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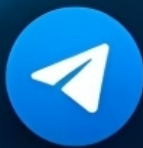


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**COMMENTARY
ON
CONTRACTS IN ETHIOPIA**

by
RENÉ DAVID

Translated
by
MICHAEL KINDRED

Published by the Faculty of Law
Addis Ababa University
Addis Ababa

1975

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COMMENTARY
ON
CONTRACTS IN ETHIOPIA

by Professor René David, Faculté de Droit et des Sciences Economiques de Paris, drafter of the preliminary draft of the Ethiopian Civil Code.

Submitted to the Imperial Ethiopian Ministry of Justice in October and November, 1954, as an explanation and commentary on the Ethiopian Civil Code preliminary draft provisions on contracts which were later enacted as Title XII of the Civil Code.

Translated into English and edited by Michael Kindred, Faculty of Law, Haile Sellassie I University, Addis Ababa, Ethiopia (1964-1969), The Ohio State University College of Law (1969-1970).

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January, 1970

INTRODUCTION

(Articles 1675-1677)

Article 1676. The Ethiopian Civil Code deals with obligations in two parts. Book IV regulates obligations in general and constructs a general theory of obligations, while Book V treats various rules regulating the principal types of contracts. Additional rules concerning certain specific contracts are found in the Commercial Code.

While this structure of Ethiopian law resembles that of French law, Ethiopian law differs from French law, and resembles English, American, and Brazilian law in disregarding the autonomy of administrative law in the area of obligations. Article 1676 (1) states that in Ethiopia contracts are regulated by the Civil Code regardless of who the parties are. Except where there are specific exceptions, contracts between the Ethiopian government and private individuals are subject to the same rules as contracts between private individuals.

Article 1677. Obligations are created both by the law itself and by contracts and other juridical acts of individuals. There is no real opposition between these various sources, however, since in a broad sense even the obligatory force of contracts depends on the law, which regulates them and ensures their enforcement. Moreover, the law often supplements the agreement of the parties. It defines the contents of the contract and provides for various problems that may not be foreseen by the parties at the time of contracting but that may arise subsequently. Finally, since the legislator is charged to do justice, he imposes some contract clauses and certain rules required by equity and the interest of society.

Article 1675. The Title on *Contracts on General* (Title XII)¹ begins with a definition of contract: A contract is an agreement

1. Editor's note: The commentary presented here deals only with what later was enacted and promulgated as Title XII of the Ethiopian Civil Code. Other, less detailed explanatory documents were submitted by Professor David with other parts of the preliminary draft and may be published at a later time. In this translation, article references have been renumbered to correspond with the final numbering in the Civil Code, as enacted. Where noted within we have omitted paragraphs dealing with provisions of the preliminary draft which were deleted by the Imperial Ethiopian Codification Commission or the Imperial Ethiopian Parliament prior to enactment of the Code.

whereby two or more persons as between themselves create, vary or extinguish obligations of a proprietary nature.

The Civil Code tries to present the rules concerning contracts in a simple and rational order. It deals first with the simplest case, where the contract is between only one debtor and one creditor and does not contain any unusual provisions. For this situation, the Code provides the rules relative to the formation of contracts (Chapter I), their effects (Chapter II), and the extinction of obligations (Chapter III). Then it regulates certain special contractual provisions (Chapter IV: time provisions, conditions, alternative obligations, earnest, and provisions as to liability), the possibility that a given obligation may have several debtors or several creditors (Chapter V), the position of third persons in relation to a contract (Chapter VI: representation, assignments of rights and duties, rights and obligations of the heirs and creditors of the contracting parties), and finally proof of the conclusion and performance of contracts (Chapter VII).

CHAPTER I: THE FORMATION OF CONTRACTS

(Articles 1678-1730)

Article 1678. The requirements for the existence and validity of contracts are enumerated in Article 1678 of the Code. The Sections of the Chapter then deal with each of these requirements in turn, with the exception of the requirement that the parties be capable of contracting, which is regulated elsewhere in the Code.

SECTION I: CONSENT

(Articles 1679-1710)

I. The Elements of Consent

Article 1679. Article 1679 emphasizes the overriding importance of the parties' consent for the formation of the contract and the definition of its contents, but goes further and specifies that in order for a contract to exist the parties must intend their agreement to have an obligatory character.

In accordance with Article 1679, there is no legally binding contract in the case of a simulated contract or where declarations are obviously not intended seriously. A similar provision is found in the German B.G.B. (Sections 117-118). We will consider later the extent to which third persons can rely upon the appearance created by such a simulated contract, but between the parties the simulated act is not a contract and produces no effect.

Similarly, two persons might conclude a real agreement, but want to keep it extra-legal, considering their undertakings simply as obligations of honour, and thus exclude the possibility for one of the parties to resort to the courts if the other does not perform his obligations. Here again the agreement is not, under the Civil Code, a contract. The German B.G.B. (Section 145) provides a similar solution.

Illustrations.

1. A man agrees to give his wife a certain amount of money each month to cover household and personal expenses.
2. A father promises his son a reward if he passes his examinations.
3. A person promises a friend or a neighbour that he will do something for him.
4. A clause is expressly included in a written agreement, stating that the agreement cannot give rise to any court

action and that its sole function is to specify how the two parties intend to act toward each other.

In none of these four cases is there a contract.

Article 1680. According to Article 1680, the declarations of the parties are considered in order to discover if they have reached an agreement.

In general, one does not try to discover what one of the parties internally desired; the external manifestations of his intention are what are legally significant. Only such external signs are considered in order to determine whether or not a contract has been formed. There are, however, some exceptions to this principle with respect to vices (or defects) of consent and the interpretation of contracts.

Illustrations.

1. A undertakes to do some work for B "within six months from the conclusion of the contract." A thinks, in using this formula, that it means "within six months from the day work is begun." Therefore, he actually never intended the same thing as B. Nevertheless, a contract exists, since A's declaration of intention accords with B's. The internal intention of A is irrelevant to the formation of the contract.
2. A offers to buy B's automobile from him, and B accepts his offer. A has frequently seen B driving C's automobile, and thinks that the automobile he is buying is the one he has seen B driving. Still, a contract for the purchase of B's car has been formed, since the declarations of A and B indicate agreement.

Article 1681. The intention to conclude a contract can be shown orally or in writing, but it can also be shown by any other unequivocal sign or conduct. This rule, set forth by Article 1681 (1), can, of course, be set aside by another express legal provision, and the law requires the use of particular forms for the conclusion of some contracts as a condition of validity. Similarly, the offeror himself, when he makes his offer, can require that the acceptance of the offer be made, or communicated to him, in a particular way. Aside from these two possibilities, the Code only requires that the intention to contract be unequivocal.

Illustrations.

1. A writes to B to order certain goods. B sends the goods. A contract is formed. It makes no difference whether

or not B writes A and tells him that he is accepting the offer and is sending the goods.

2. A orders goods from B and specifies that the contract will be concluded only if the goods are delivered to him in a particular place before a particular date. The letter by which B states that he accepts this offer will not be a valid acceptance; the goods must be delivered on time before the contract will exist.

Articles 1682-1686. In general, the silence of a person who has received an offer is insufficient as an acceptance of the offer. The response that the offeree intends to make is uncertain as long as he is silent, and that equivocal behaviour cannot be interpreted as a tacit acceptance. One must take care, however, not to confuse silence, which is not sufficient to constitute acceptance, with outward conduct other than speech that can amount to a tacit acceptance. An offer might be accepted, for instance, where the offeree performs the contract without any reservation.

Articles 1683 and 1684 provide two exceptions to the general rule that silence is not acceptance. Article 1683 deals with persons who are required, by the law or according to the terms of a concession granted them by the government, to conclude certain contracts with anyone who makes them an offer. Since the law or concession requires the offeree to accept the offer, there is no difficulty in deciding that silence, in such a case, amounts to acceptance. The moment at which the contract is formed is specified in Article 1683 (2). Article 1683 will be applicable, in particular, to enterprises which are entrusted with the management of a public service or the provision of supplies that are necessary to the life of a community. Article 1683 is an innovation by the Ethiopian Civil Code, inspired by the Anglo-American notion of "public utility." "Imposed contracts" are so common in all countries these days that it seemed necessary to deal with them in the Code.

Article 1684 provides a second exception to the general rule that silence does not constitute acceptance. This concerns contracting parties who have on-going business relations and have already concluded a contract. They exchange correspondence and one of them proposes to the other the renewal of an expired contract, the modification of an existing contract, or the conclusion of a second contract supplementing the first. He states that if he does not receive a response within a particular period of time, he will consider that his proposition has been accepted. In such a case, the courts are to interpret the silence of the offeree as a tacit acceptance.

The conditions in which Article 1684 is applicable are limited. It is required that: (1) the parties have concluded a prior contract; (2) one of them propose the renewal or modification of the contract or the conclusion of a supplementary contract; (3) that one state that if he does not receive a rejection within a certain period of time, which must be a reasonable period, the offer will be considered accepted; and (4) this offer and declaration be made in a special document.

The last of these requirements is not satisfied in the case, frequent in practice, where the seller who has delivered the goods sends to the buyer an invoice and inserts in the invoice clauses on which the parties had not agreed (e.g. arbitration clauses, clauses attributing jurisdiction to a particular court, exclusion of liability clauses). Unlike the Lebanese Code of Obligations (Article 180), Article 1685 of the Ethiopian Code states expressly that such clauses are ineffective. This inefficacy will result even if the invoice states that in the absence of protest by the buyer within a certain time limit, the clauses of the invoice will be considered accepted. The Code requires that such a statement be made in a separate document, drafted for this purpose. The statement in the invoice alone does not alert the buyer adequately and is considered insufficient.

In any case, however, a person who receives an offer that he does not want to accept is well-advised to reject it expressly, especially if he has had on-going business dealings with the offeror. He must fear that if he simply keeps silent the courts will interpret the clause inserted by the other party in the invoice not as a unilateral proposal to modify the contract but rather as the expression in writing of the agreement reached by the parties. It will often be difficult for a person who has not protested to assert later that the agreement reached did not include the clause inserted in the invoice by the other party and then relied upon by him.

Article 1686 of the Code deals with the related problem of general terms of business applied by a contracting party. The rule adopted is the same as for the clauses inserted in invoices: general terms of business ordinarily applied by one of the parties do not obligate the other party unless he knew of and agreed to them. An exception is provided, however, for the case where the general terms of business were prescribed or approved by a governmental authority, as is sometimes the case for administrative bodies themselves or for large enterprises of particular importance to the national economy (insurance, transportation, etc.). General terms of business applied by such a person will always be obligatory.

necessary if the offeror has expressly required it. Article 1681 (2). Otherwise, the judge must determine whether or not it is necessary, in the circumstances of the case, to require that the offeree communicate his acceptance to the offeror.

Article 1687 (b) specifies that when a person sends out market prices, price lists, or catalogs, he is only inviting others to make him offers and is not making an offer himself. This provision is similar to Article 7 of the Swiss Code of Obligations. When the person who receives the catalog or price list sends him an order, he can accept or reject this offer. Until he does so, the other person cannot require him to deliver the goods ordered. Contrary to the Swiss Code, the Ethiopian Code extends this rule to the case where a merchant displays goods in a store window with an indication of their price.

Article 1688, finally, settles a difficulty that has arisen in various countries. When a person announces that he is putting up for auction something that he owns, he only makes an invitation for offers, and not a true offer in the legal sense of the term. The offer is made when someone bids on the item. The acceptance comes when the auctioneer says "Sold!" in response to such an offer.

Illustrations.

1. A declares to someone that he intends to give \$100,000 to the Red Cross. The Red Cross cannot require him to keep this promise if they find out about it. The offer can be accepted only after it is communicated to the Red Cross by A.
2. A transportation company posts its time and rate schedule for buses. A cannot require the departure of a bus that has been announced in this way. The posting by the company is a simple declaration of intention. A is invited to offer himself as a passenger, but no contract is formed until the company accepts his offer.
3. A displays his wares in a window with price tags. This is a simple invitation to the public to enter the store. If B is attracted by this display and comes into the store and says that he wants to buy something from the window, A can still refuse B's offer to buy.
4. A announces that his house is to be sold at public auction. B bids \$5000 and no one overbids him, but A refuses to sell B the house at this price. There is no contract.

Note: In illustrations 2, 3, and 4, A may be liable to pay damages, if the announcement made by him caused B to in-

cur expenses. All that is decided by Articles 1687 and 1688 is that there is no contract in such a case.

Article 1689. A person is not bound by his promises as long as they have not been communicated to the person who is to receive them. This rule, stated in Article 1687 (a) of the Code, does not apply to public promises of reward. When a person states his intention to reward whoever does some particular thing and makes this intention public by using a means of publicity such as posters, newspaper advertisements, or radio or television announcements, he is bound by his offer for the period specified in Articles 1690 and 1691 of the Code. A simple oral declaration, however, even if made before a fairly large group of people, is not sufficient to constitute a public promise if a "means of publicity" is not used.

Article 1689 specifies that any person who does the act for which the reward was publicly offered has a right to receive the reward, even if he did not know it had been offered.

The Code does not regulate in detail the relations between the parties where several persons do the act for which the reward was offered. It will be for the judges to decide in such cases if the whole reward should go to one person or if it should be divided among them, and to determine the bases and proportions of the division if there is to be a division.

Illustrations.

1. A sports association establishes a prize of \$500 for the winner of a competition or for anyone who performs a particular feat. The newspaper of the association publishes the promise. B wins the competition or does the feat. He can require that the prize be paid to him.
2. A, a manufacturer of drug products, promises to pay \$1000 to anyone who, after using one of its products for 15 days according to instructions, contracts a particular disease. The promise is made public by the newspaper and, to guarantee its seriousness, A states that he has deposited \$1000 in a special bank account. B, having followed the instructions perfectly, catches the disease. He has a right to the \$1000 promised by A.

Article 1690. Article 1690 of the Code adopts a rule that is found in all recent codes. An offer with a fixed time limit for acceptance cannot be revoked by the offeror. By interpretation of the will of the offeror and to temper his obligation, Article 1690 (2) admits that in this case the acceptance must be communicated to the

offeror and not simply sent before the expiration of the time limit. The time and place of conclusion of the contract, however, will still be decided according to Article 1692 of the Code.

Illustrations.

1. A offers to sell B his house for \$5000, offer to be good until May 15. B accepts this offer by a letter that is put in A's postal box on May 14. A does not go to pick up his mail at the post office until May 16. He cannot claim that B's acceptance is late. B's letter was not read until May 16, but it *arrived* May 14.
2. In the same situation, B writes on May 5 to say that the price proposed is too high. Then, he changes his mind and, in a letter written May 10, which comes to A before May 15, accepts A's offer. No contract is formed; A's offer lapsed when B rejected it on May 5. B's letter of acceptance of May 10 is only a new offer (see Article 1694). A can accept or reject that offer.

Article 1691. No rule of the same precision can be formulated for an offer without a fixed time limit for acceptance. The principle adopted is that the offer must be kept open for a reasonable period of time. The length of this period will depend on the circumstances of the case: kind of business, whether or not the offeree is a businessman, etc.

The interpretation of the words "reasonable time" may create difficulties. Hopefully, most of these difficulties will be eliminated by Article 1691 (2): If the offeror feels that the acceptance was not made within a reasonable period of time, he must declare this to the acceptor immediately. Therefore, the question of whether or not the acceptance was made within a reasonable time will only arise if the offeror, having received the acceptance, immediately declares that it is late, and if the acceptor, when so informed, does not accept this position and protests that his acceptance was timely and insists that the contract be performed.

To determine whether or not the acceptance was timely, judges must consider, among other things, the way in which the offer was sent to the offeree. The offeror has the right to assume that his offer will be transmitted to the offeree in the time normally required.

Illustrations.

1. A writes to B, in the same country, offering him some goods at a certain price. His letter is dated January 7,

but is delayed as a result of truly exceptional circumstances and only reaches B on April 2. B immediately accepts the offer by a letter of April 3. A receives B's letter on April 5. He sends a telegram immediately saying that the acceptance is late. No contract is formed in these circumstances.

2. In the same situation, B does not write to A that A's acceptance is late until April 10. His declaration was not sent immediately, so A and B have made a contract.
3. A talks to B on the telephone and makes him an offer. B does not answer immediately, but sends A a letter of acceptance one hour after the end of their telephone conversation. No contract is made. A's offer to B over the telephone is equivalent to an offer between present persons and must therefore be accepted immediately before A and B separate, that is to say, before they end their telephone conversation. The offer has not been accepted within a "reasonable time."

Article 1692. In this Article, the Code had to choose, for contracts between separated persons, between the theory of emission and the theory of reception, each of which has been adopted by some modern legal systems. It chooses the theory of emission, as do English, American, Swiss, and Lebanese law. The contract between separated persons is deemed to be concluded at the time and place where the acceptance is sent.

Regarding this, it is only necessary to recall Article 1690 (2). The theory of emission is accepted only in principle and the offeror may avoid its application. In particular, when an offer is made with a fixed time limit for acceptance, it is decided, by interpretation of the will of the offeror, that the acceptance must come to his attention within the time thus fixed. It is not sufficient that it has been sent within this time.

Article 1692 may solve some difficulties. It does not, and cannot, solve them all. It will be very difficult to fix the place where the contract was concluded if it is the outcome of protracted negotiations, so that it is not clear what is the offer and what is the acceptance. It would have been futile to try to solve these difficulties. Only the parties can resolve them satisfactorily, by stating in their contract precisely when and where the contract was concluded. In the absence of such declarations, the courts will have to decide doubtful cases, taking into consideration all the circumstances of the case.

Article 1692 (2) deals with contracts made over the telephone and does so on a purely factual basis. One simply asks which of the parties called the other for the conversation during which the contract was concluded. The contract is deemed to have been concluded at the domicile of the person called.²

Article 1693. Carried to its logical conclusion, the theory of emission would require that both the offer and the acceptance produce their full effects from the moment they are sent. For practical reasons, Article 1693 avoids these logical consequences in some circumstances, as do a great number of legal systems. The offeror can revoke his offer if the offeree knows of the revocation before or at the same time he knows of the offer. Similarly, the acceptance can be revoked if the revocation reaches the offeror before or at the same time that he learns that his offer has been accepted; the offeror cannot validly argue that the contract was irrevocably concluded the minute the acceptance was sent.

Illustrations.

1. A writes to B and offers to sell him his house for \$5000. After he mails the letter, someone else offers him \$6000 for the house. A sends a messenger to B, or sends him a telegram, or telephones him, and says that he revokes his offer before B receives the letter containing the offer. The revocation of the offer is valid.
2. A writes B and offers to sell him a house for \$5000. B writes to A on January 10 to accept his offer, but then changes his mind and writes a letter on January 15 revoking his acceptance. B establishes that A did not go to his postal box until January 18 and that he received the two letters simultaneously, although one of the letters was put in the postal box before the other. B's acceptance is validly revoked.

Article 1694. An acceptance which goes beyond the offer or which includes restrictions or modifications to the offer is in fact a rejection of the offer accompanied by a new offer (B.G.B., Section 150).

2. Editor's note: Article 1692 (2) simply speaks of "the place where the party was called." Professor David's reference to "domicile" seems to be a slip of the pen.

Illustrations.

1. A offers to sell B his house for \$5,000 and states that the offer will be good until May 15. On May 1, B answers that he accepts this offer, but that he will pay \$3000 cash at the time of the sale and the remaining \$2000 three months later. B's answer does not amount to an acceptance, since it does not agree with the terms of the offer, which did not include any delayed payment. The contract is not completed.
2. A offers to sell B his house for \$5000; the acceptance is to reach A before May 15. B accepts the offer, but his acceptance does not reach A until May 16. No contract is formed, but the late acceptance constitutes a new offer from B, which A can accept within a reasonable time.

Article 1695. The conclusion of a contract requires a perfect concordance between the declarations of intention of the two parties. Neither of them can claim that a contract exists and require its performance as long as a disagreement continues to exist, even on a point of secondary importance.

It frequently happens in practice, however, that the parties agree to begin performance of the contract before they have reached complete agreement on its terms. The essential questions have been settled and the parties think that they will reach agreement on all the outstanding issues.

Also, it often happens that the agreement between the parties turns out to be incomplete. They have indeed reached agreement on what they have discussed, but questions arise that had not been foreseen by them.

Article 1695 (2) deals with these two situations. Its provisions are patterned on the German Civil Code (B.G.B., Sections 154-155).

Illustrations.

1. The parties carry on negotiations concerning a contract for the delivery of goods and finally declare in writing that they are in agreement on the frequency of deliveries, the quantities to be delivered, and the price of the goods. There still is, however, an obvious disagreement concerning the conditions in which the buyer can claim compensation for inferior quality of goods delivered. The contract is not complete, even though a document has been accept-

ed that states the agreement of the parties on the questions that might seem most important.

2. The parties, in the same situation, agree to begin the performance of their contract without waiting until they reach an agreement on the points that they are still discussing. In this case, a contract has been formed. The conditions under which the buyer can claim compensation for insufficient quality of the goods received by him will be established, in the absence of agreement between the parties on this point, on the basis of the suppletory Code articles dealing with the problem.

II. The Vices of Consent

Article 1696. Article 1696 simply introduces the articles that follow, enumerating the defects that can vitiate the consent of the parties and permit them to request the invalidation of the contract. These causes are mistake, deceit, and duress.....³

The vices of consent listed in Article 1696 of the Code are those familiar to all continental legal systems, with some variations internally. On the other hand, the draft is similar in various respects to the Anglo-American system, in particular in its Articles 1705 and 1709 (2).

Articles 1697-1701. The requirements that must be satisfied in order for a person who has committed a mistake in connection with a declaration of intention to be able to require the invalidation of the declaration are set forth in Articles 1697-1701 of the Code.

Article 1697 states the first requirement, which is a subjective one. The person invoking mistake must prove that he would not have given his consent to the contract if he had known the truth.

