Ethiopia essentially follows the civil law tradition.[1] Others argue that the legal system of Ethiopia is mixed. Not surprisingly, no one (at least to the best knowledge of the author) has ever written that Ethiopia follows the common law tradition. The author subscribes to the view that Ethiopia's legal system is mixed. Close examination of various aspects of the legal system supports this characterization. In characterizing Ethiopia's legal system as mixed, several factors are taken into account. These include historical sources of major branches of the law, material sources of the law, and the status of customary and religious norms.

1. See, for example, A. Jembere, *An Introduction to the Legal History of Ethiopia* (Münster: LIT, 2000), 11.

9. Before the 1960s, the body of law that was applicable consisted of customary and religious norms, *Fetha Negest*, judge-made laws, and some enactments. Enactments that applied before the modern codes were essentially of a public law nature, and these include the law on the powers and duties of ministers (1908), the law of Addis Ababa city (1908), the Ethiopian nationality law (1930), the law of loans (1924), the decree on concession (1928), the law of companies (1933), and the law of bankruptcy (1933).

Fetha Negest (the Law of the Kings) is a compilation of laws applicable in Ethiopia since the beginning of the fifteenth century.[1] It has two parts and appendix. The first part consists of 801 articles dealing with religious matters. The second part, which consists of 1033 articles, governs a wide range of matters, such as marriage, donation, loan, guarantee, guardianship, sale, and so on. The appendix, which consists of thirty-six articles, deals with the law of succession. The source of the *Fetha Negest* is widely believed to be Roman law.[2]

1. For a detailed discussion of this historical document, see A. Jembere, *An Introduction to the Legal History of Ethiopia* (Münster: LIT, 2000).
2. See, for example, G.W.B. Huntingford, 'The Constitutional History of Ethiopia', *Journal of African History* 3 (1962): 311 ('*Fetha Nagast* . . . is a compendium of ecclesiastical and civil law which is ideally the basis of Ethiopian law, though in practice there is considerable deviation from it. This, originally written in Arabic in the thirteenth century, is said not to have been translated into Ge'ez till late in the seventeenth century. But there are indications that a document bearing this title was current at least as early as the late sixteenth century, though it is true that the known manuscripts in England, France, and Germany date from 1681 onwards'.);

and S. Fisher, 'Traditional Criminal Procedure in Ethiopia', *American Journal of Comparative Law* 19 (1971): 709 ('The *Fetha Nagast*, "The Law of the Kings", is a text of religious and secular rules written in Egypt in the thirteenth century as a guide for Coptic Christians living there. It was introduced in the fifteenth or sixteenth century. The religious content of the *Fetha Nagast* derives from the Old and New Testaments, and its secular content from Roman-Byzantine law sources'.)

10. The period between 1955 and 1965 is a turning point in the legal history of Ethiopia. The five codes, which largely remain in force, are the results of the codification process of this period. These are the Civil, Commercial, Civil Procedure, Criminal Procedure, and Maritime Codes.

The fact that most of the codes were drafted by French and Swiss legal scholars has reinforced the widely held view that Ethiopia belongs to the civil law tradition. However, both the drafter of the Civil Code, Rene David, and a leading commentator of Ethiopian law, George Krzeczunowicz, wrote that Ethiopian law incorporates elements of common law and local customary and religious rules.[1] Consequently, despite the use of continental-styled codes, the content of Ethiopian law is a mixture of customary, continental, and Anglo-American principles. This is particularly true in contract, tort, procedural, and company laws.

1. See R. David, 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries', *Tulane Law Review* 37 (1963): 187; G. Krzeczunowicz, 'The Ethiopian Civil Code: Its Usefulness, Relation to Custom and Applicability', *Journal of African Law* 7 (1963): 172; G. Krzeczunowicz, 'The Present Role of Equity in Ethiopian Civil Law', *Journal of African Law* 13 (1969): 145; N. Singer, 'The Ethiopian Civil Code and the Recognition of Customary Law', *Houston Law Review* 9 (1972): 460; J. Vanderlinden, 'Civil Law and Common Law Influences on the Developing Law of Ethiopia', *Buffalo Law Review* 16 (1966): 250; and I. Idris, 'Freedom of Religion and Secularization of State: The Legal Status of Islamic Law and Shariat Courts in Ethiopia', in *Ethiopia 94: Papers of the 12th International Conference of Ethiopian Studies: Social Sciences*, ed. H. Marcus (Addis Ababa: AAU, 1996).

11. The Ethiopian law of contracts is largely contained in the Civil Code. Some kinds of contracts are also governed by the Commercial and Maritime Codes. Being one of the two countries not colonized by European powers, Ethiopia had at the time so many options, civil codes, to adapt or adopt with the hope of introducing 'modernization' into the country. The drafter had used the civil codes of France, Switzerland, Greece, Egypt, Iran, Portugal, Israel, Turkey, Quebec, and the Philippines. What is unique about the Ethiopian Civil Code, compared to the equally eclectic code of Egypt, is that the former has also borrowed some principles from common law tradition, mainly from the laws of the United Kingdom, the United States, and India.

Regarding tort law, Krzeczunowicz wrote, 'apart from the half dozen Romanistic legal systems (including the Egyptian one) inspiring our codifiers, one also finds borrowings from the common law; the extra-contractual liability chapter clearly reflects influences of both English and American law'.[1] After providing the general rule that 'whosoever causes damage to another by an offence (fault) shall make it good', the Civil Code also provides special categories of torts, such as physical assault, interference with the liberty of another, defamation, injury to the rights of spouses, trespass, assault on property, pre-contractual negotiations, unfair competition, and several others which clearly reflect the influence of English law.

The main source of Ethiopian law of civil procedure is the Indian Code of Civil Procedure. Similarly, Ethiopian law of criminal procedure is less continental[2]. The British company law of 1948 has influenced certain aspects of the Commercial Code, and close studies of the rules governing partnership also suggest the influence of English law of partnership.

1. G. Krzeczunowicz, *The Ethiopian Law of Extra-Contractual Liability* (Addis Ababa: AAU, 1970), 3.
2. S. Fisher, *Ethiopian Criminal Procedure: A Sourcebook* (Addis Ababa: AAU, 1960), xii.

12. Before the enactment of the Civil Code, many aspects of social life were also governed by customary and religious norms. The Civil Code has incorporated these customary and religious norms to the extent that they reflect a strong sense of justice of the Ethiopian people.[1] Otherwise, customary law and religious norms do not apply to matters that are governed by the Civil Code. Article 3347 (1) of the Civil Code provides: 'Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed.' This does not eliminate religious and customary norms completely. They are inapplicable only to the extent that the matter is governed by the Civil Code. If a given matter is not governed by the Civil Code, however, courts could avail themselves of these religious and customary norms. This role of religious and customary norms has been expanded by the Constitution. Article 34(5) of the Constitution recognizes the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. On the basis of this, the House of Peoples' Representatives has already enacted a law that gives recognition to Islamic law and courts.[2]

1. Emperor Haileselassie I wrote in the preface to the Civil Code: 'No law which is designed to define the rights and duties of the people and to set out the principles governing their mutual relations can ever be effective if it fails to reach the heart of those to whom it is intended to apply and does not respond to their needs and customs and to natural justice. In preparing the Civil Code, the Codification Commission convened by US and whose works We have directed has constantly borne in mind the special requirements of Our Empire and of Our beloved subjects and has been inspired in its labours by the genius of Ethiopian legal traditions and institutions as revealed by the ancient and venerable Fetha Negest.'
2. See Federal Courts of Sharia Consolidation Proclamation No. 188/1999.

13. The legal status of precedents has influenced the mischaracterization of the Ethiopian legal system as civil law. For a long time, lower courts had refused to take judicial notice of precedents set by higher courts. In cases where parties argued on the basis of such precedents, courts refused to accept them on the ground that either precedents are not laws (or they are not legally binding) or that Ethiopia is a civil law country and hence precedents are not binding. The following statement written by a member of the Council of Constitutional Inquiry, at the time of writing, reflects this view:

> The [law] has now made it clear that the decisions of the [House of Federation] on constitutional adjudication shall . . . remain applicable to similar issues that may arise in the future. This, in a way, is a new development in the field as it

> has introduced a precedent system; a practice peculiar to the common law system has thus been introduced in a predominantly civilian legal tradition. As a country of civil law tradition there is no possibility for the introduction of judge-made laws in Ethiopia. Law making is the sole responsibility of the legislative arm of the state. A sudden departure is exhibited with the adoption of this precedence system for the constitutional adjudication. It is provided in an explicit way that decisions of the House shall apply to future cases.[1]

It should be noted that Ethiopia is not a civil law country and hence this argument is not plausible. In addition, it should be noted that even civil law countries give some kind of legal force to judicial precedents.[2] In 2005, the House of Peoples' Representatives passed a law that made decisions of the Cassation Division of the Supreme Court binding on all courts in the country.[3] The Cassation Division reviews final decisions of lower courts when there are basic errors of law. It is not an ordinary Court of Appeal.[4] Whether lower courts will follow precedents set by the Cassation Division of the Supreme Court depends not merely on whether they are statutorily bound but on different extra-legal factors, such as on whether decisions of the Federal Supreme Court are published and sufficiently elaborated and explained and on whether repeated reluctance to follow precedents is easily identified and sanctioned.[5]

1. G. Kassa, 'Mechanisms of Constitutional Control: A Preliminary Observation of the Ethiopian System', *Afrika Focus* 20 (2007): 96–97.
2. See, for example, V. Fon & F. Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis', *International Review of Law and Economics* 26 (2006): 519.
3. Article 10(4) of the Federal Courts Proclamation 25/1995 (as amended by Proclamation No. 454/2005) reads: 'Interpretation of a law by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on federal as well as regional courts at all levels. The cassation division may however render a different legal interpretation some other time.'
4. See Federal Courts Proclamation No. 25/1995.
5. English or American judges follow precedents not because they are statutorily bound but as a matter of tradition. See, for example, E. Caminker, 'Why Must Inferior Courts Obey Superior Court Precedents?' *Stanford Law Review* 46 (1994): 826–827.

§3. The Status of Legislation in the Ethiopian Legal System

14. As a general principle, there is primacy of legislation in the Ethiopian legal system. A judge setting out to solve a concrete case should first consider statutory rules. Statutes include the six codes of law, proclamations promulgated by the House of Peoples' Representatives and regional legislative bodies, and regulations issued by the executive organs of the federal and state governments. In the absence of any relevant and applicable statutory law, judges could resort to customary rules.[1]

1. See para. 12 for the legal status of customary and religious norms.

15. Subject to clear provisions in any legislation, courts are also required to take judicial notice of the interpretation of law rendered by the Cassation Division of the Federal Supreme Court.[1] Mixed as the Ethiopian legal system is, there is also scope for the primary application of Islamic law in personal and family matters so long as the parties to the case have expressed their consent.[2]

1. See para. 13 for the legal status of precedents.
2. See Art. 34(5) of the Constitution and see also Federal Courts of Sharia Consolidation Proclamation No. 188/1999.

16. Considering that Ethiopia is a federal state, a question can be raised as to the relationship between federal and state legislation. The Constitution demarcates the powers and functions of the federal government on the one hand and members of the federation on the other hand. Therefore, there would not normally be an overlap between the jurisdictions of the federal and state legislatures. If there is any contradiction between federal and state legislation, however, the issue would be determined by the House of Federation as it would involve constitutional interpretation.[1]

1. See paras 5, 6 and 21 regarding the House of Federation.

§4. The Position of the Judiciary

17. The judicial branch of government is structured following the federal state structure, and this entails the establishment of federal and state (regional) courts. Article 55(1) of the Constitution stipulates that the federal and regional governments shall have legislative, executive, and judicial powers. The highest judicial power of the federal government is vested in the Federal Supreme Court, which is established by the Constitution. Article 80 of the Constitution provides: '(1) The Federal Supreme Court shall have the highest and final judicial power over federal matters' and '(2) State Supreme Courts shall have the highest and final judicial power over state matters.' Whether a given matter is a federal or state issue is determined by the Constitution. The Constitution enumerates the powers of the federal government in Article 51, and the federal courts have judicial power over those matters enumerated in Article 51. This is elaborated further by the Federal Courts Proclamation No. 25/1996.

The rule that the Federal Supreme Court (state Supreme Court) has the final judicial power does not mean that any judicial decision ought to be approved by the Supreme Court so that it is considered final; it only means that there is no other organ of government above the Supreme Court to review court decisions. It could be the case that a decision of the High Court is final unless it contains a basic error of law. Similarly, the above rule does not bar the Federal Supreme Court from reviewing the final decision of any court (whether state or federal) if it contains a basic error of law. This has its constitutional basis in Article 80(3): 'The Federal Supreme Court has a power of Cassation over any final court decision containing a basic error of law.'

The Federal High Court and First-Instance Courts are based only in the capital city (Addis Ababa) and another city, Dire Dawa. In order to spare citizens from the ordeal of going to these cities for the purpose of litigating federal matters when there is no federal court established in their regions, the Constitution contains a delegation clause in Article 78(2). This clause provides that the jurisdictions of the Federal High Court and of First-Instance Courts are delegated to the state courts. Accordingly, state Supreme Courts exercise, in addition to their state judicial powers, the judicial power of the Federal High Court and such decisions are appealable to

the Federal Supreme Court. Likewise, state High Courts exercise, in addition to their state judicial powers, the judicial powers of the Federal First-Instance Courts, and such decisions are appealable to the state Supreme Courts.

18. The Constitution declares the independence of the judicial branch of government. To this effect, it also provides certain safeguards. One such safeguard is contained in Article 78(4): 'special or ad hoc courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established'. It should be noted here that the Constitution does not prohibit the mere establishment of special or ad hoc courts. Establishment of such courts is prohibited only when two conditions are cumulatively fulfilled. The first condition relates to the effect of establishing such courts; that is, establishing such courts must take judicial power away from the regular courts. If the regular courts retain the power to review the decision of such courts, it could be argued that the special or ad hoc courts do not take judicial power away from the regular courts. The second condition concerns the procedure that the special or ad hoc courts follow in exercising their judicial power; that is, such courts are unconstitutional only when they do not follow a procedure prescribed by law. This condition apparently requires a certain legally prescribed procedure to be followed by the special or ad hoc courts to remain constitutional. However, it could be argued that such safeguard is meaningless unless the procedure is sufficient enough to afford citizens the right to be heard and defend their interest. In conclusion, therefore, it can be argued that as a safeguard to the independence of the judiciary, the Constitution prohibits the establishment of special or ad hoc courts whose decisions are not reviewed by regular courts and that do not provide citizens with adequate opportunity to be heard and defend their interests.

19. Other safeguards of judicial independence are also contained in Article 79 of the Constitution. The whole content of the article is reproduced below. The appointment of judges is governed by Article 81, which is also reproduced below:

> Art. 79: Judicial Powers
> (1) Judicial powers, both at Federal and State levels, are vested in the courts.
> (2) Courts of any levels shall be free from any interference or influence of any governmental body, government officials or from any other source.
> (3) Judges shall exercise their functions in full independence and shall be directed solely by the law.
> (4) No judge shall be removed from his duties before he reaches the retirement age determined by law except under the following conditions:
>
> > (a) When the Judicial Administration Council decides to remove him for violations of disciplinary rules or on grounds of gross incompetence or inefficiency; or
> > (b) When the Judicial Administration Council decides that a judge can no longer carry out his responsibilities on account of illness; and
> > (c) When the House of Peoples' Representatives or the concerned State Council approves by a majority vote the decisions of the Judicial Administration Council.

(5) The retirement of judges may not be extended beyond the retirement age determined by law.
(6) The Federal Supreme Court shall draw up and submit to the House of Peoples' Representatives for approval the budget of the Federal courts, and upon approval, administer the budget.
(7) Budgets of State Courts shall be determined by the respective State Council. The House of Peoples' Representatives shall allocate compensatory budgets for States whose Supreme and High Courts concurrently exercise the jurisdictions of the Federal High Court and Federal First-Instance Courts.
Art. 81: Appointment of Judges
(1) The President and Vice-President of the Federal Supreme Court shall, upon recommendation by the Prime Minister, be appointed by the House of Peoples' Representatives.
(2) Regarding other Federal judges, the Prime Minister shall submit to the House of Peoples' Representatives for appointment candidates selected by the federal Judicial Administration Council.
(3) The State Council shall, upon recommendation by the Chief Executive of the State, appoint the President and Vice-President of the State Supreme Court.
(4) State Supreme and High Court judges shall, upon recommendation by the State Judicial Administration Council, be appointed by the State Council. The State Judicial Administration Council, before submitting nominations to the State Council, has the responsibility to solicit and obtain the views of the Federal Judicial Administration Council on the nominees and to forward those views along with its recommendations. If the Federal Judicial Administration Council does not submit its views within three months, the State Council may grant the appointments.
(5) Judges of State First-Instance Courts shall, upon recommendation by the State Judicial Administration Council, be appointed by the State Council.
(6) Matters of code of professional conduct and discipline as well as transfer of judges of any court shall be determined by the concerned Judicial Administration Council.

20. The Federal Judicial Administration Commission has been established by Proclamation No. 24/1996. The Commission has nine members: the president and vice-president of the Federal Supreme Court, three members of the House of Peoples' Representatives, two most senior judges from the Federal Supreme and High Courts, and the presidents of the Federal High and First-Instance Courts. Decisions are made on the basis of majority. It is not apparently clear whether the majority is calculated on the basis of the members of the commission or on the basis of the members who are present at a particular meeting. Article 6(2) of Proclamation No. 24/1996 provides 'there shall be a quorum where a majority of the members of the Commission are present'. And Article 6(3) provides 'decisions of the Commission shall be passed by a majority vote; in cases of a tie, however, the Chairman shall have a casting vote'. Proclamation No. 24/1996 provides the criteria that must be satisfied for a person to be appointed as a federal judge. Accordingly, a person must: (1) be Ethiopian; (2) have legal training or acquired adequate legal skill through experience; (3) have a good reputation for his diligence, sense of justice, and good

conduct; (4) consent to assuming judgeship; (5) be loyal to the Constitution; (6) not be under 25 years of age; and (7) not be a member at the same time in the legislative or executive branches of government or any political party. Regarding termination, the Proclamation provides that the tenure of any federal judge may be terminated only: (1) upon resignation; (2) where the judge has attained the age of 60; (3) where it is decided that the judge is incapable of properly discharging duties due to illness; (4) where the judge has committed a breach of discipline; (5) where it is decided that the judge is of manifest incompetence and inefficiency; (6) where the judge has transgressed the Code of Conduct for judges. The Proclamation provides the meaning of the phrases 'breach of discipline' and 'manifest incompetence and inefficiency'. Accordingly, breach of discipline means a breach as specified in the Code of Conduct and includes a judge who is found guilty of an offence the judge is charged with, yields to bribes and go-betweens, practices favouritism on account of race, religion, sex, and political outlook, or frustrates parties to a case brought before him. Similarly, manifest incompetence and inefficiency is defined as what is specified in the Code of Conduct and includes a judge who commits an error of law and fact unbecoming to the competence by training and experience that the profession requires or who unduly delays the disposal of cases. The commission has the following powers:

– to select those who qualify for judgeship from among candidates nominated by members of the commission;
– to issue the Code of Conduct for federal judges;
– to decide on the transfer, salary, allowance, promotion, medical benefits, and placement of federal judges; and
– to examine and decide matters regarding termination of the tenure of judges.

21. The judicial power of courts, whether federal or state, does not include the power to determine the constitutionality of legislation and governments acts. That power is expressly vested in another organ of government, the House of Federation. This does not, however, mean that courts are not empowered to determine the legality of government acts. Judicial review, to the extent that it means checking the legality of government acts, could be exercised by the courts as judicial power is vested in them by the Constitution. On the other hand, if judicial review involves checking the constitutionality of government acts, then the courts are not the appropriate organs of government.

The constitutionality of legislation and governmental organs is to be decided by the House of Federation. In making its decision, the House of Federation relies on the professional advice or recommendation made by the Council of Constitutional Inquiry, which is established by the Constitution. The Council of Constitutional Inquiry has eleven members: the president of the Federal Supreme Court; the vice-president of the Federal Supreme Court; six legal experts appointed by the president of the Republic on recommendation by the House of Peoples' Representatives, who shall have proven professional competence and high moral standing; and three persons designated by the House of the Federation from among its members. A request for constitutional interpretation could be made to the Council by a court, any person that has a case pending in court, or any person who is affected by

the decision of any governmental organ. The powers and functions of the Council are provided in Article 84 of the Constitution and Article 6 of Proclamation No. 250/2001.

22. Until recently there was no uniform view among judges and legal practitioners as to the role of precedents in the Ethiopian legal system. When prior decisions of higher courts were invoked by litigants, some judges used to rule either that there is no legal basis for the use of precedents or that there is a difference between the invoked prior court decision and the one under consideration. Sometimes the nature of the alleged difference seems to suggest that the true reason for not following precedents is not the absence of legal basis to use precedents. Some used to rely on prior decisions rendered by the same or higher court as a sole or supporting reason for their interpretation of the law. There is not even consistency within the same court. As a result of this, there was noticeable non-uniform application of laws in certain areas. However, in 2005 the legislature enacted a law that partially gives precedents binding force.[1]

1. See para. 13 regarding the legal status of precedents.

§5. Distinction between Public Law and Private Law

23. In Ethiopia, the distinction between public law and private law does not have as many practical and legal ramifications as in other countries. There is no distinction between public courts and private courts. Ordinary courts have jurisdiction over public matters. This is without losing sight of the Constitution as an exceptional case. Though it is public law, the power of courts over the Constitution is very limited. The courts are not empowered to render any authoritative interpretation of the Constitution. It is only the House of Federation advised by the Council of Constitutional Inquiry that can interpret and resolve constitutional disputes.

24. The French distinction between *'contrats administratifs'* and *'civil contracts'* is imported into Ethiopian legal system by the Civil Code. In France, *'contrats administratifs'* are governed by the *droit administrative*, and *'civil contracts'* are subject to the provisions of the civil law. In Ethiopia, 'civil contracts' are governed by the provisions of the Civil Code relating to general contracts and/or specific contracts, such as sale, lease, and so on. And *'contrats administratifs'* are governed by the provisions of the Civil Code relating to administrative contracts. These provisions are found in Articles 3131–3306. The difference between Ethiopian law and French law in this regard is that in Ethiopia, disputes involving both civil and administrative contracts, though governed by different rules of law, are resolved by ordinary courts. There are no separate courts charged with resolving disputes over administrative contracts. On the other hand, in France, disputes involving administrative contracts are resolved by separate courts, known as administrative courts, and disputes involving civil contracts are governed by civil courts. The substantive law governing administrative contracts is developed by administrative courts and hence there is no codified but essentially jurisprudential French law of administrative

contracts. On the other hand, the law governing administrative contracts in Ethiopia is found in the Civil Code. Rene David relied on the French administrative law in drafting this part of the Civil Code, and as a result, there is not much difference between Ethiopian law and French law as far as the substance of the law governing administrative contracts is concerned.

25. The distinction between administrative contracts and civil contracts is hard to neatly draw. This is because not all contracts entered into by administrative or public authorities are necessarily administrative contracts. In addition to this, contracts between private individuals could sometimes be subject to the rules of administrative contracts. All contracts concluded by the state or administrative authorities are governed by the provisions of the Civil Code that relate to contracts in general or specific contracts. When the contract concluded by the state or administrative authorities is of a nature of administrative contracts, then the provisions of Articles 3131–3306 supplement or replace the provisions of the Civil Code that relate to contracts in general or specific contracts. Article 3132 provides for what constitutes administrative contracts. A contract shall be deemed to be an administrative contract where:

(a) It is expressly qualified as such by the law or by the parties; or
(b) It is connected with an activity of the public service and implies a permanent participation of the party contracting with the administrative authorities in the execution of such service; or
(c) It contains one or more provisions that could only have been inspired by urgent considerations of general interest extraneous to relations between private individuals.

This article contains almost all of the three guiding principles that have been developed by the *Conseil d'Etat* and the *Tribunal des Conflits* to determine what kind of contracts are administrative contracts. What is stated in Article 3132(c) is what is referred to as *'clauses exorbitantes'* in the French administrative law.

§6. Distinction between Civil Law and Commercial Law

26. In Ethiopia, the difference between civil law and commercial law is manifested by two separate codes: the Civil and Commercial Codes. Matters governed by the Commercial Code include transactions (sale, lease, mortgage, etc.) related to businesses; establishment, management, and dissolution of business organizations (partnerships and companies); negotiable instruments; contracts of carriage of goods and people; and insurance and banking transactions. However, there is no distinction between commercial and civil laws in the sense of having separate courts and a single transaction being regulated in the Commercial Code in a manner different from the Civil Code. On this point, David wrote:

> a word deserves to be said on the accord between the civil code and the code of commerce. This duality corresponds to a division of the work which was

> effected by two jurisconsults charged with preparing the codification. It has no other significance and in no case can one find the same institution regulated at the same time in a different way in both the civil code and the code of commerce. It appeared to the experts that it would be a useless complication in Ethiopia to distinguish in principle between civil law and commercial law. There can exist, as in Switzerland, special rules for commercial matters, but these rules are set out within chapters which envisage civil and commercial matters at the same time. The distribution of matters between the civil code and the code of commerce, not being dominated by a commercial criteria [*sic*], is in large measure arbitrary. All sales, all mandates, and all pledges are thus regulated in the civil code, while all insurance, all conveyances, and all partnership are regulated in the commercial code.[1]

The Commercial Code mainly applies to traders as the kind of matters regulated there are those that are normally carried out by traders. In addition to the Commercial Code (Com.C.), traders could also be subject to rules of Civil and Maritime Codes (Articles 1 and 2, Com.C.). Therefore, the scope of application of the Commercial Code is fixed mainly in terms of the nature of the persons involved and the kind of transactions regulated there.

Article 5 of the Commercial Code defines traders as 'persons who professionally and for gain carry' certain activities. The activities are also enumerated in the same article. Distinction between traders and civilians has significant legal consequences; the Commercial Code imposes two important obligations on traders. First, traders are required to register their business and some important information regarding their business (Articles 86–123, Com.C). Second, traders are required to keep accounts (Articles 63–85, Com.C).

Disputes regarding commercial contracts are entertained by the same courts that resolve civil disputes. Therefore, the difference between civil and commercial law resides instead in differences in the content of the rules governing civil and commercial contracts.

1. R. David, 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries', *Tulane Law Review* 37 (1963): 197.

27 – 28

Chapter 1. Introduction to the Law of Contracts

§1. Definition of Contract

I. General Remarks on Contracts

27. 'Contract' is simply defined as an agreement that is enforceable in law. Enforcement includes not only forcing the individual to keep his or her promises under the agreement but also ordering him or her to pay damages. These enforcement measures are known, in the Civil Code, as remedies for non-performance of contracts. Accordingly, the above definition can be refined as an agreement for which the law provides one or more remedies for non-performance. But this does not yet sufficiently describe contracts. It is clear from this definition that if the law provides remedies for its non-performance, then the agreement constitutes a contract. Otherwise, it is not. All contracts are agreements but not all agreements are contracts.

What makes some agreements contracts and others just mere agreements? For an agreement to constitute a contract, it must satisfy all of the requirements provided by the law of contracts. These requirements filter agreements that are classified as contracts from those that are not. This role of the law of contracts seems desirable considering the implication of treating a particular agreement as a contract and the capacity of the legal system. The implication is that one of the parties can resort to the law-enforcing machinery in case the other party does not live up to his or her words. And it should be noted that courts have limited resources at their disposal for the enforcement of contracts. Therefore, it seems appropriate for the law to provide criteria that can be used to filter agreements to those which it considers are important to deserve the disposal of its limited resources. In choosing such agreements, the law accords more importance to the objective of economic growth by facilitating transactions without stifling the proper level of competition that should exist in the economy.

28. The modern economy is characterized as an economy of specialization. This is more so in the era of globalization, when the destruction of trade barriers among states is increasingly associated with the intensity of specialization not only within a state but also among states. And specialization is associated with a high level of productivity, which is in turn a characteristic of economic growth. For specialization to result in the promised high productivity, people should be able to exchange goods and services. Otherwise, there would not be specialization. This is because individuals would try to produce all goods and services that they need, and even if they might succeed to do so at times, the overall level of production would be significantly low. Therefore, specialization results in efficiency by increasing the level of production, and this is so only if people are able to exchange goods and services that they have produced in surplus. And exchange of goods (transactions) is a form of cooperation.

This is, however, without losing sight of the other equally important aspect of the modern economy, which is competition. The modern market-based economy is also characterized by competition. This is believed to ensure efficient allocation and

utilization of resources by reducing the cost of production and creating a proper environment for scientific and technological innovation.

29. The law of contracts ensures cooperation, which might be absent if there were no law. Krzeczunowicz wrote in this connection:

> As shown by common experience, a contract is an indispensable instrument for exchange of goods, services and money between persons (physical or corporate) in any developed or developing economy, whatever its political regime. Non-recognition and/or non-enforcement of contracts can only lead, in a free economy, to anarchy and, in a state-planned economy, to failure of the plans. Only primitive 'subsistence economy' communities, living in their own produce and hand-to-hand barter, can do without the kind of agreements we call 'contracts'.[1]

Two related qualifications to the above statement are in order. First, there are several forms of cooperation in the real world that take place regardless of whether there is law of contracts. Most Ethiopians who are cooperating have not heard of the law of contracts, let alone rely on it. There are other behaviour-guiding systems than the law. Hence most actual transactions are explained not in terms of legal rules but in terms of these non-legal social rules. Second, contract law does not cover all agreements involving exchange of goods and services. There are some agreements that the law does not recognize as contracts and hence that are not enforceable at law. But agreements are enforced not only by the law but also by non-legal social systems. The use of law for the enforcement of agreements comes with a price. Therefore, the law selects only some kind of agreements with the hope of minimizing the operation costs of its enforcing machinery. In doing so, therefore, it is inevitable to ignore agreements that can be best managed (enforced) by other social systems.[2] What is more, some agreements are not enforceable because of other purposes of the law. Though it is predominantly about facilitating transactions, it is also about efficiency. If the use of the legal system for the enforcement of some kind of agreements is costly and expensive, it ignores such agreements so that they are taken care of by a more efficient system. The other competing objective is the need to maintain competition. Accordingly, if a certain agreement has the effect of curtailing competition to the extent of significantly affecting the market, the law will not enforce it.[3] Here the law is serving not only the value of cooperation but also the ideal of competition. In addition, the law of contracts is oriented by considerations of fairness, morality, good faith, and custom.[4] These considerations determine to some extent what is contract and what is not.

Therefore, whether an agreement is a contract or not depends on whether the agreement fulfils the minimum requirements provided in the law of contracts. And these requirements are dictated by the societal needs to foster transactions, to enhance competition, to protect consumers, to use resources of the legal system efficiently, to ensure fairness, and to protect custom and morality. To that extent, definition of contract by the law therefore involves an important choice of public policy.

1. G. Krzeczunowicz, *Formation and Effects of Contracts in Ethiopian Law* (Addis Ababa: AAU, 1983), ii.
2. See paras 100 and 101 regarding the requirement of intention to create legal relations.

3. The requirement that the object of contract must be lawful considered together with the law that declares competition-restricting agreements such as cartels as illegal supports this statement.
4. See paras 73–79 and 189–193.

II. The Definition in the Civil Code

30. 'Contract' is defined in Article 1675 of the Civil Code as an 'agreement whereby two or more persons as between themselves create, vary or extinguish obligations of a proprietary nature'. This is a concise definition that incorporates several essential characteristics of contracts.

First, for a contract to exist there must be a minimum of two or more persons. This must be taken as a general principle, as there is an exceptional situation where a person could create a valid contract by him- or herself. This is so when an agent concludes a contract on the one hand representing him- or herself and on the other hand acting on behalf of the principal.[1] Such contracts are not favourably seen by the law as they are prone to conflicts of interests. Consequently, Article 2188 entitles the principal to cancel the contract if the agent does not oppose this. In case of disagreement, however, the court decides whether or not to cancel the contract having regard to the existence of conflicts of interests between the agent and the principal. In cases where there are no conflicts of interests, such contracts remain binding and hence can be taken as exceptions to the rule that contracts are formed when there are more than two persons. Even then, one might argue that there are two persons: the principal and the agent.

The second element of the definition of contracts is that there should be an agreement between the persons. Sometimes, it may be difficult to determine whether or not there is an agreement in a particular situation. This is particularly true when there is no meeting of minds between the two persons. In such cases, the law presumes the existence of an agreement so long as there is meeting between the expressions.[2]

Third, the purpose of the agreement should be to create new obligations, or vary or extinguish existing obligations. Hence, agreements to terminate an obligation, to replace an existing obligation by a new obligation different on account of its nature or object, and to remit another from existing obligations are contracts.

Fourth, the obligations that are created, varied, or modified should be of proprietary nature. This excludes marriage, betrothal, and adoption from the domain of contracts, not because such acts do not create obligations but because the obligations are of a primarily non-patrimonial nature.

1. It is also possible for an agent representing two principals to create a contract binding on the two principals. Such contracts are also prone to conflicts of interests. See para. 335.
2. See para. 31.

III. Meeting of Declaration (Not Meeting of Minds)

31. An agreement, according to Ethiopian law, is not a meeting of minds but a meeting of declarations or expressions. Such construction of agreement has its basis

in the text of the Civil Code and the policy of ensuring certainty in transactions. Article 1680 provides, 'a contract shall be completed where the parties have expressed their agreement thereto' and 'reserves or restrictions intended by one party shall not affect his agreement as expressed where the other party was not informed of such reserves or restrictions'. From this it can be noted that Ethiopian law requires only apparent agreement. An attempt to determine the existence of a contract based on the subjective intention of the parties is believed to introduce uncertainty in relationships.[1] This does not, however, mean that the intention of the parties is totally irrelevant. For certain purposes, resort could be made to the parties' intention. For the purpose of ascertaining the meaning of terms in contracts, for example, Article 1734 requires consideration of the common intention of the parties. In addition, with respect to mistakes, Article 1699 stipulates that mistakes could be a ground for invalidation of contracts when the difference between what a person has declared and what he or she has intended is substantial.

1. G. Krzeczunowicz, *Formation and Effects of Contracts in Ethiopian Law* (Addis Ababa: AAU, 1983), 13. Krzeczunowicz is of the view that Ethiopian law is a compromise between the French theory of will and the Swiss theory of declaration of will: 'the theories of will and of declaration are based, respectively, on moral or social grounds. The moral requirement is that a man should not be tied to an agreement he did not will. The social argument is that there can be no order, no trade, etc., if men cannot rely on expressed declarations. The Ethiopian system is a compromise: declarations alone create the contract, but defects of consent may invalidate them, subject-for mistake-to damages'.

IV. Contract as a Juridical Act

32. A contract is considered as one form of juridical act. The concept of juridical act is introduced to distinguish between ordinary physical acts and those acts that have legal effects. A juridical act is one that is enforceable in law or that creates legal rights and obligations. A contract is one of such acts. Other juridical acts include making wills, establishing business organizations, serving default notice, and so on.

V. Unilateral Juridical Acts

33. A contract is an example of a juridical act that is created with the mutual agreement of two or more persons. A will is an example of unilateral juridical act. In the area of contracts, offers could be considered as examples of unilateral juridical act as they are legally binding until the period of time stipulated expires or a reasonable period of time expires (when no period of time is stipulated in the offer itself) or until it is rejected by the offerree.[1] It should also be noted in this regard that the rules of the law of contracts are applicable, to the extent they are relevant, to issues of obligations in general, including those emanating from unilateral juridical acts (Article 1677). The Cassation Division of the Federal Supreme Court held that the rules governing validity of contracts are also applicable to determine the validity of cheques.[2] The Court recognized a cheque as one form of juridical act that creates rights and obligations. Though a cheque is different in its nature and effect from

contracts, the Supreme Court readily applied the rules of the law of contracts relating to duress and held that a cheque issued under duress is invalid.

1. See paras 90–92 regarding revocation and withdrawal of offers.
2. See *Tigistu Beza v. Yeha Yebre* (Federal Supreme Court, 2007), Cassation File No. 20232.

VI. Contract as a Source of Obligations

34. As is clear from the definition of contracts in the Civil Code, contracts are sources of obligations. But they are not the only sources. Obligations could also emanate from the law. The Civil Code has a section on extra-contractual liability providing for conditions under which a person could be held liable in tort. The rules of the Civil Code on contracts are also applicable to non-contractual obligations to the extent that such rules are relevant (Article 1677). Obligations could also emanate from unilateral juridical acts such as offer, will, and apparent authority.[1]

1. See paras 346–348 for discussion of apparent authority.

VII. Rights in Personam and Rights in Rem

35. Legal rights are generally divided into two: rights in personam and rights in rem. Rights in personam are those emanating either from contract or tort. The holder of the right can enforce it against specified individuals only. On the other hand, rights in rem can be enforced against all other people. They are property rights. The provisions of the Civil Code dealing with goods are applicable to rights in rem.

VIII. The Concept of Patrimony

36. The concept of patrimony, as a reference to the totality of a person's rights and obligations, does not prominently present itself in discourses on Ethiopian law. However, the definition of contracts in the Civil Code is formulated in terms of this concept; mainly, a contract is an agreement that creates rights and obligations of a patrimonial nature (Article 1675). In this sense, it refers to rights and obligations that can be expressed in terms of money. As such, marriage is not a contract. Adoption is not a contract. It should, however, be noted that marriage is different from 'marriage contract'. The latter is a contract that deals with the arrangement set up by husband and wife regarding their relationships with respect to their properties.

IX. Two-party and Three-party Contracts

37. A contract is an agreement between two or more persons. The simplest form of contract is where there are only two persons: one debtor and one creditor with respect to a given obligation. Difficulties arise, however, when more than two

persons are involved. In such cases, the problem is whether or not there is only one contract. Difficulties also arise as to whether any of the persons is really a party to the contract. It could be the case that one of them is an agent of the other and hence is not really a party to the contract. Whether a person is a party to a contract or a mere agent depends on whether that person has made the contract in his or her own name or in the name of another person. If this person intends to avoid being considered as a party to this contract, he or she must indicate at the outset that he or she is making the contract on behalf of another specified person. When more than two persons are making a contract, the co-debtors are presumed by the law, unless otherwise agreed, to be jointly and severally liable (Article 1896). On the other hand, co-creditors are presumed to be simple joint creditors (Article 1910).

X. No Bargain Required

38. In the Ethiopian law of contracts, in contrast to, for example, English law, bargain is not an essential element of a contract. Consequently, it is possible for an agreement in which only one of the parties has undertaken an obligation to be considered a contract despite the fact that the other party has not promised anything. For example, a person could enter into a contract of agency in which he or she undertakes to represent another person gratuitously. As such, he or she would not be entitled to remuneration. The fact that the principal has not agreed to pay remuneration does not affect the validity of the contract. By virtue of law this agent is entitled to reimbursement for the expenses that he or she has incurred. But this cannot be considered as a bargain.[1]

1. See paras 340 and 102–106.

§2. Historical Background of the Law of Contracts

39. The Ethiopian law of contracts is largely contained in the Civil Code. Some kinds of contracts are also governed by the Commercial and Maritime Codes. There are legislations issued after the enactment of the Civil Code and they are designed to regulate specific forms of contracts, such as employment and mortgage by financial institutions. Being one of the two countries not colonized, Ethiopia had at the time so many options, civil codes, to adapt or adopt with the hope of introducing 'modernization' into the country. The drafter of the Civil Code used the civil codes of France, Switzerland, Greece, Egypt, Iran, Portugal, Israel, Turkey, Quebec, and the Philippines. This is without losing sight of the fact that some principles of common law have been incorporated. In addition, local customs found their way in the Civil Code. However, David wrote:

> The entire matter of contracts in the Code is a new thing, for the Ethiopian society of yesterday did not know the concept of contract. The few rules concerning contracts that were found in Ethiopian law were imported or of recent fabrication, emanating from the legislature or from tribunals, without relation to true Ethiopian custom.[1]

In marked contrast with what Rene David wrote, Jemberre said: 'Ethiopia is one of the countries close to the Eastern and Mediterranean region and was exposed to various commercial relations emanating from there. Therefore, one cannot help asking whether some sort of body of law governing commerce did not develop over the past centuries.'[2] This explains why the *Fetha Negest* is concerned, among other things, with contractual relationships.

1. R. David, 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries', *Tulane Law Review* 37 (1963): 195.
2. A. Jembere, *An Introduction to the Legal History of Ethiopia* (Münster: LIT, 2000).

40. Chapters 33 and 34 of the *Fetha Negest* deal with commercial transactions. Chapter 33 is divided into seven sections. The first three sections are concerned with obligations in general and contract of sales. Sections 4 and 5 are concerned with things that may not be sold, charitable legacies, and related matters. Sections 6 and 7 are concerned with modification of contracts and assignment of debts. Chapter 34 deals with partnership contracts.

Even though the *Fetha Negest* was cited as an authority in a number of civil and criminal matters, the part dealing with commercial transactions had very little practical significance. One of the reasons could be that trade in Ethiopia was then carried mostly by non-Christians, and the *Fetha Negest,* as a semi-religious document, was enforceable on Christians only. Hence it remained an ideal, detached from the day-to-day commercial life of Ethiopian society.

41. Jembere identified a number of principles of contract law by analysing case law before the modern codes, suggesting that there were rules of contract and they were actually implemented.[1] Where the seller sold an animal with a declaration that it was immune from certain diseases, warranty was due. The seller had the obligation to give warranty against any total or partial dispossession where the buyer might suffer from the act of a third person claiming the enjoyment of an alleged right. A guarantor had to pay the creditor where the principal debtor failed to discharge the obligation. In a contract for the breeding of animals such as goats, sheep, and cows, the increase from breeding was shared equally between the keeper and the owner of the animals. In the case of a cow, the keeper was entitled to its dairy products.

Shaking of hands between the contracting parties signified the conclusion of a contract of sale. Where the party who had received earnest money cancelled the contract, he forfeited the earnest. What is more, the law of loans of 1924, the decree on concessions of 1928, the law of companies of 1933, and the law of bankruptcy of 1933 provide some rules concerning contractual relationships.

1. A. Jembere, *An Introduction to the Legal History of Ethiopia* (Münster: LIT, 2000).

§3. Classification of Contracts

I. Consensual and Solemn Contracts

42. A common classification of contracts is between consensual and solemn contracts. Consensual contracts are those for which no special form of validity is

prescribed by law. Provided that the other requirements for validity of contracts are fulfilled, without there being a need for written form, the agreement constitutes a valid contract.

Solemn contracts are those for which a special form of validity is prescribed by law. In such cases, until the agreement is reduced into written form and signed by the parties, there does not exist a valid contract but 'a mere draft' (Article 1720). Contracts with public administration, contracts of insurance, and contracts of guarantee are examples of solemn contracts (Articles 1724 and 1725). It should be noted that courts always presume that contracts are consensual contracts unless there is clear provision in the law that prescribes a special form or unless the parties have agreed otherwise. In this regard, contracts of rent of buildings are held by the Federal Supreme Court to be consensual contracts; Article 1723, which prescribes writing and registration for contracts relating to immovables, does not apply to rental contracts.[1]

1. See *Rental Houses Administration Agency v. Heirs of Gebre Hiwot Kebedom* (Federal Supreme Court, 2008), Cassation File No. 25938.

II. Bilateral and Unilateral Contracts

43. Another classification of contracts is between bilateral and unilateral contracts. In bilateral contracts, as the name indicates, the respective parties assume both rights and obligations. On the other hand, in unilateral contracts, only one of the parties has an obligation and the other has a right. The distinction of contracts between bilateral and unilateral is not merely of an academic interest. It has also important legal implications. For example, Article 1739 of the Civil Code provides: 'The obligations assumed by a party who derives no advantage from the contract shall be construed more narrowly.' In gratuitous contracts, the person is liable to pay damages in cases of non-performance only when he or she has committed a grave fault (Article 1796). Another legal implication of the distinction between unilateral and bilateral contracts is provided with respect to agency. The Civil Code requires the agent to manage the affairs of the principal with the care and skill of a *bonus paterfamilias.* However, when the agent is acting gratuitously, he or she is required to apply that level of care and skill which he or she would normally apply to his or her own affair (Article 2211). Finally, where a contract is made for the exclusive advantage of one party, Article 1824 provides that the contract could be terminated by the court when the other party requires for good cause.

III. Nominate and Innominate Contracts

44. Under Ethiopian law, the term 'nominate' contracts refers to those contracts that are specifically dealt within the Civil Code. For example, contract of agency is a nominate contract because the Civil Code specifically deals with such contracts. Others include contract of sales, publishing contracts, and so on. For such contracts, the rules of the Civil Code dealing with 'contracts in general' are applicable only when there are no relevant rules from the specific provisions. Innominate contracts

are, on the other hand, those that are not specifically governed by the Civil Code. Hence, such contracts are primarily and principally governed by the general rules of contracts as supplemented by the agreement of the parties.

IV. Main Contracts and Accessory Contracts

45. Whether a given contract stands by itself or is an accessory to another contract has important implications. For example, an agreement to vary the terms of another contract can be called an accessory contract. For such to be valid, it should be made in the same form that is prescribed for the main contract. For example, a contract for the sale of a house is required to be made in writing. If the parties to this contract make another agreement with the views to modify its terms, then the latter contract must also be made in the same form (Article 1722). Contract of agency can be considered as an accessory with respect to the main contract that the agent is authorized to conclude on behalf of the principal. If the main contract that the agent is authorized to conclude is a type that the law prescribes must be in written form to be valid, then the contract of agency should also be made in the same form (Article 2200).

§4. Contract and Torts

46. In Ethiopian law, contracts and torts are two mutually exclusive causes of actions. Consequently, non-performance of contracts does not amount to fault for the purpose of tort liability. In this connection, Article 2037(1) provides that non-performance of a contract does not amount to fault for the purpose of holding the debtor liable in tort. However, inducing someone to breach his or her contract could entail extra-contractual liability (Article 2046). It should, however, also be noted that the rules of the law of contracts in the Civil Code are applicable to any kind of obligation and hence they can be extended to issues of extra-contractual liability.

47. The distinction between torts and contract is important because of significant differences in the substance of rules applicable to each of them. For example, the period of limitation for contractual causes of action is generally ten years (Article 1845). On the other hand, the period of limitation for tort actions is two years (Article 2143). In addition, the rules of damage are different between contracts and torts.

§5. Contract and Quasi-contract

I. *Negotiorum Gestio* (Unauthorized Agency)

48. Articles 2257–2265 of the Civil Code deal with what is termed as unauthorized agency. It is a situation 'where a person who has no authority to do so undertakes with full knowledge of the facts to manage another person's affairs without having been appointed as an agent'. Such person is known as the acting

person and the other whose affair is being managed is known as the principal. Despite the fact that the acting person does not have the authority to act on behalf of the principal, the law imposes, on the satisfaction of certain conditions, duties on both the acting person and the principal.

A. Conditions

49. Before the effects of and duties emanating from an instance of authorized agency are applicable, certain conditions must be fulfilled. First, the acting person must have acted without being authorized by the principal or the law. This condition does not relate to instances where an agent acts on behalf of the principal to perform acts that are beyond the agent's power or where an agent acts based on authority that has lapsed. Such instances are governed by Articles 2190–2196 of the Civil Code. On the other hand, a case is considered to be one of unauthorized agency when there is no agency relationship, based on contract or law, between the acting person and the principal. The absence of an authority to act on behalf of the principal means also that there was no such relationship even in the past.

The other condition relates to the nature of the act performed by the acting person on behalf of the principal. The act must be an act of management. The case is not a matter of unauthorized agency when the acting person performs an act of disposal, for instance alienating the property of the principal.

The third condition is that the person must not have acted against the will of the principal (Article 2258). That means the case is considered to be one of unauthorized agency when the acting person has undertaken the management not against the will of the principal. This includes cases where the agent has acted consistent with the will of the principal. Acting in line with the will of the principal could imply the existence of an agreement between the parties. If such agreement is a contract, then the relationship between the parties is governed by the rules of agency. But if such agreement is not a contract, the relationship between the parties is governed by the rules of unauthorized agency. The rules of unauthorized agency are applicable also in circumstances where, even if there is no agreement between the parties, the principal has not objected to the management being done by the acting person. If the acting person has acted against the will of the principal (despite the objection by the principal), the relationship between the acting person and the principal is governed by the rules of unjust enrichment or tort (Article 2258).

The fourth condition is that the acting person must have acted in the exclusive interest of the principal (Article 2259(1)). This includes, however, situations where the acting person managed the principal's affair at the same time as his or her own by reason of the fact that both affairs were so closely connected together that one of them could not be managed separately (Article 2259(2)). On the other hand, when the acting person performed the management entirely for his or her own interest, the rules of tort or unjust enrichment govern the relationship between the acting person and the principal (Article 2259(1)).

Even in circumstances where the agent did not act in the interest or will of the principal, the case could still be considered unauthorized agency if the principal has ratified the management by the acting person (Article 2258(2)).

B. Obligations of the Acting Person

50. The acting person has the duty to act with the strictest good faith toward his or her principal (Article 2263). This is the same degree of duty imposed if he or she were authorized to act on behalf of the principal. The duty of good faith includes, among others, those duties listed under Articles 2208–2212 of the Civil Code. One of such duties is the duty to act with proper diligence. Extent of the duty of diligence depends on whether the agent is a paid one or not. A paid agent shall act with the same degree of care as a *bonus paterfamilias* (Article 2211(1)). One other hand, an unpaid agent is obliged to apply the same degree of care as he or she normally applies to his or her own affairs (Article 2211(3)). The acting person, in the case of unauthorized agency, is supposed to apply a degree of care as a *bonus paterfamilias* (Article 2261(1)). Default in applying this degree of care results in the liability of the acting person. However, the court is empowered to reduce the damages to which the acting person is liable because of the default, considering the circumstances that induced him or her to undertake the management (Article 2261(2)).

The other duty of good faith is the duty to act in the exclusive interest of the principal. That implies the duty to avoid situations that might create conflicts of interests between him or her and the principal. In cases of conflicts of interests, the acting person is liable for the damage he or she has created to the principal. The amount of damage is calculated not based on the extent of the benefit the acting person has derived from the conflict of interest but based on the benefit that the principal has been denied of. However, the law provides an exception to such assessment of damage when the acting person is incapable. When acting persons are incapable of contracting, they are liable only to the extent of their enrichment or the benefits with which they parted in breach of good faith (Article 2262).

51. In addition to the obligation to act with strictest good faith, the acting person has also the duty to render accounts. These are the same rules that would be applicable if the acting person were authorized by the principal (Article 2260(3)).

The acting person has also the duty to inform, as soon as possible, the principal concerned in the affair that he or she has undertaken the management (Article 2260(1)).

Finally, the acting person is required to continue the management undertaken by him or her and bring it to completion as long as the principal is not in a position to take it over (Article 2260(2)).

C. Obligations of the Principal

52. The principal is required to indemnify the acting person for all liabilities he or she personally undertook, reimburse him or her the expenses incurred in his or her interest, and compensate him or her for any damages suffered in connection with the management and not due to his or her default (Article 2264(2)).

53. Second, where the interest of the principal requires undertaking the management, he or she is required to ratify acts done by the acting person in his or her name (Article 2264(1)). In such cases, the rights and duties of the parties (including

third parties) would be determined based on Articles 2179–2298 of the Civil Code. This implies, among others, that the act which the acting person has performed on behalf of the principal shall be deemed to have been made directly by the principal (Article 2189).

II. Unjust Enrichment

A. The General Principle

54. The provisions of the Civil Code concerning unjust enrichment run from Articles 2162–2178. Issues of unjust enrichment refer to circumstances where a person could be liable for the benefits he or she received from another without just cause. Article 2162 lays down the general principle on the matter. It reads: 'whosoever has derived a gain from the work or property of another without just cause shall indemnify the person at whose expense he has enriched himself to the extent to which he has benefited from his work or property'. The principal obligation emanating from unjust enrichment is that of indemnifying the person from whose work or property one has been enriched.

55. Before a person is liable to indemnify another, there are certain conditions that must be fulfilled. First the person to be held liable must have benefited from the work or property of another. It is not clear if the phrase 'work of another' could include use of a person's idea or information. American courts have been willing to take a person benefiting from the idea of another as a case of unjust enrichment. By doing that, they tried to impose a pre-contractual liability to cases of failed negotiations where one party has derived a benefit from the idea of another disclosed to him or her during negotiation.

Second, the enriched person must have no just cause for that. The Amharic version of the Civil Code uses the phrase 'without sufficient reason'. It is not clear, from the rule that sets out the principle of unjust enrichment, what kinds of causes are considered just or sufficient. But it becomes apparent from the remaining rules of unjust enrichment that there is no just cause if a person benefits from the work or property of another when he or she does not have any legal or contractual right to such work or property. The absence of consideration transferred from the enriched party to the owner of the property or work does not amount to 'without just cause'. It could be the case that the owner gratuitously let the enriched person derive benefit from the work or property. In such cases, it is up to the enriched person to establish that he or she was given permission to benefit from the work or property without consideration.

56. When the two conditions are fulfilled, the effect is that the enriched person is liable to reimburse the owner of the property or the work. Such liability is only to the extent of the benefit he or she has derived at the time of recovery. But it is not for the plaintiff to prove the value of such benefit. It could be presumed that the enriched party is liable to the extent of the value of the property or the work of the plaintiff. It is then a matter for the enriched party to prove that he or she benefited little or not at all at the time of recovery (Article 2163(1)).

57. It could be the case that the defendant has already alienated the property to a third party at the time of recovery. In such cases, the obligation of the defendant to make restitution depends on whether he or she is in good faith or not (Article 2163(2)). Such party is liable if he or she was in bad faith at the time alienating the property. A party is in bad faith when, at the time of alienating the property, he or she knew or ought to have known that he or she was bound to make restitution. If, on the other hand, the defendant alienated the property to a third party in good faith, he or she is not liable to make restitution. If the transfer of the property to a third party is made without consideration, the third party is liable to make restitution (Article 2163(3)). It should be noted, however, that the liability of the defendant to make restitution does not depend on whether the enrichment is transferred with or without consideration. His or her liability is determined having regard to whether or not he or she was in good faith. That implies that in circumstances where the enriched party has in bad faith transferred, without consideration, the enrichment to a third party, he or she is jointly liable with the third party.

