

Law of traders and business organizations

Only for educational purpose

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CHAPTER ONE-INTRODUCTION

General Orientation of the Commercial Code

The Commercial Code could be subjective or objective.

- A subjective Commercial Code is one which regulates a community of persons designated as “traders”.
- It considers above all the traders, but in order for the legislature to decide which persons have the status of a trader they must take into consideration the profession or activities which they deems to have a commercial character.
- Whereas, an objective commercial code regulates acts known as “acts of commerce”, as opposed to persons.
- The scope of application of such commercial code is determined entirely by the enumeration of these acts i.e. a purchase and sale of goods, banking, insurance, and construction.
- Hence, the scope of application of the commercial law would be determined entirely by the enumeration of these acts. •

Issue; Ethiopian commercial code is subjective or objective?

- Article 5 of z revised com code, Persons to be Regarded as Traders
 - **Persons who professionally and for gain carry** on any of the following or similar activities shall be deemed to be traders:
- The distinctly subjective features of the Code can be gathered from Articles 5 that is the definitional provisions of traders although article 5 incorporates a list of commercial activities secondarily w/c shows the objective feature of the code.
- The inclusion of this list/an enumeration of commercial activities carried out by any trader under Article 5 constitutes the basis for the objective system of commercial law.
- Objective com. law regulate not persons but “acts”, called “acts of commerce”, to which the commercial law applies no matter what the status of the individuals who carry out these acts.

- In short, the commercial law can be built upon certain acts known as “acts of commerce” or certain persons known as “traders.”
- The first belongs to the objective system while the second belongs to the subjective system.
- However in practice, no a watertight distinction exist between subjective and objective commercial law.

Civil V. commercial law dichotomy

- Commercial law is a special law for traders which supplement the general civil law.
- Civil laws apply to both traders and non-traders,
- The principle remains that there is no longer a distinction between civil and commercial contracts or between civil and commercial instruments.
- Commercial law is thus only a law supplementing the Civil Code.
- This is the principle incorporated in Article I of the revised commercial Code, which reads as, “Unless otherwise provided in this Code, the provisions of the Civil Code shall apply to persons and business organizations carrying on a trade.
- Hence, the only reason for the existence of the commercial law will be to supplement the Civil Code.

Definition and elements of Business

- Article 106 of the revised commercial code defines business as **an incorporeal movable consisting of all movable property brought together and organized for the purpose of carrying out any of the commercial activities in Article 5 of this Code.**

- Thus, the ultimate essence or quality of any business, as can be gathered from the above definitional provision, is its incorporeality irrespective of the existence of corporeal elements.
- This definition consists of two basic concepts
 - ✓ The **constituent elements of a business** and,
 - ✓ The **elements should be used to operate an activity of economic nature.**
- The importance of the incorporeal elements figures prominently under Article 109 of RCC, which stipulates;
- **A business consists mainly of goodwill.**

CONSTITUENTS OF A BUSINESS Article 109

1. Goodwill and Incorporeal Elements

- ✓ A business consists mainly of goodwill.
- ✓ A business may consist of other incorporeal elements such as:
 - a) **The trade name;**
 - b) Trademark** and any other designation under which the trade is carried on;
 - c) The right to lease the premises in which the trade is carried on;
 - d) Intellectual property rights; patent, copy right

2. Corporeal Elements, Article 110.

- A business may consist of corporeal elements such as;
 - ✓ Equipment or
 - ✓ Goods

Accordingly, there are **two basic constituent elements of a business.**

➤ These are **corporeal movable properties** and **incorporeal movable property**.

- Corporeal things are things that have material or physical existence and unity and hence, can occupy space and can be seen or touched.
- The corporeal elements of the business mainly constitute the equipment, goods, raw materials, things in stock and so on.
- Incorporeal things are things that do not have a material or physical existence, that cannot occupy space and hence that cannot be perceived by the senses.
- The incorporeal elements (in which the main essence of a business lays) mainly include the business's Goodwill, Trade-name, the special designation under which the business is carried on, patents and copyrights or other intellectual property rights.
- What is good will? [Goodwill] is only another name for reputation, credit, honesty, fair name, reliability." black's law dictionary
- Trademark or service mark is a symbol of goodwill.

Issue for Discussion

- Now, bearing in mind that property can be generally divided into two as movable and immovable property. Do you think that the immovable properties nevertheless they are owned by the trader himself (i.e., the land on which the premises of the business lays and the building in which the business is carried on) are the constituent elements of the business?
- According to Art. 110, the corporeal elements that make up a business include **equipment's and goods**.
- Therefore, immovable properties i.e. **the business premises** and **the land on which the premises has been erected**, had been excluded from the ambit of the definition of the elements of a business.

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

Definitions of trader

- Persons who professionally and for gain carry on any of the following or similar activities shall be deemed to be traders. art 5 of the revised commercial code
- Every trader operates a business.
- A trader may operate several businesses for the purpose of carrying out various commercial activities.
 - A trader may operate a business in the capacity of owner ባለቤት, usufructuary አላባ ጠባቂ or lessee ተከራይ; **only the person who operates the business shall be deemed to be a trader** and the owner or lessor of the business shall not be regarded as a trader. See Article 107 of com.code.
- Business in general can be operated by both physical (traders) and Artificial (business organizations) persons.
- However, sole-business or proprietorship can only be operated by natural persons.
 - From this we can derive the literal definition of a trader as, a natural person who operates a sole-business (an individual business).

- Physical persons who operate a sole business are referred to as traders.
- Article 5 of the revised com C. defines the word trader.
- Accordingly this provision has two key elements: the general condition and the special condition.
- The general condition consists, **in the existence of an enterprise or business**, of a **profession**, and **the goal of realizing profits** while the special condition is such that **the person carries out any of the activities enumerated in article 5 as her business object**.

• According to the **general condition**, three sub conditions shall be complementarily fulfilled. These are:

(1) The existence of a ‘business’: every trader should operate a business. Or otherwise stipulated, there is no trader that does not operate a business.

- Article 107(1) stipulates that “Every trader operates a business.”
- From this, it appears that there is no trader who does not operate a business.
- The manner of operating it does not actually matter- it can be operated as an owner, or a lessee, or a usufructuary of the business, but the trader is the one who is practically operating it.