But, for mistake to be invoked it is not enough that it be determinative for the person whose consent is vitiated. To this subjective element one must add an objective element: The mistake must relate to a circumstance that, in the particular case, was within the scope of the contract. This happens in two cases. A's mistake may relate to something which ordinarily seems to be essential in the type of contract in question: The identity or price of the object sold or leased; the identity or special qualifications of the other party

3. Editor's note: A sentence omitted by this translation indicates that a separate introductory sentence was contained in the preliminary draft for Articles 1708-1710: this sentence was evidently deleted, as superfluous, at a later stage in the codification process.

in a contract concluded *intuitu personae*; nature of the contract; etc. Or, it may relate to a point which has a special importance for one contracting party and has been tacitly accepted by the other party as an element of the contract. A would no doubt be well advised to make a fact that is of determining importance for him a condition of the contract or to request a formal guarantee from B on this point. Nevertheless, if A has not done this, the law protects him and permits him to rely upon the principles of good faith to free himself from the contract that he has concluded because of the mistake.

Article 1698 of the Code expresses this second requirement, essential if mistake is to be invoked, in a general formula borrowed from Article 15, paragraph 1, of the proposed joint Franco-Italian Code of Obligations. Articles 1699-1701 deal with some categories of errors, in order to avoid discussion in these cases on the question of whether or not the mistake relates to a fundamental element of the contract.

The mistake must have been decisive for the person that invokes it. In addition, it must relate to an element that falls within the scope of the contract. These two requirements must be satisfied in order for a person to be able to invalidate a declaration of intention on the ground of mistake. These two requirements are necessary and also sufficient. Unlike some legal systems, the preliminary draft makes no distinction between excusable and inexcusable mistake, nor between mistake of law and mistake of fact. Nor is any distinction made between mutual and unilateral mistake, nor between mistakes resulting from misrepresentation and those made for some other reason. Once the mistake satisfies the two requirements set forth above, the mistaken person can always have the court invalidate his declaration of intention, as well as the contract that results from it. Nevertheless, the fact that the mistake is not excusable is not without consequence, since it can lead to the subsequent liability of the person who invokes it (See Article 1703). Similarly, it is important to know whether the mistake is unilateral or shared where this may affect whether or not the mistake relates to an element of the contract that was within the scope of the contract (See illustration number 7 below). For the case where the mistake has been caused by a misrepresentation of the other party, see Article 1702 below.

Illustrations.

1. A thinks he is signing a petition in favour of a charity when in fact he is signing a promise to contribute annually to the charity. This is mistake concerning the nature of the contract and A can have the contract invalidated.

2. A buys a tractor from B and signs a contract for this purchase. He discovers later that the sale price was stipulated in U.S. dollars, although he had assumed that the price was stated in Ethiopian dollars. The performance that he has undertaken to make is substantially greater than he intended. He can request the invalidation of the contract.
3. A buys from B some land, subject to a usufruct in C. Unknown to either A or B, C had died before the contract was made. B can request the invalidation of the contract.
4. A hires B as his accountant for one year. He does not know that B had previously been convicted of breach of trust. A's mistake relates to a personal quality of the other party which in this case should be considered fundamental. A can get out of the contract.
5. If B, in the preceding case, had been convicted of negligent homicide or of assault, the result would be different. A's ignorance of this fact does not relate to a fundamental personal quality of accountants. A cannot have the contract invalidated on the basis of this mistake.
6. A buys a house from B because he thinks his son is going to be married and he wants to find him a place to live. Even if the marriage does not take place, the contract will remain valid. A's mistake only relates to the motive that caused him to enter into the contract.
7. A buys a picture from B, thinking that it is the work of particular great artist. In fact the painting is only a copy. A can have the contract invalidated if his belief that this was the work of a great artist was shared by the other party. In such a case, this characteristic of the painting has become, *in the eyes of the parties*, a fundamental element of the contract. Article 1696.

If B, on the other hand, had not considered the painting he was selling to be a painting of a master, because, for example, he did not know of the fame of the person whose signature was on the painting, A's mistake is only mistake on the motives that caused him to make the contract. A could not rely on it to have the contract invalidated. Article 1701 (1).
8. A buys one hundred typewriters of a particular kind from B at a price of \$100 per machine. In the contract this

The declaration of intention that he has made, and that is vitiated by the mistake, does not bind the mistaken person. But it would be unfair to make the other party bear the loss in all cases. The other party thought the contract valid and, in reliance on it, may have incurred certain expenses or undertaken other obligations. He who invokes his mistake must compensate the other party for the loss he sustains from the invalidation of the contract.

Contrary to Article 26 of the Swiss Code of Obligations, the Ethiopian Code provides for this obligation even where the mistake is not due to any fault on the part of the mistaken person. The obligation to make good the damage caused by the invalidation of the contract disappears only where the other party knew or should have known of the mistake.

Illustrations.

1. A buys goods from B for a price fixed in Djibouti francs, but A thinks that the price was in regular French francs. The contract can be invalidated because of the mistake, but B may already have sent the goods from Marseille, where they were stored, to Addis Ababa, where the contract provided they were to be delivered. A must compensate B for the damage that the invalidation of the contract causes him: expenses of shipping, storage, and of the return shipping to Marseille if necessary, or loss suffered on resale of the merchandise in Addis Ababa at a price lower than the contract price, and so on.
2. The correspondence between A and B at the time the contract is made reveals to A⁴ the mistake that B is making. Nevertheless, A allows B to sign the contract without pointing out his error to him. When B requests the invalidation of the contract, A cannot claim compensation, since he knew (or should have known) of B's mistake.

Articles 1704-1705. With respect to deceit, Article 1704 reproduces the solutions that are accepted in all legal systems of continental Europe. It distinguishes between essential fraud, which has a determining effect on the making of the contract, and incidental fraud, as a result of which a person just accepts more burdensome contract terms. Only essential fraud allows a person to have his

4. Editor's note: The original text of the Commentary says "reveals to B," but clearly the contrary was intended.

contract invalidated. Nevertheless, in the case of essential fraud the defrauded person may, as in the case of incidental fraud, leave the contract in existence and just require the person who committed the fraud to compensate him for the damage sustained. It did not seem necessary to state this expressly in the Ethiopian Civil Code, although it is set forth in the Greek Civil Code (Article 149).

The concept of fraud dealt with in Article 1704 requires that deceitful *practices* have been utilized by one person in order to induce an error on the part of another and thus to influence him to enter into a contract. There is no fraud when someone just makes a false assertion and still less when he keeps silent although he is aware that the other person is in error, without expressly lying to him. The invalidation of the contract can be obtained, however, in several situations where one of the parties has acted on the basis of an incorrect statement by the other party. First, this is possible where the mistaken person required a formal guarantee of the fact incorrectly asserted, and also where one ought to consider that this fact is within the scope of the contract under Article 1698. Apart from these two situations, it is possible where the requirements of Article 1705 are satisfied. This Article is patterned after a common law solution and requires that the parties be united by a relationship giving rise to special confidence and requiring particular loyalty between them. Where such a relationship exists, a person can have a contract invalidated where he concluded it after making an error that was caused by an incorrect statement of the other party, made in bad faith, with knowledge that it was incorrect, or as a result of negligence, not having taken care to be sure whether it was true or false. The same rule applies where one person, by his silence, has allowed the other to believe something that was not true.

The courts will have to determine under what circumstances there is a special confidential relationship that justifies the application of Article 1705. The special relationship in question is only possible where there exists between the parties a permanent relationship, such as that of the family or membership in a close community. The special confidential relationship foreseen by Article 1705 would also exist where the parties are, in their relationship to each other, in a position of superior-inferior, either as a result of the law (policeman and citizen) or of a contract (master and servant). On the other hand, it would not exist simply because one of the parties said he would "have confidence in the other" at the time of entering into a particular contract. It is up to each person to beware of the other party when concluding a contract. The law does not ordinarily protect one against simple misrepresentations of fact. It is only in circumstances unrelated to the contractual negotiations and the con-

clusion of the contract that the courts may find the special confidential relationship to which Article 1705 refers.

Illustrations.

1. A sells B some land in a distant province, without B having seen the land. A shows B what he calls photographs of the land, which are in fact photographs of a completely different place. He also uses false documents to convince B that a road will soon be built that will increase the value of the land greatly. A's deceitful practices allow B to have the contract invalidated.
2. After buying this land from A, B wants to get a particularly advantageous position and so buys an adjoining piece of land from C. C is not aware of A's fraud. B cannot have the contract with C invalidated on the basis of A's fraud.
3. A asserts to B that his land is very fertile and near the road, whereas in fact it is sterile and inaccessible. This is a case of simple affirmations where A does not resort to any deceitful practices to support his affirmations and make B believe them. There is no fraud, in the legal sense, and B cannot require the invalidation of the contract.
4. A exchanges a piece of land that belongs to him for a piece of land belonging to his brother, B. B tells A that the exchange was desired by their father, C, before his death. A agrees to the exchange because he believes that statement, which is false. The contract of exchange can be invalidated.
5. A is employed by B and buys some stocks from him. B told A the stocks were valuable, whereas in fact the partnership that issued them had gone bankrupt. A can demand the invalidation of the contract.
6. A sells to B, the district governor, some cattle because B says, or lets A understand, that if he does not sell them they would be requisitioned by the government at a lower price. If the affirmation made by B is untrue, the contract will be subject to invalidation.

Articles 1706-1709. The provisions of Article 1706 are in accordance with all continental legal systems. We need only to point

out that ...⁵ the words "position of the parties," in Article 1706 (3) refer not only to social position, strictly speaking, but also to such circumstances as level of education (see Article 211, Lebanese Code of Obligations) or health (see Article 127, Egyptian Civil Code) of the victim of the duress.

The provision of Article 1707(1) is similarly common to most other civil law systems, although not to that of Egypt (Civil Code, Article 128). Article 1707 (2) is similar to articles in the Swiss Code of Obligations (Article 29), the Lebanese Code of Obligations (Article 210), and the Greek Civil Code (Article 152); it constitutes an equitable counter-balance to the rule of Article 1707 (1).

Article 1708, in conformity with various codes (Swiss, Article 30 (2); Lebanese, Article 212 (2); Italian, Article 1438), regulates a particular difficulty related to the theory of abuse of rights, and in particular, to the unjust character that the duress must generally present.

The provision of Article 1709 (1) is borrowed from the French (Article 1114) and Italian (Article 1437) Civil Codes. It is tempered by Article 1709 (2), which is borrowed from English law and the theory of "undue influence" that it has developed.

Illustrations.

1. A's son signs checks, imitating A's signature. The payee of these checks, B, informs A that if A will not promise to pay the checks, A's son will be prosecuted and will be in danger of a serious penal conviction. A signs a promise to pay. This contract cannot be invalidated. Article 1708.
2. B, in the same situation, obtains a promise from A to pay \$10,000, when the value of the checks is only \$2000. A's undertaking can be invalidated. Article 1708.
3. A agrees to sell something to B on the insistence of his superior, C, out of fear of displeasing the latter. The contract between A and B cannot be invalidated for duress. Article 1709 (1).
4. A, having joined a monastery, sells something to B, his superior in the monastery, for a price of less than one-
5. Editor's note: Words from the original Commentary that are omitted here indicate that Article 1706 (1), in the preliminary draft of the Code, referred generally to persons close to the person threatened. The provision, as enacted, refers to danger to "ascendants, descendants, or spouse."

third its value. A establishes that he did not think he could refuse to give his consent to B because of the reverential fear that he had for B. The contract can be invalidated. Article 1709(2).

Article 1710. Jurists have long been divided over whether or not lesion should constitute a basis for invalidation of contracts. France and England give a negative response, in principle, to this question. But this position, taken at a time of rampant *laissez-faire* capitalism, has since been repudiated, first in the German Civil Code (B.G.B., Section 138), and then by all the recent codes (Swiss Code of Obligations, Article 21; Lebanese Civil Code, Article 214; Greek Civil Code, Article 129; Italian Civil Code, Article 1448; Egyptian Civil Code, Article 129; Franco-Italian draft code, Article 22). The Ethiopian Code joins this general movement.

The Italian Civil Code (Article 1447) provides for the case, apart from lesion, where a contract has been obtained by exploiting the state of necessity of one of the parties. It permits the person who entered into the contract because of necessity to get out of it, even if the contract is not unfair. The Ethiopian Code does not incorporate this rule.

It has followed the Italian Civil Code (Article 1448), on the other hand, in not excluding the invalidation for lesion with respect to a contract involving risk or speculation. The provision of the Lebanese Civil Code (Article 214) which decides this question in the opposite way did not seem justified. Obviously, whether or not a contract is lesionary must be judged as of the time the contract was made.

As with the provision of Article 1709(2), Article 1710 will only come into play in cases of onerous contracts. If the consent of one of the parties is inspired by a gratuitous intention, it is obvious that this person cannot invoke lesion. Gratuitous acts are, without a doubt, particularly subject to suspicion, since there is reason to fear that the consent of the person who gives up something is not always given in complete freedom. But it is in the rules relating to gifts, not in those on contracts in general, that one will find the provisions appropriate to deal with this problem.

SECTION II: OBJECT AND CAUSE

(Articles 1711-1718)

The subjects of the "object" and "cause" of contracts have given rise to continuing controversies among western legal scholars,

primarily because different writers use the terms to mean different things. For this reason, it is necessary at the outset to define what the Code means by the object and cause of a contract. The object of a contract is the obligations undertaken by the parties, not the things to which these obligations relate. The object of a contract of sale, for example, is the seller's obligation to transfer to the buyer the ownership of the thing sold and the buyer's obligation to pay the price; the thing sold, movable or immovable, is not the object of the contract. The cause of the contract, on the other hand, is the relationship of the parties' obligations to each other. Articles 1716 (2) and 1717 of the Code show why this notion is useful and how it is distinguished from the object of the contract and the motives of the contracting parties.⁶

Article 1711 of the Code poses a principle with respect to the object of the parties: It is up to the parties to draft their contract, not up to the courts to make it for them.

The parties determine freely the object of the contract, the obligations that each of them is to undertake. The Code accepts, as do present Western legal systems, the principle of contractual freedom, which is fundamental to a society and an economy that want to leave considerable scope to private initiative. In addition to the particular kinds of contracts regulated by the Code, individuals can devise other contracts. As long as these contracts do not violate any legal prohibition, the law will sanction them and give effect to the will of the parties, as manifested by their contract.

Article 1712. There are three categories of obligations that parties can include in their contracts: obligations to give, where one party undertakes to transfer all or part of the ownership of something to the other party; obligations to do, where one party undertakes to act in a certain way that will benefit the other party; and obligations not to do, where a person undertakes to abstain from acting in a particular way.

In obligations to do, there are some cases where a person undertakes strictly to procure a particular advantage to the other (so-called obligations of result). There are others where one undertakes only to do his best to procure the advantage to the other (so-called obligations of means). The doctor and the advocate, for example, do not undertake to cure the sick or to win a lawsuit for the client; they only undertake to do their best to obtain this result. The carrier,

6. Editor's note: The word "cause" is not used in the Ethiopian Civil Code, as enacted, but the substance of the provisions remains as they were in the preliminary draft.

on the contrary, undertakes to see to it that the object sent arrives at its destination, and in this sense he thus guarantees its arrival.

Article 1712 of the Code énumérates these various possible kinds of obligations, inviting the parties to explain as clearly as possible what is the object of their contract.

Article 1713. No matter how detailed the contract is, it is unlikely that it will deal exhaustively with the obligations of the two parties. Particularly, the accessory obligations are not likely to be defined, because they seem so self-evident. Not only the letter of the contract must be considered; the agreement that is expressly articulated by the parties must be supplemented by the incidental effects that obviously and necessarily follow from it as a result of custom, equity, and good faith. Article 1713 sets forth this rule, in conformity with European codes (French Civil Code, Article 1135; Italian Civil Code, Article 1374; Greek Civil Code, Article 288). It is also found in the section dealing with the interpretation of contracts.

Illustrations.

1. A sells his bread business to B. He cannot argue that he can set up a new bread store on the same street in competition with the store that he sold just because the contract is silent on this point. Good faith is sufficient to impose on him the accessory obligations of not setting up such a competing enterprise.
2. A sells B goods that are named and that are to be taken by B in fifteen days. While waiting for B to take delivery of the goods, A must take whatever measures are necessary to preserve the goods sold in good condition. This necessary obligation is imposed on him by custom and good faith.

Article 1714. The parties must, however, sufficiently define their respective obligations. By considering together the contract, the law's provisions concerning the interpretation of contracts, and its suppletory provisions, the judge must be able to determine the object of the contract, the obligations that the parties have undertaken. Article 1714 of the Code reproduces, in this respect, the rules already stated in Articles 1679 and 1695. The meaning of Article 1714(1) is stated more explicitly by 1714(2), which sets forth the formula commonly found in common law countries: the courts cannot make a contract for the parties.

Illustrations.

1. A undertakes to deliver a certain quantity of products at a stated price "at the end of the rainy season." The object of the contract and the date at which the obligation of the seller are to be performed are sufficiently defined. The contract is valid.
2. A undertakes to deliver "his crop of sugar cane this year" at so much per quintal. The amount due by the buyer is not immediately determined, but it is determinable. The contract is valid.
3. A promises to give B "a good reward" if he does some specified work. B does this work. The words "a good reward" are too imprecise; the object of the contract is not sufficiently defined. The contract is invalid.

Article 1715. A second requirement in order for there to be a valid contract is that the object of the contract must be possible. The performance by the parties, or by one of them, of their obligations under the contract must not be impossible in itself. If the obligation undertaken is impossible to perform, the contract is not valid and no liability is incurred by a failure to perform the obligations created by it.

To determine whether or not the object of the contract is possible or not, one must look at the situation at the time the contract was concluded. If the performance of the contract appeared possible at that time, but later becomes impossible, the effects of this circumstance are regulated in the Chapters dealing with the effects of contracts (Chapter 2, Section 4: Non-performance) and the extinction of obligations (Chapter 3, Section 1: Invalidation and Cancellation of Contracts).

Moreover, the impossibility must exist in itself (Egyptian Civil Code, Article 132; Lebanese Civil Code, Article 191). It must not result from the special situation of the debtor, but must exist without regard to the person involved; the performance of the contract would be impossible, even if someone other than this particular debtor were obligated.

Illustration.

A sells B a shipment of cotton, loaded on a particular ship. Unknown to the parties, the ship and cargo have perished before the contract is made. The performance of the contract is impossible. A cannot transfer to B the ownership of something that does not exist. The contract is invalid.



Article 1716 (1). The obligations assumed by the parties must not be unlawful or immoral.

For example, a contract will be invalid if the seller undertakes to transfer to the buyer the ownership of a slave, since slavery is prohibited by Ethiopian law. Similarly invalid would be a contract by which A promised to pay B for committing a crime or doing some other act prohibited by law. The same is true for the contract by which A would restrict his freedom in favour of B, in conditions rejected by Ethiopian law and morality.

It is up to the courts to decide, in each particular case, whether or not a contract should be valid, having regard to morals and the conception of morality prevalent in Ethiopia.

Article 1716(2). It could happen that, even where the obligations of each of the parties, considered in isolation, would be perfectly defined, possible, legal and moral, it would seem that the contract ought to be prohibited by the law, on the ground that it is repugnant to law or morality that the obligations of one party have as a counterpart the obligations of the other. In this case, the contract will be invalid, because its cause is illegal or immoral.

This will be the case, for example, if one person, A, undertakes to pay another, B, a sum of money in order that B not commit a crime. In themselves, there is nothing illegal or immoral about the obligations of either A or B. What is shocking is that B would take money for not doing something that, in any case, he is required to abstain from doing. The contract between A and B has an immoral cause; it is invalid.

Article 1717. It is essential not to confuse with the cause of the contract, understood in this sense, the motive that could make the parties, or one of them, contract. This motive is legally irrelevant and does not affect the validity of the contract, regardless of how shocking it may be in the light of law or morality. The Code departs on this point from the Italian Civil Code (Article 1345) and the Lebanese Civil Code (Article 201), which provide for the contrary solution.

Illustrations.

1. A rents a house from B so that he can set up a house of prostitution. The use that A intends to make of the house, whether or not it be known to B, has nothing to do with the object of the contract. This motive, which impelled A, and perhaps B, to make the contract does not make the contract invalid.

2. A loans money to B. B intends to use this money to buy a boat and organize a smuggling expedition. The contract is valid without regard to whether or not A knew B's motive. It will not be invalid, by the application of Article 1716, unless the illegal use to be made by B of the money lent was a condition of the loan, B undertaking to organize the smuggling if he received the money from A.⁷

SECTION III: FORM

(Articles 1719-1730)

Article 1719 establishes the principle that there are no formal requirements for the conclusion of contracts: the agreement of the parties is sufficient to form a contract.

This principle, however, is set aside in two cases: where the law requires that a particular contract be put in a special form, and where the parties themselves have provided that their contract will be concluded in a particular form.

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

Requirements of form must not be confused with tax requirements such as registration, that may be required by the law at the time of the conclusion of contracts. Unlike formal requirements, tax requirements usually are not sanctioned by invalidity of the contract in question; non-compliance with them results in other sanctions (fines, impossibility to enforce the contract through the courts, etc.) that are stated in the statutes concerned. Article 1720(2) states this rule, which is of great importance with respect to international contracts.

Similarly, failure to comply with requirements of publication, such as the copying or mention of a contract in a public register, does

7. Editor's note: Article 1718 of the Ethiopian Civil Code was not contained in Professor David's preliminary draft and is not commented upon by him in this Commentary. It was apparently added to the Code at some later stage, prior to enactment.

not lead to the invalidity of the contract, unless there is an express contrary provision of the law.

Articles 1721 and 1722. Formal requirements for particular contracts, as a result either of the law or of an agreement of the parties, also apply to preliminary contracts and to modifications that are to be made in these contracts. On this point, the Code follows the Greek Civil Code (Articles 164-166); it was not thought wise to retain the limitations that are found in the Swiss code (Article 12, Code of Obligations) on this point. Nevertheless, the term "modifications" does not include the various ways of extinguishing contracts; provisions concerning the formal requirements for extinction are found in Chapter III of Title XII.

Illustrations.

