Law of Traders and Business Organizations

Teaching Material

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Prepared under the Sponsorship of the Justice and Legal System Research Institute

2009

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UNIT ONE

INTRODUCTION

1.1 **A Brief Account of Ethiopian Law of Traders and Business Organizations**

Business organizations had gone through various stages throughout the centuries before they came to acquire characteristics which have made up distinct organizational forms prevalent in

Ethiopia today. They grew from a single individual to a group of individuals organized, first in some sort of partnerships, then in a more refined type of partnership and finally to a corporate form.

The era of Emperor Menelik II witnessed the first business organization- the Franco- Ethiopian Railway Company. And the company came about by virtue of an imperial concession granted to Alfred Ilg in 1894 with a view to constructing a railway from Djibouti to Ethiopia via Harar to Entoto and then to the White Nile. Since it was incorporated in France in pursuance of French company law, coupled with the fact that its head office was in Paris, it remained a French company for all practical purposes, nonetheless. In exchange for the concession, several shares had been assigned to the Emperor. The concession was for 99 years and, upon expiry, ownership of the company was to be conveyed to the Imperial Ethiopian Government.

The second company to appear was the Bank of Abyssinia which was formed in 1905 as a branch of the National Bank of Egypt. This company came into being, like the Franco-Ethiopian Railway Company, by virtue of a concession granted by the Emperor. Its total subscribed capital was $500,000 of which $100,000 was to be paid after the company commences business. With respect to share in the profits, the Imperial Ethiopian Government was entitled to 20% while the other shareholders were entitled 70%. The legal existence of the company was fixed at 50 years from the date of its formation, without any stipulation as to the company's fate upon its expiry. Nevertheless, in 1931, the government of Ethiopia bought the company and renamed it as "Bank of Ethiopia".

The next company that was formed in Ethiopia was the Agricultural and Commercial Development Company of Ethiopia. Unlike its predecessors, the company was incorporated in Ethiopia, and thus, it was the first Ethiopian company, though its incorporation had not been made in compliance with no existing law other than an imperial decree issued to that effect.

The formation of the afore mentioned companied and the general trend would seem to have prompted promulgation of the following commercial laws: the Law of Loans of 1924, the Decree of Concessions of 1928, the Law of Bankruptcy of 1931, and the Company Law of 1933.

The Company Law of 1933 provides for various forms of business organizations, namely, share companies, joint stock companies, private limited companies, ordinary partnerships, and limited

partnerships. It also contains several provisions pertaining to the formation, operation, and dissolution of companies.

In 1960, a more comprehensive commercial code was enacted. With respect to the drafting history of this code a few words were in order. Having accepted an invitation from the Imperial Ethiopian Government to draft a Commercial Code and a Maritime Code for Ethiopia, Professor Jean Escarra made several trips to Ethiopia in 1954, during which time he consulted with the Codification Commission and submitted to it the bulk of the texts later promulgated as Books II, IV, and V of the Commercial Code together with their exposes des motifs. Unfortunately, the work on the Commercial Code was interrupted due to the death of Professor Escarra in 1955. Then, the Imperial Ethiopian Government sent an invitation to Professor Alfred Jauffret to complete the unfinished draft Code by preparing the texts of Books I and III as well as to revise Prof. Escarra's work. Prof. Jauffret submitted his draft texts along with a Final Report on March 1, 1958. The Amharic version of these texts was then submitted to the parliament, which in early 1960 approved the draft with several amendments. The final draft text of the Commercial Code was promulgated on May 5, 1960 and the Code came into force on September 11, 1960.

1.2 General Orientation of the Commercial Code

One of the crucial issues that the draftsperson had to resolve before he set out to work on the project was as to whether the Commercial Code should 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 she must take into consideration the profession or activities which she 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.

In this regard, it has to be pointed out that the expert draftsperson opted for the subjective system to be the basis upon which he would build the 1960 Ethiopian Commercial Code. The distinctly subjective features of the Code can be gathered from Articles 5 and 10, i.e., the

definitional provisions of traders and commercial business organizations respectively, although Article 5 incorporates a list of commercial activities secondarily. The inclusion of this list under Article 5 is secondary, because although such inclusion in the law constitutes the basis for the objective system of commercial law, it does not appear here, as in any subjective system, except as an enumeration of commercial activities carried out by any trader. The subjective features can also be discerned easily from the logical organization of the Law of Trades and Business Organizations. The Law of Trades and Business Organizations, as found in Books I and II of the Commercial Code, regulates a group of persons called traders and business organizations. According to Prof. Escarra, who opted for the subjective system, as he thought it to be, "it is the only logical system for determining the scope of coverage of the Commercial Code." Prof. Jauffret also says that he followed Prof Escarra's suit while drafting the text of Book I.

Nevertheless, we should bear in mind that such a watertight distinction between subjective and objective commercial law does not hold in practice and one could easily show that there is hardly any law which is exclusively subjective or objective. All the same, one has to choose between the two in order that the law has got a basis or a point of departure. Hence, 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.

Jean ESCARRA, PRELIMINARY REPORT ON THE PREPARATION OF THE COMMERCIAL CODE OF ETHIOPIA.SUBMITTED TO THE IMPERIAL COMMISSION FOR THE CODIFICATION OF ETHIOPIAN LAW, 18JANUARY 1954. (Excerpts, COMM. C. DOC. NO.1) in Peter WINSHIP (ed. & trans.), Background Documents to the Ethiopian Commercial Code of 1960, Artistic Printers, Addis Ababa, 1974

> The first problem is to determine the scope of coverage of the future Commercial Code. On this point, there are series of controversies which, far from being only of academic interest, have many practical repercussions.
>
> Given that in principle all citizens of a specific country must be subject to a uniform legal regime of civil law, usually contained in a basic Code called the Civil Code, must there also be special provisions promulgated for those citizens of the country who engage in

commercial activities? In other words, is there (or should there be) a "commercial law" distinct from the "civil law"?

Moreover, another question is grafted on this first question. Suppose that one decides that there must be a special law for traders, special provisions of commercial law within the general civil law, on what criterion does one establish the special category of persons or of acts to be regulated by the Commercial Code?

