CHAPTER THREE

LAW OF CONTRACT AND ITS EFFECT

Content

INTRODUCTION

Dear student, you have been acquainted with the notions of law, persons and the competency of them in the first and second chapters respectively.

The present chapter is about law of contract. Law of contract is an indispensable instrument in economic life because it affects every ones daily life. It has the purpose to regulate valid agreements created by parties and create smooth function of business transaction in the society by making certainty, predictability, and enforceability.

That is the reason to state “we all make contracts every day… and many of us spend most of our lives performing contractual obligations”. This statement ensures that human beings are interdependent in that they always create social interaction for their survival.

Under this module, accepted wisdom related to the formation, and effects of contracts will be thoroughly discussed so as to enable students to identify a valid contract and to analyze the legal effect of such contract.

For the formation of a valid contract, there are basic elements which the law requires to fulfill. Non-observance of such basic elements leads the contract to be defective. Once the contract is validly formed, it shall be binding up on the contracting parties. The issue of failure to perform the binding obligation that arises from the contractual agreement gives rise to effects of non-performance of obligations which will be explained in more detail under this module.

After the completion of this chapter, you will be able to:

- Understand the meaning and basic requirements of a valid contract
- Distinguish and analyze causes of defective contracts and their effects
- Explain performance and non performance of obligation
- Enumerate and analyze remedies of non performance
- Discuss when notice will be important for non performance

1. Meaning and Obligation of Contract

What do you understand by contract?

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As human beings are social animals, nothing exists without creating interaction among them. That is every relationship that we create are nothing but agreements which may or may not be contractual.

The relationship may be contractual if it results obligations among the contracting parties, such as between buyer and seller, lesser and lessee, lender and borrower. It will however remain a mere agreement if it doesn't create any obligation between parties agreed such as: promise to reward your brother when he stands first among his class students, promise to invite somebody at a fixed time, agreement to buy shoes for a child when he stops crying etc.

Therefore; one may define contract as a binding obligation created by agreement between parties. But, it would be mistaken to consider all agreements to be a contract. Contract is more than an agreement because it is binding and enforceable by law. This means an agreement is a contract only if it produces obligation that shall be enforced by the court of law. This applies only when the agreement is created in conformity with the law.

It is this concept that is incorporated in the Ethiopian law under Art.1675 of the Civil Code. Under this provision, contract is defined as "agreement whereby two or more persons as between themselves create, vary, or extinguish obligations of a proprietary nature."

Obligation may be defined in different approaches. But in order not to create confusion, it would become preferable to use one of the definitions. In view of that, obligation is defined as 'a legal duty or moral duty to do or not to do something'. This is also true in the Ethiopian Civil Code. In our case, the term is not directly defined but it is defined in a way of listing as an obligation to give, to do, or not to do. Thus, a party may undertake to procure to the other party a right on a thing, or to do, or not to do something.

Students can also understand from the above definition that a minimum number of persons to conclude a contract is two, whereas the maximum is unlimited and the obligation is binding only among the contracting parties, not the third parties to the contract. This principle is termed as privity of contract.

The obligations created in a contract must be estimated in money terms and the purpose is either to create, vary or to extinguish obligations. Therefore, contract such as marriage, adoption, etc. doesn't meet the definition of contract because they cannot be valued in terms money or they do not have an equivalent economic value.

The other point that one can infer from the above definition is that the obligation is created freely by parties to the contract using the notion of freedom of contract through the consent of parties as provided explicitly in Article 1711 of the civil code. Therefore, a person has a right to freely determine obligations he/she is going to discharge by his/her consent so long as they are not prohibited or restricted by law. This means subject to the prohibition or restrictions as provided by law, a contractual obligation is highly dependent on the consent of parties.

2. Essential Elements of Contract

Every contract may not be enforced by law because of various defects that challenge the validity of it. For a contract to be valid and enforceable by the court of law, it shall fulfill basic elements prescribed in Art.1678 C.C.

As provided in this Article, contract shall not be valid unless the basic elements which are capacity, consent, object, and form, if any, are fulfilled.

This is to mean that for a contract to be valid;

a) Parties to the contract must be capable
b) The consent of parties shall be freely given
c) The object (i.e obligation) of the contract must be precisely defined, lawful, possible and moral, and
d) Its form must comply with the law, if it is provided by it.

These essential elements of contract will be briefly explained below

a) Capacity

As you might remember in chapter two of this module; every person cannot exercise his/her legal rights/duties assumed of him under the law.

As capacity refers to the ability of person to perform juridical acts, persons who do not attain majority of age (18 years), carry normal mental condition or sentenced by their acts of crime are incapable of performing juridical acts. That means, persons who do not have full capacity due to the above reasons are incapable and the contracts concluded by them are sick so that they are acts are subjected to invalidation.

