LAW OF SALES

Chapter One

1.1 Introduction

- An overall understanding of the law of sales is a condition to avoid ambiguity in the detailed discussion of the course.
- The general information about the law of sales will give emphasis on the subject matter:
  - scope and function of law of sales.
  - In discussing the subject matter of law of sales the goods and price will be emphasized.
  - Different classifications of goods and their recognition under the Ethiopian law of contract of sale will be considered.
  - Price expressed in money as a subject matter of law of sales will also be discussed.
- In addition to the subject matter of law of sales:
  - the scope and function of law of sales will also be discussed.
  - In discussing the function and scope of law of sales social interaction which is regulated by law of sales and its very purpose of facilitating movement of goods will be addressed.

❖ Therefore, upon the successful completion of this chapter you are generally expected to

- recognize the subject matter of law of sales
- delimit the scope of law of sales
- list the functions of law of sales
- put the role of law of sales and sales contract in the society

1.2 Definitions of Sale and Law of Sales

❖ Sale:-

- In the financial markets, a sale can also refer to an agreement that a buyer and seller make regarding the price of a security.
- Regardless of the context, a sale is essentially a contract between the buyer and the seller of the particular good or service in question.
- Sale is: the act of selling *specifically* **:** the transfer of ownership and title to property from one person to another for a price
- See also Art 2166 of the C.C

❖ **Law of sales is;**

- a branch of business law that regulates the relationship between the buyer and seller of goods.
- It is a collection of rules pertaining to the formation, performance and breach of contract of sale.
- It imposes certain duties on the buyers and sellers the breach of which gives rise to remedy.
  - When the dispute between buyer and seller result in litigation before the court of law,

- the court applies law of sales and general contract provisions to adjudicate the dispute.
- Article 1676 of the civil code clearly indicates that the general contract provisions are applicable to contracts including contract of sale in a way they do not contradict with special provisions.

- Functions of Law of Sales

1.3 The Subject matter of law of sales

❖ Subject matter of law of sales is paramount importance in understanding the general nature of law of sales contract, existing goods, goods belonging to third parties, future goods, contingent goods, and price.

❖ Principally the subject matter of sale is "goods".

➢ Goods are generally things such as chair, desk, electricity which can be appropriated by human beings.

➢ Although goods can be classified into:

- existing goods, future goods and contingent goods.

❖ Although there is no such classification in the Ethiopian law of contract of sales

➢ Article 2266 and 2267 shows that it is corporeal chattels which are under the ambit of contract of sale.

➢ In addition, goods price is also the subject of law of sales.

➢ The parties must define the subject of their dealings with precision.

❖ The subject of contract of sale, according to Article 2270,

➢ could be existing thing, future thing or things belonging to third party.

❖ *Art. 2270. - Subject of sale.*

➢ *A sale may relate to an existing thing belonging to the seller.*

➢ *A sale may also relate to a future thing which the seller undertakes to make for delivery to the buyer.*

➢ *It may also relate to a thing belonging to a third party.*

❖ Existing goods

➢ Existing goods are goods, which have physical existence.

➢ In addition to physical existence,

- the goods should be in the seller's ownership or possession when the contract is concluded.
- It does not matter that the thing is in possession of third party.
- The owner is considered to have general property right to sell the goods.

❖ **Goods belonging to third party**

- The seller may sell the thing that belongs to the third party at the conclusion of the contract.
- Things belonging to third parties are existing goods.
- Even a person who is not the owner and who does not have actual control can also conclude sales contract which belongs to the third party.
  - An agent can be the best example of this
  - when he agrees to sell a thing which is under the ownership and possession of the seller.

❖ **Future goods**

- Future goods are goods which do not exist at the time of the contract or
- are not in the hands of the seller although they do have material existence.
- If for example Mr. Belay agreed to sell milk but the milk,
- which his cow may yield during the coming year.

❖ **Contingent goods**

- There are also special future goods, which are called contingent goods.

- Contingent goods are future goods which the seller acquires depending on an uncertain contingency. The specialty with contingent goods is that the seller may or may not acquire the goods depending on the condition.

Can the parties make non-existent goods the subject matter of contract of sale?

The answer seems negative. The subject matter of contract sale must only be existing thing, future thing or things belonging to third party. Thus, if Naol agreed to sell to Becky his tape recorder, which was destroyed by fire yesterday, their contract is null and void. To begin with it might be said that the object of the contract is impossible. A contract whose object is impossible is said to be void contract. In addition it is moot if, mistake of the existence of the object can be valid ground to invalidate the contract. Doctor Girma in their commentary on general contract under the Ethiopian law has put inexistence of the object of the contract to make the contract invalid for the object is impossible and there is mistake as to the existence of the object of the contract.

However, contrary position seems to exist under Article 2326 that deals with things under voyage. This provision transfers risk, even when the thing does not exist at the time of the conclusion of the contract. Risk is transferred in cases where the seller did not and should not have known that the thing was damaged or perished. Transferring risk for a thing, which does not exist at the time of the conclusion of a contract, connotes the formation of a contract even when the thing does not exist.

Then this might lead us to conclude that sales contract may relate to things which do not exist at the time of the formation of the contract as is indicated under things under voyage.

In addition to goods price expressed in the form money is also the subject matter of contract of sale. The parties to the contract of sale must specify the price of the thing sold. If the parties do not determine the price of the thing or if the price of the thing is not determinable, there is no contract of sale. The parties may make the price determinable by referring to the arbitration of the third party according to Art.2271.

Art. 2271. Price estimated by third party
(1) The price may be referred to the arbitration of a third party.
(2) There shall be no sale where such third party refuses or is unable to make an estimate.

According to this article, to say that a contract of sale is formed the party must specify the price in their contract or refer to the arbitration of the third party. And the price referred to the arbitration of the third party must be determined as agreed. Otherwise, there would not be formation of the contract of sale. However, it should be noted that if the price is determined in a way it can be easily ascertained by judicial interpretation as in Articles 2305 - 2308 of the civil code, the formation of the contract cannot be questioned.

For example, Aden agreed to buy a used computer from Bushra for satisfactory price without determining the price of the computer. Thus, Eden agreed to pay the price determined by Guled who is a mechanic. Aden has taken delivery of the computer. Unfortunately, Guled died before he determined the price in a car accident. Thus, there is no contract of sale in this hypothetical example as the arbitrator is unable to determine the price of the used computer. However, Aden agreed to pay a price usually charged by the seller, it can be determined by referring article 2307.

? Can the parties refer the determination of the price to the market force? For example, can the party agree that the price would be the market price to be determined at some future date?

In some jurisdictions, for example in India, the parties may refer the price to be determined by a magazine which contains a list of items and their price and which is published regularly. The same is true in Ethiopia. For example, in Ethiopia, Ethiopian Tea and Coffee Authority, announces the price of coffee through Ethiopian Radio. Thus, the parties can agree that their price is the price to be announced by Ethiopian Tea and Coffee Authority. Still, there will be no contract of sale if the authority fails to announce the price on radio. It is not necessary that the third party be a natural person.

Price of the thing sold can also be determinable when the thing has a current price or market price or when the seller normally deals in the thing sold. In such situation, the price would be the market price or the price normally charged by the seller.

- **Chapter I: Introduction to Law of Sales**
  - Introduction to Law of Sales
  - Definitions of Sale and Law of Sales
  - Functions of Law of Sales

2 Function and scope of law of sales

Functions of Law of Sales

Having seen the subject matter of law of sales, it is worth discussing the function of law of sales and its scope of application. In discussing the function and scope of law of sales, the role which the law of sales plays, the transactions which are under the ambit of law of sales and the things or goods which can be and cannot be subject of law of sales will be discussed. Hence this sections aims at acquainting you with

> The ability to identify what the function of law of sales is

> The ability to demarcate the function of law of sales in governing transactions

> The ability to list major functions of law of sales

Generally, the function of law is fashioning the social behavior in a desired manner. In so doing laws are categorized into different s ubj e ct matters trying to regulate

certain social behaviors in a desired manner. As one category of laws on the basis of subject matter, law of sales does have function, which aims at shaping the social interaction in certain area of contractual relationship. That contractual behavior is generally encouraging sales contract in a way it is in light with public policy. It does also provide gap filling provisions in case the contracting parties should fail to agree on all the terms of the contract.

As it is known the society does not produce all kinds of goods that it consumes and it does not provide all the services by itself. It produces some goods and obtains the rest through trade. In primitive society, people used to barter one kind of goods for another. With the emergence of modern money, people began exchanging goods by using money as medium of transaction. As a result, the agreements to exchange goods through the medium of money and the rules regulating these agreements emerged. These agreements are contracts of sale and the rules regulating them are Law of sales.

Law of sales contract, therefore, governs and helps the movement of goods from the original maker to the final user to fulfill social wants. The movement of goods from the original maker to the ultimate user through the marketing process is under the ambit law of sales contract.

Law of sales as a law of contract is expected to have different functions such as regulating the contract. It can regulate the contract by providing mandatory requirement in the definition, formation, performance and remedies and other issues of sales contract. In its regulating role, it takes social interest, public policy into consideration. Accordingly, when the law of sales provides mandatory regulating rules the parties cannot set the rule aside.

It also fills the gap, which might result from on imperfect nature of a contract. As it is known contracting parties cannot predict all the contingencies, which would happen subsequent to the formation of the contract. As the contracting parties may not agree on the term for which there is no agreement, the law of sales plays a role by filling the gap by providing gap-filling provisions.

It also creates conducive environment for optimal reliance by encouraging change of

behavior on possible and probable performance with greater benefit of change of behavior and entitling compensation. It also discourages excessive reliance by using different ways of assessing compensation.

Protecting optimal performance by allowing alternative remedies of non-performance of sales contract is also one of its functions. The remedies are, however, required to be in a way they do not erode certainty and security of transaction and demote cooperation.

The subject matter of contract of sale delimits the scope of contract of sales. The subject matter of law of sales is things. However, all things are not subject of contract of sale. Things, which cannot be appropriated by human beings, cannot be the subject of contract of sale. The thing must be a corporeal chattel pursuant to Article 2267 (1) of the Civil Code. Corporeal chattels are things that have a material existence and can move themselves or be moved by man without losing their individual character. Cumulative reading of 1226 and 1227 connotes that things, which are under the category of goods, are corporeal chattels. Things, which are not corporeal chattels, are not subject of sales would be logical conclusion of the above premises. For example goats sheep, refrigerator, watch, book, pen etc are corporeal chattels while sun moon and stars are not corporeal chattels although they are things.

Intrinsic elements and accessories of corporeal chattels are also under the ambit of contract of sale. Clear connotation of Article 1131, which says, "*Unless otherwise provided, right on or dealings related to, goods shall apply to all intrinsic elements thereof*" *is* testament for the inclusion of intrinsic elements of a subject of sales. Article 1135 also shows that in the absence of clear indication rights on or dealings with regard to certain goods is also applicable to the accessories.

However, some corporeal chattels are excluded from primarily being subject to contract of sale according to Article 2267 (2) of the Civil Code. They are called special corporeal chattels. For examples, airplanes and ships are special corporeal chattels. When the special provisions dealing with the special corporeal chattels are silent, provisions of sales contract and general contract can be applied.

? Can land, building and incorporeal claims such as shares and stocks be a under the scope of contract of sale?

Some things are not corporeal chattels although they can be appropriated by man. Immovable can be appropriated but they are not corporeal chattels as they cannot move by themselves or be moved without losing their individual character. Although the possibility of being appropriated makes them goods, they are not subject to contract of sale for they are not corporeal chattels. The immovable goods under the civil code of Ethiopia are goods such as building and land. In fact, land is not subject to any form of exchange, by which ownership is transferred, as it belongs to the state, nations, nationalities and peoples of Ethiopia pursuant to Article 40 (3).

Things attached to land such as trees, crops and plants are also considered to be corporeal chattels once they are subjected to juridical acts for their separation from the land expressly or implicitly as to the connotation of article 1133(2) of the civil code. Although they are immovable by destination for they are destined to be part of an immovable, they are considered to be movables once they are subjected to juridical acts.

Incorporeal rights, pursuant to Art 1128, in securities to bearer and claims are assimilated to corporeal chattels in the absence of contrary stipulation. Although they do not have material existence, the provision has clearly provided under the title of security to bearer that claims and other incorporeal chattels embodied in securities to bearer to be presumed as corporeal chattels. However, it must be born in mind that such kind of things are not corporeal chattels. It is only by presumption that such goods are assimilated. Intangible things like intellectual property, shares and stocks are also subject of contract of sale corporeal chattels by analogical interpretation, albeit the applicability of special provisions.

Actionable claims, which can be enforced by legal action or suit like debts, are also included under corporeal chattels in certain legal system. The sale of goods act of India of 1930, which was amended in 1963, is an example of such legal systems where actionable claims are subject matter of law of sales contract. Whether such claims are included under the provision of sales contract of Ethiopia might raise a question. Be that as it may, this does not mean that only law of sales is applicable on

such incorporeal chattels. Sales contract is applicable if and only if there is no special and contrary provision.

Natural forces, which have economic value like electricity, are also assimilated to movables once they are mastered by man and put to their use. These natural resources are required to be subjected to appropriation by human beings. Unless they are under the control of human beings or are appropriated, transfer of possession and then ownership will not be possible.

It is also moot if business can be subject matter of sales contract. Business can consist of corporeal and incorporeal chattels. Business may consist of corporeal chattels like chairs, tables, television, tape computer and incorporeal chattels like copy rights, patent rights. It actually mainly consists of good will. Having seen what business is, it is questionable if business can be governed by contract of sale.

Accordingly, movable goods including things like cars, stocks and shares, goods like trade mark, copy rights, patent rights, water, gas, and decree of a court of law are regarded as corporal chattels either by assimilation or by definition. They can be subject of sales contract provided that there is no special contrary provision.

- **?** Do you think that money is a goods and under the scope of law of sales? Why? Why not?
- **?** Assume someone sold older rare coins. Can the transaction be considered as sales contract and can the coin be treated as goods?

3 Summary

It is worth understanding that law of sale is a branch of business law which regulates the relationship between the buyer and seller in a transaction called sales contract. It is a collection of rules with principal subject matter of goods. Goods can be existing goods, future goods, goods belonging to third parties and contingent goods.

Law of sales contract plays an overriding role in helping the society to make exchange as the society cannot produce all what it wants and need by itself. In

addition to this law of sales regulates market, fills contractual gaps, encourage optimal cooperation and performance among its other functions.

The scope of law of sales is limited by its subject matter. Its subject matter is corporeal chattels, intrinsic elements and accessories of corporeal chattels. Special corporeal chattels may sometimes be governed by other special laws. Although immovable is not under the scope of application of law of sales, things like trees, crops and plants on a land can be under the ambit of law of sales.
Actionable claims, natural forces which can be used by human beings and business can be the subject matter of law of sales although it might be arguable to the contrary.

4 Review Questions

1) Do you think that a contract concluded by a person who is not an owner is a valid contract of sale?
2) Discuss the difference between existing goods, goods belonging to third parties, future goods and contingent goods.
3) Discuss the function of law of sales.
4) Are actionable clams subject of contract of sale? Why or why not?
5) Are all things subject matter of law of contract of sale? Why /why not?
6) Is business subject matter of contract? Explain.
7) Discuss the application of general contract provisions on contract of sale.
8) Discuss the application of general contract and sales contract provisions on the sale of special movables.
9) Assume Ato Belay has the right to get one fifth of his father's property? Can he sell his share before the partition and can such transaction be under the jurisdiction of law of sales?
10) Ato Alemu has use right over the business of Zufan. Can his transfer of this right be subject matter of law of sales?

Chapter Two
Contract for Sale of Goods

Introduction to the chapter

In discussing contact for sale of goods a detailed discussion will be made on the main body of law of sales. In doing so 2.1 will be allotted to the definition formation and other related issues. Then performance of contract of sales of movables, transfer of risk under contract of sales of movables, non - performance and its legal effects, remedies in case of non - performance, contracts allied to sale, contract for sales of immovable will be discussed in the various sections of this chapter.

Accordingly, upon the successful completion of this chapter students are expected to:

- have a general understanding of the law of sales
- know the importance of performance of contract
- know the obligation of the parties
- understand the ways by which risk is transferred
- know the meaning of non-performance
- show the normative aspect of remedies of non-performance of contract of sale
- list and distinguish the contracts allied to sale and various forms of contract
- know the special application in the case of sale of immovable

2.1. Definition, formation, and other related issues in the contract for sales of movables

In discussing contract for the sale of goods definition, formation and other related issues will be discussed. In defining law of sales first a comparative analysis will be made with reference to different definitions forwarded by different scholars and different legal systems. The definition of law of sales in the Ethiopian civil code will be presented. Accordingly the general definition of law of sales will be discussed compared with the definition of the term under the Ethiopian law of sales and with each element of the term. Upon successful completion of the chapter on the formation of contract of sales, you are expected to:

- forward different definitions of contract of sale
- pinpoint the distinguishing features of the definitions

> define contract of sales in the civil code

> analyze the terms in the definition of sale in the civil code

> analyze the definition of sales in light with the definition of contract of the general contract provisions

> List the elements for the formation of contract in general

> state the elements for the formation of contract of sale

> analyze the elements for the formation of contract in general and contract of sale

> state the peculiar elements for the formation of contract of sale

> be able to give grounded legal advice as to whether there is valid contract of sales

2.1.1 General definition of contract of sales

So far there is no universally accepted definition of sales contract. The definition of sales contract differs from legal system to legal system. The Roman law which is considered to be the origin of civil law legal system, for example, defined sales as "a contract by which one person becomes bound to deliver a subject to another with the view of transferring the property in consideration of money" this definition seems to include the basic elements. Accordingly sales contract shall be

- a contract
- include a thing as a subject of sale
- consideration expressed in money
- deliver with the purpose of transferring ownership

According, to the Roman law in the absence of the elements, the existence of sales contract is questioned. The French law being similar with the Roman law has also defined sales verbally as: "Sale is a contract by which the one binds himself to deliver a thing and the other to pay for it" Even though this definition has incorporated the three elements that is one party, obligation to deliver a thing and obligation to pay for it, obligation of transferring ownership is for example excluded.

The Napoleon code, which reproduces the traditional meaning under Article 1582 and 1603, shows that the render obligates him to deliver the thing and warrant it. Although the definition doesn't clearly show transfer of ownership and who the render is, Roman times don not have such obligation; the obligation of the render to transfer ownership can be inferred from Article 1599. Hence transfer of ownership is an element of the meaning of sales in the napoleon code unlike the French one.

The German code on the other hand clearly includes the obligation to deliver the thing and procure ownership under Article 433. There seems to be difference in the definition of the Napoleon code and German code in clearly stipulating the obligation

to deliver.

The uniform sales act termed sale of goods as "agreement whereby the seller transfers the property in the goods to the buyer for a consideration called the price". It is not untrue to assert that the requirements of sales of goods in the modern common law have been enshrined under this definition. The uniform commercial code also defines sales as consisting of passing of title from the seller to the buyer. Thus, it is worth noting that neither delivery nor payment is necessary in contract of sale of goods in present sales.

Normally an agreement to sale and contract of sale are different in that agreement to sell does not include conveyance while contract of sale includes conveyance as an intrinsic element of its. In an agreement to sale, the contracting parties agree to sell a certain thing for specified price without making delivery an element of their contract.

Sales contract is generally defined as a "contract whereby one person who is called the render, obligates himself to transfer to another the ownership of a thing, while the other who is the buyer, obligates himself to pay to him its value in money". This definition seems to give the idea of modern sale.

2.1.2. Definition of contract of sales in Ethiopia

Sale is one way by which rights are assigned under the Civil Code of Ethiopia. There are different ways by which rights are assigned in addition to contract of sale. Sale has been defined under Article 2266 of the civil code as *„a contract whereby one of the parties, the seller, undertakes to deliver a thing and transfer its ownership to another party, the buyer, in consideration of a price expressed in money which the buyer undertakes to pay him'.*

The essential characteristic of sale lies in the obligation of the seller to deliver and transfer ownership and in the obligation of the buyer to pay a price. Other obligations of the parties are consequential in the sense that they are implied into

the contract (by law), unless clearly excluded by the agreement of the parties.

Contractual obligations are different from one another both in their nature and effect. For example, in the English law of contracts, obligations are divided into two: conditions and warranties. Conditions are essential terms of the contract and hence determine the nature of the contract. On the other hand, warranties are not essential terms and do not determine the nature of the contract. Moreover, in English law, it is only breach (non performance) of an obligation, which can be characterized as condition that results in the cancellation of the contract. If one of the parties fails to perform one of his obligations and the obligation is a warranty, then the remedy of cancellation is not available as a remedy to the other party.