(2) The professional nature of the operation:

- The second requirement of the general condition says that one who operates a business has to do so professionally.
- The profession requirement refers to something different from the standard lexical meaning of the word “profession” or “professional” i.e “a calling requiring specialized knowledge and often long and intensive academic preparation.”
- This requires the trader to operate the business as a principal means of calling or vocation or livelihood/or employment.
- To say that the business that is being operated by a certain person has to be her principal calling is, in effect, to say that she who operates a business as a pastime or in her leisure does not be counted as a trader.

- In short, the term „professionally“ under article 5 of the Code does not mean that every trader needs to have an academic certificate but implies the level of continuity of the activity.

(3) The existence of profit-motive:

- The main object of the trader should be maximizing profit or it should be operated for an economic gain (enrichment) i.e., as different from gratuity or charity.
- The third requirement tells us that one who starts a business and engages herself in such business professionally does not become a trader unless she does so for profit.
- A person does not become a trader the moment she/he runs a business professionally and for gain.
- It needs fulfilment of 2 special conditions.
- The special condition on the other hand, requires that the ‘business object’ of the undertaking should relate to one or the activities enumerated under Article 5 of the com. Code as acts of commerce or trading activities.

- Issues for Discussion

- *(1) Do you think that the list under Article 5 should be exhaustive or enumerative?*
- The Repealed Code defined a trader as a person engaged in specific activities, listed under an exhaustive list, mentioned in the code.
- Any person engaging in a sector that is not listed in one of those areas was not considered a trader.
- This meant that even though a person engaged in an activity that they believed was profitable and was something they could undertake professionally, they would not be considered a trader if that activity was not explicitly listed in the code as an act of trade, and, hence, they could not enforce the provisions of the commercial code.
- The New Code resolved this problem in two ways.

- First, it expanded the number of areas considered as trade from twenty-one to thirty-seven.
- Second, it changed the listing mechanism from exhaustive to illustrative, which means if a certain person does an activity “professionally” and “for gain” that person can be considered a trader even though the activity is not specifically listed in the code.
- This allows the New Code to accommodate activities that could be introduced in the future, which are not currently anticipated as trade activities.

Negative Definition of trader:

➤ Arts.7-9 of z revised com code exclude Handicraftsmen, Agricultural and Forestry Undertakings, and Holding Company i.e a company that holds shares in other business organisations but it does not itself conduct operations to produce goods or render service by engaging in activities specified under Article (5) of z com. code) from the scope of the Code’s applicability.

Rights and Duties of Traders

- Traders, as mentioned above, are natural persons who are the subject of rights and duties from their birth to their death.
- In addition, as a person, they are presumed to be capable unless expressly declared incapable by law.
- However, as different from the natural sense as an ordinary person, traders have special rights and duties as a professional person operating trade.
 - The following are the major ones:

Rights of Traders

- The right to carry on any trade

- Traders have the right to engage in a trading activity of their choice as a means of subsistence or livelihood so far as they do not resist those prohibitions regarding unfair competition and incompatibilities set by the law. See Article 21.
- In addition, traders have also the capacity to engage in a trading activity either as an individual or as a couple or as if they are unmarried at all.
- However, if a person acts as a trader individually where he was married, it is possible but the law reserves to the other spouse the right to an opposition if it is found to be in the interest of the household. Art 91
- Finally, traders have the right to become beneficiaries of any government flexibilities to traders or traders of a certain type and so on.
- A good example can be tax-exemption.

Main duties of traders

Commercial Registration: traders should be registered in the commercial register. Art 72

- Unless they are registered there will be no legal personality.
- All business organizations other than joint venture shall acquire legal personality upon registration in the commercial register. Art 175
- - What do you think are the effects of failure to register and cancellation of register? Art 100
- What if a trader sold his business or is unable to operate his business, but s/he failed to cancel or re-register it? See Art 101

Effect of Failure to Register

- Any person who fails to register in accordance with the provisions of this Code may not hold himself out to be a trader to third parties, but he shall be liable as though he were a trader.

- **Article 101. Effect of Failure to Cancel Entries**

- Any registered trader who assigns his business or lets it out for hire shall, until his registration is cancelled, be jointly and severally liable for all debts incurred by the assignee or lessee.

Maintaining Books and Accounts: art 61

- Every trader should maintain various books and accounts of the business s/he is operating.
- The notion books and accounts includes, among other things, the journals, inventories and balance sheet, and correspondences of a trader.

Prohibitions and incompatibilities:

- Every trader has the duty to respect such prohibitions or lawful restrictions or incompatibilities attached by the law.
- The prohibitions basically refer to the duties related to preserving free competition.
- For instance, anti-competitive agreements, anti-competitive mergers, and abuse of dominant position are prohibited.
- The incompatibilities are mostly related to the requirements of age, nationality, license and qualifications attached by law in respect of particular trades.
- For instance, minors may not operate trade art 12; partnerships and private limited companies may not operate high-profile businesses; foreign nationals may not operate banking or insurance business in Ethiopia, and associations may not carry on trade in Ethiopia.
- The obligation to pay tax and others obligations.

❖ **Factors necessitated the revision of 1960 com. Code**

- Commercial law plays a great role in regulating the practice of the economic community and thereby ensuring the existence of the smooth, stable and fair Commercial practice.

- In this regard, it may not be difficult to imagine the factors that have induced the revision of the old Commercial Code as there have been significant changes over the last five to six decades as to the types and manner of conducting business.
- Technological advancement, globalization, the emergence of the new commercial activists that have not been under the umbrella of Commercial activities, for one or another reasons, can be some of the reasons that have necessitated the revision of the 1960 Commercial Code of Ethiopia.
- The code came up with major and very important changes that will have the capacity to ease the way of doing business and thereby enhance the economic development of the Country.
- the major changes made in the new Commercial Code starts with the structure of the Code since the part of the old Commercial Code that deals with Banking, Insurance and negotiable instruments were taken out of the new Commercial code.
- Formerly, the laws that regulate Banking Business, Insurance and negotiable instruments existed in a dispersed manner with some aspects of these businesses being regulated under the Commercial Code while other aspects were regulated by proclamations.
- Beyond structural changes, the new Code also came up with major alterations that can potentially play vital roles in modernizing the Commercial environment of the Country.
- There is a change in the way the term „trader“ is defined.
 - Under Article 5 of the 1960 Commercial Code of Ethiopia, there are 21 exhaustive lists of activists that an individual or a Business Organization need to be engaged in professionally and for gain so as to be called a trader and thereby be under the coverage of commercial code.
- The new Commercial Code, the lists under the article are not exhaustive as opposed to the former one.

