ARBA MINCH UNIVERSITY

BUSINESS LAW
(Mgmt 2028)

DISTANCE LEARNING MATERIAL

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Introduction

This material is designed to teach Business law course for management and accounting students. Business law is not a single codified law rather it is a collection of different proclamations and regulations which are highly related with business. As is known business and law are highly linked. Business encompasses the production of goods and services, buying and selling, hiring, transporting etc. So all these practices are controlled and regulated by law.

"Business law" synonymously also called "commercial law' or "mercantile law". Business law is that branch of law which deals with merchants and commerce. It directs the relation between persons, merchants or business organization, engaged in commerce. It regulates the rights and duties arising from business transaction. Every business transaction and decision involves a legal component. Therefore every business manager or accountant should take in to consideration the legal aspect of every decision.

The objective of this course is to introduce the major business law and the legal frame work on which business practices are undertaken. The students are expected to acquire the basic knowledge and skills of the common legal aspects of business activity which are usually encountered to the everyday activity of business operation. Hence the students will apply this knowledge and skill up on their future profession. The core goal of this business law is to familiarize students with the legal environment in which they are going to engage as a business man or woman or as a professional service giver. The students will be on familiar terms with the principles of business law and build up some degree of capability in applying them to business problems.

The first chapter deals with the definition, function of law and meaning, nature and sources of business law. The second chapter devotes it self in studying the subjects of the law. This chapter answers the basic question regarding subjects of the law which can bear a right and assume an obligation. Accordingly concept of term personality physical and legal persons and extinction of personality are dealt with.

Third chapter is devoted for business and business entities, which encompasses definition and elements of business in one hand and sole proprietorship, partnership and companies. The fourth chapter is about the basic component of business law which is contract law. So the chapter includes the definition, formation, effect, and extinction of contract. The forth chapters is about a special kind of contract. This is a sale contract which governs the

sell of movable properties. The chapter consists of the definition, scope, formation, effect and extinction of contract of sale. In addition to that, it deals with a legal frame work which regulates agency-principal relationship. It also deals with definition of insurance, types of insurance, insurance policy and insurance of persons.

Fifth chapter is devoted to discuss about laws of negotiable instruments. Definition of negotiable instruments, cheque, bills of exchange, and promissory notes will be discussed in this part.

The sixth chapter is about law of banking transactions. In this chapter, deposits, hiring of safes, contract for current accounts, discount and credit transactions will be discussed.

Chapter seven is the last chapter of the module. In this chapter, labor law will be discussed thoroughly. Contract of employment, formation and terms of employment, duties of employee and employer and termination of contract of employment will be discussed.

Dear students you are expected to study the course thoroughly. I wish you good luck to the study of this course.

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Chapter-I

1. General Introduction

1.1. Definition of Law

What is law?

Dear students what do you think is a law? Try to give your own definition of law in the following space.

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Regarding the definition of law, legal scholars haven't yet reached an agreement on the accepted definition of law which has got a universal acceptance. Even though there is no a universally acceptable definition of law, mainly law is defined as a system of rules, usually enforced through a set of institutions. It shapes politics, economics and society in numerous ways and serves as a primary social mediator in relations between people. Law is commonly defined as the body of rules recognized and applied by the state for governing the conduct of people in their dealings with one another. Law may also be defined as the system of rights and obligations which the state might force. State, in order to maintain peace and order in the society, formulates certain rules of conduct to be followed by the people. These rules of conduct are called "laws". Hence states enact a bundle of laws to regulate the system and guide the society.

These laws may include like Contract law which regulates everything from buying a bus ticket to trading on derivatives markets. Property law defines rights and obligations related to the transfer and title of personal (often referred to as chattel) and real property, while tort law allows claims for compensation if a person's rights or property are harmed. If the harm is criminalized in penal code, criminal law offers means by which the state can prosecute the perpetrator. Constitutional law provides a framework for the creation of law, the protection of human rights and the election of political representatives. Administrative law is used to review the decisions of government agencies, while international law governs affairs between sovereign nation states in activities ranging from trade to environmental regulation or military

action. These bundles of laws regulate control or guide persons. It is better to discuss the basic features of law in order to understand it very clearly.

Dear students what do you think is a law? Try to give your own definition of law in the following space.

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1.2. Functions of Law

What would happen to you, your property and business if law didn't exist? What kind of benefits do you think you get from the law?

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Dear student, did you imagine a society without a law? Every ones property, life and human rights are not protected at all. It is quite difficult to appreciate law unless we imagine what will be the situation of the society without a law. Had there been no law there would have been no limitation up on individuals in doing things. However the law draws a line between what an individual can do and not do, what are socially desirable behaviors and those which are not. A law is very broad to cover and regulate every activity of persons and hence it is difficult to discuss all function of the law. But the following are the most important function of a law.

The first function of a law is to maintain peace, security and order. Imagine what would happened if there were no law to curtail the conduct of gang of robbers breaking into your abode and taking away the property you have gained over time through exerting your energy and investing your money. Think also of a reckless conduct that sets fire to a building in which you run your business affairs which results in a looting of essential documents. I hope you openly unwelcome such a situation. In the absence of law, persons might excessively and arbitrarily behave and you would also be discouraged to undertake proper business activities for fear of the risk of losing it someday. So laws, especially criminal laws, would become

indispensable tools to stop unwelcoming conducts and to create peace and stability for proper life of the society.

Law also serves as a tool to bring social change. Legislatures and policy makers are very keen to use law as an instrument of change. Law regulates the way a particular relationship is to be created, maintained and broken. Law is not limited to mere maintenance of peace and order; it also steps in to govern detailed individual interactions. Laws of family for instance are concerned with the regulation of the institution of marriage and matrimonial affairs. Contract and property laws administer contractual bonds and property relationships of individuals respectively. Business laws, on the other hand, intend to shape behavior in commercial transactions and ensure the interaction is conducted in healthy and effective manner.

Besides through law certain harmful traditional practices can be discouraged. For example early marriage has been the widespread practice in many parts of Ethiopia. Marriage is a big affair upon which family, the fundamental unit of the society, is found. Yet, such purpose is served only if spouses are psychologically and biologically developed enough. Ignorant of such fact, most Ethiopian parents force their teenage children (especially girls) to marry while they are in fragile mental and physical conditions, exposing them to various economic, social and biological problems. The same is true of Female Genital Mutilation (FGM). The law is a typical tool in reducing, and ultimately eradicating, these harmful traditional practices.

Law may also be used as a tool to encourage investment in area where the government priorities. Through law a lot of measures may be taken to guide investors to invest in such area.

Law administers justice. If an individual has got an injury and if his rights are violated arbitrarily, then the law will step up to redress such problem and ensure justice is done. Since everyone is equal before the law, the least disadvantages and poor parts of the society may get the protection of the law in case the dominant parts of the society interferes in their rights and privileges.

Law is also used as an instrument of social and economic change through the encouragement of innovation and creativity. Law encourages individuals to engage in innovative tasks by granting rights to exclusive enjoyment of their inventions via issuing patents, copyrights,

trademarks and the like. These mechanisms confer inventors and authors of new ideas with economic and moral benefits, as a result the majority of the society benefits from it.

1.3. Meaning of Business Law

Business law is sometimes called mercantile law or commercial law and refers to the laws that govern the dealings between people and commercial matters. There are two distinct areas of business law; regulation of commercial entities through laws of partnership, company, bankruptcy, and agency and the second is regulation of the commercial transactions through the laws of contract.

1.4. Nature of Business Law

- Business law is that branch of law which is concerned with business entities like companies and partnerships. Business entities play an important role in the society and significantly impact the economy of a nation. There are diverse means by which they transact which each other and with other entities in society.

- Law therefore steps in to define their rights and obligations with a view to protecting their interests and of those who deal with them. In fact, the very creation of businesses is governed by business law. Any transaction or phenomenon that may affect the activities of businesses is a part of business law. Business law is a vast legal discipline and encompasses within its ambit a large variety of laws like contract law , intellectual property law , securities law , employment law , to name a few.

- While the terms ‘business law’ and ‘commercial law’ are often used interchangeably, certain jurisdictions do consider the two to be somewhat distinct areas of law, but nevertheless intricately connected. Every aspect of a business is associated with legal consequences. Right from the creation to the dissolution of the business, nothing can be done in disregard of the legal principles enshrined under the area of business law.

- With the ever increasing focus on the growth of the economy, particularly given the current economic scenario, business laws have come to play a uniquely significant role in the contemporary times. A business entity cannot hope to be successful without keeping itself updated with the various business laws. It also makes businesses responsible towards and accountable to the nation at large.

1.5. Sources of Business Law

What are the sources of the law where you should look for in case you need to refer to a law regarding certain matters? Have you ever looked for a law? Where did you look for?

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Sources of law are also sources of business law, since business law is also a law. The main sources of law including business law in Ethiopian legal system are the Constitution, Proclamations, Treaties, Regulations, and Directives. These are the likely documents you can use to exercise your legal rights and the likely documents other people can use against you in case you have violated your legal duties that are put for the benefit of others.

i) The Constitution

In every legal jurisdiction a constitution is considered as the supreme law of a land. All laws and customary practice, from whatever source, that contravene the Constitution are null and void. It means the Constitution is the highest legal document in the country. It is the source of government authority. All other laws, whether federal or state, obtain their authority from this document. As a result, it is everyone has the duty to enforce and abide by the constitution. Likewise obligations or responsibilities provided in this document must be complied with. Constitution grants power to the government to enact law to the legislature. And of course fundamental human and democratic rights of individuals are recognized and protected by the constitution.

ii) Proclamations

The legislature which has got the authority to enact law legislates a law. The laws that the legislative organ enacts are called proclamations. In the Ethiopian case proclamations are enacted by the house of people's representatives. According to the Ethiopian constitution, the law making power is vested in this house for matters falling under the federal government. Such matters include labor law, business law, and nationality law. This source is the most important of the other sources, especially for our discussion of business law, since they provide the detailed principles of law that can be easily applied in our everyday activity. The

two source materials of business law, namely the Civil Code and the Commercial Code, fall under this category of the sources. Article 52 of the FDRE constitution also grants power to the state councils to enact law which are falling under their jurisdiction. For instance since family laws are state matters, state councils have the right to issue laws on family matters such as marriage and divorce. As a result we have family laws of Oromia state, Tigrai state, Amhara state, etc. these laws apply only to the concerned region only.

iii) Treaties

Treaties or conventions are international agreements that have the force of law. Normally international legal obligations emanate from treaties. But these treaties serve as sources of law if they are ratified by the Ethiopian government namely the Parliament. The FDRE Constitution states that "all international agreements ratified by Ethiopia are an integral part of the law of the land." For example, the obligation of the government to enforce the rights of workers, for that matter employers as well, to organize and form their own associations may come from the international labor convention ratified by Ethiopia, which is Freedom of Association and The right to Organize Convention, 1958. Several international documents on human rights, democratic rights, and rights of specialized groups of people such as children are documents that serve as sources of law, so people may invoke international agreements to exercise whatever rights the international document accords them because once ratified, the international agreement is a good source of law.

iv) Regulations

As we discussed the law making authority is granted to the legislature. But it becomes unrealistic and not easy for the law maker to issue laws on particular and exhaustive matters. This difficulty arises from lack of time and lack of skill and knowledge of matters to be regulated by the law. To avoid this difficulty, the parliament usually delegates the power to make laws to the Council of Ministers (an organ that constitutes the Prime Minister, Ministers and other people with the rank of ministers). Laws issued by this organ are called *Regulations.* Regulations are enacted according to the proclamation that grant the council of ministers authority to enact law and are inferior to the proclamation and constitution. If the regulations

contravene with the proclamation the later prevails over the former. Example for such a source of law is Income Tax Regulations issued by the Council of Ministers in accordance with Income Tax Proclamation. The tax proclamation explicitly authorizes the Council to issue such laws.

v) Directives

It is once more an inevitability to assign the authority to make laws to ministries which have enough expertise to issue rules in relation to the matters at hand. As such laws issued by ministries are named *directives.* Ministry of education may be allowed to issue laws on education or the ministry of Labor and Social Affairs may issue rules in relation to employment. Regulations are inferior to the other sources of law mentioned above. These laws are enacted according to the delegated power to the ministerial offices for practical and efficiency reason ministries can issue directives as per proclamation and guidance set by the council of ministers and legislature organ of the government. If directives are inconsistent with regulations, proclamations and most importantly with the constitution, the former (directives) don't have a legal effect.

Chapter- II.

2. Legal Personality

Introduction

Dear students! In chapter one, we have discussed that law governs behaviors. But what are these subjects of the law? The law only governs its subjects. And it is only persons which are the subjects of the law. In this chapter we will deal with these persons recognized by law as having rights and duties.

So under this chapter first we discuss regarding the meaning of the term person. The law classifies person in to two: Physical and Artificial person. Then we will continue to the discussion of the acquisition of personality and the attributes of personality. The chapter also cognizant of the fact that physical person's capacity might be limited by law and hence merits consideration. Finally of course we will deal with the end of personality.

Learning objectives:

Dear students after you have completed studying this chapter, you are expected to

- Explain what is meant by the concept of legal personality;
- Appreciate that the concept of legal personality is fundamental concept in law;
- List the attributes of personality;
- Differentiate the difference between rights accorded to persons after birth and before birth;
- Explain the acquisition of personality; and
- Describe how personality comes to an end

2.1. The concept of the term "personality"

What is personality? Why is the understanding of the concept so important under the law?

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The word "person" has a different meaning in law than the ordinary connotation of the word "human being". "Person" is a legal concept and we need to study the law to define and identify what do we mean by person and who are persons. This is because it is only persons who can have a right and assume a legal obligation. Personality in law refers to the authority which is given by law to be considered as a person and hence to have a right and assume an obligation. In other words, humans and fictitious entities cannot perform juridical acts without being recognized as persons before the law. In order to obtain rights and bear duties that are enforceable by law enforcing institutions, one needs to have personality first. It is only beings that are persons in the eyes of the law who can conduct legally binding transactions.

So who are persons in law? There are two kinds of persons. The term person in its normal sense refers to human beings. So human beings are the first group of entities that are considered as a person. However it is not only individual human beings who have personality upon completion of certain given requirements, but also artificial creations of the law are also endowed legal personality.

Personality is an essential concept in law because no transactions of legal significance would produce effects being recognized as a person. It answers the basic question that what the subjects of the law are. Only subjects of the law can enjoy the rights that the law confers upon them and only they can discharge the duties it imposes upon them. Thus, the normal effect of personality is the ability to be a party to legal transactions and perform various juridical acts (acts having effect at law).

As we discussed Personality is granted to two categories of beings. One is physical or natural personality that is possessed by human beings. In the past, not all human beings were subjects of the law. For instance, slaves were regarded as mere chattels of their masters and did not have any rights or duties of their own. They were objects of legal transactions rather than subjects of the law. So, during those times, personality was conferred upon non-slaves. But these days, with the elimination of slavery and its strict prohibition, virtually all human beings enjoy personality and involve in juridical acts.

The second type of personality is given to the entities which don't have material existence. These entities are alternatively called artificial persons or legal persons or juristic persons. All entities recognized by law as capable of being parties to a legal relationship are legal persons. Thus, a legal person can be an association, an organization, a company, group of persons etc. The state is recognized by law as a person. Provided that they are given personality by law, these entities are persons and can have legal relations with each other. These legal persons are exclusive creation of the law and accordingly given personality because of the necessities of modem complex legal transactions. Thus, unless otherwise determined by the context, the term person means both human begins and legal persons.

2.2. Physical Persons

How does a human person acquire personality?

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In ancient times, not all human beings were recognized as person. In the history of human society, there were times when slaves were considered as mere property. Today, all human beings are considered as equal and the principle of personality has already changed. All legal systems grant legal personality to all human beings. Every legal jurisdiction tries to answer when is the personality of human beings begin.

The first four articles of the Ethiopian civil code deals with this matter.

Article 1. Principle

The human person is the subject of rights from its birth td its death.

Article 2. Child merely conceived.

A child merely conceived shall be considered born whenever his interest ~o demands, provided he is born alive and viable.

Article 4. Viable or not viable child.

(1) A child shall be deemed to be viable where he lives for forty eight hours after his birth, notwithstanding any provision to the contrary.

(2) A child shall be deemed to be not viable where he dies less than forty-eight hours after his birth.

(3) The presumption laid down in sub-article (2) may be rebutted by proving that the

death of the child is due to a cause other than a deficiency in his constitution.

So one can realize that there is a rule which is generally considered as the initial point of personality, and there is also an exception to such rule where personality starts. So first we discuss the principle and then the exceptional circumstances where personality can also be granted to a merely conceived child.

I. The Principle.

The Ethiopian civil code sets the principle when the personality of human beings commences. It begins at birth. Article 1 of the civil code states that the human person is the subject of rights from its birth to its death. When the article provides that the human person is the "subject of rights", it means that human beings enjoy, or hold rights starting from the time of birth. In principle, therefore, the personality of natural persons begins at birth and ends at death. Hence, there is no personality before birth or after death. Birth means a complete extrusion of the child from its mother's womb. Whether the extrusion is natural or by an operation, it makes no difference. Under the Ethiopian law, birth is sufficient in itself to confer personality. No other conditions are laid down in this respect. Once a human baby is born, it is a person. Besides since rights and duties are the two faces of the same coin, the duties of a human person also begin at birth.

II. The Exception

Exceptionally however a child merely conceived may also be considered born and get physical personality. As stated in Art.2 of the Civil Code,

A child merely conceived shall be considered born whenever his interests so demands, provided he is born alive and viable.

Because personality begins at birth as a matter of principle (as per art. 1), an unborn body is not a person in the eyes of the law and can have no rights. But this general rule is excepted in that personality may be granted to a merely conceived baby without waiting for its birth for some purposes. As an exception, personality of a fetus should be restrictively construed and it is applicable only in certain circumstances. The circumstance generally revolves around the interest of the unborn child. The law has invented this fiction only for the purpose of enabling the child (if it is born) to take a benefit in all matters affecting its interest. But two

requirements must be fulfilled, according to art. 2. of the civil code, to grant personality to a merely conceived child. These are:

1. The conceived child interest shall demand this recognition
2. The conceived child must born alive and be viable.

The merely conceived baby will be given personality (before birth) only for the purpose of the particular interest that necessitates the grant. Ordinarily, the interest of a merely conceived child exists where a father dies before the birth of the child. This conception is based on the reason that a child who has already lost its father while being in its mother's womb should not be exposed to further ache of losing a advantage which it would have gained had it been born before its father's death. So, when there is an interest of the baby at stake, the unborn baby in the womb should be regarded as already born and should be allowed to take advantage of the interest if the second requirement is fulfilled.

The second requirement is that the baby must be born alive and viable. For instance, personality will never be granted if the fetus is aborted. So the child must be born alive and becomes viable. Viability is capacity to live. Under Article 4(1), a child shall be deemed to be viable if it lives for forty-eight hours after birth. A child who lives for the next forty-eight hours after birth is presumed to be a person from the moment of conception on wards. If fore example, a mother gives birth to a healthy baby three months after the death of her husband, and the baby lives for forty-eight hours, the baby is considered as though it was born at the time of his father's death. It is considered as if the baby was a "person" when his father died. This presumption is irrebutable (cannot be challenged).

The law also provides for another presumption *in the negative* that a child that dies before 48 hours after its birth is deemed to be *not viable.* But this presumption is *rebuttable* in that it can be shown to the contrary by proving the child was viable. That is to say, if a child dies before 48 hours following its birth due to a disease he caught in its mother's womb or due to other congenital biological deficiencies, it will be conclusively deemed not viable. However, external factors that may have caused the death of the child before 48 hours can be used to disprove the presumption of non viability. If, for instance, the baby dies on the 24^{th} hour after its birth because of mishandling by nurses or by hunger or due to a car accident that occurred while it was being taken home from hospital, all such can be employed to rebut the above presumption by proving that the baby would not have died had it not been for the external

factors. Therefore the child is considered viable even though he/she doesn't live for forty eight hours due to an external factor.

Generally if the merely conceived child is born alive and viable, whenever his interests so demands may be considered born and granted personality according to article 2 and article 4 of the Ethiopian civil code.

Capacity of Physical Person

What is capacity? How do you understand the term?

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Enjoyment and exercise of rights are not the same. To enjoy rights means to have, to hold rights. A physical person enjoys rights, holds rights or is the subject of rights starting from the time of birth. And the law presumes capacity. Article 192 of the civil code states that:

Art. 192. - Rule of capacity

Every physical person is capable of performing all the acts of civil life unless he is declared incapable by law.

So the law presumes that every physical person is capable of exercising a right. In other words Capacity is the rule even in the case of exercising rights and duties a physical person holds. Since holding (enjoying) rights and duties is meaningless without the authority to exercise same, the full exercise of rights and duties in principle coincides with their holding. Capacity is the ability to make or exercise a juridical act. Juridical acts are acts which are legally binding and enforceable by law. This means that all persons enjoy rights without exception, but all persons do not have the same capacity to exercise rights. Some persons have limited or restricted capacity. Some persons are incapable of exercising rights. The law calls these persons incapable persons.

Incapacity of Physical Persons

In the Ethiopian civil code there are a certain categories of person incapable to exercise algal right. Do you understand by the term incapacity? Do you know the reason behind such incapacity?

Incapacity of physical person is an exception to the rule that every physical person is presumed to be capable of exercising a civil acts. In certain circumstances the law may explicitly declare that certain categories of persons are considered incapable to exercise rights and duties. Since capacity is presumed in the exercise of rights and duties (incapacity is very exceptional), the burden of proving the existence of incapacity fails on the party who claims the incapacity. This principle is stated in the civil code.

Art.-Proof of disability

(1) capacity is presumed

(2) Any person who alleges the disability of a physical person shall prove that such person is under a disability

In the Ethiopian civil code there are t3o kids of incapacity: General incapacity which is based on the age or mental condition of persons or on sentence s pas upon them; and special incapacity which is based on nationality.

A/ Minors

Article 215 of the revised Federal Family Code defines persons regarded as minor. It states:

"A minor is a person of either sex who has not attained the full age of eighteen years"

Thus physical persons under the age of 18 are minors. It is pointed out that minors are taken as disable to engage in juridical acts.

Although the minor is incapable for entering into contracts for most of activities of human life, certain contracts may be regarded as binding upon the minor. Here we consider only two of these contracts:

1.*Contracts for the performance of acts of everyday life:* these contracts are valid if contracted by the minor. Although what constitutes an act of everyday life may be different from state to state (states have the power to issue such laws since the matter falls under family law which in turn falls under the jurisdiction of states), we can generally say that buying a soft drink or

buying a book worth 100 Birr may be considered as an act of everyday life depending upon the age and mental maturity of the minor. What matters is whether the legal representatives we said have authorized (allowed) the minor to act or not.

2.*Contract for employment:* A minor who has attained 14 years of age may enter into a contract of employment to work and earn money. Why do you think is the age lowered? This is a provision given under labor law. The main reasons seem to enable the minor acquire experience for his physical and maturity, and no less important, help himself and family, if any, by earning some income.

On the basis of juridical acts to be performed, person that may assist or represent the minor are categorized into two. These are guardians or tutors. Guardians represent the minor in respect to his personal matters, Article 216 (1) of the revised Family code provides:" A minor as regards the proper car of his person, shall be placed under the authority of a guardian." What do you understand from the expression? "Proper car of his person," that is to say , in matters concerning personal interests like contracting marriage, education, medication, determining residence, shaping social contact and correspondence or any other acts or contracts other than economic interest (property relations)

In matters concerning to financial (economic) interests the minor is represented by tutor. Article 216(2) of the revised family code states: "In matters concerning his pecuniary interest means an economic interest in all matters relating to economy the minor has to be represented by the tutor". Thus, you should notice that in relation to economic matters the minor has to be represented by the tutor. The tutor may purchase things for the minor, may sell or enter in to contractual engagements for the minor.

According to Article 36 of the FDRE constitution, everything decision relating to the child must be done by taking into account *the best interest of the child*. If the minor concludes a contract beyond his authority, the transaction may be invalidated at the request of the minor, his heirs or representatives (Article 300 of the revised family Code). Article 299 of the revised family Code States: "The juridical acts performed by the minor in excess of his power shall be of no effect." The expression," no effect" is used here to mean the transaction cannot be enforced against the interest of the minor.

The minor may acquire capacity in two ways: *attainment of a majority* and *emancipation.* When a physical person attains 18 years of age, he is no more a minor and afterwards he is fully capable of entering into a contract. The other case, which is rare, is emancipation, which refers to the granting of capacity to the minor before he attains 18 years of age. Emancipation may be ordered by a court of law or by authorized members of the family. In addition, the minor may be emancipated if he enters into lawful marriage which is authorized by the public authority. A marriage which is concluded without the authorization of the government is illegal. Hence at the age of 16 years an interested party may apply to the public authority to engage in marriage if it is the best interest of the child.

B/ **Judicially Interdicted Persons**

The court may sometimes interdict a certain categories of individuals due to their mental problem. These individuals don't understand the consequences of their action due to their mental condition. So the law steps in to protect the interests of persons with mental problem as a consequence of insanity, infirmity, senility and the like. Insane persons are believed to be unable to understand the nature and consequences of their actions because they have got a mental problem. Infirm persons are those with serious physical deformities so that such deformities will have the ultimate substantial reduction in mental functioning. For example, if a person is simultaneously deaf-mute and blind, he/she is deemed to be infirm. Senility is deterioration in mental faculty because of old age. The court can declare the interdiction of the above persons with mental deficiencies. Any interested party may apply to the court for the interdiction.

Judicially interdicted persons will lose the authority to exercise rights and duties as of the date of their interdiction. But they, just like minors, exercise rights and duties they hold through guardians if the interest pertains to the personality of the incapable person and through tutors where the interest is a proprietary one.

c) Legal interdiction

This kind of incapacity emanates from the law due to the commission of a certain crime. A

person will be legally interdicted as a result of the pronouncement of a legally prescribed punishment for the violation of criminal law. The prescribed sentence will deny the person the capacity to carryout economic affairs. A legally interdicted person retains capacity over his personality interests and thus no guardian is necessary. A tutor may represent the legally interdicted person to exercise the latter's pecuniary rights/duties. The assumption of the office of tutorship is, unlike that of minority or judicial interdiction, voluntary. The evident reason is that a person who lost his privilege because of commission of a crime should not be favored by compelling others to assume the role of tutorship on his behalf.

The End of Incapacity of Physical Persons

The incapacity arising as a result of minority may terminate through a couple of ways. A minor obviously assumes capacity to exercise rights and duties himself when he attains the age of majority (18 years). The incapacity of a minor may also come to an end through *emancipation* even if the person is still below the age of eighteen. A minor may conclude marriage in exceptional circumstances approved by the appropriate public body, and we call this situation emancipation. This phenomenon suffices to end the incapacity of the minor and releases him/her from the authorities of the guardian and the tutor.

A judicially interdicted person may be free forming the interdictions where the court, that has interdicted the person, withdraws the interdiction. If the grounds that affected the mental faculty of the person are no more exist, the interdicted person or any interested person may apply for withdrawal of the interdiction. The court examining the state of mind of the person may make him free form the interdiction.

A person interdicted by law due to the commission of a crime may also be capable in two ways: the first is when the criminal serves the sentence and the second is when the government grants a pardon as per the law.

End of physical personality

How is personality come to an end?

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The Ethiopian civil code deals with the mechanisms which brings the personality of human beings to an end. The first ground is death. Article 1 of the Ethiopian Civil Code also provides for the way personality of individuals ends through death. It states that human person is the subject of rights from birth to death, meaning personality ends at death.

The other mechanism where personality of human persons comes to an end is the declaration of absence. If a certain person is disappeared and no news of him has heard for two years any interested party may apply to the curt for the declaration of absence. If once the court declares that the person is absent the absentee is considered dead. And death is considered das the ground to end the personality of the absentee.

2.3. Juridical persons

How do juridical/artificial persons acquire legal personality? Give the answer on the following blank space.

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Legal personality is an artificial or fictitious creation of law. These artificial persons acquire legal personality in different mechanisms. These mechanisms include issuance of a particular legislation, carrying out registration and conditions of publicity. For instance, public offices will start to have personality upon the enactment of establishment proclamation or regulation with no other conditions attached to it. On the other hand, private business organizations have to be registered with a competent public authority in order to acquire legal personality. They should also comply with publicity requirements. So, acquisition of personality by business organizations is effected by meeting the requirements of both registration and publicity, and only as a result of such they can validly start acts of civil life.

Once the entities get legal personality they are recognized as equal before the law with the human person. Physical person can perform juridical acts, bears a right and assume an obligation like the physical persons. Legal (Juristic person) do have their own names and

separate legal existence. Juristic persons enjoy effects of personality by the help of physical persons that act through a representative capacity.

Attributes of personality

What are the attributes of personality?

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Legal personality, then, refers to a particular device by which the law creates or recognizes units to which it ascribes certain powers and capacities. Under the law, persons possess certain capacities. These capacities are called attributes of personality.

A) ***Having a name****:*

Names affect the legal position of a person. Names are mechanisms of identifying the civil identity of a specific person in the society and of the legal status. Furthermore, since use of a name can modify the legal status of a person, the law provides for protective mechanisms against abuse and usurpation of the name by others. Generally, it is through name as an expression of civil identity that a person in the eyes of the law can become a party to juridical acts, and thus it is a fundamental attribute of personality.

B) A person may sue or be sued in its own name:

To sue is to bring a legal action against another, and, on the contrary, to be sued is to defend a legal case brought against oneself by another. If three people Abebe, Bekele and Selam form a company, after a company has satisfied the legal requirements for the acquisition of legal personality (after it has become a legal person), it brings legal actions (legal suits) against others in the name of the company, not in the name of Abebe, Bekele and Selam. This is because legal persons have independent legal existence and their liability is separated from the shareholders liability.

C) A person may administer and own a Property

Only persons can own property. Both legal and physical persons can own and administer property. Non person entities cannot own property. Property belonging to a legal person is different from that of individuals who establish the legal person. And there is a maxim that no person can own another person. This is because every person has an independent legal existence. The human beings who establish a company are not the owners of that company but the law calls them a members or shareholders.

A legal person administers its own property. It is clear that a legal person acts through human agents. A legal person acquires rights and incurs liabilities through the acts of its human agents (representatives) in accordance with the provisions governing agency.