From this, you can understand that for a person to enter in to a valid contract he/she must be capable. If the person is incapable due to his minority, insanity or infirmity or judicially interdicted or lacks his/her in capacity by legal interdiction due to his/her criminal offender, the contract may be invalidated by the request of the incapable person or by his/her representative. The rationale behind is that incapable persons are presumed unable to give consent freely. The law presumes such persons as they are incapable to understand the nature

and the legal consequences of the acts. Therefore, it would be possible to argue that the law stands in favor of them by not permitting legal effects to their contract or by rejecting the effects of such defective contract if they wish to demand invalidation.

If invalidation of the contract made with them has the purpose to protect the interests of incapable person, the other person who is capable to the contract doesn't have the right to raise the same issue and may not be allowed to get the contract effective. Therefore, any person who alleges himself disable, shall prove that he is under a disability, to be beneficial for invalidation of the contract.

My student, as you have learnt in chapter two dealing with law of person, you might have got a lot of information about capacity of person. To pit you as a brain storming, every physical person is capable of performing all the acts of civil life unless he is declared incapable by law. From this legal assertion, you can understand that capacity is a rule and in capacity is an exception.

As regards artificial/legal person, the capacity doesn't relate to age, mental condition, or interdiction. Its incapacity is manifested only where it carries activities other than that for which it has been established.

Example; a company which has legal personality for banking activities, is in capable to perform acts such as mining, insurance, import and export transactions as it has not been given legal personality for such activities.

1.1 Consent

Consent is the process of making a proposal and creating an agreement up on it through offer and acceptance. In the formation and existence of contract free consent is a permanent pre requisite and basic requirement. As provided in the civil code, a contract shall depend on the consent of parties who define the object of their undertakings and agree to be bound thereby. Hence, any agreement which parties did not intend to create legally binding obligation is not a contact.

Therefore; consent is the freedom of individual to enter in to a contract. It is the willingness of parties in the contract to enter in to legally binding relations. In order to create a contract, it requires to communication through offer and acceptance.

Offer: is the proposal that signifies to another showing one's willingness to do or not to do a certain act with the purpose to obtain acceptance of the other. The person who declares a promise or makes an offer is called offeror.

Acceptance: is a proposal that an offeror sends is signified by an offeree or it is the way where the offeree expresses his willingness to do or not to do an act proposed by the offeror. Offeree is a person to whom an offer is made. Therefore, a contract is said to be concluded when the offer made by the offeror is accepted by the offeree.

Dear student read the statement and identify the answer following it.

Abebe expressed his willingness to buy a sofa set for 10,000 birr from Mamo and Mamo in his turn accepted to sell it by the same amount of money.

a) Who is an offeror?
b) Who is an offeree?
c) Determine whether there is a contract?

Communication of offer and acceptance is expressed by various ways. Offer and acceptance must be communicated to the offeror through: words, writings, signs, or conduct. That is to mean, a mere mental desire does not amount to acceptance unless it is expressed because one cannot prove decision that has not been communicated. Note also that communication of acceptance should be made by the offeree to the offeror not by any other colleagues and must conform to the terms of the offeror. See the following example.

> Aster expressed her willingness to buy bic pen by 2 birr but Mamit said that she will sell it with 2.20 birr. Here since Mamit's acceptance does not conform to Aster's offer, there is no contract.

2.2 Defects of Consent (vices of consent)

From the discussion above, it is said that consent of the contracting parties is a fundamental requirement to conclude a valid contract. That means not only consent but also the contracting parties must have consent free from defect. If the consent is defective, the effect shall be subjected to invalidation of the contract. Defective contracts are therefore, vices of contracts which do not satisfy essential element for valid contract. That is the case provided by the words of the civil code under Art.1678 C.C.

> "No valid contract shall exist unless the parties are capable of contracting, give their consent sustainable at law, the object is sufficiently defined, possible and lawful, and it is formed in the form prescribed by law, if any"

Therefore to conclude valid enforceable contract in our law, it is required to meet all the requirements specified under Art.1678. If not, the contract is defective and may not be enforceable for lack of one or more of the elements mentioned under such article and as a result make the contract either void abinitio or renders the contract voidable as the grounds may be. As prescribed in the civil code, a contract may be invalidated on the ground of defective consent or that the consent is given by mistake, fraud or duress exercised by the contracting party or third party, unconsciously, and also reverential fear. However, if the contract is not sufficiently defined, the object is unlawful /immoral/impossible and the form is not as prescribed by law, the effect is void which means that contract is nonexistent or that it has not been formed at the very beginning, so it doesn't have any remedy. This is to mean that the contract does not create legally binding right or duties before the court of law.