Two different answers can be given to this question. In the first place, the legislature which promulgates the Commercial Code can declare, by a sovereign act, that the Code will regulate a community of persons designated as "traders". For example, the exercising of certain professions might automatically confer on those who engage in that profession the status of "trader". It is a little as if one chose certain individuals from the mass of citizens who, by virtue of their professions receive an armband on which is written the word "trader" and who will automatically be regulated by the Commercial Code.

Conversely, the legislator may decide that the commercial Code will 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.

The first method leads to the preparation of what one calls subjective commercial law i.e. it considers above all the trader, but obviously in order for the legislator to decide which persons have the status of trader he must more or less arbitrarily take into consideration the professions or activities which he believes have a commercial character.

During the *ancient régime*, French commercial law was fundamentally subjective. Traders formed castes or "corporations" and it is for these corporations that the commercial law had been created in the from of special legislation. Moreover, the traders sought to expand the scope of a law which was essentially favorable to them and the result was that, especially in the legal disputes between traders and non-traders, the latter were subject to the jurisdiction and procedure of the commercial courts.

Thus, when the French Revolution decided to suppress the corporations, it is interesting to note that this automatically entailed the disappearance of the "subjective" commercial law of the ancient régime.

When immediately afterwards the new Commercial Code was being prepared, the authors of the Code were preoccupied with the desire not to revive a system which had been condemned and they decided in favor of an "objective" Commercial Code. They invented the theory of "acts of commerce" and decided that the scope of application of the commercial law would be determined entirely by the enumeration of these acts.

In reality, these far too theoretical concepts necessarily had to be corrected when applied in practice and by a singular paradox the French Commercial Code, which enumerates acts of commerce in the very last articles (Arts.632 and 633), begins triumphantly with Article 1, which defines "traders" as "those persons who perform acts of commerce as a regular occupation".

In this roundabout way, the devotees of the objective system returned despite themselves to a subjective system, with the result that French commercial law has been constructed on a false foundation since that period.

I recall these precedents essentially to show that the only logical system for determining the scope of coverage of the Commercial Code is the subjective system. Most of the major modern codifications have adopted this system.

Another general problem concerning the delimitation of commercial law touches on the very existence of this law as an independent discipline. One must note first of all that the creation of a special law for traders, as a supplement to the general civil law, is essentially a historical phenomenon. It is beyond the scope of this material to describe this phenomenon and its manifestations; but one should emphasize that there is a general movement in the world which questions whether the distinction between civil and commercial law is still justified at the present time and whether it is only retained by the force of inertia.

At the present time the dominant tendency seems to be to fuse more and more closely to civil and commercial law, or, more exactly, to "commercialize" civil law. To cite only one example, in France a contract such as the contract of pledge, is regulated by the provisions of the Civil Code when it has a civil purpose and by other provisions on pledge contained in the Commercial Code when it has a commercial purpose. The rules of the civil law are much more formalistic than the commercial law rules, and the provisions on proof in civil matters are also much more rigid than in commercial matters.

The paradoxical result is that the creation and execution of a civil pledge, even where the amount in question is small, requires complex and costly formalities, while commercial contracts of pledge involving valuable amounts may be created daily with a minimum of formalities.

Consequently it is natural to make the rules of the civil law less and less burdensome and finally recognize legally only one type of contract of pledge as simple as possible which would be used by both traders and non–traders. In effect this is the tendency of numerous modern codes because the law of contracts and obligations tends to become a common general source used by all citizens no matter what their professions are/is.

For example, in Switzerland there is no Commercial Code but a general Code of Obligations which contains, on the one hand, the common source I mentioned above, and, on the other hand, a certain number of special institutions for traders, such as commercial business organizations.[7] More recently still, Italy has promulgated a Civil Code containing not only a common law of obligations but also some institutions used only by traders.

Thus, one sees that the problem of the autonomy of commercial law and its fusion with civil law is not purely theoretical. At the same time, one should not give the question excessive importance. It is perfectly conceivable that a country could have two separate Codes and thus have a Commercial Code distinct from the Civil Code. All the more so because countries with a single Code still must regulate special commercial institutions within the general provisions. The only practical consequence of what has been said is that it will be necessary to synchronize the solutions in the Ethiopian Commercial Code with those solutions adopted in the Civil Code.

To regulate differently, the same type of contract in the two Codes would be bad legislative technique and the two French legal advisers called on to draft the Civil and Commercial Codes have certainly decided not to make this error.

Therefore, the future Ethiopian Commercial Code will contain, on the one hand, specifically commercial institutions, and on the other hand, by reference to the Civil Code, the general rules of law for those contracts and obligations which apply to both traders and non-traders with the exception of a small number of cases which will have to be determined.

Given that the Imperial Ethiopian Government has taken the decision to prepare two distinct codes, the principal general problem which will have to be resolved will be to determine the persons and the transactions to which the Commercial Code will apply.

In certain countries there are special courts for litigation between traders or concerning commercial transactions: here again the heavy hand of history is evident.

The creation of special courts for traders is in fact the result of historical phenomena which cannot be analyzed here. But in reality the existence or absence of specialized courts is no longer a very important question. Some countries have both a commercial law distinct from civil law or two separate Codes and commercial courts, the compositions of which varies, distinct from civil courts. Other countries have had separate laws and courts but have suppressed their commercial and civil law but nevertheless have kept the special for commercial affairs.

As I must prepare procedural rules as well as the fundamental provisions of the commercial law, my task naturally raises the question of the general judicial organization of the country and I will necessarily examine this special question taking into account the present state of affairs in Ethiopia.

Questions

1. Do all the states in the contemporary world have Commercial Codes? Why or why not?

2. Distinguish between the subjective and objective systems of commercial law.
3. Which of the two systems did the expert draftsperson opt for while drafting the Ethiopian Commercial Code of 1960? Why?