B. Recovery of Undue Payments

58. The principle of unjust enrichment is applicable to a number of circumstances. One such circumstance is where a person has made a payment to another without a just cause. The term 'payment' is not necessarily restricted to money. It could also mean delivery of property or rendering of services. It is different from other cases of unjust enrichment because the work or property came under the possession of the enriched person by the actions of the owner. Article 2164(1) of the Civil Code provides the governing rule: 'whosoever has paid what he was not required to pay may recover it'. The right to recover the payment also includes the right to 'demand restitution of the fruits of the property or legal interest from the date on which the payment was made, where the person to whom the payment was made acted in bad faith' (Article 2164(2)).

59. On the contrary, the person making the payment is not entitled to any recovery where the payment was made voluntarily and in full knowledge of the fact that he or she was not bound to pay (Article 2165). If a person has made the payment in satisfaction of a debt barred by a period of limitation or a moral obligation, that person is not entitled to recover it unless he or she was incapable of alienating property without consideration at the time of the payment (Article 2166). An enriched party is also not liable to make restitution if 'he has in good faith destroyed or annulled his title, relinquished the security for his claim or allowed his action against the true debtor to lapse' (Article 2167(1)). In such cases, it is only the true debtor that is liable to make the restitution (Article 2167(2)).

C. Expenses Incurred on a Property Subject to Restitution

60. The person required to make restitution is entitled to reimbursement of those necessary expenses incurred in preventing the loss or deterioration of the

property. Article 2169 of the Civil Code states that the phrase 'necessary expenses' does not include those that were not useful or were rendered necessary by the person's own fault or by the fault of another person for whom he or she is liable. However, he or she is not entitled to any indemnity for the cost of maintaining the property or in respect of taxes paid as a consequence of his or her possessing it. If the unduly enriched person has incurred expenses that resulted in increased value of the property, then he or she is entitled to be reimbursed (Article 2171(1)). But the reimbursement should not be more than the value added to the property calculated at the time of restitution (Article 2171(2)).

If the unduly enriched person is in bad faith, that he or she knew or ought to have known of his or her liability to return the property, the court is empowered to reduce or refuse any indemnity of the expenses incurred in preventing the loss or deterioration of the property or that resulted in increased value of the property (Article 2172(1)). Likewise, the court might grant to the owner a period of grace not exceeding two years for payment of the indemnity (Article 2172(2)). The unduly enriched person required to make restitution of the property is entitled to remove anything he or she has joined to the property that can be separated without appreciable damage to the property (Article 2173). The person required to make restitution is, when he or she is in good faith (when he or she did not know or should not have known that he or she was liable to return the property), entitled to retain the property until he or she has received payment of the indemnity due or until he or she has received adequate security for its payment on the day on which it is due (Article 2174).

61. The person entitled to make the restitution is liable when he or she has caused the property to deteriorate, or in case of total or partial loss of the property or where the property cannot be returned in kind for any reason. He or she is not, however, liable where the property has deteriorated or lost by force majeure and, at the time when it occurred, he or she was in good faith (he or she did not know or should not have known that he or she was liable to return the property). On the other hand, force majeure is not a valid defence for such person when, at the time when it occurred, he or she knew that he or she had no legal right or right deriving from a valid contract to the property. In cases where the person liable does not have a valid defence, his or her liability is to the value of the property at the time at which it becomes impossible to return it in kind. If he or she is in bad faith at the time when it has become impossible to return the property, he or she may be liable for additional damage that could place the person entitled to restitution in the position he or she would have been in had he or she retained uninterrupted possession of the property.

D. Fruits of a Property Subject to Restitution

62. The person required to make restitution of a property is entitled to retain the fruits of the property if he or she is in good faith (Article 2178(1)). On the other hand, he or she is liable to pay to the plaintiff the value of the fruits where he or she knew at the time of taking possession of the property that he or she has no legal right, or right deriving from a valid contract, to it (Article 2178(2)).

§6. Contract and the Law of Property

63. One of the characteristics of the common law tradition is the distinction between legal and equitable ownership. Equity is a major source of English law. Its principles owe their origin and development to the Courts of Chancery. The primary purpose of equity as developed in these courts is to provide remedies that are not available in the common law courts, such as specific performance, rescission, and rectification. In addition, it recognizes causes that are not actionable in the common law courts because of the latter's strict formal requirements. Although there is currently no separation between common law and equity courts, the distinction between common law and equity continues to have paramount legal implications. One such implication relates to the discretionary nature of equitable remedies as opposed to legal remedies that are available as of right.

64. Before the enactment of the six codes, there existed a court that in some way was outside the ordinary court structure. This court was known as *Zufan Chilot* (Crown Court). The fountain of justice, as the Emperor used to be considered, or his representative presided over this court. The purpose, like equity courts in England, was not to apply the law but to ensure that final decisions of other courts were in accordance with the requirements of equity. This court did not, however, survive very long after the enactment of the modern codes.

However, one can still recognize institutions and principles of equity in Ethiopian law. This is additional evidence that the drafter of the Civil Code sought inspiration from English common law as well.

One of such principles is the distinction between legal and equitable ownership. When the legal ownership of a property is separated from its equitable owners, the legal owner has the power of management only. The benefits of the property go to the equity owners. The equity owners, however, do not have the power to alienate the property.

In marked contrast to civil law countries where this distinction does not exist and where there is a unity of ownership, Ethiopian law recognizes the possibility of severing the legal from equitable ownership as provided in the provisions of the Civil Code dealing with trusts. The trustee is a legal owner and the beneficiary is the equitable owner. This is discussed further in the subsequent section.

65. Book III of the Civil Code contains rules regarding the acquisition, transfer, and extinction of property rights with respect to both ordinary corporeal chattels and immovable properties. It should be noted that the rules of the Civil Code regarding land assume that it can be privately owned and hence can be a subject of contract of sale and mortgage. However, this is no more so, for it is stipulated in the Constitution that land and other natural resources are publicly owned (Article 40). Nevertheless, courts can still use the relevant provisions, after making the necessary changes, in resolving disputes between individual landholders.

66. Ownership can be acquired in four manners: occupation, possession in good faith, accession, and usucaption. Immovables (excluding land) can be acquired through

usucaption. The other manners of acquiring ownership are, however, applicable only to corporeal chattels.

67. Articles 1309–1346 deal with the right of usufruct. It is a right in rem. The Civil Code provides that ownership is the widest possible right one can have over a property. It includes the right to use, enjoy the fruits of, and dispose the property. The right of usufruct recognizes the possibility of severing the rights constituting ownership. Article 1309 provides: '(1) usufruct is the right of using and enjoying things or rights subject to the duty of preserving their substance. (2) It may apply to land, chattels, rights or an inheritance.'

The right of the usufructuary should not affect the right of the bare owner. In this regard, Article 1314(2) provides that he or she may not acquire ownership of the property through usucaption. Likewise, if the bare owner disposes the property, Article 1323(1) provides that this will not affect the right of the usufructuary. This provision also highlights the right in rem nature of usufruct.

68. Another right in rem provided in the Civil Code is the right of occupation of premises. Article 1353 defines the right of occupation as 'the right to live in a house or to occupy a part thereof'. The right holder is entitled to live in the house together with a spouse, direct ascendants or descendents, and servants (Article 1354). However, this right is inalienable and will not pass to the heirs of the beneficiary (Article 1357).

69. Articles 1359–1385 of the Civil Code deal with another type of right in rem called servitude. Article 1359(1) defines servitude as 'a charge encumbering a land, hereinafter called the servient tenement, for the benefit of another land, hereinafter called the dominant tenement'. It 'imposes on the owner of the servient tenement the obligation to submit to the commission of some acts by the owner of the dominant tenement or to refrain from exercising some right inherent in ownership' (Article 1359(2)). However, it does not primarily impose an obligation to do an act on the servient owner; Article 1360 provides that servitude may impose on the servient owner the obligation to do an act only accessorily.

Article 1361 reflects the right in rem nature of servitude. It states: '(1) A servitude shall run with the land notwithstanding that the servient or dominant owner changes. (2) Servitude which have been registered in accordance with law shall follow the land into whatever hands it may pass.'

Servitude, created by either contract or will, is not valid unless it is made in writing (Article 1363). In addition, it must be registered for it to have an effect on third parties (Article 1364).

§7. Contract and Trust

70. Trust is an institution that distinguishes common law tradition from that of civil law tradition. It involves separation of equitable and legal ownership. As opposed to other codes belonging to civil law tradition, Ethiopian Civil Code contains rules regarding this institution. These rules clearly reflect the influence of English law.

Article 516 defines trust as 'an institution by virtue of which specific property is constituted in an autonomous entity to be administered by a person, the trustee, in accordance with the instruction given by the person constituting the trust'. It could be 'constituted for the benefit of any person, action or idea, provided it does not offend public order or morals' (Article 518). Article 517(1) provides that 'a trust may be constituted by a donation *inter vivos* or by a will'. However, it requires an 'express provision in the donation or will' (Article 517(3)). This is the equivalent of the requirement of certainty under English law. However, the later requirement is more concretized in the large body of case law. Consequently, courts in Ethiopia might benefit from consulting English case law. The requirement of express provision is also an indication that the institution of trust in Ethiopian law is narrower than trust in English law, which recognizes different types, such as constructive and resulting trusts.

71. Under English law, there is no maximum limitation on the number of trustees. However, when the trust is constituted over a land, the Settled Land Act of 1925 requires that the number should not exceed more than four. If the creator of the trust has named more than four individuals, the first four who are willing, able, and ready would become trustees and the remaining would only become trustees when there is a vacancy. The Ethiopian Civil Code has adopted what is an exception in English law as the main rule (Article 519).

72. Article 525(1) requires the trustee to 'administer the trust like a prudent and cautious businessman'. In addition, the trustee is required to 'avoid mixing the property forming the object of the trust with his own property' (Article 525(2)). The trustee 'may not draw any personal benefit from the trust, apart from the advantages which are expressly granted to him by the act of constitution of the trust' (Article 531). However, the trustee is entitled to be indemnified for all the expenses and obligations he or she has incurred in the administration of the trust (Article 532). The liability of the trustee to the beneficiaries is governed by the rules of the Civil Code governing the relationship between the agent and the principal (Article 533).

The trustee has the same power as an owner over the property that constitutes the trust; 'he may not, however, alienate immovable properly except with authorization of the court without prejudice to any provision to the contrary in the act of constitution of the trust' (Article 527). Any limitations on the powers of trustees contained in the act constituting the trust would not affect third parties who did not know or should not have known of such restriction (Article 529).

§8. Good Faith in the Ethiopian Law of Contracts

73. Good faith is an entrenched principle in the Ethiopian law of contracts. Starting from the time when parties are negotiating to enter into a contract and during the lifetime of the resulting contract, parties are required to conduct themselves in accordance with the requirements of good faith and fair dealing.

74. The notion of good faith is very relevant in determining the legal effects of mistakes by one party during formation of a contract. In this regard, Article 1702(1) provides: 'The mistaken party may not invoke his mistake in a manner contrary to good faith.' Krzeczunowicz interprets this provision to mean that the mistake must be the genuine reason of the request by the mistaken party for invalidation of the contract. He argues that if the reason is the fact that the contract has turned out to be unprofitable and the party is merely using mistake as a pretext, it should not result in the invalidation of the contract. Such interpretation of the above provision appears to be supported by Article 1702(3), which provides: 'He shall be bound by the contract he intended to make where the other party agrees to perform such contract.'

Once a contract is invalidated on the ground of mistake, the concept of good faith continues to play an important role regarding the consequences of invalidation. In particular, Article 1703 provides that the other party who is aggrieved by the invalidation of the contract can claim damages if he or she did not know or should not have known about the mistake.

75. Good faith plays an important role with respect to false statements. It determines if false statements made by one party during the formation of a contract could be a ground for its invalidation. Article 1705(1) provides: 'A contract may be invalidated where a party in bad faith or by negligence made false statements and a relationship giving rise to a special confidence and commanding particular loyalty existed between the contracting parties.' Here the principle of good faith is embodied in its negative form. Good faith appears to acquire a different meaning than in Article 1702, where it is understood to mean honesty. It seems here that a person is said to be in bad faith if he or she knew or should have known the inaccuracy of his or her statements.

76. Good faith, as a reference to actual and constructive knowledge, is also important to determine the consequences of invalidation of a contract owing to duress exerted by a third party. A contracting party is entitled to request the invalidation of a contract that is tainted by duress despite the fact that such duress is exerted by a third party. However, the other contracting party is entitled to claim damages if he or she did not know or should not have known about this fact.

77. Good faith can also be used to imply terms into contracts. Article 1713 of the Civil Code provides that the parties are bound not only by the terms expressed in the contract but also by such incidental effects as are attached to the expressed terms, according to the nature of the contract, custom, equity, and good faith.

The concept of good faith can be used to imply into contracts several kinds of obligations on which the parties have not negotiated and agreed. For example, if A sells his bread business to B, he cannot argue that he can set up a new bread store on the same street in competition with the store that he just sold because the contract is silent on this point. In such cases, David wrote that 'good faith is sufficient to impose on him the accessory obligations of not setting up such a competing enterprise'. Likewise, the obligation to preserve the goods one has sold to another could be implied into the contract based on good faith. For example, A sells goods

that are named and that are to be taken by B in fifteen days. While waiting for B to take delivery of the goods, A must take whatever measures are necessary to preserve the goods sold in good condition. This necessary obligation is imposed on him by good faith.

Commenting on Article 1913, Krzeczunowicz wrote that the requirement of good faith also implies that a party must do nothing that could disable him or her or the other party from performing their contractual obligations.

78. The role of good faith is not restricted to determine issues regarding validity of contracts and implied terms in a contract. The Civil Code also requires that contracts should be interpreted according to good faith (Article 1732).

79. One of the remedies of non-performance provided in the Civil Code is cancellation. However, not all instances of non-performance result in cancellation of contracts. In deciding whether a contract should be cancelled owing to non-performance by one party, Article 1785 directs the court to take into account the requirements of good faith.

§9. Style of Drafting

80. There is no distinct style of contract drafting in Ethiopia. But as everywhere, the manner by which courts interpret contracts determines the style of drafting. In interpreting contracts, courts are not restricted to the text of the document. They take into account good faith, the common intention of the parties, and communications between the parties before and after the contract. Recently, the Federal Supreme Court has decided that courts should in particular take into account the communications between the parties in understanding the nature of the contract between them. Such a broader approach to interpretation of contracts is reflected in the fact that contracts in Ethiopia are not solely drafted by licensed legal professionals. Shops located near courts or government offices that render secretarial services and that sell stationeries are also involved in drafting of contracts and other legal documents. The law governing licensing of advocates requires that anyone involved in the drafting of legal documents, including contracts, needs to be licensed by the Ministry of Justice. The Ministry grants a license only when certain requirements are fulfilled. The minimum requirements relate to legal education, work experience, and entrance examination. However, the requirement of license is enforced only with respect to those who represent someone in court proceedings.

§10. Sources of the Law of Contracts

81. The Ethiopian law of contracts is found mainly in the Civil Code. Some kinds of contracts are also governed by the Commercial and Maritime Codes. There are some legislations issued after the enactment of the Civil Code, and they are designed to govern some specific forms of contracts, such as employment contracts.

82. 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

Book IV 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, contracts allied to sale, donation, loan of money and other fungibles, and contracts for periodical payments); contracts for the performance of services (contracts of employment, contracts of particular kinds of work, contract of work and labour, hiring of intellectual work, medical or hospital contracts, contract of innkeepers, and publishing contracts); contracts for the custody, use, or possession of chattels (letting and hiring, loan for use or free loan, bailment, warehousing, and contracts of pledge); contracts relating to immovables (sale of immovables, lease, contracts of work and labour relating to immovables, mortgage, and antichresis); administrative contracts (concession of public service, contract of public works, and contract of supplies); compromise and arbitral submission; and provisions dealing with law repealed by this code and transitory provisions.

Regarding the relationship between Book IV, V, the Commercial and Maritime Codes, and some legislation on contracts, the Civil Code provides that 'the general provisions of this Title (Title XII on contracts in general) shall apply to contracts regardless of the nature thereof and the parties thereto' and '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'. Moreover, Article 1677 provides 'the relevant provisions of this Title (Title XII on contracts in general) apply to obligations notwithstanding that they do not arise out of a contract' and 'nothing in this Title affect the special provisions applicable to certain obligations by reason of their origin or nature'. Therefore, whenever one is faced with a certain dispute involving civil obligations, one has to first see whether there are relevant provisions in the Civil Code (other than Title XII), the Commercial and Maritime Codes, and other legislation. And it is only failing this that one can resort to the general provisions of Title XII on contracts in general.

83. The other source of Ethiopian law is case law. A recent law makes interpretations of law rendered by the Cassation Division of the Federal Supreme Court legally binding. The Federal Supreme Court has since started publishing its decisions. But it takes some time before lower courts start to take into account precedents set by the Federal Supreme Court.

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§1. General Remarks

84. There are only four books written on the Ethiopian law of contracts. One of them is a brief commentary written by the drafter of the Civil Code, Rene David. It covers only the provisions on contracts in general. It is a very brief commentary. Some time after the enactment of the Civil Code, a professor in the Faculty of Law at Addis Ababa University, George Krzeczunowicz, published another book that covers only formation of contracts. Both of these books are written in English. It is only recently that another relatively comprehensive work was published in the official language of the federal government, Amharic. Educators and students of law in the various faculties of law usually use books of other countries. Since most of these books are from the common law tradition (the medium of instruction in the universities is English), this further bolsters the influence of that tradition on the Ethiopian legal system.

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Part I. General Principles of the Law of Contracts

Chapter 1. Formation

§1. Agreement

I. Offer and Acceptance

85. It is very common in most national as well as international instruments of law to use the model of offer and acceptance to address problems of formation of contracts. The Ethiopian law of contracts is no exception. The model of offer and acceptance is a simplified representation of negotiation. The statement 'contract exists when an offer is accepted' generally constitutes the core of the model. The classic rules of offer and acceptance are 'seductive rules that proceed on a simple premise: two parties exchange proposals until an "offer" by one party is "accepted" by the other forming a contract'.[1] On this simple and general statement, no significant difference is observed among legal systems. The devil is in the details. A sufficiently built model of offer and acceptance addresses the following issues, among others: What kind of statement or action is considered an offer? Can the offeror change his or her mind? How about the offeree? Is silence considered acceptance? Legal systems of the world manifest diversity in the answers they provide to the above questions.[2]

1. E. Farnsworth, 'Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations', *Columbia Law Review* 87 (1987): 218.
2. It has been reported that the differences between the common law and civil law systems were 'the principal stumbling-block in preparing uniform rules on the formation of contracts of international sales'. See G. Eörsi, 'Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods', *American Journal of Comparative Law* 27 (1979): 311–323; and A. Garro, 'Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods', *International Lawyer* 23 (1989): 443–483.

A. Agreement Is Not Meeting of Minds

86. An agreement, according to Ethiopian law, is not a meeting of minds but a meeting of declarations or expressions. Such construction of agreement has its basis in the text of the Civil Code and the policy of ensuring certainty in transactions. Article 1680 provides, 'a contract shall be completed where the parties have expressed their agreement thereto' and 'reserves or restrictions intended by one party shall not affect his agreement as expressed where the other party was not informed of such reserves or restrictions'. From this it can be noted that Ethiopian

law requires only apparent agreement. An attempt to determine the existence of a contract based on the subjective intention of the parties is believed to introduce uncertainty in relationships.[1] This does not, however, mean that the intention of the parties is totally irrelevant. For certain purposes, resort could be made to the parties' intention. For the purpose of ascertaining the meaning of terms in contracts, for example, Article 1734 requires consideration of the common intention of the parties. In addition, with respect to mistakes, Article 1699 stipulates that a mistake could be a ground for invalidation of contracts when the difference between what a person has declared and what he or she has intended is substantial.

1. G. Krzeczunowicz, *Formation and Effects of Contracts in Ethiopian Law* (Addis Ababa: AAU, 1983), 13. Krzeczunowicz is of the view that Ethiopian law is a compromise between the French theory of will and the Swiss theory of declaration of will: 'the theories of will and of declaration are based, respectively, on moral or social grounds. The moral requirement is that a man should not be tied to an agreement he did not will. The social argument is that there can be no order, no trade, etc., if men cannot rely on expressed declarations. The Ethiopian system is a compromise: declarations alone create the contract, but defects of consent may invalidate them, subject-for mistake-to damages'.

B. Offer and Invitation to Treat

87. The rules of offer and acceptance do not provide any definition for the term 'offer'. If not a definition, a standard of decision is essential considering the legal effect of an offer: it results in a contract when it is validly accepted. One could, however, formulate a definition of offer based on those rules dealing with offer and acceptance. Article 1687 provides, 'no person shall be deemed to make an offer where: (a) he declares his intention to give, to do or not to do something but does not make his intention known to the beneficiary of the declaration; or (b) he sends to another or posts up in a public place tariffs, price-lists or catalogues or displays goods for sale to the public'. And Article 1688(1) provides, 'whosoever offers a thing for sale by auction shall be deemed to make a declaration of intention and not an offer'. Article 1687 is similar to the position of the Swiss Code of Obligations except that its scope covers display of goods for sale.[1]

The communications, in Articles 1687 and 1688, are not addressed to specific individuals. That seems to explain why they are not considered offers but instead invitations to treat or declarations of intention. If these communications were considered an offer and several people accepted the offer, then the person making it would be unfairly bound to several contracts, which would be impossible physically or economically to comply with. Consequently, when a person makes public statements on market prices, price-lists, or catalogues, he or she is not making an offer; instead, the person is inviting others to make him or her an offer, which he or she is free to accept or reject. It is not the content but the manner of the communication that is relevant here; that means statements on tariffs, price-lists, or catalogues could be considered offers if they are addressed to one or more specific persons. Without losing sight of the exception, we could generalize that for a proposal to constitute an offer, it must be addressed to one or more specific persons.

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 14.

88. Ethiopian law admits, if not generally, an exceptional possibility of public offer. Article 1689 provides that a promise published to reward the person who will find a lost object or perform a specified act is considered to have been accepted if a person brings the object back or performs the act, even though he or she did not know of the promise, and hence such person is entitled to the reward. It is not apparent why such public communications are considered offers. What if several persons accept this offer by performing the required act? David commented that the court has discretion on the issues of allocating the promised reward.[1]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 15.

89. To constitute an offer, a proposal for making a contract should, in some legal systems, indicate the intention of the person to be legally bound and should be sufficiently defined. In Ethiopia, for a contract to exist, its object must be sufficiently defined and the parties must have intended to create legal relationship. But these are not requirements that a proposal must satisfy if it is to be considered an offer.

C. Revocability and Withdrawal of Offer

90. The issue of revocability is one of 'several well known and time honoured battle grounds'. The common law uses the term 'revocation' to refer to both withdrawal and revocation. In certain cases, however, the terms 'revocation' and 'withdrawal' have different meanings. For example, in the Vienna Convention for International Sale of Goods, one speaks of withdrawal of offer when the offer has not reached the offeree and revocation after the offer has reached the offeree. Both are concepts that refer to situations where the offeror intends to release him- or herself from the offer.

91. The term 'revocation', in relation to offer, is not used anywhere in the Civil Code. However, the drafter uses the term while commenting on some of the provisions. Article 1690 provides that: 'whosoever offers to another to enter into a contract and fixes a time-limit for acceptance shall be bound by his offer until the time-limit fixed expires' and 'he shall not be bound where his offer is rejected before the expiry of the time-limit fixed'.

Commenting on this, David wrote, 'an offer with a fixed time-limit for acceptance cannot be revoked by the offeror'.[1] An offer cannot be revoked when a time for acceptance is fixed and also when no such time is fixed. Article 1691(1) provides, 'whosoever offers to another to enter into a contract and does not fix any time-limit shall be bound by his offer until the time when he can reasonably expect the other party to decide on the offer'. In order to eliminate the difficulty of determining 'reasonable time', Article 1692(2) provides, 'where acceptance is late, the offeror shall forthwith inform the other party where he does not intend to be bound'. Otherwise, the late acceptance would create a contract.

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 15.

92. Regarding withdrawal of offers, Article 1693 of the Civil Code provides, 'an offer shall be deemed not to have been made where the offeree knows that it is withdrawn before he knew or at the time when he knows of the offer'. Consequently, one can argue that the offeror cannot revoke but can withdraw offers. The difference is that the term 'withdrawal' is used before the offer is effective and the term 'revocation' is used after the offer has become effective. Such distinction in the use of the two terms is consistent with the language of the Convention on International Sale of Goods (CISG). There are, however, two notable differences. First, an offer is irrevocable in the Ethiopian law of contracts but not in the CISG. Second, an offer is effective when it *reaches* the offeree, according to the CISG. However, in Ethiopian law, an offer is effective when the offeree *knows* of the offer.

Considering in particular the irrevocable character of offers, the last phrase of Article 1693 ('where the offeree knows that it is withdrawn . . . at the time when he knows of the offer') raises a question of interpretation. It is not immediately clear whether an offer can be validly withdrawn when the offeree knows about the withdrawal minutes or hours, if not days, after he or she has known of the offer.

D. Acceptance

93. A contract exists when an offer is accepted. Like an offer, an acceptance could be made orally, in writing, by signs normally in use, or by conduct (Article 1681(1)). But there should not be any doubt as to the fact that the offeree has agreed to the terms of the offer. Sometimes, the offeror, when he or she makes the offer, can require that acceptance be made or communicated to him or her in a particular way. In such cases, a reply, however positive, to the offer does not create a contractual relationship unless it is made in the form required by the offeror (Article 1681(2)). David provides the following illustration to this: A orders goods from B and specifies that the contract will be concluded only if the goods are delivered to him in a particular place before a particular date. The letter by which B states that he accepts this offer will not be a valid acceptance; the goods must be delivered on time before the contract will exist.[1]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 11.

94. Acceptance is the unequivocally positive response to the terms of an offer. Consequently, the silence of the offeree does not amount to acceptance (Article 1682). David said, 'one must take care, however, not to confuse silence, which is not sufficient to constitute acceptance, with outward conduct other than speech that can amount to a tacit acceptance. An offer might be accepted, for instance, where the offeree performs the contract without reservations'.[1]

> Art. 1683: Duty to accept
> (1) No acceptance shall be required where a party is bound by law or by a concession granted by the authorities to enter into a contract on terms stipulated in advance.
> (2) In such a case, the contract shall be completed upon receipt of the offer.

> Art. 1684: Pre-existing business relations:
> (1) An offer to continue or vary an existing contract or to enter into a subsidiary or complementary contract may be accepted by silence.
> (2) Such shall be the case where the offer is made in a special document informing the other party that the offer shall be regarded as accepted if no reply is given within a reasonable period of time.

Article 1683 is, in the words of the drafter, an innovation by the Ethiopian Civil Code, inspired by the Anglo-American notion of public utility.[2] Circumstances to which Article 1684 can be applied are limited owing to the strict requirements that must be fulfilled (in particular, the requirement that the offer and the declaration that silence amounts to acceptance be made in a special document). The following scenario provided by the drafter illustrates the scope of Article 1684: A subscribes to a periodical for a year. At the end of the year the distributor of the periodical continues to send it although A has not renewed his subscription, and also writes to A that he will renew A's subscription if A does not inform him not to. The price for the subscription is due if the subscriber does not declare the subscription terminated within a reasonable time. Here the silence constitutes consent, since the parties had engaged in earlier business relations and the only question was one of renewing an earlier contract.[3]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 11.
2. *Ibid.*
3. *Ibid.*, 13.

E. Qualified Acceptance and the Battle of the Forms

95. The problems of qualified acceptance and the battle of the forms are the other problems that are addressed in most national and international legal instruments. The problem of qualified acceptance refers to a situation where a response by the offeree is meant to be acceptance but contains different or modified terms than what is provided in the original offer. The question is as to whether this communication brings a contractual relationship between the negotiating parties. The problem is worse if the two parties immediately proceed to performance and a dispute arises afterward as to which one of the terms is binding. This problem arises more frequently in situations where the parties have used their own standard terms in their communications intended as offer and acceptance and their terms are in contradiction. Therefore, the two questions that arise in this battle of the forms situation are: whether there is a contract between the parties, and if there is, whether it is the term of the offeror or the offeree that prevails.

96. Article 1694 provides, 'the offer shall be deemed to be rejected and a new offer shall be deemed to be made where the acceptance is made with a reservation or does not exactly conform to the terms of the offer'. This is what is known as the mirror image rule. Accordingly, if the purported acceptance does not exactly conform to the terms of the offer, it is deemed to be a counter-offer, which needs to be accepted by the original offeror for there to be a contract. However, this does not solve the

problem of qualified acceptance or the battle of the forms. It only ignores the problem. The problem is when the two parties proceed to perform their obligations under their agreement and a dispute occurs afterward. A question arises in this connection as to whether performance on the side of the counter-offeree is acceptance of the counter-offer. This is a matter of interpretation. If the performance by the counter-offeree is interpreted as an unequivocal expression of acceptance, there is no problem; in this case, the terms of the counter-offer will prevail. But this line of reasoning may not be validly made when the concerned term is found in general terms of business attached to or refereed in the counter-offer. This is because for terms inserted in invoices and general terms of business, the other party must expressly agree to the insertion, and hence implied acceptance by way of interpretation of a party's conduct is not acceptance (Articles 1685 and 1686).

97. The defect of the mirror image rule becomes apparent when the contracting parties have intended to be bound by their negotiations and proceeded performing their obligations but the law refuses to enforce their agreement. What is more, it is subject to abuse: one of the parties realizes that he has made a bad bargain. The price of the products the buyer has bought has fallen, and he can buy them elsewhere at a much lower price. He now discovers that the terms are conflicting, and invokes the conflicting terms and the mirror image rule to claim that he is not bound by any contract.

F. Contract by Correspondence (Contract between Absent Parties)

98. In certain circumstances, it might be important to know when and where a contract exists between the parties. The principle that contract exists when and where an offer is accepted is not of much help in cases where there is time and place difference between the sending and reception of acceptance. In this regard, there are two theories: the theory of dispatch and the theory of reception. The former provides that a contract exists when and where an acceptance is dispatched to the offeror. On the other hand, the theory of reception holds that a contract exists when and where the offeror receives the acceptance. Most continental legal systems follow the theory of reception, some with certain modifications. The Ethiopian law of contracts adheres to the theory of dispatch. Article 1692(1) provides, 'a contract made between absent parties shall be deemed to be made at the place where and time when the acceptance was sent to the offeror'. When the telephone is involved in the transaction, Article 1692(2) provides, 'a contract made by telephone shall be deemed to be made at the place where the party was called'. The theory of dispatch in Article 1692 is applicable only as far as the acceptance is not withdrawn. In addition, in cases where the offeror has stipulated acceptance be notified to him or her within a specified period of time, the drafter of the Civil Code remarked that 'the acceptance must come to his attention within the time thus fixed. It is not sufficient that it has been sent within this time'.[1]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 17.

G. Withdrawal of Acceptance

99. The time when the contract is concluded has several important implications. But it does not have any implication as to whether the offeree can withdraw his or her acceptance. According to Article 1693(2), an acceptance shall be deemed not to have been made where the offeror knows that it is withdrawn before he or she knew or at the time when he or she knows of the acceptance. Illustration by the drafter: A writes B and offers to sell him a house for Ethiopian Birr (ETB) 5,000. B writes to A on January 10 to accept his offer, but then changes his mind and writes a letter on January 15 revoking his acceptance. B establishes that A did not go to his postal box until January 18 and that he received the two letters simultaneously, although one of the letters was put in the postal box before the other. B's acceptance is validly revoked.[1]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 18.

II. Intention to Create Legal Relations

100. Not all agreements are contracts. A contract is an agreement for which the law provides one or more remedies for non-performance. However, the law does not provide remedies for the non-performance of all agreements. This might be explained in terms of resources needed to enforce agreements and the limited potential of almost all legal systems to afford such resources. Consequently, the function of the law of contracts is, among others, to identify those agreements that the law is an efficient and effective instrument to enforce. To this effect, the law of contracts provides several requirements that must be fulfilled so that the agreement can be considered contract. One of the requirements is intention to create legal relations.

An agreement, among other things, must be intended to create legal relations. Article 1679 provides that 'a contract shall depend on the consent of the parties who define the object of their undertakings and agree to be bound thereby'. This emphasizes the paramount importance of agreement of the parties for the formation of contract. The parties must agree not only as to their obligations but also as to the consequence of not observing their obligations. That is to mean, they must agree not only to assume their obligations but also to be subject to the law. This does not, however, mean that the parties must expressly mention their intention to create legal relations. In reality, it is rarely that the parties refer to the law when they are concluding contracts. Therefore, the fact that the parties intended to create legal relations is difficult to establish.

101. As the saying goes, even the devil knows not the intention of a man. In such cases, therefore, courts are expected to rely on factual inferences. In agreements made in social or family contexts, we could presume that the parties do not have the intention to be legally bound unless there is strong argument and reason to the contrary. In all other agreements, we could presume that the parties have intended to create legal relations unless there is strong argument to the contrary. A proof that the parties have simulated the contract for other purposes could be used

to rebut the presumption of enforceability. An express agreement of the parties making their relationship enforceable 'in honour' is another proof that can be used to rebut the presumption of enforceability. In addition, if the parties have agreed that each of them is not liable for non-performance, it is a case where the parties did not intend to create legal relations.

III. Consideration

A. There Is No Requirement of Consideration

102. Under Ethiopian law, consideration is not an essential requirement for the existence of a valid contract. This sets the Ethiopian law of contracts apart from, for example, laws of contracts belonging to the common law tradition. As a result, contracts under Ethiopian law could be gratuitous or onerous. But this should not be without losing sight of the fact that there are some specific contracts that by their nature should be supported by consideration. An example of this is a contract of sale.

103. A requirement of cause is incorporated in the Ethiopian law of unjust enrichment. But it should be noted that this is not the same as consideration. Cause in the Ethiopian law of contracts includes an entitlement that emanates from a contract or a law. It is in this sense that the term is used, for example, in relation to the law of unjust enrichment.[1]

1. See paras 54–62 regarding unjust enrichment.

104. Though as a matter of general rule, a promise should not be supported by sufficient consideration for it to be enforceable in law, there are circumstances where a contract will be voidable where a person's obligation is not proportional to his or her benefits and the other party has taken advantage of certain specified attributes of the party.[1]

1. See also paras 169–171.

B. Gratuitous Promises

105. Gratuitous promises, provided that the other requirements for existence of contracts are fulfilled, can be enforceable in law. There is no special form that is provided generally with respect to gratuitous promises. Provided that such promises are accepted by the other party, as a matter of general rule, this would give rise to an enforceable contract. For example, a contract of agency can be onerous or gratuitous. It is onerous when the agent is remunerated for his or her services by the principal. It is gratuitous when the agent is not remunerated for his or her services. In situations where the agent has agreed to represent the principal gratuitously in conclusion of contracts with third parties, whether the contract of agency should be made in writing depends not on the fact that it is gratuitous but on the nature of the main contract that he or she is appointed to conclude on behalf of the principal.

Consequently, if the main contract is a kind of contract that the law prescribes must be written to be valid, then the contract of agency, whether it is gratuitous or onerous, should also be made in that form.

Another example of a gratuitous contract is donation. It should be noted that a promise of donation is not a contract and that a donation should also be accepted by the donee. In this regard, Article 2435 provides: 'a promise to make a donation shall give rise to no obligation' and 'where such promise is broken, the promisor shall refund the other party such expenses as may have been made in good faith on the basis of such promise'.

In addition, if what is to be donated is a corporeal chattel, there exists a contract of donation when the chattel is delivered to the donee (Article 2444). When the donation pertains to immovable property, it should be made in writing and should also be registered (Article 2143).

106. The difference between gratuitous and onerous contracts has implications with respect to interpretation, cancellation, and termination of contracts. For example, Article 1739 of the Civil Code provides: 'The obligations assumed by a party who derives no advantage from the contract shall be construed more narrowly.' In gratuitous contracts, the person is liable to pay damages in cases of non-performance only when he or she has committed a grave fault (Article 1796). Another legal implication of the distinction between gratuitous and onerous contracts is provided with respect to the agent–principal relationship. The Civil Code requires the agent to manage the affairs of the principal with the care and skill as a *bonus pater familias.* However, when the agent is acting gratuitously, the agent is required to apply that level of care and skill that he or she would normally apply to his or her own affair (Article 2211). Finally, where a contract is made for the exclusive advantage of one party, Article 1824 provides that the contract could be terminated by the court when the other party requires for good cause.

C. Natural Obligations

107. The notion of natural obligation presents itself in the Civil Code in two places. First, in relation to donation, Article 2432 provides: 'a payment made in performing a moral obligation shall not be deemed to constitute a donation'. To this extent, therefore, contract law is said to recognize moral obligations. What constitutes a moral obligation is not, however, clear from the Civil Code. Second, in relation to unjust enrichment, Article 2166 provides that if a person has made the payment in satisfaction of a debt barred by a period of limitation or a moral obligation, that person is not entitled to recover it unless he or she was incapable of alienating property without consideration at the time of the payment.

IV. Modifications of the Contract

108. The fact that the underlying principle of the Ethiopian law of contracts is freedom of contract also means that the parties can at any time modify the terms

and nature of their contractual relationship. The only requirement provided in this regard is that the agreement that modifies the terms of an existing contract must be made in the same form. This means that if the original contract is required to be made in written form, then the agreement that is meant to modify the terms of the original contract will not be valid unless it is also made in writing. In *Lukeser Tourist and Travel Agency Plc v. Biruneyes Plc* [2007], the respondent and C concluded a contract under which the respondent undertook to pay USD 540,000 to C. Two months later they agreed in a written document that the respondent as a partial performance would rather delivery five specifically identified buses to the appellant. The appellant brought this action for the delivery of such buses and payment of damages for the delay. The respondent argued that the second contract is void, because unlike the first one it is not signed by two witnesses. The Federal Supreme Court held on the other hand that since the first contract is a kind of contract the law provides no validity form, it can also be modified in any form.

The absence of the requirement of consideration under Ethiopian law also means that the agreement that modifies the terms of the original contract does not have to be supported by sufficient consideration.

§2. Formal and Evidential Requirements

I. Formal Requirements

A. Contracts under Seal

109. 'Contracts under seal' is a concept of English common law that refers to situations where a person assumes an obligation enforceable at law not because he or she is in a contractual relationship but because he or she expressed this intention in writing and in attaching his or her seal. One of the requirements in English law for the existence of contracts is consideration. A promise not supported by consideration is not enforceable. 'Contracts under seal' could be considered exceptions to the English requirement of consideration. Since the requirement of consideration is absent in Ethiopian law and gratuitous promises could be considered as contracts, there are no such things as contracts under seal.

B. 'Solemn' Contracts

110. Solemn contracts are those for which the law provides a special form for their substantive validity. In Ethiopian law, the agreement of the parties, intended to be legally binding, is sufficient to constitute a contract even if it is not written. This 'freedom of form' principle is provided in Article 1719 of the Civil Code. For this, there are two exceptions. The law or the parties (by their prior agreement) could provide a special form for certain kinds of contracts; in such cases the parties must comply with this requirement. The law, for example, requires contracts of guarantee and insurance to be in writing (Article 1725). In addition, contracts

relating to immovable property and contracts with a public administration should be in writing and registered (Articles 1723 and 1724).

In other legal systems there are different kinds of formal requirements. Some are requirements that are essential for the validity of contracts; some are essential in order to assert the contract against third parties; and some are essential in order to prove the existence of contracts. Not all contracts in relation to which a formal requirement is provided are solemn contracts. A contract is solemn if the law provides a formal requirement; failure to observe this formal requirement results in the invalidity of the contract. In Ethiopia, if the law provides a special form, failure to observe it results in the invalidity of the contract unless such form is specifically required for other purposes. In this regard, David wrote:

> If the law or an agreement of the parties provides that the contract must be concluded in a particular form, the failure to observe that form results in the invalidity of the contract. Article 1720 states this rule explicitly, thus eliminating the difficulties that have arisen in some legal systems, where it has not been clear in all cases whether the form required by the law was sanctioned by invalidity *(ad validitatem)* or was only a rule of evidence *(ad probationem).* The rule of Article 1720 was previously stated in the Swiss Code of Obligations (Article 11) and in Greece (Civil Code, Article 159).[1]

Therefore, in Ethiopian law, contracts relating to immovable property, contracts with a public administration, contracts of guarantee, and insurance contracts are solemn contracts.

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 33. Art. 1720 provides, '(1) Where a special form is prescribed by law and not observed there shall be no contract but a mere draft of contract. (2) A contract shall be valid notwithstanding that fiscal provisions relating to stamp duty or registration fee, have not been complied with. (3) Unless otherwise provided, a contract shall be valid notwithstanding that prescribed measures of publication have not been complied with.'

II. Evidential Requirements

A. The Parol Evidence Rule

111. According to Article 2205(1) of the Civil Code, a written instrument constitutes conclusive evidence, as between those who signed it, of the agreement therein and of the date it bears. The effect of this is that courts shall not admit witnesses or presumptions against the statements (the agreement and the date) contained in the written instrument (Article 2006(2)). Those who signed it, only by tendering an oath to the party who avails him- or herself of such written instrument, could challenge such statements embodied in the writing (Article 2006(1)). However, third parties may prove by all means the falsity of statements contained in the instrument, unless the instrument was authenticated (Article 2009).

112. One can disclaim the handwriting or signature that is alleged to be his or her own. Articles 2007 and 2008 regulate this:

> Art. 2007: Disallowance of handwriting
> (1) He against whom a non-authenticated instrument is set up shall, where he intends not to recognize it as his won, formally disclaims his alleged handwriting and signature.
> (2) It shall be sufficient for heirs to declare that they do no recognize the writing or signature of their ascendant.
> Art. 2208: Verification of handwriting
> Where a party disclaims his handwriting or signature or his heirs declare that they do not recognize them, their verification shall be ordered by the court.

The Supreme Court once decided that the purpose of disclaiming is to shift the burden of proof away from the defendant. And this must be done as early as possible. In case the defendant is late in disclaiming, he or she bears the burden of proof:

> The next point to be considered is whether the burden of proof rested on the plaintiff to show that the documents contested were genuine or on the defendant to prove that the contested documents were forged. It is to be pointed out that when copies are given by one party to a suit to another as being documents on which the party producing them intends to rely the party receiving the documents must state at the earliest opportunity whether he admits or denies the documents; the handing of documents, or copies thereof, by one party to another is a substitute for what in the law of procedure is known as discovery of documents and the object of discovery of documents is to enable the party concerned to know what documents the other party is relying on and to enable that party to contest or admit those documents. In the present case the defendant did not deny any of the documents copies of which were given to him by the plaintiff. The first time he contested the three documents . . . was when the matter was being dealt with by accountant appointed by the court . . . the court holds that . . . the burden of proof has in this case shifted to the defendant.

However, formal disclaiming made in due time is not a substitute of verification of handwriting or signature. In this case, the appellant filed a suit in the High Court alleging that having paid to the creditor a certain amount of money as a guarantor to the respondent, he has been subrogated to the rights of the creditor and hence the respondent should pay him the said amount. Since the respondent has not only denied any debt but also alleged that the appellant owes him some money, the appellant has introduced some documents. The respondent, having disclaimed his alleged signature, has formally denied the same under oath on the application of the appellant. Later the appellant argued that the signature be examined. The respondent replied that neither the witnesses should be introduced nor the signature be examined since he has given his affidavit under oath and that the suit be struck out. The majority of the court (High Court) struck out the suit on the ground that the plaintiff should not ask that the signature be examined after the defendant has denied under oath that it is his signature. The minority judge dissented saying

that the signature should be examined. On appeal, the Supreme Court decided as follows:

> Article 2207 of the Civil Code provides that he against whom a non-authenticated instrument is set up shall, where he intends not to recognize it as his own, formally disclaim his alleged handwriting or signature. Whether this express denial is under oath or not, the signature or the handwriting cannot escape examination under Article 2208. Even more, instead of wasting the time of the litigants and that of the handwriting experts by sending the signature or the handwriting to be examined just because the party carelessly disclaimed it, the fear of the result of denial under oath would reduce much litigation, if the handwriting or the signature is sent to be examined only after the party has disclaimed it under oath having carefully examined it. We therefore change the majority decision and rule supporting the minority that the signature be technically examined and proved.

113. However, it should be noted that Article 2006(2) bars only witnesses and presumptions against statements contained in written instruments. Consequently, one of the parties could produce another document that purports to show that the terms or the nature of the contract were modified at a later point in time.

114. The rule that a written instrument is conclusive evidence as to the agreement contained therein also does not bar courts from examining communications between the parties before and after the writing with a view to interpret any terms of the contract. The Civil Code requires that contracts should be interpreted in accordance with the common intention of the parties, and courts should attempt to find out the common intention of the parties from their communications before and after the formation of the contract.

B. Function of the Notary

115. The law that regulates the legal profession requires one to have a license before rendering legal services, including drafting of contracts and legal documents. It should be noted in this connection that the fact that Ethiopia is a federal state also means that the licensing regime is different from one regional state to another. It is generally true that one needs to have a license before providing legal services to individuals.

There are two classes of licenses at the federal level. The classes are different from one another as to whether the licensee can represent clients in the Federal Supreme Court and the preconditions one must fulfil to get these licenses. But generally, one needs to have at least a diploma in law from a recognized college or university, two years of work experience, and must pass the examination that is administered annually by the Ministry of Justice.

However, it must be noted that the requirement of license is actively enforced only with respect to those legal professionals who represent people in courts. Consequently, it is common for laypersons to provide legal drafting services together

with secretarial services. Shops located near courts and government offices usually provide such services.

116. However the contract is drafted, registration and authentication of documents is done by government notary offices. The exact institutional arrangement is different from one regional state to another. In some states the Department of Justice and in others courts and municipal offices provide services for registration and authentication of contracts and other documents. Addis Ababa, which is a chartered city accountable to the federal government, has a separate notary office that is accountable to the Ministry of Justice. The functions of the notary include:

- authentication and registration of documents;
- verification of copies of documents against their originals and registration of the same;
- administration of oaths and receiving of affidavits and registration of the same;
- keeping custody of specimens of signatures and/or seals upon request by those concerned;
- ascertaining the capacity, right, and authority of persons who are about to sign or who have signed documents submitted for authentication;
- ascertaining the legality of documents submitted for authentication; and
- ascertaining with respect to contracts made to transfer properties for which title certificates are issued under the law: (a) the right of the transferor to transfer the property; and (b) that the property is not mortgaged or pledged or that such property is not attached by a court order (Article 4, Authentication and Registration of Documents Proclamation No. 334/2003).

It should be pointed out that anyone who wants to get contracts and other documents authenticated can do so; it is up to the parties to get their contracts authenticated and registered (Article 5(2)). A contract that is duly authenticated is conclusive evidence of its contents and may only be challenged with the permission of a court for good cause (Article 27).

117. Although authentication and registration of documents is a decision left to the individuals concerned, to be valid, certain types of documents and contracts ought to be registered and authenticated to be valid. The Civil Code specifies the type of contracts that ought to be registered, and it is usually those contracts that are meant to create and transfer rights *in rem*. In addition, the law requires the authentication and registration of power of attorney and memorandum and articles of association of business organizations and statutes of associations (Article 5). Such documents are not valid unless they are duly authenticated and registered.

C. Presumptions

118. The Civil Code contains a number of presumptions. Presumptions are generally of two kinds: rebuttable and irrebuttable presumptions. If a presumption is irrefutable, then the party against whom such presumption applies cannot disprove

it. On the contrary, rebuttable presumptions merely shift the burden of proof from one party to another, and hence the party against whom certain fact is presumed can refute such presumption. For example, Article 2019(2) of the Civil Code presumes the validity of contracts. This is a rebuttable presumption. The effect of this presumption is to shift the burden of proof away from a person who alleges the validity of contracts. Consequently, the party who alleges the invalidity of the contract is expected to prove the grounds for its invalidity.

119. The Civil Code presumes payment of debt from: handing over of the document of title to the debtor (Article 2020), and entries (whether or not signed and dated by the debtor) that tend to establish the debtor's release, made by the creditor at the end, in the margin, or at the back of a document of title that remained at all times in his or her possession (Article 2021). This presumption is irrebuttable.

120. With respect to debts to be paid periodically, if the creditor has given a receipt of payment for a given period of time, the debtor is presumed to have paid his or her debt for the preceding period of time (Article 2022(1)). Likewise, the debtor is presumed to have paid the interest if the principal has given a receipt acknowledging payment of the principal (Article 2022(2)). These presumptions are irrebuttable.

121. Some types of debts are presumed to have been paid sometime after they fell due. It should be noted that these presumptions are irrebuttable.

Debts that are presumed to have been paid after six months include:

- debts in respect of wages owed to clerks, office employees, servants, daily workers, and workmen;
- debts due to masters or teachers in respect of lessons given monthly;
- debts due to hotel-keepers, inn-keepers, or managers of boarding houses in respect of lodging and food; and
- debts due to merchants in respect of goods and foodstuffs supplied by them to private persons for consumption or common use.

Debts that are presumed to have been paid after two years include:

- debts due to physicians, surgeons, dentists, midwives, pharmacists, or veterinary surgeons in respect of professional services or supplies;
- debts due to advocates, notaries, or other members of the legal profession in respect of professional services;
- debts due to handicrafts people in respect of work done by them;
- debts due in respect of rents for houses or agricultural estates;
- arrears of periodical dues; and
- interest on loans and generally any sum payable annually or at shorter periodical intervals.

122. The above irrebuttable presumptions are not, however, applicable where the debtor has acknowledged the debt in writing, or when, prior to the expiry of the

period prescribed by law, the creditor has instituted proceedings with a view to the debtor paying the debt.

III. Burden of Proof

A. General Rule on Burden of Proof

123. The general principle of the evidence rule, that the one who alleges a fact shall prove it, also applies with respect to proof of contracts. Article 2001(1) of the Civil Code provides that 'he who demands performance of an obligation shall prove its existence'. Once this party has established the existence of an obligation, the obligation or the contract that is the source of that obligation is presumed to be valid. And hence he or she is not expected to prove its validity or the fact that the obligation is not varied or extinguished. Article 2001(2) provides: 'he who alleges that an obligation is void, has been varied or is extinguished shall prove the facts causing such nullity, variations or extinction'.

B. Obligations of Means versus Obligations of Result

124. Contractual obligations are generally of three kinds: obligations to give, to do, or to not do something. The further classification of obligation to do into obligation of result and obligation of means is also expressly recognized in Article 1712(2) of the Civil Code: 'The party who undertakes to do something may undertake to procure to the other party a specified advantage or to do his best to procure such advantage'.

125. The distinction between obligations of means and result has important implications in the area of performance and non-performance. Article 1740 of the Civil Code requires personal performance by the debtor only where this has been expressly agreed or where personal performance is essential to the creditor. In all other cases, the contract could be performed by a third party on behalf of the debtor. The distinction between obligations of means and result will have a direct relevance in deciding whether personal performance is essential to the interest of the creditor. In obligation of result, it might be argued that whether or not the obligation is performed personally by the debtor is not essential so far as the result is achieved. In obligation of means, the debtor has undertaken to do his or her best to achieve a certain result and the outcome of the contract depends on the personality and qualification of the performer. As a result, whether or not the debtor has personally performed the obligation of means is essential to the creditor. In such cases, therefore, obligation cannot be performed by a third party on behalf of the debtor.

126. The distinction between obligation of means and result also has implication in the area of remedies of non-performance. A person who has assumed obligations of means is liable to pay damages for non-performance only when he or she has committed a fault. Article 1795 provides 'a party may not claim damages on the

ground of non-performance of the contract by the other party, unless he can show that the other party is at fault, where the debtor has undertaken to do his best to producer something to the other party without guaranteeing that he would succeed'.

127. The distinction between obligation of means and result might also determine if a mistake regarding the identity and qualification of the other party will be considered fundamental or not.

128. In Ethiopian law, therefore, the distinction between obligations of result and means is not of mere academic interest. The difficulty is in determining if the obligation assumed by one party in a specific case is an obligation of result or means. In such cases, regard should be made to provisions of the Civil Code dealing with special kinds of contracts. For example, in medical contracts, the obligation of the physician is considered as an obligation of means. Article 2639 of the Civil Code defines a medical contract as 'a contract whereby a physician undertakes to provide a person with medical care and to do his best to maintain him in good heath or cure him, in consideration of payment of a fee'. More particularly, Article 2648 provides that a physician will not guarantee the success of his or her treatment unless he or she has expressly assumed this obligation in writing.

The problem is when a contract is not one of the nominate contracts. In such cases, primary consideration will be given to the content of the contract. In the absence of any definite guide as to the nature of the obligation, one could argue that the obligation should be presumed to be an obligation of result. This is in line with the structure of the rules on remedies of non-performance.

§3. Liability and Negotiations

129. The Ethiopian law of contracts is principally based on the principle of freedom of contract, according to which parties are entitled to contractually assume any kind of obligations formed in any kind of manner. The fact that this principle is the basis of Ethiopian law is not only stated by the drafter but also is apparent from the reading of several of its provisions. An important aspect of this principle is the freedom *from* contract. No contract could be imposed on a party against his or her will. That implies that a party is free to break off from negotiations that he or she has started. This is, however, not true if the party has made an offer, for under Ethiopian law offers are irrevocable. Though the rules of offer and acceptance are designed to simplify the process of negotiation with a view to regulate the relationship between the negotiating parties, the actual process of negotiation is not always as simple as the model of offer and acceptance. It is difficult to determine if any offer is made during the negotiation, as well as by whom and when such offers are made. This makes regulation of the relationship between negotiating parties difficult, and more so when the negotiation does not result in the expected contract. If, on the other hand, the negotiation has resulted in a contract, the relationship between the parties is determined based on the contract as may be interpreted, when a need arises, taking to account the communications between the parties during the negotiation.