Ethiopian law is apparently similar to English law of contracts, at least in terms of the above distinction. This is because, under Ethiopian law, it is only fundamental non-performance that results in the cancellation of the contract. Non-performance is fundamental only when it affects the essence (essential terms) of the contract. Non-performance related to a minor obligation of the debtor is remedied by specific performance or damages but not by cancellation. From this one can learn that contractual obligations are different from one another both in their nature and effect. Similarly it is only certain obligations that determine the nature of a given contract. Others may be incidental or non-determinative.

The definitional Article which provides two obligations of the seller and one obligation of the buyer is not intended to deal with all the obligations. The buyer and the seller have additional obligations. For example, the seller, according to Article 2273, has the obligation to warrant against partial or total dispossession and against defects and non-conformities. A question as to why these obligations are not mentioned in Article 2266 may be raised.

This is because the two sets of obligations are different in their nature and effect. The first set of obligations of the seller stated in Article 2266, determine the nature of the contract. That is to mean, in any contract, if the obligation of one party is to deliver a thing and transfer ownership and the obligation of the other is to pay a price, expressed in terms of money, that contract is considered as a contract of sale. That means these obligations are preconditions for the existence of contract of sale.

On the other hand, the other set of obligations stated in Article 2273 are not essential obligations. The parties can for example expressly agree that the seller does not have the obligation to make such warranties. The contract, however, does not change its nature. It is still a contract of sale. However, unless expressly and completely excluded by the parties, the seller has the obligation to warrant against partial or total dispossession and against defects and non-conformities. Hence, we can call these obligations as incidental, or non-essential or implied or consequential obligations. In a contract of sale, the obligations that are stated under Article 2273 are known as incidents of sale. Whereas those stated in Article 2266 are essential; in their absence, the contract could be anything but not sale. There are other essential elements of the definition of sales contract. Consider the following.

2.1.2.1. It is Contract

Among the elements of the definition of sale its being contract is one. Contract of sale is a special kind of contract. The parties should comply with the essential conditions for the validity of contracts in general. Thus the parties must be capable, that is they should not be minor, insane and infirm, judicially interdicted person, or legally interdicted person.

There must be an offer and acceptance for the formation of sales contract. The consent of the parties, which is expressed through offer and acceptance, should also be free from defect. Mistake, fraud, duress, unconscionable nature of the contract undue influence renders contract of sale invalid. The obligations of both the buyer and the seller must be defined, lawful and possible. If the parties to the contract of sale fail to comply with these requirements the contract would be invalid.

The fact that contract of sale is a contract does not, however, mean that it does not have peculiar natures to which the coverage of general contract is not enough. Contract of sale has certain peculiar characteristics different from the definition of general contract. Such peculiarity can be inferred from the definition. Accordingly, one of its peculiarities is that it must be concluded between two parties, which are called the seller and buyer.

2.1.2.2. Two Parties

There must be two distinct parties to a contract of sale, as a person cannot buy his own goods. But this does not mean that the parties to the contract of sale are only

two individuals. Two persons is the minimum requirement. Thus, if Boron, Becky, and Naol jointly own a refrigerator, they can sell it to Anatoly, Becken, Haweny and Na'ansy. Boron, Becky, and Naol a re sellers and have to discharge the obligation of the seller jointly. Similarly, Anatoly, Becken, Haweny and Na'ansy are buyers and they should jointly pay the price and take delivery of the refrigerator.

These two distinct parties are the buyer and the seller. The seller is the person who assumes the obligation to deliver a thing while the buyer is the person who assumes the obligation to pay money as a price. If, for instance, students of a hostel take meals with a mess run by themselves on cooperative lines, there is no contract of sale as there is no buyer and seller. This is because the students are joint owners of the meals they are consuming. The generally assumed fact is that every student is consuming his own goods on the basis of the understanding that he has to restore what he has consumed to get the mess to continue to provide meals for its members.

However, this does not mean that no sales contract may exist among joint owners with respect to the thing they own jointly. If, for example, Ato Merga and Ato Alem own a house jointly, Ato Alem may sell his share and such juridical act is under the definition of sales contract and both parties can be considered as buyer and seller. What should be born in mind is that whether, in the later example, the joint owners are "part owners" with divisible share in the house.

Sometimes there might be contractual transaction concluded by one party with himself. An agent may possibly sell his car for himself pursuant to Article 2188 although it is subjected to cancellation by the principal. It is questionable if it can be sale contract with the meaning of article 2266 of the civil code.

2.1.2.3. Delivery and Transfer of ownership

The owner of the thing must agree with the other person to deliver and transfer ownership of the thing. A mere agreement to transfer possession cannot be termed as a contract of sale. The seller must transfer or agree to transfer ownership so that contract of sale is concluded. This essential characteristic distinguishes many contracts from contract of sale. For example, in the contract of letting and hiring the owner (the lessor) of a thing delivers the thing to the other person (the lessee) but ownership is not transferred. For example, Mr. X hires a horse with its cart from Mr. Y at 20 Birr per day for a week. Mr. X takes the horse and used it for transporting

certain goods from one place to another. Mr. Y (the owner) did not transfer the ownership to the Mr. X (the lessee) and he did not agree to transfer ownership. In cases of contract of bailment, the owner (the bailor) also delivers the thing to the other person (the bailee). Nevertheless, the owner does not transfer ownership to the bailee. This is because transfer of possession by delivery transfers ownership although transfer of possession does not necessarily show transfer of ownership.

2.1.2.4. The Thing

The definitional provision also puts “things” as an essential element of sale. The subject matter of contract of sale must be “things”. Normally all things cannot be subject matter of sales contract if they cannot be appropriated by human beings. Someone who agrees to sell a moon cannot be said to have concluded contract of sale for the thing is not good because it cannot be appropriated. The word thing shall, accordingly, refer to goods, as it is only goods, which can be possessed and owned.

As far as goods is concerned, there is no direct meaning of goods in the Ethiopian civil code. Be that as it may, the meaning of “goods” can be inferred from different Articles as of 1126. Art 1126 says verbally “All goods are movables or immovable” Although all goods are either movables or immovable all movables or immovable may not be “goods”

Article 1127 of the Civil Code gives the meaning of movables under the title of corporal chattels. According to this provision, things which have material existence and can move themselves or be moved by themselves without losing their individual character” are said to be corporeal chattels. Assimilated incorporeal chattels are also included under things.

If the corporeal chattel is to be manufactured or produced by the person who undertakes to deliver the thing, the main materials for the production of the thing shall be provided by the seller. If the party who is going to receive delivery provides the necessary materials for the production or manufacturing of the thing it is said to be contract of service. The party who is delivering the thing is giving his service not a thing. Article 2269 of the civil code is destined to connote the difference between contract of service and sales contract.

2.1.2.5. The Price

In addition to goods consideration expressed in terms of money is also an essential element of the definition. The consideration for contract of sales must be in cash. This consideration in cash is price. The apparent peculiarity of sales contract from the general contract is the presence of consideration as its element. Thus, a contract of sale must involve consideration in return for transfer of ownership. Consideration normally co nnotes reciprocal obligation of the parties assumed in the contract.

If consideration is required to exist there shall be corresponding obligation and one obligation shall have inducement role on the other corresponding obligation. If there is no consideration, it is a contract of donation not a contract of sale. The basic difference between contract of donation and contract of sale is that in donation there is no consideration while in contract of sale there is consideration.

The price to be paid and the goods to be delivered shall exist as obligation of the buyer and seller. They shall also have inducement relationship, as consideration is one element of sales contract. If the consideration is in kind it is a contract of barter not a contract of sale. Thus, it is essential that money be used us a medium of exchange. Barter in which goods are to be exchanged for goods is not sale albeit its being moot if it is contract at all. There must be price in terms of money. However, this does not take as to the extreme that negotiable instruments like bills of exchange or check cannot be used.

? Can you say there is a contract of sale if the party agreed that part of the price should be paid in kind?

Abebe sold his Acer® desktop computer to Belete. According to their agreement Bekele would deliver two 21 inch Sony® TV sets and 1500 Birr as a consideration for the computer. Abebe has taken delivery of the TV sets and Belete has also taken delivery of the Computer.

? Is there contract of sale between Abebe and Belete?

Sale and agreement to sell are treated separately in certain countries albeit both might be included in contract of sale. Contract of sales is sometimes considered to

be a generic term including sale and an “agreement to sell”. Sale refers to contract of sale where the goods are transferred to the buyer immediately at the time of the conclusion of the contract. It is referred to as an “absolute sale”. A contract where transfer of an ownership right is effected immediately, exemplifies such a contract. Although delivery might be made in the future sale is an executed contract if the agreement is sale or absolute sale.

Agreement to sell is on the other hand an agreement where transfer of right of property is effected at a future time or after the fulfillment of certain conditions. It is an excluder contract. There is no transfer of property right at the time of the formation of the contract the conveyance of property takes place later following the formation of the contract.

Such distinction has not been clearly provided in the Ethiopian Civil code. The definitional provision of Ethiopian law of contract seems to deal with contract of sale in the context of an agreement to sell; sale implying immediate conveyance of property creating jus in rem i.e. right to enjoy goods against the whole world seems to be excluded.

The definition of general contract and the definition of the contract of sale are evident. As sales contract is a contract, the definition of contract is applicable on it. Accordingly; as a contract is “an agreement whereby two or more persons as between themselves create vary or extinguish obligation, the obligations created by sale is also between the contracting parties. In addition to this Article 2266 of the civil code connotes one contracting party undertakes to discharge his obligation towards the other contracting party. This implies that sale under Ethiopian civil code is an excluder contract.

In addition, there is also an agreement which looks like an agreement to sale that is promise of sale. However, promise of sale is an agreement where one party gives his word to sell a certain thing for a certain price. But, this is not a contract of sale strictly speaking. The contract of sale is to be concluded later not at the time of promise of sale. The promise of sale is preliminary contract for sales contract.

2.1.3. Formation of contract of sales

Having seen a general introduction to contract of sales and its definition, it is worthy discussing the formation of contract of sale. In discussing the formation of contract

of sale a comparative analysis will be made between the elements in the general contract provisions and provisions in the law of sales. In addition, the peculiar elements of the formation of sales contract will be analyzed and discussed.

Contract of sale is, like any other contract, formed when the parties express their agreement on the subject matter of the contract and its price. That is to say, the contract of sale is completed when the parties have expressed their consent to the terms of the contract. Thus, to say there is consent an offer made by one of the parties must be accepted by the other in a way that fulfills the requirements provided under general contract provisions. The parties must define the subject of their dealing with precision and their agreement shall be in special form when such form is necessary.

As a contract, a sales contract is regulated by general contract provisions. The requirements for the formation of contract should be complied with. Generally for the formation of contract offer and acceptance are indispensably required. Either the buyer or the seller shall propose to enter into a contract with specified terms if accepted by the offeree. The buyer or seller to which proposal to enter into a contract has been made should also express his assent without reservation.

Even though contracting parties might make invitation to treat, no contract of sale can be formed by mere invitation to treat in the absence of offer and acceptance by which the consent of the buyer and seller is expressed. The pretence of the parties is not again a sufficient formation of the contract of sale. The consent shall be free from defect and the parties shall have intention to be bound.

The object of the contract shall also be sufficiently defined, lawful, moral and possible pursuant to Art.1714, 1715, 1716 provisions of the civil code. The object of the contract of sale is principally delivering the thing and paying the price. The thing can be an existing thing belonging to the seller or third party or it might be a future thing. What is mandatorily required is that the thing to be delivered shall be sufficiently defined, lawful moral and possible.

The corresponding obligation assumed by the buyer is payment of price. Price as a requirement of consideration has been put in a way that creates peculiarity in contract of sale. Sufficient definition of the price shall enable the courts ascertain

the price. However, lack of sufficient definition to that effect does not make the contract subjected to invalidation as it is provided under Article 1714. Article 2271 of the civil code fills the possible gap. However, if the parties do not determine the price of the thing, and if the price not is determinable, there is no contract of sale. The parties shall make the price at least determinable by referring to the arbitration of the third party according to Art.2271.

Art. 2271. Price estimated by third party

(1) The price may be referred to the arbitration of a third party.

(2) There shall be no sale where such third party refuses or is unable to make an estimate.

According to this Article, to say that a contract of sale is formed the party must specify the price in their contract or refer to the arbitration of the third party. And the price referred to the

arbitration of the third party must be determined as agreed. Otherwise, there would not be formation of the contract of sale.

For example, Aden agreed to buy a used computer from Bushra. But they could not determine the price of the computer. Thus, Aden agreed to pay the price determined by Guled who is a mechanic. Aden has taken delivery of the computer. Unfortunately, Guled died in car accident before he determined the price. Thus, there is no contract of sale in this hypothetical example as the arbitrator is unable to determine the price of the used computer.

? Can the parties refer the determination of the price to the market force? For example, can the party agree that the price would be the market price to be determined at some future date?

In some jurisdictions, for example in India, the parties may refer the price to be determined by a magazine which contains a list of items and their price and which is published regularly. The same is true in Ethiopia. For example, in Ethiopia, Ethiopian Tea and Coffee Authority, announces the price of coffee through Ethiopian Radio. Thus the parties can agree that their price is the price to be announced by Ethiopian Tea and Coffee Authority. Still, there will be no contract of sale if the

authority fails to announce the price on radio. It is not necessary that the third party be a natural person.

Price of the thing sold can also be determinable when the thing has a current price or market price or when the seller normally deals in the thing sold. In such situation, the price would be the market price or the price normally charged by the seller.

In addition to what has been said, formal requirement is also an intrinsic element of contract of sale when it is provided either by their agreement or by law. It can be inferred, therefore, that no special formal requirement is peculiar for contract of sale.

2.2.Performance of contract of sales of movables

Definition, formation, and other affiliated issues in the contract for sales of movables have been discussed so far. Having made these considerations, discussion on performance of sales contract will be made. As performance of sales contract refers to carrying out of the obligations assumed by the contracting parties, analyzing the obligations of the seller, obligations of the buyer and common obligations of the seller and buyer imposed on the parties by the custom, good faith and the provisions of the law is be necessary to understand performance of sales contract..

Upon successful completion of the chapter on the performance of sales contract, students are expected to

- advise parties on the obligations of the buyer
- advise parties on the obligation of the seller
- advice parties on common obligation of the parties
- differentiate warranties and conditions
- differentiate express and implied warranty
- differentiate the incidental obligation related to the principal obligation

2.2.1.Obligations of the seller

The seller has certain obligations which shall be performed. The seller assumes certain obligations under the contract of sales. These obligations are the obligation to deliver, the obligation to transfer ownership, the obligation to warrant the buyer against dispossession defects and non-conformity to the contract and other ob

ligations. Failure to perform these obligation amounts to non-performance. In addition to these obligations the seller does have shared obligations with the buyer.

2.2.1.1. Obligation to deliver

The seller assumes certain obligations under the contract of sale. These obligations are the obligation to deliver, the obligation to transfer ownership, the obligation to warrant the buyer against defects and non-conformity to the contract and other obligations imposed on him by the contract of sale and gap filling provisions pursuant to Article 2273 of the Civil code. Failure to perform these obligations amounts to non- performance of sales contract.

The characteristic obligation of the seller is to deliver the thing sold. Delivery generally refers to transfers of possession willingly. Delivery takes place in accordance with the contract and the default rules of the law. It consists of handing over in not only the principal subject of the contract but also its accessories. The thing to be delivered shall, however, be the agreed thing in quantity and type.

> *Art. 2274. - Essence of obligation.*
> *Delivery consists in the handing over of a thing and its accessories in accordance with the contract.*

A) **Modes of Delivery**: Delivery can be conducted in different modes. These modes of delivery can be actual delivery, constructive delivery, (*constitutum possessorium*), *traditio longa manu, traditio brevi manu* and symbolic delivery. Different legal systems may apply different modes of delivery and modes of transfer of ownership.

Actual delivery is the physical handing over of the thing directly to the buyer or his representative. Actual delivery is the most frequently used mode of delivery. Article 1140 of the civil code shows the possibility of actual delivery by entitling the party to whom delivery is made the actual control over the thing.

Constructive delivery (constitutum possessorium) does not involve physical handing over of the thing to the buyer. It is employed when the thing is already in possession of the buyer; when the thing is to remain in possession of the seller after the contract of sale or where the things is in the possession of the third party and the buyer decided to keep the thing with that third party. For example, X has hired his

horse to Y and Y is using the horse for driving a cart. If X agrees to sell this horse to W and decides to keep the horse with Y, there is constructive delivery made by X.

Constructive delivery under Ethiopian laws refers to delivery when the seller is to remain in actual control of the thing after the conclusion of the contract. Article 1145 shows things which are certain and things pertaining to generic species which have been individualized are deemed to have been transferred when the holder declares that he detained the things on be half of the new possessor. This provision clearly shows the possibility of transfer of possession by constructive delivery although the seller can be holder.

Sometimes delivery when the buyer in possession of the thing to be sold is termed as traditio longa manu. Traditio longa manu does not again show actual handing over of the thing. The seller points out the buyer where the thing is and makes it ready to be taken. The buyer can take the thing when ever he/she pleases. On this mode of delivery actual handing over of the thing is not possible for any reason at the time of conclusion of the contract. As temporary hindrance of actual handing over does not affect possession right pursuant to Article 1142 and possessor may exercise his right indirectly pursuant to Article 1141, the possibility of traditio longa manu can be inferred from these provisions.

Delivery when the things are in the possession of the third party is sometimes termed as traditio brevi manu. In traditio brevi manu the conclusion of the contract is the way of delivery. This mode of delivery is effected when the buyer has been in actual control of the thing before the conclusion of the contract. This avoids unnecessary repeated retaking back of the thing which has been in the hand of the buyer and sold to the buyer. Since there is possibility of actual control of the thing by the buyer before the conclusion of the contract, the application of traditio brevi manu also seems to be indisputable. It is indeed impractical to give subject of sale, which has been in the hands of the buyer, to the buyer and re-take it.

Symbolic delivery is similar to constructive delivery in that it does not effect the physical handing over of the thing sold. But it is different from constructive delivery as it involves the physical handing over of other things that represent the things sold. For example, if the seller gives the key of the store to the buyer, he makes symbolic delivery. Similarly, giving bill of lading to the buyer is a symbolic delivery.

The obligation of the seller to deliver the thing includes the obligation to deliver the agreed amount as well as the obligation to deliver the thing at an agreed time and place.

B) **Quantity to be delivered:** The seller has to deliver the agreed quantity of things. If the seller delivers in excess or in short of the agreed amount, there is non-performance of contract. The buyer may accept or reject the things delivered at his discretion. If the buyer accepts the quantity that is less than the agreed amount, he has to pay the agreed price for quantity delivered but he cannot require additional delivery. In cases of excess quantity, the buyer has to pay a contractual price of the quantity delivered.

The parties to the contract of sale, according to Article 2275, may agree on delivery of “about certain quantity” of specified goods. In such case there is a possibility of delivery of a thing, which is determined by gap filling provisions, where the seller has the discretion to decide the exact quantity to be delivered. However, the seller has no duty to determine the exact quantity if the stipulation about certain quantity was made for the sole interest of the buyer. Accordingly, this benefit might be given to the buyer where „it appears from the circumstances that such stipulation has been included in the contract in the sole interest of the buyer’. For instance, imagine that Fitsume is celebrating a graduation ceremony. He invited 50 persons to the ceremony. Since Fitsume was not sure about the number of persons who would show up, he ordered around 60 bottles of soft drink from Lelisa. In this case, we understand from the circumstance that Fitsume should determine the exact quantity.

? The parties to the contract of sale agreed to deliver “about certain quantity” of specified goods. Can the seller deliver the quantity as large as he wishes or as small as he wishes?

The difference between approximate quantity and actual quantity delivered, whether the decision is made by the seller or buyer, should not exceed ten perce nt in cases of the whole cargo or five percent in other cases. For example, if Awash agrees to deliver about 400 Kilograms of sugar to Yared, he cannot deliver less than 380 kilograms or more than 420 kilograms as five percent of 400 kilogram is 20 kilograms.

C) **Time and Place of delivery:** The seller cannot deliver the thing whenever and wherever he likes. He must observe the provisions of the law and that of the contract. The seller should deliver the thing sold at agreed time. Failure to deliver at such time amounts to non-performance of the contract. However, the parties may fail to specify the time of delivery or the date of delivery cannot be inferred from the will of the parties, the seller shall deliver the thing as soon as the buyer requires him to do so according to article 2276.

It must be born in mind; however, that delivery shall be made immediately is meant to show that delivery of the thing shall be simultaneous with the payment of the price unless there is contrary agreement. If the parties agreed on the time of payment of the price, but fail to specify time of delivery, the seller should deliver at the time of payment of the price as per Art.2278. The seller may in such case retain the thing until payment is made.

