Law of Traders and Business Organizations

Chapter 1&2

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Chapter One

Introduction

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Chapter Outline

1. **Commerce and Commercial Code**
2. **Codification History of Commercial Code in Ethiopia**
3. **General Orientation of the Commercial Code**
4. **Enactment and Objectives of the Commercial Code**

1. Commerce and Commercial Law

Business Organizations (BOs) grew from a single individual to a group of individuals organized, first in some sort of partnership, then in more refined type of partnership and finally to a corporate form.

- ✓ Commerce was started in the ancient time may be when human being begun to live in the **cave**.

By the time there was **barter (**exchange of …).

- ✓ The **silent trade era**:-when the Axumite's were trading along the Mediterranean sea.
- ✓ The **Caravan Trade:-**

During this time, despite the existence of such trade movements, the state couldn't enact a law on commerce.

1. Commerce and Commercial Law Contd.

The current prevalent forms of BO in Ethiopia have passed through different stages of development.

The 1st BO in Ethiopia was **Franco-Ethiopian Railway Company** (1984)…was intended to last for 99 years.

- ✓ It was established by virtue of a concession given to a guy named **Alfred Ilg, not by law.**
- ✓ **Its head office was in France, Paris and** remained a French company for all practical purposes.

The 2nd BO to appear in Ethiopia was **Bank of Abyssinia (1905)** as a branch of **National Bank of Egypt.**

- ✓ The imperial government was entitled to **20% profit**.
- ✓ Later in 1931, the government of Ethiopia bought the company and named it **Bank of Ethiopia**.

1. Commerce and Commercial Law Contd.

- Then, the **Agricultural and Commercial Development Company** with no existing law than imperial decree to this effect have been established.
- It was **incorporated** in Ethiopia and thus, the first Ethiopian company.

✓ During the establishment and operation of these BOs there was no law. Thus, in Ethiopia **BO precedes the laws governing them.**

2. Codification History of Commercial Code in Ethiopia

- With the booming of commerce and formation of the above mentioned companies, the following commercial laws were promulgated;

1. Law of Loan: 1924
2. Decree of Concession: 1928
3. Law of Bankruptcy:1931
4. **Company Law** (1933): It has similar feature to Book II of the current and the 1960 Com C. It recognized **SC, PLC, OPP, LPP and Joint Stock Company.**

It was **not**, however, **published**. It remain draft due to:

- The Italian Invasion…was **not practically tested** and
- It takes time to the people to get accustomed to law.

2. Codification History of Commercial Code in Ethiopia

- Later in the 1950's, during the massive codification period, the codification commission sent an invitation to the French Prof. (**Jean Escarra**) who come up with a draft of Book II, IV and V of the 1960 Com C.
- When Pof. Escarra died in 1955, another French Prof, **Alfred Jaufrett** finalized the remaining Books in the code, Book I and III.
- Then, the code come into force in 1960 and it was claimed to be a comprehensive code of its time.
- The code was, however, **criticized for not taking in to account the Ethiopian custom** as its promulgation period was too short (1954-1960).

2. Codification History of Commercial Code in Ethiopia

- The Com C adopted in 1960 was under revision since 1990's.
- In 2021 the HPR approved the revision and the code is adopted as 'Commercial Code of the FDRE Proclamation 1243/2013.

Reasons for Revision of the Com C:..

2. Codification History of Commercial Code in Ethiopia

Material Sources of the New Code

The drafters have tried to use laws from the **civil law legal system** (Western European states), **Model Laws** and also consider taking laws of the states on the **same economic dev't with Ethiopia** as a material source of the New Com C. Some of these are:

- ✓ The French Commercial Code (2006)
- ✓ The German Company Law (2000)
- ✓ European Model Company Act (2007)
- ✓ The Turkish Commercial Code -2003
- ✓ The Indian Commercial Code -2006
- ✓ The Chinese Company Law-2005
- ✓ UN Commission on Int' Trade Law (UNCITRAL Legislative Guide on Insolvency) and etc .
- ✓ The **Old Commercial Code** (1960) itself and different **court cases** have been used as a material source.