1. Article 1723 of the Code requires that the sale of an immovable be in writing. A agrees with B that he will sell him an immovable at a particular price if a particular event occurs. This promise of sale, preliminary contract, is not valid unless it is in writing.
2. A gives C a power of attorney to sell B an immovable belonging to A. This power of attorney, preliminary contract, must be in writing.
3. Article 1725 of the Code requires that the contract of partnership be in writing.⁸ A concludes a contract of partnership with B. The parties later agree to modify the provisions of this contract. This modification of their original contract must be in writing in order to be valid.

Articles 1723-1725. The principle of freedom from formal requirements stated by Article 1719 is in fact set aside in the case of a number of contracts, the importance of which must be called to the attention of interested persons by requiring a written document.

The importance attached to land by Ethiopians justifies Article 1723, which requires the conclusion in writing of all acts creating or transferring ownership, usufructs, or servitudes on immovables, as well as for contracts of compromise or partition relating to an immovable.

8. Editor's note: This rule is not included in Article 1725, as enacted. Professor David's comment refers to the preliminary draft of the Civil Code. See, however, Ethiopian Commercial Code, Article 214, which requires that contracts to form a business organization be in writing.

Article 1724 requires the written form for all contracts binding the Government or a public administration.

Article 1725, finally, formulates the same requirement for certain contracts that establish lasting relations between the parties and for which it thus seems necessary to establish the provisions precisely and indisputably.

Still other contracts may be subjected to particular formal requirements by provisions of the Code or other special legislation....⁹ It is sufficient to note here the general approach of the draft. While starting from the principle of the freedom from formal requirements, it is favourably inclined toward some formalism, which seems to constitute a necessary guarantee of sincere agreements in conditions presently prevailing in Ethiopia.

Article 1726 requires no comment. It adopts a rule from the Lebanese code (Article 220), borrowed in its substance from the Swiss and German codes (Swiss Code of Obligations, Article 16; B.G.B., Section 154 (2)).

Articles 1727-1728. These two articles provide certain clarifications concerning the meaning of the words "written form" when the law or an agreement provide that a contract shall follow this form. The requirement that they be concluded in writing is, in the scheme of the Code, a requirement of form, not of proof. The requirement of the law is, therefore, not satisfied by producing letters that the parties exchanged and that indicate their agreement. It is required that a special instrument be drafted to express the agreement and that this special instrument, a solemn manifestation of the agreement of the parties and of their irrevocable intention to be obligated, be signed by them. On this point, the Code differs from French law, from Swiss law (Code of Obligations, Article 13) and from Greek law (Civil Code, Article 162).

The signature of the parties must generally be handwritten. If one of the parties does not know how to write or is unable to, his signature is to be replaced by his fingerprint. The Code found it appropriate to resort to this method of identification even in the area of civil law, as it has been used previously in administrative and criminal law.

Article 1728(3) adopts a provision of the Swiss Code of Obligations (Article 14), but the Code does not include a provision similar

9. Editor's note: At this point, Professor David noted that the legislature, upon enacting the Civil Code or at a later time, might wish to subject other types of contracts to the general formal regulation provided by Articles 1719-1730.

to Article 14(2) of the Swiss code, which provides that a machine-made signature is sufficient where it is accepted as a matter of custom (particularly in the case of signatures on commercial paper issued in quantity). If there is need for such a rule, it ought to be contained in the Commercial Code rather than the Civil Code.¹⁰

CHAPTER II: THE EFFECT OF CONTRACTS

(Articles 1731-1805)

The first Article of the Civil Code Chapter on the effect of contracts reaffirms solemnly, on the legal plane, the moral rule that a man's word is his bond. *Pacta sunt servanda*: contracts legally formed become law for those who sign them. (Comp. French Civil Code, Article 1134; Lebanese Civil Code, Article 221; Italian Civil Code, Article 1372; Egyptian Civil Code, Article 147).

The Chapter is then divided into four Sections, devoted respectively to the interpretation, performance, variation, and non-performance of contracts. The effect of contracts on third parties is dealt with in Chapter VI of Title XII.

SECTION I: THE INTERPRETATION OF CONTRACTS

(Articles 1732-1739)

Articles 1732-1739. There are fairly considerable differences among Western legal systems in the difficult area of interpretation of contracts. English and French Law approach the problem from theoretically conflicting points of view. The English approach says that contracts are to be interpreted strictly, looking only at what the parties have said, interpreting their words as objectively as possible and giving them the meaning they would have for a "reasonable man." The French approach on the other hand, is to search for the real intention of the parties, correcting imprecise terms or incorrect figures where necessary. The English approach is primarily concerned with the economic utility of contracts while the French stresses their moral basis.

Although the contrast between these two approaches definitely has practical consequences, it is clearer in theory than in practice. Rules of equity in English law allow some correction of contracts to

10. Editor's note: Articles 1727 (2), 1729, and 1730 are not commented upon by Professor David, since they only appeared at a later stage in the codification process. Article 1727(2) is of capital importance; it provides that "(The written document) shall be of no effect unless it is attested by two witnesses."

give effect to the true intention of the parties; the difficulty of discovering this true intention, on the other hand, leads the French judge to give primary attention to the declarations of the parties.

No doubt the real reason for the contrast between English and French law is that French law speaks primarily to the contracting parties themselves, while in England law is conceived of primarily as directives to the courts.

In England, as in France, one would recommend that the contracting parties conduct themselves properly and thus act according to what they really intended rather than to the letter of the contract. But, if one considers the courts' problems in interpreting contracts, one will inevitably pay more attention to what was actually said and much less to what may have been intended.

Because a code is addressed simultaneously to the contracting parties and the courts, it is difficult to formulate in a code rules on the interpretation of contracts.

Although the parties should be instructed always to act in good faith, one must beware lest the judges go astray, in the name of good faith, on a search for intention that can easily become pure speculation. One must keep them from violating the principle, already stated in Article 1714, that the court is not to make a contract for the parties under the guise of interpretation.

The Ethiopian Civil Code attempts to balance these two approaches. Article 1732, in a provision that should be compared to Article 1713, states the principle that contracts are to be interpreted according to good faith. It seemed essential to reaffirm this principle, because it ought always to guide the contracting parties.

For the courts, however, the principle is limited by an exception: the judge is to interpret the contract only when interpretation is required, and he is expressly reminded of this by Article 1733, coming as it does directly after Article 1732. Where the contract is clear, the court may not depart from it and determine by way of interpretation the intention of the parties. The courts are not to distort the contract under the guise of interpretation and make it say something other than what a reasonable man, knowing the circumstances in which the contract was made, would understand by reading its terms. If the terms of the contract are clear, the judge must give them effect. The remedy available to a person who claims that his intention was incorrectly stated is invalidation of the contract for error (Articles 1698 and 1699). The courts may not, under the guise of interpretation, revise the contract and thus impose on the other party a contract to which he never agreed.

Contracts require interpretation only when their terms are ambiguous (Compare Egyptian Civil Code, Article 150), but then it is proper to ask the courts to seek the parties' common intention. In spite of its difficulties, to search for this common intention generally is the best way to establish the meaning of the contract. It is less artificial than assigning words technical meanings they did not have for the contracting parties. Article 1734(2), borrowed from the Italian Civil Code (Article 1362(2)), enlarges the courts' powers in looking for the parties' intention. They may even look to events subsequent to the conclusion of the contract.

Article 1735 states one specific application of the principle that the courts are to seek the parties' intention. This provision seemed particularly useful, since it avoids any possible confusion. An example will show that the apparent conflict between Articles 1733 and 1735 is only an appearance. Suppose that A sells B "all his immovables" for an overall price. The conditions in which the contract is made and all the surrounding circumstances make it perfectly clear, however, that the parties mean only A's immovables located in Ethiopia. B might argue that the term "all his immovables" is a clear phrase, with no room for interpretation. Where, as in this case, the intention of the parties is clear, however, that intention ought to prevail; the expression "all his immovables" is actually ambiguous.

Articles 1736 and 1737 give the courts some directives to guide them in their search for the parties' intention, or independently of that intention if they cannot determine what the intention was, in order to settle the meaning and purpose of the contract.

A different idea inspired Articles 1738 and 1739. In ambiguous contracts, they favour one party over the other. The favoured party is usually the debtor. Where the contract is unclear, he will be considered not obligated or obligated to a lesser degree. Article 1738(2) provides an exception to this principle: the favoured party in adhesion contracts is he who simply signed the document drafted by the other. Where the contract clearly was drafted by one of the parties, the contract is to be interpreted against that party, in favour of the other. The rule set forth in Article 1738(2) is patterned after the recent civil codes of Italy (Article 1370), and Egypt (Article 151). Article 1738(1), on the other hand, adopts the French rule (Civil Code, Article 1162), which is also found in the Egyptian Civil Code (Article 151). It rejects the Italian rule (Civil Code, Article 1371), which invites the courts "to conciliate equitably the interests of the parties" in the case of ambiguous onerous contracts.

With this single exception, the principle is adopted that ambiguous contracts are to be interpreted in favour of the debtor. The court is

to decide that the debtor assumed the minimum obligation compatible with the ambiguous terms of the contract. A particularly narrow interpretation is called for, according to Article 1739, when the debtor derives no economic benefit from the contract.

An example of this is where one person, A, agrees to hold something on deposit for a second person, B, without compensation. He is obligated to take care of the thing, but this obligation might be interpreted with greater or lesser severity. Since it is a gratuitous contract, A's obligation will be very leniently interpreted. A will be required to care for B's property as if it were his own, but will not be required to use greater diligence than he shows in his own affairs.

SECTION II: THE PERFORMANCE OF CONTRACTS

(Articles 1740-1762)

In the Section on performance of contracts, the following questions are dealt with: Who must perform the contract? To whom ought payment (performance)¹¹ be rendered? What constitutes performance? To what obligation does a given payment apply? When is it due? Who bears the costs of payment?

The word "*paiement*" is used in French legal language with a broader meaning than it has in common language. It refers to the performance of any obligation, not just the obligation to pay money.

Article 1740. Who is to perform the contract? The contract creates a relationship between a creditor and a debtor,¹² and one normally expects the debtor to perform the contract. There are, however, two questions that arise. First, when can the debtor have his agent or employee perform the contract for him? And second, may a third person, in the absence of any agreement with the debtor, interfere and perform his contract for him? Article 1740 answers these questions. It does not deal, however, with the resulting relations between the debtor and the third party who performed the obligation. This problem is dealt with in Chapter VI of Title XII.

11. Editor's note: The French term *paiement* is translated in the Civil Code most frequently as "payment" and will generally be translated in that way here, but the reader must be aware that the term is being used in a broad, technical sense explained in the second paragraph of this section.

12. Editor's note: The French terms "*debiteur*" and "*créancier*" are translated in the Civil Code as debtor and creditor and will be translated that way here. Again, however, it must be noted that these terms are being used in a broad, technical sense. There is a debtor and a creditor for every obligation: the debtor is the person obliged; the creditor, the person to whom the promise is made. Thus, in a contract of sale both parties are both debtor and creditor. The seller is creditor with respect to the price and debtor with respect to delivery; the buyer is debtor for the price and creditor of delivery.

Contracts can impose a variety of obligations on a debtor. This variety requires that one make a distinction in answering the question posed. Sometimes it is important to the creditor that the obligation be discharged by the debtor and no one else. This is particularly true for certain obligations to do, in which the debtor's personal qualifications are important. In other cases, it makes no difference who is obligated; the creditor is interested in receiving the thing promised, but not in who performs the obligation. This is true usually for obligations to give, and in the case of many obligations to do.

Although the distinction between these two categories of cases is clear in principle, it is often difficult to apply. Article 1740, in the Title on *Contracts in General*, is able to do little but state the principle: The debtor shall personally carry out his obligation where the creditor has a special interest in his carrying it out personally. The creditor must establish that he has a special interest in having the obligation performed by the debtor himself, that because of the nature of the obligation,¹³ it would not be equivalent to have it performed by someone else. If, however, the parties have expressly stipulated performance by the debtor himself, the creditor need not establish this special interest; he can automatically require the debtor to perform the contract. In such a case, the courts have no power of interpretation.

Except for these cases, the obligation may be performed by someone other than the debtor, by either his delegate or someone authorized by the courts or the law.

As we have said, the relations between the debtor and the person who performs the obligation are dealt with in a later Chapter of this Title. In addition, one will find, in the various Chapters of Book V of the Code, which is devoted to special contracts, specific provisions on the personal or non-personal character of the obligations created by the various contracts.

Illustrations.

1. A buys five quintals of Dutch seed potatoes from B. It makes little difference to A whether the potatoes are delivered by B or C. B can have C discharge his obligations.
2. A is to dig an irrigation canal on B's land. It makes little difference to B whether the canal is dug by A or by

13. Editor's note: The phrase "*étant donné sa nature*" appears in the French version of Article 1740 (1). It is translated in the Amharic version, but is completely omitted in the English.

C as long as the work is done. A can have C do the work under his, A's, responsibility.

3. A deposits some valuable objects with B. It is important to A that the bailee be B, whom he knows personally or who has a guaranteed solvency, and not C, any other person. B cannot give over to C the valuables that he has received by virtue of his contract of bailment with A.

Articles 1741-1744. To whom should performance be tendered? To whom¹⁴ should payment be made? The principle stated by Article 1741 requires no comment: Payment shall be made to the creditor or a third party authorised by the creditor, the court, or the law to receive it on his behalf.

The creditor may be incapable of receiving payment because of minority, for example, or because of a judicial decision taking from him the administration of his property. In such a case, payment is to be made to the person designated by the court or the law to represent the creditor, rather than to the creditor himself or someone designated by him. The debtor who pays the creditor in such a situation does not make a valid payment, and he thus exposes himself to a possible second claim. Even so, he will not be required to pay a second time if he can prove that his payment benefited the creditor and that the creditor, when he requests the second payment, still has the enrichment from the first payment. Article 1742 adopts this provision from the French Civil Code (Article 1241). A similar provision is found in the Italian Civil Code (Article 1190).

Article 1743 provides for two cases where payment is valid and the debtor consequently is discharged, even though he has not paid the person legally entitled to payment.

Article 1743(1) adopts the rule of French Civil Code Article 1239 (2). Payment is valid if ratified by the creditor or if it benefits him, that is if it has, and to the extent that it has, enriched the creditor in fact.

Article 1743(2), using a formula borrowed from the Italian Civil Code (Article 1189), states a rule that is also found in the Civil Codes of France (Article 1240), Lebanon (Article 293) and Egypt (Article 333). The debtor is discharged with respect to the true creditor if he pays in good faith a person who has no right to receive payment but who seems unequivocally to be the creditor. The particular situation in mind here is that of the apparent heir. It is also the case of

14. Editor's note: In the original, French version of the Commentary, these words are "*par qui*," but the meaning is clearly "a qui."

a person who has improperly taken possession of a bearer note and demands payment of the note at maturity. The debtor pays the person whose position as creditor appears to be established. He is discharged and the true creditor has recourse only against the person who has improperly used his note; the creditor can require the latter to reimburse the amount improperly collected (See Italian Civil Code, Article 1189(2)).

Article 1744, finally, deals with the situation where the debtor cannot be sure who is the creditor. An example of this would be where the succession of the original creditor is in dispute between two persons, both of whom claim to be the heir. Article 1744 borrows Article 168 of the Swiss Code of Obligations to solve this problem.

Illustrations.

1. A owes B \$1000, but B is 15 years old and thus subject to the incapacity of all minors. Rather than pay B, A ought to pay C, B's legal representative.
2. In the same situation, A pays the \$1000 to B and B wastes the money. Since the payment to B is not valid, a second payment of \$1000 can be requested by B after he reaches majority, or by C, B's legal representative.
3. B, having received the \$1000 from A, gives it to C. A is discharged.
4. B wastes \$500, but invests the other \$500 in shares that doubled in value and are worth \$1000 at the time B sues A. A does not have to pay anything. As a result of A's payment, B is presently enriched by \$1000. It is irrelevant that B wasted \$500 of the \$1000 paid him by A.
5. A owes B \$1000. He pays C, who has a mature claim of \$1000 against B. A is discharged.

Article 1745. What things, goods, or services are to be delivered? Article 1745 first reaffirms the principle already set forth in Article 1731: Contracts are law for the parties. What must be given by the parties is what they have agreed to give. A contracting party cannot discharge his obligation by offering his creditor something else, even if the other thing is of incontestably greater value than the thing promised. The creditor never commits an abuse of right in holding to the contract and requiring, even if one cannot see why he should, the exact thing that was agreed to. Article 1745 adopts the rule that is found in the civil codes of France (Article 1243), Lebanon (Article 299), Italy (Article 1197) and Egypt (Article 341).

Illustration.

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

Article 1746. From this principle that the creditor can demand exactly what was promised follows the creditor's right to refuse a partial payment. Article 1746 (1) states this rule. Similar provisions are found in the civil codes of France (Article 1244), Germany (B.G.B., Section 266), Lebanon (Article 300), Italy (Article 1181), and Greece (Article 316).

The rule of Article 1746(2) is borrowed from the Egyptian Civil Code (Article 342(2)). It gives the creditor the right to require, as well as refuse, a payment that he considers partial if part of the debt is contested by the debtor. The debtor cannot delay payment until the dispute is resolved, nor subordinate payment to the condition that the creditor agree not to press his claim to receive more.

Illustrations.

1. A sells B three cases of Champagne. A delivers two cases. B can refuse to accept this performance.
2. A and B are discussing the amount that B owes A. A claims it is \$1300; B claims it is only \$1100. A writes to B, "Send me \$1100 now; we will settle our dispute later." B must send the \$1100.¹⁵

Article 1747. Where the obligation is to deliver fungible things, there are other problems. Who has the right to select the thing that the creditor is to receive? Article 1747 leaves this choice to the debtor in the absence of agreement to the contrary, as do the Swiss Code of Obligations (Article 71) and the civil codes of France (Article 1246), Lebanon (Article 299), Italy (Article 1178), and Greece (Article 289). But the debtor, in performing his obligation, must choose goods of at least average quality.

15. Editor's note: The commentary on the preliminary draft at this point contains several paragraphs discussing an Article 70 of the draft, which was replaced at a later stage in the codification process by the present Article 1758. This latter Article, unlike Article 70 of the draft, places the risk of deterioration and loss on the debtor, in principle, rather than on the creditor.

usage. It seemed desirable to place it in the Title of the Code dealing with *Contracts in General* and thus to extend the scope of its application.

Illustrations.

1. B sells A 100 liters of olive oil, to be delivered in Addis Ababa. When B's shipment comes to A, it contains only 97 liters. A cannot refuse the shipment.
2. The contract specifies that the oil must be of a particular quality. The quality delivered is slightly inferior. A must still accept the shipment, unless he specified that he would have the right to refuse anything not satisfying the contract specifications or can prove that the difference in quality is sufficiently important that the delivery is not of value to him.
3. A specifies that he is buying olive oil of a certain brand. B delivers 100 liters of olive oil of a different brand. Here it is not just the quality of the goods, but their identity that is involved. A can refuse the shipment.
4. In place of olive oil, B sent peanut oil. A can refuse the shipment.

Articles 1749-1750. Money debts are to be discharged in the currency of the country where payment is to be made. This is so even where the amount is stated in the contract in another currency, unless the contract expressly states that payment is to be made in the foreign currency.

Articles 1749(1) and 1750 formulate these rules in accordance with Section 244 of the German Civil Code and Article 84 of the Swiss Code of Obligations.

The Code also provides, in Article 1749(2), that parties may fix the amount due by referring to an index made up of the price of certain goods or services without indicating a specific amount of currency. This provision seemed desirable to exclude the doubts that have arisen in other countries where it has been asked whether such clauses, which are aimed primarily at the danger of monetary instability, were contrary to public policy. The Code recognizes the validity of such clauses, except where they are regulated or prohibited by law.

Article 1749 (2) provides for these clauses because monetary instability and inflation can occur independently of any legislative decision. No effort was made, on the other hand, to specify in the

Code the effects of monetary regulations; these would require special legislative action. The Code, made to last, can only provide principles that prevail in normal circumstances and in a time of stability. When stability is compromised, the legislator must take appropriate action in the particular circumstances of the moment to conciliate public and private interests. Legislation that devalues the currency ought to include provisions dealing with contracts in force. Legislation on control of foreign currency ought to say what happens to clauses in existing and future contracts that provide for payment in foreign currency. In any case, the legislator must define what is meant by "local currency" as that term is used in Article 1749(1). Provisions on payment should be put in the Civil Code only if they reflect permanent monetary concepts or relate to currency phenomena that can occur independently of legislative action.

Illustrations.

1. A owes B E\$300, payable in Asmara. A cannot discharge his debt by paying B the equivalent, in Egyptian pounds, of E\$300. He must pay in bills or coins that are legal tender in Ethiopia.
2. A concludes a contract with B and is to pay B, according to the contract, 500 pounds sterling. The place of payment is Asmara. A will discharge his debt by paying B, in Asmara, the equivalent in Ethiopian dollars of 500 pounds sterling.
3. In the preceding case, it is specified in the contract that pounds sterling must actually be paid, and not Ethiopian dollars. A must pay in pounds sterling.
4. A loans B E\$1000. It is stipulated that B is to repay a sum corresponding to the price of X kilograms of butter or X meters of a particular kind of cloth. This stipulation is valid.

Article 1751. Article 1751 is similar to rules in the codes of Switzerland (Code of Obligations, Article 73), Germany (B.G.B., Section 246), and Italy (Civil Code, Article 1284). It does not specify in what cases interest is due in the absence of agreement between the parties or at what time interest payments are to be made. It simply states the rate of interest that is to be paid when interest is due and the parties have not fixed the rate. The provision of Article 1751 is applicable, in particular, where one of the parties owes the other a

sum of money, has not paid it, and has been put in default (interest for default, dealt with in Article 1803).¹⁶

Articles 1752-1754. When a debtor does not pay all he owes his creditor, either because he makes a partial payment that is accepted by the creditor, or because he owes several debts to the creditor and makes a payment that is insufficient to discharge them all, it is necessary to determine to what the payment applies.

Article 1752 deals with partial payments and states that it covers first costs, then interest due, and only finally the principal debt. This conforms with the rule in various Western legal systems: French Civil Code (Article 1254), Swiss Code of Obligations (Article 85), Italian Civil Code (Article 1194). The formula itself is borrowed from the codes of Lebanon (Article 308) and Egypt (Article 343).