Where the parties have agreed that delivery shall take place during a given period, it shall be for the seller to fix the exact date of delivery unless it appears from the circumstances that it is for the buyer to do so. Regarding this Article 2277 provides as follows:

> *Where the parties have agreed that delivery shall take place during a given period, it shall be for the seller to fix the exact date of delivery unless it appears from the circumstances that it is for the buyer to do so.*

For example, if the seller agreed to deliver the thing sold between July14 and August 16, he has to make delivery during this period. However, the buyer determines the exact date where circumstances may give such power to determine the exact date of delivery to the buyer. For example, if Y agrees to deliver a wedding cake between June 6 and 19 to X, it is clear from circumstances that X needed the cake on the day of his wedding. Thus, it is X who should decide the exact date according to Article 2277 because Y has no interest in the date of delivery and for that matter Y does not know the date of wedding.

As far as place of delivery is concerned, unless otherwise agreed, the seller shall deliver the thing at the place where, at the time of the contract, he has his place of business or, failing such, his normal residence. On the other hand, where the sale

relates to a specific thing and the parties know the place where such thing is at the time of the contract, the seller shall deliver the thing at such place. The same is true where the contract relates to fungible things selected from a stock or a specified supply or to things, which are to be made or produced in a place known to the parties at the time of the contract.

2.2.1.2. Obligation to Transfer ownership

The seller shall take the necessary steps for transferring to the buyer unassailable rights of ownership over the thing. Ownership transfers upon transfer of possession. Possession transfers upon delivery. Thus, the necessary step to be taken by the seller to transfer ownership is to deliver the thing to the buyer in any of the modes of delivery discussed in the previous section.

However, delivery alone does not transfer ownership. The seller must be the owner of the thing sold. It is the basic principle of property law that a person can transfer no greater right in property than he himself possesses. For example, if Kebede steals a watch from Degu and sells it to Boron, Boron has no greater title to the watch than Kebede possessed. Thus a non-owner cannot transfer ownership. This principle is called ***nemo dat quod non habet*** in Latin. Thus the obligation to transfer ownership includes the obligation to have a good title.

The rule that holds a person can transfer no greater right than his own suffers an exception. That is, this rule does not apply in certain cases. This exception is possession in good faith. The principle of possession in good faith holds that a person who in good faith enters for consideration into a contract to acquire ownership of a corporeal chattel will become owner of that corporeal chattel by virtue of this good faith when he takes possession of such chattel. Good faith is honesty in fact in the transaction. The buyer is in good faith when he purchased the thing with an innocent belief that the seller is an owner.

2.2.I.3. Obligation to warranty title, defects, and non - conformity

The obligation of the seller to warrant is extended to warranty of dispossession, defect, and nonconformity. Warranty is a contractual promise by the seller regarding the quality, character, or suitability of the goods he has sold. Warranty is classified into express warranty and implied warranty.

Express warranty is created when the seller makes a statement of facts or a promise to the buyer concerning the goods that become part of the bargain. The seller who gives an opinion or recommends the goods does not create an express warranty. Whether a statement made by a seller is interpreted as an opinion or as an express warranty often depends on the relative experience and knowledge of the buyer and the seller. If the seller deals in the types of goods he is selling and the buyer does not deal in such goods and knows little about them, a statement by the seller about the quality or character of the goods might be interpreted as an express warrant y. On the other hand, if the buyer is a dealer in such goods and has had experience and knowledge similar to that of the seller, the same statement might be interpreted as an expression of an opinion.

In negotiating, a seller may use descriptive terms to convey to the buyer an idea of the quality or characteristics of the goods Similarly a seller might use pictures, drawings, blue prints or technical specification or in some cases a sample or model.

Implied warranty is responsibilities imposed by law on the seller for the quality of goods he sold. Implied warranty arises whether or not the seller has made express promises as to the quality of the goods.

Implied warranties are imposed on the seller in the interest of promoting higher standards in the market place for the following three reasons. First, the buyer commonly has little or no opportunity to examine goods carefully before making a decision to buy them. This might result in information asymmetry. Secondly, the buyers are often not in a position to test the goods to determine their quality prior to buying them due to complexity and the nature of many goods. Lastly, the seller or manufacturer of such goods is in a much better position to make a thorough examination or test of the goods to determine their adequacy and quality. The obligation of the seller to warrant dispossession, defect and non-conformity can in certain circumstances be set aside by the agreement of the parties.

A) **Warranty of dispossession:** Warranty against dispossession has been provided as oan bligation of the seller in Article 2282 of the civil code. The seller shall warrant the buyer against any total or partial dispossession, which he might suffer in consequence of a third party exercising a right he enjoyed at the time of the contract. In addition to assuring the buyer that the seller is a rightful owner the

obligation to transfer ownership includes the obligation to transfer unassailable rights over the things.

The seller may be an owner of the thing sold. His title to the thing is not defective. However, the seller may never encumber the thing sold with some rights of third parties; chief among such encumbrance is pledge and liens. If the seller transfers ownership over the thing encumbered with pledge or liens, the seller fails in his obligation to transfer unassailable rights over the thing according to Art. 2281 which provides that:

> *The seller shall take the necessary steps for transferring to the buyer unassailable rights over the thing.*

To perform his obligation of transferring unassailable rights, the seller is duty bound to warrant the buyer against total or partial dispossession. Warranty against dispossession is an implied warranty which does not depend upon the agreement of the parties. But this implied warranty against dispossession is not effective in the following legal limits. These legal limits are when the buyer is aware of the threat of dispossession, when the parties excluded or restricted warranty against dispossession, when the buyer fails to join the seller in the proceeding against him and when dispossession is due to the act or contribution of the buyer.

The awareness of the buyer about the threat of dispossession is among the limits of warranty of dispossession. The buyer may sometimes know that there is a possibility that a third party would dispossess him. For example, the buyer may know that the thing has been given as a security for loan. Where, at the time of the contract, the buyer knows that he risks dispossession, the seller shall not warrant the thing unless he has expressly undertaken to do so. Since it is implied warranty, the presumption is that the parties know that there is warranty of dispossession. If the knowledge of the buyer is established, however, the implied warranty shall not be considered. If the buyer is aware of the risk of dispossession he is expected to have taken advantage of the risk in their negotiation to enter in a contract of sale.

Even though the buyer is aware of the dispossession, warranty shall be due where dispossession is due to the falling in of a pledge made by the seller. The basic reason for favoring warranty against dispossession while the buyer knows the risk is the role of the seller in avoiding dispossession by performing the obligation for which

the thing is pledged.

Relieving the seller from warranting dispossession owing to falling of the thing in pledge directly implies that the seller will not discharge his obligation secured by pledge. Failure to discharge the obligation may not affect the seller at least in his interest in the pledged property.

Exclusion or restriction of warranty against dispossession is also another limit of warranty of dispossession. The parties exclude the warranty against dispossession when they agree that the seller would not be responsible if the third party dispossesses the buyer. Contracting parties can exclude or restrict the above warranty which emanates from the law. But the law provides some mandatory and gap-filling provisions regarding an agreement to exclude or restrict the legal warranty against dispossession:

Art.2284.__ provisions excluding or restricting warranty.

(1) Provisions which exclude or restrict the warranty shall be construed restrictively;

(2) Unless otherwise expressly agreed, such provisions shall impose on the seller the obligation to return the price to the buyer, in whole or in part, in cases of dispossession; and

(3) A provision excluding or restricting the warranty shall be of no effect where the seller has intentionally concealed that a third party had a right on the thing or dispossession is due to the act of the seller.

In addition to the aforementioned grounds, the failure of the buyer to join the seller in the proceeding against him is also another limit of implied warranty of dispossession. Third parties may sue the buyer. In such case, the buyer must inform the seller that he had been sued. The seller may raise objections in the court and may win the case. He shall, therefore, join the seller as a party to the proceedings instituted against him in due time. However, if the seller is not joined in the proceedings without any fault on his part, he shall be released from his warranty where he can show that the proceedings might have had more favorable issue, had he been joined in due time.

Finally, when dispossession is due to the act or contribution of the buyer,

dispossession of warranty is limited. If the dispossession is due to the buyer, for example, the thing is attached by the creditor of the buyer and sold by auction according to the order of the court. The seller will not warrant such dispossession. When the dispossession is also due to the act of the buyer, the seller is released from his warranty. If the buyer acknowledges the right of a third party outside judicial proceedings or he has entered into a compromise with such a third party, he may not avail himself of the warranty given by the seller. He can however be benefited from warranty if he can show that the latter could not have prevented dispossession.

*B) **Warranty against defects in the thing:** The seller shall guarantee to the buyer that the thing sold conforms to the contract and is not affected by defects in addition to the warranty of dispossession. There are circumstances where the seller gives an express warrant against defect. When a seller uses descriptive terms and the buyer takes them into consideration while making the purchase, the seller has expressly warranted that the goods he delivers will meet that description. Express warranty can be given in a limited manner. Where the seller has warranted during a specified period, certain qualities or the good working condition of the thing, it shall be sufficient for the buyer to inform the seller of the defect before the expiry of such period.*

It must be born in mind that the fact that the seller has given express warrant does not necessarily mean that he has the obligation to warrant. If the seller can prove that the buyer knew of the defects at the time of the contract, he is not liable on his warranty against defects. According to Article 2295(2) *Express warranty given by the seller is void where the buyer knew of the defects in the thing at the time of the contract.* To have a valid express warranty, the warranty must relate to the defects that the buyer does not know during the conclusion of contract.

The seller does not only warrant for what he has expressly warranted but also for warranties he is presumed to have undertaken by implication. Implied warranties are imposed by law and arise only under certain circumstances and they can be excluded or restricted by the parties as they are not absolute.

What shall be taken into consideration is that exclusion or restriction is of no effect when the seller has fraudulently concealed from the buyer the defects in the thing according to Article 2297which provides that:

> *Any provision excluding or restricting the warranty shall be of no effect where the seller has fraudulently concealed from the buyer the defects in the thing.*

The other limitation on implied warranty is the gross negligence of the seller. The seller is not liable on a warranty against defects which are so obvious that the buyer could overlook them only as a result of gross negligence. However, the warranty holds the seller who has expressly declared that the thing was free from defects or has expressly warranted certain qualities albeit the presence of obvious defects.

The seller who can prove that the buyer was not in gross negligence but in knowledge of the defect can, however, be relieved of his warrant liability whatever their agreement is. Express warranty while the buyer is cognizance of the defect does not have effect and for stronger reason implied warranty while the buyer is cognizance of the defect relieves the seller from warranty liability.

All defects are not warrantable. Certain defects are warrantable and others are not warrantable. A warrantable defect for which warranty shall become effective according to Article 2289 is where the thing:

- *Does not possess the quality required for its normal use or commercial exploitation;*
- *Does not possess the quality required for its particular use as provided expressly or impliedly in the contract;* (warranty of fitness for particular use)*or;*
- *Does not possess the quality or specifications provided expressly or impliedly in the contract* (warranty of fitness specified in the contract)

Warranty of fitness for normal use obliges the seller to deliver goods that are fit for the ordinary purpose. For example, a person of normal weight who buys a chair should be able to sit on it without it collapsing. The chair should also withstand other things people commonly do with chairs, such as occasionally standing on them or dragging them across the floor. If the chair fails to have such qualities, it is believed not to have the quality required for normal use.

Warranty for commercial exploitation exists when the goods are of such quality and in such condition that a reasonable man would accept them under the circumstances of the case in performance of his offer to buy those goods. Thus, to be fit for commercial exploitation the goods must be such as are reasonably saleable under the description by which they are known in the market. For example, Becky bought a

tape recorder from Natoly. If Natoly could not resell the tape recorder to another seller, the tape recorder is not fit for commercial exploitation. If Ato Dawit agrees to sell four cans of Nido milk and if it is unsealed, it is not possible to resell. Therefore it does not possess the quality required for commercial use.

Warranty of fitness for particular purpose is made to the seller when the seller knows the particular purpose for which the buyer needs the goods and knows that the buyer is relying on the seller to select goods sailable for that purpose. For instance, a person goes to the shop and tells the shop owner that he needs a scissors that will cut cloth. If the shopkeeper knows the buyer is depending on him to pick a suitable pair of scissors, there is warranty that the scissors selected are fit for the buyer's need.

Warranty of fitness to specification provided in the contract is available when the thing is described in the contract. In this case, the thing that may serve normal use or particular use may not comply with the specifications in the contract. For example, the seller agrees to deliver a table which is 3 meters long, two meters wide and one meter high. If the seller delivers a table with a width of three meters, the seller is liable on warranty even though the table serves the need of the buyer.

*C) **Warranty against non-conformity:** A seller, in addition to warranty against dispossession and defect, has the obligation to warrant against non-conformity of the thing. Non-conformity can be warranted as of article 2287 if it is warrantable non-conformity and Article 2288 has given positive meaning of warrantable non-conformity.*

Warrantable non-conformities: The thing is deemed not to conform to the contract where the seller delivered to the buyer part only of the thing sold or a greater or lesser quantity than he had undertaken in the contract to deliver or the seller delivered to the buyer a thing different from that provided in the contract or a thing of a different species as per Article 2288(1) which provides that:

> *The thing shall not be deemed to conform to the contract where:*
> *(a) The seller delivered to the buyer part only of the thing sold or a greater or lesser quantity than he had undertaken in the contract to deliver; or*
> *(b) The seller delivered to the buyer a thing different to that provided in the contract or a thing of a different species.*

For example, if the seller agrees to deliver 500 kilograms of sugar, the seller breaches the warranty against non-conformity if he delivers a thing different from that provided in the contract or a thing of different species. For example, if the seller agrees to deliver a Sony TV set, he breaches the warranty against non-conformity when he delivers a tape recorder or JVC TV set as tape recorder is a different thing and JVC TV set is a thing of different spec ies.

There are certain preconditions and limitations which affect the liability of the seller for warranties of defect of the thing and non-conformity. The time when defects are to be considered, examination of the thing by the buyer, notification of defects, period for suing on a warranty, are among the conditions which affect the effectiveness of warranty.

Time when defects are to be considered is one of the preconditions and limitations on which the liability of the seller depends. The conformity with the contract and the absence of defects is to be ascertained having regard to the conditions of the thing at the time of the transfer of risks. Where there is no transfer of risks because of the cancellation of the contract having been declared or the replacement of the thing having been required, then regard is to be given to the time when the risks would have been transferred, had the thing been in conformity with the contract. As an exception, however, the seller is held to his warranty if the non-conformity or the defects occur at a later date and are caused by the seller or a person who he is liable.

Examination of the thing by the buyer is also another condition on which the liability of the seller depends and it is the duty of the buyer to examine the thing. The buyer should examine the thing without delay as soon as he has the opportunity. Unless otherwise agreed, the examination is to be carried out in accordance with the usages of the place of examination. Where the buyer intends to avail himself of the results of the examination, he shall in due time invite the seller or his representative to attend such examination, unless the thing is likely to perish.

The buyer must examine the thing as soon as he has an opportunity and notify the defects or nonconformity without delay to the seller to avail himself of warranty. Failure to notify the existence of defects may also results in loss of rights of the buyer unless there is a latent defect, i.e. a defect that cannot be disclosed at the time

of examination, in the thing. Where the examination discloses non-conformity with the contract or a defect in the thing, the buyer shall without delay give notice thereof to the seller. In notifying the defect, the buyer shall indicate its nature in accordance with custom and good faith. Where the buyer has not notified the seller, he may no longer avail himself of the non-conformity or defects unless the seller admitted their existence.

Where a defect which could not be discovered by the normal process of examination, is subsequently discovered the buyer may avail himself of such defect where he notifies the seller as soon as he discovers it. The seller who has intentionally misled the buyer may not avail himself of the fact that the notification of defects has not been sufficiently precise or made in due time.

In addition to the above mentioned conditions, there is also period of limitation for suing on a warranty. The buyer must sue the seller within one year from the date of notification of the defects or non-conformity to the contract except when the seller misled the buyer. The parties may provide in their agreement a period exceeding two years for suing on warranty but they cannot lessen this period to less than two years. In this regard, article 2298 provides that:

(1) The buyer shall, under pain of losing his right, bring proceedings on a warranty against defects within one year from his having given notice to the seller, unless the seller intentionally misled him.

(2) The parties may not shorten this period.

(3) Where specified qualities or the good working condition of the thing have been warranted by the seller for a specified period, the time within which the buyer may bring proceedings shall be reckoned from the day when this period has expired

Where specified qualities or the good working condition of the thing have been warranted by the seller for a specified period, the time within which the buyer may bring proceedings shall be reckoned from the day when this period has expired.

After the expiry of the above period, the buyer may no longer avail himself of the defect or nonconformity. However, where he has not paid the price and he notified

the defect or non conformity in due time, The buyer may, however set off against the demand for payment a claim for reduction in price or damages.

In a sale of fungible things, the seller may replace defective things by new ones within the period provided for in the contract. In a sale of goods to be manufactured or produced by the seller on the specifications of the buyer, the seller may put right the defects within a reasonable time, even after the expiry of the period fixed for delivery, provided that the delay causes the buyer no substantial inconvenience or expenses. But this will not affect the right of the buyer to claim damages.

D) **Other obligations of the seller:** The seller does have other accessory obligations as provided in the gap filling provisions. Other obligations of the seller relate to handing over of documents and insurance. If it is customary for the seller to hand over to the buyer documents concerning the thing sold, the seller shall, in addition to delivery, hand over such documents. The documents shall be handed over as carefully and quickly as possible at the place fixed in the contract or provided by custom. The buyer shall not be bound to accept the documents unless they conform to the contract.

Where the seller must know from the circumstances that carriage insurance is the custom and where the seller is not bound to contract such insurance himself, he shall provide the buyer with the necessary information to enable him to contract insurance, where the buyer requires such information from him.

2.2.2. Obligation of the Buyer

The main obligations of the buyer under the contract of sale are the obligation to pay price and the obligation to take delivery of the thing sold. These are the conditions of contract of sale with the exclusion of which no contract of sale can be made. The contract of sale may also include some other obligations such as obligation to cover expenses of delivery which are not an intrinsic element of the definition as they are warranties:. The buyer must appropriately discharge all obligations under contract to avoid suit on non- performance of contract of sale. In this regard, article Art. 2303 provides that:

(1) The buyer shall pay the price and take delivery of the thing.
(2) He shall be bound by any other obligation imposed upon him by the contract of

sale.

2.2.2.1. Obligation to pay price

The buyer has the obligation to pay the price and take delivery of the thing. The price is the amount of money that the buyer undertakes to pay to the seller in consideration of a thing. It is the cost at which a thing is bought.

The obligation of the buyer to pay price includes the obligation to take any steps provided by the contract or by the custom to arrange for or guarantee the payment of price, according to Art 2304. For example, the contract of sale may provide that the buyer should pay the price in check. In this case the buyer must open account in bank and deposit money in the bank from which he orders payment to the seller. Thus, the buyer fails in his obligation to pay price if he does not open an account in a bank. The parties to the contract may agree that the buyer would pay the price after delivery of the thing provided the buyer gives security to the seller. In such case, the buyer's obligation to pay price includes the obligation, for example, to give surety.

In many kinds of business, there are customs and practices of the trade that are known by people in the business. Applying these customs and practices in light with providing gap filling rules considering hypothetical contract that is the contracting parties would assume these customs and practices had they been cognizanct of the gap. The buyer has, accordingly, the obligation to pay in accordance with the custom and arrange for or guarantee the payment of the price. For example, assume that the custom in purchase of pharmaceutical products the buyer has to transfer the purchase price through the bank to the seller. In such case, the buyer should take step to transfer the money through the bank.

According to Article 2304 (2), the obligation of the buyer to pay price also includes the obligation to accept bills of exchange, to open credit account and to provide bank security.

Parties to sales contracts frequently fail to regulate price or leave gaps which might result in unresolved dispute. In such cases, the provision of the Civil Code determines the price in some instances by its gap filling provisions. Such circumstances relate to the absence of fixed price while the price is based on weight of the thing when the thing; has market price, when the buyer accepts excess

quantity, when the time and place of payment is not agreed.

? How do you see the validity of a contract whose object (price) is not specifically stated?

A) **Price determined by weight:** According to Art 2305, if the parties determined the price based on the weight of the thing, the price should be based on net weight rather than gross weight and the new weight is taken into account in the event of doubt. For example, if the seller agrees to deliver 20 quintals at 520 Birr per quintals, he has to deliver a quintal containing 100 Kilograms excluding the weight of the container.

