LAW OF CONTRACT – II

Teaching Material

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Introduction

As it might be speculated, this material is the continuation of contract I. In Contract I material you have read about formation of contract, along with the elements for its formation, the effect of an already formed contract and other important points. In this material, you will find the methods and mechanism of protecting your right if the contract suffers from defects in consent as it is enunciated in the Contract Law I material or if you need to cancel the contract for different reasons. The consequences of cancellation and invalidation of contracts with other means of extinction of contract are dealt within Chapter One of this material.

Again, it is to be recalled from contract one reading material that the autonomy of the parties to make their own contract is one of the corner stones on which the law of contract seeded. Chapter Two of this material will take you further and strengthen your understanding of the issue by discussing some very common terms of contract, their implication and the position of the law in their interpretation when the parties fail to regulate it in their contract.

In contract I, it is provided that at least two parties are needed for the formation of a contract. In light of this, it is not uncommon to find more than two parties involved in one contract. In Chapter Three of this material, therefore, you will find some principles and rules dealing with the plurality of parties shaped in a way to give you precise but adequate notes.

In Chapter Four of this material, surety ship will be discussed. In reading this chapter, you have to relate the notes with your daily activities and to visualize some cases in order to have a clear understanding of the issues raised thereto.

In Chapter Five of this material, the effect of contract on third parties is discussed. The doctrine of privity of contract with its many exceptions is dealt with some degree of complexity but interestingly.

In Chapter Six you will be introduced to law of evidence. Having in mind that you will take the course 'Law of Evidence' in the coming semesters, the notes are not detail enough. The discussion will be limited to how a contract is proved. In general, to achieve the objectives of this material in the required efficiency, reading each chapter and title of the material in relation to the lessons of contract one is important.

Chapter One

Extinction of Obligations

Introduction

An already formed contract creates obligation of proprietary nature among the contracting parties. These obligations rarely exist forever without being extinguished. Sometimes after the formation of the contract, the contractually created obligations extinguish because of different reasons.

Having appreciated the formation and effect of contract, it is worth discussing extinction of obligation. Extinction of obligation connotes the stoppage of already existing obligation. In light of this, this chapter deals with the grounds on which on already created obligation is extinguished.

In so doing, the ways by which obligation extinguishes will be discussed in a detailed manner. According to Article 1806 of the civil code(C.C), there are different grounds which cause extinction of obligation. Cumulative reading of Articles 1806 and 1807 of the C.C takes performance, invalidation, cancellation, termination, novation, set off, period of limitation of a contract, and merger as grounds of extinction of obligation. Each way of extinction of obligation has been, accordingly, discussed in different sections.

While discussing the grounds of extinction, their meaning, the difference among them and with other ambiguous terms, effect on the contractants and third parties, effect on the main obligation and on the collateral obligation will be discussed.

1.1. Performance of contract

One of the ways by which contractual obligation extinguishes is through performance of contract. Even though performance of contract is one way of extinction of obligation, it has been discussed as effect of contract in the Contract Law I course. Some discussion on the performance of contract as a way of extinction of obligation will be made.

Objective:

The objective of this section is therefore to

- understand that performance of obligation is one way of extinction of obligation
- be able to clarify how performance of contract extinguishes obligation

Performance of obligation is not only an effect of contract but also a ground of extinction of obligation. Performance of the contract shall however be made according to the terms of the contract and mandatoy provisions of the law if it shall extinguish contractual obligation. It shall be performed according to the agreement without discrepancy if it shall bring the contractual obligation to an end.

If someoneagrees to deliver his Mercedes car but actually delivered a vitara, the obligation is not extinguished. Extinction of obligation by performance of a contract needs performance of a contract in a legally required conformity.

1.2. Invalidation and cancellation of a contract

Invalidation of contract is one means by which contractual obligations are extinguised. Invalidation of a contract happens when there is defect in the formation of the contract. If a party that is incapable concludes a contract or if one of the parties concludes the contract without having the legally required consent, the contract is subjected to rescission. *Hence, what do you think the difference in grounds and effect of invalidation and cancellation of contracts?*

This title discusses invalidation and cancellation as one mechanism by which obligation extinguishes. The discussion in invalidation and cancellation covers the meaning, grounds, entitled parties, time limitation,and effect of invalidation and cancellation. The party, which is entitled to invalidate the contract along with other rights and duties of the party, has been dealt with.

It has incorporated the effect of invalidation and cancellation when the whole contract and part of the contract is invalid and its effect on third parties whose right might be affected by the effect of invalidation and cancellation. It also includes issues with reference to the position of Ethiopian law of contract towards void and voidable contracts.

Objectives

The Objective of this title is, accordingly, to make students able to:

- differentiate invalidation and cancellation
- pinpoint the grounds of invalidation
- state the difference between void and voidable contracts
- state the effect of invalidation and cancellation on the contracting parties and third parties.

Invalidation means making an effective contract ineffective when it has a problem in its formation. Invalidation is related with the problem in the formation of the contract. Invalidation comes into question when one of the parties wants to be free from the contractual obligation owing to a problem in the formation of the contract.

Therefore the mere presence of willingness of one party to have a contract invalidated is not enough. In addition to that, the legally provided grounds shall also be fulfilled. Lack of capacity and lack of sustainable consent are among the grounds that render a contract invalid.

The nature of invalidation of a contract is reflected in its effect. Now that invalidation of contract takes us to the conclusion that the contract is not properly formed, the effect of contract is said to be restitution. The contracting parties are put to the place where they were before the formation of the contract.

Sometimes compensation might be ordered when a contract is invalidated. This might lead us to the conclusion that the effect of invalidation and cancellation is the same in compensation. However, the damage following from an invalidation of a contract shall aim at putting the contracting parties in a place they would have been had the contract not been formed.

Cancellation on the other hand is making a contract ineffective when there is non-performance. Cancellation of a contract is one effect of contract in that the contract is formed within the legally provided requirements. When one of the contracting parties fails to perform a contract the other party might cancel the contract as one remedy of non-performance of the contract. There might be again other grounds of cancellation like the condition which results in cancellation.

The other basic difference between invalidation and cancellation is their ground. The ground for invalidation is defect in its formation while the ground for cancellation is non-performance. This does not, however, mean that the only difference is in their ground. They are also different in their effect. Eventhough the effect of both invalidation and cancellation is restitution, cancellation additionally entitles the party a compensation that rewards the benefit of contract.

Unless the invalid contract is invalidated, the contract is upheld and becomes effective. Eventhough the contract might not be performed, the remedies of non-performance will be due. Under Ethiopian law of contract anybody that wants it to be invalidated cannot invalidate a defective contract. It shall be the party who is affected by the invalid contract that can invalidate the contract. Article 1808 (1) of C.C is provided to this effect stating in its wording:

"A contract which is affected by a defect in consent or by the incapacity of one party may only be invalidated at the request of that party"

The basic reason to entitle the party that is affected by the invalid contract the power of invalidating the contract is to protect the interest of that party. The other party whose consent is not affected or who is not incapable is considered to have full information or rationality behavior. Unless he suffers from information asymmetry or was irrational at the time of the formation of the contract there is no reason to help him by empowering him to invalidate the contract.

This does not, however, mean that no one other than the party who is affected by the contract can invalidate the contract. Representative of a party who gave his consent either by defect in consent or under incapacity can invalidate the contract. Representatives of the party, that is potential to be adversely affected by the invalid contract might be in a position of enforcing the rights of the party. If for example a minor enters into a contract, the minor may not necessarily invalidate the contract by himself. His tutor can invalidate it, as his tutor is his legal representative.

In sub-Article two of this provision, however, any party is entitled to invalidate an invalid contract in the definition of this provision. Article 1808 sub Article (2) connotes that "A contract whose object is unlawful or immoral or a contract not made in the prescribed form may be invalidated at the request of any contracting party or interested third party". This provision is not clear in its position as to a contract whose object is not sufficiently defined and whose object is impossible. Whether such contract is included under this provision is a gap to be filled by interpretation.

When we generally observe the sprit of the provisions, contracts whose object is not sufficiently defined, impossible and which are not in a prescribed form seems to be incorporated by analogical interpretation. In spite of the fact that sub Article (1) of the provision does not include a contract which is defective owing to the aforementioned grounds, its exclusion does not mean that such contracts are valid.

If such contracts are not valid the effect of a contract whose object is invalid or immoral is the same with the effect of contract whose object is not sufficiently defined, made in a prescribed form, and whose object is not possible. Articles 1714 (1), 1715(2), 1716(2) and 1720(1) clearly show that the above mentioned grounds shall render the contract ineffective.

Capacity and consent do not, however, render a contract ineffective. These grounds rather entitle one of the parties the power either to invalidate the contract or give it effect. Therefore since the grounds provided underArticles 1714 (1), 1715(2), 1716(2) and 1720(1) are similar in rendering the contract defective, it is advisable that Art.1808 (2) shall include a contract whose object is not sufficiently defined, and not possible by analogical interpretation with all the criticisms.

In addition to insufficient coverage, the provision seems to connote that void contracts are subjected to invalidation as the phrase "… may be invalidated at the request of any contracting or any interested party…" is put to that effect. Its being under the title of extinction of obligation, along with this provision also leads to the conclusion that unless void contract is invalidated, the obligation created is not extinguished. Eventhough this seems a logical conclusion which takes its premises from the title of Chapter 3 and Article 1808 (2), giving effect to an illegal or immoral contract is not only absurd but also in contrary with 1714 (1), 1715(2), 1716(2) and 1720(1) of the Civil code which shows that such contract shall be of no effect.

However, the concept of invalidation depicts making a potentially effective contract ineffective. A contract, which is not invalidated, is required to have effect like any other contract. It is this effect of invalid contract that begs its invalidation to make it ineffective and correct the error it imposes on contractants. If the contract is void, however, it does not have legal effect from the very beginning.

Provisions that cover the requirements whose absence renders a contract void vividly shows the ineffective nature of such a contract. Under Article 1714- it has been vividly stated that the contract shall be of no effect by law not by invalidation if "the obligation of the parties or one of them cannot be ascertained with sufficient precision."

Article 1715 again renders a contract, whose object is impossible absolutely and insuperably ineffective. Similar connotations have been incorporated in Articles 1716, 1717 and these provisions in effect show that the contract is no more effective.

Noncompliance of formal requirements also renders a contract void or ineffective. We can infer this from Article 1720 in that a contract which is not made in the prescribed form is not a contract; it is rather a mere draft. From this inferred conclusion it is not illogical to infer that a contract, which is not made in a prescribed form does not have legal effect. For someone's amusement this provision even says that it is not a contract but rather a mere draft. Invalidating an agreement which is not contract seems to be absurd.

Having the above affirmation in mind, Article 1808 seems to be in contradiction with the very nature of invalidation that is rendering a contract ineffective and with the provisions, which deal with the effect of noncompliance of the requirements. This provision is also on the grounds of extinction of obligation. Invalidation of a contract is one of the grounds. Unless a contract, which shall be invalidated, is not invalidated, the obligations created are not extinguished in the absence of other grounds. It is questionable if this is true for a contract whose object is undefined, unlawful, immoral or impossible. From the very beginning no legal obligation is created under such contracts

If it does not have legal effect there is no need to have such agreement invalidated. There is not any created obligation to be extinguished by invalidation. Such nature of void contract casts doubt if invalidation of such contract really extinguish obligation as void contracts do not create effective obligation as it has been seen before. Be that as it may the invalidation of contracts which have no effect by the function of law, has been put under the extinction of obligation by invalidation.

An invalid contract can result in the extinction of contract eventhough it is not invalidated. Notwithstanding the fact that a contract is invalid, the reaction of contracting parties to a contract is not necessarily invalidation. Contractants can also resort to other options like refusing performance without having the contract invalidated.

Article 1809 denotes that a party entitled to invalidate a contract can refuse performance at any time. The contracting party can extinguish the obligation by refusing performance of a contract. Albeit the absence of the act of invalidation the obligation will thereby be extinguished. The right to refuse performance seems, however, to be made at any time without any prescription.

The right to invalidate a contract is, however, limited by lapse of a certain period of time. Article 1810 connotes that a contract shall not be invalidated unless an action to this effect is brought within two years from disappearance of the ground for invalidation. This provision seems to be prohibiting invalidation even if the period of limitation is not raised, as it says, "… no contract shall be invalidated."

It is consequently doubtful if the court can on its own motion prevent invalidation when it is cognizant of the lapse of time although prescription is preliminary objection which shall be raised at the possible early stage. The question whether the period of limitation is not preliminary objection in the aforementioned case casts perplex doubt as substantive law has overriding importance over procedural matters and the procedural laws refer to the substantive laws to determine whether certain objection is preliminary objection or not.

The time from which two years is counted starts from the disappearance of the ground for invalidation excepting unconscionable contract for which the starting point is the formation of the contract. If the ground for invalidation is a mistake, two years from the knowledge of the misperception or erroneous understanding, if the ground is duress, two years from the avoidance of the threat, and if the ground is incapacity from the time the incapable becomes capable are the points where counting starts.

Assume that a 15 year old boy enters into a contract. He can invalidate the contract within two years after he attains the age of 18. He can invalidate it within five years from the formation of the contract in this specific case.

The beginning for the two years of the period of limitation is different when the ground is unconscionable nature of contract. Article 1810 (2) says in its wording as:

Where a contract is unconscionable and the party injured is of age, the action shall be brought within two years from the making of the contract.

The point from which we count the time is not the time at which the ground disappears but the time of formation of the contract.

The presence of invalid contract does not necessarily mean that the contract will be invalidated and the obligation will be extinguished. There are circumstances where the contract is upheld. Confirmation by the injured party is one among the circumstances. Article 1811 indicates “the party whose consent was vitiated may waive his right to require invalidation where the cause which vitiated his consent disappeared.”

The confirmation can set free the contract from invalidation if the confirmation was made after the cause which vitiated the consent disappeared. The 15 year old boy can confirm the contract and avoid invalidation after he attains 18 years old.

If the invalid contract due to defect in consent was made in special form, confirmation shall also be in special form so that the confirmation is to be valid. A contract for the formation of which form is a mandatory requirement shall also be confirmed in the same form.

Eventhough an invalid contract can be confirmed by the injured party, there are certain circumstances where the contracting party of the injured party may make the contract effective even against the will of the injured party. Where the invalidity is owing to unconscionable nature of the contract, the other party against whose will invalidation is required can put the action to an end by making good the injury pursuant to Article 1812.

Art.1812. Putting an end to action.
Where a party requires the invalidation of an unconscionable contract, the other party may put an end to the action by offering to make good the injury.

The connotation enshrined here is that once the element of unconscionable nature of a contract that is unfair consideration is made good, the contract shall be effective. Amendment of a contract as effect of invalid contract is also connoted under this provision.

The presence of grounds for invalidation does not necessarily imply complete invalidation of the contract. When only part of the contract is invalidated, only that part is invalidated provided that such invalidation does not affect the essence of the contract.

The party who has the right to invalidation is imposed with certain obligation aimed at protecting certainty as to the fate of the contract. Article 1814 entitles a party whose contract can be invalidated to require if his contractant intends to confirm or cancel or invalidate a contract. When such inquiry is forwarded for the party with the right of invalidation or cancellation, he is duty bound to respond. If the party fails to respond, the contract is presumed to have been invalidated. Failure to respond gives the other party the right to make a contract ineffective.

When an obligation of a contract extinguishes owing to invalidation and cancellation there are certain effects which are worth discussing. For the most part, the effect of invalidation and cancellation of contract is extinction of a contract. After a contract is invalidated or cancelled the obligations created by the invalidated or cancelled contract disappears. There is no more contractual obligation to be discharged.

Extinction of contractual obligation does not however mean that there is not any obligation left to be carried out by the obligation. If one of the parties or both have discharged their obligations, invalidation or cancellation will create obligation of effecting restitution.

Article 1815 is provided with this implication as:

Art.1815__ effect of invalidation or cancellation

(1) Where a contract is invalidated or cancelled, the parties shall as far as possible be reinstated in the position which would have been existed, had the contract not been made.

(2) Acts done in performance of the contract shall be of no effect.

From the above Article do you think the effect of invalidation and cancellation are the same? If not what are the differences and the rational behind it?

According to sub Article (1), the parties are required to be put in their original position before the formation of the contract. The parties are expected to be with their original properties before the contract. After the formation of the contract the parties are put in different position because of the newly created obligation. All or part of the obligations might have been performed. If invalidation or cancellation happens the parties are put in their previous position in that the performed obligations are reinstated.

Sub Article (2) confirms the above assertion putting specific effect. Any party who has performed can invalidate the performance. Someone who has given something to discharge his obligation can reclaim the thing given. A party who has given a car in consideration of price shall give back the car and take back his money.

A question as to whether cancellation and invalidation are the same, excepting a titular difference, may be raised if the effect of both is reinstatement under the law of contract of Ethiopia. Although cancellation might be followed by compensation, invalidation can also be followed by compensation according to Article 1817 (2), as it shows that payment of compensation shall be made for parties to reinstate them.

However, difference still exists in their effect as cancellation paves the way for compensation that puts the victim in the place he would have been had the contract been performed. Article 1790 (1) shows that damage shall be made good for injury of non-performance of contract. When the reason of damage is non-performance perfect expectation damage is understood. The possibility of forced performance and damage together strengthens the inclusion of perfect expectation damage.

Invalidation is, on the other hand, followed by compensation that puts the victim in his original position. Such effect also exists in Ethiopian law of contract pursuant to Article 1817 which shows that the compensation shall be aimed at reinstating the party in his original position. Eventhough this provision is equally applicable to cancellation, cancellation can also be followed by additional damage pursuant to Article 1790.

The reinstatement effect of invalidation and cancellation is not made without limitation in a way it hinders security of transaction in parties which have no and are not expected to have information about the cancellation or invalidation. An act that is made in performance of a contract is not subjected to invalidation if such invalidation affects the interest of third parties. Article 1816, which protects the right of third parties, aims at the said purpose saying:

Art.__ Rights of third parties.

Acts done in performance of a contract shall not be invalidated where the interest of third parties in good faith requires.

Some discussion as to who can be a party in good faith is necessary here. A party who does not know the invalid nature of a contract or about the cancellation of the contract whose invalidation or cancellation would affect his interest is in good faith. A party who is not reasonably expected to know is also in good faith.

If Mr. Habtamu bought a car from Mrs. Meselech and Mrs. Meselech previously has the car on account of invalid contract with Ayalew, Mr. Ayalew cannot invalidate the contract unless Mr. Habtamu is proved to know the invalid nature of the contract between W/ro Meselech and Mr. Ayalew.

Impossibility of restoring to the previous position is also another limitation on the reinstatement effect of invalidation and cancellation. Thorough reading of Article 1817 states that acts done in performance of the contract shall be upheld if there is impossibility, serious disadvantage or inconvenience of invalidation to cause to one or both parties.

Someonewho has bought bricks on account of invalid contract and used the brick in building may refuse reinstatement since reinstatement creates serious disadvantage, inconvenience. It is even impossible to take the bricks back as they were. Sub Article (2) has provided a solution to alleviate the inconvenience by monetary compensation or any other remedy which the court thinks fit.

Restoring to their position pursuant to Article 1818 has been ordered to be applied referring to unlawful enrichment. Someonewho has bought a small house on account of invalid contract may construct another house. If restitution is ordered, the party may require payment for the additionally constructed house in accordance to unlawful enrichment.

1.3. Termination of contract

In addition to invalidation and cancellation, termination is also one way by which obligation is extinguished. Termination of contract is making the contract ineffective starting from the time of termination of the contract. This title discusses termination as one way of extinction of obligation. The overall meaning of termination, the difference between termination on the one hand and invalidation and cancellation on the other hand will be discussed. Effect of termination in extinction along with its peculiar nature will also be discussed.

Objectives

After dealing with this topic, students are expected to:

- Explain termination in comparison to invalidation and cancellation
- Differentiate unilateral and bilateral termination
- Identify the circumstances in which the court can terminate a contract
- Pinpoint the pre-conditions for termination of contract
- State the condition where court can terminate a contract

1.3.1 Types of terminations

Termination refers to the stoppage of obligations created by the contract. It ceases the existence of the obligations as of the time the contract is terminated. Termination of contract can be either, bilateral (by the agreement of both the contracting parties), unilateral by one party, or judicial (by court order)

A) Bilateral termination

Bilateral termination refers to putting an end to a contractual obligation by the agreement of both parties. Article 1819 indicates the possibility of termination where the parties so agree. The connotation of this provision is that the parties may agree to terminate the contract mutually.

Agreement to terminate is, actually, a contract as a contract can be to extinguish obligation of proprietary nature. Termination of contract by agreement is in light with the definitional provision of Article 1675, which shows that agreement to extinguish obligation of proprietary nature is a contract.

Termination of contract by agreement can be made in two ways. The parties may effect termination pursuant to their contract provided that they have inserted such termination clause in their contract or agreed later. The termination clause may also entitle one of the parties the power of termination unilaterally. It may also put a condition upon the fulfillment of which the contract is terminated. Eventhough the parties might not agree in the contract about termination and its condition, they can also agree later to terminate the contract. Termination of contract by consent of the parties provided under Article 1919(1) includes all that are discussed above.

B) Unilateral termination

Unilateral termination is made either by the effect of agreement when such unilateral termination clause is provided in their contract and when a condition which entitles unilateral termination is fulfilled. Unilateral termination can also be made by giving notice in advance. The time of notice might be either fixed by law, by custom, or reasonably by the contractants

C) Judicial Termination

In addition to unilateral and bilateral cancellation, cancellation can also be made when one of the parties requires to that effect. Court termination is the principle and termination by the parties is an exception as parties shall not be judges on their own case.

Although termination extinguishes obligation, the way it extinguishes such obligation is different from the manner of extinction of obligation by invalidation and cancellation. Termination does not have retrospective effect; rather it has prospective effect. This means, extinction of contractual obligation by termination of contract works only in the forwarding direction from the time the contract is terminated regardless of its type.

We have seen termination which can be made by agreement either together in the contractual agreement in the contract or independently after the contract and without agreement unilaterally by either parties as well. Moreover, a contract can be terminated by the court, as it can be inferred from Article 1823 and 1824.

Article 1823_ Special relation between the parties

A party may apply to the court to order the termination for a contract, which requires a special confidence, cooperation, or community of views between the parties and where such requirements are no longer present.

If the previous confidence, cooperation or community of view that helps the continuity of the contract ceases, the contractual relationship might not be worthy upholding. In this connotation an application may be made to the court to that effect. The court has actually the discretion to the extent of identifying whether the requirement of special confidence, cooperation or community of view ceased or not.

In addition to the cessation of special relation between the parties, gratuitous contracts also entitle the party who has made such grant the power of having the contract terminated by requesting court order. Article 1824 has provided the above connotation as:

Art. 1824__ Gratuitous contracts.

The court may order the termination of a contract made for the exclusive advantage of one party where the other party for good causes so requires.

The provision has provided certain requirements so that the contract is terminated. Primarily. The contract shall be for gratuitous in that the contract is made for the exclusive advantage of one party; it shall not be for consideration. There shall be good because that makes the party require termination. The requirement of good cause is not alterative requirement rather it is cumulatively required so that such contract can be terminated.

Whether the party has good cause to terminate the contract or not is to be decided by the court and thereby needs interpretation. Good cause shall be interpreted to mean a cause for the existence of the contract such special relationship that fosters such contract and other causes which are relevant to the case.

Let us illustrate this by taking a hypothetical case. Ato Abebe gratuitously assumed the obligation of giving 300 Ethiopian Birr for his unemployed brother. Ato Abebe can have the contract terminated starting from the time his brother got a job elsewhere. In this hypothetical case the employment of his brother can be a good reason if Ato Abebe entered into that contract for the exclusive advantage of his unemployed brother thinking of his unemployment.

1.3.2 Similarities and differences between invalidation and cancellation on the one hand and termination on the other.

The basic difference between termination on the one hand and invalidation and cancellation on the other is their effect. The ground of termination is not again attributable to defect in the formation of a contract or non-performance on one of the parties. Termination can be made by agreement, unilaterally by one party or by court order. However, the grounds of invalidation and cancellation are defect in consent and non-performance in accordance to the terms of the contract respectively. In relation to the effect of the two categories as stated above, invalidation and cancellation have retrospective effect while the effect of termination is prospective. Article 1819 Sub (2) and (3) are obvious in indicating the prospective nature of termination. Quite the reverse, Article 1815 is testament for retrospective effect of invalidation and cancellation.

Let us take an example of this and assume that Ato Ahmed agreed with a coffee trader in which he agreed to pay the trader 300 birr per quintal in consideration to get 100 kgs of coffee every month. If the contract is terminated the parties are not required to give back what they have given to each other. And they are no more required to carry out their obligation as of the time of termination.

If the contract is invalidated or cancelled, however, Ato Ahmed shall give back 100 kgs of coffee of every month and get back his money. If the coffee is consumed the restitution effect of invalidation or cancellation can be difficult. However, the restitution effect is still effect of invalidation and cancellation unlike termination. Invalidation, cancellation and termination are the same in that they extinguish contractual obligations.

Discuss: You have seen that invalidation and cancellation have retrospective effects while termination has prospective effect. What do you think is the rational for this difference in effect?

1.4. Remission of debt

Along with termination, remission of debt is also one way of extinction of obligation. Remission of debt is voluntary release of debtor of his obligation by the creditor. Article 1825 is testament for the extinction of obligation by remission of debt under the Civil Code.

1825__ Remission of debt.
Where the creditor informs the debtor that he regards him as released, the obligation shall be extinguished unless the debtor forthwithinforms the creditor that he refused his debt to be remitted.

According to Article 1825 of the C.C the mere willingness of the creditor to release the debtor by remission is not enough to make the remission effective and result in extinguishing of obligation. The willingness of the debtor to that effect is also required.

However, the provision does not put express acceptance of the remission as a mandatory requirement. The debtor shall object when he is informed of the remission if he wants the remission not to be made. Unless such protest is made the law seems to presume silence as acceptance in the case of an offer to effect remission of debt to the debtor.

Discuss:
Why may someone refuse be remitted of his/her debt? Would you please discuss the rational behind?

1.5. Novation

Previously we have seen that remission of debt and termination of contracts are among the ways by which a contract is extinguished. Novation is also one way by which a contract is extinguished. This title is allotted to cover the extinction effect of novation. Heres the meaning of novation, the effect of novation on principal and collateral obligation will be discussed.

Objectives

After you read this section thoroughly you are expected to:

- Explain what novation is
- Distinguish novation and variation of contract
- State the effect of novation on the original obligation
- State the effect of novation on collateral obligation attached to the original obligation.

Before discussing the effect of novation, it is worth knowing what novation is. When we look at the civil code, there is no direct definition of novation. A thorough reading of Article 1826, however, sheds light on what novation is.

Article 1826__ principle.

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.

Consistent with this provision, novation is substitution of an existing obligation by new obligation in its nature or object. The new obligation shall be different from the substituted obligation either by its object or nature. Mere difference without substantial change either in the object or in the nature does not amount to novation; rather it is variation in fact.

Assume for example that Mr. Kemal entered into a contract with Lelisa to deliver 100 kilos of sugar in Addis Ababa. Later they agree to change the place of delivery to be Mekelle. After sometime again both parties agree delivery of 100 kilos of sugar to be replaced by 50 kilos of coffee.

Do you think that one or all of them are novation or not? The change of place is not novation. Neither the nature nor object of the original obligation is different. Change of sugar by coffee is, however, novation as the object of the contract has been substituted.

When original obligation is different from the substituted obligation in its cause it is also considered to be novation. Illustrative example has been provided by Rene David:

"Suppose, for example, that B owes A $10,000 for some goods he purchased from him; it is agreed later in the 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, but henceforth, it has a different cause. B owes $10,000 because A lent it to him, not because he purchased the goods from him.

Novation is required to be intentional so that it can have the desired consequence in accordance with Article 1828.

Article 1828__ intention to extinguish the original obligation.
Novation shall not occur unless the parties show the unequivocal intention to extinguish the original obligation.

Replacement of certain obligation with other obligation in the absence of intention to make novation does not have the effect of novation. Actually knowing intention can be of certain impenetrability, the apparent activities of the parties can be inference for the presence of intention, though. The apparent acts of the contracting parties can be used as an inference to reach conclusion regarding the presence of intention.

The negative meaning of novation in Article 1829 helps to explain it by providing cases ; novation may not occur as stated below.

Article 1829 __Absence of novation.
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 debtor*
c) *new securities are provided to ensure payment of an existing debt.*

All the acts provided in Article 1829 do not show substitution of an existing obligation with a different obligation in its nature or object. Preparing of a new document to support an existing debt, signing of a promissory note or bill of exchange in respect of an existing debt does not show novation and nor does providing securities to ensure a debt show ovation.

There might be ambiguity as to whether the lists of 1829 are exhaustive or not. In relation to this, whether signing a promissory note or bill of exchange excludes signing other negotiable instruments might create perplexity. Albeit the presence of such ambiguity, Article 1829 is on illustrative list by which other acts, which are not novation, are included.

Its illustrative nature is also strengthened by the definitional provision of Article 1826 and the additional illustration of absence of novation in Article 1830. Had Article 1829 been exhaustive the definition would not have been necessary as the definition is wider in scope than the negative meaning of novation in Article 1829. Moreover, positive meaning of novation in Article 1830 would have been again unnecessary had it been exhaustive. Because if it is exhaustive the contraries reading of 1829 would tell us that acts other than the lists of Article 1829 are novation.

When we see Article 1830, it incorporates negative and positive meaning of novation in case of entry of credit and debit in current account.

1830- Current account.
(1) Novation shall not result from entry of credit and debit items in a current account.
(2) Novation shall occur where the balance of an account is finalized and admitted.
(3) Unless otherwise agreed, the creditor shall retain such securities as may attach to one of the items entered in a current account not with standing that the balance of the account has been finalized and admitted.

Sub Article (1) of Article 1830 shows that mere entry of credit and debit items in a current account does not show novation. Parties who have contractual relationship of current account are usually expected to make their balance debt and credit that will later be finalized and admitted. Entry of debit and credit in a current account before finalization and admittance does not show novation although it might resemble it.

In sub Article 2 of 1830 however, the presence of novation has been denoted when the balance is finalized and admitted. After the debits and credits are calculated and put in a final result, the contract would be clear with their position either as a debtor or creditor. The contractants would either admit the final result or oppose.

If they or one of them protest, further analysis would be made by the contractant and other relevant professional. Once the final result is admitted, novation is presumed to have been made. The obligations in respect of specific items have been, after admittance, substituted by the analyzed upshot of debit and credit in the current account. The connotation behind such novation is that a debt in respect of certain item in a contract of current account is replaced by the final result of finalization and admittance. The nature of the obligation is changed.

Novation in current account does not, however, result in all the effects of novation according to Article 1830. Securities attached to one of the items entered in a current account do not extinguish even after novation unless there is contrary agreement. Had it been novation other than in current account, however, securities would have not been transferred to the new obligation because of novation. Extinction of collateral obligation as one effect of novation has been provided under Article 1827.

1827- Effect of novation

(1) Unless otherwise expressly provided, securities or privileges attaching to the original obligation shall not be transferred to the new obligation.

(2) Unless otherwise expressly provided interest due prior to novation may not be recovered there after.

Novation in its effect does not extinguish only the principal obligating but also the accessory ones. Accessory obligations in pledge, mortgage and personal guaranty are extinguished as the principal obligation extinguishes by novation in accordance with the aforementioned provision.

Let us illustrate this by taking on example. Assume that Ato Lelisa bought a track from Mesfin industrial engineering on loan. He has assured payment of his debt (price of the track) by providing a guarantor. If later novation is made whereby the price of the track is to be substituted by one-year service, obligation to pay the price of the car is extinguished. The guarantor's obligation of paying the price when the principal debtor fails also extinguishes, as it shall not transfer to the new obligation. It must be born in mind that if the guarantor agrees to that effect, his accessory obligation is upheld.

However, if the contract of sale of track is made in the course of contract of current account, the price of the track is entered in debit or credit item in the current account. At this time its entry in debit or credit item does not amount to novation. Once the price of the track is calculated, finalized and put in sum, the parties are expected either to admit or protest. Still there is no novation till the parties admit.

After admittance novation takes place. The debt in the form of price of a track has been replaced by the sum, which is said to be novation in its nature. Be that as it may, the obligation of the guarantor to pay the price of the track, if Ato Lelisa fails to pay, does not extinguish. It is rather transferred to the new obligation, which comes about as a result of finalization and admittance.

In addition to that as novation creates new obligation, the effect of period of limitation is different as to the new obligation from the previous obligation. There might be even difference in the duration of the period of limitation. Assume Lemlem cheru had the obligation to pay 50,000 Birr for Dashen Bank before 8 years. After the lapse of 8 years if the parties agree to replace the obligation to pay 50,000 birr by 10 months consultancy service, a new period of limitation starts to run and the defense on the lapse of period of limitation based on the original contract does not work.

1.6. Set off

Set-off is among the grounds by which a contract is extinguished. In this section we will discuss set-off as one way of extinction of obligation. The conditions in which set-off is possible and the conditions in which set-off is not legally allowed will be discussed. The role of courts in effecting set-off and the restrictions will also be the concern of this topic.

Objectives

Dear students, after you read this section you will be able to:

- Explain how set-off brings extinction of obligation
- Point out the negative conditions of set-off
- Point out the positive conditions of set-off
- Pinpoint the exceptions of the conditions of set-off
- Locate the areas where the parties can set-aside conditions of set-off
- State the effects of set-off on the contracting parties and third parties

As you can see obligation extinguishes when set-off is made. Article 1831 of the civil code is provided to indicate the extinguishing effect of set-off as:

Article 1831- principle

Where two persons owe debts to one another, set off shall occur and the obligation of both persons shall be extinguished in accordance with the provisions of the following Article.

As of this provision, two parties in which one is a debtor in respect of one obligation while a creditor with respect of another obligation to other party may extinguish the obligation by set-off.

Assume that Ato Abebe owes Ato Tolosa birr 500,000 in one transaction and Tolosa owes Abebe birr 500,000 in another transaction. The two parties can then set-off their debts and extinguish their obligations. Set-off can be made upon the fulfillment of certain conditions although the contractants owe debt to one another. These conditions have been put as positive and negative conditions respectively under Articles 1832 and 1833. Article 1832 has put the positive conditions as:

Article 1832–positive condition
Set off shall not occur unless both debts are money debts or relate to a certain quantity of fungible things of the same species and both debts are liquidated and due.

The conditions that are provided in Article 1832 are.
(a) The debts shall be money debt or fungible things of the same species.
(b) The debts shall be liquidated.
(c) The debts shall be due.

Set-off is not possible if someone owes in item and the other owes in money. Nor is set-off possible when the debts are items unless the items are fungible things. The money debt or fungible things shall also be liquidated ones in that the parties should be certain about the debt. The parties shall not have a dispute as to the amount of the debt. If the amount claimed by the creditor and the amount accepted by the creditor is not equal, the debt requires further liquidation. In such disagreement the debt is not liquidated and hence not subjected to set-off.

However, although the debt is required to be liquidated so that the court can make set-off when it is required to do so, there is exception to the requirement of “liquidation” of the debt. According to Article 1841 eventhough one of the debt is not liquidated, the court may decide that set-off has been made to the extent of the admitted amount.

Assume that Ato Mesfin claims to owe Ato Zeberga birr 500,000 while Ato Zeberega admitted to have owed only birr 300, 000 and denied the birr 200,000(is contested). In such a case, although birr 200,000 is contested, the debt to the extent admitted (birr 300,000) can be subject of set-off.

The other exception is when the debt can be liquidated without delay. A debt whose amount is contested by the parties or which is not fully liquidated can be delayed so that set-off is made with regard to the whole debt. The court may suspend judgment against the debtor whose debt is liquidated until the other debt is liquidated if the debt can be liquidated without delay. These are exceptions to the condition that the debt shall be liquidated so that set-off is made.

The other condition is that the debt shall be due at the time set-off is required. The time when both obligations are required to be performed shall be at the same time. If one of the debts is to be paid on September 1 and the other debt is to be paid on October 3, set-off cannot be made with regard to these two debts on September 1 since both debts are not due by then.

This requirement protects the debtor who can be beneficiary of time limit. The one who shall perform the obligation in October 3 is the beneficiary of time limit and refusal of set-off is not to affect such contractant adversely.

An exception to this requirement has been provided under Article 1834 dealing with period of grace. Granting of period of grace does not bar set-off although the time in which payment shall be made is protracted by the court order of period of grace. A debtor who is given period of grace shall not be protected against set-off like other beneficiaries of time limitation.

Although the debts are liquidated and due, there are also other requirements which shall be additionally fulfilled. Additional negative conditions have been provided under Article 1833.

1833 Negative conditions

Set –off shall occur regardless of the cause of either obligation except where

a. *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*
b. *the obligation is owing to state or municipality ; or*
c. *The obligation is to restore a thing of which the owner has been unjustly deprived ;or*
d. *The obligation is to return a thing deposited.*

If the special nature of the obligation harmfully affects one of the parties when set off is carried out, set off is prohibited for such kinds of obligation. Someonewho lives on a maintenance payment might be in another transaction with a debtor(the person under obligation to pay him maintenance); if his maintenance payment is set off he might be in a position not to live. If he is refused payment of his maintenance payment for he is debtor, his life might be endangered. Protecting such undesired consequence of set-off begs providing of exceptions to set-off.

An obligation owing to state or municipality is not subjected to set-off because the action by which the state or municipality become debtor and creditor can be different. In such a case set off can mess up the accounting system of the state or municipality.

Excluding an obligation to restore a thing unjustly taken from being subject of set-off is to deter unjust deprivation of property and recognize its immoral nature. Excluding such obligation has great social importance in deterring unjust deprivation of properties like theft. Allowing set-off with debt owing to unjust deprivation on the other hand entails negative connotation of encouraging deprivation.

When the obligation is to return a thing deposited, it is not again subject of extinction by set-off. The basic reason for this is actually to give protection and encourage the trust built among parties. It is a confidence that makes a party deposit something with some one. Such special confidence is required to be created and protected for the sake of smooth social relationship. Obligation to return a deposited thing is excluded from being extinguished by set-off to achieve the said purpose.

Be that as it may, set-off cannot be made in the absence of intention to do so. Article 1838 provides that if the debtor fails to inform the creditor his intention to effect set-off, set-off does not occur. Knowing intention can be difficult as there is no proof of mental element of the parties. Circumstances from which the mental element of the parties can be inferred should be considered. Set-off cannot be made upon the proposition of the court. The court is strictly prohibited from making set-off unless it is raised.