Article 216(1) of the Commercial Code.

A business organization acquires rights and incurs liabilities by its agents in accordance with the provisions governing agency.

Article 2189(1) of the Civil Code

Contracts made by an agent in the name of another within the scope of his authority (power) shall be deemed to have been made directly by the principal.

Hence the legal persons own and administer a property through an agent.

D) A person can enter in to a contract

It is only a person who can conclude a contract. Contract is a source of obligation and the parties need to be a person in order to be legally bound by it. Legal persons can enter into various contracts in their own name. A company can conclude a contract with another company or with a human being, and the benefits obtained as well as the liabilities assumed because of the contract belong to the company itself, and not to the members. So the capacity to conclude a contract is one attribute of personality.

E) Obligation to pay taxes

The entities which are recognized as a person before the law have also obligations. A legal person as well as a physical person is liable to pay taxes on taxable benefits and gains. Hence

from every taxable income or benefit that they earn, legal persons have the duty to pay tax. This one example of obligation of persons.

Summary

Dear students I hope you understand as the law regulates behavior. The question of whose behavior does the law regulates and governs is discussed under this chapter. The concept of personality is the fundamental concept under the law. Under any legal system, it is only persons that are the subjects of rights and duties. Only persons enjoy rights. The word "person" is broader than we ordinarily know. The word person refers to both human beings and other entities recognized by law as persons. Person is a legal concept. Personality is grant on people by law. The law may accord personality to anything like the corporations, associations, business organizations, religious organizations, etc. As long as these entities have personality by law they are considered as a person. Hence they acquire personality.

Human persons begin to enjoy personality since birth. Birth is a condition to grant personality to human beings. However as long as the interests of the conceived child necessitates, the law may sometimes grant personality to the conceived child, provided that the child is born alive and viable.

Enjoyment of rights is different from the exercise of rights. All physical persons enjoy rights without exception. But all physical persons do not have the same capacity to exercise rights. There are a certain categories of persons who are incapable to exercise a juridical act.

The personality of human beings comes to an end when the person dies or declared absent. Legal personality ends when the artificial person dissolves by the parties or by the operation of the law.

Chapter- III

3. Business and Business Entities

Introduction

In this era almost everything that we produce and consume comes out from a business. To produce and distribute products, traders establish either solo business or business organizations. As a business student it will inevitably be important to know the legal frame work behind business, traders, business organization establishment, registration, licensing and responsibilities. This will make the business students aware of the legal environment in which they are going to engage after graduation.

The law has lots to say in connection with the way you carry out your commercial activities. The way people do business is regulated by the law. The elements of business are identified, defined and protected by the law. At present day it is becoming very difficult to imagine doing business without the artificial persons that we call business organizations. This chapter is about business and business organizations.

Objectives

Having studied this chapter, you should be able to:

- Define traders under Ethiopia
- Describe obligations of traders
- Define business under Ethiopian law;
- Explain the elements of business;
- Define business organizations;
- Enumerate forms of business organizations;
- Discuss common provisions regarding business organization
- Identify specific characteristics of each form of business organization

3.1. Definition of Business

What is the definition of business? What are the elements of a business?

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Article 124 of the Commercial Code defines business as

> *"An incorporeal movable consisting of all movable property brought together and organised for the purpose of carrying out any of the commercial activities specified in Art.5 of this Code."*

Thus, the ultimate essence or quality of any business, as can be gathered from the above definitional provision, is its incorporeality irrespective of the existence of corporeal elements. The importance of the incorporeal elements figures in prominently under Article 127, which stipulates:

> *(1) A business consists mainly of a goodwill.*
>
> *A business may consist of other incorporeal elements such as:*
>
> *(a) the trade-name;*
> *(b) the special designation under which the trade is carried on;*
> *(c) the right to lease the premises in which the trade is carried on;*
> *(d) patents or copyrights;*
> *(e) such special rights as attach to the business itself and not to the trader. (Emphasis added)*

In general , the term "business" embraces tangible and intangible assets, including tools, equipment, raw materials, goods in stock, good will, trade name, trade mark, patent, copy right, and the right to lease of the premises. But, immovable properties cannot form part of the business. Hence, the land or buildings which form of the business premises and the fixtures on such premises are no part of the business, even though they are owned by the trader himself. To a greater degree, the business is regarded as an entity distinct from its constituent elements, as long as the whole is more valuable than the sum of the constituent parts. In this sense, the business is a *res*, thing, or object over which a person can exercise property rights, including ownership, usufruct, and lease.

3.2. Elements of a Business

The Code identifies elements of business that can be protected by law. Some of the important incorporeal ingredients of a business are: *good will, trade name, trade mark, patent and copyright.*

1. **Good will**: it refers to an intangible value of a business measured by reputation. In the Code's terms it "results from the creation and operation of a business and is of a value which may vary according to the probable or possible relations between a trader and third parties who may require from him goods or services." Persons (including business rivals) may attack the good will of a business. They may mislead customers about the business (undertaking) or its products or other commercial activities. A trader for this unlawful conduct may seek protection by instituting actions for compensation or for stoppage of the wrongful conduct.

2. **Trade name**: It is "the name under which a person operates his business and which clearly designates the business." A trade name identifies the particular business manufacturing the product such as Awassa Textile Factory or rendering the services such as Alem Cinema. To obtain protection to a trade name, it must be registered in accordance with the provisions of Commercial Registration and Licensing Proclamation.

3. **Trade mark**: a trademark is used to distinguish a certain product from similar products. Like a trade name, a trader must get his trademark registered to obtain any kind of legal protection. Presently registration of trade mark is done before the Intellectual Property Office organized under Science and Technology Commission.

4. **Patent and copyright**: patent means the title granted to protect inventions, which may relate to a product or process. It confers its owners the exclusive right to exploit his or her invention. And copyright refers to the ownership right to a work of the mind. These two intellectual property rights are protected in accordance with the relevant laws that create them.

3.3. Different kinds of Business Entities

The Commercial code of Ethiopia defines six forms of business entities/organizations that are

legal persons. These are:

1. Ordinary partnership,
2. Joint venture,
3. General partnership,
4. Limited partnership,
5. Share company, and
6. Private limited company.

3.3.1. Sole proprietorship

A sole trader is a business carried on by an individual acting in an independent way. The business operation will be treated as personal assets and liabilities of the owner. The owner is the ultimate employer and manager, regardless of whether he or she lives in the country. In terms of the legislation in force, before starting any commercial or investment activity, such a person must apply for a registration.

This is the simplest way to set up a business. A sole proprietor is fully responsible for all debts and obligations related to his or her business. A creditor with a claim against a sole proprietor has a right against all of his or her assets, whether business or personal. This is known as unlimited liability. If the proprietor chooses to carry on a business under a name other than his/her own, he/she must register with the concerned local authorities. Your business name registration, or renewal of registration, will be valid for a certain period of time. A sole proprietorship is the cheapest and easiest form of business. Under a sole proprietorship, the entrepreneur is the owner as well as the manager of the business.

The sole proprietorship terminates by law upon the death of the sole proprietor, with very few exceptions. Estate planning documents for the sole proprietor may grant the heirs of the sole proprietor the right to continue the business.

3.3.2. Partnership

According to Ethiopian commercial code article 210, all business entities are born out of partnership agreement between persons. The commercial code classified partnership in to three sub divisions:

I. Ordinary partnership

Although an ordinary partnership is defined as a business organization, it is not known as Commercial business organization and is not authorized to undertake trade activities. If it carries out a trade activity, it will automatically be considered as a general partnership.

The other types of business organizations can be characterized by three main features, namely, Commercial character, being subject to civil Law and Ethiopian national. They can also have their branch units.

Although all these forms of business organizations practically exist, the most commonly used forms are private limited company and Share Company. Before a business organization starts operation, it should be registered in the commercial register kept by the Ministry of Trade and Industry or Regional Trade Bureau. But as a one-stop shop, the Ethiopian Investment Authority serves as a trade register to foreign investment pursuant to the power vested upon it by Proclamation No 67/1997 article 43.

II. General partnership

General partnership is an agreement between two or more persons who are eligible for entering into binding contracts. The memorandum of association drawn up by the parties has to be approved by public notary, published in the newspaper and finally be registered by commercial register.

The partners are personally, jointly, severally and fully liable as between themselves and to the partnership for the partnership firms undertaking. General partnership has no minimum capital requirements. It is left to the partners to decide on the amount of the capital to be contributed. The management and administration of the company is determined by the agreement concluded by the partners in the memorandum of association. The memorandum of association can also provide voting procedures in which the partners make their decision as to the assignment of shares.

The name of the partnership consists of the names of at least two of the partners followed by the words "General partnership".

III. Limited partnership

A limited partnership is a partnership with two types of partners namely, general partners who are liable personally, jointly, and severally and limited partners who are only liable to the extent of their contribution. A limited partnership is managed by the general partners. Limited partners are not allowed to participate in management. Otherwise they are to be held jointly and severally liable for all the debts and obligations of the company. However, they can require to be presented with a copy of the balance sheet and are entitled to inspect the books of the firm.

A limited partnership must consist of the names of the general partners followed by the words “Limited partnership". Where a limited partner allows his name to be included in the firm's name, he shall be liable to third parties in good-faith as though he were a general partner. A limited partnership is based on a written memorandum of association drafted and signed by the partners.

3.3.3. Private companies

A private limited company is a company whose partners are liable only to the extent of their contributions. The maximum number of the partners is fifty while the minimum is two. The company shall not issue transferable securities.

The company has a minimum share capital of Birr 10,000 which must be paid up on registration. The capital contributed by the partners may include in kind contribution which is subject to valuation. The registered capital is divided into shares. Shares may be transferred among shareholders as provided in the memorandum of association, but they can be traded with third parties only after seeking the approval of shareholders owning at least three quarter of the capital.

The company may have one or more managers. They must be individuals appointed by the shareholders, but they need not be shareholders. Although the memorandum of association may provide limitations on a manger’s power, these limitations are not binding on third parties. The appointment of auditors is compulsory if the number of shareholders exceeds twenty.

The name of the private limited company may contain a disclosure of the nature of its activity and must include the words “private limited company". The firm-name and the amount of capital of the company shall appear on all of the company documents, invoices, publications and other papers. Nowadays, most of the companies established in Ethiopia by foreign or domestic investors are private limited companies.

3.3.4. Public companies

Public/Share Company is a public company whose capital is fixed in advance and divided into shares and where liabilities are met only by the assets of the company. The establishment of Share Company requires at least five persons and there is no maximum as to the number of partners. Subject to the laws provided for the establishment of banks, the capital of the company shall not be less than 50,000 Birr.

The shares are freely transferable and the public may be invited to subscribe. When the share company is established between the founders, all the shares have to be allocated among them and one-quarter of the par-value of the shares has to be paid up and deposited in a bank in the name and to the account of the company. Public subscription is another possibility for establishing a share company. In this case a notarized prospectus must be drawn up and filed with the trade register in the appropriate authority. The trade register certifies compliance with the Ethiopian legislation and authorizes the issuance of the prospectus. One quarter of the capital raised by subscription shall be deposited in a bank account opened for the company to be established.

The formation of the company shall be by public memorandum. The article of association which governs the operation of the company shall be drawn up by the founders in accordance with the law. The shareholders’ general meeting is the supreme managing body of the company. Shareholders’ general meeting may be ordinary, extra ordinary or special. The company is managed by board of directors whose minimum number is three and the maximum is twelve. The operation of the company is governed by the general manager elected by board of directors. The directors shall deposit as security such number of their registered shares in the company as is fixed in the memorandum of association.

The company shall have one or more auditors elected by the general meeting. Shareholders representing not less than twenty per cent of the capital may appoint an auditor elected by them. The name of the share company shall include the words “Share Company".

Summary

Nowadays the eye of every one is towards business. Ordinarily the word business is used to connote every activity of a person. But legally speaking business is any activity that seeks profit by production and supply of goods or services to satisfy the needs of consumers. When persons do business, they have the right to seek protection for elements of business. The typical elements of business that are protected by law are good will, trade name, trademark, patent, and copyright.

Normally business can be carried out by an individual as a sole proprietor and/or business organization. Business by an individual, usually called sole proprietorship, is an easy way of doing business. To do business in this form, registration is a legal requirement. Sole proprietorship does not have legal personality and as a result there is no distinction between the business's and the owner's liabilities.

The second form of doing business is in the form of business organization. Business organization, by definition is an association of two or more persons for the performance of business activities with the ultimate objective of sharing profits. There are six forms of business organization: ordinary partnership, joint venture, general partnership, limited partnership, Share Company, and private limited company. The Commercial Code provides common provisions to business organizations and special provisions for each. Under the common provisions, with the exception of joint venture, business organizations must be formed in writing must be registered, and they have legal personality. All business organizations carry out their legal activities through agent. With few exceptions, the profits and losses coming out of the business must be shared among all partners. Generally business organizations may come to an end by agreement of the partners, or in accordance with the provisions of the law, or by court decision to be mad for good cause.

As to the special provisions, an ordinary partnership is formed for professional services. The

partners assume unlimited liability and ownership interest is not easily transferable. As to joint venture, it does not have legal personality; it must not be divulged to third parties; and it must not be registered. As to general partnership, it is the common form of partnership business organization. The partners assume unlimited liability and, like other partnerships, ownership cannot be easily transferred. As to the limited partnership, it is almost the same with general partnership. But there is one big difference. In limited partnership, there are two categories of partners: general partners with unlimited liability and limited partners with limited liability. It is only the general partners that can manage the affairs of the partnership.

Share Company is different from the other forms of business organization in many aspects. The liability of the owners is limited. The government control of the business is strict. The minimum capital and the number of members required are birr 50000 and 5 respectively. As to the private limited company, it is a compromise between company and partnership. Like a company the owners' liability is limited. And like partnership it is established by few members (maximum being 50) and ownership interest is not freely transferable. The minimum amount of capital required to open up private limited company is 15,000 birr.

Chapter -IV

4. Law of Contracts

Introduction

The law of contract is the foundation up on which the supra structure of modern business is built. It is common knowledge that in business transactions quite often promises are made at one time and the performance follows later. In such a situation if either of the parties were free to go back on its promise without incurring any liability, there would be endless complications and it would be impossible to carry on trade and commerce.

Hence, the law of contract was enacted which lays down the legal rules relating to promises, their formation, performance and enforceability. The law of contract is applicable not only to the business community, but also to others. Every one of us enters in to a number of contracts almost every day, and most of the time we do so without even realizing what we are doing from the point of law. The law of contract is the most important branch of business law. Under this chapter we will discuss the definition, formation of contact, effect of contract, non-performance of contract as well as extinction of contractual obligations.

Learning objectives of the chapter:

Dear students you should note that this area is crucial for business people and managers. Contracts are matters of daily life especially in commerce. Thus, the knowledge of fundamental principles of contract law is of much help in commercial success. Dear distance learner, as a business professional you need to check yourself at the end of this chapter if you have attained the following.

Discovering the nature of a civil obligation;
Comprehending the essential principles of contracts;
Identifying the essential requisites in the formation of contracts;
Noticing the effects of contracts;
Exploring issues of performance of contracts;

Explaining non-performance and identifying the remedies.

4.1. Contracts In General

Law of contract

What are the sources of obligations of a person? List some of the obligations which arise from the law?

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In civil law, we have the generic area of law called law of obligations. Law of obligations is a law that requires persons to do, to give or not to do something. In other words it regulates what persons must do and must not do in their civil relations such as relations that exist in employment, partnership etc. But the issue here is: what is the source of these obligations? Where do you think your obligation to pay tax comes from? Where do you think the obligation of the college to provide you with the appropriate lessons comes to existence? There are two sources of obligations that we encounter in our everyday lives: the law and contract.

Law as a source of obligations

These obligations are imposed by law. There are so many obligations you are required to perform without making any agreement on your side. These obligations do not require your consent or agreement for their existence. They are simply there because the law maker wanted them to exist for whatever public good it had in mind. When we ask the reason why these obligations existed, our immediate and clear answer would be: because the legislature or the parliament said so. Let us take a couple of illustrations to elucidate these obligations:

1. ***The obligation to pay income tax:*** this obligation is created by the law. The law imposes on the persons to pay tax. The justification may be because the government needs money to pay salary, to expand infrastructure and to cover the expenses of its day to day activities.

2. The obligation to compensate the victim of one's wrong*:* if someone has incurred due to the fault of another person, the person who inflicted injury has the right to get compensation. This right is the obligation of the wrong doer which emanates from the law. For example, if you inflict a physical injury against another person, you will be under obligation to pay for medical and related expenses the injured person incurs and if there is permanent damage, the court may order you to give money by way of compensation.

3. The liability of an employer for the action of his employee: the employee works for the interest of the employer as per the guidance of the later. In the process of performing his official duty, if the employee injured another party, the employer has the duty to pay compensation to the injured party. This obligation created by the law.

Contract as a source of obligations

How does a contract become the source of an obligation?

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Unlike obligations from the law, the obligations here exist if the parties consent to it. The obligations exist simply because the parties for whatever reason give their consent to be bound by it. This agreement to establish an obligation is a contract. Here the parties are free to enter in to the contract. But if they once enter in to the contract they are no more free. They are expected to discharge that obligation. Some of these obligations are: *The obligation of the buyer to give the price to the seller, the obligation of the employee to work for the employer: and the obligation of the borrower to repay the money he took from the lender:*

Although the obligations in the above three illustrations are created by the parties, it does not mean that the law has no place in contractual obligations. The law has important roles to play. The law gives recognition to these obligations, requires the parties to perform them and provides solutions in case one of the parties, motivated by different reasons, refuses to perform. For instance in our last illustration, the borrower is duty bound under the law to pay his debt. If he does not voluntarily pay the debt, the lender can sue him before a court and collect the principal and interest that is due. This is the most important role of the law in both contractual and legal obligations.

4.1.1. Definition

Dear students, in this section I'll introduce you with certain fundamental concepts of contracts including the definition given by the Ethiopian law. You are strongly advised to apply your maximum effort to understand these concepts.

How do you define a contract? What is a contract for you?

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Contract basically upholds the following philosophical concepts. The first is *Contractual freedom.* The parties must be free from any defects which affect their consent. The parties in principle are free to determine the content and form of the contract withstanding some mandatory provisions of the law. Second, once the contracting parties entered in to the contract the law enforces it. A validly formed contract binds the contractants and hence the law enforcing machineries enforce it. Finally contracts have a relative effect. Contract only binds the contracting parties. It is only the contracting parties who can benefit from the contract as well as obliged to perform obligations. Contract doesn't bind the third parties (n parties who are outside of the contract).

Art. 1675 of the Ethiopian Civil Code. It states that:

> *"A contract is an agreement whereby two or more persons as between themselves create, vary or extinguish obligations of a proprietary nature".*

The contractual elements that emerge out from dissecting the definition and other related issues are stated below.

A) Contracts are agreements

They are based on compulsory exchange of consent. There must be an agreement as to every aspect of the contract, and this agreement must be meant to be legally binding. And, conversely, there are agreements which do not give rise to a legal bond and therefore not contracts. For instance, acts of courtesy, a "gentlemen's agreement", a free performance of service, or even a consensual relationship between neighbors to help each other, are not

contracts even if they are agreements. Therefore, we can conclude that while all contracts are agreements, the vice versa is not true.

B) A contract needs at least two persons for its existence there cannot be a one-one contract. The contract is not a unilateral legal instrument which is an expression of a single person's wishes. Such matters as a will drawing an order of succession, the acknowledgement of a natural child, or the resignation made by an employee are all unilateral expressions of a person's intention to generate juridical obligations. But none of these are contracts because a contract cannot emerge by a single person's actions; contracts are bi-party juridical, acts that exist between two persons to the minimum.

*C) "…*as between themselves…"

This is the principle of *relative effect of contracts* so much so that third parties are not concerned by the contracts made by other persons. The phrase "as between themselves" in the definitional provisions of the Ethiopian Civil Code reveals the concept in that it is only parties to a contract who are entitled to the benefits or burdened with the liabilities that arise from the contract, and not third, parties. In this regard, a contract is distinguishable from other collective legal instruments which may be imposed on persons who did not take part in them. A decision taken by a general assembly of shareholders, for instance, does create a binding obligation on the partners of the company through the operation of the majority rule even though they had opposed the obligation. The basis of a contractual obligation is the equality of the parties, an important aspect of which is its affirmation of individual liberties. Thus, the right to enter into a contract is also the right not to enter into a contract.

D) The object of contracts is the establishment and performance of an obligation - an obligation is a legal tie (as defined previously), an action of being bound by a duty, and here it is a freely imposed or accepted duty. Being the instrumentality of establishing a legal bond, entering into a contract entitles the contracting parties to claim the assistance of public force, in the guise of the courts and their officials, to obtain the performance of this contract.

E) "...to create, vary or extinguish obligations…"

The possible reasons for formation of a contract are stated in the definition. They are creation, variation, and extinction of obligations. The first is a contract may be formed to *create* new obligations. Persons who do not know one another may come together and bind themselves by obligations which have not existed before. For example Kebede, a new entrant in an employment market, may look for a job. If he finds one, he can agree with the employer for a contract of employment that brings forth new obligations. After the contract, both Kebede and his employer will assume new obligations that did not exist previously. The employer will give money (salary) to Kebede and Kebede will render services to the employer.

The other reason may be *variation* of the existing obligations. In our employment example, after the employment commenced, the employer and Kebede may, by their mutual consent, vary their obligations by increment of salary or by promotion or transfer of work position etc. Here they adding or reducing their already made obligations. The last purpose of a contract may be to *extinguish* or end existing obligations. Again in our employment illustration, Kebede and his employer may agree to terminate their relationship, declaring that they are no more bound by the previous employment obligations. Can you imagine for yourself a case where you voluntarily created or varied or extinguished contractual obligations? Please you must an illustration of your own.

Indeed these three are manifestations of freedom of contract. Freedom of contract dictates persons can agree to whatever obligations they desired. It allows you to sell your property, or give it for free or lend it. It is up to you to decide. However, this freedom may is subjected to certain legal restrictions imposed for public good or other justifiable reasons. For instance you cannot freely agree for commission of a crime.

F) "…proprietary nature of the obligation…"

The last important point in our definition is *proprietary* nature of obligations. The obligations in our contract must be aimed at property or economic gain. If the obligations are formed principally for reasons other than that of money or property, the contract may not be covered in our chapter of contract. Take for instance marriage. Is it not a contract in a sense that it is an agreement resulting in legal obligations? It is actually. But since marriage mainly is aimed

at social benefits, it is not normally considered as a contract in our definition. Of course for our course on business law this element does not pose a problem since the obligations business people assume in their career are clearly of proprietary nature.

4.1.2. Formation and Elements of contracts

Dear students it is quite clear that you have been making contract inn your day to day life or you profession. How did you form those contracts?

Dear students, I hope you have understood from the previous introductory part that contracts emerge out from the free will of the contractants. But it may be the case that such free will would be exercised improperly so that the economic interest that is the subject matter of a contract may be prejudiced. A party may enter in to a contract because the other party may have improperly induced him to do so. So, there are two interests at stake here: one is that free will must be reasonably made and must be legitimate in the circumstances; the other is that the formed contract should be enabled to produce the economic effect it was intended for.

A striking balance between the interests is reaches by the law through the imposition of certain non-derogable requirements in contractual undertakings. There is a vested interest for the law, being cognizant of the possibility of abuse or prejudice of freedom to contract and of the significance of contracts as instruments of economic performance, to intervene in contractual affairs and set certain standards. The law regulates contracts in two ways. On the one hand, there are provisions of the law that are deemed mandatory such as those regarding formation of contracts from which contracting parties cannot deviate because of the need to ensure the free exercise of contractual liberty and due to public policy reasons. On the other, the law provides for permissive rules that serve the purpose of filling the gap that may be left by the contracting parties - parties are free to determine whatever they like on such regard but the law steps in so as to fulfill the contract should the parties fail to do so. Accordingly, the law has regarded formative requirements as essential and, therefore, compulsory upon the parties to comply with. You'll learn about these essential requisites of concluding a contract in the sections that follow.

What are the requirements which must be fulfilled in order to form a valid contract?

Article 1678 of the Ethiopian Civil Code states that no valid contract shall exist unless:-

a) the parties are capable of contracting and give their consent sustainable at law;

b) the object of contract is sufficiently defined, and is possible and lawful;

c) the contract is made in the form prescribed by law, if any.

Four mandatory conditions are evident in the provision above: *capacity, consent*, object and *formality.* Let's turn ourselves on to briefly exploring their nature and scope.

4.1.2.1. Capacity of the parties

Much is said on legal capacity of a person to perform juridical acts. As contract is a juridical act, remembering what is discussed in the foregoing chapter enables you easily understand the requirement of capacity in the formation of a contract. The law of contracts itself does not address the issue of capacity, which means it suffices to look into the general rules of capacity we addressed in the precious chapter.

It is fairly enough to repeat here that either because the person has to be protected (minors, judicially interdicted persons) or because he undergoes a prohibition (legally interdicted persons, foreigners) the law decides that they cannot enter a contract. They are *incapable* of binding themselves to somebody else. But if they do conclude a contract, the sanction is the nullity of the contract as claimed by a person whose incapacity is proved.

4.1.2.2. Consent of the parties

Consent is a defect-free mutual agreement by the contracting parties. It is a manifestation of freedom of contract, and therefore is the basis upon which rests the entire law of contractual obligations. Consent carries a double aspect: first, the parties must agree on the scope of their undertaking (there must be agreement on each and every important detail) and, second, there must be a willingness on the part of the contractants to make their undertaking legally binding. It is only when this double condition is present that the effectiveness of the binding nature of the obligation is guaranteed by the civil law.

The existence or otherwise of these aspects and their consequential bearing on the validity or otherwise of a contract is to be scrutinized by judges taking into account the circumstances of the case. Regarding the first element, for instance, the court is to examine whether or not all details are essential in that lack of consent on one detail might render the whole contract ineffective. Certain details may be insignificant so that the presence or otherwise of consent will not have a bearing on the contract as whole and on the overall status of the contracting parties. Furthermore, the parties need not necessarily express certain details in their contract so much so that one should not hastily conclude these details are totally omitted from the contract and no corresponding consent is given. The mere absence of some details does not mean that parties have not consented to them, for consent is broad enough to be said existent having regard to custom, equity and good faith.

The element of intention to be bound is an important psychological aspect that relates to the contract as a whole. It refers to the state of mind of the contracting parties to create a legally binding instrument. The mutual assent of the parties is deemed to have final legal force only if it is accompanied by a genuinely made *intentio obligandi (*intention to be bound). Mere intention to be bound existing only in the subjective state of mind of the parties does not suffice for the purposes of the law. An intention which is not expressed in the contract makes the ascertainment of its existence by the courts very difficult as the determination of a state of mind of a person is so complex a matter. The law requires the intention to be bound to be declared so that the willingness of the parties is externally manifested and this is deemed to simplify the work of the courts and to reduce the possibility of disputes. Whether the declaration of intention is express or tacit is not a question here, but only whether the declared *intentio obligandi* can be objectively established. Further analysis of how consent is to be expressed is given below.

Offer and acceptance

Dear students do you know what offer and acceptance are? Do you know how the contracting parties communicate to each other to form a valid contract? Give your answer in the space provided below.

Ordinarily, mutual assent is evidenced by a contractual offer and acceptance. One party offers a certain bargain to another party, who then accepts that bargain. The parties are required to manifest to each other their mutual assent to the same bargain. A contract is therefore the meeting of the offer with an acceptance. The two stages of offer and acceptance are sometimes much slower to develop into a final contract. There may have been a number of exchanges between the parties where conflicting offers and acceptances were exchanged over a period of time and where, during the negotiation process, an agreement was achieved only on certain terms and not on others. The meeting of the consent of the parties may be fragmented over time before all these part agreements finally come together to form a global contract. Regard is to be had to the final offer and acceptance that truly manifests the mutual consent of the parties for it is only a finally made offer and acceptance that bind the parties.

Offer

An offer is a firm and definite (precise) proposal made by the offeror (the party who takes the initiative to conclude a contract) to enter into a contractual engagement regarding a particular subject matter. It expresses the willingness of the offeror to create a binding obligation. Three elements are necessary for an offer to be effective at law: *serious intention (firm proposal), certainty or definiteness,* and *communication.*

An offer is firm when the offeror has a serious intention to become bound by the offer. But such serious intent is not determined by the subjective intentions, beliefs, and assumptions of the offeror. It is determined by what a reasonable person in the position of the person to whom the offer is addressed would conclude the offeror's words and action meant. Offers made in obvious anger or undue excitements do not meet the intention test. Because these offers are not effective in the eyes of the law, hence acceptance does not create a contract. For instance, suppose A and B ride every morning to a school in A's 50,000 Birr worth car. One cold morning, both persons get into the car, but A cannot start the car. A Shouts in anger that he will sell the car to anyone for Birr 10,000. The next morning B brought 10,000 Birr to take the car. Given these facts, a reasonable person, taking into account A's frustration and the

obvious difference in value between the market price of the car and the proposed purchase price, would declare that his offer was not made firmly and that B did not have a contract.

Mention those invitations which are not considered as an offer in the Ethiopian civil code?

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There are various proposals that are not legal offers. The concept of firm intention can be further clarified by, distinguishing between offers and numerous kinds of non-offers. As such, social invitations, expressions of opinion, or statements of motive all do not evidence an intention to enter into a binding agreement. If someone invites you to a dinner and later on tells you that he has cancelled the invitation because he has got another appointment, you can't invoke the law of contracts to enforce the promise because such social relationship are not normally intended to be legally binding. Suppose again that you wanted a doctor to operate on your broken legs, and the doctor, after making the operation, tells you that your legs would probably heal a few days later. If your legs do not heal after a month, you can't will a suit against the doctor for breach of contract because the doctor did not make an offer to heal your legs in two or three days but merely expressed an opinion as to when the legs would heal. Likewise, if A says he plans to sell his stock in XY S.c. for Birr 5000 per share, a contract is not created if you accept and tender the 5000 Birr per share for the stock. A has merely expressed his motive to enter into a future contract for the sale of the stock, and no contract is formed, because a reasonable person would conclude that A was only thinking about selling his stock not promising to sell.