B) **Things at current price:** If the thing sold has a market price and the parties did not agree on the price of the thing, the buyer should pay the market price. If the seller normally sells the thing and there is no agreement on the price of the thing, the buyer should pay the price normally charged by the seller. In both cases, the place and time of delivery should be considered. For example, if the place of delivery causes the buyer to incur extra expenses, that expense should be included in the price. Likewise, the price should be increased in proportion to the duration of delay in paying price, when the sale is on credit.

C) **Quantity greater than agreed:** The seller should deliver the quantity of the thing agreed upon in the contract. Where the seller delivers a quantity greater than that provided in the contract, the buyer may accept or reject the excess quantity as he pleases. If the buyer, on the other hand, accepts the quantity in excess, he should pay a price increased in proportion to the quantity delivered to him. For example, A agreed to deliver 10 quintals of sugar to B at 500 Birr per quintal. Instead A delivered 15 quintals. B has an option to accept or reject the additional 5 quintal. If he accepts, he should pay 500 Birr for each additional quintal.

D) **Place of payment:** If no place is fixed in the contract, the buyer should pay the price at the address of the seller. However, if the contract provides that the price is paid when the thing or documents are handed over, when the price is paid at the place where, under the contract, such thing or documents are to be handed over.

2.2.2.2. Obligation to take delivery of the thing

The buyer must take necessary steps to complete the delivery according to article 2313 which provides that:

> *The buyer shall, after delivery, take such steps as may be necessary for completing the delivery of the thing.*

These necessary steps include the obligation to go to the place of the business of the seller and physically rec eive the thing from the seller or to keep the buyer's store opened if delivery is to be made at the buyer's place. It also includes the duty to accept the thing when the place of delivery is at the residence of the buyer when the thing does not suffer from any defects. The buyer may take deliver by only telling the seller to keep the thing on his behalf. This is the case where the buyer takes delivery through constructive mode of delivery. The buyer's failure to pay the price might be equated to failure to take delivery when payment of the price is a precondition for delivery.

2.2.3. Common Obligations of the Seller and the Buyer

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.

2.2.3.1. 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 tobe 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.

2.2.3.2. 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 b uyer. 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 b uyer. 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 reta in 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 nonconformity. 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.

2.3. Transfer of risk under contract of sales of movables

Like the performance of contract transfer of risk is also of paramount importance in the contract for the sale of goods. As a result this section will deal with the meaning of risk transfer, effect of risk transfer and the ways by which risk is transferred. Upon completing this section students should be able to:

- Provide the j ustification of risk transfer
- define what risk transfer is
- put the effect of risk transfer

2.3.1. General

Risk is the liability of loss or deteriorations of a thing sold. The thing sold may be damaged, destroyed or lost during transportation. Floods, tornadoes or other natural catastrophes may destroy it. As a result allocating risk some times requires transfer of risk from the seller to the buyer. General principle of economic analysis of contract tells us that risk shall be borne by the person who is in a better position of avoiding the risk or shared when none of the parties is in a batter position of avoiding the risk. Therefore the laws dealing with risk transfer are normatively required to take into consideration the efficient risk allocation.

The effect of risk allocation is that the person who bears the risk is to cover the value of the thing which has been damaged or lost. Thus, the basic principle, which is provided regarding transfer of risks in the sale of goods, is that, the buyer shall pay the price notwithstanding that the thing is lost or its value altered where the risks are transferred to him Article 2323 which provides as follows:

Where the risks are transferred to the buyer, he shall pay the price not withstanding that the thing is lost or its value altered.

The risks shall be transferred to the buyer from the day when the thing has been delivered to him in accordance with the provisions of the contract or of this code. The risk is transferred upon delivery notwithstanding that the thing delivered does not conform to the contract, where the buyer has not cancelled or required the cancellation of the contract or required that the thing be replaced.
Risk transfers from the seller to the buyer in the following cases.

- Delivery
- Delay of buyer
- Handing over to carriage

The risk transfers to the buyer when the seller delivers the thing to the buyer in any of the modes of delivery. According to Article 1758 of the Civil Code the debtor bears the risk till delivery is made according to the contract. This provision shows that risk is transferred upon delivery and it follows the principle which says *res peri demino* or risk perishes to the owner or risk follows to the ownership.

This way of risk transfer seems to be based on the assumption that when the thing is delivered the person to whom the thing is delivered is in a better position of avoiding the risk and shall accordingly bear the risk.

Be that as it may, there are circumstances where the risk is not transferred upon delivery. The buyer must accept the thing to assume its risk of loss or deterioration. The buyer usually accepts when the thing conforms to the contract or when the thing suffers from no defects. The buyer rejects the thing if it does not confirm to the contract or if it is defective when he required the seller to replace the non-conforming things or defective things. Therefore, delivery transfers risk to the buyer only when the thing conforms to the contract. If the thing does not conform to the contract, there must be failure to reject the thing or acceptance of the thing so that delivery transfers risk.

Even though it is generally said that delivery transfers risk, there are circumstances where risk transfers without the delivery of the thing. Sub Article (2) of article 1758 shows that risk is transferred to the creditor even if there is no delivery if the

creditor is in default for not taking delivery.

Sales contract provisions have also provided, in addition to delivery, failure of the buyer to take delivery of goods transfers risk from the seller to the buyer even in the absence of delivery. The risks shall also be transferred to the buyer from the day he is late in paying the price pursuant to Article 2325 although being late in paying the price might result in delay to take delivery. This is an exception to the principle which declares that risk perishes to the owner and in light with risk follows hands.

In addition to delay certain additional conditions are attached when it involves fungible things. Where the sale relates to fungible things, the delay of the buyer shall not transfer the risks to him unless the thing, clearly designated for the performance of the contract, has been especially allocated to the buyer and the seller has sent notice to the buyer to that effect. Where fungible things are of such a nature that the seller cannot set aside part of them until the buyer takes delivery, it shall be sufficient for the seller to have performed all the acts necessary to enable the buyer to take immediate delivery. Therefore, the general conditions upon the fulfillment of which risk transfers to the buyer owing to delay in taking delivery of fungible things are:

- The thing must be designated for the purpose of delivery that is the thing must be identified from other things
- The thing must be allocated to the buyer, that is, identification alone is not enough.
- The notice of designation and allocation must be given to the buyer. Thus, default notice alone is not enough.

2.3.2. Special arrangement by the parties - term of shipment

In addition to delivery and delay of the buyer, handing over of the thing to the carriage also transfers risk in the case of a thing under voyage. Where the sale relates to a thing under voyage, the risks shall be transferred to the buyer from the day when delivery has taken place by the thing having been handed over to the carrier. This is special arrangement where the thing is delivered before the conclusion of the contract. Such transfer of risk allows transfer of risk before the conclusion of the contract. Article 2326 says that where the subject of sale in under voyage (being transported) the risk shall be transferred to the buyer upon delivery

by handing over to the carrier. Delivery or handing over of a thing which is under voyage is effected before the conclusion of the contract because it is after delivery the thing can be called things under voyage. Effected deliver transfers risk and delivery is before the conclusion of the contract means risk is transferred retroactively.

Hence, it is not illogical inference to say the effect of contract of sale comes be fore the conclusion of contract. However, it is the effect which follows the cause not the cause which comes after effect. In addition to this mistake as to existence of a thing impossibility delivery before the conclusion of contract can also be a challenge for such transfer of risk as risk depends on validly formed contract.

For example some number of mobile apparatus was handed over to a carriage on September 7 and a contract of sales for the things under voyage was concluded on September 20. At the conclusion of the contract, however, the things under voyage was destroyed. In this case the risk is transferred to the buyer as of September 7 that it is when the things were handed over.

In this case leave alone risk transfer, the formation of valid contract is at issue for the buyer may invoke mistake as to the existence of the contract. It might also be said that there is no contract since the object of the contract relates to impossible object because non-existing object before the conclusion of contract is said to be impossible object.

Risk is not transferred in a situation where at the time of the making of the contract the seller knew or should have known that the thing had perished or was damaged. This seems to get it justification from allocating risk to the person who is in a better position of avoiding the risk and the seller who has knowledge or is reasonably expected to know is in a better position to avoid the risk by not entering the contract.

However, even though the seller does not know or should not have know, there seems not tenable justification to make the buyer bear a risk for a thing which did not exist at the time of the conclusion of the contract or was perished before the conclusion of the contract.

Special consideration is made when there are provisions relating to expenses and the goods are shipped in common. As far as a provision relating to expenses is concerned, any provision relating to expenses stipulated by the parties, especially a provision whereby expenses are to be borne by the seller does not in itself transfer the risks.

As far as goods shipped in common is concerned, the risks shall be allocated to each of the buyer in proportion to his share from the day when delivery has taken place by the goods after being handed over to the carrier, where the seller has sent to the buyer the bill of exchange or other document showing that the shipment has taken place.

2.4. Non - performance and its legal effects

Having discussed transfer of risk in section three, non-performance and its legal effects will be discussed. Under non-performance of contract and its legal effects a discussion will be made on the meaning of non-performance and provisions from which the meaning of the term can be inferred will be analyzed. The purpose of remedies of non-performance as its legal effect will be dealt with. The precondition of default notice as a legal effect of non-performance will then be discussed, along with its purposes. After studeying this section student should be able to:

- Identify whether certain discrepancy between the agreement and the actually performed act is tantamount to non-performance.
- List the pre-conditions of remedies of non-performance
- State the time when default notice can be given
- List the circumstances where default notice is not necessary

2.4.1 Meaning of non-performance

Non-performance of a contract refers to the failure of the contracting parties to discharge their obligation. Contracting parties assume obligation which emanates from the express agreement of the contracting parties, from the incidental effects of the contract and from the gap filling provisions. When the contracting parties do not comply with these obligations it can be said that there is non-performance of the contract.

Even though the definition of non-performance of contract has not been made in the

civil code different provisions imply failure to discharge these assumed obligations according to the agreement or with trivial discrepancy. Article 2329, 2331, 2332, 2333 are among the provisions from which the meaning of non-performance of contract can be inferred.

Contract of sale is said to be non-performed or breached when either the buyer or the seller or both fail to carry out their obligations under the contract. Usually both parties to the contract for the sale of goods perform the obligations they agreed to in the contract. Occasionally, however, one of the parties to a contract may fail to perform his obligations for different reasons. A buyer, for instance, may fail to pay a purchase price at the agreed place or time or fail to take or receive delivery. Similarly, a seller may change his mind and refuse to deliver a thing sold or a buyer while enjoying a thing purchased may be disturbed by a third party claimant, or the thing delivered may be defective.

There is also non-performance of contract when a party not only fails to discharge his/her obligation but also fails to accept performance specially delivery. Article 1779 gives remedy for non-performance by refusal to accept the thing. It can be inferred from this provision that refusal to accept without good cause is non-performance of the contract.

2.4.2 Legal effects of non-performance

Among the basic functions, which are carried out by contract law, providing remedies for nonperformance of contract is the most important one. Party would be reluctant to enter into a contract in the absence of legal remedy for non-performance of contract. The purpose of contract law dealing with non-performance of a contract is avoiding the deterrence effects of nonperformance on the parties for fear that their contract may not be performed.

The legal remedies for non-performance protect the concern of the party whose interest is affected by non-performance. The interest, which might be effected by non-performance of the contract, is the benefit, which could have been gained, had the contract been performed. Accordingly; the remedies are supposed to provide the party with the benefit of the performance of the non-performed or to put the party whose interest is affected by non-performance in a place he would have been had the contract been performed.

In addition to the party whose interest is affected by non-performance; the party who fails to perform is required to be protected, in the contract law dealing with non-performance. The cost incurred, as remedying of non-performance should not exceed the reason by expected remedy of that specific non- performance, the party shall be protected from untreatably excessive cost of remedy of non-performance.

The general purpose of general contract in providing remedies of non-performance is not peculiar to contract of sales. The purposes, which are required to be met, shall also be secured in contract of sales.

The non-performance of the obligation in contract of sales begs striking a balance between the interest of the party who fails to perform and the party for whom the contract is not performed. Taking these interests into account most countries apply forced performance, cancellation and compensation of damage as a remedy of non-performance. Applying these remedies can be considered legal effect of non-performance of contract of sale.

Under Ethiopian law of contract and contract of sale, before resorting to the remedies of nonperformance, a contractant that requires such remedies shall put the other contracting party in default, This effect of non-performance of contract of sale, along with the manner of its application, is provided in Articles 1772 to 1775 as a pre-condition of remedies of nonperformance of contract.

Art. 1772. - Notice necessary.

> *A party may only invoke non-performance of the contract by the other party after having placed the other party in default by requiring him by notice to carry out obligations under the contract.*

The connotation, enthroned in this provision is that, default notice is a pre-condition for the remedies of non- performance putting the party who failed to perform in due time incorporates certain purposes. The special provisions of sales contract also provide default notice as a condition for the remedies of non-performance when the date for performance is not compulsory according to 2338(2) and 2348(2) considering its importance. Articles 1773 has been, therefore, provided referring to the forms and time of notice

Art. 1773. - Form and time of notice

Notice shall be by written demand or by any other act denoting the creditor's intention to obtain performance of the contract.

Notice may not be given unless the obligation is due.

There is no any mandatory formal requirement of default notice. It shall, however, denote the intention of the creditor requiring performance. This intention can be expressed in either written form or any act capable of depicting that an unequivocal expression of intention shall be made.

Default notice cannot be made before the time of the performance of the contract. It shall be made when the obligation is due. In addition, the default notice shall include the time for performance upon the expiry of which the creditor will not be accepting performance.

The time, for which performance shall be made and upon the expiry of which performance is not accepted, is required to be put and be reasonable according to Art. 1774. Such reasonableness shall be determined taking into account the nature and circumstance of the case. Such circumstance might include whether the party has the object of obligation at hand. Whether it is to be manufactured in the future and the time for its manufacturing shall be considered.

It has also been stated that the buyer must notify the seller his intention to require forced performance, within a short period according to Article 2331(1). Thus, the buyer cannot require forced performance for unlimited period whether he has a particular interest or not. The buyer may also fix a reasonable period to the seller for making the defects or non-conformity good.

Despite the fact that notice is a pre-condition for someone to resort to remedies of nonperformance there are cases where the remedies can be applied without putting the other party in default. Article 1775, 2338 provides cases when remedies can be applicable without default notice.

When the obligation is assumed to be discharged within fixed period of time and that period expires, there is no need for notice. Compulsory date for delivery as of 2338 can the best example where default notice is not important. Such non-performance

cannot be rectified by performance following notice once the time expires. A debtor, assuming the obligation of selling birth date cake or selling soft drinks which has market price need not be put in default, if he fails to perform his obligation. The contract can be performed only before the date of the birthday expires and the soft drink can be obtained in replacement.

Anticipated non-performance when the debtor declares not to perform the obligation in writing also excludes the pre-condition of notice to rectify non-performance. Reminding someone who declares not to perform has no any tangible effect for he knows the non-performance and he has already refused to do so.

In addition to this exclusion of notice for failure to discharge obligation, express stipulation in the contract also have parties apply directly the remedy of non-performance. When the obligation is not discharged in due date and express agreement excluding notice is stipulated in their contract, the effects of non-performance become applicable without notice.

2.5. Remedies in case of non - performance

After putting the debtor in default or if notice is excluded as discussed above, the party to whom performance is required to have been made, may apply to the remedies of non-performance provided under Article 1771. The remedies of non-performance is accordingly aimed at discussing the different alternative and cumulative remedy of non-performance, the preconditions to require and apply each remedies and the guidelines and ways of applying these remedies.
This section is therefore aimed at enabling students

> to list the remedies of non-performance of contract of sale

> to list the cumulative and alternative remedies of non-performance of contract of sale

> to state the conditions upon the fulfillment of which the remedies can be effected

> to specifically put the ways of assessing compensation

> effect of the remedies of non-performance of contract of sale

The remedies for non-performance of obligations in a contract of sale are structured in such a way that the various possibilities are provided with respect to each of the remedies. These remedies have been provided under Article 1771 of the general

contract provisions as effect of non-performance of contracts verbally as:

(1) Where a party does not carry out his obligations under the contract, the other party may, according to the circumstances of the case, require the enforcement of the contract or the cancellation of the contract or in certain cases may himself cancel the contract.

(2) He may in addition require that the damage caused to him by non-performance be made good.

According to Article 1771, the remedies for non-performance of contract of sale are:

- Forced (specific) performance
- Cancellation of the contract
- Damages

The objective of these remedies is to put the party aggrieved by non-performance in the same position as if the contract has been performed so that certainty, security of transaction and optimal cooperation is secured.

2.5.1 Forced Performance

Forced performance is one remedy of non-performance of contract of sale. Forced performance, as the term implies, is to have the contractant carry out the contractual obligations unwillingly in compliance with the order of the court. Forced performance can be applied as, either specific performance or substituted performance. Forced performance begs the role of court for its implementation. Specific performance is not, however, ordered for the mere reason that it is required by the party. Certain requirement shall be fulfilled in order that the court orders specific performance.

Art. 1776. - Specific performance.

Specific performance of a contract shall not be ordered unless it is of special interest to the party requiring it and the contract can be enforced w ith ou t affecting the personal liberty of the debtor.

Two criteria are put, in this provision to order specific performance. Indispensably the creditor shall have a special interest and the personal liberty of the debtor shall remain intact. These requirements protect the debtor from violation of his right to liberty in civil case. In addition to these conditions of the general contract, in sales contract forced performance can be required when certain failures happen that is

when a there is failure to deliver, when there is nonconformity or defects, and non-payment of price.

The presence of special interest can be inferred from the importance of the obligation required to be discharged towards the creditor and its possibility of being discharged otherwise. Accordingly, the buyer cannot require forced performance in all cases of non-performance of the obligation to deliver unless the following conditions are fulfilled. First, the buyer must have a particular interest in the thing sold pursuant to Article 1776 and 2329 which provides that:

> *Where the thing has not been regularly delivered, the buyer may demand the forced performance of the contract where it is of particular interest to him.*

Article 2329 provides „where the thing has not been regularly delivered, the buyer may demand the forced performance of the contract where it is of particular interest to him". The buyer should have a particular interest, no possibility of purchase in replacement and should notify within a short period. The buyer cannot demand the forced performance of the contract where the sale relates to a thing in respect of which a purchase in replacement conforms to commercial practice or such purchase can be effected by him without inconvenience or a considerable expense. The buyer shall lose the right to demand the forced performance of the contract where he fails to inform the seller, within a short period after he has ascertained the delay, of his intention to demand such performance. This period is estimated with particular strictness where the date fixed for the performance of the contract is a compulsory date.

Unlike the general contract in the sales contract provision, the requirement of leaving the liberty of individual intact is not provided as a condition. This is because in sales contract there cannot be a circumstance where the liberty of individual is affected. What is done is only attaching the property of the party who failed to perform the contract.

The seller may demand forced payment when the buyer fails to pay the price pursuant to Article 2333. Forced performance is the only option where the thing is delivered to the buyer and it cannot be returned as the buyer has already assigned, transformed or the thing is destroyed due to the fault of the buyer. The seller cannot

require forced performance when the thing is not delivered to the buyer and the seller can make compensatory sale according to the custom of the market. Compensatory sale is possible when the thing can be sold to other persons.

The buyer has a particular interest in the thing sold when no other thing except the thing sold to him satisfies his need. For example, Guyo wants to buy a horse for inorder to participat in a regional horse competition. He bought a horse that was a champion in the national horse competition from Galgalo. Thus, Guyo has a particular interest in the horse he bought.

To give additional example of this, in obligation of supplying electricity assumed by corporation can be of special importance as such service is not of trivial advantage rather of paramount importance and such service cannot be given by other party.

Secondly, the buyer must not have any possibility of purchase in replacement. In this regard Article 1778 reads:

Art. 1778. - Fungible things

> *Where fungible things are due, the creditor may be authorized by the court to buy at the debtor's expense the things which the debtor assumed to deliver.*

Where the fungible things are due the debtor may have substituted performance be made upon court authorization to buy the thing at the debtors expense. If Ato Shewa fails to perform his obligation of delivering 100,000 of sugar in due time, the creditor may buy the agreed amount of sugar from the market upon court authorization. The price of the sugar would then be covered by the debtor.

Article 2330 also provides that:

> *The buyer may not demand the forced performance of the contract where the sale relates to a thing in respect of which a purchase in replacement conforms to commercial practice or such purchase can be effected by him without inconvenience or considerable expense.*

The buyer cannot require the forced performance if the market usage is to buy the thing from another seller. For example, Becky agreed to buy a 14 inch *Sony*® TV set from Natoly who deals in TV sets and another electronic goods. Becky cannot

require forced performance if it is the custom of the market that the buyer should obtain the good from other seller. Even if it is not a custom in the market, the buyer should obtain the TV sets from other sellers if he could do that without incurring considerable expenses or inconvenience. Thus, if the buyer cannot obtain the thing in the same market it is inevitable that he will incur considerable expenses. For example, the buyer incurs considerable expense if he had bought the thing in Dire Dawa and if that thing cannot be found except in Addis Ababa. When the buyer incurs such an expense he may require it in the form of compensation.