Articles 1753 and 1754 deal with the case where the debtor is liable toward a single creditor for several debts. The debtor may indicate which of the debts he intends to discharge. If he does not, the creditor may specify in his receipt the debt to which he is applying the payment; when the debtor receives the receipt he can declare his opposition to this application of the money and declare which debt he has discharged. The provisions of Article 1753 are similar to rules in the Swiss Code of obligations (Article 86) and the Lebanese Civil Code (Article 307).

If the debtor does not declare his choice and if the receipt contains no specification, the law itself makes an imputation of the payment. Article 1754 considers first the date of maturity of the debt and secondly how burdensome the debt is for the debtor. Payments are applied first to debts that are due; among debts that are due no distinction is made on the basis of the date on which they fell due. For debts that are not due, payments are imputed first to those that will fall due first. If several debts are already due or will become due on the same date, the payment is imputed first to the one most burdensome to the debtor. If an application of these principles does not dictate imputation to one debt over another, the payment is to be applied to all debts in proportion to their amount.

These rules, which apply when neither the debtor nor the creditor has specified his choice, seemed sufficient and certain distinctions made in other civil codes (French, Article 1256; Italian, Article 1193; Swiss, Article 87) have been abandoned.

16. Editor's note: At this point, Professor David discussed the factors to be considered in deciding what rate to fix as the legal rate of interest. The rate finally adopted in the Code is 9%.

Article 1755. This Article determines the place where payment is to be made. If the parties determine the place of payment, their agreement will be respected. If the parties have said nothing, it is provided generally that the payment is to be made at the domicile of the debtor.¹⁷

There is, however, an exception to this principle under Article 1755(3): unless otherwise agreed, payment in respect of a definite thing is to be made at the place where such thing was when the contract was made.

Article 1755 is similar to rules in the civil codes of France (Article 1247), Lebanon (Article 302), and Egypt (Article 347). It differs, however, from the Swiss Code of Obligations (Article 74), the German B.G.B. (Section 270), the Italian Civil Code (Article 1182) and the Greek Civil Code (Article 321), which declare payments of money due, in general, at the domicile of the creditor. It did not seem advisable to include in the Code such a provision, which would favour creditors; if they desire such a clause they should be sure to include it in the contract.

Nor does the Code contain any provision like Italian Civil Code Article 1182, which provides that exceptions to this rule may result from custom, the kind of business involved, or circumstances. A clear rule seemed preferable; if the parties wish, they can alter these rules by agreement.

The example of the Greek Civil Code (Article 322) led us to speak in Article 1755(2) of the place where the debtor had his domicile at the time the contract was made rather than, as do other codes, simply at the domicile of the debtor (or creditor).¹⁸

Illustrations.

1. A loans B E\$1000. Nothing is said about the place where the money is to be paid. It is to be paid at the place where B has his domicile at the time the contract is made. The place where the contract is concluded and the place where the money is paid to B are irrelevant.
2. A sells B a carpet. The carpet is to be put at B's disposal at the place where it is located when the contract is concluded.

17. Editor's note: Here again, Professor David uses the word "domicile" in a non-technical sense, since the text speaks in terms of "the place where the debtor had his normal residence." See note 2 above.

18. Editor's note: See note 17 above.

3. A undertakes to deliver 10 quintals of flour to B. The flour is to be delivered at the place where A has his domicile when the contract is made.

Articles 1756 and 1757(1). The time when payment is due, like the place of payment, is to be fixed by agreement between the parties. Among the possible provisions in the contract, the Code deals in Chapter IV of Title XII with time provisions and conditions, both of which are related to this question.

Where no time for payment is fixed in the contract, the parties are normally required to perform their obligations immediately. A party must perform as soon as the other party gives him a notice of default in the manner prescribed in Section IV of this Chapter.

Performance (in bilateral contracts) should take place, in principle, simultaneously; he who requires the other party to perform his obligation should already have performed his own, or should offer to perform it immediately, unless of course the contract fixes a later time for performance by him. Article 1757(1) states this rule expressly, similarly to the codes of Germany (B.G.B., Section 271), Switzerland (Code of Obligations, Article 82), Italy (Civil Code, Article 1400), and Egypt (Civil Code, Article 161).

Articles 1757 (2) and 1759. Article 1757 (2) deals with two situations where one party, although not the beneficiary of a time provision, can, as an exception to Article 1757(1), refuse to perform his obligations. This is inspired by the English concept of anticipatory breach of contract.

The first situation is that where the other party has clearly shown that he will not perform his obligations. Article 1757(2) does not require that this intention be expressed in any particular way nor that it be communicated to the creditor by the debtor.

The second case is that where the insolvency of the other party has been established by a court. The Code does not require that bankruptcy have been declared; an attachment that has been ordered without success in favour of another creditor of the debtor is sufficient.

In these two situations, a person has the right to refuse to perform his obligations; the other party cannot then object that his own obligations need not be performed.

In order to have a clear idea of the rights of the parties, one should consider together with Article 1757 (2) the provisions in the Section dealing with the non-performance of contracts that allow a party to declare a contract cancelled in certain cases.

The right to suspend performance of the contract in the two situations outlined in Article 1757(2) ceases, by virtue of Article 1759,

if the other party produces securities sufficient to guarantee that he will perform his obligations. A new undertaking by the defaulting party is insufficient; he must provide securities that guarantee timely performance of his obligations.¹⁹

Illustrations.

1. A has undertaken to perform for B a role in B's theater in February. A then undertakes to play another role in another theater in the same city at the same time. It is clear that the two undertakings cannot both be performed. B can refuse to make advance payments that he was to make to A under the contract.
2. B declares in public that he will not perform his obligation to A. A can suspend performance of his part of that contract that B has declared he will not perform.
3. A concludes a contract with B. He is to deliver to B a fixed number of cases of beer per month that B will pay for every three months at a fixed time. B goes bankrupt. A can stop his deliveries, until he receives a guarantee that he will be paid.
4. A is to deliver to B, under a contract, 100 cases of beer, for which he has already been paid. B negligently injures A in an accident and must pay him compensation for this. A cannot refuse to deliver the cases of beer until this compensation has been paid. B's debt is not connected with the contract from which A's obligations derive.

*Article 1760.*²⁰ Unless otherwise agreed, the debtor is to meet the costs of payment. This rule is also found in the codes of France (Article 1248), Lebanon (Article 304), Italy (Article 1196), and Egypt (Article 348). The costs of payment can be considerable; they include costs of packaging, transportation to the place of delivery, and taxes that are collected at the time of this transportation (import duties in particular). Generally, however, the debtor will not have to meet most of these expenses anyway because of the way Article 1755 establishes the place of payment. The expenses of payment will

19. Editor's note: The Commentary on the preliminary draft at this point contains two paragraphs discussing an Article 83 of the draft, which was omitted at a later stage in the codification process.
20. Editor's note: Article 1758 was not contained in the preliminary draft of the Code. It was added at a later stage in the codification process, and so is the subject of no comment here.

always include, on the other hand, the costs of providing a receipt and stamp taxes that may be collected at the time of payment.

Articles 1761-1762. Articles 1761 and 1762 establish the debtor's right to require a receipt for payment and, when he has paid the whole debt, the return of the document evidencing the debt. These Articles are similar to Articles 88 and 90 of the Swiss Code of Obligations. Similar articles are found in other codes: Egypt (Civil Code, Article 349); Italy (Civil Code, Article 1199); Lebanon (Civil Code, Article 366), and Germany (B.G.B., Sections 368-371).

SECTION III. VARIATION OF CONTRACTS ²¹

(Articles 1763-1770)

Articles 1763-1766. The question of whether the courts should have the power to modify contracts in certain circumstances has caused lively discussion since the War of 1914. Writers, courts and legislators have proposed and adopted various solutions to this problem.

The problem of modification of contracts comes up in two different ways. First, do the courts have a supervisory power over the formation of contracts so that they can modify its clauses simply because they seem inequitable, apart from any change in circumstances? Aside from a few specific contracts (contract of assistance at sea, payment of some agents, and, in France, marriage brokerage), Western legal systems have unanimously refused to give courts this power, which would allow them "to make contracts for the parties." Article 1763 states this rule explicitly. The only remedy for a party to an inequitable contract is to request the invalidation of the contract on the ground of a defect in consent.

The threat of such an action might lead the other party to compromise and modify by agreement the unfair clauses in the contract. Variation by agreement is, of course, always possible. The courts themselves can only invalidate an inequitable contract; they cannot modify it.

The problem of whether a court can modify a contract also comes up in another context, where circumstances have changed after the contract was made. The balance in the contract that existed when it was concluded has been upset. The party who is prejudiced claims either that the contract should be modified or that he should be released. He asserts the existence of an implied *rebus sic stantibus*

21. Editor's note: The words "vary" and "modify" are used interchangeably in the translation of this Section of the Commentary, as they are in the Code articles themselves.

clause in the contract. Or he claims that it is impossible to perform the original contract; the contract that can be performed, he says, is a different contract from the one the parties agreed to. There was considerable division among Western legal systems following the War of 1914 concerning how this problem should be dealt with.

Article 1764 holds to the traditional position on this point which was accepted in all countries before 1914 and which still prevails in France. Except where expressly permitted by law, the courts cannot vary contracts.

The reasons that support this solution are obvious. First, it is an attempt to avoid a proliferation of litigation. And second, although courts are well able to solve legal problems and state the law, they are not qualified to deal with questions of economics and to draft contracts. For this double reason, it is essential to have the rule set forth in Article 1764. The parties must know that their contracts bind them; when they conclude a contract of long duration, they should protect themselves against the risk of circumstances changing after the contract is made. This is in fact what happens in countries like France where the "theory of *imprévision*" is rejected. The rule provided in Article 1749(2) increases these possibilities in Ethiopia.

The courts cannot modify contracts except in cases provided by law. Article 1764, in stating this rule, calls contracting parties' attention to the problem of contract modification and suggests that they may want to provide for it in their original contract. It also suggests that even if they did not put such a provision in the contract, they may want to make a new contract taking account of new circumstances where justice so requires. With respect to this latter possibility, however, one should remember Article 1722: the new agreement, modifying the earlier one, must be concluded in the same form that was required for the validity of the original contract.

Illustrations.

1. A contracts with B to have B do some work for a fixed price. A later learns that this price, which he freely agreed to, is terribly high. Another contractor would have done the same work for one third the price. The court cannot vary the contract on the grounds of fairness.
2. A agrees to furnish water to B for the irrigation of B's land. The contract is made for 99 years. It is provided that A will supply B with a certain number of gallons of water per day or per week for a fixed total price. The cost of living increases greatly and the price agreed to

seems absurdly low. The courts cannot vary the contract in order to raise the price.

3. A undertakes toward the central, or a provincial, government to provide specified transportation services between two towns for a certain time according to stated conditions. Circumstances change and the service can no longer be provided except at a loss under the terms of the contract. Nevertheless, the contract must be performed. The courts cannot modify it (except in the circumstances set forth in Article 1767).

Article 1765 again shows the Code's positive attitude toward the variation of contracts where circumstances have changed, with the single restriction that the variation is not to be made by the courts. It allows, and even suggests, that the parties submit to third party arbitration in such a case. Article 1765 seemed desirable also to make it clear that, if there was an arbitration provision in the contract, no one can claim that the object of the contract is insufficiently defined and that the contract is therefore invalid by virtue of Article 1714.

A particular use of Article 1765 is shown in the discussion below of Article 1767.

Article 1766. Articles 1766 and following provide four exceptions to the general principle that courts cannot modify contracts.

The first exception, provided by Article 1766, deals with certain contracts where good faith is particularly required of the parties because there is, independent of the contract, a special relationship between them. Article 1766 should be seen in conjunction with Article 1705(1), which also deals, in connection with vices of consent, with cases where there exists between the parties "a special relationship of confidence that commands particular loyalty in their dealings with each other." This same kind of relationship justifies the variation of the contract by the court in certain cases under Article 1766.

Article 1767. It seemed necessary to provide for court modification of contracts in a second situation: contracts with the government,²² to which the Civil Code does apply, as we have already point-

22. Editor's note: The French legal term "*l'administration*" is a particularly difficult one to translate into English. The term designates one part of the executive branch of government. "*L'administration*" is that part of the executive which administers, in the strict sense, and is distinguished from "*le gouvernement*" which is made up of higher level officials who make the policies that are administered by "*l'administration*". "*L'administration*" is ordinarily translated in the Ethiopian Civil Code by the term "the administrative authorities." We will use this translation here, but will also translate "*l'administration*" as "the government" in cases where that seems more clearly what was intended.

ed out. Contracts with the government pose a special problem because the government is significantly different from private persons. In addition to its power to conclude contracts, the government can enact rules that apply to all. It cannot be admitted, in a code based on the principle of the equality of contracting parties, that such general rules could upset the equilibrium of the contract to the detriment of a person who contracted with the government. In such a case, Article 1767 allows the court to modify the contract. Article 1769 specifies the basis on which the modification is to be made: the court is to ensure that the equilibrium of the contract, upset by the unilateral act of one of the contracting parties, is re-established.

Article 1767 presupposes an act of the government. This must be a regulatory act: statute, decree, order, etc. The general policy of the government or its failure to act may make the performance of a contract more difficult, but it is not sufficient reason to modify the contract. Moreover, the act in question must be an assertion of public power, that is to say an act that the government could take only because it is the government and thus has regulatory power. The person contracting cannot complain of an act that does not result from these special prerogatives of public power since he could have been exposed to the same risks if the other party had been someone other than the government.

The term "a public administration," as used in Article 1767, includes the State and its administrative subdivisions, both on a geographical basis (provinces, districts, communes) and on a functional basis (ministries, public schools, public hospitals, etc.).²³

In spite of appearances, Article 1767 does not constitute an exception to the general rules on contracts. In an ordinary private contract, the rule that contracts are to be performed in good faith would prohibit one party from modifying unilaterally the conditions in light of which the contract was concluded, thus making the performance of the contract more onerous for the other party. Such conduct would amount to a failure to perform the contract and the other party would be able to collect damages or even have the con-

23. Editor's note: In other words, it means "the government" as that term is used in English, and that still in a very broad sense. This paragraph was intended to clarify the broad sense in which *l'administration* was meant here in the original, French, preliminary draft of Article 1767. See note 22 above.

tract cancelled. The allocation of damages, which is generally available, is actually equivalent to the variation of the contract provided for in Article 1767. A special rule for contracts with the government is useful for two reasons. First, it is impossible to say that the government acts contrary to good faith when it exercises its public power. And second, it is important to limit the possibilities for variation to cases where there has been an assertion of the public power, which is here distinguished from the government's general conduct of business and its policies.

Article 1767 seems to give the person who contracts with the government a privileged position, since the right to require modification of the contract only operates in his favour. But this is only appearance, since the government has the means, when it enacts a decree or an order, to limit its effects with reference to contracts in force.

However justified court modification of contracts may seem in this situation, it is still desirable to limit this kind of modification to the minimum required. The best way to avoid the necessity of court modification of administrative contracts is to include a clause in the contract providing for third party arbitration in the situation dealt with by Article 1767. The problem of administrative contracts was the main reason that Article 1765 was included in the Code.²⁴

Illustrations.

1. A undertakes, in a contract with a provincial government, to provide transportation between cities X and Y. The government establishes a new gasoline tax or requires the payment of a toll for the use of a bridge between X and Y. A can require the modification of the contract to compensate him for the damage caused by this general regulation.
2. In the same situation, A complains that the road is badly cared for by the province so that his equipment wears out quickly. The contract cannot be varied by the court, since there has been no act of which A can complain.
3. The tax on commercial profits, to which the transporter is subject, is increased. A cannot require the modifica-

24. Editor's note: Article 1767 can give an illusion of simplicity. It must be read together with Article 3179-3193, which provide a complex set of rules concerning the modification of administrative contracts, a special kind of government contract that is defined in Articles 3131-3132 of the Code.

tion of his contract. The business in which he is engaged may have become less profitable, but the performance by A of his obligations under the contract has not become more onerous.

Article 1768. Article 1768 states a rule that has long been accepted in Western legal systems. It applies where the performance of the contract has become partially impossible. The impossibility may not be sufficient to justify the cancellation of the contract under Article 1788, but the judge is authorised, in such a case, to modify the contract and reduce the obligations of the party who will not receive the full performance that was promised him. Court intervention is not subject to the usual criticism in this case. Here something affects the very possibility of performing the contract, rather than being exterior to it, and requires the intervention of the court. In addition, the court will not be creating a new contract with a new balance between the parties. Rather its attention is to be directed to reestablishing the equilibrium between the parties that was reflected in the original contract.

Article 1769 states this explicitly.

Illustrations.

1. A leases land belonging to B. A part of this land is expropriated by the State in order to build a military base. A only retains 9/10 of the land that he leased. The court may reduce the rent to 9/10 of what was provided in the contract.
2. A undertakes to build a house for B, using a certain kind of wood for the floors. It becomes impossible to get the wood specified, and a different wood, of inferior quality, is substituted. The price agreed to by B may be reduced.

Article 1770. Article 1770, finally, allows a court to grant the debtor a period of grace. This possibility is also provided by the civil codes of France (Article 1244), Lebanon (Article 115), and Egypt (Article 346). It seems to be unknown in other countries. With much hesitation it was included in the Code, which did limit it, however, to six months maximum.

It is possible for the parties to provide that the courts cannot grant a period of grace.

SECTION IV: NON-PERFORMANCE OF CONTRACTS **(Articles 1771-1805)**

Article 1771. Sometimes a debtor fails to perform his obligations, either totally or in part, or he may perform them improperly

or late. In all of these cases, the Code speaks of non-performance of the contract.

Article 1771 introduces generally the three possible consequences of non-performance irrespective of whether or not the debtor is at fault. They are specific performance, cancellation, and damages. The subsequent Articles of this Section specify the conditions under which these various remedies are available.

Articles 1772-1775. Before a person can assert the rights that arise from non-performance of a contract, he must put the other party in default, that is he must call his attention to the fact that the obligations are due and to the sanctions the debtor may incur if he does not perform them. This requirement of putting the other party in default by notice exists in all Western legal systems:²⁵ French (Civil Code, Article 1139), Swiss (Code of Obligations, Article 102); Lebanese (Civil Code, Article 257), Italian (Civil Code, Article 1219), Greek (Civil Code, Article 340) and Egyptian (Civil Code, Article 218).

No special formality is required to put a person in default. The notification can be by means of an official summons, or simply by a letter, even unregistered. The notification of default can be accomplished by any act that indicates to the debtor that the time has come for him to perform his obligation and that indicates the creditor's intention to require performance. The only condition imposed by the law concerns the time for notification; it cannot be given before the debtor's obligations are due and, thus, enforceable.

The notification of default has four functions. In obligations to give, it puts the risk of loss of the thing on the debtor. In obligations to pay money, it begins the accumulation of interest for delay. More generally, it reminds the debtor of his obligations and of the sanctions he will face if he does not perform. And finally, it should lessen the number of cases that come before the courts; they will only get cases in which there is a clear failure to perform.

Where the notification of default cannot serve any of these ends, the Code does not require the creditor to use it and allows him, instead, to immediately bring a court action against the debtor. Article 1775 (a) and (b) enumerate two cases where this is so. Article 1775 (c) adds a third case, where the debtor has declared in writing that he will not perform his obligations. The effects that would otherwise result from the notification of default run from the time when this written declaration is made. Finally, according to Article

25. Editor's note: By this Professor David means all western legal systems of the civil law type.

1775(d), notification of default is unnecessary when the parties have expressly so agreed. Other situations in which no notification of default is required are provided for in Article 1780.

Article 1774 adopts a provision from the German Civil Code (B.G.B., Section 250) and allows the creditor to specify in his notification of default a time after which he will not accept actual performance of the contract and will insist on cancellation and damages. The purpose of this provision is to permit, as often as possible, the settlement outside of court of difficulties that arise at the time of performance of the contract.

The time fixed by the creditor must be reasonable. But if it is reasonable and has expired, the creditor may unilaterally cancel the contract without going to court. In such a case, the courts will only become involved if there is a dispute as to whether the time fixed was reasonable, or if the creditor also claims damages and the debtor disputes their amount or the fact that they are due.

Illustrations.

1. A, who manages a cafe, undertakes to buy beer exclusively from B's brewery. He then orders beer from C's brewery. The sanctions for non-performance follow without the necessity of a notification of default, since it is an obligation not to do something that has been breached.
2. A orders some fire-crackers and dance costumes from B for a feast or fair. It is obvious that A intends to sell these items at the feast and that if they are delivered late he will not be able to sell them for a very long time. B will be subject to the sanctions for non-performance if he has not delivered the items before the fair. A notification of default is not necessary in such a case.

Article 1776. When a debtor fails to perform his obligations, one remedy available to the creditor is to request the courts to force him to perform.

Specific, or forced, performance is usually considered as the normal remedy in a civil law system. The Anglo-American common law system, on the other hand, regards this as an exceptional remedy, available only if damages are inadequate to satisfy the creditor's needs.

The Code leans in the direction of the common law solution, stating that specific performance is only available where it is of specific interest to the creditor. Even then it must—and this requirement

is common to all Western legal systems—be possible to have specific performance without affecting the personal liberty of the debtor. Thus, a contract of employment cannot be the object of a judgment of specific performance.

Illustrations.

1. A manages a factory that runs on electric current. He contracts with B to furnish the electricity needed. After a disagreement, B cuts the current to A's factory. The court will order that the current be turned back on (specific, or forced, performance), since A has a particular interest in the performance of the contract.
2. A undertakes to provide B with room and board for a fixed period of time at a fixed price. A refuses to perform the contract. The courts will ordinarily not order the specific performance of this contract. As an exception, they may order it if:
 - a) the performance of the contract is of particular interest to B, who cannot find any place else to live; and
 - b) the performance of the contract is possible without A himself, acting, such as where other persons in A's establishment can provide the services due B.

Both of these two conditions must be satisfied before specific performance will be ordered.