I. Broken Negotiations and Pre-contractual Liability

130. The term 'pre-contractual liability' is used nowhere in the Civil Code. This does not mean, however, that the concept is unknown in Ethiopian law. So in order to determine whether there exists such an idea in Ethiopia, one has to go beyond looking for the phrase in the Civil Code or any other law. It requires in particular understanding the meaning of the concept and the factual situations governed by this concept in other legal systems. It could be the case that even if the term is not used in the Civil Code or any other Ethiopian law, factual situations governed under the doctrine of pre-contractual liability are governed in Ethiopia in the same manner.

With a view to conclude a binding contract, parties usually engage in negotiations that might take some time. They might have intended to finalize the negotiation by writing down and signing it or by registering it if that is required by law. While the parties are engaged in such negotiation, it could be the case that one of them disclosed to the other important information, or it could be the case that one of them declined other offers. If, at the end of the day, the parties have finalized their negotiation by transforming the agreement reached into a binding contract, the fact that one of them disclosed important information to the other or declined other offers does not raise any problem. If the other party 'withdraws' from the contract, then the rules of the law of contracts will govern the situation. But the problem is when the other party withdraws from the negotiation before the agreement is turned into contract. By relying on the agreements reached as a result of the negotiation, the party might have incurred costs or lost benefits. So the concept of pre-contractual liability is concerned with situations where one party could be liable to the other party who has incurred costs or lost benefits because he or she relied on the agreement reached but such agreement has not been transformed into contract for the withdrawal of the party.

131. The basis for the creation of what is called pre-contractual liability is the doctrine of good faith. Countries that provide for pre-contractual liability put good faith as a general obligation of the parties during not only the lifetime of the contract but also the negotiation period. As a result, parties are required to behave in good faith once they have started negotiations. If one of them withdraws in bad faith, the other party who has relied on the negotiation in good faith is entitled to damages. Recognition of the doctrine of pre-contractual liability does not necessarily mean that the parties are required to make a contract once they have started negotiations. To require so would be to defeat the basis of the law of contracts, freedom of contract. Parties are entitled to decide whether or not to enter into contracts. But when they make a decision not to enter into a contract, it should be in good faith. If one of them withdraws from the negotiation and the other party incurred damage, then he or she is liable to the extent that the other party has incurred damage and that he or she is in bad faith.

132. It is important to stress that good faith occupies a special place under Ethiopian law. Several kinds of terms could be implied into a contract on the basis of good faith.[1] In addition, the law requires that contracts be interpreted in accordance

with the requirements of good faith. Good faith is also considered in performance and remedies of non-performance. But there is no provision of the law of contracts that generally imposes the duty to negotiate in good faith. Parties can, however, create this obligation by agreement. They could enter into a preliminary contract, the terms of which impose, among other things, the duty to negotiate in good faith. There is no specific provision in the Civil Code that governs the relationship between parties in such kinds of agreements, except the provision stating that preliminary contracts should be made in the form prescribed for the final contract. The preliminary contract could be designed in different manners. It could, for example, provide some terms of the final contract and require the parties to negotiate in good faith in order to reach agreement on other terms of the contract. In such cases, therefore, a failure by one of the parties to negotiate in good faith amounts to non-performance of the preliminary contract and entails liability. If, on the other hand, the parties failed to reach on agreement despite negotiating in good faith, their relationship depends on whether they have intended to be bound by those terms as is provided in the preliminary contract. Though Ethiopian law requires the agreement of the parties on all the terms of the negotiation for the contract to be completed, a contract is said to be completed where the parties show that they intend to be bound even if they have not agreed to all the terms of the negotiation (Article 1695(2)). This is the case when the law could supply terms to remedy the deficiency in the agreement of the parties (Article 1695(3)). So, if the parties to a preliminary contract failed to conclude the final contract despite negotiating in good faith, the status of the preliminary contract depends on their intention and the sufficiency of the terms in the preliminary contract. If the parties have intended to be bound by the preliminary terms despite the failed negotiation to arrive at the other terms, the preliminary contract governs their relationship if it is so sufficiently definite when seen together with the implied terms.

1. See paras 73–79 regarding the position of good faith in the Ethiopian law of contracts.

133. Apart from circumstances where parties have created it, Ethiopian law does not provide any general obligation to negotiate in good faith. This implies that generally parties do not have remedy in the Ethiopian law of contracts in situations where they have incurred damage because they have relied on a negotiation from which the other party withdraws in bad faith. This is understandable in view of the fact that the remedies of the law of contracts are applicable as long as there is a contract between the parties. But the common element of the situations falling under the doctrine of pre-contractual liability is the absence of contract between the parties. So the law of contracts is not concerned with such situations as far as the structure of Ethiopian Civil Code is concerned. Thus, in deciding whether there is such concept as pre-contractual liability in Ethiopian law, one must look beyond contract law.

134. Tort law is concerned with liability that might arise when there is no contract between the parties. Article 2055 of the Civil Code reads: 'a person commits an offence where, having declared his intention of entering into a contract and having induced others to incur expenses with a view to concluding a contract with him, he

arbitrarily abandons his intention'. This must be read together with Article 2028, which provides that 'whosoever causes damage to another by an offence shall make it good'. Consequently, a person is bound to make good any damage he or she causes to another if, having declared his or her intention of entering into a contract and having induced others to incur expenses with a view to concluding a contract with him or her, he or she arbitrarily abandons this intention. So the elements leading to such liability include: declaration to another of one's intention to enter into a contract, costs incurred by the other party with a view to conclude the contract, costs incurred as a result of being induced by the party, and arbitrary abandonment of the intention to enter into a contract.

135. One of the elements of the tort of pre-contractual liability is declaration of one's intention of entering into a contract. The fact that one has started negotiation with another could be understood to imply an intention to enter into a contract. Even if a party has not made any offer, he or she could yet be considered to have declared his or her intention of entering into a contract. This could be the case when one has put a thing up for sale by auction. The law considers this not an offer but a declaration of one's intention of entering into a contract. The same is true when one sends to another or posts in a public place tariffs, price-lists, or catalogues or displays goods for sale to the public. Provided that other elements of the tort of pre-contractual liability are fulfilled, this person could be held liable.

136. The other important element of pre-contractual liability is inducing the other party to incur costs. A party who declared his or her intention of entering into a contract could be held liable if, among other things, he or she induced the other party to incur costs. If the declaration is made in such a manner that it requires incurring costs so as to respond to it, then it could be argued that the declaring party has induced the other to incur costs.

137. The other element relates to the nature of the costs. The costs covered by the tort of pre-contractual liability are only those that the party has incurred in order to enter into a contract. That means only expenses incurred during the negotiation are recoverable. Expenses incurred with a view to perform a party's obligations under the expected contract are not recoverable, and neither are lost opportunities.

138. Withdrawal from a negotiation having induced the other party to incur costs is not sufficient to make the withdrawing party liable. The withdrawing party is liable only when he or she abandoned his or her intention arbitrarily. What does this mean? If the party withdraws from the negotiation because he or she was offered an attractive contract by a third party, can we say that this party arbitrarily abandoned his or her intention to enter into a contract? A party is said to be arbitrary in his or her actions when he or she does not have adequate reason. But here choosing a contract that is more attractive is not an arbitrary action. The fact that a party is in bad faith does not necessarily mean that he or she is arbitrary in his or her actions.

139. There is a possibility that circumstances that fail to satisfy the strict requirements of the tort of pre-contractual liability might be accommodated by

other provisions of Ethiopian tort law. For example, Article 2032 of the Civil Code provides that 'a person commits an offence where, with full knowledge of the facts, he causes substantial damage to another in seeking personal gain disproportionate to the damage caused'. This provision can be used in certain circumstances where a person withdraws from negotiations after the other party has incurred costs while expecting a contract, provided that all of the elements of this tort are fulfilled. This tort requires that a person suffered substantial damage because the other party withdraws from the negotiation seeking a personal gain (a more profitable contract) and the damage caused is disproportionate to the benefit gained from the withdrawal.

II. Void Contracts and Pre-contractual Liability

140. Pre-contractual liability refers also to circumstances where the contract is void (no contract in law) but the parties have been acting toward one another as if there was a contract (contract in fact). A question as to the liability of the parties arises when the void contract is invalidated. The legal effect of invalidation is reinstatement. And this might require, depending on the circumstances, the duty to make restitution or the liability to pay damages.[1]

1. See paras 178–185.

III. Tortious Liability for Acts Done during Negotiation

141. The other circumstance where liability of the parties for what happened during the negotiation stage will be an issue is where a contract has resulted from the negotiations and this contract is not invalidated. It could be the case that one of the parties has supplied the other false information with a view to induce him or her to the contract. Ethiopian law provides circumstances where this might lead to the invalidation of the contract. False information by itself is not sufficient to result in invalidation (Article 1705). The question now is: what is the liability of the party who supplied false information when the contract is not invalidated because other requirements are not fulfilled or because the party who acted on the information did not request the invalidation of the contract? Ethiopian tort law makes a person liable if he or she, intentionally or negligently, supplies false information where he or she knew that the person would act upon the information and suffer damage, or where he or she is bound by the rules of his or her profession to give correct information (Article 2059). The person is not, however, liable where he or she confined him- or herself to giving advice or making recommendations to another (Article 2062). Silence of a party could be construed as supplying false statements if the silence induces the other to believe a fact that was not true. In such cases, the person is liable only when he or she knew that the other person would act upon this silence and suffer damage, or where he or she is bound by the rules of his or her profession to disclose those facts that he or she did not disclose.

IV. Earnest and Pre-contractual Liability

142. The Ethiopian law of contracts contains rules regarding the institution of earnest. The meaning of 'earnest' and the reason people give earnest is not clear from the provisions of the Civil Code. However, it is an ancient institution in Ethiopian society. The *Fetha Negest* had some provisions dealing with the subject matter of earnest.

143. Article 1883 provides that the giving of earnest shall be proof of the making of the contract. Some commentators take this provision to the extent of arguing that it is a conclusive evidence of the existence of a contract in all cases.[1] This is, however, difficult to accept for two reasons. The first relates to contracts that the law requires to be proved by producing the written document. In such cases, it is difficult to accept the giving of earnest as a conclusive proof of the making of the contract. Second, even if we argue that earnest proves the making of the contract, it does not, however, prove the nature of the contract and the obligations of the parties, and hence it could not be conclusive and determinative.

1. T. Teshome, *Fundamental Principles of Ethiopian Law of Contracts* (Federal Supreme Court, 1997), 371.

144. Article 1885 of the Civil Code provides that: 'unless otherwise agreed, the party who has given earnest may cancel the contract subject to forfeiture of the earnest given by him' and 'unless otherwise agreed, the party who has received earnest may cancel the contract subject to repayment of double the amount received by him'. In one case brought before the Supreme Court (Civil Appeal File No. 964/57), a woman agreed to sell her piece of land to a man and received earnest money. After some time, the woman refused to hand the land over to the buyer, who then brought a court action seeking specific performance. The lower court granted specific performance, against which the woman appealed to the Supreme Court. The court decided, based on the above article of the Civil Code, that the man is not entitled to specific performance. The woman is entitled to cancel the contract. However, the court ruled that when she cancels the contract she must pay double the amount of the money she received as earnest.

In another case (Civil Appeal File No. 1674/83), a contractor agreed with a subcontractor for a construction of a certain structure, and he paid a certain sum of money as earnest. However, the subcontractor failed to start the work even after the lapse of the time within which he agreed to finish the work. As a result, the contractor declared the contract cancelled and constructed the structure himself and brought a court action claiming the earnest money. The subcontractor argued that it is earnest money and since the contractor has cancelled the contract he forfeits the earnest money. To this argument, the contractor replied based on Article 1884 that the earnest money is just an advance payment and since the subcontractor did not perform his obligation under the contract he should return the money. The lower court accepted the argument of the subcontractor and ruled based on Article 1885(1) that the contractor could cancel the contract only subject to forfeiture of the earnest given by him. The contractor brought an appeal to the Supreme Court

and the court rendered a judgment based on Article 1885(1). The judgment of the lower court, which is also based on Article 1885(1), was criticized as a literal application of the text of the law. The Supreme Court moved to interpret the same article. Accordingly, it ruled that a party who has given earnest forfeits it only when he or she cancels the contract without good cause. But in this case, the court ruled, the contractor cancelled the contract because the subcontractor failed to discharge his obligations under the contract, and this is a good cause. As a result, the court ordered the subcontractor to return the earnest money. The Supreme Court read into Article 1885(1) an exception of good cause and it did not even bother to explain the reasons for doing that. It should be noted that in the first case, it did not raise and entertain the issue of good cause.

145. The problems with Article 1885 and its interpretation in the above two cases will be clear when we compare the remedies available to the parties in two kinds of situations: one when one of them gives earnest and the other when no earnest is involved. If there is no earnest involved in the contract, a party can cancel the contract only when there is non-performance and he or she is entitled to cancel the contract by him- or herself according to the contract or the law. In other situations, even if there is non-performance, a party can only request cancellation of the contract by the court and the court cancels the contract only under certain conditions. This means, in the first case, where the woman agreed to sell her land (provided that she did not receive any earnest money), she cannot cancel the contract. Any refusal to observe the contract amounts to non-performance on her part and the man could request the remedies of damage or specific performance. In the sale of real property, it is most likely that the court will grant specific performance. Now consider the situation where the man paid earnest. The court ruled that the woman is entitled to cancel the contract subject to her paying double the amount of the earnest money. If double the amount of money amounts to specific performance or damages, then there is no problem. But there is no guarantee that double the amount of earnest given is equivalent to getting the land or damages. In such cases, therefore, we could observe that earnest erodes the force of contracts to the disadvantage of the person giving the money. Similarly, in the second case, the contractor could cancel the contract (or request the cancellation of the contract) and/or request the payment of damages when the subcontractor failed to perform his obligation (provided that no earnest is involved). But now because the contractor paid an earnest and because he has good cause in cancelling the contract (the court did not even entertain the issue of whether unilateral cancellation as opposed to judicial cancellation is possible), he can get his earnest back, no more or no less. Getting the earnest money back could be considered as a remedy of non-performance, but this remedy protects only one legitimate interest of the contractor: reliance interest. If the court accepted the propriety of the contractor cancelling the contract, return of the earnest money is just a legal effect of the cancellation. But the law provides that a party may claim damage, in addition to cancellation, when there is non-performance by the other party. Damages make the remedy of cancellation complete by extending protection to the expectation interest of the party. But since he gave earnest, the contractor can only claim the return of the money. By making this judgment, the court has once again ruled in effect that earnest erodes the force of

contract to the disadvantage of the party giving it and to the advantage of the party receiving it.

146. Another point that could be raised about earnest relates to its difference from advance payment. In cases where the parties have performed their obligation as stipulated in the contract, earnest is considered as advance payment. For example, Article 1884 provides that 'unless otherwise agreed, the party who has received earnest shall return it or deduct it from his claim where the contract is performed'. However, the parties could agree otherwise. The question that is difficult to answer is what could possibly be the reason for the parties to agree other than considering earnest as an advance payment. Though difficult to answer this might be, this could not be a reason for ignoring such agreement of the parties.

The problem is where one of the parties receives some amount of money (which is a proportion of what is due to him or her) from the other party and fails to perform his or her obligation. The issue now is if this money that the party received is a partial and advance payment from the other party or an earnest money. If the money is considered as partial and advance payment, then the party who made the payment can claim it back by requesting the cancellation of the contract (or declaring the contract cancelled where it is possible) and/or can also claim an extra amount as damages where he or she has incurred damage because of the non-performance. On the other hand, if we consider the money as earnest, the effect is totally different. The party who gave the receipt can cancel the contract, and if we accept the element of good cause introduced by the Supreme Court, he or she can also demand the return of the earnest money. What will be the situation if it is the party who wanted to withdraw from the contract after making the payment in the first place? The answer here also depends on whether the money is advance payment or earnest money. If it is advance payment, the party who received it and who is willing to perform his or her part of the contract can claim the remedies of non-performance, which might include specific performance, cancellation, and/or damages. If specific performance is not the appropriate remedy, the party can claim damages – the amount of money that could take him or her to a position he or she would have been had the contract been performed. For the purpose of simplicity, assume that the parties have included a penalty clause in their contract. In such cases, the party who is willing to perform his or her part of the contract but for the unwillingness of the other party can claim the amount of money agreed in the penalty clause. However, if he or she has not incurred any expenses by relying on the contract, he or she should return the money received from the other party or that amount of money will be deducted from the penalty. If, on the other hand, the money is considered earnest, the party who received it can keep it when the other party is unwilling to continue with the contract. This is so even when the parties have included in their contract a penalty that is greater than the money considered earnest. The difference is when the money is not considered earnest; the party is entitled to remedies of non-performance that might possibly be far more than the amount of the money received at the beginning. If it is considered earnest, the party is entitled to only that money which might possibly be much lower than the amount of money the party could have received by way of remedy of non-performance. From this it follows that earnest could erode the force of contracts

also to the disadvantage of the party who received it and to the advantage of the party who made it. This is only because we took the interpretation of the provisions of the Civil Code on earnest given by the Supreme Court.

147. This raises a question as to why the Civil Code incorporates provisions and institutions that erode the force of contracts and a question as to why contracting parties usually give money as an earnest when not doing so might be beneficial to them. It should be remarked here that in both of the cases mentioned above, the Supreme Court did not determine if there exists a valid contract between the parties. There is no mention that the courts looked into the terms of the contract. It is just that the parties in the land case seemed to agree in their submissions to the court that they agreed to buy and to sell and that the man paid money as earnest and the woman received the money as earnest. But just because the parties have not contested the fact does not necessarily mean that there is contract and that the money is earnest. Whether there is a contract and whether a payment is earnest are questions of law, not facts. Thus, it would have been good if the Court had determined these issues. The answer to the question of whether the payment is earnest or advance payment results in different legal effects. And the determination as to whether there exists a contract or a mere agreement between the parties could also shed some light as to the purpose of the payment made.

If there is a contract between two parties, there is no reason or purpose that could be established for giving earnest. This is because the payment of earnest could erode the force of the contract as discussed above. It could be argued that earnest could be taken as a guarantee of future performance on the part of the party giving it. So if the party receiving it could not get the expected performance from the other party, he or she could keep the money. Even when there is no earnest involved, the party could claim the remedies of non-performance. But this has costs and involves a great degree of uncertainty. The costs involve the expenses of judicial proceedings for the remedies of non-performance and the uncertainty involves the use of judicial discretion by the courts to deny the party any remedies, the time taken by the court to grant remedies, and the possibility that the non-performing party might be insolvent. In such cases, earnest alleviates and, depending on the amount, avoids the costs of judicial proceeding and uncertainty. What the person has to do is to ask for an earnest payment and keep it when the other party fails to perform his or her obligation. The idea of the law of contracts is to formulate the rules on remedies with a view to protect individuals who have relied on contracts. However, the effectiveness of this guarantee is highly reduced because of costs of judicial proceedings and of uncertainty. So even when there is a contract, one of the parties could require the other to give an earnest payment. But if the purpose of earnest is to protect a party from the costs of judicial proceedings and of uncertainty, the amount of the earnest should reflect the party's interest that would have been effectively protected had it not been for such costs. The amount would be approximately the same as the amount of reliance and expectation damages that would follow from the non-performance by the other party. Stated in other words, if the purpose of earnest is to protect a party from reliance and expectation damages that would have been protected by the law of contracts but not for the costs of judicial proceedings and uncertainty, its amount would usually be the same as the amount the parties would

have inserted in their contract as liquidated damages. The difference is only that in the case of liquidated damages the amount is to be paid later when there is non-performance but in the case of earnest the amount is paid in advance for possible future non-performance. The facts that earnest is paid in advance and forfeited at the will of the receiving party in the case of non-performance and that liquidated damages are to be paid later when there is non-performance and require the involvement of a court when the defaulting party is not willing to pay indicate that the two are designed to protect the same interest, but their differences indicate the purposes behind the decision to require earnest or to agree on the amount in advance. Liquidated damages are supposed to protect the performing party's expectation and reliance interests that would have also been protected had it not been for the uncertainty and insufficiency of the results of the assessment of the damage awarded by the court because of the subjective nature of the rules on quantum of damage and because of the rules of damage that do not recognize some categories of loss as deserving compensation. On the other hand, earnest is supposed to protect one party's expectation and reliance interests that would have also been protected had it not been for the uncertainty of future payment by the defaulting party, and the uncertainty of the results and the costs of judicial proceedings. That is why earnest is paid in advance and liquidated damages are to be paid in the future. If the party tenders to perform his or her obligation, the money that he or she has paid as earnest will be deducted from his or her obligation or will be returned to him or her. If the party has performed his or her obligation, then he or she will not be required to pay the liquidated damage.

If this is the purpose, then it is appropriate to rule that the party who gave earnest and who fails to perform his or her obligation cannot claim back the earnest. The problem here is if he or she has failed to perform his or her obligation because of force majeure. When a party is prevented absolutely from performing his or her obligation by an event unforeseeable at the making of the contract, he or she is not liable to pay damages. As a result of this, he or she is not also liable to pay liquidated damages. And if liquidated damages and earnest are supposed to protect a party's expectation and reliance interests to the extent that protection is due against different kinds of risks, then there is no purpose of allowing the party to keep the earnest he or she received where the other party was prevented by force majeure from performing his or her obligation because in such cases the expectation interest of a party will not be protected for uncertainty and cost reasons, but even without them it is not considered by the law of contracts as worth protection. Therefore, when a party who gave earnest fails to perform his or her obligation because of force majeure, the party who received the earnest can keep the earnest to the extent that it is enough to protect his or her reliance interests (damages). Anything above that should have been returned to the party who gave the earnest in the first place. What if the amount of the earnest is not enough to protect the reliance interests of the party who received the earnest? Similarly, if a party who gave the earnest failed to perform his or her obligation and there is no force majeure that prevented the performance, the party who received the earnest should be entitled to keep it to the extent that it is enough to protect his or her reliance and expectation interests. What if the amount of the earnest is not enough for this? What if the earnest is more than that which is required to compensate for reliance and expectation interests?

Similarly, what if the party who received the earnest fails to perform his or her obligation? The party received the earnest because he or she required guarantee not for his or her own performance but for the other party's performance. In such cases, it becomes clear that it should have been him or her that must be required to pay the earnest. But it did not happen. So what should be the remedy of the party who gave the earnest? The party is entitled to those remedies that are provided in law: specific performance, cancellation, and damages. Assume for simplicity that specific performance is not available for one or another reason. If this is so, the party is entitled to cancellation and damages. By ensuring that the contract is cancelled, the party protects his or her reliance interests, and by getting damages, the party protects his or her expectation interests. The amount that is due to him or her as a result of cancellation includes the full amount of the earnest and any other payments he or she made to the non-performing party. The amount that is due from the damage assessment is the amount that compensates him or her for the profit he or she lost and the costs he or she incurred because of the non-performance. The sum of this money could be greater or less than double the amount of the earnest that he or she gave to the other party. But in no way could it be less than the amount of the earnest that he or she gave to the other party unless the party who received the earnest has partially performed his or her obligation. The law entitles the party to double the amount of the earnest. The question here is what happens if the sum of money that would have been due if the party had used the default remedies of the law of contracts is less than or greater than double the amount of the earnest. What if it is less than even the amount of the earnest because the party who received the earnest has partially performed his or her obligation? When making the discussion and raising the questions above, we are assuming that there is a contract between the two parties and that the term 'may cancel' the contract in Article 1885 refers not to its technical meaning of cancellation because of non-performance by the other party but mere refusal to perform one's obligation or refusal to be bound by the contract. We should note here that the Supreme Court also took the ordinary meaning of cancellation when dealing with the case between the man and the woman and the land. Otherwise, it should have held that the woman did not cancel the contract. She just refuses to perform and if there is any cancellation as a result of her refusal, it should be by the man or at the request of the man. Had the court used its technical meaning and ruled that it is the man who cancelled the contract because of the failure of the woman and that this is good cause, the result would have been requiring the woman to return the earnest money. But it ruled that the woman should return double the amount of the earnest money. That means it impliedly accepted that it is the woman who cancelled the contract, which in turn implies that the court took the term 'cancellation' in its ordinary usage to mean refusal to perform.

Questions could also be raised regarding the decision of the Supreme Court in the above cases. Assuming that the man and the woman entered into a contract of sale of land and that the money that the man has paid is earnest, what should have been the remedy of the refusal by the woman to hand over his land? This is a classic instance where it should have been the woman who should have made the earnest payment in the first place because it became clear that it was she who failed to perform her part of the contract. But it did not happen this way, and then she

refused to perform her obligation. In such cases, the law entitles him to the remedy of double the amount of the earnest she received. If we applied the default rules of the law of contracts, the person could have been granted specific performance. But let us assume that specific performance is not available. In such a case, he could be entitled to the amount of money that he gave as earnest, any amount of money that he made as payment, and the profits he lost and costs he incurred because of the non-performance. What if the resulting sum is greater than double the amount of the earnest? Let us assume that the man paid 1,000 as an earnest and also paid another 10,000 as partial payment for the price of the land and the woman refused to sell. Obviously, if we applied the default rules of the law of contracts, the man is entitled to at least more than double the amount of the earnest money – 2,000 is double the amount of the earnest and the man could be entitled to at least 11,000 (without considering the damages he is entitled to) had the default rules been applied. In such cases, a literal application of Article 1885(2) as also supported by the Supreme Court gives the result that the man is entitled to 2,000. The question is whether he is entitled to any amount more than that. What would be the decision of the Supreme Court had it entertained the case as modified this way? We could reasonably expect the Supreme Court to grant a remedy that is more than 2,000 but what is not clear is how much more it would grant and what other element it would introduce to the article by way of interpretation. Now let us come to the second case. After receiving the earnest money, the subcontractor refused to perform his obligation and as a result the contractor cancelled the contract and claimed the earnest. Had the Court been consistent in following the reasoning in the previous case, it should have took the term 'cancellation' in Article 1885 to mean refusal to perform and hence should have ruled that when a party who received the earnest fails to perform his obligation, he should pay double the amount of the earnest. But here since the contractor is only claiming the amount of the earnest and not double the amount and the subcontractor is using the term 'cancellation' in its technical sense in arguing that it is the contractor who cancelled, the court instead followed a different route. If it used the reasoning as used in the previous case, it would have ruled that the subcontractor should pay double the amount of the earnest, which would be awarding a remedy more than requested. So it took the argument of the contractor and said that it is the contractor who cancelled the contract. But had this line of reasoning been extended until its logical meaning, the result would have been that the subcontractor would be entitled to keep the earnest. So the Court was forced to introduce an exception of good cause in Article 1885(1). By doing so, the Court introduced further confusion about the rules on earnest, let alone refining them. Our discussion assumes that the money given is earnest and that there is contract between the parties.

148. Now what if earnest is given when there is no contract? Here the question is what would be the purpose of giving earnest if there is no contract. The parties might have arrived at an agreement on all aspects of the transaction but because other formalities are not fulfilled the agreement is not yet a contract. This could be the case where, for example, the contract should be made in writing. The law requires that any contract on immovable property should be in writing. If such transaction is not in writing, the contract shall be void or there shall be no contract

but a mere draft of a contract. Pending the contract being written down, the parties might need to make decisions relying on and expecting the fact that the agreement will be written down. Such decisions might involve avoiding other negotiations or offers on the same subject matter, making expenses and other contracts with a view to perform the agreement that is yet to be written down. Even if making such decisions assuming that the agreement is as good as a contract might be in the interest of both parties, the party might need a guarantee that the agreement will be written down. Otherwise, the party might decide not to make those actions, anticipating the possibility that the party might withdraw from the agreement. In such cases, since the agreement is not yet a contract, the law of contracts does not extend any protection to such party. The tort provision seen above might also be sufficient enough to cover all such possible scenarios. This is because the person is liable only if he or she abandons the agreement arbitrarily, and even then his or her liability is only to the extent of the expenses the party has incurred with a view to entering into a contract. It does not cover situations where a person withdrew from the agreement on the ground that he or she found a more attractive contract. It also does not cover situations where a person has lost opportunities because of relying on the agreement. What is more, it does not cover situations where a person has incurred expenses with a view to perform the contract. The maximum a person gets by virtue of the above tort rule is the cost of writing down the agreement (when the other party refused to sign it) and the cost of negotiation. So in such cases, the institution of earnest comes to satisfy the need for a sufficient guarantee. Pending the agreement being written down and signed, the party who needs the guarantee might require the other party to produce an earnest payment. The party could request such amount as it is sufficient. In cases where the party refuses to perform his or her obligation, he or she forfeits the earnest, and in cases where the receiving party refuses to perform his or her obligation, he or she is required to pay double the amount of the earnest. In this way earnest is a guarantee for both of the parties. This is because even for the party who paid the earnest, he or she takes double because the amount of the earnest is just his or her money and the amount that the other party is providing above the earnest is his or her protection against withdrawal. If the parties have performed their obligation according to their agreement, then the earnest would be considered as an advance payment. Similarly, if we understood the meaning of earnest in this way, there is no need also to determine whether a given payment is an advance payment or not. If the payment is made before a contract exists, then it is earnest. If after earnest is given a contract starts to exist, then the earnest would be taken to be advance payment. If we take earnest this way, then it becomes clear why Article 1885 is phrased in such a manner. So the term ‘contract’ in the articles dealing with earnest could be understood to mean void contract. Experience in business and civil transactions also suggests this. It is often the case that earnest is involved in transactions when the transaction is not, properly speaking, a valid contract.

149. Another use of the provisions of earnest could be to solve the problem of evidence. In contracts for which the law does not prescribe any form, the parties are required to establish by any manner the terms of the alleged contract. The party could succeed to prove that he or she gave to the other (received from the other)

an earnest payment, but he or she might fail to find any means to prove the terms of the contract. In the absence of any evidence as to the terms of a contract, it is difficult for the court to make any decision. It would also be difficult to rule that the party does not have any case when payment of money is proved. In such cases, it is fair for the law to say that payment of earnest proves the making of a contract. But since the terms of the contract are not sufficiently clear, it is also fair for the law to rule that in case of non-performance, the party who receives the money should return double its amount and the party who gives the money forfeits it in case of non-performance. This is of course subject to a proof to the contrary.

On the other hand, if any money is paid after the making of the contract or if after the making of money a contract is made, it is reasonable to rule that the money is advance payment as opposed to earnest and hence the rules of the Civil Code on earnest will not be applied in such cases. This kind of reasoning is better than a literal application of the rules of earnest for the following reasons. First, it avoids the need to make a distinction between earnest and advance payment when payment is made after the making of the contract or a contract is made after payment. Second, it avoids the effect of eroding the force of contracts when the provisions of the Civil Code on earnest are applied to situations where there is a contract between two parties. This is illustrated amply by the decision of the Supreme Court on the above two cases.

So from the above analysis it is clear that earnest is used in practice by individuals to protect themselves against circumstances that the doctrine of pre-contractual liability in other countries would protect them from. Thus the institution of earnest and the provisions of the Civil Code on the matter and the tort of pre-contractual negotiation are used in Ethiopia to cover circumstances falling under the doctrine of pre-contractual liability.

Chapter 2. Conditions of Substantive Validity

§1. Capacity of the Parties

I. General Rule

150. One of the requirements for the validity of a contract is that the parties must be capable (Article 1618). Otherwise, the contract is voidable and hence might be invalidated by the court at the request of the party who was incapable at the making of the contract (Article 1808).

As a matter of general rule, every person is presumed to be capable unless declared incapable by law (Article 192).

II. Minors

151. A minor under Ethiopian law is a person who has not attained the full age of 18 years (Article 198). Such persons are, as a rule, incapable and hence any contract that they make with other parties is voidable. A minor may, however, be authorized to enter into certain kinds of contracts:

> Art. 305: Authorization to act given to the minor. 1. Principle
> (1) The tutor may authorise the minor to conclude alone those contracts which, considering his age and his financial position, are to be regarded as acts of everyday life.
> (2) Such authorisation may be tacit.
> Art. 306: 2. Acts of everyday life
> (1) An act may in no case be regarded as an act of everyday life where for its conclusion the law requires the authorisation of the family council.
> (2) Nor may an act be ever regarded as an act of everyday life where it entails on the minor an expense or obligations the value of which exceeds one hundred Ethiopian dollars.
> Art. 307: 3. Effect with regard to the tutor
> The tutor shall stand surety, in favour of third parties, for the obligations which the minor has assumed with his authorisation.

One important provision regarding contracts made by a minor in excess of his or her power is that they will not be invalidated where the other party was in good faith and did not take advantage of the party requesting the invalidation of the contract (Article 315). A minor is not required to pay back what he or she was paid based on a voidable contract unless he or she has benefited from such payment (Article 316).

III. Notoriously Insane or Infirm Persons

152. Insane and infirm persons are defined in the Civil Code as follows:

> Art. 339: Definition
> (1) An insane person is one who, as a consequence of his being insufficiently developed or as a consequence of a mental disease or of his senility, is not capable to understand the importance of his actions.
> (2) Persons who are feeble-minded, drunkards or habitually intoxicated and persons who are prodigals shall in appropriate cases be assimilated to insane persons.
> Art. 340: Infirm Persons
> Deaf-mute, blind persons and other persons who, as a consequence of a permanent infirmity are not capable to take care of themselves or to administer their property may invoke in their favour the provisions of the law afford protection to those who are insane.

The Civil Code states that juridical acts performed by a notoriously insane or infirm person are voidable, and hence they could be invalidated in the same way that other voidable contracts are invalidated. Two provisions of the Civil Code provide situations where a person is said to be notoriously insane or infirm. Article 341 provides: 'a person shall be deemed by law to be notoriously insane where by reason of his mental condition, he is an inmate of a hospital or of an institution for insane persons or of a nursing home, for the time for which he remains an inmate'. Likewise, Article 342 provides: 'in a communes of less than two thousand inhabitants, the insanity of a person shall be deemed to be notorious, where the family of that person, or those with whom he lives, keep over him a watch required by his mental condition, and where his liberty of moving about is, for that reason, restricted by those who are around him'.

153. Where a contract made by a notoriously insane person is invalidated and as a result the other party has suffered damages, the law holds the insane person liable where the other party is in good faith (Article 345). The good faith of the other party is presumed unless the person's insanity is considered notorious as a result of the fact that that person lives in a small rural community (Article 346).

IV. Judicially Interdicted Persons

154. Judicial interdiction is a judgment given by a court regarding a person who, because of his or her insanity or infirmity, is deemed not to be able to appreciate the nature and consequences of his or her acts. In such cases, the court appoints guardians and tutors for such a person. The Civil Code contains detailed rules on when a person can be judicially interdicted.

The effect of judicial interdiction is limitation of the capacity of that person to enter into contracts. Article 373(1) provides: 'acts performed by an interdicted person in excess of his powers may be impugned in the same circumstances as if

they had been performed by a minor'. Where the other party is in good faith, the guardian shall be liable for the prejudice suffered by such person (Article 374). However, it should be noted that the other contracting party 'shall never be deemed to be in good faith where he has contracted with the interdicted person within a province where his interdiction has been given publicity in terms of the law'. The law assumes that there will be a special registry for putting the names of those people who are judicially interdicted. However, in practice, there has never been such a register and hence whether or not the other contracting party is in good faith is to be determined on a case-by-case basis and it will be a mere factual determination.

V. Legal Persons

155. The capacity of legal persons is to be determined according to the article of associations and the laws that are applicable to each of them. Whether it is a civil association or a business organization, a person intending to make contracts with a legal person would benefit from looking at the article of associations. If it is a statutory agency, the capacity of such legal person is to be determined from that specific law that has established it.

§2. Defects of Consent

156. The other requirement for the validity of contracts is that the consent of the contracting parties should be free and sustainable. According to Article 1678, 'no valid contract shall exist unless the parties give their consent sustainable at law'. And there are three kinds of defects that make consent not sustainable in the above sense. Article 1696 provides, 'a contract may be invalidated where a party gave his consent by mistake or under deceit or duress'. The fact that there is a discordance between true intention and declaration of intention does not have merit as a matter of principle, and one of the two exceptions where the true intentions of the contracting parties is important is in the case of defects of consent. Stated in other words, when the cause for the discordance between the true intention and declaration of intention is one of the defects of consent, which are provided in Article 1696, a contract can be invalidated.

I. Mistake

157. Mistake is one of the defects of consent recognized under Ethiopian law. However, the Civil Code does not define the term 'mistake'. It only provides some positive and negative requirements, which are useful to determine the kind of mistake that affects the validity of contracts. There are two positive requirements for a mistake to make the contract voidable: it must be decisive and fundamental. The Ethiopian law of contracts does not set forth any other requirements, unlike other laws:

> These two requirements are necessary and also sufficient. Unlike some legal systems, the preliminary draft makes no distinction between excusable and

> inexcusable mistake, nor between mistake of law and mistake of fact. Nor is any distinction made between mutual and unilateral mistake, nor between mistakes resulting from misrepresentation and those made for some other reason. Once the mistake satisfies the two requirements set forth above, the mistaken person can always have the court invalidate his declaration of intention, as well as the contract that results from it.[1]

The mistake must be decisive in the sense that 'the party who invokes his mistake shall establish that he would not have entered into the contract, had he known the truth' (Article 1697). This is a subjective requirement.

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 21.

158. And the other requirement is that the mistake must be fundamental: 'a contract may be invalidated on the ground of mistake as defined in Article 1697 where such mistake relates to an element of the contract which the parties deem to be fundamental or which is fundamental, having regard to good faith and to the circumstances in which the contract was made' (Article 1698). This provision is defective because it does not sufficiently define the requirement of fundamental mistake. This ambiguity seems to be alleviated by the subsequent provisions. Though not exhaustive, Articles 1699–1700 provide three categories of mistakes that are fundamental.

159. First, a mistake that relates to the nature of the contract is considered fundamental. For example, if an owner of a house entered into a contract of sale believing that it was a contract of rent, the mistake can be said to relate to the nature of the contract. Consequently, it is considered a fundamental mistake and is a ground for invalidation.

160. Second, the mistake is fundamental 'where the mistaken party has undertaken to make a performance substantially greater or to receive a consideration substantially smaller than he intended' (Article 1699(b)). The difference between what one has intended and what that person has actually undertaken must be substantial. Though the requirement of being fundamental is supposed to be an objective standard, this category of fundamental mistake is, however, defined in a subjective manner. David illustrates this as follows: A buys a tractor from B and signs a contract for the purchase. He discovers later that the sale price was stipulated in US dollars, although he had assumed that the price was stated in Ethiopian Birr. The performance that he has undertaken to make is substantially greater than he intended. He can therefore request the invalidation of the contract.[1]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 22.

161. Third, a mistake regarding the identity or qualification of the other contracting party is fundamental where 'such identity or qualifications are a fundamental element of the contract in the general opinion or having regard to the circumstances of the case' (Article 1701). An example of a contract where the identity or qualification of one of the parties is a fundamental element is a contract for the provision

of medical services. In such cases, if the patient makes a mistake regarding the identity or qualification of the other party, it can be argued that such mistake is fundamental. Another example is a contract of agency. In such contracts, the identity or qualification of the agent can be said to be fundamental, particularly considering the fact that the agent has the power to affect the legal rights and duties of the principal.

162. The Civil Code, in addition to enumerating instances of fundamental mistakes, also lists two kinds of mistakes that cannot be considered fundamental. Article 1701 provides that no contract will be invalidated when a person commits a mistake that relates only to his or her motives leading to the making of the contract. The following is an illustration from the drafter: A buys a house from B because he thinks his son is going to be married and he wants to find him a place to live. Even if the marriage does not take place, the contract will remain in force.[1]

Likewise, arithmetic mistakes are simply rectified and do not result in invalidation.

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 22.

163. As stated by David, though whether a mistake is excusable or inexcusable or unilateral or bilateral does not determine the validity of the contract, a requirement of good faith is included in a way that determines the validity as well as the consequences of invalidating a contract. Article 1702(1) states that 'the mistaken party may not invoke his mistake in a manner contrary to good faith'. Krzeczunowicz argues that good faith in this case means honesty and that when a mistaken party requests the invalidation of a given contract, the sole reason must be that he or she erred while making that contract. If it appears that the reason is that the contract has become unprofitable and the party is only using his or her mistake as a pretext, Krzeczunowicz argues that it is contrary to good faith and hence the contract cannot be invalidated. Krzeczunowicz adopts a narrow definition of good faith in this connection. However, it could also be argued that good faith in this context refers to whether the mistake relates to a fact that he or she should have known. If a person makes a mistake regarding an element of a contract that is fundamental yet that he or she should have known, it could be argued that requesting the invalidation of a contract is contrary to good faith.

164. Good faith is also used to determine the consequences of invalidation. In this regard the good faith of the person to be assessed is not that of the mistaken person but that of the other contracting party. Article 1703 provides: 'Whosoever invokes his mistake to avoid the effect of a contract shall make good the damage arising out of the invalidation of the contract unless the other party knew or should have known of the mistake.'

II. Misrepresentation

165. Misrepresentation is one of the grounds for invalidation of contracts. In this regard, there is noticeable ambiguity in the Civil Code and hence the relevant provisions are reproduced as follows:

Art. 1704: Fraud
(1) A contract may be invalidated on the ground of fraud where a party resorts to deceitful practices so that the other party would not have entered into the contract, had he not been deceived.
(2) A contracting party who has been deceived by a third party shall be bound by the contract unless the other contracting party knew or should have known of the fraud on the making of the contract and took advantage thereof.
Art. 1705: False statements
(1) A contract may be invalidated where a party in bad faith or by negligence made false statements and a relationship giving rise to a special confidence and commanding particular loyalty existed between the contracting parties.
(2) The provisions of sub-art.(1) shall apply where a party, by his silence, caused the other party to believe a fact which was untrue.

It seems from the above provisions of the Civil Code that fraud refers to something that is more than a false statement. It involves deceitful practices, although the exact meaning of that term is not clear. In addition, it is clear that a false statement or failure to disclose information (silence) is a ground for invalidation of a contract only under exceptional circumstances. Failure to disclose information or disclosing false information results in invalidation of the contract provided that two cumulative conditions are fulfilled. First, the failure to disclose or the false information should have been made in bad faith or by negligence. This covers circumstances where a person keeps silent or makes a false statement while he or she knew or ought to have known that it would mislead the other contracting party. Second, there must be a relationship that existed between the parties and this relationship must be special in the sense that it requires transparency between them. An example of such special relationship is that which exists between a lawyer and his or her client. In such cases, a false statement or non-disclosure results in the invalidation of the contract if it is made in bad faith or by negligence.

166. One could argue, however, that the scope of application of Article 1705 should be restricted to non-disclosure, and hence false statements – so long as they are made in bad faith – should be considered as deceitful practices within the meaning of Article 1704. This latter interpretation is supported by the need to ensure trust between the contracting parties. There is no reason why a contract should continue to be binding where one of the parties entered into that contract only because he or she relied on incorrect information supplied by the other party, and that other party also was in bad faith in the sense that he or she knew or should have known that the statement was inaccurate.

III. Improper Pressure

167. Consent that is expressed under duress is not sustainable in law. The victim of duress is entitled to request the invalidation of such contract. Article 1706(1) provides: 'A contract may be invalidated on the ground of duress where the acts of duress led a party to believe that he, one of his ascendants or descendants, or his

spouse, were threatened with a serious and imminent danger to the life, person, honour or property.' The kind of standard to be used to determine if an alleged duress is sufficient to affect the validity of a contract is conditional subjective. This is not the same as an objective standard in the sense of referring to an abstract objective person in the position of the victim, though Article 1706(2) states that 'duress must be such as to impress a reasonable person'. This is because Article 1706(3) states that 'the nature of duress shall be determined having regard to the age, sex and position of the parties concerned'. So the standard is partly subjective and partly objective: would another person, having the same age, sex, and position as that of the victim, be coerced into this contract?

168. For the purpose of determining if the contract should be invalidated, the source of the duress is not important and hence the victim can invoke duress exerted on him or her by a third party (Article 1707(1)). However, once the contract is invalidated, the victim must pay damages to the other contracting party if 'he did not or should not have known about the duress' (Article 1707(2)). One can notice here that the law follows a different structure between fraud by a third party and duress by a third party. In the former, whether the other contracting party knew or should have known about the fraud is important at the stage of determining whether the contract should be invalidated. But in the latter case, the question is not important to decide if the contract should be invalidated; it is relevant only to determine if the party requesting the invalidation of the contract should pay damages.

IV. Gross Disparity

169. Consideration is not as a rule required for the existence or validity of contracts. However, in exceptional circumstances it may affect the validity of the contract. Under Ethiopian law there are three situations where the proportionality of the obligations of the parties may be considered in order to assess the validity of the contract. It must, however, be stressed here that it is the existence of other factors in addition to disproportional obligations that makes a contract voidable. First is the case of unconscionable contracts:

> Art. 1710: Unconscionable contracts
> (1) A contract may not be invalidated on the sole ground that its terms are substantially more favourable to one party than to the other party.
> (2) Where justice requires, any such contract may be invalidated as unconscionable where the consent of the injured party was obtained by taking advantage of his want, simplicity of mind, senility or manifest business inexperience.

It is clear from this that it is not the fact that the benefits and duties are disproportional that renders the contract voidable; rather, it is when this manifest non-proportionality is the result of the fact that one of the parties has obtained the consent of the other by 'taking advantage of his want, simplicity of mind, senility or manifest business inexperience'. So in such cases it is substantive unfairness coupled with procedural unfairness that makes a contract voidable; one by itself

is not sufficient. Whether or not a contract is substantively fair is determined by looking at the contract at the time of its making.[1]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 28.

170. The other situation where assessment of proportionality of the parties' obligations may be carried out is where one of the parties has made the other party enter into the contract by threatening to use his or her right. In this regard, Article 1708 provides, 'a threat to exercise a right shall not be ground for invalidating a contract unless such threat was used with a view to obtaining an excessive advantage'. This is a problem of abuse of rights and the drafter mentions similar provisions in the laws of other countries: Article 30(2) of the Swiss Code of Obligations, Article 212(2) of the Lebanese Civil Code, and Article 1438 of the Italian Civil Code.[1]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 27.

171. The third situation relates to reverential fear. Article 1709 provides that fear of an ascendant or a superior will not be sufficient to invalidate a contract; however, the contract will be invalidated if it is made with a person feared who derived excessive advantage from the contract. In this case too it is not the fact that the other contracting party inspires fear that renders the contract voidable; in addition it must be established that such person has derived an excessive advantage from the contract.

§3. Other Conditions of Validity

I. Existing and Licit Cause

172. Under Ethiopian law, there is no validity requirement with respect to the cause of the contract.

II. Determined or Determinable, Possible and Licit Objects

173. For a contract to be valid, its object must be lawful, moral, and sufficiently defined. The object of a contract must be differentiated from its subject. The subject of a contract is the thing over which the parties are contracting. It could be a horse or a house that the parties are, for example, contracting to buy and sell. The object of the contract is not also the same as the motive of the contracting parties. It refers to the respective obligations of the parties. Understood in this way the object of the contract must be sufficiently defined, possible, lawful, and moral.

174. Article 1714(1) provides that 'a contract shall be of no effect where the obligations of the parties or of one of them cannot be ascertained with sufficient precision'. This provision does not impose a requirement on the contracting parties to spell out all the terms of their contract. It must be seen in light of all the implied terms. If, after consideration of all the implied terms, there remains a gap, then the contract is void.

III. Initial Impossibility

175. The object of the contract must also be possible. The possibility of the contract for the purpose of determining its validity is to be assessed considering the situation at the time of the contract. Article 1715(2) provides: 'a contract shall be of no effect where the obligations of the parties or of one of them relate to a thing or fact which is impossible and such impossibility is absolute and insuperable'.

IV. Illegality and Public Policy

176. In addition, the law requires that the obligation of the parties or any one of them ought to be lawful and moral (Article 1716(1)). Even if the obligation of the parties is lawful or moral when seen separately, it could be the case that it might be unlawful or immoral when the obligations are considered in relation to one another. An example of this is an agreement between two parties where one of them agrees to pay in return for sex. There is nothing illegal or immoral when the obligations of the parties are considered separately unless one is seen in relation to the other. Such cases are covered by Article 1706(2): 'a contract shall be of no effect where it appears to be unlawful or immoral that the obligations assumed by one party be related to the obligations of the other party'.

177. For the purpose of ascertaining if the obligations of the parties are moral and lawful, as a matter of general rule, the motive of the parties is irrelevant (Article 1717). However, an exception is provided in Article 1718: 'the court shall not order a contract to be performed where (a) the terms of the contract denote that the parties or one of them have an unlawful or immoral purpose in view; or (b) the party who requires the performance of a contract produces a document denoting such purpose'.

When assessing if the object of a contract is lawful or not, regard should be made only to mandatory provisions of the law. Such provisions are not restricted to the law of contracts and include any piece of legislation setting out mandatory rules of conduct. For example, the Trade Practices Proclamation prohibits certain categories of contracts on the ground that they restrict competition in the market. An example of such contracts is an agreement between competitors that divides a given market and avoids restriction among them. Such contracts are therefore void and hence cannot be enforced.

§4. The Consequences of a Defect of Consent or a Lack of Substantive Validity

I. Avoidance of the Contract

178. The term used in Ethiopian law to indicate the consequences of defects of consent or a lack of substantive validity is invalidation of the contract. Invalidation is always judicial in the sense that it ought to have the blessing of the court for it

to be effective. Article 1808(1) provides that, 'a contract which is affected by a defect in the consent or by the incapacity of one party may only be invalidated at the request of that party'. The other party whose consent is free and sustainable and who is capable cannot move the court to invalidate the contract.

179. Though the party whose consent is vitiated or who is incapable has the right to require the invalidation of the contract, this right is limited, as is the case with most other legal rights. First, there is a time limit attached to it. Article 1810 provides, 'no contract shall be invalidated unless an action to this effect is brought within two years from the ground for invalidation having disappeared' and 'where a contract is unconscionable and the party injured was of age, the action shall be brought within two years from the making of the contract'. In either of these cases, after two years the party's right to require the invalidation of the contract does not disappear. What is limited, because of the time period, is one of the methods of enforcing the party's right – that is, the recourse to the court of law. Otherwise, the party can use self-help or counterclaim to assert his or her right even after two years. This is evident from Article 1809, which provides 'a party who is entitled to require the invalidation of the contract may at any time refuse to perform it'. Therefore the situation depends on whether the contract is performed or not. If the party whose consent is defective or who is incapable has performed his or her obligation under the contract, then he or she must bring the court action within two years in order to undo his or her performance. If, on the other hand, the party has not yet performed his or her obligation, the party does not have to bring a court action at all since he or she is entitled to refuse performance anytime he or she is requested.

180. The second limitation relates to unconscionable contracts: 'where a party requires the invalidation of unconscionable contract, the other party may put an end to the action by offering to make good the injury'. This is identical to the good faith requirement provided with respect to mistakes: a contract will not be invalidated on the ground of mistake where the other party agrees to perform the contract as intended by the mistaken party.

181. Sometimes, it may be the case that the defect of consent is related only to a certain part of the contract; in such cases, it may be prejudicial to the other party to invalidate the whole contract. This is particularly true where the other party has nothing to do with the problem. Such situations call for partial invalidation. Article 1813 provides that only the part of a contract that is affected by a defect of consent should be invalidated unless doing so affects the essence of the contract.

II. Retroactive Effect of Invalidation

182. Invalidation has a retrospective effect: the parties will be reinstated in a position that would have existed had there been no contract (Article 1815). Acts done in performance of the contract will be of no effect. Consequently, a party who has received money or a thing as a result of the contract is required to return it to

the other party. For example, if the contract of agency between the principal and the agent is invalidated, it means that acts done in performance of that contract shall also be invalidated. A contract that is concluded by the agent, on behalf of the principal, with a third party is an act done in performance of the contract of agency and hence it will also be invalidated when the contract of agency is invalidated.

III. Damages

183. There are exceptional circumstances where damages are paid in addition or in lieu of restitution following invalidation of a contract. There are three conditions where damages may be paid in lieu of restitution. Following invalidation and restitution of the parties to their original position, damages may be paid by the party requesting invalidation to the other party under two exceptional circumstances.

The court may order payment of damages instead of restitution under three conditions. First, it may be the case that invalidating acts done in performance of a contract might affect the interest of third parties in good faith. An example in the previous section can be used to illustrate this point. It is stated that where a contract of agency is invalidated, the main contract shall also be invalidated. However, the main contract between the principal and the third party shall not be invalidated where the third party is in good faith. In such cases, the third party is said to be in good faith when he or she did not know or should not have known of the defect that rendered the contract of agency voidable. The problem with this is when the reason for the invalidation of the contract of agency is the request by the principal, because he or she was incapable or because his or her consent was defective. One may ask, therefore, what will be the remedy of the principal if the main contract is still binding between him or her and the third party? The principal will be paid damages in lieu of invalidation of the main contract. Who is going to pay these damages? The fact that the contract of agency is invalidated at the request of the agent does not necessarily mean that it is the agent who is to blame, and hence there is no prima facie case to hold the agent liable for such damage. On the other hand, one could argue that the third party should be required to pay damages to the principal. At first look this appears futile because the very reason the main contract is not invalidated is to protect the interest of the third party; yet we are saying that the third party should pay the principal in order to maintain the main contract. This is not, however, a futile exercise once it is realized that the type of damages that the third party is required to pay is different from the type of interest of the third party protected by the maintenance of the main contract. In addition, the main contract is going to be maintained only when it is requested by the third party. That means this third party has two options. The first is to agree to the invalidation of the main contract. If the party thinks, however, that he or she would rather prefer being bound to the main contract, he or she could pay damages to the principal and maintain that contract.

In one case, an agent has concluded, in the name of another, a contract with a third party, on the basis of an authority that has already been revoked by the principal.[1] The law on this point is that the principal may ratify or repudiate such contract. Repudiation has the same effect as invalidation and cancellation: restitution of the

parties to their original position. However, this might not be the case where, as in this case, the subject of the contract has already been transferred to a third party in good faith.