Parties do have freedom of contract about set-off with regarded to obligation they assumed reciprocally. Parties may wave their legally permitted right to require set-off. Article 1839 to this effect has provided that the debtor may in advance waive his right to make set- off.

Freedom to wave set off encourages further transaction between parties who have unsettled obligation.

Discuss: How do you think that allowing waiver of set-off can encourage further transaction between the parties

Assume that Ato Tillahun is a debtor of Ato Fitsume in one transaction. Ato Tillahun may not enter into a contract with Ato Fitsume for fear that Ato Fitsume may make set-off to Ato Tillahun's claim in their future transaction. Although Ato Fitsume may promise not to make set-off for he needs the transaction with Ato Tillahun, Ato Tillahun may not rely on the promise of Ato Fitsume unless the law recognizes and gives effect for such contracts. There can be such binding effect of law if the other party can wave set-off. The rationale behind giving a legal effect for waiving of set-off in advance is to encourage furtherance business transaction and smooth furtherance of economic and social advancement.

Freedom of the parties is not only to wave their right to set off but also to extend set-off beyond the legally possible ones and set aside certain conditions. Article 1840 permits occurrence of set-off eventhough it is not provided by law if the parties agree. Legally it is money debts or tangible things, which are subject of set off. However, parties can specify conditions of set-off, otherwise setting aside the legally provided conditions.

For example Henok and Biniyam may agree to make set-off to their debt, which they owe each other though it is not due. They may also agree to effect set-off though the debts are neither money debts nor fungible things. Since freedom of agreement made under the umbrella of public and social policies are guiding principles of contract, agreement of the parties as to either exclusion or inclusion of set-off has legal effect.

As it is known we are discussing set-off under extinction of obligation. The effect of set-off is then extinction of obligation. Although set-off extinguishes obligation, its extinction effect is limited to the lesser amount regarding debts subject of set-off. Article 1836 has been provided connoting this effect as:

Art.1836__Effect of set-off

The debts shall extinguish each other as from the day when both exist and to the amount of the lesser debt.

In its effect set-off extinguishes obligation to the lesser extent as it is illustrated below. Assume A owes B 500 Birr and B owes A 1000 Birr. Set-off does not extinguish obligation of paying the whole birr of 1000. Here set-off can take place up to Birr 500 only and the rest (500) remains as a debt of B against A.

This might cast doubt if the right to refuse part payment might not be applied in the case of set-off in light with the extinction effect of set-off to the extent of the smaller debt because if set-off is effective to the lesser amount, the one who is entitled to a greater amount might not refuse set-off although part of his claim is to be extinguished. He can, however, refuse part payment.

Assume for example Abebe is a creditor of Hanna to the extent of 1000 Birr. If Hanna provides to pay 500 of the debt as a part payment, Abebe may refuse to receive pursuant to Article 1746 (1). What if Hanna requires set-off to the extent of 500 as she is creditor of Abebe to that extent? Actually Abebe cannot refuse set-off on the ground of its being part of the debt.

Discuss: What do you think is the reason for allowing set-off to extinguish part of the debt in the face of the creditor's right to refuse part payment under Article 1746(1)?

Set-off and payments are not the same although both are grounds of extinction of obligation. Set-off is not mode of payment. This can be exemplified by the validity of set-off made with an incapable person and invalid nature of payment made to incapable person unless it is proved that the incapable benefited.

Contracting parties are not allowed to set-off their debts if it is going to affect the rights of third parties. Extinction of obligation by set-off "*shall not affect rights which third parties have on one of the debts*." Extinction of obligation has effect only between the parties whomake set-off.

Assume that Ato Yeselam owes to Solomon and Ato Stiffo Birr 1000 each. In another transaction Solomon owes Stiffo Birr 1000. If Yeselam and Solomon make set–off, the right of Stiffo to recover his money form Yeselam's receivables may be at stake. Therefore, Stiff can protest set-off, as it is detrimental to him. At least its effect on third parties shall be protected.

A bit of perplexity might be created with regard to appropriation of payments. Appropriation of payment in the case of set-off has been provided in Article 1835 of the civil code in its wording as: "*Where several debts liable to set-off are owing from the same person, the set- off shall be made in accordance with the provisions of chapter 2 of this Title relating to appropriation of payments"* (Art. 1752-1754 of the C.C*)*.

When set-off is made with a person who has claims related to costs, interests and principal debt, set-off extinguishes first the cost, then the interest and finally the principal debt pursuant to Article 1752. When set-off is made against a creditor who has several claims, the debtor who wants to effect set-off may specify the debt which is extinguished by set-off. However, if the debtor, who effects set-off, does not exercise his right of specifying the subject of set-off, the person who has several claims may specify the subject of set-off among his several claims according to Article 1753.

When both parties do not specify the subject of set-off among the several claims, the law fills the gap as provided under Article 1754. Accordingly, the debt which is due or where none of them is due, the debt which shall first become due shall be subject of set-off. When there are several debts which become due at the same time, the debt which is of greater advantage to the debtor shall be extinguished by set-off. As far as debts which are of the same advantage to the creditor are concerned, such several debts shall be extinguished proportionally.

Rene David illustrates this well. Assume A owes B 1000 and B owes A 1000. B also owes another 1000 because of another transaction. All these debts are liquidated and due. Both debts extinguish reciprocally immediately when they exist simultaneously up to the amount of the level of the two debts.

1.7. Merger

Among the grounds of extinction of obligation, merger is also one. Merger in extinguishing the contractually created obligation has certain peculiar effects on the contracting parties and the third parties. This section will, accordingly, discuss merger, along with its peculiar characteristics.

Objectives

After discussing this topic, students are expected to

- Understand the meaning of merger and how extinction of obligations happens
- Identify the effect of merger on the contractants and third parties
- Exemplify how merger can revive

Merger is another method by which obligation extinguishes. Merger happens when the position of creditor and debtor becomes one and the same. There are different reasons for merger between debtor and creditor. Successions, formation of partnership are among the juridical acts which result in merger. Merger makes the debtor and creditor the same person.

If we see Article 1842 of the Ethiopian civil code the principle of merger in extinction of obligation has been put verbally as:

Art.1842__ Principle

Merger shall occur and the obligation shall be extinguished where the position of creditor and debtor are merged in the same person.

Performance of obligation after merger is not actually realistic once the creditor and debtor become the same since performing certain obligation towards one self is actually absurd.

Assume Ato Haile borrowed 25,000 birr from his father, Ato Aklilu; however his father died before collecting the debt from his son, Ato Haile. The later is the only successor of his father, Ato Aklilu. Here we can say that Ato Haile becomes the owner of the property of his father including the 25,000 Birr. It is not feasible for Ato Haile making payment to himself. The position of Ato Haile merged with that of his father. The obligation to pay his debt is then said to be extinguished by merger.

Extinction of obligation on the account of merger has certain limitations in its effect of extinction of obligation. The limitation is when it affects the right of third parties. Merger shall not be made to the prejudice of the interest of third parties, which have a right on the debt. Article 1843 of the civil code is provided in a way such rights of third parties are enshrined.

Art.1843.__Rights of third parties
Merger shall not affect the rights which third parties may have in respect of the obligation.

The protection of the right of the third party gets its strong support from the privity principle provided in the definitional provision of Article 1675, 1731 (1) and 1952 (1). Third parties may have a right on the credit which is subjected for extinction by merger. The right of third parties shall be protected to avoid the externality effect of merger. When third parties who have usufruct right or pledge on the credit, such right is not subject of extinction though the main obligation on which such right depends could be extinguished by merger.

For example, Ato Yidnekachew is a creditor of Ato Zinabu, his only son, for the extent of 1,000,000 Birr. Kemal is entitled to get the interest of the debt of Zinabu by dint of another transaction with Ato Yidnekachew. If Ato Yidnekachew dies Zinabu will succeed him and the obligation of paying 1,000,000 extinguishes, as there is merger. However, the merger, which extinguishes the principal obligation, does not extinguish the obligation to pay interest pursuant to Article 1843.

Merger has certain peculiar characteristics, as obligation extinguished by merger might revive in certain circumstances. The circumstance which results in revival of obligation extinguished by merger is when the merger comes to an end. Article 1844 of the civil code has been put incorporating this connotation.

Art.1844__End of merger
The obligation shall revive where merger comes to an end.

Discuss: How do you think does merger come to an end? and discuss its effect on the parties and how the period of limitation is calculated.

Assume that Misganaw has borrowed 50,000 Birr from his father, Ato Alebachew. In the mean time, Ato Alebachew disappeares and his absence is declared by court. Since Misganaw is the only successor of his father, he becomes the owner of his father's property and his obligation is extinguished by merger. After 3 years of declaration of absence, Ato Alebachew returns. In this case Ato Alebachew can claim all his properties along the credits he has with his son, which he could have claimed before the declaration of absence and before the extinction of obligation. Here the obligation of Misganaw to pay Birr 50,000 to his father is said to be relieved.

His son may not claim that his obligation to pay the money has extinguished by merger as coming of merger to an end results in revival of the extinguished obligation according to Article 1844 of the Civil Code.

Another illustration in which obligation extinguished by merger could be revived is for instance, if company X lent company Y Birr 2,000,000 but if the two companies merged into one before company Y paid its debt (merged). However, if the two companies split back to their original position, merger is said to cease and the obligation will revive on the debtor.

1.8. Limitation of action

As it is remembered, different ways by which contractual obligations can be extinguished have been seen. The last way by which contractual obligation comes to an end is limitation of action. Limitation of action will be discussed, along with prescription and limitation of right.

Under this topic we will discuss the effect of the period of limitation on principal and collateral obligations, the instances on which the period of limitation is interrupted, the role of court in disregarding and considering, along with the right of the parties in waiving and invoking the period of limitation.

Objectives

After you have studies this section, you are expected to:

- Tell the difference among prescription, limitation of action, and limitation of right
- Explain the provisions if they are limitation of action or limitation of right
- State the effect of period of limitation on principal and collateral obligations
- Pinpoint the circumstances where period of limitation can be interrupted and its effect
- Explain the power of the parties to waive or invoke period of limitation, along the circumstances where such powers can be exercised
- Explain the power of courts in setting aside or disregarding period of limitation

Under the Ethiopian law of contract limitation of action has been put as one way of extinction of obligation. Making period of limitation a means of extinction of obligation creates security of business transaction eroding uncertainty among contractants. Period of limitation also avoids bafflement which might be created owing to loss of evidence when time lapses. Its deterrence impact on dormant contractants is also considerable purpose of extinction of obligation by period of limitation after which the party will not be compelled by thes undertaking in the contract. The problem related with loss of evidence after the lapse of a considerable of period time is also avoided by period of limitation or prescription. Prescription can be either acquisitive or liberative. Acquisitive prescription entitles the beneficiary with certain right after the expiry of certain period of time.

Period of limitation is one classification of prescription that includes libertive and acquisitive prescription. Liberitive prescription relieves the beneficiary from certain obligations after the lapse of certain period of time.

In liberative prescription there can be limitation of right and limitation of action. Limitation of right absolutely extinguishes the right of the other party while limitation of action extinguishes the right to bring action i.e. court action. The Ethiopian law of contract under Article 1845 provides the principle of period of limitation.

Art.1845__ Period of limitation

Unless provided by law, action for performance of a contract, action based on non-performance of a contract and action for invalidation of a contract shall be barred if not brought within ten years.

According to this provision "action for performance" refers to bringing a court action to effect performance, "action based on non-performance of a contract" refers to bringing court action aimed at remedies of non-performance like damage, cancellation and even forced performance, and "action for invalidation of a contract" refers to bringing court suit to have a contract invalidated. All these actions shall be barred unless brought forward within ten years.

Discussing whether period of limitation bars right or action is on issue worth discussing. In dealing with this, the title of the section where the provision is found connotes that it limits action. In addition to that the French version equivalent to this provision (Article 2262) limits all actions. There are also provisions that show the possibility of existence of certain rights even after the lapse of the prescribed time. Article 1850, showing that limitation does not bar the right exercised on pledge even when period of limitation bars the principal obligation, exemplifies such provision.

On the other hand, it is argued whether this provision limits all rights out of the contract albeit the indication of its title. Professor Rene David has put this position in his commentary as: "The Ethiopian code preferred the formula found in the Italian civil code which provides that all the *rights* are subject to ten years limitation." He has confirmed this position denoting that the right created by the contract disappears by limitation; it can be asserted in anyway.

The controversial issue in light of period of limitation is the relationship between Article 1845 and Article 1810.

The time when period of limitation starts to count has been put under Article 1846 of the Civil Code as:

Art.1846__ Beginning of period of limitation
The period of limitation shall run from the day when the obligation is due or the right under the contract could be exercised.

Period of limitation for action based on non-performance does not for example beginto run from the time of the formation of the contract unless performance shall be made immediately. If the time of performance of the contract is after one year from the formation of the contract, period of limitation runs one year from the formation of the contract as the obligation is due after one year.

The provision additionally solves the problem with respect to certain obligations like conditional rights, which are treated separately as made in Article 2257 of the French Civil Code. The French Civil Code deals with each right which can be due or claimed at another time from the time of formation of contract. Conditional right cannot be exercised till the condition is fulfilled and it is then when period of limitation runs.

Ambiguity that could arise in respect of annuities has been covered by Article 1847 where limitation runs from the day the first payment was not made was due. Article 1847 has clarified the perplexity verbally as:

Art.1847- Annuities.
In respect of annuities, the period of limitation shall run from the day when the first payment not made was due.

In annuities the due date of the payments is different. One payment is paid first and the following will be paid next. The Civil Code makes the time of the first payment a reference for counting period of limitation in respect of annuities.

Someonewho is entitled to be paid every May 1 and November1 is not, for example, paid as of 1960 till 1975. It is questionable if his right is barred for his claims staring November 1, 1960 – November 1964 as these payments have been due for more than ten years or he has lost all his right since ten years has lapsed before the rights are asserted. According to Article1847, all the rights are barred starting from the time when the first payment which was not made is due.

Haziness, which can be created by way of assessing a year whether in weeks, days or hours, has been dealt with under Article 1848. Accordingly, the period of limitation shall run from the day when the obligation is due or the right under the contract could be exercised and is effective, excluding the day on which period of limitation begins to run. The action is barred upon the expiry of the last day without having been used.

If the remaining last day for the effect of period of limitation is a holiday, the action shall be debarred on the next working day. According to the exemplification of David "If a claim is due on March 3, 1955, the period of limitation will be completed on March 4 1965 at the very beginning of the day" (6:00Am considering Ethiopian way of dividing days into hours).

Principally period of limitation is one way by which obligation extinguishes. Extinction of principal obligation might have different effect on the collateral obligations attached to it. The effect of period of limitation on collateral obligations has, accordingly, been treated under Article 1849 and 1850.

Art.1849__Collateral claims.
Interests and collateral claims shall be barred where the principal claim is barred.

According to this provision, as a rule interests and collateral claims are barred when the principal obligation is debarred by period of limitation. This seems justified, for the collateral claims depends on the principal claim which is being barred by period of limitation.

When the collateral claim is a pledge, however, the pledgee may exercise his right on the pledged property pursuant to Article 1850 which says: *"A creditor whose claim is secured by a pledge may exercise the rights arising out of pledge notwithstanding that the claim is barred"*

Assume that Ato Ejigu borrowed 5000 Birr to be paid after one year with 2% interest. After 2 years Belay pledged his car and Wasihun became a guarantor. The obligation to repay the debt is barred after 11 years as the right to reclaim starts after one year and this year is not included. Ten years has not lapsed for the obligation of Belay and Wasihun even after 11years lapses from the due date of the principal obligation.

Be that as it may, Ejigu cannot exercise his right on collateral obligations like surety, and mortgage eventhough 10 years has not lapsed for the claim on surety and mortgage. If the principal obligation is barred collaterals are also barred excepting pledge. He can, accordingly, exercise his right on the pledge.

There are two ways by which period of limitation is interrupted. These are recognition of the debt by the debtor and bringing of action or providing default notice to effect payment. These two ways have been stated in Article 1851 sub (a) and (b).

Art.1851__Interruption.

The period of limitation shall be interrupted where:

(a) the debtor admits the claim, in particular by paying interest or installments or by producing a pledge or guarantees; or

(b) the creditor brings an action for the debtor to discharge his obligations.

When the debtor recognizes the presence of debt by paying interest, installments, providing pledge or mortgage, the period of limitation is interrupted. When the creditor brings an action to effect performance, period of limitation is again interrupted. A court action interrupts period of limitation if it is communicated to the debtor. If the debtor is communicated, it is not necessary that the action be brought to a competent court. Serving notice to the debtor is enough to interrupt period of limitation. It must be born in mind that these ways by which period of limitation is interrupted are illustrations which might again include other ways like novation.

Interruption of period of limitation is of great importance for the creditor, as his right is not debarred. This effect of interruption of period of limitation has been indicated under Article 1852 as follows:

Art.1852.__effect of interruption.
(1) A new period of limitation shall beginto run upon each interruption
(2) Such period shall be ten years where the debt has been admitted in writing or established by a judgment.

According to this provision, a new period of limitation runs when there is interruption. A new ten years period starts to run. Assume for example Ato Abraham did not require performance for 9 years against his debtor. If Ato Abraham did ask performance or put the debtor in default, a new period of limitation starts to run. Then Ato Abraham can require performance again within ten years after 9 years. He can then require performance within 19 years from the formation of the contract.

The court has discretion whether certain claim shall be barred by period of limitation or not when there is special relationship between the parties. Article 1853 empowers the court with the power of setting aside a plea of period of limitation if it is convinced that the creditor failed to exercise his right because of obedience or fear he feet of the debtor with whom he has special relationship.

Art.1853 __ Special relationship between the parties.
(1) 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 the account of obedience he owed to or fear he felt of the debtor to whom he is bound by family relationship or subordination.
(2) In such a case, third parties who guaranteed the payment of the debt shall however be released.

If for example a employee of Ato Haile fails to exercise his right to require payment of 1000 Birr, which he lent to his employer, and his right is debarred by period of limitation, the court may set aside plea of period of limitation.

If Kebede lent 5000 Birr to his father and 10 years lapsed before he requires repayment, the court may disregard period of limitation if his father invokes period of limitation. The court does not, however, have such discretion with regard to third parties who guarantee payment. Third parties are required to be released of their collateral obligation pursuant to Article 1853(2).

Although the value of good faith has paramount importance in law of contract, bad faith of the parties is rarely considered in enforcing period of limitation. The beneficiary of period of limitation can raise period of limitation contrary to good faith according to Article 1854 of the civil code.

Period of limitation is a mandatory way of extinction of obligation and is not subjected to the agreement of the parties. They can never waive it in advance by agreement, nor can they fix period of limitation other than that fixed by law. Such prohibition has been provided under Article 1855 as:

Art.1855.__ Contrary provisions.
The parties may not in advance waive limitation nor may they fix periods of limitation other than those fixed by law.

It can, however, be waived after it has been due. Beneficiary of period of limitation is at liberty to waive period of limitation after it has fallen due. Failure to raise period of limitation is considered to connote waiving of the defense of period of limitation. In light of this, Article 1856 denotes the above connotation.

Art. 1856__ waiving of limitation.
A party may waive limitation after it has become effective.
The court shall not have regard to the period of limitation unless pleaded.

It is questionable if this is equally applied to Article 1810 which says, "No contract shall be invalidated unless an action to this effect is brought within two years from the ground for invalidation having disappeared." The phrase "No contract shall be invalidated" seems to impose obligation on the court not to allow invalidation eventhough plea of limitation is not raised.

Discuss: What is your position regarding the above issues?

Chapter Summary

Obligation created by contract does not exist forever. Sometimes it is natural to extinguish it for different reasons. Normally, a contract extinguishes when it is performed according to the agreement. In addition, contractual obligation can also be extinguished by invalidation, cancellation, termination, limitation of action, set-off, novation, remission of debt and merger.

When a certain contract is invalidated for the presence of defect in the formation of the contract, there will be no obligation to be performed. The same holds true once a contract is cancelled owing to non-performance of an obligation in the term of the contract. When a contract is terminated the obligation of the parties ceases prospectively starting from the time of termination unlike that of invalidation and cancellation which have retrospective effect.

Remission of debt, which can be accepted by silence, is among the other grounds of extinction of contractual obligation.

When contractants replace an existing obligation with another new obligation in its nature the previous obligation extinguishes. Novation is different from variation as the previous obligation is replaced in novation unlike variation in which the obligation is modified. Novation extinguishes the obligation along with its accessory obligations.

Set-off, which happens when contractants are creditors to each other in different transaction upon the fulfillment of certain conditions, extinguishes contractual obligations, as well. It can be undertaken only if the debts are money debts or fungible things of the same species. The extinction effect of set-off is strongly limited to the extent of not affecting the right of third parties.

Merger with its peculiar effect brings an obligation to an end. It happens when the debtor becomes creditor at the same time. Unlike other ways of extinction of obligation, merger shall not affect the right of third parties on the obligation.

Period of limitation, which bars the party from requiring any effect of the contract, has also been put as a ground of extinction of obligation. Once certain period of time lapses, the creditor is prevented from enforcing his right against the debtor or the debtor can be relieved of his obligation invoking period of limitation. The court cannot, in its own motion, invoke period of limitation. Rather failure to invoke the defense as a preliminary objection, results in presumption of waiver of the defense.

Generally, when an obligation is extinguished for any reason there is no legal mechanism to enforce it. The capacity of enforcing the obligation might vary depending on the ground of extinction of obligation. Obligation which extinguishes owing to merger and performance does have different impacts on the contractants.

Review questions

1. What are the differences between ancellation, invalidation and termination?

2. Ato Belay and one minor child enter into a contract. In the contract the minor child has sold his motorbike. Late Ato Belay sold it to Ato Behailu and the tutor minor wanted to have the contract invalidated. Can he invalidate the contract and get back his motorbike?

3. Bahre PLC owes Mesebo cement factory 1,000,000 birr and on another transaction Mesebo cement Factory owes Bahre PLC 1,000,000. Bahre PLC has bought a bus on loan from Mesfin industrial engineering for, 1000, 000. Unfortunately, the PLC is declared bankrupt and consequently Mesebo cement factory wanted to effect set-off. What would be your advice for Mesfin industrial engineering if you were the organization's legal advisor?

Chapter Two
Special Provisions Relating To Contracts

Introduction

As we have discussed over and over again, one of the functions of contract law is filling the gap which might be created because of the failure of the parties to anticipate forthcoming contingencies. Bearing this in mind the civil code provisions provides certain gap filling provisions. These gap filling provisions are found scattered in the civil code.

All the same the civil code cannot exhaustively deal with all the contingencies, which may come up with the formation of a contract. It rather tries to cover the most frequent contingencies for which the parties do not agree or agree less vividly. Special terms of obligations or contracts is rationed to deal with gap filling provisions; it includes certain mandatory provisions, though.

The most frequent areas where the parties do leave gaps or agree less clearly are stipulation as to time, earnest, liability, alternative obligation and condition. These areas are to be discussed under this chapter. In doing so, provision as to time, earnest, provision as to liability, alternative obligation and condition will be discussed respectively in each section.

Objectives

Having read this chapter, students are expected to be able to:

- Distinguish which provisions are gap-filling provisions
- Identify among gap filling and mandatory provisions of the law
- Explain how time in days, weeks, and months could be calculated
- Know what conditional contractual obligation mean
- Understand what differertiates alternative obligations from other obligations
- Distinguish between damages and penalty

2.1. Provision as to time

Contractants may more probably provide the time of performance within certain period of time without specifically stating the time. They may also provide the time in certain number of weeks, months, or ambiguously on first, last, or middle of a month. The presence of different days in months in Gregorian calendar and the presence of thirteen months in Ethiopian calendar might continually and unexpectedly create gap as to time.

This title aims at filling gaps that happen with reference to time. In doing so, it settles gaps which may be created when time is fixed to be after certain period of time from certain date, within certain period of time, in weeks and months, when a holiday lies in between, and other related gaps.

Objectives

Dear learners, after you have read this section, you are expected to specify the exact time when:

- The time is not specific but rather given within a certain period of time
- The time is fixed in days, weeks, months,
- The time is fixed in the first, last or middle of a month
- The last due date is a holiday

Provisions as to time generally deals with the time at which performance is due in order that the debtor can be clear as to exactly when to perform his obligation. Article 1857 declares that calculation of time as to when an obligation is to be discharged after certain period of time from the date of the contract or any other date is to be considered as of this provision.

These provisions generally deal with fixed days, weeks, months and other period of time like holidays. Article 1858, destined to cover time fixed in days, states that the debt to be due on the last day of such period without including the day of the conclusion of the contract.

For example, Mr. Aragaw promised in a contract made on 5/3/2000 to perform his obligation in 7 days from the formation of the contract. The last date for the performance of the contract is on 13/3/2000. In counting the days 5/3/2000, the reference time, is not counted. That's why the last date is not 12 but 13.

Time in contract can be fixed in weeks. Article 1859 reveal the calculation of the period fixed in weeks. If the time is fixed in weeks, the day of the last week that corresponds by its name to the day of the formation of the contract is the due date.

To illustrate, assume Samson concluded a contract to perform his obligation on Monday Sene 1/3/1998. He agreed to perform his obligation after three weeks from the making of the contract. The due date is then Monday 22/1998.Monday in the time of formation of the contract shall be corresponded to Monday in the time when performance shall be made.

When the time is fixed in months, Article 1860 portrays the ways of computing the time. According to Article 1860, the last date is the day of the last month which corresponds the day of the making of the contract in number not in name.

For example, the last date for someone, who entered into contract on June 1, 1998 promising to perform his obligation within four months, is Oct 1, 1998. Sameness shall be in date not in name. The date in the formation of the contract is 1 and the date of performance shall also be

Sometimes certain dates of a month in Gregorian calendar might not have corresponding number in other months. The absence of corresponding number might create uncertainty whether it will be transferred to the next month or it will be the last day of the month, which does not have a corresponding number.

Gap filling function of such uncertainty has been played by Sub Article (2) of this provision. Sub Article (2) of this provision, dealing with period fixed in Gregorian calendar without a corresponding date for the day of the making of the contract, stipulates the due date to be the last day of the last month.

The due date of someone who concludes a contract on October 31 to perform his obligation in four months is February 29. Normally the corresponding number shall be 31. But there is no such number in February. This is because February does not have the date 31. Its last date is 29. Accordingly, the due date is February 29.

In addition to the cases where there is no corresponding number in Gregorian calendar, peculiar Ethiopian calendar with thirteen months also begs gap-filling provision. As the thirteenth month has five or six days, the probability of not getting corresponding date is more probable. This creates two choices which are either totally ignoring the month or ignoring the month when there is no corresponding date and considering it when there is corresponding date in it.

The Ethiopian Civil Code prefers totally ignoring the month as it can bee seen under Article 1860 (3) which says that "The thirteenth month of the Ethiopia Calendar shall not be taken into account". The thirteenth month of the Ethiopian calendar is disregarded pursuant to Sub Article (3) of the above mentioned provision when the periods are fixed in months.

For example, assume that a contract was made on Hamle 10 and stipulated that the obligation will be discharged within four months. The due date is Hidar 10 without considering Pagumen. Pagumen/thirteenth month is not considered. It must be born in mind that contract concluded in Pagumen is considered to have been concluded in Meskerem. A contract concluded on any day of pagumen is considered that it has been made on Meskerem 1 in the Ethiopian calendar.

Sometimes, contracts may stipulate time provisions with less clarity using expressions like, at the beginning, in the middle or at the end of a certain month. Stipulating such indistinct expression can puzzle parties with reference to the exact time. Article 1861 provides a way out for such vagueness.

Art.1861.__Monthly periods.
Where the period expires at the beginning or at the end of a month, such period shall expire on the first or on the last day of such month.

Where the period expires in the middle of a month such period shall expire on the fifteenth of such month.

According to this provision, if the period expires at the beginning or at the end of a month, the due date is the first or last date of such month. If the stipulation is in the middle, it shall expire on the 15th day of such month.

The day which we arrive at by the aforementioned techniques may be a holiday. This has been covered under Article 1862 of the Civil Code. Pursuant to this provision, the next day shall be the last date when the period expires on a holiday, as payment may not be possible on holiday.

It might be questionable whether that holiday shall be a national holiday and the place whose holiday is considered might as well cast doubt on you. The holiday may not necessarily be a national holiday. When it is not a national holiday, it shall be determined having regard to the place of payment. And the place of the debtor shall consider in determining holidays other than national holidays pursuant to Article 1862.

Art. 1862.__Holidays
Where the period expires on a day which is holiday at the place of payment, such period shall expire on the next working day.

It is worth knowing that Article 1862 is an exception to the Articles that precede it. Holiday cannot be invoked where there is specified time within which an obligation is to be discharged pursuant to Article 1863. In light of this, Article 1863 has been provided as:

Art.1863.__Lapse of time.
Where an obligation is to be discharged within a specified period of time, the debtor shall discharge his obligations before the expiry of such period.
He shall fix the exact date on which he shall discharge his obligations unless the circumstances are such as to show that the said date is to be fixed by the creditor.

In such a period of time the debtor shall discharge his obligation before the expiry of the period eventhough the last date is a holiday. He cannot be relieved of his liability to his failure to discharge his obligation on due time on the ground of holiday.

When certain contractual act is fixed to be made within a certain period of time, a question can be raised as to who is entitled to fix the exact time. Determination of beneficiary of period of time has been presumed as of Article 1865 of the Civil Code. Article1865 presumes that the debtor to be beneficiary of such period, unless the contrary, can be inferred either from a clear stipulation or circumstance of the case. The debtor is required to fix the exact time on which he will discharge his obligation unless the circumstance depicts that it is to be fixed by the creditor.

The advantage, which the debtor gets from being beneficiary of period of time, is waving it at his option. Article 1866 of the civil Code provides this in its wording as:

Art.1866.__Waiving of benefit of time.
The debtor may discharge his obligations before the expiry of the agreed period of time unless contrary intention of the parties can be inferred from the terms or nature of the contract or from the circumstances.
Payment made before the expiry of the agreed period of time may not be recovered.

The debtor can discharge his debt before the expiry of the agreed period of time unless contrary intention of the parties can be inferred. The debtor cannot, however, get back what he has paid before the expiry of the time albeit his being beneficiary of time. Once he discharges his obligation his benefit of time limit ceases. The creditor has similar advantage as well if he is a beneficiary of the period of time. Article 1867 is destined to deal with such benefit of the creditor.

Art.1867.__Right of creditor.
The creditor may not demand performance before the expiry of the agreed period unless such period was fixed for his exclusive advantage.

Where the period is fixed for the exclusive benefit of the creditor, he shall, where necessary, grant a reasonable period of time for the debtor to discharge his obligations.

The provision allows the creditor to demand performance before the lapse of the agreed time, if the period is fixed for his exclusive advantage. Be that as it may, the creditor is required to give a reasonable period of time for the debtor to discharge his obligation pursuant to Sub Article (2).

Article 1868 extends protection to a creditor whose interest might be jeopardized by an insolvent debtor with benefit of time. This provision entitled "*Loss of benefit of time*," says verbally "The *debtor whose insolvency has been established or who has reduced the value of the securities given by him to the creditor shall lose the benefit of the agreed period of time*."

If insolvency of the debtor is established or if the debtor reduces the value of securities, benefit of time cannot be invoked against the creditor. The reason seems reduction of value of securities and establishment of insolvency reduces the paying capacity of the debtor and imperiled the creditor when time passes.

2.2. Conditional Contractual Obligations

Contracting parties are free to design their contract as far as they do not contradict the mandatory provisions of the law which cannot be set aside. Providing a condition upon the fulfillment of which the effect of contract depends is one way by which contractants exercise their freedom of contract. Providing a condition is one way by which parties may determine the fate of their agreement. It can thereby help them cope with the contingencies. Accordingly, contracting parties can make their contract conditional as a whole or one of its terms.

A contract to which condition is attached is covered by this section. While discussing the conditional contract, this section provides the meaning of condition, the obligation of the parties to a conditional contract, the types of condition along with their effect, the relationship between the condition and the contract with reference to validity.

Objectives

After discussion on this topic students are expected to be able to

- Explain what condition is under the civil code
- State the acts, which the parties can do before or after the fulfillment of the condition
- State the two types of conditions along with their effect on the contract
- Explain whether validity of the condition affects the contract

Such freedom of contract is enshrined in Article 1869, which says in its verbalization *"A contract shall be deemed to be conditional where it relates to an obligation whose existence depends on the occurrence or non-occurrence of uncertain event."*

According to this provision, existence of the obligations is determined by occurrence or non-occurrence of uncertain event. It is this determinant event which is a condition for existence of the contractual obligation. The determinant event shall be uncertain in its meaning. The meaning of uncertainty in Ethiopian law of contract is broader than in some other legal systems, which limits the term to mean only events whose very existence is uncertain.

Professor David has defined it broadly to include uncertainty as occurrence or non-occurrence of certain event or even uncertainty as regards the time of its occurrence. The meaning of certainty is broad enough to put in a nutshell uncertainty that exist only in the minds of the parties and which depends on whether something happened or did not happen in the past. The meaning of conditional contract is expected to take all the above instances into account.

For example, Ato Behailu is not sure if his brother is alive or dead though his absence is declared. He sold his house on condition that his brother is dead. This is a conditional contract though the event may have already happened.

Condition determines the effect of contract in two ways. It either ends the effect of contract or makes the contract effective upon its fulfillment. Consequently, a condition can be condition subsequent or condition precedent. Articles 1871 and 1872 deal with condition precedent and condition subsequent respectively.

Article 1871__ condition precedent.

Unless otherwise agreed, the contract shall be effective as from the day when the condition is fulfilled.

This provision encapsulates a presumption in favor of condition precedent in the absence of agreement otherwise. The agreement, which sets aside this presumption, shall be clear enough to help judges reach a decision that the condition is condition subsequent. The possibility of ambiguous agreement concerning whether it is condition precedent or condition subsequent call for presumption of either of them that is condition precedent.

Assume that Macdona private college , which is permitted to run Diploma program, and Ato Tatek entered into a contract of employment. They said verbally "The College and Ato Tatek have concluded contract of employment on condition that the government permits the college to start a degree program." There is no indication whether the condition is condition subsequent or precedent.

It is accordingly questionable if the contract shall be effective or remain ineffective till the condition is fulfilled. To solve such problem that emanates from a possible gap, the law presumes a condition to be regarded as condition precedent. Ato Tatek can start his work or the college can have Ato Tatek start his work as in condition precedent, the contract is effective when the condition is fulfilled. Before the fulfillment of the condition the contract is not effective. Another connotation incorporated in this provision is its effect on the contract. The effect of contract starts upon the fulfillment of the condition.

To illustrate assume that Ato Bergena entered into a contract where he is to sell his house if he wins DV lottery. In the case at hand the contract of sale of house will have effect only when the condition is fulfilled. The condition is, accordingly, condition precedent or suspensive condition.

Article 1872 depicts the other type of condition, along with its effect. The depiction in its wording has been put as:

Art.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.

Condition subsequent or resolutive condition is uncertain event upon the occurrence of which the cancellation of the contract is carried out. The contract ceases to exist upon the occurrence of the event. The effect of the contract starts immediately after the formation of the contract.

The effect of the condition subsequent is cancellation of the contract upon its fulfillment. A thing sold on condition subsequent shall be delivered immediately after the conclusion of the contract and handed back if the condition is fulfilled. Saying the effect of condition subsequent is cancellation takes us to the conclusion that the cancellation will have the effect of reinstatement as provided under Article 1815 of the Civil Code. It shall, however, be born in mind that it will not be preceded by perfect expectation damage as this cancellation is not owing to non-performance of contract.

In addition to that, condition subsequent shall clearly put it as condition subsequent. Unless there is agreement that shows the type of condition the presumption as we have seen before is condition precedent.

The parties themselves can sometimes influence the condition, which determines the contract. In such a case, the party who does not want the fulfillment of the condition may prevent its fulfillment. Such contracting party is no less to be equated to a party that fails to be bound by a contract. Failure to be bound by a contract is socially undesired behavior. The presumption of uncertain event on which conditional contract depends is also eroded if one of the contracting parties can determine its occurrence. Considering the possible aforesaid behaviors of contractants, Article 1870 provides a remedy.

Article 1870__ good faith

A party may regard a condition as fulfilled where the other party has prevented its fulfillment in a manner contrary to good faith.

Eventhough the condition is not fulfilled, if its fulfillment is hindered by one of the parties and his act of hindrance emanates from bad faith, the condition can be presumed to have been fulfilled. Then the party may require the right he would have done so had the condition been fulfilled. The value of good faith is actually fluid which requires interpretation depending on the case at hand.

For example, assume that Ato Abebe entered into a contract with Senait to sell his house if he is employed. Later if Ato Abebe refuses the employment having got the chance, Senait can require performance of the contract proving that he did it in bad faith. This is because Ato Abebe can be employed or refuse to be employed. His right to be employed or not puts him in a position where he can determine the fulfillment of the condition. Bad faith can be proved if he did it in case the contract is performed.

She can also keep silent without requiring performance. Ato Abebe cannot, however, require performance, as it is an option only to the party that did not prevent the fulfillment of the condition. The party that prevents the fulfillment of the condition cannot “regard the condition fulfilled”

Discuss: Do you think that Article 1870 is equally applicable to condition subsequent?

The provision is equally applied to both condition precedent and condition subsequent. The requirements which are provided in this provision are prevention of the fulfillment of the condition and bad faith of the party that prevents its fulfillment. These two requirements are cumulative as well as sufficient equipment. These requirements are cumulative in that both prevention and bad faith shall be established. These requirements are sufficient in that no additional requirement is required to enable the party regard the condition fulfilled.

To illustrate it, assume in the above example Ato Abebe bought a house, which will be given back on repayment of the price if he did not succeed his father. At the time of succession he renounced the succession. Senait can give back the house on the presumption of the fulfillment of the condition eventhough he did not succeed.

The good faith requirement, which is dominantly found in contract law provision, is emphasized in contracts whose existence depends on condition as well. Article 1873 is provided to strengthen the good faith requirement provided in Article 1870.

Art.1873__ Non-interference.
The parties shall refrain from doing any act likely to prevent the regular performance of the contract upon the fulfillment of the condition.

The connotation enshrined in this provision seems to create ambiguity. The act may prevent either the fulfillment of the condition and thereby performance or the performance of the contract. The provision is therefore doubtful if it refers for the act that prevents the fulfillment of the condition and thereby performance or directly the performance of the contract.

The parties as we have seen before may prevent the fulfillment of the condition and thereby prevent the performance of the contract. The parties may also destroy, damage or alienate the object of the contract to which condition is attached. These acts clearly prevent the normal performance of the contract.