Entering in to a contract with make defective consent and incapacity, however, it doesn't make a contract nonexistent from the very beginning but merely makes defective. This gives option to the party who is a victim of such defect either to kill or to cure such defective acts. Until such option is exercised to the negative however, it remains a valid contract.

Therefore, when the contracting party proves that the consent for the formation of the contract is given on one or many of the above grounds, the contract may be invalidated on the ground of defect in consent. When the contract is invalidated, the effect will be reinstatement. That means, the parties remain in the previous position had not been a contract is concluded.

Example – Abebe sold a tape recorder to Shimelse by 5,000 birr on the ground of fraud. Abebe proved that there was fraud on the side of shimelse that misleads Abebe to sell the Tape recorder. Therefore, up on the request of Abebe, the contract may be invalidated. As a result the tape recorder shall be returned to Abebe and the money paid (5000 birr) shall be returned to Shimelse.

For more information, please distinguish the difference and identify a clear manifestation of fraud, mistake and duress. Please, read the definition of the terms below for a course of understanding.

Mistake: Mistake may be defined as misunderstanding or erroneous belief on the matter or obligation that a party has to do in the contract. Mistake is a wrong belief of about a certain fact and it is personal in the sense that it is the person in the contract who perceived the fact of something for another.

It is one of the grounds for defective contracts which result invalidation. However, every mistake cannot be the ground for invalidation**.** The law requires that the mistake must be decisive and fundamental. The party invoking mistake need to establish that he/she would not have entered in to the contract had he/she known the truth for showing it be decisive. Not only this, to indicate that the mistake is fundamental, he/she must show that parties considered being fundamental or the mistake relates to an element of the contract which is fundamental having regard to good faith and the circumstances in which the contract was made. Please, refer Articles 1696-1699 of the Civil Code to understand more.

Fraud: may be understood to be false representation or deceitful practice with a view to gain advantage against the other party. Fraud is different from mistake in that in fraud, there is another person who misleads the contracting party in believing that something is true which enables him/her to decide to give consent for which he/she would not have given had he/she have known the truth. If one proves that he/she entered in to the contract because of fraud made by the other contracting party or third party for the benefit of the other contracting party, he/she can require invalidation on the ground of fraud.

For instance, obtaining a high salary by securing false job experience, qualification, which in reality is not, are examples of invalidation on the ground of fraud.

Duress: Duress is a threat or a kind of coercive act imposed on the other party, to enter in to a contract. This is a forced (compulsion) act to sign an agreement which he does not want. Duress is a cause for invalidation only where the threat must be serious and imminent. The words of the law provides that a contract may be invalidated on the ground of duress when 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, honor and property.

For example when "A" with a loaded gun pointing at "B" and asked him to sign his signature that adduces the sale of his house by 200,000 birr which otherwise he would kill without excuse. In this case, the threat is serious and he is under compulsion act without a time gap. B in this case has two evil options, either to die or to put his signature. Thus, if B chose a less evil, say, putting his signature, he is justified to require invalidation after the duress being disappeared.

Do you think that he is justifiable if the threat is against, his brother, sister?

The other ground that may amount to a defective consent is reverential fear.

Reverential fear: is said to exist where a party obtains any benefit from the other contracting party where confidential relationship exists under a contract or as a gift by exerting undue influence. Such special relationship is deemed to exist where the relations arise between the doctor and patient, parent and child etc. In principle, reverential fear is not a ground for invalidation; however, where the contract was made with the person inspiring the fear and such person derived an excessive undue advantage due to fear from the contract, the contract may be invalidated on the ground of it. Therefore, in order to protect the weak party which lost benefit unduly due to fear article 1709(2) C.C provides invalidation as a remedy.

Unconscionable contracts: the bargaining power of contracting parties may be affected by several factors such exposure, experience, senility. As a principle, such factors may not result invalidation of the contract. However, exceptionally, where the bargaining powers of contracting parties are unequal and as a result the consent of the injured party was taking advantage of his want, simplicity of mind, senility or manifest business in experience, invalidation may be justifiable remedy.

Furthermore, unconscionable contract exists when the contract concluded is disadvantageous for one party but substantially more favorable to the other party. In particular, it is a normal business practice when one relatively derives advantages from the contract but absolute benefits cannot always be derived from usual contracts. The contract may not be invalidated by the mere fact that the terms are substantially more favorable to one party than to the other. The contract may be invalidated on the ground of unconsciouablity where the consent of the injured party was obtained by taking advantage of his want, simplicity of mind, senility, or manifesting business in experience.