1. *Hailemariam Bayu v. Samuel Gosaye* [2007], Federal Supreme Court, Cassation File No. 26399.

184. Another circumstance where damages are paid in lieu of restitution is where restitution is physically impossible or where restitution results in harm disproportionate to the benefit it gives to the other party. The reason for the latter condition is the same as the reason that underlies the doctrine of abuse of rights.

185. Damages might also be paid by the party requesting the invalidation of the contract to the other party. This is the case where the reason for the invalidation of the contract is mistake and the other party did not know or should not have known of this mistake. The second condition is where the reason for the invalidation of the contract is duress by a third party and the other contracting party did not know or should not have known of such duress.

Chapter 3. The Contents of a Contract

§1. The Different Clauses

I. Express Terms

186. The contents of a contract are primarily formulated by the parties. Parties have freedom in determining the contents of their contract. Article 1711 supports this statement by providing that 'the object of a contract shall be freely determined by the parties subject to such restrictions and prohibitions as are provided by law'. The rule allowing the parties freely to determine the contents of their contract also means that they are not limited to conclude any of the 'nominate' contracts specifically dealt with within the Civil, Commercial, and Maritime codes, but are free to conclude also 'innominate' transactions not so named. David wrote, 'the code accepts, as do present western legal systems, the principle of contractual freedom, which is fundamental to a society and an economy that want to leave considerable scope to private initiatives'.[1] However, this freedom is subject to certain restrictions and prohibitions provided by law. In this regard, it should be noted that only mandatory provisions, as distinguished from the permissive ones, provide such restrictions and prohibitions limiting the contractual freedom of the parties. Examples of such restrictions or prohibitions include the requirements that the obligations of the parties must be sufficiently defined, lawful, moral, and possible.

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 29.

187. In English law, terms of a contract are of two types: conditions and warranties. Conditions are essential terms, the breach of which entitles the other party to claims of damage and cancellation of the contract. On the other hand, warranties are incidental obligations, breach of which entitles the other party only to claim damages. Article 1785 provides, 'a contract shall not be cancelled except in cases of breach of a fundamental provision of the contract'. From this it follows that whether a certain term of the contract is fundamental (condition in English law) or not influences the decision to allow the cancellation of the contract. In addition, whether a term is fundamental or not is also important in deciding whether the contract should be partially or totally invalidated. Article 1813 provides, 'where part only of the contract is vitiated, only that part shall be invalidated unless such invalidation affects the essence of the contract'. An obligation that is said to be fundamental forms the essence of the contract.

Therefore, in Ethiopian law, terms could be divided into fundamental or essential or characteristic terms and incidental terms taking into account their comparative importance and effect. The term 'condition' of English law is used in another sense in the Civil Code of Ethiopia.

188. The express terms of a contract are to be determined from the agreement of the parties, whether it is written or oral. But contracts are not necessarily written or oral. The existence of a contract could be implied from the behaviour of the

parties. In such cases, the contract is itself an implied contract and as such it could not have express terms. The terms of an implied contract are also implied. On the other hand, if a contract is express (written or oral), it could have both express and implied terms. And the express terms are to be ascertained from their written or oral agreement. At times ascertaining the express terms of a contract might require interpretation of the words of the contract.

II. Implied Terms

189. Article 1713 provides that the parties are bound not only by the terms expressed in the contract, but also by such incidental effects attached to the expressed terms, according to the nature of the contract, custom, equity, and good faith. Such incidental effects of contracts are known as implied terms. Implied terms form the content of the contract unless excluded by the agreement of the parties.

190. Implied terms are important in order to minimize or avoid instances where the literal enforcement of the contract results in unfairness. Although the court cannot, as a principle, vary the expressed terms of the contract on grounds of fairness, it can imply terms in the contract. This can be contrasted with the power of English courts, which can imply terms only to make the contract effective. In Ethiopia, courts can, subject to the agreement of the parties, imply terms to make the contract not only effective but also fair.

In addition, implied terms minimize the harsh consequences of the strict requirement that the object of the contract must be sufficiently defined by the parties. It is almost impossible and even undesirable to exhaustively deal with the obligations of the parties. Hence, some obligations might not be expressed in the contract, particularly accessory obligations, because parties overlook them or deem them self-evident. In such cases, instead of making the contract void on the ground of insufficient definition of obligations, it is better to supplement the express obligations by such incidental effects that 'obviously and necessarily follow' from them as a result of the nature of the transaction, custom, equity, and good faith.

191. The concept of good faith can be used to imply into contracts several kinds of obligations on which the parties have not negotiated and agreed. For example, if A sells his bread business to B, he cannot argue that he can set up a new bread store on the same street in competition with the store that he sold just because the contract is silent on this point. In such cases, David wrote that 'good faith is sufficient to impose on him the accessory obligations of not setting up such a competing enterprise'.[1] Likewise, the obligation to preserve the goods one has sold to another could be implied into the contract based on custom or good faith. For example, A sells goods that are named and that are to be taken by B in fifteen days. While waiting for B to take delivery of the goods, A must take whatever measures are necessary to preserve the goods sold in good condition. This necessary obligation is imposed on him by custom and good faith.[2] Commenting on Article 1713, Krzeczunowicz wrote that the requirement of good faith also implies that a party must do nothing that could disable him or her or the other party from performing their

contractual obligations.[3] In addition, he wrote that the term 'custom' in Article 1731 must be understood broadly so as to include usages.

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 30.
2. *Ibid*.
3. G. Krzeczunowicz, *Formation and Effects of Contracts in Ethiopian Law* (Addis Ababa: AAU, 1983), 61.

192. It should be noted, in this connection, that default rules of the law of contracts constitute the implied terms of the contract pursuant to Article 1731(3). As with all kinds of terms implied into the contract based on the nature of the transaction, custom, good faith, and equity, such default rules of the law of contracts constitute part of a contract insofar as the parties have not derogated from them by agreeing otherwise.

193. An issue of hierarchy might arise when there is contradiction between two implied terms – for example when one term implied from custom contradicts with another implied from the default rules of the law of contracts. Krzeczunowicz argued that default rules override customary practices.[1]

1. G. Krzeczunowicz, *Formation and Effects of Contracts in Ethiopian Law* (Addis Ababa: AAU, 1983), 60.

III. Standard Terms and Exemption Clauses

A. Standard Terms

194. Standard terms or general terms of business are those that one of the parties normally follows in his or her dealings with third parties. They are usually included in receipts, invoices, and official documents of the party. These terms are considered part of the contract under certain conditions. Article 1685 provides, 'particulars entered by a party in an invoice shall not bind the other party unless they conform to a prior agreement or have been expressly accepted by the other party'. Similarly, Article 1686 provides, 'general terms of business applied by a party shall not bind the other party unless he knew and accepted them or they were prescribed or approved by the authorities'. Therefore, standard terms form the content of a contract when governmental organs approved these terms or when the other party knew and accepted them. Whether a party knew the terms is a question of fact to be determined by considering all the attending circumstances of a particular case. In this regard, Krezeczunowicz wrote: 'Whether he has known the general term is a question of fact for the court, which shall examine whether they were sufficiently brought to his notice. A large poster in the office where the contract was made may be enough. A minutely printed clause in an obtrusive corner of the contract form may not be enough. Where the customer is obviously lacking in literacy, the above-mentioned poster is not enough. It all depends on the circumstances.'[1] It must be established not only that the party knew the terms but also that the party has accepted such terms. The silence of the party could be construed as acceptance of the terms but

only in a very limited set of circumstances. For example, A buys some beams from B for building construction. B sends A the bill, which states that the seller shall not be liable for any defects in the materials delivered. This clause has never been considered during negotiations for the contract. The buyer accepts the bill without protest. The clause written on the bill does not obligate him.[2]

1. G. Krzeczunowicz, *Formation and Effects of Contracts in Ethiopian Law* (Addis Ababa: AAU, 1983), 20.
2. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 13.

195. Another circumstance where general terms of business could form part of the contract is where such terms have been approved by the relevant government organ. If such terms are approved by a governmental authority, the party is bound by them even if he or she did not know or did not expressly accept them. For example, A sends good by rail. The railroad applies a fixed schedule of rates and conditions, which includes the price of transport, the transmit time allowed, and clauses limiting the railroad's liability. If this schedule has been approved by the government, the general conditions that the railroad applies are automatically incorporated in the contract and hence they bind the sender of the goods, even if he or she was not familiar with them and had not approved them.[1]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 13.

196. It is often the case that general terms of business are prepared by one of the parties and are not usually negotiated during the making of the contract. As a result, the law has provided very strict conditions upon which they could form part of the contract. Such terms are also treated differently when it comes to interpretation. Article 1738(2) provides 'stipulations inserted in general provisions, models or forms of contracts prepared by one party shall be interpreted in favour of the other party'.

B. Exemption and Limitation Clauses

197. Exemption clauses are clauses that exempt one or all of the parties from contractual liability in the case of non-performance. And limitation clauses limit the liability of one or all of the parties in case of non-performance. There are also clauses that extend the liability of the parties.

As far as the latter are concerned, the Civil Code has given them recognition. According to Article 1886, 'the parties may extend their liability under the contract and provide that they will be liable for non-performance notwithstanding that performance is prevented by force majeure'. It is not, however, clearly provided whether the parties can extend their liability under the contract and provide that they will be liable for damages even in the absence of fault. Ordinarily the Code provides for liability for non-performance even in the absence of fault. However, a party whose obligation is that of diligence as opposed to result is not liable for damages unless it is shown that he or she has committed a fault (where the contract is with consideration) or a grave fault (where the contract is without consideration).

In this case, can the two parties agree to extend their liabilities in the above way? The reasonable and convincing answer seems to be in the negative. This is not because Article 1886 does not expressly provide so but it is because of the nature of such contracts. To agree that one of the parties is liable for damages in obligations of diligence (despite that the party has not committed a fault or grave fault) amounts to changing the nature of the obligation into an obligation of result. And to guarantee a result in obligations that are normally that of diligence amounts to agreement on an impossible object. And this renders that clause, if not the whole contract, void. The Civil Code recognizes, however, an agreement making a medical professional liable for failing to achieve a specified result provided that such agreement is made in writing.[1]

1. See para. 418 for a discussion of medical contracts.

198. Regarding clauses that limit liability, Article 1887 provides, 'the parties may limit their liability under the contract and provide that they will not be liable unless they commit a fault'. And Article 1888 provides: '(1) the parties may provide that they will not be liable where non-performance is caused by a fault of their employees or auxiliaries' and '(2) any such provision shall be of no effect where it is made to the prejudice of a party who is the employee of the other party'. In addition, the parties can limit their liability by providing that they will not be liable, even in case of a fault, where the fault is committed not by themselves but by one of their employees. Article 1888 gives them this possibility, in conformity with the Swiss Code of Obligations (Article 101) and the Egyptian Civil Code (Article 217). The second paragraph of Article 1888 is patterned after the Swiss Code of Obligations (Article 101(3)) and, for certain cases, prohibits this exclusion of liability where one's employees or auxiliaries are at fault.[1]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 102–103. Art. 1679 provides 'a contract shall depend on the consent of the parties who define the object of their undertakings and agree to be bound thereby'. Art. 1879 provides 'an obligation assumed subject to a condition the fulfilment of which depends solely on the party who assumes the obligations shall be of no effect' and such is the case in particular 'where the promisor's liability for non-performance of the contract is excluded in the contract'.

199. Exemption and limitation clauses are to be taken more seriously than clauses that extend liability. The drafter justified this based on the notion that the beneficiary of such clauses might have imposed them on the other party taking advantage of its stronger bargaining power. On the other hand, there is a need to respect the freedom of the contracting parties to voluntarily agree on any terms. So Ethiopian law, on the matters of clauses exempting and limiting liability for non-performance, could be considered as an attempt to strike a balance between two competing interests.

IV. Penalty Clauses

200. Contracting parties may determine in advance in their contract the amount of damages due in case there is non-performance, which may be total or partial

non-performance or delay in performance. There is marked difference between the common and the civil laws of contracts. Benjamin writes in this connection that 'the attitude in any legal system towards liquidated damages, penalties, or penal clauses, reflects public policy and as such varies not only from country to country, but also within the same country at different period of time'.[1]

In common law, as far as such a clause amounts to liquidated damages and not penalties, it is enforceable. However, if such a clause amounts to penalties, it will not be enforceable. Whether a given clause provides for penalties or liquidated damages depends on the intention of the parties: if the parties intended to determine the amount of damages, it is liquidated damages. If, on the other hand, the parties intended to force performance, it is considered a penalty. The expression of penalties or liquidated damages used by the parties does not conclusively determine the nature of the clause.[2] Mattei writes the following as rough description of the law on penalties and liquidated damages: 'if a penalty clause is to be considered as liquidated damages, and if therefore it is to survive, it must be: (a) incorporated into a contractual scheme where it is very difficult to predict the exact amount of the damage; (b) introduced by the parties with the intention of predicting the actual damage and not to introduce a coercion to perform properly; (c) a reasonable *ex ante* estimate of the amount of damage to be liquidated'.[3] It is therefore imperative to determine whether the amount of damages agreed in the contract is liquidated (stipulated) damages or penalties. It is only if it is liquidated damages that the clause will be enforceable. But once a clause is determined to provide for liquidated damages and not for penalties, the courts will enforce such a clause even though the party has incurred less or no actual damage. 'This attitude of English law with regard to liquidated damages is extremely liberal, for the clause providing for liquidated damages is sacrosanct, and provided that the contract in which it is inserted is valid, and provided that the circumstances giving rise to payment have in fact arisen, the courts will neither increase nor decrease the amount agreed upon, for such an alteration of the parties' contract would be an unwarranted interference with the freedom of contract.'[4] The common law distinction between penalties and liquidated damages is characterized as a 'historical accident' that was created after the seventeenth century by the courts of equity, which considered penalty clauses as contrary to natural justice and as clauses *in terrorem*.[5]

1. P. Benjamin, 'Penalties, Liquidated Damages and Penal Clauses in Commercial Contracts: A Comparative Study of English and Continental Law', *International and Comparative Law Quarterly* 9 (1960): 602.
2. *Ibid*.
3. U. Mattei, 'The Comparative Law and Economics of Penalty Clauses in Contracts', *American Journal of Comparative Law* 43 (1995): 435–436.
4. See Benjamin, 603.
5. See Mattei, 433.

201. On the other hand, civil laws of contracts generally accept the enforceability of penalty clauses. The position of the Roman law before the enactment of the French Civil Code is different over time.[1] The earliest Roman law recognizes the use of a penalty clause so as to force the party to perform his or her obligations, and as a result the courts are supposed to award no lesser damage. In fact, where

the party has actually incurred damage more than the amount of the penalty, he or she could be awarded more than the penalty. In the latter age of the Roman law attempts were made to use penalty clauses to make contracts enforceable that would have been not enforceable because of the usury law, for example. As such, it started to emerge that penalty clauses were not intended to force performance of a contract but to determine the amount of damages payable in the event of non-performance. Consequently, courts could reduce the penalty when they found it to be high. This changed again upon the introduction of the French Civil Code. Article 1152 of the original version of the French Civil Code provides that when an agreement states that the party who fails to perform it shall pay a certain amount of damages, no larger or smaller amount may be awarded to the other party. This law was, however, changed in 1975, and as a result judges are empowered to reduce the penalty when they consider it excessive. Mettei wrote in this connection that 'the traditional French principle that penalties and damages are unrelated to each other was therefore flouted. The court (the Cour de Cassation), moreover, violated the letter of the law that assigns the power to reduce, but not to annul, a penalty'.[2] The civil codes of Italy, the Netherlands and Germany empower the courts to reduce the amount of penalties when they are 'excessively' or 'manifestly too' high. On the other hand, Article 161 of the Swiss Code of Obligation provides that penalty is due even when the creditor has actually suffered no damage. Mattei argues that 'the area of penalty clauses in contract law seems to be one in which all legal systems converge towards inefficiency, although the civil law countries may be considered, from this perspective, more efficient (or less inefficient) than their common law counterparts'.[3]

1. P. Benjamin, 'Penalties, Liquidated Damages and Penal Clauses in Commercial Contracts: A Comparative Study of English and Continental Law', *International and Comparative Law Quarterly* 9 (1960): 606–610.
2. U. Mattei, 'The Comparative Law and Economics of Penalty Clauses in Contracts', *American Journal of Comparative Law* 43 (1995): 436–437.
3. *Ibid*.

202. In Ethiopian law, whether the amount agreed in the contract is greater than or less than the actual damage, the clause is known as a penalty clause. So a penalty clause in Ethiopia includes what common law courts would characterize as a liquidated damages clause or a penalty clause. Article 1889 of the Civil Code provides that 'the parties may fix the amount of damages which will be due, should a party fail to discharge his obligations or to discharge them completely and in due time'. It should be noted here that a penalty clause does not have the effect of derogating all the rules of the law of contracts on damages. Article 1891 prescribes that penalty is due whenever the creditor is entitled to claim damages by reason of non-performance of the contract. As a result of this assimilation of penalty clauses and damages, the debtor can raise force majeure as a defence against payment of the penalty. This rule makes Ethiopian law different from the ancient Roman law where the penalty is payable 'even where the subject-matter had been destroyed by reason of circumstances beyond the debtor's control'. And depending on the circumstances, absence of fault could also be invoked by the debtor as a defence. However, when it comes to calculating the amount of damage, Ethiopian courts

have limited power where the parties have included a penalty clause. The creditor can claim the payment of the penalty even if he or she has incurred no actual damage. This is one instance where the assimilation of penalty clauses and damages is not taken to its logical conclusion.

The courts can, however, award an amount of damage greater or less than the amount of the penalty in limited circumstances. Article 1893 provides that the agreed amount of the penalty due for non-performance might be reduced by the court if the debtor has partially performed his or her obligations and the penalty is fixed for total non-performance.

Likewise, Article 1892 provides that the court might award damages above the amount of the penalty if non-performance is due to the debtor's intention to cause damage or to his gross negligence or grave fault. This exception is also found in the French law of contracts but not in the French Civil Code because it is a judicial creation.

203. Another exceptional circumstance where courts could award damages greater than the penalty is where the amount of the penalty is so low that it contradicts the provision of the law where liability could lawfully be limited. For example, Article 594 of the Commercial Code provides that 'the carrier may by agreement limit his liability for any total or partial loss of or damage to goods or registered baggage. Any such limitation shall be of no effect where the agreed compensation is so disproportionate to the value of the object carried as to make the carrier's liability negligible'.

204. A penalty clause could be invalidated on those grounds that are recognized as grounds for the invalidation of contracts. If the invoked ground relates only to the penalty clause, it could be invalidated and, according to Article 1894, the contract shall remain in force notwithstanding that the penalty is not valid.

205. Penalty clauses might at times raise a question of interpretation: what is the intention of the parties when they include a penalty clause in a contract? Is it to give the debtor the option of choosing between performance and payment of the penalty? Or can the creditor claim specific performance if it is available in the circumstances? The answer to these questions depends on the interpretation of the contract in general and that part of the contract. If the parties have agreed in clear terms that the obligation to be performed and the penalty to be paid are alternative obligations, then the provisions of the Civil Code on alternative obligations will govern the case. According to Article 1881(1), in the case of alternative obligations, the debtor may choose which duty he or she will discharge unless such right is expressly conferred on the creditor or a third party.

206. If the performance of the obligation and payment of the penalty are not expressly agreed as alternative obligations, Article 1890 stipulates that the creditor might require the performance of a contract. However, he cannot require both the performance of the contract and the payment of the penalty unless the penalty was provided in respect of delay or non-performance of a collateral obligation. The rule that a person cannot sue both on the penalty and on performance is also shared by

the French and German Civil Codes. However, in the latter, both remedies can be claimed in circumstances where that is not possible in Ethiopian and French law. Article 840 of the German Civil Code (BGB) 'excludes a creditor both claiming performance of the contractual obligation and suing on the penal clause, save where the penalty is designed to cover delayed performance. Notwithstanding this provision it is possible in practice to sue both for performance of the contractual obligation and for payment of the penalty, for the courts have held that the provisions of Article 840 can be excluded by agreement, and they have been particularly ready to infer such an agreement where the penalty is designed to compel performance of an obligation as opposed to refraining from doing some act'.[1]

Therefore the decision that the performance of the contract and payment of the penalty are alternative obligations cannot be made on the basis of interpretation. The drafter wrote that Article 1890 is intended to provide a presumption in favour of penalty clauses and against alternative obligations. And this presumption can only be refuted by establishing that the parties have agreed to make them alternative obligations.

1. P. Benjamin, 'Penalties, Liquidated Damages and Penal Clauses in Commercial Contracts: A Comparative Study of English and Continental Law', *International and Comparative Law Quarterly* 9 (1960): 606–610.

V. Arbitration Clauses

207. Individuals may enter into a contract whereby they entrust the solution of a dispute to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the principles of law. These types of contracts are known as arbitral submissions (Article 3325). Likewise, the parties to a contract may also submit to arbitration disputes, which may arise out of the contract in the future. These types of clauses in a contract are known as arbitration clauses (Article 3328).

§2. Interpretation

208. The Civil Code provides certain rules regarding the interpretation of contracts. When the provisions of a contract are not clear, interpretation is required to ascertain the terms of the contract. On the other hand, Article 1733 provides that when the provisions of a contract are clear, the court may not depart from them.

209. Article 1733 establishes the role of good faith in the interpretation of contracts. Good faith is referred to imply terms into a contract. In addition to that, reference should also be made to good faith in the interpretation of a contract: 'contracts shall be interpreted in accordance with good faith, having regard to the loyalty and confidence which should exist between the parties according to business practice'.

210. Interpretation of contracts basically involves discovering the common intention of the parties. To that effect, the behaviour of the parties before and after

the contract is taken into account. On this point, Article 1734 provides 'where the provisions of a contract are ambiguous, the common intention of the parties shall be sought' and 'the general conduct of the parties before and after the making of the contract shall be taken into consideration to this effect'. The following are the remaining provisions on interpretation of contracts:

> Art. 1735: General Terms
> A contract shall be deemed to relate to such matter only on which it appears that the parties intended to contract, however general the terms used.
> Art. 1736: Interpretation in accordance with the context
> (1) The provisions of a contract shall be interpreted through one another and each provision shall be given the meaning required by the whole contract.
> (2) Ambiguous terms shall be given such meaning as it the more likely, having regard to the subject matter of the contract.
> Art. 1737: Positive interpretation
> Provisions capable of two meanings shall be given a meaning to render them effective rather than a meaning which would render them ineffective.
> Art. 1738: Interpretation in favour of the debtor
> (1) In cases of doubt, a contract shall be interpreted against the party who stipulates an obligation and in favour of the party who assumes it.
> (2) Stipulations inserted in general provisions, models or forms of contracts prepared by one party shall be interpreted in favour of the other party.
> Art. 1739: Gratuitous contracts
> The obligations assumed by a party who derives no advantage from the contract shall be construed more narrowly.

§3. Conditional Contracts

211. It could be the case that the parties have made the existence or cancellation of their obligations dependent upon the occurrence or non-occurrence of an uncertain event. Such contracts are called conditional contracts in Ethiopian law. The condition is the occurrence (positive condition) or non-occurrence (negative condition) of an uncertain event. If the existence of the obligation depends on a positive or negative condition, it is called condition precedent. On the other hand, it is called condition subsequent if it determines the cancellation of a contract. If the condition is unlawful, immoral, or impossible, then the rules of the Civil Code pertaining to unlawful, immoral, or impossible objects will be applicable (Article 1878). When the object of the contract is unlawful, immoral, or impossible, the contract is void and could be invalidated by the court at the request of any of the parties or any interested third party (Article 1808(2)). This implies that the conditional contract will be invalidated at the request of any of the parties where the condition of the contract is unlawful, immoral, or impossible.

212. In the case of condition precedent, Article 1871 provides that the contract will be effective as from the day when the condition is fulfilled. Until the condition is fulfilled, the contract does not have any effect on the parties. This does not mean,

however, that the parties can do whatever they like with respect to that contract. Even if they are not yet bound by the obligations emanating from the contract, Article 1873 requires the parties to refrain from doing any act that is likely to prevent the regular performance of the contract upon the fulfilment of the condition. It could be difficult to determine which acts might have the effect of preventing the regular performance of the contract. What is more, a question might be raised as to the legal effect of acts that have the result of preventing the regular performance of the contract. Questions like this are entertained in the Civil Code. Article 1874 provides that acts of management done prior to the fulfilment of the condition by the party who exercises the right shall remain valid where the condition is fulfilled. David elaborates that the phrase 'the party who exercises the right' is meant to refer to the party who has a right in rem over the subject of the contract. What is more, whether a given act is an act of management or not could be determined based on Articles 2204 and 2205 of the Civil Code. For example, acts of maintenance or leases for terms not exceeding three years are deemed to be acts of management. Consequently, a party who has agreed to sell his property subject to condition precedent is entitled to perform acts of management with respect to the property, for example, leasing the property for terms not exceeding three years. Even though the condition precedent is fulfilled before lapse of the three years, the contract of lease is effective. However, the buyer of the property may claim damage where the lease was done in bad faith (Article 1874). In relation to this, Article 1876 provides 'the party who exercises the right prior to the fulfilment of the condition shall, where the condition is fulfilled, retain the fruits and profits he received in good faith prior to the fulfilment of the condition'. That implies that the above seller can keep the rents he collected as long as he did that in good faith. However, he may be required to hand over the rents he has collected in bad faith to the buyer.

If, on the other hand, the party who agreed to sell his property subject to a condition precedent contracts to sell the same property to a third party, the latter contract of sale cannot be considered as an act of management. The effect of such contract is governed by Article 1875, which provides that 'acts beyond management done by the party who exercises the right may be invalidated where the other party so requires'. This implies that the first person who agreed to buy the property subject to a condition precedent might request the invalidation of such a contract.

213. In the case of condition subsequent, Article 1871 provides that the contract is binding on the parties as soon as it is made. However, it will cease to be effective where the condition is fulfilled.

214. It is therefore important to determine whether a given condition is a condition precedent or subsequent. This is because condition subsequent and condition precedent have different legal effects. It might at times be difficult to determine the kind of condition. In such cases, the condition is presumed to be condition precedent.

215. There are also circumstances where a condition could be considered to have been fulfilled even if it was not actually fulfilled. In this connection, Article 1870 provides that 'a party may regard a condition as fulfilled where the other party has prevented its fulfilment in a manner contrary to good faith'.

Chapter 4. Privity of Contracts

§1. The Rule of Privity of Contracts

216. The doctrine of privity of contracts holds that contracts have effects between only the contracting parties. This means that contracts do not have any effect on third parties. This principle is also stated in Article 1952 of the Ethiopian Civil Code, which makes a general provision stating that contracts produce effects only as between the contracting parties. Though this is the general rule, Article 1952 also recognizes several exceptions to this rule. These exceptions are discussed in the following sections.

However, it must be noted that the general rule, that contracts do not have effects on third parties, is not applicable to agency relationship, which is governed by another part of the Civil Code. In agency relationship, the agent enters into contract on behalf of the principal; however, the contract has its effects between the principal and the other party.[1]

1. See paras 316ff for a discussion of agency.

217. In addition, the rule does not affect the case of extra-contractual liability whereby a person could be liable for the fault he or she has committed with respect to a contract that exists between two other parties. That is to mean, even if a third party is not affected by the rights and obligations emanating from the contract, he or she has yet an obligation of not interfering with the performance of that contract.[1]

1. See paras 46 and 47.

§2. Promise and Stipulations Concerning Third Parties

I. Option to Substitute a Third Party

218. One of the exceptions to the doctrine of privity of contracts is stated in Article 1953 of the Civil Code. It could be the case that the parties have agreed in the contract that one of them could substitute him- or herself by a third party who would assume the rights and obligations emanating from the contract. In such cases, the contract will not have any effect until the party who has reserved the right to substitute a third party has appointed such third party. Thus, until such time, the contract does not have any effect either between the contracting parties or as regards the third party. It could be the case that the third party is or is not identified in the contract. If the identity of the third party is not relevant to the contract, the other party could logically agree to such a clause in the contract. If, on the other hand, the nature of the contract is such that its effectiveness depends on the identity of the person who assumes the obligation or the right, we could expect the third party to be identified in the contract. In any case, the contract will not have any effect until such third party is appointed by the contracting party who has reserved the option to substitute a third party. Depending on the essence of time to the contract, the parties may fix a time period within which the party who has reserved

such option must decide whether or not to appoint such other third party as is identified in the contract or whom he or she chooses. If the parties have fixed such period of time, then the contract will not have any effect until such period has lapsed or until the third party is appointed before the lapse of such period of time. If before the lapse of this period of time, the party has appointed a third party, then the contract is deemed to have been made between such appointed third party and the other contracting party. This means that the contract will not have any effect on the original contracting party who has reserved the option to substitute a third party and who has appointed such third party except under the circumstances where the agent is liable to the third party or the principal as regards the contract that he or she makes on behalf of another. This is because, under Ethiopian law, if party has reserved the option to substitute a third party and if he or she has appointed such third party, the contract is deemed to have been made through representation (Article 1954(1)). Thus, after the appointment, the original party is considered as an agent of the substituted third party as regards the contract. If, on the other hand, the party has failed to substitute such third party within the time period agreed, the contract will have its effect as between the parties who made it (Article 1954(2)). Therefore, if there is a time period within which a third party could be substituted, the effect of the contract is determined on the basis of whether a third party is appointed within the time period or not.

219. If, on the other hand, the parties have not agreed on any time limit, Article 1954(2) provides that the appointment of the third party must be made within three days. In such cases, the contract is deemed to have been made through representation and hence it will have its effects as between one of the original contracting parties and the third party who is substituted in the position of one of the original contracting parties. If the appointment is not, however, made within three days, the contract shall have its effect between the original contracting parties.

II. Promise for Third Party

220. This refers to circumstances where a person enters into a contract with another promising not to assume an obligation him- or herself but promising that a third party will assume the obligation. In such cases, if the third party has ratified the contract, then the person will be released (Article 1956). This means that the contract will have its effects as between the third party and the other contracting party. If, after ratifying such contract, the third party fails to perform his or her obligation, the original party is not liable unless he or she has agreed to guarantee the proper performance of the contract (Article 1956). If, on the other hand, the third party fails to ratify the contract, the original party will be liable toward the other contracting party for the damage resulting from the non-performance of the contract (Article 1956). As opposed to the previous scenario, the contract does not have full effect between the original parties. Thus, the party who stood promisor for the third party does not have the option of performing the act him- or herself instead of being liable for damage. The other contracting party also does not have the option of requiring performance by the original party as opposed to requiring damages.

III. Stipulation for the Benefit of a Third Party

221. The other exception to the doctrine of privity of contracts is contract for the benefit of a third party. This refers to situations where, in the contract, it is agreed that one of them would perform the obligations arising from the contract for the benefit of a third party. The third party could be named in the contract or it could be the case that the third party would be appointed sometime after the contract. In such cases, the party who stipulated performance for the benefit a third party is known as the stipulator. The party who has agreed to perform the obligation for the benefit of the third party is known as the promisor. And the third party for whose benefit the obligation is to be performed is known as the beneficiary of the stipulation.

222. It is within the discretion of the appointed or named beneficiary to accept or refuse the offer of the benefit of the stipulation (Article 1959). Where the beneficiary is not specifically identified in the contract or where the beneficiary has refused such benefit, the stipulator may appoint a new beneficiary or reserve for him- or herself the benefit of the contract (Article 1958). The parties could agree otherwise (Article 1958).

223. If the party has accepted the benefit, the beneficiary irrevocably acquires the rights that the contract confers upon him or her as against the promisor (Article 1961(1) see *Lukeser Tourist and Travel Agency Plc v. Biruneyes Plc* [2007]). This means that the stipulator cannot revoke the stipulation nor appoint another beneficiary. This is, however, subject to the rule that the stipulator retains the right to claim the remedies as are available in the law and/or in the agreement when there is non-performance by the promisor (Article 1958(2)). And the promisor may not set up against the beneficiary any defences of a purely personal nature that he or she may have against the stipulator (Article 1961(2)) (The English version of this provision of the Civil Code contradicts the corresponding Amharic version. However, the Amharic version prevails in such cases.) One of the defences that could be considered personal is set off, and hence the promisor cannot claim that the debt is set off against another debt that the stipulator owes him or her.[1]

It could also be the case that the obligation undertaken by the promisor is to be performed upon the death of the stipulator; in such cases the appointed or the named beneficiary of the stipulation acquires (where he or she accepted the benefits of the stipulation) his or her right against the promisor on the day of the stipulator's death (Article 1960(1)). The heirs of the stipulator may not revoke the appointment made by him or her for the beneficiary of the stipulation (Article 1960(2)).

1. Tilahun Teshome, *Fundamental Principles of Ethiopian Law of Contracts* (Federal Supreme Court, 1997), 298.

§3. Assignment of Rights and Subrogation

I. Assignment of Rights

224. This refers to situations where a contracting party (the creditor) assigns his or her rights to a third party. In such cases, arrears of interest are considered to

have been assigned with the principal of the debt (Article 1963). Moreover, the assignee of a right may exercise the liens, securities, and other accessory rights attached to it (Article 1973(1)). However, he or she may not enter into the possession of the thing received in pledge by the creditor without the consent of the pledger (Article 1973(2)). As opposed to the previous cases, this does not require the consent of the other party (the debtor) (Article 1962). The debtor can, however, object to such assignment where this is forbidden by law or the contract or is barred by the very nature of the transaction (Article 1962).

225. The creditor could assign his right to a third party for consideration or gratuitously. If it is done for consideration, the assignor shall guarantee the existence of the right at the time of the assignment (Article 1964(1)). Thus, if the contract is found to be void or the actions to claim the right are already barred by the period of limitation at the time when the assignment was made, the assignor is liable to the assignee because when making the assignment he or she is deemed to have guaranteed the existence of the right. On the other hand, the assignor is not deemed to have guaranteed the solvency of the debtor unless he or she has expressly accepted such liability (Article 1964(2)). In any case, the liability of the assignor is only to the extent of the amount he or she received in principal and interest, the costs of the assignment, and the costs of any unsuccessful proceedings against the debtor (Article 1965).

If, on the other hand, the assignment was made gratuitously, the assignor is not liable in case it is established that the right does not exist (Article 1964(3)).

226. In cases where a creditor has assigned his or her right to a third party, the debtor can set up against the assignee any defences that he or she could have done against the assignor and that are available to him or her upon becoming aware of the assignment (Article 1966(1)). If the debtor had a claim against the assignor that was not yet demandable at the time, he or she may invoke a set-off provided the claim does not fall due later than the assigned claim does (Article 1966(2)).

If after the assignment, the debtor pays the assignor in good faith before the assignment was brought to his or her knowledge either by the assignor or the assignee, the payment is deemed to have been validly made (Article 1967). In case the right is assigned to several assignees, the debtor is released if he or she pays to the assignee who avails him- or herself of the earliest date (Article 1967).

II. Subrogation

227. Subrogation by creditor: Contracts could have effects on third parties in cases where they are subrogated by the creditor. Article 1968 provides that a creditor who is paid by a third party may subrogate him or her to the creditor's rights, and subrogation shall be express and effected at the time of payment.

228. Subrogation by debtor: Article 1969 provides that if a debtor has borrowed money or other fungibles to pay his or her debt, the debtor may subrogate

the lender to the rights of the creditor even without the consent of the latter. Article 1970 provides the conditions of subrogation by the debtor:

(1) Subrogation by the debtor implies that the instrument evidencing the loan bears an authenticated date and that the use of the sum lent is expressly specified therein.
(2) The receipt for the loan shall bear an authenticated date and include an express statement that the payment was made by means of the borrowed money.
(3) The creditor may not refuse to include this statement in the receipt where the debtor so requires it.

229. Legal subrogation: The law also provides circumstances where a third party could be subrogated by virtue of the law. Article 1971 provides that subrogation to the rights of the creditor shall take place by virtue of the law, to the extent of the amount paid: (a) for the benefit of any person who, being bound with others or on behalf of others for payment of a debt, discharged the debt and is thereby entitled to indemnity or contribution from his or her co-debtors; and (b) for the benefit of any person who, being owner of a property or enjoying over it a right of lien, mortgage, or pledge, paid a creditor who enjoyed over the same property a right of lien, mortgage, or pledge.

230. The subrogated creditor may exercise the liens, securities, and other accessory rights attached to it (Article 1973(1)). However, he may not enter into possession of the thing received in pledge by the creditor without the consent of the pledge (Article 1973(2)). With a view to facilitate the subrogated creditor to exercise his or her rights, the original creditor who was paid by the third party shall hand over to the subrogated creditor the document of title relating to the debt and furnish him or her with any available means of proof as well as with the necessary information (Article 1974(1)). In the case of partial payment, the original creditor shall supply a copy certified by two witnesses of the documents evidencing the claim (Article 1974(2)).

§4. Delegation of Obligations

231. This refers to situations where a debtor has delegated the performance of his or her obligations to a third party. For this, the consent of the creditor is normally required unless otherwise provided by law or usage (Article 1976). Where such delegation is done with his or her consent, the creditor can still retain rights against the original debtor unless otherwise agreed (Article 1977). The creditor may not, however, demand satisfaction from the original debtor before demanding it from delegate debtor (Article 1977). The person who is delegated by the debtor can refuse to accept the delegation even if he or she is the debtor of the person appointing him or her as delegate; however, this is subject to usage (Article 1978). The provisions of the Civil Code concerning delegation of obligations and its effects are reproduced as follows:

Art. 1979: Revocation of delegation
(1) The delegator may not longer revoke the delegation after the delegate accepted the liability towards the creditor or effected the payment.
(2) The delegate may accept the liability or perform the obligation even after the death of the delegator or after the delegator having become incapable.
Art. 1980: Rights of delegate
(1) The delegate may not set up against the creditor defences deriving either from his personal relationship with the delegator, or from the relationship between the creditor and delegator.
(2) He may set up against the creditor defences deriving from his personal relationship with him.
Art. 1981: Insolvency of delegate
(1) A creditor who has released the original debtor has no remedy against him where the delegate debtor becomes insolvent, unless the delegation instrument contains an express reservation on this point.
(2) He shall retain his remedy against the original debtor where the insolvency of the delegate had been already judicially recorded at the time of the delegation.
Art. 1982: Securities
Third parties who have secured the debt upon their property or are guarantors shall not be liable to the creditor unless they consented to the delegation.

§5. Heirs and Creditors of the Parties

I. Heirs of the Parties

232. The Civil Code provides that the heirs of a person might be substituted for him or her in contracts to which he or she was a party unless the contrary is stipulated or flows from the nature of the contract (Article 1986). In *Ethiopian Telecommunication Corporation v. Hirut Biyadegelegn* [2008], there was a contract for the supply of telecommunication service between the appellant and a deceased whose heir is the respondent. The appellant brought action against the respondent for the payment of the service fees. The respondent argued that she should not be liable as the fee claimed is for the service that is provided after the death of the deceased and hence cannot be considered to be part of the estate that is inherited. The Federal Supreme Court held that there is no way the appellant would know the death and hence the termination of the contract by its own without being notified by the heirs and in such cases the heirs will be liable for the service charge unless they notify the provider as to the death of the recipient of the service and their desire to terminate the contract. Similarly, a stipulation for the benefit of a third party shall be performed for the benefit of his or her heirs where the individual dies after having accepted it but before it was performed (Article 1987).

II. Creditors of the Parties

233. Article 1988(1) of the Civil Code recognizes the principle that 'the performance by the debtor of his obligations shall be secured by all his assets, with the exception of those which cannot be attached at law'. Article 404 of the Civil Procedure enumerates assets that cannot be attached at law:

> Art. 404: Property not liable to attachment
> The following property shall not be liable to attachment or sale at any stage of the proceedings:
> (a) the necessary wearing-apparel, cooking vessels, bed and bedding of the judgment-debtor and his family;
> (b) tools, instruments or implements of any kind used by the judgment-debtor in his profession, art or trade;
> (c) where the judgment-debtor is an agriculturalist, such as cattle and seed-grain as may, in the opinion of the court, be necessary to enable him to earn his livelihood;
> (d) such amount of food and money as may, in the opinion of the court, be necessary for the judgment-debtor and his family for a period of three months;
> (e) pensions and alimonies;
> (f) without prejudice to the provisions of Article 121 of the Maritime Code, two thirds of the judgment-debtor's salary, provided that the entire salary shall be exempt from liability to attachment where it does not exceed two dollars per day and the judgment-debtor has no other income;
> (g) any other property declared by or in accordance with any law to be exempt from liability to attachment or sale.

234. As a consequence of the general principle embodied in Article 1988, the Civil Code recognizes ways by which a creditor might protect his or her interest over the assets of a debtor. Article 1992 empowers a creditor to 'take in the name of the debtor any preservatory step required with a view to preventing the extinction of a right of the debtor'. This is further elaborated in Article 1993:

> Art. 1993: Exercise of debtor's rights
> (1) A creditor may, with the authorisation of the court, exercise as representative of the debtor all the rights of the debtor so as to prevent such impoverishment of the debtor as would jeopardize the payment of the debt.
> (2) The authorisation to act shall be refused to the creditor where the right he intends to exercise is, by nature or under the law, inherent in the person of the debtor.
> (3) The authorisation shall be refused where the creditor's rights are not imperilled by the inaction of the debtor whose insolvency is not in view.

235. In addition, the Civil Code contains the following provisions so as to ensure that the assets of the debtor are not disposed with the sole purpose of denying a creditor any security:

> Art. 1994: Simulation
> A creditor may, by judicial decision, establish that a transaction effected by a debtor was a simulated one which, by agreement, was not intended to be carried out.
> Art. 1995: Debtor's fraud
> A Creditor may, in his own name, challenge the validity of acts whereby the debtor, in fraud of the creditor's rights, alienated property or entered into obligations.
> Art. 1996: Fraudulent acts
> (1) An act shall be deemed to have been done in fraud of the rights of creditors where it was done by the debtor so as to become insolvent, or with the knowledge that he was thereby increasing his insolvency.
> (2) The payment of mature debts may not be challenged by the creditors.
> Art. 1997: Third parties in good faith
> A third party who is prejudiced by the creditors action may set up his good faith as a defence against such action where the act which is challenged, or a contingent act conferring rights on the third party, was done for consideration.
> Art. 1998: Time
> The creditor's action shall be brought within two years from the date of the act which is challenged.
> Art. 1999: Effect
> (1) A debtor's act declared to be fraudulent may not be set up against the creditor who brought the action.
> (2) It shall remain valid as between the parties and in regard to other creditors.

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Chapter 5. The End of the Contract

§1. Performance and Breach

I. Generally on Extinction of Obligations

236. Articles 1806–1856 of the Civil Code provide various modes of extinction of obligations. These include performance; cancellation, invalidation, termination, and remission of debt; novation; set-off; merger; and limitation of actions. In this chapter, the essentials of these are presented. Matters relating to limitation of action are presented in the next chapter, for the reason of not distorting the general outline that this monograph should follow.[1] What is more, although impossibility, frustration, and hardship are not recognized causes of extinction of obligations, discussion is made in §2 on the manner in which the Ethiopian law of contracts responds to such problems.

1. It is also clarified in the next chapter that provisions of the Civil Code on limitations of actions are actually misplaced. This is because a close scrutiny of the provisions on limitations of actions reveals that they are not really a ground for extinction of obligations.

II. Payment

237. Performance is the normal and the most satisfying way of putting an end to contractual obligations. If the parties have performed their obligations in accordance with the contract and law, the contractual relationship existing between them comes to an end.

Detailed matters on performance are addressed in the Civil Code (Articles 1740–1762) in case the parties have failed to regulate them in their contract. This means that these provisions are essentially gap filling and hence a contract may derogate from them. In this connection, the French term *paiement* is translated in the Civil Code as 'payment', but the drafter wrote that it has a broader meaning than it has in common language; hence it should be understood that the term 'payment' refers to the performance of anything due under the contract (not restricted to money debts).[1]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 39 (stating that 'the word *paiement* is used in French legal language with a broader meaning than it has in common language. It refers to the performance of any obligation, not just the obligation to pay'); and G. Krzeczunowicz, *Formation and Effects of Contracts in Ethiopian Law* (Addis Ababa: AAU, 1983), 91.

A. Who Should Pay?

238. As a rule, the debtor or third party can perform obligations under the contract (Article 1740). The third party, however, must be authorized by the debtor, the court, or law.[1] This is different from the rules of most continental systems, which allow any third party to perform for the debtor without establishing the existence of an interest or authority for such performance.[2]

Exceptionally, the debtor may be required to perform his or her obligations personally if this is essential to the creditor or has been expressly agreed (Article 1740). In such cases, the aid of assistants under the personal control of the debtor is not precluded. Personal or specific performance is essential to the creditor in all cases of obligations of diligence, where the result of the performance depends on the identity and qualification of the debtor. In obligations of result, it is not essential to the creditor whether the debtor performs it personally or through a third party, as he or she can still proceed against the debtor in case the promised result has not been procured. Personal performance might be required in obligation of result when there is an agreement to that effect on the law governing that particular contract requires personal performance as a matter of rule (see paragraph 413).

If a contract is one for which the Civil Code specifically provides special rules, then whether personal performance is required may be decided having regard to these special rules.[3]

The drafter of the Civil Code provides two scenarios to illustrate the meaning and scope of Article 1740:

– A is to dig an irrigation canal on B's land. It makes little difference to B whether the canal is dug by A or by C as long as the work is done. A can have C do the work under his, A's, responsibility.
– A deposits some valuable objects with B. It is important to A that the bailee be B, whom he knows personally or who has a guaranteed solvency, and not C, any other person. B cannot give over to C the valuables that he has received by virtue of his contract of bailment with A.

1. 'But several special provisions of the law allow or even force a third person to pay for the debtor when he has an interest in the performance, as, for example, if he is bound with the debtor (co-debtor) or for the debtor (guarantor). Other legal provisions, instead of demanding that the payer be interested, rest satisfied with the creditor's consent. An example is the provision of the Civil Code on payments with subrogation (Article 1968). Provisions of the commercial code allow anybody to pay a dishonoured bill of exchange. What is more, a payment made without the authorization of the debtor may still be valid in accordance with the rules of the Civil Code on authorized agency.' G. Krzeczunowicz, *Formation and Effects of Contracts in Ethiopian Law* (Addis Ababa: AAU, 1983), 92–93.
2. *Ibid.*, 92 (citing Arts 1236 and 323 of the French and Egyptian Civil Codes, respectively).
3. G. Krzeczunowicz, *Formation and Effects of Contracts in Ethiopian Law* (Addis Ababa: AAU, 1983), 92 (stating that personal performance may be considered essential 'where the contract or suppletory (and not derogated) legal provisions governing hire of service, agency, partnership, etc., deem it essential').

B. Who Is Qualified to Receive Payment?

239. According to Article 1741, performance should be made to the creditor or a third party who is authorized (by the creditor, by the court, or by law) to receive it on behalf of the creditor.

Performance made to the creditor personally is not always valid. Such is the case where the creditor is incapable of receiving the performance. In such cases, the performance is valid only to the extent that it has benefited the incapable creditor (Article 1742).

As a rule, payment made to a person unqualified to receive it is invalid (Article 1743(1)). An unqualified person is one who is not authorized to receive payment on behalf of the principal. However, there are some exceptions where such payment is considered valid. Payment to a person unqualified to receive on behalf of the creditor is valid where: the creditor ratifies it either expressly or impliedly, or such payment has benefited the creditor (Article 1742):[1]

> The unqualified person may be one of the creditor's staff or relations who was not authorized to receive the payment, but invests the money received in the creditor's property. If he does it with the creditor's knowledge and tolerance, this amounts to confirmation, so that the payment becomes valid even if its use was not advantageous. If he does it without the creditor's knowledge and tolerance, the money invested validates the payment only to the extent that it has turned to the creditor's benefit at the time he sues the debtor for a second payment.[2]

Payment made to a person who is unqualified to receive it on behalf of the principal can also be considered to be valid if it is made in good faith to a person who appears without doubt to be the creditor (Article 1743(2)). (This provision is formulated based on Article 1189 of the Italian Civil Code, Article 1240 of the French Civil Code, Article 293 of the Lebanon Civil Code, and Article 333 of the Egyptian Civil Code.) Commenting on this point, David wrote:

> The particular situation in mind here is that of the apparent heir. It is also the case of a person who has improperly taken possession of a bearer note and demands payment of the note at maturity. The debtor pays the person whose position as creditor appears to be established. He is discharged and the true creditor has recourse only against the person who has improperly used his note; the creditor can require the latter to reimburse the amount improperly collected.[3]

It should be remarked that in a situation where payment made by the debtor is considered void because it is made to a person who is not qualified to receive it on behalf of the creditor, the debtor can recover the payment on the basis of the rules of the Civil Code on unjust enrichment.[4]

In other legal systems, payment made to the creditor's creditor is valid, but the same cannot be said about Ethiopian law as a payment made to the creditor's creditor does not necessarily extinguish the debt.

In cases where payment is valid only to the extent it has enriched the creditor, the extent of enrichment is to be assessed by taking the situation at the time of the suit. David illustrated this as follows: A owes B ETB 1,000, but B is fifteen years old and thus subject to the incapacity of all minors. A pays the ETB 1,000 to B and B wastes ETB 500, but invests the other ETB 500 in shares that doubled in value and are worth ETB 1,000 at the time B sues A. A does not have to do anything. As a result of A's payment, B is presently enriched by ETB 1,000. It is irrelevant that B wasted ETB 500 of the ETB 1,000 paid him by A.

In situations where there is doubt as to the identity of the true creditor, Article 1744(1) provides that the debtor can release him- or herself by depositing the amount due

with the court. If the debtor, after being aware of litigation between two persons contending to be the right claimants, pays any one of them, he or she may be subject to second payment (Article 1744(2)).[5]

1. *Ibid*., This provision adopts Art. 1239(2) of the French Civil Code. See R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 41.
2. G. Krzeczunowicz, *Formation and Effects of Contracts in Ethiopian Law* (Addis Ababa: AAU, 1983), 94.
3. See R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 41–42.
4. See paras 54–62.
5. The drafter wrote that Art. 1744 is borrowed from Art. 168 of the Swiss Code of Obligations. See R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 42.

C. What to Pay?

240. Article 1745 provides, 'the creditor shall not be bound to accept a thing other than that due to him, notwithstanding that the thing offered to him is of the same or of a greater value than the thing due to him'. Whenever a thing different from what is due under the contract is tendered by the debtor, the creditor may at his or her will accept or refuse the substitute. By refusing to accept the performance tendered by the debtor, David remarked that the creditor would not be committing abuse of rights.[1] Article 1745 of the Civil Code is inspired by Article 1243 of French Civil Code, Article 299 of the Lebanon Civil Code, Article 1197 of the Italian Civil Code, and Article 341 of the Egyptian Civil Code.[2] Ethiopian law does not provide the effect of acceptance of a substitute by the creditor. If this amounts to novation, then it results in extinction of the original obligation.

The drafter illustrates Article 1745 as follows: A buys from B a case of Champagne of X brand name. B delivers a case of Champagne of Y brand, saying that he does not have any more bottles of brand X in his storeroom at the moment, but that brand Y is better and that, as a special favour, he will give A the bottles of brand Y at the price of brand X in order to keep his promise. In doing this, B is actually offering to modify the contract; he is not performing the contract that has already been concluded. A can refuse the delivery tendered by B.

1. See R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 42.
2. *Ibid*.

241. It is the discretion of the creditor whether to accept or refuse partial payment if the debt is liquidated and fully due.[1] The justification for this rule is that 'it is more difficult for the creditor to preserve and reinvest parts of than all of his capital'.[2] For the purpose of the above rule, the term 'liquidated' refers to a debt for which the amount is fully ascertained by the parties or by the court.[3] For the creditor to refuse partial performance on the basis of this rule, the whole debt must be fully due. This implies that the creditor cannot refuse partial performance if the debt is due partially at different points in time and if the payment tendered by the debtor at a given point in time is all of what is due at that time.

It should also be noted in this connection that the right of the creditor to refuse partial performance does not prevent him or her from accepting what is tendered

by the debtor where the remaining is contested; in such cases, the debtor cannot refuse performance unless the other party accepts to forfeit the remaining part that is contested.[4]

However, the court could grant the debtor a grace period not greater than six months unless such possibility is precluded by agreement: Article 1770 provides, 'the court may, with all necessary care, grant a period of grace for the debtor to carry out his obligations under the contract, having regard to the position of the debtor and the requirements of good justice'.

Sometimes the quality of a fungible thing might be left unspecified in the contract; in such cases the debtor (unless otherwise agreed) is entitled to choose the thing to be delivered.[5] In any case, the quality cannot be inferior to the average.[6]

1. Article 1746(1), Civil Code. Similar provisions are found in the Civil Codes of France (Art. 1244), Germany (BGB, s. 266), Lebanon (Art. 300), Italy (Art. 1181), and Greece (Art. 316). See R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 43.
2. G. Krzeczunowicz, *Formation and Effects of Contracts in Ethiopian Law* (Addis Ababa: AAU, 1983), 97.
3. *Ibid*.
4. Article 1746(2), Civil Code. This rule is borrowed from the Egyptian Civil Code (Art. 342(2)). See R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 43 (stating that this rule 'gives the creditor the right to require, as well as refuse, a payment that he considers partial if part of the debt is contested by the debtor. The debtor cannot delay payment until the dispute is resolved, nor subordinate payment to the condition that the creditor agrees not to press his claim to receive more').
5. Article 1747, Civil Code. This rule is inspired by the Swiss Code of Obligations (Art. 71) and the Civil Codes of France (Art. 1246), Lebanon (Art. 299), Italy (Art. 1178), and Greece (Art. 289).
6. *Ibid*.

242. The debtor is not required to strictly comply with the quality and quantity specifications of a fungible thing, unless such compliance is expressly agreed or essential to the creditor (Article 1748(1)). In such cases, Article 1748(2) provides, 'where the thing does not exactly conform to the contract, the creditor may proportionately reduce his own performance or, where he has already performed, claim damages'.