Alfred JAUFFRET, REPORT ON THE COMPLETION OF THE DRAFTING OF THE AVANT – PFOJECT OF THE COMMERCIAL CODE OF THE EMPIRE OF ETHIOPIA (1 MARCH 1958) (EXCERPT)*, in Peter WINSHIP (ed. & trans.), Background Documents to the Ethiopian Commercial Code of 1960, Artistic Printers, Addis Ababa, 1974

General Orientation of the Commercial Code

In his preliminary Report of 18 January 1954, Professor Jean ESCARRA has set out in a masterful way the technical problems involved in the preparation of a Commercial Code. Without repeating this remarkable exposition, which I think is definitive, I will state very briefly the questions on the very foundations of the commercial law which have not yet been answered and must be answered in order to prepare the draft Commercial Code, especially Book I. Here are the questions.

A) Will the Ethiopian commercial law be subjective or objective?

B) If the Ethiopian commercial law is to be subjective, must the theory of acts of commerce be included?

C) What will be the relation of the commercial law will be to the civil law?

Professor Jean ESCARRA explained definitively the differences between the two streams of commercial law which, following the German terminology, are called subjective and objective. In its simplest form this question can be rephrased as follows: will commercial law be applicable to traders and only to traders or will it be the law applicable to certain acts, called acts of commerce, no matter who the persons carrying out these acts are?

Of course such a clear cut distinction is by no means complete in practice and one could easily show that in substantive law there is hardly a law which is exclusively subjective or exclusively objective. Nevertheless, as a basis for the law or as a point of departure, one must choose between the two.

Professor Jean ESCARRA did not hide his preference for the subjective system, which he calls in his preliminary report "the only logical system for determining the scope of coverage of the Commercial Code." Not all commercial law experts will agree with this positive affirmation of

the principle, but it is true that this system is the most widely adopted in recent laws. This system also corresponds to the present tendency to have special laws for the various professions and, even in systems which are called objective, it is necessary to have a special status for traders.

In conclusion, I believe it very desirable to follow the intention of professor ESCARRA on this point. Thus Book I, which I drafted, is devoted to the subjective concept: the point of departure of the Code is found in the definition of trader in Article 5 and the definition of commercial business organization in Article 10 Book I, in sum, is devoted for the most part to the status of the trader, a status supplemented by the bankruptcy provisions of Book V. As for commercial business organizations, they are governed by Books II and V, which deal in the same way with the status of commercial business organizations.

Even in a subjective system which sees the essence of commercial law to be the creation of a special status for traders and commercial business organizations, there can be a theory of acts of commerce as a secondary concept. As secondary concept because, although an act of commerce corresponding to a series of activities listed in the law is the basis of an objective system, it does not appear in subjective systems except as being an act done by a trader in carrying out his trade. This is, for example, the concept of Section 343 of the German Commercial Code of 1897.
It is, therefore, perfectly conceivable, even in a subjective system, that there could be special legal rules for acts of commerce: notably, special rules on judicial jurisdiction, special rules on the law of obligation (especially the proving of contracts), and even, as in German Law, special set of regulations for certain contracts when they are acts of commerce (commercial sale or commercial pledge, for example, which are not regulated, at least on certain points, by the rules of civil sale or civil pledge).

I believe the theory of acts of commerce can be ignored entirely. On the one hand, the absence of commercial courts in Ethiopia avoids any interest in a question which is very important in France, for example, where these commercial courts exist. In addition, as for the question of proof in the case of contracts, after several conferences with Professor DAVID, we have concluded that it is possible to arrive at a single rule on this question. Thus, the last amendment to the Title on Obligations, proposed last December by Mr. Rene DAVID, by incorporating in principle the freedom of proof, results in a general rule common to both civil and commercial law.

Finally, the regulation of contracts can be sufficiently adapted, perhaps, even to the more complete than that of the Swiss and Italian law, and the complete departure from a theory of acts of commerce governed by a special set of rules. This is a very great simplification.

There will probably always be some traces of the influence of commercial law on these acts. Thus, in the case of bankruptcy, certain special rules will be applied to contracts entered in to by a bankrupt trader; special rules will be necessary for the employment contract with commercial employees (Art. 29 ff. (29 – 32). Similarly, the right to the lease of the premises where a business is carried on (Art. 144 ff. (142-147) or the sale of a business (Art. 153 ff. (150 – 170) require special rules. But these are very limited exceptions.

The principle remains that there is no longer a distinction between civil and commercial contracts or between civil and commercial instruments.

One might conclude that the Commercial Code should be reduced to Books I, II and V which deal with the status of trades and of commercial business organizations.

However, this conclusion would go too far. In fact, it is logical that a Commercial Code should contain the rules on instruments, contracts and transactions which, without being exclusively commercial (because this distinction is no longer applicable), nevertheless are interest of traders in particular.

This is the justification for the existence of Book III devoted to Carriage and Insurance: Subjects which are of particular interest to traders because, on the one hand, the carriers and insurers are traders and, on the other hand, traders are the most important clients of these carriers and insurers. Undoubtedly other contracts also interest traders, such as the contract of sale or of pledge. But these contracts find a more logical place in the Civil Code because they are also frequently used by non – traders. And, although the commission contract interests traders in particular, it is logical nevertheless to include the provisions governing this contract among the Civil Code provisions governing Agency because it is merely a variety of agency contract.

Similarly, Book IV should stay in the Commercial Code because negotiable instruments are used most often by traders, since bankers are traders, and because the most important clients of banks are traders.

In sum, the Commercial Code in its present draft appears as a Code regulating the special status of traders and of commercial business organizations and governing certain transactions or contracts which have particular interest for traders and commercial business organizations.

What remains to be determined is the place of commercial law in relation to civil law – a question apparently not considered by Professor ESCARRA. A recent theory, which is still not widespread, maintains that the commercial law is autonomous. I thought it preferable, however, and more in conformity with the preeminent place of the civil law in the future law of Ethiopia, in the theory of obligations, and in the regulation of contracts, to maintain the classic principle of the priority of civil law. Commercial law is thus only a law supplementing the Civil Code. This is the principle I have incorporated in Article I of the Commercial Code, which reads as, "Unless otherwise provided in this Code, the provisions of the Civil Code shall apply to the status and activities of persons and business organizations carrying on a trade."