Articles 1777-1778. Articles 1777 and 1778 deal with several situations where specific performance of the debtor's obligations differs little from an award of damages and where, consequently, the possible objections to specific performance disappear. Where the debtor has undertaken to do or not to do something, the creditor can be authorized to have the obligations performed at the expense of the debtor, or to have destroyed at his expense the thing that the debtor has constructed in violation of their agreement. These two possibilities are also foreseen by the laws of France (Civil Code, Articles 1143-1144), Switzerland (Code of Obligations, Article 98), Lebanon (Civil Code, Article 250), and Egypt (Civil Code, Articles 209-212).

Egyptian law even provides that in case of emergency the creditor need not obtain the court's authorization, but it did not seem advisable to include such a provision in the Ethiopian Civil Code. Forced performance of the obligation presupposes a court decision in all cases where the debtor was obliged to do or not to do something.

In the case of obligations relating to fungible goods, on the other hand, it seemed useful to make a distinction in Article 1778.

In principle, the creditor must obtain a court authorization even here if he wants to purchase at the expense of the debtor the things that were supposed to be delivered but were not. A court authorization is not necessary, however, where the contract explicitly allows the creditor to by-pass it. Similarly, it is not necessary if the things that were to be delivered are quoted on an exchange or have a market price.²⁶

No article of the Code deals specifically with the situation where the contract creates an obligation for the debtor to transfer to the creditor his ownership or some other real right in a specific thing. Article 1776 is sufficient to deal with this case. If the interest of the creditor requires, the court can transfer the right to the creditor and authorise him to perform all the necessary formalities at the expense of the debtor.

Illustrations.

1. A undertakes to maintain in good condition irrigation ditches belonging to B. If he does not perform his obligations, B can request court authorization to have C do the necessary work and send C's bill to A.
2. A, in violation of a contract with B, closes off a passage that B needs to use. B can be authorized to clear the passage at A's expense.
3. A buys 500 kilograms of sugar from B. B does not deliver. A can be authorized to buy 500 kilograms of sugar at B's expense

Articles 1779-1780. To the rights given the creditor under Articles 1777 and 1778 there correspond certain rights for the debtor where the creditor cannot or refuses to receive the performance that is due and offered by the debtor. These are specified in Articles 1779 to 1783; where the debtor has put the creditor in default for not accepting performance, he has the right to deposit the thing the creditor refuses without good cause to receive. He has the same right whenever he cannot perform his obligations normally, as for

26. Editor's note: The distinction mentioned by Professor David was removed from the preliminary draft of the Code at a later stage in the codification process. Court authorization is necessary under Article 1778, as enacted, in all cases. We have, therefore, omitted a fourth illustration of the operation of these Articles, which dealt with the eliminated exception.

example where he does not know who his creditor is or where he is to be found, where several persons claim to be the creditor, and where the creditor is incapable of receiving payment and has no representative. In all these cases, a notification of default to the creditor is of no use. A notification of default is necessary, however, when the creditor simply refuses to accept performance, unless this refusal was declared in writing (Article 1775).

In these two categories of cases, the debtor can exercise his right to deposit the thing without getting a court authorization. The deposit is an act that does not prejudice the rights of the creditor, who can always subsequently dispute whether or not the debtor had the right to act as he did. If the debtor acted improperly, he will be liable for non-performance of his obligations, including the expenses resulting from this deposit. It is important, however, to give him this right to act without any court decision and thus to permit him to get rid of the thing without delay.

The deposit of goods is made by the debtor at the place designated by the court of the place where performance is due. Since this decision by the court can be made without the creditor being summoned to court, it does not establish that in fact the debtor has just cause to deposit the things. The debtor will not need to go to court at all if there exists, at the place where performance is to be made, a public warehouse that can receive the thing the debtor is to deliver, or if it is a debt of money, a public bank that can receive the money.

Illustrations.

1. A transports some coffee for B under contract. The coffee is to be delivered to B in a specific place on May 1, 1956. B fails to appear and cannot be found. A may deposit the thing. If there is no public warehouse he will be wise to ask the court to designate a place of deposit. Otherwise, he will be liable if he has chosen the warehouse poorly.
2. A owes B some money. A claims he owes \$500, while B claims that \$550 is due and refuses to receive the \$500 on the ground that he has the right to refuse a partial payment. A may deposit the money in the Commercial Bank of Ethiopia.
3. B, A's creditor, is dead and both C and D claim the inheritance. Without waiting for the dispute between C and D to be settled, A can discharge his debt by depositing the money due in a public bank.

Article 1781. The deposit of the thing usually safeguards the rights of both creditor and debtor. There are cases, however, where deposit is impossible or disadvantageous. Article 1781 allows the debtor in such cases to sell the thing either at public auction or, sometimes, by private sale. A court authorization is always required for such a sale, but here again the role of the judge is limited. He is to decide only whether and in what way the thing should be sold, assuming that the debtor has the right to deposit the thing. He is not to decide whether or not the creditor had good cause to refuse the performance tendered or whether the debtor is properly claiming that he does not know to whom performance should be made or where someone can be found who is authorized to receive performance. The price received by the debtor when he sells the thing should be deposited in a public bank. Article 1781, which states these rules, is inspired by the Swiss Code of Obligations (Article 93), the Egyptian Civil Code (Article 337) and the German B.G.B. (Sections 383-386).

Illustrations.

1. The goods that B will not accept or which are to be delivered to either B or C are perishable: eggs, butter, fresh vegetables. The debtor can request court authorization to sell them.
2. The delivery is of watches, which are not perishable and require minimum expense for deposit. The court cannot authorize their sale.
3. Delivery is to be of firewood, straw, or manure. The cost of deposit would be quite high relative to the value of the thing sold. The court should authorize sale.

Articles 1782-1783. As has been explained, the deposit of something does not itself discharge the debtor. It simply rids the debtor of the thing and transfers the risk of its deterioration or destruction to the creditor. In order for the debtor to be discharged, a court must decide that his behaviour was justified and this in a hearing to which the creditor is properly summoned.

The judgment deciding that the deposit was valid discharges the debtor, but it does not transfer ownership of the thing to a creditor who refuses to accept, is not in a position to receive, or does not know of, the deposit. Therefore, even after the judgment recognizing the validity of his deposit, the thing continues to belong to the debtor and he may retake it. In such a case, his contractual obligation of course revives immediately, but it revives without the securities that may previously have supported it if the deposit was recognized as

valid by a court. On this point, Article 1783 has followed the rule of the civil codes of Egypt (Article 340) and Germany (B.G.B., Section 376), rather than that of the Swiss Code of Obligations (Article 94).

Illustrations.

1. A deposits coffee that he owes B in a place fixed by the judge. B has not taken delivery of it. A can have the deposit declared valid by a court. Subsequently, B cannot claim that A has not properly performed his obligation.
2. Even then, A can retake the deposited coffee in order to sell it to C. The judgment declaring the deposit valid will cease to have effect in such a case. B can again claim that A has not properly performed his obligations to B.
3. The performance by A of his obligations to B was secured by C's personal guarantee. C is discharged when the court declares valid the deposit made by A. He remains discharged even if A retakes the thing that he deposited.

Articles 1784-1785. The Articles studied so far relate to the situation where one party has not performed his obligations and the other holds to the contract and intends to require its performance. Another remedy available to a party where the other party has failed to perform his obligations is to request from the court, or declare unilaterally in some circumstances, the cancellation of the contract.

Generally, the cancellation of a contract must be requested from a court. This is an application of the principle that no one may be a judge in his own case. Non-performance of a contract, however, occurs in quite varying circumstances and it would show too great an attachment to formalities, and involve solutions that are too rigid, unfair and impractical, if one were always to follow this system. Although the total and definitive failure to perform a contract ought automatically to result in the cancellation of the contract, the same solution is not always suitable for cases of partial performance, delay in performance, or defective performance. In the earlier Sections of this Chapter, we have already seen Articles that take account of these variations. Article 1748 deals with the situation where the debtor who is obligated to deliver fungible goods delivers a quantity or quality slightly different from that required by the contract. Article 1770 gives the court the power to grant the debtor a period of grace.

The non-performance of the contract must be of some importance before it should result in the cancellation of the contract. Arti-

- b. the state of the work: What has been done and what remains to be done;
 - c. the damage that the cancellation of the contract will cause A and the interest that B has in cancellation; and
 - d. the reasons why the work has not been completed in the time agreed and the additional time that will be required to finish it.
2. A borrows £3000 from B at 7% interest for a period of 5 years. Interest was to be paid every three months on a day specified in the contract. A fails to make a required payment at the time agreed. B requests the cancellation of the contract. The court must exercise its discretion in this case as in the preceding one. It will determine the importance that the parties attached, when making the contract, to the regularity of interest payments, considering their profession, their earlier relations, the amount of the loan, etc. It will determine whether this is an isolated instance or whether there have been earlier delays, how the parties in the case have been acting, the causes of the present delay, the advantages and disadvantages that cancellation, which would require A to immediately repay the loan, would have for A and B. In view of all these circumstances, it will grant or refuse, or grant conditionally, the cancellation requested by B.

Articles 1786-1789. Although cancellation of a contract for non-performance generally must be pronounced by the court, there are situations where it is appropriate to give a party the right to declare the cancellation without having to go before a court. Articles 1786-1789 set forth four cases where the cancellation of the contract may be declared unilaterally by one of the parties.

The first case is where the contract contains an express stipulation that the contract can be cancelled in certain circumstances. The contract is law between the parties. Where it is certain that the specified circumstances have occurred, it is useless to require a person to go to court to have the contract cancelled.

The second case is where a fixed, rigid time for performance has been specified in the contract and performance has not taken place within this time. In fact, this is only a specific application of the previous case, but it seemed useful to state it separately. The same solution is provided for the situation where the court, acting under

Article 1770, has fixed a time for final performance. Some codes (Italian Civil Code, Article 1454; Greek Civil Code, Article 343) permit one party, even where there is no clause in the contract allowing for it, to set a rigid time limit for performance by the other party, the duration of which must be at least two weeks, after which the contract will be automatically cancelled if it has not been performed. The Code has adopted this solution in order to avoid the congestion of the courts as much as possible, but it seemed best to speak in Article 1774 simply of "reasonable time" without specifying any duration.

The two other situations, which are dealt with in Articles 1788 and 1789, occur at a different stage from the preceding ones. A party may declare a contract cancelled even before there has been an actual failure to perform, if performance by the other party in conformity with the contract has become impossible or can be regarded as very unlikely.

Article 1788 provides for the situation where the performance of one party's obligations has become impossible. The classic situation is where a specific thing that was essential to performance has perished: the house to be leased was destroyed by fire, the animal to be delivered has died. Similarly, the performance of an obligation can become impossible because it is forbidden by a new law: it may be made illegal to manufacture or sell the product that one of the parties was supposed to manufacture or purchase for the other.

In these situations, the performance of the contract by one of the parties has become physically or legally impossible. The other party can declare the contract cancelled, so that he need not perform his own obligations or so that he can assert his rights after cancellation under Chapter III of Title XII.

One problem can arise with respect to this cancellation. It may happen that the impossibility of performance is not complete or that it is not final. One party cannot perform the contract perfectly or completely, but he can perform it in part or late. What should happen in such a situation? Article 1788 states explicitly that the other party can declare a contract cancelled in such a situation only if the very essence of the contract is affected. Naturally, the courts will have to exercise a control on the judgment of the cancelling party in this regard. Just as in the case of a request for court cancellation under Article 1785, the judge must consider the importance of the part of the contract that cannot be performed relative to that of the part that can, as well as the interests of both parties and the requirements of good faith.

The other situation, dealt with in Article 1789, is similar to that dealt with in Articles 1757(2) and 1759. When one party clearly indicates that he is not going to perform his obligations, the other party is authorized immediately to suspend his performance of the contract (Article 1757(2)). In addition, he can decide whether he prefers to require the specific performance of the contract as soon as the obligation is due or to declare the contract cancelled. Article 1789 allows him to take this latter position without going to court and without waiting for the debt to become due or to be liquidated by the court. The conditions laid down by Article 1789(2) for the exercise of this right of cancellation are in conformity with the rules stated earlier in Article 1759. The only difference is that a time was specified here that did not seem necessary in Article 1759. Article 1789(3) provides a limitation on Article 1789(2), in conformity with Article 1775(c).

Illustrations.

1. A borrows money from B, and it is stipulated in the contract that, if A does not make interest payments on the stipulated days, B can immediately require the repayment of the capital loaned. This formal clause must be enforced. Since the court has no discretion with respect to it, the Code authorises the cancellation by B's simple unilateral declaration.
2. The contract contains no such clause. A has not paid the interest that was due on April 1, and in an action instituted by B, the court has given him until May 15 to pay it. If he has not paid the interest by May 15, B can declare the contract cancelled without going to court again.
3. A is required, under a contract, to manufacture machines for B and to deliver them on a particular date. Political events (a revolution in A's country, war between B's country and another country, blockade of the port of embarkment or destination provided in the contract) prevents the performance of the contract within the time stated. The delay in execution is of unpredictable duration. It had seemed that the contract could be performed within about a year, but this now appears very unlikely because of the delay. B would certainly not have concluded the contract in such conditions and A knows this full well. B can declare the contract cancelled in such circumstances.

Article 1790(1). Specific performance and cancellation of the contract are alternatives, between which a person must choose when his cocontractant does not perform his obligations. Both of these remedies may, however, be insufficient. In spite of them, a person frequently finds himself in a worse position than he would have been in if the contract were properly performed as he had expected it to be. If the court orders specific performance, it may be effective only after a delay, so that for a time the person is deprived of the enjoyment of the thing that he had counted on. He may also have lost a good chance to resell the object if that was his intention. On the other hand, if the contract is cancelled, the person is deprived of the advantage that he could legitimately expect from it. In both cases, it is proper to reestablish the equilibrium established by the contract and upset by the failure to perform the contract. This is done by requiring the person who has not performed his contract, or has performed it incompletely, imperfectly, or late, to pay damages to the other party.

*Article 1790(2).*²⁷ The rules relating to "extracontractual liability" apply by analogy in the case of contractual liability. The Code here reproduced the rule given in the Swiss Code of Obligations (Article 96(2)). Thus, for example, various rules in the Title on extracontractual liability that deal with the evaluation of injury or of the sharing of a loss between the debtor and the creditor or a third party are also applicable to contractual liability.

Articles 1791-1794. In principle, damages are due whenever the contract has not been performed as it was supposed to be, unless of course nothing is due by virtue of the rules that determine the amount to be paid.²⁸

Article 1791 provides that there is only one excuse for non-performance. Damages are not due if the debtor can establish that his non-performance is the result of force majeure. Article 1792 defines force majeure. There is force majeure only when there has been an occurrence that was unforeseeable and insurmountable. With respect to unforeseeability, the Article considers unforeseeable any event that could not normally be foreseen. With respect to the insurmountability, the Article is more strict and requires that it be *absolutely*, and not only *normally*, impossible to perform the obligation.

27. Editor's note: The discussion originally referred to an Article 132 of the preliminary draft, which came at the very end of the Section on *Non-performance of Contracts*. This Article was revised somewhat and became Article 1790(2).

28. Editor's See Articles 1799 ff. in this regard.

In order to make it very clear what is meant by force majeure, Article 1792 defines it twice, first in a positive formulation and then in a negative one. The general formula of Article 1792 is supplemented by the two following Articles. Article 1793 suggests certain situations that, according to the circumstances, may or may not be cases of force majeure. Article 1794, on the other hand, enumerates various situations and states that in no case may any of them ever be considered to constitute force majeure. These particulars, more similar to English legal methodology than to continental, seemed useful. What is essential is to provide rules that can be easily understood. Knowing these rules, the contracting parties can always provide for other cases in which non-performance will be excused, if they so desire.

In this area, the Code deliberately chose a very strict approach. Its provisions are inspired in this respect by the French Civil Code (Article 1147), which has been followed also by the Civil Codes of Italy (Article 1218), Greece (Article 336), and Egypt (Article 215). The severity of these codes seemed preferable to the greater laxity of the Swiss Code of Obligations (Article 97) and the German B.G.B. (Sections 275 and 55), according to which the debtor is discharged whenever no fault is imputable to him.

In using the stricter approach, the Code has tried to increase the responsibility of the debtor and make it more difficult for him to escape liability when he has not properly performed his obligations. The approach of the Swiss Code was avoided because of a fear that it would encourage the courts to be lax. They could easily consider that the absence of fault, a negative fact, would be established by proof that the debtor did what he thought he was obliged to do, *i.e.* that he acted in good faith. In principle, it did not seem that this should be sufficient, and only in certain exceptional cases, provided for in Article 1795, is it allowed. A rule of strict liability seemed necessary; in principle, the Code favours the party who does not receive what was promised over the party who cannot do what he has promised to do. It therefore defines very narrowly the bases for discharge of the debtor, in conformity with a policy which is also followed in the common law.

The severity of Article 1791 is attenuated by the Code for certain kinds of contracts (Articles 1795 and 1796), and the parties can always limit or even partly exclude their liability. Provisions as to liability are dealt with in the Chapter on Special Terms of Contracts (Chapter IV).

Illustrations.

1. A sells 100 quintals of sorghum to B. He is counting on his harvest in order to be able to perform his obligation.

The harvest is less than 100 quintals. This may be an event that is exterior to and not imputable to A. But this event does not prevent A absolutely from performing his obligations, so long as he did not promise that the 100 quintals "would come from his harvest." Since sorghum is fungible, he can obtain it elsewhere. He is liable if he does not perform his obligations.

2. A sells 100 quintals of paper to B. He is counting on C to provide him with this paper. C does not deliver it and as a result A cannot keep his promise. In this case, the event is not exterior to A. A must bear the risk of having badly chosen his cocontractant, C. A is liable if he does not perform the contract.
3. A is to transport a trunk for B. He has his employee, C, handle the transportation. C breaks into the trunk and steals things. A is liable. The theft by C is not A's fault but it is still imputable to him since he should have chosen his employee with greater care.
4. A's factory is closed down for two weeks because the electric current is turned off, and therefore A is late in delivering some merchandise that he has to deliver to B. B asks for damages for this delay. The court must ask:
 - a. whether, according to the contract, the things promised to B had necessarily to come from A's factory that was shut down.
 - b. whether the circumstances that led to the shutting down of the factory were unusual, or whether A should have have foreseen them.
 - c. whether these circumstances are imputable to A, and whether they prevented him absolutely from performing his obligations.
5. A is to manufacture something for B. The machine used to manufacture these products breaks down and the products are not ready on time. A is liable and owes damages. A cannot be discharged by merely proving that he always took good care of the machine, that he did his best to perform the contract, and that he has committed no fault. He is responsible for running his factory and therefore for his failure to perform where that is caused by a break-down in the factory.

Articles 1795-1796. The formula used by Article 1791 may appear very strict for the debtor, but one must not forget that this

strictness presupposes that the debtor has failed to perform his obligations. Before the debtor will be liable, it must be established that he has not performed. In this regard, one must recall the distinction that is made in Article 1712 between obligations of result and simple obligations of means. If a person has undertaken only an obligation of means, it is clear that he incurs no liability if he proves that he acted in good faith and has committed no fault; in such a case, he has thus fully performed his obligations under the contract.

It can be seen that the rule of Article 1791 is only effective in cases where a person has promised a particular result and this result has not been achieved: obligations to give, obligations not to do, and obligations to do that are also obligations of result. But there are many contracts in which, because the party has not obligated himself to produce a given result, one must come back to the less rigorous approach of the Swiss Code of Obligations and admit that damages are not due where one party has not obtained what he expected from the contract so long as the other party has done everything that can reasonably be expected of him, in conformity with good faith, and where he has committed no fault.

In a situation of this kind, there is actually no non-performance of the contract. Nevertheless, one can expect that the other party, disappointed in the expectations he had from the contract, will think otherwise and accuse the first party of not performing his obligations. For this reason, it seemed desirable to clarify the position of the parties in the Chapter dealing with non-performance. This is the purpose of Article 1795. The provision of this Article applies to contracts where it has been foreseen by the parties, either explicitly or implicitly, that one of them promised the other only his best efforts, without guaranteeing the particular result. In addition, it can apply by virtue of a legal provision to certain kinds of contracts in which the legislator sees fit to attenuate the liability that Article 1791 ordinarily places upon the debtor.

In addition, a second situation has been dealt with in Article 1796, that of contracts that are made for the exclusive advantage of one of the parties. Article 1739 also deals with this kind of contract, providing that in case of ambiguity they are to be interpreted in favour of the party that derives no advantage from the contract. Article 1796 reinforces that provision, providing that it is only where there has been a grave fault that that party will be liable in such contracts.

Illustrations.

1. A, a surgeon, concludes a contract with B to operate on a tumor. The operation does not have the effect expected, and

B remains diseased. B demands that A pay him damages, B will get damages only if he proves that A committed a fault.

2. A deposits a suitcase with B. B agrees to take this suitcase as a favour to A and receives no remuneration. The suitcase and its contents are damaged by water or mice. If A claims damages from B, the court must ask whether B has committed a grave fault.

A grave fault will exist only where B takes less care with A's suitcase than he would have with his own. B's obligation and his liability, will therefore be considered differently according to whether or not B knew or should have known the nature and the value of the objects entrusted to him.

Articles 1797-1798. Where the debtor proves that his non-performance was the result of force majeure, this non-performance does not expose him to liability. Even in this case, however, there are two exceptional cases where he will be required to pay damages to the other party.

The first case arises where he does not inform the other party immediately of the reason why he cannot perform his obligation. The other party can then, within the limits of Articles 1799 ff., require compensation for damage that he has suffered and would have been able to avoid had he received timely notice of the non-performance.

The second case is that where the debtor was in default at the time of the event that prevents him from performing. It makes no difference that the event is a case of force majeure. If he had performed his obligation on time, the event would not have obstructed his performance. This is sufficient to make him compensate the other party for the damages caused him by non-performance.

Article 1799. With respect to the amount of damages due, the Code differs from French and French-inspired laws and adopts a formula similar to that used in the common law countries.

In order to decide how much must be paid as damages, there is no need to start, as one does in continental legal systems, from the actual injury that the non-performance caused the other party. One begins by asking, more abstractly, what injury one would normally expect from the failure to perform the contract.