3. General Orientation of the Commercial Code

Based on whether a commercial code, primarily, governs persons (traders) or their acts (acts of commerce), it may adopt either a Subjective, objective or Mixed Approach.

1. **Subjective Approach**

A subjective commercial code regulates community of persons called as traders/Bos and not their acts.

2. **Objective Approach**

If a commercial code adopts an Objective A, it will regulate acts known as acts of commerce no matter who the persons carrying out those acts.

It lists acts known as acts of commerce and regulates them.

In the 1960 Com C, although the drafters opted for a Subjective A, the code as it was promulgated were mixed. (5+10). **The same applies to the New Com C**.

Monopolistic or Dualistic System?

States may use a single code to govern both civilians and traders or may do so by adopting a separate codes.

1. **Monopolistic System**: It is when a state use a single code to govern both civilians and traders. E.g. Switzerland
2. **Dualistic System**: Two separate code for traders and other civilians. E.g. France and Ethiopia

✓ In such case, the codes governing traders (Com c) and civilians (Civil Code) will not be completely separate. There is an interrelationship between them.

Art. 1 of the Com C reads:

"Unless otherwise provided in this Code, the provisions of the Civil Code shall apply to persons and business organizations carrying on a trade."

According to **Prof**. **Jaufret** "the only purpose for the existence of commercial law is to supplement the civil laws."

4. Enactment and Objectives of the Commercial Code

Power to Enact Commercial Law

✓ Art. 55/4 + 52/1 of the FDRE Constitution ... HPR

A commercial code **must be uniform** to establish **one economic community…hence…**

Objectives of the commercial Code

The whole commercial code is interested/aimed:

✓ To **regulate status of** person who take part in business activities (**traders and BOs**)

✓ To **regulate commercial transactions** to which these persons are a party**.**

Chapter Two

Traders and Business

Traders

Part One

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Traders: Defined

- **Businesses** are operated by persons, whether physical or juridical. **However**, sole businesses or sole proprietorships can only be run by physical persons.
- Physical persons who operate a sole business are referred to as traders.

1. **Who are traders under the commercial code?**
2. **What are the conditions attached to the definition of traders under art. 5 of the code (+ve definition)?**
3. **Are the list of acts of commerce under art.5 exhaustive or limitative?**
4. **Who are excluded as trader by the –ve definition given to traders?**

Traders: Defined Contd.

1. Positive Definition

It is a direct explanation of who a trader is. Such explanation can be found under Arts. 5, 9, 42, 54

- In defining traders, the Com C stipulates **two conditions:**

1. **General conditions**: a physical person will become a trader if he/she operates a business:

1. **Professionally**: as his principal calling
2. **For gain (profit)**: not to pass time or not as a recreational activity

2. **Special Conditions**: the activities in which the person engages, professionally and for gain has to be within the list of **art. 5… acts of commerce.**

Is there a difference between the new and the old Com C in relation to acts of commerce listed under art.5?

Is the list under art.5 of the New Com C exhaustive or illustrative? Should it be so? Why?

Traders: Defined Contd.

Positive Defn Contd.

- In the old Com C the drafter's intention was to make the list exhaustive **at the risk of having a long list** but to avoid subjective interpretation in the absence of such listings.
- **Even though**, the list under art 5 of the Com C was meant to be exhaustive, it was later broadened by a subsequent legislations.
- Drafters of the new Com C prefer to list certain acts and yet to make it **open ended**.
- Thus, list of acts of commerce under the New CC is illustrative as it reads "*Persons who **professionally** and **for gain** carry on, **among others**, **any of the following activities** as trade shall be deemed to be traders:"*

Traders: Defined Contd.

Positive Defn Contd.

The following are traders:

- ✓ **Holding Companies?** (Art 9)…are traders

What about SC and PLCs?

The Old code states that SC and PLCs are always commercial in nature and are traders whether or not they carry acts of trade under art. 5.

- ✓ Commercial Agents (42)
- ✓ Commercial Brokers (54)
- ✓ Commission Agent (58)

Traders: Defined Contd.