It must be born in mind that the buyer may not be awarded with forced performance if the nonperformance is owing to dispossession even though the buyer has a particular interest and the liberty of the seller cannot be affected. This is because contract including contract of sale creates an obligation between the contracting parties only. Forced performance in case of dispossession affects not only the contracting parties but also third parties who have better title that the contractant. Ordering forced performance results in negative externality (affecting third parties). Article 1952 (1) shows that contract shall have effect only on contracting parties. Article 1675 also indicates that a contract can have effect “as between” the contractants.

The buyer may require forced performance in case of non-conformity or defects. The buyer who has regularly given notice of the defects may require the seller to deliver new things or the missing part or quality of the things where the forced performance of the contract may be demanded. He may require that the defects be made good by the seller within a reasonable time where the sale relates to a thing which the seller has to make or produce on the specifications of the buyer and where such defects can be made good. Where the buyer’s right to decide later as to the form, measurements or other details of the thing is reserved in the contract and he has failed to give such specifications within the time fixed in the contract or on the expiry of a reasonable period of time notified to him, the seller may himself make the specifications according to the requirements of the buyer as he knows them. The seller shall inform the buyer of the specifications of the thing where he has determined them and fix him a reasonable period of time for giving different specifications. Where the buyer fails to give his specifications within such time, the specifications made by the seller shall be binding.

Non-payment of price might also be remedied by forced performance. Where the buyer fails to pay the price, the seller may demand payment unless the sale relates to a thing in respect of which a compensatory sale is imposed by custom.

2.5.2 Cancellation of contract of sale

The other remedy for non-performance of the contract of sale is cancellation. There are conditions and effects of cancellation. There are two kinds of cancellation under law of sales. Cancellation is the action by which contracting parties make an already formed contract ineffective. Cancellation of contract is made in response to non-performance. Cancellation presupposes the presence of contract. They are judicial cancellation and unilateral cancellation.

Cancellation by the court, upon the request by party who is aggrieved by non-performance, is judicial cancellation. Sometimes the party is empowered to cancel the contract and it is called unilateral cancellation follows.

2.5.2.1. Cancellation by Court

Cancellation of a contract can be made by court action. The party who requires cancellation as a remedy for non-performance shall bring action to effect. Article1784, deals with cancellation of contract by court action as a remedy for nonperformance of a contract, and is provided as:

Art. 1784. - Cancellation of contract by the Court

A party may move the court to cancel the contract where the other party has not or not fully and ad equ ate ly performed his obligations within the agreed period of time.

A party whom assumed an obligation has not been performed, not been fully and adequately performed, can have the court cancel the contract. The party requiring cancellation shall be in a position to perform or shall have performed his obligation unless he can be benefited from time limit.

The court does not cancel a contract when an action is brought to this effect simply because there is non-performance of a contract. The court shall consider the good faith of the parties. Manadatory Article 1785 has put the importance of good faith to guide the court in deciding whether are not to order cancellation or not in the following words:

Art. 1785. - Good faith.

(1) In making its decision, the court shall have regard to the interested of the parties and the requirements of good faith.

(2) A contract shall not be cancelled except in cases of breach of a fundamental provision of the contract.

(3) No contract shall be canalled unless its essence is affected by non-performance and it is reasonable to hold for such reason that the party requiring cancellation of the contract would not have entered into the contract without the term which the other party has failed to exacted being included.

Article 2340 also shows that the court shall not cancel the contract of sale unless there is a fundamental breach and if the breach can be made good with in a period of time fixed by the contract. According to this provision, where the seller delivers the thing at a place other than that where he is bound to make delivery, the court shall not cancel the contract on the application of the buyer unless the manner in which the contract was enforced constitutes a fundamental breach of contract. The contract may not be cancelled where the breach can be made good by the seller within such a period of time as is fixed by the contract or by law. The court is required to consider the interest of the parties and requirements of good faith. The party requiring cancellation shall be affected in a way his interest is not secured by the non-performance.

Assume Ato Kahadi enters into a contract with Ato Tamagn. In the contract, Ato Tamagn agreed to deliver the thing in Addis at Kahadi's domicile. Later for Ato Kahadi has been a resident of Mekelle, Ato Tamagn delivered the coffee at Ato Kahadi's residence in Mekelle. Ato Kahadi requires cancellation for non-compliance of place of performance. The court shall not invalidate such contract, as the non-compliance of place of performance does not affect his interest.

Cancellation by court shall be ordered in cases of only fundamental breach. Note that it is fundamental breach which can obviously affect the interest of the party. For example, A enters into a contract where he will make a table out of oak but he made the table out of a piece of metal. The contracting party of A requires cancellation. The court shall cancel the contract for there is a fundamental breach of contract provision.

Breach of fundamental provision should be seen in light of the effect it results in. The interest of the party requiring performance shall take the decisive nature of the non-performance. Cancellation shall be effected if the essence of the contract is affected. Whether the party requiring cancellation would have entered into the contract of sale without the term, which the other party failed to perform, shall be considered.

Mesebo Cement Factory enters into a contract with XY Company. The XY Company undertakes to deliver necessary materials at the head office of the company in Addis. XY Company delivered the raw material in Mekelle where cement is produced. Mesebo Cement Factory would have entered, into the contract had it known the way of performance as it had been.

As the seller can require cancellation when the thing is not delivered in the place where it should have been delivered, cancellation can also be required when the whole ownership is not transferred to the buyer pursuant to 2341. The contract may be cancelled where, as a result of a defect affecting his title, the seller has not procured for the buyer the thing free from all rights belonging to third parties. The contract, however, may not be cancelled where the buyer, on buying the thing, knew of the encumbrance. In addition, the contract may not be cancelled where the right with which the thing is encumbered is of small importance and it appears that the buyer would have bought the thing, had he known of the encumbrance.

The seller may also require cancellation of the contract when there is default in taking delivery according to Article 2349. Where the buyer fails to take delivery of the thing on the conditions laid down in the contract, the seller may require the cancellation of the contract where the failure of the buyer justifies the fear that he will not pay the price or it appears from the circumstances that taking delivery was an essential stipulation of the contract.

Court cancellation can be required when there are contracts for successive deliveries as is provided under Article 2351 of the Civil Code. Where, in contracts for successive deliveries, by reason of the non performance or the defect of one of the performance due by a party, the other party is justified in fearing that the future performance will not be made or will be affected by defects, such party, may require that the contract be cancelled for the future. The buyer may also require the cancellation of future deliveries or deliveries already made, or both, where he proves

that, by reason of their connection, these deliveries are of no use to him without those which have not been made or were affected by defects

2.5.2.2. Unilateral cancellation

In addition to court cancellation, parties, who are aggrieved by non-performance of a contract, may opt to cancel it unilaterally, as provided under the law. Unilateral cancellation can be made by the party without going to court if there is a unilateral cancellation clause, expiry of time limit, impossible performance, anticipated nonperformance, dispossession, partial delivery, defect, non-payment of price, impossibility of performance and anticipatory breach.

The buyer and the seller do have different conditions which entitle them to the power of canceling the contract and some common ones. The parties are also required to take into consideration whether the breach of contract affect the essence of the contract in unilaterally canceling the contract of sale. Article 1786 provides the possibility of unilateral cancellation by cancellation clause in a contract.

Art. 1786. - Cancellation by a party. - 1. Under the contract
A party may cancel the contract where a provision to this effect has been made in the contract and the conditions for enforcing such provision are present.

Contracting partners are free to the extent of stipulating a clause that permits unilateral cancellation when a certain condition is fulfilled. Stipulating cancellation clause helps to avoid going to court to effect cancellation. It can also serve to avoiding delay and back log. In addition to agreement expiry of certain period of time can also lead to unilateral cancellation according to Article 1787.

Art 1787. - 2. Expiry of time limit
A party may cancel the contract where the other party has failed to perform his oblations within the period of time fixed in accordance with Art. 1770, 1774, or 1775 (b).

This provision makes cross-reference to the provisions upon the expiry of which a unilateral cancellation is legally possible. The expiry of period of grace, period put in default notice and the expiry of a fixed period of time in which the debtor shall perform the obligation having to the nature of the contract, and the party unilateral

cancellation of contract.

In light of this general contract provision, the expiry of a compulsory date for delivery entitles the buyer the power to cancel the contract unilaterally pursuant to Article 2338(2). The date fixed for delivery is deemed to be compulsory date where the thing has a market price on markets to which the seller can apply to obtain it. The date fixed by the seller or the buyer, where it is for either of them to fix such a date within a period of time provided in the contract, shall also be deemed to be a compulsory date. Where the date fixed for delivery is not a compulsory date, the court may grant the seller a period of grace within which he shall perform his obligations. The buyer may, under the same circumstances, grant the seller an additional period of time fixed in a reasonable manner and inform him that he shall refuse the thing upon the expiry of this period. The contract shall be cancelled as of right where the seller fails to deliver the thing within such additional period.

Where the period fixed by the buyer is not reasonable, the seller may, within a short time, inform the buyer that he shall only deliver the thing upon the expiry of a reasonable period. Failing such declaration, the seller shall be deemed to accept the period of time fixed by the buyer.

Non-payment of price as of 2333 may make the seller cancel the contract when an express stipulation is put to that effect. The seller may forthwith declare the cancellation of the contract in case of non-payment of the price where this right has been expressly given to him by the contract of sale. Failing an express stipulation, the seller may cancel the contract on the expiry of a reasonable period fixed by him in the notice placing the buyer in default, where the sale relates to things which are quoted on the stock market or have a current price or where this right has been expressly given to the seller by the contract. The seller may also declare the cancellation of the contract upon the expiry of the period of grace, where the court has granted such period to the buyer.

Moreover, failure to make specifications within specified time can entitle the power of unilateral cancellation. Where the buyer has reserved in the contract the right to decide later on the form, measurements or other details of the thing and he fails to give such specifications at the date agreed as being compulsory or upon the expiry of a reasonable period granted to him by the seller, the seller may declare the

cancellation of the contract.
Impossibility of performance is also another way where unilateral cancellation is possible pursuant to Article 1788 and 2352

Art. 1788. - 3. Performance impossible

> *A party may cancel the contract even before the obligation of the other party is due where the performance by the other party of his obligations has become impossible or is hindered so that the essence of the contract is affected.*

It must be born in mind that impossibility of performance in Article 1788 is different from object impossible provided in Article 1715. Article 1715 refers to an obligation which is impossible before the formation of the contract and that is why it affects the formation of the contract.

Article 1788 refers to an obligation which becomes impossible after the formation of the contract. The impossibility shall affect the essence of the contract in order to carry out unilateral cancellation, as non-performance is required to affect the essence of the contract to affect it.

In addition to the aforementioned provisions Article 2352 of the civil code connotes that either the seller or the buyer can cancel the contract unilaterally where the performance of the obligation of the other party became impossible or when one of the parties inform another, party that he would not perform the contract.

For example, Adem agreed to sell his ox to Bushra. According to their contract, Bushra will take delivery and pay the price after ten days. On the third day, the ox died. Bushra can unilaterally cancel the contract. If the ox is alive and Bushra told Aden before delivery date that he would not pay the price of the ox, Adem can unilaterally cancel the contract.

For example Mugger Cement Factor enters into a contract of sale assuming the obligation to deliver 1000 tone in consideration to 1,000,000 of cement to Surconstruction. Later Mugger assured that Surconstruction is declared bankrupt and cannot pay the price. The cement factory came across damage, which hinders it to produce the agreed amount of cement.

Anticipated non-performance unequivocally expressed by the refusal of the contracting party pursuant to. Article 2353 and 1789 has been put to add clarity to the possibility of unilateral cancellation this way:

Art. 1789. - 4. Party refusing performance

(1) A party may cancel the contract where the other party informs him in an unequivocal manner that he will not carry out his obligations under the contract.

(2) The party who intends to cancel the contract shall place the other party in default and the contract shall not be cancelled where the party in default produces with in fifteen days securities sufficient to guarantee that he will perform his obligations at the agreed time.

(3) Notice shall not be required and the contract may be cancelled forthwith where a party informs the other party in writhing that he will not perform his obligations.

When there is an indication that the party would not perform the contract, the other party shall put him in default and cancel the contract. If the party who protests cancellation can provide security guarantying his payment within fifteen years, the contract shall remain effective. However, if the contractant showed that he would not perform in writing immediate cancellation of the contract can be made without any default notice.

Dispossession of the subject of sale entitles the buyer the power of unilateral cancellation pursuant to Article 2342. The contract shall be cancelled as of right where the buyer is totally ousted from the thing and the seller is bound to warrant the buyer against dispossession. The contract may be cancelled where the buyer is partially ousted from the thing. The contract may however not be cancelled where dispossession only affects a part of the thing of minor importance and it appears that the buyer would have bought the thing, had he known that he would be dispossessed of such part.

Partial delivery also gives similar power to the buyer. According to Article 2343 where part of the thing only has been delivered or does not conform to the contract, the buyer may not cancel the contract for the whole unless it appears that he would not have entered into the contract, had he known how it would be executed. In case

of delay in the delivery of part of the thing, the buyer may cancel the contract for the whole notwithstanding that the remaining part of the thing is delivered subsequently, where the date of delivery constituted a compulsory date for the whole. Where the buyer is not entitled to cancel or require the cancellation of the contract, he may cancel it partially or require that it be partially cancelled and confine himself to paying a price proportionate to the value of such part as has been duly delivered to him.

In addition to what has been seen delivery of defective thing or partially defective thing can lead to unilateral cancellation. The contract may be cancelled where the thing is affected by a defect against which the seller warranted the buyer. The contract may however not be cancelled where the defect is of small importance and it appears that the buyer would have bought the thing, had he known of the defect pursuant to Article 2344.

Article 2345 also connotes that where the sale is of several things at a time or of collection of articles and only some of them are defective, the contract may be cancelled with regard to such defective things or articles only. The buyer shall in such case pay to the seller a price proportionate to the value of the things or articles, which have been delivered to him free from defects. The contract however, may not be cancelled for the whole where the defective thing or article cannot be separated, without considerable inconvenience to the buyer or seller, from those which are free from defects. The cancellation, which relates to the principal thing, shall extend to accessories notwithstanding that they have been sold for a separate price.

Generally, there are certain conditions and effects of cancellation. The effects and conditions of cancellation are the ambiguity of the intention of the other party in delayed performance, effect of cancellation on price and profit, expenses, outlays, transformed things and when restitution is not possible.

In case of delay the other party can assure the intention of the other party according to Article 2354. Where a party, being late in the performance of an obligation which constitutes an essential stipulation of the contract, asks the other party whether he still consents to the execution of the contract, the contract shall be cancelled as of right where the other party does not answer within a short time.

Where a contract is cancelled, the parties shall be released from their obligations under the contract, without prejudice to such damages as may be due. If a party has performed his obligations in whole or in part, he may claim the restitution of what he has supplied including expenses incurred. On the other hand, if both parties have performed their obligations, each of them may refuse the restitution due by him until the other party has effected his obligation.

The effect of cancellation on price and profit has been stipulated under Article 2356. Accordingly, whenever the seller is required to refund the price, he shall in addition pay interest on such price calculated from the day of payment. The buyer shall restore, in addition to the thing, the profits he has derived therefore.

Where the thing cannot be returned in its previous condition, however, the buyer shall retain the right to require or declare the cancellation of the contract or to avail himself of cancellation already declared where the thing or part thereof has perished or been damaged without this being due to his own act or that of a person for whom he is liable. He shall in particular retain this right where the thing has been damaged as a result of an examination made by him in accordance with custom. The contract may not be cancelled where the buyer is unable to restore the thing because he has assigned or transformed it or it has perished or been damaged by his act.

Transformation of thing also makes reinstatement impossible. where the thing is transformed, the buyer shall retain the right to require or declare the cancellation of the contract where: (a) the thing or part thereof has been transformed by him before he was able to discover the defect of which he avails himself to require or declare the cancellation of the contract; or (b) the alteration of the thing is of no importance.

As regards outlays made by the buyer on the thing, the provisions of the Chapter of this code relating to „unlawful enrichment „shall apply (Articles 2168-2178). The buyer may only claim from the seller the payment of these outlays in the case of dispossession where he is unable himself to be indemnified by the third party by whom he is dispossessed.

Abebe has for example sold his TV Ato Chala and Ato Chala has fixed a certain known problem of the TV. If the contract is cancelled then Abebe is duty bound to

cover the expenses of repairing the TV.

2.5.3. Compensation

In addition to forced performance and cancellation, compensation is also among the remedies for non-performance of sales contract. Compensation because of non-performance is recommended to put the victim of non-performance in a place he would have been had the contract been performed. Most scholars of economic analysis of law are ardent proponent of this purpose of compensation.

Any one enters into a contract to get benefit not to be in the same position of his before the formation of the contract. If the law does not either enforce the contract or have the party given a remedy that puts him indifferent between performance and non-performance of the contract, the contracting party would be reluctant to enter into a contract. And this would in turn affect security of transaction.

On such analysis scholars of economic analysis of law agree on the efficient nature of perfect expectation damages that is a compensation which puts the contracting party at the place he would have been had the contract been performed. The relevant general contract provisions and special sales contract are also expected to be in light with this purpose.

In light with this Article 1771(2) has permitted damage to be required in additio n to the other remedies put in Sub-article (1). Reading this provision in light with Article 1790 shows that compensation can be both alternative and cumulative remedy of non-performance of a contract.

Article 2360 also supports the aforementioned general contract provisions by allowing claiming of damages whether the contract is cancelled or upheld.

The concept of perfect expectation damages is enshrined in these provisions. Only enforcement of a contract may not put the victim of non-performance in a place he would have been had the contract been performed. Because the failure of the party to perform in due time may negatively affect the victim of non-performance and may make him incur cost of court litigation.

Only cancellation may not also put the victim of non-performance in the place he

would have been, had the contract been performed. Therefore, allowing damage and enforcement or damage and cancellation together gets its justification from the need to put the contracting partner in a place he would have been, had the contract been performed.

Where the contract of sale is not cancelled, the amount of damage is fixed in accordance with the provisions of general contract law pursuant to Article2361. This provision seems to connote that the provisions of contract of sale is applicable in other cases. However, general contract provisions are also applicable when it is relevant even in case of cancellation and compensation pursuant to Article 1676. Accordingly, the preconditions of compensation which are not covered by sales contract are also to be governed by general contract provisions.

2.5.3.1. Conditions for compe nsation

The remedies of non-performance do not ignore the interest of the party who failed to perform although the absence of fault does not relieve the party, who fails to perform, from making good the damage. The preconditions for damage owing to non-performance are aimed at protecting the interest of the other party. Therefore, there are certain excuses for the non-performing party one of which is force majuer.

Art. 1791. - Damage when to be made good.

(1) The party who fails to perform his obligations shall be liable to pay damages notwithstanding that he is not at fault.

(2) He shall not be released unless he can show that performance was prevented by force majuer.

This provision shows that non-performance is not excusable although the party is not at fault except for force majuer. The fact that party is not at fault does not mean that he is not in a better position of avoiding the risk.

This is because of non-performance whose ground is neither of force majuer nor fault, is a foreseeable event. Its foreseeability puts the party with duty of performance in a better position of avoiding the risk. Accordingly, the party in a better position of avoiding the risk shall bear it.

Putting force majuer as an excuse for performance is also justified by equal position of the parties to avoid the risk. Force majuer is not foreseeable. The absence of foreseeability put neither of them in a better position of avoiding risk

Putting force majuer as an excuse for performance is also justified by equal position of the parties to avoid the risk. Force major is not foreseeable. The absence of foreseeability put neither of them in a better position of avoiding risk.

Knowing force majuer as an excuse of non-performance, it is worth noting what force majuer is. An attempt to define force majuer has been made under Article 1992. Instance of force majuer and absence of force majuer have been put under Article 1993 and 1794 to add clarity on Article 1792

Art 1792. - Force majuer.

(1) Force majuer results form an occurrence which the debtor could normally not foresee and which. Prevent him absolutely from performing his obligations.

(2) Force majuer shall not exist where the occurrence could normally have been foreseen by the debtor or where it renders more onerous the performance by the performance by the debtor of his obligation.

Force majuer has been put under the determination of objective standard of foresee ability. An occurrence, to be force majuer, shall absolutely prevent the performance and not be foreseen by a reasonable person.