For example, Ato Hailu agrees to sell his house if his wife comes from America. It is questionable if this provision prohibits the contractant from preventing the coming of his wife and thereby hinders performance of the contract or it prohibits him from selling or destroying the house and prevents the performance of the contract.

The act of the parties which prevent the fulfillment of the condition has been covered under Art.1870 of the Civil Code. Extending Article 1873 to cover such acts makes the provision redundant. In addition to that, the provisions that follow Article 1873 seem to show that the act refers to acts which directly prevent the performance of the contract. Therefore Ato Hailu is prevented from selling or destroying the house by Article 1873 and his contractant is given the discretion to regard the condition fulfilled for Ato Hailu's act of prevention of the fulfillment of the condition pursuant to Article 1870 of the Civil Code.

This does not mean, however, that the parties are absolutely excluded from any act with regard to the object of the contract subject to condition. Strict restriction not to do anything on the object of the contract not only renders it unproductive but also denies the holder the right to take necessary measures to protect damage and depreciation and administer the thing. Accordingly, albeit certain restrictions the holder may exercise certain acts on the object of the contract subject to condition. Article 1874 has been provided with this rationale.

Article 1874__ Acts of management.
Acts of management done prior who exercises the right shall remain valid where the condition is fulfilled. Damage may be claimed where such acts were done in bad faith.

According to this provision acts of management are exceptionally allowed albeit the prohibition of Article 1873. Knowing what acts of management and acts beyond management are important to determine the acts which can and cannot be carried out.

Discuss: What do you think are acts of management and acts beyond management?

You are expected to refer to Article 2204 and 2205 in order to know these terms. Lease for term less than three years, the collection of debits, investment of income, discharge of debts, are acts of management while alienating or mortgaging real-estate, investing capitals, signing a bill of exchange, effecting a settlement, giving consent to arbitration, making donations or bringing or defending an action are acts beyond management. These two provisions are not exhaustive lists which exclude other acts. Other acts may also be included by analogical interpretation now that these lists are illustrative lists.

In addition to that, whether the provision refers to condition precedent or condition subsequent is moot to be dealt with. The provision clearly relates to "any act likely to prevent the regular performance of the contract upon the fulfillment of the condition”. This phrase shows condition precedent as it is condition precedent which is performed upon the fulfillment of a condition. On the contrary, condition subsequent results in cancellation of the contract. Therefore it seems to refer to condition precedent.

However, it seems unreasonable to allow acts that prevent restitution preventing acts that hinder performance of the contract upon the fulfillment of the contract. Interpreting the provision in a way it avoids absurdity makes it to be extended and applied to both condition precedent and condition subsequent. The provision seems sound therefore if it is applied to both condition subsequent and precedent.

A buyer of an immovable under condition subsequent and seller of immovable under condition precedent are in actual control of the immovable. The act of these persons might affect the right of their respective contractants by preventing regular performance or restitution. Before the fulfillment of the condition, they are not allowed to carry out any acts beyond management like alienating, investing capital, denoting and so on.

If acts beyond management are performed, they are subject to invalidation by the other party. Article 1875(1) indubitably depicts the right to invalidate such contract by the victim of acts beyond acts of management.

Art.1875.__ Acts beyond management.

(1) Acts beyond management done by the party who exercises the right may be invalidated where the other party requires.

(2) Any interested party may require the other party to state within a reasonable period of time whether he will require the acts beyond management to be invalidated.

(3) The effect of invalidation shall be as provided by Art. 1808-1818.

Eventhough the parties in actual control of a thing before the fulfillment of a condition are allowed to exercise acts of management they shall be in good faith. The acts of management shall be made in good faith. It shall not, for example, be made to affect the interest of the party for whom performance will be made. Acts of management made in bad faith are also subjected to invalidation.

Assume a prisoner who does not know his conviction sold his house for 100,000 to Ato Mekbib. The contract will be cancelled if he is released. Then he was sentenced to three years of imprisonment and this is communicated to Ato Mekbib. Later Ato Mekbib rented the house for two and half years when the prisoner was left with 3 months to be released receiving the money in advance. Though the act of Mekbib is act of management, it is contrary to good faith and entitles the prisoner to the right to require compensation.

Invalidating acts other than acts of management may affect third parties who have dealing the actual holder. Sub Article (2) has extended protection to such party to require the other party to state whether he will require the invalidation of the acts beyond management. These third parties are required to be protected so that business transaction is secured. Such protection can be analogized from general effects of invalidation as invalidation cannot be made in a way it affects third parties in good faith pursuant to Art.1816 of the Civil Code.

Article 1876 is leased to cover the status of the party that exercises the right before the fulfillment of the condition with respect to fruits and profits.

Art.1876__ Fruits and profits.
The party who exercises the right prior to the fulfillment of the condition shall, where the condition is fulfilled, retain the fruits and profits he received in good faith prior the fulfillment of the condition.

That party which exercises the right before the fulfillment of the condition is, accordingly, entitled to profits and fruits, which he received in good faith before the fulfillment of the condition provided that the acts are not invalidated.

Assume Ato Abebe agreed to sell his house on condition precedent and Bancha bought a garden on condition subsequent. Both Abebe and Bancha exercise their rights before the fulfillment of the condition. Ato Abebe rented the house and Bancha is earning money from the garden by selling vegetables. When the condition is fulfilled Abebe and Bancha have the obligation to deliver the house and garden retaining the income from the rented house and sold vegetables of the garden before the fulfillment of the condition.

A party whose right might be affected by the parties in actual control can take protective measures pursuant to Article 1877. The possibility of a protective measure has been verbally put as:

Art.1877.__Protective measures.
A party whose conditional rights are imperiled may take such protective measures as he could take, were his rights not conditional.

This provision gives this party to take protective measures in the way Article 1873 requires the person in actual control to do necessary actions of protection. As taking protective measures may not be enough, the party in actual control is also required to make necessary actions of protection before the fulfillment of the condition. Article 1877 entitles the party whose right might be imperiled publicity to protect acts beyond management by the other party, interrupting running of period of limitation if his right is subject to condition precedent, and other such acts.

Unlawful, immoral or impossible conditions are regulated by applying provisions relating to the impossible, unlawful or immoral object of a contract, starting Art.1715-1716. Their consequence depends on the relationship of the condition and contract. If there is strong relationship the contract will be invalidated.

The same holds true for obligation subject to condition fulfillment which solely depends on the will of the debtor. Such obligation is not valid. If, for example, a debtor promised to do something if he wishes, if it pleases him, the obligation is not a valid obligation. You have, however, to bear in mind that this does not mean a contract subject to condition where a party excludes liability by agreement is invalid. Article 1879 is a testament to the above assertion now that it says:

Art.1879.__Condition depending on a party

(1) An obligation assumed subject to a condition the fulfillment of which depends solely on the party who assumes the obligation shall be of no effect.

(2) An obligation shall be deemed to be assumed under sub-art. (1) where the promisor's liability for non-performance of the contract is excluded in the contract.

2.3. Alternative Obligations

Among the different ways in which contractants can agree is providing alternative obligations. The debtor may assume an alternative obligation where he is to discharge either of the obligations. Making a stipulation of alternative obligations may probably leave gaps as to:

- Who will choose the obligation to be discharged
- What would happen if one of the alternative obligations is impossible
- What if such impossibility was owing to one of the parties?

This chapter is allotted to deal with the aforementioned gaps.

Objectives

After you read this section, you will be able to

- Define alternative obligation
- Identify the party that is entitled to choose
- State the position of the law when one of the obligations becomes impossible

Alternative obligations are dealt within Articles 1880-1882 of the civil code. Alternative obligation happens in a contract when the debtor is to discharge one among different obligations. Article 1880, in principle, depicts that the debtor is released by performing either of the obligations provided in the contract. The presence of another alternative obligation casts doubt as to who is favored in choosing the obligation to be discharged.

Article 1881 is about who has a right to choose the obligation to be carried out among given alternatives. Unless there is contrary agreement, it is the debtor who is entitled with preferring the obligation to be performed pursuant to Article 1881(1). This is not, however, without limit in that “where the party entitled to choose does not exercise his right on being required to do so such right shall pass to the other party pursuant to sub-art. (2) of the same provision.”

When the creditor puts the debtor in default, stating that the debtor has to choose which obligation to discharge, if he fails to do so immediately, such right passes to the creditor. This right of the creditor becomes important for the debtor to attenuate the liability of non-performance. On the other hand, when the creditor is entitled for such choices and if he fails to do so, the choice passes to the debtor.

For example, Dr. Sintayehu a public hospital employee, has borrowed birr 30,000 on March 11/07 from Dr. Mekasha , a private higher clinic owner. The agreement laid an alternative obligation upon Dr. Sintayehu either to pay back the loan on January 31/08 with 10% interest or to give two hours daily professional service for six months in the private clinic of Dr. Mersha starting from Feb 1/08. Here the law gives right to choose either obligation to the debtor (Dr. Sintayehu). Assume that Dr.Mersha on December 5/07 has notified Dr. Sintayehu to make choice of which obligation he is going to perform. However, the debtor does not reply and in the mean time the date is due. So which obligation do you think the creditor can enforce? In fact the creditor can choose to enforce either of the obligations, but in this particular case in which specific performance is mandatory, claiming the back payment of the loan is advisable since you have seen in contract- I that one cannot require specific performance in a situation where the personal liberty of the debtor could be affected.

The choice of the parties as to the obligation to be performed is respected as far as it is possible. Article 1882 under its Sub Article 1 shows that once one of the obligations becomes impossible, the debtor shall discharge the other obligation. When the impossibility is owing to fault of the party that is not entitled to choose, damage is required to be paid to the party that is entitled to choose.

2.4. Earnest

There is a great deal of disagreement on the nature and significance of earnest. In spite of disagreements, it is an old and frequent practice. Earnest is considered testament for the conclusion of a contract.

Objectives

After dealing with this chapter, you will be able to

- Explain what earnest is
- Discuss earnest in comparison to contract
- Identify effect of earnest

There are, however, different positions as to whether earnest entitles a party the right to terminate a contract unilaterally. Certain countries adhere to the position that denies the right to terminate unilaterally. Others hold the position that earnest confers the right on a party to terminate the contract unilaterally. There are also other points of controversy, which come following the position adhered to. This section is allotted to discussing the position of the Ethiopian law of contract towards the above issues.

When we see the position held by the Ethiopian law, termination of promise guaranteed by earnest unilaterally is possible upon certain limitations.

Article 1885__ non-performance of a contract.

(1) Unless otherwise agreed the party who has given earnest may cancel the contract subject to forfeiture of the earnest given by him.

(2) Unless otherwise agreed, the party who has received earnest may cancel the contract subject to repayment of double of the amount received by him.

It can be clearly inferred from this provision that a contract secured by earnest can be cancelled unilaterally by either party. The party that cancels the contract shall, however, pay the amount of earnest. The party that has given earnest can cancel losing the right to get back his payment. The party that has received earnest can on the other hand terminate the contract paying double of the earnest.

The earnest paid in advance is considered to be part of the performance when the contract is performed. When the contract is performed, the party to whom earnest is paid shall return it to the other party or deduct it from his claim. Article 1884 has put it clearly as:

Article 1884.__ Performance of contract.
Unless otherwise agreed the party who has received earnest shall return it or deduct it from his claim where the contract is performed.

For example, Makda, gives earnest of 1000, and agrees to buy television for a price of 3000. The seller shall either receive 2000 deducting 1000 from 3000 or if he received 3000 he shall give back the amount of earnest that is1000.

This position of the law is applicable indeed in the absence of contrary agreement. The parties can set aside this gap filling provision and provide otherwise.

Discuss: Do you think earnest shows conclusion of contract? So, can one who has given earnest claim more than double of what he has given as earnest if he can establish damage in this effect? What about the one who received earnest in the same situation?

2.5 Provisions as to liability

There might be circumstances where the parties fail to perform the obligation, which they assumed. The Ethiopian law of contract has provided remedies of non-performance as a gap filling ones. Nevertheless, the freedom of the parties to set aside such gap filling provision and provide their own is permitted.

Provision as to liability is one of the ways where such gap filling provisions can be set aside. In doing so, the parties can either extend or limit their liability subject to the legal limitation of unconscionable contract. Still in extending or limiting liability, the parties may probably leave gaps. This section also fills filling the gap left in either extending or limiting liability.

Objectives

By the time you finish reading this section you will be able to:

- locate the scope of the parties in extending and limiting their liability
- differentiate penalty and earnest
- explain the effect of invalid penalty on the main contract and vise versa

Article 1886 entitled “Extension of liability” indicates the possibility of extension of liability under the contract and provides that “they will be liable for non- performance” albeit the presence of force majuer.

As to this provision eventhough non-performance owing to force major does not make the debtor liable (see 1791(2), the parties can agree to extend their liability even in the presence of force majuer. In extending their liabilities, parties may provide a penalty clause. Article 1889 is provided to this effect as:

Article 1889. __ Penalty

The parties may fix the amount of damages which will be due should a party fails to discharge his obligations or to discharge them completely in due time.

Freedom of contract to determine penalty for non-performance discourages reluctance to enter into a contract owing to fear of non- performance. They can fix penalty clause either in the main contract or in a separate document. However, freedom to fix the amount of damage might on the other hand create unconscionable contract. It was in fact penalty clauses, which was the reason for the rule of unconscionable contract in certain common law countries.

As unconscionable contract is also subjected to invalidation, the problem related with lesionary penalty can be moot in penalty clause. It seems to put limit in determining the penalty clause with reference to unconscionable nature of the clause.

Article 1710 shall, consequently, be applied to limit the extent of the amount of damage at the time of non- performance of contract. If the penalty is terribly maximum and backed up by condition that renders the party in unequal bargaining power, it is subjected to invalidation on the account of unconscionable contract pursuant to Article 1710 or to rectification pursuant to Article 1812.

The validity of penalty clause is assured in light with the validity requirements of general contract provisions. A penalty clause which is made owing to mistake, fraud, duress and undue influence is subjected to invalidation of a contract provided that the grounds which foster invalidation are fulfilled. An illegal penalty clause will not again have effect as illegal acts are required to be deterred.

In light of the validity of the penalty clause, looking into the relationship between the main contract and the penalty is worth discussing. Accordingly, it is doubtful as to the effect of invalid contract on valid penalty clause and the effect of invalid penalty clause on the main contract. Article 1894 indicates their relationship.

Art.1894. __ Invalidation.

(1) A penalty shall be of no effect where the contract in which it is prescribed is invalidated

(2) A contract shall remain in force notwithstanding that the penalty is not valid.

Illustration: assume Ato Belay entered into contract with Ato Gadissa owing to mistake. The contract is backed up by penalty clause. If the contract is invalidated the penalty will not have effect, pursuant to sub-Art. (1) of 1894.

Assume in the above example Ato Belay and Gadissa concluded a valid contract. Later Ato Belay agreed to a penalty owing to mistake. In this case the main contract is valid although the penalty is invalidated pursuant to Sub-Art. (2) of the aforementioned provision.

Assume for example. Anbassa shoes factory employed Ato Chanyalew for one-year contract deceived by false documents. The factory assumes penalty of 1000 for breach of contract before one year. In the case at hand if the main contract is invalidated, the penalty is of no effect.

Let us assume that there was no penalty clause in the main contract but the penalty clause was inserted because of intimidation that amounts to duress made by Ato Chanyalew on the manager of the factory. In this case only the penalty clause is invalidated and the main contract remains effective.

Contractual sanctions which are not specific enough are seen with suspicion. Consequently, such contractual sanctions are subjected to court verifications as to whether the agreed sanctions may be applied.

The other equivocal point in this provision is when the contract is not invalidated. It sheds doubt if a party that can invalidate a contract may refuse performance and refuse penalty without invalidating the contract as the provision in its phrase "…is invalidated…" seems to connote that invalidation a precondition to make the penalty effective.

When a contract is invalid, however, the party may simply refuse performance without invalidating the contract. This power of a contractant who is adversely affected by an invalid contract shall be extended to a penalty clause.

Fixing of penalty does not imply the discretion of the debtor either to perform or pay penalty. It is rather upon the discretion of the creditor either to require performance or effect penalty unless they clearly deprive the creditor of such right by agreement. One of them cannot refuse to perform to pay penalty unlike earnest where one of them can cancel the contract paying either double of the received earnest or the amount of earnest itself.

If one of them fails to perform a contract backed up by penalty, on the other hand, the other party may opt for either enforcement or payment of penalty. All the same, the creditor cannot require both enforcement of the contract and the penalty unless penalty was provided in respect of delay or the non-performance of a collateral obligation. Article 1890 has been destined to connote the above assertion:

Art.1890.__ Right of the creditor.

(1) Unless otherwise agreed, the creditor may require the performance of a contract which includes a penalty.

(2) He may not require both the enforcement of the contract and the penality unless the penalty was provided in respect of delay or the non-performance of collateral obligations.

Let us illustrate this: Messebo Cement Factory and Sur Construction entered into a contract whereby Sur Construction will pay 100,000 penalty in case of non- performance. If Sur Construction Company fails to discharge its obligation, Mesebo Cement Factory can require either forced performance or penalty, but not both.

If the 100,000 penalty was provided for failure of performance in due time or for failure of providing pledge, Mesebo Cement Factory can require both forced performance and payment of penalty.

We might wonder if contractants can agree both for the enforcement of penalty along with forced performance. It is even questionable if such agreement amounts to unconscionable contract. Actually, unless there are business inexperience, necessity, senility and other instances that render the other party in a position of unequal bargaining power, the contract is valid and they can agree as they think fit. These provisions are permissive gap-filling provisions.

Then enforcement of a penalty clause can be made any time without any restriction. There are conditions upon the fulfillment of which it is applied. Accordingly, Article 1891 provides that "penalty shall be due whenever the creditor is entitled to claim damages by reason of non-performance of the contract." A person who could not have damage as a remedy of non-performance cannot be entitled to payment of penalty.

A person who can get damages as a remedy is a party that has put the debtor in default. A person against whom negative obligation is assumed, the assumed obligation is required to be performed only within a fixed period of time, whose obligation shall be performed within a specified period of time and that period has expired, the debtor declare in writing that he would perform the obligation, or performance is to be made expressly without notice can require remedies of non-performance. Such conditions are also provided as a precondition of application of penalty.

Eventhough the aforementioned conditions are fulfilled, unless there is actual damage, a party is not entitled to compensation as it can be inferred from Article 1801. Such condition is not, however, applied in case of penalty. An exception to 1891 has been provided under Article 1892, which sets aside the condition to get compensation to be applied to penalty. This provision shows that there shall be penalty even in the absence of actual damage.

The same holds true when actual damage is more than the penalty. In its Sub Article (2), this provision deviates from payment of actual damage when the penalty is less than the actual damage. Actual damage which is more than the penalty and less than the penalty cannot be required. However, exceptionally actual damage instead of penalty can be required if the damage is caused intentionally or with gross negligence or grave fault.

The underlying reason to provide a penalty clause is to be certain as to the remedies of non-performance. Consequently, the role of the courts in varying the penalty is limited to protect the required certainty of the parties. Article 1893 is testament to this.

Art. 1893__variation of penalty.
The agreed amount of penalty due for non-performance may not be reduced by the court unless partial performance has taken place.

The court can vary the penalty clause only if there is partial performance. Allowing the power of variation provided when there is partial performance seems to be justified on account of securing justice vent at the expense of certainty. Ordering the whole penalty while there is partial performance is actually unfair which begs correction even paying certainty as a cost.

Assume Berhane, a pianist, entered into an agreement with the owner of Geza in which the pianist agree to present concert for five consecutive days with penalty of 100,000 for failure. After he made his concert for four days, he got a better payment and went away. In such a case the court has the discretion to vary the penalty of 100,000 to the extent the court thinks to be fair.

The validity of a penalty clause can be affected by the validity of the main contract. Invalid nature of the penalty clause does not on the other hand affect the validity of the main contract.

Agreement that set a aside gap filling provision is made not only to extend but also to limit liability due to non-performance. Article 1887 to this effect says" *the parties may limit their liability under the contract and provide that they will not be liable unless they commit a fault.*"

In the gap filling provision dealing with non-performance of a contract, there is contractual liability in the absence of fault unless it is force majuer as you remember in your contract law I. However, contrary to this, parties can limit liability by agreement provided by gap filling provisions. They cannot, however, exclude liability of non-performance because of fault as it encourages deliberate breach of contract.

Contractants can specifically exclude liability owing to the fault of their employees or auxiliaries pursuant to Article 1888. The provision has provided this in its wording as:

Art.1888. __ Acts of employees.
(1) The parties may provide that they will not be liable where non-performance is caused by a fault of their employees or auxiliaries.
(2) Any such provision shall be of no effect where it is made to the prejudice of a party who is employee of the other party.

Such limitation of liability shall not, however, be to the prejudice of the employees of the other party pursuant to Sub-Art (2) of 1888. The effect of such limitation of liability will be only on the contracting parties. The burden will then shift from the party who has excluded to the other contractant not to the employee.

Illustration: assume for example Sur Construction limits its liability emanating from the fault of its employees. When the employer is relived of such liability, the employee might be held liable for more than the liability he would be liable had the employer been not relieved, since both the employer and employee are jointly liable. Such liability might then negatively affect the employee. Such negative impact of limiting of liability is of no effect with regard to the employee pursuant to Article 1888 of the civil Code.

Chapter Summery

Providing a gap filling provision for incidents which contracting parties do not predict is among the purposes of the law of contract. In light of this, the Ethiopian law of contract has provides certain provisions with this purpose. Special terms of obligation or contracts play gap-filling role of the law of contract.

Provisions as to time are among the laws, which fill the most repeatedly happening gap in contractual agreement. Accordingly, when the time is fixed in days, the day of the formation of the contract is not considered in assessing the time. Time fixed in weeks is determined with reference to the corresponding name of the last week unlike the period fixed in months, which is determined referring to the corresponding day of the last month by number.

In addition to provisions of time, provisions dealing with condition also play gap-filling role. When a contract depends on the occurrence and non-occurrence of uncertain even, it is said to be a conditional contract. Condition may be condition precedent if the contract will be effective upon the fulfillment of the condition. It can also be condition subsequent if the contract is cancelled upon the fulfillment of the condition being effective before the fulfillment of the condition. The presumption is in favor of condition precedent.

The other gap filling provisions provided under the civil code are provisions which deal with alternative obligation. When there is gap as to the party who will choose the obligation to be performed, the law fills the gap by presuming in favor of the debtor. When the party with the right to choose does not exercise his right, the other party can choose the obligation to be performed.

When contractants provide earnest for their contract, this in itself is proof for the presence of a contract. It however, entitles also either of the contractant the right to cancel the contract upon causing the other party to profit the amount of earnest.

Finally, provisions as to liability, with certain restrictions on the freedom of contract, have been provided. The parties are free to either extend or limit their liability subject to the mandatory provisions. Unconscionable nature of a contract and negative impact of exclusion of liability on third parties, are the ones among the limitations.

Generally, provision as to time, condition, earnest, provision as to liability are all about the fate of a contract which is not fully addressed with reference to the said incidents. The law fills such gaps and provides mandatory provisions to protect the very purpose of a contract.

Review questions

1. Ato Mesele, an academic staff of Mekelle University got scholarship in Norway. Mekelle University wants to have him sign a contract, which shows Ato Mesele, will serve the university the whole of his life or pay a penalty of 1,000,000. The actual cost Mekelle University incurs is 40,000 Ethiopian Birr. Ato Mesele signed the contact for he was in need of the scholarship.

   a) Can the university require both forced performance and the penalty?
   b) Deal with the validity of the contract along with its penalty.

2. Berhane bought a car on condition subsequent from Alemayehu and sold a television on condition precedent to Alemayehu.

   a) Who is the holder of the car before the condition is fulfilled?
   b) Who is the actual holder of the television before the condition is fulfilled?

CHAPTER THREE
PLURALITY OF DEBTORS OR CREDITORS

Introduction

The presentation of the general law of contracts was based up to now on the assumption that it was dealing with a given obligation, which had a single creditor and a single debtor. But of course, this presentation is made in the interest of simplification. In practice things may be much more complex. An important and frequent variation on the scheme of a single obligation binding one creditor and one debtor is where more than one party is involved in the performance of the obligation. For instance, several creditors and debtors may be involved. The study of this situation is the object of the present chapter.

In our law, Chapter six of Title Twelve of the Civil Code deals with plurality of debtors or creditors. However, it is worth noting to show the different terminologies used in different legal systems in the common law, the French law, and our Civil Code there are different terms used in those systems.

For reasons of consistency it will be better to use the term solidary obligation from the perspective of debtors, creditors, and nature of obligation itself. Thus, this chapter covers three units: solidary obligations in case of plurality of debtors, solidary obligations in case of plurality of creditors and obligations other than solidary obligations in case of plurality of debtors or creditors.

Objectives

After having completed the study of this unit, you will be able to:

- Define joint and several liability or solidary obligations;
- Explain the effect of joint and several liability among co-debtors;
- Discuss the relationship of co-debtors with the creditor;
- Discuss the relationship of co-debtors among themselves;

- Define joint obligations in the case of plurality of creditors;
- Explain the effect of joint creditorship;
- Discuss the relationship of the joint creditors *inter se;*
- Distinguish indivisible and divisible obligations and explain their effects.

3.1 Solidary Obligation in Case of Plurality of Debtors

Solidary obligations in case of plurality of debtors in the French legal system and joint and several obligations in the common law legal system, which is termed as debtors jointly and severally liable in the Civil Code relate to solidary obligations that exist among plurality of debtors. The provisions of the civil code which deal with such plurality of debtors are Articles 1896 through 1909 of the Civil Code.

Accordingly, the title solidary obligations on debtors is used to refer to a situation where there is a joint and several obligations among debtors. In this unit, we will discuss the nature of solidary obligation in different legal systems, the relationship between a creditor and co-debtors and the relationship among co-debtors.

Objectives

After having completed the study of this unit, the student will be able to:

- Define joint, several, and joint and several (solidary) obligation;
- Explain the effect of solidary obligations among plurality of debtors;
- Discuss the relationship between the co-debtors and the creditor;
- Discuss the relationship of co-debtors among themselves.

3.1.1 Nature of plurality of debtors or creditors in different legal systems

The concept of plurality of debtors or creditors is treated as solidary obligations in the civil law and as joint and several obligations in the common law. The common law has three categories of promises: joint, several, and joint and several. A joint promise is a single promise made by several persons to perform the same obligation with the stipulation that each of them is only proportionally liable. In a joint promise there is only one cause of action against the promissory, and consequently, performance by, or discharge of, one of the joint obligors releases the others. On the other hand, a several promise is made by one person to perform an obligation eventhough that promise might be in an instrument which contains the promises of other promissors; and the creditor will be entitled to as many causes of actions as there are promissors. As to the type of joint and joint and several obligations, please refer Law of Contracts I, the discussions on types of obligations.

A joint and several promise binds all obligors jointly as well as severally for the performance of the total obligation. Actually each party contracts a several promise to discharge the total obligation in addition to contracting a joint promise with the other. Although a joint and several obligation is to the disadvantage of debtors, in many instances it is the only type of contract a creditor will accept. In common law, because all joint obligations are contracted as one, it was necessary that all of them should be joined as defendants in a suit on a joint contract. However, a joint and several obligors can be sued individually and a successful suit against one of the co-obligors does not prevent the common creditor from suing the other obligors either jointly or individually. Nevertheless, if a debt is completely satisfied by one debtor, the creditor can have no further satisfaction against the other debtors. Also, a discharge of one joint and several debtors is generally held to release co-debtors.

A joint and several obligor who is compelled to pay the whole debt has a right of contribution against his co-debtors. Contribution in this sense means that each co-debtor must compensate the performing debtor to the extent of his proportionate liability for the total debt.

Therefore, it may be said that all joint and several debtors are liable individually to the creditor for the whole debt but among themselves the co-obligors are liable only for their proportionate share. The respective shares of the co-obligors may be regulated by a contract created for that purpose or stated in the joint and several obligations, but in the absence of such a stipulation the law will imply that they joined equally in the venture.

The French concept of solidary obligation and the common law concept of joint and several obligations have a common feature, i.e., that each solidary debtor binds himself for the whole obligation with the result that performance by one debtor discharges the other debtors.

In the French legal system, solidary obligations are divided into two forms: those which are contracted in favor of several creditors, active solidarity and those which are contracted by several debtors, passive solidarity.

The starting point in the French codal provisions as to debts contracted solidarily is that the creditor of a solidary obligation has an advantage in that he may obtain payment from any solidary debtor. Although the debtors are obliged to perform the same object of the contract, they may be obliged in different ways; for example, one debtor may be bound purely and simply and another may be bound subject to a condition or a term.

The creditor who has taken action against one of the solidary co-debtors is not barred from taking action against the others. Furthermore, a judicial demand against one of the solidary debtors interrupts prescription as to all co-debtors. The theory used by the French commentators and the jurisprudence to explain the rights and duties of solidary debtors is that there is either a fictions or real reciprocal mandate among the debtors. Furthermore, a co-debtor may not increase the burden of the debt upon the other co-debtors. In a suit by the creditor a solidary co-debtor may plead defenses which are common to all the co-debtors in addition to defenses which result from the nature of the obligation and his own personal defenses. However, the solidary co-debtors may not use those defenses which are personal to other co-debtors.

Defenses which are common to all the co-debtors are payment, novation and prescription and various grounds of invalidation of contract that make the contract null and void. The personal exceptions such as duress, error or incapacity belong to one or several of the debtors but not to all of them.

If a debtor is released by the creditor and the creditor fails to reserve the solidarity against the other co-debtors, all co-debtors are released and the debt is extinguished. The remission by a creditor in favor of a solidary co-debtor discharges the other debtors unless the creditor expressly reserves his rights against them. Solidary debtors inter se are liable only for their respective interests in the debt; and payment of the whole debt by one co-debtor renders the others liable for contribution to the paying co-debtor. There is a presumption that the obligation is divided into equal portions among the co-debtors, but this presumption is open to rebuttal by evidence of a prior agreement between the debtors. Therefore, the debtor who pays the creditor more than his portion of the debt may pursue his co-debtors for their respective shares of the excessive payment. If one of the co-debtors is insolvent his share is borne equally by the remaining co-debtors.

3.1.2 Treatment of solidary obligations in case of plurality of debtors under the Ethiopian Law

In a solidary obligation in case of plurality of debtors, each debtor is considered in his relation with the creditor as debtor of the entire performance or each debtor is obliged as if he were the only debtor. In this regard, the principle is provided under Articles 1896 & 1897 of the Civil Code.

These provisions illustrate the idea of solidary obligation among plurality of debtors. An obligation is said to be joint and several among the debtors when each debtor is considered in his relation with the creditor as debtor of the entire performance (as if he were the only debtor) or where both debtors are jointly liable for the whole debt. Each solidary debtor or both solidary debtors, in so far as the creditor or creditors are concerned, is/are the debtor (s) of the entire amount individually (severally) or jointly.

Thus, each debtor is held liable until the obligation is fully discharged. The same debt may be required, be it divisible or indivisible, from only one of the co-debtors. The creditor has the discretion to select the most solvent debtor and ask everything from such debtor.

Under our law, Article 1896 of the Civil Code lays down a fundamental rule regarding the situation where several debtors are concerned by the same debt. It reads, unless otherwise agreed or provided by law, co-debtors shall be jointly and severally liable. This implies that failing an express provision to the contrary, the very fact that there are two or more debtors makes them jointly and severally compelled to perform the obligation. Of course, joint and several liabilities arise from the law.

One has to say that the presumption of joint obligation is by no means evident. The presumption in French law is exactly the reverse: where no express provision so states, a plurality of debtors does not make them joint debtors and the same goes for German law for divisible obligations. The foreign legislations decide to protect debtors first and foremost, because it is considered that in case of doubt a person does not have to be held beyond his share of the debt. On the contrary, the Ethiopian Civil Code is in favor of creditors. Where no express provision prohibits them from acting this, they may always claim that the debtors are joint debtors, and therefore ask for payment of the entire debt of one of them only.

The Ethiopian solution is a choice probably dictated by the intention of seeing contracts effectively enforced, rather than putting creditors at the risk of insolvency in the many cases where no written contract is drafted. Another advantage is that the creditor does not have to divide his actions between the joint debtors: he will simply select the one most likely to be able to pay in full and lets him later take the risk of getting refunded from his co-debtors (Article 1908). It is almost a pedagogical approach, forcing upon the debtors the meaning of the enforceability of contracts. On the other hand, in an age where consumer protection expands more and more, such a presumption of joint liability may not be in line with current trends.

Accordingly, a joint obligation is therefore on automatic by-product where a contract involves several debtors. But the law itself might decide to impose a joint obligation in various other cases; for instance in the case of the debts contracted by spouses, for persons jointly held to pay maintenance (Article 819), for the persons concerned by the cummulation of liabilities (Articles 2124, *2125,* 2136 of the Civil Code), for persons involved in the same criminal action as instigator, principal or accomplice (Article 2155(2)), or persons required to make good the same damage (Article 2155 (3), or *"obligation in solidum"),* plurality of principals in the contract of agency (Article 2225). See also the following Articles: 458,510,2155,2195,2225 of the Civil Code and Articles 255, *296*, 301, 308, 309, 328,342, 364,*366*, *780,* 790, 825,868, 872 of the Commercial Code.

3.1. 3. The effect of joint and several obligations on the relations between creditor(s) and co-debtors

Apart from the effect we have discussed, the fundamental effect of joint and several obligations with respect to co-debtors may also be reflected in the case of novation, remission of debt, payment of the whole debt by one co-debtor etc. All the effects, among debtors, derive from the principle that each of the co-debtors, taken separately, is bound towards the creditor so completely and absolutely as if he was the only debtor.

Since the co-debtors are bound one for the others and each for all, for the entire debt, they must be considered in their collective relations with the creditor as representing each other. This representation, which serves primarily the interests of the creditor towards the several co-debtors, serves likewise the interest of the debtors against the creditor. This mandate produces the following effects.

A) On Resjudicata

Firstly, Article 1897, sub 2 of the Civil Code provides that each debtor will be liable until the obligation is fully discharged. The extent of this plurality of rights is illustrated by the fact that the creditor may assign his right in respect of one debtor and exercise it in respect of another, or that he may prosecute different debtors before different courts if necessary.

This shows that the action of the creditor against one debtor does not amount to a waiver of the actions open against the others later (Article 1898). Conversely, the inadmissibility of the action against one debtor is no bar on the links to the other debtors.

The situation can be described as a series of independent and direct links between each joint debtor and the creditor, but which are unconnected. Personal objections may not be extended from one debtor to the other. But each link may have a specific term or/and condition. Conversely, the obligations of each debtor may be of different amounts, such is the case for suretyship.

Accordingly, an action brought against one of the co-debtors shall be no bar to an action which may be brought against the others so long as the debt has not been fully discharged. The creditor has the liberty to pursue successively all his debtors so long as the obligation is not fully discharged (see Article 1898 of the Civil Code).

By *acontrario* reading of this provision, the idea is that the creditor who has instituted a court action against one joint debtor is precluded from proceeding against the same person. This is implied from the phrase "other debtors".

The other issue that may be raised in connection with Article 1898 is whether or not the creditor who has instituted a suit against a joint debtor partially is allowed to institute another case on the remaining debt against the same co-debtor if he won the previous case.
Dear student, how do you see the splitting of claims under Article 217 of the Civil Procedure Code in case of plurality of debtors?

B) On Default notice

Secondly, a notice given to one is deemed given to all, and interrupts limitation (Article 1899 of the Civil Code). A default notice putting one of the co-debtors in default implies that such notice is deemed to have also been given to the other co-debtors pursuant to Article 1899 of the Civil Code. The notice sent to one transfers risks for all debtors. As you remember, a creditor who has a right to demand performance from co-debtors is required to put the debtors in default to claim rights arising from the non performance of the debtors unless it is unnecessary according to Article 1775 of the Civil Code.

The principle enshrined in Article 1899 is a direct reflection of the principle of reciprocal representation of the co-debtors whereby the act accomplished by or against one of them is considered to be made by or against the others with regard to whom it produces the same effect as if it were done by them. Co-debtors represent each other in their collective relations with the creditor.

C) On void and voidable contracts

The third effect relates to void and voidable contracts. As to the nature of void and voidable contracts, the reader is advised to read Chapter One. From Article 1900 of the Civil Code, you can understand that there are defenses common to all co-debtors and defenses which are strictly personal. In this regard sub-Article one seems to refer to void contracts while the second sub Article relates to contracts which are voidable.

Thus, where the contract is void, any of the co-debtors can raise this defense against the creditor(s). Accordingly, this defense is classified under common defense available to all. For instance, if the object of the contract is unlawful, immoral or the contract doesn't fulfill the prescribed formality requirement, any co-debtor can raise such defense.

On the other hand, where the contract is voidable this may not be raised by all the co-debtors. It is only a debtor who has the right to invoke invalidation of such contract that may raise it as a defense. Accordingly, the defense is said to be a personal one. For instance, if the contract suffers from defect in consent or in capacity by one of the co-debtors, it is only this co-debtor, who is mistaken, deceived, compelled, or incapable, that can raise this defense.

Among the common defenses that are available to all the co-debtors are payment and limitation of actions. Where there has been a total or partial payment or where the claim of the creditor is barred by limitation, each debtor may invoke this as a defense according to Article 1901 of the Civil Code. In this regard, in case of total payment and limitation of actions, the defense is to bar the total obligation. If payment is made by one, being the same debt, all are released in respect of the creditor. In case of particular payment by one of the co-debtors, however, the obligation will be reduced to the extent of the payment made by the co-debtor.

D) On remission of debt

The fourth effect relates to remission of debt by the creditor. In cases where there is solidarity of debtors, remission of debt may be absolute or relative in accordance with Article 1902 of the Civil Code. In this regard, if the creditor remits the debt to all co-debtors the obligation is extinguished and all co-debtors are released.

However, if the creditor remits one of the co-debtors, there may arise a problem for applying such remission. Sub Article one of 1902 states that where the creditor remits the debt to one of the co-debtors, then all the co-debtors will benefit from such remission as they are released from the obligation to the extent of the remitted debt.

Be that as it may, the creditor can make the remission to benefit only one of the co-debtors and reserve his right against the others. In this regard, the remission will benefit only that debtor and the creditor has a right to collect from the others less the amount he has remitted. But this will be the case where the creditor has expressly stated that the debt is remitted for the exclusive benefit of one debtor and that his right against the other debtors is reserved. This is clearly enshrined under Sub Article 3 of 1902. Thus, if the creditor does not expressly reserve his rights, then the remission may benefit all the co-debtors.