Questions

1. What is Alfred Jauffret's position regarding the general orientation of the avan-projet?
2. Is there any difference between the positions of Jean Escarra and Alfred Jauffret?
3. Should there be a Commercial Code independent of the Civil Code?

1.3 Scope of the Code

Central to the scope of the Code is the issue of the territorial scope of application of the Code: is it applicable in administrations that are directly accountable to the Federal Government only, or to the Federation? The problem is hypothetical rather than actual and hence is more of academic interest than a practical one. This is so because the Code was promulgated in 1960 at a time when the Ethiopian State was unitary. So, the real problem shall await the promulgation of the Revised Commercial Code. Only then shall it be addressed. A clue to this problem is to be found in Article 55(4) of the Constitution of the Federal Democratic Republic of Ethiopia, which invests with the House of Peoples' Representatives 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.

With respect to the relation between the Civil Code and the Commercial Code, Article 1 of the Commercial code provides that "Unless otherwise provided in this code, the Provisions of the Civil Code shall apply to the status and activities of persons and business organization carrying on trade. :"Article 1 provides for the pre-eminent place of the Civil law. It encapsulates the classical principle of the priority of civil law in respect of the theory of obligations and the regulation of contracts. Hence, the only reason for the existence of the commercial law will be to supplement the Civil Code. Furthermore, Article 2 renders applicable in pertinent part provisions of the Maritime Code to persons and business organizations carrying on maritime Code to persons and business organizations carrying on maritime trade. Whereas, Article 4 excludes the application of the Commercial Code to bodies corporate under public law, as they are not going to be presumed to be traders even where they carry on activities under Article 5. sub-article (2) of the same renders the first paragraph in applicable is cases where the bodies corporate under public law only participate in the undertakings as partners or shareholders.

UNIT TWO

TRADERS AND BUSINESSES

2.1 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. Chapter 2 of Title I in Book I deals with the definition of persons having the status of traders. Particularly, Article 5 defines the trader. 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. Traders, pursuant to Article 5, are persons who professional and for carry on any of the following activities:

(1) Purchasing of movables and immovable with a view to re-selling them either as they are or after alteration or adaptation;
(2) Purchasing of movables with a view to letting them for hire;
(3) Warehousing activities as defined in Art.2806 of the Civil Code;
(4) Exploitation of mines, including prospecting for and working of mineral oils;
(5) Exploitation of quarries not by handicraftsmen;
(6) Exploitation of salt pans;
(7) Conversion and adaptation of chattels, such as foodstuffs, raw materials or semi-finished products not by handicraftsmen;
(8) Building, repairing, maintaining, cleaning, painting or dyeing movables not by handicraftsmen;
(9) Embanking, leveling, trenching or draining carried out for a third party not by handicraftsmen;
(10) Carriage of goods or persons not by handicraftsmen;
(11) Printing and engraving and works connected with photography or cinematography not by handicraftsmen;
(12) Capturing, distributing and supplying water:
(13) Producing, distributing and supplying electricity, gas, compressed air including heating and cooling;
(14) Operating places of entertainment or radio or television stations;
(15) Operating hotels, restaurants, bars, cafes, inns, hair- dressing establishments not operated by handicraftsmen and public baths;
(16) Publishing in whatever form, and in particular by means of printing, engraving, photography or recording;
(17) Operating news and information services;
(18) Operating travel and publicity agencies;
(19) Operating business as an agent, broker, stock-broker or commercial agent;
(20) Operating a banking and money changing business; and
(21) Operating an insurance business.

2.1.1Positive Definition

According to the general condition, a physical person becomes a trader if and only if she operates a business/enterprise, engages in such business professionally, and for gain. The general condition's requirement of the existence of a business has not been made as explicit as in the unofficial French master-text as the remaining two. Despite its inexplicitness, the business requirement can be read into Article 5 without difficulty. This is so for two reasons. First, it is *a priori*. One cannot be a trader without operating a business or an enterprise. Second, though it has been contended that the business requirement is implicit in the fact of being trader, it is submitted that a conjunctive reading of Articles 125(1) and 5 render it explicit. Article 125(1) stipulates that "Every trader operates a business." From this, it appears that there is no trader who does not operate a business.

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". For example, Merriam-Webster's Collegiate Dictionary defines "profession" as "a calling requiring specialized knowledge and often long and intensive academic preparation." The term also denotes "a principal calling, vocation, or employment." It is not in the sense of a learnt calling, as in the first meaning, that the Code uses the term. Rather, it is in the sense of a principal calling, vocation, or employment that the Code makes use of it. 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 no be counted as a trader.

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. Turning to the second kind of condition, which I call the special condition, a person does not become a trader the moment she runs a business professionally and for gain. According to the special condition, the business objects of such person has to be carry out one or more of the activities listed in Article 5 of the Commercial Code. Here, I wish to raise one issue in connection with the special condition. Is the enumeration under Art.5 illustrative or exhaustive?

The list in Article 5 was meant to be exhaustive (Read the excerpts below). However, it has been broadened by subsequent legislations. Cases in point are the Commercial Registration and Business Licensing Proclamation No. 67/97, as amended, the Re-enactment of the Investment

Proclamation No. 280/2002, as amended, and the Trade Practice Proclamation. The said laws redefined the scope of the enumeration of commercial activities under Article 5 of the Commercial Code. For instance, such activities as higher education, health, and construction are included. In addition to studying the list of activities that are being opened for traders, it is also important to examine the definition of trader in these laws. In this regard, note that Article 2(2) of Proc. No.67/97 replaces the word 'trader', which is a legal term of art used by the Commercial Code, by 'businessperson'. The definition of the newly introduced term 'businessperson' as found in Art.2(2) of Proclamation No.67/97 is broader than the definition of the hitherto existing terminology "trader". Art.2(2) defines a businessperson as "any person who professionally and for gain carries on any of those activities specified in Article 5 of the Commercial Code, or who dispenses services, or who carries on those commercial activities designated as such by Regulations issued by the Government." Amazingly, Article 2(10) of the Trade Practice Proclamation No.329/2003 uses the term 'trader' with the same definition given for the term 'businessperson' by Proc. No.67/97. Still, the terminological question does not seem to have been settled once and for all. For instance, the Commercial Registration and Business Licensing Proclamation (Amendment) No. 376/2003 introduces a new term 'sole businessperson'. Anyway, you should keep in mind that all of the above terms refer to one and the same legal concept, viz., and the concept of trader.