This rule may seem, at first glance, harder to apply than the continental rule. In fact, it seems to us to be simpler. The continental rule mentioned above is actually tempered by other rules, which require that the injury for which compensation is demanded be a direct result of non-performance and that it have been foreseeable at the time

the contract was concluded. These two limitations bring the continental rule much closer to the common law rule and that of the Ethiopian Code. They make this latter rule, which allows one to ignore the exceptions, seem at least as simple, and perhaps simpler, than the continental approach.

There may be many cases in which it is hard to see how Article 1799 would be applied at all, because it is hard to see how there would be any "normally foreseeable" damage that results from non-performance. The solution in such a case is simple enough: non-performance would not necessarily result in the payment of damages. If the parties want to avoid this situation and give their contract more force, they can do so. Under Article 1801, they can require the debtor to pay damages for injury that is caused to the other party in the peculiar circumstances of the case. Or they can fix the amount of damages that will be due upon failure to perform by inserting a penalty clause in the contract. Penalty clauses are dealt with in Chapter IV of Title XII.

Although the formula of Article 1799(1) is inspired by the English rule derived from the case of *Hadley v. Baxendale*, the Code does not accept all the consequences that have been deduced from that rule in England. In particular, it seemed that the "reasonable man" called to say what injury the non-performance would "normally" cause the creditor ought to take account not only of the nature of the contract, but also of all other circumstances known to the two parties, on the basis of which it ought to be considered that they contracted. Article 1799(2) states this explicitly. The illustrations of Article 1799 that are listed below should serve as a guide to the meaning of this Article.

Illustrations.

1. A is to deliver 10 tons of coal to B, a private individual, on October 15. It is normal to foresee that if B does not receive the coal from A, he will buy it from C. A owes B the difference between the price set in the contract and the price that B had to pay C.
2. A sells 400 kilos of coffee to B. It is normal to think that B is a merchant and that he will resell the coffee at a certain profit. B will obtain as damages the amount of this profit that the failure by A to perform the contract has lost him.
3. A undertakes to transport B's trunk to a particular destination. The trunk is lost. It is reasonable to think that it has a certain value in light of its weight and that it contains personal effects rather than precious objects. The court will

award as damages the value of the objects that one could reasonably expect to find in the trunk or the value of the objects that B proves to have in fact put in the trunk as long as it was not unreasonable for him to put them in without warning A especially.

4. A makes a contract with B for the repair of a turbine. It is normal to think that if the repairs are not made in time, A will be injured somewhat: he will have to use more expensive machinery or hire additional labourers. But it is not normal to think that the mill will be totally stopped and that A will be liable to third persons with whom he had contracted who were in turn prevented from performing their obligations.

The evaluation of the injury for which compensation is due according to Article 1799 may result in an amount of damages greater than the actual damage caused to the injured party by the non-performance. Article 1800 allows the person who did not perform to prove that this is the case. If he does so, he will only be liable to the extent of the injury actually suffered by the other party.

One specific case that is often dealt with in Western codes is the following: The debtor is late in performing his obligations, and after he is in default an event that is not imputable to him occurs, which makes it impossible for him to perform. In principle, he is liable in such a case (Article 1798). He may avoid this liability, however, under Article 1800, if he proves that the event that prevented him from performing would have occurred to the detriment of the creditor even if the contract had been performed, and that the creditor would thus have been deprived of the benefit of the contract in any case. The animal or thing that was to be delivered and that perished before delivery would have perished in the same way if it had been delivered to the other party on time. This result is expressly stated in various codes (Article 1302, French Civil Code; Article 103, Swiss Code of Obligations; Article 207, Egyptian Civil Code; Article 344, Greek Civil Code), it follows, without any necessity to state it separately, from the general rule set forth by Article 1800 of the Ethiopian Code.

Illustrations.

1. A is to send B's trunk by ship X. Breaching his obligation, he sends it by ship Y and the trunk arrives three weeks later than the time provided in the contract. Generally A would owe damages for this delay, but if he proves that ship X sank with all its cargo and that B's trunk would have been lost if it had been sent on ship X, he will not be liable to B for damages.

2. A is to turn an apartment over to B on October 1. He does not do so until November 1. A proves that B would have left the place unoccupied and would not have used it before November 1 in any case. A is not required to pay B damages.

Article 1801. On the other hand, it can happen that the injury to the disappointed party is actually greater than the amount of damages that a court would award if it applied the rule of *Hadley v. Baxendale*. According to Article 1799, the injured party usually cannot claim compensation for the full injury he has suffered. Nevertheless, Article 1801 provides for two cases where he can claim full compensation.

The first case is where the party who has failed to perform the contract was warned by the other party, at the time they concluded the contract, of particular circumstances that have the effect of increasing the amount of injury above what it would normally be. In such a case, we consider that the debtor has accepted the risk of having to pay the higher damages if he does not perform the contract properly. Because this is the basis for the increased liability, it is required that the circumstances that lead to the increase in the damages due be pointed out to the non-performing party at the time the contract is concluded. Liability will be limited to that provided for under Article 1799 if the non-performing party has been warned of these circumstances only after the contract was made.

Even in this latter case, it is true, full compensation may sometimes be required, but this will result from Article 1801 (2), not 1801(1).

Article 1801 (2) provides a second case in which a person who does not perform his obligations must compensate the other party fully for the injury he has suffered. This is the case where the failure to perform can be imputed to an intention to injure, to gross negligence or to a grave fault on the part of the person who fails to perform.

Once one party knows of a special interest that the other party has in the performance of the contract, he cannot ignore that special interest, and less still can he purposely fail to perform in order to injure the other party. If a person fails to perform his obligations and a result of such an intention to injure, or if he shows by his gross negligence that he does not care whether or not the other party is spared this loss, Article 1801(2) requires him to pay for it. He is similarly liable whenever the failure to perform the contract is the result of a grave fault on his part, and in this case, even if he did not know the peculiar injury that the failure to perform would cause the other party.

Illustrations

1. A informs B, in giving him a machine part to repair, that this part is of strategic importance and that the whole factory,

or a part of it, will be shut down until the part has been replaced. B undertakes to repair the part within 48 hours. Instead, he keeps it for four days. He is liable for the injury caused by the closing of the factory during the two days of delay in performing his obligations.

2. B is warned of the same circumstances, but only on the day after he agreed to his obligations. He is not liable for the special injury suffered by A, since he, B, could not foresee it at the time the contract was made.
3. B, warned of these special circumstances the day after he entered into the contract, gives priority in his work to repairs that are not urgent, thus showing a disregard for the injury that will be suffered by A. He must compensate A fully for the injury suffered.

*Articles 1803-1805.*²⁹ With respect to money debts, Article 1803 sets forth special rules.

Article 1803 contains a precise rule to facilitate the application of the principle stated in Article 1799. The injury that failure to pay ought normally to cause the creditor is here set by the law itself; it is generally the legal rate of interest established by Article 1751 of the Code. A higher rate of interest is due if, during the currency of the debt, it produced interest at a rate higher than the legal rate.

The rule of Article 1800, moreover, is set aside in the case of money debts: the debtor who does not pay his debt owes the legal rate of interest, or a higher contract rate if there was one, even if the other party has not suffered any injury as a result of the delay in payment.

Special rules are provided in Article 1804 for the case where the debt that has not been discharged on time is a debt which requires from the debtor periodical payments and which constitutes for the creditor an income rather than a return of capital. Where these two conditions are met, a special, favourable treatment is given the debtor in conformity with the precedent established in certain Western countries (Articles 1154-1155, French Civil Code; Article 105, Swiss Code of Obligations; Articles 1282-1283, Italian Civil Code; Article 296, Greek Civil Code; Article 232, Egyptian Civil Code). There is a two-fold explanation for this special treatment. First, it is presumed that the creditor is in less of a hurry to receive his money, and second, it

29. Editor's note: Article 1802 seems to have been added at a later stage in the codification process and, therefore, is not discussed in Professor David's Commentary.

is recognized that there is great danger for a debtor in the rapid increase in his debt as a result of the accumulation of compound interest.

The favour shown the debtor by the Code appears, first, in the provision that interest on interest runs only from the day on which legal proceedings for recovery are instituted rather than, as is the case under Article 1803, from the day when the debtor is put in default. In addition, a second precondition must be satisfied before interest on interest begins to run: it is required that the debtor be a full year in default on his payments.

Article 1804(2) reenforces this protection still more in one particular case: compound interest itself never produces interest.

An award of damages for delay, of which the amount is fixed according to the formula just set forth, is ordinarily the only award of damages that will be given in the case where the obligation that is not performed is an obligation to pay money. Nevertheless, it might happen that, in the particular circumstances of the case, the injury caused by non-performance would be greater than this amount. Article 1805 provides that, in this situation, the debtor will be required to compensate the creditor fully for the loss sustained by him in the two cases that are provided, for other kinds of obligations, in Article 1801 of the Code. There is no need to dwell further on these cases, since they were discussed fully above.

Illustrations.

1. A borrows \$1000 from B at 3% interest and is to repay this sum on October 1, but he does not do so. A is put in default on October 15. Starting from October 15, the \$1000 bears interest at the legal rate.
2. If the interest rate is originally 11%, the debt will continue to bear 11% interest after the debtor has been put in default.
3. A leases a house to B. The rent is to be \$2000 per year, payable in fourths on January 1, April 1, July 1, and October 1. B does not meet the April 1 payment. A puts him in default on April 10; the fact that B is in default does not make interest for delay begin to accumulate. A attaches some property belonging to B on April 20; still interest for delay does not accumulate. This interest only begins to run after the amount in arrears reaches \$2000, the amount due by B for one year of rent.

CHAPTER III: EXTINCTION OF OBLIGATIONS (Articles 1806-1856)

Contractual obligations are normally extinguished through performance in accordance with the contract and the law. There are,

however, other ways in which a contract and the obligations created by it can come to an end.

The contract, may for instance, be cancelled or invalidated. Although we have already discussed the circumstances in which cancellation or invalidation can occur,³⁰ Section I of this Chapter, deals with the details of implementation and the effects of invalidation and cancellation. The five following Sections, as outlined in Article 1807, deal respectively with termination of contracts and remission of debt (Section II), novation (Section III), set-off (Section IV), merger (Section V), and limitation of actions (Section VI).

SECTION I: INVALIDATION AND CANCELLATION OF CONTRACTS] (Articles 1808-1818)

Article 1808. With respect to invalidation, the Code distinguishes between two kinds of cases, as do Western legal systems.

Where the contract's invalidity results from a vice in consent, its purpose is to protect one, and only one, of the contracting parties, *i.e.* the victim of error, fraud, or duress, or the person whose want, simplicity of mind, senility, or manifest business inexperience has been exploited. In such a case, only the person that the law intends to protect can invalidate the contract. The other party cannot invalidate it, and the invalidity of the contract will not be effective for him unless the victimized party chooses to invoke it.

When the contract is invalid for some other reason, on the other hand, the parties' positions are equal; either one of them, or any other interested person, can invalidate the contract.³¹

Illustrations.

1. A enters into a contract with B because of an error induced by B's fraud. A can have the contract invalidated, but B cannot.
2. A and B conclude a partnership contract, but they do not put the contract in writing as the law requires. Either of them can assert the invalidity of the contract.

30. Editor's note: For invalidation, see pp. 20-36 above; for cancellation, see pp. 63-67 above.

31. Editor's note: Professor David's list of cases in which only one party can invalidate the contract is not exclusive. Article 1808 (1) also mentions the case of invalidity resulting from incapacity.

3. A promises to pay B \$200 per month if B will prostitute herself and turn over to him her receipts from prostitution. Both A and B can assert the invalidity of the contract.

Articles 1809-1810. There may be a time limit for assertion of the invalidity. As long as the situation is unchanged and the contract has not been performed, there is no limit. Anyone entitled to assert the invalidity of the contract may, at any time, refuse to perform it.

If, however, the contract has been performed, it is necessary to fix a deadline after which invalidation cannot be required. Western legal systems differ in the time limits that they fix, as well as in the point from which the limitation is calculated. The Code adopts a very short time limit, two years from the day on which the ground for invalidation disappears. In practice, the only case where this limitation is likely to be important is where the invalidity results from a vice in consent, since normally this is the only case where the ground for invalidation would disappear. Since other cases are not covered by Article 1810, their solution depends on the general provision on limitation of actions. Therefore, the invalidity of acts done in performance of the contract can be invoked as long as the action to invalidate these acts is not barred by the limitation that extinguishes all actions.³²

Illustrations.

1. A sells B a picture at a high price, having fraudulently made him think that this was a masterpiece. B can require the invalidation of the contract within two years of the time when he pays the agreed price.³³ If he has not paid, he can refuse to pay at any time.
2. A and B conclude a partnership contract that is invalid because not in the proper form. Both A and B can at any time refuse to carry out the contract. The ground for the contract's invalidity will disappear only in the unlikely event that a new law is enacted changing the formal requirements for a partnership contract, allowing it to be made in the form used by A and B. A and B can require the invalidation of acts done in performance of the contract at any time prior to the expiration of the ordinary period of limitation, *i.e.* at any time within ten years of when they took place.

32. Editor's note: See Section 6 of Chapter 3 of Title XII.

33. Editor's note: Note that the point of departure under Article 1810 would seem to be the moment when the fraud is discovered rather than the moment of payment, as is suggested here.

Article 1811. In the case of a vice in consent, the person who can assert the invalidity may also confirm the contract. This confirmation can occur only after the cause that vitiated the consent has disappeared. When the mistake or fraud is discovered or the duress ceases, the party's will becomes free and informed. When the contract is then confirmed, the vice in consent disappears and there is nothing wrong with the contract. If it has not been performed, it must be; if it has been, invalidation will no longer be granted.

Since confirmation is neither a preliminary contract nor a modification of the original contract, Articles 1721 and 1722 require no special form. It did not seem necessary to expressly state this rule, as was done in Germany (B.G.B., Section 144).

The short period of limitation set by Article 1810 where the ground for invalidity disappears seemed to obviate the need for a provision that would permit one party to require the other, where the latter has the right to require invalidation, to state within a certain period whether he intends to confirm the contract or assert its invalidity.³⁴

Nor was any rule included in the Code similar to Article 31(3) of the Swiss Code of Obligations, which provides that "confirmation of a contract tainted by fraud or concluded as a result of justifiable fear does not necessarily imply renunciation of the right to require the payment of damages." In light of the Code's silence on this point, the opposite solution should be given to this problem in Ethiopia.

The provisions of Article 1811 apply only to the case where invalidity results from a vice in consent. A contract cannot be confirmed where the invalidity results from a deficiency in the object, the cause, or the form of the contract.

Article 1812. Article 1812 provides a special defence where the action for invalidation is based on lesion.³⁵ This provision is intended to minimize the disturbance to established expectations caused by such an action. The formula of Article 1812 draws on similar provisions found in the civil codes of Italy (Article 1450) and Egypt (Article 129).

Illustration

A, taking advantage of B's senility, buys from him a house, agreeing to pay a life annuity of \$100 per year. A "fair price"

34. Editor's note: Although the preliminary draft of the Code did not contain any provision to this effect, such a provision was inserted at a later stage in the codification process and is contained in Article 1814 of the Code, as enacted.

35. Editor's note: See Article 1710.

would have been an annuity of \$300. B requests the invalidation of the contract on the ground that A exploited his senility. A can have this action dismissed by promising to pay B an annuity of \$300 per year in the future and \$200 supplement for each payment already made.

Article 1813. Article 1813 states an express rule concerning invalidation of contracts that finds its parallel for cancellation of contracts in Articles 1785 and 1788. These latter Articles provide that the other party's failure to perform does not always justify cancellation; the non-performance in question must affect the very essence of the contract. The same principle applies to invalidation. The whole contract is not necessarily invalid just because some of its clauses are. The whole contract is invalid only if invalidation of the affected clauses will upset the very essence of the contract, where enforcement of the contract without its invalid clauses would be like writing a new contract for the parties.

Except for a modification at the end, Article 1813 was formulated on the pattern of Article 20(2) of the Swiss Code of Obligations. It corresponds to French case law, particularly the court interpretation of French Civil Code Articles 900 and 1172. One also finds similar provisions in the civil codes of Germany (B.G.B., Section 139), Italy (Article 1419), and Egypt (Article 143).

Articles 1815-1817. Articles 1815-1817 indicate the consequences of invalidation and cancellation of contracts.³⁶ In principle, invalidation and cancellation have a retroactive effect. All that has been done in execution of the contract is to be invalidated. Deliveries made in performance of the contract are to be returned, so that the parties are put in the positions they would have held if the invalidated or cancelled contract had never been concluded.

To this principle, there are two exceptions. First, the retroactivity of the invalidation or cancellation ought not to affect the rights of third persons in good faith. If one of the parties has transferred to a third person in good faith something that he received as a result of a contract that is being invalidated or cancelled, this third person will keep the thing he thus acquired. The contracting party's obligation to return the thing does not extend to the third person. By third person in good faith we mean any person who has acquired his rights without knowing of the ground for invalidation that tainted the right of his transferor.

More generally, the reestablishment of the status quo and the restitution of deliveries made by the parties may be very inconvenient

36. Editor's note: Article 1818 of the Code as enacted was not contained in the preliminary draft and so is the object of no commentary here.

or involved. In such a case, we need not insist on restitution. In place of the restitution provided by Article 1815, the court can order the payment of damages or some other appropriate remedy.

By stating this general principle, Article 1817 made it unnecessary to include a special provision for contracts requiring repeated or continuous performance, as is found in Article 1458 of the Italian Civil Code.

Where invalidation of the acts done in performance of the contract would cause considerable inconvenience or serious complications, the validity of the acts "is maintained." By saying that the validity "is maintained," instead of simply that it "may be maintained," the Code indicates that this is not a possibility to be utilized only rarely. Although Article 1815 is theoretically the principle and Article 1817 the exception, it may well happen in practice for many kinds of contracts that the exception will become the rule and the rule the exception, particularly in the commercial area.

SECTION II: TERMINATION OF CONTRACTS AND REMISSION OF DEBT

(Articles 1819-1825)

Articles 1819-1822. "Termination" of a contract indicates that the parties, or one of them, have put an end to the contract. It is the opposite of cancellation in that the latter has a retroactive effect, while termination is only effective prospectively. All that has already been done in performance of the contract remains effective when the contract is terminated; the contract simply ceases to be enforceable or to produce new effects in the future.

Ordinarily, termination of a contract requires the consent of both parties. There are, however, two situations in which the contract can be terminated by a simple unilateral declaration.

This can happen if the contract itself foresees the possibility for one or both of the parties individually to denounce it by a simple unilateral declaration. Such a stipulation is valid. It seemed unnecessary to state this expressly; in such a case, the contract is not invalid as having been contracted under a purely potestative condition. Although the parties may put an end to the contract at any time, until they do so they are bound by the contract and subject to the obligations that it imposes on them.

Similarly, it is possible in multilateral contracts to include a provision for the expulsion of one of the parties and its continuation

among the remaining parties. Such a clause would seem particularly useful in such contracts as the contract of association.

The second situation where unilateral termination is possible is that of contracts of indefinite duration. A hires B, or A leases a field to B, or A receives something from B on deposit and no time provision is included; the contract does not provide how long the contract of employment, or of lease, or of deposit, is to last. If the law itself, in a supplementary provision, does not fix the duration of the contract, either party can end the contract unilaterally.

Where either the law or the contract gives one party the right to terminate a contract, this right cannot be exercised arbitrarily. If there are customary periods of notice, they are to be observed, and the termination is effective only at the expiration of such notice period. If there is no such customary period, one must give notice that is reasonable in the circumstances. By thus expressly forbidding what would be a clear abuse of right, Article 1822 states a specific application of the principle, found in Article 1732, that contracts are to be interpreted according to good faith.

Articles 1823-1824. In addition to termination by agreement and by one person's unilateral declaration, the Code provides for two cases of judicial termination, where one party can require the court to terminate a contract he has entered into.

The first case is that of contracts in which the parties do not have antagonistic interests, but rather have a common interest in the pursuit of a single objective. Typical contracts of this sort are the contract of association and the contract of partnership, but other contracts may have this characteristic as well. An example is the contract of employment, where often one of the parties is not in a position to supervise the other and must necessarily have confidence in him. If the confidence, harmony, or cooperation that is essential to such a contract disappears, either of the parties ought to be able to get out of the contract. Obviously, parties to such a contract would be wise to foresee this possibility and regulate it in their contract. Nevertheless, if they fail to do so, they should be allowed to appeal to the court, which will decide whether or not the reason invoked to justify termination is sufficient and justified, considering the nature of the contract, the relationship that it requires between the parties, and their behaviour.

The second case where the court can terminate a contract, also provided by Article 1824, is that of gratuitous contracts, entered into for the exclusive advantage of one of the parties. The Code allows a person obligated by such a contract to require the judge to free him for good cause.

The provisions of Articles 1823 and 1824 are inspired principally by German legal writers.

Article 1825. The termination of a contract puts an end to the obligations of both parties. The remission of debt, on the other hand, is unilateral; it discharges one party from his obligations without regard to any performance the other party may have provided or still owes.

Before a remission of debt can extinguish an obligation, it must be accepted by the debtor. Nevertheless, since it is economically advantageous for the debtor, the Code here reverses the traditional rule, found in Article 1682, that silence does not amount to acceptance of an offer. If the debtor intends to reject the remission of debt, he must so inform the creditor immediately when informed by the creditor of his intention. The word *immediately* has been substituted for the phrase *in a reasonable time* that is found in the corresponding article of the Italian Civil Code (Article 1236). If one intends to reject a gift, it is reasonable that it be done immediately.³⁷

SECTION III: NOVATION (Articles 1826-1830)

Article 1826. Another method of extinguishing obligations is novation, which consists of replacing an old obligation by a new one. The new obligation may differ from the old in its object. One might agree for example that D would work for C for X days instead of paying him Y Ethiopian dollars as had been agreed in the original contract. The new obligation may also differ from the original one by its cause. Suppose, for example, that B owes A \$10,000 for some goods he purchased from him; it is agreed in a new contract that B will keep the \$10,000 as a loan from A. This is novation by change in the cause: B's debt has the same object, \$10,000, but henceforth it has a different cause. B owes the \$10,000 to A because A lent it to him, not because he purchased the goods from him. The debt of B *the purchaser* has been extinguished; it has been replaced by the debt of B *the borrower*.