There is, however, a discrepancy between the two versions of Sub-Article 3 of Article 1902. The English version implies that where the entire debt rests upon the debtor whose share has been remitted by the creditor, the other joint debtors are going to be released. It does not seem to refer to the share of the debt of the remitted debtor. On the other hand, the Amharic version clearly deals with the share in the debt of the debtor whose debt has been remitted. This means where the creditor has remitted for the exclusive advantage of one of the co-debtors, the other co-debtors remain responsible towards the creditor who is merely entitled to deduct from the common debt the portion owed by the one discharged. Thus, in this regard, the Amharic version seems preferable.

In respect of joint obligations of co-debtors, Article 1902, which settles the question the remission of the debt granted to one co-debtor releases all the other co-debtors. This is the logical consequence that the debt granted to one co-debtor releases all the other co-debtors. This is the logical consequence of the presumption of "joint and several liabilities". But it is a rebuttable presumption.

The opposite is true when the creditor specifies that the remission is for the exclusive advantage of one debtor only. The provision insists ("specifies") on the fact that such an exclusive advantage must be clearly stated by the creditor. In case of doubt, the court will therefore extend the benefit of the remission to all co-debtors. Where the remission is limited to one co-debtor, the others however, benefit from it (Article 1902, sub. 3) if the debt ultimately rests with the advantaged debtor. What is meant by such a provision? It means that they may only claim a reduction of their own share if it is clear that the remission was meant to reduce the global debt by the amount remitted.

The following example will illustrate what has been just said. A, B and C are debtors of 900 birr in respect of P. Failing any contrary contractual or legal provision, they are deemed jointly liable, that is, each one may be required to pay 900 birr to P if he is the first to be asked. If he pays, he will then ask the other two debtors each for one third of the debt (300 birr) pursuant to Article 1907 and 1908, sub. 1.Suppose P decides to remit B's debt. If P doesn't state clearly that such remission is in the exclusive interest of B, then one must consider that the entire debt of 900 Birr is remitted and that A and C are therefore released (Article 1902 sub. 1).

P may state that the remission is in the sole interest of B. If he does not say anything else, the other debtors remain held for the total amount. In the previous example A or C may be asked to pay the full 900 birr, and may only require from the other half of what he paid (450 Birr). We have an illustration of the rule also stated under Article 1908 sub. 2: the joint co-debtors incur the risk of a non-paying co-debtor.

Finally, if it is clear that the debt remitted rests with B, A and C can claim a proportional reduction of their obligations. Here, the amount B can claim from A or C is equal to 900 - 300 (B's share of the debt) = 600 Birr. Conversely, the debtor (A or C) who has paid has an action against the other for half that amount (300 Birr).

E) On novation

Fifthly, in case where the creditor agrees with one of the co-debtors to substitute a new obligation for the original one, then provisions of Article 1902 will *mutatis mutandis* apply.

Thus, pursuant to Article 1903(1) cum 1902(1), where novation occurs between one of the co-debtors and creditor, all the other co-debtors will be released from their obligation.

Dear student, how do you see the requirement of unequivocal intention to novation under Article 1828 for the remaining co-debtors? As per-Article 1903(1) of the Civil Code, the very fact that there is a novation agreement between the creditor and one of the co-debtors relieves the other co-debtors from their obligations.

As is the case of remission of debt, the creditor may limit the effect of the novation to only one of the co-debtors. This he can do by expressly specifying that the novation will only apply to the share of that co-debtor. Where this occurs in accordance with Article 1902(3), the remaining co-debtors will remain liable to the creditor but their liability will be reduced to the extent of the share of the co-debtor who has agreed with the creditor.

F) On set off

The seventh effect is on set-off which is provided under Article 1904 of the Civil Code. Similar to 1902, the two versions of Article 1904 seems to have discrepancy. However, the Amharic version seems appropriate for the same reason discussed under Article 1902.

In this regard, Article 1904 clearly allows the co-debtor who is owed by the creditor to invoke set-off. The issue, however, is whether or not the other co-debtors can invoke set-off on behalf of the other co-debtor. The other co-debtors can plead set-off to the extent of the obligation of the debtor who is owed by the creditor.

G) On Merger

The last effect, merger in cases of co-debtors, is treated under Article 1905 of the Civil Code. Article 1905 states that, merger between the creditor and one co-debtor does not release the co-debtors unless the debt should have ultimately rested with the beneficiary of the merger. For example, C, D and E are joint debtors of A for 1,000 Birr. A dies and C is his heir. Merger therefore happens between A and C, the latter may request of D and E their share in the contribution, or 333 Birr each as a consequence of Article 1907, unless the whole 1,000 Birr was supposed to rest with C.

There is also discrepancy in the two versions. But you have to take the Amharic version for the reason we discussed above. If there is merger, on the debt between one co-debtor and creditor, the portion of the common debt that relates to one of the co-debtors will no longer exist. Accordingly, the new creditor, the co-debtors will no longer exist. Thus, the new creditor, the co-debtor whose debt is merged with the previous creditor, may demand payment from the remaining co-debtors less the amount that relates to his share.

3.1.4 Defenses open to joint debtors

Schematic arrangements of Defenses open to joint debtors

Common objections	Personal objection extended to all	Purely personal objection	Debt rests finally with other debtor
- Payment (total or part) - Absolute nullity - Remission of debt to all co-debtors - Limitation -Liability 1906 (2)	Remission of debt to 1 debtor 1902 (1) - Novation 1903 (1)	1. Incapacity 2. Vice of consent 3. Term 4. Condition 5. Specific remission 1902 (2) 6. Specific novation 1903 (2) 7. Set-off 1904 8. Merger 1905	- Remission of debt 1902 (3) - Set-off 1904 - Merger 1905

The defenses open to joint debtors must be distributed according to their scope in the four categories set out above. The first category is that of the defenses common to all, which may be exercised by any of them. In fact, Article 1906 (2) of the Civil Code states the duty for a debtor to raise all objections common to all debtors.

Certain objections are personal of one of the joint debtors, but by a mechanical effect they may be extended to all. The third category is that of purely personal objections. The last category is where the debt rests finally with another debtor, even if the joint debtors were called at one stage to contribute.

3.1.5. The Relation of the co-debtors inter se

The relation of the co-debtors as between themselves or among themselves is regulated under Article 1906 through 1909 of the Civil Code. These will be discussed in the following manner.

Firstly, where several debtors are bound jointly and severally for the performance of one and the same obligation, they are duty bound to promote the betterment of the condition of all of them. Accordingly, a debtor is required to abstain from doing anything which might aggravate the situation of the other co-debtors. This principle is incorporated under Article 1906 of the Civil Code. Article 1906(1) imposes upon each joint debtor the prohibition to aggravate by his behavior the situation of the other debtors. You may, for instance, consider a situation where the claim of the creditor is barred by limitation but one of the co-debtors fails to raise this defense. This failure implies an increase in the liability of the other co-debtors.

Apart from this, Sub Article 2 provides that where the debtor fails to raise a defense that is available to all co-debtors, then such a debtor will be liable to the other co-debtors. Such is the case where one of the co-debtors fails to raise limitation as defense.

Secondly, the co-debtors will share the common debt after payment. The fact that each debtor is held liable for the performance of the whole obligation in his relation with the creditor does not prevent the common debt from being divided. After the performance of the obligation, the obligation becomes divisible among the co-debtors. This is because every one of them is presumably acting for his own benefit and thus must have a share in the debt despite the fact that the undertaking by the co-debtors is considered as involving a common debt in their relation to the creditor.

This being said, the principle, once the creditor has been paid, is that the joint liability ceases and that the principle is that of the division of the debt between the debtors, on an equal basis, unless otherwise provided (Article 1907 of the Civil Code). This provision provides the manner of the division of the debt among the co-debtors.

This provision takes a presumption of equality in the share of the debt among the co-debtors. This presumption may, however, be rebutted where there is either a contrary agreement among the parties or a contrary provision of the law. If, for instance, the co-debtors have a separate agreement which states that the shares of each debtor in the total debt are not equal, the contribution is to be made in accordance with their agreement.

Thirdly, in so far as each debtor is liable to contribute to the extent of his part in the common debt, a debtor who has paid in excess of his share will be entitled to a right of recourse against the remaining co-debtors for the excess amount as per-Article 1908.

Thus, the operation of division is made along the lines set out by Article 1908 of the Civil Code. The debtor who paid more than his share may be refunded the surplus by each other debtor in proportion of their share. Equality is not necessarily absolute if the contractual provisions stated different shares to rest on the heads of the debtors. Where one of the debtors is insolvent, the risk is assumed by the others who pay his share, again in proportion of their own (Article 1908(2)).

Sub Article 1 of Article 1908 provides that the debtor who has paid in excess of his share may claim the amount paid in excess of his share from the other co-debtors in proportion to their shares. Once the obligation towards the creditor has been fully discharged, the solidary nature of the debt comes to an end. The paying debtor may only claim the excess amount he paid from the co-debtors in proportion to their shares in the common debt as there is no joint and several obligations among the co-debtors.

However, where one of the debtor's shares cannot be recovered, Sub Article (2) provides that such unrecovered amount is to be repaid by the other co-debtors in proportion to their share. This may include insolvency of the debtor. Thus, where one of the co-debtors becomes insolvent, such risk of insolvency is borne by the other co-debtors in proportion to their shares in the common debt. A co-debtor with greater share in the common debt will assume the greater risk and the co-debtor with a smaller share in the common debt will assume smaller risk.

Lastly, a debtor who has paid in excess of his share will be entitled to a right of recourse against the other co-debtors who have not yet paid their shares pursuant to Article 1909 of the Civil Code. The paying debtor by virtue of this provision is entitled to claim contribution from the other co-debtors. Such action is what is called the legal right of subrogation as a result of which such paying debtor will be placed in the position of the creditor to the extent of the amount paid by him to the latter. In such cases, the creditor is legally required to hand over any document and make available all information to the paying debtor to enable the latter to claim from his co-debtors. If the creditor fails to discharge this legal duty, he is subject to the payment of damage arising from his failure.

Accordingly, the debtor who has paid may exercise his action to the extent of the amount paid. The creditor has a duty of collaboration with the debtor who paid him, and must specifically hand all the documents and make all the formalities necessary for the refund. This duty of collaboration of creditor is sanctioned by Article 1909(3): he will be liable for the damage caused by him to the debtor who has paid when such substitution is impossible because of his own behavior.

Dear students, how do you see the right of substitution and subrogation?

3.2 Joint Creditors

Regarding joint creditors, the law takes a presumption against solidarity or joint and several entitlements. Article 1910 of the Civil Code states exactly the reverse rule from Article 1896 of the Civil Code: joint creditors are not jointly entitled to claim payment. To this effect, Article 1910 provides that unless otherwise agreed or provided by law, joint creditors shall not be jointly and severally entitled to claim payment. It means the law presumes that, where there is plurality of creditors, each co-creditor is only entitled to claim his share of the total claim and cannot claim the totality of the claim. This presumption, however, will not operate where there is an agreement otherwise. It is clear that solidarity of creditors may be established by contract or testament.

The question is whether solidarity can be created between creditors by the operation of the law. How do you see the principle of non existence of joint and several entitlement under Article 1910 and requiring payment of the total debt by each joint creditor from the debtor under Article 1911?

Regarding the second question, there are two arguments. The first argument is that Article 1911 of the Civil Code is applicable only when there is agreement between creditors as to joint and several entitlements. It means when their agreement reflects the fact that each joint creditor can require the total debt, Article 1911 may be effected. In this case each joint creditor is considered as a principal creditor for requiring payment of the total debt.

The second argument is that, as joint and several entitlements in case of plurality of creditors are exception, Article 1911 doesn't provide about this issue. As per this argument, each creditor may require the debtor to pay the whole debt by way of mutual representation or mutual agency, but not as a principal creditor. Thus, the basic principle underlying joint creditors is that there is a relationship of mutual agency among the solidarity creditors by virtue of which each creditor is empowered to exercise against the debtor and only the right which corresponds to him, but also all the rights which correspond to the other creditors, with the consequent obligation to render an account of his acts to such creditors.

As a result of the mandate given to each joint creditor to sue and collect payment of what is due to others, each creditor may demand the debtor to pay the whole debt. The debtor may not plead the benefit of division of the credit. Accordingly, the debtor may pay the entire debt to any of the creditors and such payment extinguishes the obligation of the debtor.

The debtor has a right of choice as to which of the creditors to effect payment of the total debt subject to the limitation put under Article 1911(3) of the Civil Code. There seems to be a slight inconsistency between the two versions of this sub Article.

The English version seems to imply that where there has been a court action instituted by any one of the creditors, the debtor may not pay the other creditors. On the other hand, the Amharic version merely says that where the debtor has been given notice by any one of the creditors, not court action being instituted, the debtor may not have such choice.

If so, which version is more tenable? In this regard, it seems tenable to uphold the Amharic version for there is no presumption of joint and several entitlements to protect co-creditors. Accordingly, where there is any judicial or extra judicial demand of payment by one of the creditors, such creditor is to take precedence. This is because such notice warns the debtor from paying the other creditor(s).

The other implication of the principle of unity of debt, in addition to mutual agency, is that any act interrupting the period of limitation as regards one of the joint creditors interrupts it for the benefit of all the joint creditors as per Article 1912 of the Civil Code.

However, if one of the co-creditors puts the debtor(s) in default, would the effect of such default benefit the other co-creditors? In the French law, if one of the co-creditors gives default notice for the debtor, the effect of such default is to benefit all the creditors. In our law, there is similar provision on joint debtors. There is also mutual representation among the co-creditor. Thus, it seems that the answer to the above question is positive.

Thus, the situation of joint creditors can be analyzed along the same lines as that of the joint debtors, i.e. in terms of unity of the debt. The unity of the debt is considered under Articles 1911 and 1912. Each creditor may require payment of the whole debt, the payment to one amounts to payment to all, and any interruption of limitation benefits all. Translated on the side of the debtor, it allows the latter to pay the creditor of his choice, at least until proceedings have been instituted by another, who then takes precedence.

The plurality of links can be seen in Articles 1913 and 1914 of the Civil Code, where a remission of debt or a novation granted by one creditor only affects this creditor's share. In the same sense, in the event of a set-off, Article 1915 of the Civil Code states that the debtor may only oppose such a defense to the extent of the creditor's ultimate share in the claim.

Although each creditor is considered as a representative of the other, solidary creditors do not have the right to dispose of the entire credit individually. In reality, the credit belongs to each creditor only for his part. Each of the co-creditors may do whatever may be useful to the others, but not anything which may be prejudicial to the latter.

Accordingly, there is a limitation on the power of each creditor to represent the other joint debtors. These limitations are enshrined under Articles 1913 through 1915 of the Civil Code.

Firstly, no one of the joint creditors can remit the entire debt without the consent of the others. Where remission of debt is made by one joint creditor, the credit remains intact with regard to the other creditors. The remission will be effective only as to the part of the joint creditor who effected the remission. The remission thus made only releases the debtor in respect of such remitting creditor. This principle is incorporated under Article 1913.

For example: Cl, C2, and C3 are joint creditors of the sum of 900 Birr in respect of D. If C2 remits the debt to D, D sees his debt drop by the share of C2 (300 birr) and he stands to pay 600 Birr either for C1 or C2

Thus, what is the consequence of a remission of debt on guarantors? The suretyship granted to the creditor is given in respect of a precise debt (Articles *1920,* 1928 and 1946 *(acontrario)* of the Civil Code, the suretyship is an accessory to the principal contractual relation. Where the creditor remits the principal debt, the suretyship has no reason to endure and the guarantor is released at the same time (Articles 1926 of the Civil Code). On the other hand, the creditor may release the guarantor; this does not affect the existence of the principal debt.

In the event of a plurality of guarantors, the release of the suretyship granted by the creditor should logically follow the same lines as what has been said for the case of several debtors, that is, it varies according to whether the guarantors are jointly held or are simple guarantors.

Secondly, similar to remission, a joint creditor does not have the mandate to enter into a novation agreement with regard to the entire credit. Any novation agreement made by a joint creditor will have effect only with respect to the share of that creditor as per Article 1914 of the Civil Code. However, where the other joint creditors have consented to the novation, it may have effect as regards such consenting creditors.

Thirdly, in case where the debtor becomes creditor of one of the co-creditors, the debtor may invoke set off against the other co-creditors only to the extent of the share of such creditor pursuant to Article 1915 of the Civil Code.

Lastly, where one of the co-creditors has collected the entire amount of the debt from the debtor(s), there arises an obligation on such creditor to render an account to his co-creditors. He is held liable to the others for the share in the obligation corresponding to them. A joint creditor who is paid more than his share must then distribute the surplus between his co-creditors, in proportion of their respective shares. With respect to such distribution between the co-creditors of the debt paid, Article 1916 of the Civil Code provides the mode of distribution. The principle incorporated under Article 1916 is that of equality of shares in the distribution of the payment made by the debtor. This principle may not work where a contrary provision is there in the agreement of the parties, i.e., the co-creditors. Here again, one must insist on the fact that a joint creditorship does not necessarily mean that each creditor is ultimately entitled to an equal share. The judge will have to study the contract.

3.3 Non Joint Obligations

There may be situations where there is plurality of debtors and/or creditors regarding an obligation that is not joint and several one. The obligation may be either indivisible or divisible. Indivisible obligation is treated under Article 1917 of the Civil Code and divisible obligation is treated under Articles 1918 and 1919 of the Civil Code.

3.3.1 Indivisible obligations

The Ethiopian Civil Code has no where defined indivisible obligations. Accordingly, it would be better to consult literatures and other legal systems about indivisible obligations. Indivisibility is generally a characteristic of the object of the obligation. For instance, a car is indivisible if this is the object of the obligation. The same applies to a given obligation to perform a service. If there exists a plurality of debtors, the situation is de facto very close to a joint obligation. Hence the rule stated by Article 1917 is the applicability by analogy of the rules governing joint obligations.

In the French law, an obligation is indivisible where corporal or intellectual division of its object is legally or physically impossible. Thus, where the obligation is indivisible, the debtor cannot execute the obligation in part. In such cases, it is impossible for the debtor to perform his obligation in part, but must be performed altogether.

An indivisible obligation is either absolute or relative. An obligation is absolutely indivisible where the object of the obligation is indivisible under whatever aspect it is envisaged, in such a way that it can never be due without the obligation being indivisible. For instance, in a contract of sale of a horse, obligation of delivery of a horse is absolutely indivisible.

On the other hand, relative indivisibility is present when the thing considered in its natural form is indivisible, although one can conceive that it can be executed successively and by fractions. The best example given to this kind of impossibility is the obligation to construct a house.

However, indivisibility of an obligation may also arise from an express provision of the law. In this regard, the law provides that shares and debentures, or bonds are indivisible. (See Articles 434 and 328 of the Commercial Code).

Coming to the Civil Code, natural indivisibility of an obligation is recognized. Article 1917 provides that the provisions regarding joint obligations shall apply by analogy to obligations which are indivisible owing to their nature. The origin is generally natural in origin as stated in this Article. But nothing prevents the parties from stipulating that a given performance will be indivisible even if it is divisible by nature, such as a sum of money. This can be used as a form of security. But it must be explicitly stated in the contract if the rule of Article 1896 is not applicable.

Indivisibility of an obligation has its own effects in case of plurality of debtors and creditors. In this regard, Article 1917 which is the only Article dealing with such obligation simply provides that the provisions dealing with joint obligations are to apply by analogy to obligations that are indivisible. Accordingly, it is important to see the various effects of indivisibility where there are several debtors and/or creditors.

In case of plurality of debtors, firstly, since the object due to not being susceptible of a partial performance, the co-debtors must necessarily execute the obligation at one time. It follows that each one of the co-debtors can be sued for the total debt or obligation. Where the obligation is fully discharged by one of the co-debtors, the obligation is validly discharged. Accordingly, the creditor has no right of recourse against the other co-debtors.

Secondly, interruption of period of limitation of actions effected against one of the co-debtors preserves fully the rights of the creditor as against all. (See Articles 1899 cum 1917 of the Civil Code).

In general, the provisions dealing with jointly and severally liable co-debtors is applicable for those co-debtors whose obligation are indivisible by its own nature (see Articles 1896 through 1909 cum 1917 of the Civil Code).

On the other hand, indivisibility of obligation may have certain effects in cases where there are pluralities of creditors. Each creditor may demand performance of the obligation in full and may validly discharge the debtor. However, each creditor may not be entitled for remission of entire debt or make novation agreement over the total debt. If this happens, the debtor remains bound to the other creditors, deductions being made of the part of the one who dealt with him.

Nevertheless, interruption caused by one of the creditors, and suspension of prescription established in favor of one of them, benefits all others. On top of this, if one of the creditors received the payment, he is required to reimburse the extra amount he received.
To sum up, for the case of plurality of creditors in case of indivisible obligation, refer to Articles 1910 through 1916 of the Civil Code.

3.3.2 Divisible obligations

The other type of obligation treating the concurrence of two or more debtors and, or creditors is the concept of divisible obligations. Under our law divisible obligations in cases of plurality of debtors is governed by Article 1918 while the case of plurality creditors is regulated by Article 1919.

Article 1918, which deals with plurality of debtors to a divisible obligation, defines such obligation negatively. This means according to such provision, an obligation is said to be divisible where it is neither joint nor indivisible. Thus, the principle underlying divisible obligations among several debtors is that the debt is to be divided into as many fractions as there are debtors. Unlike the case of joint obligations, there is no representation among the co-debtors. If the obligation is not a joint one but a divisible obligation, Article 1918 states that each debtor may only be held for his own share.

From this principle the following effects arise. Firstly, each debtor is bound to pay, only his respective portion of the debt which of course is not necessarily equal to that of the others, rather depends on their contract or law in every case. But there may be a situation where one of the debtors has acted as a surety and guaranteed the performance of the obligation by the principal debtor. In such cases, such debtor will be held liable for his own share in the debt as well as for that of the debtor whose performance he guaranteed to the guarantor.

Secondly, acts interrupting the period of limitation directed against only one of the debtors cannot be asserted against the other debtors.

Thirdly, the risk of insolvency of one of the debtors is assumed by the creditor and not by the other debtors.

Fourthly, where the divisible obligation is accompanied by a penalty clause, the penalty is incurred by the debtor who breaches the obligation and only for the portion of the principal obligation for which he is bound.

Fifthly, the default of one of the debtors is absolutely without effect as to others. The sixth one is that a remission of debt made by a creditor to a co-debtor will only have effect with regard to the share of such debtor.

Sixthly, the remission of the debt made to one of them is without incidence on the others. The remission does not profit nor burden them, because their obligation is divisible. For example, A, B and C are not joint debtors of P according to the contract which binds them. Suppose they owe P respectively; 450, 300 and 150 Birr. Even if P remits the entire debt of B, this has no influence on A and C, who will stand to pay 450 and 150 Birr respectively.

Lastly, a novation agreement made between a creditor and a co-debtor will release only such co-debtor, but no effect with respect to the other co-debtors.

Thus, one has to imagine a situation where the obligation is neither joint nor indivisible; in practice this will be the case for a divisibility stipulated by contract, and therefore it will have a relatively limited scope, especially because it is of little interest to creditors. Each debtor of a divisible obligation will only be liable for his own share, which of course is not necessarily equal to that of the others. The judge will have to check the contract in every case.

The effect of a divisible obligation is that each link to the creditor is independent of the others. If one is void, it does not affect the others. If one is paid it does not affect the share of the others. A notice to one debtor does not concern the others. The interruption of limitation in respect of one debtor does not affect his co-debtors. Article 1918(3) of the Civil Code, moreover, states that the fact that the obligation is divisible does not affect the suretyship, which may have been granted by one debtor to the principal debtor.

Similar to Article 1918, Article 1919 provides that obligations which are neither joint nor indivisible are considered to be divisible among the creditors. In respect of creditors, the divisible nature of the obligation means that each creditor may only claim his share of the obligation and no more, whether determined by contract or by law (Article 1919 of the Civil Code).

This aspect explains that the situation considered by Article 1919 will in practice be far more frequent than that of joint creditors. The interest for the creditor, who is generally the dominant party in the contract, is that the work, expense and liability of determining the respective shares of the creditors, of sending them the payments and of proving that such payments have been made rests on the paying debtor.

The basic principle underlying divisible obligations among several creditors is that the portion of the various creditors in a divisible obligation are to be considered as being as many distinct credits as there are creditors. Based on this principle, the following principles arise.

Firstly, each creditor may claim only his respective portion of the debt that is determined based on the contract. Secondly, acts interrupting a period of limitation proceeding from only one of the creditors do not benefit the other creditors. Moreover, remission of debt, novation, set-off applies only to the co-debtor who is the beneficiary of them.

Review Questions

1. Some scholars say that “Article 1911 of the Civil Code is applicable only when there is joint and several entitlements by operation of the law or agreement of the parties as per Article 1910 of the Civil Code”. Do you agree? Why or Why not?
2. Discuss the difference between/among joint, several and joint and several obligations.
3. Some legal systems adopt the principle of joint and several liabilities but others do not. What are their justifications?
4. Explain briefly the effects divisible obligations and indivisible obligations, whether they arise from the law or agreement of the parties, by way of comparison.

CHAPTER FOUR
SURETYSHIP

Introduction

In this unit, an important section is devoted to suretyship, showing its importance both because it is an ancient tradition, and most of all, a very cost-efficient one. It is also related to the plurality of debtors as a third party guarantor assumed the obligation of the principal debtor.
In this unit, the different characteristics of suretyship, the relationship between creditor and guarantor, the relationship between debtor and guarantor, the relationship between guarantors and other related issues will be explored.

Objectives

After students successfully complete this unit, they will be able to:

- Explain the nature of suretyship;
- Discuss the effects of suretyship on guarantor towards the creditor;
- Explain the effects of suretyship on debtor towards the guarantor;
- Distinguish simple guarantor from joint guarantor;
- Distinguish counter guarantor from secondary guarantor;
- Explain the effects of the above types of guarantors.

4.1. Nature of Suretyship

The idea deriving from the wording of Article 1920 of the Civil Code is that where the principal debtor defaults, the guarantor steps in and executes his obligation in respect of the creditor- usually a payment - in the debtor's place. So a third party is introduced in the bilateral relation, which exists between creditor and debtor.

Thus, suretyship is defined as a contract in which a person binds himself for another already bound and agree with the creditor to satisfy the obligation if the debtor does not. Suretyship involves a three party relationship of creditor, debtor and surety. The obligation of the surety presupposes and depends upon the existence of an obligation of a principal debtor. This is also what is clearly enshrined under Article 1920 of the Civil Code. According to this provision, whosoever guarantees an obligation shall undertake towards the creditor to discharge its obligation, should the debtor fail to discharge it.

The fundamental advantage of suretyship is to make transactions much easier by increasing the safety of the creditor entering such a secured transaction. The creditor has in fact two (or more) debtors for the same debt. He is encouraged to conclude riskier contracts in the knowledge that in case of a default of the main debtor, he can fall back on the guarantor. Hence suretyship is a classic and extremely frequent security in commercial relationships. This enables the trader to contract with a buyer he does not know of for instance, or with a partner who presents an uncertain solvency. This consideration is important in countries where commercial information is still little developed, where balance sheets are not readily available to creditors or commercial registers still relatively uninformative.

The advantage of suretyship from the side of the debtor, on the other hand, is that he gains credibility and will be able to trade. It is an important asset for someone setting up a business or entering a new field of activity. Suretyship supports the creation of new businesses and buttresses a developing economy. It is furthermore a cheap way of curing credit, obtaining loans ... etc.

Suretyship as it develops can become an important area of activity for financial institutions such as banks or insurance companies, who will be willing to grant their guarantee against a relatively low fee paid by the main debtor. It indirectly encourages transparency in commercial relationships because such financial institutions are directly interested in precisely appreciating the risk they are covering. This in turn encourages the development and professionalism of accounting professions, which are the best informants as to the financial health and prospects of businesses.

The advantages of suretyship for the guarantor are not evident. The effect of a suretyship is that the risk of not being paid is transferred from the creditor to the guarantor. The latter is at the risk of pay, whilst he has not benefited from the performance given by the creditor. Furthermore, his chances of being refunded are slim, by definition, as he is only called to pay when the debtor has refused to do so, or is unable to do so.

Eventhough the suretyship is an accessory obligation to that existing between the creditor and the debtor, the debtor is not a party to the suretyship. The suretyship does not have to be known by the principal debtor (Article 1921 of the Civil Code). He does not have to give his express consent to such suretyship, and it can even be concluded without his knowing. This last situation will be where the guarantor wants to make a liberality to the debtor. The originality of this situation bears underlining: it is an exception to the very general principle that a person may only be obliged *where* he has given his consent (Article 1679 of the Civil Code). The rationale behind this exception is that the guarantor *must* be allowed maximum protection where it does not conflict with the proposed increase in the number of suretyships. To state otherwise would be to endorse an unlawful enrichment of the defaulting debtor.

However, suretyship should be distinguished from other institutions. The nature of suretyship can be clearly shown by comparison with certain other obligation. Firstly, surety differs from real surety. Certain legal scholars used the term "real surety" where a third person guarantees the debt of another, not by obliging himself personally, but in engaging certain of his property. This is in effect a pledge or mortgage for the debt of another. The term "real surety" has also been used to designate the deposit of money or other property by the debtor himself to guarantee the execution of his obligation, but in the legal sense of the situation, this is a pledge.

In the strict and legal sense of the term, "suretyship" is a contract by which a person, an individual or artificial one, engages himself to a creditor to satisfy an obligation undertaken by the debtor if the latter does no satisfy it. This person, called surety, obligates himself personally and is, in principle, a second debtor for the creditor.

Secondly, surety differs from insurance in that in a contract of insurance, one party, the insurer, undertakes to pay a second party, the insured or a person nominated by the party for the loss occasioned by the happening of the specified event. To put it differently, suretyship is a collateral undertaking while insurance is an independent original undertaking. Being a primary obligation, a contract of insurance need not be accessory to any further obligation nor is it necessary for an insurance contract to relate to the conduct of any party.

On top of this, in the insurance contract two parties are bound and classified as a bilateral contract. In this respect both parties, the insurer and the insured, are duty bound to perform certain obligation towards each other. Suretyship contracts are unilateral contracts and presuppose the existence of three persons: the debtor, creditor and surety.

Is there any other parameter for the distinction between suretyship and insurance?

Thirdly, there is distinction between suretyship and warranty in that the former must relate to some legally enforceable obligation or duty to which another person is subject in contract. It is quite common for warranties to gear no relation to the obligation of any third party.

There are also other institutions that seem to be similar but differ from suretyship such as warranty, teyass. Please discuss their peculiar features on your own.

Regarding the characteristics of suretyship, there are different characteristics provided in our law. The first one is the form of suretyship. By form is meant some peculiar solemnity attaching to the expression of agreement for the inclusion or exclusion of certain subject matter. It is not the agreement itself rather it is the solemnity which is attached to the agreement. It is the way of expressing the agreement of the parties. Agreement is expressed through consent of both parties towards an object defined. The consent of the parties to a contract is expressed through an offer made by one party and acceptance of the other. The solemnity is then attached to the expression of offer and acceptance which reveals the agreement of the parties.

When we consult the Civil Code provisions dealing with suretyship, no form requirement is laid down for suretyship agreements. But Article 1725 which is headed contracts for a long period of time seems to require suretyship agreements to be made in a written form.

Pursuant to Article 1727 of the Civil Code, a contract of guarantee needs satisfaction of three elements: special document, signature of parties bound and attestation of two witnesses. When we say the document has to be special, we mean that it has to expressly deal with the particular purpose for which it is designed, and it should not deal with matters other than the contract.

With regard to signature, Sub-Article (1) of Art 1727 states that the formal contract has to be supported by a special document signed by all the parties bound by the contract. The main issue rests on the term "bound." This term assumes the existence of obligations on the parties. Consequently, a distinction has to be made between unilateral and bilateral contracts to ascertain the existence of obligation on parties.

We have seen that only one party is bound in unilateral contracts. Since suretyship contract is a unilateral one and only the guarantor is bound by it, the obligation rests on the surety and not on the creditor. The guarantor is the only person who assumes an obligation from the suretyship agreement. Accordingly, it is only the guarantor who is to sign the contract of guarantee. George Krzeczunowicz commenting on this issue stated the following: "A contract required to be in writing must be signed by all the parties bound, and only by them. Consequently, in unilateral contracts binding merely one party, only the latter has to sign; a mere contract of guarantee (Art. 1920) has to be signed only by the guarantor and the witness. ..."

The other issue related to Article 1727 (2) is whether or not the witnesses are to sign on the contract of guarantee. In this respect, the peculiar requirement of attestation by witnesses is intended to make up for the present premature public authentication facilities and of familiarity with them, in many areas of this country. It is far from giving a contract the probative and executory force resulting from its authentication by a court or notary. It nevertheless enhances the contract's evidential value, through Article 1730(1): it is more difficult to deny one's signature or to allege alternations in or mistakes as to the terms of the contract as being genuine or true by signing it. We can, therefore, conclude that a contract of suretyship has to be signed only by the guarantor and attesting witnesses but not by the creditor.

Secondly, a contract of suretyship must be express. The essential rule is that a suretyship may not be presumed, it has to be expressly given. The law does not admit tacit suretyship. The rationale is that such a security is extremely dangerous for the guarantor; he takes the final risk of default of payment although he did not even get the counterpart execution of contract. So a simple attitude or an equivocal action by a person cannot be deemed to be a suretyship if it is not express. It seems unwise that an affirmation made in vague terms to induce someone to treat with a determined person, should be taken for a veritable suretyship. Article 1922(1) & (2) of the Civil Code provide this characteristic of suretyship. Accordingly, a logical requirement is that, whatever the form, there must be no doubt as to the identity of the debtor secured, nor as to the debt secured. If not, the suretyship will be considered invalid as being uncertain.

Thirdly, a suretyship must have limits (Ato X will guarantee Ato Z up to the sum of 15,000 birr inclusive for instance), and a maximum amount must be indicated. Since the extent of the guarantor's liability depends on the way the primary debtor performs his obligation and as such facts are beyond the surety's control, the law requires that the contract of suretyship must specify the maximum amount of which the surety will be held liable for. This rule is incorporated under Article 1922(3) of the Civil Code. The sanction is simply that the suretyship is void, and therefore that the beneficiary assumes the risk of the default of the guaranteed person.

However, how do you see the provision of Article 1922(3) of the Civil Code in the light of the traditional institution of suretyship to secure an employee's loyalty?

There are many provisions which seem to be only technical of first glance but have rather substantive function. One which has substantive function is that of warning. The person undertaking an obligation shall be advised that he is doing something serious, and it is a matter of experience that persons are more likely to promise something by word.

The warning function, which is one of the purposes of formality requirement, is also of special importance in the case of suretyship. The guarantor may run a risk he can neither force nor control. The provision of Article 1922 (3) ensures that the guarantor only undertakes a calculable risk. By doing so, the Code therefore, is not just introducing a technical requirement for a contract of suretyship but requiring it for the above mentioned reasons.

For this reason, the provisions of the Civil Code dealing with suretyship equally applies to guarantees for a person in the contract of employment as it is even more important to protect the guarantor from entering into an uncalculated risk.

Would the surety be liable to pay interests and legal cost even beyond the maximum amount fixed in the suretyship agreement?

Article 1930 of the Civil Code states that unless there is agreement otherwise, the surety is held to pay interests when the debt guaranteed bears interest. This means, he does not have to give a specific consent to pay interest but that he must nevertheless be informed of such rate of interest. But this extension of his obligation remains limited to the maximum amount he has given his suretyship for. This principle is incorporated under Article 1930 of the Civil Code.

To illustrate with an example: the guarantor has guararanted a suretyship for the maximum amount of 25.000 Birr, which corresponds to the amount of the contract of sale of a car. The debtor only pays 5.000 Birr. The main contract is stipulated a 10 % rate of interest, which because of the debtor's default has risen to 8.000 Birr. The guarantor is held to cover the remainder of the principal, that is, 25,000 – 5, 000 = 20.000 Birr, as well as the accrued interest, but within the limit of the maximum covered by his suretyship. In the example, there will be 5.000 Birr, and the remaining 3.000 Birr interest will have to be recovered (or more likely lost) by other means.

When it comes to legal costs, Article 1931 of the Civil Code states a different rule in respect of legal costs to that- concerning interest. The guarantor is indeed held to pay the legal costs of any actions brought against the main debtor, even if they are in excess of his maximum suretyship.

The condition however is that he has received sufficient notice in advance to be able to forestall them by discharging the debt. This provision evidently addresses the situation where the guarantor will pay early in the frill knowledge that there is no payment to be expected from the main debtor who has become insolvent. But it would be unfair to make him pay such legal costs if he is not in a position to prevent them by offering his payment. Note here that there is a sanction against the creditor who does not timely inform the guarantor of his intention of suing the defaulting debtor, for he loses all claims to legal costs up to the date of such notice. The creditor has the burden of proof and will be well advised to notify his intention to the guarantor with sufficient time to spare in writing.

The above statement can be best illustrated by the following example: A sues B, his debtor, for a capital of 25,000 Birr which was guaranteed by G for the same amount. His legal costs are 7,500 Birr, of which 3,000 were spent before the day A notified G of the action against B. G will only pay 25.000+ (7,500 - 3.000) $^{=}$ 29500 Birr.

Fourthly, the scope of the suretyship may not exceed that of the principal obligation (Article 1924 of the Civil Code). In discussing the extent of the suretyship obligation, we need to consider the fact that suretyship cannot exceed that which is due by the debtor or be contracted on more onerous condition. Thus the creditor may not ask more of the guarantor than what the debtor promised. The guarantor is a second debtor, and the temptation must not be to punish him for the main debtor's default. Furthermore, the guarantor can only be held of the same execution conditions as the guaranteed person; his execution is already secured although he has not benefited from the contract, it would be unfair to impose specific penalties for delayed execution for instance. The sanction of this rule is not the voidability of the suretyship, but simply its reduction to the legal maximum, which is the precise extent of the main obligation (Article 1924 (3)).

The surety may undertake an obligation equal to or less, but not greater, than that of the principal debtor. Thus, the suretyship does not have to cover the whole extent of the main obligation, and may be for part only of such an obligation, or be contracted under less strict conditions (Article 1924 (2)).

The fifth characteristic of suretyship is that it is accessory. From the definition of suretyship you can realize that there are two obligations. The first is the principal obligation which is created between the creditor and the principal debtor and the second one is the obligation created by the contract of suretyship. The later cannot stand by itself and it exists only in relation to the former. The suretyship contract can only be understood by the existence of the principal obligation which the surety guarantees. The accessory nature of suretyship can be further explained by consideration of the relation between the principal obligation and the obligation created by the suretyship enshrined in the Civil Code.