On the relationship between Articles 1746 and 1748, the drafter wrote that the former applies to cases of partial performance and the latter applies to cases 'where the debtor pretends to discharge the whole debt but in fact delivers an insufficient quantity. In the first case, the creditor can always refuse the performance tendered; in the second, he must, except in the two cases just dealt with, show that he has a special interest in receiving exactly the performance promised'.[1]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 44.

D. Payment of Money Debts

243. Article 1749(1) provides, 'a debt consisting of money shall be paid in local currency'. This is the case even where the debt is expressed in foreign currency. In this regard, Article 1750 provides, 'where under the contract a debt is to be paid in

a currency which is not legal tender at the place of payment, the debt may be paid in local currency at the rate of exchange on the day when the debt falls due, unless the contract contains the word "actual value" or any other provision of the same nature imposing literal performance of the contract'. Articles 1749(1) and 1750 are based on section 244 of the German Civil Code and Article 84 of the Swiss Code of Obligations.[1]

The principle of monetary nominalism applies when the amount is expressed in Birr and hence only the amount that is stated in the contract is paid, whether the Birr has depreciated in value or not. The parties can, however, restrict the application of the principle of monetary nominalism by expressing the amount in foreign currency or by using commodity clauses. Article 1749(2) provides, 'the sum of money owed by a party may be fixed by reference to the prices of raw materials, goods or services or any other element whose value can be ascertained'. 'This provision seemed desirable to exclude the doubts that have arisen in other countries where it has been asked whether such clauses, which are aimed primarily at the danger of monetary instability, were contrary to public policy.'[2]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 45.
2. *Ibid.*

E. Place of Payment

244. Determining the place of payment is important for it has significant ramifications. Krzeczunowicz wrote that '1. The place of payment shows who bears the forwarding costs. 2. Offering the due payment at the wrong place is a kind of non-performance carrying the consequences of Article 1771. 3. Under Article 1749(1) the place of payment determines the currency to be used. 4. In certain matters it may determine the court's territorial jurisdiction'.[1] It is not clear, however, if the place of payment determines who bears the forwarding costs, as it is perfectly possible that the parties might agree on who bears the forwarding costs in a way different from that which can be inferred from the place of payment.

Payment is to be made at the place designated in the contract. If the parties have not designated any place of payment, Article 1755(2) provides, 'payment shall be made at the place where the debtor had his normal residence at the time when the contract was made'. If the payment relates to a definite thing and if the parties have not designated any other place of payment, Article 1755(3) provides that payment 'shall be made at the place where such thing was at the time when the contract was made'.

Article 1755 is based on the Civil Codes of France (Article 1247), Lebanon (Article 302), and Egypt (Article 347).[2] It should be noted here that the drafter opted for a clear rule that can be derogated only by the agreement of the parties, and hence custom or usage cannot be used to derogate from the default rules regarding place of payment.[3]

1. G. Krzeczunowicz, *Formation and Effects of Contracts in Ethiopian Law* (Addis Ababa: AAU, 1983), 103–104.
2. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 48 (also stating that the rule on place of payment is different from the Swiss Code of Obligations (Art. 74),

the German BGB (S. 270), the Italian Civil Code (Art. 1182), and the Greek Civil Code (Art. 321), which declare payments of money due, in general, at the domicile of the creditor).
3. *Ibid.*

F. Appropriation of Payment

245. The rules regarding appropriation of payment are stated in Articles 1752–1754. Article 1752 provides: 'where the debtor is to pay costs and interest in addition to the principal, any part payment made by him shall be appropriated firstly to the costs, secondly to the interest and eventually to the principal'. This rule, inspired by the Civil Codes of Lebanon (Article 308) and Egypt (Article 343), is also similar to Article 1254 of the French Civil Code, Article 85 of the Swiss Code of Obligations, and Article 1194 of the Italian Civil Code.[1]

Articles 1753 and 1754 deal with appropriation of payment where the debtor owes several debts to the same creditor but tenders partial payment that is accepted by the creditor. Article 1753 gives the debtor the discretion to specify which of the debts his or her tendered performance is meant to satisfy. Failing this and unless immediately objected by the debtor, the creditor may specify which debts are satisfied (partially or completely) by a particular performance, and that specification could be stated in the receipt. This rule is similar to those found in the Swiss Code of Obligations (Article 86) and the Lebanese Civil Code (Article 307).[2]

In cases where neither of the parties has specified to which debt the payment is appropriated, Article 1754 governs the issue of appropriation. Accordingly, 'the payment shall be appropriated to the debt which is due, or, where no debt is due, to the debt which shall first become due'. This rule does not make a distinction between debts that are already due even if they fell due on different days.[3] If the debts are already or will become due on the same day, 'the payment shall be appropriated to the debt which it was to the greatest advantage to the debtor to pay'. In other cases, the payment is appropriated proportionately.

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 47.
2. *Ibid.*
3. *Ibid.*

G. Costs of Payment

246. Article 1760 provides: 'unless otherwise agreed, the debtor shall meet the costs of payment'. This is a rule that is also found in the Civil Codes of France (Article 1248), Lebanon (Article 304), Italy (Article 1196), and Egypt (Article 348).[1]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 50.

III. Breach and Cancellation

247. The rules of Ethiopian law on breach of contracts and the consequent remedies of performance in kind and cancellation are treated in Chapter 6. However,

it can be stated here that cancellation is one of the remedies of non-performance and it can be requested alone or together with damages. At any rate, cancellation is one of the ways by which a contract comes to an end. Similarly, when a contract is invalidated because of a defect in its formation, the contract comes to an end.

§2. Impossibility, Frustration and Hardship

I. Force Majeure

248. One of the remedies of non-performance of contractual obligations under Ethiopian law is payment of damages. It is not essential for the aggrieved party to establish that the non-performance was due to the fault of the debtor. However, the debtor is relieved from being liable to payment of damages if he or she was prevented from performing by an event that could be considered force majeure. Article 1792(1) defines force majeure as 'an occurrence which the debtor could normally not foresee and which prevents him absolutely from performing his obligations'.

The defence of force majeure has two constitutive elements. First, the alleged event must be something that cannot normally be foreseen by the party at the time of concluding the contract. It is an objective notion, and hence the fact that the particular debtor had not actually foreseen the occurrence of an event is not relevant. Second, the effect of the occurrence of the alleged event must be to absolutely prevent the performance of the contract. If the event merely renders the performance of an obligation more onerous, it will not be considered as force majeure.

In addition to generally defining 'force majeure', the Ethiopian Civil Code also contains two provisions that are meant to provide illustrations. Article 1793 provides events that might be considered as force majeure provided that in a particular circumstance they were not normally foreseeable and have rendered performance absolutely impossible. These include:

– the unforeseeable act of a third party for whom the debtor is not responsible;
– an official prohibition preventing the performance of the contract;
– a natural catastrophe such as an earthquake, lightning, or floods;
– international or civil war; or
– the death or a serious accident or unexpected serious illness of the debtor.

In a similar vein, Article 1974 enumerates events that will in no case be considered as force majeure. These include:

– a strike or lock-out taking place in the undertaking of a party or affecting the branch of business in which the party carries out his or her activities;
– an increase or reduction in the price of raw materials necessary for the performance of the contract; or
– the enactment of new legislation whereby the obligations of the debtor become more onerous.

In determining the scope of the defence of force majeure, the drafter had consciously disregarded the less-strict approach taken by the Swiss Code of Obligations (Article 97) and the BGB (sections 275 and 55) and opted for a narrower definition. David wrote in this connection: 'In using the stricter approach, the Code has tried to increase the responsibility of the debtor and make it more difficult for him to escape liability when he was not properly performing his obligations. The approach of the Swiss Code was avoided because of a fear that it would encourage the courts to be lax.'[1]

In a case examined by the Supreme Court, fire destroyed a lorry and its carriage being transported from the port.[2] Evidence suggested that the fire was caused by a technical failure in the electrical and mechanical system of the lorry. The trial and appellate courts released the carrier from its liability on the ground that the non-performance (failure of the carrier to deliver the goods) was caused by force majeure. The Supreme Court reversed this decision; noting that the carrier has an opportunity to ensure that the lorry it buys is technically reliable and suitable for the particular topographic and climatic conditions of the places to which it may be taken; once bought, it has also the opportunity to periodically check to ensure that it continues to be reliable. A fire caused by technical failure in the electrical and mechanical system of the lorry is something that can normally be foreseen by the carrier at the time of the contract, and hence it cannot be considered as force majeure.

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 69.
2. *Global Insurance S.C. v. Nib Transport S.C.* [2007], Federal Supreme Court, Cassation File No. 26565.

II. Initial versus Supervening Impossibility

249. The time when performance has become impossible has important implications in the Ethiopian law of contracts. Initial impossibility renders the contract concluded void. On the other hand, if the performance has become impossible after the conclusion of the contract, then it does not affect its validity. However, provided that the event that rendered performance impossible could not normally be foreseen by the party and such impossibility is absolute, the person will not be liable to pay damages. In such cases, whether impossibility will bring the contract to an end depends on whether it is cancelled.

If, on the other hand, the supervening impossibility is caused by an event whose occurrence can normally be foreseen, the non-performing party would be liable to pay damages.

III. Absolute versus Practical Impossibility

250. Under Ethiopian law only absolute impossibility is considered force majeure and hence serves as defences against claims of damages. If an event makes performance more onerous to the party, this is not a defence against claims of compensation. It may be, however, a ground for variation of the terms of the contract.

IV. Variation of Contracts: General Rule

251. The general rule under the Ethiopian law of contracts is that courts do not have any power to vary the terms of a contract. Article 1963 provides: 'The court may not vary a contract or alter its terms on the ground of equity except in such cases as are expressly provided by law.' David writes while commenting on this rule: 'The only remedy for a party to an inequitable contract is to request the invalidation of the contract on the ground of a defect in consent. The threat of such an action might lead the other party to compromise and modify by agreement the unfair clauses in the contract.'[1] Likewise, Article 1764(1) provides:

(1) A contract shall remain in force notwithstanding that the conditions of its performance have changed and the obligations assumed by a party have become more onerous than he or she foresaw.
(2) The effect of such changes may be regulated by the parties, and not by the court, in the original contract or in a new agreement.

The above rule is meant first 'avoid proliferation of litigation. And second, although courts are well able to solve legal problems and state the law, they are not qualified to deal with questions of economics and to draft contracts'.[2]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 51.
2. *Ibid.*, 2.

V. Variation by the Court

252. Although as a matter of general rule courts are barred from modifying the terms of a contract, the Civil Code recognizes a limited set of circumstances where courts might do so.

First, Article 1766 provides: 'The court may vary a contract where the parties do not agree and a family or other relationship giving rise to special confidence exists between the parties and compels them to deal with each other in accordance with equity.' David wrote that this provision must be seen together with Article 1705(1), which deals with circumstances where false statements made in bad faith might result in invalidation of the contract. The notion is that if there is a special relationship between the two parties where false statements made in bad faith could void the resulting contract, then in the same relationship courts would have the power to vary the terms of the contract if because of unforeseen circumstances the balance of the contract is distorted.[1]

Second, Article 1767(1) empowers the courts to modify the terms of 'a contract made with a public administration where the circumstances in which it was made have changed through an official decision in consequence of which the obligations assumed by the party who contracted with the administration have become more onerous or impossible'. The drafter justifies the inclusion of this rule in the Civil Code as follows:

> In an ordinary private contract, the rule that contracts are to be performed in good faith would prohibit one party from modifying unilaterally the conditions in light of which the contract was concluded, thus making the performance of the contract more onerous for the other party. Such conduct would amount to a failure to perform the contract and the other party would be able to collect damages or even have the contract cancelled . . . A special rule for contracts with the government is useful for two reasons. First, it is impossible to say that the government acts contrary to good faith when it exercises its public power. And second, it is important to limit the possibilities for variation to cases where there has been an assertion of the public power, which is here distinguished from the government's general conduct of business and its policies.[2]

Perhaps the following illustration provided by the drafter makes plain the scope of the rule that allows judicial variation of contracts with a public administration: A undertakes, in a contract with a provincial government, to provide transportation between cities X and Y. The government establishes a new gasoline tax or requires the payment of a toll for the use of a bridge between X and Y. A can require the modification of the contract to compensate him for the damage caused by this general regulation. In the same situation, A complains that the road is badly cared for by the province so that his equipment wears out quickly. The contract cannot be varied by the court, since there has been no act of which A can complain.

Third, Article 1768 charges the courts with the authority to 'reduce the obligations of one party where the performance by the other party of his obligations has become partially impossible and there is no ground for cancelling the contract'.

Fourth, the court may grant a period of grace for the debtor provided that there is no contrary provision in the agreement between the parties; the court must do so with all necessary care and having regard to the position of the debtor and the requirements of justice. In any case, the period of grace shall not exceed six months.

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 53.
2. *Ibid*., 54–55.

§3. Discharge by Agreement (Termination and Remission of Debt)

253. In Ethiopian law, a contract could come to an end by the agreement of the parties. In such cases, it is said that the contract is terminated. Termination and remission of debts result in extinction of obligations. Termination and remission of debts have a prospective effect; acts done in performance of a contract shall remain valid but any obligation that is not yet performed does not have to be performed (Article 1819).

The parties by agreement can terminate their contract (Article 1819). Termination occurs when parties make a separate contract to extinguish an existing obligation. In such cases, the termination agreement should be written if the contract to be ended is required to be made in writing.

Termination could also occur when one of the parties exercises his or her right of termination based on a clause in an existing contract; it could be the case that

the parties have included a clause in their contract that stipulates conditions under which one or any one of the parties could terminate the contract (Article 1820(1)). In multiparty contracts, it is also possible for the contract to be terminated with respect to one of the parties and remain in force with respect to the remaining parties (Article 1820(2)). The latter possibility 'would seem particularly useful in such contracts as the contract of association'.[1]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 83.

254. A contract could also be terminated by one of the parties even if nothing is provided in the contract to that effect. This possibility is provided in Article 1821: 'where a contract is made for an undefined period of time, both parties may terminate it on notice'. The period of notice is determined by custom or law; in the absence of any customary or legal period of notice, Article 1822 requires that 'it shall be reasonable having regard to the circumstances'. According to the drafter, the requirement to provide adequate notice is just a specific application of the general duty of good faith provided for in Article 1732.[1]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 83.

255. In certain cases, the court is empowered to terminate a contract on the application of one of the parties. One such case is provided in Article 1823: 'a party may apply to the court to order the termination of a contract which requires a special confidence, cooperation or community of views between the parties, where such requirements are no longer present'. Examples of contracts of such nature include contracts of association, contracts of partnership, and contracts of employment.[1]

The other case relates to gratuitous contracts: Article 1824 provides, 'the court may order the termination of a contract made for the exclusive advantage of one party where the other party for good cause so requires'.

In drafting Articles 1823 and 1824, David had been inspired mainly by German legal writers.[2]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 83.
2. *Ibid*., 84.

256. The other mode of extinction similar to termination is remission of debts. It is different from termination in that it releases only one of the parties. But it is yet a contract that requires the consent of both parties. Article 1825 provides, 'where the creditor informs the debtor that he regards him as released, the obligation shall be extinguished unless the debtor forthwith informs the creditor that he refuses his debt to be remitted'. The offer of remission and the acceptance must, however, be written if the debt that is remitted emanates from a contract that is required to be made in a written form.

§4. Novation

257. Novation is substituting an existing obligation with another obligation. It is one mode of extinguishing contractual obligations. Article 1806(c) provides,

'an obligation shall be extinguished where the parties agree to substitute a new obligation for the original obligation'.

Article 1826 provides the principal essence of novation. It says: 'an obligation shall be extinguished where the parties agree to substitute therefore a new obligation which differs from the original one on account of its object or nature'. The agreement of novation is different from that of termination in two important respects: purpose and effect. When the parties are making an agreement of novation, it is clear from the very meaning of substitution that they have two purposes. First, they want to extinguish the existing obligation. And second, they want to create a new one. That is the idea of substitution, extinguishing one and creating another. On the other hand, when the contracting parties are making an agreement of termination, they have only one purpose, and that is to extinguish an existing obligation and not to create another. This difference between novation and termination is important not for its theoretical sake but for the implication that it has on deciding on the form, if any, that agreements of termination and novation should fulfil.

258. To say that there is novation, the new obligation must be different from the original or old one in its object or nature. Rene David nicely illustrates this as follows:

> The new obligation may differ from the old in its object. One might agree for example that D would work for C for X days instead of paying him Y Ethiopian dollars as had been agreed in the original contract. The new obligation may also differ from the original one by its cause. Suppose, for example, that B owes A $10,000 for some goods he purchased from him; it is agreed in a new contract that B will keep the $10,000 as a loan from A. This is novation by change in the cause: B's debt has the same object, $10,000, but henceforth it has a different cause. B owes the $10,000 to A because A lent it to him, not because he purchased the goods from him. The debt of B *the purchaser* has been extinguished; it has been replaced by the debt of B *the borrower*.[1]

In Ethiopian law the term 'novation' does not refer to substitution of the creditor or debtor by another person. This is treated in a separate section of the Civil Code on assignment of rights and obligations.

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 84. David used the term 'cause' instead of 'nature', which is used by the Civil Code.

259. Consider the following hypothetical situation. A and B entered into a written and registered contract of rent of a house on the 1 September. On the 1st of November, A and B agreed orally to substitute the contract of rent with a contract of sale. After this a dispute arose between A and B. Now B is asking for the transfer of ownership of the house, based on the oral agreement of sale. To this claim, A replied that the contract of rent is not validly substituted by sale. A argued that there is no valid novation, as the agreement made on the first of November is only a mere agreement (draft of contract) that does not constitute a contract because it is not made in the form prescribed by the law for such contracts. A, on the other hand,

is of the opinion that Article 1826 does not require a second contract for novation; it only says, 'where the parties agree to substitute therefore a new obligation'. Articles 1826 and 1807 do not provide for novation only where the parties make a contract to substitute the original one.

In order to solve this dispute, the issue that should be addressed is whether a mere agreement is sufficient to substitute an original obligation with a new one. Though the provisions of Article 1826 provide for the agreement of the parties, one could argue that such agreement must amount to a contract. For substitution or novation to occur, we must have two valid obligations: the original and the new. And if the parties agree to substitute the original by the new one, we can say that there is novation and hence the original obligation is extinguished. Therefore, the issue here must refer to whether a new obligation is created between the two parties. Though the parties made an oral agreement on the first of November, this agreement created an obligation that is not legally binding. For this obligation to be legally binding, it must be created by a valid contract. Though there is an agreement between the parties, this cannot be considered as a contract as it is not made in the form prescribed by law and, according to Article 1721, there shall be no contract in this case but a mere draft of a contract. Consequently, we can say that the parties have agreed to substitute the previous contract with a new contract that is not yet validly made, and hence there is no novation that extinguishes the previous contract.

In summary, we can say that for a valid novation to exist, the following elements of Articles 1826 must be fulfilled: there should be an original obligation; there should be a new obligation that comes after the original obligation in terms of time; and the parties must agree to substitute the original obligation with the new one.

260. Consider the following hypothetical situation. A and B entered into a written contract of sale on credit on 1 September, under which A has the obligation to pay ETB 500 to B. On 15 September, A and B entered into another written contract of loan, under which A has the obligation to pay 5000 to B. Until then, it is not clear whether the parties are intending to make novation or to make another additional contract. However, on 20 September they made an oral agreement that the second contract is a substitution for the first contract. Later, contrary to the expectation of A, B brought a court action based on the first and the second contracts demanding a payment of ETB 5,500. To this A replied that the first contract is novated by the second contract, according to their oral agreement made on 20 September and hence he has the obligation to pay only ETB 5,000. But A said that the oral agreement is not sufficient for novation to occur. The issue here is as to whether there is novation between the two obligations.

Three elements should be fulfilled for the existence of novation: original obligation, new obligation, and an agreement to substitute the original obligation by the new one. In such cases, the original obligation is said to be extinguished by novation. The question is therefore: are these conditions fulfilled? There is not doubt that here we have two obligations: original and new. The doubt is as to whether there is a valid agreement to substitute the original with the new obligation. Should such agreement be written? Or is oral agreement sufficient?

To answer this question, we have to first understand the effect of such an agreement, if there is any. The effect is to extinguish the original obligation. Therefore, the question can be rephrased as follows: could a written contract (contract of sale on credit) be extinguished by an oral agreement? In the Civil Code, there is no specific provision that can be used to answer this. But we can use a related one – that is, Article 1722, according to which a contract made in a special form shall be varied only in the same form. This means that if parties want to change (vary) the terms of a written contract, they can do so only by written agreement. If a written agreement is required to vary the terms of a written contract, then for a stronger reason a written agreement is required to extinguish the terms of (or obligations based on) a written contract. Hence, one can argue that even if A and B made an oral agreement to substitute the obligation to pay 500 by the obligation to pay 5,000, this agreement cannot extinguish the obligation to pay 500, which is based on a written contract. This is because, as we have said before, obligations based on a written contract can be varied (and for stronger reason extinguished) only by a written agreement. Oral agreement is not sufficient. Thus, there is no novation but a mere draft of novation (to use the language of Article 1721(2)).

But can we consider the oral agreement that was made on 20 September as part of the written contract made on 15 September? This is a question that does not have any specific and relevant provision in the Civil Code as a solution. But we can consider different scenarios to arrive at a suggestion.

Assume that A and K entered into a contract of sale, in which A undertook to sell coffee to K for a price of ETB 10 per kilo. The contract is written. But the total amount of coffee to be sold is not agreed between them nor is it mentioned in the written contract. On morrow, A and K have agreed orally that the total amount of coffee to be delivered is 10 quintals. When K asked A to deliver the coffee, A replied that the written agreement made between them does not bind him, as the amount of coffee is not sufficiently and precisely defined; he said their oral agreement does not have any legal effect. On the other hand, K is of the opinion that the written agreement is supplemented by the oral agreement and hence the amount of coffee to be delivered is sufficiently and precisely defined.

The issue here is as to whether oral agreements made in relation to a written contract could be considered part and parcel of the latter. What we know here is that A and K are not intending to vary the terms of a written contract (as there is nothing expressed or implied in the written contract about the amount of coffee to be delivered) and hence we will not apply Article 1722.

If the written contract does not say anything about the total amount of coffee to be delivered, we must try to interpret the contract before concluding that the contract is void (on the ground that its object cannot be ascertained with sufficient precision).[1] This is without losing sight of the rule, in Article 1714, that the court may not make a contract for the parties under the guise of interpretation.

In our example, it is obvious that the amount of coffee is not expressly determined in the contract but it is determinable, making the contract valid. It is determinable based on Article 1734, which states, '(1) where the provisions of a contract are ambiguous, the common intention of the parties shall be sought' and '(2) the general conduct of the parties before and after the making of the contract shall be taken into consideration to this effect'. If we are to consider 'the general conduct of the

parties before and after the making of the contract', then it means that the oral agreement of the parties after the making of the written contract should be considered in giving effect to the written agreement. From this it follows that, in our case, the object of the contract can be ascertained with sufficient precision; that is, the seller has the obligation to deliver 100 quintals of coffee to the buyer.

If we can do so, then it follows that the oral agreement to substitute the original with the new obligation is part of the written contract and hence there is a valid novation.

1. The situation could have been different had A and K failed to mention the place of payment in the written contract and they agreed later orally about the place of payment. Here even if the parties have not expressly agreed about the place of payment, it is implied based on Art. 1755 that payment is to be made at the place where the debtor has his or her normal residence at the time when the contract was made (or at the place where the thing was at the time when the contract was made if the payment relates to a definite thing). Hence, any later agreement made between the parties as to the place of payment would amount to modification or variation of the implied terms of a written contract and hence the formal requirement dictated by Art. 1722 must be complied with.

261. Novation results in extinction of the original obligation. To this extent, therefore, it is similar to invalidation, cancellation, and termination of contracts. Invalidation and cancellation are different from termination in that they have a retroactive effect (they involve restitution or reinstatement); termination, on the other hand, has only a prospective effect. A question can therefore be asked as to whether novation has a retroactive or prospective effect. In this regard, the relevant provision is Article 1827, which provides, '(1) unless otherwise expressly provided, securities or privileges attaching to the original obligation shall not be transferred to the new obligation' and '(2) unless otherwise expressly provided, interest due prior to novation may not be recovered thereafter'. In relation to the obligation of suretyship, Article 1927 provides, 'the voluntary acceptance by the creditor of an immovable or of any other asset in satisfaction of the primary debt shall discharge the guarantee even though the creditor may subsequently be evicted'. From the above it seems that novation has a prospective effect and hence anything done in performance of the original contract shall remain in force.

262. Article 1828 provides that 'novation shall not occur unless the parties show the unequivocal intention to extinguish the original obligation'. This provision is formulated based on the Civil Codes of France (Article 1273) and Italy (Article 1230).[1] This general principle is illustrated by provisions of Article 1829: 'unless otherwise agreed, novation shall not occur where: (a) a new document is prepared to support an existing debt; or (b) the debtor signs a promissory note or bill of exchange in respect of an existing debt; or (c) new securities are provided to ensure payment of an existing debt'.

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 85.

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Chapter 6. Remedies

§1. General Provisions

263. The Ethiopian law of contracts has been in force for about fifty years now. Yet, there exist only four books on this branch of Ethiopian law. These books are structured following the outline of the Civil Code; the topic of remedies is discussed as part of the effect of contracts. Remedies are sanctions, provided in contracts and/or in the law, for non-performance of contractual obligations. Article 1731(1) provides, 'the provisions of a contract lawfully formed shall be binding on the parties as though they were law'. This means that the terms of a contract are binding on the parties just as provisions of the law are binding on citizens. As there are remedial or punitive sanctions for breaches of the law, there are also remedial, if not punitive, sanctions for breaches of contracts.

264. Non-performance could take several forms: total or partial non-performance and defective or late performance. Any purported act of performance on the side of the debtor is considered non-performance if it fails to comply with the specifications in the contract or the default rules of the law of contracts.

265. The Ethiopian law of contracts generally provides for three remedies: forced enforcement (specific or substituted performance), cancellation (judicial or unilateral), and damages, as follows:

> Art. 1771: Effect of non-performance
> (1) Where a party does not carry his obligations under the contract, the other party may, according to the circumstances of the case, require the enforcement of the contract or the cancellation of the contract or in certain cases may himself cancel the contract.
> (2) He may in addition require that the damage caused to him by non-performance be made good.

From Article 1771, it appears that enforcement and cancellation are mutually exclusive; with respect to a given obligation that is not performed, the creditor is entitled to only either one of the remedies. On the other hand, the remedy of damages is available together with either forced enforcement or cancellation of the contract. Cancellation is a lenient remedy and it will in most cases be accompanied by a claim for damages. This is because the legal effect of cancellation is reinstatement, which protects the reliance interests of the creditor. And even if forced enforcement ultimately protects both the reliance and expectation interests of the creditor, damages could be claimed for the loss occasioned because of the delay.

266. Cancellation should be distinguished from invalidation. A contract is invalidated because of a defect in its formation, and this defect may take the form of incapacity or defects of consent of one or all of the contracting parties. On the other hand, cancellation is an issue that arises when there is non-performance. In Ethiopian law, despite their similar legal effect, one should take care in the use of

these words mainly because of the different rules of law applicable to each of these concepts. For example, the period of limitation for taking actions of invalidation is two years as a rule, and for that of cancellation is ten years. In addition, though both cancellation and invalidation are judicial remedies, in some cases a contract could be cancelled (but not invalidated) by operation of the law or by unilateral declaration.

§2. The Requirement of Default Notice

267. There is one requirement that must be met before a creditor is entitled to any of the remedies of non-performance. Article 1772 provides, '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 his obligations under the contract'. However, it is not in all circumstances that the creditor must give such notice. There are circumstances where the creditor is not required to put the debtor in default:

> Art. 1775: Notice when unnecessary
> 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 contracts 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 obligations; 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.

One of the circumstances where default notice is not required is where the debtor assumed to perform an obligation that the contract allows to be performed only within a fixed period of time. This does not mean that default notice is not required where the parties have agreed on a given period of time for performance. It does not mean either that default notice is required where the parties have not agreed on the time of performance. Even if a period of time is fixed for performance, default notice is not required only when the parties have agreed that the period of time is essential. This can be gathered from the circumstances of the case. Likewise, even if the parties have not fixed in the contract a period of time for performance, default notice may not be required if it appears from the circumstances of the case that performance within only a certain period of time is essential. The following example is provided by the drafter of the Civil Code: A orders some fire-crackers and dance costumes from B for a feast or fair. It is obvious that A intends to sell these items at the feast and that if they are delivered late he will not be able to sell them for a very long time. B will be subject to the sanctions for non-performance if he has not delivered the items before the fair. A notification of default is not necessary in such a case.[1] When the time of performance has been fixed in the contract and such time has expired before the obligation is performed, the creditor can invoke the available remedies only after giving a default notice. In such cases, default notice is not required if: (1) it appears from the circumstances that the contract allows performance only

within that period of time, and (2) the parties have agreed that default notice is not required.

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 58.

268. There is no formality prescribed by the law for putting the debtor in default. It could be 'by written demand or by any other act denoting the creditor's intention to obtain performance of the contract' and whatever form it may take, 'notice may not be given unless the obligation is due' (Article 1773). That implies that default notice could be made orally. Conduct could also amount to default notice if it shows the intention of the creditor to obtain performance. In this regard, Krzeczunowicz wrote that sending an invoice to the other party does not necessarily amount to putting that party in default: 'incidentally, invoice does not necessarily denote a demand for prompt payment. The invoice should include such a demand if it is to have the effect of a default notice in starting the running of the interest for delay'.[1] Therefore, if the sender intended to put the other party in default by sending the invoice, he must include in the invoice a demand for payment. It is, however, not clear if the action of the person, apart from demanding the performance of an obligation that is due, should indicate the consequences of non-performance. The idea that the person must, in putting the other in default, bring the consequences of non-performance to attention of that party appears from commentary by the drafter: 'before a person can assert the rights that arise from non-performance of a contract, he must put the other party in default, that is he must call his attention to the fact that the obligations are due and to the sanctions the debtor may incur if he does not perform them'.[2] This idea is, however, arguable, as there is no clear basis in the text of the Civil Code. In addition, it is 'incompatible with the wording of the present article and the foreign provisions [David] cites (primarily Article 1139 French Civil Code and Article 102 of Swiss Code of Obligations)'.[3]

1. G. Krzeczunowicz, *Formation and Effects of Contracts in Ethiopian Law* (Addis Ababa: AAU, 1983), 122.
2. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 57.
3. G. Krzeczunowicz, *Formation and Effects of Contracts in Ethiopian Law* (Addis Ababa: AAU, 1983), 122.

269. The drafter wrote that default notice has the general purpose of reminding a party of his or her obligations. In addition, it 'should lessen the number of cases that come before the courts; they will only get cases in which there is a clear failure to perform'.[1] On top of these two general purposes, by putting a debtor in default for an obligation to pay money, one can legitimately claim interest for delay of the payment afterward. As far as the claim of interest on an obligation to pay money is concerned, it should be noted that the law disregards this requirement in certain circumstances. For example, Article 2210(2) provides, 'where the agent converted to his own use monies he owed to the principal, he shall be liable for the payment of interest as from the day of such use, without it being necessary that notice be given to him'. Likewise, Article 2221(3) provides, 'interest on (outlays made and expenses incurred by the agent in the proper carrying out of the agency) shall be due by the principal as from the day when they were incurred without it being necessary to place the principal in default'.

David mentioned also another function of default notice: 'in obligations to give, it puts the risk of loss of the thing on the debtor'.[2] This function of default notice is arguable. This is because, in such cases, the risk is already on the side of the debtor and hence there is nothing to be transferred away from the creditor:

> Art. 1758: Transfer of risks
> (1) The debtor bound to deliver a thing shall bear the risks of loss of or damage to such thing until delivery is made in accordance with the contract.
> (2) The risks shall pass to the creditor where he is in default for not taking over the thing.

Krzeczunowicz wrote, 'David's comment that, in obligation to give, the default notice puts the risk of loss of the thing on the debtor is misleading, since the reader will necessarily infer that the debtor is free from such risk before this notice. Pursuant to article 1758, the opposite is true: the debtor in any case bears risk until delivery or until the creditor's default. "Putting" the risk of loss on a debtor already bearing it is obviously impossible'.[3]

If the drafter, by using the term 'debtor', meant to refer to the party who has the obligation to take delivery, then giving default notice could transfer the risk from the one who is supposed to deliver the thing. In such cases, the party who is to deliver the thing is not required to give default notice where the creditor is not known or there is a doubt as to who is the creditor, or he or she cannot deliver the thing for a reason within the control of the creditor (Article 1780).

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 57.
2. *Ibid*.
3. G. Krzeczunowicz, *Formation and Effects of Contracts in Ethiopian Law* (Addis Ababa: AAU, 1983), 121.

270. Even if he or she has already been late for some time, the debtor may offer, after being in default, to perform his or her obligations. And the creditor cannot decline performance tendered by the debtor unless it is made after a reasonable period of time, which is fixed in the notice. Article 1774 provides, 'the creditor may in the notice fix a period of time after the expiry of which he will not accept performance of the contract' and 'such period shall be reasonable having regard to the nature and circumstances of the case'. This is adopted from the German Civil Code, section 250.[1] Stipulating a period of time in the default notice within which an obligation can only be performed has certain purposes. First, in situations where performance of contracts would be useless after a certain period of time, the creditor can avoid the possibility of being forced to receive performance, which does not bring him or her any economic benefit. Second, by providing such period of time, the creditor can spare him- or herself from the ordeal of going through judicial proceedings in order to cancel the contract and he or she can unilaterally, without there being any need to get the blessing of the court, declare the contract cancelled. Article 1787 stipulates, in this connection, that a party may unilaterally cancel the contract in case the other party has failed to perform his or obligation within the time limit fixed in the notice.

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 58.

§3. Faulty Behaviour of the Debtor

271. The only precondition that must be met before the aggrieved party is entitled to forced performance or cancellation or/and payment of damages is putting the debtor in default. In marked contrast with most civil law systems, it is not required that the non-performance be attributed to the fault of the debtor. Whether the debtor has committed a fault is not normally an issue in the Ethiopian law of contracts. Article 1791(1) provides, 'the party who fails to perform his obligations shall be liable to pay damages notwithstanding that he is not at fault'.

272. The parties can agree, however, that they will not be liable unless they have committed a fault, in which case non-performance does not amount to breach of contract unless the debtor is at fault. In addition, in certain circumstances, Ethiopian law makes the liability of the debtor conditional upon the establishment of fault, or grave fault, on his or her part. This is provided in Articles 1795 and 1796. Article 1795 provides, 'a party may not claim damages on the ground of non-performance of the contract by the other party, unless he can show that the other party is at fault, where: (a) the debtor has undertaken to do his best to procure something to the other party without guarantying that he would succeed; or (b) such an exception is expressly provided by law in respect of certain contracts'. David wrote, 'there are many contracts in which, because the party has not obligated himself to produce a given result, one must come back to the less rigorous approach of the Swiss Code of Obligations and admit that damages are not due where one party has not obtained what he expected from contracts so long as the other has done everything that can reasonably be expected of him, in conformity with good faith, and where he has committed no fault'.[1]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 71.

273. Article 1791 is apparently not favourable to the debtor because it excludes the element of fault. But it is now clear from Article 1795 that Article 1791 applies to only obligations of result and, for obligations of means, the debtor is not liable until the creditor establishes that the former committed fault. One can argue here that even without Article 1795, the debtor is not liable to pay damages when he or she does not commit an offence. This is because, based on Article 1771, it must be proved that the debtor has failed to perform a contractual obligation, and doing that requires proving that the debtor has not achieved the result (in obligations of result) or done his or her best to achieve the result (in obligations of means). In obligations of result, the debtor is liable even if he or she committed no fault. But in obligations of means, the debtor is liable only when he or she fails to do his or her best to achieve a certain result; this means that the debtor is not liable unless he or she committed a fault. Therefore, in obligations of means, fault and non-performance are the same.

That apparently renders Article 1795 superfluous. Although Article 1791 is sufficient to address both kinds of obligations, the drafter decided to include Article 1795 expecting that obligations of means might pose a problem of clarity. It could be the case that the result might not be achieved despite the best efforts exerted by the debtor. In such cases, the creditor, 'disappointed in the expectation he has from

the contract', might consider the debtor guilty of non-performance. So the purpose of Article 1795 is to clarify the meaning of non-performance in obligations of means. For this purpose, it is not required for the parties to expressly agree that the obligation concerned is that of means.

Article 1795 not only clarifies what non-performance means in the case of obligations of means but also provides exception to the rule that a debtor is liable where he or she fails to perform his or her obligation of result where no fault is attributed to him or her. This exception is, however, generally phrased: 'where such an exception is expressly provided by law in respect of certain contracts'. One such exception provided by law is in the case of agency. The obligation of the agent is essentially an obligation of means. That is why the law imposes upon the agent the duty of diligence in managing the affairs of the principal. Therefore, the failure of an agent to achieve a certain result entails his or her liability only when he or she has committed a fault.

274. Before the debtor of an obligation of means become liable, it must be proved by the creditor that the former committed a fault. What constitutes a fault? In some cases of specific contracts, the law provides the standards of 'best effort' or diligence expected from the debtor. For example, a paid agent shall, in managing the affairs of the principal, apply the same degree of care and skill as a *bonus paterfamilia*s. An unpaid agent shall apply the same degree of care and skill as he or she applies to his or her own affair. So in deciding whether a paid agent has committed a fault or not, one must ask if there was anything that a *bonus paterfamilias* would have applied that the agent did not. Similarly, in deciding whether an unpaid agent has committed a fault or not, one must ask if there was anything that the agent would have applied in managing his or her own affair but did not apply to the affairs of the principal. Apart from the provisions of the law for specific contracts, the standards of care could sometimes be clearly spelled out in the contract itself. In either of the cases, the decision as to whether a debtor has committed a fault is made with relative ease. In all other cases, however, it is imperative to go to other sections of the law. The Civil Code deals with fault in its part concerning extra-contractual liability. And Krzeczunowicz submitted that resort could be made to these provisions by analogy 'with due caution and discernment, since breach of a promise given to a person to do something for him diligently essentially differs from the universal duty not to harm any persons by fault'.[1]

1. G. Krzeczunowicz, *Formation and Effects of Contracts in Ethiopian Law* (Addis Ababa: AAU, 1983), 145.

275. Article 1796 provides, 'where the contract is made for the exclusive advantage of one party, the other party shall not be liable to pay damages in cases of non-performance unless he has committed a grave fault'. On the standard to establish whether the fault committed by the debtor is grave or not, the two leading authorities on Ethiopian law of contract wrote differently.

Consider the following hypothetical situation. A deposited a suitcase with B. B agreed to take this suitcase gratuitously. A has now claimed damages from B on the ground that the suitcase and its contents are damaged by water or mice.

According to Article 1996, B is liable for the damage only when he has committed a grave fault. David explained that B is liable only when he did not apply the same care and skill he would have applied to his property, and that depends on whether or not B was in good faith (did not know or should not have known about the nature and value of the objects entrusted to him).[1] This standard of grave fault, writes Krzeczunowicz, '(a) finds no support in the text of the present article, which it is supposed to illustrate; and (b) the criterion used is taken from Article 2211(2)'.[2] On the contrary, Krzeczunowicz submitted that a person is guilty of grave fault where he or she acted with intent to injure, or reckless negligence (disregarding the known probability that the fault committed may seriously injure the other party):

An advocate who accepts gratuitously the representation of a friend in litigation is not liable for professional fault where he negligently fails to submit to the court material points of fact and law, unless he was aware of the likelihood that his client may thereby lose the case. His awareness may be inferred from circumstances, for example, from the fact that he is a seasoned old lawyer, who therefore obviously must have been so aware.[3]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 72.
2. G. Krzeczunowicz, *Formation and Effects of Contracts in Ethiopian Law* (Addis Ababa: AAU, 1983), 146.
3. *Ibid*., 147.

276. The debtor, in obligation of result, has a defence against payment of damage: 'he shall not be released unless he can show that performance was prevented by force majeure' (Article 1791(2)). This is comparable to the fault requirement in obligations of diligence except that, in this case, it is the debtor who must prove the existence of force majeure, but in the other case, the creditor must prove that the debtor committed a fault or grave fault (in gratuitous contracts). Hence, fault (or grave fault) is a constitutive element of the liability of the debtor in obligations of diligence (or gratuitous contracts). However, force majeure is an exception to the liability of the debtor in obligations of result.

277. Where the debtor fails to perform his or her obligation because of force majeure, the debtor must inform the other party about the situation. This is so that the creditor may take preventive or mitigating measures regarding expected losses. Failure to inform the creditor immediately, according to Article 1797, results in the liability of the debtor: 'he shall be liable as though non-performance were attributable to him for any damage caused to the other party which could have been avoided, had notice been given'.

278. Force majeure serves as an exonerating circumstance only when the event occurs before the debtor is put in default. Article 1798 provides, 'where performance is prevented by force majeure, damages shall be due where force majeure occurred after the debtor had been placed in default'. A person could be put in default either by giving him or her notice or by operation of the law. The meaning of force majeure is discussed in detail in the previous chapter.[1]

1. See para. 248.

§4. Self-Help Remedies

279. A system of law is generally based on, among others, the principle that no one may be a judge in his or her own case. The very reason the institution of law is constituted is to avoid the disorder and injustice that might result from a scenario where individuals, by the use of force or otherwise, attempt to enforce their 'rights'. Law avoids this by making government the only one entitled to use force and decide on disputes. As an application of this principle, a party aggrieved by non-performance must request the court for remedial measures. However, in certain circumstances, a rigid application of this principle appears to be ineffective or unfair. In such circumstances, the law exceptionally allows self-help remedies. Such remedies include suspension of performance, lien, and set-off.

I. Exceptio Non Adimpleti Contractus

280. The term *exceptio non adimpleti contractus* refers to the right of the debtor to withhold performance until the other party performs. The defence of unperformed contract is based on Roman law and it is difficult to find an exact equivalent in English law. This defence can be considered as one variant of the self-help remedy, where the beneficiary is not required to go to the courts.

In Ethiopian law, the debtor cannot, in all circumstances, refuse to perform his or her obligation on the ground that the other party has not performed his or hers. The matter of withholding performance is dealt with in Articles 1756, 1757, and 1759. These provisions, though similar to the defence of unperformed contract, are more similar to the English doctrine of anticipatory breach of contract. Under normal circumstances, an obligation must, first of all, be due before one can raise issues related to non-performance and the consequent remedies of forced performance, cancellation, and damages. Stated in other words, a debtor can be said not to have performed his or her obligations only when the obligations are already and fully due. This is a general principle accepted in the Ethiopian law of contracts. Principle as it is, it is justifiable to expect exceptions to it. The exception is the doctrine of 'anticipatory breach' of contracts. Defined in a simple, tolerably circular, and general way, 'anticipatory breach' is a breach of contract that takes place before performance is due by the party in breach. Though the origin of the doctrine can be traced back to the English common law, it has already found its way into the laws of several countries and into international conventions and non-binding instruments:

> Art. 1756: Time of payment
> (1) Payment shall be made at the agreed time.
> (2) Where no time is fixed in the contract, payment may be made forthwith.
> (3) Payment shall be made whenever a party requires the other party to perform his obligations.
> Art. 1757: Simultaneous performance
> (1) Only a party who benefits by a time-limit having regard to the terms or nature of the contract or who has performed or offered to perform his obligations may require the other party to carry out his obligations under the contract.

> (2) A party may refuse to carry out his obligations under the contract where the other party clearly shows that he will not perform his obligations or where the insolvency of the other party has been established by the court.
> Art. 1759: Limit of right to refuse performance
> Notwithstanding the provisions of Art. 1757(2), a party shall carry out his obligations under the contract where the other party produces securities sufficient to guarantee that he will perform his obligations at the agreed time.

From the above articles, it is clear that in deciding the time of payment (performance), precedence is to be given to the agreement of the parties; that is, payment is to be made at the time agreed between the parties. However, the gap-filling role of the law comes into the picture where there is no time agreed between the parties. In such cases, the cumulative reading of Article 1756(2) and (3) gives the impression that the debtor shall perform his or her obligation immediately when the creditor requests him or her to do so. But one may ask: in what kind of circumstances is the creditor him- or herself entitled to request immediate performance from the debtor? This question is addressed in Article 1757(1); a creditor is entitled to request immediate payment where: he or she is beneficiary of a time limit having regard to the terms or nature of the contract; or he or she has performed his or her obligations; or he or she has offered to perform his or her obligations. If the creditor has performed or offered to perform his or her obligations, it is only fair to entitle the creditor to request the debtor and to require the debtor, in such cases, to make immediate performance. On the other hand, it seems contrary to fairness and common wisdom (at least from the perspective of the debtor) to entitle the creditor to request the debtor and to require the debtor to make immediate performance in situations where the creditor has neither performed nor offered to perform his or her obligations. How about postponing payment until the creditor has performed or offered to perform his or her part? It might work, but at times it might reduce the importance of the performance to the other party and hence the utility of the contract or it might go contrary to the terms of the contract. In such cases, it is provided that if the party benefits by a time limit, he or she can request the other party to perform without performing his or her part. A party is said to be a beneficiary of a time limit where time of performance is agreed in the contract and there is nothing in the contract to hold that the time is fixed for the sole benefit of the other party. This is a solution that tries to maintain the utility of the contract and is based on the freedom of contract. But the solution is not foolproof, as the party claiming the benefit of time might use this benefit to the disadvantage of the debtor. This problem is foreseen by the provision in Article 1757(2): the debtor may refuse to carry out his or her obligations under the contract where the creditor clearly shows that he or she will not perform his or her obligations or where the insolvency of the creditor has been established by the court. If not for this provision, a debtor might be forced to perform his or her obligation when the creditor has neither performed nor offered to perform his or her obligation even in circumstances where at the time when the creditor has requested immediate performance, he or she has clearly shown that he or she will not perform his or her obligations or his or her insolvency has been established by the court.

281. The key phrases in Article 1758(2) are 'where the creditor clearly shows that he will not perform his obligations' and 'where the insolvency of the creditor has been established by the court'. The condition contained in the latter phrase is relatively easy to apply; it is only a matter of determining whether the creditor is judicially declared insolvent. The problem is, however: when is the creditor said to have clearly shown that he or she will not perform his or her part of the contract? The drafter wrote: 'The first situation is that where the other party has clearly shown that he will not perform his obligations. Article 1757(2) does not require that this intention be expressed in any particular way nor that it be communicated to the creditor by the debtor.'[1] Therefore, one can say that the creditor has clearly shown that he or she will not perform his or her obligation based on express words of the creditor or based on circumstances. The following illustrations shed some light on the issue: A has undertaken to perform for B a role in B's theatre in February. A then undertakes to play another role in another theatre in the same city at the same time. It is clear that the two undertakings cannot both be performed. B can refuse to make advance payments that he was to make to A under the contract. He can also suspend performance of his part of the contract if A has declared in public that he will not perform his obligations to B. Therefore, for the purpose of the right to suspend performance, anticipatory breach consists of situations where the creditor has clearly shown that he or she will not perform his or her obligations or where the insolvency of the creditor has been established by a court.

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 72.

282. Article 1757(2) should be read together with Article 1759. The result of this cumulative reading is: even when the situation of the creditor amounts to anticipatory breach within the meaning of Article 1757(2), the debtor shall perform his or her obligations (instead of suspending performance) where the creditor produces securities sufficient to guarantee that he or she will perform his or her obligations.

In certain situations provided in Article 1757, therefore, the debtor may refuse to perform an obligation until the other party performs his or her part or produces sufficient security. The party who is entitled to suspend performance may, in certain cases, unilaterally cancel the contract. But the remedy of unilateral cancellation is different from the remedy to suspend performance, though the circumstances under which they are available might overlap.

283. Article 1748 stipulates that a person is entitled to reduce the extent of his or her obligation in response to the fact that the other party has not discharged his or her obligation in line with the agreement. A party is, in principle, entitled to refuse accepting delivery of things that do not conform in quality or quantity with the terms of the contract. This does not, however, apply to cases where the thing to be delivered is fungible. In such cases, partial disparity in quality or quantity between what has been actually delivered and what has been agreed in the contract is not a valid ground for refusal to take delivery of the things, unless this is essential to the creditor or has been expressly agreed. Performance that does not conform to the quantity agreed in the contract should be distinguished from partial performance. In the latter, the debtor has paid part of his or her debt on the understanding

that he or she would pay the remaining debt in the future. On the other hand, in the former, the debtor has offered the delivery of a thing not as a partial performance of what is agreed but as a substitute performance. The substitute is not, however, in the nature of the thing but in quality and quantity. In such cases, therefore, the creditor may not refuse accepting such delivery. The creditor is, however, entitled to proportionately reduce his or her own performance or, where he has already performed, claim damages. This is what is called the remedy of reducing price.

II. The Defence of Incapacity and Defects of Consent

284. A contracting party could refuse to perform not only when the other party has not performed (in certain cases) but also when he or she was incapable or his or her consent was defective at the time of formation of the contract. The parties to a contract must be capable or must have given consent free from mistake, fraud, and duress. Otherwise the contract is not valid. The party who was incapable or whose consent was defective is entitled to require the invalidation of the contract. Invalidation enables such party to claim back the money or property that has exchanged hands. The law requires actions for invalidation to be brought within a certain period of time. However, when no money or property has exchanged hands, the party entitled to request the invalidation of a contract could refuse to perform his or her obligation. Therefore, refusal to perform on the ground of incapacity or defect in consent can be considered as a self-help remedy.

III. Lien and Set-off

A. Lien

285. Lien is a self-help remedy in which a creditor retains an ordinary corporeal chattel belonging to the debtor until the latter performs. However, for the creditor to assert this there must be clear textual basis in the law. This means that a lien is not a general remedy available to all kinds of creditors. One such instance where a lien is available is in the case of agency. Article 2224 provides, 'until the payment of the sums due to him by reason of the agency, the agent shall have a lien on the objects entrusted to him by the principal for the carrying out of the agency'. Lien is also specifically recognized in contracts of sale and bailment:

> Art. 2320: Obligation of the seller
> (1) Where the buyer is late in taking delivery of the thing or in paying the price, the seller shall ensure the preservation of the thing at the buyer's expense.
> (2) He may retain the thing until he has been indemnified by the buyer for the expenses he incurred in preserving the thing.
> Art. 2321: Obligation of the buyer
> (1) Where the thing sold has been received by the buyer, he shall, where he intends to refuse it, ensure its preservation at the seller's expense.

(2) He may not return the thing to the seller without further formality.
(3) He may retain the thing until he has been indemnified by the seller for the expenses he incurred in preserving the thing.
Art. 2794: Lien
The bailee may retain the chattel until all monies due to him in consequence of the bailment have been paid in full.

The creditor may assert a lien on those things, belonging to the debtor, that he or she possesses properly in connection with the contract but not on those things that he or she unjustly deprived the debtor of.

B. Set-off

286. Set-off is a mechanism of discharging one's obligation, without actually performing it, at the expense of losing one's right to ask performance of another obligation from the debtor. Article 1831 provides, 'where two persons owe debts to one another, set-off shall occur and the obligations of both persons shall be extinguished'. Set-off occurs when certain conditions are fulfilled: both debts must be money debts or must relate to a certain quantity of fungible things of the same species and both debts must be liquidated and due (Article 1832). For the purpose of set-off, it is not required that the two debts be contractual or that they be equal in amount. There are circumstances in which set-off cannot occur even when the above conditions are fulfilled. According to Article 1833, set-off will not occur: 'where the special nature of the obligation requires that the creditor be actually paid, as in the case of maintenance or wages necessary for the livelihood of the creditor and his family, or the obligation is owing to the State or municipalities or the obligation is to restore a thing of which the owner has been unjustly deprived or the obligation is to return a thing deposited'.

287. Article 1836 provides, 'the debts shall extinguish each other as from the day when they both exist and to the extent of the amount of the lesser debt'. The phrase 'as from the day when they both exist' means as from the day when both of the debts become liquidated and due. Although this article seems to suggest that set-off occurs automatically, Article 1838 clearly provides, 'set-off shall not occur unless the debtor informs the creditor that he intends to make a set-off' and 'the court shall not have regard to set-off unless raised'. Therefore, Ethiopian law is different from other laws such as Belgian law, which allows automatic set-off by operation of the law and the English law, which requires a court action. It is, however, similar to German law.

288. The parties are entitled to exclude the possibility of set-off. Article 1839 provides, 'the debtor may in advance waive his right to make a set-off'. As an extension of this freedom of the parties, Article 1840 provides, 'set-off may occur in cases not provided by law where the parties agree'. David remarked that the agreement of the parties to make set-off in conditions not provided by law is subject

to mandatory provisions of the law and hence it is not possible to derogate from the negative conditions provided in Article 1833.[1]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 88.

289. In Ethiopian law, set-off can also occur by judicial decision. Inspired by Article 1243 of the Italian Civil Code, Article 1841 provides two such possibilities: 'where one of the debt is not liquidated, the court may hold that a set-off has been made to the extent of such amount of the debt as is admitted' and 'where one of the debts is not liquidated but can be liquidated without delay, the court may suspend judgment against the debtor whose debt is liquidated until the other debt is liquidated'.

§5. Forced Enforcement

I. Specific Performance

290. When one of the parties fails to perform his or her obligation, the other can request the court for forced enforcement. The court could either order the debtor to perform according to the contract (specific performance) or authorize the performance of the contract at the expense of the debtor (substituted performance). On this point Ethiopian law takes the common law approach.[1] Article 1776 provides, 'specific performance of a contract shall not be ordered unless it is of special interest to the party requiring it and the contract can be enforced without affecting the personal liberty of the debtor'.

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 58.

291. The remedy of specific performance is not available to a party if it is not of special interest to that party. From the illustrations provided by the drafter, it seems that specific performance can be ordered only when the person cannot get the property or work from any other place. In this regard, the distinction between unique and non-unique things could be considered in deciding whether the obligation to give could be enforced by an order of specific performance.