Another obvious non-offer category is constituted by advertisements, catalogues, price lists and circulars. In general, these cases are treated not as offers to contract but as *invitations to negotiate.* For example, a seller's price list is not an offer to sell at that price; it merely invites the buyer to offer to buy at that price. In preliminary negotiations, a request or invitation on to negotiate is not an offer. It only expresses a willingness to discuss the *possibility* of entering into a contract. Similarly, when construction work is to be done for the government

and private firms, contractors are invited to submit bids.

The *invitation to submit bids* is not an offer, and a contractor does not bind the government or private firm by submitting a bid. (But the bids that the contractors submit are offers.) In some cases, what appears to be an offer is not sufficient to serve as a basis for the formation of a contract. Particularly problematic in this respect are "offers" to sell goods at auctions. In an auction, a seller 'offers' goods for sale but this is not a contractual offer. Instead, the seller is only expressing a willingness to sell. The seller can withdraw the goods at any time before the sale is closed by announcement or by knocking down of the auctioneer's hammer, unless the terms of the auction are explicitly stated to be *without reservation* (in which case the seller is obliged to accept the highest bid). In principle, there is no obligation to sell, and the seller may refuse the highest bid. The bidder is actually the offeror and the contract is formed when that bid is formally accepted.

The second requirement for an effective offer involves the definiteness of its terms. An offer must have reasonably definite terms so that a court can determine if a breach had occurred and can provide a remedy. Courts are authorized to supply a missing term in a contract when the parties have clearly manifested intent to form a contract. If in contrast, the parties have attempted to deal. with a particular term of the contract but their expression of intent is too vague or uncertain to be given any precise meaning, the court will not supply a reasonable term, because to do so might conflict with the intent of the parties.

A third requirement for an effective offer is communication of the offer to the offeree, resulting in the offeree's knowledge of the offer. Ordinarily, one cannot agree to bargain without knowing that it exists. Uncommunicated offer is no offer at all. The offer must also be addressed directly to the offeree (the person to whom the offer is directed for his/her consideration) so much so that if the offeree learns of the offeror's intentions from some other source, no legal offer results because no offer has been communicated. The manner of communication need not necessarily be in writing or oral; the law recognizes even signs and conduct as legitimate media for communication of an offer in so far as there is no doubt as to the making of the offer.

Once an offer is properly made and made known to the offeree, it will be binding on the offeror. The offeror cannot engage in activities that negate the offer, and his consent has the force of law upon him.

Termination of Offer

Describe the situations where an offer is terminated?

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An offer addressed to the offeree does not remain in force indefinitely. It will cease to have a binding effect, and the offeror would be released from the legal bond. An offer terminates generally by the action of the parties or through the operation of the law.

i) Termination by the Action of the Parties

An offer can be terminated by the action of the parties in any of three ways: by revocation, by rejection or by counter-offer.

(**a) Revocation**: - refers to the offeror's act of withdrawing an offer. Revocation becomes effective where it is communicated to the offeree before the offeree knows of the offer. Revocation practically operates as a mechanism of terminating offers especially where there is a time between the making of the offer and the knowledge of the offeree. Thus, revocation of an offer sent to the offeree through post can be made by using a faster means of communication (such as telephone) so that the offeree knows of the withdrawal notice before he does of the offer. In so far as it carries with it the test of offeree's first knowledge, revocation may be accomplished by express repudiation or by performance of acts inconsistent with the existence of the offer, which are made known to the offeree.

(b) Rejection: - this is the act of the offeree to terminate an offer. The offeree is free to accept or reject the offer. If he elects to reject the offer and communicates same to the offeror, the offer comes to an end even though the period for which the offeror agreed to keep the offer open has not expired.

(c) Counter-offer:- A rejection of the original offer and the simultaneous making of a new offer by the offeree is called a counter-offer. It is required that the offeree's acceptance should match the offeror's offer exactly. Any material change in, or addition to, the terms of the original offer automatically terminates that offer and substitutes a counter-offer. The counter-offer, of course, need not be accepted; but if the original offeror does accept the terms of the counter-offer, a valid contract is created (Art 1694 of the Civil Code).

ii) Termination by Operation of Law

The power of the offeree to transform the offer into a binding legal obligation can be terminated by operation of the law through the occurrence of the following events: lapse of time; death or incompetence of the offeror or the offeree.

a) Lapse of time: - An offer terminates automatically by law when the period of time specified in the offer has passed. Such is the case with offers in which a time-limit has been stipulated. The time-limit specified in an offer normally begins to run when the offer is actually received by the offeree, not when it is sent or drawn up. When the offer is delayed (e.g. through misdelivery of mail), the period begins to run from the date the offeree would have received the offer, but only if the offeree knows or should know that the offer is delayed.

If no time for acceptance is specified in the offer, the offer terminates at the end of a *reasonable period* of time. What constitutes a reasonable period depends on the subject matter of the contract, business and market conditions, and other relevant circumstances. An offer to sell farm products, for example, will terminate sooner than an offer to sell farm equipment because farm produce is perishable and subject to greater fluctuations in market value.

b) Death or Incompetence of Either party; - An offeree's power of acceptance is terminated when the offeror or offeree dies or is deprived of legal capacity to enter into the proposed contract. An offer is personal to both parties and cannot pass to the descendant's heirs, guardian, or estate. Furthermore, this rule applies whether or not the other party had notice of

the death or incompetence.

Acceptance

> Contracts are formed when the offeree accepts an offer. How shall acceptance be made in order to form a valid contract?
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Acceptance is a voluntary act by the offeree that shows assent to the terms of an offer. It refers to the pure and simple agreement given by the offeree to the offeror. In other words, acceptance must be absolute and unconditional in the sense that one must accept just what is offered. This is the *mirror image rule* which requires acceptance to mirror (reflect back) the full images of the offer. So acceptance must unequivocally conform to the terms of the offer; it must agree in the manner, at the place, and within the time set forth in the offer. If the acceptance is subject to new conditions or if the terms of the acceptance materially change the original, the acceptance may be deemed a counter-offer that implicitly rejects the original offer.

Acceptance must be communicated, and, conversely, uncommunicated acceptance is no acceptance. Just as for the offer, the communication of acceptance does not call for any special formality. The only requirement, similar to the case of offer, is to have no doubt as to the intention to undertake an obligation. Thus, acceptance can be communicated expressly or tacitly. The express acceptance may be oral or in writing. The tacit acceptance results from signs normally in use or conduct such that there is no doubt as to consent. The above lenient approach to form of acceptance is, however, excepted where the offeror stipulates a special form of acceptance in the offer. Such a specific term is deemed to be part and parcel of the offer itself, and therefore acceptance, by definition, must conform to the special form demanded by the offer. If, for example, the offer states that acceptance is to be made in writing, the offeree is deemed not to have accepted the offer purely and simply if he communicates his assent orally or through conduct.

Dear student, do you think acceptance can be effectively made when the offeree keeps silent? Silence is a borderline and problematic concept with regard to acceptance and communication thereof. "Silence" in the legal sense of the word has to be defined. It should not be confused with the simple absence of verbal or written expression, because an outward behavior other than speech can be equivalent to a tacit acceptance. In other words, silence is the total absence of any form of expression, be it verbal, written or behavioral.

Can the offeree accept a contract in silence? What is the implication of silence?

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The grand rule is that silence does not constitute acceptance, and this is set out in Article 1682 of the Ethiopian Civil Code. This principle has a logical explanation deriving from the basic ideal of contractual liberty. If silence is to amount to acceptance, a converse situation that imposes upon offeree to resort to mechanisms of express rejection is created. This would make life unbearable for all of us, who are constantly subjected to a stream of unsolicited offers. It would place the burden of evidence of rejection on the client and be unreasonable. It in effect means that freedom not to contract is significantly restricted and creates insecurity. Thus, to protect contractual freedom, which also includes a freedom not contract, it is traditionally established that silence cannot amount to acceptance and that some form of outward expression is needed.

The above traditional rule is, however, not without exception. According to Art 1683 of the Civil Code, certain persons are required by law or by concession to conclude certain contracts on terms stipulated in advance with anyone who makes an offer to them. The explanation of this exception goes like this. Certain activities may constitute public utility and are indispensable for the descent life of the community. Moreover, it is probably the case that these activities provide limited or no alternatives, and perhaps monopolistically held, with the consumer of such goods or services vulnerable to denial of consumption. The modem conception of the duty of the state requires the latter to supply "public utility" services to

citizens. The state discharges such function through granting certain economic operators the privilege to undertake the activities, and at the same time imposing upon them the duty to accept any offer from the public, by either a special law (e.g. establishment regulations for Ethiopian telecom) or a concession concluded between the government and a private company.

The protection accorded to the public lies in the fact that the terms of the would-be contract are fixed in advance by the relevant law or contract of concession. There is no negotiation possible; it is a *contract of adhesion* for the client (consumer) and an *imposed contract* for the supplier of the service if forced to accept clients. It is also noteworthy that although the supplier of the service, the terms of the contract may not necessarily be profitable for the client. Since the law or concession requires the offeree to accept the offer, silence in such a case clearly amounts to an acceptance. The moment at which the contract is concluded is upon the receipt of the offer. It must be stressed that the contract is thus concluded through an offer, and not through the acceptance. This means that not only does silence not reject an offer but also acceptance is not necessary.

The second exception to the general rule that silence does not amount to acceptance is provided by Art.1684 of the Civil Code in cases of *pre-existing business relations.* This is a concern of contracting parties who have pre-existing or ongoing business relations and have previously concluded a contract. If one of the parties proposes the renewal of an expired contract, the modification of an existing contract or conclusion of another contract supplementing the first, silence on the part of the other party results in acceptance. To be a bit specific, for example, an offer to enter into a subsidiary contract that supports the previous contract or to conclude a complementary contract that addresses a lacuna or omitted element from the first contract, can be accepted through silence. Nevertheless, in respect of offers relating to pre-existing business relations and their silent acceptance, the law additionally imposes the observance of certain formalities: the offer must be made in a *special document* stating expressly that the offer will be considered accepted if no rejection is made within a specified time, or absent such time, reasonable period of time. A 'special document' is a document which is specific to the contract and to the party concerned, and cannot be a general

document sent to everybody every time. This shows that the law is taking a cautionary approach in derogating from the principle of silence as not constituting an acceptance by adopting a restrictive application of the exception.

In connection with this question of silent acceptance, the law also addresses issues of *invoices* (Art.1685) and *general business terms* (Art.1686). An invoice is merely a supportive document drawn up by the seller and addressed to the buyer evidencing the delivery of goods in a sales contract. It may be the case that the invoice contains terms not agreed upon by the parties. The law thus, having regard to the unilateral drawing up of the invoice, declares that particulars entered into an invoice are acceptable only if they conform to a prior agreement or if they have been expressly approved, and they cannot be accepted through silence. Regarding general terms of business, very often a trader drafts his terms of business for all future contracts by using a special prewritten form, stating various specific clauses which he wants because they are in his interest. Conversely, such clauses are not at the advantage of the other party, who is not necessarily a trader. Such contracts of adhesion frequently give cause for suspicion, and the law has rightly provided that such clauses would be inadmissible unless they are expressly known and approved by the other party, or unless they are prescribed or approved by the public authorities.

A timely and definitive acceptance completes the contract. The issue as to when and where the contract is fully created can be easily settled if the parties are present because no difference would be there in place or time of offer and acceptance. A difficulty would, however, arise if the contract is to be entered into between absent parties. The parties will be at different places and they may enter into a contract using certain media of communication. Determination of place of formation of a contract is important because it solves the problem of, for instance, jurisdiction, applicable law and form of the contract. Ascertainment of the time when the contract begins to have a legal force where a time-gap exists between offer and acceptance settles issues relating to rate and amount of contractual interest, limitation of actions, and transfer of ownership, amongst others.

For absent parties who conclude a contract by sending a letter using the mailbox, Art 1692 (1)

of the Ethiopian Civil Code provides that the time and place of conclusion of the contract is when and where the offeree *sends* his acceptance. The date of contract will be the date of *expedition* of the acceptance, and it's popularly known as the *theory of emission* or the *dispatch theory.* Certain legal systems prefer the time and place of reception by the offeror of the acceptance; this is the *theory of reception.* The solution afforded by the dispatch theory advantages the accepting party because in case of a dispute it will be his local court that exercises jurisdiction and his local law that applies.

The situation is slightly different if the absent parties intend to conclude a contract over a telephone conversation and fail to specify the place of the contract. Art 1692(2) states that the contract shall be deemed to be made at the place where the person was called. Here, the place chosen is not the place from where a party sends his acceptance, but the place where he was called, i.e. the place chosen by the caller. It seems that the caller is the offeror and the person who is called is the offeree. Finally, even if the law has not expressly covered other modem means of communication such as faxes and internet mailing, we can extend the provision on telephone call to these cases because of their substantial similarity to phone call.

One point finally should be noted: termination of acceptance. Even if we have said above (especially dispatch theory) that the making of acceptance completes a contract, Art. 1693(2), opens a right for the accepting party to withdraw his acceptance. The timely withdrawal of an acceptance amounts to destroy a contract which was validly formed unlike the case of withdrawing an offer. Timely withdrawal of acceptance that terminates the binding effect of the contract is that made before the acceptance reaches the offeror in which case one could say that the theory of reception is reborn in respect of the withdrawal of an acceptance.

4.1.2.3. Defect in consent

Contract law requires a free consent. However in exceptional circumstances the parties may not give their free consent. What are these circumstances and the effect of giving defective consent?

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Vices of consent are defects that vitiate the validity of consent. So that consent fails to be given freely and in full knowledge of the obligations. The theory of the vices of consent has to answer a double and, to a certain extent, contradictory requirement. Its objective is on the one hand to ensure justice by avoiding that persons are trapped against their will by given contractual obligations. On the other hand, it is necessary to ensure that contracts concluded do remain secure too liberal an approach of the possible defects of contracts would bring about a great measure of legal uncertainty. Article 1696 provides for a classical1ist of defects in consent -mistake, fraud and duress. The law also adds to the above traditional "vice of consent" category the borderline problems of unconscionable contracts. While the vices of consent proper address a psychological issue, unconscionability is an economic vice consisting in the discrepancy between the real value of the obligations subscribed and their contractual valuation. Art. 1710 of the Civil Code provides for a different nature and scope in the case of unconscionable contracts.

The sanction of a vice of consent is *relative nullity.* This means that where it is established, this type of contractual defect may only be raised by the person it intends to protect. If the contract is voidable, it remains that this must be decided by a court ruling, and the mere fact that the vice exists does not automatically nullify the contract.

Invalidation can be defined as avoidance of a contract due to failure to comply with the four formation requirements if the contract is *against* the consent, capacity, object or form prerequisite, it is likely that the court invalidates this contract. The principal effect of invalidation is *restitution* or *reinstatement* i.e. returning the parties back to their original position, a position which would have existed before the contract was made. What we actually do to enforce restitution is make the parties return what they have taken from one another and, if they have not carried out what the contract requires them, to release the parties form their obligations. For example assume Chaltu, at a gun point, gave 10,000 birr to Melaku and also signed a promissory note declaring that she will give him additional 10,000 birr a month after. As you can clearly see from common sense or as you will find out later under this section, Chaltu's agreement with Melaku must be invalidated since she was forced into the agreement.

By invalidation, the court will order the return of the 10,000 birr paid out to Melaku; and the court will also release Chaltu from her promise to pay additional 10,000 birr to Melaku. This is the simple application of *reinstatement.* Having the meaning of invalidation and its reinstatement effect in mind we pass to the vices in consent.

1. Mistake

Mistake is normally an erroneous belief about a certain state of affairs. In the course of making a contract, it is very easy to make a mistake. (Here the mistake is an honest mistake which is not brought about by deceit. the problem is simply a mistaken belief in the mind of the mistaken party. A party may intend to sell for one price but quote another. In filling in blanks or writing letters, wrong figures may be inserted. Failure to read a contract before signing, or a hurried or careless reading of a contract, may result in obligations that a person had no intention of assuming. All of these things are mistakes. But do they invalidate the contract?

All mistakes do not invalidate a contract. Invalidation follows where the mistake fulfills two important requirements set under the law. Mistake must be both *decisive* and *fundamental.* Mistake is *decisive* where it is the mistake that made one of the parties consent to the contract. If the mistake is negligible, it will not invalidate the contract. If we assert that "Had it not been for the mistake, the mistaken party would not have consented to the contract", the mistake is decisive and may invalidate the contract given the other requirement is met. But if we say that "the mistaken party would have consented even though he knew the mistake", the mistake is not decisive and does not avoid the contract. So it is not a negligible mistake rather a material mistake that leads to avoidance of the contract.

We can take an easy illustration to understand the nature of decisive mistake. Take for instance a case where someone has bought an artificial diamond believing that it is the real one. The firs question that should come to our minds is whether there is a mistake or not. As you can easily tell, there is a mistake on the side of the buyer in his mistaken belief that the piece he sees is a real diamond while actually it is an artificial one. (Remember to assume that the seller has not said anything as to the nature of the diamond; simply the buyer saw and

thought that it was the real diamond; no one deceived him.) The second question is: is the mistake decisive? To answer this question we need to apply one of the conditional statements we provided earlier. When we apply the first conditional statement, we can safely say that 'had the buyer been aware of the fact that the piece he was to buy was, contrary to his belief, an artificial diamond and not a real diamond, he would have avoided the contract. This criterion in effect makes the mistake decisive and the contract is likely to be invalidated if the fundamental test is fulfilled. What is then fundamental mistake?

In addition to its decisive nature, mistake must be *fundamental*. By fundamental we mean the mistake must be in connection with an element in the contract or the content of the contract. In other words, it must relate to the terms of the contract as they existed at the time of the formation of the contract. Under the law, mistakes as to the *type or nature* of the contract, as to the *subject matter* of the contract and as to *the parties* to the contract are considered to be fundamental mistakes. We can take illustrations for understanding of the nature of fundamental mistake. Assume our previous case of the mistake in the purchase of artificial diamond on the belief that it is a real diamond. The question: is the mistake in this case fundamental?

Obviously the mistake is fundamental because it relates to an element in the contract, which is the subject matter of the contract. As a result, the contract will be invalidated since, as we already saw the case above, the mistake is in addition to being fundamental it is as well decisive. Another illustration is a case where a person promises a reward of 100,000 to Haile Woldesellassie believing that he was promising the reward to the famous athlete Haile Gebreselassie. The main issue that arises here is: can the person avoid his promise on the ground of mistake? As we already stated, the mistake must fulfill the two conditions. As to the first, we can say that the mistake is decisive because had the promisor been aware of his mistake, he would not have consented to the promise. Obviously one cannot give so much money for someone without any reason. His intention was to give the money to the real runner and not to a complete stranger. As to the second, we can say that the mistake is fundamental because the mistake relates to the parties to the contract, a mistake which is related to an element to the contract. Since both decisive and fundamental requirements are met the person

can avoid his promise.

So if the mistake fulfills the two criteria we set above, the mistaken party may invalidate the contract. But one last point about mistake must be mentioned before we proceed to the other vices in consent. Normally invalidation rules try to protect the mistaken party. However we may raise a question as to the protection that should be extended to the other party as well. At the time of invalidation, the other party may suffer some damage when restitution is ordered. For this damage, this party is allowed to ask compensation from the mistaken party especially for expenses the former incurred believing that he has a contract. For instance Abebe and Almaz might have a contract. But by proving that he made a mistake, and that his mistake was decisive and fundamental, Abebe may invalidate the contract. But at the invalidation moment, Almaz may claim compensation from Abebe for the damage the invalidation occasioned against her. But the other party is likely to lose his compensation claim if it is proved that he was aware of the mistake of the mistaken party. On our previous case, Almaz will lose her compensation claim if she was aware of the mistake and acted without warning Abebe.

2. Fraud

Fraud by definition is misrepresentation of material facts to induce a person into a contract. It is not all fraud that invalidates a contract. Normally for fraud to exist, in addition to the false statement, there must be a deceitful action (practice) such as forgery of documents. So if someone lies to you about the existence of a certain fact and gets you into a contract, you may not be able to invalidate the contract by simply raising the false statement. There must be an action to support the lie told. For instance, forged documents or fake signature, etc ... may serve as deceitful practices. For example a prospective employee may declare that he has undergone three years training in a certain vocation while actually he has no such formal training. This fact, i.e. the lie about the training, by itself may not invalidate the contract if the employer trusts the employee and hires him by a contract of employment. The employer must have made an independent investigation to verify the truthfulness of the declared fact. However if the employee had brought a forged certificate to support his false claim, the employer can later invalidate the contract when he discovers the truth about the training since, in addition to the false statement, there is a deceitful action by the employee.

As we already stated, a mere false statement by itself may not invalidate a contract. However the contract may be invalidated by the existence of a mere false statement where there is a confidential relationship among the contracting parties. Confidential relationship refers to relations that should depend upon confidence, trust and loyalty among the people concerned. For instance, relations between close relatives, agent and principal, and the insurer and the insured are considered to be confidential relations. So in these relations the parties must act truthfully. If one of the parties lies to the other, the contract may be invalidated the false statement alone without the requirement of deceitful practice. For instance if an insured gets health insurance declaring that he is healthy and has not undertaken any medical treatment while the truth is he has an incurable disease, the insurer, depending on circumstances, may invalidate the contract on the ground of false statement since an insurance relationship is a confidential relationship among the parties to it.

One last point in connection with fraud is about *sources of fraud.* Fraud may come from *one of the contracting parties* or *by a third party.* In the first case, the contract will be automatically invalidated at the request of the party deceived since the deceiver must not benefit from his wrong which resulted in a contract. So if Nuru deceives Almaz into a contract of sale with himself, Almaz can invalidate the contract by proving that there is fraud. In the second case, although it is a rare case, it may happen that a third party (who is not a party to the given contract) may deceive one of the parties into a contract. This happens especially when middle men such as brokers are involved in the formation of a contract. For whatever reason, this third party may be motivated to defraud (deceive) one of the parties. The question is: Shall we invalidate this contract on the ground of fraud? In principle, the contract remains valid. However, if the other party was aware of the deceit and entered into the contract regardless of it, the contract may be invalidated at the request of the party deceived.

3. Duress

If one person compels another to enter into an agreement by threat of force or by an act of violence, the agreement is said to be obtained under duress. Duress may invalidate the contract. When under duress, a person is denied the exercise of free will in entering into

contracts. It is logical that the party compelled should not be bound by his agreement. For example someone may come to you with a gun and say "unless you agree to give me your stereo, I will shoot you". Being afraid of death, you may agree to give him the radio. In this situation is there a genuine consent on your side? Definitely, there is not. And you have the right to avoid the agreement or you have the right to claim your stereo back where the threat ends because you can invalidate the contract on the ground of duress.

The threatened or actual violence may be to the life, liberty, or property of the party, the spouse (wife or husband), ascendants (e.g. parents), or descendants (e.g. children). So if someone consents being afraid that his child may be hurt or killed if he has not consented, there is duress. Likewise if a daughter agrees to certain obligations for fear that her father's house will be destroyed, there is duress and she can invalidate the contract at later time. If she does not agree, it may be likely that damage will result against her father's property, a damage that is likely to force her into a contract.

Like fraud, duress may come from two sources: *the contracting party* or *a third party*. But unlike fraud, the contract will be invalidated irrespective of the sources. As far as invalidation is concerned, it does not make any difference whether the duress is made by one of the parties or a third party. But if the threat is by a third party, the other party may claim compensation against the party compelled (the party who invalidates the contract) for expenses he incurred for formation of the contact. However, if this party knew of the existence of the violence against his trading partner and agreed without any regard to it, he cannot claim compensation at later time.

4.1.2.4. Object of contract

What do we mean by object? And what are the requirements that the object of contract should be in order to establish a valid contract?

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Dear students, you have studied the two essential elements to have a valid and binding contract; you have also seen the voidability of a contract formed without complying with

those elements. These are capacity and consent of the contracting parties. This part introduces you with a third essential requisite for the formation of a valid contract. To remind you once again of the provisions of Article 1678 of the Civil Code, "no valid contract shall exist unless the *object* of the contract is sufficiently defined, is possible and lawful ...”

By "object" one must not be confused with a *thing,* movable or immovable, concerned by the contract. The expression "object of the contract" as employed by the Ethiopian Civil Code refers to the obligations undertaken by the parties in a given category of contract. In a typical sales contract, for example, the payment of the price by the buyer and the delivery of the good by the seller are the objects (obligations) of tile Contract. The object of the contract is thus the legal result which the parties wish to achieve.

The freedom of contract is still upheld so that the parties are free to determine the obligations in their contract. Parties have the right to define the nature and scope of the obligation they subscribe. But, failure to define the object is a critical defect, and makes the contract void and null. If the object is present, it should be determined or at least determinable. The principal faculty of determination of the object of a contract resides with the contracting parties themselves, but lacunae (gap) left by parties may be filled by making a reference to custom, good faith and equity. Generally, object must be sufficiently defined or determinable in order to create a valid contract.

The object (obligation) undertaken in the contract may take one of three broad forms: *to do, to give,* and *not to do.* In obligation to do, a party undertakes to act in a way required by the other. Such obligations are themselves divided into two subcategories. One is *obligation of result* in which a definite end is to be achieved under the contract, and the other is *obligation of means* in which a party undertakes to do his/her best to achieve the result without guaranteeing the achievement of an outcome. In obligation to give, a party undertakes to transfer a right (such as full ownership) on a thing to another party. Finally, obligations not to do are *negative obligations* that require a party to refrain from acting some way. Any obligation in respect of all the above scenarios needs to be defined with sufficient precision. The parties must obey certain legal requirements for their contract to be valid. The general

requirements that must be obeyed are three:

*1.*The object of the contract must be *defined;*

*2.*The object of the contract must *be possible;*

*3.*The object of the contract must be *lawful;*

1. *The object of the contract must be sufficiently defined:* Despite the fact that one can find a valid offer and a valid acceptance leading to an agreement, still the contract may not be enforced for lack of clarity. The question as to whether the contract is enforceable or unenforceable largely revolves around the level of vagueness, ambiguity or incompleteness in the contract. If it is possible for the court to enforce the contract by applying the rules of interpretation under the law or by considering the remedial provisions of the law, the court must preserve the contract instead of avoiding it. Here it does not mean that the court will write a contract rather it should try to find the unexpressed will of the parties within the legal parameters given. For instance, if the parties have failed to state the thing in a contract of sale and if the parties fail at later time to exactly identify the subject matter, the court has no option except to invalidate the contract.

2. The object of the contract must be possible: It is unlikely for people to enter into impossible obligations. But if they agree for the performance of impossible obligations, they cannot enforce the contract before a court of law. This is so because there is no way for courts to enforce impossible obligations. For instance if one of the parties assumes an obligation, say for instance, to bring up a dead man in return for payment of a million birr, this agreement is invalid and cannot be taken to courts of law because curing a dead man is humanly impossible.

4.*The object of the contract must be lawful:* Although the parties are competent to reach at mutual agreement, it does not necessarily follow that they may contract entirely as they wish. The formation, purpose, and performance of the agreement must be lawful. This means it must not be contrary to law or morality. Some types of agreements may be declared illegal by provisions of the law. Others may be declared immoral by the given community. In either case the agreements are void and therefore unenforceable. As to the legality of contracts, there is

no much problem in invalidating the contract since we can ascertain the illegality by merely looking at the documents of the law. For example if a person agrees with another person to give the latter a thousand birr in return for killing another third party, this agreement is illegal and unenforceable.

But how are we to determine about the question of morality (immorality)? How can we ascertain whether a certain agreement is immoral and hence unenforceable? (By the way morality refers to the opinion a society holds towards a certain action or inaction. If the society thinks a certain action is wrong, the action is immoral and if the society holds positive opinion towards a certain action, the action is moral.) The question is very difficult especially because morality may differ from time to time, place to place and society to society. However, normally this question is left for the courts to decide having considered the morality of the given community. For instance, prostitution is widely believed to be immoral in the country. As a result, any agreement in connection with it may not be enforced by a court.

4.1.2.5. Form of contract

Form is outward appearance of the contract, and so the way the will of the parties becomes apparent. The Ethiopian law takes a middle position compromising between the dangers of excessive formalism and advantages of relative consensualism. In pursuance of this: Article 1719 of the Civil Code provides that no special form is required of parties when they conclude a contract and consensualism is upheld in principle. But the law imposes a certain formality requirement. In addition parties can impose upon themselves the compliance with a certain form. In both exceptional cases, formality must be observed and parties are not free to set aside the prescribed formal requisite. Strict compliance with a legally or contractually stipulated formality is a *validity* requirement *and* sanction for the non-observance of such requirement is the *absolute nullity* of the contract. The question of validity is a more fundamental a matter than the dictation of form to provide proof of the contractual obligations because it is concerned with the very existence of the contract. Thus, failure to comply with the exceptionally imposed formality requirements would render a contract null and void.

Dear student, we shall now see some specific cases where the law imposes a formality. But first remark must be made of contracts made in writing. Written contracts must be *signed* by all the parties for signature signifies the individualized consent of a party. Again, they should

be *attested* by at least two witnesses, or in some cases they may be alternatively *authenticated* by a public authority.

There are certain important kinds of contracts which cannot be enforced in court unless there are written agreements. Some of such kinds of contracts are:

1.Contracts in relation to immovable property;
2.Contracts with public administration;
3.Contracts of guarantee;
4.Contracts of insurance; and
5.Contracts to vary written contracts;

1. Contracts in relation to immovable property: Immovable property refers to land and things attached to it. If there is a contract to assign rights associated with such property, the assignment must be done in writing. For instance if you want to sell your house, you can do it only through a written agreement between yourself and the buyer. Or if you want to borrow money giving your house as security for the repayment of the debt, still you must do the contract in writing. Otherwise you cannot take any dispute arising out of your agreement to a court of law.

2. Contracts with public administration: The government, since it has legal personality, enters in to lots of contracts with private individuals. Irrespective of the nature and value of the contract, the contract between the government and other people must be made in writing. For instance if the Civil Aviation Authority enters into an agreement with a private contractor to rehabilitate an airport located at Axume, the contract must be made in writing.