Article 1827. Novation can have several effects. For example, the new debt is not created at the same time as the old one, and the period within which it can be extinguished by limitation will, therefore, have a different starting point and, depending on the kind of obligation

37. Editor's note: The Commentary on the preliminary draft at this point contains two paragraphs discussing an Article 150 of the draft, which was omitted at a later stage in the codification process. That Article dealt with the form required for the termination of a contract and a remission of debt.

involved, may even have a different duration. The creditor's original right may also have been supported by a preferential right, a personal guarantee, or a pledge. As seller of goods, A had the seller of movables' preferential right; a surety may have guaranteed that B would pay the price; D might have given C something as a pledge to ensure the payment of the debt. In the absence of express agreement to the contrary, these preferential rights, sureties and guarantees will not be transferred to the new debt. After the novation, A can no longer invoke his preferential right as seller, the surety will be released, and D can reclaim the thing he gave in pledge. Article 1827(1) states this expressly, similarly to the French Civil Code (Article 1278), the Swiss Code of Obligations (Article 114), and the Italian Civil Code (Article 1232).

Article 1827(2), drawing on the Swiss Code of Obligations (Article 114(2)), eliminates a possible difficulty in interpreting the new agreement between the creditor and the debtor: the new performance promised by the debtor replaces, in principle, the performance to which he was originally held and all his accessory obligations.

Article 1828. The way in which obligations are normally extinguished is by the debtor's performance. Novation is therefore an exceptional means of extinguishing obligations. Not only is it not presumed, as the Swiss Code of Obligations provides (Article 116), but it will be recognized only if the intention of the parties to carry it out and to extinguish the original obligation in this way is unequivocal. Article 1828 states this principle, in accordance with the civil codes of France (Article 1273) and Italy (Article 1230).

Article 1829. Article 1829 clarifies the principle formulated in the preceding Article by specifying three cases of novation, as do the codes of Switzerland (Code of Obligations, Article 116) and Italy (Civil Code, Article 1231).

The examples given in Article 1829 illustrate the principle stated in Article 1828, but the general formula of Article 1828 will help decide cases in many other circumstances as well. For example, unless the contrary is clearly intended, one ought not to consider that the parties intend a novation were they modify the terms of the contract either by adding or deleting a particular clause.

Again in conformity with the Swiss Code of Obligations (Article 117), Article 1830 provides for the case of the current account. The inscription of items on a ledger of current account does not act as a novation, although the acceptance of a specific balance of account does have that effect. Even in this latter case, however, Article 1830 provides an exception to Article 1827, in that the creditor keeps the benefit of guarantees that may support one of the items entered in the current account in order to ensure the payment of the new debt.

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Article 1828. The way in which obligations are normally extinguished is by the debtor's performance. Novation is therefore an exceptional means of extinguishing obligations. Not only is it not presumed, as the Swiss Code of Obligations provides (Article 116), but it will be recognized only if the intention of the parties to carry it out and to extinguish the original obligation in this way is unequivocal. Article 1828 states this principle, in accordance with the civil codes of France (Article 1273) and Italy (Article 1230).

Article 1829. Article 1829 clarifies the principle formulated in the preceding Article by specifying three cases of novation, as do the codes of Switzerland (Code of Obligations, Article 116) and Italy (Civil Code, Article 1231).

The examples given in Article 1829 illustrate the principle stated in Article 1828, but the general formula of Article 1828 will help decide cases in many other circumstances as well. For example, unless the contrary is clearly intended, one ought not to consider that the parties intend a novation were they modify the terms of the contract either by adding or deleting a particular clause.

Again in conformity with the Swiss Code of Obligations (Article 117), Article 1830 provides for the case of the current account. The inscription of items on a ledger of current account does not act as a novation, although the acceptance of a specific balance of account does have that effect. Even in this latter case, however, Article 1830 provides an exception to Article 1827, in that the creditor keeps the benefit of guarantees that may support one of the items entered in the current account in order to ensure the payment of the new debt.

SECTION IV: SET-OFF

(Articles 1831-1841)

Articles 1831-1834. The Code Articles dealing with set-off are very similar to corresponding provisions of Western codes, particularly the French Civil Code (Articles 1289-1299) and the Italian Civil Code (Articles 1241-1252).

After an introductory Article establishing the principle of set-off, Articles 1832-1834 define the conditions in which set-off occurs automatically. Article 1832 imposes three positive conditions: the debts must be in money or similar fungibles, they must be liquidated, and they must be due. With respect to this last requirement, Article 1834 provides that a grace period granted by a court (see Article 1770) is no bar to set-off. The debt is considered due even though the debtor has obtained a period of grace for the performance of his obligation.

To the positive conditions stated in Article 1832, Article 1833 adds several negative conditions. There are some debts that cannot be set-off against others. In such cases, the obligated person must actually perform his obligations without regard to the fact that his creditor is at the same time his debtor with respect to another obligation.

The first two cases provided for by Article 1833 are absolute bars to set-off. The person owed a maintenance allowance must actually receive the money due him, since he needs it to purchase necessities. His debtor cannot be allowed to refuse to pay this money and simply reduce another obligation that the maintenance creditor owes him. Nor can set-off be allowed when the creditor is the State or one of its subdivisions; it would run counter to principles of public accounting.

The two cases dealt with in Articles 1833(c) and 1833(d) are perhaps less clear. They have traditionally been accepted in Western countries, and the Code retains them. Article 1833(c) attempts to reenforce the thief's obligations of restitution, or more generally, that of anyone who has unjustly deprived another of something. Article 1833(d) is inspired by the idea that the deposit and the loan for use are generally gratuitous contracts and thus require a high degree of fiduciary responsibility.

Article 1835. A owes B \$1000 and B owes A \$1000. The two debts are extinguished by set-off. But what is to be done if B owes A not only this \$1000, but another \$1000 based on another cause. Assume that B bought \$1000 worth of goods from A, and that in addition he borrowed \$1000 from A. All these debts are liquidated and due. Which one is to be set-off with the debt that A owes B? Article 1835

solves this problem by referring back to Articles 1752-1754, which deal with the appropriation of payments.

Articles 1836-1837. The effects of set-off are stated in Articles 1836 and 1837.

The two debts are extinguished reciprocally at the first moment when they exist simultaneously, up to the amount of the lesser of the two debts. Three comments need to be made about Article 1836. First, by "the day when they both exist" is meant the moment when they both exist with the characteristics that allow set-off to take place between them. Set-off does not take place, in other words, until both debts are liquidated and due.³⁸

Second comment: Set-off is effective from the moment stated by Article 1836, but it only takes place if it is asserted by one of the parties. Another Article a bit further on states this explicitly.³⁹ Finally, we should observe that although set-off can be analysed as a simplified double payment, it operates between debts of unequal amount and thus is an exception, allowed by law, to the principle that the creditor cannot be required to receive a partial payment.

Whatever resemblance there may be between set-off and a double payment, set-off is a mode of extinction of obligations distinct from payment. Just as the rule excluding partial payments does not apply to set-off, there are other rules concerning payments that are inapplicable to it. For example, although it is impossible to make a valid payment to an incapable person, set-off is available against such a person. A owes B, a minor, \$1000 and B owes A \$1000. A cannot make a valid payment to B, and B cannot make a valid payment to A, but A can refuse to pay his debt to B by asserting that it has been set-off against the debt owed him by B.

Article 1836 seems to say that set-off occurs automatically. This notion is not, however, pushed to its logical extreme. Article 1837 states expressly that set-off shall not prejudice the rights of third persons.

Article 1298 of the French Civil Code gives an example of this. A owes B \$1000. B's creditor, C, gets a court order forbidding B to pay A. Later, A acquires a right against B for \$1000. Set-off cannot take place between this right and B's debt to A. Set-off here would prejudice the rights of the third person, C, who has acquired a privi-

38. Editor's note: The French version of the Code speaks of "*l'instant où elles se trouvent exister à la fois*," so that Professor David's comment is not addressed to the difference between the words "day" and "moment", but rather to the meaning of the word "exist" in Article 1836.

39. Editor's note: See Article 1838.

leged position through attachment of the right that B, his debtor, has against A.

Article 1838. Article 1838 is borrowed from the Swiss Code of Obligations (Article 124) and the Italian Civil Code (Article 1242). It eliminates difficulties that exist in French law.

Articles 1839-1840. By agreement, the parties can set aside the Code provisions on set-off and exclude set-off in their relations. Inversely, they may liberalize these provisions and provide that set-off will occur between them in situations where, under the Code, the conditions for set-off would not be satisfied.

Such an agreement is of course, as always, subject to the requirements of public policy. It would not be possible, for example, to provide that a right to maintenance would be set-off against a debt owed by the creditor of the maintenance right. This rule will be stated explicitly in the part of the Code where maintenance rights are regulated.⁴⁰

Article 1841. As a supplement to set-off by virtue of the law and set-off by agreement, Article 1841 provides for judicial set-off. Generally, the Code requires that both debts be liquidated before set-off can occur between them. Nevertheless, Article 1841, which is inspired by Article 1243 of the Italian Civil Code, allows a loosening of this rule where only one of the debts is liquidated.

Judges are given two alternatives. If a part of the debt is indisputable, they may declare that part set-off. Or they may delay giving judgment against the debtor of the liquidated debt until the other debt has been liquidated, but this is only possible if the liquidation of the non-liquidated debt can be accomplished easily and quickly. The Italian Civil Code requires the satisfaction of this last condition before the judges may utilize either of the two alternatives described above, but it seemed better to impose it only in the second case.

SECTION V: MERGER (Articles 1842-1844)

Articles 1842-1844. Merger occurs when one person, with respect to a single debt, becomes both creditor and debtor at the same time. The Code provides for this method of extinction of obligations, as do Western codes.

In principle, merger extinguishes the obligation, which has actually become impossible to perform. It does not occur, however,

40. Editor's note: See Articles 807-825.

to the prejudice of interests which third persons may have in the right. Thus, if a third person had a usufructuary right or a pledgee's right on the credit, he does not lose this right as a result of the merger (See Italian Civil Code, Article 1253). The same rule will apply where the creditor inherits from his debtor, or vice versa, as long as the two patrimonies have not been merged, because for example the creditors of the deceased have blocked the merger.

Article 1844 reproduces a provision of the Swiss Code of Obligations (Article 118). It applies where the heir assigns his successorial rights, among which are found a credit of the deceased against him or a debt he had toward the deceased.

SECTION VI: LIMITATION OF ACTIONS

(Articles 1845-1856)

Limitation of actions is a means of extinguishing obligations which all legal systems recognize as necessary. Where a creditor fails for many years to exercise his rights, it is proper to declare the rights extinguished. It is probable in fact that this extinction has resulted from another cause, either payment of the debt by the debtor or remission of the debt by the creditor. Although there no doubt are cases where this is not true, they are exceptions and even then the creditor cannot complain about losing a right that he was in so little a hurry to enforce.

Article 1845. The French Civil Code (Article 2262) sets the time after which recovery is barred at thirty years, but everyone now agrees that this is too long. In light of these criticisms, Article 1845 fixes a ten year period of limitation, as do the codes of Switzerland (Code of Obligations, Article 127), Japan (Article 167), Lebanon (Article 349), and Italy (Article 2946). Longer periods of limitation have been kept by some codes: 15 years in the Egyptian Civil Code (Article 374), 20 years in the Greek Civil Code (Article 249), 30 years in the German Civil Code (B.G.B., Section 195). The Philippine Civil Code (Article 1149) fixes the general period of limitation at just five years, but provides for numerous exceptional cases.

In the Ethiopian Civil Code, we have tried to avoid exceptions. Some exceptions may be desirable and may be included in other Titles of the Code, but it seemed possible and desirable to avoid any exceptions in the Section containing the general rules on limitation. The Ethiopian Code differs in this way from the civil codes of France, Switzerland, Italy, and other countries, which provide a shortened period of limitation for certain kinds of debts. Since these shortened periods were based, according to the commentators, on presumptions of

payment, it seemed better to omit them from this Section and include them in a Section dealing with proof of payment.⁴¹

The formula of the French Civil Code is that all *actions* are barred if not brought within the time established by the Code. The Ethiopian Code preferred the formula found in the Italian Civil Code, which provides that all *rights* are subject to a ten year limitation. This makes it clear that at the end of ten years the possibility of raising a right as a defence to another action is precluded as well as the possibility of asserting the right in an affirmative action. The right created by the contract disappears by limitation; it cannot be asserted in any way.⁴²

Article 1845 deals only with contractual rights. While the rules dealing with limitation will no doubt be of use with respect to other types of problems, it seems that limitation needs to be considered from different points of view in the areas of property and family law than in connection with contracts. This fact seems to justify the restrictions contained in Article 1845.

Articles 1846-1847. The period of limitation runs from the day the obligation falls due and this can be enforced by the creditor. This due date is independent of notice putting the debtor in default.⁴³ Although the creditor may have to serve a default notice before he can enforce his claim, the obligation is due before notice is given. Indeed, maturity of the debt is a prerequisite to the creditor's default notice. (Article 1773(2)).

Article 130 of the Swiss Code of Obligations, after providing that the period of limitation runs from the time when the debt can be enforced, adds: "If the right can be enforced only after notice, the period of limitation runs from the day when this notice could be given." Article 1846 covers this same problem by referring to the time when "the rights under the contract could be exercised." In such a situation, the creditor loses his right to give the debtor notice ten years after the day on which he could first have given it.

It seemed unnecessary to provide in the Ethiopian code for the many special cases enumerated in the French Civil Code (Article 2257), since they can be dealt with simply by applying Article 1846. Because

41. Editor's note: See Articles 2023-2024 to this effect.

42. Editor's note: This comment clarifies the meaning of Article 1845, which in the French version of the Code is still somewhat ambiguous, since it speaks of the "right to exercise an action" rather than of "all rights arising from the contract." The English version speaks only in terms of "actions."

43. Editor's note: See Articles 1772 on notice of default.

a conditional right cannot be enforced until the condition is fulfilled, it is only then that the period of limitation begins to run on such a right. It does not run on a warranty of peaceful enjoyment until after eviction. It does not run with respect to an obligation due on a specified date until that date arrives. It seemed unnecessary to deal specifically in the Code with these particular applications of the general rule.

A difficulty could have arisen, however, with respect to life and perpetual annuities, had we not included a special provision for them. Assume, for example, that the beneficiary can require payments on April 1 and October 1 each year throughout his life. How does the period of limitation work if the debtor makes no payment after October 1, 1954 and the beneficiary waits until 1970 to assert his claim to all post-1954 payments. Should he be told that he loses his right to the payments due between October 1954 and October 1959 because these payments have been due for more than ten years, but allowed to collect the money due for 1960 and the years following. Or should we say that since he has waited more than ten years to assert his right to payments due, he has lost this right itself and so cannot collect either the past amounts due or any in the future on this contract? The Code had to choose and opted for the second solution, following Article 131 of the Swiss Code of Obligations: All right to claim payments is barred ten years after the debtor ceased paying money due under the annuity.

Article 1848. Is the period of limitation calculated hourly or daily? Article 1848 answers that it is calculated daily. Normally ten full years must pass before a claim is barred. 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 (6:00 a.m. if the present manner of dividing days into 12 day hours and 12 night hours is kept in Ethiopia).

If the last day of the period is a holiday, the day when the claim is barred is delayed until after the first non-holiday. To decide whether or not a day is a holiday, one must look to the place of performance, that is, the place where performance is supposed to take place according to the contract or to the law. The Ethiopian Code does not require, as does Article 78 of the Swiss Code, that the holiday be a legal holiday. In the Ethiopian Code, the question of whether or not a particular day is a holiday is a question of fact to be determined by the court.

Articles 1849-1850. Articles 1849 and 1850 reproduce Articles 133 and 140 of the Swiss Code of Obligations and require no comment.

Articles 1851-1852. The period of limitation is interrupted in two cases: (1) recognition of the debt by the debtor; and (2) the bringing of an action to enforce the claim or the giving of default notice by the

creditor. Any act of the debtor indicating that he considers himself bound by the debt will constitute a recognition of the debt.

A court action interrupts the period of limitation only if the debtor receives notice of it. Where this has happened, it is not essential that the action have been brought before the proper court. Even if it is brought in the wrong court, it will serve as notice of default and the Code states that default notice is sufficient to interrupt the period of limitation.⁴⁴ This system is similar to that of French law (Civil Code, Article 2244) and Italian law (Civil Code, Article 2943) and less strict than the Swiss Code (Code of Obligations, Article 135), whose complications are thus avoided.

The effects of interrupting the period of limitation are indicated in Article 1852 of the Code, in conformity with the provisions of the Swiss Code of Obligations (Article 137) and the Italian Civil Code (Articles 2945 and 2953).

Article 1853. Article 1853 states a rule that is unique to the Ethiopian Code; no other code has a corresponding provision.

Other codes suspend the period of limitation in certain cases, apart from those where the period is interrupted. In the interest of simplification, these special cases of suspension were eliminated from the Ethiopian Civil Code.

Many Codes suspend the statute of limitations where a child, wife or servant is the creditor of his parent or tutor, husband, or master, since their inaction is explained by their delicate situation in relation to their debtor.⁴⁵ Article 1853 allows these cases to be disposed of satisfactorily without the automatic mechanism of other codes. In so doing, it makes use of a general concept that is applied elsewhere in the Code (Articles 1705, 1709, and 1766): Because the law must be more flexible where a contract exists in special circumstances, as between persons linked by a close relationship of parentage or subordination, a special approach was needed.

Still, other legal systems do suspend the period of limitation in other cases as well: the Codes of Switzerland (Code of Obligations, Article 134) and Italy (Civil Code, Article 2941) suspend it where the debtor has a usufructuary interest in the right. The Italian Civil Code

44. Editor's note: No explicit statement to this effect is contained in Article 1851, but such a position might be seen as a logical extension of that Article.

45. Editor's note: The original version of the commentary refers to "*leur créancier*", but this is clearly a slip of the pen. Naturally, in bilateral contracts both parties are both creditor and debtor, but in respect to the statute of limitations it is the creditor of the particular obligation whose right is barred.

also suspends it in relations between an heir and the succession he has inherited (Article 2941), and in favour of minors or others lacking capacity who do not have a legal representative (Article 2942). It is suspended in the Swiss Code of Obligations (Article 134) for as long as it is impossible to assert the claim before a Swiss court.

In the majority of these cases, one can bar the claim by limitation without prejudice to the person whose claim is barred, because this person can require indemnification from someone else for the loss he suffers. Even in the other cases, it seemed to us that, on balance, it was better to eliminate suspension of the period of limitation. This institution, which undermines that of limitation and impairs its utility, seems to be far from essential, given the length of the period of limitation. The creditor has ten years to act and should not wait to enforce his right until the last minute. If a special solution seems desirable in a particular kind of case, the Code can deal with it when regulating that situation. The Code achieves a desirable simplification by eliminating the general provisions on suspension of periods of limitation that are found in other codes.

Article 1854. Article 1854 states a general principle without which the whole institution of limitation would be undermined. An action is barred even though the debtor is in bad faith. One can only hope that a debtor who knows he should pay a debt will not invoke limitation. But should he be without scruples, the most obvious bad faith on his part will not prevent him from relying on limitation.

Articles 1855-1856. Limitation is an institution imposed by the law.⁴⁶ One's right to invoke limitation cannot be waived by prior agreement; an agreement that limitation will bar recovery only after a period other than the statutory period is ineffective.

Although the parties can achieve a similar result by putting appropriate clauses in their contract, the imperative rules dealing with limitation cannot be modified by agreement.

On the other hand, once the period of limitation has expired, the parties are not required to take advantage of it. The court may not, of its own motion, reject a claim on the basis of limitation; they may only base their decision on this ground if the defence has been raised by one of the parties. In addition, once the period of limitation has expired, one may validly agree not to raise it as a defence.

46. Editor's note: "*une institution d'ordre public.*"

CHAPTER IV: CONTRACTUAL PROVISIONS⁴⁷

(Articles 1857-1895)

The Ethiopian Civil Code accepts the principle of freedom of contract, with the consequence that contracting parties are free to organize their relations as they like, except where the law specifically provides otherwise. For this reason, it is impossible to foresee, and to specify the meaning and effect of, all the provisions that one might include in a contract; and it would be futile to try.

Nevertheless, some provisions are used very frequently, so that the Code can usefully provide for them. The Code considers five such provisions: the time provision; the condition; the case of alternative obligations; the payment of earnest, and finally, provisions concerning liability (particularly, the penalty clause). One Section in Chapter IV is devoted to each of these five kinds of provisions.

SECTION I: TIME PROVISIONS

(Articles 1857-1868)

No provision is more frequent than the time provision. One or both of the obligations under the contract is not to be performed immediately. A time is set for performance: the contract may provide for performance on a given date, or in so many days, weeks or months, or at the beginning, middle or end of a particular month, or before a particular date.

Articles 1857-1864. In each of these situations, we need to specify precisely the moment at which performance is due in order that the debtor may be clear as to his obligations and so that we know when the creditor may set in motion the sanctions that flow from non-performance and when the period of limitation begins to run.

The provisions of Articles 1857 to 1864 reproduce those of the Swiss Code of Obligations (Articles 76-80). They were modified in only one respect, and the text is clear in that case, where the period is fixed in months (Article 1860).

In that Article, the Swiss Code was copied in the first two paragraphs to cover cases where the period is fixed according to the Gregorian calendar. But a new paragraph was added to deal with the case where a period is fixed according to the Coptic calendar. Article 1860(3)

47. Editor's note: In the Civil Code itself, the title of Chapter IV is "Special Terms of Obligations or Contracts," thus indicating that various of the provisions in the Chapter may apply to obligations other than contractual obligations.

declares that the thirteenth month of the Coptic calendar is to be ignored.

The meaning of this paragraph is as follows. If a contract was concluded on Sene 10 and provided that the debtor was to perform his obligations "in three months," he must perform on Maskaram 10. The 5 or 6 days of Pagume that come between Nahasse and Maskaram are not counted.