Article 1793 has provided examples of force majuer

Art. 1793. - Cases of force majuer

The following occurrences may accordingly the circumstances, constitute cases offorce majuer.

a) the unforeseeable act of a third party for whom the debtor is not responsible; or

b) an official prohibition preventing the performance of the contract; or

c) a natural catastrophe such as an earthquake, lightning or floods; or

d) international or civil war; or

e) the death or a serious accident or unexpected serious illness of the debtor

It must be born in mind that Article 1793 illustratively puts examples of force

majuer. Accordingly, by analogical interpretation, other case of force majuer can be included.
The same holds true for Article 1794 that illustrates the absence of force majuer.

Art. 1794. - Absence of force majuer.
Unless otherwise expressly agreed, the following occurrences shall not be deemed cases offorce majuer:

- *(a) a strike or lock-out taking place in the undertaking of a party or affecting the branch of business in which he careers out his activities; or*
- *(b) an increase or reduction in the price of raw materials necessary for the performance of the contract; or*
- *(c) the enactment of new legislation whereby the obligation of the debtor become more onerous.*

There are certain exceptions where force majuer does not relieve the parties from paying compensation. The party who fail to perform a contract may be excused for non-performance on certain grounds. In addition to his failure to perform, the party may also fail to notify the other party about his non-performance to avoid further loss. In such case the party who tends not to perform is in a better position of avoiding certain loss. Article 1797 is put in order to avoid such loss by imposing duty of notifying the creditor about nonperformance.

Article 1797 provides a warning that his failure to notify the other party of the reasons, which prevents him, from performing can result in taking the benefit of excuse off him. Although nonperformance is attributable to force majuer, the party who failed to notify is liable to the damages owing to his failure to notify.

The other exception of exclusion of damages when non-performance is owing to force majuer is, if the other party is put in default. Although force majuer relieves the party who failed to perform his obligation, his being put in default changes such situation of the debtor.

Although performance is hindered by force majuer, if performance had been possible before the default notice, the party would be liable to pay damages for non-performance.
Illustration: The compulsory date of the obligation of A was March 1, he was put, in

default March 5, the force majuer occur on March 10, A is liable to make the damage good since force majuer occurred after the debtor was put in default.

2.5.3.2. Assessment of compensation

As far as the assessment of compensation is concerned the provisions starting Article 1799 till 1805 of the general contract shall be, as gap filling provisions, applicable in a way they do not contradict with special provisions provided in provisions of contract of sale. When the contract is cancelled there are ways of assessment of compensation in things that have current price, purchase in replacement, special circumstances, thinng that have no current price, anticipatory breach and in dispossession in the special sales contract provisions and general contract provisions.

A) Things having a current price: - Article 2362 in principle depicts that where the contract is cancelled and the thing has a current price, damages equal to the difference between the price fixed in the contract and the current price as on the day the right to declare the cancellation of the contract could be exercised or on the day following the day the contract was cancelled by the court or as of right. In addition, regard shall be giver to the normal expenses of a purchase in replacement or compensatory sale. The price to be taken into account shall be that on the market where the buyer or seller would, in the normal course of business, buy or sell the thing to which the contract relates.

This is in line with Article 1799 (1), which reads, *"Damages shall be equal to the damage which non-performance would normally have caused to the creditor in the eyes of a reasonable person."*

Sub Article (1) of this provision orders objective standard to be employed in assessing damage. The damage is assessed as a damage which non-performance would normally cause in the eye of a reasonable person. That is why the difference between the price fixed in the contract and the current price is taken into account in assessing the damages.

According to this provision actual damage which has been actually incurred may not be awarded. If the loss which has been actually incurred is more than the loss which is reasonably assessed (normal damage), the normal damage which has been

assessed by taking into account a reasonable man's standard would be paid. This provision excluded an actual damage which is not foreseeable and which is the result of excessive raliance. Accordingly; the party who excessively relies on buying in excess of price in the normal course of business is not compensated to that extent. The law orders only normal damage to be made good.

B). Purchase in replacement:- Where the buyer has effected a purchase in replacement or the seller has effected a compensatory sale according to Article 2363, the price paid for such purchase or obtained from such sale shall be taken into consideration in calculating the amount of damages. Such amount may be reduced where the other party proves that the purchase in replacement or compensatory sale has been effected in bad faith or in abnormal business conditions.

Article 1802 in line with the above concern provides the duty with its consequence of reduction of compensation verbally as:

Art. 1802 - Duty to limit the extent of the damage.

(1) The party who invokes nonperformance shall take all reasonable measures not involving inconvenience or heavy expenses to limit the ex tent of the damage caused.

(2) Where he fails to take such measures, the other party may invoke such failure to require that the amount of damages be reduced.

The party who is entitled to claim compensation may have a chance to reduce the damage by buying for a lesser amount without considerable inconvenience. At least if he buys more than the normal business the compensation is reduced for he failed to discharge his duty to limit the extent of damage.

C). Special circumstances: - Article 2364 and 1808 order greater damage as an exception to the normal damage. Damages shall be equal to the prejudice actually caused where the party who suffered such prejudice shows that, at the time of the making of the contract, he had informed the other party of the special circumstances by reason of which the prejudice caused is greater. The same is true where the party shows that non-performance is due to the other party's intention to harm, gross negligence or grave fault.

D) . Thing having no current price :- Article 2365 and 1799 provides that if the thing has no current price, damages shall be equal to the prejudice which non-performance would normally cause to the creditor in the eyes of a reasonable person. Da mage s shall be equal to the prejudice actually caused where the party informed the other party of the special circumstances by reason of which prejudice is greater, or where the party shows that non-performance is due to the other party's intention to harm, gross negligence or grave fault.

E) . Anticipatory breach of contract:- In cases of anticipatory breach of contract, damages shall, where the thing has a current price, be calculated having regard to the market price of the thing on the last day of the period fixed in the contract for the performance of the obligation. Where no period has been fixed in the contract, damages shall be calculated having regard to the market price of the thing on the day when the right to declare the cancellation of the contract could be exercised. Damages however, may not exceed the price actually paid for a previous purchase in replacement nor the difference between the price fixed in the contract and the price actually received for a previous compensatory sale.

F). Dispossession:- Where the buyer is dispossessed of the thing, the seller shall, without prejudice to other damages, reimburse him the judicial and extra-judicial expenses of the proceedings he had to institute, with the exception of the expenses he could have avoided by informing the seller of the proceedings. This compensation is not expected to be perfect expectation damage as it does not consider the opportunity he has lost and does not award him with the expense of buying suchthing.

2.6. Contracts allied to sale (various forms of contract)

2.6.1. Overview

There are contracts which are similar to sales contract with certain unique applications. These contracts have certain unique application in their formation, in transfer of risk, obligation of the parties, and other associated issues.

Having discussed the various remedies of non-performance therefore, various forms of sales and contracts allied to sale specifically sale of cattle and other living things, Sale by sample, Sale on trial, sale by installment, sale with ownership reserved, sale

with right of redemption, sale with obligation to forward, sale by auction, under various forms of sales and barter contract, hiring sale and contract of supply under the contracts allied to sales will be discussed.

Generally, corporeal chattels are the subject matter of various forms of sales and contracts allied to sales. Accordingly, when the special provisions dealing with the special corporeal chattels are silent, provisions of sales contract and general contract can be applied as discussed in scope and function of law of sales. Their similarity and difference with contract of sale and among themselves will be discussed in dealing with each special contract. After studying this section students are expected to:

- Differentiate between the contract of sale and various forms of sales and contracts allied to sales
- Differentiate each various forms of sale and contracts allied to sales
- State the peculiar nature of the various forms of sale contracts allied to sales

2.6.2. Various contracts

As indicated above, various forms of sales and contracts allied to sale specifically sale of cattle and other living things, Sale by sample, Sale on trial, sale by installment, sale with ownership reserved, sale with right of redemption, sale with obligation to forward, sale by auction, under various forms of sales and barter contract, hiring sale and contract of supply under the contracts allied to sales will be discussed in the following sections.

A) Sale of cattle and other living animals:- Sale of cattle and other living things is one the various forms of sales. This special form of sales has certain peculiar characteristic s of which the obligation of the seller is one. The seller has the obligation to warranty against contagious diseases and defect. On making delivery, the seller shall guarantee that the animal sold by him does not suffer from any of the diseases which are listed in Article 2369. And any contractual stipulation contrary to this is of no effect. But the presence of such contractual obligation does not affect the very existence of the contract although the obligation to warrant is characterizing obligation of the contract.

Giving no effect to contrary stipulations is against the freedom of contract because

the parties do not have the right to agree as they like. This limitation on the freedom of contract of the parties seems to be justified on the protection of the party against information asymmetry. However, this limitation seems to overlook the possibility of agreement of parties with full knowledge. For example someone might be willing to buy an animal with such disease for research.

This is one difference between sale of cattle and other living things on one the hand and contract of sale on the other. In contract of sale leave alone express exclusion of warranty, the knowledge of the buyer about the defect denies the buyer protection.

As far as warranty against defects is concerned, warranty shall be due by the seller where the animal sold is affected by a defect such that it is not fit for the purpose to which it is destined by its nature or under contract. The parties may by express provision in the contract exclude with regard to a given defect the warranty is due.

Likewise, the parties may extend the warranty and provide that the seller shall warrant that the animal possesses a given quality. In this case the parties are free to agree in the way they like and this shows that the obligation to warrant against defect is not characterizing obligation.

Where the obligation of the parties is not discharged the contract can be cancelled pursuant to Article 2373. Where the animal suffers from a contagious disease or is affected by a defect for which warranty is due under the law or the contract, the buyer may require that the sale be cancelled.

When the contract is cancelled there are certain circumstances where compensation is ordered pursuant to Article 2375. The seller shall make good the damage caused to the buyer where: (a) the seller has expressly guaranteed that the animal was no affected by the disease or defect by reason of which the sale is cancelled; or (b) the seller is shown to have known, at the time of delivery, of the disease or defect by reason of which the sale is cancelled.

Such protection is also extended when the animal is lost as of Article 2374. Where the animal sold dies in consequence of a disease or defect for which warranty is due or of a fortuitous even caused by such defect, the loss shall be borne by the seller who shall refund the price he received.

It is not only the buyer who is protected as the seller is also protected in sale of cattle or other living things. Article 2326 shows that the buyer shall lose his rights against the seller where he fails to cause the disease or defect to be ascertained by experts and to inform the seller of such disease or defect within the time fixed in writing by the parties. Where no time has been fixed, the buyer shall lose his rights where he fails to cause the disease or defect to be ascertained by experts and to inform the seller of such disease or defect within thirty days from the animal having been delivered.

B) Sale by sample:- In addition to sale of cattle and other living things sale by sample is also another form of contract of sale. Sale by sample refers to a contract where an example of the thing to be delivered is given to the buyer.

In a sale by sample or pattern, the qualities of the thing shall conform to those of the sample or pattern. Where there is discrepancy between the sample and the manner in which the thing is described in the contract, the sample prevails. And if there are differences but no discrepancy, the thing shall combine the qualities of the sample and those of the description.

The basic difference between sale by sample and sale contract is that in sale by sample there is warranty indicating that the example given is the same as the thing to be delivered. The sample may not necessarily be the subject of sale. But the thing given as a specimen or sample shall be in conformity with the subject of sell.

Accordingly, the party to whom the sample was entrusted shall have to prove that the sample exhibited is identical to the sample received. There is no sale by sample or pattern where the seller proves that the sample or pattern was only presented to the buyer by way of information without any undertaking as to conformity.

C) Sale on trial: - In sale on trial acceptance is required to be within a certain period of time or a reasonable period. Here, it can be inferred that sale on trial is one indication of an offer with time limit for acceptance. Hence, Article 2380 connotes that where the sale has been made upon trial, the buyer shall, within the period fixed in the contract, declare whether he accepts or refuses the thing. The seller is duty bound by the contract until the expiry of the fixed period of time pursuant to Article 1690 of the civil code.

If no period is fixed in the contract, the seller may give the buyer a reasonable period of time to decide. It is questionable if the buyer can have a remedy for his reliance when the seller reneged his promise and entered into another contract. Such problem can be solved by applying general contract provision article 1691 which dictates that where acceptance is late in an offer without time limit, the offerer shall forth with inform the offeree (buyer) his intention not to be bound by his offer. This might be again result in a controversy as to what time is reasonable time.

Within the aforementioned time the buyer may show his acceptance either by keeping silent or by implication. Where the buyer fails to inform the seller of his decision within the above period, the sale shall be deemed to be concluded where the thing has been delivered to the buyer so that he may try it. This mode of acceptance is contrary to the general contract provisions.

> **?** How do you think should the contradiction between the general contract and sale on trial be resolved?

According to the general canon of interpretation and Article 1676 (2) of the Civil Code special provisions shall prevail over general provisions. The provisions on sale on trial shall be applied as general contract and sales contract provisions shall not affect special provisions of sale on trial. The thing shall be deemed to be refused in the contrary case.

In addition to acceptance by silence acceptance can also be made by implication as provided under article 2382. The sale is deemed to be concluded where the buyer pays without reservation all or part of the price or dispose of the thing otherwise than is necessary to try it. Acceptance by implication is, for stronger reason, more substantial than acceptance by silence.

As far as risk transfer is concerned, Article 2383 shows that risks shall be borne by the seller notwithstanding that the thing has been delivered to the buyer, as long as the buyer has not accepted it. This is in line with the principle which dictates that risk perishes to the owner contrary to risk follows hands.

D) Sale by installments:- In sale by installments the seller has certain options as stated under Article 2384. According to this provision, where the thing has been sold

and delivered on the condition that the price will be paid by installments and the buyer is in arrears with one of the part payments, the seller may proceed to recover the unpaid installments or, where such right has been expressly reserved to him, declare the cancellation of the contract.

Art.2385 shows that where the contract is cancelled, the seller and the buyer shall return the payments, which they have made to each other. The seller may, however, claim a fair rent and an indemnity for the wear and tear of the thing. Any stipulation imposing more onerous obligations on the buyer shall be of no effect.

Exigibility of balance is limitation on the seller to exercise his rights. Article 2386 dictates in connoting the limitation that where the exigibility of the balance of the claim has been stipulated in the case of default of payment of an installment, the seller may not avail himself of this stipulation unless the buyer is in arrears for two consecutive payments representing together not less than one tenth of the price of the sale. Any stipulation imposing more onerous obligations on the buyer shall be of no effect. Although the parties may stipulate such obligation, it will be void without affecting the very existence of the contract.

E) Sale with ownership reserved:- Sale with ownership reserved is a contract where the seller delivers the thing to the buyer without transferring ownership unlike the contract of sale where ownership is required to be transferred. In a contract with ownership reserved, the rights of third parties might be negatively affected and result in negative externality.

For example Degef might buy a car from Yidnekachew who has got it because of sale with ownership reserved from Abebe. If the real right of the Abebe is given priority, the right of third party (Degef) who has bought it might be affected.

To protect third party, Article 2387 has been provided connoting that a provision whereby the seller reserves to himself, until payment of the price, the ownership of a thing the possession of which has been transferred to the buyer shall not affect third parties unless it has been entered in a public register kept for this purpose at the place where the buyer resides. Where the third party who has acquired the thing is bankrupt, such provision shall not affect his creditors except on the conditions laid down in the commercial code. Whether the third party for whom protection is

extended is required to be in good faith or not has not been provided.

And protecting a party in bad faith seems to be absurd. If for example the third party has bought the car knowing that it belongs not to the seller but to a third party, he shall not be protected although he is a third party.

The way risk is transferred is also an important issue worth discussion. Article2388 dictates that the risks are born by the buyer from the time the thing is delivered to him. Although the seller is still the owner, risk is transferred to the buyer upon delivery or risk follows hands. This is in lin with the principle that delivery transfers risk and against the principle that dictates risk perishes to the owner.

Article 2389 dictates cancellation of sale with ownership reserved and its consequences. Where the sale is cancelled, the seller shall return to the buyer all partial payments, which he had received. He may however claim a fair rent and an indemnity for the wear and tear of the thing. Any stipulation imposing more onerous obligations on the buyer shall be of no effect.

F) Sale with right of redemption:- Sale with the right of redemption is a contract where the buyer has the right to re-take the subject of sale unlike the contract of sale. The seller may reserve to himself the right to redeem within a given period of time the thing which he sold to the buyer pursuant to Article 2390. In sales contract, however, the seller may have the chance to retake the thing sold provided that the contract is valid. Such contract might have a negative impact on certainty and security of transaction as the buyer might lack certainty on the thing he has bought.

Article 2391 has been put to attenuate such negative impact by providing limitation on the time of redemption. The period for exercising the right of redemption may not exceed two years. It shall be two years where a shorter period has not been fixed. The contracting parties are free to shorten the period of limitation of redemption by agreement unlike period of limitation in general contract provisions pursuant to Article 1855.

The buyer who buys a thing with the right of redemption has certain limitation to protect the right of the seller. The buyer may, according to Article 2392, not assign the thing to which the right of redemption extends. But this will not affect third

parties unless the clause providing for redemption has been entered in a public register kept for this purpose at the place where the buyer resides.

The seller does not have the freedom to take what he has sold without limitation as it might have negative impact on the buyer. Article 2393 has extended protection to the buyer by imposing obligation on the seller. The seller who exercises his right of redemption shall refund the buyer the price, which he had received, and the expenses of the contract of sale. Unless otherwise agreed, the provisions of the chapter of this code relates that to unlawful enrichment shall apply as regards the expenses incurred by the buyer on the thing.

G) Sale with the obligation to forward the thing:- Sale with obligation to forward wccurs when the seller is duty bound to convey the thing to the buyer. Article 2394 which deal with care of transport, sates that where the seller is bound by the contract to forward the thing, he shall make, on the usual conditions and by the usual means, the contracts of carriage necessary for the thing to be actually forwarded to the place fixed in the contract of sale.

Where the contract of sale implies the carrying of the thing, the delivery shall, unless otherwise agreed, be effected by the handing over of the thing to the carrier as of Article 2395. This mode of delivery is actual handing over of the thing. Where the seller uses his own means of transport or means of transport hired by him for the purpose of effecting part of the carrying, delivery shall be effected by the handing over of the thing to the carrier with whom the contract of carriage is made on behalf of the seller. Where the thing is to be carried by successive carriers and the seller is bound by the contract of sale to enter into one or more contracts of carriage covering the whole transport, delivery shall be effected by the handing over of the thing to the first carrier.

Article 2396 which deal with thing not intended for the execution of the contract indicates that where the thing handed over to the carrier is manifestly not intended for the execution of the contract, by reason of an address written thereon or otherwise, the duty to make delivery shall not be deemed to have been carried out unless the seller gave notice of the transport to the buyer and sent him, where appropriate, a document describing the thing.

As far as delivery in carriage by water is concerned Article 2397 states that where the carrier to whom the thing is handed over is required to carry the thing by water, delivery shall be effected by the thing being put on the board or by the ship according to the terms of the contract.

The seller may postpone the forwarding of the thing until he is paid, where the contract of carriage does not give him the right to dispose of the thing under voyage. But the seller cannot do so, where it has been agreed that delivery would take place at the place of arrival or the price is to be paid after delivery. Where the seller has forwarded the thing because he had the right to dispose thereof after the beginning of the voyage, he may, until the price is paid, object to the thing being handed over to the buyer at the place of destination.

Where a bill of lading or other document has been issued which permits to obtain the delivery of the thing or the possession of which is necessary to be able to dispose of the thing, the payment of the price may only be demanded against transfer of the document provided by the contract or by custom. In such case, the buyer may not refuse to pay the price on the ground that he was not able to examine the thing. The obligation to transfer the documents shall be deemed to be an essential provision of the contract where the document is a bill of lading or nay other document which permits to obtain the delivery of the thing or the possession of which is necessary to be able to dispose of the thing.
Where, after having forwarded the thing, the seller comes to know that the buyer has been declared insolvent, he may object to the thing being delivered to the buyer notwithstanding that the buyer is already in possession of the bill of lading or any other documents which permits to obtain the delivery of the thing. The seller may not object to the delivery where it is required by a third party regularly in possession of the bill of lading or the above mentioned document. In such case, the seller may not object to the delivery unless the bill of lading or other document contains reservation regarding the effect of its transmission or he can show that the holder, in acquiring the bill of lading or other documents, knowingly acted to the detriment of the seller.

Where the thing has been forwarded to the buyer and placed at his disposal at the place of destination, the buyer shall, if he intends to refuse the thing, take possession thereof on behalf of the seller where he can do so without payment of the

price and without inconvenience or considerable expense. But this is not the case where the seller is present at the place of destination or there exists at such place a person qualified to receive the thing.