In addition to being of special interest to a party, specific performance is available only when it does not affect the personal liberty of the debtor. The requirement that specific performance must not affect the liberty of the debtor seems to suggest that only obligations to give could be subject to the remedy of specific performance. This is because, in obligation to do or not to do, specific performance affects the liberty of the debtor.

Despite the strict requirements in the Civil Code that tend to restrict the application of specific performance to obligations to give only, the Civil Procedure Code seems to suggest that the remedy of specific performance is not determined by reference to the form of the obligation involved. All forms of obligations could be enforced by an order of specific performance. In case of obligation to do or not to do, the Civil Procedure Code embodies mechanisms of putting pressure on a defaulting debtor.

II. Astreinte

292. The availability of the remedy of specific performance should be seen together with the procedures for enforcing such order. This is particularly true in obligations to do or not to do. Foreign courts put pressure on the debtor to perform in several manners. One such manner is the imposition of astreinte, a daily fine for delay in performance.

293. There is no express provision in the Ethiopian Civil and Civil Procedure Codes that allows the imposition of a daily fine for delay in performance. If the debtor has wilfully failed to comply with the order of specific performance, Article 389 of the Civil Procedure Code empowers the court to order his or her arrest and detention in civil prison for a period of time not exceeding six months. The purpose of this detention is as much to put pressure to perform on the debtor as a punishment for contempt of court.

294. If, despite the pressure put on the debtor in the form of civil prison, the debtor has failed to comply with the order of specific performance, Article 400 of the Civil Procedure Code empowers the court to execute the order by the attachment and sale of his or her property and the court may, out of the proceeds, award to the decree holder such compensation as it thinks fit. Therefore, it is now clear that the availability of specific performance as a remedy of non-performance depends ultimately on the willingness of the debtor. If the debtor has willingly failed to observe the order of specific performance, the maximum the court can do is to order his or her detention. If that has not put enough pressure, then the court can only order the satisfaction of the order by awarding compensation. The amount is that which the court thinks is fit. But there is no limitation that the amount of the compensation should be the same as that amount which the court could have granted had it refused to grant specific performance. Hence the possibility of civil imprisonment and an award of compensation (the amount of which is freely determined by the court) are mechanisms provided in the Civil Procedure Code for putting pressure on the debtor to comply with the order of specific performance.

III. Seizures, Attachment and Sale of Property

295. Where specific performance involves delivery of movable property, Article 399 of the Civil Procedure Code provides that the order could be executed by the seizure and delivery of the property to the creditor. Similarly, where specific performance involves immovable property, the property shall be delivered by removing any person who refuses to vacate the property. This might involve removing or opening any lock or bolt or breaking open any door or doing any other act necessary for putting the creditor in possession.

296. Where specific performance involves payment of money, the method of enforcement is the same as damages. In this regard, Article 394 of the Civil Procedure Code provides that every decree for the payment of money may be

executed by the attachment and sale of the judgment debtor's property. The Civil Procedure Code provides detailed rules on the procedures of attachment and sale of a property.

IV. Substituted Performance

297. Article 1777 provides the rule on substituted performance: '(1) the creditor may be authorized to do or to cause to be done at the debtor's expense the acts which the debtor assumed to do' and '(2) the creditor may be authorized to destroy or to cause to be destroyed at the debtor's expense the things done in violation of the debtor's obligation to refrain from doing such things'. Provisions of such nature are also found in other legal systems. The Egyptian law authorizes the creditor to use the remedy of substituted performance without the authorization of the court in case of emergency. However, the drafter wrote that such possibility was not advisable to include in the Ethiopian Civil Code.

298. What is the remedy of the debtor where the creditor refuses to take delivery of the thing or where delivery is not possible because the creditor is not known or there is a doubt as to who the creditor is or the debtor cannot deliver the thing for a reason within the control of the creditor? Article 1779 provides, 'where the creditor refuses without good cause to accept the thing offered to him, the debtor may deposit the thing at the risk and expense of the creditor in a public warehouse or deposit bank or in any other place named by the court of the place where payment is to be made'. The same is true (except that the debtor is not required to give notice) where the creditor is not known or there is a doubt as to who the creditor is or the debtor cannot deliver the thing for a reason within the control of the creditor.

§6. Cancellation

299. The essence of cancellation as a remedy for non-performance lies in its legal effect. Cancellation has the immediate effect of reinstatement; that is, the parties would be taken to a position that would have existed had there been no contract. Ultimately, it results in extinction of contractual obligations. Cancellation is normally a judicial remedy. The cancellation of a contract must be requested from a court. Under certain circumstances, however, cancellation takes place automatically by operation of law. In addition, in certain exceptional circumstances the Civil Code authorizes unilateral cancellation.

I. Judicial Cancellation

300. The Ethiopian law of contracts recognizes the sweeping and retroactive effect of cancellation and hence does not allow cancellation whenever there is non-performance. The Civil Code provides that the court should consider the interests of the parties and the requirement of good faith. This means that the contract can

be cancelled only when the interests of the parties and the requirement of good faith demand doing that. It is not clear when the interests of the parties require cancelling the contract. Nor is what good faith requires clear form the text of the Civil Code.

In addition to the guidance that courts should consider the interests of the parties and the requirement of good faith, the Civil Code stipulates that the contract will not be cancelled unless the non-performances relates to a fundamental provision in the contract. Elaborating on this, Article 1785(3) provides: 'no contract shall be cancelled unless its essence is affected by non-performance and it is reasonable to hold for such reason that the party requiring cancellation of the contract would not have entered into the contract without the term which the other party has failed to execute being included'.

II. Unilateral Cancellation

301. The general rule that only the court can decide on the cancellation of a contract is based on the principle that a person should not take the law in his or her own hands. However, in certain cases, the creditor can unilaterally declare the cancellation of a contract. Such cases are provided in Articles 1786–1789:

> Art. 1786: Cancellation by a party 1. Under the contract
> A party may cancel the contract where a provision to this effect has been made in the contract and the conditions for enforcing such provision are present.
> Art. 1787:2. Expiry of time limit
> A party may cancel the contract where the other party has failed to perform his obligations within the period of time fixed in accordance with Articles 1770, 1774, or 1775(b).
> Art. 1788:3. Performance 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.
> Art. 1789:4. Party refusing performance
> (1) A party may cancel the contract where the other party informs him in an unequivocal manner that he will not carry out his obligations under the contract.
> (2) The party who intends to cancel the contract shall place the other party in default and the contract shall not be cancelled where the party in default produces within fifteen days securities sufficient to guarantee that he will perform his obligations at the agreed time.
> (3) Notice shall not be required and the contract may be cancelled forthwith where a party informs the other party in writing that he will not perform his obligations.

III. Automatic Cancellation

302. A contract could be cancelled automatically by operation of the law. Such instances are provided in Articles 1814 and 1872:

Article 1814: Duty to opt
(1) The party who is entitled to require the invalidation of the contract or to cancel the contract shall, where he is so asked by the other party, without delay answer whether he intends to confirm or to cancel the contract.
(2) Notwithstanding any proof to the contrary, the contract shall be deemed to be cancelled where answer is not given in due time.
Article 1872: Condition subsequent
(1) A contract whose cancellation depends on the occurrence of an uncertain event shall be effective forthwith.
(2) It shall cease to be effective where the event occurs.

IV. Effect of Cancellation

303. The essence of cancellation as a remedy for non-performance lies in its effect. The ultimate effect of cancellation is extinction. Therefore, for an aggrieved party, it serves as definite release from his or her obligation. The immediate effect of cancellation is reinstatement. The parties would be reinstated in a position that would have existed had there been no contract between them. Therefore, for an aggrieved party who has already performed his or her obligation or incurred costs in connection with the contract, cancellation involves reinstating the party to an economic position that he or she would occupy had it not been for the contract.

Reinstatement is to be made by returning the thing exchanged before the invalidation of the contract. If that is not possible, because either it is impossible or it affects the interest of third parties in good faith or it entails a serious inconvenience or disadvantage, reinstatement will be made by the payment of an equivalent sum of money.

§7. Damages

304. Damages are the principal remedy of non-performance under Ethiopian law. Damages can be claimed alone or together with specific performance or cancellation. The rules of the Civil Code on the amount of damages are influenced more by the English common law than by the laws of the continental legal system. The key provision regarding the amount of damages is contained in Article 1799:

Art. 1799: Normal amount of damages
(1) Damages shall be equal to the damage which non-performance would normally have caused to the creditor in the eyes of a reasonable person.
(2) The nature of the contract, the profession of and the relations between the parties and any circumstances known to the debtor which surrounded the making of the contract shall be taken into consideration in assessing the amount of damages.

The drafter of the Civil Code stated that Article 1799 is inspired by the English case of *Hadley v. Baxendale*, albeit with some modifications: ‘although the formula

of Article 1799(1) is inspired by the English rule derived from the case of *Hadley v. Baxendale*, the Code does not accept all the consequences that have been deduced from that rule in England. In particular, it seemed that the "reasonable man" called to say what injury the non-performance would "normally" cause the creditor ought to take account not only of the nature of the contract, but also of all other circumstances known to the two parties, on the basis of which it ought to be considered that they contracted'.[1] The following scenarios provided by the drafter illustrate the scope of the rule of normally foreseeable damages under Ethiopian law:

(1) A is to deliver 10 tonnes of coal to B, a private individual, on October 15. It is normal to foresee that if B does not receive the coal from A, he will buy it from C. A owes B the difference between the price set in the contract and the price that B had to pay C.
(2) A sells 400 kg of coffee to B. It is normal to think that B is a merchant and that he will resell the coffee at a certain profit. B will obtain as damages the amount of this profit that the failure by A to perform the contract has lost him.
(3) A undertakes to transport B's trunk to a particular destination. The trunk is lost. It is reasonable to think that it has a certain value in light of its weight and that it contains personal effects rather than precious objects. The court will award as damages the value of the objects that one could reasonably expect to find in the trunk or the value of the objects that B proves to have in fact put in the trunk as long as it was not unreasonable for him to put them in without warning A especially.
(4) A makes a contract with B for the repair of a turbine. It is normal to think that if the repairs are not made in time, A will be injured somewhat: he will have to use more expensive machinery or hire additional labourers. But it is not normal to think that the mill will be totally stopped and that A will be liable to third persons with whom he had contracted who were in turn prevented from performing their obligations.

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 73.

305. One of the exceptions provided for the principal rule of normally foreseeable damage relates to situations where the actual damage incurred is less than what is normally foreseeable. In such cases, the actual damage instead of the normally foreseeable damage is to be paid (Article 1800). The drafter illustrates this exception as follows:

(1) A is to send B's trunk by ship X. Breaching his obligation, he sends it by ship Y and the trunk arrives three weeks later than the time provided in the contract. Generally A would owe damages for this delay, but if he proves that ship X sank with all its cargo and that B's trunk would have been lost if it had been sent on ship X, he will not be liable to B for damages.
(2) A is to turn an apartment over to B on October 1. He does not do so until November 1. A proves that B would have left the place unoccupied and would not have used it before November 1 in any case. A is not required to pay B damages.

306. The second exceptional circumstance where actual damage is paid instead of normal damage (even though the former is greater than the latter) is provided in Article 1801 of the Civil Code:

> Art. 1801: Greater damage
> (1) The amount of damages shall be equal to the damage actually caused to the creditor where the debtor on entering into the contract was informed by the creditor of the special circumstances owing to which the damage is greater.
> (2) The provisions of sub-art. (1) shall apply where non-performance is due to the debtor's intention to cause damage or to his gross negligence or grave fault.

The following scenarios provided by the drafter illustrate the scope of the above provision from the Civil Code:

(1) A informs B, in giving him a machine part to repair, that this part is of strategic importance and that the whole factory, or a part of it, will be shut down until the part has been replaced. B undertakes to repair the part within forty-eight hours. Instead, he keeps it for four days. He is liable for the injury caused by the closing of the factory during the two days of delay in performing his obligations.
(2) B is warned of the same circumstances, but only on the day after he agreed to his obligations. He is not liable for the special injury suffered by A, since he, B, could not foresee it at the time the contract was made.
(3) B, warned of these special circumstances the day after he entered into the contract, gives priority in his work to repairs that are not urgent, thus showing a disregard for the injury that will be suffered by A. He must compensate A fully for the injury suffered.

§8. Limitation of Actions

307. Ethiopian law provides a period of time after the expiry of which a contractual right is limited. This is known as extinctive prescription. Part of the Civil Code dealing with property provides another kind of prescription, acquisitive prescription, a means of acquiring a new right. This section is concerned with extinctive prescription.

The first question that can be raised here is as to whether the period of limitation found in the Civil Code is a limitation of action (as in the case of France) or a limitation of right (as in the case of Italy). Limitation of action precludes the possibility of enforcing a right by bringing a court action; however, the right holder can assert it as a counter-claim or may invoke self-help remedies, if there are any. On the contrary, limitation of right extinguishes an obligation (right) and hence the right cannot be enforced in any manner. David wrote:

> The formula of the French Civil Code is that all actions are barred if not brought within the time established by the Code. The Ethiopian Code preferred the formula found in the Italian Civil Code, which provides that all rights are

> subject to a ten-year limitation. This makes it clear that at the end of ten years the possibility of raising a right as a defence to another action is precluded as well as the possibility of asserting the right in an affirmative action. The right created by the contract disappears by limitation; it cannot be asserted in any way.

From the above comment it appears that what the drafter intended to incorporate in the Ethiopian Civil Code is the limitation of right, found in the Italian Civil Code, as opposed to the limitation of action as it is embodied in the French Civil Code. This contradicts, however, the spirit and text of the code. First, the section of the Civil Code on the matter is entitled 'limitation of action'. Second, Article 1845, which provides the principal rule of prescription, bars only actions. Third, Article 1850 recognizes the possibility of exercising a right on any available pledge, even if the right of action is barred. Last, Article 1809 provides that a party who was incapable or gave a defective consent may refuse to perform, even if his or her right of action to invalidate the contract is barred. For the above four reasons, it can be argued that Ethiopian law accepts limitation of action, at least as far as contractual obligations are concerned.

What does one make of the above quote from the drafter? There are two possible explanations. First, it can be said that the intent of the drafter is not correctly translated into words and since the text of the Civil Code is clear, one cannot resort to the above quotation in order to determine the intention of the drafter. Second, it might not even be what the drafter has intended to do. This is because the above quote is taken from a book translated from French into English by another author and the translator might have himself created that error.

308. Article 1845 provides, 'unless otherwise provided by law, actions for the performance of a contract, actions based on the non-performance of a contract and actions for the invalidation of a contract shall be barred if not brought within ten years'. Instead of providing a longer period of limitation (e.g., thirty years) and allowing exceptions of shorter periods, based on presumptions of payment, the drafter opted for ten years and avoided adding numerous exceptions. However, the formulation of Article 1845 is open-ended; law could provide shorter or even longer periods.

As far as actions for invalidation of contracts are concerned, we have two periods of limitation. The first is the ten-year period in Article 1845. The second is the two-year period in Article 1810: 'no contract shall be invalidated unless an action to this effect is brought within two years from the ground for invalidation having disappeared' and 'where a contract is unconscionable and the party injured was of age, the action shall be brought within two years from the making of the contract'. Regarding their relationship, David wrote:

> Western legal systems differ in the time limits that they fix, as well as in the point from which the limitation is calculated. The Code adopts a very short time limit, two years from the day on which the ground for invalidation disappears. In practice, the only case where this limitation is likely to be important is where the invalidity results from a vice in consent, since normally this is the only case where the ground for invalidation would disappear. Since other

> cases are not covered by Article 1810, their solution depends on the general provision on limitation of actions. Therefore, the invalidity of acts done in performance of the contract can be invoked as long as the action to invalidate these acts is not barred by the limitation that extinguishes all actions.

Article 1808 provides two groups of grounds for invalidation of a contract. The first set of grounds relate to consent and capacity of the parties. And for such actions, the two-year period is provided. And for the other set, which relates to the legality and formality of the contract, the ten-year period is provided. The relationship is therefore a matter of rule and exception. In addition, Article 1845 serves as the maximum limit for actions for invalidation.

309. The ten-year period of limitation starts to run, according to Article 1846, 'from the day when the obligation is due or the rights under the contract could be exercised'. This provision is likely to create a problem of interpretation. This is because the due date and the date beginning from which a right under a contract could be enforced are different dates. A party can enforce his or her rights under the contract only after having given a default notice, and a default notice can only be given only after the debt is due. This means there are two different starting points, and depending on at which point one has started counting, a party's action for invalidation of a contract, for enforcement of a contract, or the action based on the non-performance of a contract could or could not be barred. Assume that there is a contract between A and B under which the obligation of A is due on 6 November 1990. On 7 November 1990, B served A with default notice stating that he will not accept any performance after one month. On 5 December 2000, B brought a court action for damages. This raises a question as to whether the action is barred by the ten-year period of limitation. The result depends on whether it is the due date, 6 November 1990, or the day beginning from which the party can enforce his right, that is, 7 December 1990, that should be taken into account. If one takes the due date as the starting point, the action is barred. If, on the other hand, one takes 7 December 1990, the action could be entertained. The problem is that both of the starting points are recognized under Article 1846. David's commentary on the article seems to avoid the problem as it uses the conjunction 'and' instead of 'or', which has been used in the text of the law.

310. Regarding annuities, Article 1847 provides, 'the period of limitation shall run from the day when the first payment not made was due'. The importance of this provision is not in the date on which the period of limitation starts to run but on the effect:

> Assume, for example, that the beneficiary can require payments on April 1 and October 1 each year throughout his life. How does the period of limitation work if the debtor makes no payment after October 1, 1954 and the beneficiary waits until 1970 to assert his claim to all post-1954 payments? Should he be told that he loses his right to the payments due between October 1954 and October 1969 because these payments have been due for more than ten years, but allowed to collect the money due for the 1960 and the years following. Or

> should we say that since he has waited more than ten years to assert his right to payments due, he has lost this right itself and so cannot collect either the past amounts due or any in the future on this contract? The Code had to choose and opted for the second solution, following Article 131 of the Swiss Code of obligations: All right to claim payments is barred ten years after the debtor ceased paying money due under the annuity.[1]

1. R. David, *Commentary on Contracts in Ethiopia* (Addis Ababa: AAU, 1973), 73.

311. According to Article 1848, 'the period of limitation shall not include the day from which such period begins to run' and 'the action shall be barred where the last day of the period of limitation has expired without having been used'. 'Where the last day of the period of limitation is a holiday at the place of payment, the action shall be barred on the next working day.'

312. Regarding interruption of the period of limitation, Article 1851 provides, 'the period of limitation shall be interrupted where: (a) the debtor admits the claim, in particular by paying interest or instalments or by producing a pledge or guarantees; or (b) the creditor brings an action for the debtor to discharge his obligations'. Article 1851(a) is not an exhaustive list in the sense that 'any act of the debtor indicating that he considers himself bound by the debt will constitute a recognition of the debt'. Regarding sub-point (b) of the above article, it seems apparent from the text of the provision that bringing a court action is sufficient in order to interrupt the period of limitation. However, the drafter suggests the contrary:

> A court action interrupts the period of limitation only if the debtor receives notice of it. Where this has happened, it is not essential that the action have been brought before the proper court. Even if it is brought in the wrong court, it will serve as a notice of default and the Code states that the default notice is sufficient to interrupt the period of limitation. This system is similar to that of the French law (Civil Code, Article 2244) and Italian law (Civil Code, Article 1943) and less strict than the Swiss Code (Code of Obligations, Article 135), whose complications are thus avoided.

What is the effect of interruption? This is stated in Article 1852, which provides 'a new period of limitation shall begin to run upon each interruption' and 'such period shall be of ten years where the debt has been admitted in writing or established by a judgment'. The article, according to the drafter, is designed 'in conformity with the provisions of the Swiss Code of Obligations (Article 137) and the Italian Civil Code (Articles 2945 and 2953)'. This article is ambiguous in the sense that it specifies the effect of interruption in terms of the particular method (where the debt is acknowledged in writing or established by a judgment) that has interrupted the period of limitation, and it is not clear what would be the effect of the interruption where the method is other than those stated in the article (where, e.g., the period of limitation is interrupted by the payment of interest or instalment or any other conduct that indicated admission of the debt by the debtor).

313. The Civil Code provides one important general exception with respect to the defence of the period of limitation, and that pertains to situations where there is a special relationship between the debtor and creditor. According to David, this exception is unique to the Ethiopian Code; no other code has a corresponding provision. The exception, which is stated in Article 1853, provides 'the court may set aside a plea based on limitation where it is of opinion that the creditor failed to exercise his rights in due time on account of the obedience he owed to or fear he felt of the debtor to whom he is bound by family relationship or subordination' and 'in such a case, third parties who guaranteed the payment of the debt shall however be released'.

314. Apart from this general exception, the operation of which depends on the discretion of the courts, there is no other limitation on the defence of the period of limitation, not even the requirement to act in good faith. This aspect is expressly provided in Article 1854, which says 'a party may plead limitation notwithstanding that he is in bad faith'. 'One can only hope that a debtor who knows that he should pay a debt will not invoke limitation. But should he be without scruples, the most obvious bad faith on his part will not prevent him from relying on limitation.'

Article 1855 provides, 'the parties may not in advance waive limitation nor may they fix periods of limitation other than those fixed by law'. And Article 1856 provides '(1) a party may waive limitation after it has become effective' and '(2) the court shall not have regard to limitation unless pleaded'.

315. One of the issues that arises relates to the relationship between the rules on the period of limitation and the rules of the Civil Code, which presume debts to have been paid if a certain period of time (six months or two years depending on the kind of debt) has lapsed since they fell due. In *Housing Agency v. Bironi Atikpa*, the Cassation Division of the Federal Supreme Court ruled by majority that the two doctrines are different and hence rules on one cannot be applied regarding the other. In this case, the applicant brought a court action in the lower court against the respondent claiming debts related to rents for houses. The respondent did not appear either in the lower court or the Supreme Court. The lower court rejected the claim on the ground that Article 2024 presumes debts of this nature to have been paid if two years have lapsed since the debt fell due. The applicant argued that the lower court had committed a fundamental error of law. In particular, the applicant argued that the court invoked, contrary to what Article 1856(2) provides, the period of limitation on its own motion in order to bar the claim. So the Cassation Court took as the main issue whether the presumption of payment embodied in Article 2024 is applicable when the defendant did not appear in court. The Supreme Court decided as follows:

> The applicant took the rules on presumption of payment in Article 2024 and those on period of limitation as similar and argued that the court should not have invoked the presumption of payment on its own motion. However, the court did not accept this argument because the presumption embodied in the Civil Code is different from that of period of limitation provided in Article 1845 and other articles of the Civil Code. Period of limitation bars an action from

being brought in a court and entertaining the substantive merits of the claim. On the other hand, presumption (including the presumption of payment in Article 2024) has the effect of only transferring the burden of proof from one party to another and hence does not bar examining the merits of the claim. Article 1856 prohibits the court from raising the issue of period of limitation unless it is raised by the defendant. However, this does not apply to the issue of transferring burden of proof by way of presumption. The applicant's argument that the rule provided with respect to period of limitation should also be applicable to the case of presumption of payment is not consistent with the spirit, purpose and clear text of the law and hence not acceptable.

It should be noted here that the Supreme Court did not expressly discuss the purpose of the law despite its ruling that the argument of the applicant contradicts the purpose of the law. There are two possible purposes of limiting the right of individuals by a time period. The first has to do with ensuring certainty and predictability in transactions. Unless there is a time limit after the lapse of which the right cannot be enforced, people do not feel secure to do whatever they like with respect to their property. And this will adversely affect investment. And the other reason is that whenever a person is sued, he or she must be given an opportunity to defend him- or herself. And meaningful defence requires access to evidence. Allowing a party to bring a court action at any time is limiting the right of the other party to meaningful defence. This is because as time lapses the availability and credibility of evidence diminishes and hence an action should be brought within a certain period of time. If one looks at the first reason, it has a public aspect, and hence the period of limitation should not be waivable and should also be raised by the courts even though it is not pleaded by any of the parties to the dispute. In addition, not only the right to bring a court action should be barred but also the right itself should be extinguished. However, the provisions of the Civil Code as discussed above indicate that it is the limitation of action not the limitation of right that is incorporated in Ethiopian law. What is more, the defence of limitation of action is private; it can be waived after it has become effective, and the court cannot raise it by its own motion. Therefore, one can say that of the two possible reasons for the period of limitation, the one that informs the provisions of Ethiopian Civil Code is the second one: that it is designed to ensure the right of the other party to meaningful defence.

Part II. Specific Contracts

Chapter 1. Agency

§1. Generally on Agency

316. Agency is a relationship between two parties, principal and agent, in which the agent has the authority to act on behalf of the principal in performing juridical acts. Article 2179 provides that such authority could emanate from the law or a contract. The legal effects of acts performed by the agent depend on whether he or she is a direct or indirect agent. A direct agent acts in the name of the principal and hence his or her acts affect the principal directly. On the other hand, an indirect agent acts in his or her own name but on the account of and for the benefit of the principal. In this case, the acts of the agent affect the principal only indirectly.

317. Law of agency is a part of the law of contracts that deals with issues pertaining to not only the agency relationship but also the relationship among other parties involved in transactions with the agent. The part of the Civil Code dealing with agency consists of five chapters. Chapter 1 contains general provisions regarding sources of agency, effects of agency, conflict of interests, abuse of power, and effects of ratification and repudiation. Chapter 2 contains provisions regulating such matters as formation and termination of contracts of agency and rights and duties of the agent and the principal. Chapter 3 governs a special kind of agency that is known as commission agency. Chapter 4 is concerned with issues relating to the power of the court to grant, to one person, the authority to act on behalf of another. Finally, Chapter 5 deals with the problem of unauthorized agency. The Commercial Code contains provisions regarding commercial agents, commercial representatives and travellers, commission agents, managers, and brokers. Therefore, in determining the applicable agency rule, one must determine the source of the agent's authority. If the agent's authority emanates from the law, one must look for relevant provisions of the law from which the authority of the agent emanates. On the other hand, if the agent's authority emanates from a contract, before applying Chapter 1 or for that matter Chapter 3, one must determine the specific kind of agency. It may be commission agency or other kinds of agencies governed by the Commercial Code. If so, one must first determine whether there is a relevant and contrary provision in the Commercial Code. Failing this, one can resort to the Civil Code.

318. The law gives a person the authority to act on behalf of another in many instances. The common case is where a person is incapable and hence must be

represented by someone else, his or her tutor or guardian, in the management of his or her property and money. In addition, liquidators are often appointed to act on behalf of a deceased (in the law of succession) or an organization (in the law of business organizations) in dealings with third parties. Likewise, the authority to act on behalf of another may be given by the court to someone (called a curator), where the person to be represented is unable to appoint an agent for several reasons, such as illness and absence (Articles 2253 and 2255(1)). The power of the curator is determined by the court but should be of an urgent nature (Article 2255(2)). To protect the interest of the person represented, the court ought to make arrangements to ensure that the curator will execute any sentence that may be passed upon him or her (Article 2255(3)). One such measure might involve requiring the curator to produce sufficient securities.

319. Article 2199 defines agency as 'a contract whereby a person, the agent, agrees with another person, the principal, to represent him and to perform on his behalf one or several legally binding acts'. The characteristic obligation in a contract of agency is the obligation of the agent to act on behalf of the principal. From this it follows that contract of agency could be onerous or gratuitous. The obligation of the principal to reimburse expenses incurred by the agent is one that is imposed by law and hence cannot be considered as a consideration moving from the principal to the agent.

320. Issues of agency arise only to the extent that the acts performed by the agent are legally binding acts. As a rule, a person is entitled to perform juridical acts personally or through an agent. In certain circumstances, however, a person might be compelled to act personally. One such circumstance is where the law requires so. For example, the law does not permit marriage by representation unless it is 'allowed by the Ministry of Justice where it has ascertained that there is a serious cause and the person who intended to do so has fully consented'.[1] Another circumstance relates to contracts where personal performance by the debtor has been expressly agreed or is essential to the interests of the creditor.[2]

1. Article 12, Revised Family Code Proclamation No. 213/2000.
2. See para. 238.

321. General contract law governs issues pertaining to formation of contracts of agency. Agency is concluded when one (usually the agent) accepts an offer made by another (the principal). As a rule, therefore, silence of the offerree does not amount to acceptance.[1] But Article 2201(2) provides an exception (in addition to those provided in general contract law): 'the appointment as an agent shall be deemed to be accepted, unless it be immediately refused, where it relates to functions which the agent carries out in an official capacity or professionally, or where he holds himself out publicly for such functions'. Therefore, under three circumstances, the silence of the agent when an offer is made to him or her amounts to acceptance. The first is where the agent carries out the function of representation in an official capacity. The exact nature of such circumstances is not apparent from the text but it might refer to cases such as when a public agency is established to render such

services to the public. If this is the case, then, it is not different from one of the exceptions provided in relation to contracts in general. The second case is where the agent is rendering the representative functions professionally. There are a number of professional agents rendering representative services in various areas. Attorneys are professional agents. Thus, when a client makes an offer to an attorney, the silence of the attorney is considered acceptance. The third case is where the agent 'holds himself out publicly for such functions'. It must be noted in this connection that a person cannot be said to have made an offer where he or she advertises to the public that he or she can represent people in legal affairs.[2] In such cases, an offer is made when an intending principal has communicated his or her intention to the advertiser, who is free to accept or reject the offer. However, failure to reject the offer immediately (silence) amounts to acceptance.

1. See para. 94 regarding the exceptions in general contract law.
2. See para. 87 regarding the distinction between offer and invitation to treat.

322. A contract of agency can be either express or implied. But Article 2180 provides, 'where the law requires that a contract be made in a prescribed form, the authority to enter into such contract on behalf of another shall be given in the same form'. For example, a contract of partnership must be written. Consequently, a contract of agency that authorizes the agent to make a contract of partnership needs to be written. In this regard it should be noted that a law that has been issued after the Civil Code requires that powers of attorneys should be registered to be valid.[1]

1. See para. 117.

323. Where the law is the source of agency, determining the limits of the powers of an agent is a relatively easy task. More often than not, the law provides the limits. At times, this might require interpreting the law. However, the task would be problematic where the source is a contract. A problem arises when the agency relationship is not written or oral but implied from surrounding circumstances. Even if the contract is express, it may be the case that the scope of agency is not expressly fixed in the contract.

324. Although the contract does not expressly provide any power, the agent might still possess implied powers. This is because, according to Article 1713, parties are bound by the terms not only expressed in the contract but also implied from custom, good faith, and the nature of the transaction.[1] Similarly, Article 2202(1) provides, 'where the scope of the agency is not expressly fixed in the contract, such scope shall be fixed according to the nature of the transaction to which it relates'. For example, B authorizes C to represent him in the sale of a house. The transaction to which this authorization relates is known but the powers of the agent are not expressly fixed. In such a case, C possesses those implied powers that are necessary to complete the transaction. Thus, C can negotiate, sign, and perform a contract of sale on behalf of B.

1. See paras 189–193.

325. If the authority of the agent is expressed in general terms, without specifying the transaction to which it relates, the agent possesses only the power to perform acts of management. Acts of management are not defined in the Civil Code but Article 2204 gives some non-exhaustive items of acts of management: acts done for the preservation or maintenance of property; leases for terms not exceeding three years; collection and discharge of debts; investment of income; and sale of crops, goods intended to be sold, or perishable commodities.

326. Specific and express authority is required when the agent is meant to perform acts other than those of management (acts of disposal) (Article 2205(1)). Acts of disposal include: alienating or mortgaging real estate, investment of capitals, signing bills of exchange, effecting settlement, consenting to arbitration, making donations, and bringing or defending an action (Article 2205(2)).

327. If the power of the agent is specifically expressed, the affairs specified therein are the limits. This is without losing sight of the rule that the agent may conduct the 'natural consequences' of those specified acts 'according to the nature of the affair and usage' (Article 2206). Accordingly, it can be argued that an attorney has the implied power of collecting the spoils of the litigation on behalf of his or her client. Likewise, the Supreme Court held that an agent who is expressly authorized to alienate and transfer the ownership of a house has also the implied power to borrow money by mortgaging the house on behalf of the principal.[1]

1. *Ethiopian Commercial Bank v. Shawel Gebre and Shewarekab Teshome* [2008], Federal Supreme Court, Cassation File No. 17320.

§2. Obligations of the Agent

328. The relationship between the principal and the agent is essentially contractual. (This is without losing sight of cases where the authority emanates from the law and hence the resulting relationship between the agent and the principal will be non-contractual.) Consequently, the principal and the agent have those obligations and rights that form the content of the contract of agency. The content of any contract can be express or implied. The same applies to contracts of agency. As a result, the principal and the agent have those obligations that are expressly provided in the contract or implied from good faith, custom, equity, and law.

329. The express obligations of the principal and the agent are to be determined from the express agreement of the parties, written or oral. In a contract of agency as well, the principal and the agent have freedom to choose their respective obligations and to decide on collateral issues that may arise in their relationship. As a result, it may be difficult for the law to predict and explain in advance what possible obligations the agent and the principal might have consensually assumed. Of course, general contract law could govern matters of interpretation of the contract of agency and common terms such as time, liability, conditions, and so on. However, agency law provides the minimum essential obligation that should be agreed between the

parties, in the absence of which the rules of the law of agency do not come into operation. Such obligation is characteristic obligation. The characteristic obligation is the obligation of the agent to represent the principal and perform one or several juridical acts on behalf of the principal. The fact that the parties have not agreed on the obligation of the principal is no bar to the existence of the contract of agency.

330. The specific juridical acts that should be performed by the agent need not be expressly mentioned in the contract of agency. Where the power of the agent is not expressly provided, it shall be determined based on the nature of the transaction involved and when there is no specific transaction involved, the agent is a general agent, having power to perform only acts of management.[1]

1. See paras 324 and 325.

331. It is difficult to generally determine whether the obligation of an agent is that of means or result. It can, however, be argued that if the agent has contracted with a principal to perform certain acts, he or she is under a contractual duty to perform them. This includes the duty to perform those acts that are necessary for the completion of the transaction (where the power is not expressly provided but the appointment relates to a certain transaction) or the duty to perform acts of management (in the case of general agent).

332. Article 2208(1) provides one of the implied obligations of an agent: 'the agent shall act with the strictest good faith towards his principal'. The duty of good faith is not unique to agency relationships. In every contract, parties have the duty to act in good faith toward each other.[1] This is one of the implied obligations stated in Article 1713. The agent is obliged to act not only in good faith but also with the strictest standard. Therefore, the difference is a matter of degree. The standard of behaviour required from agents, in this regard, is higher than that of parties in other contracts.

1. See paras 73–79.

333. The problem with the duty of good faith is that it is too amorphous to serve as a standard of conduct for the agent. In some cases, the law tries to give it a relatively fixed shape and form. For example, Article 2194(2) provides (emphasis added) that: 'the agent shall not be liable where he acted in good faith *not knowing the reason by which his authority had come to an end*'. Similar attempts of making the concept of good faith specific are found in the Civil Code. The principal purpose of the duty of good faith is to avoid injustices resulting from the literal application of contracts. To this extent, therefore, some kind of ambiguity is tolerable, as it gives freedom to the courts so that they are able to render a just decision for a particular set of facts. On the other hand, too much generality and ambiguity is not tolerable as it affects certainty and predictability, which the law is expected to ensure in the area of business. It cannot also serve as a standard of conduct for the agent, who will be left without guidance in a situation where he or she must decide whether a particular course of action is contrary to good faith. The law of agency attempts to operationalize the obligation of good faith by giving illustrative duties.

These include: the duty to disclose information; the duty to act in the exclusive interest of the principal; the duty of confidentiality; the duty to hand over money and property of the principal; and the duty to account.

334. Agency is a special relationship. It requires complete transparency between the parties. That explains why the agent is obliged to disclose information to the principal. What kind of information is the agent required to disclose? Obviously it could not be all kinds of information. There should be some sort of qualification on this duty. This is for several reasons. First, it is impossible for the agent to disclose all kinds of information. Second, disclosure has its own costs and the result would be that the agent does not perform his or her main task because he or she would be preoccupied by the task of disclosure. This result obviously is not in the interest of the principal. Nor is it in the interest of the agent. Third, without qualification, the agent could not decide whether certain information needs to be disclosed or not. Fourth, some information may, if the principal acquired it on the basis of this duty, affect the personal business interest of the agent. Consequently, Article 2208(2) provides, 'he shall disclose to his principal any circumstance which could justify the revocation of the agency or a variation of its terms'. Therefore, the standard to be used by the agent in deciding what information to disclose and by the court in determining whether certain undisclosed information amounts to breach of the obligation is: whether such circumstance would, if disclosed to the principal, justify the revocation of the agency or a variation of its terms.

In general contract law, the extent of the duty to disclose remains uncertain. However, it can be argued that even if there is such duty, it applies to the formation of contracts. That is, parties are required to disclose information or circumstances that they have knowledge of at the time of the formation of the contract. On the other hand, in the law of agency, the agent has such duty not only at the time of formation of the contract but also during the time in which the contract of agency is in existence. It is not clear, however, if this obligation continues after the agency relationship has come to an end.

335. Another duty of good faith imposed on the agent is the duty to avoid conflicts of interest. Article 2209(1) provides, 'the agent shall act in the exclusive interest of the principal and may not, without the latter's knowledge, derive any benefit from any transaction into which he enters in pursuance of his authority'. Accordingly, an agent is not allowed to receive payment from both parties to the transaction without both parties knowing about it. Similarly, an agent who is authorized to purchase goods at a certain price and who managed to obtain them at a lower price is not entitled to retain the difference.

A consequence of this obligation of the agent is that the principal is entitled to cancel contracts in which the interests of the principal conflict with that of the agent provided that the third party knew or should have known of that (Articles 2187 and 2188). In a case that was recently examined by the Supreme Court, an agent concluded a contract of sale of a house and a vehicle belonging to the principal.[1] The principal requested the cancellation of this contract on the basis of Article 2188(1) on the ground that the buyer is the wife of the agent and hence the principal claimed that this contract should be treated as a contract that the agent has concluded himself.

The buyer argued that at the relevant time she was not married to the agent and even if she was married, they are still two different persons. She provided evidence indicating that the agent and the buyer were married ten days after the contract of sale. The trial and appellate courts did not accept the argument of the principal. The Supreme Court, on the contrary, ruled that both the trial and appellate courts committed an error of law. The agent has the duty to avoid conflict of interest, and contracts where the interest of an agent conflicts with that of the principal may be cancelled at the request of the principal when the third party knew or should have known about the conflict of interest. In this case, even though at the time when the contract of sale was made the agent and buyer were not married, the evidence is that they were planning to do that shortly. This suggests that the agent may not act in the exclusive interest of the principal and the court also held that the buyer knew about this conflict of interest.

1. *Kasechi Tekalegn v. Hailemariam Abebe and Tigist Duresa* [2008], Federal Supreme Court, Cassation File No. 32241.

336. The general duty of good faith requires the agent not only to disclose material information to the principal but also not to use, to the detriment of the principal, any information obtained by him or her in the performance of his or her duties as agent. The information could be that which the principal confided to him or her or which the agent is authorized to collect or discover. The duty to disclose requires the agent to be transparent. And the duty of confidentiality encourages the principal to be transparent.

337. The obligation of the agent to act with strictest good faith toward the principal also includes the duty to account. Article 2210(1) provides, 'the agent shall account to the principal for all sums received by him and all profits accruing to him in the course of his employment, notwithstanding that the sums he received were not owed to the principal'.

338. The duty of good faith, though necessarily required, is not sufficient to solve an incentive problem inherent in agency relationships. The problem is manifested in the agent not taking proper care and applying necessary skills in the affairs of the principal where the beneficiary of the transaction is not the agent but the principal. With a view to minimize this problem, it seems, the law provides for a duty of diligence. This is a requirement that the agent ought to apply proper care and skill in the affairs of the principal. The degree of diligence expected of the agent depends on whether he or she is remunerated or not. Article 2211(1) provides, 'the agent shall exercise the same diligence as *a bonus paterfamilias* in carrying out the agency as long as he is entrusted therewith'. However, if the agent is not remunerated, he or she will be liable only when he or she fails to apply to the affairs of the principal the same degree of care that he or she applies to his or her own affair. Consequently, an agent is liable if he or she contracted with a person whose insolvency he or she knew or ought to have known at the time of the making of the contract.

339. General contract law requires personal performance where this is essential to the creditor or expressly agreed.[1] This means that delegation is allowed as a rule

and prohibited exceptionally. An agency relationship is created by and based upon the confidence of one person in another. And hence the agent is in principle prohibited from delegating his or her authority to another person. Article 2215 provides the exceptions to this. The first is where the agent was authorized by the principal to appoint a substitute. The second is where such authorization is implied from usage. The last is where, because of unforeseen circumstances, the agent could not act personally and there is no time to inform the principal about this. In such cases, the agent is liable only with regard to the care with which he or she has selected the substitute agent (Article 2216(2)). On the other hand, if the agent appoints a substitute when he or she is not authorized to do so (by the principal, expressly or impliedly, or by the law), he or she is liable for the acts of the substitute as if they were his or her own (Article 2216(1)).

Whether or not the agent has the power to appoint a substitute does not matter insofar as the relationship between the substitute and the principal is concerned. What matters is whether 'the substituted agent had reasons to believe that the agent was authorized to appoint substitute'. In such cases, therefore, 'the relationship between the principal and the substituted agent shall be as though the substituted agent had received authority to act as agent directly from the principal' (Article 2217). In other cases, the provisions of the Civil Code governing unauthorized agency govern his or her relationship with the principal.[2]

1. See para. 238.
2. See paras 48–53 regarding authorized agency.

§3. Obligations of the Principal

340. The most important right that an agent possesses against his or her principal is the right to be remunerated for his or her services. This right stems from the contract, and therefore the agent is entitled to receive remuneration for his or her services only when there is an express or implied term in the contract of agency providing for this remuneration. The fact that this right is contractual means that not all agents are entitled to it.

Article 2219(2) provides, 'the court may reduce the remuneration fixed in the contract where it appears excessive and out of proportion to the services rendered by the agent'. This provision has its counterpart in other legal systems. The power of the court in cases where the remuneration fixed in the contract appears to be low is not provided in the Civil Code. This may be understandable in cases where the agent has possibly higher bargaining power than the principal. However, if the court has the power to assess the value of the services rendered by the agent and reduce the remuneration to make it proportional, it may also be argued that it should also assume the power to increase the remuneration where it appears to be low. And this argument seems to be in line with developments in other legal systems where greater protection is being given to agents because it is assumed that agents are economically inferior to principals and hence lack the necessary negotiating power to reach mutually advantageous terms.

If there is not any indication to that effect in the contract, the agent is not entitled to remuneration. However, where the agent carries out the representation within the

scope of his or her professional duties or where such remuneration is customary, the agent is entitled to the amount of remuneration that is agreed between them or fixed by the court in conformity with recognized rates and usage.

341. Article 2221 provides, 'the principal shall advance to the agent the sums necessary for carrying out the agency'. As a corollary to this obligation, the principal must reimburse the agent for 'expenses incurred by the agent in the proper carrying out of the agency'. It could be argued that 'expenses incurred in the proper carrying out the agent' are those that the agent has incurred while acting within the scope of his or her power. It should be noted in this regard that the fact that the transaction that the agent was authorized to carry out was not successful is not a valid ground for the principal to refuse payment due to the agent (Article 2223(1)).

The principal is required to pay also interest on such outlays and expenses as from the day when they were incurred without it being necessary to place the principal in default.[1]

1. See paras 267–270 regarding the requirement of default notice in the general law of contracts.

342. The principal is liable to the agent, where the latter has incurred damages while carrying out the agency (Article 2222(2)). What is more, the principal should release the agent from liability that the latter incurs in the interest of the principal (Article 2222(1)). The importance of this rule can be seen in the case of undisclosed agency, where the agent agrees to carry out certain transactions for the benefit of the principal but without disclosing the identity of the principal to third parties. In such cases, the agent may rely on this rule so that he or she will be relieved of those contractual obligations that he or she has incurred in the interest of the principal. It remains to be seen if this rule also means that the principal will be vicariously liable when the agent commits a tort while representing the former.

§4. Effects of Direct Representation

343. The cornerstone of agency law, Article 2189(1), provides, 'contracts made by an agent in the name of another within the scope of his power shall be deemed to have been made directly by the principal'. The agent is not a party to such a contract. As a result, the agent is not liable to either the third party (for the default of the principal) or to the principal (for the default of the third party).

344. The principal can request the invalidation of a contract entered into by the agent with the third party on the ground that the consent of the agent was defective (Article 2189(2)). But the principal cannot invoke the incapacity of the agent, where such incapacity occurred before the formation of the contract of agency. On the other hand, if the incapacity occurred after the formation of the contract of agency, it results in the termination of the agency (Article 2230).

345. The third party can invoke deceitful practices by the agent against the principal. Article 2183(3) provides, 'any fraud committed by the agent might be set

up against the principal by the third party who entered into the contract with the agent'. Had it not been for this, the third party would have been required to establish that the principal knew or should have known about the deceit by the agent and derived a benefit from it.[1]

1. See para. 165 regarding deceit as a ground for invalidation of contracts.

§5. Apparent Authority of the Agent

346. The authority of the agent can be real or apparent. It is real authority if it is created by the agreement of the principal and the agent. On the other hand, the authority is apparent if the person is not in fact authorized but the principal's actions or inactions give the impression to third parties that the former is authorized and third parties have relied upon this impression. Despite the difference in the source of the authority, both apparent authority and real authority have the same effects in such laws as, for example, the English law of agency. On the other hand, in Ethiopian law, apparent authority of the agent results in extra-contractual liability of the principal or the agent and the principal jointly. The principal and the agent are jointly and severally liable, according to Article 2195, where: the principal informed a third party of the existence of the power of attorney but failed to inform him or her of the partial or total revocation of such power; or the principal failed to ask the agent to return the document evidencing the power of attorney and failed to seek a judicial decision to the effect that such document was revoked; or the principal caused – in any other manner, in particular by his or her statements, behaviour, or failure to act – a third party to believe that the person with whom he or she was dealing was authorized to act on behalf of the principal. However, according to Article 2194, it is the principal alone who is liable where the agent has acted in good faith, not knowing the reason by which his or her authority has come to an end.

347. Although apparent authority as a rule has an extra-contractual effect, there are also circumstances where it is treated the same as real authority so far as third parties are concerned. One such instance is provided in the Commercial Code. According to Article 33 of the Commercial Code, a manager is a person who has been authorized, expressly or tacitly, to carry out acts of management and to sign in the name of the trader. Article 35 of the Commercial Code provides, 'in his relations with third parties, the manager shall be deemed to have full power to carry out all acts of management connected with the exercise of the trade, including the power to sign a negotiable instrument'. At first sight, this provision seems redundant, as this has already been indicated in Article 33. However, a closer scrutiny suggests otherwise. A manager, by virtue of his or her appointment only, has powers to carry out acts of management and the signing of a negotiable instrument. But the trader (the principal) may: authorize him or her to perform acts of disposal, in addition to the acts of management, and restrict or limit his or her inherent powers. This can be done in a number of ways: by limiting his or her powers to the management of a branch, by excluding some acts of management out of his or her power domain, or by providing a maximum money value of the acts of management deemed permissible.

The problem as far as third parties are concerned is regarding the restrictions or limitations of the powers of a manager. By the mere fact that a certain person is appointed as a manager, third parties might believe that he or she has the power to perform acts of management and to sign negotiable instruments. And this belief is justified. But what if the powers of a manager are restricted? In such cases, a problem arises. To solve this, the Commercial Code requires that if the power of a manager is restricted or limited to the management of a branch, it should be registered in accordance with the Code. What is more, dismissal of managers should be registered. Article 36 provides, 'the powers of a manager may be limited to the management of a branch; such restriction shall not affect third parties in accordance with Article 121 of this code unless notice of such restriction has been entered in the commercial register'. What if third parties knew by any other means that the powers of the manager were limited? According to Article 121, the limitation of the powers of a manager to the management of a branch or agency and the dismissal of a manager does not affect the rights of third parties in good faith where they have not been registered. Therefore, it is only third parties in good faith that could avail themselves of the provisions of Articles 121 and 36. In this connection, it must be noted that third parties are not permitted to prove that they did not know of a fact entered in the commercial register. And the failure to register these facts does not affect the relationship between the manager and the trader. What if the powers of a manager are restricted in any other manner? In such case, despite the restriction, as far as third parties are concerned, the manager is considered to have full power. There is no legal requirement to enter such facts in the commercial register. And Article 36(2) provides that restrictions other than those in Article 36(1) shall not affect third parties.

348. The scope of a power of attorney is fixed in accordance with the contract of agency. Only those powers of the agent agreed between him- or herself and the principal in the contract of agency can be included in the power of attorney. This means that the power of attorney should exactly conform to the contract of agency, oral or written, regarding the scope of power of the agent. The question that arises in this case is: what would happen if the power of attorney provides that the agent has certain powers that are not originally agreed in the contract of agency? Article 2181(2) provides, 'where the agent informs a third party of his power of attorney, the scope of his authority shall, as regards such third party, be fixed in accordance with the information given to him by the agent'. It follows that whenever the content of the power of attorney does not exactly conform to the contract of agency, it is the power of attorney that should be taken into account in determining whether the agent has acted within his or her scope of power. This is on the condition that the third party has entered into the contract relying on the power of attorney. In such cases, the agent does not have obviously real but apparent authority unless the addition in the power of attorney amounts to variation of the contract of agency.

In one case entertained by the Cassation Division of the Federal Supreme Court, a bank advanced a loan to an 'agent' by taking the house of the 'principal' as a collateral.[1] The bank did so after seeing that the power of attorney was registered and authenticated by the relevant authority. The power of attorney gives the 'agent' the power to borrow money by mortgaging the house of the 'principal'. The official

who authenticated the power of attorney has testified that the 'principal' (owner) was not present at the time of authentication and registration and did not sign the document. Forensic examination also suggests that the signature on the document is not that of the 'principal'. On these bases, the 'principal' (owner) requested the invalidation of the contracts of loan and mortgage. However, when such power of attorney was presented, the Supreme Court held that the bank was not expected to determine whether the signature on the document was really that of the alleged principal. As far as there is a stamp of the authority, authorized to authenticate, the bank can rely on such documents and conclude contracts with the agent. Accordingly, the contracts of loan and mortgage cannot be invalidated by the 'principal' (owner) on the ground that the agent has acted on the basis of a forged document. Such owner can only bring action against the agent and/or the official who authenticated without ascertaining the genuineness of the document (with or without conspiring with the 'agent').

1. *Development Bank of Ethiopia v. Alemneshi Haile* [2008], Federal Supreme Court, Cassation File No. 20890.

§6. Agent and Third-party Relationship

349. The relationship between the agent and the third party depends on whether the agent has acted in the name of the principal and on whether the agent has acted within the scope of his or her power. Article 2189(1) provides that if the agent acted in the name of the principal and within the scope of his or her power, the contract binds the principal. The rights and obligations arising from the contract are those of the principal and the third party. If the agent acted in the name of the principal but outside the scope of his or her power or under an authority that had lapsed, the effect of the agent's act is determined by the principal. Article 2190(2) provides, 'contracts made by an agent in the name of another outside the scope of his power may be ratified or repudiated at his option by the person in whose name the agent acted'.

350. Article 2192 provides, 'where the contract is ratified, the agent shall be deemed to have acted within the scope of his power'. On the other hand, if the contract is repudiated, Article 2193(2) provides, 'the third party having entered into the contract with the agent may demand that the damage caused to him by reason of his having in good faith believed in the existence of a valid authority be made good'. The liability of the agent to pay compensation to the third party could be excluded under two circumstances. First, Article 2196(1) provides, 'except in cases of fraud, a third party who has dealings with the agent may not claim compensation from the agent on the ground that he acted outside the scope of his authority where such third party, prior to entering into the contract, took cognizance of the document evidencing the authority of the agent'. Second, Article 2196(2) provides, 'a third party may not claim compensation where the personal qualifications of the person with whom he has dealings is not essential to him and the agent agrees to be personally bound by the act he has done on behalf of another'.

351. Although the agent has abused his or her authority by exceeding it, the law requires the principal to ratify the contract in certain situations:

> Art. 2207: Obligation to ratify
> (1) The principal shall, where good faith requires so, ratify the act done by the agent notwithstanding that he departed from his terms of reference.
> (2) The provisions of sub-art. (1) shall apply where it is reasonable to admit that, in the circumstances, the principal would have extended the scope of the agent's authority, had he been aware of the situation.
> (3) The agent may not require the principal to ratify where, before acting, he had the possibility of securing authority from the principal or where, after having acted, he omitted forthwith to inform the principal.

§7. Termination of Agency

352. The principal could bring the agency relationship to an end by revoking the authority of the agent. In order to revoke the authority of the agent, the principal is not required to show a good cause. Revocation, renunciation, death, and incapacity could terminate an agency relationship. Article 2226(1) provides, 'the principal may revoke the agency at his discretion and, where appropriate, compel the agent to restore to him the written instrument evidencing his authority'. However, 'the principal shall indemnify the agent for any damage caused to him by the revocation where such revocation occurs prior to the agreed date or under conditions detrimental to the agent' (Article 2227(1)). If the principal has a justifiable ground or the date agreed is for the exclusive interest of the principal, he or she is not required to indemnify the agent (Article 2227(2)).