If a contract is concluded during Pagume, and contains the same time provision, it will be considered as if concluded on Maskaram 1, since Pagume is not counted. Performance will be due on Tahsas 1.

One should also note the respective positions of Articles 1862 and 1863. Article 1862 provides an exception to the Articles that precede it. It cannot be invoked by the debtor in the case provided for in Article 1863. If the debtor has undertaken to perform his obligation before July 1, he must perform it by June 30 at the latest. He is in default if he performs on July 1, even if June 30 is a holiday.

In Article 1862, the Code speaks of a day that is a holiday at the place of payment and not, as the Swiss Code does, of a day that is a legal holiday at that place. The same modification was made with respect to Article 1848, and it is discussed more fully in connection with that Article.

Articles 1865-1867. Articles 1865 to 1867 determine the effects of time provisions. The significance of a time provision differs according to whether it was included in favour of the debtor, in favour of both parties, or in favour of the creditor alone.

Article 1865 establishes a presumption that a time provision is ordinarily included for the benefit of the debtor alone, as do the Civil Codes of France (Article 1187) and Italy (Article 1184). This presumption can be rebutted, however, either by invoking an express clause or by proving on the basis of circumstantial evidence that the time provision was put in exclusively for the benefit of the creditor or for the mutual advantage of the two parties.

If the provision was included for the benefit of the debtor alone, he can renounce it and perform his obligation before the due date. But if he does this, he cannot reclaim the money as an undue payment.⁴⁸ If the time provision was included in the parties' mutual interest, or exclusively for the creditor's benefit, his agreement is necessary before advance performance can be given.

If the provision was included for the creditor's exclusive benefit, he can require that the debtor perform his obligations before the time

48. Editor's note: See Article 2164.

fixed. Otherwise, unless the parties revise the agreement, he must await the due date; prior to that, he can only act to safeguard his rights (See Egyptian Civil Code, Article 274). Even where the time provision is for his benefit, he cannot always require immediate performance; where it appears necessary, he must give the debtor a reasonable time for performance. Article 1867(2) specifies this result, which is not expressly stated in France (Civil Code, Article 1186) or Italy (Civil Code, Article 1183), although both countries accept it without express legislative provision.

Article 1868. The final Article in this Section provides for the loss of the benefit of a time provision. This happens when the debtor's insolvency has been "judicially established," a formula also used in Article 1757(2). It also happens where the debtor has acted to reduce the security he gave to the creditor. On this point, the Code is in conformity with Articles 1188 of the French Civil Code and 1186 of the Italian Civil Code.

If the securities given by the debtor have been lost or reduced in value by something for which the debtor is not responsible, the debtor does not lose the benefit of the time provision and he does not have to furnish new securities to the creditor. It did not seem advisable to follow Article 273 of the Egyptian Civil Code on this point.

SECTION II: CONDITIONS

(Articles 1869-1879)

Article 1869. Contracting parties may make conditional the effectiveness or the cancellation of their contract or one of its clauses. The contract will not have any effect unless the condition is satisfied, or in the contrary case, will cease having effects if the condition is satisfied.

The condition must relate to an uncertain event by definition. But the uncertainty may relate to whether the event will occur or not or to the date when it will occur. In addition, the uncertainty may exist only in the minds of the parties and relate to whether something did or did not actually happen in the past. The formula of Article 1869 covers all these possibilities.⁴⁹

49. Editor's note: Professor David's definition of a conditional obligation in this paragraph is materially broader than the traditional concept. Most legal systems regard as conditional only those obligations whose very existence is uncertain, because it is dependent on an event whose occurrence is uncertain. Where only the date of the event is uncertain, as the death of a specified person, most legal systems consider that there is an uncertain time for performance, but not a condition.

While the official Amharic version of the Code and the unofficial French text permit this broader interpretation, the English translation specifically excludes it, since it refers to "an obligation whose *existence* depends on the *occurrence or non-occurrence* of an uncertain event. (Editor's emphasis)."

Article 1870. The conditions on which the performance of contracts are made to depend vary greatly. Some are a matter of pure chance, while the parties themselves may influence or determine whether others are fulfilled. In this latter case, Article 1870 falls back upon the principle of good faith, which dominates all of the law of contracts. It uses the principle boldly and provides that, even though a condition is not fulfilled, one party can consider the contract effective and thus require its performance where the other party has prevented the condition's fulfillment in a manner contrary to good faith. Article 1870 differs from the statement found in the Swiss Code of Obligations (Article 156) and still more from that of the French Civil Code (Article 1178) and the Italian Civil Code (Article 1359), as it gives the person an option, whereas the other codes seem to require that he consider the condition fulfilled. There seems to be no justification for the more mechanical approach.

Article 1871. When a contract is subject to a condition precedent, it has effect only from the time when the condition is fulfilled. When it is subject to a condition subsequent, it has effect immediately, but its effects are wiped out if the condition is fulfilled.

Although the parties are to decide whether their contract is subject to a condition precedent or a condition subsequent, their language is not always clear on this point. Article 1871 solves the problem by creating a presumption that the parties intended to make their contract subject to a condition precedent.

Article 1871 also establishes the principle that where a contract is made subject to a condition precedent, it has no effects until the condition is fulfilled.

The creditor, therefore, cannot require performance before this time, nor can the debtor validly tender performance (See Article 268, Egyptian Civil Code). Article 1871 is similar to Article 151 of the Swiss Code of Obligations.

Article 1872. Article 1872 provides the inverse rule for contracts subject to a condition subsequent. Where a contract is concluded subject to a condition subsequent, performance can be required immediately: the immovable sold subject to a condition subsequent is delivered to the buyer; the thing lent subject to such a condition is given over to the borrower.

When the condition is fulfilled, the contract is cancelled and ceases to be effective; the immovable sold subject to condition subsequent must therefore be returned to the seller. Similarly, the thing lent subject to condition subsequent must be returned to the lender without delay.

Articles 1873-1877. The rights of the two parties before the fulfillment of the condition and the effects of the condition's fulfillment are specified by Articles 1873 to 1877.

Article 1873 is another affirmation of the principle of good faith. The parties are to refrain from any act that would prevent the normal performance of the contract upon the fulfillment of the condition. A similar express rule is found in the Swiss Code of Obligations (Article 152(1)) and the Italian Civil Code (Article 1358).

This general rule did not seem sufficient, however, and we have attempted in subsequent Articles to specify the acts that parties to a conditional contract may perform before the condition is fulfilled and the status of such acts when the rights of the person who performed them are cancelled by fulfillment of the condition.

The Code decided against simply announcing a general principle of retroactivity or non-retroactivity to solve these problems. Rather, it has isolated the various questions that can arise and has provided a solution for each of them.

Article 1874 deals with the acts of management⁵⁰ that the party holding the right⁵¹ can perform prior to the fulfillment of the condition. These acts are normal for he who does them, because he holds the right under the conditional contract. Often they are even required in order to keep the rights from being dissipated. The seller of an immovable subject to a condition precedent and the buyer subject to a condition subsequent conclude contracts for the upkeep, repair, and leasing of the immovable; where shares are sold subject to a condition precedent, the seller participates in the deliberations of the general shareholders' meeting. These acts are valid and enforceable against the other party, who must respect them once the condition is fulfilled. Damages can be claimed by him only if these acts cause him a loss and were done in bad faith, *i.e.* purposely to injure the other party or in disregard of his interests.

On the other hand, the holder of a right that has been transferred by a conditional contract cannot validly conclude acts beyond manage-

50. Editor's note: In this translation, we have kept the terminology of the English translation of the Code itself, *i.e.* *acts of management* and *acts beyond management*. The French terms used are *actes d'administration* and *actes de disposition*.

51. Editor's note: When using this concept of "holding the right" Professor David is speaking of the *real right* to deal with the thing that is being sold, or whatever, under the conditional contract. The holding of a real right must be distinguished from the *personal rights* that the two contracting parties have against each other by virtue of the contract.

ment with respect to the right until the condition has been fulfilled. This conclusion would result from Article 1873 alone, but Article 1875 reaffirms it and specifies what happens if the rule is violated. It provides that the improper acts are subject to invalidation. This invalidity can be requested only by the other party to the conditional contract; it cannot be asserted against a third party who has acted in good faith. It can also disappear as a result of confirmation, which Article 1875(2) allows any interested third party to insist upon within a reasonable period of time. The right to invalidate the act disappears if within a reasonable period of time the person has not declared his intention to do so. The requests for invalidation and for confirmation can be made even before the fulfillment of the condition. This result is dictated by general principles and it seemed unnecessary to state it expressly in the Code.

Article 1876 deals with the disposition of fruits and profits that accrue to the right that is the subject of a conditional contract prior to the fulfillment of the condition. The solution adopted relates only to fruits and profits collected in good faith. Fruits collected prematurely and profits whose accrual was accelerated contrary to good faith must be returned to the other party, either in kind or by damages.

While Article 1873 requires the holder of the right prior to the fulfillment of the condition to do whatever is necessary to protect this right, Article 1877 expressly gives the other party the right to take the same protective measures. He can provide for publicity that will protect him fully against possible acts beyond management by the other party; he can interrupt the running of a period of limitation with respect to a right that he has acquired subject to a condition precedent. Provisions similar to Article 1877 are also found in the codes of Switzerland (Code of Obligations, (Article 152(2)), France (Civil Code, Article 1180), Italy (Civil Code, Article 1356), and Egypt (Civil Code, Article 268).

Articles 1878-1879. Article 1878 deals with impossible, unlawful, and immoral conditions. Their consequences depend on the importance of the condition in relation to the whole contract. Article 1878 provides for the application to this problem, by analogy, of the Code Articles dealing with clauses of the contract that are impossible, illegal, or immoral.

Article 1879 establishes the invalidity of an obligation that is subject to a condition that depends wholly on the person obligated. For example, a person might undertake an obligation with the stipulation that he will perform if he wants to, or if he judges it fitting.

Since failure to perform an obligation undertaken in this way would result in no liability, it is not an obligation. It is invalid. Article

1879 states this rule, in conformity with the Civil Codes of France (Article 1174), Egypt (Article 267) and Lebanon (Article 84). It did not seem desirable to include in the Ethiopian Code the reservations on this subject that are contained in the Lebanese Code.⁵²

SECTION III: ALTERNATIVE OBLIGATIONS

(Articles 1880-1882)

Articles 1880-1882. Alternative obligations exist where the contract says to the debtor: you do either this or that, you rent me one of these two houses, or you deliver either so many meters of material or so many shammās.⁵³ Articles 1880 to 1882 deal with this kind of contract. It did not seem necessary, on the other hand, to deal separately with optional obligations, as various other codes do. The Ethiopian Code considers optional obligations as a kind of alternative obligation.

Article 1880 sets forth the basic principle that regulates alternative obligations: the debtor is discharged by performance of either of the obligations provided in the contract.

Which of the obligations ought he to perform? Article 1881 states that ordinarily he may decide, but he must make his choice as soon as the creditor puts him in default to perform his obligation, assuming performance is due. If he does not make his choice immediately, the right to choose passes to the creditor. This latter rule becomes important if the creditor intends to ask for forced performance and in the calculation of damages in case of non-performance.

Where the contract gives the creditor the choice of which obligation is to be performed, a similar rule applies. The debtor gives the creditor notice that he must state his choice; if the creditor does not then choose immediately, the choice passes to the debtor.

On the other hand, if the choice belongs to a third person, the Code does not provide for a replacement in case he fails to act. In this case, one would apply the rules relating to an insufficiently defined object. If the third party has promised to make the choice, he may be liable to indemnify the contracting parties for the damage suffered. The Ethiopian Code does not follow the Italian Civil Code (Article 1287), under which the court chooses which obligation is to be performed in such a case.

52. Editor's note: Article 1879 (2) seems to have been added at a later stage of the codification process and is the subject of no commentary here.

53. Editor's note: The *shamma* is the Ethiopian national dress.

Article 1882, finally, disposes of the case where performance of one of the obligations foreseen in the contract is or has become impossible. The other obligation must be performed. The party who by his fault has deprived the other of his choice can be required to pay damages. The Ethiopian Code does not adopt the distinctions in this respect that are made by the Italian Civil Code (Articles 1288 and 1289).

Seen as a whole, the rules provided by Articles 1880 to 1882 are basically in conformity with the provisions found in the Civil Codes of France (Article 1189 ff.), Germany (B.G.B., Sections 262-264), Switzerland (Code of Obligations, Article 72), Egypt (Article 276 ff.) and Greece (Article 305).

SECTION IV: EARNEST

(Articles 1883-1885)

Articles 1883-1885. It often happens that when a contract is concluded one party gives the other a sum of money as earnest. But in spite of how old and how frequent this practice is, there is little agreement on its nature and significance.

The Civil Codes of Germany (B.G.B., Section 336) and Switzerland (Code of Obligations, Article 158), followed generally by the Italian Civil Code (Article 1385(3)), consider the giving of earnest as designed to establish clearly that the contract has been concluded; they state specifically that the giving of earnest does not confer on the person who has paid it the right to terminate the contract unilaterally. But it is precisely this latter meaning that is given to earnest by the Egyptian Civil Code (Article 103), and the same meaning is given to earnest in the only Article in the French Civil Code that deals with it (Article 1590), with respect to the option to buy. The Greek Civil Code (Articles 402-403) also adopts this second approach, seeing in earnest a kind of penalty clause.

The Ethiopian Code follows the Egyptian Code on this point, but indicates more clearly the double function of earnest: it establishes clearly that the contract has been concluded and also gives one party the right to terminate the contract unilaterally. The first function exists in all cases, the second exists only in the absence of a contrary stipulation or usage. A contrary usage must be established beyond question by the person relying on it, but it may be a local usage or a usage for a particular trade or kind of contract.

Where earnest has been given, the contract may be performed or it may be terminated. Where it is performed, a further question arises: Ought earnest to be considered as a down-payment on the price owed by the debtor or is it paid in addition to this price? Here

again Western legal systems provide different answers: The Civil Codes of Germany (B.G.B., Section 337) and Italy (Article 1385) adopt the first; the Swiss Code of Obligations (Article 158) adopts the second. Article 1884 of the Ethiopian Code opts for the first solution, more favourable to the debtor, in conformity with the general principle of interpretation formulated by Article 1738. But here again only a presumption is created and it can be rebutted by proving a contrary stipulation or usage.

We have seen that ordinarily the party who gives earnest may terminate the contract unilaterally. If he does this, he loses the earnest that he paid the other party; the latter is allowed to keep it.

May the party who has been paid earnest also terminate unilaterally? Swiss law (Code of Obligations, Article 158(3)) and Egyptian law (Civil Code, Article 103) allow this with the proviso that in such a case the cancelling party must pay double the earnest to the other party. The same solution was adopted by the Italian Civil Code (Article 1386) for cases where the earnest is paid in addition to the contract price, and by the French Civil Code for options. In spite of all these examples, the Ethiopian Code has chosen the opposite solution, which seemed more in conformity with practice; the person who has received earnest does not have a right to terminate the contract, in the absence of a contrary stipulation or usage⁵⁴

SECTION V: PROVISIONS AS TO LIABILITY

(Articles 1886-1895)

Article 1886. Clauses extending contractual liability are permissible. Article 1886 of the Code recognizes their validity, as does Article 217 of the Egyptian Civil Code.

Articles 1887-1888. Clauses limiting or excluding liability are a matter for greater concern. One can fear that the beneficiary of such a clause has imposed them on the other party. In addition, in extreme cases, they destroy the very essence of the obligation and contract; a person who incurs liability is not legally obligated. The Code's

54. Editor's note: It should be remembered that the present "commentary" was written as a memorandum to the Codification Commission prior to enactment of the Ethiopian Civil Code. Article 1885 (2) expressly provides, contrary to Professor David's provisional recommendation, that the party receiving earnest can cancel the contract by repaying double that earnest. Presumably, this change was made after Professor David's proposal had been discussed in the Codification Commission. In a sentence omitted in this translation, Professor David suggested that the Codification Commission consider this question with especial care.

approach to these problems has already been indicated by Articles 1679 and 1879.

Nevertheless, it is desirable to permit certain clauses limiting liability. Thus Articles 1887 and 1888 allow two kinds of provisions. Article 1887 allows clauses limiting the liability of the parties or of one of them to the case where non-performance is due to his fault. Ordinarily the Code provides for liability for non-performance even in the absence of fault (Article 1791), but contracting parties ought to be able to stipulate that liability arises only in case of fault, with the burden of proof of fault on the person who asserts liability.

The parties cannot, however, provide that they will not be liable even in case of fault. We have not adopted the distinction made in some codes between serious and slight faults in this respect: compare the Italian Civil Code (Article 1229), the Egyptian Civil Code (Article 217(2)), and the Swiss Code of Obligations (Article 100). It did not seem desirable to include this distinction here.

In addition, the parties can limit their liability by providing that they will not be liable, even in case of a fault, where the fault is committed not by themselves but by one of their employees. Article 1888 gives them this possibility, in conformity with the Swiss Code of Obligations (Article 101) and the Egyptian Civil Code (Article 217).

The second paragraph of Article 1888 is patterned after the Swiss Code of Obligations (Article 101 (3) and, for certain cases, prohibits this exclusion of liability where one's employees or auxiliaries are at fault.

Article 1889. The parties agree that if one of them does not perform his obligations, he will have to pay the other \$1000. Or they agree that if performance is late, \$20 per day will have to be paid for delay. Such stipulations are called penalty clauses, and the payment required is called the penalty. Penalty clauses are frequent in contracts and are provided for and regulated in the various Western civil codes: France (Civil Code Article 1226), Switzerland (Code of Obligations, Article 160), Lebanon (Code of Obligations, Article 266), Italy (Civil Code, Article 1382), Greece (Civil Code, Article 404), and Egypt (Civil Code, Article 223).

Article 1890. A first question concerning penalty clauses is to know how to interpret them. When contracting parties include a penalty clause in their contract do they intend to give the debtor a choice between performance of his obligation and payment of the penalty stipulated? Or is the penalty clause only a fixed evaluation of damages, so that the creditor can still insist on forced performance of the contract?

The penalty clause definition given by Article 1889 should answer this question, but it seemed desirable to be more explicit. Article 1890 provides expressly that, unless otherwise agreed, the creditor may insist upon performance of a contract even though it includes a penalty clause. This solution is in accordance with French law (Civil Code, Article 1228), German (B.G.B., Section 340), and Swiss (Code of Obligations, Article 160).

As in French law, penalty provisions are thus treated differently than earnest, for which the opposite solution is provided. Where earnest is paid the person who has paid it can ordinarily terminate the contract unilaterally (see Article 1885). But where a penalty clause has been stipulated, the debtor is irrevocably bound by his contractual obligations. Unless it is agreed that the penalty is an alternative obligation, he cannot extinguish his obligation by paying the amount stated in the penalty clause.

There is no difficulty in allowing these two solutions simultaneously. A penalty clause is easy to distinguish from earnest since the latter is paid at the time the contract is concluded, while the penalty clause is not effective until later. It may be more difficult to distinguish between a penalty clause and alternative obligations, but Article 1890 (1) helps solve the problem by establishing a presumption in favour of the penalty clause. A clear stipulation is required before a contract will be interpreted to include alternative obligations.

Article 1890 (2) also defines the creditor's rights, by stating that ordinarily he cannot require both performance and payment of the penalty. The only case in which he can do so is where the penalty was intended to penalize a mere delay in performance or the non-performance of an accessory obligation. Article 1890(2) is in accordance with French law (Civil Code, Article 1229), Lebanese law (Code of Obligations, Article 266), and Italian law (Civil Code, Article 1383).

Illustration.

A purchases some wool from B, with the stipulation that B is to deliver wool of a particular quality. It is agreed that if, upon inspection of a bale to be chosen by the purchaser, the wool is shown to be of a quality inferior to that promised, B will pay A a compensation equal to 10% of the sale price. In such a case, A can require both the performance of the contract and the payment of the penalty, since the penalty related only to the seller's accessory obligation to guarantee the quality of the goods sold.

Article 1891. Where a penalty has been stipulated, should a debtor who fails to perform, or performs late, be excused and thus

not have to pay the penalty, where he can show that his delay or non-performance was caused by for example, force majeure?

Article 1891 deals with this question and simply refers back to the general rules on non-performance of contracts, which determine the circumstances in which damages are due for non-performance. The penalty clause determines the amount of damages to be paid, but it has no effect on the rules that determine when damages are due. This solution is in accordance with French law, but contrary to German law (B.G.B., Section 340).

Article 1892. Where there is a failure to perform a contract and the debtor is liable as a result of Articles 1791-1798, the penalty clause constitutes a definitive liquidation of the damages that are to be paid.

This liquidation excludes the application of Articles 1799 ff. In particular, Article 1800 is no longer available to the debtor; the penalty is due even if the creditor has suffered no damage at all. The same solution is found in Article 161 of the Swiss Code of Obligations, Article 1382 of the Italian Civil Code, and Article 405 of the Greek Civil Code. Egyptian law provides the contrary solution (Civil Code, Article 224).

Article 1801 is similarly excluded except that Article 1892(2) permits the applicability of Article 1801(2) in cases where there is a penalty clause. The Code has followed the Egyptian Civil Code (Article 225) on this point. It does not go as far as German law (B.G.B., Section 340), however, which permits the debtor to claim damages in excess of the amount stipulated in the penalty clause whenever non-performance is due to fault of the debtor without regard to the seriousness of the fault.

Article 1893. Western legal systems are divided on the question of whether the courts have the right to reduce an excessive penalty. Courts are given such a right in Lebanon (Code of Obligations, Article 266), Italy (Civil Code, Article 1384), Egypt (Civil Code, Article 224), Germany (B.G.B., Section 343), and Greece (Civil Code, Article 409). The Swiss Code of Obligations (Article 163) even imposes a duty upon the court to do so. On the other hand, French and English case-law deny to the courts any power to reduce a penalty, even where it is excessive.

The Code adopts the latter approach. The court may not reduce the amount of the penalty in case of non-performance of the obligation that the penalty was designed to sanction, unless there has been a partial performance. This provision, similar to Article 1231 of the