Regardign examination of the thing: where a thing is forwarded, the buyer shall examine it at the place of destination. Where the thing is re-dispatched by the buyer without transshipment and where the seller, at the time of the making of the contract, knew or should have known of the possibility of re-dispatching, the examination shall be postponed until the thing arrives at its new destination.

H) Sale by auction:- Sale by auction has certain peculiar features one of which is its formation. As far as the formation of contract in the case of sale by auction is concerned, the contract of sale shall be concluded by the auction, which the seller or the auctioneer makes of the thing. The person who conducts the auction shall be deemed to be entitled to knock down the thing to the highest bidder, where the seller has expressed no contrary stipulation. The auctioneer does not have the right to refuse for the highest bid.

Sometimes it is questionable if there is last bid before the knocking down of the thing. A clear clarification has been put under the obligations of bidder in Article 2404 which indicates that the bidder shall be bound by his offer on the terms of the conditions of sale. Unless otherwise provided, he shall be released where a higher bid is made or his offer is not accepted immediately after the usual calls.

For example an auctioneer who is conducting an auction may not refuse to accept the highest bid from the other bidders although the auctioneer believes that the proposed price is much less than what he expected.

The obligation to pay is required to be in cash pursuant to Article 2405. Accordingly, unless otherwise provided in the conditions of sale, the bidder shall be bound to pay cash. The seller, who is not paid cash or according to the conditions of sale, may unilaterally cancel the contract forthwith,

Obligation of warranty due by the seller has been imposed under Article 2406 in that in a public and voluntarily sale by auction, the seller shall give the same warranty as in ordinary sales. In compulsory auctions, the seller shall not give warranty except in

the case of fraud on his part.

Article 2407 has also provided obligation of warranty due by the disdainer. Accordingly, he at whose request the auction takes place shall warrant the conformity of the thing with the description given of it in the conditions of sales. He shall also be liable for any fraud he may commit.

I) Barter contract:- Barter is one of the contracts allied to sale. Barter is a contract where a thing is exchanged for a thing. Certain scholars do not consider it is a contract for it leaves no obligation to be discharged.

Be that as it may it has been treated as a contract under Ethiopian laws. It differs from contract of sale in some respect. One of the differences is that there is no price to be paid in consideration of a thing to be delivered. One of the basic difference concerns their subject matter in that price is subject matter of law of sales but not a subject matter of barter contract.

Each of the exchangers shall, as regards the things subject to the exchange, have the same rights and obligations as a seller. The exchanger who is bound by the barter contract to pay a balance shall, as regards the payment of such balance, have the same obligations as a buyer. This is one way by which the general contract and sales contract provisions can be applied.

The other peculiarity is sharing of expense. Unless otherwise agreed, the exchangers shall share equally in the expenses of the barter contract since there is no buyer and seller in contract of barter. The provisions applicable to contracts of sale shall for the remainder apply to barter contracts. In addition to law of sales general contract provisions are also applicable to barter contract if they are relevant in a way they do not contradict with law of contract of sale and barter provisions.

J) Transfer of rights other than ownership:- In addition to barter transfer of rights other than ownership is also among the contracts allied to sales. This is transfer of rights without the right to dispose the thing. The bare ownership is within the owner. Transfer of rights other than ownership includes transfer of usufruct and incorporeal rights. One of the basic differences with contract of sale is lack of obligation to transfer ownership.

i. Transfer of usufruct: - Transfer of usufruct is transfer of the provisions applicable to contracts of sale apply where a person transfers for consideration the usufruct of a thing. The obligation of the seller to transfer ownership of the thing is in such case replaced by the obligation to transfer the usufruct of such thing.

ii. Transfer of incorporeal rights: - The provisions applicable to contracts of sale shall, as far as possible and without prejudice to the provisions of special laws, apply where a person transfers for consideration an incorporeal right. Copy rights, business as it constitutes mainly good will can be under this provision. The transfer of choices in action is subject to the general provisions of the law of contract. It is, accordingly, questionable if transfer of actionable rights is under this provision.

K) Hiring sale:- Regarding sale, as provided under Article 2412, the provisions applicable to contracts of sale apply where the parties have described their contract as one of hiring a thing, if it has been provided that the tenant of the thing will become the owner thereof upon payment of a given number of installments. However the following points should be given prior consideration.

The risks are borne by the tenant from the time when the thing has been delivered to him. Here the mode of delivery does not necessarily mean actual handing over. What is required to be taken into consideration is only delivery. However, it must be born in mind that ownership is not transferred accordingly the principle of transfer of risk is risk follows hands.

On termination of contract Article 2414 connotes that the tenant may at any time terminate the contract by returning the thing to the lessor. But sale contract is not subjected to termination upon the choice of one party.

As far as cancellation of the contract is concerned the general contract provisions can be applied. Especially Article 2415 connotes that where the contract is cancelled, the lessor shall return to the tenant the rents, which he has collected. He may only claim a fair rent and an indemnity for the wear and tear of the thing. Any provision imposing more onerous obligations on the tenant is of no effect. This is without affecting the formation of the contract.

L) Contract of supplies:- The definition of contract of supply has been provided under Article 2416 as “A contract of supplies is a contract whereby a party undertakes for a price to make in favor of the other party periodical or continuous deliveries of things”.

Article 2417 shows lack of sufficient definition about the quantity to be delivered does not affect the contract in its formation. Where the quantity to be supplied has not been fixed, the supplier shall supply such quantity as corresponds to the normal needs of his contracting party, having regard to the time when the contract was made. If the parties have only fixed a maximum and a minimum limit for the whole of supplies or for each delivery, the person with whom the supp lier contracted may fix, within these limits, the quantity to be supplied to him. If the quantity is to be fixed according to his needs, the person with whom the supplier contracted shall take all he needs, notwithstanding that this quantity exceeds the minimum fixed in the contract.

Lack of sufficient definition as to the price does not also affect the formation of the contract. Article 2418 states that where supplies are to be made periodically, the price for each delivery is, failing an express provision in the contract, fixed in accordance with the provisions of the law governing ordinary sale.

Article 2419 provides a gap-filling rule concerning time of payment. Accordingly, where supplies are to be made periodically, the price is due at the time of each delivery. Where supplies are to be continuous, the price is due on the usual maturity dates.

Article 2420 states that the time fixed for the various performances is considered to have been fixed in the interest of both parties. If the party entitled to the supplies is allowed to fix the time when each performance shall be made, he should inform the supplier of such time by giving him a reasonable notice.

If one of the parties fails to carry out his duties regarding a given performance, the contract may be cancelled where non-performance is of importance and capable of destroying the confidence in the regularity of the performance of future obligations. The supplier may only cancel the contract or suspend its performance after having given reasonable notice to his contracting party. Any provision to the contrary shall

be of no effect pursuant to Article 2421.

Concerning preference clause Article 2422 and 2423 goes on to say, that a provision whereby a person undertakes to get supplies in preference from a given supplier, should he need certain kinds of goods, shall not be effective for more than three years. It shall be reduced to three years where it has been made for a longer period. A person who entered in such kind of undertakings should inform the supplier of the terms offered to him by third parties. In such cases, the supplier should, under pain of loss of right, declare within the time fixed in the contract or within a reasonable time whether he intends to avail himself of the preference clause.

When there is exclusive clause binding the client, Article 2424 fills the possible gap by providing that if a provision has been made in a contract to the effect that a person shall supply himself exclusively with certain things from a given supplier, such person may not receive from third parties supplies of the things of the nature provided in the contract. Unless otherwise agreed, such person may not himself manufacture or produce things of the nature provided in the contract.

When there is an exclusive clause binding the supplier Article 2425 also takes the gap filling role and shows that if it has been agreed that the supplier should supply his products to a given person only, the supplier may not, in the area provided in the contract and during the currency of the contract, directly or indirectly supply third parties with goods of the nature provided in the contract. If the contracting party has undertaken to develop, in the area provided in the contract, the sale of the things, which have been reserved to him, he shall be liable where he fails to carry out this obligation, even if he sold the minimum quantity provided in the contract.

As far as termination of contract is concerned, if the duration of the contract of supplies has not been fixed in the contract, each party may terminate the contract by giving notice as provided in the contract or, where not provided, reasonable notice. The reasonableness of the time shall be assessed considering the position of the parties in supplying it to others and in obtaining the thing to be supplied from others.

2.7.Contract for sales of immovable

Having discussed contract for sale of goods, a discussion on sale of immovable is

necessary to understand the peculiar nature of sale of immovable in the formation performance and other related issues. In doing so general overview of sale of immovable, validity requirement and performance of sale of immovable will be discussed. In discussing the general overview, applicable laws, the subject matter of sale of immovable and other related issues will be discussed. In discussing the validity requirement for the sale of immovable, the elements of the sale of immovable along with the general elements of contract will be dealt with. Then the obligation of the contracting parties to the sale of immovable will be analyzed in the performance of sale of immovable.

Upon the completion of this section, students are expected to acquire the following legal skill:

- Pinpoint the subject of law of sale of immovable
- Differentiate between movables and immovable
- Identify whether all immovable are subject of law of sales
- List the validity requirement for the sale of immovable
- Give correct legal advice as to the validity requirement of sale of immovable
- State the peculiar obligations of the buyer and seller in relation to the sale of immovable.

2.7.1. General overview

Sale of immovable deals with sale of land, building and immovable by destinations which are considered to be immovable. Sale of immovable is contact of sale where the subject matter of the contract is immovable properties. Immovable properties are goods which cannot be moved or move by themselves contraries reading of Article 1127 and land and building are the immovable according to Article 1130 of the civil code. A contract of sales where the object of the contract is immovable according to the definition of the civil code is said to be sale of immovable.

However, it shall be born in mind that land is not subjected to sale as an individual cannot have ownership over land. The right to ownership of land is vested in the nation’s nationalities and peoples of Ethiopia pursuant to Article 40 (3) of the constitution. This provision clearly prohibits sale or any other means of exchange. This shall, however, be understood a long with its exceptions where the peasants can possess the land, pastoralists may use for free grazing and investors can use it with pay.

The general contract provisions are applicable to the contract of sale of immovable for, discussed, earlier general contract provisions are applicable to all contracts regardless their nature. Sales contract provisions are also applicable to contract of immovable pursuant to Article 2894. Article 2894 also says "*Those provisions in the Title of this code regarding "Contracts relating to the assignment of rights" which apply to contracts of barter, assignment of rights other than property and hire purchase shall apply to contracts relating to immovable.*"

Although general contract and sales contract provisions are applicable to sale of immovable, a certain special treatment is provided under the provisions dealing with sale of immovable. Article 2875 goes on to say verbally "Without prejudice to the provisions of the following Articles, the provisions of the Title of this Code regarding „contracts relating to the assignment of rights" shall apply to the sale of immovable". What we can infer from this is that the provisions of sales contract are applicable in the elements for the formation of the contract of sale of immovable, performance of the contract, non-performance of the contract and its remedies and other relevant areas where these provisions.

2.7.2. Various requirements for the validity of the contract

The validity of contract of sale of immovable requires the validity requirements provided in the general contract and contract of sale of corporeal chattels as it is contract and the provisions of law of sales are applicable on it. There are, however, additional or peculiar validity requirements which are worthy discussing here in this chapter.

Lesion has been put not to have any effect on the validity of contract. Accordingly, a sale of an immovable may not be rescinded by the buyer or the seller on the ground of lesion. However, this shall be seen in line with the general contract provisions dealing with unconscionable contracts. If the unconscionable contract is backed up by circumstances which result in unequal bargaining power of the contracting parties, the contract will be invalidated automatically pursuant to Article1710 (2) of the civil code. If for example one of the contracting parties is in necessity, has business inexperience, in certain position which puts him in unequal bargaining power, and the contract is a lesionary contract, it is subjected to invalidation by the party whose consent is vitiated.

The other validity requirement is existence of the immovable. The immovable shall exist so that the contract of sale of immovable is validly formed. Such inexistence makes it different from sale of immovable. To give an example a contract whereby one of the parties undertakes to deliver to the other party a house, a flat or another building which does not yet exist, is a contract of work or labor relating to immovable and not a contract of sale.

This actually seems to be sales contract as sales contract may relate to things which do not exist. However, this is not true in case of immovable. An immovable is not subject of sale and when the contract is for the delivery of a flat or another building it is not sales contract. Nor is it sale of immovable. The basic difference is the presence of service or labor, its relation to immovable and the inexistence of the thing to be delivered.

Another requirement is form of contract as it has been put under Article 2877. Accordingly, a contract of sale of an immovable shall be of no effect unless it is made in writing. This is in line with the general contract provisions which order that contract relating to immovable to be in written form. Article 1723 clearly connotes that contracts relating to the immovable shall be in written form and registered.

The other requirement is registration in registers of immovable property as stated under Article 2878. The contract shall be registered in the registers of immovable which is termed as “masreja na wul mezgeb kifli” It is however, questionable if it is, strictly speaking, validity requirement. The provision which on goes to say “*The sale of an immovable shall not affect third parties unless it has been registered in the registers of immovable property in the place where the immovable sold is situate”,* seems to connote that lack of registration does not affect the formation of the contract but the effect of the contract on third parties. It will have effect on the contracting parties even though it is not registered and absence of registration only affects the effect of the contract on the third parties. Had it been avoid contract specifying its effect on third parties would have been unnecessary.

Another possible interpretation of this provision is that the provision is giving emphasis on the registration in the place where the immovable is situated. Normally registration is compulsorily required and this assertion can be backed up by Article 1723 which orders registration for contracts relating to immovable. The place where

registration can be made might be the place where the immovable is situated or any other place. If it is not registered in the place where the immovable is situated, it will not have effect on third parties but it will have effect on the contracting parties. If it is not registered at all, however, it is considered to be avoid agreement.

This argument gets support from Article 2881 that deals with registered rights and burdens. The buyer shall be deemed to know all the rights and burdens affecting the immovable, which has been registered in the registers of immovable property in the place where the **immovable is situate**. In this respect, the buyer may not avail himself of the provisions concerning the warranty against eviction, unless the seller has warranted that such rights of third parties did not exist. Such warranty may only result from an express provision in the contract of sale. The buyer may avail himself of the provisions concerning the warranty against eviction where the immovable is attached and sold at the request of a creditor who has a mortgage or an antichresis. He can also avail himself if registration is in another place other than the one where the immovable is situate.

Registration in the case of hire purchase also seems to be in line with this argument as provided in Article 2895. In the case of a hire purchase, the hire purchaser may register in the registers of immovable property in the place where the immovable is. These provisions seem to indicate the importance of the place where the immovable is situated. Therefore, the exclusion of its effect on third party while making it effective for the parties and the requirement of the place where the immovable is situated in case of hire purchase can be said to emphasize the place of registration.

In practice if a contract related to immovable is not registered it is not considered to be contract in the courts of Tigray. Most lawyers also believe that registration is a mandatory validity requirement. In relation to this contracts which are made secretly for any purpose is not considered to be contract at all for they are not registered if they have to be simulated ones.

Colossal controversy has also been made as to whether registration is validity requirement or not in the Federal Court judges and lawyers. For example in a civil case C.No. 37869 between Appellants Habte Zurga and Kebebush Deberka and Respondents Mullushawa Tefere and Zewdnesh Belay Federal high Court decided that *“ a contract of sale of an immovable property need only comply with the*

requirements that it be made in writing, signed by all the parties to the agreement, and be attested by two witnesses. The requirement of registration is not a requirement as to form and is imposed for the protection of third parties not privy to the agreement."

This decision of the High Court was also reversed by the Federal Supreme Court Cassation Bench as it has been put in Cass.F.No.21784. In its decision the court said" *a contract of sale of immovable shall have no effect unless it is registered with a court or notary. The provisions of 1723 and 2878 are not mutually exclusive. Article 1723 lays down the special form which a contract of sale of an immovable has to follow in order to acquire validity. Art. 2878 imposes the additional requirement of registration in the register of immovable properties once a valid contract of sale has been entered into."*

A similar position has also been held and the same decision has also been given in a similar case whose main issue is whether registration is validity requirement as it can be referred in F.No.21448 Federal Supreme Court Cassation decision.

Even though Ethiopia is among the Civil law Legal System where court decisions do not bind other courts, Article 2(1) of Proclamation 454/1997 cassation court decision has a binding effect on any Federal and State Courts. Be that as it may, entertaining the different controversies is of greater importance for legal education.

Regarding this, one of the strongest counter arguments to the cassation decision is that of Ato Mekebeb's article that deals with formal requirement of immovable requirements. Mekbeb

Tsegaw has provided detailed argument against the cassation court decisions showing that registration is a validity requirement. He has said that Article 1723 (1) has put the requirement of registration and he added that the Amharic version is in line with the cassation court's decision.

In interpreting by seeking the intention of the legislature, he has said that the function of courts was neither registration nor authentication at the time of legislation and nor was any organ with such function. In such circumstance, the intention of the legislature was not making registration validity requirement.

He has supported his argument by the comment of Professor George Krzeczunowicz quoting his comment as “lack of registration with court or notary of the written contracts contemplated by this article does not affect their validity between the parties (1720 (3)).

After asserting the presence of at least difference at most contradiction between Article 1723 (1) and 2877, the writer maintains the position that *lex specialis derogate generalis* canon of interpretation shall be applied.

2.7.3. Performance of contract of sale of immovable

Peculiar application in sale of immovable is also observed in the obligation of the parties. Obligation of the seller to Cooperate under Article 2879 of the Civil Code is one of these. The seller shall furnish to the buyer all the documents necessary to enable the buyer to cause the transfer of the immovable to be registered in the registers of immovable property. Such obligation shall be deemed to be an essential stipulation of the contract of sale. The absence of this stipulation affects the very formation of the contract. This is an essential condition of sale of immovable without which such contract is not said to be contract of sale of immovable.

In line with the obligation to cooperate, the seller has also the obligation to disclose information about the encumbrances on the immovable pursuant to Article 2880. The seller shall declare to the buyer the rights which third parties have on the immovable sold where such rights may be set up against the buyer independently of a registration in the registers of immovable property. The contract may compel the seller to declare to the buyer the rights which third parties have on the immovable notwithstanding that such rights are entered in the registers of immovable property.

Concerning sale of immovable belonging to others, the provisions concerning the warranty against eviction shall apply where the sale relates to an immovable which, in whole or in part, did not belong to the seller. The buyer may avail himself of the provisions relating to the warranty against eviction without waiting until he has been evicted. He may accordingly require the cancellation of the contract or other remedies of non-performance. He may not avail himself of such provisions where, at the time the court is to make its decision, such eviction is no longer to be feared.

An exception to the rights of warranty has been provided with regard to persons who

have Right registered and persons who have rights of recovery. The buyer is presumed to know all the encumbrances if such rights of third parties are registered pursuant to Article 2881. In cases where the rights are registered the buyer may not be benefited from warranty of eviction unless the seller expressly agreed to warrant against eviction owing to the registered rights.

Unless otherwise expressly agreed, the seller shall not be liable in damages to the buyer where the latter is evicted by a person who avails himself of a legal right of recovery on the immovable sold.

However, if the seller is totally evicted the exception suffers an exception of exception. In case of total or partial eviction of the buyer, the seller shall refund to the latter, in addition to the price and the expenses of the contract, all the expenses incurred by him in altering the immovable.

The seller shall guarantee the area of the immovable sold where such area has been indicated in the contract. This obligation of warranty is actually in line with the agreed term of the contract. It is if the contracting parties indicate such area that the warranty is due. Such indication is not necessarily required to be express. An implied indication can also result in such obligation of warranty.

As of Article 2889 entitled Rights of buyer, *where the true area is smaller than the one which has been indicated, the buyer may require that the price be reduced accordingly. He may require the rescission of the contract where the true area is smaller by at least one-tenth than that which has been indicated or where it renders the immovable unsuitable for the use which the buyer intended to make of it and such use was known to the seller.*

Such discrepancy has been considered as non-performance of the contract and the contract can be cancelled. The term rescission seems not to be a right word as it refers to invalidation of a contract and the term is employed in the provision to connote cancellation.

Here the contract can be made ineffective if there is a fundamental breach of contract and the fundamental nature of such breach is known to the seller. The knowledge of the seller is necessary when the buyer wants it a for a particular use. If

it is of no significant importance reasonably, the trivial discrepancy does not result in rescission.

The action of the buyer based on the warranty of area shall be subject to the same conditions and be instituted within the same time as an action based on the warranty against defects. This is to refer to the time when warranty for smallness of an area is due. This shall take into account the time when the risk is transferred subject to the exceptions.