3. Contracts of guarantee: Sometimes a creditor in business transactions may want the debtor to give him some security for the repayment of the debt when the time comes. In such instance the debtor may provide a third party who promises to pay the creditor in case the principal debtor fails to meet his obligation. This agreement between the creditor and the guarantor is called *contract of guarantee.* And for this contract to be enforced, it must be made in writing.

4. Contracts of insurance: Insurance contracts must as well be in writing. (For clear understanding of the subject matter of insurance you are referred to the chapter on insurance contract).

6.*Contracts to vary written contracts:* As we have stated above, contracting parties may reduce their agreement to writing even when the law does not require them to do so. But when they want to change any of the provisions in their contract made in writing, they must vary it in the same form i.e. in writing. For instance Almaz and Abebe may agree in writing that Almaz will paint the building owned by Abebe in return for 2000 birr. But before the work is done the cost of the paint has increased and both parties agreed to increase the payment to 3000 birr. This agreement for increment of the price must be made in writing. Otherwise the contract to vary the amount will not be valid. So the above five contracts and others that are required to be in writing must be made in a special written form. If this requirement is not fulfilled, there is no valid contract among the parties.

One last point in connection with form is, when the above contracts are made in writing it is not enough that the terms of the contracts are written down and signed by the parties. In addition to the parties' signature, there must be at least *two witnesses* that must sign on the same document attesting that the agreement among the contracting parties is the genuine desire and consent of the parties.

4.1.3. Effects of contract

What are the effects of a validly formed contract? What are the consequences that follow if the party once concludes a contract?

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The general effect of a validly concluded contract is its legal enforceability. Once they have created a contract between them following legitimate formation requisites, parties are obliged to comply with the terms the breach of which would entail a legal liability. Thus, as clearly stipulated under Article 1731 of the Civil Code of Ethiopia, the terms of a contract shall be

binding on the parties as though they were law. A party cannot unilaterally change his mind with regard to a contract created by the mutual consent of the contracting parties. Contracts are the law of the parties from which derogation is disallowed and, as the famous English saying goes, *a man's word his bond.* They are binding not only on the parties but on the judge himself (the adjudicating organ) in the sense that the judge will give effect only to the validly made terms of the contract whenever a dispute appears before him.

A contract may contain ambiguous provisions; it may also have terms that apparently conflict with each other. These problematic terms may not be sufficient to invalidate a contract or otherwise render it ineffective. Here the court is authorized to remedy the defective terms through interpretation having regard to the common intention of the parties, custom, good faith and equity. But if the terms of the contract are clear even if they may appear to be unfair, no interpretation is allowed. The judge cannot create a contract for the parties under the guise of interpretation when the terms are clear, for this amount to binding parties with an obligation they have not intended. So, a validly formed contract will be legally binding on the parties to the extent clearly spoken by its terms or to the extent substantiated through interpretation by courts if the terms happen to be unclear.

4.1.4. Extinction of Obligations

What do we mean by extinction? What are the grounds that extinct a contractual abrogation?

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The last topic of our discussion and the last stage of any contract is extinction (end) of obligations. Don't you think contractual obligations should come to an end at a certain point in time? You would definitely say "yes they should come to an end this way another." Obviously contractual obligations do not stay forever. They come to an end by several grounds. We will name and briefly explain these grounds.

Performance

As we defined it under effects of contract, it is a full discharge (fulfillment) of contractual obligations. Where people have carried out their contractual duties, they are no more bound by these obligations. For example, imagine a contract of loan in which the borrower took

5000 birr to repay it within a month time. When the borrower pays the money back, his obligation is automatically extinguished by performance. That means after he paid the money, we do not talk about the loan contract. The contract is no more existent.

Invalidation

Invalidation, which is explained at length under the requirements of formation of a valid contract, is again another ground for extinction of obligations. Whether for incapacity, or defects in consent, or illegality, impossibility of object or non-observance of form, the contract may successfully be invalidated. If it is so, the parties are no more obliged to carry out their obligations. For example assume that a minor, age 15, entered into a contract for the purchase of a computer for the price of 15,000 birr. When the parents discovered this deal, they immediately asked for invalidation of the contract and the court ordered invalidation. Following invalidation, neither the minor nor the other contracting party is required to perform the contractual obligations of payment of the price or delivery since the obligations are already ended by invalidation.

Cancellation

You are well aware that a remedy of cancellation may be obtained unilaterally or by court decision. Following cancellation, the parties are not required to perform the contract. For instance, a mobile supplier promised to bring a Nokia, 5120, for the price of 1500 birr to Kebede. Unfortunately, the supplier declared that he could not deliver it because the containers that carried the mobile phones were lost in the high seas. In this case the buyer may get the remedy of cancellation resulting in the extinction of the seller's obligation of delivery of the thing and the buyer's obligation of payment of price. However, although the contract is cancelled for non-performance by one of the parties, you should remember that the remedy of compensation is usually ordered against the defaulting party. In our previous example, it may be the case that the seller has not delivered the property just because the price has gone high. The buyer, in addition to cancellation of the contract, is likely to get compensation for the additional money he is required to get the same thing in the market.

Termination

The parties to a contract may terminate their obligations by agreement or by unilateral action allowed under the contract. The typical distinction between termination and cancellation is

termination does not have an effect against things done in the past. It simply extinguishes the future obligations of the parties. But in case of cancellation, restitution (getting the parties back to their original position by asking them to return what they have taken from one another) is the order that takes place. For example we can imagine a contract of employment relationship that stayed between Fatuma and XTZ Company. The company and Fatuma agreed that they terminated their relationship on January 3, 2005. By this agreement, Fatuma is no more bound to attend at the work place and do some job; and the company is no more obliged to give money (wages) to her. On the basis of their mutual agreement, the contract has come to an end.

Novation

This is extinction of obligations by substitution. The parties may substitute their existing obligations for new ones. The parties, by novation, are released from their old obligations but bound by the new ones. As you can easily see, actually the parties are not totally freed from their obligations. Rather they are bound by new duties that have eliminated the previous obligations. For example Abebe and Alemitu have agreed that Abebe, who lives in Addis, would keep the property of Alemitu, who is leaving the town for personal reasons, until she comes back. But when the lady comes back, the property is already sold out by Abebe, who declared that he was in need of money and had no choice except to sell the property. But both parties have negotiated and reached at an agreement to the effect that, instead of the property, Abebe would give 1000 birr in three months' time to Alemitu. Now novation has occurred and Abebe's obligation to hold the property on the lady's behalf and give the property back to her are extinguished; and instead he is bound by supply of money to Alemitu.

Set-off

Where two persons owe debts to one another, set-off shall occur and the obligations of both persons shall be extinguished. In this case, same parties have several contractual relations and have created debtor-creditor relationship. A party, who is a *creditor* in one of the transactions, is the *debtor* in another. These facts make the parties both creditors and debtors against and in favor of one another. If the debts the parties owe each other are similar, instead of performance by both, the parties may set-off their obligations. Set off usually applies to monetary obligations. Dersu and Deresu partnership, a supplier of Nokia, sold a dozen of mobile apparatus, worth 50,000 Birr, to Nuru and Netsanet Partnership on account to be paid

on January 1, 2000. By another transaction, Nuru and Netsanet Partnership, a furniture manufacturer, sold office equipment, worth 50,000 Birr, to Dersu and Deresu partnership, payment to be made on January 1, 2000. As can be seen from the facts, both organizations owe each other (that is, both are debtors to one another). Instead of making separate payments of 50000 birr each, the organizations can simply extinguish their obligations by set-off.

Merger

Merger happens when the positions of debtor-ship and creditor-ship fall upon one and same person. After debtor-creditor relationship is formed, although rarely, there is a possibility that the creditor may take over the debtor and become the debtor himself. Since a person cannot be a debtor in favor of himself or a creditor against himself, the obligations are extinguished following merger. For example imagine a contact of rent between Kebede, a homeowner, and Solomon, a lessee. The contract was agreed to stay for a year and Solomon was to pay the whole rental money at the end of the period. But three months after this contract begun, Solomon buys the house he rented from Kebede. This purchase extinguishes the contract of rent and eliminates Solomon's obligation to pay the rent because after this contract, Solomon has now become both the debtor (the lessee) and the creditor (the owner of the house) in the contract of rent.

Remission

For several reasons the creditor may release the debtor from his obligations. This is what we call remission. If the debtor has received a release from the creditor, his obligations are extinguished. For example, a seller might have sold goods on account and delivered them to the buyer. But when the buyer's obligation becomes due, the seller may declare that he releases the buyer from his obligation of payment of the price. Afterwards the buyer is free from his obligation of paying the price. Note however that if the debtor rejects the release he obtains from the creditor, the remission does not operate and the contract and its obligations subsist. Is it likely for the debtor to say 'no' to the benefit the creditor let him enjoy? To say 'yes' to this question for me is very much doubtful.

Period of Limitation

When we talk about period of limitation, it reminds me of a cartoon depicted in a certain foreign material on business law that is intended to *illustrate* period of limitation. It shows two old men, in their 70's or 80's, coming from different directions. They meet at a crossroads,

stop for a while and stare at each other with disbelief that they have finally met each other. One of them says, "I have not seen you for the last thirty (30) years!?" "That is right," the other replies and demands angrily. "Now 1 want the 1000 Birr I lent you then (the last time they saw each other)." Imagine what the other old guy would have said or should have said to the poor man demanding this sum of money he lent three decades back. What would you say if it were you that should respond to the demand? There are two alternatives for the borrower in this illustration. One is to admit the debt and pay the lender; and the other is to deny him. If there is admission and voluntary payment, there is no problem. But what do you advise the lender if the alleged borrower denies the debt and tells him to stay out of his way?

The question of period of limitation, as sometimes called 'limitation of action', is an issue that you usually encounter in the performance of business activities. What is then period of limitation? A period of limitation is a duration (period) within which a legal action must be brought before legal organs. The law demands people to exercise their legal rights as soon as possible. If they do not invoke their rights and demand remedies within the time specified by law, they are likely to lose their rights to bring a suit against the persons that might have violated their rights. This happens by application of period of limitation. With few exceptions period of limitation applies for all legal claims. Criminal law has a number of periods of limitation, extra-contractual laws do have their own periods of limitation and so do the laws of contract.

The law of contract provides the maximum period of limitation for contractual claims. The maximum duration is ten (10) years for all kinds of issues such as remedies for non-performance or invalidation for defective contracts. So whatever your contractual right is you must take it to court before 10 years period. But a number of shorter periods of limitation are provided by different laws. Some of them are:

1. In the Labour Proclamation, the period of limitation is three months for claim of *reinstatement* and six months for claim of *wages (or any kind of remuneration or payment that is due to a worker).* Reinstatement is a sort of forced performance remedy in which the employer is required to take the employee back to work. It is the rule of labour law that an employee should not be dismissed arbitrarily; and if dismissed arbitrarily it is again the

principle of labour law that the worker must get her employment back.

2. Under insurance contract, the period of limitation is two (2) years. (For better understanding of the provisions of insurance you better see the chapter on insurance.)

You must note the way a period of imitation is invoked before courts of law. It is an objection that must be presented by the defendant in the suit. It is not the court that will raise the period of limitation by its own initiation. The party who benefits by the operation of period of limitation must present it as a defense.

4.1.5. Contract Administration

Contract administration is the management of contracts made with suppliers, contractors, consultants or technical service providers to assure that all the parties comply with and fulfil the terms and conditions of the contract. It includes all dealings between parties to a contract from the time a contract is awarded until the task has been completed and accepted or the contract terminated, payment has been made, disputes have been resolved and the contract closed.

Contract Administration is the responsibility of the Procurement Entity and is distinguished from physical performance of the contract which is the responsibility of the Supplier, contractor, consultant or technical service provider.

Contract Administration is similar to project management. Each contract is a mini-project. It has a unique goal, consumes resources, has a beginning and end date, and requires coordination and planning of relevant activities, as well as documentation in a contract file throughout the process.

The stages of Contract Administration are intended to ensure that the parties work together to achieve the objectives of the contract. Contract Administration is based on the idea that the contract is an agreement, a partnership with rights and obligations that must be met by both sides to achieve the goal. Contract Administration is aimed not at finding fault, but rather at identifying problems and finding solutions together with all contracting parties involved.

For Contract Administration to be effective, it is necessary to develop control procedures of contract performance which will enable the Procurement Entity to obtain value for money from the contract within the framework of the applicable law. Effective Contract

Administration seeks to obtain the goods, construction works and services of the required quantity and standards of quality within the time frame and cost parameters stipulated in the contract in order to satisfy the needs of the end-user on a sustainable basis and also minimize disputes.

4.2. Law of Agency

An agency relationship exists when one party, called the agent, agrees to represent or act for another party, called the principal. Agency is the way a person does legally binding act by the instrumentality of another person. Sometimes, a person may not be able to do a given task by him herself. A person at a far distance may carry business activity by employing someone to represent him/her. Representation may also be demanded to take special expertise of the person representing

The person representing the principal is called an agent. The agent acts in accordance with the instruction given by the principal. The person who deals with the principal by the instrumentality of an agent is a third. The principal has the right to control the agents conduct in matters entrusted to the agent.

Agency is a fiduciary relation that exists between two persons so that one shall act on the behalf and subject to the control of the other. Fiduciary relation means that the relationship is one involving trust and confidence. In a principal-agent relationship a legal bond will be created between the parties so that the agent will act on behalf of and instead of the principal in negotiating and transacting business with the third parties.

4.2.1. Definition

Agency is defined, under Art. 2199 of the Ethiopian Civil code as follows:

Article 2199- Definition.

> *Agency is a contract whereby a person, the agent, agrees with another person, the principal, to represent him and to perform on his behalf one or several legally binding acts.*

So, as we have mentioned earlier, agency is a contract and as such the rules of contract law apply to formation of a valid agency. Article 1678 of the Civil Code provides elements that

need to be fulfilled to have a valid and binding contract. The principal and the agent must consent and their consent must be free from the vices in consent. It is also necessary to have full contractual capacity in order to be the agent of another person or the principal giving authority to another. Although the relationship of principal and agent is normally based on mutual consent, the agreement, as a rule, does not have to be in any particular form.

Unless the law demands the contract of agency to be in writing, it need not be made in writing or registered. Article 2200 of the civil code states the contract of agency even may be formed by implication the power of attorney, however, shall always be in writing. Moreover, where the agent has to make representation in legal relationships or contract that have to be entered in writing, the main contract of agency has also to be entered in writing. If the main contract has to be registered, the contract of agency has also to be registered. The power of attorney in addition to the requirement of writing it has to be registered for the purpose of authentication.

If the act the agent is to perform is required to be in writing, the agency as well must be established in writing. The form of agency depends in effect upon the form of the juridical act to be carried out. If the juridical act can be performed orally, the agency created orally is valid. But if the legally binding act must be made in writing, the agency must be in that same form. For example, as we said under form requirement in chapter three, an insurance contract must be made in writing. If the principal wants to authorize someone to be his agent and thereby conclude a contract of insurance on his behalf, he must give the authority in writing. In the absence of a written authorization to that effect, the agent cannot act on behalf of the principal because there is no valid contract of agency for lack of formal requirement.

The contract of the agency shall specify what the agent has to do. The object of the agency must be sufficiently defined, possible, moral and legal. The scope of authority of an agent is determined by the contract of agency. The promise the agent or the principal make each other is their respective obligation. The obligation one owes to the other shall be sufficiently defined. This means the authority given to the agent shall be clearly stated in the contract of agency. If there is any ambiguity as to the powers of an agent, the contract of agency cannot

be enforceable. The promise the agent or the principal makes shall be humanely possible. If the agent or the principal promises to do an act or to make a representation that all humanely impossible, the contract of agency has no effect.

4.2.2. Source of Agency

What are the sources of agency relationship?

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A person to represent the other shall have an authority. The source of authority may be law or an agreement (Article 2179 of the civil Code). The law sometime authorizes a person to represent other Person.

Agency by the operation of the Law

The law intervenes in the absence of formal agreement between the parties in uncertain cases for reasons of public policy, to fill in the gap created by the parties and sometimes even the undesirability of securing consent. There are various specific reasons attributable to particular cases of agency created in this way. The Ethiopian law recognizes agency by the operation of the law in certain circumstances.

a) Agents of Minors

Minors are persons below the age of 18 years. The minors are not permitted to engage in the acts beyond their power. However these minors need someone to take care of their day to day activity and business. So the Guardians and Tutors of the child are considered as the agent of the minor by law.

b) Representation of Persons under Interdiction

A person may be interdicted due to a mental problem or due to the commission of a certain crime. In this case such a person may be limited to make a juridical act. However the law may appoint an agent who represents an interdicted person.

c) unauthorized agency

Sometimes it may happen that a certain person may represent the principal without the proper authorization of the latter. For example a person may extinguish a fire which burns his neighbor's house. In such cases the law considers such kind of person who has been extinguishing the fire as an agent. The situation necessitates the representation and the law recognizes it as an agency relationship.

Article 2257-2265 of the Civil Code provides rules regulating agency of necessity. The Code calls this kind of agency, "unauthorized 'agency". Unauthorized agency occurs where a person who has no authority to do so undertakes with full knowledge of the facts to manage another person's affairs without having been appointed an agent.

Here a person who has no contractual authority to represent another person acts on behalf of another with full understanding. The system of agency is called agency of necessity. As the law confers authority in this case, we cannot say the agent has no authority. The agent is contractually not authorized but legally authorized to make the representation. The expression "agency of necessity", is more expressive than that of the unauthorized agency.

In order to make representation under agency of necessity the following requirements shall be met. First, a sudden and unexpected situation causing damage on economic interest of a person shall happen. Second, unless represented by a necessity agent, the economic interest of the person represented shall be affected. Finally there shall be no means of communicating the matter to the principal.

The necessity agent shall manage the affairs of the principal in good faith and in accordance with the requirement of good faith.

d) Curator

A person may not be able to manage his property or business due to different causes. It may be due to illness or absence. And any interested party may not available to manage the property of that person. So the court may appoint an agent to administer the property. The person appointed by the court is called a curator. The curator is an agent the same to other

cases of agency but the only difference is that he is appointed by the court and the court limits of the power of the curator. The law requires the curator to inform to the principal his appointment

Contract

Contractual agency is an agency that arises from contract. This is the usual methods of creating agency relationship. The principal communicates the offeror to appoint someone and if the agent accepts the offer contractual relationship is created between the agent and the principal. As the contractual agency is a special contract, it has to satisfy all the requirements necessary for the formation of valid contract.

4.2.3. Scope of agency

What is the scope of authority of an agent?

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Scope of agency refers to the extent of the power or the authority given to the agent. What are the juridical acts the agent can perform on behalf of the principal? Can he for instance sell the house of the principal or can he insure the property of the principal? The answer for these and similar other questions much depends upon the content of the contract of agency. Normally it is up to the parties to decide the scope of the authority of the agent. If the principal in the contract of agency authorizes the agent only to sell his computer, the scope will be limited to this act and the agent cannot bind the principal by acts other than the specific transaction of sale of computer. But in reality it may not be as easy as our illustration to determine the exact power of the agent. The reason may be the parties' negligence or ignorance to stipulate each and every term in their agency relationship. In cases where the scope is not ascertained by mere looking at the contract of agency, the law has remedial provisions to decide the scope of agency. There are two classes of agency under the law: *General agency* and *special agency.*

General Agency

It is an agency expressed in general terms. For instance a principal may simply declare that he appoints a person to be his agent without any mention of what the agent is supposed to do

or not to do. In such cases, the agency will simply be considered as a *general agency,* and the agent as a *general agent.* So under the law what can this general agent do on behalf of the principal? A general agent is considered to have authority to carry out *acts of management.* Acts of management are listed under the law and include preservation or maintenance of property, leases for terms not exceeding three years, the collection of debts, the investment of income and the discharge of debts, and the sale of crops, goods intended to be sold or perishable commodities

Special Agency

Special agency is an agency that must be created for the performance of acts other than acts of management. This is an agency with express and specific authority given to the agent. Some acts under the law require special authority. These acts include, selling or mortgaging real estate, investing capitals, sign bills of exchange, effect a settlement, consenting to arbitration, making donations or bringing or defending an action. Performance of these and similar other acts must be conferred upon the agent expressly and specifically. If they are not given so, the agent cannot carry out these acts. A simple fact that a certain person is appointed as an agent does not give him authority to perform such legal acts. He must show that he is expressly authorized to do so.

Principles of Agency

What is the effect of agency? What are the responsibilities of the agent in agent relationship? Does the main contract bind the agent?

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Where an agent acts within ambit of power entrusted by the principal, a direct contractual relationship emerges out between the principal and the tired party. The agent, after making the representation wipes out from the transaction and no more important. The agent neither benefits from the transaction nor be liable for loss that may emerge from the representation.

Art. 2189-Complete agency

1. *Contracts made by an agent in the name of another within the scope of his power shall be deemed to have been made directly by the principal*
2. *The principal may avail him self of any defect in the consent of the agent at the time of the making of the contract.*
3. *Any fraud committed by the agent may be set up against the principal by the third part that entered in to the contract with the agent.*

Once the contractual relationship between the principal and the third party has been established by the agent, the agent generally drops out of the picture. His task, which is of bringing his principal and the third party together, has been fulfilled. The rights and obligations contained in the contract created between the agent and the third party belong solely to the principal and the third patty. The agent has generally no rights or liabilities under the contract. All this is the reflection of the principle of agency which states: *he who does a thing through another does it himself.* This principle dictates that it is the principal and the third party that are parties to the contract concluded by the agent. The agent was simply serving as intermediary between the two with no intention of becoming party to the act. But for this principle to hold true, the Ethiopian law requires the fulfillment of two conditions: - the use of the *name* of the principal and observance of the *authority (power)* given to the agent.

a. Name of the principal: for the principal and the third parties to be parties to the act performed by the agent, and to be answerable to one another, the agent must have told the third party the fact that he was acting on behalf of the principal. If the principal's name was not mentioned, principal would not be liable to the third party that had dealings with the agent. It would be the agent that must answer to the third party's complaint. This rule applies even where the agent was acting on behalf of the principal. For example, if, when acting on behalf of the principal and with the principal's authority, the agent makes a contract to buy goods from a third party and does not disclose he is acting for another person, the third party has the right to claim the price of the goods from the agent and not the principal because the name of the principal was not used.

b. Power of the agent: The main assumption behind the agency principle we mentioned

above is the agent did have authority from the principal to conclude the contract with the third party and was therefore capable of binding the principal to it. If the agent is given by the principal express authority to make a certain contract or type of contract with the third party and, acting in accordance with that express authority the agent makes such a contract with the third party, the principal is bound by it. But if the agent exceeds the power given to him, the principal can repudiate (lawfully reject) the act done by the agent. For instance if an agent, with the authority to sell goods, buys the same goods, the principal will not be bound by the purchase transaction and the third party seller cannot demand payment or any other performance from the principal since the agent acted (for the purchase transaction) without authority to do so. Although the existence of prior authority is required for the application of agency principle, sometimes, however, the power requirement may be waived *by* the *principal* himself or *the law*. The principal may do it by *ratification* and the law by taking into account the requirement of *necessity*.

a. Ratification: It is the express adoption by the principal of the contract, or by the conduct of the principal showing unequivocally that he adopts the agent's acts although the agent was not originally authorized to act. Let us elaborate it a bit further. Sometimes it may happen that the agent abuses his power (i.e. acts outside his power) or acts after his power has expired. The act of such an agent, as the power test tells us, normally does not bind the principal. But still the agent, without authority, might have contracted with the third party on the principal' behalf. The principal in this case has two alternatives to choose. If he rejects the act, the agent will be left alone to defend himself. But instead of doing (rejecting) it, as he was allowed by law, the principal may simply ratify (accept) the contract or the act concluded by such an agent. If the ratification happens, then it relates back to the making of the contact by the agent and the principle of agency will apply to the situation. The principal will then be held responsible as if he gave authority to the agent to act.

b. Agency by necessity: In certain limited circumstances, a person may act on behalf of another without authority to do so. As we stated in the previous section, the principal may voluntarily ratify the act. But the problem is what happens if the said principal refuses to ratify the act done by the agent without authority? Normally the principal will not be

responsible for the act. However, in certain instances, the person (the principal) may be bound by a contract made on his behalf although he (the principal) declines to ratify. This means although the said agent has acted on behalf of the principal without authority to do so, the law compels the principal to accept the act. The considerations here are *good faith* and the *interest of the principal* (or simply *necessity).* This law applies in case where the agent has acted for the exclusive benefit of the principal and out of good faith, with no intention to enrich himself or other people. The principal, if he were a reasonable, would have been thankful. Because had the agent not acted the way he did, probably the principal might have suffered as a result. It is in the interest of honesty that the principal must be forced to accept the act of the agent.

If the agent has represented the principal without understanding the fact that his authority is ended, the principal may be liable to the third party. The agent represented the principal in good faith, not with the intention of pursuing his own interest, but with the desire of discharging his/her agency duty: Article 2194 of the Civil Code expresses this rule. It stated that the agent shall not be liable where he acted in good faith not knowing the reason by which his authority had come to an end. In such a case, if the unauthorized representation is invalidated and the third party suffers loss, the principal shall be liable to pay compensation.

In, some cases pointed out in Article 2195 of the Civil Code, the agent and the principal may be jointly 1iable. If the agent has acted without an authority or acted outside the scope of the power entrusted on him the dealing would be invalidated. If the third party suffers loss or damage because of the invalidation of the contract the principal may be jointly liable with the agent in certain cases. Joint liabilities are stated in Article 2195 of the Civil Code.

Dear students what are the liabilities of the principal towards the third party?

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Art. 2195 –Liability of principal

The principal shall be jointly liable with the agent where;

(a) He informed a third party of the existence of the power agency o but failed to

inform him of the partial or total revocation of such power or

(b) *He failed to ask the agent to return the document evidencing the power of attorney and failed to seek a judicial decision to the effect that such document was revoked; or*

(c) *He caused in any other manner in particular by his statement, behavior or failure to act, a third party to believe that the person with whom he was dealing was authorized to action behalf of the principal.*

Suppose a principal has told to a third party that a certain person is his/her agent. The principal immediately revokes (withdrew the power back), but fails to inform the revocation to the third party. In this the third party may assume the agent having authority and may deal with him/her in accordance with the information given by the principal. If he principal invalidates the dealing, invoking absence of authority the third may bring action for compensation either from the principal or the agent or from both.

In any case, whence an agent acts outside the power entrusted by the principal or acts without an authority the principal can repudiate the contract but the third party can use the principal for the loss or damage that may happen because of the invalidation of the contract or the dealing.

4.2.4. Duties of Agent

The promises an agent makes to his principal are his duties, the promises may depend upon the interest of the principal and an agent. We cannot mention all the conceivable duties of an agent. The following are the main duties the agent.

A. Duty to follow Instruction of the principal

The principal when appointing an agent may prescribe certain mode of representing. As the agents serves as a messenger of the principal he/she has to follow whatever the principal says. If the agent ignoring the instruction given and follows his own way, he/she may be liable for losses or damages that may happen on the representation

B**. Duty of care and diligence**

The agent shall make the representation in a way the interest of the principal demands and only to safeguard the interest of the principal. The agent when representing a person shall take due care and diligence. Article2211 demands the agent to make the representation as a good father. The extent of care and skill required from a gratuitous agent and an agent does the representation for payment is not identical. The gratuitous agent has to make the representation in a way he manages his own affairs, this criterion of measuring the scope of ease is subjective. If the agent is careless on his private affairs and make the representation carelessly, he cannot be responsible for damage that may happen because of the representation.

The standard for weighing the diligence required from a paid gent is more stringent. In this case the standard is objective. This means the agent has to effect the representation in a way other people, on his situation, may do. If the agent did the representation in a way he does his own affairs that is not sufficient. He has to follow what other people may act in the same situation

C. Duty to remit sums and make report.

The agent has to give all the money or property that he receives under the guise of agency. The agent cannot enjoy a secret benefit from the representation. He can enjoy only the legal remuneration in accordance with the terms of the contract.

D. Duty to avoid conflict of interest

The agent should represent only the interest of his principal. His interest shall not be involved in the transaction. If the agent represents interest of anyone other than the interest of his principal, the principal may invalidate the contract

If the principal discovers the fact that the agent has, acted in a way contrary to his interest, Article 2187 of the Civil Code permits invalidation of the contract.

1) A contract made by an agent in a case where his interests conflict with those of the

principal may be cancelled at the request of the principal where the third party who entered into the contract knew or should have known of the conflict

2) The principal shall within 2.years'jro';' his knowing of such circumstances, declare whether or not he intends to cancel the contract.
3) The contract shall be cancelled where the third party concerned fails to declare his intention to bound by the contract within two months from having been informed of the principal's formed of the principal's the contract,

The agent, for example, when selling a given item may receive a secret benefit and sell the property at a price below its real value. Similarly if the agent has purchased a property above its market price with the intention of having a hidden benefit, you may assume a conflict pf interest. If any one of these instances happens, the principal may require cancellation of the transaction performed by the agent. His right to cancel the contract is related to the behavior of the third party. The principal has to prove the third party's bad faith or his negligence or possibilities of having awareness as to the conflict of interest.

If the agent took a secret benefit from the third party, no doubt, the third party is knowledgeable as to the conflict of interest. Sometimes, the third party may not actually know the existence of the conflict of interest between the principal and the agent but the knowledge may be presumed. Would you, for example, presume knowledge where the agent has purchased his father's or any near relative's properties for his principal? Do you think, the principal would make the negotiation neutrally or favor his father or relatives? In this situation, though the third party did not actually know the fact that the agent did not make the negotiation prudently, a reasonable person may assume the existence of conflict of interest.

If the principal proves either the actual knowledge of the third party as to the existence of conflict of interest or where knowledge of conflict of interest is presumed can cancel the contract or the dealing. The principal before canceling the contract has to communicate the existence of conflict of interest to the third party, and unless the deficiency is remedied to avoid the effect of the contract by cancellation. The third party if desires to save the contract have to respond before lapse of 2 months. If the third party keeps silent for longer period of

time the principal may cancel the contract

Can an agent legally purchase a property that he is entrusted to sell or sell his own property to his principal? Self-dealing is a clear manifestation of conflict of interest. In principle an agent cannot purchase from himself or sell his own property to the principal he represents. Article 2188 of the Civil Code states that a contract made by an agent may be cancelled at the request of the principal where the agent made the contract with himself, whether he acted on his own behalf or in the name of a third party. Self-dealing can be possible where it is supposed that the agent cannot take a hidden benefit where price at which the thing to be sold is objective, the agent or any person may purchase a thing he is authorized to sell. There is no difference whether a lottery seller or any other person purchases the lottery. A commission agent may purchase a property he is authorized to sell (article 2248 of the Civil Code).