2.1.2. Negative Definition

A negative definition of the trader is also to be found in Articles 6-9, which exclude from farmers, fishermen and artisans from the scope of the Code's applicability. In particular, Articles 6 and 7 deal with agriculture, while Article 8 assimilates fishermen and persons who breed fish to farmers. Article 9 deals with artisans, who are already excluded by sub-articles (5),(7),(8),(9),(10) and (11) and (15) of Article 5.

At this juncture, it is instructive to compare and contrast the proposed revision of the law concerning traders under the Draft Revised Commercial Code prepared by the Ministry of Justice. Article 5 of the Draft provides:

> Any person who as his regular profession and for gain, carry on any production and service activities is a trader. In particular:

(1) Purchase of movable or immovable with a view to reselling or letting them for hire either as they are or after alteration or adaptation;

(2) Warehousing activities;

(3) Exploitation of mines and other resource deposit;

(4) Exploitation of marine resources;

(5) Construction, repairing, maintaining and similar activities;

(6) Transport and communication activities;

(7) Printing, publishing, engraving, binding; cinematography, photography and computer activities;

(8) Producing, distributing, and supplying water, electricity, gas, compressed air, heating and cooling;

(9) Operating radio and television stations, or places of entertainment;

(10) Operating hotels, restaurants, bars, inns, public baths, hairdressing and beauty salon establishments;

(11) News, information and advertisement activities;

(12) Operating travel agencies, safaris, and tour operations;

(13) Operating business as a commission agent, broker, stock broker, or commercial agent;

(14) Operating banking, money changing and bank related activities;

(15) Operating insurance activities;

(16) Operating health, education and kindergarten activities; and

(17) Any consultancy service;

Alfred JAUFFRET, GENERAL REPORT: BOOK I (1 MARCH 1958) (EXCERPT), in Peter Winship (trans.), Background Documents to the Ethiopian Commercial Code of 1960(Artistic Printers, Addis Ababa: 1974)

The list in Article 5 is very long, and one might even think it too long. One could, in effect, summarize commercial activities in a shorter formula, as has been done in the Italian Civil Code. But the danger of these general formulae is that they raise difficulties of interpretation. At the risk of having a rather long list, I though it better to prevent difficulties of interpretation and to guide the judge in detail. Of course, each activity enumerated has been carefully weighed to include all the activities which I though should be subject to commercial law. Because the list is as complete as possible, I have decided that the enumeration should be limitative.

I have also decided to exclude from commercial law the farmer and the handicraftsman two very delicate points. Articles 6 and 7 deal with agriculture; article 8 assimilates to farmers fishermen and persons who breed fish. Article 9 deals with handicraftsmen, already excluded by sub – articles (5), (7), (8), (9), (10) and (11) of Article 5, which declare that certain activities are not commercial if carried on by handicraftsmen. I have kept the maximum number of employees and apprentices allowed at the number three, which is the number that the codification commission gave me in April 1957.

Questions

1. Elaborate on the two conditions inherent in the positive definition of a trader found in Article 5 of the Commercial Code.
2. Discuss the negative definition of a trader.
3. What is the position of the expert draftsperson on the question of whether the list under Article 5 is exhaustive?
4. Is the position of the foreign draftsperson justifiable in light of the present state of commercial life in Ethiopia?
5. How does the Commercial Code relate to and differ from the Draft in respect of the definition of traders?

2.2 Businesses

Alemayehu FENTAW, Ethiopian Unfair Competition Law: A Critical Evaluation (forthcoming, Excerpt), Jimma University Journal of Law, Vol.I, No.II

Article 124 of the Commercial Code defines business as "an *incorporeal movable* consisting of *all movable property* brought together and organised for the purpose of carrying out any of the commercial activities specified in Art.5 of this Code." Thus, the ultimate essence or quality of any business, as can be gathered from the above definitional provision, is its incorporeality irrespective of the existence of corporeal elements. The importance of the incorporeal elements figures in prominently under Article 127, which stipulates:

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

A business may consist of *other incorporeal elements* such as:

(a) the trade-name;
(b) the special designation under which the trade is carried on;
(c) the right to lease the premises in which the trade is carried on;
(d) patents or copyrights;
(e) such special rights as attach to the business itself and not to the trader. (Emphasis added)

According to Art. 128, the corporeal elements that make up a business include equipments and goods. Therefore, what transpires from Chapter 2 of Title 4 in Book I of the Commercial Code is the fact that immovables, 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. Of course, a naïve and shallow-minded person will find it odd to see that only one aspect of the immovables, namely the right to the lease of the premises, was incorporated in the enumeration of the elements of a business. The oddity, none the less, will whether away no sooner than he realizes the lease right's inextricable link with the goodwill of the business.

In a nutshell, the term "business" embraces tangible and intangible assets, including tools, equipments, 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 (fonds de commerce). Hence, the land or buildings which form of the business premises and the fixtures on such premises are no part of the business even though they are owned by the trader himself. To a greater degree, the business is regarded as an entity distinct from its constituent elements, as long as the whole is more valuable than the sum of the constituent parts. In this sense, the business is a *res*, thing, or object over which a person can exercise property rights, including ownership, usufruct, and lease.

Alfred JAUFFRET, GENERAL REPORT: BOOK I (1 MARCH 1958) (EXCERPT), in Peter Winship(trans.), Background Documents to the Ethiopian Commercial Code of 1960(Artistic Printers, Addis Ababa: 1974)

Businesses (*fonds de commerce*)

Businesses are regulated by Title V of Books I which in its 89 articles (Arts. 124 –212 (124 – 209) provides a very detailed regulation. The Swiss and German Codes do not mention the business and the Italian Civil Code only has ten or so articles on the subject.[17]

On many points I have looked to French law, [18] which is certainly the most developed on this matter, but on a number of points I have departed from this model. I have done my best to make the regulations complete and adapted to practical needs. The regulations may appear a little complex on certain points, but the considerable experience in France – the basic law goes back to 1909 shows that traders, have adapted themselves perfectly well to this legislation which has proved itself very useful.