2. Negative Definition (Arts 6-8)

Refers to an exclusion of activities in which if a person engages would not be considered as a trader.

Accordingly, the following are excluded from being regarded as a traders:

1. **Small Scale-Works (6/1/2+ 5(4)(5)/33/34/36 & 37)**
2. **Agriculture (farming & breeding) and Forestry (Arts 8):** why?

i. To **incentivize** them…encourage

ii. Political game: to make them lower price of their pdts

iii. Our agriculture is not large scale & is only means of subsistence…

iv. Traders needs to keep books & accounts, a requirement w/c probably these persons (farmers) **cannot fulfill**.

Traders: Defined Contd.

- **2. Negative Definition Contd.**

3. **Handicraftsmen** (Art 7): what are the conditions?

4. **Commercial Employees** (Art 27): they work (non-manual) for the trader…e.g Accountant

5. **Commercial Travellers** (36): Represent the trader in the same domicile where the head office of the bss situates…not a trader

6. **Commercial Representative** (37): rep/t the trader in a **different** city…not a trader

Traders: Defined Contd.

2. Negative Definition Contd.

7. **Bodies Corporate under public law** (**Arts. 4+24-26)** such as:

- ✓ **Administrative bodies**
- ✓ **Religious Institutions**
- ✓ **CSO and**
- ✓ **Cooperative societies**
- ✓ **Associations (24)**

These organs will not be considered as a trader even if they carry out acts under article 5 (4/1) and the Co C will not be applicable to them.

However, if any of them become a share holder in a trader BO, the laws applicable to shareholders will apply to them (Art. 4/2).

How about public enterprises? Are they subject of the Com C? See art. 4/3**/….are subject of the code, but not a trader.**

Right to Become a Trader

Everyone has the right to become a trader. T/F?

- ✓ **According** to Arts **41/1 of the Con**, **21/1 o**f New Com C and **16 of the Civil C**, it is **true** that every person is free to exercise any activity, including trade as a matter of principle.

However, the general right to engage in any trade activity **can be restricted** because of the following requirements or conditions. These are:

1. **Capacity (Minority, Interdicted Persons**| Arts. 10-14)

Persons incapable under the civil code may not carry on any trade (10/1).

- ✓ **A tutor cannot carry on a trading activity as a matter of principle,** but it is left for another law to decide whether a tutor can continue running an already existing trade of the minor or the interdicted person (11/2)

Right to Become a Trader Contd.

- **Incapacity**, both minority and interdiction, **cannot be raised as a defense** unless such incapacities are registered (14).
- An emancipated minor can carry out acts of trade (12).

2. **Married Persons** (**Arts 15-20**): **Unless** there is an objection from the other spouse, any married person can carry on a trade as though he/she were unmarried (15).

✓ If there is **objection** and the objection is **registered** (Arts 16+103), then only the trading spouse will be liable from his/her personal ppty.

Right to Become a Trader Contd.

3. **Exclusions** not to be a trader: egs.

- ✓ **Associations** (24 of the New Com C+404 of the CC)
- ✓ **Ordinary PP** under the Old Com C cannot carry acts of trade… **Now the form itself is removed**.

4. **Monopoly**: It limit not the right to be a trader but the options on which to trade.

- ✓ For instance: Until recently investment in telecom service was only reserved for the government.

Obligations of Traders

- Like it entitle rights, being a trader is not without certain obligation that needs to be discharged.
- Thus, a trader have the following main obligations:

1. **Registration** (Art 82-89 of The NC+ Art 5 of Commercial Reg & Licensing proc. 980/2016)

No person is allowed to engage in trade without registration (82/1).

Why registration is mandatory? What are it purposes?

- ✓ Promote legal business & restrain illegal trade
- ✓ Helps in providing the public a reliable info about the business
- ✓ It serves evidentiary role
- ✓ BO s will get legal personality after registration (7/1 of the Pr)

Obligations of Traders

2. Keeping Books and Accounts (61-81 N Com C)

Books: correspondences-incoming and outgoing letters should be kept **for at least 10 years** (66)

Why 10 years?...the civil code 1845 obligation is barred only after 10 years (PL).