The maximum period at which the principal has to demand cancellation of the contract is 2 years. After two years of the understanding of the conflicting situation, the law does not permit the principal to cancel the contract.

C. Duty not to delegate

The agent has to execute the agency personally. The agent is a delegate and cannot delegate someone to represent the principal represent the principal. The principle is a delegate cannot delegate. This general rule has, however, exceptions. Now study the following exceptions stated in article 2215 of the Civil Code.

i. The nature of activity.

In certain cases a transaction may be of a nature that cannot be fully operated by the agent. The agent may lack expertise to discharge a given representation by him/her self. In such as case, the agent may delegate someone to execute the representation. An architect, for example, may employee a mechanical or electrical engineers or a plumber to execute a given task.

Therefore appointment of a sub-agent may be presumed from the nature of the transaction to

be represented.

ii. Consent of the principal

If the principal consents to the delegation, the agent is free to appoint someone that may represent the principal. Sometimes, the principal may permit the agent to appoint a sub agent. Conditions at which the agent may delegate someone or the qualification or the person to represent the agent may be agreed in the contract of agency or later on when where the situation demanding sub agency happens.

iii. Emergency situation

If unexpected danger preventing representation by the agent happens or where the agent by himself cannot execute the agency, he may delegate someone. Say, fro example, the agent fall sick and could not communicate to the principal in ignorance of his/her place or address. It may happen also that the agent may be imprisoned or incapacitated by whatever unforeseen event that prevented him to continue the representation. The agent before delegating a sub-agent shall communicate the matter to the principal. The principal is the most appropriate to determine on his destiny. The agent may not be able to make the representation personally. If he could not do that, he has to inform the matter to the principal. If the agent executed the agency in pursuance to the requirements of article 2215 of the civil code, may not be responsible for the representations of the sub agent. The agent may be responsible only for improper selection of a given sub-agent (Article 2216 of the Civil Code).

4.2.5. Duties of principal

The principal, in consideration of the agent's duties, promises to discharge certain performances. Here you will study the most important obligations of the principal

a) Duty to remunerate

The principal promises to remunerate the agent. The contract of agency is expected to disclose the extent of remuneration payable to the agent. What would happen if the contract of agency is silent as to the remuneration? Where the contract of agency discloses no remuneration, the

assumption is the agent make the representation freely Article 2230 (1) of the Civil Code provides, "in the absence of the stipulation in the contract, the agent shall not be entitled to remuneration unless he carried out the agency within the scope of his professional duties or where such remuneration is customary." Thus, in the case of silence an agent may be remunerated where he is a professional agent. The amount of remuneration in such as case will be determined by business custom. In the case of disagreement the court will determine the remuneration.

b) Cost and expenses

The principal shall give all costs and expenses necessary for effecting the representation (Art. 2223 of the Civil Code). If the agent has spent the money from himself, the principal has to refund the money. The agent is entitled to have interest on the money paid until refunded by the principal.

c) Release the agent from liabilities

The principal shall release the agent from any liabilities that may happen while executing the agency in accordance with the requirements of the interest of the principal. If the liability emerged out because of fault of the agent, the principal cannot be liable; in this case, the agent has to bear it.

4.3. Law of Sale of Goods

This contract basically deals with the sale of movable properties. Every individual or a person can't produce all the necessary materials to live and run a business. Hence they are forced to buy and sell the products that they have. As an accountant or a manager you may involve in the process of sale or purchase. You should therefore understand legal effects of sale contract. Legal rules that regulate the process of sale are mentioned in articles 2266-2407 of the civil code.

4.3.1. Definition

What is a sale contract? How do you define it?

In this regard the Art. 2266 of Ethiopian Civil code states that

> *A contract of sale is a contract whereby one of the parties, the seller, undertakes to deliver a thing and transfer ownership to another party, the buyer*, in consideration of a *price expressed in money which the buyer undertakes to pay him.*

A sale is a contract in which ownership or title to goods passes from seller to buyer for a price. As can be inferred from this definition, the law of sale is an extended discussion of contract law. Since sale is a contract, the provisions of contract law regulate sales transaction. The main purpose of the contract is to transfer of ownership from the seller to the buyer for consideration. Of course the consideration is price expressed in money. If the price is expressed in other forms, the contract is not sale under this chapter. For instance if people agreed to change goods for goods, the transaction is not sale rather it is barter to be regulated by another law.

The other important point in the definition is the type of thing that can be subjected to sales law. Normally the subject matter of the contract here must be ordinary corporeal chattels (ordinary goods) that can be easily transferred from person to person. Other properties such as house and special goods like car and ship, which require registration before the concerned organs, are excluded from the application of the rules of sales law. It is not to say that these properties cannot be subjected to sale. As they are properties over which ownership can be extended, they can be sold and the ownership title over them can be transferred. But what the law means by this exclusion is their sale shall be regulated by special laws applicable directly to them. (Note that with few exceptions, the rules that apply to ordinary goods would regulate the sale of special properties.) This is about the definition of sale.

Sale of certain things that-are attached to immovable properties may also be taken as sale of movable properties. A person may sell the door of a building. If an intrinsic element of an immovable property can be detached and sold independently, then such a thing is also a subject of contract of sale.

A thing which doesn't exist at the time of the conclusion of a contract may also be sold. Such kind of things is called a future thing. A future thing is a thing that does not exist in a deliverable state which can be produced in the future. In the case of future things, the law requires the main raw materials necessary for production to be supplied by the producer. Agreement to produce and deliver a future thing may be taken as sale where the prouder uses his own material for the production. If person agrees to make a table on his own wood or materials, the agreement is taken as sale. But if the purchaser supplies materials necessary for production of the thing to be delivered, the agreement is contract of work.

Price is another crucial element in the contract of sale. Sometimes buyer and seller may not agree on the price to be paid. They may refer determination of the price to a third party arbitrator. A person when purchasing a car may refer determination of the price to a mechanic. Where the mechanic becomes unable or refuses to determine the price of the thing sold, there is no contract as per Art.2271 of the civil code.

If the price is not fixed at the formation of the contract and merely procedures are set the contract is conditional. Conditional contracts are not pure and simple but depend upon fulfillment of a condition. If the condition subsequently fails, there will be no contract. Determination of price is a condition necessary to be determined.

Price may also be determined to be a market price of the thing sold during time of delivery. A buyer and seller, for example, refer the determination to market price or prices usually determined by a seller. If the price at which the thing to be sold depends on a market, the buyer and seller may agree that the price will be the market price. This is usually important regarding the sale of goods whose price is highly fluctuating, like coffee. This kind of arrangement may be suitable to coffee traders. Prudent dealers may agree to sell it on the basis of market price of a given date and place. In this method the buyer and seller have to agree on the date and place of delivery. In this case, the buyer pays a price objectively determined by the market.

Article 2307 of the Civil Coe, states,

> *"Where the sale relates to a thing which the seller normally sell the parties shall be deemed to have concluded the sale at the price normally charged by the seller having regard to the time when and place where delivery is to take place Assume a seller sells a given item at a certain price".*

The price is the same in most case. This is a price normally charged by the sellers. In a country where a price at which things would be sold is determined by mere negotiation, it is not easy to know and prove a price nominally charged. In this case the parties may agree the price will be the price that the seller normally charges.

Sometimes, it may happen that the buyer and the seller may merely agree on the basis of weight. In this circumstance the law as per Article 2305 of the Civil Code states that where the price is determined by the weight of the thing, the net weight shall be taken into account in cases of doubt. Unless expressly agreed, the weight of sacks and other containers in which the thing is delivered will be deducted.

Before proceeding to the other section, a distinction must be made between a contract of sale and contact of services. In many situations, a contract may be concluded primarily for personal services and any goods supplied are merely incidental. For example, when a dentist provides a set of artificial teeth, or a shoemaker repairs an old pair of shoes with new soles, the relationship is not regarded as a sale rather it is service contract that should be regulated by other laws. So the existence of goods alone is not sufficient to say that there existed contract of sale. On the other hand, when an electrician sells and installs a room air-conditioner, there is a sale because the labor or service is a minor part of the transaction.

Likewise a contract for the delivery of goods to be manufactured or produced will be considered a sale where that party who undertakes delivery is to provide the main materials necessary for the manufacture or production of the goods. For instance a textile manufacturer may provide clothes (or textile materials) to tailors to prepare pairs of trousers and to return them back. Obviously there is no contract of sale between the manufacturer and the tailor. This contract is a service contract that should be regulated under contracts of service or employment law. It is a service contract because the material for the production of the

trousers is fully supplied by the manufacturer.

4.3.2. Obligations of Seller

Discuss the obligation of the seller?

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The obligation of the seller bears normally those imposed by the contract itself. The law also imposes certain obligations up on the seller either because of the silence of the contract or due to the mandatory nature of the law. The main obligations of the seller are; an obligation to deliver the thing sold, transfer ownership, providing warranty and other duties.

Obligation to deliver a thing sold

Delivery is the transfer of possession. By definition delivery of a thing includes delivery of its accessories as per Art. 2274. The buyer has to use the thing purchased. Use of the thing can only be effective if the thing sold is delivered. There are various ways of effecting delivery which are discussed herewith.

Modes of Delivery

Delivery of the thing may be conducted in three ways. The first and the most usual one is actual delivery. Under this mode of delivery, the seller actually hands over the thing sold to the buyer or his representative. If a seller of horse actually hands over the horse to the buyer, the mode of delivery is called actual.

Delivery may also be effected constructively. This means the thing will not be actually delivered to the buyer but after happening of certain acts the law regards the thing delivered. If you purchase a VCD from a shop in Mercado and put it at the possession of the seller to pick it after a week or at any time, the legal assumption is the thing is sold and delivered. Do you understand the reason why the law assumes such delivery while; the thing is not actually delivered? It is at the possession of the seller. Though the thing sold is packed and

individualized and it is still at the shop, the seller is assumed to have discharged his obligation of delivery. The buyer put the thing in the shop with the intention to take it later on. The seller cannot legally sell the thing because he is no more an owner of the thing. He possesses the thing for the buyer and represents the buyer. We call such kind of delivery as 'constructive' because it is the law which presumes such acts amounts delivery.

The third mode of delivery is symbolic delivery. Symbolic delivery is almost similar to that of constructive delivery. But in the case of symbolic delivery, the seller delivers a document representing an item sold or that facilitates taking delivery of the thing. The seller may delivery a document (title deed) without which the thing cannot be sold or may deliver a key that makes use of the thing possible

For example, if the thing to be delivered is in the warehouse, and a key of the warehouse is delivered, we assume delivery took place from the time at which the thing representing an item purchased is delivered or a key enabling to take the thing is delivered. The law assumes that the seller has discharged his ob1igation of delivery. The best examples of documents representing the thing are bill of lading and warehouse receipts. When the seller gives a carrier a consignment note, or a bill of lading as a receipt for the delivery of the goods, it is deemed that the contract is concluded and goods are transferred**.**

The time of delivery is expected to be determined and the parties put it in their contract of sale. If in case the parties fail to determine the time of delivery the law may fill the gap. If the parties have not agreed as to the time of delivery, the law obliges the seller to deliver the thing as soon as the buyer requires him to do so. The seller and the buyer may also agree that delivery shall be made during a given period of time. Under such a situation, it is the seller who fixes the exact date of delivery unless it shown that it is for the buyer to fix it. For example if the period expressed in the contract is a month, the seller can choose any appropriate date within the month. The seller cannot deliver before or after the stated period.

Regarding place of delivery, it depends on the agreement of the parties. The parties have no fixed place of delivery; the seller shall deliver the thing at the place where he had his place of business. If he cannot make delivery at the place of business, he must make delivery at his

normal residence. Where the sale relates to a specific thing and the parties know the place where such thing is, the seller shall deliver the thing at the place where the thing was at the time of the formation of the contract.

Obligation to transfer ownership

The second important obligation of the seller is obligation to transfer ownership of the thing sold to the buyer. Ownership is the widest right that may have on a corporeal thing. The owner has the right the buyer purchases the thing with the intention to be an owner. The seller shall do whatever he could do the make the buyer an owner.

Ownership of a thing may be transferred from one person to the other in two ways. As stated in article 1184 of the civil code, ownership of a thing may be transferred by operation of law and by virtue of contract.

There are various ways in which the law transfers ownership of a thing from one person to the other. If a person abandons a property, the one who takes the property will be an owner by virtue of law. If an owner dies, his/her successors will take ownership of properties of the deceased. Finder of a lost thing after passage of longer period of time may acquire ownership.

We limit our discussion to the transfer ownerships by contract. Even in this chapter we only discuss transfer of owner ship in sale contract.

In order to transfer ownership through contract certain requirements must be fulfilled. To transfer ownership by contract, the first requirement is the existence of the contract itself. A valid contract must come into existence. You can imply this from Article 2266 of the Civil Code, which reads that sale is a contract whereby the seller undertakes to transfer ownership to the buyer.

In order to transfer the ownership of a corporeal movable, the conclusion of a contract alone is not enough. The thing must be handed over to the purchaser. There are some legal systems where ownership passes as soon as the contract is concluded. But this is not the case under the

Ethiopian law. This conclusion is based on Article 1186 of the Civil Code, which provides that the ownership of corporeal chattels shall be transferred to the purchaser or legatee at the time when he takes possession of the thing. Thus, conclusion of the contract must be followed by delivery of the thing. The purchaser or legatee comes into possession of the thing only when it is delivered.

There are some special chattels or movables that require additional formality of registration for the transfer of ownership. Corporeal movables such as motor vehicles, TV sets, airplanes, ships, etc..., require the registration of contract with an appropriate authority. The most practical example is the case of motor vehicles. You may buy a car, pay for it takes possession of the car and you may begin using the car. There is a valid contract. The thing (car) is delivered. But you cannot become the owner of the car until the contract is registered with the Ministry of Transport and Communication.

To transfer ownership by contract, the seller must have a valid title on the thing. He must be the owner or the agent of the owner. Transfer of ownership by contract presupposes that whosoever sells a thing in consideration of a price has a valid title. One who does not have title over a thing cannot transfer it to another. If the title of the transferor is defective, the title of the transferee also becomes defective. According to Article 2281 of the Civil Code, the seller shall take the necessary steps for transferring to the buyer unassailable rights over the thing. He must transfer to the buyer a right that cannot be challenged or attacked by a third party. The seller can transfer to the buyer such right (a right that cannot be challenged) only if he has a valid title. Suppose, for example, you find some movable thing which has been lost. You sell it to someone. The buyer cannot acquire the ownership over the thing because you, the seller, did not have title on the thing. You cannot give to another person what you do not have. The buyer cannot receive a better title than you had. Your title on the thing was that of a finder; not that of an owner.

If the seller does not have a valid title on the thing, the buyer may not acquire ownership by contract. However, a buyer may become owner of a movable thing by acquisition or possession in good faith. This is effected by the operation of the law in accordance with Article 1161 of the Civil Code. A party who enters into a contract and consequently comes

into possession of the thing sold to him the buyer must have a good reason for his belief.

Good faith must exist at the time of contract or at the time the buyer entered into possession of the thing. If the buyer discovers after the contract that he contracted with a person who has no title, his right is not affected. A person, who challenges his good faith, must show that the buyer knew of the fact that he was dealing with a wrong person.

There are cases under the law where possession in good faith cannot serve as a defense. That is, there are certain movables whose ownership cannot be acquired by acquisition in good faith.

1. Special Movables that Require Registration of Contract: you noted that in order to transfer the ownership of certain special movables, registration of the contract is a requirement. The ownership of movables such as motor vehicles, ships, airplanes and TV cannot be acquired by possession in good faith.
2. Public Domain (Public Property): This is the second case where possession in good faith does not apply. Property forming part of a public domain may not be acquired by possession in good faith. Property belonging to the state or other administrative bodies shall be deemed to form part of the public domain where it s directly placed or left at the disposal of the public or it is destined to a public service.
3. Stolen property - This is a third case where possession in good faith does not apply. A person who has bought a stolen thing cannot acquire the ownership of such thing. This conclusion is based on Article 1165 c.c. It reads:

   (1) Any person from whom a corporeal chattel was stolen may reclaim it from the person who has become owner thereof in good faith

   (2) Such claim shall be barred if it is not made within five years from the time when the theft occurred.

The owner of a stolen property can trace and reclaim it from any person. The person may not know about the origin of the property (That is, he may be in good faith). But his good faith does not serve him as a defense.

The owner must act within five years (It is the Amharic Version of the Ethiopian Civil Code that puts five years. In the English Version, the period is three years. Since the Amharic version is the governing version it prevails over the English). If the owner does not act (does not reclaim) within five years, he loses his right and the buyer of a stolen property may become the owner.

However the law tries to protect a person who bought a thing from a dealer.

Article 1166 of the Civil Code

> *Where the person from whom the property is reclaimed acquired it from a trades man dealing in similar articles, in market overt or at a public auction, he may require the seller to reimburse him with the price he paid.*

Warranty

Warranty, or sometimes called guaranty, here refers to assurance of quality or performance of the thing sold and delivered to the buyer. Generally there are two types of warranty: *express warranty* and *implied warranty.*

Express warranty: *a warranty given by express statements made by the seller.* To persuade a customer to buy a product, a seller of a computer for instance may say, "I will give three years warranty for the monitor, two years to the system unit." When such an assurance of quality or promise of performance is explicitly stated by the seller of goods, it is an express warranty. The buyer is justified in demanding the stated quality in the property he took. If the thing does not work as the seller said expressly, the buyer can sue the seller and demand compensation or cancellation. For instance, when you buy a radio, the seller may say that he gives warranty for ordinary performance of the radio for three years. You take the radio and start to use it. But after three months the radio stops operating. In such a case, you can go back to the seller and ask for maintenance, or any other remedy. This right arises because the seller has given you express warranty saying that he will give three years warranty for ordinary operation of the radio. An express warranty may be oral or written. Most express warranties are given before or at the time of the sale. The price serves as consideration for the goods and the warranty. A buyer who is given express warranty is more likely to buy the thing or more

likely to pay more than the buyer with no warranty.

But are all statements of quality or performance declared by the seller warranty statements? The buyer should be cautioned that all statements do not result in warranty claim. Sellers often exaggerate the merits of the goods they are trying to sell. The making of statements such as "the best quality ever made" or "made for the best" or "the choice of the generation" is known as sales talk, or puffing. Such declarations should not be considered as warranty statements. They are merely personal opinions or judgments of value, and buyers are not justified in relying on them. The buyer should make independent investigation of his own. As the old principle has it, "let the buyer beware" i.e. the buyer should be careful. If he is negligent in buying the goods and in checking out their qualities, probably the law will not help him. It is only genuine statements of facts by the seller that are considered to be declarations giving rise to express warranty obligations. Only statements of quality the seller seriously believes to be real are considered to be statements of warranty.

Implied warranty: *A warranty created or imposed by law.* In many cases, the law requires that sellers to provide certain minimum standards of quality and performance even if no explicit promises or representations are made at the time of the sale. A warranty obligation so imposed by law is an implied warranty. Why do you think the law imposed such an obligation contrary to the parties' freedom of contract? As you are well aware from your daily experience, it is the seller that knows better about the property than the buyer. He is either the producer or the maker of the thing or he is a wholesaler or retailer who is close to the manufacturer of the property. On the contrary the buyer may not have the knowledge and expertise to check the quality of the property he buys. In majority of the cases he must rely on what the sellers or suppliers tell him about the property. As a result, the buyer's position became worse, relying on people who simply want money from him. So the law intervened and started to improve the position of the buyer.

In addition, it is the requirement of good faith that reasonable standards of fair dealings must be observed. The buyer should not be exploited unfairly. That is why the principle of "let the seller beware" has emerged. This is the principle behind the implied warranty, a warranty

imposed by law. This principle says that the seller must be careful when he sells goods to purchasers. He must sell goods that are ok for use, sale etc. If the things suffer some undue problems, the buyer, although there is not express warranty of quality given by the seller, can sue the seller demanding some kind of remedy.

But are all problems over the property covered under implied warranty? For instance you may buy a thing with inferior quality when compared to other brands of similar goods. Is there an implied warranty for this problem of quality? As you will definitely say, there is no implied warranty here. It is up to you to choose the general quality of the property. The law is not trying to guarantee best quality of all goods for all buyers. But there are areas of problems given assurance by law. The Ethiopian law of warranty provides three heads of (implied) warranties:

a. Warranty against dispossession
b. Warranty against defect
c. Warranty against non-conformity

A. Warranty against dispossession

To protect the buyer of goods, the law implies a warranty on the part of the seller that the seller has the right to sell the goods and that the title transferred is good. Normally it may happen that third parties have some claim over the property the buyer took delivery and possessed. The claim of the third parties may be ownership claim or any other claim that may lead us to partial or total dispossession (the taking away of the property from the buyer). Dispossession may be the whole property or part of it. So if the third parties succeed in taking the property from the buyer due to the right they had while the property was with the seller, the buyer has a remedy against the seller on the basis of warranty against dispossession. This is because by the very act of selling, every seller normally warrants that the goods shall be delivered free of all encumbrances (creditors' claims) of which the buyer is not aware at the time of contracting.

However, the seller does not give warranty against dispossession to the buyer in the following two cases: The first is in the case where the buyer knows at the time of the contract that he

risks dispossession. By this warranty the law wants to protect the unsuspecting buyer who was unaware of the claim of the third parties over the property. If the buyer knew of the possibility of dispossession, it is up to him to protect himself by getting express warranty. Unless he gets express warranty from the seller, the law will not help him. The second is the case where there are provisions excluding or restricting warranty.

B. Warranty against defect

This is a warranty given for the use or quality of the thing. There are three cases of this warranty under the law. These are where the thing does not possess the quality required for its normal use or commercial exploitation there is a breach of contract against defect and the seller will be liable under the law. Second where the thing does not possess the quality required for its particular use as provided expressly or implied in the contract. A buyer might make known to the seller the purpose for which the goods are required. He intends to make use of the thing for its particular purpose. The thing in such a case must serve for its particular use. If the thing does not serve for the particular purpose the buyer can take a legal action against the seller. The buyer has a right of action for breach of warranty. Finally the seller has the duty to give warranty against defects where the thing does not possess the quality of specification provided expressly or impliedly in the contract. Under these circumstances the seller has a legal duty to give warranty.

C. **Warranty against non-conformity**

Where a description of the goods or a sample or model is made part of the contractual agreement, there is a warranty that all the goods supplied shall confirm to the description, Sample or model which is provided in the contract. What is the important thing here is the difference between the thing provided in the contract and the thing delivered to the buyer. It is the rule under the law that the thing delivered must be the same with they properly agreed. If there is any discrepancy the buyer may claim on the basis of warranty against non-conformity. There are four cases that are considered under the law to be bases for claim of warranty against non-conformity, these are; first delivery of part only of the thing, delivery of greater or lesser quantity than they agreed, delivery of a different thing ,and delivery of a thing with different species

The legal warranties of defect and non-conformity normally apply to all cases of contract of sale irrespective of the parties and the subject matter. But the seller will not be responsible for defect or non-conformity under the following four cases,

i) Knowledge of the defect or non-conformity:- where the buyer knows of the defect or nonconformity at the time of the contract. He cannot benefit from the warranties against defect and nonconformity. So if the buyer knew of the defect and nonconformity and agreed regardless of it, he will assume the loss by himself and the warranty doesn't protect him.

ii) Exclusion of the warranties: A seller may sometimes be anxious to sell goods without being obligated by warranties. The seller may know that the goods are defective and be willing to sell them at reduced prices. Or perhaps the seller fears that too many claims of possible breach may be made if a warranty is given on new goods. Whatever the reason, as we already saw under the warranty against dispossession, a seller may legally exclude all warranties by simply making no express warranties and using appropriate language to exclude implied warranties against defect and non-conformity. If the buyer has agreed to the exclusions, he cannot later invoke the warranties. So if the seller of a computer at the time of the contract said that he will not give express and implied warranties and the buyer agrees with it, the implied warranties do not work. If the computer fails to work, the buyer will be left on his own and he cannot take a legal action against the seller on the basis of the legal warranties against defect and non-conformity.

iii) Failure on the buyer's side to obey obligations imposed upon him: Normally as we will see later the buyer has an obligation to check the thing to find out whether the thing is free from defect or conforming and to inform the seller, if he finds some defect and/or non-conformity. If he does not carry out these obligations (examination and notification) and the thing is found to be defective and non-conforming, the buyer cannot have a remedy under the legal warranties. It is all about taking responsibility for failure to obey legal obligations.

iv) Period of limitation: If the buyer, having informed the seller, must immediately proceed to exercise his legal rights under the legal warranties. If he fails to take a legal action within a

year starting from the time when he informed of the defect or nonconformity to the seller, his action will be prevented since the period of limitation has expired. So if the computer you bought is defective (and if the defect is covered under the legal warranty), you must inform the seller immediately. For instance, if you informed the defect of the computer to the seller on January 15, 2003, and if the seller does not give you a solution for the defect voluntarily, you must go to court within a year, i.e. until January 15, 2004. If you have not taken your legal action till that time, it is likely that you will lose your legal right under warranty against defect.

So much is about the seller's main obligations. But you should note that these three are not the only obligations of the seller. He may bear other obligations on the basis of the law or the contract. Now we go to the obligations of the buyer.

4.3.3. Obligation of Buyer

What are the obligations of the buyer in the contract of sale of movable properties?

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Since sale contract is for mutual benefit of the buyer and the seller, the buyer assumes several obligations (under the contract and the law) like the seller does. Under this topic we will consider the typical obligations of the buyer: *payment of price, taking delivery* and *examination and notification.*

Payment of price

The important consideration for the seller when he delivers the thing, transfers ownership and gives warranty is the fact that he is going to be compensated by money that we call *price.* So the buyer must give the price to the seller and do everything necessary to transfer the money from himself to the seller. The provisions of price under the law normally discuss about the remedial provisions as to the *amount, place* and *time of payment.* The questions are: What is the price that is due to the seller if the price is not agreed upon at the time of the contract? Are we going to say there is no contract at all? What will be the place and time of payment

assuming that the parties have not agreed as to these terms in the contract and that a dispute arises on the bases of the place and time of payment?

As we repeatedly said if the contractual terms are well defined as to the amount of the money or the place and time of payment, the contract will be enforced and the buyer must pay as agreed, i.e. the agreed amount, at the agreed place and at the agreed time. But in case there are no terms of agreement on these matters, the following rules will apply.

Where the amount is not fixed in the contract, we look for the current price of the thing having taken into account the place and time of payment. This *current price* will be the price that the buyer must pay. The other alternative is to see the price the *seller normally demands* from buyers of the same commodity. This applies where the seller is a trader and his job is to sell the thing at hand. So in this case, the buyer should pay the normal price that the seller receives from other buyers. However, if the thing does not have current price or it is not possible to ascertain for what the seller sells the thing to buyers, the contract of sale should be invalidated for lack of clarity of object as we discussed it in the second chapter. (For clarity requirement, look at the *object* requirement of formation in the second chapter). If a contract is not sufficiently defined, as we said, the contract should be avoided.

Where the place of payment is not agreed upon, the payment normally must be made at the address of the seller. If there is no agreed time of payment, payment must be made at the time the seller demands or simultaneously with time of delivery whichever is appropriate under the case.

Taking delivery

As you remember from our discussion of obligations of the seller, delivery is the duty of the seller. But how can the seller carry out his obligation of delivery if the buyer is not cooperative and refuses to take delivery? This is the reason why taking delivery is the buyer's obligation. Unless he has a justifiable reason, the buyer must take delivery when the seller offers the goods for delivery. If he does not take delivery while the seller is ready, the buyer will be responsible for the subsequent loss and expenses the seller incurs. (See transfer of risk

for more.)

Examination and notification

While the law provides the warranty against defect and non-conformity obligations against the seller on the one hand, it provides examination and notification duty against the buyer on the other hand. For the buyer to benefit from the two warranties, he is obliged to perform these duties. According to this Civil Code, as soon as the buyer has the opportunity, he shall without delay examine the thing. The examination is to look for the existence of possible defects and nonconformity over the property. The time of examination is normally at the time of delivery or immediately following delivery. But custom or usage may determine the time of examination. If the examination shows no defect or non-conformity in the thing delivered, there will not be a problem. But if the examination reveals some kind of defect or non-conformity, the buyer must immediately communicate this fact to the seller. Any delay in informing the seller may deprive the buyer of his remedies under the warranties against defect and non-conformity. (As to the consequence of failure to discharge these obligations, you may look at the end part of our discussion on warranties against defect and non-conformity.)

4.3.4. Common Obligations

In the preceding discussions, we have discussed the respective obligations of seller and buyer. The obligations of the contracting parties are not limited to these obligations. They have some obligations in common like obligation to pay expenses, obligation to preserve the thing and obligation to bear unpreventable risk of loss and deterioration. The common obligation of the parties will accordingly be deal with.

Obligation to pay expenses

The contract of sale may not involve expense when it is an instance sale. For example, when you buy a jacket, you pay the price and take the jacket. You have concluded a contract of sale but you did not incur expenses. However, when contract of sale involves a lot of money, the parties usually make their contract in writing. In such case the conclusion of contract involves certain expenses like advocate's fee for drafting the document incorporating the agreement, expenses for typing, printing and photocopying the document.

Sometimes the conclusion of the contract may involve brokers. The remuneration paid to the brokers is an expense of the contract. When the contract of sale involves expenses, the buyer should cover such expense.

The obligation of the buyer to pay price sometimes involves expenses like charges by the bank when the money is to be sent to the seller through the bank according to the contract. The obligation to pay price like obligation to open credit account and the obligation to provide bank security are always accompanied by expenses. In addition to expenses of payment and expenses of contract the buyer bears the expenses of transportation when the goods sold is to be taken to other places than place of delivery. It can be safely concluded that the buyer bears the following expenses:

Expenses of a contract of sale;

Expenses of payment;

Any expense arising after delivery;

Expenses of transport where the thing sold has to be sent to another place than the place of delivery and if the delivery is not to be carriage free;

Under the discussion dealing with common obligation of the parties, there are certain obligations of the seller. The seller bears the additional expenses incurred by the buyer as a result of changing his residence after the conclusion of contract pursuant to Art 2315.