Moreover, I should note that I have eliminated some of the French rules which are perhaps too complex. Thus I have not included the dividing up of the price of the sale of a business, which leads to very great complications (although French practice has solved them) in the exercise of the guarantees of the seller.[19]

Nor have I included the restrictive legal rues on renting businesses because the Codification Commission, whose advice I sought on this point, did not favor this restriction.

Also on the advice of the Codification Commission, I have not included the right to renew the lese of business premises, thus eliminating what the French law calls “commercial property” (propritie commercial), a concept which gives rise to very detailed and changing legislation and to considerable case law.[21]

It is difficult to go in to the details of the rues, Nevertheless, I should note the importance of the general provisions of Chapter I and point out that chapter 2 (Elements of a business) regulates a certain number of important questions: the concept of good will (clientele) and its protection (Art. 132 ff.(130 – 134); the rules of unfair competition which supplement the provisions of the Civil Code (Art. 135 (133) being inspired by the fairly recent amendments to the famous Union of Paris,[22] to which a very large number of states have adhered and the rules on trade names and distinguishing marks (Arts. 137 – 143 (135-141). As for the right to lease business premises, although, as I have indicated, I have rejected the right to renew the lease, I have included a certain number of special rules protecting the legitimate interests of the trader and his creditors.

2.3 Goodwill and Its Protection by Unfair Competition

Alemayehu FENTAW, Ethiopian Unfair Competition Law: A Critical Evaluation (forthcoming, Excerpt), Jimma University Journal of Law, Vol.I, No.II

Since the definition of goodwill in Art.130 of the Commercial Code is defective, it is of little help to us. This is so, precisely because it fails to tell us the essence or nature of goodwill. Instead of doing the proper job of a definition, it gives you an extra piece of information concerning its origin and the obvious thing that goodwill has a value. Art. 130, reads:

> The goodwill *results from* the creation and operation of a business and *is of a value* which may vary according to the probable or possible relations between a trader and third parties who may require from him goods or services. (Emphasis added.)

With respect to the origin of goodwill, Art.130 tells you that it "results from the creation and operation of a business." In my humble opinion, this part of the definition adds nothing up to the stock of knowledge of any academic lawyer, so long as the fact that goodwill originates from the creation and operation of a business has already been made crystal-clear from preceding provisions on elements of business. Goodwill, being the main constituent element of a business, results from the creation of business. The second part of the definition, which says goodwill is of a value, too, adds little to your craving for understanding the essence of goodwill.

In order to appreciate the very essence of goodwill, I propose to consider two legal lexical definitions of the term as found in the Black's Law Dictionary and the Oxford Dictionary of Law respectively.

> A business's reputation, patronage, and other intangible assets that are considered when appraising the business, esp. for purchase; the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets. • Because an established business's

> trademark or servicemark is a symbol of goodwill, trademark infringement is a form of theft of goodwill. By the same token, when a trademark is assigned, the goodwill that it carries is also assigned…. "[Goodwill] is only another name for reputation, credit, honesty, fair name, reliability." … "Good will is to be distinguished from that element of value referred to variously as going-concern value, going value, or going business. Although some courts have stated that the difference is merely technical and that it is unimportant to attempt to separate these intangibles, it is generally held that going-concern value is that which inheres in a plant of an established business."[1]

> The advantage arising from the reputation and trade connections of a business, in particular the likelihood that existing customers will continue to patronize it.[2]

In order to gain a head start to appreciate the nexus between goodwill and unfair competition, the reader is advised to peruse the following instances of unfair competition: trademark infringement, dilution of goodwill and trademarks, use of similar trade or firm names, simulation of product packaging or configuration, false advertising, passing off goods for those of another, and theft of trade secrets. Most, if not all, of the examples of unfair competition listed above include a common element: Utilizing someone else's commercial reputation for commercial benefit or 'sailing in their wind'. This commercial reputation or 'wind' is more often than not referred to, in legal parlance, as the 'good will' of a business. This 'good will' or reputation is generally focused in the public's attention in the form of a trademark, trade name, product appearance or configuration, and trade secrets. Accordingly, unfair competition law is nothing but one of the devices designed to protect or preserve the goodwill of a business. As per Art.131, two alternative courses of action have been put at the disposal of a trader in the hope of enabling

[1]Bryan A. GARNER(ed.) , **Black's Law Dictionary**, 8th ed., West Group, St. Paul, 2004.

[2] Elisabeth A. Martin(ed.), **Oxford Dictionary of Law**, 5th ed., Oxford University Press, London, 2003.

him to effectively safeguard his goodwill. The first course of action available to such a trader is to bring an unfair competition claim under Art.133 of the Commercial Code. The second is to institute a proceeding based on the legal or contractual prohibitions specified in Art. 30,40,47,55,144,158,159,204 and 205 of the Commercial Code.

For the moment it suffices to say that there is a common thread passing through all instantiations of unfair competition: utilizing or assailing someone else's commercial reputation for commercial benefit. This commercial reputation, more often than not, is referred to, in legal parlance, as the "goodwill" of a business.

2.4. Commercial Unfair Competition

Art.133 sets forth acts of competition that are regarded as unfair as follows:

(1) Any act of competition *contrary to honest commercial practice* shall constitute a fault.
(2) The following shall be deemed to be acts of unfair competition:
(a) any acts *likely to mislead customers* regarding the undertaking, products or commercial activities of a competitor;
(b) any false statements made in the course of business with a view to *discrediting* the undertaking, products or commercial activities of a competitor.[Emphasis added.]