3.3 Object

Object is one of the basic elements that must be fulfilled for the contract to be valid. Object may be defined as something that has material existence that can be detected by our sense organs. However, in case of contract, object refers to the obligation of parties to the contract created by their agreement. It is the performance which is expected of the parties in the contract. Therefore, the obligation which the parties are obliged to perform under the contract is the object of the contract.

For instance Abebe concluded a contract to sell a quintal of white Teff to Kebede for 1000 birr. In this contact, both Abebe and Kebede have the respective obligation. Can you identify their obligation? My student, if you replied that the obligation of Abebe is to deliver a quintal of white teff to kebede where as the obligation of kebede is to pay 1000 birr to Abebe, you are absolutely correct.

Now, the question may be raised as to who may determine the object of the contract. In the formation of a contract, parties must determine the object clearly by their consent. In our law, under Art.1711of Civil Code states that the object of the contract shall be freely determined by the parties unless it is restricted or prohibited by law. Therefore, except that prohibited by law, every other obligation can be made by the parties themselves using the right of their freedom of contract.

The phrases “unless restricted or prohibited by law” above indicates the existence of an exception to the principle of freedom of parties to determine object of contract. The law prohibited to create insufficiently defined, unlawful/immoral and impossible object. If the object

is not sufficiently defined or when the object is unlawful, immoral and impossible, the law gives no remedy. The law says that the contract shall have no effect. That means, it remains void at the very beginning (abinitio). It considers as if there were no contractual obligation. This means that when object is not established according to the rules of the law, it does not have remedy like that of the defective consent. When the consent is defective, the option to leave or reject the contract relies on the parties injured by the vitiated consent. In this case, there is a legal remedy either to continue the contractual obligation or to request invalidation by the party who alleges defective consent (i.e by mistake, duress, fraud, etc, or incapacity).

Student, are you familiar with the terms; sufficiently defined, unlawful, immoral and impossible of objects? Let me further explain them to you so as to make them clearer.

Sufficiently defined is one of the legal requirements. As provided under Art.1714 C.C, a contract shall be of no effect (i.e. void) where the obligation of the parties or one of them cannot be ascertained with sufficient precision. If it is not precisely defined by parties in the contract, a court may not define it under the guise of interpretation to make it a contract. This is because object is freely determined by the parties themselves subject to the prohibitions made by the law. Due to this, parties are under a duty to specify their respective obligation so as to require legal remedies if one of them fails to discharge according to the agreement.

For example; Abebe agreed to sell one of his horse to Mamo for birr 2000.00. Do you think Mamo can take the case before the court for performance? He might take but the court cannot order to deliver a horse without being identified. This is because their agreement didn't make clear/define/ which type of horse is sold and to be delivered by Abebe.

Object must be possible: This is also the other requirement what an object shall fulfill in a given contract. As provided in article 1715 of the civil code, where the obligation of parties or one of them relates to a fact which is impossible, a contract shall have no effect.

Impossibility may be defined as the fact or condition of not being able to occur, exist, or a fact or circumstance that cannot occur, exist. The impossibility must be absolute for all human nature. Suppose one agrees to supply coffee from moon for certain money, to agree to sell cows can give birth monthly, etc, may fall under this category.

Object must not be unlawful/ immoral: you may take cognizance that every obligation parties would like to agree to do may not be valid and enforceable by law. This is true because an object which is prohibited by law of the country or what is being immoral by the society cannot in any case get acceptance. For example; to agree to sell a human being, to agree to employ a woman for commercial sex, etc,

As you remember in section one under the 'meaning and obligation of contract', an obligation created by the parties in a contract may fall either an obligation to give, to do or not to do. For more understanding, see the following examples.

- Obligation to do- Example; obligation to build a house.
- Obligation to give- Example; to transfer a thing to some one
- Obligation not to do- obligation to be abstained from doing an act. Example, an obligation not to build a fence.

Please; identify the problem of objects in the following contractual agreement.

- B leases his house to C for the payment of 2000 birr.
- B entered in to a contract with B to sell him a Diamond excavated from moon for the payment of 10,000 birr/gram.
- A concluded a contract to give 10,000 birr to B in order to kill C.

1.4 Form of Contract

Form refers to the manner how contractual agreement is entered in to.

In principle; parties are free to determine which form is used in their contract. However, if the law provides to apply a specific form, parties must observe it.

The law under Art.1719 C.C states: unless otherwise provided, no special form shall be required and a contract shall be valid where the parties agree. Where a special form is expressly prescribed by law, such form shall be observed.