353. Similarly, Article 2229(1) provides, 'the agent may renounce the agency by giving notice to the principal of his renunciation'. However, 'where such renunciation is detrimental to the principal, he shall be indemnified by the agent unless the latter cannot continue the performance of the agency without himself suffering considerable loss' (Article 2229(2)). This is a remarkable deviation from the rules of general contract law. It has been noted that generally unforeseen circumstances making performance more onerous are not excuses for non-performance, and it is not a defence for the defaulting party against claims of compensation.[1]

1. See para. 248 regarding the defence of force majeure.

354. In addition, the death, incapacity, bankruptcy, or absence of either of the parties, the principal or the agent, terminates the contract of agency (Articles 2230 and 2232). In case of the death, incapacity, bankruptcy, or absence of the agent, 'the heirs or the legal representatives of the agent who are aware of the agency shall inform the principal of these circumstances without delay' (Article 2230(2)). And, 'they shall, until such time as the necessary steps can be taken by the principal, do whatever is required in the circumstances to safeguard the principal's interests' (Article 2230(3)). In case of the death, incapacity, bankruptcy, or absence of the

principal, 'the agent shall in such event continue his management where he had commenced it and there is no danger in delay until the heirs or the legal representative of the principal are in a position to take it over themselves' (Article 2232(2)).

§8. Indirect Representation

355. Indirect representation involves an agent authorized to act on behalf of the principal but in his or her own name. In such cases, the agent personally enjoys the rights or incurs the liabilities deriving from the contract he or she makes with third parties (Article 2197(1)). Consequently, 'third parties shall in such case have no direct action against the principal and may only exercise against him, on behalf of the agent, the rights pertaining to the agent' (Article 2197(2)). The principal is entitled to recover any movable that the agent has acquired while acting in his or her own name but on behalf of the principal. But this is subject to the rights of third parties in good faith (Article 2198(1)). In addition, the principal can proceed against the third party only by substituting him- or herself in the position of the agent (Article 2198(2)).

Chapter 2. Bailment

§1. Bailment in General

356. A contract of bailment is defined, under Article 2779, as 'a contract whereby one person, the bailee, undertakes to receive a chattel from another, the bailor, and to keep it on the latter's behalf'. Contractual as it is, the parties must have consented to the arrangement before the rules of bailment apply in a particular case. Consequently, Article 2805 declares that the rules of bailment do not apply where chattels have been deposited with a person without his or her knowledge or against his or her will, and the person with whom the chattel are thus deposited shall incur no liability as a consequence of the deposit.

However, a person could be considered as a bailee by virtue of law. This is so, for example, where a person has found and taken possession of a chattel (Article 2804).

It should be noted that in an agreement where a person undertakes to receive a chattel and keep it on behalf of another, the contract is not considered bailment if that person has the option, according to the contract, of retaining the chattel on the expiration of the contract by paying its price. In such cases, the rules of conditional sale will govern the relationship (Article 2780(1)). Likewise, the contract is not considered bailment if the person has undertaken to repair the chattel or to transform it. In such cases, the rules of hire of services will govern the relationship between the parties (Article 2780(3)).

It should also be noted that where the chattel entrusted to the person is a sum of money or a certain quantity of consumable goods and the person has been authorized to use them, the contract is not considered bailment. In such cases, the rules of the Civil Code relating to loans of money and other fungibles will govern the relationship between the parties (Article 2782(1)). The person is presumed to have been authorized to use a sum of money where it has been handed over to him or her without being sealed and unclosed (Article 2782(2)).

357. In a contract of bailment, the bailor retains the ownership of the bailed chattel and it is the duty of the bailee to return the chattel to the bailor when the contract is terminated (Article 2781).

The bailee is not entitled to use the chattels without the authority of the bailor (Article 2783(1)). Where he or she does so, the rules governing the letting and hiring shall apply to his or her detriment (Article 2783(2)). The bailor may in particular demand payment of a rent, the amount of which shall be fixed equitably (Article 2783(3)).

358. Consideration is not an essential element of a contract of bailment. Consequently, bailment could be either gratuitous or onerous. Whether the bailee is entitled to remuneration depends on the terms (both express and implied) of the contract. In this regard, Article 2784 directs the courts to consider the professional standing of the bailee and all other relevant circumstances. The implication is that the bailee is entitled to reasonable remuneration even if no such thing is mentioned in the contract where he or she provides these services professionally.

359. The bailor may demand at any time the return of the chattel (Article 2786(1)). The bailee is required to answer this demand unless a period of time is fixed in the contract and this has been done in his or her favour (Article 2786(1)). In the event that there is such a period of time, the bailor ought to indemnify the bailee for the expenses he or she incurred (Article 2786(2)). It should be noted in this regard that where the bailment is made in the interest of a third party and such third party has informed the bailor and the bailee of his or her agreement, the bailee is required not to return the chattel to the bailor without the third party's consent (Article 2789).

Likewise, the bailee is entitled to require the bailor at any time to take the chattel back unless there is a time fixed in favour of the bailor (Article 2787(1)). The court may, however, grant the bailor a reasonable period within which to take the chattel back (Article 2787(2)).

In returning the chattel, the bailee is required to return also the profits that he or she had collected from the chattel (Article 2791).

What if the bailee has died and the heirs have alienated the chattel? In such events, the heirs are required to pay damages to the bailor. However, the amount of damage depends on whether or not the heirs were in good faith at the time. If they were in good faith, they are required to pay only the price that they have received for the chattel (Article 2795).

360. In addition to remunerating the bailee when the contract expressly or impliedly provides so, the law also imposes additional obligations on the bailor.[1] One such obligation is that of indemnifying the bailee 'for all expenses incurred for the preservation of the chattel' (Article 2793(2)). In addition, he or she is obliged to compensate the bailee 'for all damage the bailment may have caused him unless such damage is due to the bailee's default or that of a person for whom the bailee is liable' (Article 2793(2)).

1. See para. 358 regarding remuneration.

§2. Bailment in Trust

361. Bailment in trust is defined under Article 2796 as a bailment 'where a chattel, the legal position of which is in dispute or uncertain, is entrusted to a third party, the trustee, who keeps it and returns it to its lawful owner when the doubt has been resolved'.

The trustee is to be appointed by agreement between the parties; failing such agreement, the trustee will be appointed by the court (Article 2797). The trustee will not return the chattel except with the agreement of all interested parties or upon an order of the court (Article 2798).

§3. Bailment in Distress

362. Article 2800 defines bailment in distress as a bailment 'where a person is compelled by urgent necessity to entrust to another the custody of chattels . . . in order to preserve them from imminent danger'.

Departing from the principle of freedom of contract, the Civil Code provides that the person to whom the chattels are offered may not refuse to accept them without good cause (Article 2801(1)). He or she may, however, demand remuneration where the bailment lasts for more than one week (Article 2801(2)). The court may reduce the amount of the remuneration required at the time of bailment (Article 2801(3)).

§4. Warehousing

363. Article 2806 defines a contract of warehousing as 'a contract whereby one party, the warehouseman, being duly licensed for the purpose by the public authorities, undertakes to receive and store goods on behalf either of the bailor or of the purchaser of the goods or of a person who received them in pledge'. In its nature it is different from an ordinary contract of bailment in two ways. First, the warehouseman is a licensed trader. Second, the goods are to be stored and kept on behalf of not only an owner but also a person who receives them in pledge. The Civil Code contains a number of provisions dealing with this special kind of contract.

364. As opposed to ordinary bailment, the warehouseman may not, before the expiry of the agreed time period, demand the bailor to take the goods (Article 2809). When the time period agreed expires, the warehouseman is entitled to sell the goods after putting the bailor in default (Article 2811(1)). If there is no period of time stipulated in the contract, he or she is authorized to sell the goods after one year from the date of deposit (Article 2811(2)). This is also without losing sight of the right of the warehouseman to make sale when the goods are in danger of decay (Article 2811(3)).

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Chapter 3. Aleatory Contracts

§1. Gambling Contracts

365. Article 713(2) of the Commercial Code provides: 'games and gambling shall not give rise to valid claims for payment'. However, where a person pays a debt arising from a game or gambling, he or she cannot claim the sum back so long as no fraud has been committed.[1]

1. Article 713(3), Commercial Code. See also para. 59 regarding moral obligations.

§2. Contracts for Periodical Payments

366. Article 2490(1) defines a contract for periodical payments as 'a contract whereby a party confers on the other the right to demand the periodical payment of a certain sum of money or of a certain quantity of fungible things in exchange for the alienation of a thing or the assignment of capital'. The stipulation for such payments may also be agreed on as a counterpart of a liberality (Article 2490(2)). The annuity may be set up in perpetuity or as a life annuity (Article 2492). The provisions of the Civil Code that govern loan of money and other fungibles apply to contracts for periodical payments (Article 2494).

I. Perpetual Annuity

367. Article 2496 provides the principal rule that the annuity set up in perpetuity may be redeemed by the debtor notwithstanding any contrary provision. However, the parties may agree that the redemption shall not take place before the death of the creditor or the expiration of a period of time not exceeding ten years (Article 2497).

The debtor may be compelled to redeem the annuity under certain conditions. One such condition is where the debtor ceases to fulfil his or her obligations for two years and another is where his or her insolvency is judicially established (Article 2498).

In the case of redemption of the annuity, the debtor is required to pay the creditor a sum corresponding to the capitalization of the annuity effected on the basis of the rate of the legal interest (Article 2499(1)). Any agreement in this connection that has the effect of increasing the liability of the debtor is not valid (Article 2499(2)).

II. Life Annuity

368. A life annuity may be set up on the life of the creditor, of the debtor, or of a third party (Article 2500(1)). It should be noted that the rights emanating from such contracts transfer to the heirs of the creditor when the annuity is set up on the life of the debtor or a third party (Article 2503). Unless otherwise agreed, it shall be deemed to be set up on the life of the creditor (Article 2500(2)). The life annuity

may be set up on the lives of several persons (Article 2501(1)). It may also be stipulated to be revertible, on the death of the creditor, to the life of another person (Article 2501(2)).

It should be pointed out that the contract is not valid if none of the persons on whose lives the annuity is set up is alive on the day of the making of the contract (Article 2502(1)). The same is true when the annuity is revertible to another person when that other person is not alive at the time of the making of such contract (Article 2502(2)). The following are some of the provisions governing the special case of a life annuity:

> Art. 2504: Usurious rate of arrears
> (1) Where the life annuity is set up in exchange for payment of a capital sum, the arrears due by the debtor shall not exceed twenty percent of this capital.
> (2) They shall be at the rate of twelve percent where a higher rate has not been fixed in writing or a rate exceeding twenty percent has been fixed.
> Art: 2505: Cancellation of Contract
> The person for whose benefit the life annuity has been set up may require the cancellation of the contract where the settler does not give him the sureties stipulated for its performance.
> Art. 2506: Non-payment of arrears
> (1) Mere failure in the payment of arrears of the annuity shall be no ground for the person in whose favour it has been set up to require the repayment of the capital or to re-enter into the goods alienated by him.
> (2) He may only seize and cause to be sold the goods of his debtor and to have ordered or agreed to the setting aside, out of the proceeds of sale, of a sum sufficient to secure the payment of the arrears.
> Art. 2507: Absence of power of redemption
> (1) The debtor may not free himself of payment of the annuity by offering to repay the capital and by renouncing to claim the recovery of the arrears paid.
> (2) He shall pay the annuity during the whole life of the person or of the persons on whose life or lives the annuity has been set up, whatever the length of the life of these persons and however onerous the payment of the annuity may become.
> Art. 2508: Risks
> (1) The life annuity shall accrue to the creditor in proportion to the number of days that the person on whose life it is set up has lived.
> (2) Where it has been agreed that it will be paid in advance, the arrears shall accrue from the day when the payment was to be made.
> Art. 2509: Assignment and attachment
> (1) Unless otherwise agreed, the creditor may assign his rights.
> (2) He who sets up an annuity gratuitously in favour of a third party may stipulate at the time when he sets up the annuity that it cannot be seized by the creditors of such third party.
> Art. 2510: Proof of claim
> The creditor of a life annuity may only demand the arrears by proving his existence or that of the person on whose life it has been set up.

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Chapter 4. Sale

§1. Definition of Sale

369. Sale is defined, in Article 2266, as 'a contract whereby one of the parties, the seller, undertakes to deliver a thing and transfer its ownership to another party, the buyer, in consideration of a price expressed in money which the buyer undertakes to pay him'. The essential characteristic of sale lies in the obligation of the seller to deliver and transfer ownership and in the obligation of the buyer to pay a price. Other obligations of the parties are consequential in the sense that they are implied into the contract (by law), unless clearly excluded by the agreement of the parties.

Contracts for the delivery of corporeal chattels to be produced or manufactured pose a special problem, as it is possible for such contracts to be regarded as sales or contracts of service. In this regard, Article 2269 provides that such contracts are regarded as that of sale 'where the party who undertakes delivery is to provide the main materials necessary for the manufacture or production'.

§2. Obligations of the Parties

I. Obligation to Deliver

370. The characteristic obligation of the seller is to deliver the thing sold. Delivery takes place in accordance with the contract and the default rules of the law. It consists of the handing over of not only the principal subject of the contract but also its accessories (Article 2274). It may be the case that the quantity of the goods is specified approximately (e.g., in terms of 'about a certain quantity' of specified goods). In such cases, the seller has the discretion to decide the exact quantity to be delivered (Article 2275(1)). However, this benefit might be given to the buyer where 'it appears from the circumstances that such stipulation has been included in the contract in the sole interest of the buyer' (Article 2275(1)). In any case, the difference between the amount stated by way of approximation and the actual amount delivered may not be greater than 10% where the sale relates to the whole cargo of a ship and 5% in all other cases (Article 2275(2)).

371. Time of delivery is ascertained from the will of the parties as stated in the contract and as interpreted by the court. However, if time of delivery cannot be ascertained in this manner, the seller is required to deliver the thing as soon as he or she is requested by the buyer (Article 2276). It could happen that the parties have agreed on the time of delivery but not in precise terms. For example, they could stipulate that delivery takes places within a specified period of time. In such cases, the seller determines the exact date of delivery 'unless it appears from the circumstances that it is for the buyer to do so' (Article 2277).

The law also presumes that delivery and payments are to be made simultaneously (Article 2278(1)).[1] Consequently, the seller is entitled to refuse delivery until

he or she is paid (Article 2278(2)). This is, of course, a rebuttable presumption (Article 2278(1)).

1. See paras 280–282 regarding the rules on contracts in general.

372. The rules of the Civil Code regarding place of delivery in a contract of sale are not significantly different from the rules on contracts in general (see paragraph 244). According to Article 2279, unless otherwise agreed, the seller shall deliver the thing at the place where, at the time of the contract, he or she had his or her place of business or, failing such, his or her normal residence. Exceptions to this are the following:

> Art. 2280: Exceptions
> (1) Where the sale relates to a specific thing and the parties know the place where such thing is at the time of the contract, the seller shall deliver the thing at such place.
> (2) The provisions of sub-art. (1) shall apply where the contract relates to fungible things selected from a stock or a specified supply or to things which are to be made or produced in a place known to the parties at the time of the contract.

II. Warranty against Dispossession

373. The seller is obliged to not only deliver the thing but also take 'the necessary steps for transferring to the buyer unassailable rights over the thing' (Article 2281). A necessary implication of this duty of the seller is that he or she will be liable in cases where the buyer is dispossessed (totally or partially) by 'a third party exercising a right he enjoyed at the time of the contract' (Article 2282). This is not, however, an absolute warranty; the law limits the scope of this warranty. First, the seller is not liable for the dispossession of a buyer (unless he or she has expressly undertaken to do so) where the latter knows, at the time when the contract was formed, that he or she risks dispossession (Article 2283(1)). Even in such cases, the seller would be liable where the buyer is dispossessed 'due to the falling in of a pledge made by the seller' (Article 2283(2)).

Second, in cases where the buyer is sued for dispossession, he or she is required to join the seller as a party to such proceedings (Article 2285(1)). If the seller is not duly joined to such proceedings, he or she will not be liable for the eventual dispossession of the buyer provided that he or she can show that the proceedings might have had more favourable issue had he or she been joined in due time (Article 2285(3)).

Third, the seller is not liable where the buyer is dispossessed because of his or her own act (Article 2285(2)). The same is true if the buyer has acknowledged the right of the third party outside judicial proceedings and consequently is dispossessed, unless he or she can show that even the seller could not have prevented the dispossession (Article 2286).

374. The liability of the seller for the dispossession of the buyer by a third party emanates from the law; it is not contractual. However, it should also be noted

that the parties may by agreement exclude or restrict the ambit of such warranty. The law provides some mandatory and gap-filling provisions regarding agreements excluding or restricting the legal warranty against dispossession. First, such agreements ought to be construed restrictively (Article 2284(1)). Second, unless expressly excluded, such agreements are understood not to exclude the obligation of the seller to return the price to the buyer in case of dispossession (Article 2284(2)). Third, a provision excluding or restricting the warranty is invalid where the seller has intentionally concealed that a third party had a right to the thing or when dispossession is due to the act of the seller (Article 2284(3)).

III. Warranty against Defects and Non-conformities

375. In addition to making delivery and transfer unassailable rights of ownership, the seller is also responsible for non-conformities and defects of the things delivered (Article 2287).

Not all non-conformities are, however, warrantable. Article 2288 provides that 'the thing is deemed not to conform to the contract where: (a) the seller delivered to the buyer part only of the thing sold or a greater or lesser quantity than he had undertaken in the contract to deliver; or (b) the seller delivered to the buyer a thing different to that provided in the contract or a thing of a different species'. This must be read together with the rules of general contract law.[1]

Likewise, it should be noted that not all defects are regarded as warrantable. In relation to this, Article 2289 stipulates that 'the warranty shall become effective where the thing: (a) does not possess the quality required for its normal use or commercial exploitation; (b) does not possess the quality required for its particular use as provided expressly or impliedly in the contract; or (c) does not possess the quality or specifications provided expressly or impliedly in the contract'.

1. See paras 240–242 regarding related rules in the general law of contracts.

376. Article 2290 provides that whether there is any warrantable non-conformity or defect is to be determined 'having regard to the conditions of the thing at the time of the transfer of risks'. As an exception, however, the seller is held to his or her warranty if the non-conformity or the defects occur at a later date and are caused by the seller or a person for whom he or she is liable (Article 2291(1)). The buyer is required to examine the thing at the earliest opportunity that he or she has and should do so in the presence of the seller or his or her representative if he or she intends to avail him- or herself of the results of the examination (Article 2291(3)).

If a latent warrantable defect or non-conformity is discovered later or if a defect is discovered through normal examination but in the absence of the seller or his or her representative because such examination was made necessary because the thing is likely to perish, the buyer is required, without delay, to give notice to the seller indicating the nature of the defect or non-conformity (Articles 2291(3), 2292 and 2293(2)). Failure to give such notice in due time and indicating precisely the nature of the defect and non-conformity denies the seller his or her right to hold the seller liable unless the seller admitted their existence or the seller has intentionally

misled the buyer (Article 2293(1) and (3)). It should also be noted that in cases where the contract includes a period of time for which the seller warrants that the thing is free from defects and conforms to the terms of the contract, it suffices for the buyer to notify the seller about defects before the expiry of such period of time (Article 2294).

377. Article 2295 provides that the seller is released from this warranty if he or she can establish that at the time of the contract the buyer knew of the defects. In such cases, any express contractual clause that provides warranty for such defects is invalid. Likewise, the seller is not liable for what are called obvious defects, those which 'the buyer could overlook them only as a result of gross negligence' (Article 2296(1)). However, the seller will be liable if he or she has expressly declared that the thing was free from defects or has expressly warranted certain qualities (Article 2296(2)).

It should be noted that the warranty against defects and non-conformities is implied by law into contracts of sale, and hence the parties are entitled to exclude or restrict this. However, any provision excluding or restricting the warranty is of no effect if the seller has fraudulently concealed from the buyer the defects in the thing (Article 2297).

378. The law provides a special period of limitation for the buyer to bring an action against the seller on the basis of warranty against defects and non-conformities. Such period is one year from having given notice to the seller (Article 2298(1)). This period of time may not be shortened by the agreement of the parties (Article 2298(2)). If the seller gives warranty for a certain period of time, the action should be brought within one year from the day when this period expires (Article 2298(3)).

It should be noted that even when one year has passed without the buyer bringing a court action against the seller and he or she has not paid the price, he or she may set off against the demand for payment a claim for reduction in price or damages (Article 2299(2)).[1]

1. See para. 307.

IV. Obligation to Pay Price

379. The buyer has the obligation to pay the price and take delivery of the thing (Article 2303(1)). The obligation to pay the price includes the obligation to take any step provided by the contract or by custom to arrange for or guarantee the payment of the price (Article 2304(1)). Thus, the buyer may be compelled, according to circumstances, to accept a bill of exchange, to open a credit account, to provide bank security, or otherwise (Article 2304(2)).

380. A question that may arise in some cases in relation to price is what will happen if the parties have not expressly agreed on the price of the thing that is sold? Does it follow that the object of the contract is not sufficiently defined and hence

the contract is void? Price is such an essential element of a contract of sale that it is normally expected that the parties would provide for the precise amount of the price or a way of determining such a price. If they failed to do that, there are two important provisions of the law that may be used to fill the gap. Article 2306 provides, 'if the thing sold is quoted on the market or has a current price, the parties are deemed to have concluded the contract at this price, having regard to the time when and the place where delivery is to take place'. Similarly, Article 2307(1) provides, 'if the sale relates to a thing which the seller normally sells, the parties are deemed to have concluded the sale at the price normally charged by the seller, having regard to the time when and the place where delivery is to take place'.

If the price still cannot be ascertained even after applying such provisions, the contract of sale will be considered invalid. The following are some of the provisions of the Civil Code dealing with the obligation of the buyer:

> Art. 2308: Quantity greater than agreed
> (1) Where the seller delivers a quantity greater than that provided in the contract, the buyer may accept or refuse such quantity as exceeds the agreed quantity.
> (2) Where he accepts the whole quantity, he shall pay a price increased in proportion to the quantity delivered to him.
> Art. 2309: Place of payment
> (1) The buyer shall pay the price at the place fixed in the contract.
> (2) Where no place is fixed, he shall pay the price at the address of the seller.
> (3) Where the contract provides that the price shall be paid when the thing or documents are handed over, the price shall be paid at the place where, under the contract, such thing or documents are to be handed over.
> Art. 2310: Date of Payment 1. Sale for cash on delivery
> Where payment is due on delivery, the buyer shall not be bound to pay the price until he had had an opportunity to examine the thing.
> Art. 2311: Credit sale
> Where the contract relates to a sale on credit and no date of payment is fixed, the buyer shall pay the price as soon as the seller demands it after the date when delivery is to be made.
> Art. 2312: Co-operation in delivery
> The buyer shall, where appropriate, take such steps as may be required of him to enable the seller to carry out his obligation to deliver the thing.
> Art. 2313: Taking delivery
> The buyer shall, after delivery, take such steps as may be necessary for completing the delivery of the thing.

V. Common Obligations of the Parties

381. Under the Civil Code there is a section covering common obligations of the seller and the buyer, and the provisions therein relate to expenses, duty to preserve, and transfer of risks. The buyer bears the expenses: of a contract of sale; of payment; arising after delivery; and of transport where the thing sold has to be sent

to another place than the place of delivery and if the delivery is not to be carriage free. And the seller bears additional expenses of payment arising from change of address by the seller of his or her place of business or residence after the making of the contract, and expenses of delivery (the cost of counting, measuring, and weighing the thing).

382. The seller has the duty to ensure the preservation of the thing at the buyer's expense if the buyer is late in taking delivery of the thing or in paying the price (Article 2320(1)). The seller has also the right to retain the thing until the buyer has indemnified him or her for the expenses he or she incurred in preserving the thing (Article 2320(2)).

The buyer has the obligation to preserve at the seller's expense where the thing sold has been received by him or her but he or she intends to refuse it (Article 2321(1)). The buyer may retain the thing until he or she has been indemnified by the seller for the expenses incurred in preserving the thing (Article 2321(3)).

383. The basic principle regarding transfer of risks in the sale of goods is that the buyer shall pay the price notwithstanding that the thing is lost or its value altered where the risks are transferred to him or her (Article 2323). The risks shall be transferred to the buyer from the day when the thing has been delivered to him or her in accordance with the provisions of the contract or the provisions of the Civil Code (Article 2324(1)). The risk is transferred upon delivery notwithstanding that the thing delivered does not conform to the contract, where the buyer has neither cancelled or required the cancellation of the contract nor required that the thing be replaced (Article 2424(2)).

Article 2325(1) provides, 'the risks shall also be transferred to the buyer from the day he is late in paying the price'. This is not, however, the case where the sale is related to fungible things, unless the thing clearly designated for the performance of the contract has been especially allocated to the buyer and the seller has sent notice to the buyer to that effect (Article 2325(2)). Where fungible things are of such a nature that the seller cannot set aside part of them until the buyer takes delivery, it suffices for the seller to have performed all the acts necessary to enable the buyer to take immediate delivery (Article 2325(3)).

If a thing that is under voyage is a subject of sale, the risks are transferred to the buyer from the day when delivery has taken place by the thing having been handed over to the carrier (Article 2326(1)). But this is not the case where, at the time of the making of the contract, the seller knew or should have known that the thing had perished or was damaged (Article 2326(2)).

§3. Remedies of Non-performance

I. Forced Performance

384. Non-performance of obligation to deliver: Article 2329 provides 'where the thing has not been regularly delivered, the buyer may demand the forced performance of the contract where it is of particular interest to him'. However, the

buyer cannot demand the forced performance of the contract where the sale relates to a thing in respect of which a purchase in replacement conforms to commercial practice or such purchase can be made by the buyer without inconvenience or considerable expense (Article 2330). The buyer loses the right to demand the forced performance of the contract if he or she fails to inform the seller, within a short period after having ascertained the delay, of his or her intention to demand such performance (Article 2331(1)).

385. Non-conformity or defects: The buyer who has duly given notice of the defects is entitled to require the seller to deliver new things or the missing part or quality of the things where the forced performance of the contract may be demanded (Article 2332(1)). The buyer can also require that the defects be made good by the seller within a reasonable time where the sale relates to a thing that the seller must make or produce on the specifications of the buyer and where such defects can be made good (Article 2332(2)).

386. Non-payment of price: Article 2333 provides that 'where the buyer fails to pay the price, the seller may demand payment unless the sale relates to a thing in respect of which a compensatory sale is imposed by custom'.

II. Cancellation by the Buyer

387. Compulsory date for delivery: The provisions of general contract law that provide for conditions under which a contract may be cancelled apply also to contracts of sale. Therefore, the buyer is entitled to cancellation under these conditions. The principal rule is, therefore, that a buyer is entitled to cancellation of the contract where there is fundamental non-performance. One of the questions here is whether or not delay in delivery by the seller amounts to fundamental non-performance.

The date fixed for delivery is deemed to be a compulsory date where the thing has a market price on markets to which the seller can apply to obtain it (Article 2337(1)). The date fixed by the seller or the buyer, where it is for either of them to fix such date within a period of time provided in the contract, shall also be deemed to be a compulsory date (Article 2337(2)).

Where the date fixed for delivery is not a compulsory date, the court may grant the seller a period of grace within which he or she ought to perform his or her obligations (Article 2338(1)). The buyer may, in the same circumstances, grant the seller an additional reasonable period of time and inform the seller that he or she will refuse the thing upon the expiry of this period (Article 2338(2)). If the seller fails to deliver the thing within such additional period, the buyer may require the cancellation of the contract as of right (Article 2338(3)).

388. Place of delivery: Article 2340 provides that delivery made at a place other than that which the seller is bound to make is not a good ground for cancellation of the contract unless 'the manner in which the contract was enforced constitutes a fundamental breach of the contract'. This contract also will not be cancelled provided that the seller can redeliver the thing within the period of time as is fixed by the contract or by law.

389. Whole ownership not transferred to the buyer: One of the obligations of the seller in a contract of sale is to transfer unassailable right to ownership to the buyer. So the question is, what will happen if a third party has a right over the thing? Article 2341 provides that in such cases the buyer is entitled to cancellation of the contract unless he or she, at the time of the contract, knew of the rights third parties have on the thing. Most important, Article 2341(3) provides that the contract will not be cancelled if the right the third party has over the thing is of small importance and it appears that the buyer would have bought the thing even if his or her attention were brought to it.

390. Dispossession: It is an implied duty of the seller to warrant the buyer against total or partial dispossession by third parties exercising a right that they have at the time of the contract. The question here is whether total or partial dispossession by third parties will entitle the buyer to cancellation of the contract. Article 2342 provides that the contract will be cancelled as of right where the dispossession is total, but in cases where it is partial the court has discretion to decide. However, it should be noted that the court will not order the cancellation of the contract where the dispossession affects only part of the thing of minor importance and it appears that the buyer would have bought the thing had his or her attention been brought to the possibility of later dispossession.

391. Partial delivery: Is partial delivery a ground for cancellation of the contract? Article 2343 provides that in such cases the buyer cannot cancel the contract for the whole unless it appears that he or she would not have entered into the contract had he or she known how it would be executed. In case of delay in the delivery of part of the thing, the buyer may cancel the contract for the whole notwithstanding that the remaining part of the thing is delivered subsequently, where the date of delivery constituted a compulsory date for the whole. Where the buyer is not entitled to cancel or require the cancellation of the contract, he or she may cancel it partially or require that it be partially cancelled and confine him- or herself to paying a price proportionate to the value of such part as has been duly delivered.

392. Defects: Article 2344 provides that the contract may be cancelled where the thing is affected by a defect against which the seller warranted the buyer. However, this contract will not be cancelled if the defect is of small importance and the buyer would have bought the thing had his or her attention been brought to the defect.

III. Cancellation of the Contract by the Seller

393. Non-payment of price: It should be noted that the rules of the general law of contracts are also applicable here regarding conditions where the seller may be entitled to cancellation of the contract because of non-performance by the buyer. In addition to those general rules, Article 2348 provides that the seller may declare the cancellation of the contract where the buyer fails to pay the price and where the right to cancel the contract has been expressly given to the seller in the contract. Where there is no such express agreement in the contract, the seller may cancel the

contract on the expiry of a reasonable period fixed by him or her in the notice placing the buyer in default, where the sale relates to things that are quoted on the stock market or have a current price, or where this right has been expressly given to the seller by the contract. The seller may also declare the cancellation of the contract upon the expiry of the period of grace, where the court has granted such period to the buyer.

In addition, Articles 2349 and 2350 provide for other scenarios where a contract may be cancelled at the request of the seller:

> Art. 2349: Default in taking delivery
> Where the buyer fails to take delivery of the thing on the conditions laid down in the contract, the seller may require the cancellation of the contract where the failure of the buyer justified the fear that he will not pay the price or it appears from the circumstances that taking delivery was an essential stipulation of the contract.
> Art. 2350: Failure to make specifications
> Where the buyer has reserved in the contract the right to decide later on the form, measurements or other details of the thing and he fails to give such specifications at the date agreed as being compulsory or upon the expiry of a reasonable period granted to him by the seller, the seller may declare the cancellation of the contract.

IV. Damages

394. Where the contract is not cancelled, the amount of damage is fixed in accordance with the provisions of general contract law. However, the following additional guiding rules are also incorporated in the Civil Code:

> Art. 2362: Thing having a current price 1. Principle
> (1) Where the contract is cancelled and the thing has a current price, damages shall be equal to the difference between the price fixed in the contract and the current price as on the day when the right to declare the cancellation of the contract could be exercised or on the day following that when the contract was cancelled by the court or as of right.
> (2) Regard shall in addition be had to the normal expenses of a purchase in replacement or compensatory sale.
> (3) The price to be taken into account shall be that on the market where the buyer or seller would, in the normal course of business, buy or sell the thing to which the contract relates.
> Art. 2363: 2. Purchase in replacement or compensatory sale
> (1) Where the buyer has effected a purchase in replacement or the seller has effected a compensatory sale, the price paid for such purchase or obtained for such sale shall be taken into consideration in calculating the amount of damages.
> (2) Such amount may be reduced where the other party proves that the purchase in replacement or compensatory sale has been effected in bad faith or in abnormal business conditions.

Art. 2364: 3. Greater damage
(1) Damages shall be equal to the prejudice actually caused where the party who suffered such prejudice shows that, at the time of the making of the contract, he had informed the other party of the special circumstances by reason of which the prejudice is greater.
(2) The provisions of sub-art.(1) shall also apply where the party shows that non-performance is due to the other party's intention to harm, gross negligence or grave fault.
Art. 2365: Thing having no current price
(1) Where the thing has no current price, damages shall be equal to the prejudice which non-performance would normally cause to the creditor in the eyes of a reasonable person.
(2) Damages shall be equal to the prejudice actually caused where the circumstances mentioned in Art. 2364 have obtained.
Art. 2366: Anticipatory breach of contract
(1) In cases of anticipatory breach of contract, damages shall, where the thing has a current price, be calculated having regard to the market price of the thing on the last day of the period fixed in the contract for the performance of the obligation.
(2) Where no period has been fixed in the contract, damages shall be calculated having regard to the market price of the thing on the day when the right to declare the cancellation of the contract could be exercised.
(3) Damages may however not exceed the price actually paid for a previous purchase in replacement nor the difference between the price fixed in the contract and the price actually received for a previous compensatory sale.
Art. 2367: Dispossession
Where the buyer is dispossessed of the thing, the seller shall, without prejudice to other damages, reimburse him the judicial and extra-judicial expenses of the proceedings he had to institute, with the exception he could have avoided by informing the seller of the proceedings.

§4. Various Forms of Sale

I. Sale of Living Animals

395. Warranty against contagious diseases: On making delivery, the seller shall guarantee that the animal sold by him or her does not suffer from any of the diseases that are listed in Article 2369. And any contractual stipulation contrary to this is of no effect (Article 2370).

In addition, the seller warrants that the animal possesses a quality that makes it fit for the purpose to which it is destined by its nature or under the contract (Article 2371). As opposed to the warranty against contagious diseases, the parties may by an agreement exclude, extend, or restrict this latter warranty (Article 2372).

It should be noted that where the animal suffers from any of the diseases or defects covered by the warranty, the buyer is entitled to request cancellation of the contract (Article 2373). If such animal dies, the loss is borne by the seller and hence the seller will refund the price he or she received (Article 2374).

II. Sale by Sample

396. In a sale by sample or pattern, Article 2377 provides that the qualities of the thing ought to conform to those of the sample or pattern. Where there is discrepancy between the sample and the manner in which the thing is described in the contract, the sample prevails (Article 2377(2)). And if there are differences but no discrepancy, the thing shall combine the qualities of the sample and those of the description (Article 2377(3)).

It should be noted that the contract is not sale by sample or pattern if the seller proves that the sample or pattern was only presented to the buyer by way of information without any undertaking as to conformity (Article 2379).

III. Sale on Trial

397. Sale on trial is an arrangement where contract of sale is concluded only after the thing has been delivered to the seller for trial and the seller has declared his or her acceptance. Within the period of time fixed in the contract or within a reasonable period of time when there is no time fixed, the buyer is expected to declare whether or not he or she accepts the thing (Article 2380). Acceptance of the buyer of the thing delivered could also be implied from the circumstances. For example, acceptance is implied if the buyer fails, after having received delivery of the thing, to declare his or her refusal within the period of time fixed in the contract or within a reasonable period in the circumstances when no time is agreed (Article 2381). In addition, acceptance is implied if the buyer pays without reservation all or part of the price or disposes of the thing otherwise than is necessary to try it (Article 2382).

It should be noted that in such types of arrangements, risks are not transferred to the buyer until he or she has expressly or impliedly accepted the contract despite the fact that the thing has been delivered to him or her (Article 2383).

IV. Sale by Instalments

398. This form of sale involves an arrangement where the price is paid by the buyer through instalments. In such cases, one of the questions that may be raised is as to whether the contract may be cancelled when the buyer is in arrears with one of the partial payments. Article 2384 provides that in such cases the contract may be cancelled only when this right is expressly given to the seller. The effect of cancellation is restitution; the seller will return the payment that he or she has received and the buyer will return the thing that he or she received from the seller. However, according to Article 2385, the seller may claim a fair rent and an indemnity for the wear and tear of the thing. Any agreement that imposes more onerous obligations on the buyer following cancellation of the contract is void.

V. Sale with Ownership Reserved

399. This form of sale involves an arrangement where the ownership of the thing sold remains with the seller (despite transfer of possession) until the price is paid in full. This raises a question as to whether this arrangement affects third parties. Article 2387 provides that this does not affect third parties unless it has been entered in a public register kept for this purpose at the place where the buyer resides. It might be argued that even in the absence of registration, the clause by which the seller retains ownership of the thing might affect third parties whose attention is brought to it otherwise.

Despite the fact that the seller retains ownership of the thing sold, Article 2388 provides that risks are transferred to the buyer upon delivery.

VI. Sale with Right of Redemption

400. This form of sale involves an arrangement by which the seller may redeem, within an agreed period of time (not exceeding two years) or within two years when there is no agreed period of time, the thing that is sold to the buyer (Articles 2390 and 2391). The effect of this clause is that it restricts the ability of the buyer to assign the thing to third parties; however, this clause does not affect third parties unless it has been entered in a public register kept for this purpose at the place where the buyer resides (Article 2392).

VII. Sale with an Obligation to Forward

401. The Civil Code contains some additional rules for contracts of sale where the seller also undertakes to forward the thing to the buyer:

> Art. 2394: Care of transport
> Where the seller is bound by the contract to forward the thing, he shall make, on the usual conditions and by the usual means, the contracts of carriage necessary for the thing to be actually forwarded to the place fixed in the contract of sale.
> Art. 2395: Delivery 1. Principle
> (1) Where the contract of sale implies the carrying of the thing, the delivery shall, unless otherwise agreed, be effected by the handing over of the thing to the carrier.
> (2) Where the seller uses his own means of transport or means of transport hired by him for the purpose of effecting part of the carrying, delivery shall be effected by the handing over of the thing to the carrier with whom the contract of carriage is made on behalf of the seller.
> (3) Where the thing is to be carried by successive carriers and the seller is bound by the contract of sale to enter into one or more contracts of carriage covering the whole transport, delivery shall be effected by the handing over of the thing to the first carrier.

Art. 2396: 1. Thing not intended for the execution of the contract
Where the thing handed over to the carrier is manifestly not intended for the execution of the contract, by reason of an address written thereon or otherwise, the duty to make delivery shall not be deemed to have been carried out unless the seller gave notice of the transport to the buyer and sent him, where appropriate, a document describing the thing:
Art. 2397: 3. Carriage by water
(1) Where the carrier to whom the thing is handed over is required to carry the thing by water, delivery shall be effected by the thing being put on the board or by the ship according to the terms of the contract.
(2) Nothing shall affect the case where the seller may under the contract present to the buyer a bill of lading 'received for loading' or any other document of a similar nature.
Art. 2398: Right of retention of the seller
(1) The seller may postpone the forwarding of the thing until he is paid, where the contract of carriage does not give him the right to dispose of the thing under voyage.
(2) The provisions of sub-art.(1) shall not apply where it has been agreed that delivery would take place at the place of arrival or the price is to be paid after delivery.
(3) Where the seller has forwarded the thing because he had the right to dispose thereof after the beginning of the voyage, he may, until the price is paid, object to the thing being handed over to the buyer at the place of destination.
Art. 2399: Payment against documents
(1) Where a bill of lading or other document has been issued which permits to obtain the delivery of the thing or the possession of which is necessary to be able to dispose of the thing, the payment of the price may only be demanded against transfer of the document provided by the contract or by custom.
(2) In such case, the buyer may not refuse to pay the price on the ground that he was not able to examine the thing.
(3) The obligation to transfer the documents shall be deemed to be an essential provision of the contract where the document is a bill of lading or any other document which permits to obtain the delivery of the thing or the possession of which is necessary to be able to dispose of the thing.
Art. 2400: Stoppage in transit
(1) Where, after having forwarded the thing, the seller comes to know that the buyer has been declared insolvent, he may object to the thing being delivered to the buyer notwithstanding that the buyer is already in possession of the bill of lading or any other documents which permits to obtain the delivery of the thing.
(2) The seller may not object to the delivery where it is required by a third party regularly in possession of the bill of lading or above mentioned document.
(3) In such case, the seller may not object to the delivery unless the bill of lading or other document contains reservation regarding the effect of its transmission or he can show that the holder, in acquiring the bill of lading or other documents, knowingly acted to the detriment of the seller.

Art. 2401: Obligation to take delivery
(1) Where the thing has been forwarded to the buyer and placed at his disposal at the place of destination, the buyer shall, if he intends to refuse the thing, take possession thereof on behalf of the seller where he can do so without payment of the price and without inconvenience or considerable expenses.
(2) The provisions of sub-art.(1) shall not apply where the seller is present at the place of destination or there exists at such place a person qualified to receive the thing.
Art. 2402: Examination of the thing
(1) Where a thing is forwarded, the buyer shall examine it at the place of destination.
(2) Where the thing is re-dispatched by the buyer without transhipment and where the seller, at the time of the making of the contract, knew or should have known of the possibility of re-despatching, the examination shall be postponed until the thing arrives at its new destination.

VIII. Sale by Auction

402. The Civil Code contains few special rules regarding sale by auction. Article 2405 provides that unless the contrary is provided in the conditions of sale, the bidder may be required by the seller to pay cash, and in such cases the seller is entitled to cancel the contract if the buyer fails to pay in cash or according to the conditions of sale. Regarding warranties, the Civil Code distinguishes two kinds of sale by auction. In a public and voluntary sale by auction, the seller warrants the buyer against dispossession by third parties and against defects and non-conformities (Article 2406). On the other hand, in compulsory auctions, the seller does not give such warranties unless he or she has committed fraud (Article 2406).

§5. Contracts Allied to Sale

I. Barter Contract

403. What distinguishes barter contract from sale is that it involves exchange of one thing for another instead of exchange of a thing for a price. Therefore, each of the parties involved has the same rights and obligations as a seller (Article 2408). It could be the case that the things to be exchanged are not equal in value, and hence one may undertake to pay some money in addition to the thing that he or she delivers. In such cases, the party has the same obligations as a buyer with respect to the balance to be paid (Article 2408).

II. Transfer of Rights Other than Ownership

404. Transfer of usufruct: Article 2410 provides that contracts for the transfer of usufruct for consideration are considered as a contract of sale except that instead

of the obligation to transfer ownership of the thing, a person will have the obligation to transfer the usufruct of such thing.

Likewise, according to Article 2411, the provisions of the Civil Code regarding contract of sale also apply to contracts for the transfer of an incorporeal right for consideration; however, if the contract involves transfer of chose in action, the provisions of general contract law will be applicable.

III. Hiring Sale

405. This is an arrangement where a tenant becomes an owner of the thing after payment of a given number of instalments. In such cases, the risks are transferred to the tenant upon delivery of the thing (Article 2413). The tenant is entitled to terminate the contract at any time by returning the thing to the lessor (Article 2414). Other than these two special rules, the provisions of the Civil Code governing contracts of sale also govern hiring sale (Article 2412).

IV. Contract of Supplies

406. The Civil Code provides for the following special provisions for contract of supplies.

> Art. 2416: Definition
> A contract of supplies is a contract whereby a party undertakes for a price to make, in favour of the other party, periodical or continuous deliveries of things:
> Art. 2417: Object of contract
> (1) Where the quantity to be supplied has not been fixed, the supplier shall supply such quantity as corresponds to the normal needs of his contracting party, having regard to the time when the contract was made.
> (2) Where the parties have only fixed a maximum and a minimum limit for the whole of supplies or for each delivery, the person with whom the supplier contracted may fix, within these limits, the quantity to be supplied to him.
> (3) Where the quantity is to be fixed according to his needs, the person with whom the supplier contracted shall take all he needs, notwithstanding that this quantity exceeds the minimum fixed in the contract.
> Art. 2418: Price
> Where supplies are to be made periodically, the price for each delivery is, failing an express provision in the contract, fixed in accordance with the provisions of [the Civil Code governing contracts of sale].
> Art. 2419: Time of payment
> (1) Where supplies are to be made periodically, the price is due at the time of each delivery.
> (2) Where supplies are to be continuous, the price is due on the usual maturity dates.

Art. 2420: Term
(1) The time fixed for the various performances is considered to have been fixed in the interest of both parties.
(2) Where the party is entitled to the supplies is allowed to fix the time when each performance shall be made, he should inform the supplier of such time by giving him reasonable notice.
Art. 2421: Non-performance of contract
(1) Where one of the parties fails to carry out his duties regarding a given performance, the contract is cancelled where non-performance is of importance and capable of destroying the confidence in the regularity of the performance of future obligations.
(2) The supplier may only cancel the contract or suspend its performance after having given reasonable notice to his contracting party.
(3) Any provision to the contrary shall be of no effect.
Art. 2422: Preference clause 1. Duration
(1) A provision whereby a person undertakes to get supplies in preference from a given supplier, should he need certain kinds of goods, shall not be effective for more than three years.
(2) It shall be reduced to three years where it has been made for a longer period.
Art. 2423: 2. Application
(1) Whosoever has entered into an undertaking as defined in Article 2422 shall inform the supplier of the terms offered to him by third parties.
(2) The supplier shall, under pain of loss of right, declare within the time fixed in the contract or within a reasonable time whether he intends to avail himself of the preference clause.
Art. 2424: Exclusive clause binding the client
(1) Where a provision has been made in a contract to the effect that a person shall supply himself exclusively with certain things from a given supplier, such person may not receive from third parties supplies of the things of the nature provided in the contract.
(2) Unless otherwise agreed, such person may not himself manufacture or produce things of the nature provided in the contract.
Art. 2425: Exclusive clause binding the supplier
(1) Where it has been agreed that the supplier should supply his products to a given person only, the supplier may not, in the area provided in the contract and during the currency of the contract, directly or indirectly supply third parties with goods of the nature provided in the contract.
(2) Where the contracting party has undertaken to develop, in the area provided in the contract, the sale of the things, which have been reserved to him, he shall be liable where he fails to carry out this obligation, even if he sold the minimum quantity provided in the contract.
Art. 2426: Termination of contract
Where the duration of the contract of supplies has not been fixed in the contract, each party may terminate the contract by giving notice as provided in the contract or, where not provided, reasonable notice.

§6. Sale of Immovables

407. Article 2876 provides that in cases where one of the parties undertakes to deliver to the other a house, a flat, or another building that does not yet exist, the contract that exists between the parties is a contract of work and labour relating to immovables and not a contract of sale.

408. There are two formal requirements provided with respect to sale of immovables. First, Article 2877 provides that such contract is not valid unless it is made in writing. Second, Article 2878 provides that such contracts will not affect third parties unless they have been listed in the registers of immovable property in the place where the immovable is located. It is to be noted here that registration is not a validity requirement.

409. In addition, the Civil Code provides some specific rules regarding the sale of immovables:

> Art. 2879: Cooperation of seller
> (1) The seller shall furnish to the buyer all the documents necessary to enable the buyer to cause the transfer of the immovable to be registered in the registers of immovable property.
> (2) Such obligation shall be deemed to be an essential stipulation of the contract of sale.
> Art. 2880: Seller to declare certain rights
> (1) The seller shall declare to the buyer the rights which third parties have on the immovable sold where such rights may be set up against the buyer independently of a registration in the registers of immovable property.
> (2) The contract may compel the seller to declare to the buyer the rights which third parties have on the immovable notwithstanding that such rights are entered in the registers of immovable property.
> Art. 2881: Registered rights and burdens 1. Principle
> The buyer shall be deemed to know all the rights and burdens affecting the immovable which have been registered in the registers of immovable property in the place where the immovable is situate.
> Art. 2882: 2. Express warranty by seller
> (1) In respect of the rights mentioned in Article 2881, the buyer may not avail himself of the provisions concerning the warranty against eviction, unless the seller has warranted that such rights did not exist.
> (2) Such warranty may only result from an express provision in the contract of sale.
> Art. 2883: 3. Mortgage and Antichresis
> The buyer may avail himself of the provisions concerning the warranty against eviction where the immovable is attached and sold at the request of a creditor who has a mortgage or an antichresis.
> Art. 2884: Sale of immovable belonging to others
> (1) The provisions concerning the warranty against eviction shall apply where the sale relates to an immovable which, in whole or in part, did not belong to the seller.

(2) The buyer may avail himself of the provisions relating to the warranty against eviction without waiting until he has been evicted.
(3) He may not avail himself of such provisions where, at the time when the court is to make its decision, such eviction is no longer to be feared.
Art. 2885: Right of recovery
Unless otherwise expressly agreed, the seller shall not be liable in damages to the buyer where the latter is evicted by a person who avails himself of a legal right of recovery on the immovable sold.
Art. 2886: Liability of seller
In case of total or partial eviction of the buyer, the seller shall refund to the latter, in addition to the price and the expenses of the contract, all the expenses incurred by him in altering the immovable.
Art. 2887: Lesion
A sale of an immovable may not be rescinded by the buyer or the seller on the ground of lesion.
Art. 2888: Warranty of area: 1. Principle
The seller shall guarantee the area of the immovable sold where such area has been indicated in the contract.
Art. 2889: 2. Rights of buyer
(1) Where the true area is smaller than that which has been indicated, the buyer may require that the price be reduced accordingly.
(2) He may require the rescission of the contract where the true area in smaller by at least one-tenth than that which has been indicated or where it renders the immovable unsuitable for the use which the buyer intended to make of it and such use was known to the seller.
Art. 2890: 3. Conditions and time
The action of the buyer based on the warranty of area shall be subject to the same conditions and be instituted within the same time as an action based on the warranty against defects.
Art. 2891: 4. Rights of seller
(1) The seller may not require an increase of price where the true area is larger than that indicated in the contract.
(2) The provisions of sub-art. (1) shall not apply where the error of the seller is due to fraud on the part of the buyer.
Art. 2892: Compulsory execution of contract
(1) The buyer of an immovable shall be deemed to have a particular interest in the specific performance of the contract.
(2) He may accordingly demand such execution.
(3) The buyer shall lose the right to demand the specific performance of the contract where he fails to demand it within one year after he has ascertained the delay of the seller.

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Chapter 5. Hire of Work and Skill and Building Contracts

§1. Contract of Work and Labour

410. Article 2610 defines a contract of work and labour as a contract whereby one party (the contractor) undertakes to produce a given result, under his or her own responsibility, in consideration of a remuneration that the other party (the client) undertakes to pay him or her. Articles 2612–2631 of the Civil Code regulate such contracts. However, these provisions do not govern building contracts, which are governed by another part of the Civil Code and that are also discussed here in a separate section.

411. The provisions of general contract law also apply to formation of contracts of work and labour. Accordingly, silence when an offer is made does not normally amount to acceptance except under those exceptions recognized in general contract law. In addition to those in the general law of contracts, Article 2612 provides for two more exceptions to the rule that silence does not amount to acceptance. First, where a person has publicly offered to execute a certain task or where the carrying out of this task is within his or her professional duties, a contract of work and labour shall be formed where such person, having received an offer, does not immediately refuse to carry out the task that has been ordered. Second, silence is also considered acceptance where a person is appointed by the public authorities to carry out a certain task and does not immediately refuse to do so.

412. Unless otherwise provided in the contract, it is the contractor who at his or her own expense provides the materials and tools necessary for the carrying out of the task (Article 2613). In such cases, the contractor, like a seller, warrants the good quality of the materials (Article 2614). It should, however, be noted that in cases where the work that the party undertakes to do has a character of secondary importance in relation to the value of the things that such party provides, the whole contract is to be regarded as contract of sale instead of a contract of work and labour (Article 2614).

413. In general contract law, as a rule, a debtor can delegate another to perform the contract on his or her behalf, and it is only in exceptional circumstances that the debtor might be required to personally perform his or her obligations. In contracts of work and labour, on the other hand, Article 2617 provides that the contractor is required to personally carry out the tasks unless, considering the nature of the work ordered, his or her personal capacities are not of importance to the client.

414. Article 2618 provides that if the contractor delays the carrying out of his or her task so that it becomes evident that he or she cannot accomplish it in the time fixed in the contract, the client may fix a reasonable limit to begin the execution of the task. The client is entitled to cancel the contract if the time fixed for the beginning of the work has lapsed without the contractor beginning the work or if the contractor has begun but interrupted it in bad faith. Even though no time period is fixed in the contract, Article 2619 stipulates that the contractor ought to begin

the execution of the task and complete it within a reasonable time in accordance with custom.

The same procedure is to be followed when it appears, during the currency of the contract, that the task is being carried out in a defective manner or contrary to the contract. The contract may be cancelled after providing the contractor a reasonable period of time to remedy the defects.

415. What is remarkable about such contracts is that the Civil Code does not require the amount of the price to be paid by the client to the contractor to be specified in advance. This means that the contract is still valid despite the absence of any agreement regarding the price. The following are the provisions of the Civil Code regarding payment of price:

> Art. 2623: Time for payment
> (1) The price shall be paid to the contractor where the work has been completed and has been accepted by the client.
> (2) Where partial deliveries and payments have been agreed, the price attaching to each part of the work shall be paid at the time of the delivery and acceptance of that part.
> Art. 2624: Price fixed in advance
> (1) Where the price has been fixed in advance, the client shall pay that price.
> (2) The contractor may not claim an increase on the ground that the work has required more effort or expense than had been foreseen.
> (3) The client may not claim a reduction on the ground that the work has required less effort or expense than had been foreseen.
> Art. 2625: Change in the agreed work
> (1) The price fixed in advance for the work shall remain the same notwithstanding that changes have been made by a new agreement between the parties in the conditions under which the execution of the work was originally to have been carried out.
> (2) Such changes shall not give rise to an increase or decrease in price unless such has been agreed.
> Art. 2626: Price not fixed in advance
> (1) Where the price has not been fixed by the contract, it shall be fixed by the contractor in accordance with professional rates and usages.
> (2) In the absence of professional rates and usages, it shall be fixed by reference to the value of the materials provided by the contractor, the work normally necessary to carry it out and the expenses if the contractor.
> Art. 2627: Price fixed approximately
> Where a price has been fixed approximately on the making of the contract, the actual price may not exceed by more than twenty percent the approximation thus made.
> Art. 2628: Right of retention
> (1) The contractor shall have, as a guarantee of the obligations that the client owes him under the contract, a right of retention over such movable goods belonging to the client as he has made or repaired and as are in his possession.

(2) Where the things which the client has entrusted to him belong to a third party, the contractor may set up his right of retention against such third party, unless he knew or should have known that the things were entrusted to him without the knowledge or against the will of the third party.