Art.133 has been modelled upon the Convention of Paris for the Protection of Industrial Property of 1833, as amended. Thus, one should not be taken back if the definition of unfair competition in Art.133 follows closely Art.10^{bis} of the Paris Convention. For the purpose of comparison, the full content of Art.10bis is reproduced below:

(1)The countries of the Union are bound to assure to persons entitled to the benefits of the Union effective protection against unfair competition.
(2)Any act of competition **contrary to honest practices** in industrial or commercial matters constitutes an act of unfair competition.
(3)The following in particular shall be prohibited:
1.all acts of such a nature as to create **confusion** by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;

2.false allegations in the course of trade of such a nature as to **discredit** the establishment, the goods, or the industrial or commercial activities, of a competitor;

3.indications or allegations the use of which in the course of trade is liable to **mislead the public** as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.[3]

As quick look at the above cited provisions discloses, the definition of unfair competition in Art.133 is substantially the same as the 1st and 2nd alineas of sub-Arts (2) and (3) of Art.10bis of the Paris Convention.

Implicit in the notion of commercial unfair competition are two ideas: unfairness and competition. Before we move onto a discussion of the unfairness aspect, a few words are in order about the competition aspect. 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. Consider the following counterexamples:

(1) A trader who produces coffee beans is not in competition with a trader who grows roses. In economic parlance, the goods or services have to be at least substitutes.

(2) A trader who exports bottled potable water is not in competition with a trader who markets bottled potable water only in Ethiopia.

(3) A trader who ceases to offer products or services for sale or does not yet offer products or services for sale is no longer in competition with a trader who does.

Turning to a tentative treatment of the unfairness aspect, Art.133 gives us two standards whereby we can designate certain acts of commercial competition as unfair. The first, which I may call the general standard, is provided for in sub-art.(1). The second, which might be called the specific standard, is provided for in sub-art(2). The specific standard can further be broken down into two alternative requirements: likelihood of confusion and false discrediting statements. In connection with the scope of these standards, the first, by contrast, is broader than the second in

[3] Peter WINSHIP(ed. & trans.), **Background Documents to the Ethiopian Commercial Code of 1960**, Artistic Printers, Addis Ababa, 1974, pp.178-179.

that it is difficult, if not impossible, to figure out, at a given point in time and space(i.e., now and here), all possible situations of unfair competition that it covers. Put differently, the scope of activities prohibited by the general standard of unfair competition in sub-art.(1) is wider than the specific acts mentioned in sub-art.(2).As a result, this provision can be construed as a catch-all for all forms of unfair competition falling outside the purview of sub-art.(2). Unfair competition, as defined in sub-art.(1), expresses the idea that a particular act of competition is to be condemned as unfair because it is inconsistent with the community's currently accepted standards of honest practice. Thus, unfair competition depends upon commercial custom in determining what acts are honest and what are not. By virtue of its flexibility, the general standard requires judges to exercise their discretionary powers. In exercising their judicial discretion, the judges must take into account the peculiarities of each case as well as the historical and cultural context in which the case arises.[4] Therefore, the following discussion shall focus upon the specific standard.

2.4.1. The Specific Standard

A. Misleading Commercial Practices

A confusion analysis has to be made to reach a decision pursuant to sub-art (2) (a) of Art. 133. Any act gives rise to liability if it is "likely to mislead customers", though it does not create actual confusion. It is sufficient that an act passes the test of likelihood of confusion. One standard example of an act of unfair competition that is likely to mislead or confuse customers is trademark infringement. To prove a claim of unfair competition based upon trademark infringement, it is not necessary to prove actual confusion of specific customers. Proof of the likelihood of confusion in the market circumstances satisfies the requirement, so that similarity between two marks can make the case for unfair competition. Strictly speaking, sub-art. (2)(a) Does not grant legal rights in trademarks beyond registration. However, sub-art (2)(a) affords a remedy for unfair competition involving special designations, including trademarks. Unlike trademark infringement claims under the Trademarks Registration and Protection Proclamation, unfair competition claims do not require any registered marks. As a result, sub-art(2) (a) of Art.133 involves all unfair competition claims based upon trademark infringement and extends further to cover other situations of unfair competition.

[4] GOLDBERG, supra at n. 5, p.135

A likelihood of confusion exists when there is confusion as to the enterprise undertaking business, products and services, or commercial activities. More particularly, confusion may occur with respect to any of the following:

(a) trade-names
(b) distinguishing marks
(c) the appearance of a product,
(d) the presentation, including advertising, of products or services

B. False Discrediting Statements

Sub-art.(2) (b) of Art.133 broadens the touchstone of liability for unfair competition by making actionable any false statement that is likely to discredit or compromise the reputation of a business or its activities, when made in a competitive context. A claim of unfair competition under sub-art.(2)(b) requires a showing that a party made misrepresentations in the course of business. The elements an alleged injured party must show to sustain a claim of unfair competition based on false discrediting statements are:

1. a party uses any false statement,
2. it is the course of business,
3. aims at misrepresenting the nature, characteristics, qualities or geographic origin of a competitor's undertaking, goods or services and,
4. it is with the purpose of discrediting the establishment, products or services of a competitor.

Typically, situations that fall under sub-art.(2)(b) include, if not limited to, false advertising. Here, it has to be emphasized that any false allegations made, in the course of business, against the person, rather than against his undertaking, products or services, do not fall under sub-art.(2)(b). Such cases may constitute defamation, subject to the fulfillment of the requirements in Arts.2044-2049 of the Civil Code.

2.5. 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. Article 134(1) provides for certain remedies: damages and other orders that are deemed fit to put an end to the unlawful act.[5] The orders may in turn take the form either of an order for corrective publicity under Art.2120 of the Civil Code or an injunctive order Art.2122 of the Civil Code. Sub-art (2) of Art.133 stipulates:

(2)The court may in particular:

(a) order the publication, at the costs of the unfair competitor, of notices designed to remove the effect of the misleading acts or statements of the unfair competitor to cease this unlawful acts in accordance with Art. 2120 of the Civil Code.
(b) order the unfair competitor to cease this unlawful acts in accordance with Art. 2122 of the Civil Code.