Accounts: It involves keeping of financial statements such as profit and loss and balance sheet.

Purposes of Keeping B& A

- ✓ Helps the gov't in determining tax
- ✓ Serves as an evidence
- ✓ Helps the owner to control his employees

Obligations of Traders

3. Business License (22-32 of Proc 980/16)

- ✓ No person shall engage in a business activity without having a valid business license (22/1).
- ✓ The trader has to renew his license annually (27/1).

BUSINESSES

Articles 106-171

Part Two

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Business: Meaning and Nature

- Business as defined by the code is '**an incorporeal movable consisting of all movable property brought together and organized for the purpose of carrying out any of the commercial activities in Art.5 of this Code**' (106/1)
- '**የንግድ መደብር** ማለት ግዙፍነት የሌለው ተንቀሳቃሽ ንብረት ሆኖ በዚህ ሕግ አንቀፅ 5 የተጠቀሱትን የንግድ ሥራዎች ለማካሄድ የተሰበሰቡና የተደራጁ የሚንቀሳቀሱ ንብረቶችን ሁሉ ያካትታል።
- Thus, Business is an **incorporeal movable thing**.

✓ Its in corporeality is its ultimate feature irrespective of the existence of corporeal elements.

✓ Business mainly consists of **goodwill/maqaa gaarii/መልካም ስም** (109/1).

Business: Meaning and Nature

- Corporeal elements that make up bss include equipment and goods (ሸቀጣ ሸቀጦች) (110).
- Is it always mandatory for a business to have corporeal? **–ve…brokers**
- The business premises (immovable) cannot form part of business.
- Business by itself is **an object of property** and therefore **can be made subject of sale, lease or mortgage**.

Traders and Business

What is the interrelationship between trader and business?

- ✓ Every trader operates a business (107/1).

Is the vice versa true? Can we say every business is operated by traders?

- ✓ A trader may operate business in the capacity of **owner, usufructuary and lessee(107/3)**.

But in such cases, whom to consider as a trader? The owner, the lessee or the usufructuary?

- ✓ In such cases it is the one **who actually operates** the business that will be considered as a trader (107/3).

Business Contd.

- ✓ A business may consist of **one principal business** or of a **principal business with branches or agencies** which shall be deemed to be part of the business.
- **In such case, if branch is sold does it amounts to sale of a business?**

Where a branch or agency **is sold or let out for hire without the principal** being sold or let out for hire, such sale or lease **shall be deemed to be a sale or lease of a business (108/2)**.

- ✓ In such cases, the business will become two and this implies existence of two traders.

Elements of Business (109-111)

1. A business consists mainly of a **goodwill (109/1)**

Goodwill: is a value derived from traders and consumers relations.

Is the definition provided by art 112 on goodwill really a definition?

It depends on consumer patronage, whether a consumer likes or not your pdt/services.

- ✓ **Goodwill** appear in the public's attention in the form of a **trade mark, trade name, trade secret, industrial design** and etc.
- While some wants to share your good will others need to damage it by misleading or false discrediting statements.
- Hence, good will needs legal protection.

Protection of Goodwill

When a trader's goodwill is interfered with, the trader can use the ff two courses of action (114/1)

1. Institute a legal proceeding based on the legal or contractual prohibitions specified under arts: 29, 39, 53, 118, 131, 166,167 and etc.
2. To bring an unfair competition claim under art 2057 and sought pmt of damages.

- ✓ What is considered as a commercial unfair competition?
- ✓ What elements has to be fulfilled in order to say there is commercial unfair competition?

Commercial Unfair Competition

- Commercial Unfair Competition has two implicit ideas: **Unfairness & Competition.**

1. Competition: It presuppose existence of competitors.

Competitors are traders who are trying to reach the same customers.

✓ **Inherent** in the idea of competition, there are three elements:

i. The competitors must be selling **similar pdts** …atleast substitute goods

ii. In the **same market/area**

iii. At the **same time**

Commercial Unfair Competition Contd.

2. **Unfairness**: in relation to what makes a competition unfair, the old Com C have a detailed provision while the New CC chooses to leave the matter regulated by another law (114/2).