- The list is open, so it is possible to add new activities into the lists of commercial activities provided under Article 5 of the Code and it has a long list by adding the activities that were not recognized as trader activities in the former Commercial Code.
- Therefore, as opposed to the former Code, under the new Commercial Code an individual or a Business Organization can be a trader without even engaging into one or more of the trading activities provided under article 5 of the Code but some other one or more activities similar to the activities provided under article 5 of the new Commercial Code.

❖ **Scope of the Code**

- Article 55(4) of the Constitution of the Federal Democratic Republic of Ethiopia, which invests with the HPR the power to enact a Commercial Code.
- Besides, Article 52(1) stipulates that “All powers not given expressly to the Federal Government alone, or concurrently to the Federal Government and the states are reserved to the states.”
- Thus, if the power to enact a commercial code is given expressly to the Federal Government, then the states are automatically divested of the power to enact such a law.
- This implies that the commercial code must be a uniform code, like the Federal Criminal Code, that applies to the Federation as a whole.

CHAPTER TWO--CONSUMER PROTECTION AND TRADE COMPETITION

Definitions and theoretical rationale for Consumer protection and competition law

❖ **Consumer law**

- the class of laws which are especially designated to protect the consumer in his or her dealings with a trader (direct protection)
- Competition Law and Unfair Competition rules give only indirect protection to consumers. *which define the rights and obligations of consumers and traders*

Consumer-who is a consumer?

- A natural person who is acquiring goods or services for another use than business purposes/meaning for his personal or family consumption.
- A new trend: from consumer protection to a more wider user or client protection (e.g. passenger protection in air, railway, sea and road transport contracts)

Trader

- a natural or legal person who is (1) professionally selling goods or providing services to consumers (2) in order to obtain economic benefit.legislation

Consumer rights

- Basic rights of consumers, art 14
 - Right to safety; i.e., not to be deceived,
 - Right to be informed; to have access to information about products.
 - Every consumer shall have the right to get sufficient and accurate information or explanation as to the quality and type of goods or services he purchases;
 - **Right to choose-i.e., to have a variety of products at competitive prices**

- **Claim** compensation from the supplier of goods or services as manufacturer, importer, wholesaler, retailer or in any other way for damage he has suffered because of purchase or use of the goods or services.

❖ **Who is responsible for consumer protection?**

- Government agencies
- Ministry of Commerce, Investment and Consumer Affairs
- Consumer organizations
- Private groups play a vital role in promoting the consumer interest: lobbying government (e.g., Consumers Union).

What is competition?

- ❑ Competition is perhaps the core concept in competition law.
- *What then is ‘(free and fair) competition’?*
- ✓ Competition is a situation in a market in which firms or sellers independently strive for the buyers’ patronage in order to achieve a particular business objective eg. profits, sales or market shares [WorldBank,1999]
- ✓ A process of rivalry between firms ... seeking to win customers’ dealing over time.” [UK Competition Commission]
- ✓ Competition is a basic instrument of the market economy and encourages companies to provide consumers products that consumers want.
- ✓ It also encourages innovation, and pushes down prices.
- ✓ In order to be effective, competition needs suppliers who are independent of each other, each subject to the competitive pressure exerted by the others.” [European Commission]

Benefits of Competitive Market (compared with the monopolistic market)

- Lower prices of products and services
- Better products and services
- Wider choices for customers
- Greater efficiency (allocative, and productive)
- Stimulation of innovation
- Contribution to total welfare (sum of consumer and producer surplus) and development.

Illustration: Telecoms sector: successful product innovation driven by competition



What Is Competition Law?

Competition law is a class of law which attempt to bring about *free and fair competition* (*workable/contestable/competitive market*) or *the benefits of competition* by tackling *competition concerns/barriers* in the form of (cartels ቀጋ መወሰን, the abuse of a dominant position and anti-competitive mergers)

Competition Law vs. Competition Policy?

Competition policy

- All government policies and measure aimed at creating a competitive environment, including:
- Trade policy measures;
- Fiscal policies;
- Subsidies

Competition law

- Legislative framework that aims at protecting the competitive process by:
- Prohibiting certain forms of anti-competitive practices of undertakings; and
- Preventing agreements that would lead to a substantial lessening of competition; and
- Preventing unwarranted government/regulatory intervention.

Objectives of Competition Law and Policy

- Protecting the process of competition in order to bring about:
- Economic welfare – consumer, social, public, or total welfare
- Free and fair competition
- Part of the legal framework for a well-functioning market economy
- Maximizing economic efficiency and social welfare by promoting competition and regulating anti-competitive practices
- Protecting the business community from anti-competitive and unfair market practices
- Protecting consumers from misleading market conducts,
- Establishing a system that is conducive for the promotion of competitive free market;

- Ensuring that consumers get goods and services safe and suitable to their health and equivalent to the price they pay; and
- To accelerate economic development.
- Competition/antitrust rules are mainly prohibitions (prohibit certain conducts)

Anti-competitive and unfair trade practice

- Trade practice proclamation prohibits two types of commercial behaviour: Anti-competitive and No-competitive behaviours (consists of non-compliance with the legal requirements)

The former comprises of three categories of acts,

- Anti-competitive agreements
- Unfair competition, and
- Abuse of dominance

Abuse of Market Dominance

- It occurs when a dominant firm in a market, or a dominant group of firms, **engages in conduct that is intended to eliminate a competitor or to deter future entry by new competitors**; with the result that competition is prevented or lessened substantially. e.g
- Mitigating production/ ምርትን መገደብ, Hoarding የንግድ እቃን ማከማቸት or diverting, preventing or withholding goods from being sold in the regular channels of trade;
- Selling at a price below cost of production, causing the escalation of the costs of a competitor and etc.