The seller shall pay such transportation expenses when the delivery of the thing is carriage-free as per article 2318. The buyer should bear expenses after delivery like expenses for loading a cargo pursuant to 2317. Where transport of the thing is interrupted by an event beyond the control of either party, the additional transport expenses shall be borne by the party who bears the risks.

The seller should bear the expenses of delivery where delivery involves expenses. The expenses of delivery including the expenses incurred for counting, measuring and weighing of the thing sold.

Where import customs duties or other duties charging the imported thing are to be paid by the seller and such duties increase after the contract is made, such increase shall be added to the price. Where, however, a delivery bearing such duties has been delayed by the act of the seller or of a person for whom the seller is liable, the additional duties shall be paid by the seller whenever the buyer can show that the increase would not have been due, had the delivery been made at the time fixed in the contract or provided by law. Whenever there is a decrease in customs duties, the price shall be reduced accordingly.

Obligation to preserve the thing

In addition to bearing expenses, both the buyer and the seller should preserve the thing which has been sold. After delivery of the thing, the ownership transfers to the buyer. In cases of constructive delivery, the thing belonging to the buyer may remain in possession of the seller. The same is true when the buyer is late in taking delivery or in paying the price. In these circumstances, the seller should preserve the thing belonging to the buyer. The seller should not neglect the goods. The seller's duty to ensure the preservation of the thing is at the buyer's expense. In preserving the goods the seller may incur expenses as when the seller hires a guard for the purpose of keeping buyer's goods or when the seller keeps the buyer's good in warehouses at his own cost. The buyer should then refund the seller according to Article 2320 of the Civil Code. When the buyer fails to do so, the seller has also the right to retain the thing until the buyer indemnifies him for the expenses he incurred in preserving the thing.

Although risk might be transferred to the buyer, the seller has the obligation to preserve the thing and if the thing is damaged for lack of preservation, the seller will be liable for the damage. Article 2325 (1) indicates that risk is transferred to the buyer from the day when he is late in paying the price. Transfer of risk connotes that the buyer shall pay the price notwithstanding that the thing is lost or its value is altered. This is however true if the loss or

alteration of the value of the thing is not attributable to lack of preservation of the seller who is in actual control of the thing.

The buyer has also the obligation to preserve the thing at the seller's expense where the thing sold has been received by him and he intends to refuse it either owing to defect or non-conformity. Article 2324 (2) dictates that risk will not be transferred to the buyer even after delivery and the seller is in actual control if he has cancelled the contract, require cancellation or require replacement of the thing. We can infer from this that if the thing which is in the actual control of the buyer is lost or damaged, it is the seller not the buyer who shall cover the price of the thing.

However, if the loss or damage is attributable to the noncompliance of the obligation to preserve the thing by the buyer, the buyer will be liable to cover the price of the thing. Even though risk is not transferred to the buyer, his obligation to preserve the thing in his actual control makes him liable.

The seller and the buyer may relieve themselves of the obligation to preserve the thing by consigning or selling it in accordance with the provisions of the title of this code relating to 'contracts in general' (Article 1779-1783). If for example Ato Yehiya sold 100 kilos of bananas to Ato Waq jira and the buyer died before accepting delivery, Ato Yehiya may be authorized to sell bananas and deposit the money if the person who shall receive performance is not known or refuse to accept.

4.3.5. Transfer of Risks

When does risk transferred from the seller to the buyer?

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As we stated it already, risk is born normally by the owner of the goods. Since ownership is transferred by delivery, so is risk. The risk will be transferred form the seller to the buyer at the time of delivery. However there are exceptions to this rule. Risk of loss may transfer from the seller to the buyer on different times depending on the agreement of the parties

and the provisions of the law. That is risk may be transferred before delivery or sometimes it may remain with the seller even after delivery.

In the first case risk may pass form the seller to the buyer before delivery. This happens when the *buyer is in default in* taking delivery. As we said under the obligations of the buyer and the seller, the buyer must take delivery while the seller offers it. If the buyer does not take it due to his default and the property is lost due to uncontrollable event, the buyer will assume the risk and must pay for the property although he has not taken delivery of the thing and has not benefited from the thing. It is all about the default of the buyer. Had the buyer taken the property as agreed, he could have saved the property from the loss.

But the fact that the risk is transferred against the buyer does not mean that the seller can throw the property out. Until he delivers the property to the buyer, the seller must take good care of the property. This is the *preservation duty* the law expects from the seller. The seller shall handle the property as though the loss over the property affects him. If the seller does not preserve the property, and if his negligence in handling of the property causes damage to the property, the seller is going to lose and is going to be responsible for the damage. He cannot say that the risk is transferred against the buyer. This argument applies if the seller has done his obligation of preservation. You should note that the expenses of preservation by the seller must be borne by the buyer.

The other case where the exception to the transfer of risk by delivery applies is where the seller bears the risk although the property is given or transferred to the buyer. This happens when the property suffers a problem and the buyer has the right to demand the return of the thing back to the seller. This usually happens in cases of non-conformity where the delivered property is entirely different from the property agreed. There is no possibility that the buyer bears the risk for property to which he has not consented to. For instance, if the seller delivers a computer while the agreement is to deliver a certain television, the risk over the delivered property i.e. the computer remains with the seller. The risk remains with the seller because the buyer has the right to demand the return of the delivered computer and delivery of the exact

property, i.e. the agreed television. Here again *preservation duty* of the buyer must be noted. Until he returns the property back to the seller, the buyer must preserve the property on behalf of the seller. If the mishandling by the buyer of the property delivered is the ground for the loss the property suffers, the buyer becomes liable under the law and must compensate the seller. This happens irrespective of the fact that the delivered property is defective or totally unrelated to the thing agreed in the contract. It should also be noted that if the preservation of the property requires expenses, the expenses shall be incurred by the seller.

4.4. Law of Insurance

Insurance may be defined in various ways. Firstly, from the point view of an individual it may be defined as a risk transfer mechanism or an economic device whereby a person, called the insured/assured transfers a risk of a possible financial loss resulting from unforeseeable events affecting property, life or body to a person called the insurer for consideration. For instance, let us take a case of an owner of a motor vehicle, who always runs the risk of suffering a financial loss resulting from the loss or destruction of his property because of unforeseeable events such as fire, collision, overturning or even theft. Therefore, if the person purchases a motor insurance policy covering these risks from an insurer, it means that he transferred this possible financial loss to the insurer.

Secondly, from the point of view of the insurer, insurance may be defined as a mechanism through which a risk is distributed among the group of persons who are exposed to the same type of risk, i.e., persons who bear the risk of suffering a financial loss as a result of events affecting property, life or body. We can further clarify this definition through the following example.

Form the definitions provided above, we can understand that insurance is a cooperative economic device to spread the loss caused by a particular risk over a number of persons who are exposed to it and who agree to insure themselves against that risk. This means that insurance provides a pool to which many persons contribute a certain amount of money called the premium, and out of which the insurer compensates the few who suffer losses. This is always true in the case of property and liability insurance which cover contingencies and given for a short period of time, usually a period of one year, but does not so fully apply to

insurance of persons particularly life insurance(see Art 692) in which the policy usually becomes a claim ultimately.

We can also understand that by insurance, the risk is transferred from the individual to the insurer who takes into account the total or probability of loss in a certain period, and then fixes the premium to be paid by each person insured.

It has to be noted that insurance does not and cannot prevent loss of property, incurring civil liability, death, or injury or illness, rather it provides financial compensation for the effects of misfortune. In other words, we can say that insurance does not protect the insured property from loss or damage, or the insured from incurring civil liability or the insured person from death or injury or illness, but provides a financial compensation to the insured or the beneficiary who has suffered pecuniary losses as a result of loss or damage to property, or because he has incurred a civil liability or illness or death of the insured.

4.4.1. Definition

What does contract of insurance mean?

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A contract of insurance is a contract whereby one party undertakes, in return for a consideration called a premium, to pay to the other party a sum of money on the happening of a certain event (death or attainment of a certain age, or injury) or to indemnify the other party against a financial loss arising from the loss or damage to property or from incurring civil liability.

The party which promises to pay a certain amount of money to, or to indemnify, the other party is called the insurer (sometimes called the assurer- in cases of insurance of persons and the under writer in cases of marine insurance and the party to whom such protection is given is called the inured (or the assured). The document containing the terms and conditions of the contract of insurance is called the policy, and the insured is therefore, also referred to as a policyholder

A contract of insurance is a type of contingent or conditional contract. As the name indicates, a contingent or conditional contract is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen. In other words, it is a contract in which the performance of the obligation arising there from by the parties or one of them is dependent upon the condition or contingency agreed upon by them. Accordingly, as the obligation of the insurer/assurer to pay compensation or the agreed amount to the insured or the beneficiary is dependent upon materialization of the risk or risks specified in the policy. Thus, for instance, if X Insurance Company agrees to pay Birr 100,000 in exchange for B paying Birr 2500 as premium, if B's house is destroyed by fire; there will be contingent contract, the performance of which depends upon the happening of an uncertain event, i.e. the destruction of the house by fire.

Finally, let us see how a contract of insurance is defined under the insurance law of Ethiopia.
Art 654 of the Commercial Code of Ethiopia defines insurance as follows:
Insurance (policy) is a contract whereby a person, called the insurer, undertakes, against payment of one or more premiums, to pay to a person, called the beneficiary, a sum of money where a specified risk materializes.

According to this definition, insurance is a contract between two or more persons in which one person called the insurer, agrees to pay the agreed amount of money or compensation to another person, called the insured, or the beneficiary where the insured property is lost or destroyed (in cases of property insurance), or where the insured person incurs civil liability (in cases of liability insurance) or where the insured person dies or suffers bodily injury or falls ill (in case of insurance of persons). The insurer undertakes this obligation for consideration, called premium payable by the insured person.

Sub Art(2) of the same article provides that a contract of insurance may be concluded in relation to "damages" covering risks affecting property or arising out of the insured person's civil liability. These types of insurance are generally referred to as indemnity insurances, in which the insurer's obligation is to pay compensation, which is always equal to damage. Similarly, sub Art(3) provides that a contract of insurance may also be made in respect of

human person's life, body or health in which the insurers obligation is to pay the amount agreed upon (the sum insured). This is a type of insurance in which the principle of indemnity or compensation is not applicable since human life or body does not have a market value, hence the name Non-indemnity insurance.

Thus, a contract of insurance, as a contingent contract is a perfectly valid contract, and the general principles of the law of contract apply equally to such a contract. Hence, to be valid, it must fulfill the following requirements: (i) there must be an agreement between the parties (ii) the agreement must be supported by consideration, (iii) the parties must be capable of contracting (must have capacity), (iv) the consent of the parties to the agreement must be free from defects, and (v) the object must be legal or the object must not be illegal and immoral.

4.4.2. Types of Insurance

Types of Insurance

Discuss the types of insurance prevalent in the Ethiopian commercial code?

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Insurance of objects

Insurance objects (or property insurance) indemnifies a person who has an insurable interest in physical property for its loss or for the loss of its income-producing ability. Property insurance protects against loss from certain "perils." A peril is a cause of loss such as fire, flood, or theft. Unless otherwise agreed. The insurer shall not be liable for losses or damages due to international or civil war. The policy shall terminate where the object insured is lost for a reason not specified in the contract of insurance. The principles of insurance would apply to insurance of objects. But we should note one point about principle of subrogation. It normally applies under insurance of objects. But the insurer cannot claim against the ascendants, descendants, agents or employees of the insured person or against persons living with him, unless such persons have acted maliciously.

Insurance of liability

A person or firm faces two broad types of liability for damages-liability for breach of contract and liability for a wide variety of torts (or liability for wrongs committed). Liability insurance does not cover liability for breach of contract, nor does it cover losses resulting from other speculative activities such as trading in the stock market. Liability insurance protects only against tort liability, including, however, tort liability assumed by contract. (A tort is a legal injury or wrong to another that arises out of actions other than breach of contract, in which courts will provide a remedy by allowing recovery in an action for compensation.) The sources and types of tort liability fall into several categories and they include:

1. Liability for one's own faults--negligent driving, professional malpractice, false imprisonment by an individual, defamation, and so on. For instance there is malpractice insurance which protects professionals such as doctors, lawyers, and accountants from liability for negligence in the practice of their professions.

2. Liability of an employer for torts committed by employees in the course of their employment, including many intentional torts. The coverage is usually called employer's liability insurance. It may provide normally for coverage for worker's compensation claims. For instance a worker may beat a customer. If injury is inflicted on the customer, the employer may be held liable for the wrong committed by the employee.

3. Liability for loss resulting from defective products, whether based on negligence, breach of a warranty, or strict liability in tort. For instance a producer of goods might have distributed defective goods. If a consumer uses the goods and as a result suffers some damage or disease, the consumer may claim compensation for the damage he suffered against the producer.

4. Liability resulting from ownership of property. For example, we can take the strict liability attending the ownership of hazardous property. For example an ox you own may heat a bystander and inflict damage upon the latter. For this damage, the injured bystander may claim compensation against you.

Insurance of persons

Policies of life and health insurance provide protection against a number of general risks: premature death, temporary and permanent disability, temporary illness, and outliving one's financial resources. In a family context, insurance can provide reimbursement for medical expenses, a replacement for income lost due to disability, and at death, funds to cover the cost of the last illness, burial, unpaid debts, and similar expenses. Insurance can also provide surviving family members with funds for maintaining their standard of living or adjusting to a lower one if necessary, for supporting minor children, and for meeting special needs such as education. In a business context, a firm can insure the lives of key personnel whose untimely death would create great financial hardship for the firm. Firms can also use insurance to enhance the availability of credit to the firm, to assure the continuation of business, and to fund employee benefit plans in an effort to attract and hold talented employees. A question may arise as to the amount of insurance. According to the Commercial Code, since insurance of persons is not considered to be a contract for compensation, the amount insured may be freely fixed and shall be due regardless of the damage suffered by the insured. Also, the rule of subrogation in no case applies under insurance of persons.

Life insurance

A life insurance, by definition, is a contract whereby the insurer undertakes against the payment of one or more premiums to pay to the subscriber or to the beneficiary a specified sum on certain conditions dependent upon the *life* or *death* of the subscriber or third party insured. From this definition, we can see two types of insurance contracts: one is insurance *in the event where the insured is alive* on the date specified in the contract and two, insurance policy *in the event of death.* Let us see the first type of life insurance. The insurer who enters into a life insurance undertakes to pay a specified capital or money provided the insured person is alive at a date fixed in the policy.

Let us go to the second type of life insurance which is common compared to the first. The insurer, who enters into insurance for the event of death, undertakes to pay, on the death of the insured person, a specified capital or life interest to those having rights from the insured person or to the beneficiary named in the policy. But there are exceptions for the application

of this insurance contract. An insurance policy made for the event of death of an *incapable* person shall be of no effect even where the incapable person or his legal representative agreed to the insurance. So no benefit arises by insuring the life of an insane person. In addition, notwithstanding any provision to the contrary, an insurance policy for the event of death shall be of no effect where the insured person knowingly commits *suicide.* So if Kebede insures himself for the benefit of his wife and, at later time, kills himself, the wife cannot benefit from the insurance contract. Another exception relates to the wrong committed by the beneficiary of the contract of life insurance. As the insurance law states, an insurance policy for the event of death shall be of no effect where the *beneficiary intentionally kills the insured person and is convicted* thereof by a criminal court. This is the reflection of the principle of law that says "no one shall benefit from one's wrong". So in our previous case, if the wife, the beneficiary of the contract, kills Kebede, she cannot claim on the basis of insurance contract. But a mere opinion among members of the society that the lady killed her husband is not enough to deprive the lady of her right under the insurance contract. A court of law must find her to have committed the crime.

Insurance against accident and illness

Insurance against accident and illness or simply health insurance may be defined broadly as the type of insurance that provides indemnification for expenditures and losses of income resulting from loss of health. This insurance is given normally for medical expenses including surgical and hospitalization and disability.

4.4.3. Insurance policy

Insurance policy is a contract between insurer and insured, known as the policyholder, which determines the claims which the claims which the insurer is legally required to pay.

The insurance policy is generally integrated contract, which means, it includes all forms associated with the agreement between the insured and insurer. The contents of written document or written insurance agreement is called insurance policy. Insurance policy is prescription of rights and obligations of parties to the insurance contract and conditions to be materialized to claim payment from insurer.

4.4.4. Rights and Duties of the parties

Discuss the rights and duties of the parties in the contract of insurance?

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The insurance policy contains certain obligations of parties to the contract of insurance. The obligation each party owes the other may be exhaustively stated in the contract of insurance. The duties of the insured or the assured may be stated in the contract of insurance. The amount of premium, the period at which the premium has to be paid may be expressed in the contract of insurance. Similarly, duties of the insurer may be stated in the contract of insurance. The following duties are expressed in the commercial code.

Duties of the insurer

The contract of insurance is expected to spell out certain duties of the insurer. As the insurance contract may vary with the variation of interest of parties to the contract of insurance and nature of the protection given to the insurer, we cannot exhaustively deal with the conceivable duties. But it is possible to mention some of the duties usually imposed on the insurer.

The risk to be insured shall be probable. This means the occurrence of event to be insured shall be unexpected. If you insure, for example, a car against collusion, whether the car might be collided or not is uncertain. The insurer insures risks that come out from unforeseen circumstances or that may arise from the negligence of the beneficiary (Article 663(2) of the commercial code). Therefore, risks arising out of the intentional default of the beneficiary shall not be covered by the policy. If the assured likes to get ride of the property insured or desires to have the compensation he/she may intentionally bring about the happening of the risk insured and that is contrary to the public interest.

If the risk materializes due to fault or negligence of a third party to whom the insured is responsible then as per Article 665 (1) the insurer shall pay the agreed sum within the time specified in the policy or when the risk insured against occur or at the time specified in the

policy. It does not matter whether the negligence is that of the assured, his servants or strangers.

If the risk insured happens not within the sum limit stated in the policy, the insurer will be compelled to compensate the insured or assured. The insurer's liability shall not exceed the sum stated in the contract or insurance.

Duties of the insured

Subjected to the terms of the insurance policy, the following duties expected to be discharged by the insured.

1. **Payment of premium**

The time at which the premium to be paid has to be stated in the policy. If the insured fails to pay premium in due time, the insurer may notify the insurer demanding payment of the premium. If the insured keeps silent, for more than a month, the insurer, at his option may terminate the contract of insurance or may still demand payment of the premium. If the insured pays the premium at this time, the insurance relationship will be renewed from the date of payment of the premium. Thus, you see if the risk happens in the meantime the insurer will not be responsible. This means until the premium is paid the insurance coverage is suspended (Article 666(3) of the commercial code).

2. **Disclose material information**

The obligation to compensate a risk depends upon future uncertain risk. Insurance is a contract depending upon speculation. The insurer computes his profit on the basis of the contingent chance. The facts material for evaluation of the happening of the contingent chances depend upon the nature of the interest insured which are well known to the insured only. The insurer records only facts objectively known and information disclosed by the insurer.

The insured therefore has to disclose all important facts to the insurer. The insured has to be utmost good faith. If the insured knows any information that would influence the insurer whether to accept the application for insurance or not, the insured has to inform to the insurer.

Non-disclosure of material fact vitiates the insurance contract. Moreover, misrepresentation (false information) of important information makes the contract of insurance voidable. The person seeking to insure may fairly be presumed to know all the circumstances which materially affect the risk, and generally assumed the only person who has the better knowledge as to the interest insured.

Article 667 of the commercial code provides, "…on making proposals for a policy, the beneficiary shall state exactly all the circumstances within his knowledge and which are likely to assist the insurer to appreciate fully the risks he under takes to insure". Failure to make the disclosure, therefore, is breach of duty and the insured or the assured may be responsible.

The insured is obliged to disclose only matters he/she knows. If the insured intentionally conceals material fact the insurer may invalidate the contract as it would cause the insurer to wrongly appreciate the risks to be insured. The insurer may maintain the policy by increasing the premium to the correct figure. As increasing premium results in variation of the earlier contract the insured has to agree, otherwise the contract of insurance would be invalidated, either to invalidate the contract or increase the premium, the insurer has to prove that he/she would not have entered in to the contract or determined the premium otherwise, he/she has been aware of the truth. If the true information is discovered before materialization of the risk, the insurer may terminate the policy by giving one month notice or may maintain the policy by increasing the premium.

You may ask the effects of non-disclosure where the risk insured materialize. In such a case the insurer may be compelled to compensate the damage caused by the risk. If the information concealed assumed to change the extent of the premium, the insurer when compensating, may deduct the excess premium (Article 668 (2) (b) of the commercial Code).

Where the risk insured increases because of the act of the beneficiary than what was expected at the time of the contract, the assured has to inform it to the insurer. The assured shall communicate such information within 15 days from occurrence of an event increasing the risk. If the beneficiary, for example, while repairing the car, insured affected an operative part of the

car, the act of the beneficiary increased the probability of happening of the risk, the insurer should be informed. The period of 15 days cannot be shortened by a contrary agreement (Art. 669 of the comm. Code).

3. Notify the occurrence of the risk insured

The assured shall notify occurrence of the risk as soon as possible to the insurer (Article 670). Unless prevented by the factors beyond control the insured shall inform happening of the risk insured within 5 days. The parties cannot shorten this time.

4.4.5. Insurance of persons

Is a contract whereby insurer undertakes to pay fixed amount of sum once or installment against premium dependent on certain conditions attached to the life or death of subscriber/third party.art.691.

Under Ethiopian context life insurance can be divided in to three types based on type of coverage the policy:

I. whole life Policy: is a life policy which provides for the payment of a lump sum up on the death of the insured (Art. 692(2). Therefore, in order to get benefit out of the policy, the beneficiary must wait the death of insured.

II. Pure Endowment policy (term Policy): This type of life insurance policy provides for the definite payment of a definite sum at a certain date or when insured attains certain years of age. Art. 692(1) of Ethiopian Com. Code.

III. Combined policy: This type of life insurance policy on the other hand, is combination of whole life & endowment policy, the proceeds of the policy is payable to the insured himself if he is alive at the date specified in the policy or to the beneficiary of insured when the insured dies before the date specified in the policy.

Chapter-V

Law of Negotiable Instruments

Introduction

Commercial instruments facilitate transaction. Commercial instruments are substitute for money. As commerce and trade developed people used some papers substituting money. The use of papers instead of money, gold and other precious metals minimized the risk of people carrying hung collection of money. A single paper may represent millions or billions of money. The terms negotiable instrument encompasses such substitute in common usage. Have you ever tried to negotiate a document? The terms negotiation applies to all written document that can be transferred by delivery or by endorsement and delivery, and passes to the transferee a good title.

The thing sold may write (draw) a bill of exchange on the buyer. The person holding the bill may demand payment or present for acceptance by the buyer. The seller endorses the bill to a third party who wishes to purchase it on may draw the bill for the benefit of a third party.

The third party who purchased the bill from the seller or for whose benefit the bill of exchange is drawn has to present the bill for acceptance. From the moment the bill is accepted by the buyer a contractual relationship is created between the buyer and the third party possessing (holding) the bill. On the date appointed for payment, the holder of the bill of exchange has to present the bill for payment.

Issuing a bill of exchange is not restricted to credit transactions. A person may draw a bill on a person for any reason if he promised to accept a bill written on him. A bill of exchange is a form of commercial instrument that involves an order to pay money. The person writing the bill on another person is called a drawer, if a seller writes a bill on a third party, the buyer is the drawee and the seller is the drawer, the drawee is the person who accepts the bill or promises to pay it at the due date. The third party to whom the bill of exchange is given is called a payee.

Under this unit, you will briefly study the three important negotiable documents that are recognized by the commercial code of the transferee a good title.

Learning objectives:

At the end of this unit, you will be able to:

Define the terms negotiable instruments:

Distinguish bill of exchange, promissory note and cheque;

Negotiate negotiable instruments;

Discuss legal rules governing negotiable instruments in Ethiopia ; and

Familiarizing on issues involving negotiable instruments;

5.1. Definition of Negotiable Instruments

What do you think is negotiable instruments?

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The word negotiable means 'transferable by delivery' and the word 'instruments' means a written document by which a right is created in favor of a person. Thus, the term negotiable instrument literally refers to a document containing rights that can be transferred by delivery.

Similarly, Article 715(1) of Ethiopian Commercial Code of 1960 defines the term negotiable instruments as any document incorporating a right to an entitlement in such a manner that it is not possible to enforce or transfer the right separately from the instrument.

The rights that could be incorporated in negotiable instruments may be rights for payment of money arising out of various contracts such as the contract of loan, sale, lease, or any other contract performed by payment of a certain amount of money. Such rights may also arise from ownership in companies or loan made to the government or to a share company. The rights that are incorporated in negotiable instruments may be rights to receive goods under voyage or deposited in a warehouse. According to this provision, the holder of negotiable instruments can transfer the rights incorporated in the instrument by transferring the instrument. Similarly, a person who claims the rights incorporated in negotiable instruments may enforce or exercise

them only if he has possession of the instrument, i.e., he should be a holder to whom the instrument is issued or transferred following the rules governing its transfer. He must also present the instrument to the person who is supposed to perform the obligations arising out of the instrument. (See also Art 716/1/). The fact that the rights incorporated in negotiable instruments may be transferred by the transfer of the instrument and the fact that a person may not exercise or enforce them unless he is in possession of the instrument are the two main features which distinguish negotiable instruments from other documents evidencing rights such as a title deeds whose transfer does not transfer the rights they establish. /Refer to Art 1185 and 1195 of the Civil Code/

Another point that has to be noted here is that negotiable instruments are issued or negotiated based on other contracts. For instance, a person may issue a bill of exchange to repay the money he has borrowed from the payee, the company issues a share certificate or debenture certificate as evidence of the person's right arising out of contract of partnership creating the company or a contract of loan respectively. / Art 211 and 429 of the Commercial Code/. The warehouse person or the carrier issues the warehouse goods deposit certificate or the bill of lading / consignment note based on contracts of warehousing or carriage respectively. Finally, the definition of negotiable instruments under the Ethiopian law is much wider than the one adopted by most legal systems, particularly those following the Common Law tradition. This is evident from the Uniform Commercial Code of the United States and the Bill of Exchanges Act of 1882, which restricts the concept to bills of exchange, checks and promissory notes.

Based on the purpose and rights incorporated in the instruments, Article 715(2) of the Commercial Code categorizes negotiable instruments into three main types, i.e., Commercial Instruments, [Transferable] Securities and Documents of Title to Goods

5.2. Bills of Exchange

Bills of exchange are negotiable instruments incorporating an unconditional order, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a certain sum in money to or to the order of a specified person.

Bills of exchange, therefore, involve an order to pay money rather than a promise to pay money. The person issuing the order is the drawer, the person ordered to pay is the drawee and the person who receives the payment is the payee.

5.3. Promissory Notes

A promissory note is defined as a document incorporating an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person or to bearer. This, definition implies that promissory notes are promise to pay money and they are only two parties i.e., the maker of the promise and the payee to whom payment is effected.

Similar to the cases of bills of exchange, the Commercial Code of Ethiopia does not provide the definition of a promissory note apart from the requirements provided under Art 823 for validity of promissory notes, which are identical with the definition given above. These requirements are essential for the validity of a promissory note.

The Commercial Code of Ethiopia does not provide a definition of bills of exchange. However, Art 735 enumerates the requirements to be fulfilled for drawing a valid bill of exchange from which one may deduce the definition of the term under Ethiopian law.

It is important to note the following distinctions between bills of exchange and promissory notes, i.e. a promissory note contains promise to pay whereas a bill of exchange contains an order to pay. The maker of promissory note is always primarily liable and its liability is the same as the acceptor of a bill of exchange, but in case of drawer of bill of exchange once the bill is accepted he is only liable as surety in the event of dishonoring of bill of exchange. The concept of acceptance is not applicable to promissory notes unlike bills of exchange that may be accepted. Finally, promissory notes involve two parties only as opposed to bills of exchange that under normal circumstances involve three parties.

5.4. Cheques

A check is the most widely used form of commercial instrument. It is bill of exchange drawn on a bank and payable on demand. The English Bills of Exchange Act of 1882 defines a check under Art 73 as a bill of exchange drawn on a banker payable on demand. Therefore, since

check is defined by reference to a bill of exchange, most provision governing bills of exchange are applicable to check. The check is an unconditional order in writing, addressed by one person, the drawer, to a banker, signed by the drawer, requiring the bank to pay, on demand, a sum certain in money to or to the order of specified person or to bearer.

The following are the main differences between checks and bills of exchange. A check is always drawn on a banker and is always payable on demand while a bill of exchange may be drawn on any one and may be made payable on demand or at fixed or a determinable future time and a check can be crossed in several ways but bills can not be crossed. Acceptance is not necessary for a check since it is payable on demand as opposed to bills of exchange which may be made payable at fixed or determinable future time presentment for acceptance may be necessary.

It is also important to note that a drawer of a bill of exchange and a check or the maker of a promissory note may antedate or postdate it, provided that he has not committed a fraud. In other words, unless the drawer or maker intended to jeopardize the interest of the payee by causing the rights contained in the instrument to lapse, the mere fact of antedating or postdating an instrument does not make it invalid.

Chapter-VI

Law of Banking Transaction

INTRODUCTION

A bank or banker is a business organization or a person engaged in the business of accepting money, valuable things and documents on deposit, lending the money it accepted on deposit to

others, depositing and managing securities, buying and selling foreign exchange and gold and silver bullions and discounting commercial instruments and transferable securities having a future maturity date.

6.1. Deposits

A deposit of funds is a contract whereby a person agrees to deliver and transfer the ownership of specified amount of money to a bank which agrees to repay them under the conditions agreed up-on in the contract or on the demand of the depositor. The bank, as the owner of money deposited, has right to use it in respect of its professional activities, i.e. the bank may lend it to its customers or invest it in areas which are allowed by the national bank /Art 896/. The contract of deposit of funds is almost identical to contracts of loan of money or other fungible things under Art 2471 of the Civil Code of Ethiopia in which the borrower becomes the owner of the money or fungible he borrowed and has the right to dispose of in any manner he wishes.