The other law governing the effect of non-observance of law is provided under Art 1720 of the Civil Code. Accordingly, where a special form is prescribed by law and not observed, there shall be no contract but a mere draft of contract.

Therefore; where a special form is provided by law, parties shall comply with it. If they fail to observe the form prescribed by the law, the effect of the contract will be incomplete /draft and remains unenforceable.

Summary, parties are free to determine the form they follow but when the law provides to follow a certain form, it shall be followed otherwise the contract shall remain incomplete and as a result, it cannot be enforced. For instance, the form for sale of immovable property is provided by the law under Art.1723 of the civil code. As stated thereof,

> "a contract creating, or assigning rights in ownership or bare ownership in an immovable or an usufruct, servitude or mortgage of an immovable shall be in writing and registered in a court or a notary"

Therefore; if sale of immovable property is not concluded in writing with a support of the signature of two witnesses and not registered, the contract shall have no effect by the mere fact that the form prescribed by law is not conformed. The reason for it is because they fail to conclude the contract with the form provided by the law. Do you think that it would be possible if the law requires all contracts to be formed in written form, such as buying a single item in the market, purchasing a single cloth in a shop, buying something to eat in hotel, drinking hot drinks in cafeteria, polishing your shoes, etc?

If your answer to the above question is impossible, you are right. If every contract were made in writing, everyone would face with shortage of time. Besides, it would be impractical. That is why the law prefers to allow freedom of form to the parties and only prescribes certain contracts which may be significantly important for policy consideration or public interest to be made in written form.

To summarize, in principle a form of contract is determined by the parties themselves. However, where the law exceptionally provides the form of a contract to be made in writing, there shall be no contract until it is made in the prescribed form.

Activity-1

1. Explain basic elements of contract as prescribed in the Ethiopian civil code_____
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   _____
2. What are the ways by which contract is created? And how?
   _____
   _____

3.Describe the importance of consent for the formation of contract
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4. Identify and discuss which elements of contract lead to an effect of void and voidable contract._____
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5. Discuss the principle of privity of contract

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6. Explain when freedom of contract is limited by the law**.**
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7. Abebe went to Tesfaye's shop at Debremarkos town,East Gojjam Zone and asked him to sell a pair of leather shoes made in Ethiopia for 300 birr. Though Tesfaye initially replied that he would sell for 350.00 birr, he immediately changed his mind and accepted the offer to sell it for 300.00 birr. Based on the above case, answer the following questions

a) is there a contract between Abebe and Tesfaye? Why or why not?
b) Determine who the offeror?_____
c) Who is a counter offeror? _____
d) Who is expected to accept to have a valid contract?

3. Effects of contract

Students are expected to understand how a contract is formed and what elements are essentially fulfilled to be a valid contract, in the previous unit. Under this unit, you will be acquainted about effects of a valid contract

For the obvious reason, Parities to the contract are bound by their agreement. Since they form the contract in their own enthusiasm with a view to gaining benefit from the performance of the contract, it is the duty of them to perform willingly and bound by the words of them with no any other intervention so that it becomes a moral obligation. Contract is not only a moral obligation but also a legal duty.

This is a universally accepted Latin maxim known as "Pacta-sunt servanda" to mean that the agreement shall be kept by the contracting parties. To make it more detail, if a party is not accorded with the words of his/her mouth, a mandatory intervention of the law is required. This

principle is explicitly recognized in Ethiopia under Art.1731 C.C. In the strict sense of such article, a provision of a contract lawfully formed, shall be binding on the parties as though they were law.

Accordingly, when a contract is formed by fulfillment of the legal requirements stated under Art 1678, it becomes a law among them in view of that they must perform their respective obligation. If this is so, the law intervenes and binds the party who does not perform by his consent as would have been made in the formation of the contract. That means if one of the parties fail to discharge his/her obligation, it shall be enforced by the order of the court on the application of the person who alleges non-performance.

For more clarification, if one of the parties in the contract is not willing to perform by himself/herself, the contract shall be enforced by the law without the willingness of the party who breached his/her promise.

Law is enforced by executive and interpreted by the judiciary organs of the government. As we have just discussed before in chapter one, the law makers are parliament but for a contract, law is made mainly by parties. A contract formed by the parties following the necessary requirements is considered as though it were a law so that it is enforced by law. The law of contract made by the law making body is used as gap filling provisions.

As law makers do, parties to the contract can create, vary or amend or extinguish the contract. And once, it is validly made, the contract should be performed. Non- performance of a contract leads to various remedies (enforcement, cancellation and damages).

Therefore; effect of a contract implies that it becomes the law of the nation in the sense that the executive and the judiciary have a constitutional duty to implement and interpret it respectively.