Anti-Competitive Agreements

- Anti-competitive agreements are **agreements among competitors to prevent, restrict or distort competition.**

- An agreement between business persons in a horizontal or vertical relationship in order to prevent or significantly lessening competition
- It involves, directly or indirectly, fixing a purchase or selling price

Unfair Competition

- Unfair competition is essentially **a wrongful business practice that economically harms either consumers or business entities.**
- The act of business person which is dishonest, misleading or deceptive, and harms or is likely to harm the business interest of a competitor in the course of trade.
- Unfair competition law is nothing but one of the devices designed to protect or preserve the goodwill of a business. See Article 113. of the revised commercial code
- Competition presupposes the existence of competitors.
- Competitors are traders who are trying to reach the same customers.
- In other words, competitors are traders who offer products or services in the same market.
- Thus, inherent in the idea of competition are three elements:
 - they must be selling similar products,
 - in the same area, and
 - At the same time.

Acts amounts to unfair competitions

- Any act that causes or is likely to cause confusion **ማደናገር** with respect to another business person or its activities, in particular, the goods or services offered by such business person;

- ✓ One standard example of an act of unfair competition that is likely to mislead or confuse customers is trademark infringement.
- More particularly, confusion may occur with respect to any of the following:
 - ✓ trade-names
 - ✓ distinguishing marks
 - ✓ the appearance of a product,
- Any false or unjustifiable allegation that discredits, or is likely to discredit another business person or its activities, in particular the goods or services offered by such business person;
- Comparing goods or services falsely in the course of commercial advertisement;
- Disseminating to consumers or users, false information in connection with the price or nature or system of manufacturing or manufacturing place or content or suitability for use or quality of goods or services
- See art 8(2) of **the Competition And Consumer Protection Proclamation No 813/2013**

Effect of Unfair Competition

- In any event where an act of unfair competition has been committed by one trader against another, the Commercial Code affords the victim remedies.
- **Damages(compensation)** is the 1st remedy
- According to article 114 of the revised commercial code a trader may claim damages under Article 2057 of the Civil Code from any person who commits an act of competition which amounts to a fault.
- **Injunction**-to put an end to the unlawful act or order for corrective publicity. see 2120 & 2122 of the CC.

- Since unfair competition is a species of extra-contractual liability, all the Civil Code provisions on extra-contractual liability dealing with matters not expressly covered in commercial code and trade practice proclamations are applicable; for example, period of limitation, extent of damages, etc.
- **Administrative measures.**
 - ✓ Suspend, correct or eliminate the practice in question;
 - ✓ Suspend or cancel business license
 - ✓ Fine
 - ✓ In addition to the civil and administrative remedies, the Ethiopian legal system affords victims of unfair competition a criminal remedy.
- See Article 719, 720 and 721 of the Criminal Code w/c criminalize such specific cases of unfair competition as infringements of IP rights and misleading the purchasing public.

CHAPTER THREE-BUSINESS ORGANIZATIONS

What is business organization?

- A business organization (BO) has been defined in the old Commercial Code (old CC) as an association arising out of a partnership agreement.
- But now in the new CC a business organization is defined as an association created by memorandum of association by persons coming together contributing for the purpose of carrying economic activities and of participating in the profits.
- The term partnership agreement existing in the old CC has been left out and probably substituted by memorandum of association.
- However, there are exceptions to the above definition.
- The exceptions are joint venture (JV) and a one-person private limited company.
- JV is established not by memorandum of association but by a contractual agreement.
- Such contractual agreement should not be revealed to third parties.
- The other exception is a one-person private limited company/ ባለ አንድ አባል ኃላፊነት የተወሰነ የግል ማህበር.
- Association requires two or more persons.
- However as an exception, a company can be established by a single person.
- **The Key elements**

1. Memorandum of association

- Memorandum of association is an instrument drawn up to establish a business organization. Art173
- MoA serves as the formation document of BOs except JV.
- Therefore memorandum of association is the basic condition for the Formation of a Business Organization.

- The formation of a business organization, except joint venture, shall be of no effect unless established through a memorandum of association. Art 173

2. Contributions

- The parties must undertake to bring contributions in order to run the business.
- Contributions can be made in cash, kind, or services.

Capital contribution includes intangible property i.e copyrights, patents, trademarks, service marks, and trade secrets, including debts owed to and the use of property belonging to the contributor

3. For the purpose of carrying out economic activities

- The objective of the parties must be to engage in economic activities.
- Economic activities include, but not limited to, all of the commercial activities mentioned under Article 5 of z commercial code.
- However, all non-economic activities are excluded.

4. Participating in the profits and losses arising out thereof

- Every party in the association must have the intention to share in the profits and losses.
- Distribution of profits shall be effected in accordance with the provisions of the memorandum of association. Art 436.
- Unless otherwise provided in the memorandum of association, the share in the profits can be calculated in proportion to his holding in the paid up capital of the company. Art 291(2)
- Any provision giving all the profits to only one or some of the members of a business organization shall be of no effect/null and void (Article 178).

Types of Business Organizations

- It used to be 6 types of BOs in the old CC.
- They were ordinary partnership, joint venture, general partnership, limited partnership, Share Company and private limited company.
- Now in the new CC, they became 7(seven) in number.
- These are general partnership, limited partnerships, limited liability partnership, joint venture, Share Company, private limited company and one-person private limited company.
- In general Book II of the new commercial code on business organizations has undergone some fundamental and mostly liberal changes.

The most notable changes are:

- ✓ Abolition of the ordinary partnership;
- ✓ Introduction of limited liability partnership, and one member company as new business vehicles; and
- ✓ Abolition of articles of association as an incorporation document;
- ✓ The Memorandum of Association is the only instrument to be drawn up to establish business organizations in Ethiopia. This eliminates the Articles of Association
- ✓ The previously requirement of two incorporation documents- the MOA & the articles of association is now Incorporation will be effected by the memorandum of association alone together with other documentations.
- ✓ In practice the two document requirement served little purpose as incorporators often reproduced the same instrument with two names.
- ✓ This will make company formation simpler and ease of doing business.