Pursuant to sub-Article (1) of Art 1926 of the Civil Code the fact that the principal obligation is discharged results in the release of the surety. In this respect, the principal obligation can be discharged by one of the causes of extinction of obligation discussed under Chapter One. Thus, where performance, remission, novation, merger, set-off, limitation of actions etc extinguish the principal obligation, then the surety is deemed to be released.

Similarly, where the principal obligation is void, there cannot be any guarantee with respect to such obligation. Article 1923 incorporates this principle.

On the other hand, where the principal obligation is affected by a defect relating to the mistake of incapacity on the part of the principal debtor, such obligation can be validly guaranteed where the surety on entering into the contract of suretyship was aware of such defect.

A corresponding provision is also found under Article 1926(3). The difference between Article 1923 (2) and Article 1926(3) is that the latter generally states that where the contacts is affected by a defect in the consent of the principal debtor while Article 1923 (2) only talks about mistake on the part of the principal debtor. However, the Amharic version of the two provisions talks about defect in consent in general which seems correct.

On top of this, suretyship may be applied to every obligation, whatever its object. But in fact it is principally used to guarantee the payment of money debts. In obligations to do, the surety guarantees the damages which may be due to the debtor in case of non-performance. The principal obligation may therefore be of any type so long as it is valid and subsisting. Since suretyship is accessory and, therefore, requires a valid principal obligation to which it can attach, it can only be given for the performance of "valid" contracts.

Thus, a suretyship may only be validly given where the principal obligation is not void. So the first defense of the guarantor will often be to look for some defect in the contract which would make it void. It is logical that the guarantor cannot be held where the guaranteed person is not because the contract of sales is void (Article 1923 (1)).

Exceptionally, however, where the principal obligation is voidable, the suretyship agreement may remain valid. This is where the surety was aware of the defect in the principal contract, which consists of the legal incapacity or of a vice of consent, when concluding the contract of guarantee. In such cases, the guarantor takes his chances. But most likely, he is an accomplice of the guaranteed person, because he is usually in a better position to know this person. Quite often, there is a fraud issue against the other party. But the proof of such knowledge by the guarantor at the time of his express consent will be borne by the guaranteed person's partner and this will prove difficult to prove. The solution is confirmed by Article 1926 (3), which prohibits such defense for the guarantor.

On the other hand, no statutory provision leads to declare the suretyship void where the main debtor was insolvent at the time when the guarantor granted the security, whether the guarantor knew of such insolvency or not. The only requirement is a valid debt, which is then the statutory cause or consideration of the suretyship. Of course, in such a situation, the guarantor may feel that there is a fraud on the side of the debtor, or even of both parties to the contract, and the guarantor will probably raise a defense against the request for payment made by the creditor on the basis of this alleged fraud. The decisive factor will probably be whether the debtor knew, or should have known that he would be incapable of paying at the appointed time, which is not necessarily that of the conclusion of the contract.

The guarantor cannot claim that he made a mistake as to the solvency of the main debtor to try and avoid paying. There is no requirement set out by law that the debtor states his solvency to the guarantor. An exception to this rule will only be made if the guarantor clearly made of the debtor's solvency at the date of the suretyship a condition of their commitment to secure the main debt. Conversely, a condition requiring the solvency of the debtor at the time of the payment of the obligation seems inadmissible, because it would in effect amount to withdraw any interest for the creditor of resort to a suretyship.

Generally speaking the mistake made by the guarantor as to the risk incurred is not a cause of nullity of the suretyship. -The validity of his consent is not affected. The only exception is where the suretyship is clearly granted in consideration of other securities (mortgage, pledge, other guarantor ...), when it appears that such annex sureties did not exist in fact at the time of the consent of the guarantor.

Sixth, suretyship is always consensual in that the surety has to always consent to stand as surety to the performance of the obligation of the debtor. There can be no suretyship without the surety giving his consent to such an obligation. When seen from the point of view of the debtor, however, there can be legal or judicial suretyship. This consensual character of suretyship is reflected in Article 1920, which provides the principle of suretyship.

The seventh characteristic relates to its unilateralism. A contract is bilateral where the several persons are obligated to one or several others without any obligation on the part of the latter. Hence, in bilateral contracts both parties assume obligation. The situation is different in unilateral contracts. Only one party is bound in such contracts. The obligation entirely rests on the promisor and not on the promisee.

A suretyship contract is classified as a unilateral one. The surety assumes an obligation towards the creditor to discharge the debt of the principal debtor in case the debtor fails to discharge his obligation. The creditor assumes no obligation towards the surety.
The eighth one is whether it is for consideration or gratuitous. In the continental legal system, suretyship is a unilateral undertaking with no reciprocal obligation. The nature behind the

guarantee that one undertakes is not the consideration but respect for friendship and familial tie. The laws of many countries of the continental legal system and Ethiopian alike do not require consideration as a prerequisite for a contract of suretyship. Consequently, it is said that suretyship is gratuitous as the contract is concluded without any payment being made by the creditor or debtor towards the surety. This does no, however, mean that there are no instances where the debtor pays to the surety for his standing as surety for the law does not prohibit such arrangements.

In the common law legal systems, however, a suretyship agreement is not valid, if it is not made for consideration. A consideration is an act, a promise or forbearance bargained for and given in exchange for a promise.

Ninth, the obligation secured may be a future obligation or a conditional one (Article 1925). Here the suretyship predates the obligation guaranteed. It is also an added danger for the guarantor, because the main obligation may yet not be very well defined. The guarantor will be liable to pay until the future obligation or condition has materialized.

Accordingly, it is not necessary that the debt to be secured be presently in existence. Just as one can promise future things, one can become surety for a future debt. Properly speaking, there is no suretyship until the day the principal obligation is formed, but in the interim the surety is bound and cannot withdraw his promise; as soon as the debt arises he will be bound as surety. Usually, the period of suretyship is determined in the contract that set up the security. Very often, this will be the case of successive execution contracts. In that case, the guarantor will be held for the whole length of that period. Where a period has not been set in the contract, the surety may retract his suretyship until the day when the obligation has become exigible. This is because until that day, the contract has probably not been executed, and the creditor,seller still owns the thing.
Tenth, the scope of the suretyship may not be extended by the contracts concluded between the principal debtor and the creditor after the consent given for the suretyship. So the guarantor's conditions may not be worsened through a posterior agreement between the principal debtor and the creditor, which could be fraudulent, unless he gives a renewed consent to such extension of the security. The code does not prohibit, on the other hand, the agreement tending to reduce the

extent of the guarantor's obligation, because it is obviously in his favor (Article 1928 (1) of the Civil Code)

Apart from this, suretyship may be classified as conventional, legal and judicial. This distinction in the types of surety is made from the point of view of the debtor, not of the surety. From the point of view of the surety, suretyship is always voluntary and conventional. This is also reflected in Article 1920 of the Civil Code. When the debtor is required by the judgment of court to furnish a surety, the surety is called a judicial surety. In this case the law authorizes the judge to act, but it leaves to his discretion the determination of the need for the surety. It is in this sense that the surety is judicial rather than legal.

It is said that the distinction between legal and judicial sureties is less important today than previously, in view of the legislation placing a number of the judicial and legal sureties on the same footing.

4.2 Effects of Suretyship

4.2.1. Effects of Suretyship between the Creditor and the Surety

A. The moment for action

Limitation will probably be amongst the first line of defense of the surety. Here the link between him and the principal debtor plays against him, because any action against the debtor shows that the creditor is diligent and has no intention of not being paid. See Article 1929 of the Civil Code which deals with limitation of actions.

B. Maturity of debt

Here is another illustration that the guarantor may not be treated worse than the main debtor. It goes to the extent that the maturity of the debt, which may not profit the debtor anymore because of his bankruptcy, still benefits this special third party, the guarantor (Article 1932 (1) of the

Civil Code). One can consider that the guarantor has only accepted the suretyship in consideration of the time agreed between creditor and debtor for the debt to mature. In this respect, the surety may not be demanded to perform his obligation prior to the maturity of the debt. (See Art. 1932 of the Civil Code)

Apart from this, where the principal parties the principal debtor and the creditor had agreed to a notice before the debt is due. Then such a notice has to be served to the surety too. This case in point is again illustrated where the principal parties had agreed to a notice before exigibility of the debt (1932 (2)). Further, the guarantor is eligible to benefit from the entire contractual period of notice (1932 (3)).

C. Simple suretyship and joint suretyship

Dear students, before reading the following discuss the difference between simple and joint guarantee on you own.

i) Simple suretyship

The provisions of the Code dealing with simple suretyship are Articles 1934 through 1937 of the Civil Code. In this respect, no longer does the subject of controversy that the obligation of the simple guarantor subsides to the principal debtor. He undertakes to discharge his obligation "should the debtor fail to discharge it." (See Article 1920)

Similarly, Article 1934(1) of the Civil Code sets the principle of simple guarantee. The main condition to obtain payment from the guarantor is the non-execution of contract by the principal debtor. So it follows that the action of the creditor against the guarantor may only be initiated after the contractual term set for the execution of the principal debtor's obligation. But this condition is sufficient and the guarantor, who is substituted as a debtor, must execute immediately.

The central question, as to when the creditor can proceed against the guarantor much depends on our construction of the phrase "should the debtor fail to discharge under Article 1920 and 1934.

Then, when is the principal debtor deemed to have failed to discharge obligation?
In this respect, you can think of three situations: Soon after performance is due; after the debtor has been placed in default; after the creditor brings action against the debtor and fails to obtain performance.

Where you consider the first possibility, it seems that this is considered to be the right time for many persons and lawyers alike. Yet, the provisions, particularly Article 1920 only talk about the debtor merely failing to discharge his obligation. In the literal and direct interpretation of the term, a debtor fails to discharge his obligation soon after the date of performance falls due. Such period, as discussed in Chapter Two, is calculated in accordance with Article 1857 of the Civil Code.

Unlike the popular attitude, the code provisions do not talk in terms of the debtor being unable to discharge his obligation, nor do they require the creditor to first bring action against the debtor before he can proceed against the guarantor.

The position is supported by other provisions dealing with surety. In this respect, Article 1933, which sets the distinction between the simple guarantee and a joint one, states that "the creditor may *sue* (the surety) *without previously demanding payment* from the debtor" (emphasis added)

One may note the careful use of the words "sue" and "demand payment" in the provision of Article 1933 of the Civil Code. One privilege of a creditor who gets the obligation of the debtor secured by a joint guarantee is that he can bring action against the guarantor even before demanding payment from their debtor. This implies that where the guarantee is not a joint one the creditor may not sue the guarantor before demanding payment from the debtor.

Since a suretyship that is not a joint one is a simple one, the provision of Article 1933 of the Civil Code may be taken to mean that in the simple guarantee, the creditor may not sue the debtor surety without previously demanding payment from the debtor. Thus, we may conclude that as long as he first demands payment from the debtor, the creditor can sue the simple guarantor before he sues the debtor.

In this respect, we may say that Article 1933 throws light as to what is meant by "fail to discharge" under Article 1920. We have already seen that the guarantor may not in any case be required to discharge his obligation before the expiry of the period fixed for the payment of the primary obligation. Thus the debtor is deemed to have failed to payment of discharge his obligation if he does not perform it, in spite of the creditor's demand to that effect, upon the expiry of the time fixed for the payment of the primary debt. You should, however, note that where notice is necessary, the creditor is duty bound to place the debtor in default before he can proceed against the principal debtor. Apart from the requirement of notice, the creditor is also required to realize the real securities that are at his disposal.

Thus, you can conclude that the only conditions that are required from the creditor to sue the guarantor are placing in default and realizing the real securities. So, the creditor need not sue its principal debtor first to proceed against the simple guarantor.

However, there are defenses available for the simple guarantor. The first defense derives from Article 1934 (2) of the Civil Code. This provision organizes an important protective measure for the guarantor, the benefit of discussion. In the case of simple suretyship, you have seen that the engagement of the surety is subsidiary; he images himself to pay only if the principal debtor does not. The idea is that he is not to pay simply because the main debtor arbitrarily refuses to do so. It must really be a case where payment in kind through sale of assets or realization of securities may be obtained by the creditor. The creditor has to try an enforced payment (and its procedural delay) before coming to the guarantor.

The discussion is not automatic and has to be required by the guarantor when he is himself sued (Article 1935 (1) of the Civil Code). By availing himself of this benefit, the guarantor can compel the creditor to first seize the property of the debtor and recover what is owed him form its proceeds before brining action against him which will have the result of diminishing the sum to be disbursed by the surety and perhaps to exonerate him entirely. In effect, the creditor would be forced to suspend his action against the guarantor and proceed against the debtor.
Then, the question is, what is the purpose of entitling the creditor to sue the guarantor before suing the principal debtor if the latter can force the creditor to first proceed against the principal

debtor? This is because the guarantor cannot simply require discussion. It means it is not easy for the guarantor to exercise the benefit of discussion. He has to fulfill a number of conditions which are provided under Article 1935 to 1936 of the Civil Code: he must cooperate with the creditor by indicating the assets of the debtor (with the exceptions stated in Article 1936 (2)), and even more interestingly, advance the procedural costs (Article 1936(1), presumably to be recouped from the debtor when he acts in turn against him.

Accordingly, in the words of Article 1936(1), the discussion is not automatic. The guarantor should raise and exercise his benefit "as soon as he is proceeded against." Thus, it must be pleaded in the form of a preliminary objection, lest it is deemed to have been waived once the court embanks upon the task of framing issues. In this respect, please read Article 244(3) of the Civil Procedure Code which regulates the consequence of failure to raise objection.

The benefit of discussion is a valuable right which the debtor must plead as soon as he is proceeded against. The same holds true in France where the benefit of discussion is considered a dilatory plea that must be raised in *Limine Litis*, before the issue is joined.

The other condition that must be satisfied is that the creditor cannot simply require discussion. He must cooperate with the creditor by indicating the debtor's assets located within the country of payment and which are not subject matters of litigation. Even more interestingly, the guarantor has to advance the procedural costs for the discussion of the debtor's property.

Obviously, the guarantor cannot exercise the benefit where the insolvency of the principal debtor has already been judicially established. This is obvious since an insolvent does not have assets that can be discussed. Thus, the burden of identifying the debtor's property that can be discussed and also covering the cost of discussion are borne by the guarantor.

What do you think would happen when the guarantor has successfully managed to satisfy all the conditions necessary to exercise the benefit of discussion?

Where the guarantor has raised the benefit of discussion at the earliest possible, time identified the debtor's properties that can be discussed, advanced the costs for their discussions, the court will suspend the suit against the guarantor and grant the creditor permission to institute fresh action against the principal debtor. This it can do pursuant to Article 278(2) of the Civil Procedure code.

Accordingly, the consequences of the defense of the benefit of discussion are the following. If the assets are sufficient for a total or part payment of the main debt, the guarantor benefits accordingly and is discharged in part or totally of his suretyship. If no money can be made from the debtor's assets, the guarantor has no option but to pay the main debt, pending his action against the principal debtor. But in the case of negligence of the creditor through failure to proceed upon the assets indicated by the guarantor (Article 1937 of the Civil Code) who has supplied sufficient money for costs, the loss of the value of such assets through an insolvency of the principal debtor makes the creditor liable vis-a-vis the guarantor. Where the creditor by his failure to proceed against the debtor is suddenly faced with the insolvency of the debtor, then the surety will be liberated up to the value of the assets thus indicated. The result is that debts will be set off one against the other.

Is joinder of the principal debtor and the guarantor possible in our legal system?

The substantive laws of some legal systems expressly provide for joinder of the principal debtor and the simple guarantor. Under our law, the substantive law does no stipulate joinder of the debtor and the guarantor. But the procedural law provides for the possibility of joining plurality of defendants in a variety of cases. In this respect, Article 36 of the Civil Procedure Code deals with joinder of defendants.

Under this procedural provision, it is possible for the principal debtor and the guarantor to be joined in the same suit. In fact, the practice seems to be that usually creditors join the debtor and the guarantor in the same suit.

The issue, however, is that since the substantive law does not stipulate joinder of the debtor and the guarantor, this may give rise to a number of questions. The creditor can argue on the basis of the more specific law, the Civil Procedure Code, that he is entitled to sue the simple guarantor without suing the principal debtor. He can further claim that since it is of a procedural rule which is designed to govern a particular situation, this law should prevail over the much more general provisions of the Civil Procedure Code. The creditor may, therefore, argue that the right of the simple surety is to invoke the benefit of discussion. On the other hand, the guarantor may also refuse to remain a co-defendant by invoking his right to compel the creditor first to discuss the assets of the principal debtor.

Can the guarantor claim that the judgment be executed against the principal debtor if the guarantor remains in the suit with the principal debtor and fails to raise his benefit of discussion?

Under Louisiana law, the creditor is legally entitled to join the debtor and the guarantor the same suit and once the court has passed judgment against both defendants, guarantor has the benefit to claim that the judgment be first executed against the principal debtor. In this respect, the Louisiana law is entirely different from Ethiopian law suretyship. Under our law, the benefit of discussion should be invoked in *limine litis,* i.e. as soon as the guarantor is proceeded against. Once the court has framed issues, this objection is deemed to be waved.

The practice in Ethiopia is that after judgment is passed against the co-defendants, the judgment is first executed against the principal debtor. This practice has no support of the law of suretyship. We can therefore, note the rift between the law and the practice.

Can a person who is engaged as a guarantor for one of the co-debtor compel the creditor to discuss the assets of those debtors for whom he is surety?

The Civil Code provisions are mute on this issue. You can, however, provide a solution by resorting to equity. It is equitable, in so far as it can be done, that a debt be paid by the real principal debtors who have benefited from it rather than by those who are bound others. It may even be argued that those debtors who are jointly and severally liable discharge the whole obligation are also representatives of each other. As such guarantor who guaranteed the obligation of one of such co-debtors is also in some respect guarantor for the others. Thus, we can say that the guarantor has to be entitled to exercise his benefit of discussion with respect to the assets of the other co-debtors.

The second defense available for the simple guarantor is the benefit of division which is raised in case of plurality of guarantors. We will discuss this latter.

The third one, not special for simple guarantor, is the possibility to raise the principal debtor's defenses. Article 1942 (1) of the Civil Code has an interesting formulation: the guarantor has the right and the duty of setting up all the defenses available to the debtor, unless excluded by the nature of his suretyship (by a contractual clause, for instance). In other words, he not only may defend himself with another person's arguments (if the debtor is negligent or misinformed, for instance), but he must do so. The sanction is strict (Article 1942 (2)); the guarantor will be debarred of his remedy, in so far as it would have relieved him of payment.

Of course, one cannot force the guarantor to know all the details - or secrets - of the debtor. So he is not obliged to use defenses where his ignorance is not his fault. The criterion will be that of the normal diligences of the average guarantor acting in good faith. One can assume that the courts will impose a certain degree of investigation by the guarantor into the situation of the debtor, so as to find means of detecting as far as reasonably possible. Once again, the guarantor is forced to intervene directly in the legal relationship between third parties.

ii) Joint Suretyship

The surety may bind himself either by simple or joint guarantee. Under the former, you have seen that the guarantor's obligation is secondary because it arises if the principal debtor fails to discharge his obligation. In cases of joint guarantee, however, the obligation of the guarantor is primary and direct because the creditor is not required to demand payment from the principal debtor in order to bring an action against the guarantor.

In principle, pursuant to Article 1920 and 1934, every suretyship is presumed to be simple. There can be joint guarantee only where the person who becomes a surety expressly described himself as joint guarantor by using words implying the same. The intension of the guarantor to be bound jointly with the principal debtor has to be expressed clearly. Where the suretyship is joint, the creditor is entitled to proceed against the guarantor without demanding payment from the principal debtor. The direct effect of joint guarantee is the deprivation of the surety of his benefit of discussion.

To avoid this duty of discussing the principal debtor's assets, the creditor will often ask for a joint suretyship in the undertaking signed by the guarantor. It is a dangerous situation for the guarantor, who may then be required to pay for a debtor who still has some assets, and may even sell them before the guarantor, having paid the creditor, turns to him for an enforced payment or realization of securities. Because of the serious consequences of such types of guarantee, the form is important and must imply unequivocally that there is a renunciation to the benefit of discussion by taking the qualification of joint surety, co-debtor and equivalent terms.

D. Acceleration of action by guarantor

Precisely, because as time goes by the risk increases of seeing the debtor become insolvent, and therefore of preventing the guarantor of getting his money back, this guarantor may want to accelerate the payment to the creditor, so that he takes things in hand. He is the one who has an interest in accelerating the process. Two solutions are possible:

In this regard, two solutions are possible. The first relates to summons to proceed under Article 1938 of the Civil Code. This is the case of the negligent creditor, who does not pursue payment despite the fact that the obligation is due. The guarantor here has the means to force him to do so under six weeks by way of a summons (which does not mean that the procedure will be ended in six weeks, but simply initiated). Where the creditor fails to comply with the summons or to continue the proceeding with reasonable diligence, the sanction is that the surety is released from his obligating. The issue whether or not the creditor has followed the case with reasonable diligence is left to be resolved by the court.

The second solution relates to tender of payment as incorporated under Article 1939 of the Civil Code. This is even more radical, because the guarantor considers that there is no legal way of stopping the creditor from obtaining payment from him. So he will give him notice to accept payment. The sanction for failure to accept payment would be the release of the guarantor. There are two differences with previous situation. First, the law does not set a fixed delay for such tender, so the court will have to check it is reasonable. Second, the release may also follow the refusal to transfer securities that are annex to the debt. The idea here is that the guarantor who has paid must enjoy the maximum securities to be refunded whilst on the other hand these securities are now of no interest to the creditor any more. Thus, where the creditor refuses to transfer to the guarantor securities the former enjoys after the surety tends payment, the surety will be released from his obligation.

4.2.2. Effect of Suretyship between the Debtor and the Surety

This is the situation where the guarantor has paid the debt in place of the debtor. How does he get his money back? The surety, having engaged himself for another, necessarily has recourse against the principal debtor.

When the surety pays the creditor, he is discharging the obligation of the principal debtor. The principle is that the guarantor, who has paid the creditor instead of the debtor, shall be indemnified by this debtor. Accordingly, the guarantor is entitled to be indemnified by the principal debtor.

In this regard, the fact that the guarantee may be given without the consent of the principal debtor does not relive the latter from indemnifying the surety what the latter paid to the creditor. In exercising his right of indemnification, the surety enjoys two rights of action, one which is personal to him arising from the contract of suretyship and the other which is the action of the creditor who has been paid and which the surety obtains by subrogation. The first is called chirographic action while the latter is the right of subrogation.

The personal action of the surety arises from the contract of suretyship itself. The action is based on the theory of implied mandate. Accordingly, this recourse is open to the surety only against those debtors for whom he has become surety and not against the other debtors.

This personal action entitles the surety to claim the principal, interest, expenses and damages if any. The principal is not just the amount of the debt paid. It includes every thing the surety has disbursed in acquitting the debtor. Thus, as regards the surety, the interest due to the creditor and paid by the surety is considered as forming the principal of his payments, so that they in turn produce interest. Similarly, the surety has the right to require payment of interest on his disbursement which starts from the day of payment.

Expenses are those expenditures incurred by the surety in defending the action of the creditor which may include costs advanced for discussion of assets under Article 1936(1) of the Civil Code. The surety is, however, required to give notice to the debtor of the proceedings instituted so that the latter may prevent such costs by paying the creditor. The surety is, in principle, to be indemnified completely. Accordingly, in addition to interests, the surety is entitled to be indemnified for all damages he suffers as a result of the debtor's fault or negligence. In this respect, see Articles 1940 (2) and (3) and Article 1941 of the Civil Code.

Pursuant to Article 1940 of the Civil Code, the surety is entitled to indemnity which includes the principal, interest and costs. Regarding costs, Sub-Art (3) has laid down a time-limit, i.e. only those costs posterior to notification of the debtor of the proceedings instituted against the guarantor shall be taken into account. The idea here is to encourage cooperation between the guarantor and the principal debtor.

Article 1941 of the Civil Code provides that damages are possible. But they require extra proof to be brought by the guarantor, that of fault or negligence of the debtor, which directly lead the guarantor to having to pay. So the simple fact that the suretyship came into action is insufficient to claim damage to award to the surety is to be assessed in accordance with Articles 1790 through 1805 of the Civil Code.

The second situation is, when the surety or sureties pay the creditor in satisfaction of the debt, the debtor's obligation is not at an end. A new creditor is substituted for the old; the surety having paid the debt, he is subrogated to the rights of the original creditor against the debtor.

There are two kinds of subrogation: conventional and legal subrogation. As the terms imply, conventional subrogation is achieved by the agreement of the parties, whereas legal subrogation is achieved by the effect of the law. In this respect, the surety is entitled to legal subrogation because he is the one who, being bound for others for the payment of the debt had an interest in discharging it. In this regard, Articles 1971 and 1944 of the Civil, Code, deal with the surety's legal subrogation.

The surety benefits from the provision of Article 1971 of the Civil Code as he is bound on behalf of the debtor for the payment of a debt to discharge the obligation. Accordingly, the surety being subrogated by law to the rights of the creditor, he need not enter into a subrogation agreement with the creditor.

The legal right of subrogation may be advantageous than the personal (chirographic) action of the surety because it permits the later to avail himself, as subrogate, of all the accessory guarantees, mortgages and others which belong to the creditor while the action of mandate is a chirographic action, pure and simple.

You must note that the phrase "to the extent of his payment" under Article 1944 of the Civil Code should be construed to mean the full payment that he is to discharge in default of the principal debtor. This is because in cases, of partial payment, the right of subrogation will be seen in the slant position. In such cases the guarantor will not be accorded subrogation hastily. Pursuant to Article 1972(1) of the Civil Code, subrogation may not be made to the determent of a creditor who has been only partly paid.

This is the first restriction imposed by the Code with respect to subrogation. The other restriction relates to waiver of the right of being surrogated. Article 1944 (2) of the Civil Code states the benefit of subrogation may not be waived in advance. There seems to be no restriction on the latter type under the French law, which is the major source of our contract law.

Be this as it may, the contrary reading of Article 1944 (2) implies that the guarantor can waive his benefit of subrogation after he is entitled to the benefit. The rational for such legal restriction seems to be ambiguous. The basic maxim in respect of waiver of right states, *"Quiliber pretext enunciate jury prose introduction to"*, which means "a man may waive a right established for his own benefit". Accordingly, the guarantor should have been entitled to waive his legal right of subrogation even before the time when he is entitled to subrogation.

In cases where there are plurality of debtors bound by divisible obligation, the guarantor is obligated to divide his resource between them; if, however, they are bound by a joint obligation, he has a right to pursue against each one of the debtors for the total debt assuming that he went surety for all of them.

What would happen if the surety guaranteed the obligation of one debtor alone who is bound with other co-debtors on joint obligation?

4.3 Protection of a Guarantor's Action against a Debtor

4.3.1 Duties of a creditor

The creditor who has been paid has a duty to ensure that, as far as possible, the guarantor enjoys an effective action against the debtor. Three situations are provided for:

1- Handing over of documents of title and performance of formalities to transfer available securities (Article 1945 of the Civil Code). A sanction in the form of a court injunction may be considered here if the creditor is negligent or late in passing over such documents.

2- To make subrogation possible (Article 1946 of the Civil Code). The sanction of the creditor's action or omission is that he may not ask payment from the guarantor, where this has led to the impossibility for the latter to claim refund from the principal debtor. for instance, where through his negligence, the creditor let a mortgage expire. So before paying, the guarantor has a right to check that the subrogation in the rights of the creditor is still possible.

3- Debtor's bankruptcy (Article 1947 of the Civil Code). In this situation, the creditor has a double duty: i) to declare and prove the debt in the hands of the liquidator, so that the right to claim payment survives and can be transferred to the guarantor; and ii) to inform the guarantor of the bankruptcy as soon as he is aware of it.

This last point might prove delicate in court: how will the guarantor prove that the creditor was "aware" ("informed" says the French version) of the bankruptcy, and at which moment in time? This is important, because the sanction (Article 1947 (3) of the Civil Code is the loss by the creditor of his rights against the guarantor to the extent of the latter's loss resulting from such failure. Furthermore, it allows the guarantor to take speedy action (see Articles 1938, 1939 and 1948 of the Civil Code).

4.3.2 Securities obtained from principal debtor (Recourse before payment)

The surety who has paid to the creditor has a right of recourse against the debtor for indemnification. The surety who has not yet paid may also have recourse against the debtor. The guarantor, who is informed of a serious chance that the principal debtor is not going to pay, may take protective measures through securities demanded of the debtor, even before any payment is made to the creditor. Three situations are limitatively mentioned under Article 1948.

a) The guarantor may, even before payment, demand securities from the debtor where the creditor has given the debtor notice to pay his debt. This presupposes that the debt is mature or due;
b) Where the debtor is judicially declared bankrupt or insolvent, it appears that the debtor is in failing circumstances;
c) Where the debtor's losses generate a considerably greater risk for the creditor. The question that may be raised is "how does the creditor get to know about these losses or faults of the debtor? Does this mean he has investigating powers regarding the debtor's financial

situation? Here the role of the commercial register is decisive. Furthermore, how does the court appreciate the economic notion of "considerably greater risk"?

4.3.3 Loss of Right

The general principle is that upon payment the surety has a right of recourse against the debtor. However, there are two situations in which the surety loses his right against the debtor. The first exception is where the indemnity claim has lapsed. The guarantor has a duty to set up all available defenses of the debtor he reasonably knew of. If not, he is debarred from indemnification by the debtor. Article 1942 of the Civil Code deals with such kind of laps of surety's indemnity claim. It is possible to compare here with the rule laid out by Article 1940 (3) of the Civil Code, which also call for a notification by the guarantor under sanction of losing the costs he has incurred.

The second exception to the principle is the case where a second payment is made by the debtor (Article 1943 of the Civil Code). According to this provision, the guarantor who pays has a duty to inform the debtor of such payment. The sanction is where this lack of information led to the debtor making his own payment; the guarantor loses any remedy against the debtor. But to let the creditor get paid twice would be undue enrichment, so the guarantor may then claim refund from the creditor (Art.1943 (2)).

4.4 Plurality of Guarantors

The idea of a plurality of guarantors is that the risk of suretyship is spread over several persons. Three situations can be considered.

Counter Guarantor

An effective way to protect the guarantor is to have him benefit himself of another guarantor. This counter-guarantor will only step in where the main guarantor has been called to pay for the principal debtor. Article 1949 of the Civil Code which governs counter guarantors state that, "The counter guarantor guarantees towards the guarantor the effectiveness of his indemnity claim against the principal debtor". You must note that the counter-guarantor involves between the principal debtor and the guarantor. Therefore, the counter -guarantor has no relation with the creditor.

This being said, what is understood by "guarantees the effectiveness of indemnity claim against the principal debtor"? Does this mean that the counter-guarantor agrees to act so that the debtor pays, or simply undertakes to pay in his place? In fact, both duties seem enforceable.

What are the relations between guarantor and counter-guarantor? Can he for instance impose discussion of assets of the main debtor, where it is possible, although the guarantor has not required it? The answer should appear to be positive: the counter-guarantor must benefit of all the particular advantages of a guarantor, even if this means he has to act against the previous or main guarantor.

4.4.2 Secondary Guarantor (in French "suretyship certifier")

A different situation is that of the secondary guarantor, which is distinguished from the precedent in that it also benefits the creditor. The creditor can here not only challenge the guarantor, but also the secondary guarantor. Article 1950 of the Civil Code, which deals with secondary guarantors reads:

Article 1950 - secondary - guarantor

1) *A person may stand survey not only for the principal debtor but also for his guarantor.*
2) *The secondary guarantor shall be in the same position towards the guarantor as a simple guarantor is towards the principal debtor.*
3) *Merger between the principal debtor and the guarantor shall not extinguish the creditor's right of action against the secondary guarantor.*

Nothing in the code specifically forces the creditor to establish first the insolvency of the main guarantor before soliciting the secondary one, although this seems to be the logical order of things. The secondary guarantor, in turn, if he happens to have paid may then be subrogated in the rights of the creditor against both the debtor and the main guarantor. The code does not say so, but normal rules for suretyship (discussion, subrogation ...) should apply.

Normally, being "secondary" to the main guarantor, or better, a "certifier", he will be towards the guarantor in the position of a simple guarantor towards the principal debtor (Article 1950 (2)). This makes him a counter-guarantor of the guarantor who has paid.
In respect of the secondary guarantor, both the principal debtor and his guarantor are considered as principal debtors. Accordingly, unless the creditor exhausts all his remedies against the principal debtor and the main guarantor, the secondary guarantor shall not be held liable.

Since both the principal debtor and the main guarantor are considered as principal debtors in their relation to the secondary guarantor, he can be indemnified from either or both of them in case he paid to the creditor without seeking benefit of discussion. His action against the simple guarantor is justified pursuant to Article 1950(2). His action against the principal debtor is justified, for the latter is the one who should bear the ultimate burden of the debt as he benefited from it.

What could be implied form Article 1950(2) is that the secondary guarantor cannot undertake his obligation under joint guarantee because if he undertakes so, he will be primarily liable with that of the guarantor in which case the concept of plurality of guarantors of Article 1951 (3) of the Civil Code will apply. This is discussed in the sub-section of Article 1951 of the Civil Code.

Finally, Sub-Art (3) of Article 1950 provides merger between the principal debto,r and the guarantor (for instance where a succession has intervened) does not affect the creditor's right against the secondary guarantor, although the main suretyship relation is extinguished as of right.

4.4.3 Plurality of Simple and/or Joint Guarantors

A common situation is where the creditor wishes to spread his risk over several persons acting as guarantors for the same debt and for the same debtor. A creditor may seek and obtain guarantees from more than one person in respect of the indebtedness of one principal debtor. This situation is governed under Article 1951 of the Civil Code.

Where the plurality of guarantors granted the security at the same time (Art. 1951(1)) of the Civil Code, each of them shall be liable for his own share as a simple guarantor, and as a secondary guarantor for the shares of the others. In other words, the creditor has to divide his action in as many actions as they are guarantors, which is called benefit of division, and ask the appropriate amount from each. Here we are concerned with plurality of sureties for the benefit pre supposes the existence of several guarantors. Our code provision which deals with this benefit, Article 1951(1), provides that the surety against whom the creditor brought suit for the whole of the debt is entitled to compel the latter to divide the debt between him and his co-sureties so that he will be required to pay only his portion of the debt to the creditor.

However, it is necessary that the co-surety with whom the surety demands division of the debt be solvent; otherwise, he will be held as a secondary guarantor. See the following example which may help illustrate the above discussion. Abiy borrowed Birr 10, 000 from Belay. Five persons, Chane, Dawit, Feleke, Girum and Hailu came and signed in one instrument undertaking Abiy's obligation as simple guarantors. If Abiy becomes insolvent and Belay proceeds against Girum only for the recover of the Birr 10, 000 the latter can raise the benefit of division so that he should be required to pay only Birr 2, 000 which is his share of the total debt. The total debt is to be divided among the co-sureties.

If, however, the other co-sureties have become insolvent, Girum cannot demand benefit of division. This is because he will be responsible for his share as simple guarantor and as secondary guarantor for the share of the other co-sureties. If, however, only Hailu becomes insolvent, the remaining guarantors shall be liable for their own shares and the share of Hailu's debt will be proportionately distributed among the solvent co-sureties. Accordingly, Chane, Dawit, Feleke and Girum will be liable for Birr 2, 500 each.

What would happen where each guarantor specified in the instrument the maximum amount for which they will be responsible?

In the above example if Chane guaranteed for the payment of Birr 1, 000, Dawit for Birr 3, OOO, Feleke for Birr 4, OOOO, Girum for Birr 1, 500 and Hailu for Birr 500. Since a guarantor is not responsible beyond the maximum amount expressed in the agreement except for legal costs and interests, Belay cannot sue one of them to recover more than the amount they guaranteed.

Should the guarantors be responsible for the share of an insolvent surety? Article 1951 of the Civil Code does not explicitly address the situation where each of the guarantors expressed the maximum amount of their obligation. In this respect, you may argue that Article 1918 (2) of the Civil Code will apply by analogy in which case one surety cannot stand as secondary for the debtors.

Article 1951 has put three conditions which must be met to raise the defense of benefit of division. These are: the guarantors should have become guarantors at the same time; the guarantee should be in respect of the same debt; and the guarantors should not assume joint guarantee.

In considering the effects of benefit of division, the benefit destroy the action of the creditor against the surety who opposed it and therefore, the creditor can no longer come upon him even if the co-sureties become insolvent afterwards. It is the creditor's duty to act rapidly against the other sureties after the division is ordered between solvent creditors.

Is benefit of division possible with a surety who cannot validly contract as in cases of incapacity resulting from minority of the surety?

You have seen that Article 1951 permits benefit of division with only solvent co-sureties. If one of them is insolvent, no division is permissible. This implies that benefit of division is only a favor which ought not to be granted to the prejudice of the creditor. We may extend this to refuse division 'when the co-surety is incapable of obliging himself for instance where the surety is a minor. There is no reason why it should be granted in such cases and denied in cases of insolvency.

Obviously, the benefit of division will not be available where the sureties expressly bound themselves as joint guarantors with the principal debtor as between themselves. If two debtors who are bound jointly and severally for the same debt had each given a surety, the surety of one of them cannot demand benefit of division between himself and the surety of the other debtor. Though such sureties are sureties of the same debt, as they are not sureties of the same debtor, they are not sureties of the same debtor, they are not properly co-sureties in the meaning of Article 1951 (1)

Where the plurality of guarantors granted the security at different times (Article 1951 (2) of the Civil Code), the chronological order determines the secondary character of the guarantors, and therefore the order of their respective contributions. Accordingly, if several persons become guarantors at different times, there shall be no benefit of division even if they are guarantors of the same debtor in respect of the same debt. The relationship of such sureties is governed under Article 1951(2) in which case the one who bound himself in the second place is considered as a secondary guarantor of the one who bound himself before him.

You have studied the situation where there are secondary guarantors. Secondary guarantor envisages a situation where one surety agrees to stand as a surety for another surety. This can otherwise be called a surety of a surety. In such cases, there will be no right of contribution. The secondary surety is only liable to the extent that the first surety does not pay. That means, on the payment by the first, the second guarantor is discharged. Conversely, if the second surety is called upon to pay, he will have a right of indemnity and not merely contribution, against the first surety who does not pay. That means, on the payment by the first, the second guarantor is discharged. Conversely, if the second is called upon to pay, he will have a right of indemnity and not merely contribution, against the first surety, for the first surety is in the position of the principal debtor.