The seller may not require an increase of price where the true area is larger than that indicated in the contract. The provisions of Sub-Art (1) shall not apply where the error of the seller is due to fraud on the part of the buyer. Thus it is questionable if the contract can be invalidated. When the contract is made owing to the fraud of the buyer, the contact can be invalidated by referring to the general contract provisions. Optionally the seller can require increment of the price of the additional area.

It is questionable if this holds true for a fraudulent act of third party. Generally contract made by a fraudulent act of third party results in an invalid contract. This is not an exception for fraudulent act in the area of immovable. But if the contract is upheld whether increment of the price is due is moot. It might be argued that if a contract which is formed by fraudulent act of third party can be invalidated, for stronger reason the seller shall have the right to require increment in the price of the additional area. Therefore, the provision should be interpreted in a way it allows increment when there is a fraudulent act which might result in invalidation of the contract.

However, the buyer might prefer invalidation to increment and he does not actually have the power to require invalidation as it is only the seller, being cheated, can require the invalidation of the contract. Imposing the duty of increasing the price of the additional area would be against freedom of contract. Accordingly, it should not be interpreted in a way that erodes the freedom of the contracting party who does not have the power to invalidate the contract.

By presumption the buyer of an immovable is deemed to have a particular interest in the specific performance of the contract. The importance of this presumption is that he may, accordingly, demand such execution. The buyer is not duty bound to accept

compensation as a remedy of non-performance as it can be made when the buyer does not have a special interest in the specific performance of the contract.

There is, however, period of limitation for specific performance. The buyer shall lose the right to demand the specific performance of the contract where he fails to demand it within one year after he has ascertained the delay of the seller. This period of limitation is for the specific performance not for remedies of non-performance of the contract. The buyer can resort to the other remedies of non-performance.

As far as sale with right of redemption is concerned the seller may, in the contract of sale, reserve to himself the right to purchase the immovable from the buyer during a certain period. The provisions of the Title of this Code relating to “Joint ownership, usufruct and other rights in rem” concerning the promise of sale shall apply to such stipulation.

2.8. Summary

Contract of sales does not have universally accepted definition although it might have a working definition in different legal systems. Article 2266 has defined sales contract in terms of the obligation of the seller to deliver and transfer ownership and in terms of the obligation of the buyer to pay a price. Contract, seller and buyer, the thing, the price, have also been provided as elements of the definition.

In its formation in addition to all the requirements for the formation of contract, consideration has been put as peculiar requirement. In performance of the contract of sale the seller and the buyer have certain obligations imposed by law custom, good faith. The obligations of the seller are delivery, transferring ownership, warranty, handing over of documented and insurance. The seller also has the obligation of paying the price and taking delivery. The obligations to pay expenses and preserve the thing are also common obligations of the parties. In law of sales the crucial issue of risk transfer has been provided to be effected by delivery, delay of buyer and handing over of the thing to carriage.

The gap filling provisions of contract of sales in non-performance of the contract provide various remedies to protect security of transaction. After the precondition of default notice is complied, a party may require forced performance, cancellation,

cancel the contract by him/her self and /or require compensation depending on the circumstance.

various forms of sales and contracts allied to sale specifically sale of cattle and other living things, Sale by sample, Sale on trial, sale by installment, sale with ownership reserved, sale with right of redemption, sale with obligation to forward, sale by auction, under various forms of sales and barter contract, hiring sale and contract of supply under the contracts allied to sales are among the most similar juridical acts with contract of sales. Be that as it may they all have their own peculiar features.

Although sale of immovable is not strictly under law of sales and has its own peculiar features, general contract and sales contract provisions can be applied depending on the circumstances. Immovable as subject matter creates one peculiar feature. In addition to that unconscionable sale of immovable has been said to be valid. The existence of the immovable has also been put as a validity requirement. Furthermore formal requirement is a validity requirement with great deal of controversy whether registration is validity requirement.

2.9. Review questions

1. Does lack of sufficient definition affect the formation of contract of sales? Why/ why not?
2. What is the difference between conditions and warranties in common law legal system?
3. Is there such a distinction in Ethiopian law of sales?
4. Discuss the limits of warranty of dispossession.
5. Can a party who does not bear risk have the obligation to preserve a thing? Why/why not?
6. Discuss nemo dat quad non habet in light of transfer of ownership by sales contract?
7. W/ro Semira bought a pledged car for a certain amount of money from W/ro Danayit being informed that the car is pledged. How is the obligation of warrant of W/ro Danayit against dispossession owing to pledge? How would be the obligation of warranty against defect if the car was defective and such defect was known by the buyer?
8. What is the element of the definition which distinguishes sales contract from lease and donation?

9. What is the difference between sale and agreement to sale? Does Ethiopian law of sales show such a difference?
10. What are the preconditions of the remedies of non-performance of contract?
11. Why do you think is default notice necessary?
12. What are the remedies of non-performance of contract?
13. Discuss whether the remedies are alternative or cumulative remedies.
14. List the various forms of contract of sale and contracts allied to sales, along with their peculiar natures.
15. What is the difference in the formation of general contract and sale of immovable with reference to lesion as elements of contract?
16. What is the very purpose of formal requirement? Argue if registration is a formal requirement pursuant to the provisions of the Civil Code.
17. How is delivery effected in sale of immovable?

Chapter Three

International sales contract

Introduction to the chapter

Having seen the contract for sale of goods, it is important to discuss the circumstances when the contracting parties are Ethiopians or when their contract is considered to be an international contract of sale. Most of the issues in the international sales contract are a question of private international law. The basic issues related to an international sale contract is the court which has jurisdiction, the applicable laws and other related issues of conflict of law.

In an international sales contract, the basic concern of this reading material will be the applicable laws, the court which have jurisdiction in certain international contracts and the application of internationally applicable laws by Ethiopian courts.

Objectives of the chapter

By the end of this chapter, students are expected to:

> Define the term international sales contract;

> recognize how courts having jurisdiction over international sales contract are determined;

> To distinguish international conventions applicable in international sale of goods;

> Detect whether signing to conventions has binding effect on the states and its citizens;

> To detect the circumstances by which these international conventions can be applicable in Ethiopian courts;

An international sales contract is concerned with sales contract between a seller and a buyer, which can be from different countries. International sales contract is a concern of conflict of laws. In light with this the laws, which govern international sales, contract, the court having jurisdiction and other issues of conflict of law are relevant. Be that as it may it is worthy discussing certain laws or conventions, which are applicable to international sales contract, which might be concluded by Ethiopian traders.

CISG (Convention on International Sales of Goods), UNIDROIT Principles as Principles of European Contract Law and Model Contracts are designed to facilitate and promote international trade by making uniform laws, which result in legal certainty and predictability. Several countries have already adopted CISG. Ethiopia is not, however, among these countries although this does not mean that Ethiopian traders are not to be affected by it. Ethiopian traders enter into sales contract not only in Ethiopia but also outside Ethiopia. Certainly the application of CISG, UNIDROIT Principles will be more probable when Ethiopian trades are involved in contracts outside Ethiopia.

There might also be circumstances where this principle might be of help even in domestic affairs. Freedom of contract also allows parties to choose the applicable law even though the parties are Ethiopian or the contract is made in Ethiopia.

Accordingly, the application of CISG and UNIDROIT in international sales contract and domestic contracts will be discussed as of CISG and UNIDROIT is possible when

- the rules of conflict of law orders the application of;
- there is lex mercatoria or trade usage; and
- the parties agree the application of CISG.

3.1. The application of CISG (Convention on International sale of Goods) on international contracts

CISG was signed in Vienna in 1980 and became effective on January 1, 1988. It is

one of the international conventions that is gaining worldwide acceptance. It is a result of the work of UNCITRAL, a commission of the United Nations empowered with synchronization of international trade laws of the world by removing legal barriers in international business. The commission comes up with uniform rules of law on significant subjects such as agency, arbitration, leasing, international sales, and others. In maturing and promoting the CISG, the UNCITRAL is not doing something new rather implementing prior aspirations of the international society.

In 1930 the International Institute for the Unification of Private Law (UNIDROIT) determined to advance with the preparation of a uniform law on the international sale of goods under the auspices of the League of Nations. Its inception is traced to the report of Professor Ernst Rabel which advocated the importance and practicality of unification of laws. Ernst Rabel not only initiated the drafting of an international uniform law of sales, but also established the fundamentals for consequent process in his comprehensive comparative study on sales law. Consequently, two uniform laws were adopted in 1964 by a diplomatic conference at The Hague, (ULIS) and (ULFIS) dealing with the international sale of goods and the formation of contracts for international sales respectively.

The two Hague conventions were applied by courts and in extrajudicial settlements. The two conventions were believed to be inclusive in their substantive application. Be that as it may, the extent of application of these two uniform laws was restricted essentially for they were ratified by few Western European Countries and hence failed to receive substantial acceptance outside Western Europe. 28 states were present at the Hague Conference. These states also signed the Final Act. Four additional countries sent observers. In the end, however, only nine states ever ratified the Conventions, which came into force on 18th August 1972. “It was especially disappointing that the Hague Conventions were not ratified by some of the signatory states such as France and the United States which had exercised a considerable influence on the formulation of their rules”.

The other reason, strictly associated to the negative belief of the developed countries which believed is that it favored the sellers of manufactured goods in the industrialized nations as these countries were not represented in the drafting process at the Hague Conference. Therefore, if the two Hague conventions are applied, either judicially or in arbitration, it is only in the context of transactions

between parties from these small number of member states.

Four years after the adoption of The Hague conventions, in 1968, UNCITRAL engaged in the mission of unifying international sales law. This is considered as an extension of the past since UNCITRAL did begin with the Hague conventions as a basic threshold intending to create an international sales law acceptable to as many countries as possible. These efforts resulted in the emergence of CISG.

Developed in such a way, CISG has four parts. Part I deals with the Convention's scope of application and its general provisions. Part II provides the provisions governing formation of contracts. Part III provides the substantive rules for the sales contract itself. And finally Part IV provides the obligations of the contracting states. A state may partly adopt part II or III together with part I. This was in response to a request made by the Scandinavian countries. This is also incorporated in Article 92 verbally as: "a Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention" and it goes on to say: " a contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this convention in respect of matters governed by the Part to which the declaration applies".

Though the convention is about contracts for international sale of goods, it does not govern every aspect of any kind of contracts for sale between every contracting party. On the other hand, the scope of application of the convention is limited in some four aspects as it is provided in the first six articles. These aspects defining the scope of application of the Convention's are personal, territorial, temporal and material aspect".

3.2. The application of UNIDROIT principles on international contracts

The UNIDROIT Principles were published in 1994 by the intergovernmental agency of International Institute for the Unification of Private Law, known as UNIDROIT. Characterized by some as "a significant step forward in the globalization of legal thinking," these principles represent a new approach to international trade law.

The UNIDROIT Principles are characterized by some as an expression of the modern lex mercatoria. The UNIDROIT Principles as a whole clearly do not (yet) represent absolute usages, nor do they merely lay down doctrines and rules which are generally accepted at an international level; they also provide solutions which, even if they still represent a minority view, are perceived to be better suited to the special needs of international trade.

The UNIDROIT Principles may be used for three different purposes. One is as the lex contractus chosen by the parties; the second is as a means of interpreting and supplementing the applicable domestic law, and as a means of interpreting and supplementing existing international uniform law instruments.

3.3. The case for using CISG and UNIDROIT principles in Ethiopia

There are circumstances where CISG and UNIDROIT Principles are applied in Ethiopia. The application of CISG and UNIDROIT Principles in Ethiopia with respect to international contracts is based on two grounds: the first is freedom of contract and the other is rules of private international law. As it has been put there might also be circumstances where CISG and UNIDROIT principles are used in domestic contracts although it is believed not worth discussing now.

In examining situations where understanding of CISG and UNIDROIT Principles is imperative for those connected to Ethiopian legal system, it is worth seeing it in light with its scope of application and the conditions upon the fulfillment of which CISG could be applied to international contracts in Ethiopia.

There are three basic conditions that limit the scope of application of CISG. The cumulative satisfaction of the three conditions results in “direct and automatic application of CISG with the effect of displacing the various system of contract law of its member states in their entirety”.

The first is what is known as the „internationality’ requirement provided in Article 1 of CISG, which stipulates that “this convention applies to co ntracts for sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State”. “Therefore, neither the nationality of

the parties or their civil or commercial character nor the location or intended place of delivery of goods is not relevant in determining the application of the CISG" according to certain scholars like Ahmad Azzouni. What is considered is the place of business of the parties not the parties.

And most importantly, it "extends the application of the CISG further to contracts involving parties from non-contracting states when the rules of private international law lead to the application of the law of a contracting state". Here it should be noted that there are possibilities of avoiding this by making reservation at the time of ratification or exclusion of CISG by the contracting parties. According to Article 95, "any state may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by Subparagraph (1) (b) of Article 1 of this convention". "The US has made such a declaration on the grounds that the application of Article 1 (1) (b) would lead to their own law being displaced more often than that of the non-contracting state". "Germany responded to this declaration by the United States (and other countries) with its own reservation that it assumes no obligation to apply when the rules of private international law lead to the application of the law of a Party that has made a declaration to the effect that it will not be bound by sub paragraph (1) (b) of Article 1". What is more, Article 6 provides, "the parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions". This does not however allow unilateral exclusion of the application of the convention. Whatever the proposal of one party is the formation of the contract will in the first place be determined by the convention. It can only be excluded if the application of these policies and principles are excluded by agreement of the parties, nevertheless their application as an initial matter is inevitable.

Among the essential conditions for the application of CISG, the subject matter of the contract is one condition. CISG applies exclusively to contracts for the sale of goods. This condition is stated in Article 1 and also clarified under Articles 2, 3, 4 and 5. Article 2 excludes goods bought for personal, family or household uses, if the seller has the information. Sale by auction, under authority of law, or of securities, vessels, or electricity is also among the excluded transactions.

Moreover, "the impossibility to determine for certain kind of sales if they are of a

national or of an international character, also the possible conflict that may occur with respect to other international instruments, which also regulate the same objects as those falling into the scope of the CISG", and "the fact that in many countries the sale of some or all of the items listed in Article 2 is governed by special rules reflecting their special nature, determined either because of the purpose of sale (goods bought for personal, family or household use), or the nature of the sale (sale by auction, on execution or otherwise by law), or the nature of the goods (stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, a ircraft or electricity)" partly explain the exclusions made in Article 2.

Article 3 provides that, "contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production" and the provision goes on to say "this Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services" This provision distinguishes contract of sale of goods from contracts for the supply of services, in cases where in a given situation the obligation to provide services is mixed with the obligation to provide goods.

Article 4 also limits the ambit of CISG by saying, "this Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this convention, it is not concerned with: (a) the validity of the contract or any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold". Moreover Article 5 excludes the liability of the seller for death or personal injury caused by the goods to any person.

The third condition for the application of CISG is provided in Article 100 (1) of CISG:

“this convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1) (a) or the Contracting State referred in subparagraph (1) (b) of article 1”. The principle of non retroactivity has been provided in Article 100 of CISG to protect stability and foreseeability

Having seen jurisdiction when the application of this convention in international contract in Ethiopia is concerned, it is a well recognized principle in private international law that determination of applicable law is not connected with determination of the court having jurisdiction on the matter. Article 7 of the Inter-American Convention on the Law Applicable to International Contracts partly provides, “selection of a certain forum by the parties does not necessarily entail selection of the applicable law”. And Article 5 of the same provides partly, “this convention does not determine the law applicable to the agreement of the parties concerning arbitration or selection of forum”. These indicate that Ethiopian court may have jurisdiction on the matter but the applicable law may be CISG or UNIDROIT Principles.

The condition in which Ethiopian courts assume judicial jurisdiction over international transactions has been provided by Sedler as observed from the practice. According to him, Ethiopian courts might assume jurisdiction in three different kinds of situations. The first is when the defendant in dispute is an Ethiopian national or domiciliary. The second instance is where the contract which is the subject matter of the dispute has occurred in Ethiopia. The third ground is when the parties consent to that effect.

Even though Ethiopia does not have codified rules on the choice of law, general observation can be made about the possible principles and rules that would help courts determine the applicable law based on some of the findings of scholars on the subject and the new draft proclamation on private international law.

First, courts will have to see if the parties to any international contract have made “effective choice” of the applicable law. In the absence of effective choice by parties,

the following options may be forwarded. The first is the LEX LOCI CONTRACTUS - the law of the place where the contract is concluded, which may sometimes be fortuitous and thus not advisable. In addition to that determining the place where the contract was formed might be difficult to determine when there are different rules in the formation of the contract. For example Ethiopia follows the theory of dispatch as can be remembered in contract one course. When an Ethiopian enterers into a contract with someone whose country adheres to the theory of reception, determining the place where the contract was formed can be difficult.

The second is, the LEX LOCI SOLUTIONS - the law of the place the contract is to be performed. And the third solution is the law of the state with which the contract has substantial connection or otherwise termed as the "proper law of the contract".

After applying the rules of private international law, the applicable law may be the law of a Contracting State or Non-Contracting State. If it is the law of a contracting state, then CISG may be applied on the condition that the three cumulative essential conditions mentioned earlier related to the requirement of internationality are proved to exist in given case.

This could have been different had Ethiopia ratified the CISG. In that case, the court would directly go to Article 1 and other relevant articles to see whether CISG could be applied. But since Ethiopia has not ratified CISG, Ethiopian courts are not expected to apply it. Therefore, the first thing that they would do is to apply their rules of private international law with the hope of determining the applicable law. If the rules of private international law point to the law of a Contracting State, then they will be engaged in another factual determination. Whether CISG is the applicable law for the given case shall then be ascertained.

In cases where CISG is applied by the Ethiopian courts, UNIDROIT Principles can also be used in order to supplement the CISG. Moreover, just as CISG can be applied when it is chosen by the contracting parties in Ethiopia, UNIDROIT Principles can also be applied. The other possib ility for the application of CISG and UNIDROIT Principles is as an expression of lex mercatoria by arbitral tribunals in Ethiopia.

Pursuant to Article 1713 of the Ethiopian civil code, which provides that contracting parties are bound not only by the express provisions of their agreement but also by such incidental effects as may be attached to it considering trade usage, custom and good faith, CISG and UNIDROIT can be referred to. Determining what practices are considered trade custom and usage may beg, for a very strong reason, giving attention to such documents.

On top of the above discussed possibilities, CISG and UNIDROIT Principles may be applied as a draft for contracts. This involves incorporating part or all of the provisions into their contract.

Obviously, here the court applies the provisions as it applies the terms of the contract. “This is not exactly a choice of law clause unless the parties chose the law of a Contracting State, having the state’s implementation of the CISG in mind. Instead it is to be viewed as a drafting technique which uses the provisions of the CISG as a kind of model contract”.

Generally, an international contract occurs when a contract involving parties which have business place in different countries are involved. In such case the parties might apply a law of their choice provided that their choice is sustainable at law. In the absence of such choice certain international documents like CISG and the supplementing document of UNIDROIT can be applied upon the fulfillment of certain conditions. The conditions relate to when rules of conflict of law orders the application of these documents, when there is lex mercatoria or trade usage; and when the parties agree on the application of CISG.

3.4. Summary

Ann international sales contract is a contract which is made between contracting parties who are in different countries. CISG, UNIDROIT Principles as Principles of European Contract Law and Model are among the applicable laws in international sales contract. The very purpose of these instruments is to facilitate and promote international trade by making uniform laws, which result in legal certainty and predictability.

Having passed through different historical phenomena, the convention on the international sale of goods has four parts. The scope of application of the Convention and its general provisions, formation of contracts, the substantive rules for the sales contract, and the obligations of the contracting states are respective parts of the convention and the scope of application of the convention is limited in some four aspects.

The UNIDROIT Principles being characterized as an expression of the modern lex mercatoria, may be used as the lex contractus chosen by the parties, as a means of interpreting and supplementing the applicable domestic law, and as interpreting and supplementing existing international uniform law instruments.

The circumstances where CISG and UNIDROIT principles can be applied in Ethiopia is by dint of freedom of contract and rules of private international law. Ethiopian courts can also have jurisdiction over international contracts when the defendant in dispute is an Ethiopian national or domiciliary, when contract which is the subject matter of the dispute has occurred in Ethiopia and when the parties consent to that effect. When CISG is applied by the Ethiopian courts, UNIDROIT Principles can also be used in order to supplement the CISG.

3.5.Review questions

1) What is the purpose for which the international sale of goods comes in to existence?
2) What is the role of UNIDROIT principles and CISG in international sale of goods?
3) Discuss the four parts of CISG.
4) Does signing CISG result in a mandatory application of the convention?
5) Discuss internationality requirement in light of Article 1 of CISG.
6) What is subject matter of CISG?
7) Do you think that there are circumstances where Ethiopian law of contract and law of contract of sales may be applied in international sales contract?