- ✓ Here in the new CC ordinary partnership is left out, meaning the law on ordinary partnership has been deleted entirely. Why?
- ✓ There has always been confusion as to the nature and purpose of an ordinary partnership.
- ✓ The confusion emanated from the characterization of ordinary partnership as a non-commercial business organization.
- ✓ If so, its inclusion in the old code from the outset was problematic.
- ✓ And the business world didn't use the ordinary partnership as an organizing vehicle. This justifies its deletion.
- ✓ While the ordinary partnership form of business organization is deleted, a new form of partnership is introduced i.e. the limited liability partnership (LLP).
- ✓ This form of business vehicle combines the advantages of partnerships and companies, i.e., simplicity of partnerships and the advantage of limited liability from companies.
- ✓ It is however not open for all types of businesses/investors.
- ✓ It is reserved for professional businesses, i.e., businesses requiring professional qualification such as auditing, legal service, architecture, and so on.

Features of business organization

- The first feature, initial plurality of membership, distinguishes the business organization from the business owned by one man.
- Except one Man Company, all business organizations need minimum of two persons.
- The second feature, the possession of distinct assets.
- The third essential feature, a system of management, varies greatly.

Distinguishing B/n Business Organizations & Associations

- Association is group formed between two or more persons with a view to obtaining a result other than the securing or sharing of profits. Art 404 civil code

1. Profit motive

- It is an essential character of a business organization that it should have a profit motive, this being the feature which distinguishes it from an association.
- Profit is considered to be the underlying motive for the formation of a certain organization, then it is said to be a business organization.
- Associations are always formed for non-profit purposes.
- Examples are charitable organizations, religious groups, local and international NGOS, etc.

2. Governing laws

- Associations and business organizations are governed by two different **legal regimes** which are independent of each other.
- Associations are regulated by Articles 408-482 of the Civil Code whereas business organizations are governed by Book II of the Commercial Code.

3. Executive oversight/supervision

- **The power of executive oversight in respect of these entities vests on two distinct offices.**
- While associations are being supervised by the office of associations of the Ministry of justice,
- Business organizations fall within the jurisdiction of the Ministry of Trade and Industry.

- Under the old CC associations are expressly prohibited from engaging in any of the commercial activities listed in Article 5 of the CC.
- But under the new commercial code associations may carry on trade. See Art 24(1) of z revised commercial code.

Major Classification of Business Organizations

Partnerships and Companies

- Business organizations may be classified into **two basic types** according to the general characteristics they share in common: **partnerships** on the one hand and **companies** on the other.

(i) Partnerships.

- A partnership is an aggregate or collection of individual members.
- Thus, in a partnership firm, of paramount importance is personality of the individual partner.
- This is so, because incapacity, death, or serious disagreement between partners may result in dissolution of the partnership firm. Art 205
- Partnerships are suitable for small business involving a relationship of mutual trust and confidence.

Liability of partners;

- The partners are agents for each other.
- Therefore, they are normally jointly and severally liable for the acts of each other and the liability of each partner to third parties is unlimited, although they are liable to contribute to each other's liability and entitled to claim to an indemnity from the partner at fault.
- **What is joint and several liability mean?**

Length of existence;

- With respect to its length of existence the partnership firm, in the absence of a contract to the contrary, comes to an end when a partner dies or becomes insolvent.
- Hence, the length of existence of the partnership firm is generally considered as contingent/ dependent.

Transfer of share;

- A partner cannot transfer or assign his interest in the firm to an outsider or third party and make the transferee or assignee a partner without the consent of all the other partners.
- In other words, a partner can transfer his share in the firm, but the assignee does not thereby become a partner and is merely entitled to the assigning partner's share of the profits.

(ii) Companies.

- A company is an aggregate or collection of shares or capital.
- As a result, of capital importance is legal personality of the company.
- Thus, the company may own property, make contracts, and sue and be sued under its name.
- Also, it is entirely distinct from its members.
- The company has perpetual succession.
- As a result, death or insolvency of a shareholder does not affect its existence.

Transfer of shares;

- Shares in a company are freely transferable unless the company's memorandum of association otherwise provides.
- Thus, a shareholder can transfer his share and ordinarily the transferee becomes a member.
- That is to say, a shareholder of a company acting in his individual capacity cannot bind the firm by his acts.
- A company is managed by a board of directors, general manager, shareholders' meetings, and auditors.

Forms of Business Organizations

- Though the main classification is between partnerships and companies, partnerships can be further broken down into four legal forms and Companies comprise of three legal forms.
- Totally, there are seven legal forms of business organizations. These are; General partnership; Limited partnership; Limited liability partnership; Joint venture; Share company; Private limited company; One person private limited company. Article 174 of the Commercial Code:

Legal Personality of Bos and its Attribute

- Article 175 of the revised Commercial Code stipulates that ‘All business organizations other than joint venture shall acquire legal personality upon registration in the commercial register’.
- Legal personality, therefore, is a device whereby groups of people such as business organizations become the subject of rights and duties.

Attributes of Legal Personality

(a) Capacity

- The fundamental importance of legal personality is that an entity with legal personality is capable of enjoying, as opposed to exercising, rights.

(b) Firm name

- Another attribute of a legal person is name.
- The name of a business organization, firm-name, is chosen by the members in pursuance of the rules governing firm-names.

(c) Head Office

- The head office of a business organization is the place where its principal organs of administration and management are situated.
- It is the same as those of residence for the physical person.
- It's important to determine judicial jurisdiction and nationality of the business organization.

CHAPTER 4- GENERAL PARTNERSHIP

Definition- art 183

- A general partnership is a business organization consisting of partners who are each jointly and severally liable with the partnership itself for the obligations of the partnership. Any agreement to the contrary may not be invoked against third parties.
- The stipulation that “Any agreement to the contrary may not be invoked against third parties” Thus, it can be argued that a statutory clause relieving the partners or some of them from joint and several liabilities, if any, may only be effective as between themselves.
- General partnerships shall have firm-names. The firm names must contain at least the names of two of the partners accompanied by the phrase “General partnership”. The name of the partnership may not contain names of persons who are not partners (Art. 184)
- Where a partner whose name is mentioned in the name of the partnership ceases to be a partner, the name of the partnership shall be changed accordingly. If such partner knowingly fails to object when his name is used in the partnership name is going to be liable as a partner.

Article 185. Memorandum of Association

- A general partnership arises out of memorandum of association. In order for the memorandum of association to be valid, it must be reduced into writing.