Apart from Article 1950, the situation of secondary guarantor is also governed under Article 1951. According to this Article, one is held liable as secondary guarantor for another in two events. These are: In cases of the insolvency of either one or more of the guarantors; and where the sureties entered in their undertaking by successive acts.

In considering the second situation, the provision of Article 1951(2) states that "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."

The relationship between such guarantors is relatively simple where two or more of the sureties stand as guarantor under successive instruments in respect of the full or equal portions of the same debt. For instance, assume there are three sureties A, B and C who entered into suretyship agreements with the creditor by successive acts to discharge the full indebtedness of the principal debtor and the total indebtedness is Birr 800. 00.

The relationship of the co-sureties is then governed in accordance with Article 1951 (2). Accordingly, A is considered as a secondary guarantor in respect himself before B. By the same taken C is considered as a secondary guarantor in respect of B. In other words, B is held liable to the extent that A does not pay if he is called upon to pay. In the other words, B is held liable to the extent that A does not pay if he is called upon to pay by the creditor. Similarly, C is held liable to the extent that A does not pay. If A becomes insolvent, the creditor can demand payment of the total debt from B. If we assume that B only paid Birr 600 as a result of his insolvency, the creditor can claim the remaining birr 200 from C. The matter becomes complex where two or more sureties stands as guarantors under successive instruments for different portions of the same debt. See the following example.

A, B and C in the above example undertook to guarantee the total debt Birr 800 in different proportions, i.e. A limiting his maximum liability to Birr 400, B to Birr 100 and C to Birr 300. This means the creditor can claim only to the extent of Birr 400 from A. If A pays Birr 400 to the creditor, the latter cannot resort to B because B is only liable to the extent A does not discharge his obligation. But A has already paid what is expected of him. If A failed to discharge his obligation the creditor can resort to B but only to the extent of Birr 100.

If B discharges his obligation, does the creditor have any claim against C? or Is C held liable as secondary guarantor for both B and A or for B only? From the reading of Article 1951 (2), C is held liable as secondary guarantor of B only. This is because the provision reads "of the guarantor who bound himself before the preceding guarantor.

Thus, in the example above C is held liable as secondary guarantor to B only. Accordingly, as long as B has discharged his obligation, the creditor has no right of recourse against C.

But the most common situation, because it affords maximum protection to the creditor who probably required the suretyship in the first place, is the situation of joint guarantors (Art. 1951 (3) of the Civil Code). Here the consequence is that the creditor may ask the whole debt from one guarantor only, obviously the one which seems to have the most money, leaving him then to initiate several actions against his co-guarantors, to recuperate a proportional amount of the debt.

4.5 Relationship between/among Co-sureties

When there are several sureties for the same debtor in respect of the same debt, the one who pays the creditor is entitled to contributions from the others. This implies one of the co-sureties, who pay more than his proportionate share has the right of recourse against the other co-sureties for contribution.

The surety is entitled to contribution from his co-sureties independent of contract, eventhough they could agree among themselves with respect to the extent of their liability.

The basis of contribution is payment by surety of more than his share and also equity. The surety's right to obtain contribution from his co-sureties is based on the equitable principle that the creditor should impose the burden upon all the co-sureties on a retable basis, and if he does not, the court will act to correct this in equity. Thus, we can say that equity requires that the surety who has made payment is entitled to contribution from his co-sureties who might have been compelled to pay by the creditor.

Under our law, Article 1951 provides that guarantors who are either severally, or jointly and severally liable for the same debt and who stand as surety for the same debtor at the same time are entitled to proportionate contribution. This implies that persons who undertake as sureties in respect of different debts of the same debtor are not entitled to contribution from the other surety. Similarly, where a single debt is guaranteed by successive acts of two or more sureties, there is no right of contribution among such sureties.

There are factors that govern the right and extent of contribution. Whatever is the basis, recourse for contribution is subject to several restrictive rules. In this respect, some of the restrictions that will be discussed are not explicitly provided by our code. Yet, their consideration is important as they involve relevant issues that our law ought to have taken into consideration.

The first one is payment of more than one's share. The surety's right to recover contribution does not arise from the fact that he has been called upon to pay or that the surety has paid some part of the debt to the creditor. It is over payment that gives rise to a right to claim contribution. Pursuant to Art.1951 (3), where the surety fully discharges his own liability to which other co-sureties are equally liable, he is entitled to recover contribution.

The question is where is a surety entitled to claim contribution when he makes a payment? A surety is not entitled to contribution until the whole debt is paid, for he is still liable for the remainder. Thus, even where the surety has paid more than his share, he may not claim contribution until the debt is fully discharged. This is because the surety cannot know what should be contributed to him by his co-surety until he knows what has been done in respect of the residue of the debt for which he is equally liable. To demand contribution, there has to be an actual ascertained amount to be contributed. In this respect, there cannot be such an ascertained amount until the "whole debt is discharged.

Accordingly, you may conclude that the surety has to discharge the totality of the debt so that he may claim contribution from the other co-sureties.

Secondly, to be entitled to contribution, payment must have been made by a surety in a situation where he was legally obliged to pay. If the co-surety can show that the paying surety was under no legal obligation to effect payment, then no right of contribution will be available to the surety who made payment.

If a surety makes payment in a situation where he had valid defenses against the claim of the creditor which will relieve him from payment, the surety will not be able to have right of contribution from the other co-sureties. Thus, a surety who pays a creditor where the principal obligation is already extinguished is not legally entitled to contribution from his co-sureties.

Where, for instance, the principal obligation is extinguished as a result of payment, set off, period of imitation, nullity etc, a surety must raise all these as a defense against the creditor. A surety who fails to raise this defense and makes payment to a creditor is deemed to have waived his right to demand contribution.

In this respect, you may recall the provision of Article 1942 which requires the guarantor to raise against the creditor all defenses available to the principal debtor; failure to discharge this duty debars the guarantor from indemnification. By analogy, the failure by a surety to raise valid defense against the creditor deprives him of the right of contribution to the extent that the defense would have relieved him from payment.

Though Article 1951 is mute on this issue, nor makes cross reference to the provision of Article 1942, there is no reason for the law to limit the recourse of the guarantor against the principal debtor but not in his relation with co-sureties. The limitation on the right of recourse of the guarantor will also extend in his relation with his co- sureties.

The third one relates to costs and interests. Pursuant to Article 1951 (3), the paying surety is entitled to recover proportionate share from the debtor cosureties. This provision is, however, mute about what constitutes a proportionate share.

Does proportionate share constitute only what the guarantor has paid to the creditor or does it also include costs incurred by the surety in making defenses against him?

When you consult legal literatures on these issues, you may find that the surety is also entitled to claim a ratable share of any legal costs which he incurred in making reasonable defenses against the claim of the creditor, whether or not these defenses are successful, provided that the surety made such defenses on the basis which might have led to the relief of the other co-sureties as well.

This implies that a surety who raises a defense which is personal to him, for instance, incapacity, is not entitled to recover contribution from his co-sureties. This is because the surety has incurred no cost for the benefit of the other cosureties.

The other question is whether notification by the paying guarantor is necessary. You may recall Article 1940 (3), which require that the guarantor must notify the principal debtor and the surety may only cover interest since the notification. By the same taken, the duty to notify is imposed on the guarantor not only in his relation with the principal debtor but also with his co-sureties. The logical conclusion would therefore be the guarantor can claim contribution of costs from his co-sureties, which he incurred since he notified the latter of the proceedings directed against him.

Regarding interest on the amount paid to the creditor, our law says noting. Despite this legal lacuna, the guarantor should be entitled to claim interest that is accrued on the sum paid more than his share. Such interest is chargeable from the date he is entitled to claim contribution.

The other factor is attached to securities held by a co-surety. You have seen that a surety may obtained guarantee from a counter-guarantor for the effectiveness of his indemnity claim. Similarly, he may obtain sureties from the principal debtor to which he may look for indemnification. He may also be subrogated to the right of the creditor and realize the securities available to the creditor.

Can the other sureties share the benefit of securities which one co-surety obtained? The provision that deals with plurality of guarantors is silent in this respect.

Consideration of legal literature regarding this issue reveals that any security held by one surety stands as security for the full amount owed to all the co-sureties. We may, therefore, argue that the right to share in a security is a right of the co-sureties and therefore is not liable to be defeated by any agreement between one of their members and the principal debtor.

If it is independent of the agreement between the surety and the principal debtor, what then is the basis of the right?

The basis of the right is the principle that equality of treatment is equitable and sureties should in general bear the burden of guarantee in equal proportions. The basis of this right is on the principle that one co-surety must not withdraw something from the estate of the debtor for his exclusive benefit depriving the other co-surety of the value of the security withdrawn.

This principle of equity should apply in our case since Article 1951 (1) and (3) seem to be based upon the same principle although the provision does not speak of security held by one co-surety.

The rationale behind the benefit of division as incorporated under Sub Art (1) and contribution under Sub Art (3) of Article 1951 is that the sureties should be treated equally and bear the burden of guarantee in proportion to their share.

If we permit that a co-surety benefit exclusively from the security held by him, in effect, we are opposing the rationale behind benefit of division, and contribution. This is because the co-surety, who exclusively benefited from the security, is not really sharing the burden, for he is indemnified by the security held by him whereas the others will not be indemnified if the debtor is insolvent. Thus, to be consistent with the basic principle underlying the benefit of division and contribution between the co-sureties, the securities held by one co-surety should be deemed to have been held for the benefit of all the co sureties.

Accordingly, when the principal debtor has given security to one co-surety, any other co-surety may look to and realize upon the security after the default of the principal debtor.

The co-surety who held the security should hand over the document of title to the surety who paid the creditor and perform such formalities as will enable the surety to exercise his remedy and realize the security. This position is analogous to what is provided under Article 1945 dealing with the relationship of the guarantor and the creditor concerning securities held by the latter.

What remedy is there in cases where the securities have been prejudiced or destroyed by a surety? In this respect, literatures disclose that the right of a surety, who pays the debt of the principal debtor to seek contribution from his co-sureties, is affected by his ability to hand over the same securities as he received from the principal. If the securities have been prejudiced or destroyed by the surety, the co-sureties will be relieved of their obligation to contribute to the extent of the value of the property so prejudiced or destroyed. You must, however, note that our law is mute in this respect.

<u>Questions</u>

1. What do you think would happen where the creditor releases one of the co-sureties?
2. What effect does the act of remission of a surety by another co-surety produce?
3. What effect will be produced where merger takes place between the creditor and one of the jointly and severally liable co-sureties?
4. What effect does a set - off effected between a co-surety and a creditor produce?
5. What do you think is the effect of a novation agreement undertaken by a co-surety and the creditor?
6. What would happen if one among these co-sureties has consented to the extension of time while the other co-sureties have not?

4.6 Extinction of Suretyship

One of the grounds of extinction of suretyship is payment. A creditor is entitled to only one payment. As against the creditor, payment is a defense available to the principal debtor and to the surety, no matter which of the two paid the debt. However, in case of subrogation the obligation which arises from suretyship may continue.

The second ground is novation. Novation has double effect: extinguishing a preexisting obligation and replacing it with a new obligation. Novation not being presumed, it is necessary that the intention to novate be clearly expressed. A novation of the principal obligation by the debtor with the creditor extinguishes the principal obligation and also the accessory suretyship obligation. This principle is incorporated under Article 1827 (1) of the Civil Code.

Thirdly, a voluntary remission by the creditor to the debtor discharges the surety as well, since the remission of an underlying obligation also extinguishes the accessory obligation. A remission to a surety does not discharge the principal debtor as the creditor is considered to have abandoned the security, but not the primary obligation.

Fourthly, set-off extinguishes an obligation when two persons are indebted to each other. A surety may be entitled to plead set-off of what the creditor owes to the principal debtor. It seems proper that the surety should be able to benefit by a liquidated amount due from the creditor to the principal, in as much as the principal owes his surety the duty of paying the creditor so that the surety will not be required to pay. The principal debtor, of course, cannot plead the compensation of what the creditor owes to the surety.

Regarding merger in relation to suretyship, Relph Sovents, who wrote an Article entitled "Suretyship" on Tulane Law Review, Vol. 39 stated the following:
"With regard to suretyship, there are three possible cases of confusion [merger]. First, a confusion of debtor and creditor extinguishes the principal obligation and the accessory suretyship obligation also falls. Confusion (merger) of a solidary debt with the creditor benefits the co-debtors in solido only to which of the share for which the debtor whose liabilities were merged was liable.

Second, confusion (merger) of surety and creditor extinguishes the obligation of suretyship, but it does not extinguish the principal debtor's obligation.

Third, a confusion of debtor and surety does not extinguish the principal obligation, but it brings an end to the contract of suretyship because a man cannot be his own surety. However, the confusion (merger) which takes place when the principal debtor and his surety become heirs for one another does not extinguish the creditor's rights against a sub-surety of the surety."

The other one is that in the case of principal obligation that is void, the absolute nullity of the principal obligation entails nullity of the accessory contract of suretyship. However, in cases where the principal obligation is voidable, the contract of suretyship may or may not be invalidated. See Article 1926 (3) and 1923.

On top of this, limitation is one of the causes for the extinction of an obligation. A suit, unless it is commenced within the time limit provided cannot be maintained, if by virtue of prescriptions, the principal debtor has not asserted it, and even if he has renounced it. This rule results from the general principle that the debtor cannot harm the position of the surety.

There are also other causes of extinction of suretyship. The first one is where the creditor has accepted a payment in the form of an immovable or any good, even if he is later dispossessed (Article 1927 of the Civil Code). Payment has taken place, and the creditor has assumed the transfer of risk.

Thus, this is a situation where there has been performance in substitution, i.e. by giving the creditor some assets. Thus, where the creditor accepts such assets, the surety will be discharged even if the creditor is subsequently-evicted from the property he received. The creditor, not the surety, bears the risks of the thing accepted in payment. The result would be different if the surety had consented to the substituted performance; in this event, the surety would be held liable with the debtor in warranty of the thing given in payment.

The second is where the creditor, without special permission given by the guarantor, has granted a delay to the debtor (Article 1928 (2) of the Civil Code). This is because the creditor is extending on the back of the guarantor the delay during which he is held liable. Of course, this rule only applies when the initial period of suretyship has expired.

Accordingly, an extension of time for performance or payment, granted by the creditor to the debtor, is an alternation of the original obligation which is considered prejudicial to the surety. Thus, the prolongation of the time granted to the principal debtor without the consent of the surety, operated as discharge of the latter.

Review Questions

Case One

St. Mary's University College has a diligent employee, Ato Bedilu Terefe, whose rank is a lecturer in the college. The university usually sends employees for further education to build its capacity. Unfortunately, Ato Bedilu got a scholarship opportunity to attend his masters degree at Addis Ababa University, as he was the beneficiary of the capacity building program of the College by the year 2003. At this time the university college and Ato Bedilu agreed for the undertaking that the college has to pay the salary and every fringe benefit at this study leave and Ato Bedilu has to come back and work for the college up to three years as soon as he has finalized his study.

Before joining Addis Ababa University, the University College demanded Ato Bedilu to furnish a security to guarantee his loyalty for his undertaking. To this effect there is a contract between Ato Taye, brother of Bedilu and St. mary's University College. Accordingly, Ato Taye guaranteed the loyalty of his brother. The terms of agreement reads "I, Ato Taye Menaw, shall be jointly and severally liable for a maximum of 30,000 birr to ensure the performance of the obligation assumed by Ato Bedilu toward the St. Mary's University college". Nevertheless, Bedilu didn't come back and report to the College though he graduated from Addis Ababa University in 2005 with the a master of law degree.

1. If Ato Taye is required to perform the obligation that Bedilu assumed, what would you advise him?
2. What would you advise St. Mary's University College, if it would require you an advice as you are a lawyer?

Case Two

Almaz has concluded a contract of guarantee with Bekele on account of a principal contract entered into between Bekele and Hailu. Almaz entered into contract with full knowledge that Hailu's consent was vitiated by violence. When asked to discharge the obligation on behalf of Bekele, Almaz did so without any qualms.

Do you think Almaz would have valid indemnity claim against Hailu? Why or why not?

Case Three

Ato Melese who is an employee of the Ministry of Labour and Social Affairs is one of the very hard working and honest workers of the ministry. Due to this exceptional talent and his qualification, he is promoted to the position of financial officer of the newly established project of the ministry called FADE since 1996 G.C.

In 1998 this very outstanding worker again got with a scholarship opportunity in England for 2 years. Upon leaving his country, the Ethiopian Immigration Bureau required him a guarantee for 50,000 Birr. W/ro Tsehay and Ato Abera entered into the contract of guarantee.

After Ato Meles has left the country, the external auditors of the Ministry notified that the FADE project account shows a loss of 70,000 Birr

In 2001, even if the estimated two years school time has lapsed Ato Meles didn't show up. Now the Ministry has two proposals.

A. to sue Ato Meles's guarantors to pay the amount they agreed for he didn't come.
B. To Bring an action against Ato Fekadu Who was the guarantor of Ato Melese for 40,000 Birr when he was recruited in the Ministry.

   Would you please give the ministry your esteemed opinion as to how it can go about on the above two proposals?

<u>Case Four</u>

Ato Genetu, who graduated from St. Mary's College by 2000, was employed by the Ministry of Finance and Economic Development as a cashier of one of the departments of the Ministry. At the conclusion of the contract of employment, contract of guarantee was concluded between Frehiwot and the Ministry to the amount of ETB 50,000.00 In 2003 there arose a quarrel between Ato Genetu and the guarantor. Following this, the latter notified the Ministry in writing that she will no more be liable for any loss the employee would cause against the Ministry.

In mid 2005, while the Ministry audited its financial circulation, it was discovered that Ato Genetu Misappropriated ETB 60,000.00 . The Ministry instituted a calim against Ato Genetu and Frehiwot jointly for ETB 60,000.00. The Guarantor responds before the court that she has notified the creditor in writing for the termination of the contract of surety-ship. The court, after due consideration over the dispute, ruled that the contract of guarantee was not terminated in accordance with the relevant provisions of the Civil Code [Arts. 1806-1807]. It was therefore decided that the guarantor shall be liable for the money improperly lost ETB 60,000 withinterest it bears.

Suppose you are a renowned advocate in the city, examine the judgment of the court in light of the Civil Code.

Conceptual Questions

1. Some people argue that there is a contradiction between Sub (3) of Art 1922 and Art 1925 of the Civil Code in that while the former provides a contract of guarantee shall be void unless it specifies the maximum amount for which the guarantee is given, the latter reveals that it can be undertaken in respect of future or conditional obligations. Do you agree with this statement? Why? Why not?

2. Discuss the following concepts with example

a. Joint guarantee and simple guarantee
b. Counter guarantor and Secondary guarantor

CHAPTER FIVE
THIRD PARTIES IN RELATION TO CONTRACTS

Introduction

One must first of all recall here the principle of the relative effect of contracts (Article 1952 of the Civil Code). The potency of the binding obligations (this force of binding obligations upon parties is set out under Articles 1731 and 1763 of the Civil Code), which parties can decide upon through their contractual freedom, leads to the logical consequence that what they decide upon by contract should normally not affect third parties. This is called the principle of relative effect of contracts. A contract may only affect its signatories, whether they benefit from it or have to implement obligations.

In the civil law legal system, the basic principle, which is known as contracts produce effects as between the contracting parties is referred to as *"relative effect of contracts"*, while it is called *"privity of contracts"*, in the common law legal system.

Similarly, this principle is incorporated under the Ethiopian law of contracts. Article 1675, which defines contracts, states that a contract is an agreement of two or more persons "as between themselves". The phrase "as between themselves" implies that a contract produces effect only among the contracting parties. Similarly, Article 1731, which incorporates the doctrine of *pacta sunt servanda* states that the provisions of a contract lawfully formed are binding on the parties as though they were law. This provision reflects the doctrine of privity of contracts. Thus, third persons, in principle, can neither suffer nor profit from a contract which was neither made by them nor for them.

However, in many cases, third parties cannot be indifferent to contracts concluded by other parties. There may be exceptions in which case a contract may produce effect on third parties. This is the purpose of the present chapter.

The first situation is that of promises and stipulations concerning third parties, whereby a party to the contract sets out that the contract will have effect on a third party. The second is where the right of a contractual party is assigned to a third party. The third unit addresses the reverse situation where a liability may be assigned to a third party. And finally Unit 4 concerns the special situation of the heirs of the parties and the protection of creditors of contractual parties.

But whatever the category of third parties concerned, Article 1952 states clearly that this part does not affect two categories of situations: Extra contractual liability (Article 2056 of the Civil Code) and Agency (Articles 2179 to 2265 of the Civil Code)

Objectives

After the student completes this unit, he will be able to:

- Explain the nature and effects of promises and stipulations for third parties;
- Discuss the conditions for valid assignment of rights;
- Explain the concept of subrogation and its different types;
- Explain the effects of assignment of rights and subrogation;
- Discuss delegation and assignment of obligations;
- Explain the rights of heirs of the parties; and
- Discuss the rights of creditors of the parties and the limitation thereof.

5.1 Promises & Stipulations Concerning Third Parties

Introduction

It is legally possible that persons may conclude a contract by reserving a right to substitute a third party in their place or by promising that a third party will commit a certain act or omit from performing an act. It is also possible to make contractual stipulations for the benefit of third parties.

In this unit, one considers the situation of third parties who are not yet part of the contract. The contracting parties may provide in their agreement that a future third party may become part of such a contract. Three situations are considered by the Civil Code: the third party may be substituted to a contracting party, the third party will become the debtor of the contract, and the third party will become the creditor of the contract.

In this unit, we will discuss the ways of substituting a third party in place of the contracting party and promising for a third party. Also, a situation where a party to a contract makes a third party beneficiary from a contract will be covered.

Objectives

After completing this unit, you will be able to:

- Distinguish among promise for third party, option to substitute third party and stipulations for the benefit of third party.
- Explain the effects of option to substitute third party, promise for third party and stipulations for the benefit of third party;
- Discuss the rights of the stipulator and his heirs;
- Explain the options of the beneficiary; and
- Explain the effects of acceptance by the beneficiary of the stipulation.

5.1.1 The option to substitute a third party

Article 1953 of the Civil Code opens the possibility for a contracting party including in a contract a clause enabling him to substitute another person for himself. The promissory under such contract concludes the contract in his own name but reserves the option of substituting another third party for himself.

Note immediately that the identity of the third party to be substituted is not required at the time of the formation of the contract. In fact, such a third party may be perfectly unknown to the other party and we can also imagine that he is still unknown to the party stipulating such possibility.

Another remark is that such an option is open both to the creditor and to the debtor. Each side can introduce a clause of this type and it is theoretically possible that the parities actually performing the contract are not the parties who concluded it.

For example: A and B conclude a contract for the delivery of grain, but the contract includes a clause stating that each party may substitute another person for himself. A sees he does not have enough grain and substitutes himself C, who has a big stock. B negotiates the sale of his right to D. The contract will be performed validly between C and D, although both may have been completely ignorant of its existence at the time of conclusion.

The advantage of the possibility opened by this Article is to introduce flexibility in the choice of partners. It corresponds to a great number of modern transactions, where the identity of the person who will perform the contract is irrelevant, and what matters is only the quality of the work.

It allows a persons who sees a good busines opportunity to conclude the contract and therefore to a claim for performance, and then, at a second stage, to sell this claim to a third party, and making a profit, of course. It enables a person who does not have the adequate facilities or equipment to perform the contract to substitute himself a person better equipped. It makes it possible to contract secretly in the name of a person who does not what to be known to the other party until the contract is concluded.

One may also consider the potential of the provision to introduce a third party to perform part of the contract concluded, as a co-debtor, or as often in construction cases, as a sub-contractor. For instance, a builder concludes a contract for the construction of an entire house, but reserves the possibility to substitute himself an electrician for the electrical installation.

For instance, SATCON Construction Company concluded a contract with Amhara Regional State for constructing Management Institute building. In the contract SATCON reserved the possibility to substitute an electrician for the electrical installation which is a valid one.

The question is what is the effect of the contract where the substitution is or is not effected?

The solution is clearly provided under Article 1954 of the Civil Code. Sub Article one states that where the third party is substituted within the following three days from the formation of the contract, the contract will produce effect as between the third party substituted and the other party. In this respect it can be said that the person who reserved the option of substituting another person for himself is the agent of the third person. Accordingly, it is a form of agency or contract of commission, as is apparent from Article 1954 (1).

Article 1954 states the logical rule that the person having introduced such a substitution clause is free either to remain the contract acting party (Article 1954, sub. 2) or to refer to the clause to introduce a substitution partner. He is entirely free to select one or the other option. But it is clear that, should no substitution occur, the parties are bound by the terms of contract along ordinary rules, and specially, the contract is enforceable against each party.

This being said, the provisions of Article 1954 as to the effect of substitution seem unduly restrictive. The main difficulty lies on the three days within which substitution is to be effective as it is short. This considerably restricts the flexibility sought from the institution. One understands that the creditor wishes to be informed as soon as possible of the final identity of his contracting partner, but a three day time - limit seems somewhat unrealistic in a world of complex legal and administrative regulation, where permissions or agreement have to be sought, loans negotiated with banks, exchange currencies secured, negotiations led with foreign investors or buyers ... .etc....

The sanction for over stepping the time limit will be that the stipulation party becomes irrevocably bound by the contract. Such a restriction is therefore a serious constraint when one wants to encourage economic and business relations. Generally speaking the drafting seems to be not only considering physical persons and not enough on juridical persons.

However, the time limit seems to be not mandatory in which there may be agreement otherwise. It works where the parties have not come up with a different one.

Accordingly, the solution will be for the party who intends to substitute somebody else for himself to simply require that the time limit be extended contractually beyond three days. This time limit does not appear mandatory but rather suppletive of the will of the parties, telling an express provision to the contrary. What is mandatory, on the other hand, is that the parties are bound by the contract upon the expiry of the time limit, whether legal or contractual. To state otherwise would closely amount to a potestative condition by the debtor.

Finally, it is self evident that the party that is to substitute himself to the original creditor or debtor must be in full agreement with the terms of the substitution, as explained under Article 1954 (3)

5.1.2 The promise for third party

A person may stand promisor for a third party by promising his contractual partner that this third party will perform some contractual obligation or respect some omission, as explained under Article 1955 of the Civil Code.

One must be very clear as to the legal structure of the operation. The situation provided under this Article covers in fact two different contracts: a contract between a contractual partner and the promissory, i.e., contract of promise; and a future or potential contract between the first partner and the third party, the existence of which is subject to ratification by a third party, i.e., the main contract. Here again there is no need to have prior information of the third party.

The interests of this provision are many. They coverall the situations where the promisor is sure enough of his influence, or of the extremely interesting potential of the main contract, to realistically speculate he will indeed convince the third party to enter into the contract.

It may be used also for instance by the legal representative of an incapable, or of an absent, or of a juridical person when the contract has to be ratified by a collegial body. On the other hand, it may be the situations were the first partner is ready to pay the promisor to use his influence in determining the third party to enter into a contract with him: the provision will then cover the work of all kinds of intermediaries.

In this regard, we have a specific illustration under Article 2270(3) of the Civil Code, which states the possibility of selling a thing belonging to a third party. This sub Article in fact implies a previous promise to obtain the sale of such thing, because, of course, the owner cannot be forced pursuant to the doctrine of privity of contracts to comply with the provisions of a contract of sale to which he is alien.

Note here that no time-limit is imposed by law for the conclusion of the main contract, contrary to the provisions governing substitution which confirms the remarks made as to the constraints generated by the three day rule of Article 1954 of the Civil Code.

The question is: what is the effect of the contract in case the contract is or is not ratified by a third party?

The effects of ratification and non ratification are provided under Article 1956 of the Civil Code. When the main contract is ratified by the third party that is to say, when the third party accepts its terms and ratifies the main contract, the promisor is released; and since his promise is observed, he incurs no liability.

Regarding the scope of promise, Article 1956(2) provides that the promissor promises the conclusion of the contract but does not guarantee its performance. The duty of the promissor is fulfilled from the moment the third party has ratified as he is not a guarantor for the performance of the obligation by the third party. However, the parties may agree in the contract of promise that the promissory will be held liable for the non performance by the third person.

If the third party does not ratify, the promised, unlike in cases of declaration of demand, will not be obliged to perform the contract as per-Article 1956(3). This is so because the promissor has only undertaken to secure the ratification of the promise by the third party and no more. Although the promised is not required to perform the obligation, he has failed to discharge his obligation, i.e. to secure ratification. Accordingly, the non performance on the part of the promissor will entail payment of damages sustained by the other party as a result of the non performance of the latter's obligation.

In general, Article 1956 addresses the different problematic situations. The first problem is where the third party refuses to ratify the projected main contract. Contrary to the previous situation of substitution, the promissor is not held to implement the contract, simply because this is not the purpose of his obligation to the first partner. But such a failure will amount to the fact that the promise will not be held, and therefore that the promissor is liable to pay damages (Article 1956(3))

This restricted scope of liability will be the one enforced by the judge, failing an express provision to the contrary in the contract of promise. There is a potential difficulty of coordination of this second paragraph of Article 1956 with its third paragraph, which lays down that damagse are due for non-performance.

This should be construed, in the normal case were the promissor only promises the conclusion of the contract, as the obligation to pay damages resulting only from the non ratification and not from the non-performance.

But the promise may contractually go beyond simply promising ratification, provided it is expressly stated in the contract. Subject to this last condition, the promissor may indeed promise performance, and as a consequence, stand to pay damages for non performance valued as stated under Article 1799 and following.

5.1.3 Stipulation for the benefit of a third party

It happens quite often that parties to a contract may make stipulations for the benefit of a third party. Stipulations for the benefit of third persons serve to make institutions function or effect transactions, which would be impossible or at least more difficult with all other principles of the law. For instance, life insurance for the benefit of a third party, a collective insurance against accidents by employers for their employees, warranty given by manufacturers for their products to consumers, etc.

The difference with the previous situation is that Articles 1957 and following of the Civil Code open the possibility for two contracting parties to provide for a benefit to be granted to a third party. The relation is a triangular one. The promissor undertakes by contract with the stipulator to perform an obligation for the benefit of a third party, the beneficiary.

The interests of this institution of the stipulation for a third party are many. It may cover the intention of the stipulator to make a liberality, present or donation to the third party beneficiary. It may be a mode of payment to a third party creditor of the stipulator. But the most frequent and important situation is the contract of insurance.

For instance, 1. B enters a life insurance contract with A, an insurance company, and appoints as his beneficiary a member of his family his wife or children usually. If he dies, the insurance company will pay out an indemnity or serve annuity to his wife and,or children. 2. B concludes an insurance contract for his possible liability as a driver of a car with A, an insurance company. Should an accident occur and C is the victim, A will pay for the damages suffered by C.

These two examples show that the third party may very well be unknown to the contracting parties. The beneficiary may even be a future person, for instance in the case where life insurance is made to benefit children not yet born. Finally the stipulation may very well be a conditional one as in the case of a car accident in an insurance covering the driver's liability. The only requirement for the effectiveness of the contract is that the beneficiary, if he is known as to his precise identity at the time of the contract, can nevertheless objectively be determined.

However, there is no agreement regarding the basis of stipulation. Nevertheless, there are three principal theories forwarded in relation to such stipulations. These are: theory of offer, theory of the administration of affairs, and theory of the direct creation of the action.

According to the theory of offer, the stipulant offers to the third person the stipulation which he had made in his favor. This offer must be accepted in order for the engagement of the promissor to be binding. Once the acceptance is made, it retroacts to the day of the contract and the third person becomes the personal creditor of the promissor.

The theory of the administration of affairs dictates that he who stipulates in favor of another, without having received mandate, is an administrator of affairs, for he performs for the account of a third person an act which he could have been able to perform in the quality of a mandatory, if he had previously been given the power. The adhesion, which a third person later gives to the contract is a ratification which makes it definite. The ratification can take place after the death of the stipulator, and can be made by the heirs of the third person.

According to the theory of direct creation of the action, contract with stipulations for the benefit of third persons are exceptions to the general rule, which provides that contracts do not benefit third parties. Accordingly, being derogation from the general rule, contracts concluded for the benefit of third parties create direct right for the benefit of the third person similar to the rights arising in favor of the parties. However, there are some who argue that there has to be a necessary fusion of all these principles in order to understand the real basis of such stipulations.

As we have said earlier, Article 1957 of the Civil Code provides the principle on stipulations for the benefit ofa third party. From the wording of this Article, the relation seems to be triangular. In this regard, there are three persons: the stipulator- the creditor who can demand performance from the debtor; the promissor- the debtor; and the third party beneficiary for whom a benefit has been stipulated in the contract concluded between the stipulator and promissor. Thus, the basis of the contract between the promissor and the stipulator is that the promissor undertakes to perform an obligation for the benefit of the third person beneficiary.

The question is : what is the real cause of the stipulation?

In this regard, the legislations of many countries require that one must have a cause for making stipulation in favor of a third person. In the common law legal system, they require that the third party must either be a donee or creditor beneficiary. Donee beneficiaries are those for whom the stipulator has stipulated a benefit gratuitously. Creditor beneficiaries are those who are creditors of the stipulator in another transaction.

Do you think Article 1957 of the Civil Code has laid down any such requirement?

The next issues that are worthy of treatment are: who should be the beneficiary of the stipulation? What are the rights of the stipulator and his heirs, and third party beneficiary?

Regarding beneficiaries, there is no provision under our law that clearly determines who the beneficiaries of a stipulation are. However, when we consult the literatures, beneficiaries may be: determined persons at the time of stipulation, undetermined persons or future persons.

When the beneficiary is determined and living at the time the stipulation was made, there is no difficulty. The person designated as beneficiary is qualified to benefit from the contract subject to the terms of the contract and the requirements of the law. However, there is difficulty when the stipulation is made for a third party that is undetermined at the time of the stipulation. This is possible only if the beneficiaries of the stipulation, presently undetermined, are determinable on the day on which the agreement is to have effect for their benefit.

There is also a stipulation for the benefit of a third person who does not exist at the time of formation of the contract but a future person who has to be capable of being determined at the time when the contract produces effect. For instance, the insurer may stipulate his children whom he will give birth to in the future in his life insurance.

A) Rights of the stipulator

The stipulator is a contracting party, and he may exercise all the rights deriving normally from the contract, such as cancellation for vice of the contract, termination or enforced performance in the event of a non-performance by the promissor.

Article 1958 of the Civil Code states that the stipulator may reserve for himself the benefit of the contract and thus the stipulation for the third party may be changed into an ordinary (synallagmatic) contract with the promissor. He may also always change the beneficiary of the contract if he so wishes, replacing for instance the children as main beneficiaries of the life insurance instead of his predeceased wife. But these possibilities are subject to the condition that the beneficiary has not yet been offered the benefit (note that the provisions refers to the offer itself and not to the acceptance of the offer, which might only arise at same time later) or has expressly refused the benefit offered. Of course, all these provisions may be amended at the parties will (unless otherwise agreed), provided there is no dispute as to the interpretation of the will of the parties.

In general, the rights of the stipulator are clearly provided under Article 1958 of the Civil Code. Sub-Article one provides that where there is no contrary agreement the stipulator may have the right to reserve for himself the benefit of the contract or appoint a new beneficiary under the stipulation. This is possible where the option has not been offered to the third party mentioned in the contract; or where the beneficiary after having been offered with the option refuses to accept the benefit of the stipulation. Thus, in principle, the stipulator can change the stipulation for the benefit of a third party into an ordinary (synallagmatic) contract with the promissor thereby reserving the benefit for himself or even designated another beneficiary.

Under Article 1958(2) of the Civil Code another right is given to the stipulator. The law entitles the stipulator to retain the right to vindicate the rights resulting from the non performance of the contract where the promissor fails to perform his obligation. This implies that the beneficiary has accepted the benefit but the promissor has not discharged his obligation towards the beneficiary. The stipulator has no right to demand forced performance since this right is reserved for the beneficiary.

B) Rights of the beneficiary

Coming to the rights of the beneficiary, the beneficiary being delegated as the person to receive benefit from the promissor may accept or reject the benefit upon being given the option pursuant to Article 1959 of the Civil Code. For the effectivity of stipulation for the benefit of third persons, it must be "accepted" by the third party beneficiary. The right of the beneficiary is not derived from a contract made by him with the promissor. There are no two successive contracts but only one, i.e. concluded between the promissor and the stipulator. It is from this contract that the action arises in favor of the third person and what is asked from him is to ratify the act which was made for him by a person who was not his representative. Thus, acceptance is ratification of the stipulation made for his benefit.

However, once the third person ratifies the stipulation, he shall acquire all the rights the contract bestows upon him. The stipulator may not refuse his appointment once the beneficiary has accepted to receive the benefit stipulated in his favor. This implies that the stipulator will have no right against the promissor regarding that portion which has been stipulated for the benefit of the third person. Moreover, the promissor may not set up against him any defenses of a purely personal nature which he may have against the stipulator as per Article 1961(2) of the Civil Code. However, the English version of this sub Article is defective. The defenses available for the promissor may be incapacity, immorality, unlawfulness ....

Accordingly, the beneficiary is entirely free in his choice, and does not have to state reasons, nor be liable if he refuses. To this situation one must add that the beneficiary should logically also be allowed to revoke his acceptance without incurring any liability, because on his part there is no obligation, but only a right which he is free to waive at any time. On the other hand, he does not have to be informed in advance as shows the case of the victim of a car accident, nor does he have to give a preliminary consent to the stipulator before the latter enters into the contract for his benefit.

As soon as the contract is born, and even before his acceptance, the beneficiary is granted a direct and personal right to the benefit. He is not dependent of the will of the stipulator. Being granted a right, he may also assign it or use it as a security for another contract he is party to. As is generally the case for potential rights, the beneficiary may initiate preservation measures to ensure the effective performance by the promissor.

For instance, A, the seller, and B, the buyer enter into a contract of sale of a house in Addis, which includes the clause that if B stops to live in Harar, the sale will be transferred to C, B's son. If A does not insure the house, C can apply for a court injunction against him to force him to insure it against fire.

If the offer is accepted by the beneficiary, he becomes the direct creditor of the promissor and may exercise all the rights deriving from the contract, especially obtain enforced performance form the promissor debtor. Conversely, the promissor may set up against him the defenses open by the contract to resist performance. The only exception is stated under Article 1961(2) of the Civil Code, where the promissor may not oppose to the beneficiary the defenses of a purely personal nature, which he may have against the stipulator (note the omission of the "not" in the English version of the Civil Code).