3.1 Performance of Contract

In this section, you will learn who is under a duty to perform, to whom and how performance is formed.

In a contract, performance is deemed to be the fulfillment of an obligation, in a manner that releases the performer from all liabilities under the contract. The contract shall be performed in

accordance with the terms made therein. This is because formation of contract by fulfilling essential elements will be meaningless unless the contract is performed by both parties. If performance is carried out by one party, it discharges only the obligation of such party who discharges it.

Contractual obligation is mainly extinguished by performing obligations by the respective parties. The contracting parties therefore shall discharge their respective obligation in conformity with the terms and conditions of the contract.

Example: Abebe agreed to sell his 21 inch sony flat Television to Meseret for 5000 birr. Delivery of the Television was agreed to be on September 20,2011, five days after the payment of the price. Assume that Meseret paid the price on september16, 2011. However; Abebe failed to pay on September 20, 2003. Here you can see that Abebe's obligation is not discharged. Hence, the obligation of the contract is not completed because only the obligation of one contracting party is completing.

Contractual obligation is mainly extinguished by performing obligations by the respective party in conformity with the terms and conditions of the contract. If obligation is performed according to the terms of the contract, the obligation will cease to exist and ends its natural existence.

Do you think that performance is only made by the contracting party or that it does not matter by whom it is performed so long as it is carried on according to the agreement. You can find the answer from Article 1740(2) C.C.

As provided in it, "the debtor shall personally carry out his obligations under the contract where this is essential to the creditor or has been expressly agreed." unless personality of the debtor is essential, contractual obligation may be performed by third party." The question continues, what about when performance in person is not essential to the creditor or not agreed in the contract that it must be performed in person by the debtor? The answer is also given by the same instrument stated as, in the other cases, the obligation under the contract may be carried out by a third party so authorized by the debtor, by the court, or by law.

As you can understand from this provision, performance in person by the debtor is not a principle, it is rather an exception. As clearly stated above, personal performance is only

essential where parties agree that it shall be carried by the parties themselves using their freedom of contract, or when it is essential to the creditor to perform by the debtor in person.

Therefore, performance shall be carried out by any third person when permission is obtained by the debtor, by court or by law but when it is significant to the creditor, performance shall be carried out by another person on behalf of the debtor as an exception. This is because, it does not result any change whether a performance is carried out by the debtor or by any other person such as payment of money in a loan contract, sale of lottery, delivery of goods, etc.

The question is again will be what does the word 'essential' to the creditor refers to? This is to indicate that when the creditor has special interest on the debtor's valid performance, it can only be performed by the debtor, such as delivery of historical antiques which a creditor may not find in anywhere except the debtor. The intention of the law maker in this case seem to safeguard the interests of the creditor so that in the event of special interest, there is no way to assign third party on behalf of the debtor.

Essentiality of personal performance/special interest for the creditor/ may also be raised when obligations may require special ability, skill or experience. In such case a contract is made by assuming personal skill or experience in priority of the other. Hence, it is essential to the creditor so that performance by the contracting party in person shall be required.

For instance, a contract made with popular musicians, a contract concluded with an engineer for construction purpose, contract entered with physician for health examination, and a contract concluded with lawyers, etc may not be substituted. Instead, the contract concluded with them shall be performed in person because of the respective knowledge that they have been preferred from other similar professionals.

In these cases, contracting parties are selected for their special knowledge, skill, gift, experience, so performance in person is mandatory, otherwise, it a mounts to violation of contractual obligation.

In the other cases, like receiving payment of money, delivery of goods, etc. may not be necessarily performed by the contracting party in the sense that there is no any change whether it is performed by the contracting party or by the other person, on behalf of the contracting party.

The other issue is to whom performance is made? As regards this issue, the law under Art,1741 C.C provides that payment/ i.e performance/ shall be made to the creditor, to third party to whom authorization is made by the creditor, by court, or by law to receive it on behalf of the creditor. What if the creditor is a minor, or incapable to receive payment? In this case, the law warns the debtor to be diligent in the payment of his debt; otherwise the payment shall not be valid. If that is so, he/she may be required to make performance for the second time unless he/she proves that the creditor is benefitted.

The other issue relates how performance is to be made. Of course performance shall be made according to the contract. The creditor shall not be bound to accept a thing different from that provided in their contract even if such thing is the same or greater value than that specified therein. This shows that in principle, the type of the thing to be delivered, the quantity, quality, etc. must be as agreed in the contract. However, as it is not compulsory, the creditor may have a discretionary power either to accept or reject the payment/ performance.

In the case of part payment, the creditor may have the right to refuse it at the date of maturity but if he/she thinks that it is not economical, he can decide to accept it even it is part of the performance.