Also it must meet the legal requirement as the minimum contents which include the name, address and nationality of each partner; the firm-name; the head office and branches, if any; the business purpose of the firm; the contributions of each partner, their value and the method of valuation; the services required from persons contributing skill; the share of each partner in the profits and in the losses and the agreed procedure for allocation of the same; the managers and agents of the firm; and the period of time for which the partnership has been established.

Article 186. Nature and Extent of Contributions

- Each partner shall make a contribution in the form of money, movable or immovable property, skill, trademark, goodwill, patent, copyright, lease right, usufruct or other contributions.
- A partner who has made contributions in kind, excluding skill, shall carry out the duties of a seller under the sale provisions of the Civil Code. Art. 187(1)
- A partner who has contributed only the use of property shall carry out the obligations of a lessor under the provisions of the Civil Code dealing with the contract of lease. Art. 187 (2)
- A partner who has contributed a debt shall have the same obligation as a debtor under the contract of loan provisions of the Civil Code. Art. 187 (3)

Who bears the risk when ownership or use of property right is contributed by some of partners? See art. 188

RIGHTS AND DUTIES OF PARTNERS

- ***See art. 190 and 191***

- Creditors of the partnership may not take an action against individual partners for debts due by the partnership until after the partnership has been served a default notice. However, an action for the repayment of fictitious dividends may be brought at any time directly against individual partners. Art. 191(2)
- Unless otherwise agreed, every partner shall have an equal share in the profits and losses, irrespective of the nature and amount of contribution he made to the partnership. Art. 192

Transfer of share

- Unless there is a contrary provision in the memorandum of association of the partnership, a partner is entitled to transfer his share to another partner. But, unanimous consent of the partners is required to admit an outsider into the partnership.

MANAGEMENT OF THE PARTNERSHIP

- The partnership shall be managed by one or more managers who may or may not be partners. Where the number of managers is more than one, their respective duties shall be specified in writing. Art. 198/1&2

Scope of the Powers of Statutory Managers

- The manager shall have the power to carry out, in the name of the partnership, all lawful acts in order to achieve the business purpose of the firm.
- More often than not, there will be a stipulation in the memorandum of association specifying the powers of the manager. Through registration, third parties become aware of the scope of the powers of the managers appointed in the memorandum of association. Also, any restriction on the powers of a manager should be entered in the commercial register. [Art 199(2)]. Unless it can not be invoked against third party.

Authority of managers

Implied authority

- The managers, whether employees or partners, are agents of the firm. Hence, there exists the typical agent principal relationship between the manager and the firm. Article 2202(1) of the Civil Code stipulates that “where the scope of the agency is not expressly fixed in the MoA, such scope shall be fixed according to the nature of the transaction to which it relates.”
- Article 199/1/ applicable to this scenario. A contrario reading of Article 199/1/ reveals an important standard that enables us to determine the power of the manager whose scope is not specified in the memorandum of association, normally the standard of the normal partnership purpose.

Apparent authority

- This is a situation where partnership, by its act or failure to act, caused a third party to believe that the person with whom he was dealing was authorized to act on behalf of the principal.
- Technically speaking, this is a situation where the partnership masked the manager with an apparent authority. In this case, both the manager and principal are jointly liable.
- The manager would be exempted from liability in cases where he acted in good faith, not knowing the reason by which his authority has come to an end.

Several Managers

- Where the number of managers is more than one, their respective duties shall be specified in writing. Art.198/2/

Manager`s Improper Exercise of Power

- ❖ Where a manager acts in the name of the partnership for his own benefit, the partnership shall be liable to third parties who dealt with him in good faith. Where it is shown that the third parties were aware of the improper use of the partnership name by the manager, the manager alone shall be liable {Art.200/1/}.
- ❖ Where a manager deals with a third party without using the partnership's name, he shall be deemed to have acted on his own behalf. The partnership shall be liable where it is shown that the manager was transacting on behalf of the partnership {Art.200/2/}.
- ❖ A manager who acts outside the scope of his powers shall alone be liable. {Art.200/3/}.
- ❖ Except with the unanimous consent of all the partners, a manager may not have dealings with the partnership on his own behalf or for the benefit of third parties.[Art. 201]

Dismissal of Manager.

Three types of dismissal

- i. **Dismissal by law (statutory dismissal):-** needs consent of all partners
- ii. **Dismissal by partners:-** it needs majority vote of the partners
- iii. **Dismissal by court:-** it needs request of one partner and good cause

As per Art. 203

1/ A partner appointed as a manager in the memorandum of association or in an amendment thereto may be dismissed by the partners in accordance with the rules that apply to the approval or amendment of the memorandum.

2/ A manager who is not a partner or a partner appointed as a manager not in the memorandum or an amendment thereto per Sub-Article (1) of this Article may be dismissed by a majority vote of the partners.

3/ A manager may be dismissed by the court for good cause at the request of a partner.

Decision Making. Art.204

- 1/ the consent of all the partners shall be required to vary the memorandum of association, appoint an attorney or carry out any act which goes beyond normal partnership practice.
- 2/ Without prejudice to the provisions of Sub-Article (1) of this Article, partners may agree to take decisions by a majority vote of all the partners. In the absence of such agreement, decisions shall be taken by a unanimous vote of the partners.
- 3/ In the absence of a contrary agreement, each partner shall have equal vote.

Dissolution, Winding up, and Termination

➤ Extinguishment of a partnership consists of 3 stages:

- ***Dissolution***
- ***Winding up or liquidation, and***
- ***Termination.***

1. **Dissolution:-** occurs when the partners cease to carry on the business together.

➤ Upon dissolution, the partnership is not terminated but:

- ✓ continues until the winding up,
- ✓ unfinished business is completed,
- ✓ receivables are collected,
- ✓ payments are made to creditors, and
- ✓ remaining assets are distributed to the partners.

Grounds of Dissolution

Dissolution by Notice- as per art. 205(1) a

- Partnership may be dissolved at any time by any partner by giving six month notice, especially in conditions where:
- ✓ no period time is agreed on (or where a partnership agreement is entered into for an undefined period);or.
- ✓ a partnership agreement is entered into for the life of one of the partners; or
- ✓ the power to dissolve on notice is provided in the MoA.