Article 1960 confirms this direct right open to the beneficiary. It addresses the situation of the heirs of the stipulator when the promissor's obligation was not yet performed at the time of the stipulator's death, or is to be performed upon the stipulator's death such as in contract of insurance. The right of the beneficiary exists and is enforced without the heirs being in a position to refuse it. The beneficiary is not an heir to the succession, and the performance of the promissor is not an asset of the succession it is a part of and has to be paid out directly to the beneficiary.

Thus, sometimes, the stipulator may have appointed a beneficiary to receive the benefit upon the former is death. In such a case, once the beneficiary has accepted the benefit, he has the right to claim the benefit from the promissor on the day of the death of the stipulator. In this case the heirs of the stipulator have no right to revoke the appointment made by the stipulator (see Article 1960(2) of the Civil Code). For instance, B takes a life insurance with A, an insurance company, to the benefit of C, his mistress. Upon his death, the heirs of B may inherit nothing if the liabilities of B's estate exceed the assets he leaves. But C is entitled to the full payment of the indemnity paid out by A, without being challenged in any way by B's heirs.

One thing that is worth noting is that, the last phrase "...on the day of the beneficiary's death" under Article 1960(1) of the Civil Code. In this regard, the Amharic version is the correct one.

A final remark can be made in respect of certain evolutions of foreign case laws in respect of stipulation for third parties. In certain cases, judges have "discovered" an implicit stipulation for third parties in given contracts. For instance, it was ruled in France that the parents had an action against the carrier in the event of an accident having caused the death of their son, independently from any issue of succession rights or of the direct right to indemnification of their direct prejudice derived from the accident. But such case law has been manipulated with precaution.

5.2 Assignment of Rights and Subrogation

Introduction

The other situations in which a third party is a beneficiary in the contracts made by others are the case of assignment of rights and subrogation.

In this part, we will see assignment of rights and subrogation as they are provided under Articles 1962 through 1975 of the Civil Code.

It is a principle that creditor can assign his claim for any person. However, there are exceptions that prohibit the creditor not to assign his rights. There are also different types of assignment of rights.

Subrogation is also part of this unit. Subrogation occurs where a person makes payment to a creditor or where a person lends the debtor and paid the creditor and is thereby placed in the rights of the latter to the extent of his payment. This may be either legal or conventional.

Objectives

At the end of this section, the student will be able to:

- Explain the nature of assignment of rights;
- Discuss the validity requirements for assignment of rights;
- Distinguish the different types of assignment of rights;
- Define subrogation;
- Distinguish legal and conventional subrogation; and
- Explain the effects of assignment of subrogation.

5.2.1 Assignment of Rights

A) Definition of assignment of rights

An important consequence of the right to property is the derived right of selling such property, the *"abusus"* element of the right of property. This is taken up as a principle by Article 1962 of the Civil Code. We are in the situation where the debtor sees a new creditor replace the original party to the contract. This situation is normally indifferent to him, because it only changes the beneficiary of his performance or payment, not the scope of such performance or payment. Hence the provision of the Article stating that the debtor does not even have to be informed of the assignment to a third party creditor.

The principle of assignment of rights is put under Article 1962 of the Civil Code. This provision states that a creditor may assign his right to a third party without the consent of the debtor, unless such assignment is forbidden by law or the contract or is barred by the very nature of the transaction. Thus, an assignment is a contract concluded between the assignor and the assignee, whereby the former transfers his rights under the contract or part of it to the latter.

Such right may also be a conditional or future right. A very frequent illustration is the technique used for endorsing bills of exchange. The person holding such an instrument has a future right of being paid by the person who drafted it. If he wishes to obtain cash immediately, he may assign another party, a bank generally, who will pay him minus a discount for its profit. The bank will then wait until the term of the obligation arrives and obtain payment from the debtor. In this case, there might be a succession of several assignees for the same debt, creating eventually a doubt as to who should be paid and the sanction set out under Article 1967(1) of the Civil Code.

You must note that the consent of the debtor is not required for an assignment to be valid. The debtor is normally indifferent to an assignment because it only changes the beneficiary of his performance or payment and not the scope of such performance or payment. This may be the reason why the debtor is not informed of the assignment of rights.

The question is: what are those rights which are not subject to assignment?

Article 1962 reserves, however, three categories of exceptions, where the assignment to another creditor is prohibited without the consent of the debtor.

Firstly, the assignment of certain rights may be prohibited by law. The law may for one reason or another prohibit the assignment of certain rights by creditors. For instance, the claim of a victim of damage may not be assigned until it is appraised by a court (Article 2146 of the Civil Code); an administrative contract may not be assigned without the consent of administration (Article 3202 of the Civil Code). A famous example is the traditional prohibition of assigning succession rights before the death of the person concerned (Article 1124 of the Civil Code). Thus, where the law has forbidden assignment, the parties are not free to make agreements to the contrary by assigning such rights. Any assignment in relation to such right is unlawful.

Secondly, the assignment to a third party creditor may be prohibited by the contract itself. Rights under a contract which are legally assignable may be the agreement of the parties, which may also be made non-assignable. This is done by the agreement of the creditor and the debtor in the contract which created the right. This is a consequence of the freedom of contract because parties are free to agree that the right may not be assigned without the consent of both parties. Thus, based on their agreement, the rights of the creditor to assign his right, without the consent of the debtor, is thereby limited.

This is the case where, for instance, a franchise for a given brand is granted to a specific trader, who may not transfer such benefit to another trader, especially who sells his business, without the agreement of the franchiser.

Finally, the personal nature of a right may prevent its assignment. This is the category of *"intuitu personae"* contracts, contracts made in consideration of the person, but seen here from the side of a creditor. In other words, there are certain types of contracts which are classified as contracts *"intuitu personae"* or (personal contracts) in which assignment is impossible by its very nature. The buyer of a made-to-measure suit cannot assign his right to the suit to another person, thus forcing the tailor to change measurements.

Also, in case of contract of employment, the employee is not allowed to assign his right to work for a third party as the worker possesses special skill, knowledge or profession. Likewise, a partner in partnership agreement can't assign his part for another without the consent of the other partner as the partnership is formed as a result of the special confidence that exists among the partners (see Article 250 of the Commercial Code). Thus, unless assignment is impossible without the consent of the debtor based on the above situation, the holder of a right is entirely free to determine the scope of the assignment, whether it will be wholy or in part, certain or conditional, etc....

But if no precision exists as to the scope in the contract of assignment Article 1963 of the Civil Code sets out a presumption that the assignment covers both the principal of the debtor's debt together with the arrears of interest due, obviously at the time of the assignment. If, however, there are arrears of interest after the assignment, such arrears will follow the holder of the debt. This provision is important in the event of a succession of assignees.

B) Types of Assignment

When we see the types of assignment, an assignment could be made for consideration or gratuitously. An onerous assignment is an assignment of a contractual right by the creditor which

is made for consideration. This consideration which can either be in kind or in cash or both, is furnished by the assignee for the assignment of the right.
A gratuitous assignment, on the other hand, is a voluntary transfer of the creditor's right to the assignee which is made without consideration. In such cases, the assignor gets no economic benefit.

In case of assignment of rights, warranty may or may not be required depending on the form of the assignment. In this regard, our law makes distinction between onerous contracts and gratuitous contracts. Where the assignment is made against payment, "for a consideration", the Civil Code provides for a warranty due by the assignor.

Article 1964 (1) of the Civil Code provides in this case that the assignor has to guarantee the existence of the right at the time of the contract when the assignment is made for consideration. In the case of assignment of rights, warranty signifies a promise as to the title, defects, or quality or quantity contemplated in the subject matter of the assignment. This is a relatively restricted scope to the warranty, because it entails a transfer of risk to the assignee from the day of the sale. Thus the assignor shall be held liable towards the assignee if he had no right at all, if the right is destroyed by, for example, set-off, or if the credit exists for the benefit of a third person at the time the assignment was made.

But the greatest limitation to the scope of the warranty is that the assignor does not guarantee the solvency of the debtor (Article 1964 (2) of the Civil Code). It is for the assignee to endure the risk of insolvency, eventhough he has paid for the debt. This explains that he will generally have bought the right at a discount, precisely and has taken into account such a risk. But of course, the option is always open to the parties to expressly provide in the contract of assignment that the assignor shall in fact guarantee performance.

However, the situation is entirely different where the assignment is made gratuitously. In such cases the assignee should not expect any legal warranty (Article 1964 sub. 3 of the Civil Code)

Taking into account the statutory limitation of the scope of the guarantee that is only the existence of the debt, the liability of the assignor is defined by Article 1965. This is the case where in fact he assigned a debt which did not exist at the time (Article 1964 (1) *acontrario).* Where the assignor is bound by warranty, the warranty is limited to the amount that is received by the assignor and to the interests. The assignor is not liable to pay to the assignee the amount of the right that is transferred to the latter. In addition, the assignor will also be liable for the cost of assignment and any cost made with regard to unsuccessful court proceeding against the debtor as the assignee is required to proceed against the debtor and fail to get performance prior to suing the assignor in accordance with the warranty. Thus, the scope of his remedy against the assignor is therefore logically to amount to the principal of the debt and arrears effectively cashed by the assignor, plus any costs of the assignment or possible court proceedings.

The assignment is a transfer of the right to the performance of the contract. It entails naturally a transfer of the defenses open on the basis of this contract to the debtor. No restriction is imposed to the debtor as to the time when he became aware of the existence of the assignment. He may oppose them even if they preexisted the assignment (Article 1966 sub. 1 of the Civil Code). This provision allows the debtor to raise against the assignee those defenses he may have raised against the assignor when the debtor became aware of the assignment.

A special defense is open to the debtor by Article 1966 sub. 2. He may oppose a set-off to the assignee, based on a claim he had, not against the assignee (which is the ordinary case), but against the assignor, provided the conditions for set-off are present. In such a case, the assignee loses his right against the debtor. The issue is whether he will be covered by the statutory warranty of Article 1964, sub.l, which is not explicit on this issue. It is more probable he will have to resort to the criterion of unjust enrichment of the assignor.

Be this as it may, for set-off to occur both the negative and positive conditions set out under Article 1832 & 1833 should be fulfilled. It seems logical that the debtor may also raise set-off where he has a claim not against the assignor but against the assignee. The debtor may also raise as defense any matter, which renders the assignment of no effect. Fore example, where the right is legally prohibited from being assigned, the debtor could raise this as a defense.

However, set-off can take place, according to the English version of Article 1966(2) of the Civil Code, where the claim of the debtor does not fall due later than the assignee claim does. On the other hand, the Amharic version of this provision implies that set-off can take place only if the claim of the debtor does not fall due after the assignment of claim.

Which provision is tenable? Why?

An additional right is also incorporated under Article 1967 of the Civil Code, i.e. opposability of assignment. The principle of opposability of assignment is that they are demurable to debtors. The assignee will claim performance from the debtor who will be obliged to perform. Accordingly, a difficulty arises when the debtor pays in good faith the original creditor before the request for performance is made by the assignee. In such a case the debtor shall be validly released if he was not informed by either the assignor or the assignee of the assignment before he performs.

Who is duty bound to give information? What if the assignor accepts the payment after assignment?

It is an important requirement that, eventhough his consent is not needed, the debtor is informed of the change of creditor. This precaution should be clearly stated as to who must give information in the contract of assignment, and failing which, by the assignee who does not want to risk a valid refusal from the debtor. If the debtor is released, the original creditor is paid for a debt he has assigned. It seems logical then to open a remedy to the assignee on the basis of unlawful enrichment.

The *a contrario* reading of Article 1967(1) of the Civil Code implies that the debtor will be held liable where the debtor pays the original creditor after having been informed by either assignee or the assignor about the assignment.

The question is: would it make a difference if the debtor learnt about the assignment from sources other than the assignor or assignee? It would be logical to uphold that the debtor who has got information about the assignment in whatever manner should be precluded from making payment to the original creditor.

This is because the debtor who pays the original creditor being aware of the assignment is acting in bad faith. Thus, such kind of debtor should not make payment to the assignor.

The subsequent two sub Articles of 1967 of the Civil Code deal with assignment of a given right to various persons. In such cases, you must distinguish between assignment of a single right to several persons under the same instrument and transfer of a single right to several persons by successive acts.

In the first case, the right shall be divided among the assignees in accordance with the terms of the contract of assignment. Failing any provision in their agreement, the right is deemed to be equal.

On the other hand, where the debt was assigned to several assignees by successive acts, the requirement of notification or acknowledgment by the debtor of the assignment in an authenticated document will serve to appoint which assignee has priority in the payment by the debtor pursuant to Article 1967(2) of the Civil Code. Failing any of the above two, the debtor is required to make payment to the debtor who avails himself of the earliest date by virtue of Article 1967(3) of the Civil Code.

5.2.2 Subrogation

A) Definition of subrogation

Pothier, a French writer, defined subrogation as a legal fiction through which a creditor is considered as ceding all of his rights, actions, privileges, and mortgages to the subrogee who pays the debt.'1

Thus, subrogation can be said is a situation where an obligation extinguished with regard to the original creditor by payment which he has received from a third person or from the debtor himself but with funds that a third person has furnished to that effect is regarded as subsisting in favor of this third person who is entitled to assert, to the extent of what he has paid, the rights and actions of the original creditor. Thus, subrogation accompanies payment.

Subrogation is the situation where a right with all its accessories is transferred from one person to the other. The mechanics of subrogation involve the substitution of the subrogee to the position occupied by the subrogor, who is a creditor of the principal debtor. The subrogee is then able to exercise the rights of the creditor- subrogor after he has effected the subrogation by payment of the debt. Thus, certain persons who are incapable of purchasing a credit may validly contract to pay the debt and obtain subrogation.

In case of subrogation, there are three persons: subrogor (original creditor), subrogee (the new creditor who is subrogated on the right of the original creditor), and the debtor. Generally, the sources of subrogation are two: conventional (contractual) or legal subrogation.

B) Types of Subrogation

i) Conventional subrogation

Conventional or contractual subrogation is divided into two: subrogation by the creditor and the debtor.

a) Subrogation by the creditor

The most frequent form of contractual subrogation is where the creditor subrogates to his rights the third party who has paid him the debt (Article 1968 of the Civil Code). It seems that the creditor's subrogation envisaged by Article 1968 may be entered into by the creditor with any third person who is willing to pay the debt. The third party is thus exactly transferred into the position of the creditor and is granted the best chance of being refunded by the original debtor.

For a creditor to subrogate a third person to his rights, Article 1968 imposes two conditions: the contract of subrogation must be express and must provide that the subrogation takes place at the time of payment.

The requirement that subrogation be express is meant to preclude the courts from inferring simply from the circumstances surrounding payment, that the creditor has subrogated the person who paid him to the original creditor's rights against the debtor. In other words, subrogation requires unequivocal words as to its existence.

The question that may be raised here is: what would happen where the subrogation does not satisfy the requirement that it be express?

The law does not provide a solution to this problem. A certain writer, Jonathan A. Eddy, states that "the requirement that subrogation be express means that in doubtful cases, where the creditor's intention to transfer a right to a third party may be implied, or is even express, but there is no express declaration of intention to subrogate, the transfer must be treated". In other words, where the legal requirement that the subrogation be express is not fulfilled, the case may be treated as one of assignment. If the contract is one of assignment the effect would be the creditor will have the right of lien, mortgage or pledge attached to the right.

On the other hand, Ato Tilahun Teshome, in his book titled Basic Principles of Contract Law, argued that if there is no express declaration as to subrogation, the payer is treated as ordinary creditor for the debtor. Thus, failure to meet the requirement laid down under Article 1968 deprives the payer from enjoying the rights of lien, mortgage and other accessory rights.

The second condition put under Article, 1968(2) of the Civil Code is that subrogation should be effected at the time of payment. Normally, when payment is made, the obligation is extinguished thereby. Subrogation forms an exception to this rule, by allowing the debtor's obligation to continue to exist in favor of the subrogee, who takes the place of the original creditor. The subrogee and the subrogor could not by their agreement survive an obligation on the part of the debtor whose original obligation had already been extinguished by the subrogee's payment. A prior agreement by the subrogor and subrogee, however, that the subrogee will be subrogated to the rights of the subrogor when, in future, he makes payment presents no problem of "revival" and should be accepted as a valid subrogation, even if there is no further mention of subrogation when payment is actually made. Thus, it seems sound that this provision precludes subrogation after payment, but not before payment.

Accordingly, the commentators insist that a subrogation agreement after payment cannot be valid even if the act of subrogation occurs on the same day as payment. The reason for the rule which prohibits subrogation after payment is that the creditor's power to subrogate ceases with the payment which extinguishes the obligation. Nevertheless, it should be observed that a person who pays the debt without obtaining subrogation has an action against the debtor for reimbursement on a quasi- contractual basis. The party that paid will become an ordinary creditor of the person for whose benefit the payment was made. Some legal systems, however, uphold subrogation in the cases in which the subrogation agreement is entered into before payment.

b) Subrogation by the debtor

Articles 1969 and 1970 of the Civil Code govern the second type of conventional subrogation, subrogation by the debtor. In this case, subrogation is effected by agreement between a debtor and a third party who lends him money or fungibles for the purpose of paying the debtor's creditor. Then, the creditor's rights against the debtor are transferred to the third party, without the consent, or even against the will, of the original creditor. For example, a debtor who owes several creditors and who prefers to be obligated to a single new creditor may borrow funds from a third person to pay his creditors and subrogate the third person to the rights of the former creditors.

In this regard, for subrogation to occur, the code requires both the instruments evidencing the loan and the receipt for payment obtained from the creditor to have an authenticated date. Apart from this, the loan instrument must also include an express statement as to the intended use of funds, and the receipt, as to the source of the funds. Absence of any one of these conditions will invalidate the subrogation.

This option is however, extremely restricted. It only concerns loans of money or other fungibles, when the loan is specifically granted to pay off a specific debt. This is confirmed by the conditions put by Article 1970 of the Civil Code. The date of the operations (loan and then payment) must be certain (authenticated dates), as well as the destination and origin of the money set out precisely both in the loan itself and in the receipt given by the creditor. The debtor may require that such origin is stated in the receipt granted by the creditor. Note that the English translation improperly says under 1970 sub.2 "receipt for the loan", where it should of course be "receipt for the payment".

Under the French law, Article 2160(2) requires three conditions for the subrogation granted by the debtor (1) an act of borrowing and a receipt from the original creditor executed before a notary and two witnesses; 2) a declaration in the act of borrowing that the funds were borrowed by the debtor to pay the creditor; and 3) an acknowledgement in the receipt from the creditor that the payment was made with the funds furnished by the new creditor.

Nonetheless, nothing prevents in a contractual subrogation to restrict the scope of such subrogation to part of the original debt. The difficulty here is to decide who will benefit from the sureties covering the entire original debt. Article 1972 of the Civil Code states the principle that such a part subrogation cannot be detrimental to the original creditor. In other words he has a priority to get paid the balance due, or even to resort to the sureties granted to get paid such balance. The third party subrogated only comes second if he has only paid for part of the original debt. This provision encourages him therefore to pay in full in order to benefit in full of all the sureties. It also leads to limit in practice the number of situations of part payment, which are indeed problem situations because of the co-existence of two creditors for the debtor.

B) Legal subrogation

In quite a number of cases, a person who pays another person's debt is accorded the benefit of subrogation by simple operation of the law, without the necessity of any agreement at all. In legal subrogation cases the law recognizes a special interest of the payer in the extinguishment of the other person's debt. Usually this is because, although the debt ultimately rests with another, the payer entitled to legal subrogation is directly affected by the extinction or non-extinction of the debt. This is the situation, for example, in .cases of co-debtors, guarantors, or persons enjoying interests in the same property.

Article 1971 provides three situations where there could be legal subrogation. These are payment by a person bound with another or on behalf of others, i.e., subrogation as co-debtor (1909(1), 2161 of the Civil Code) or guarantor (1944 of the Civil Code); payment by a person who is owner of a property or who enjoys the rights of lien, mortgage or pledge, i.e., Subrogation as holder of sureties (legacy of mortgaged assets 1045, legatee paying debt 1059, pledge 2831 and several Articles for mortgages: 3083, 3086, 3095, 3097, 3117 of the Civil Code); and other cases of subrogation provided by law.

According to Article 1971 (a) of the Civil Code, if a payer discharges the debt of a person with whom or on behalf of whom the payer is himself bound, the payer is entitled to subrogation as a matter of law to the extent of the amount paid. Thus, this provision operates in two cases: where a co debtor who is bound with another and where there is a guarantor who is bound on behalf of another, the principal debtor. In this regard, you have to remember Articles 1909 and 1944.

Accordingly, any co-debtor who has paid in excess of his share has a right to claim contribution from the other co debtor(s). To this effect, Article 1909 clearly provides that such payer is entitled to legal subrogation. Similarly, the creditor is required to make substitution possible. In such cases, what the payer is entitled to is not indemnity but contribution as the payer himself is a co debtor. It may also apply to cases where a co-debtor in an indivisible obligation discharges the total obligation.

In relation to extra contractual liability, Article 2161 of the Civil Code similarly provides for subrogation. The second case that is governed by Article 1971 (a) relates to payment made by a person who is bound on behalf of others. This principally relates to persons who guaranteed the obligations of the debtor are discharging the obligation of the principal debtor. Thus, the guarantor should be subrogated to the rights of the creditor to the extent of his payment to the latter.

Coming to the second situation, if a person who is owner of a certain property or enjoys a security interest i.e. right of lien, mortgage or pledge in certain property pays a creditor who enjoys a security interest in the same property, Article 1971 (b) accords such payer legal right of subrogation to the extent of the amount paid.

This provision relates to a payer who is owner of a property or one enjoying a security interest, in certain property paying a creditor who enjoys a security interest over the same property. Where a person has given his property as security for the performance by the debtor of his obligation, the creditor is said to enjoy real security.

In such cases, the person guaranteeing the performance is not a surety. Thus, where the creditor proceeds against the property given by way of security, the owner of such property can pay the creditor and be subrogated to the rights of the creditor by virtue of Article 1971 (b). Article 1971 (b) is also given more specific application by special provisions of the Civil Code, such as Articles 3083, 3095 and 3097.

Apart from the specified cases under Article 1971(a) and (b), the last sub Article of this Article opens the door open for persons to be entitled to subrogation where the law so provides. There are a number of instances where the various substantive laws provide for subrogation. Such instances are: subrogation in cases of insurance of property (Article 683 of the Commercial Code), subrogation in maritime cases (Article 323 and 304 of the Maritime Code), cases of succesorial subrogation (Article 1059, 1045), subrogation in cases of warehousing (Article 2821 of the Civil Code), subrogation to the bailor (Articles 2795 of the Civil Code).

In essence, legal subrogation does not differ from the conventional type as both are based upon payment of the debt or obligation to the creditor and their effect is the same. Accordingly, a legal subrogee as well as a conventional subrogee is subject to any defenses which were available to the debtor against the original creditor. For example, if prescription has run against the creditor-subrogor, the plea of prescription will be sustained in a suit by the legal or conventional subrogee.

Article 1251 of the French Civil Code enumerates four classes of persons who possess a sufficient interest to effect a legal subrogation: 1) Inferior creditors who pay a fret erred creditor; 2) acquirers of immovable property who pay the mortgage creditor; 3) persons who are bound with or for others and who pay the debt; and 4) the beneficiary heir who pays the debts of the succession.

5.2.3. Effect of subrogation and assignments

Articles 1973 and following of the Civil Code state the consequences common to assignments and subrogation. This provision makes no distinction between the effects of assignment for consideration and gratuitous or legal subrogation and conventional subrogation. The assignment or subrogation to a right entails the right to exercise the liens, securities and accessory rights attached to it, with an exception in respect of a pledge, which calls for the express consent of the pledger.

In such cases, the assignee or subrogee may not be allowed to take possession of the thing given in pledge without securing the consent of the pledger (see Article 1973(2)) of the Civil Code. The reason behind such prohibition is that the pledger gives the pledge to the creditor on the assumption that the latter will properly be given by way of pledge and believes that the creditor will keep the thing he received in pledge as he would keep that of his own. The original creditor has a duty to cooperate to ensure as much as possible that the assignee or subrogated creditor has the best chances of being paid by the debtor. This covers the transfer of contracts, title-deeds and any means of proof of the obligation, as well as of any relevant information.

Coming to the duties of the original creditor, the new creditor must be supplied with everything, by the original creditor that helps him acquire the right from the debtor. Accordingly, the assignor or subrogor who will be in possession of the document of title and other means of proof should hand over these documents and proofs to the new creditor.

However, in the event of a part payment, and to counterbalance the priority right set out under Article *1972,* sub.2 the original creditor shall supply certified copies of the evidence of the claim. But these documents, not being the original document, do not have its enforceability of course (see Article 1974 of the Civil Code).

One last point is that the provisions on assignment of rights are applicable only where there are no special provisions dealing with special cases of assignment as per Article 1975 of the Civil Code. Sub-Article one of this Article talks about special cases of assignment of rights, such is the case for instance for usufructuary rights (Article 2410 of the Civil Code); incorporeal rights (Article 2411 of the Civil Code); succession of rights (Article 1124 of the Civil Code) and administrative contracts (Article 3202 of the Civil Code). Sub-Article two of 1975 of the Civil Code reserves the case where the claim is embodied in a registered document or an instrument to order or bearer.

5.3 Delegation and Assignment of Obligations

Introduction

In addition to declaration of demand, promise for third party, stipulation for the benefit of third party, assignment of rights and subrogation, contracts produce effect on third parties in case of delegation of obligations and assignment of estate.

Unlike assignment of rights, what is delegated is obligation; and what are assigned are rights with its corresponding duties, but not only rights. Thus, in case of delegation, the debtor may delegate performance of his duties to a third person. On the other hand, rights arising out of a contract with its corresponding duties can be transferred to a third person by way of assignment of obligation, estate,.

In this unit, we will study Articles 1976 through 1982 of the Civil Code and Articles 1983 through 1985 of the Civil Code which deal with delegation and assignment obligations respectively.

Objectives

At the end of this section, you will be able to:

- Define delegation and assignment of obligations;
- Explain the validity requirements for delegation;
- Distinguish between perfect and imperfect delegation;
- Explain the effects of perfect and imperfect delegation;
- Discuss amalgamation of undertakings and formation of partnership; and
- Explain the effects of amalgamation and formation of partnership

5.3.1 Delegation of Obligations

A) Principle of delegation

Delegation is the act by which a person delegates the performance of his obligation to a third person. There are three persons in cases of delegation. These are: the delegator, the person whomakes the delegation; the delegatee, the creditor; and the delegate-debtor, the third party who is delegated and becomes a debtor. Article 1976 of the Civil Code states the principle governing delegations is that the debtor of a contractual obligation may substitute himself another debtor to perform the obligation. In case of delegation of obligation, in principle, unlike assignment of rights, the debtor has to ask the creditor to accept a third person as his debtor, who consents to bind himself to him. The change of debtor could be very detrimental to the creditor, this is why the latter's consent is required as a rule. But the Ethiopian law reserves cases where usage or the law itself allows such substitution of debtors without the consent of the creditor.

The interest of such an institution is first and foremost for the debtor to avoid performing the contract either because he does not wish to or simply cannot. The substituted debtor may accept the operation as a favor for the original debtor, or simply be paid to do so when for some reason the main debtor cannot perform. We are here often in the case where the substituted debtor is in fact a sub-contractor of the main debtor.

Most often the delegator is the creditor of the delegate debtor and delegation is a means whereby he frees himself from his obligations towards the delegatee. However, this is not always the case. The debtor assigns his own debtor to the creditor who is to perform his obligation in his place.

Generally, the economic importance of delegation is that it simplifies transactions and obtain, by means of a single act, the same result as if two payments will be made successively, one by the delegate debtor to the delegator the other by the delegator to the delegate.

However, for the delegation to be complete is the acceptance by the delegate-debtor. This is the fundamental requirement because the delegate assumes the position of substituted debtor, and may be compelled to perform the obligation. This is recalled in Article 1978 of the Civil Code. This provision stresses that such consent remains necessary even if the delegate is also the debtor of the debtor. He cannot be forced to perform a given obligation in respect of a creditor who was up to now alien to him, by the mere fact that he owes another obligation to the delegator.

This being said, Article 1979 sub.2 of the Civil Code states that the delegate may accept the liability or perform the delegated obligation, even after the death or incapacity of the delegator. Moreover, once the delegate debtor has consented to the delegation or made performance to the creditor, the delegation may not be revoked. (See Article 1979 of the Civil Code).

B) Types of delegation and their consequences

Delegation of obligations may be perfect delegation or imperfect delegation. This classification depends on the intention of the parties. The parties may agree that the old debt owed by the delegator towards the creditor will be extinguished and that the original debtor will be relieved from any obligation. For instance, a creditor who has been provided with sufficient securities by the delegate debtor may release the original debtor. This is a case of perfect delegation. In such cases the creditor has no right over the original debtor (debtor) after delegation.

On the contrary, they may have intended that the old debtor (delegator) will not be exonerated but rather the creditor will have a second debtor, delegator, in addition to the first one, delegate debtor. This is a case of imperfect delegation.

Article 1977 of the Civil Code seems to imply this distinction between perfect and imperfect delegation. This provision gives recognition for imperfect delegation. The presumption of the law is that of imperfect delegation where the creditor who has consented to delegation still retains his right against the original debtor.

In case of imperfect delegation, the relationship of the original debtor vis-a-vis the creditor is that of a simple guarantor and a creditor. The creditor retains his right against the original debtor but he may not demand satisfaction from the original debtor before demanding performance from the delegate debtor (see Article 1977(2) of the Civil Code). The creditor may not proceed against the original debtor prior to demanding performance from the delegate debtor. It is because of this fact that imperfect delegation is said to resemble suretyship.

The situation might be entirely different where delegation is perfect. In such cases, the creditor has consented to discharge the delegator. In this regard, Article 1981 talks about perfect delegation in case of insolvency of the delegate debtor. This provision approaches the situation from two aspects: firstly, the creditor is entitled to proceed against the original debtor who has been discharged, if the insolvency of the delegate debtor was judicially established at the time of delegation (Article 1981(2) of the Civil Code). This is because it is believed that there has been either error or fraud and that the liberation of the old debtor would not have been consented to had the insolvency of the new debtor been known by the creditor.

Secondly, if the insolvency of the delegate debtor occurred after the delegation, then the risk of insolvency is borne by the creditor. This is a normal risk assumed by every creditor.

However, Article 1981(1) of the Civil Code provides the possibility for the creditor to foresee such risk and avoid it by expressly reserving his recourse against his old debtor in case the new debtor is unable to make payment.

C) Rights of the delegate

Article 1980 of the Civil Code lays down the rights of the delegate. They are in fact relatively restricted. Not only must he perform, but he may not oppose the creditor the rights derived from his own relation with the delegator nor the defenses only by the delegator against the creditor. He is only entitled to oppose if necessary his own defenses, deriving from his personal relationship with the creditor. This expression should nevertheless be construed as granting the defenses open to all debtors such cases of absolute nullity.

Regarding defenses available for the delegate debtor, they could arise from one of the three relationships. These are the relationship between the original debtor and the creditor; between the original debtor and the delegate; and between the delegate and the creditor.

When we see the defenses arising from the relationship between the original debtor and the creditor, you may for instance think of a case where the delegator has a claim that can be set-off with that owed by the creditor. The question here is, can the delegate raise the defense of set-off towards the creditor? He can't set up such defense pursuant to Article 1980(1) of the Civil Code.

Defenses may also arise from the personal relationship of the delegate and the delegator. For instance, the delegate may have a claim against the delegator and raise set-off against him. But he may not raise such defense against the creditor as per Article 1980(1).

Finally, defenses may also arise from the relationship of the delegate and the creditor. For instance the delegate may have a valid defense of set-off against the creditor. Accordingly the delegate may set-off his debt with the one owed to him by the creditor. Article 1980(2) allows the delegate to raise defenses arising from his personal relationship with the creditor.

B) **Effect of delegation on third parties**

The final question related to delegation is: what is the effect of delegation on third parties who have secured the debtor upon their property or guarantors?

Third parties may be involved in the original contract as sureties (mortgagors, surety givers....). They may give a surety in respect of a precise contract, the one linking the original creditor to the original debtor, and cannot be presumed to have extended into benefit the delegated debtor. Article 1982 of the Civil Code therefore decides that they shall not be liable, unless they consented to the delegation. This is because, they have given a surety in respect of the first contract; the one linking the original creditor to the original debtor and cannot be presumed to have extended it to benefit the delegated debtor.

The difficulty here is what happens if for some reason the delegation does not work and the creditor returns to the original debtor for payment. If the sureties have consented to the delegation, they cannot be presumed to have accepted more than the simple substitution of debtor. It follows that if the creditor sues the original debtor after a delegation was consented to, he may not claim the sureties granted by third parties. This would amount to presuming they agreed to guarantee two debtors instead of one. The creditor will thus be prudent and see to it that this eventually is provided for in the instrument embodying the consent of the surety givers to the delegation.

5.3.2 Assignment of Obligation

Articles 1983 to 1985 of the Civil Code consider special forms of delegation, which all rest on the same idea of an amalgamation of estates which include both assets and liabilities, thus making the identification of individual debts, and by consequence, their precise delegation, very difficult.

In the case of the assignment of an estate or an undertaking the acquirer (buyer) will be liable to the creditors for all the liabilities from the day he notified them of the assignment or published the transaction in the newspapers (Article 1983 (1) of the Civil Code). Note the imprecision here about the identity of the newspaper; "Herald or Tribune?"

This calls for serious formalities to guarantee the effectiveness of such publicity measures. The assignee will be guaranteed by the joint liability of the assignor for a two year term from the publicity measures when debts are due, or from the date of maturity of the debtors in all other cases (Article 1983(2) and (3) of the Civil Code).

Articles 1984 and 1985 of the Civil Code address respectively the issue of merger (amalgamation) of companies and the transformation of an individual undertaking into a general or limited partnership. Where two or more undertakings having independent legal personality of their own merge by the mutual transfer of their assets and liabilities, the new undertaking formed will be held liable for the debts of each undertaking as per Article 1984 of the Civil Code.

The last instance where the assignment of obligations may occur is in cases where an individual undertaking or a sole proprietorship having no legal personality of its own is transformed into a general or limited partnership. After the transformation a new juridical person is born which undertakes the liabilities of the former individual undertaking as per Article 1985 of the Civil Code.

5.4 HEIRS AND CREDITORS OF THE PARTIES

Introduction

The last instance in which contract produces effect is upon heirs and creditors of the parties. The heirs of the contracting parties may be accorded the right to acquire rights and duties from a contract made by the deceased by the mere fact that they are heirs. This is clearly governed by Articles 1986 and 1987 of the Civil Code.

Similarly, creditors are accorded with certain rights so as to make them able to enforce their rights. These rights include preservatory measures and revocation, among others. Such rights are provided under Articles 1988 through 1999 of the Civil Code.

Objectives

At the end of the study of this unit, you will be able to:

- Explain the rights of heirs of the contracting parties;
- Discuss the rights given to creditors of the parties;
- Distinguish simulated contracts from real contract (counter deed);
- Explain the preservatory measure or oblique actions that may be taken by creditors; and
- Discuss the action of revocation or paulian action.

5.4.1 Heirs of the Parties

Heirs are the other category of third party who may benefit or be obliged by the contract made by the principal contracting parties. They continue the person of the deceased, provided, of course, they have accepted the succession. The continuity of rights or obligations by heirs is provided under Article 1986 of the Civil Code.

However, such continuity may be limited to two instances. These are where the nature of the contract doesn't provide room for substitution of the heirs; and where the parties agreed to restrict the continuity of rights and obligation by heirs. Thus, they will assume his contractual obligations, unless otherwise provided, or where the nature of the obligation prevents it (contracts *"intuitu personae")*

As you remember, in the principal contract there may be stipulation for the benefit of third party. It means in the contract, there is a third party beneficiary based on the contract made between the stipulator and promissor as per Articles 1957 and the following.

The question is: what would happen in cases of death of the third party beneficiary?

In the line with what was said above in respect of stipulations for third party beneficiaries (see Articles 1957 and following) the heirs of such a party are entitled to the performance of the obligation considered, if the deceased had already accepted the stipulation but dies before receiving the performance.

5.4.2. Creditors of the Parities

A) The principle: attachment of the debtor's assets

Creditors are a special category of third parties in respect of the contracts made by their debtor. This derives from the very important principle stated by Article 1988 that the entire assets of the debtor are open to be used as a security for the performance of his obligations. Whoever obligates himself personally is held to fulfill his engagement on all his property movable or immovable, present or future. There is the maxim which says *"the property of a debtor is the common pledge of his creditors*". This means that a creditor has a general right to attach and have sold any asset belonging to the debtor in order to get paid. This rule is dictated by the necessity of enforcing the observance of civil obligations, without which contracts would remain a dead letter and the economy would have no basis for exchanges. It is thus directly to be linked with the rule which sets out the binding force of contracts in Article 1731 of the Civil Code, to which the reader can refer for further reading.

Of course, this general right cannot be absolute, and it is framed within the rules governing attachment, as stated in the civil procedure code, and especially the rule stating that certain assets cannot be attached essentially the basic living commodities and tools of the debtor's trade. Accordingly, there are a number of things that are not seizable which the debtor can keep without paying his debt.

In most cases, the non-attachability is founded on the idea of humanity. The law declares that the objects necessary for the life of the debtor are not subject to attachment; to take them away would expose him to die of hunger, or at least reduces him to begging. Some of these non attachable properties are listed under Article 404 of the Civil Procedure Code.

B) Agreements entered into by the debtor

Let us raise one question here: Does the fact that a person is a debtor of another person preclude the former from entering into agreement regarding his patrimony?

The principle of contractual freedom cannot be affected by the fact that the debtor already has an outstanding debt. The mere fact that someone is a debtor of another does not totally preclude him from entering into agreements regarding his property. Therefore, the principle is stated in Article 1989 (1) of the Civil Code that any other agreement entered into by the debtor can be set up against this other creditors. Article 1989(2) of the Civil Code even goes to maintain his principle in respect of things upon which the creditors have acquired a right. For instance, the pledger may sell the pledge despite the fact that it is pledged (Article 2834 of the Civil Code). So the rights of the debtor over his own assets are far ranging, as they derive from his right of ownership.

But if the agreements are not legitimate, there still has to be a balance struck to maintain the rights of the creditor, hence the following exceptions to the principle incorporated under Article 1989.