However, in situation of performance of fungible things (things that can be exchanged by themselves, example; teff, Pease, coffee etc.), the debtor may choose things to be delivered when the time to deliver such fungible things are due. In this case, the creditor cannot refuse fungible things on the ground that the quantity or quality given to him does not exactly conform unless that is important to him or has been expressly agreed in the contract. Therefore, if the agreement is for instance, delivery of wonbera coffee, the debtor is forced to delivery such type because they have been restricted in their contract.

Essentiality of fungible things may be implied from the content of the contract or has to be proved by the creditor that a slight difference of it is unbearable in that it does not serve the purpose for which the contract is established. For instance; if the debtor agreed to deliver a certain number of drug which is the right dosage for a medical purpose, the creditor has the right to refuse acceptance in that a slight difference of the fixed amount may be prejudicial to his health, hence, it is essential.

In situation where it does not exactly conform to the contract and he is under obligation accept performance, he may have the right to proportionately reduce his/her performance or claim damage if he/she has already performed.

3.2 Non – performance of Contract

I hope you remember the effects of performance. What do you guess about the effects of non-performance?

As you might remember in the previous discussion, a contract lawfully formed must be performed by the parties. If that is done, no longer obligation exists in that the obligation created shall be extinguished. Failure to perform according to the terms or conditions made in the contract results non performance.

Non performance of contract is therefore breach of contractual obligation. The point to be raised here is what are the effects when parties do not perform obligations according to the terms entered in the contract, for instance; non performance according to the time, place, size, quantity or quality, etc.?

Non-performance has various legal remedies. The legal remedies for non performance are specified under Art.1771 C.C. accordingly, where a party fails to carryout his/her obligation under the contract, the other party may have the right to require;

- Enforcement of the contract
- Cancellation of the contract (Judicial or unilateral)
- In addition, requires damage caused up on him.

Therefore, if the contractual obligation is breached, the other party has the right to require performance of the contract, cancellation by the order of the court or unilateral cancellation by the declaration of the creditor. In addition to performance or cancellation, a creditor may have the right to demand damage for the loss suffered up on him by non-performance.

However, to require remedies for non-performance, the party who claiming breach of contractual obligation is required to give notice for non performance, to the debtor. Notice has at least two importance;

A) to remind the default party that the obligation is due
B) to warn the debtor that he/she would take the case before the court if the former doesn't perform until a certain date which is fixed by the creditor expires.

Notice is given after the due date when the debtor failed to discharge his/her performance. Due date is referring to the agreed time of performance before which the creditor may not bring the case to court debtor unless notice is not required by law.

Notice may be given either in writing or in any other means so long as that conveys the intention that the creditor is in need of performance (Art. 1773). So there is no formal requirement for notice so long as it clearly expresses the intention of the creditor for performance.

Though notice may be a prerequisite requirement to require non performance, there are certain circumstances where notice is unnecessary so that a creditor would sue the debtor directly. As stated in Art 1775 notice is unnecessary where;

a) obligation not to do, or refrain from a certain act
b) when the nature of the contract shows that it is performed with in a fixed period of time.
c) when parties by their agreement exclude that giving notice is unnecessary in their original contract
d) when the debtor declared in writing that he would not perform his/her obligation in advance.

In all the event of the above condition, notice is not important as a result a creditor can require damage without expecting of him to put the debtor under default notice.

Please, discuss the above factors with your colleagues how they are different from one another.

The next issue that needs to be raised is whether forced performance as a remedy is always applicable or not.

Forced performance which alternatively called Specific performance, is an order of a court which requires a party to perform a specific act, usually what is stated in a contract. Forced performance refers to performance of the debtor by the order of the court or it is a performance of an obligation by the order of the law.

As provided in Article 1776 C.C, forced performance or performance by the debtor himself/herself may be order only if it is of special interest and can be obtained without affecting the personal liberty of the debtor. That means, there is a restriction to require forced performance. This shows that court may not always order forced performance. To order a forced performance by the debtor on the application of the creditor, there are two factors to be taken in to consideration, these are:

a) It must have special interest to the creditor and
b) Performing the obligation must not affect the liberty of the debtor.

Therefore, if the two elements are cumulatively fulfilled, a debtor is forced to perform the obligation.

For instance "A" a contract who concluded a contract to build hospital with state organization "B" failed to complete the contract as agreed. is "A" be forced to accomplish the building? Why?

If your answer is "no" you are right. Because if by the order of the court 'A' is physically forced to do, his liberty will be affected. Therefore, rather than to order forced performance against 'A', the creditor, "B" may be authorized to do by himself if possible, or cause to be done by any other person in substitution of the debtor "at the expense of him /"A"/.