§2. Hiring of Intellectual Work

416. The provisions of the Civil Code governing contract of work and labour and general contracts are also applicable to contracts where a person undertakes to perform works of an intellectual nature, subject to the following special provisions:

Art. 2633: Personal nature of obligation
(1) Whosoever hires out his work shall carry out his obligations personally.
(2) He may however employ assistants, under his control and on his own responsibility, where such collaboration is allowed by the contract or usual practice and is not incompatible with the object of the contract.
Art. 2634: Advances by client
(1) The client shall make an advance payment to the other contracting party for the expenses necessary to carry out the work.
(2) He shall also grant him, where it is the practice, instalments on his remuneration.
Art. 2635: Excessive payment
The remuneration agreed between the parties may be reduced by the court where it is so excessive as to be contrary to the etiquette of the profession of the person hiring out his work.
Art. 2636: Required care and responsibility
(1) Whosoever hires out his work shall undertake to carry it out in the best interest of his client, conscientiously and in conformity with the practice and rules of his profession.
(2) He shall not be liable to his client, unless he commits an error, having regard to the rules of his profession.
(3) The error may consist in an omission or an act detrimental to his client.
Art. 2637: Termination of contract 1. By the client
(1) The client may at any time terminate the contract.
(2) He shall in this case compensate the other party for his expenses and pay him a fair remuneration for the work that he has completed.
Art. 2638: 2. By the other party
(1) Whosoever hires out his work may terminate the contract at any time
(2) He shall in such case return to the client any advance that he has received on account of his remuneration and expenses.
(3) The termination of the contract shall be effected, under pain of damages, in such a way that the client will suffer the least possible prejudice thereby.

§3. Medical or Hospital Contracts

417. According to Article 2639, a medical contract is a contract whereby a physician undertakes to provide a person with medical care and to do his or her best to maintain that person in good health or cure him or her, in consideration of payment of a fee. And a contract of hospitalization, according to Article 2640, is a contract whereby a medical institution undertakes to provide a person with medical care from one or several physicians, in connection with a given illness. It should be noted that such contracts may be made by the person directly or indirectly through a third party (Article 2642). Even if the third party was not authorized to make such contract on behalf of the person receiving the medical service, the latter is obliged to pay the fees of the physician or the medical institution if he or she was not capable at the time of the contract of expressing his or her wishes and it was at that moment essential to provide with the necessary treatment (Article 2643). If this third party has paid the fee to the physician or medical institution, he or she is entitled to get reimbursement from the patient (Article 2645).

418. The obligation of the medical professional or health institution in such contracts is an obligation of means, not an obligation of result. Article 2648 provides that a physician will not guarantee the success of his or her treatment unless he or she has expressly assumed this obligation in writing. Considering the fact that in obligations of means, the outcome of the contract depends on the identity and qualification of the debtor, it is in the interest of the creditor that the debtor personally performs the contract. That is why Article 2649 provides that a physician who undertakes to treat a person ought to carry out his or her obligations personally, albeit with the assistance of others who are under his or her control and responsibility.

In obligations of means, the general rules of the law of contracts state that the debtor is liable to pay damages only when it is established that he or she has committed a fault. The same rule is stated in Article 2647 regarding the liability of the physician: a physician will not be liable to the person toward whom he or she is bound under the contract unless he or she commits a fault, having regard to the rules of his or her profession. In such cases, fault might consist of an omission or commission. The physician is liable in particular where he or she abandons without good cause the patient he or she has undertaken to care for and fails to arrange for his or her substitution in accordance with usages.

§4. Contracts of Work and Labour Relating to Immovables (Building Contracts)

419. Article 3020 provides that a building contract is complete where the parties have agreed on the work to be done and on the price. This seems to require that as opposed to ordinary contracts of work and labour, the parties need to agree on the price. However, a look at the following provisions makes it plain that the price may be determined by the court even when the parties have not agreed on it. The following are additional provisions in the Civil Code regarding price:

Art. 3023: Provisions as to price
(1) The price to be paid by the client may be fixed by way of a lump sum.
(2) An estimate price may be fixed.
(3) Where no lump sum or estimate price is fixed, the price shall be deemed to be fixed having regard to the value of the materials and importance of the work necessary to perform the contract.
Art. 3024: Price fixed approximately
(1) Where the price has been fixed approximately, the contractor shall carry out the contract as though the price had been fixed by way of a lump sum.
(2) He shall fix the price definitively having regard to the expenses made and difficulties encountered in the performance of the contract but the price so fixed may not exceed by more than twenty percent the price agreed as approximate price.
(3) Unless otherwise agreed, the client may not demand accounts for the price so fixed nor may he appeal against such price.
Art. 3025: Price fixed having regard to expenses and labour 1. Duty to account
(1) Where the price is fixed having regard to the value of the materials and the work necessary for the performance of the contract, the contractor shall, notwithstanding any agreement to the contrary, inform the client of the work already done and expenses already incurred.
(2) Unless otherwise agreed, such information shall be given at the end of each month.
Art. 3026: 2. Remuneration of contractor
(1) The contractor shall be entitled to the remuneration fixed by agreement between the parties.
(2) In the absence of a specific provision, he may only enter in the accounts given by him to the client wages corresponding to his work.
Art. 3027: 3. Rights of clients
(1) The client may at any time require that the amounts appearing in the accounts of the contractor be checked by experts.
(2) Where the parties have not agreed on the remuneration of the contractor, the client may require that such remuneration be fixed by arbitrators.
Art. 3028: Examination of work
The client may at any time cause to be examined by experts the progress achieved in the work, the quality of the materials used and of the work completed.
Art. 3029: Delivery and payment
(1) Payment of the price shall raise the presumption that the work has been examined and accepted by the client.
(2) The provisions of sub-art. (1) shall not apply where the sums paid are to be regarded as instalments on the price.
Art. 3030: Partial delivery and payment
(1) Where it has been agreed that the work would be carried out by stages, such work shall be examined and delivered on completion of each of such stages.
(2) The contractor may require that part of the price corresponding to the work completed be paid to him on completion of each of such stages.

420. After the conclusion of a building contract, alterations may need to be made regarding the work to be carried out by the contractor. The following provisions deal with the consequences of such alterations:

> Art. 3031: Alterations required by client: 1. Rights of client
> The client may demand that alterations be made in the work as originally planned where such alterations can technically be made and are not such as to impair the solidity of the work.
> Art. 3032: 2. Effects
> (1) The client may require a reduction in the price as originally agreed where the alterations required by him reduce the expenses of the contractor.
> (2) The contractor may require an increase in the price and his remuneration as originally agreed, where the alterations required by the client increase his expenses, work or liability.
> (3) Where the parties do not agree, such reduction or increase shall be settled by arbitrators appointed by the parties or, failing such, by the court.
> Art. 3033: 3. Contractor refusing alterations
> (1) The contractor may refuse the alterations required by the client where such alterations affect plans, schemes or other documents on which the parties have agreed.
> (2) The contractor may also refuse the alterations where they are of such a nature or importance that they constitute a work absolutely different to the agreed work.
> 3. The work shall be deemed to be absolutely different to the agreed work where it implies an alteration exceeding by twenty percent the value at which the original work was or could have been estimated.
> Art. 3034: Alterations required by contractor
> (1) Where it appears necessary for technical reasons to make alterations in the work as originally agreed, the contractor shall, except in urgent cases, give notice to the client.
> (2) The contractor shall give such notice notwithstanding that the proposed alterations do not result in the client having to pay an increased price.

421. The client is entitled to terminate the contract at any time without there being a requirement to establish fault on the part of the contractor. The effects of such termination depend, however, on whether or not there is fault on the part of the contractor:

> Art. 3036: Rights of contractor: 1. Price fixed by way of a lump sum
> (1) Where the client terminates the contract, the contractor shall be entitled to the lump sum or approximate price agreed.
> (2) The amounts saved by the contractor in consequence of the termination of the contract shall be deducted.
> (3) Where the price had been fixed approximately, the contractor may increase by not more than twenty percent the sums due by the client under sub-art. (1) and (2).

Art. 3037: 2. Price fixed otherwise
(1) Where the price had been fixed having regard to the value of the materials and the work necessary for the performance of the contract, the contractor shall be entitled to the value of the materials used and work carried out before he was informed of the termination of the contract.
(2) The client shall be bound by the contracts made in good faith by the contractor prior to the termination of the contract or shall make good the damage caused to the contractor by the rescission of such contracts.
(3) The contractor shall be entitled to the whole remuneration agreed with the client.
Art. 3038: Rescission of contract
(1) Where the contract is rescinded by reason of fault committed by the contractor or his refusing to accept alterations required by the client, the contractor shall be entitled to such part of the price and remuneration as corresponds to the work already carried out.
(2) Nothing shall affect the client's right to claim damages for the prejudice caused to him by the contractor failing to perform his obligations.

422. The contractor, according to Article 3039, warrants during ten years from its delivery the proper execution and solidity of the work done by him or her; during this period of time, the contractor is liable for such loss or deterioration of the work as is due to a defect in its execution or to the nature of the soil on which the work has been done. Any agreement excluding this warranty or shortening the period of time is invalid.

423. Article 3040 provides that independent contractors or workers employed under a contract of work and labour relating to an immovable may claim against the person on whose behalf the work was done with a view to obtaining payment of their claims to the extent of the amount due by the client to the principal contractor on the day the claim is made.

Chapter 6. Lease: Commercial and Agricultural Lease

§1. Letting and Hiring

I. General Provisions

424. Article 2727 defines a contract of letting or hiring as a contract whereby one party (the lessor) undertakes to transfer to the other party (the lessee) the possession of an object for a fixed term in return for a consideration called the rent or hire.

The subject of the contract remains the property of the lessor, and hence it will be returned upon termination of the contract (Article 2728). In the meantime, the lessee is responsible for its maintenance (Article 2731). Unless there is express agreement to the contrary, the lessee is not allowed to sub-let the subject of the contract or assign the contract without the consent of the lessor (Article 2734).

425. If the lessee fails to pay the rent for a give period of the contract, by virtue of Article 2733, the lessor may give him or her ten days within which the former may settle the outstanding debts. If the lessee fails to pay within the additional ten days, the lessor is entitled to cancel the contract.

426. Article 2738 provides that if the lessee remains in possession of the object hired and the lessor does not claim its return upon expiration of the contract, the contract is deemed to have been extended by the parties for an indeterminate period on the same terms as the original contract. However, third parties who guaranteed the proper performance of the original contract will be released from their liabilities.

427. In addition to relevant provisions of the Civil Code regarding contracts in general, Articles 2698–2726 also apply to contracts of letting and hiring.

II. Hiring of Cattle

A. Cattle Included in Lease of Agricultural Undertaking

428. The following are the special provisions applicable to contracts of lease of agricultural undertakings that include cattle:

> Art. 2740: Sale of cattle: 1. Rights of farmer
> (1) The farmer may sell the cattle included in the undertaking.
> (2) He shall however keep on the land cattle equivalent in species, number and quality to that which he received.
> (3) The lessor may not compel the farmer to sell cattle, notwithstanding that the cattle have increased in number.
> Art. 2741: 2. Rights of lessor
> (1) The lessor may not sell the cattle included in the undertaking.
> (2) He may compel the farmer to prepare every year an inventory of the cattle to be found within the undertaking.

(3) He may terminate the contract where it appears that the cattle are reduced in number by more than one quarter for reasons attributable to the farmer.
Art. 2742: Products of animals: 1. Principle
(1) Without prejudice to the provisions of the following Articles, the farmer may freely dispose of the products of the animas, of their hides, skins and increase.
(2) He shall account for his management to the lessor, where the rent consists of a share of these products or is fixed having regard thereto.
Art. 2743: 2. Wool
(1) Only the farmer may sell the wool of sheep and ewes where he manages the undertaking or the flock consists of less than fifty heads.
(2) Only the lessor may sell such wool where he manages the undertaking or the flock consists of more than fifty heads.
Art. 2744: 3. Manure
Manure from animas shall be used exclusively for the exploitation of the land.
Art. 2745: 4. Increase from breeding
Animals which perish or are slaughtered shall be replaced in proportion to the increase from breeding.
Art. 2746: Duty to return cattle
(1) The farmer shall, at the end of the contract, return cattle equivalent in species, number and quality to that which he received.
(2) The provisions of sub-art. (1) shall apply notwithstanding that the cattle were valued in the contract.
Art. 2747: Deficit: 1. Loss borne by the lessor
(1) Where there is a deficit, the loss shall be borne by the lessor where the rent consists of a given share in the profits or of certain products of the animals.
(2) The farmer shall not be liable for such deficit unless the loss of the animals is due to his fault or that of a person for whom he is liable.
Art. 2748: 2. Loss borne by the farmer
The farmer shall be liable to repay the value of animals not returned by him where the rent is fixed independently of the profits of the animals.
Art. 2749: 3. Extent of liability
(1) The value of animals not returned shall be fixed having regard to the valuation made by the parties.
(2) Failing such valuation, the farmer shall repay their value as on the day of the termination of the contract.

B. Cattle as a Principal Object of the Contract

429. For contracts of hire that principally involve cattle, the Civil Code encourages the Ministry of Agriculture to formulate model contracts for each region of the country and for certain kinds of animals. Apart from providing for this, the Civil Code also contains the following special provisions:

Art. 2752: Duration of contract
(1) Unless otherwise expressly agreed, the contract shall be deemed to be made for four years.

(2) The period of four years shall be reckoned from the day of the making of the contract.

Art. 2753: Notice to landowner

(1) Where cattle is given to another person's farmer, notice shall be given to the owner whose land is exploited by such farmer.

(2) Where notice is not given, the owner may, notwithstanding any custom to the contrary, seize or retain the animals with a view to obtaining payment of his claims against the farmer.

(3) It may not be alleged that he knew or should have known that the animals did not belong to his farmer.

Art. 2754: Inventory of animals

(1) The ownership of animals shall not be transferred to the tenant as a result of an inventory of the animals having been made in the contract.

(2) Such inventory has as its sole purpose to permit of establishing whether there is a profit or loss at the end of the contract.

Art. 2755: Upkeep of animals

(1) The tenant shall preserve and maintain the animals with the care required by custom.

(2) He shall bear the costs arising therefrom.

Art. 2756: Increase from breeding

Increase from breeding shall be jointly owned by the lessor and tenant.

Art. 2757: Products of animals

Only the tenant shall be entitled to the dairy products, manure and work of the animals.

Art. 2758: Wool

(1) The wool of sheep and ewes shall be divided equally between the lessor and tenant.

(2) The tenant shall inform the lessor of the day when the shearing will take place.

Art. 2759: Sale of animals

(1) The tenant may not, without the consent of the lessor, dispose of any animal of the flock or of the increase from breeding.

(2) The lessor may not dispose thereof without the consent of the tenant.

Art. 2760: Loss of animals

(1) The tenant shall not be liable for the loss of animals unless it is due to his fault.

(2) The lessor shall prove that the tenant is at fault.

(3) The tenant shall account for the hides of animals which have died.

Art. 2761: Accounts

(1) The lessor may demand that the tenant submit every year an inventory of the animals together with his annual accounts.

(2) He may terminate the lease where it appears that the animals have reduced in number by more than one quarter for reasons attributable to the tenant.

Art. 2762: Termination of contract

(1) The contract shall terminate on the expiry of the period agreed by the parties or prescribed by law.

(2) A party who intends to terminate the contract shall give the other party at least six months notice in advance.

Art. 2763: Death of parties
(1) The contract shall not be terminated by the death of either party.
(2) The heirs of the deceased tenant may however terminate the contract by giving notice to the lessor within six months from the death of the tenant.
(3) In such case, the contract shall terminate on the first of Megabit [April] which follows but less than three months after the lessor has received notice from the heirs of the tenant.
Art. 2764: Settlement of accounts
(1) Where the contract comes to an end or is rescinded, a new inventory of the animals shall be made.
(2) The lessor may take animals of each species to the extent shown in the first inventory made.
(3) What remains shall be divided equally between the lessor and the tenant.
Art. 2765: Insufficient number of animals
(1) Where the animals are reduced below the number shown in the fist inventory, the lessor shall take what remains and the parties shall bear the loss equally.
(2) The tenant shall not be liable for the loss unless it is due to his fault or that of a person for whom he is responsible.
Art. 2766: Usages or stipulation null and void
(1) Any usage or stipulation to the effect that the tenant shall be liable where all the animals are lost as a result of a fortuitous event and without his fault shall be of no effect.
(2) Any usage or stipulation to the effect that the share of the tenant in the loss shall be greater than his share in the profits shall be of no effect.
(3) Any usage or stipulation to the effect that the lessor may, at the end of the contract, take more animals than he supplied shall be of no effect.

§2. Lease of Immovables

I. General Provisions

430. Article 2896 defines a lease of an immovable as a contract whereby one of the parties (the lessor) undertakes to ensure to the other party (the lessee) the use and enjoyment of an immovable for a specified time and for a consideration fixed in kind or otherwise. The Civil Code does not provide any special form for the validity of such contracts; however, whether evidence other than a written contract could be produced in court depends on whether the parties have begun the execution of the contract. Article 2898 provides that if the parties have not yet begun execution, the existence of a contract of lease can only be proved through a written instrument or by an admission made or oath taken in court; if the parties have begun execution, the existence of the contract may be proved by witnesses or presumptions.

However, a lease made for a period exceeding five years, according to Article 2899, will have effect on third parties only when it is registered.

431. The lessor warrants that the immovable and its accessories are in a state fit for the use for which they are intended in terms of the contract or according to their nature (Article 2900). If at the time of delivery or later, it is discovered that the immovable has defects diminishing the normal use to which it can be put, the lessee is entitled to demand the rescission of the contract (Article 2904). It should be noted that for this purpose the term 'defect' does not include those faults that are apparent or that the lessee knew or should have known of on the making of the contract (Article 2907). However, the lessee will have remedies for apparent (obvious) defects if they constitute serious danger to the life and health of the lessee or those who reside with him or her, or his or her employees (Article 2908).

It should be noted that the fact that the lessee intended to put the immovable to a special use will be taken into consideration unless the lessor knew or should have known about it at the time of the making of the contract (Article 2904).

If the lessor knew or should have known that the immovable suffers from defects at the time of delivery and fails to inform the lessee, he or she will be liable for the damage caused to the lessee; this is independent of the remedy of rescission (Articles 2905 and 2906).

The above warranty implied by law can be limited or excluded by the agreement of the parties; however, any such agreement will be invalid if the lessor has in bad faith failed to mention the defects or the defects are such as to render the thing completely useless for the lessee (Article 2909).

432. Regarding warranty against dispossession, the Civil Code contains the following provisions:

> Art. 2913: Claims of third parties on the immovable
> (1) Where a third party claims the ownership of the immovable let or claims to have any right thereon, the lessee shall immediately inform the lessor of such claim.
> (2) Where the third party institutes proceedings, the lessee may demand that the proceedings against him be discontinued and that the suit be proceeded with between the third party and the lessor.
> (3) Where his enjoyment has been interrupted in consequence of such proceedings, the lessee shall be entitled to a proportional reduction of the rent, where he informed the lessor of the molestation or hindrance.
> Art. 2914: Mere molestations of fact
> (1) The lessor shall not warrant the lessee against molestations to his possession by third parties who do not claim to have any right on the immovable.
> (2) The lessee may take action in his own name against such third parties.

433. As a security for a payment of rents, the Civil Code entitles the lessor to retain movables furnishing the immovable that is the subject of the contract of lease:

> Art. 2924: Right of retention of lessor: 1. Principle
> The lessor shall have a right of retention on the movables which furnish the immovable set and which serve either for its fitting up or for its use, as a

security for the rent in respect of the year which has elapsed and of the current period of six months.
Art. 2925: 2. Movables affected
(1) The right of retention shall not affect those things which the lessor has known or should have known not to be the property of the lessee.
(2) Where the lessor comes to know only during the currency of the lease that some movables brought by the lessee are not the property of the latter, his right of retention on such movables shall lapse unless he gives notice for the termination of the contract for the next following term of the lease.
Art. 2926: 3. Effect
(1) By virtue of his right of retention, the lessor may, with the authorisation of the court, compel the lessee to leave in the immovable let as many movables as are necessary to guarantee the rent.
(2) The things taken away secretly or with violence shall continue to be subject to the settlement of the preferential claims of the lessor, where the latter attaches them within ten days after they have been removed.

434. The lessor is responsible for the repair and maintenance of the immovable property to make it continually useful for its normal use or a special use he or she knew or should have known of at the time of the making of the contract. The following are the relevant sections of the Civil Code dealing with this matter:

Art. 2916: Repairs 1. Duties of lessor
The lessor shall maintain the immovable in good condition and make therein during the currency of the lease such repairs as are necessary and are not repairs incumbent upon the lessee.
Art. 2917: 2. Duty to give notice to the lessor
Where the thing let requires, for its preservation or maintenance, expenses which are not incumbent upon the lessee, the latter shall inform the lessor of such requirement.
Art. 2918: 3. Duty to suffer repairs
Where, during the currency of the lease, the thing let requires repairs which cannot be delayed until the expiration of the lease, the lessee shall suffer them, whatever the inconvenience which they cause him and notwithstanding that he may be deprived of a part of the immovable let during their execution.
Art. 2919: 4. Limitation of duty of lessor
The lessor may not be compelled to carry out the repairs which are at his charge, where their cost is higher than the rent which he is to receive from the immovable in the course of three years of lease.
Art. 2910: 5. Sanction of duties of lessor
(1) Where repairs which are necessary to ensure the enjoyment and which are at the charge of the lessor are not executed without delay by the latter, the lessee may have them executed at his expense and retain their cost, with legal interest thereon, from the rent payable by him.
(2) The lessee may, where he prefers to do so, according to circumstances, claim damages from the lessor and, where appropriate, the termination of the lease.

II. Lease of Houses

435. Articles 2945–2974 provide special rules regarding lease of houses. The following are some of these rules:

> Art. 2950: Amount of rent
> (1) The amount of rent shall be fixed freely by agreement between the parties.
> (2) In case of doubt, it shall be fixed in conformity with the tariffs established by the municipal authorities or, failing such tariffs, in conformity with the custom of the place.
> Art. 2951: When the rent falls due
> (1) Unless otherwise agreed, the rent shall be paid at the end of each quarter where the lease has been made for one or more years.
> (2) It shall be paid at the end of each month, where the lease is of shorter duration or made for an indeterminate period.
> (3) The rent shall in all cases be paid on the expiry of the lease.
> Art. 2952: Delay of lessee
> (1) Where the lessee is late in paying a term of rent which has fallen due, the lessor may give him a period of thirty days where the lease is for a year or more, and a period of fifteen days where the lease is for a shorter period, informing him that, in default of payment, the contract shall be terminated at the end of that period.
> (2) The period shall run from the day when the lessee has received the notice of the lessor.
> (3) Any stipulation reducing such periods or giving to the lessor the right to terminate the lease forthwith on account of a failure in the payment of rent shall be of no effect.
> Art. 2953: Repairs incumbent upon lessee: 1. Duties of lessee
> The lessee shall carry out at his expense the repairs which are incumbent upon him.
> Art. 2954: 2. Which repairs are incumbent upon lessee
> (1) The repairs which in the contract of lease are placed at the charge of the lessee shall be deemed to be repairs incumbent upon him.
> (2) Unless otherwise agreed, repairs necessary to the doors, windows, floor-boards, tiling, taps and water-drains shall be deemed to be repairs incumbent upon the lessee.
> (3) The works of cleaning and maintenance which become necessary by the enjoyment of the thing shall also be deemed to be repairs incumbent upon the lessee.
> Art. 2955: Old age or force majeure
> (1) No repairs which are deemed to be incumbent upon the lessee shall be at the charge of the lessee where they are occasioned only by old age or force majeure.
> (2) The contract of lease may derogate such rule by an express stipulation.
> Art. 2956: Deprivation of enjoyment due to repairs
> (1) Where the repairs which the lessor carries out on the immovable during the lease take more than fifteen days, the rent shall be reduced in proportion to the time and to the portion of the thing let of which the lessee is deprived.

(2) Where the repairs are of such a nature as to render uninhabitable what is necessary for the accommodation of the lessee and his family, the lessee may require the termination of the lease.

Art. 2957: Sub-lease: 1. Principle

(1) The lessee may sub-let all or part of the immovable let to him.

(2) Prior to sub-letting, he shall give notice of his intention to the lessor and ask him whether he has any objection to such sub-lease.

Art. 2958: 2. Objection by lessor

(1) The lessor may object to such sub-lease where it is contrary to contractual undertakings made by him in favour of other lessees of the same immovable or is of such nature as to cause to him damage for any other reason.

(2) The lessee may in such case terminate the contract.

(3) Nothing shall affect the right of the lessor to claim damages where the reason of his opposition was known or should have been known by the lessee on the making of the contract.

Art. 2959: 3. Provision restricting right to sub-let

(1) A contract of lease may prohibit the sub-lease of the immovable or make such sub-lease conditional on the acceptance of the sub-lease by the lessor.

(2) Where, under the contract of lease, the sub-lease of an immovable is made conditional on the acceptance of the sub-lease by the lessor, the lessee may demand the termination of the lease where the lessor arbitrarily refuses his consent to the sub-lease.

Art. 2960: 4. Duties of lessee

(1) A lessee who has sub-let all or part of the immovable shall remain bound, in his relations with the lessor, by all the obligations which, by virtue of the contract of lease, have to be performed by him.

(2) The provisions of sub-art.(1) shall apply notwithstanding that the lessor has given his consent to the sub-lease.

(3) The lessee shall not be released from such obligations unless such release has been expressly stipulated between the lessor and himself.

Art. 2961: 5. Duties of sub-lease

(1) The sub-lessee shall comply with the provisions of the principal lease concerning the enjoyment of the immovable given on lease.

(2) The lessor may take action directly against the sib-lease to enforce compliance with such provisions.

(3) Where the sub-lessee did not know of such provisions or was dispensed by the lessee from observing them, he shall have recourse against the lessee.

Art. 2962: 6. Direct action of lessor

(1) The sub-lessee shall be liable only up to the amount of rent payable in respect of what has been sub-let to him.

(2) The lessor may require the sub-lessee to pay such rent directly to him.

(3) The sub-lessee may not set up against the lessor the payment made by him in advance, with the exception of the payments made in respect of the current term of the principal lease.

Art. 2963: 7. Right of retention

The right of retention of the lessor may be exercised by the lessor and by the lessee on the movables brought in the immovable by the sub-lessee.

Art. 2964: 8. Termination of principal lease
(1) The termination of the principal lease shall bring the contract of sub-lease to an end.
(2) Where the lessor has expressly consented to the sub-lease, the sub-lessee may substitute himself for the lessee for the execution of the principal lease.
Art. 2968: Renewal of contract
(1) Where, at the expiration of the lease, the lessee continues in the enjoyment of the thing with the knowledge and without the opposition of the lessor, the contract of lease shall be renewed for an indeterminate period.
(2) The rights and duties of the parties for the further duration of the lease shall be governed by the provisions of the previous contract.
(3) The security given for the original lease shall however be released.
Art. 2973: Improvements made in immovable 1. Right to indemnity
(1) The lessee shall not be entitled to compensation for improvements which he has made in the immovable without the consent of the lessor.
2. Where the improvements have been made with the consent of the lessor, the lessee may claim the reimbursement of the lesser sum between the amount of expenses made by him and the increase in the value of the immovable is at the time of the restoration.
Art. 2974: 2. Set-off and right of removal
(1) Even where the lessee is not entitled to compensation, he may set off the increase in value procured by him to the immovable against the decrease in value that such immovable has sustained as a consequence of deteriorations for which he is liable but which have been caused without any fault on his part.
(2) The lessee may also remove the improvements which he has made in the immovable where this can be done without damage to the immovable.

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Chapter 7. Compromise Settlements

436. Article 3307 defines compromise as a contract in which the parties terminate an existing dispute or prevent a dispute from arising in the future. As a contract, therefore, it is governed by all the general rules of contracts unless a contrary provision is provided with respect to this particular kind of contract.

437. There are two provisions provided regarding interpretation of contracts of compromise. Article 3309 provides 'the terms of the compromise entailing renunciation shall be interpreted restrictively'. What does this mean? The provision contained under Article 3309 is a principle and its application is stated in the following article. According to Article 3310, 'renunciation by one party of all his rights, actions and claims shall entail the extinction of such rights, actions and claims only in respect of which the compromise has been reached' and 'where a person who has made a compromise on a right which he possessed in his own right acquires subsequently a similar right through which another person, he shall in no way be bound in respect of the newly acquired right by the previous compromise'.

438. A contract of compromise has a relative effect in the sense that 'a compromise made by one interested party shall not be binding on the other interested parties and may not be set up by them' (Article 3311).

439. A contract of compromise may be invalidated when it is a result of defects of consent or when one of the contracting parties is incapable. In addition to those general provisions regarding defects of consent and other requirements for validity of contracts, Articles 3312 and the following provide some special provisions for all kinds of compromise contracts. Article 3312 provides 'as between the parties, the compromise shall have the force of res judicata without appeal and it may not be contested on the ground of a mistake made by one or both of the parties concerning the rights on which they have compromised'. A mistake regarding the right over which the parties are making the compromise agreement is not therefore fundamental.

On the other hand, the mistake is fundamental where it is a result of void or false documents. In this connection, Article 3313 provides, '(1) a compromise may be invalidated on the ground of mistake where the instrument for the performance of which it is made is void. (2) It may also be invalidated where the agreement of one or both of the parties was due to the existence of a document, which is shown to be false. (3) The compromise shall be valid in either case where, at the time of the contract, the parties had in view the possibility that the instrument might be void or the document false'.

In addition, there is a fundamental mistake where a contract of compromise is concluded with a party being unaware that the dispute is settled by a judgment and the judgment has a finality effect. In this connection, Article 3314 provides '(1) a compromise may be invalidated where the dispute which it was intended to terminate has been settled by a judgment having the force of res judicata of which one or both of the parties were unaware. (2) Where an appeal lies from the judgment of which one or both of the parties are unaware, the compromise shall remain valid.'

Compromise may be concluded with respect to a particular dispute or to any common matters between the parties. Article 3315 provides '(1) Where the parties have reached a general settlement on all matters they may have had in common, the compromise may not be invalidated on the ground that documents unknown to one or both of the parties at the time of the contract, have subsequently been discovered. (2) The compromise may however be invalidated in such a case where the documents in question were willfully withheld by one of the parties at the time of the contract.'

440. Regarding warranties, Article 3317 provides '(1) the compromise shall have a declaratory effect as regards the rights which one of the parties renounces therein. (2) The conditions and forms required by law for the transfer of the right renounced shall be complied with. (3) The parties to the compromise shall not give each other any warranties concerning these rights, save that of their personal act and such other warranty as may have been expressly stipulated.'

441. Article 3318 provides some rules regarding appointment of a conciliator: '(1) The parties may entrust a third party with the mission of bringing them together and, if possible, negotiating a settlement between them. (2) The conciliator may be appointed, at the request of the parties, by an institution or by a third party. (3) The person appointed conciliator shall be free to accept or to refuse his appointment.' In this regard, the parties are required to comply with two duties, positive and negative. The positive duty, stated under Article 3319(1), is that 'the parties shall provide the conciliator with all the information necessary for the performance of his duties'. And the negative duty, which is stated in Article 3319(2), is that 'they shall refrain from any act that would make the conciliator's task more difficult or impossible'.

442 – 445

Chapter 8. Suretyship

§1. General Provisions

442. The terms 'suretyship' and 'contract of guarantee' are used interchangeably in the Civil Code; both terms refer to a contract between two parties (the guarantor and the creditor) under which the guarantor undertakes toward the creditor to discharge the obligation should the debtor fail to discharge it. Article 1921 provides that the consent or even the knowledge of the debtor is not required for the validity of such contracts.

443. *Form:* Being in writing is a validity requirement for contracts of guarantee. In addition, Article 1922 provides that contract of guarantee will not be presumed and whether one of the parties stands a guarantee to a person who owes something to the other party should be made express. Apart from explicitly providing that one of the parties is a guarantor, the contract is also required to specify the maximum amount for which the guarantee is given.

444. *Relationship between the main contract and the contract of guarantee*: The existence of two separate but related contracts should be noted in suretyship. There is the original contract to which the debtor and the creditor are parties, and there is the contract of guarantee to which the guarantor and the creditor are the parties. The question that arises here is, what will happen to the contract of guarantee if the original contract is invalidated? If the defect with the original contract is the incapacity of the debtor or the fact that the consent of the debtor is not sustainable in law, Article 1923 provides that the contract of guarantee will remain binding provided that the guarantor, on undertaking the guarantee, was aware of such defects. On the contrary, if the original contract is void because it was not made in the form prescribed by law or because its object was not sufficiently defined, possible, moral, and legal, or because the debtor was incapable or his or her consent was defective and the guarantor did not know about it, the contract of guarantee will also be invalidated.

Likewise, according to Article 1926, the contract of guarantee comes to an end when the original debt has been extinguished.

§2. The Relationship between the Creditor and the Guarantor

445. The relationship between the creditor and the guarantor depends on whether the guarantee is joint or simple. A guarantor is presumed to be simple unless he or she described him- or herself as joint guarantor, co-debtor, or used equivalent terms. The principal distinction between the two lies in the availability of the defence of benefit of discussion. A simple guarantor is liable only when the principal debtor fails to discharge his or her obligations, and as a result he or she may demand that the creditor should first discuss the principal debtor's assets and realize the real securities available. In a case that was reviewed by the Supreme Court, a creditor sued both the principal debtor and the (simple) guarantor.[1] The trial and appellate

courts released the guarantor on the basis of Article 1934(1). The Supreme Court, by reversing the decisions of the lower courts, held that Article 1934(1) cannot be relied on to release the guarantor from his or her liability. The guarantor could be released only when the principal debtor is found to be solvent and consequently discharged the obligations by him- or herself. It is a mistake of law, according to the Supreme Court, to release the guarantor without making sure that the principal debtor has the solvency to pay the creditor.

On the other hand, the creditor is entitled to sue the joint guarantor without previously demanding payment from the debtor or realizing his or her securities. The following are additional provisions regarding benefit of discussion:

> Art. 1935: Benefit of discussion
> (1) The creditor shall not discuss the principal debtor unless the guarantor so requires as soon as he is first proceeded against.
> (2) The guarantor may not claim the benefit of discussion where the insolvency of the debtor has been judicially established.
> Art. 1936: Assets to be discussed
> (1) A guarantor requiring discussion shall indicate the debtor's assets to the creditor and advance sufficient money for the costs of their discussion.
> (2) He may not indicate such debtor's properties as are subject to litigation, or situate outside the country of payment, or mortgaged as security for the debt but no longer in the debtor's possession.
> Art. 1937: Failure to proceed
> Where the guarantor has indicated the assets as provided in Art. 1936 and has supplied sufficient money for their discussion, the creditor is answerable to the guarantor, up to the value of the assets thus indicated, for an insolvency of the principal debtor due to the creditor's failure to proceed.
> Art. 1938: Summons to proceed
> (1) Where the primary obligation has fallen due, the guarantor may demand that the creditor sue the principal debtor within six weeks for the enforcement of his rights.
> (2) The guarantor shall be released where the creditor fails to comply with this summons or to continue the proceeding with reasonable diligence.

1. *Mamo Gobena v. Workeneh T/Mariam* [2007], Federal Supreme Court, Cassation File No. 25115.

446. The guarantor may be released from his or her liability if the debtor and the creditor have modified the nature of the obligation in certain manners. More particularly, Article 1927 provides that if the creditor has voluntarily accepted an immovable or any other asset in lieu of the primary debt, the guarantor will be released despite that fact that the creditor may subsequently be evicted. Article 1928 recognizes the possibility for the debtor and creditor to vary the terms of the original contract without increasing the liability of the guarantor; however, the creditor is not allowed to provide additional time for performance to the debtor without the consent of the guarantor.

447. Scope of the liability of the guarantor: According to Article 1930, unless the contrary is agreed, the guarantor is liable also for interests on the principal debt,

but he or she may not be obliged to pay more than the maximum amount specified in the contract of guarantee. On the other hand, Article 1931 provides that the guarantor will be liable (even beyond the maximum limits) for the costs of any action brought against the principal debtor provided that he or she received sufficient notice that would enable him or her to forestall them by discharging the debt.

448. Subrogation: After making payment to the creditor, the guarantor will be subrogated in the position of the former. The following provisions govern the matter of subrogation:

> Art. 1944: Subrogation
> 1. The guarantor shall be subrogated to the rights of the creditor to the extent of his payment to him.
> 2. The benefit of such subrogation may not be waived in advance.
> Art. 1945: Duties of creditor
> The creditor shall hand over the document of title to the guarantor who pays him and perform such formalities as will enable the guarantor to exercise his remedy and realize the securities available to the creditor.
> Art. 1946: Impossibility of subrogation
> The guarantor shall be relieved of his obligation towards the creditor where the guarantor's subrogation to the rights, mortgages and liens of the creditor can no longer be effected owing to the creditor's act or omission.

449. It is possible for the creditor to enter into another contract of guarantee for the purpose of guaranteeing the obligation of the guarantor. This guarantor is known as a secondary guarantor.

§3. The Relationship between the Debtor and the Guarantor

450. Despite the fact that a guarantee was given without his or her knowledge, the principal debtor, according to Article 1940, r is required to pay the indemnity to the guarantor who has paid the debt; the indemnity includes the principal amount paid by the guarantor, interest, and costs. Article 1942 provides that the guarantor loses his or her right to be indemnified if he or she fails to raise defence that he or she knew or should have known and that would have relieved him or her of payment.

After paying the creditor, the guarantor is required to notify the principal debtor so that he or she may not pay the creditor for the second time. Otherwise, according to Article 1943, the guarantor will lose his or her right to be indemnified; the guarantor may, however, claim from the creditor what the latter unduly received from the debtor.

If non-performance by the principal debtor is attributed to his or her own fault or negligence, the guarantor may also claim damages.

451. There are conditions where the guarantor may proceed against the debtor even before paying the creditor. According to Article 1948, the guarantor may take action against the debtor and demand securities from him or her where: (1) the

debtor has been give notice to pay the debt; (b) the debtor has been declared bankrupt; or (c) either by reason of the losses the debtor has suffered or as a result of a fault committed by him or her, the guarantor runs a considerably greater risk than when he or she undertook the guarantee.

452. It is possible for the guarantor to enter into a contract of guarantee with another person where this other person guarantees the guarantor's indemnity claim against the principal debtor. In such cases the second guarantor is known as a counter-guarantor.

§4. Co-guarantors

453. The relationship among several co-guarantors is regulated by Article 1951, which is reproduced as follows:

> Art. 1951: Plurality of guarantors
> (1) Where several persons became at the same time guarantors of the same debtor in respect of the same debt, each of them shall be liable as simple guarantor for his share and as secondary guarantor for the shares of the others.
> (2) Where the guarantors entered into their undertakings by successive acts, he who bound himself in the second place shall be held liable as secondary guarantor of the guarantor who bound himself before him.
> (3) Where the guarantor expressly bound themselves as joint guarantors either with the principal debtor or as between themselves, each of them shall be answerable for the whole debt, subject to contribution from the others proportionate to their shares.

454 – 458

Chapter 9. Pledge

§1. General Provisions

454. Article 2825 of the Civil Code defines a contract of pledge as a contract in which a debtor undertakes to deliver a thing (called the pledge) to his or her creditor as security for the performance of an obligation. In terms of purpose, contracts of pledge and contracts of guarantee are similar: they are securities to the creditor. It should also be noted that a contract of pledge may be concluded between the creditor and a third party to secure the debt of another person (Article 2826). Under normal circumstances, a contract of pledge is concluded after or at the same time with the conclusion of the main contract. This is, however, without losing sight of the possibility that it might as well be made in order to secure a future or conditional debt (Article 2827). A contract of pledge is an accessory to the main contract, and hence extinction of the obligation for the security of which the pledge is produced results also in the extinction of the contract of pledge (Article 2849).

455. There is no special form prescribed for the validity of contracts of pledge in general. However, the Civil Code provides that the contract of pledge will be void if the maximum amount of the debt secured by the pledge is not specified (Article 2828). It should also be noted that if the amount exceeds ETB 500, the contract can only be evidenced by writing and will be valid as from the day when such deed acquires an undisputed date (Article 2828).

456. Delivery of the pledge to the creditor is an essential element of a contract of pledge; the contract will be invalid if it stipulates that the pledge will remain with the debtor except in those cases where the law expressly provides for the furnishing of a pledge without dispossession of the debtor (Article 2832). If the pledge is a kind of good that cannot be disposed of without a document of title, such as vehicles, goods in warehouses, and goods transport, it is not essential that such goods are physically delivered to the creditor; it suffices if the document of title is delivered to him or her (Article 2830). It should also be noted that it is possible for the parties to agree that the pledge will be delivered and kept by a third party (Article 2831).

457. The Civil Code contains special provisions for pledging of claims and other intangibles. These are provided in Articles 2863–2874. When the object of the pledge is a business, primary regard should be given to those special rules found in the Commercial Code, Articles 171–193.

458. The Civil Code also provides for rules applicable to mortgage of immovable properties. These provisions are found in Articles 3041–3130. These provisions are also supported by other statutes governing mortgage and foreclosure by financial institutions.

§2. Rights and Duties of the Pledger

459. A contract of pledge does not result in the transfer of ownership of the pledge; the pledger retains his or her rights on the pledge, including that of disposing and alienating or re-pledging it subsequently (Article 2834). The cost of maintaining and preserving the pledge is to be borne by the pledger, and hence the pledgee will be reimbursed for such expenses (Article 2835). The pledger may, at any time, demand the return of the pledge by paying the debt for the security of which it is delivered to the pledge; this right may not be derogated from by contrary stipulation in the contract (Article 2837).

460. In situations where the pledge is provided by a third party, any subsequent agreement between the debtor and the creditor will not adversely affect the third party (Article 2838). It is, however, not clear if the modification of the terms of the main contract in any way has the effect of releasing the third party. In addition, the third party could raise all defences that could be raised by the debtor against the creditor, and the debtor may not waive such defences to the detriment of the third party (Article 2838).

§3. Rights and Duties of the Pledgee

461. The pledgee is not allowed to use the pledge without the consent of the pledger; this is without overlooking the situation where use of the pledge might be necessary for its preservation (Article 2840). It is the duty of the creditor or the custodian of the pledge to collect any fruits produced, and such fruits will be the property of the pledgee, with their values applied successively to the expenses incurred for the custody and preservation of the pledge, to the interest and to the capital of the debt secured (Article 2841).

462. What will happen when a pledge has been delivered to the pledgee by a person who does not have the authority to dispose it? This problem poses a serious issue considering the fact that the subject of the contract of pledge is corporeal chattel, and any person who is in possession of corporeal chattel is presumed to be the owner. However, there might be a problem where the apparent owner is not the same as the real owner. In such cases, it can be argued that the pledgee has a reason to believe that a person in possession of a chattel is the real owner and might rely on this belief when entering into the contract of pledge. In such cases, Article 2844 provides that the pledge may exercise the rights deriving from the contract of pledge notwithstanding that the pledge has been delivered to him or her by a person who was not authorized to dispose of it. However, the owner of the pledge may take it back where he or she shows that the pledgee knew or should have known, on the making of the contract, that the other party was not authorized to pledge the thing (Article 2844).

§4. Sale of Pledge

463. The essence of a contract of pledge as a security device lies in the ability of the creditor to be able to sell the pledge and get his or her money in the event that the debtor fails to perform his or her obligation. Article 2853 provides that before the pledge is sold, the pledgee is required to put the pledger (and the third party who has furnished the pledge) in default. The following are the provisions governing matters relating to sale of the pledge:

> Art. 2854: Sale of pledge
> (1) Where, within eight days from the notice provided in Art. 2853, no objection has been raised or the objection is dismissed, the pledgee may cause the pledge to be sold by auction.
> (2) Where the pledge is quoted on the market or has a current price, the pledgee may cause it to be sold by private contract through the intermediary of a person authorised to make such sales.
> Art. 2855: Limitation by the court
> The court may, on the application of the pledger, limit the creditor's right to the sale of one of the pledge which is sufficient to pay off all the pledgee.
> Art. 2856: Assignment of pledge to the pledgee
> The pledgee may apply to the court to order that the pledge be given to him in payment, to the extent of the amount due to him, according to an expert valuation or the current price of the pledge, where it is quoted on the market.
> Art. 2857: Priority right
> (1) The pledgee may be paid out of the proceeds of the sale of the pledge before all other creditors.
> (2) In addition to the debt specified in the contract of pledge, the pledge shall secure the contractual interest and legal interest on the debt and the expenses incurred for the custody, preservation or sale of the pledge.
> Art. 2858: Limitation of creditor's rights
> (1) The pledgee may not enforce his priority right arising out of the contract of pledge beyond the maximum amount specified therein.
> (2) The pledger may not enforce his priority right to obtain security for another debt, even if incurred subsequently to the contract of pledge, owed to him by the debtor or pledger.
> Art. 2859: Disposal of proceeds
> (1) The proceeds shall be attributed to the creditor to the amount of the debt due to him and shall be deemed to have been paid by the pledger.
> (2) The balance of the proceeds shall be handed over the pledger.
> Art. 2860: Several pledgees
> (1) Where the pledge is encumbered with several rights of pledge, the creditors shall be paid according to their rank.
> (2) The rank shall be determined by the dates on which the various pledges were entered into.
> Art. 2861: Purchaser's rights
> The purchaser of the pledge shall acquire the ownership thereof free of any encumbrance.

Art. 2862: Creditor's liability
A creditor who sells a thing belonging to a third party which has been duly pledged shall not be liable unless he knew or should have known, on the making of the contract, that it belonged to the third party.

464 – 468

Chapter 10. Loans

§1. Loan of Money and Other Fungibles

464. Article 2471 defines loan of money and other fungibles as a contract in which a party (the lender) undertakes to deliver to the other party (the borrower) a certain quantity of money or other fungible things and to transfer to him the ownership and the borrower undertakes to return to the lender as much of the same kind and quality.

465. There is no special form prescribed for the validity of loans in general. However, the law requires that a loan of money exceeding ETB 500 can be proved only in writing or by a confession made or oath taken in court (Article 2472). In one case, the Supreme Court has accepted a bank transfer receipt by one person to another as a document sufficient to prove the existence of a loan.[1]

1. *Gebru G/Meskel v. G/Medhin Reda* [2008], Federal Supreme Court, Cassation File No. 31737.

466. The lender has the same set of obligations as a seller (Article 2474). Consequently, the lender warrants the borrower of fungible things against dispossession, defects, and non-conformities. However, Article 2474 also provides that in cases where the contract of loan is gratuitous, the scope of the warranty should be construed restrictively. This can be understood to means that when there is doubt as to whether certain instances of dispossession and defects are covered by the warranty, they should be taken to be beyond the scope of the warranty. In addition, in gratuitous loans, the lender warrants only those defects that are known to him or her.

467. The lender is entitled to refuse to deliver the subject of the contract where the borrower has become insolvent after the making of the contract; the lender can also refuse to do so in situations where the borrower was insolvent at the time when the contract was made but not to the knowledge of the lender (Article 2475). The implication of this is that if the lender knew, at the making of the contract, of the insolvency of the borrower, the lender cannot refuse to deliver the thing that he or she promised.

468. Payment of interest is not an essential element of a contract of loan, and hence the lender is entitled to interest only when it is stipulated in the contract (Article 2478). Though the parties are free to determine whether or not to provide for interest, there are, however, certain restrictions on the rate of interest. Article 2479 states that the rate should not exceed 12% per annum. It should also be noted that when the parties have agreed that the loan will bear interest but did not agree on the exact rate or when they provide for a rate exceeding 12% per annum, the borrower owes interest at the rate of only 9% per annum. Agreements providing for compound interest also are not valid (Article 2481). Loans by financial institutions are, however, subject to a special and different regulatory regime.

469. One of the essential elements of a contract of loan is the obligation to return the money or the fungible thing undertaken by the borrower. If there is a time agreed for the restitution of the money or the thing borrowed, the borrower should observe this law; however, he or she is entitled to return them before the agreed time (after having informed the lender of this intention) provided that the loan does not bear interest (Article 2482). He or she can also return the subject of the contract if a rate of interest exceeding 12% has been fixed in writing in the contract.

In cases where a time for the return of the money or the thing is not agreed in the contract, the borrower is required to return the thing within one month when requested to do so by the lender; likewise, the borrower could return it to the lender at his or her own initiative one month after declaring this intention to the lender (Article 2483). Courts might fix the period of time not exceeding six months within which the borrower ought to return the thing when the contract stipulates that the borrower will repay when he or she can or when he or she has the means to do so (Article 2484).

470. Article 2488 provides that non-payment of interest is not a ground for demanding the payment of the whole loan unless the borrower is in arrears for two consecutive payments representing together at least one-tenth of the capital loaned; this provision is non-derogable.

§2. Free Loan

471. A loan for use or free loan is defined as a contract in which the lender undertakes to transfer a chattel to the borrower for gratuitous use (Article 2767). However, the borrower is expected to return the chattel to the lender on the termination of the contract (Article 2769). In addition, the borrower is required to maintain the chattel at his or her own expense (Article 2770). The Civil Code contains the following special provisions regarding free loans:

> Art. 2771: Use of chattel
> (1) The borrower may use the chattel loaned only for the purpose defined in the contract or, failing such stipulation, for a purpose in keeping with its nature.
> (2) He may not allow a third party to make use of the chattel without the lender's consent.
> Art. 2772: Return of chattel
> (1) The borrower shall return the chattel at the agreed time.
> (2). Where no time has been agreed and the use for which the chattel has been lent itself implies no such time, the borrower shall return the chattel immediately at the lender's request.
> Art. 2773: Premature return: 1. Borrower's right
> The borrower may return the chattel before the agreed time unless such return causes damage to the lender.

Art. 2774: 2. Lender's right
The lender may claim the return of the chattel before the time at which it should normally have been returned where the borrower makes an unconvenanted use thereof, deteriorates it or allows a third party to make use of it or where the lender himself is in urgent and unforeseen need of it.
Art. 2775: Death of borrower
Where the borrower dies, the lender may require his heirs to return the chattel to him immediately, notwithstanding that he had agreed to lend it to the borrower for a fixed term.
Art. 2776: Wrongful use
(1) The borrower shall be liable for the loss or deterioration of the chattel, even due to force majeure, where he puts the object to an unauthorized use or improperly allows a third party to make use of it.
(2) In such case, he shall not be released from his liability unless he can prove that the chattel would have been lost or deteriorated, had he not violated his obligation.
Art 2777: Avoidable loss
The borrower shall be liable for the loss of the chattel through force majeure where he could have averted the loss by using a chattel of his own or, being unable to save both of his own chattel and that lent to him, chose to save his own.

Chapter 11. Administrative Contracts

472. The French distinction between administrative contracts and civil contracts is imported into the Ethiopian legal system by the Civil Code. In France, administrative contracts are governed by administrative law and civil contracts are subject to the provisions of the French Civil Code. In Ethiopia, civil and administrative contracts are governed by the Civil Code and are adjudicated by the regular courts. However, administrative contracts are one of those specific contracts having special provisions for regulation provided in the Civil Code. Accordingly, Articles 3131–3306 provide rules applicable to administrative contracts. In drafting the part of the Civil Code on administrative contracts, Rene David relied on French administrative law, and hence there is not much difference between Ethiopian law and French law as far as the substance of the law governing administrative contracts is concerned.[1]

1. See also paras 24 and 25.

473. The importance of the body of law applicable to administrative contracts should not, however, be overstated. This is because of many factors. First, statutes establishing administrative agencies provide different rules regulating the activities of these agencies; these rules may sometimes derogate from those provided in the Civil Code. Second, there are not many public services that are directly provided by private companies through concession from the government. Most public services in the country are provided by government departments and public corporations. Third, large public works are usually financed by international and regional financial institutions. In such cases, the contracts themselves, mostly based on international model contracts, will be sufficient to govern such transactions, and even in cases where there are disputes they are referred to international arbitral organs.

474 – 475

Chapter 12. Contracts of Partnership

474. The basis of any business organization is a partnership agreement (Article 210). The Ethiopian Commercial Code recognizes six forms of business organizations: ordinary partnership, joint venture, general partnership, limited partnership, share company, and private limited company (Article 212). Joint ventures, general partnerships, and limited partnerships could be constituted as commercial or non-commercial business organizations. On the other hand, an ordinary partnership is always a non-commercial business organization. Article 213(2) of the Commercial Code states: 'where a commercial business organization is created in the form of an ordinary partnership or where the form of the organization is not specified, the commercial business organization shall be deemed to be a general partnership'. Likewise, private limited companies and share companies are always commercial organizations.

Article 211 of the Commercial Code defines a partnership agreement as a contract 'whereby two or more persons who intend to join together and to cooperate undertake to bring together contributions for the purpose of carrying out activities of an economic nature and of participating in the profits and losses arising out thereof, if any'. From this it appears that the intention of the contracting parties is one of the essential elements of a partnership agreement: the parties must intend to join together and to cooperate. Another essential element is that the parties must have undertaken to bring together contributions for the purpose of carrying out economic activities. It should be noted here that the economic activities are not only those that are listed under Article 5 of the Commercial Code. Article 5 lists commercial activities. However, the concept of commercial activities is narrower than economic activities. If the contracting parties have undertaken to cooperate and bring together contributions for the purpose of carrying out commercial activities, then the resulting business organization is commercial. It should be noted here that despite the fact that the activities undertaken by a private limited company or a share company are merely economic (not commercial), the business organization is considered as commercial.

Another essential aspect of a partnership agreement is the undertaking of the contracting parties to participate in the profits and losses arising from the activities. It is not required that the parties must state their share in the profits and losses. However, Article 215 of the Commercial Code renders any provision giving all of the profits to one partner or any provision relieving one or more of the partners of his or her share in the losses void.

475. Written form is a validity requirement for partnership agreements (Article 214).

Chapter 13. Quasi-contracts

476. Issues regarding quasi-contracts are discussed in paragraphs 48–62 of this monograph.

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