However, where the deposit relates to "coins and other individual monetary tokens" and where there has been an agreement that they shall be refunded to the depositor in kind, the bank does not acquire the right of ownership and hence cannot dispose of such items. /Art 896 second proviso/. This rule applies, it seems, not to coins and paper money that are a legal tender currency at the time of deposit unless they bear special signs which are of historic or sentimental importance to the depositor. It also applies to currencies or coins used previously in the history of a country and which are considered by the owner/depositor of historic importance.

The contract of deposit of funds results in the opening of an account in the name of the depositor by the bank in which the latter enters all transactions made with the depositor. The bank credits the account of the depositor with all deposits made by the depositor and debits the account where the depositor makes withdrawals or order payments to third parties. (Art 897).

The type of account opened may either be a current account in which the depositor has the right to dispose of the deposit at sight or on demand. This type of account also is a check

operated account, i.e., the holder may demand repayment of part or the whole of the deposit by drawing a check on the bank payable to himself or a third party. As the repayment may be demanded at any time, this type of deposit does not bear interest. / Art 897, 898. /

The account may also be a saving account, which is interest bearing and the right of the depositor to demand repayment may be limited. The insured may be prevented from withdrawing an amount which is greater than a certain amount of money within a certain period or to give notice of withdrawal. /Art 897, 98. / It may also be a time deposit or account in which the depositor cannot demand repayment or withdrawal before the lapse of the agreed period of time. This type of deposit normally bears interest at a rate agreed upon between the parties provided that it does not exceed the maximum limit determined by the National Bank. Art 897, 898 (2). Where the person has several accounts, each account shall operate independently unless the parties agree otherwise. /Art 902/

However, a contract of deposit of funds does not entitle the depositor to demand withdrawal of an amount that is greater than the balance in his favor in the account. In other words, the right of the depositor to demand repayment is limited to the amount of money held in account in his favor and he does not have the right to overdraw his account without a special agreement to this effect, which is one form in which banks give loan to their customers. /Art 899,945 of the Comm. Code and Art 2471 Civil Code. /

6.2. Hiring of Safes

Banks take charge of their customers' valuables like jewelry, negotiable securities, and documents of title to properties, will, and deposit them, as they can be conveniently stored. Such deposits are special in nature and thus do not fall under the general category of banks' deposit.

The acceptance of valuables for safekeeping from their customers is one of the essential, though subsidiary, services of banks. The right of a bank to render this service is recognized as a legitimate banking transaction. Though deposit or storage companies can render the service as well, the fact that the modern bank, for its own protection, is well equipped with safes and strong rooms it particularly suitable for rendering this service.

Banks deposit their customer's values in either of the following two ways:

1. By accepting the valuables for safe-custody or
2. By hiring out safe deposit boxes to their customers.

In the first case, customer's valuables are handed over to the bank either openly or in a sealed cover box. The particulars of the deposit may be known to the bank in which case a record of them will be made in the safe custody register. However, as it was said above, valuables constitute special deposit and, as a matter of principle, special deposit should not be commingled with the banks' other deposits. Banks usually place the valuables in their safes together with other deposits. This service is known as 'safe - custody'.

Nowadays, safe-custody service is being abolished, because of the nature of the service in increasing the liability of banks for the loss of customer's valuables; undoubtedly, the banks will be held liable for their customers, as bailers will to their bail ees.

At present in correspondence with their customers, banks usually avoid the term safe-custody' preferring to use the term 'safe-deposit'. Facilitating safe deposit of valuables by hiring out safe boxes for their customers is the dominant service of banks in most countries of the world, including Ethiopia. This mode of deposit, also known as safe deposit, constitutes the second way of depositing valuables. In this case, the bank hires out safe boxes and the valuables to be deposited are not as such handed over to the bank; rather the customers themselves place them in the hired safe boxes. The particulars of the deposit will not be disclosed to the bank. This service is known as 'safe-deposit.

Some banks provide a service whereby they make available to their customers a safe deposit box to which the customer himself keeps the key and to which he may have access during business hours.

In safe deposits or hiring of safes the bank and the customer execute a contract specifying the conditions on which the safe will be hired the contract includes the customer's duty to pay rental charges and the method of payment. Sometimes, the customer may be made to open a saving account and deposit a certain amount of money from which the bank could debit the

rental charges whenever they are due. The nature of the relationship created by the contract is a subject of argumentation. It will be discussed in chapter four.

When a customer enters into a contract for hiring of safe, a safe or compartment of a safe will be placed at his disposal for a specified period. The key of the safe box, with its reserves, will be given to the customer. This key will be at his exclusive possession during the terms of the contract. The customer can use the safe box to deposit any article that he wants as far as the article to be deposited in the safe box is not dangerous in such a way as to cause damage to the bank's and other customers' property or is not thought to be harmful to the public at large.

Having exclusive possessions of the key to the safe box, the customer and his duly authorized agent are the only ones who could have access to the safe box, and they are also the only persons who could have direct control over the deposited valuables. To ensure this the customer will be provided with an access identification card when he enters into the contract.

The bank maintains a safe deposit register in which it will take down the customer's name, address and safe box number. The customer's specimen signature will also be taken on the signature card. As an additional safeguard to identify the customer and his signature, he may be required to choose a 'code word' or a 'pass word' which he will communicate to the strong room attendant when he comes to visit his safe box.

The safe boxes are placed in the strong rooms of the bank. The customer cannot have access to his safe box without the permission of the strong room attendant. Thus, despite the contract for hire the bank can control the customer's visits to his safe by putting restrictions on visiting hours. For instance, the customer can be made not to visit his safe box outside the specified business hours.

The customer's right to deposit anything he wants in the safe box can be restricted in the contract based on different considerations, like the bank's and other customers' security and security of the public at large. The customer is not obliged to disclose the contents of his safe box. As a matter of fact, the bank has no interest in knowing the contents of the safe box since in such a case it is less likely to be held responsible for any loss or damage to the contents of the safe box.

A safe box may be hired in the joint names of two or three persons. In such a case the banker should get the mutual consent of all the hirers in executing any instructions or making subsequent modifications.

The contract for hiring of safes can be terminated at the will of the parties although both parties have the right to unilaterally terminate the contract; the bank, as a service rendering institution to the general public, should show good cause to terminate the contract. The contract could also be terminated at the death of the customer or an individual banker. At the event of the customer, the bank should deliver the contents of the safe box only when the person requiring delivery presents a document from a court evidencing the fact that he is the legal representative of the deceased. The laps of the period of the contract and failure to pay the rental charges by the customer may also be grounds for terminating the contract.

Under Ethiopian law, a contract of hire of a safe is defined as a contract whereby a bank agrees to place at the disposal of the hirer a safe or a compartment of a safe for a specified period of time on payment of a rent. The bank under this transaction has the duty to prepare a room where the safes are to be kept called a strong room and prepare safes for the hirer, and take the necessary measures to ensure the up keep and safe custody of safes. However, the bank is under no obligation for the deterioration or damage of the contents of the safe. A person may hire a safe in a bank to deposit valuables such as gold, silver, diamond (jewelries), important documents such as title deeds, insurance policies, wills, inventions and works of art. However, the hirer may not deposit things that are dangerous by themselves such as explosives, inflammable things, narcotic drugs, guns and legal tender currency, which is supposed to circulate, or deposited through contracts of deposit of funds and not in hired safe, as this puts the money out of beneficial use. Violation of this prohibition is a ground for the cancellation of the contract by the bank. /Art 922/

In addition to making sure that the safe and the strong room are not endangered by fire, water or breach by unauthorized third parties, the bank must give immediate notice of the danger to hirers and enable them to empty the content of their safes before the risk materializes. The bank has this obligation even where the danger occurs outside working days and hours of business. However, the bank is not required to give individual notices to each hirer. The bank

may notify the hirers by means such as local radio or TV stations or through public announcements. /Art 920/

The bank has also the obligation to allow the hirer or his agent to have access to the safe by providing him with keys and identification cards during working days and of hours of business. / Art 921/

The obligation of the hirer on the other hand is the obligation to pay the rent on time and return the keys to the safe by emptying the contents of the safe upon termination or cancellation of the contract. /Arts 919 and 923/1//

The contract of hire of a safe shall terminate as of right where the hirer fails to pay a rent within a period of one month from the date of notice by registered letter given by the bank. Where the hirer fails to pay a rent for a single term, the bank demands payment by a registered letter. The contract shall terminate as of right where the hirer fails to pay the rent within a period of one month from the date when the bank gave the notice, and the bank shall take possession of the safe at the end of the period of notice by calling the hirer to be present on the date and time fixed. Where the hirer fails to appear on the fixed date and time or refuses to return the key and give up his safe by removing his deposits, the safe shall be forced open in the presence of a court official who shall draw up a descriptive report of the contents of the safe which shall constitute a conclusive evidence as regards all interested parties. /Art 923/2//

6.3. Contracts for current accounts

Opening a bank account is nowadays a part of everyday life. A current account is a deposit account held at a bank or other financial institution in order to provide for its holder a secure and quick access to deposited funds on demand and to carry out operations with the monetary funds on the account. The main purpose of a current account is therefore to enable its owner to use their money in a clearing. There are various types of bank accounts offered by the banks to suit all their customers´ different needs (e.g. personal, business, student, children accounts etc.).

To open a current account, the law requires a written agreement where both contracting parties, a bank and an account holder (owner) – have to be properly identified (hence opening

an anonymous account is de facto forbidden by law). In practise, though, banks sometimes require a minimum deposit too. An account holder may be an individual or an entity. One current account may be opened for more than one person (owner). If the account is established for two or more persons, each of them has the status of an account holder. Therefore co-owners dispose with the account jointly and their shares in the balance of monetary funds in the account shall be equal, unless the contract (or a court) stipulates otherwise.

6.4. Discount

Discount is a contract whereby a bank agrees to pay to a holder of a commercial instrument or security having a future date of payment an amount which is lesser than its actual value, against the surrender of the instrument and the undertaking to repay the value of the instrument by the holder where payment is not made at the maturity of the instrument. A bank discounts a commercial instrument for consideration, which is the difference between the value of the instrument and the discounted amount paid by the bank to the holder. /Art 941. /. On the other hand, a holder of a commercial instrument agrees to receive an amount which is lesser than the actual value of the instrument in most cases because he needs the money for immediate uses and his rights in the instrument do not mature until a distant future date and he cannot get the money he needs from other sources and the need does not allow him waiting until that date.

The amount of commission and interest charged by the bank which discounts the instrument shall be calculated by taking into account the time remaining until maturity of the instrument and the value of the instrument respectively. /Art 941/2/ and 942/

The bank, which discounts a commercial instrument or a security, shall acquire all the rights of the beneficiary of discount on the instrument including the right to demand payment from the person or persons who are liable on the instrument. In addition, where the bank receives the full value of the instrument at maturity, the obligations arising out of discount shall be extinguished. However, if the bank is not successful in its claim for payment at maturity, it will have two alternative remedies, Art 944(1).

- It may proceed against parties liable on the instrument under Art 790 of the commercial code, or the company which issued the share or bond, or

- It may proceed against the beneficiary of the discount on the basis the contract of discount (Art 941(1) and 943).

However, the right of the bank is limited to the amount of money it has paid to the beneficiary plus commission, interest and expenses (944(2)).

6.5. Credit transactions

Transactions are the building blocks of our accounts. Any transactions that occur within our business should be present in our accounting records.

There are many different types of transactions to keep track of such as sales, purchases, and even more. A regular point of confusion that we come across when we talk to small businesses about their accounts is the difference between cash and credit transactions. So, what is the difference? The only difference between cash and credit transactions is the timing of the payment. A cash transaction is a transaction where payment is settled immediately. On the other hand, payment for a credit transaction is settled at a later date.

Try not to think about cash and credit transactions in terms of how they were paid, but rather, when they were paid. For example, you may buy some groceries at your local shop and pay for them in cash there and then, that's a cash transaction. However, what if you paid by card rather than cash? That can also be classified as a cash transaction because you paid immediately.

On the other hand, credit transactions are paid at a later date than when the exchange of goods or services took place and almost all of time an invoice for the transaction is issued. The time period before payment can vary depending on the types of businesses or even the industry in which the transaction is taking place. Once again, when payment is finally settled for the invoice, it may be done with cash or card, or any other payment method but it is still a credit transaction.

Businesses will have a mixture of cash and credit transactions make up their accounting records. Some businesses may have the majority of their transactions be either one or the other and some will have a more even split. However, you would be hard pressed to find a business that didn't have at least one cash or credit transaction occur during its lifetime.

Chapter-VII

Labor Law

Introduction

This chapter will try to bring to light some key concepts on the Ethiopian labor and employment law. Accordingly, it will identify the forms and contents of contract of employment and their peculiar features, explain the respective rights and duties of employees and employers, compare and contrast the labor and civil service employment regimes and pin point the modalities of suspension, modification and termination of employment contract recognized by law.

In nut shell, it will reflect on the role of employment law in maintaining industrial peace, in affecting investment positively or otherwise and in affecting delivery of qualitative public service.

Learning Objective

Dear students it is undisputed fact that this area of law is crucial for you, your family or any one you may know who happens to be an employee or employer. Employment is a matter of livelihood for employees and more of source of business for employers. Thus, the knowledge of the rules on the Ethiopian labor and employment law is of utmost importance. Dear distance learner, as a business professional you need to check yourself at the end of this chapter if you have attained the following;-

- identify the essential definitional elements of employment relation
- scope of labor law and probation period
- explain the rights and duties of the contracting parties
- spell out what modification, suspension and termination are and the grounds thereto

7.1. Contract of Employment

Definition

Pursuant to art.4 (1) of proc. No. 1156/2019 Contract of employment is defined as a contract whereby a natural person agrees directly or indirectly to perform work for and under the authority of an employer for definite or indefinite period or piece work in return for wage. Please compare this definition with art.2512 of the civil code?

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The first decisive phrase of this definition is that which reads… an employment contract shall be deemed formed where a natural person agrees directly or indirectly …". Here unlike the previous labor proclamation no 377/96, this proclamation has qualified the type of person who is going to enter into contract of employment. It clearly states that only a natural person can enter into employment contract. Given the fact that only natural persons can get sick and need all sorts of leaves, the proclamation can be said to have made a good start correcting the previous error. The fact that the natural person can agree directly or indirectly, on the other hand, signifies that employment relationship can be created by a legal representative or agent.

As you may know the civil service proclamation, Proc. No.1064/2017, does not define contract of civil service. If we have to make a distinction, the principal base of difference is the definition provided by the civil service proclamation concerning who civil servants are. Based on art.2 (1) of this proclamation civil servant is a person employed by a Federal (Regional, emphasis added from reference of regional civil service proclamations) government institutions; provided, however, that it may not include the following:

a) Government officials with rank of state minister, deputy director general and their equivalent and above;

b) members of the House of People's Representatives and the House of the Federation;

c) Federal judges and prosecutors;

d) members of the Armed Forces and the Federal Police including other employees governed by the regulations of the Armed Forces and the Federal Police;

e) employees excluded from the coverage of this Proclamation by other appropriate laws;

Thus, when art.4(1) and art.2 (3) of the labor proclamation refer to a natural person or worker as a person who has an employment relationship with the employer it is refereeing to workers that are excluded from the ambit of the civil service proclamation and other laws. The same form of exclusion on certain group of employees is also provided under art.3 (2 & 3) of the labor proclamation. We will discuss this in the topic about scope of labor law.

The second decisive element of the definition is the phrase which reads…."to perform work for and under the authority of the employer …" The first thing that has to be done here is defining who an employer is. The labor proclamation defines under art.2 (1 & 2) who an employer is, which can also be used as a point of distinction between civil servants and workers under the labor law. It must be underlined that employer under the labor law is any natural or legal person which is engaged in any lawful activity, ***be it profit making or otherwise***; whereas employer under the civil service, as indicated under art.2(3) of proc no.1064/2019, is a status assigned to an exclusively federal legal organ established by a legal instrument and fully or partially financed by government budget.

At this juncture, it will be good to emphasize that employers under the labor law can even be religious or charitable institutions engaged in business/profit making activity separately. This is something that can be gleaned from the reading of art.2 (2) of the labor proclamation and the interpretation given by the Federal Supreme Court Cassation Bench in vol.8 file no.18419.

Dear students, have you read this decision? Discuss it in the classroom?

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As we continue on the definitional element, this employer is granted the right to control or supervise the work. Perhaps the most decisive element of the definition that serves as a litmus paper to distinguish contract of employment from other similar contracts for service is this control aspect of the definition. The employer has the right or privilege to determine what to be done, where or when to be done including how and with whom the work has to be done. This doesn't mean actually that the employer can instruct the employee something not related to the contract of employment or that the employee is a slave. The right of the employer to instruct and control the work shall be as it is prescribed under the contract of employment or collective agreement, if any. This distinguishing feature of contract of employment is usually used to differentiate contract of employment from independent contractors and home workers. Pursuant to article 2610 cum 2616 of the civil code independent contractor enjoys the freedom of how, when and with whom to do the work. Similarly, home workers under article 46(1) of proclamation no. 377/2003 perform their work without their employers' direct supervision.

Dear students why do you think are employers given the right to control the performance of the work?

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The reason why employers under employment law are given the right to supervise and control the performance of the employee is because whatever damage they cause on property or life of human beings' employers are held liable for their employee's fault as per article 2130 of the

Ethiopian civil code vicariously. The government seems to have justified this based on assumption that employers as a beneficiary of employee's performance should also bear the expenses related to work including the harms the employees inflict up on third parties. It can also be justified by the economic assumption that the employers who are rich should shoulder the harm its employees inflict up on the society. This however will only make employers civilly liable. Criminal liability is more of personal and concerns the one who committed the crime.

The other important element of the definition is the phrase which reads …." for a definite or indefinite period or piece work…….". From the cumulative reading of art.4, 8 & 9 of the labor proclamation one can infer that contract of employment may be concluded for indefinite period, definite period or for a piece of work. Indefinite contracts of employment are those contracts of employment that are not concluded for a definite period or piece work. Thus, to define (know) indefinite period of contract of employment we need to firstly identify definite contract of employment or piece work. A contract of employment will be regarded as if concluded for a definite or piece work if it falls part of the list of contracts under article 10 of the proclamation.

Therefore, every contract of employment will be deemed to have been concluded for an indefinite period unless it is one of those mentioned in article 10 in kind. This means before categorizing contract of employment as indefinite or definite, one had to always check whether or not the particular contract falls under the list of typical definite contract of employment or piece works.

The last element of the definition is the last phrase which says… "In return for wage". Wage is defined as a regular payment on art.53. The remuneration may be effected / paid on daily, weekly, bimonthly, monthly or yearly basis. Similarly, the mode of payment may be in kind or in cash. In relation to this the civil service proclamation which does not define contract of civil service determines the period of wage & indicates under art.7 that a salary scale will be prepared by the government.

7.2. Formation and terms of the employment contract

Having seen the definitional elements of contract of employment it is also vital to raise the formality requirements for the formation of contract of employment altogether.

Capacity

Dear students what do you think is the contractual age for employment?

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Just like any other contract contracts of employment shall be concluded by person capable under the Ethiopian law. And as you know capacity of physical person is presumed under article 192 and 196 of the civil code. Every person is capable of performing of all acts of civil life unless declared in capable by the law. Incapacity emanates from the law and it is categorized in to general and special under article 193 and 194 of the civil code. To give you a glimpse of your law of person course, general incapacity relates to age, mental condition and penal sentence, while special incapacity depends on nationality and the functions one carries out in accordance of the law.

So, when we say persons contracting for employment should be capable, we are saying they should be free from incapacity depending on age, mental condition, penal sentence, nationality and lawful function. Accordingly, with regard to age, a potential employer should not be a minor or below the full age of 18 years as per article 198 of the Ethiopian civil code and if the employer is an undertaking it should have lawful personality being established in accordance of law, fulfilling registration or publication. Here it is good to mention that the ILO convention no 138, which was ratified by Ethiopia in 1999, under article 2 requires the minimum age of employment to be 15 years but it allows employment at 14 years obliging member states to report their reason to ILO. Increasing production is the most acceptable reason that many developing countries put forward.

Similarly, we can also look at art 14 of ICESCR. In accordance of the international law, Ethiopia has declared that employment age should not be below 15 years of age. see art.89 of the proc. On the other hand, the civil service proclamation, proclamation no 1064/2017, under art 14 requires the attainment of 18 years of age to get employed as a civil servant.

With regard to penal sentence, even if an employer is convicted, he may remain an employer through his representative (tutor) because acting as an employer is not strictly personal. The status may be exercised by a representative as a prisoner can be represented by his tutor with respect to his pecuniary interest. However, employees cannot perform their job through a representative since they are required by the law to carry out the work in person. See art.13 (1) of the proc. In addition, if the employee is imprisoned for more than 30 days after employment then pursuant to art 27(1) (j) the employer has the right to terminate the contract of employment without notice. See also art 123(c) of the criminal code.

With regard to mental condition both the employer and the employee should not be insane (notorious, non-notorious, judicially interdicted, feeble minded, drunkard or prodigal) or infirm (deaf-mute and blind)

With regard to nationality-we have seen that foreign diplomatic missionaries or international organs will be regulated by the labor proclamation unless international agreement to which Ethiopian is a party provides otherwise or until the council of ministers enacts a regulation especially applicable to them (article 3(3)(a)). Foreigners are in principle assimilated to Ethiopian citizens with regard to the employment and exercise of civil right. And civil rights are defined negatively as those rights the exercise of which doesn't imply participation in the government or administration of the country. See the Ethiopian civil code under art.389 (1 & 2). But the civil code has also indicated that a special condition may be required by other laws with regard to foreigners working right in Ethiopia. See the Ethiopian civil code under art.389 (3) Accordingly, the labor proclamation under article 174 has provided that foreign nationals can only be employed in any type of work in Ethiopia when they are granted a three-year work permit in advance by minister of labor and social affairs.

However, when you see article 15 cum. 22 (2&3) of the federal civil servant proclamation foreign nationals in principle or basically are not eligible to be a civil servant. Nevertheless, exceptionally foreign nationals of Ethiopian origin are allowed to enjoy especial rights as per article 5(2) of proclamation no 270/2002. Accordingly, s/he shall have the right to be employed in Ethiopia without a work permit. However, s/he cannot be employed in Ethiopia on a regular basis in the National Defense, Security, Foreign Affairs and other similar political establishments. Note also that according to this proclamation art.5 (4) the provisions of Articles 390-393 of the Civil Code shall not apply to persons of Ethiopian origin holding the Identification Card. Here it is noteworthy that the labor law does not treat foreign nationals of Ethiopian origin and with regard to this it would be necessary to look at proclamation no. 270/2002.

Object and Form

Generally, other than the requirements of capacity the proclamation under article 4 indicates that a contract of employment can't be deemed formed for unlawful or immoral work. This upholds the fact that the object of employment contract cannot in any case be unlawful, immoral and impossible. As regards to forms of contract, the labor law regime in principle does not require any special form for contractual validity. (see art.5) It is under exceptional cases that it requires written form as provided under art.11 (3), 15 (3) and art.48 (3). The fact that there is no formality requirement in principle could be expressed as an indication of freedom of contract because if the law imposes an obligation to follow a special form for the conclusion of a contract of employment it would cause an inconvenience to the speedy transaction of goods and service.

The Civil service regime on its part requires written instrument in all cases. As a contract of employment is a contract with public administration, the civil code requires a special form for the purpose as shown under art.1724 of the C.C.

Having said this, if a contract of employment is made in a written form just because the parties wanted or the law dictates, that contract of employment has to include the basic information's provided under article 6 of the proclamation, i.e.

- ✓ the identity of the contracting parties including their address,
- ✓ the type of work and place of work,
- ✓ the amount of salary,
- ✓ the method of calculation of the salary,
- ✓ the manner of payment and
- ✓ the period of contract of employment.

Otherwise proving the existence of a contract of employment would be very difficult. Especially if the amount of salary is not specified, even if courts may have the power to consider and interpret contracts as one entered into for the payment of salary, they cannot remedy the problem of meager salary as there is no law so far that fixes the minimum amount of salary. See art.55(2).

Perhaps something important to finally make sure of its existence in the contract of employment is the contracting parties' signature, because signature is the key to tie the parties to their words and it is an indication of their will to be bound by the agreement. After listing down the important information's that should be included in the contract of employment under article 6, the employment law does not say anything about whether a contract of employment just like any other contract need to be attested by witnesses or not.

Dear students what do you think? Do you think contract of employment has to be attested by two witnesses?

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As we all know pursuant to article 1722 (2) of the civil code a contract has to be attested by at least two witnesses. Actually, on the one hand, we can say that since article 6, first paragraph, give an implied recognition to the civil code articles on the general requirement of contract,

attesting contract of employment by witnesses can also be said is necessary requirement. But on the other hand, it can also be argued that since contract of employment are not supposed to observe a special formality requirement and since a contract of employment may be made in a written form mostly when the parties wish to do so the requirement of attesting contract of employment might have been considered irrelevant by the legislature.

At this juncture it is important to cite the decision of the federal Supreme Court cassation bench in the case between Ethiopian Rental house agency and Mrs. Sosina Asffaw, file no 15992 vol.1. In this case the court argued that the requirement of attesting contracts by witnesses is a requirement applicable only on contracts that are subjected to a written formality by law and as a result unless the contracting parties want to attest their contract by witnesses courts may not refuse to enforce written or unwritten contract of employment for lack of the requirement of attesting a contract under article 1722 (2).

Finally, it is good to say little about the duration of contract of employment. There are deferent issues with regard to the provision of the proclamation in relation to period of contract of employment. The first and most important one is, the fact that the law under article 4(3) gives the parties the freedom to determine the period of the contract of employment on the one hand and on the other hand presumes every contract of employment to be for indefinite period except those listed under article 10. These provisions seem to contradict each other but some say that the proc while upholding the principle of freedom of contract on the one hand is trying to play a gap filling role by art.9 and 10 when the employer and employee fail to determine the duration of their contract.

In addition to this, there is also an issue relating to the illustrative or exhaustive nature of article 10. From the reading of article 9 we may understand that article 10 is exhaustive, but the federal supreme court cassation bench on one controversial case decided that person who have attained the retirement age cannot be reemployed in another undertaking for an indefinite period because that would be against the interest of an employer to be profitable by only hiring young employees permanently and retired or old aged persons temporarily. See Mr. kebede Tulu and EELPA, Fed.sup.c. Cassation bench decision, file no. 18832, vol.6.

And since the cassation bench decisions are binding as though a law that case has created another kind of definite contract of employment that can be used to rebut the presumption that says except those listed under article 10 every contract of employment will be considered (presumed) as an indefinite period contract of employment. Therefore, such an experience may force us to consider that the listing of article 10 is or should be taken as illustrative.

On top of all these, there was also an issue over the question who shoulders the burden of proving whether a contract of employment is for definite or indefinite period and weather a claim to be regarded as permanent employee has a cause of action or not? However, this issue was also settled on one case…Mr. Geleta Gemea and ETC. Corp, Fed.sup.c. Cassation bench decision, file no. 16273, vol. 2.

In this case Mr. Genta Gemea, guard of Telecommunication Corporation, instituted a petition saying that "while I was employed for an indefinite period my employer is not paying me the important benefits that are paid to other permanent employees considering me as a temporary employee". And he asked the lower courts to declare him as permanent employee of the employer and be compensated for the benefits that other permanent employees have been enjoying. Accordingly, the labor relation board and the higher appellate court, saying that the employer has failed to prove the disputed contract was for a definite period, decided for Mr. Genta to be compensated and be paid all the arrear benefits the other permanent employees have been enjoying. However, the cassation bench without moving on to framing issues and without saying anything regarding the burden of proof decided that the case instituted by Mr. Genta has no cause of action from the beginning. The reason it gave was that the law by itself presume every contract of employment as though they are for an indefinite period and in such a situation courts, unless it is for redressing injustice done by employers on their employee, do not have the power to declare a person as though s/he was employed for an indefinite period or permanently.

As a result, it dismissed the case rejecting the decision of the lower courts. However, among the five judges that adjudicated the case the female judge put her dissenting opinion saying

that in the given case the petitioner has requested for a decision declaring him as an employee employed for an indefinite period. Though such a claim can be said to have no cause of action with respect to art 9, the claim for declaration to be regarded as a permanent employee is not simple and one, rather the petitioner has said that he is not receiving benefits that other employees are enjoying because of the consideration that their employment contract is for an indefinite period.

Similarly, we can understand from the case that the employer is preventing the employee from enjoying other benefits enjoyed by employees employed for an indefinite period for the only reason that he considers the employee as a temporary employee. Thus, since declaring him as a permanent employee will enable him to secure important benefits just like the other permanent employees, we cannot say that the claim is not justiciable or has no cause of action. Generally, the decision of the court now a day's has been used as a law or precedent on many subsequent decisions of the same court like case no 18351 and 18780.

What is your position with regard to this decision?

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7.3. Work of employee-contractual duties

Dear students what possible rights and duties may employers and employees have?

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The rights and obligations of the employer and the employee may not only emanate from the law as it is prescribed in art 12, 13 and 14 but also from work rules, collective agreements and their contract of employment.

Obligations of the employee

Similar to the obligation of the employer the employee is bound to observe the provisions of this proclamation, collective agreement, work rules and directives issued in accordance with the law. See art.13 (7) of the labor proc.

Some of the basic obligations include;

- **To perform the work in person (art.13 (1))**

The equivalent obligation to the obligation of the employer to pay wage is the employee's obligation to perform the work prescribed in the contract of employment. The employee is encumbered to perform the work mentioned in the contract of employment but this does not mean that s/he will not perform subsidiary or incidental works to the main work. The other important thing to mention here is that the employee is obliged to perform the work in person. This personal nature of the work under contract of employment is one good factor to differentiate employees from independent contractors and agents. See art. 2617 & 2215 of the civil code.

The same obligation is also indicated under art 2523 of the civil code. Here note that it is in view of this obligation that the employee enjoys the benefit of annual leave, sick leave and maternal leave. This obligation is more or less connected to the obligation to work in fit mental and physical conditions. See art. 13(4). This is because if the employee comes to work in a state of intoxication s/he may cause danger to both life and property in work place. And in such cases the employer may terminate the contract of employment without notice as per article 14(2) (d) cum 27 (1) (i) and also as per art 96 (2) (b) the employer will not be vicariously liable for the danger or damage caused in the work place.