Therefore, in the above case, even if "B" likes "A" to build hospital until the construction activities are being accomplished, it shall not be forced because his liberty will be affected. What if the obligation is to deliver an ordinary thing, such as tape recorder? In this case, the creditor does not have special interest because he can find it everywhere.

The debtor may not be obliged to deliver it because it can be bought from other dealer of similar kind at the expense of the debtor. What if the thing under the contract is a historical antique so that the creditor cannot find anywhere other than from the debtor? In this case, the creditor has a special interest on it and also the debtor's liberty cannot be affected. Here the debtor is forced to deliver the thing or forced performance may be ordered against the debtor..

Therefore substituted performance or self performance is alternatively used as a remedy on condition when there is no special interest up on the creditor and affects on the liberty of a debtor.

Summary

As you seen the effects of contract, the agreement of parties are initially given the status of law as between themselves. Like the public law, the law made by the contracting parties must be respected by them so long as it is freely made. When the contract is formed willingly with no defect, parties shall respect and perform accordingly. If a contract validly formed has a law status, it shall have a binding effect if one of them fails to perform it according to the agreement. It is binding means that if one of the parties violates the agreement, the other party demanding performance can take the case before the court for forced performance or requiring other remedies he/she might need to be. So the defaulted party shall perform by the order of the court.

Therefore, performance and non performance of obligation are opposite to each other. Performance refers to the discharge of the contractual obligation as defined by their agreement. Non performance relates to failure of parties to perform contractual obligation according to the agreement made in the contract. Non-performance or breach of contract may be partial or total. Where there is non-performance, the party demanding performance can request the court to order forced performance by the debtor himself or in substitution of him at the expense of the debtor.

The party may also require judicial cancellation with or without damage. If there is prior agreement that there will be unilateral cancellation on happening of certain condition or where the condition set by law for unilateral cancellation is fulfilled, the party can declare cancellation of the contract unilaterally without the need to go to court.

Activity.2

1. **"**Performance by a third party authorized by the debtor, court or law is a rule where as performance in person is an exception" Do you agree or disagree with the above statement? Explain whatever your position may be.

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2. Explain about effects of contract_____

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3. Identify and explain the remedies for non performance of contract and the requirements, if any to require non performance_____

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4. Discuss the difference among forced performance, self performance and substituted performance and when each of them is applicable?

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5. Describe when notice is necessary and the importance of it to require performance.

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6. Mesfine entered a contract to build a dwelling house with Sayih. According to their terms of contract; Mesfine will be paid for his professional service after a successful completion of the work. The work shall be completed for one year .Sayih on his part,

would supply the necessary construction materials and shall pay 20,000:00 birr for professional service to Mesfine. Mesfin however, failed to complete the work for the time fixed in his agreement with Sayih.

- Do you advise Sayih to require forced performance? Justify why or why not?

Extinction of Obligations

In this section a brief devotion is made on the grounds which give an end to contractual relationship.

A. **Performance**- when the parties perform their respective obligations, the obligation of the parties is extinguished.

B. **Cancellation or Invalidation**- if one of the parties was incapable or his consent was vitiated; the contract can be extinguished by invalidation. The same is true if the contract is cancelled by the court or unilaterally. Invalidation is preceded by problems with the formation of the contract. In cancellation the contract is validly formed but is affected by non performance. Cancellation and invalidation have retroactive effects.

C. **Termination** – a contract can also be terminated by the agreement of the parties. One party may also terminate the contract unilaterally if both parties previously agreed for one party terminate the contract by giving prior notice. The same is true if the contract is concluded for an indefinite period of time. Termination will have only prospective effect.

D. **Remission of Debt** – is an act of forgiving a valid claim by the creditor. Remission of debt is not however a unilateral act of the creditor. For remission of debt to take effect it must be accepted by the debtor.

E. **Novation** – is a substitution of an old obligation by a new obligation. For novation to take effect, the new obligation should differ from the original obligation on account of its cause or nature.

F. **Set-off** – is a situation where by the debtor has a money claim or claims of fungible things on the creditor at the same time the creditor has similar claim on the debtor. They can simply set-off their claims. The debt should be liquidated and due for there to be set-off.

G. **Merger** – is a situation whereby the position of the debtor and the creditor is merged together in the same person.

H. **Limitation of Actions** – this is also one way of extinguishing contractual relationships in which a party cannot bring action in court of law because he did not exercise hid right in a certain period of time. Unless the law stipulates otherwise, a party can bring such action within ten years. After that time, his claim will be barred by period of limitation.