B. Dissolution due to Death, Incapacity, and Bankruptcy of a partner

- Partnership shall be dissolved where one of the partners dies or is no longer able, under the law, to be a partner- Art. 205(d).
- a partnership shall be dissolved where partner is declared bankrupt or where one his personal creditors causes his share to be disposed of under Art. 204/ b-d/.

Continuation upon Dissolution

- Even if a partnership is to be dissolved, the partners can prevent dissolution by:
- ✓ Partners may agree at any time that the interest of the indebted/insolvent partner shall be **purchased** by another partner.
- ✓ They agree to take in an additional partner or they may agree to permit the partner to sell his interest to another and to accept that person as a substitute partner. These agreements are called buy-out agreements in American legal system.

❖ Situations in which continuation in Ethiopia are:-

- Where a partner has given notice to dissolve (art.204(2) a, his partners may prevent dissolution by paying out his share- Art. 204(2) b

- Where a partner is dies, incapable, declared bankrupt-[art.205(2)b].
- Where one of his personal creditors causes his share to be disposed (Art. 204 (1) e.

Powers and Duties of Manager During Dissolution. See Art. 206

Appointment of liquidators

- Liquidators may be one or more appointed under the memorandum of association (**statutory liquidators**), or ,
- In default, by liquidators appointed by all the partners (**consensual liquidators**) or,
- In default, by court appointed liquidators(**judicial liquidators**). **Art.207**

Powers of Liquidators

- ✓ Shall take all steps necessary to complete the winding-up of the partnership. May sell the property of the partnership, represent the partnership in legal proceedings and may compromise or refer to arbitration any matters in issue, etc. [see art. 208(1)]
- ✓ Liquidators shall have the same duties & responsibilities as managers-Art. 208(2).

Steps of winding up- All claims settled →
contributions returned → surplus distributed

Settlement steps- debts → expenses and
advances → profit or losses

CHAPTER FIVE- LIMITED PARTNERSHIP

A limited partnership consists at least one general partner and one or more limited partners. The general partners assume management responsibility of the partnership and, as such, have full responsibility for the partnership and for all the debts of the partnership. In other words, the general partners, unlike limited partners, are personally liable to the partnership's creditors. Thus, at least one general partner is necessary in a limited partnership so that someone has personal liability. The formation of a limited partnership must be by a written memorandum of association signed by the partners and registered by the official in charge of the commercial register. The memorandum of association, in addition to the particulars required by article 186, must contain a clause indicating the identity of the general partners as well as the limited partners. A limited partnership shall have a firm name, which must contain the names of the general partners accompanied by the words "Limited partnership". In case a limited partner allows his name to be included in the firm-name, he shall be liable to third parties in good faith as he were a general partner.

CHAPTER-6-JOINT VENTURE

DEFINITION

A joint venture is a business organization established by an agreement among two or more persons.

- It has no legal personality and its existence is unknown to third parties.
- Registration formalities required of other business organizations do not apply to a joint venture. Article 234.
- It is the simplest form of business organization.
- It is regulated by title 5 of Book II of the Commercial Code.
 - Joint ventures, more often than not, are used for a single transaction or project, or a related series of transaction or project.
 - Although joint ventures can hardly be adapted to industrial enterprises, commercial transactions in which great amount of capital are involved are often dealt with by joint ventures.
 - • Large organizations often investigate new markets or new ideas by forming joint ventures.

Merits of Joint ventures:

- Transactions or projects can remain secret by virtue of the secretive nature of the organization; The hidden nature of joint venture is practically important for people who want to invest their capital but only in secret.
- Joint ventures are exempted from registration, unlike the remaining legal forms of business organizations;

Characteristics of JV

- A joint venture is not made known to third parties/unknown to third parties. Art 234
- Only the manager of a joint venture is known to third parties.
- Third parties do not know the existence of the venture itself let alone who the partners are. Only managers are

known to third parties.

- The hidden nature of joint venture is practically important for people who want to invest their capital but only in **secret**. • He shall alone be liable for the debts and liabilities of the joint venture. Art 242
- Where a joint venture is made known to third parties, it shall, as of such date, be regarded, insofar as such parties are concerned, as **a general partnership**. Art 235
- The very purpose of treating joint venture as general partnership is to protect third parties. Among the partnerships, general partnership is a prototype one that provides maximum protection by subjecting all partners to joint and several liability which may not be circumscribed by otherwise agreement.
- It is a **de facto business organization**, because it has not been registered. venture may not have a firm-name; may not enjoy ownership right over the capital; may not incur liabilities; may not have a head office; cannot sue or be sued in its firm-name; cannot be declared bankrupt.
- Since a joint venture has no legal personality, ownership right over the capital contributions shall remain with individual contributors (**EVERY PARTNER OWNS HIS CONTRIBUTION**) in the absence of an agreement to the contrary.) Art 236 (2).
- A joint venture agreement is not subject to registration and does not have legal personality.
- Thus, it is not going to be considered as a legal entity. Art 175
- As a consequence of lack of legal personality, a joint

Contributions

- Each partner make a contribution in the form of **money, movable or immovable property, skill, trademark,**

goodwill, patent, copyright, lease right, usufruct or other contributions. Art 186 cum 236

- Unless otherwise agreed, **every partner owns his contribution.**) ተቃራኒ ስምምነት ከሌላ በስተቀር እያንዳንዱ ሸሪክ ሆኖ መቆየቱን ባሳይንትና እንደያዘ ይቆያል። Art 236(2)

Transfer of Shares

- In the absence of an agreement to the contrary, share in a joint venture **may be transferred only with the agreement of all the partners.** Art 237

MANAGEMENT art 238

- A joint venture may be managed by one or more managers, who need not be partners.
- In the absence of an appointed manager, **all the partners shall have the status of a manager.**
- The manager enters into legal relationships with third parties in his own name.
- **Only the manager of a joint venture is known to third parties.**
- **He shall alone be liable for the debts and liabilities of the joint venture.**

Powers and Duties of Manager

- The powers and duties of the manager of a joint venture shall be specified in the agreement among the partners.
- The agreement may not be invoked against third parties. **In other word, a statutory clause that restricts the powers of the manager may not be set up against the 3rd party.** የማንበሩ ሥራ አስኪያጅ ሥልጣንና ተግባር በማህበረተኞች መካከል በሚደረግ ስምምነት ይወሰናል፤ ሆኖም ይህ ስምምነት በሦስተኛ ወገኖች ላይ መቃወሚያ ሊሆን አይችልም፤

DISSOLUTION

- Article 242 sets out various grounds for the dissolution of joint ventures. These are

- by unanimous decision of the partners for dissolution;
- A request for dissolution by one partner, where no fixed term has been specified;
- The acquisition by one partner of all the shares;
- Death, bankruptcy or incapacity of a partner, in the absence of an agreement to continue the partnership;
- A decision of the manager, if such power is conferred upon him in the agreement between the partners.