The first exception is Article 1990 of the Civil Code which deals with preferred creditors. Preferred creditorship may arise from a contract. A debtor may give his movable or immovable property as security to his creditor. Preferred creditorship may also arise from the law. In such cases, there is no contract giving rise to such privilege. It is the law, for various policy reasons, that makes certain creditors preferred from others. For instance, any claim of payment of worker arising from employment relations by virtue of proclamation No. 377,2003 and payment of tax to the tax authority by virtue of Article 8 of pro. No 286,2002 makes workers and tax authority preferred creditors. Thus, in the above cases, the provision of Article 1989 will not apply. Article 1990 adds one item to the list, where the debtor is deprived by a court of his right to manage his properties. This frequently occurs in cases where a trader or a business organization is judicially declared bankrupt (Article 1023 of the Comm. Code)

The second important exception is that of simulation. Simulation is defined by Article 1994 of the Civil Code as the case where the debtor enters a simulated contract with a third party, i.e. a contract which was not intended to be carried out. The simulated act is the apparent act, whilst the reality of the situation is in a hidden act, called the counted deed or back letter. For instance, the debtor shows the contract of sale for a car at 10,000 birr, when the counter-deed was in fact for 100,000 birr. Or the debtor states apparently that he loans 25,000 birr, whereas in reality it is a gift. This is the second situation where Article 1989 is not applicable which is provided under Articles 1994 and 1991 of the Civil Code.

The creditor will have the burden of proving that the apparent act is only a simulation, a sham. This might be difficult for him, but if he manages to prove it and obtains a court decision to this end, then Article 1991 of the Civil Code is applicable. The counter deed, or hidden agreement is not declared invalid; it is in fact binding on the debtor and the other contracting party. But it cannot be opposed to the creditor, who, quite on the contrary, and according to his interests, may avail himself of the apparent act. The debtor will stand to suffer the difference to take up the examples stated above, the creditor will declare that the sale at 10, 000 birr cannot be opposed to him, and thus will prove that the assets of this debtor have in fact been increased by 100, 000 birr. But in the second example, he will claim that the asset given is in fact loaned and is entitled to attach it as it will be deemed still in the ownership of the debtor.

Every simulation presupposes the concurrence of two contradictory agreements, to which it is impossible to give a cumulative effect with regard to the same person. It is, therefore, necessary to choose between them, and to hold either to the apparent or the secret act by discarding one of the two. This depends on the relationship of parties *inter se* and that of the parties with third persons.

In case of relations of the parties *inter se,* considering the simulated contract, the intention of the parties is to give it no effect. This contract lacks the basic element of contract the *intentio* *obligandi.* The parties did not intend to be bound by the apparent act or the simulated contract. As per Article 1991(2) of the Civil Code, it is the counter-deed or secret contract which alone is given effect.

On the other hand, third parties confronted by an act affected with simulation can have opposing interests. Some know of the existence of the secret act and have an interest in proving it because the apparent situation created by the simulated contract is prejudicial to them. Others have dealt' with the parties on the basis of the apparent act, and accordingly they have an interest to set aside the counter deed agreement in order to maintain this apparent situation which is profitable to them. Thus, there are third parties against whom the secret agreement will not be effective and others against whom the apparent act is not admissible.

For those third parties against whom a secret agreement is not admissible, they should be able to rely on apparent acts as these are the only agreements known to them. That is why Article 1991(2) clearly states that counter deeds shall bind contracting parties only. Thus, in all cases where the production of counter deed would entail unfavorable result as to those good faith third persons, the apparent act alone is observed.

On the other hand, for those third persons against whom the apparent act is not effective, their right is put under Article 1994. In this case, who the third parties confronted with the apparent act which the parties have made, they have the right to show that the act is only a sham and to disclose the real agreement which the parties have kept secret. If he proves the existence of simulation, the simulated contract will have no effect against such third persons and only the secret act will be taken into consideration, giving effect to it.

C) Rights of the creditors of the parties

This being said, because of this general right, the creditor is interested in the use his debtor does of his contractual freedom. The risk is that either because of negligence or incapacity, the debtor loses a right which would increase his solvency, or that he diminishes his estate by concluding other contracts, eventually with the intention of defrauding his creditor, or finally that he becomes bankrupt.

i) Preservation measures

As the possessor of a potential right, the creditor, who yet has to be paid has an interest in seeing that the debtor does not lose an endangered right. Article 1992 of the Civil Code entitles him to act in their common interest by petitioning a preservation measure to secure his debtor's right. This provision entitles the creditor to take any preservatory measures aimed at preserving the patrimony of the debtor from being extinguished. But he could act of his own accord if this is the only way of preventing an imminent loss. The scope is endless. The creditor only has to show he has an outstanding right vis-a vis the debtor, to be allowed by the judge to take any preservation measure, at the debtor's final cost of course, or to obtain the refund of his expenses if he acted of his own initiative.

ii) Exercise of debtor's right or oblique action

One clear instance where the creditor may be entitled to take preservatory measures is through an action called an oblique action or otherwise called exercise of the debtor's rights. One stage further is where the creditor seeks to avoid the impoverishment of his debtor, there again because such impoverishment diminishes the scope of the security offered to the creditor. The origin of the impoverishment is indifferent, provided the risk is there; it may be that the debtor is unaware of the risk, incompetent, absent or simply negligent.

The oblique action is the necessary consequence of the principle incorporated under Article 1988(1) of the Civil Code, "the debtor's property is the common pledge of his creditors." This general right of the creditor would be exposed to too many causes of loss or diminutions if the debtor could without any consequence let his patrimony perish. By lack of care or by negligence he would bring about his insolvency, or at least would accept a creeping impoverishment, which at the end would affect his creditors. The law thus affords creditors a means of preserving the debtor's patrimony, a kind of supervision. The action is based upon the psychological observation that a debtor on the verge of insolvency often becomes discouraged and fails to manage him patrimony with the customary prudence. The oblique action's chief purpose is to prevent the debtor from negligently allowing his valuable rights to extinguish. In cases of oblique actions, creditors do not act in their own name, directly, against the debtors of their debtor.

The conditions of the action are nevertheless relatively strict to avoid any creditor intervening into his debtor's personal affairs on the flimsiest pretext. The creditor must first refer to the court and may not act of his own accord, contrary to simple preservation measures. The second condition is that the risk of impoverishment of the debtor is real and here again the burden of proof is on the creditor. Furthermore, he must prove that the impoverishment is such that it jeopardizes the payment of the debt: a proportion will therefore have to be demonstrated between the alleged impoverishment and the outstanding debt. These requirements show that this provision has little chance of being implemented unless the court devises speedy systems to answer such urgent requests.

For a creditor to take this action, he must fulfill certain conditions, which are set out by the law. These conditions are: 1) interest of the creditor: the oblique action is accorded to creditors only when the debtor is insolvent and neglects to act himself. This condition which is laid down under Article 1993(1) of the Civil Code provides that the oblique action is allowed to prevent impoverishment of the debtor which otherwise jeopardizes the creditor's right to payment. 2) In action of the debtor- it is also necessary that the debtor neglects to act himself. 3) The creditor must secure court authorization to take the oblique action. Thus, the court shall not grant application (Article 1993(3) of the Civil Code) where the rights are not endangered by the debtor's inaction, nor if insolvency is not in view ("is not to be feared" in the French text). The condition seriously restricts the scope of Article 1993, because by the time insolvency is proved to be near, the chances are the debtor will be bankrupt before the court decides to grant the creditor the permission he seeks. Speedy judicial decisions are here again essential.

Article 1993 of the Civil Code sets out negative conditions. The court shall refuse the creditor's applications where the right he intends to exercise is too personal to the debtor, by law or by nature. To put it differently, all actions are not equally susceptible of being exercised by the creditor. Thus, there are exceptions provided by law. Actions denied to creditors include extra-patrimonial actions and certain actions included in the patrimony of the debtor. As a consequence, all extra-patrimonial actions, that is, those that safeguard personal status, are not subject to seizure by creditors. Such actions are excluded by their very nature, as the actions included in the oblique action are intended to apply only to actions having pecuniary object. Among the extra-patrimonial actions you may consider, for instance, the actions in reclamation or in contestation of filiations, demand for divorce and separation, marrying a rich woman, accepting of donation with charges etc. This situation is clearly provided under Article 1993(2) of the Civil Code.

The second exception may relate to certain patrimonial actions. There are certain actions which, although patrimonial in nature because of their pecuniary object, are nevertheless beyond the reach of creditors and remain reserved to the debtor. For instance, you may consider Art 404 of the Civil Procedure Code, which was mentioned in relation to Article 1988 of the Civil Code. Those mentioned under Art. 404 of the Code of Procedure are not subject to attachment. Although such property is included in the patrimony of the debtor, it is not subject to the pledge of creditors. The latter, therefore, have no interest in exercising any action over such rights.

Question: Should the debtor be made a party to the proceeding?

It is possible for the creditor to exercise the action of his debtor alone, and without the latter figuring in the case. But it seems more advisable to make the debtor a party.

The issue that may also be raised in connection with this is whether or not the judgment rendered by the court will have the effect of *res judicata,* regarding the debtor, the real owner of the right. There is no doubt that it will have a *res judicata* effect where the debtor has been made a party. When such precautions have not been taken, i.e. where the debtor has not been made a party to the proceeding, it would be difficult to know what answer to give. Some jurists think that the judgment is never *res judicata* as regards the debtor because his creditor is not his representative and he is only taking preservatory measure, not judgement. Others argue that the judgment can always be used for or against the debtor. Still others make a distinction according to whether the judgment was or was not favorable to the creditor. It seems that the first position seems to be sound.

The question is: Can the creditor sue for the whole claim of his debtor even where his claim is smaller?

Certain jurists believe that the creditor is not pursuing his own action. The amount of his credit is a matter of indifference. It is the right of the debtor, which he is exercising, right which is indivisible in the relations of the third party with the debtor. The creditor has, therefore, the right to demand a judgment for the total amount, regardless of the amount of his own credit.

Question: Who benefits from the effects of the action? When the creditor wins his suit against the third party, who profits from the judgment obtained?

You should note that the object of the judgment is property which forms part of the patrimony of the debtor and does not at all belong to the creditor pursuing the action. Whatever the subject matter of the suit which has been recovered, they form part of the estate of the debtor.

Thus, it necessarily follows that the value obtained by a diligent creditor is not attributed to him to the exclusion of others; it falls into the common pledge of all his creditors. The pursuing creditor is, therefore, required to share the profits with the others. He is subject to their rights to share according to their share and even is subordinated to them if they are privileged, unless he himself has a right of preference.

As to the types of creditors that are entitled to take the oblique action, the oblique action is available to any creditor, without distinction between secured or unsecured, privileged or unprivileged. The very fact that a person is a creditor, entitles him to such action, subject, of course, to the conditions laid down by the law.

Finally, you must note that the Civil Code provisions regarding oblique actions will not be operative in cases where there are special provisions in relation to specific matters (Article 2000 of the Civil Code).

iii) The Paulian or Revocatory Action

There is something worse for creditors than the negligence of the debtor and that is his bad faith. A debtor burdened with debts, who is threatened with suits, is naturally tempted to conceal his assets from his creditors. For that purpose, he can have an understanding with a third party who will be reputed as having acquired his property by purchase or donation, and who will secretly recognize that he is not the real owner; he can liquidate his visible property, which could easily be seized and replace it by cash or other securities easy to conceal, he can even from ill intent and without profit to himself agree to transactions which enrich his relatives and friends and impoverish him.

In this regard, where it is possible to discover the act which is fraudulent, Article 1995 of the Civil Code opens the right to what is called *"actio pauliana"* by the name of the Roman jurist Paul, who created it, or "revocatory action." The Paulian or revocatory action is an action given to creditors to obtain the revocation of acts done by their debtor in fraud of their rights. The creditor will have to prove the fraud to his rights and thus obtain the annulment of the disputed agreement.

An act is deemed to a fraud, in the meaning of Article 1996 of the Civil Code, when it was intentionally made by the debtor so as to become insolvent, or with the intention of becoming insolvent. This often happens where the debtor tries to "save" certain assets with the complicity of a third party, who pretends in fact to buy them when his intention is only to keep the asset out of the creditor's reach to return it to the debtor or to let the debtor continue enjoying it. For instance, the debtor sells his car to a friend for a very low price, and the friend, legally the owner, then lets him use it "free of charge" pretending it is a friendly loan.

Note here that the action is brought by the defrauded creditor in his own name and not as a representative of his debtor as in Article 1993. If he commits a fraud, if he tries to make his assets disappear in order to avoid paying his debts, his conduct gives birth to a new action in favor of his creditors, distinct from the first, for the fraud is a civil act and as such produces an obligation to repair the damage caused. The creditor thus sinned with a special action ceases to suffer the effect of the fraudulent act. This is because he is the direct victim of the fraud. Its object is to place the creditors in the same situation in which they were before the fraudulent act. Accordingly, the Paulian action may be used to reconstitute an impoverished patrimony but not to enrich it.

Question: What is the creditor required to prove to the satisfaction of the court to succeed in his revocatory action against the debtor's act?

The creditor is required to show two conditions which are to exist cumulatively. These are: 1) the act must have caused a prejudice to the creditor. A prejudice to creditors is said to have been caused where the act augments a pre-existing insolvency and the act be related to property that is subject to attachment by the creditors and that it forms part of their common pledge. 2) The prejudice must have been known by the debtor because fraud strictly speaking consists in the intention to harm. Similarly, Article 1996(1) provides that an act is deemed to have been done in fraud of the rights of the creditors where it was done by the debtor so as to become insolvent or with the knowledge that he was thereby increasing his insolvency.

Apart from the above requirements, the creditor who attacks an act of his debtor should prove that his credit arose prior to the act attacked. If the credit arose after the fraudulent act, the creditor cannot complain of such act. The creditor could not have counted on property which has already left the patrimony of the debtor.

Regarding the effects of the revocatory action, the prime object of the revocatory action is to make reparation to the creditors for the damage they have suffered by the fraud committed against them by the debtor. When the conditions are satisfied, the fraudulent act is only annulled in the interest of the defrauded creditor and remains effective with all its consequences with regard to all other person.

Accordingly, you must note that the thing restored does not re-enter the patrimony of the debtor, nor does it become the common pledge of all his creditors; it can only be distributed to the creditor(s) who pursued the action. This seems the underlying difference between revocatory and oblique actions. In the case of oblique action, the creditor exercises a right belonging to the debtor with the effect of return of the property claimed into the common pledge of the creditors. On the other hand, revocatory action is pursued by the creditor as a personal action belonging to him and the result, therefore, can profit only those who took the action.

The revocation is to be pronounced only to the extent of the damage suffered by the creditor who took the action. As a consequence, if the damage is less than the value of the thing reclaimed, the third party has a right to keep it on satisfying the claim of the creditor. The fraudulent act, according to Article 1991, does not lose its effect in the relations of the third party with the debtor and regarding other creditors of the debtor.

On top of this, the action has to be brought within two years form the act challenged (Article 1998 of the Civil Code). Its effect is that the act declared fraudulent cannot be opposed to the creditor. Article 1998 set a two year period within which the creditor is to begin a revocatory action. Such period is to be calculated from the date of the formation of the fraudulent act which is challenged.

However, two limitations are set out concerning alleged fraudulent acts. The first one is payment of mature debts, which are in fact rarely fraudulent, may not be challenged by the creditor (Article 1996(2)). Second, third parties may resists the action of the creditor on the basis of fraud, if they prove the double condition of their own good faith and the fact that the act itself of the act through which the third party acquired his rights, were done for a consideration (Article 1997).

When the third party has transacted with the debtor under an onerous title, i.e. by way of purchase or an exchange, etc, the creditor cannot succeed against him unless he establishes the bad faith of such third party. If, on the other hand, the third party transacted with the debtor on a gratuitous basis, the creditor obtains the revocation of the act without the necessity of proving that the third person was conscious of the fraud. This rule is incorporated under Article 1997.

Article 2000 refers the creditor to the rules governing bankruptcies, when the debtor is declared bankrupt, and where the creditor wishes to exercise the debtor's rights or the *"actio pauliana"*. This provision limits the scope of application of Articles 1995 through 1999 by providing that these provisions are not to be applied in cases of bankruptcy. This is because there are special provisions in relation to actions that may be taken against fraudulent acts of a bankrupt debtor.

Review Questions

1. Comment on the following quotations within the Ethiopian context.
   - i. "The property of a debtor is the common pledge of his creditors".
   - ii. "Delegation of performance of an obligation resembles simple suretyship" "
   - iii. "Any juridical act the debtor commits or omits over his assets may be set up as a defense against his creditors."

2. Abeba and Tesema concluded a contract of sale in 1988 in Addis Ababa. In this contract, Abebe agreed to sell his house to Tesema for Birr 85,000. For reasons not mentioned in the contract, Abebe and Tesema have also concluded another contract relating to the same house in 1989. In the second contract, the parties mentioned that the house is leased by Tesema for a period of ten years. Tesema has been living in the house since 1988.

In 1999, Abebe wrote a letter to Tesema asking him to leave the house at the end of 1999 or renew his contract for another 10 years, if he so wishes.

Tesema was very much surprised by Abebe's request because he always thought that the second contract was only a cover for the first contract, which, both parties believed, was not permitted by law at the time of its conclusion.

1. What are the legal arguments that can be raised by each side?
2. What would be your decision, if the case is brought before you?
3. Discuss the difference between perfect and imperfect delegation and their application under the Ethiopian law.
4. Briefly explain the difference between Paulian action and oblique action.

Chapter Six
Proof of contracts

Introduction

Conflicts in members of a community are unavoidable natural phenomena starting from ancient societies in the world and have grown swiftly with the development of transactions. That is why there is law in place to regulate how disputes should be settled, empowering people to decide on matters which are subject of dispute. The difficulty faced judges, arbitrators, mediators, or others in a position of trying dispute resolution is whether what a party claiming against the other is true or not. Truth finding is not an easy task unless regulated properly. The whole function of law of evidence is then to serve this broad purpose of need of proof required for justice and sustainable resolution of conflict.

Contract is an instrument by which people engage in a huge and complex business transaction where the question of raising of rights and claims are frequent. Disputes in a contract arise if either of the parties diverse from the term of the agreement, if the contract demonstrated any defect in its formation or object, or the contract becomes impossible to be performed, etc.

For whatever reason, if a dispute arises in a contract in which one of the contractants claimed certain right the other party denied, the requirement of production of evidence is inevitable reality.

Of course, proof is not a subject matter to be discussed under law of contract. Rather, for obvious reasons, it is the pure concern of the law of evidence. However, since Ethiopia has no codified material on law of evidence, the rules are found scattered in various substantive and procedural laws. Each area of law has incorporated rules of evidence regulating how disputes may be raised under that specific area could be proved. For instance, family law has included rules evidence on how assertions on family matters would be attested. The same holds true in other areas of law. Likewise, the civil code on law of general contract has provided a separate chapter on how allegations in contract would be established.

Having this reality in mind, the developers of this material have discussed burden of proof and admissibility of evidence in one topic, written evidence, and presumption of payments in subsequent topics respectively.

Objectives

After dealing with this chapter, students are expected to able to:

- Understand burden of proof and admissibility of evidence
- explain the status of written evidence and best evidence rule
- Distinguish between presumption of payments and period of limitation

6.1 Burden of proof and admissibility of evidence

Burden of proof (Latin *onus probandi*) is the obligation to prove allegations which are presented in a legal action The Latin maxim *necessitas probandi incumbit ei qui agit* explains the rule that "the necessity of proof lies with he who complains." For example, a person has to prove that someone is guilty or not guilty (in a criminal case) or liable or not liable (in a civil case) depending on the allegations. More colloquially, burden of proof refers to an obligation in a particular context to defend a position against a prima facie other position. **(Wikipedia, the free encyclopedia)**

In civil cases such as in contracts the basic rule is that the burden of proof lies with the party that is seeking to assert the existence of the fact. So, for example, if a party is trying to assert that there was a contract in existence and not performed according to the terms of the agreement, then that party will ordinarily have to prove that there was indeed a contract and not performed as of the agreement. If the other party is denying that there was contract it will not be for him to prove that there wasn't one, unless they are trying to assert the existence of other facts.

An example of this would be if Mr.A seeks to rely on the fact that there was a contract for the sale of 1,000 quintals of cement against Muger Cement Factory to be due on March 21st 2008, but Muger Cement Factory denies this. In this case, it is Mr. A who has to establish the existence of the said contract of sale; otherwise, he will lose the case. For the Factory denial is enough except to defend itself against evidence of Mr. A when established.

The burden of proof also applies to negative assertions, for example, if a lessor tries to assert that the tenant (lessee) was not taking care to repair the premises, as stipulated in the lease, then he will bear the burden of proof. It will not be for the tenant to prove that he had been repairing the premises. In both cases, be it positive or negative assertion, the above illustrations show that burden normally lies upon the claimant who alleges some contention others. In most cases he will be a plaintiff. The Ethiopian civil code in this regard under Art.2001 states that:

Art. 2001. Burden of proof.

(1) He who demands performance of an obligation shall prove its existence.

(2) He who alleges that an obligation is void, has been varied or is extinguished shall prove the facts causing such nullity, variation or extinction.

Having in mind as discussed above that he who asserts must prove, however, if the defendant admits the allegation of the plaintiff but raised counter-claim stating that the contract is defective, extinguished, or existence of force majuer as an excuse, the burden of proof as to the existence of facts raised as defense shifts to the defendant. This is what Sub-Article 2 of Art. 2001 affirms.

After having discussed as to who shall prove facts in dispute, the logical issue to come next is as to what type of evidence should be produced. In deciding as to what type of evidence to be produced, the guiding principle resides in the relevancy and admissibility of facts. These two principles are limbs of law of evidence governing what types of facts to be adduced to prove alleged facts. Since the function of evidence is to enable the court know what is really true, facts expected to demonstrate this reality should have direct or indirect connection to the point of dispute. On this point, Art. 263 of the civil procedure code provided as quoted here, *"questions put in examination-in-chief shall only relate to facts relevant to the issue to be decided and only* *to such facts of which the witness has direct or indirect knowledge".* Art. 137 of the criminal procedure code supports the significance of relevancy in criminal cases using the same words.

Eventhough relevancy is the prerequisite for facts to be admitted as evidence, it is not the ultimate license. Rather, there are situations which may render relevant facts inadmissible for policy reasons. Hence, unless facts are excluded by law in this manner, relevant facts are admissible. So, evidences screened by the above discussed rules would be admissible be it written, oral, , presumptions, or admission of the party according to rules and prescribed forms(Art. 2002). However, Art. 2003 is an exception to the inclusive rule and provides:

Art. 2003. Contracts to be in writing.
Where the law requires written form for the completion of a contract, such contract may not be proved by witnesses or presumptions unless it is established that the document evidencing the contract has been destroyed, stolen or lost,

This provision provides when a written form is validity requirement for the completion of a contract, the only type of evidence admissible is such document of contract. Although formation of contract in principle doesn't require any special form, sometimes the law prescribes a special form, in most cases written form, for policy reasons(refer to Arts. 1719 - 1725 of the civil code, not exhaustive,). In these and similar circumstances proof by testimony or presumption is not admissible. However, if the document forming the contract is lost, stolen, or destroyed, the claimant may establish the content of the document by witnesses after he has proved that there was a document as required by law and such document is lost, stolen, or destroyed. The phrase " *unless it is '**established**' that the document evidencing the contract has been destroyed, stolen or lost,"* emphasizes the fact that the destruction, loss, or stealing of the document evidencing some fact has to be proved before calling witnesses to testify the alleged content of the destroyed, stolen, or lost document. A person having complied with this requirement can prove his case by testimonial evidence as exception eventhough the rule requires the production of the document constituting the contract.

Marcel Planiol in rule1123 of Trait Elementaire de Dorit Civil which is translated by Louisiana state law institute provided similar idea as quoted below:

The person who wishes to be benefited from this exception should first prove three things:

1. *That he provided himself with a writing in conformity with the law;*
2. *That such proof is destroyed;*
3. *That the loss was due to an accident. After which he will be permitted to adduce testimonial proof of the contract or of the act on which his credit is based.*

The assertion given under point- 3 as quoted above states that in addition to establishing the loss or destruction of the document, the person who avail himself of alternative proof should also establish that the loss or destruction of the document is due to force majeure or accident. He should be able to show that his fault doesn't contribute for such loss or damage. The rational here seems not to benefit people from proceedings of their bad faith; instead, it is aimed at promoting justice by allowing those who would be deprived of their inevitable rights contained in lost or destroyed documents for reasons out of the control of who would benefit by the document.

Marcel Planiol in rule 1122 of the material mentioned above stated in similar words:

It is assumed as the law expressly states that the loss of the title results from an accident or force majeure. It is so provided in paragraph 4 Art. 1348. It was absolutely necessary to admit testimonial proof here, because the party is under impossibility, although posterior to the act, which has the same effect as the contemporaneous impossibility which prevents him from procuring a writing. he has procured it but is deprived of it without his fault.

This idea serves the same rational as discussed above on the admissibility of alternative proof in relation to contracts required by law to be made in a written form.

Discuss: What do you think the position of the Ethiopian law is on requirement of good faith to claim alternative proof in a situation where a contract is required by law to be formed in writing and the document of the contract is lost or destroyed?

6.2 Written (documentary) Evidence and its probative value

Written evidence is any proof, which may be adduced in the form of document. Document is defined in the draft evidence rules as any matter expressed or described upon any substance by means of letters figures, marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter. Written evidence is normally used interchangeably with documentary evidence. Documentary evidence is then defined by the draft evidence rules as all documents and their product for the inspection of the court.

Documentary evidence is a type of written proof that is offered at a trial to establish the existence or non-existence of a fact that is in dispute. Letters, contract, deeds, licenses, certificates, ticket, or other writings are documentary evidence. Documentary evidence as the definition indicates is any inscription found in any material for which the content is submitted as proof. Having this general meaning of written or documentary evidence in mind, for the purpose of this course we will confine ourselves to only contractual documents made in a written form.

A contract may be required by law to be in written form such as provided in Arts.1719 – 1725 and others or on free will of the contracting parties. For any of such reasons if once a contract is made in written form, what will the status of a contractual document be in proving the existence and content of the document?
The civil code provisions from Articles 2005 – 2019 provide governing rules on written (documentary) evidence.

6.2.1 Authentication of Documentary Evidence

Documentary evidence is subject to specific forms of authentication for its reliability, usually through the testimony of an eyewitness to the execution of the document, or to the testimony of the witness able to identify the hand writing of the purported author.. There are various methods of authentication both in our substantive and procedural laws and the draft evidence rules. Authentication is a mechanism of ascertaining authorship of the document (who the author of a document is?) and genuineness of the document sought to be introduced. Unless a document is authenticated it may not be admitted as proof.

6.2.1.1 Modes of authentication

- Admission authorship by the writer: the writer himself may admit or concede that he is the author of a certain document and if this admission is a formal admission it will serve as a conclusive proof to the issue of who the author of the document is? Consult Articles 2007 and 2008 of the civil code on the proof in relation to contracts.

A) Proof of signature or handwriting

58. If a document is alleged to be signed or to have been written or in part by any person, the signature wholly or the handwriting of so much of the document as is alleged to be in the person's handwriting must be proved to be in his handwriting.

- Production of a person or persons who witnessed the writing or signature: persons who have observed or witnessed a certain document being written by someone may be called to ascertain the author of a specific document.
- Attesting witnesses: certain documents are required by law (for example Article 1727 (2)of the civil code) to be attested by witnesses whose signature will be included in the document and document of these attesting witnesses, whenever the authorship of an attested documents is questioned, is sufficient to prove that the author of the document is questioned, is sufficient to prove that the author of the attested document is the one who signed on the document attested by witnesses.

C) Presumption as to documents not produced

Legal presumption is a consideration taken by law for convenience. Here it is one way of authentication in condition provided under rule 74 of the draft evidence rule (DER), as stated below.

74. The court shall presume that every document called for and not produced after notice to produce was attested, stamped, and executed in the manner required by law.

D) **Comparison of signature, writing with others admitted or proved**

One way of authentication is to compare the writings of the contested document with other writing proved to be authored by the same person. The court will compare two writings of the same person and may reach the conclusion that the author of this specific document is the person whose writing is submitted to investigation. DER provided this under rule 59 as follows;

59. 1. in order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made any signature, writing or seal admitted or proved to the satisfaction of the court to have been writing, or made by that person may be compared with the one which is to be proved although that signature, writing, or seal has not been produced or for any other purpose.

2. *The court may direct any person in court, except a person accused of an offence, to write any word or figures for so written with any words or figures alleged to have been written by such person.*
(3) This rule applies to any necessary modifications to finger impressions.

E) **Lay witness authentication**

There may be some persons who are well acquainted with the writings of the person who is submitted for investigation. Hence, calling these persons to verify whose writing is a specific document is another mechanism of ascertaining authorship. These witnesses do not apply modern ways of examining and ascertaining writing in laboratories or somewhere else but by a comparison between retained mental image of the supposed writer's writing and the writing in dispute.

F) **Opinions of experts**

Authentication by expert witnesses refers to proof of authorship depending on the opinion of a person who has specialty on identifying the writing of persons. These persons are called expert witnesses for they form conclusions based on inferences. DER states this here under in rule 42.

42. (1) when the court has to form an option upon a point of foreign law or of science or art or as to identity of handwriting or finger impressions, the options that point of persons (hereafter called “experts”) specially skilled in such foreign law, science or art or in question as to identity of handwriting or finger impressions are relevant facts.

(2) Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

G) **Ancient document rule**:

A document, which survived long enough, for example 30 years according to the Indian evidence Act, and kept in proper custody will qualify as ancient document and then no need for proof of authorship. The draft evidence rules don’t contain document rule and neither do our substantive and procedural codes.

6.2.2. Best evidence rule

Authentication alone is not sufficient for the admission of documentary evidence as proof but must also be qualified by the best evidence rule, which states the contents of a document can only be proved by adducing the original document itself.

A) Justification for best evidence rule

Providing a literature into the roots and connected matters of the best evidence rule serves a better understanding and below is provided a selected excerpt from Wikepedia on best evidence rule.

The best evidence rule is the common law rule of evidence which can be traced back at least to the 18^{th} century. The general rule is that secondary evidence, such as a copy or facsimile, will not be admissible if an original document is available.

The rationale for the best evidence rule can be understood from the context in which it arose: in the eighteenth century a copy was usually made by hand by a clerk (or even a litigant). The best evidence rule was predicated on the assumption that, if the original is not produced, there is a significant chance of error or fraud in relying on such a copy.

In the age of digital facsimiles, etc. the rule is more difficult to justify. The likelihood of actual error (as opposed to mere illegibility) through copying is slight. The balance of convenience favours avoiding needless effort and delays where there is no dispute about the fairness and adequacy of a digital facsimile. Further, it is by no means clear what the 'original' of an electronic communication such as an e-mail actually is: as many as eight electronic 'copies' of a message might come into existence from creation to receipt.

The best evidence rule is also thought to be the basis for the rule precluding the admissibility of hearsay evidence, although the two rules are now quite distinct.

In the United States, the rule has been codified in the Federal Rules of Evidence as rule1002:
To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of congress.

The rule requires that when writings are introduced as evidence in a trial, the original writing must be produced as the “best evidence”. In federal practice, however, any exact copies of the original carry the same legal weight as the original unless their authenticity is in question.

The term “writing” has been liberally interpreted to include photographs, x-rays, and films. Note that for photographs and films, this could be construed to mean negatives, not prints, as they are the true ‘original’. The rule applies in two situations:

a) Where the terms of the writing are legally dispositive in the issue at bar (not collateral documents or issues).
b) Where the witness’s sole knowledge of a fact comes from having read it in the document. There is an exception. If the original document is unavailable for reasons other than serious misconduct of the proponent, secondary sources of evidence (such as oral testimony) can be used in place of the original.

Currently, both California law and the federal rules allow the use of mechanically produced duplicates unless a party has raised a genuine question about the accuracy of the copy or can show that its use would be unfair.

What do you think is the situation in our legal system?

Rule 53 of the draft evidence rules statses that the contents of a document may be proved either by primary evidence (this is the best evidence) or by way of exception that secondary evidence may be used to prove the content of a document.

B) Primary (Best) evidence

Primary evidence is defined in rule 54 of the draft evidence rules as the document itself (the original) produced for the inspection of the court. As clearly provided in rule 53(2) of DER documentary contents must be proved by primary evidence except in the cases mentioned in rule 56 as stated below. Nothing in the rules hereinafter contained shall affect the provisions of any law regarding proof of the existence and contents of particular documents, such as the provisions of the civil code regarding proof of wills and contract.

C) Secondary evidence

The contents of documents may be proved by secondary evidence where primary evidence could not be found. Secondary evidence is the second best alternative for proving the contents of a document and is defined under rule 55 of the draft evidence rules. Rule 55 of the draft evidence rules defines secondary evidence in the following manner

55. Secondary evidence means and includes:

1. *Copies given under the provisions hereinafter contained;*
2. *Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies Compared with such copies;*
3. *Copies made from or compared with the original;*
4. *Counterparts of documents as against the parties who did not execute them;*
5. *Oral accounts of the contents of a document given by some person who has himself seen it.*

Secondary proof as means of proof of contents of a document is employed in limited circumstances as outlined in rule 56 of the draft evidence rules. The circumstances are described in rule 56 of the DER in the following manner for which a lengthy explanation is a waste of time.

56.

(1) secondary evidence may be given of the existence, condition, or contents of document when:

(a) The original is shown or appears to be in possession or power of the person against whom the document ought to be proved or of any person out of reach or not subject to the process of the court or of any person legally bound to produce it and when after the notice mentioned in rule 57, such person does not produce it;

(b) The existence condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by representative in interest;

(c) The original has been destroyed, lost, or when the party offering evidence or its contents cannot for any other reason produce it in reasonable time;

(d) The original is of such a nature as not to be easily movable;

(e) The original is a public document within the meaning of rule 60;

(f) The original is a public document of which a certified copy is permitted by these rules or by law in force to be given in evidence;

(g) The original consists of numerous accounts or other documents which cannot conveniently be examined in court and the fact to be proved is the general result of the whole collection.

(2) In the cases mentioned in paragraph (a), (c) and (d) of sub-rule (1), any secondary evidence the contents of the document is admissible.

(3) In the case mentioned in paragraph (b) of sub-rule of (1) the written admission is admissible.

(4) In the case mentioned in paragraph (e) and (f) of sub-rule (1) a certified copy of document, but no other kind of secondary evidence is admissible.

5. In the case mentioned in paragraph (g) of sub-rule (1) evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in examination of such documents.

The civil code, especially in relation to proof of contracts, provides how the contents of a document shall be proved in as almost similar fashion as the draft evidence rules and does no harm in failing to discuss the provisions in the civil code.

6.3 Presumption of payment

Presumption is one mechanism by which we can resolve a dispute, employing it as a means of proof when provided by law. The party in whose favor the presumption is taken need not produce evidence in support of his allegation. The burden of proof transfers to the one who contests what has been taken as presumption.

Presumption of payment is among various types of presumptions, which the civil code of Ethiopia recognize as a means of proof of contracts. The Civil Code of Ethiopia has provided various rules from Art.2020 – 2226 on this concept. The code has given four instances in which presumption of payment should be taken.

A) Handing over of evidencing documents

When the creditor hands over to the debtor documents of title evidencing the existence of the debt (Art.2020 of the C.C) presumption of payment takes place. Here, if the creditor has some rights to be claimed against the debtor, he has to keep all evidences (documents) supporting the claim carefully. If the creditor has given the documents of the contract representing his/her claim to the debtor, with proof of this fact, the law presumes that the claim is settled.

Q1. But do you think this presumption works if the handed over document to the debtor is a copy (not original)?

Q2. What if the debtor has got the document by unlawful means?

Q3. Does this presumption work, if the contract (claim) may be proved other than by producing documents?

B) Creditor's entries (2021 C.C)

The civil code provides that entries in the contractual documents by the creditor, which tends to release the debtor from his/her obligation presumes payment. The entries may be in the margins, at the end, or back of the document. Again it doesn't matter even if the entries are neither dated nor sighed if it is proved that the documents were under the control of the creditor all time. However, if the creditor can prove that the document of contract has been accessed by the debtor or other people who may act against his favor, the presumption of payment could not be taken.

Q1. What does it mean when the law says that the document of title should remain all times in the possession of the creditor? Can the creditor raise as defense access of the document by close relatives or friends for whom he willfully given?

Q2. Is such presumption taken if the said entries have been made in copies (not in originals)?

C) Prior or Concomitant Debts (2022)

In the situation where the creditor required to give receipt to the debtor for periodical payment, he/s is required to give such receipt for the payment of each period. However, if the creditor has given receipt for the given amount without any contrary reservation on unpaid debts, the law presumes that the periodical dues prior to the date of issuance of receipt are paid. In the same manner, if creditor has given receipt for payment of the principal without reservation, it is presumed that the interest is also paid.

D) Period of time related presumptions

In relation to time limitation, the conditions in which the debtor could make use of presumption due to lapse of period of time are clearly given by law. Under Arts.2023 and 2024 there are specific lists of passage of six months and two years respectively amounting to presumption of payment. Here students are required to make cross-reference the above-mentioned provisions of the civil code to identify which debts are the subject of the presumption of payment after the lapse of six months and which are after two years. Also refer to the discussion made under the section on limitation of actions.

2.3.1 Contrary proof

As you will discuss in depth in your law of evidence, presumptions may be rebuttable by production of contrary proof if they may be irrebuttable (contrary proof may not be accepted to disprove what is hold by presumption). Rebuttable presumptions are also divided into freely rebuttable by producing any evidence and those could be disproved by only producing specific type of evidences provided by law.

Here, as we can understand from Art. 2026 of the C.C, presumption provided from Art. 2022 to 2024 are not rebuttable in principle. However, Art. 2025 has laid down as exception three specific situations in which such presumptions could be confronted. These are;

a) By Proving that the debtor has acknowledged the debt in writing
b) By establishing that the proceeding is initiated before the expiry of the time limit set out under Arts.2023 and 2024 of the C.C.
c) By tendering an oath to the other party or his heirs

Review Questions;

1. Assume that Mr.A lent Mr. B birr 3000 on April 7/08 in the presence of four witnesses. It has been agreed that the money will be paid back on September 10/08. They have not made their contract in writing because they were far away from town while making the contract. On due date, Mr. B denied the loan and refused to pay it back. Mr. A wants to institute a court action. Do you think he would be successful? Why? Why not?
2. Is there any difference in result if Mr.A and Mr. B have made the same contract in writing in the presence of the same witnesses but if the contractual document is lost? How?
3. What are the situations in which secondary evidence in documentary evidence may be admitted?

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