Thus, it is must look at Trade Competition and Consumer Protection procl.n 813/13. According to the proclamation, a competition is unfair, among others if there is:

- ✓ Any **act that causes or is likely to cause confusion** with respect to another business person or its activities…pdts

E.g. **Adidas vs Adibas**

- ✓ Any act of **disclosure/use of information of another business person w/t their consent**
- ✓ Any **false or unjustifiable allegations that discredits** or is likely to discredit another business person or its activities
- ✓ **Disseminating** to customers **false** or equivocal information

Remedies for Acts of Unfair Competition

A person/trader whose goodwill is affected by an act of commercial unfair competition may be entitled to the following remedies:

- ✓ Payment of damages for the loss
- ✓ Publication of notices designed to remove the effect of the misleading acts/statements
- ✓ Cessation of the act of unfair competition

Elements of Business (109-111) Contd.

Even if Business mainly consists of goodwill, there are also other incorporeal constituencies of business. These are (109/2):

1. the **trade name**;
2. **trademark** and any other designation under which the trade is carried on;
3. the **right to lease** the premises in which the trade is carried on;
4. intellectual property rights (copyrights &Patent);
5. Such **special rights as attach to the business itself** and **not to the trader**.

Elements of Business Contd.

- In r/n to trade name and trade while the old code made a detailed explanation, the New CC left it to be regulated by the relevant provisions of the **civil code and other laws**.

A business shall normally **not include** the **assets and debts** of the trader (111/1).

Exceptions:

- ✓ **R to the lease of the premise** (111/1)…E.g If Arsenal is sold 1 year after leasing Oltraford for 10 years…
- ✓ **Employees** (2587): if the undertaking is sold, they will remain employees of the business
- ✓ **Insurance Policy (111/2)…if** any it will pass to the new Owner
- ✓ **Non-Compete duty** (118+130): when there is sale of bss, the seller has a duty refrain…. For 5 years.

Lease of Bss Premise and Sale of Business

A person may lease a premise of business. In such scenarios, **the lessor of the business premise may not in the same building carry on similar trade to that of the lessee (116-118)**.

- ✓ When there is sale of Bss, the Civil C (2266-2367) shall be applicable (122).
- ✓ Sale of Bss has to be **made in writing, if not** it will be null and void (124).
- **Non-compete duty**: the seller is barred from doing any act of competition likely to injure the buyer.

Particularly, he may not carry on, **in the vicinity of the business he sold**, a trade similar to the trade carried on by the buyer (130/1). **For a period of 5 years** (130/2). **Is such prohibition part of the business?**

- ✓ Such prohibition **is considered part of business and may be enforced by the buyer, his heirs or any subsequent buyers**.

Rights and duties of Buyers and Sellers of Business

- The seller has a duty to hand over the bss (127/1) with its constituent part, save for contrary agreement (127/2).
- Until he is fully paid, the seller shall be secured by a **legal mortgage** and shall have the right to cancel the contract (135)
- The buyer shall pay the price (132)…unless there is objection to the sale in w/c case he may keep the price.
- The buyer has a duty to publish notice of sale within one month…(136-138).

Mortgage and Lease of Business (143-155)

- Business can be mortgaged and this arrangement may arise from law (as in **135+145**) or contract(148/1)(143).
- Any person who is capable under civil law and who owns a business may mortgage such business notwithstanding that he does not operate it himself.
- In both legal and contractual mortgage, the mortgage has to be in **writing and registered**(145/2+148).

✓ A person can **lease** his business (156/1).

✓ For the lease of Bss to affect 3rd party, it has to be made in **writing & published** (157/1)

Since a contract of lease of Bss is to be made on personal qualification, the lessee **may not assign it w/t consent** of the **lessor** (163).

Contributing Business to a BO

- **Can a person contribute a business, like money cash, skill or service, in the formation of a BO? Why/why not?**

In the first place, business is an object of property and hence subject of assignment or transfer.

✓Thus, it is possible for a person to contribute business as a contribution in another BO…fulfilling the necessary requirements (Arts 168-171)