EXPULSION OF A PARTNER in lieu of DISSOLUTION

- According to Article 243(1) the court may grant an order for of the **expulsion**/ሸሪክን ከማኅበሩ ስሆማስወጣት/ of the wrongful venturer in lieu of dissolution upon application by the other venturers, where dissolution is requested for reasons attributable to one venturer.
- The agreement among partners may specify the grounds for the expulsion of a partner.
- A person who is expelled is entitled to be paid what is due to him on the day of expulsion. Sub-3

CHAPTER- 7

Limited liability partnership

❖ **Definition – art. 222(1-3)**

- A limited liability partnership is a business organization formed by two or more persons to render professional service and services complementary thereto in which the liability of partners is limited to the amount of their contributions.
- “Professional service” shall, in the context of this partnership, mean a service provided based on a professional license granted by an appropriate organ;
- “Complementary service” shall mean a related service that falls under one or more professions and is necessary to provide the professional service.
- The 1960 Commercial Code of the Empire of Ethiopia incorporated one form of limited partnership called Limited Partnership. However the limited partnership comprises of two types of partners. General partners in full liability personally, jointly and severally and limited partners who are only liable to the extent of their contribution.
- The name limited partnership does not describe it perfectly. It is a two type of liability partnership rather than a limited partnership. The correction in naming is made in the new Commercial Code of Ethiopia Proclamation No 1243/2013. It is now called a Two Type Liability Partnership rather than limited partnership.
- On the other hand, the new CC proclamation introduces a new additional form of limited partnership. It is called Limited Liability Partnership (LLP). The LLP comprises of only limited partners who are only liable to the extent of their contribution. LLP does not have partners with full liability personally, jointly and severally.
- The LLP can be **formed** by two or more partners. The partners need to have professional practice licences. The partners come together to exercise their profession and related professional services.

- Not only physical persons but also juridical persons with the necessary professional competencies can also be partners in the LLP. Nevertheless, the general manager of a LLP must be a natural person who has the professional licence that qualifies him to practice the profession.
- LLP once registered will have its own **legal personality**. The LLP shall have a name. The name need not necessarily be the name of the partners, as in the case of Two Type Liability Partnership. The name has to be a legally acceptable name and the name shall have at the end ‘Limited Liability Partnership’.
- LLP shall be established by a **memorandum of association(MoA)** and shall contain particulars as stated in Article 185 of the new CC Proclamation.
- However, in addition to those particulars, licence copies and licence numbers of each partner should be attached to the formation document of the LLP. This requirement identifies LLP as a business model done by licensed practitioners of a certain duly recognized profession.
- **Contributions** by partners is not limited to skill. Contributions can be in cash, movable or immovable property, trade mark, good will, patent, copy right, lease right, use right or any other form of contribution.
- **Conflict of interest** between a partners and the LLP shall be governed by specific profession related laws. Such laws for example include the new Federal Advocates Licencing and Administration Proclamation 1249/2013.
- However, a partner seeking to do a similar job with the LLP by himself or to a third party can do so only when he obtains a unanimous vote in the LLP. The intention is to reduce conflict of interest and if so happens with the full consent of its partners.
- **Liability** of the LLP is broad. The LLP is jointly and severally liable with a partner that inflicts damage intentionally or through negligence, to third parties while doing his job.

- Nevertheless, the LLP shall be free from such liability only when the third party victim knows that the partner is acting beyond his powers. For this and similar incidents and compensations thereof, the LLP is required by law to have professional indemnity insurance.
- **Withdrawal** or **expulsion** of a partner happens when the partner gives a three month written notice unless otherwise a different term is mentioned on the MoA, upon death or for a legal person partner upon dissolution, creditors of the partner take over his shares or sell of ALL his share contributions, insolvency of the partner, cancellation of the professional licence, barred from his profession for a long period of time unless a different agreement is there in the MoA, incapacity or ordered by court of law for good cause.
- The forms of withdrawal or expulsion of a partner have become more detailed and incorporate the professional licence cancellation or barring.
- The withdrawal or expulsion of a partner should be entered in the register where the LLP is formed, for the protection of third parties, the LLP itself and the knowledge of the licencing body.
- **Shares** of a deceased, incapacitated or insolvent partner shall be given to the rightful successors in CASH. A request to be a substitute partner is not allowed. When calculating the amount to be dispersed to a successor, the contributions of the partner, debts of the LLP or accumulated dividends if any of the partner, possible profits on progressive cases the partner has been working on, shall be considered. This made it clear what to consider in assessing the amount devolving a partner leaving the LLP.
- **Voting** for normal business affairs shall be majority of the members support. For amendment of the terms of the MoA, a 2/3 approval is required. And for change in nationality of the LLP or change of business field, 3/4 approval is required. It is unclear whether majority support, or 2/3 approval or 3/4 approval are in terms of number of partners

or share values. The MoA has to clarify the voting system. For that matter, a different voting requirement can be included for normal business voting and amendment of the MoA.

- **Dissolution** of the a LLP happens when the membership is reduced to one partner and the remaining partner cannot add a partner within six month period of time.
- The remaining partner can request an extension for three more month. In total a 9 month period is given for the remaining partner to raise the number of partners to more than one.
- A partner who continues to work the LLP without taking the necessary measures of adding a partner or partners beyond one, shall be jointly and severally liable with the LLP for creditors and debts of the LLP.
- In conclusion, the new Commercial Code of Ethiopia introduces limited liability partnership for professional services, with limited liability enjoyed by the partners.