- **To follow instructions (art.13 (2))**

Note that the instructions should be one which relates to the contract of employment. In another way speaking the employer cannot instruct the employee something that is not related to the reason s/he is employed.

- **To keep work instruments and tools carefully (art.13 (3))**

This obligation of the employee is the counter part of the employer's obligation to keep occupational safety and health standard under article 12(5). In addition, the proclamation under part VII provides the obligation of both the employer and employee under article 92(3) and 93(4). The consequences of employer's failure to keep occupational safety and health measures is discussed under article 12(5) cum 184 cum 186 (1) (e).

On the other hand, if the employee fails to observe his /her obligation to keep work instruments & tools the consequences would be as per what is provided in article 14 (2) (f) cum 27(1) (i) and 96(2) (a).

- **To come to work in a state of fit physical and mental condition (art.13 (4))**

Article 14(2) (d) cum 27(1) (i) and article 96(2) (b).

- **To inform the employer and give aid when a threat or accident occurs (art.13(6))**

Here the employee while rendering the aid is not expected or obliged to make it to the extent of endangering his/her life. The same is indicated under article 575 of the criminal code. What actually should be primary in sequence is informing the employer about the treat or accident.

7.4. Wages and working conditions to employee

Pursuant to art.12 (9) the employer has the obligation to observe all the provisions of the labor law, terms of the contract of employment, collective agreement, and work rules.

However, some of the basic obligations prescribed by the law include;

- **To provide work and implements & materials necessary for performance of work** (art.12(1))

This obligation of the employer is a pre-condition for the employers' obligation to pay wage. If wage is not paid for a work not done then the employer has the obligation to provide work. See art.53 (1) and 54 (1) of the labor proc. The civil code under article 2541 (1) states that an employee is entitled to his wage even if s/he didn't work because the employer did not provided work.

However, this does not connote that the employee has the right to ask for work. But the intention of this proclamation in preceding work than wage seems to provide the employee the right to ask for provision of work. This finally makes the proclamation as one that propagates the socialist principle that citizens have the duty as well as the right to work. Note also that the ICESCR and other conventions underscore that "work forms inseparable and inherent part of human dignity". This makes the obligation to provide work and the right to ask for work a proper and legal one.

The obligation to provide implements and materials of work are also the obligation of the employer. In fact, this obligation of the employer usually serves as an indicator for the existence of employer and employee relationship. Because in an independent contractor - client relationship the obligation to provide implements and materials of work principally rest on the independent contractor himself. See art.2613 (1) of the Ethiopian civil code.

- **To pay wages and other benefits (art.12(2))**

Can you imagine a work without wage?

There may be, by custom or because the worker conceded working for free, but such kind of labor relation cannot be governed by the labor law this is mainly because wage is prescribed as one element of a contract of employment under article 4(1).

- **To respect the workers human dignity (art.12(4))**

This right of the employee is a very old aged and a universal human right. The FDRE constitution also under article 24 enshrines human dignity. Here we have to note that the obligation to observe human dignity of workers is imposed only on the employer. This means the proclamation does not resolve the question -what if a coworker discredits the dignity of the employee. With respect to the obligation of the employer, an employee whose right to be respected is in fringed has the choice of terminating his contract without notice thereby deserving severance payment and compensation. See art. article 41 & 39(1) (d) cum. article 32(1) (a). Nevertheless, so far there is no regulation that illustrate what kind of actions amount infringement of human dignity.

Is it insult or assault that amounts to infringement of human dignity?

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- **To keep a register of particulars required by law (art.12 (7))**

This obligation is expressed both under sub article 7 and 10 of article 12. It entails criminal liability on the employer as per art 184. In addition, he may be liable to pay fine punishment for submitting inaccurate information. See art.186 (1) (e).

- **To give certificate of work experience (art.12 (8))**

The prior labor laws, both the civil code and proclamation no 64/68 had provided that the certificate shall be given whenever the contract of employment is terminated. However, the present proclamation gives the employee the right to request the certificate of work experience either during or up on termination of the contract of employment.

The other important thing to mention is the fact that the previous labor proclamation had provided that the certificate in addition to stating the type of work the employee performed, the length of service and the wages s/he was earning may state the reason why the employment is terminated, which is properly quoted as "testimonial reference". However, the existing and effective proclamation cut out the need to mention testimonial reference. This amendment seems to hold the reason that suggesting the behaviors of employees would endanger their future carrier and can be regarded as a double jeopardy. Nevertheless, since the proclamation neither forbidden nor permitted including testimonial references everything lies on the employer and employees wish to include it or not.

- **Not to discriminate against female workers in matters of remuneration (art.14 (1)(b))**

Discrimination on the bases of sex, nationality, religion, political outlook etc. is generally prohibited under sub article (f) of article 14(1). However, in consideration of the past oppressions towards females the law separately prohibited discrimination against them. The discrimination is prohibited not only because females were disfavored previously, but also the discrimination doesn't coincide with the main labor principle which says "similar payment for similar work". In addition, the proclamation under article 87(1) also states that discrimination

against women as to payment & employment is prohibited. Far more seriously, the basic law to all the laws of the country, i.e. the constitution also under article 42(1) (d) enshrine that women are entitled for similar payment in similar works.

- **Not to interfere with the right of collection or association (art.14 (1) (d))**

It is highly prohibited to intervene with the unionization right of employees in any way. The international conventions such as the universal declaration of HR under article 23(4), ICCPR under article 8 also provide the right to assemble. Our constitution also under article 42(1) (a) provides the right to form a union.

- **Not to make the employee work in life jeopardizing working environment (art.14 (1)(e))**

This obligation is similar to the one provided under article 12(4) the employer cannot claim that the employee has not carried out the obligation to work, when the employee hesitates to work in a life jeopardizing work environment. An extension of this obligation of the employer is also dealt under article 92.

- **Not to discriminate between workers on the bases of race, sex, age, color, religion etc (art.14 (1) (f))**

This obligation is the reflection of article 25 of the FEDRE constitution. The bases of discriminations are listed illustratively that labor relation boards and court may add other bases that are mentioned in international conventions with regard to physical disabilities and diseases. Something to underscore here is weather discrimination before the contract of employment are governed by the labor law or not.

For instance, if the employer declares that s/he doesn't hire HIV victims, would we dare to apply the labor law? The civil service law under article 13(1) clearly avoids this problem by stating that discrimination shall not be made against those who are in search of work and those who are in work. The labor law has already settled that the law is applicable after making sure the existence of labor relation or existence of employment contract under article 3(1). Thus, this law doesn't apply to what happens prior to the formation of the contract. In another words, the labor law doesn't cover or regulate discriminations occurring in the course of

hiring. Nonetheless, this doesn't mean those persons can't bring suit based on other laws. However, article 87(1) especially protects women from discrimination either prior to employment or during employment. Furthermore, proclamation no 568/2000 a proclamation for employment right of physically disabled persons-provides under article 2(2) cum 4 that employers shall not make discrimination on the bases of physical disablement during hire or after hire.

7.5. Employer duties-Health, Safety and welfare

Employer has the following duties regarding health, safety and welfare of employee:

- **To keep occupational safety and health (art.12 (5))**

This obligation is imposed on the employer in consideration of his economic position and on the supposition that the employer may add the value s/he expends to observe the obligation on the products of its firm. See art. 103-112. the non-observance of this obligation entails fine punishment on the employer. See art. 186(1) (a), article 92-94 and article 95-112.

- **To defray the cost of medical examination (art.12 (6))**

Here the medical examination is not a normal one in the sense that it will be made whenever law or authority orders so. These kinds of examinations are infrequently held and it is one that won't be taken by the employee or employers wish, rather by the order of government. So, it has some kind of public interest behind it.

One instance could be to control the spread of epidemic disease. With regard to this the employee has no right to refuse the examination as per article 14 (2) (e). In addition, if the employee refuses the examination the employer as per article 27 (1) (i) has the power to terminate the contract of employment without notice. Here it is important to note that this is an exception to what is indicated to the civil code under article 20 (1).

7.6. Termination of the employment contract

We have already seen that a contract after it's formed may be modified and suspended. Moreover, the final fate of every employment contract is termination. It will be terminated because unlike contract of marriage it will not be concluded for life time span. Even in case of indefinite period of contract of employment, the parties agree only to maintain the relation up to where possibilities could take them and of course, retirement. However, this doesn't mean

that contract of employment is a contract in which one party may cancel/ terminate the relationship as s/he wishes.

Once it is formed legally it will also have its own legal grounds to terminate. Actually, in countries that adopt capitalism like USA the contractual employment relation lies on the will of the employer. In this "at will employment "system the employee may at any time for any reason may terminate contract employment and same holds also true for employers. In many developing countries like Ethiopia the grounds employers may terminate contract of employment are only statutorily provided. Many employer associations and federations protested such statutory limitation during the enactment of the previous labor law. They said in modern democracy even a spouse in a marriage may terminate the contract of marriage without having a reason, so it is very undemocratic to limit grounds of termination to employers.

Even if comparing contract of marriage with contract of employment is ridiculous, giving employers the right to terminate contract of employment whenever they want and for whatever reason jeopardize the job security of employees in the country. Mostly employees in under developed countries start family life hoping that their income remains sustainable. So, in such countries letting employers to terminate contract of employment at any time for any reason is to contribute to social insecurity.

The government also believed that the end of slavery could be assured when employers terminate contract of employment in legally prescribed ground. Thus, it was for these reasons that the government stated under article 42 that any kind of termination either by the employer or employee remains unlawful unless it is made in accordance of the statutory requirements.

Contract of employment can be terminated in four ways;

- By the law
- By collective agreement
- By bilateral agreement of the parties
- By either of the parties unilaterally

As we have already discussed, amalgamation, division or transfer of ownership does not amount termination.

It is also important to note also that in principle contract of employment shall be terminated by giving a prior notice, but exceptionally provides that in case of art 24, 25, 27 and 32 the obligation to give prior notice is relived.

A. Termination of contract of employment by the law

Contract of employment may be terminated by the operation of the law and the grounds are;-

- ✓ **On the expiry of contractual period or the completion of the work (art.24 (1))**

This is related with art 10 and it is obvious that a contract of employment for a definite period of time or piece work will terminate up on the expiry of the contractual period or the work. How do you see this in line with art 35(2)?

- ✓ **On the death or retirement of the employee (art.24 (2 & 3))**

Pursuant to art 1 of the civil code the human person is subject of rights & duties from birth to death. Thus, every contract of employment terminates up on death of employees.

What do you think happens in case the employer dies? Consider the situation when the employer is an individual or an undertaking.

Concerning retirement age, you shall consult proclamation no 714/2003 and 715/2003, proclamation for civil servants and employees in non-governmental organizations respectively. Compare with art 85 and 86 of the federal civil service proclamation?

- ✓ **On the winding up of the undertaking's operation due to bankruptcy or any other reason and the inability of the employee to work due to partial or total permanent incapacity. Art.24 (5)**

Here note that the phrase any other cause may include article 18(5) & (6) cum 21(2). And that while incapacity includes both physical disablement and mental deficiency the Amharic version of the proclamation translates incapacity only relating to physical disablement.

B. Termination of contract of employment by the bilateral agreement of the parties.

As individuals create contract by their agreement, they can also extinguish their contract by agreement. Contracts also remain legally binding as long as the parties continue in agreement. The only requirement to terminate contract of employment by agreement is to make the agreement in a written form. This indicates that even if the agreement was not made in a written form it can only be terminated by the written agreement of both parties.

Here we have to note that the employee cannot enter into contract of employment agreeing not to exercise some rights and even if he agrees to waive some of his rights but start to exercise them after the contract, the employer cannot terminate the contract saying that the employee has infringed contractual terms. Because from the beginning an agreement to wave ones right does not have a legally binding effect. Those kinds of agreements or employment contracts are usually nick named as "yellow-dog-employment contracts"

C. Termination of contract of employment by the unilateral initiation of the employer

In addition to termination by the law and the bilateral agreement of the parties, contract of employment may also be terminated by the unilateral initiation of either of the parties. When the employer terminates the contract of employment by his own initiation the law calls it firing or dismissal. And when the employee terminates the contract by his own initiation the law calls it leaving or resignation. The law does not look dismissal and resignation in the same way.

Dismissal shall be made based on sufficiently reasonably grounds and these sufficiently reasonable grounds are those that the law statutorily provides or those that may be provided by collective agreement. However, the employee in principle does have the right to leave without having or stating any reason even for an unreasonable ground. Under normal circumstances both in case of dismissal and resignation prior notice is supposed to be given.

In case of dismissal the employer shall give a prior notice of termination up to 3 months to the maximum whereas in case of resignation employees are only obliged to give a prior notice of up to 30 days. This difference seems to connote that finding a job is hard and difficult than finding a worker. In addition, the difference seems to maintain the principle of labor law i.e. job security. Furthermore, it may also be construed as a protection to the right of employees to

work. Thus, the law protects employee's right to work by guarantying the right to resign without any reason on the one hand and by forbidding employers from dismissing employees without legitimate ground on the other hand. Generally, employers may unilaterally terminate contract of employment on three fundamental grounds;

- **Based on the employees conduct or disposition**
- **Based on the employees ability to work**
- **Based on the organizational or operational requirements.**

With regard to the first ground the employer is empowered with a special right to terminate contract of employment without notice. However, when he terminates contract of employment on the second and third ground, he is required to observe the procedures of prior notice. Except for these provided grounds the employer cannot terminate contract of employment.

If the employer terminates the contract of employment for some other reason or ground than those provided by the law that will entail different civil and criminal liabilities like reinstatement, severance payment, compensation and fine punishment. The employer cannot also terminate contract of employment for the only reason that the employee exercises his rights because if the employer does so he will face both civil and criminal liability as per art 43 and 184(2) (d).

The basic rights of an employee include the right to form a union and be part, the right to seek or hold office as a workers representative, the right to sue the employer or the right to participate in judicial or other proceedings and the right not to be discriminated based on nationality, sex, religion, political outlook, marital status, race, family responsibility, color, pregnancy, lineage line, etc. see art.26 (2) of the labor proc.

Before jumping on to discuss summary and ordinary dismissal by the initiation of the employer lets first see the various precautions the employer is expected to take before terminating the contract of the employee.

- **Things employers shall observe during termination of contract of employment**

First and for most, before terminating the contract of employment the employer should make proper investigation and examination. Since to dismiss an employee is a fundamental decision

the employer has to make sure that the conduct of the employee suffice termination in accordance of the law, collective agreement or work rules.

In consideration of the time that the investigation as to the commission of a certain act or offence may take, the law under article 27(4) provides that collective agreement may provide a time limit for investigation that may not exceed 30 days with in which the employee remains suspended. Actually, the collective agreement is supposed to determine many things such as what kind of acts or offences amount a ground of suspension, what happens when the employee after suspension is found innocent, will he be paid of his wage for the period he was suspended if he is found innocent?

The Federal Civil Service Proclamation is clear with regard to such issues. For instance; it provides the reason why a servant may be suspended when he is suspected of disciplinary offence under article 70(1). It also provides that if the employee is found innocent after investigation held during suspension, he will be paid of his wage for the period of suspension. Thus, concerning employees under the labor proclamation collective agreements have to determine all those issues.

What if collective agreement fails to provide ground of suspension or what if it fails to provide that the employee who is found innocent of the alleged offence shall be paid of his wage for the period he was suspended?

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In such case pursuant to article 27(4) employers cannot suspended an employee for a period of more than 30 days and in case the employee is suspended & found innocent after the investigation since employers should be careful of not suspending their employee for every simple reason they shall be obliged to pay wage for the period of suspension. This basically go in line with what is indicated in article 54(2), an employee shall not lose his right to wage if work wasn't done because of fault not coming from his side.

Secondly, employers during dismissing an employee shall observe the procedure of rendering a written notice of termination involving the reason and the date the termination commences. See art.27 (2).

What is the deference between notice of termination and prior notice of termination?

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Actually, notice of termination is a notice written by the employer explaining the reason the contract is terminated and that the employee is dismissed from a specified day which may also be the day of the reception of the notice. The reason that notice of termination is required to be in a written form is because it serves as documentary evidence in proving the reason the employee is dismissed. Thus, employers can't dismiss without notice orally and even if they do an employee should request notice of termination.

Note also that the burden proving that the contract of employment is terminated is the employee's burden while the burden of proving lawful termination is the employers. Here, it is important to note that an employer can't make the termination to have retroactive effect. I.e. he can't write in the notice of termination a date that mention the effective date of termination as one proceeding the date of reception.

Can the employer declare that the termination of contract of employment take effect from the day the employee was suspended for the purpose of investigating the offence he is finally ascertained to have committed?

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No, because every minutes and days do have effect on employees' interests. On top of this if the employer is allowed to give his termination a retroactive effect it would be mixing the ground of suspension and termination. If suspicion does have the effect of suspension then only termination shall have the effect of termination.

Thirdly, the employer is expected to observe 30 working day period of limitation provided under article 27(3). Since the employees should not worry always about the time or day the employer could terminate the contract of employment for something they have done once in their stay the law orders the employer to decide to terminate or not within 30 working days from the day he knew the commission of an offence. Does hearing that the employee has committed a certain offence amount knowledge/ what if an employer after he heard of the offence made an investigation for one month? See cassation decision file no.53358, vol.9.

Here, it is important to underscore the deference between civil cases period of limitation (e.g. see article 1845) and period of limitation for labor cases. Period of limitation of civil cases is a period for bringing a claim before the court the legality of which becomes ineffective for failure of exercising it in duly prescribed time.

Generally, a right that is not exercised in due time usually lapses. This is because the law envisages the inconvenience of losing a certain property by someone who actually doesn't own it legally but possess it on behalf of someone who owns it and who doesn't claim to possess it. This means, the law supports someone who uses a certain property without being an owner from somebody who doesn't use his property being an owner. However, the period of limitation for labor case is not a period for bringing a claim before a court of law rather a period to use once right without the need to go to court for approval.

a. Termination without notice (summary dismissal)

As we have already said earlier employers are empowered with a special right to terminate contract of employment without notice on grounds related to the employees conduct or disposition. Unless parties to employment contract observe their respective duties industrial peace can never be achieved. Thus, the law in view of maintaining industrial peace statutorily provides civil liabilities and criminal punishments which regulate misconducts.

Just like the grounds of suspension, the grounds of termination are not also limited to those provided under the law. Rather other offences that may be stipulated in a collective agreement can also serve as ground of termination without notice. See the phrase which reads "unless otherwise determined by a collective agreement…" under article 27(1) and article 27(1) (k).

The grounds of termination without notice by the unilateral initiation of the employer, as provided by the law, are;-

- ✓ **Tardiness or absence from work**

The primary ground that may result dismissal from work without notice is tardiness or absence from work. We have seen under article 13(1) & (4) that employees are obliged to perform their work in a fit physical and mental condition personally. This indicates the obligation not to be late, rather to report for work punctually. The employer before terminating the contract based on this ground he has to make sure that both the absence and tardiness are despite warning in writing. Both the absence and tardiness are repeated.

With regard to the repetition, the law is clear as to what amounts to repeated absence i.e. absence for five days in six months. But the law tolerates repeated tardiness up to eight times in six months.

For how many days do you think an employee could be absent from work with a justifiable reason?

- ✓ **Breach of trust and misappropriation**

The other ground that gives the employer the right to terminate contract of employment without notice is the deceitful or fraudulent conduct of the employee. As you have learned in your law of contract course fraud is one ground of invalidation of contract. Basically, there is no tangible difference between deceit and fraud. As you may see article 1704 of the civil code also use these words interchangeably.

What do you think happens if an employee commits a deceitful act during hire or what if the employee applied a forged certificate of degree or work experience and the employer identify it after the employment? See cassation decision file no. 39543, vol.8.

What if an employer finds out that, without any express permission, his employee is working for another person while at the same time s/he is employed for him? See cassation decision file no.41767, vol.9. In addition to the deceitful practices, an employee who misappropriates

the property or fund of the employer with the intent to enrich himself or a third party will also be dismissed without notice.

What do you think happens if the employee misappropriated a needle from a needle company?

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When an employer proves that the employee has misappropriated something, shall s/he also prove whether the misappropriation was for the employees or another person's enrichment? See cassation decision file no.39118, vol.8. Furthermore, if an employee intentionally or with a gross negligence causes damage to the property of the employer he will be dismissed without notice as per article 27(1) (h). This is related to employee's obligation to handle work instruments and tools carefully. Therefore, we can say that employees are always expected to work with honesty and diligence.

Similarly, when an employee work below his capacity and product quality and quantity gets persistently below what's agreed in the contract or collective agreement the employer can out rightly dismiss the employee without notice as per article 27(1) (e). Generally, honesty and diligence are the prime elements of contract of employment and employees conduct should never be contrary to breach of trust.

- ✓ **Causing brawls or quarrels at the place of work.**

Here, the employer has to weigh the gravity of the case before dismissing the employee without notice. However, still we don't have the yardstick to measure the grave nature of the brawl or quarrel. So, the employer can take the law in to his hands using this loophole in the proclamation. In addition, courts may come up with inconsistent judgments as they may hold different perception as to what amounts to grave brawl or quarrel. Anyways before terminating the contract the employer is expected to analyze three things.

First, that the brawl or quarrel occurred at the place of work. Second, identify the exact employee who invoked the brawl or quarrel from other employees who have participated in the brawl or quarrel. Third, the gravity of the brawl or quarrel.

Is a quarrel that occurred 2 or 3 meters around the compound or fence of the company between employees a quarrel at the place of work? See cassation decision file no.23205.

What if the employees usually carry out their job outside their organization's compound?

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✓ **Criminal liability of employees.**

With regard to this the law assumes two situations. The first is when the employee is held liable for a certain offence the commission of which incapacitates the employee to remain in his/her post. For instance, if the employee is an accountant and unfortunately criminally convicted for breach of trust, the law gives the employer the right to terminate the contract without notice even if the crime was not committed on him/her. See art.27 (1) (g)

The second is when an employee is imprisoned for more than 30 days. In such case, even when the crime does not relate to the post he holds in the employers undertaking the later is empowered to terminate the contract as per article 27(1) (j). On top of the above kinds of criminal liability, pursuant to art 27(1) (i) commission of any of the acts provided under article 14(2) does also have the effect of termination without notice.

b. Termination with notice or ordinary dismissal

As we have discussed in our previous session rendering prior notice to the other party during termination is in principle a necessary requirement. However, the law in consideration of the different nature or grounds of termination takes off the obligation of serving prior notice in case of termination by the operation of the law, termination by the bilateral agreement of the parties, and termination by the unilateral initiation of the employer or the employee without notice. In case of article 24 and 25 the law assumes that both parties are aware of the time of termination and thus there is no need of exchanging a notice as to the time of termination.

On the other hand, in case of article 27 and 32 the law assumes that since the law devised the concept of prior notice to protect employers and employees in good faith, wrong doers in article 27 and 32 shall not enjoy the protection. Thus, prior notice is a requirement only in

case of article 28, 29 and 31. However, here something we can infer is even if serving prior notice is a principle the exceptional circumstances in which the principle will be disregarded are far more in number. Thus, because of this some may even counter argue that in principle it is not necessary to serve a prior notice.

If we deal with prior notice this much, lets now move on to ordinary dismissal. As we have seen earlier employers by their own initiation can terminate the contract of employment without notice with regard to those grounds we have seen in article 27 and they can terminate contract of employment with notice in connection to the grounds provided under article 28 and 29. The grounds prescribed under article 28 can generally be categorized in to two; i.e. grounds of termination in relation to

Summary

Contract of employment is defined as a contract whereby a natural person agrees directly or indirectly to perform work for and under the authority of an employer for definite or indefinite period or piece work in return for wage. Contract of employment as a form of contract expected to comply with mandatory provisions in the civil code regarding essential elements of crime such as form, capacity, consent & object.

Since it is a contract, employee and employers have duties and rights prescribed under labor proclamation. The major duty of employee is to perform the work specified in the employment Contract and the major right employee has is to receive remuneration or wage stated in the employment contract. The rights of employee are at the same time, duties of employer & Vis versa.

Contract of employment can be terminated on the grounds of based on the employees conduct or disposition, based on the employees' ability to wok & based on the organizational or operational requirements.

ARBA MINCH UNIVERSITY

COLLEGE OF BUSINESS AND ECONOMICS

Business Law Course Assignment

1. Students name_____
2. Id. No_____
3. Program_____
4. Department_____
5. Course Title_____
6. Course Code _____
7. Town(City)_____
8. Points Number_____
9. Tutor's Name and Signature_____

Tutor marked Assignment for: Business Law Course

This is a tutor marked assignment you are expected to do on your own. It accounts 30% of your total mark. The tutor marked assignment should be completed and submitted to Arba Minch University distance education coordination office for evaluation.

Any questions in the course that you have not been able to understand should be stated on a separate sheet of paper and attached to this assignment. Your tutor will clarify them for you during the tutorial program.

After completing this assignment, be certain to write your Name, Id No, department and address on the first page.

Q1. Human beings are different from other creatures in their ability to live under a certain rules and regulations. Life wouldn't be the same as we know it today had law not been in place. Based on chapter one, try to answer the following questions.

a) What differentiates law from other social norms and rules as well as religious commandments?

b) What are the functions of the law?

Q2. Law regulates behaviors. And law wouldn't be meaningful with out the existence of its subjects. The subjects of the law bear rights and assume responsibilities or duties. So the law extensively deals with entities which can have a right and assume an obligation.

a) Discuss the entities which are recognized as the subjects of the law in the Ethiopian civil law?

b) Elaborate the attributes of being considered as a person before the law?

Q.3.The father of a child died before his son was born. The child was born on Thursday, November 3, 2009 after 3 months after the death of his father. Unfortunately the mother of the child also died after 12 hours after she gave birth to the child. Now a contention arises as to the right of the newly born child regarding his right to inherit his parents. Give your reasoned advice to the following questions.

a) Can the child inherit his father and mother? Why?

b) Assume the child dies at the 24^{th} hour after his birth. Can he still inherit his father and mother? Why?

Q4. Mr. Kebede is business man who has engaged in coffee export after buying the coffee from the producers. The child of Mr. Kebede, Biniam who is only 15 years of old, concluded a

contract of sale of 100 quintals of coffee with another exporter of coffee Mr. Abebe. Based on this hypothetical case, answer the following questions.

a) Mr. Abebe wants to invalidate the contract on the ground of Biniam's age. Can he do that or not? Why?

b) What about Mr. Kebede? On what ground?

Q5. Business activities are highly dependant up on promises. The traders usually exchange promises to do, not to do or to give something to each other. Contract law aspires to guide the process of formation of promises as well as ensure their performance.

a) Explain the requirements for the formation of a valid contract?

b) What will be the fate of a contract which is formed with out fulfilling one or more requirements of the law?

Q.6. Arba Minch Hotel concluded a contract with Azo Share Company. The company agreed to deliver 1000kg of meat to Arba Minch Hotel every week. The two contracting parties have agreed that Arba Minch Hotel is going to pay the price of the meat with in a year subject to an interest. However the hotel and the company failed to specify the rate of interest, place of performance, specific time of performance etc. so based on the above hypothetical case answer the following questions.

a) Where is the place of performance of the contract?

b) When is the time of performance?

c) How much is the interest rate?

d) To whom and by whom performance shall be made?

Q.7. Contract is a juridical act. The usual effect of contract is performance. In the normal course of things the contracting parties are expected to discharge their contractual obligations. However for different reasons one of the contracting parties may totally or partially fail to discharge his/her obligations. In this case there are remedies available to the aggrieved party to get justice.

The legal remedies available for the aggrieved party are specific performance, cancellation and/or damages. Nevertheless before resorting to these legal remedies notice is required. So I would like you to answer the following questions which are related with the above paragraph.

a) What is notice? What are the purposes of notice? And what are the circumstances where notice may not be required?

b) Elaborate the requirements which must be fulfilled in order to force the non-performing party to discharge his/ her obligation?

c) Judicial cancellation is the usual way of cancellation. However there are circumstances where the party may unilaterally cancel the contract. Explain

d) In addition or alternative to the above remedies, damages may be awarded to the aggrieved party if he incurs loss due to the non-performance of the other contracting party. However there is one exception where damages may not be given to the aggrieved party even if he incurs loss. Discuss.

Q.8. Contract of sale is a special kind of contract which basically governs the sell of corporeal (tangible) movables and an intrinsic part of immovable properties which can be sold independently. Even though it is quite difficult to discus all obligations of the seller and the buyer, the law enumerates some of the major obligations of the seller and the buyer. Discuss these obligations of the seller and the buyer.

Q.9. Based on your knowledge of law of agency:

A. state the duties of principal

B. state the duties of agent.

Q.10. Agency is a legal relationship which is based on trust. The agent has the duty of "at most good faith". This duty of the agent is in one way or another expressed in the civil code of the empire of Ethiopia. Explain the duties as well as right of an agent in agency relation ship.

Q.11. Business persons, property owners or any other persons who have an insurable interest might have inevitably been worried about loss, damage, theft and the like of their business or

property, unless a mechanism didn't exist to overcome this risk. However the society has devised a mechanism to compensate the loss, theft or damage of a property through insurance service. Insurance eases the burden of business persons, individuals or organizations by ensuring that the insurance company (insurer) will refund (compensate) the property insured in case the risk materializes. Hence business persons and owners undertake their business activities and affairs with out a fear which ultimately benefits the whole society. Based on the above concept, answer the following questions.

a) Elaborate the definition and nature of insurance?

b) What are the purposes of insurance?

c) Discuss the types of insurance in the Ethiopian civil law?

Q.12. Many individuals are keen to start their own business. Others need to learn about the legal framework which governs traders, business and business organization to expand their business or avoid risks which arise from the ignorance of the law. Having carefully study chapter seven of the material answer the following questions.

a) Who are traders in Ethiopia?

b) Define a business and explain its elements?

c) Define business organization in general and identify the features of each types of business organization in Ethiopia?

Q.13. Explain what do you understand about the nature of negotiable instruments, and their types in Ethiopia?

Q. 14. What is contract administration? Explain briefly.

Q.15. Discuss the duties and rights of employee and employer under Ethiopian labor proclamation.