The courts, while entertaining a claim for damages arising from unfair commercial competition, must stick to the rules and principles of the Civil Code governing extra-contractual liability. In the words of Everett F. Goldberg: "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 Articles 132-134 are applicable; for example, period of limitation, burden of proof, extent of damages, responsibility of persons or bodies corporate for the acts of others, etc." [6]

Trade Practice Proclamation

The Trade Practice Proclamation, which entered into force on 17th of April 2003, contains 31 articles under 4 Parts. Part one, being general, deals with short title, definitions, objective, and scope of application whilst Part two contains rules regulating, as can be gathered from its caption, anticompetitive practices. Part three establishes the Trade Practice Investigation Commission and defines its powers. Part four provides for such miscellaneous matters as indications of prices, labels, power to regulate prices of basic goods, issuing and keeping of receipts, administrative measures and penalties, rule-making powers, repeal, and effective date.

[5] See Art.155, the Civil Procedure Code.
[6] GOLDBERG, Supra at n.5, p.140

A closer perusal of the above legislation reveals that it prohibits two types of commercial behaviour: anti-competitive and no-competitive behaviours. The former comprises of three categories of acts, viz. anti-competitive agreements, unfair competition, and abuse of dominance while the latter consists of non-compliance with the legal requirements pertaining to indications of prices, labels, price lists of goods and services subject to regulation; conditions of distribution, sales and movement of same; orders for replenishment of stock of same; and the issuance and keeping of receipts.

The proclamation applies to all commercial activities except such "activities that are, according to investment proclamation, exclusively reserved for the Government." Besides, "[e]nterprises having significant impact on development and designed by the Government to fasten growth and facilitating development" are also excluded and so are "[b]asic goods or sevices that are subject to price regulation."[7]

The declared aim of the Trade Practice Proclamation, in keeping with the free market economic policy of the country, is maximizing economic efficiency and social welfare by promoting competition and regulating anti-competitive practices.[8] In particular, the proclamation has two objectives: to secure fair competitive process through the prevention and elimination of anti-competitive and unfair trade practices, on the one hand and to safeguard the interests of consumers through the prevention and elimination of any restraints on the efficient supply and distribution of goods and services, on the other.[9]

In what follows, I shall focus on unfair competition as found in Article 10 of the Trade Practice Proclamation No.329 and leave out the remaining forms of unfair trade practices untreated, as they fall beyond the scope of this paper. Here, again, it has to be borne in mind, as a caveat, that the scope of activities prohibited by sub-Art.(1) is broader than the specific acts enumerated in sub-Art.(2), though the list in the latter is more elaborate and lengthier than its counterpart in the Commercial Code.

Unfair Competition

1. Any act or practice, in the course of commercial activities, *that aims at eliminating competitors* through different methods shall be deemed to be an act of unfair competition.

[7]The Trade Practice Proclamation No.329/2003, Art.4
[8]Ibid, Preamble
[9] Ibid, Art.3

2. The following activities, in particular, shall be deemed to be acts of unfair competition.

(a) Any act that *causes* , or *is likely to cause, confusion* with respect to another enterprise or its activities, in particular, the products or services offered by such enterprise;

(b) Any act that *damages* , or *is likely to damage the goodwill or reputation* of another enterprise falsely;

(c) Any act that *misleads or is likely to mislead* the public with respect to an enterprise or its activities, in particular, the products or services offered by such enterprise;

(d) Any act of *disclosure, acquisition or use of information* without the consent of the rightful holder of that information in a manner contrary to honest commercial practice ;

(e) Any *false or unjustifiable allegation that discredits, or is likely to discredit* with respect to another enterprise or its activities, in particular the products or services offered by such enterprise;

(f) Any act that directly or indirectly *restricts, impedes or weakens the competitive production and distribution* of any commercial good or the rendering of any service;

(g) Any act that *restricts or debars the timely or economic means of producing or distributing* any good or rendering of any service;

(h) The importation of any goods from any foreign country into Ethiopia *at a price less than the actual market price or wholesale price of such goods in the principal markets of the country of their production with the intent to destroy or injure the production of such goods in Ethiopia or to restrict or monopolize* any part of trade in such goods;

(i) Trading in any manner in *goods imported into Ethiopia for humanitarian purpose without authorization* by the Ministry. (Emphasis added.)

In connection with the definition of unfair competition in Art.10 of Proclamation No.329/2003, I should say the following by way of commentary. First, it is important to bear in mind that the logical organization of Art.10 is parallel to that of Art.133 of the Commercial Code. Despite the absence of the element of honest commercial practice in sub-art.(1) of Art.10, unlike sub-art.(1) of Art.133, both deploy general standards: likelihood of elimination of competitors in the former

and contrariness to honest commercial practice in the latter. In spite of the structural similarity between these two provisions, however, the missing element renders the literal application of Art.10(1) broad and impractical. For example, under a strict interpretation of the provision, a trader who resorts to producing better products, which is an honest method, and thereby eliminates competition would be held to be liable for unfair competition. Also sub-arts.(2) of the two articles consist in specific standards. The difference between these sub-articles lies in the farmer's inclusion of such activities as provided for in (d), (f), (g), (h), and (i). Even (d) can be interpreted to fall within sub-art.(1) of Art.133, as the test deployed is the one encapsulated in the phrase " in a manner contrary to honest commercial practice." In my opinion, the whole of the provisions under sub-art(2) can be reformulated in such a manner as to avoid redundancy, which I suspect has been an outcome of bad legislative draftsman ship. In this regard, my proposal is to merge some of the provisions together.

(a) and (c): Misleading/confusing activities;

(b) and (e): False discrediting statements;

(d): Secret information;

(f) and (g):Restricting, impeding, debarring, or weakening the competitive(efficient) production and distribution of goods and services;

(h): Dumping, and

(i): Trading in humanitarian aid.

With respect to sub-art. (2)(d), it is interesting to note two serious pitfalls. That the information has to be secret is self-evident in as much as what is prohibited is the acquisition, disclosure, or use of such information contrary to honest commercial practice. But, what kind of information is considered secret is not clear. Besides, the legislation fails to pin down the nature of the sort of information that it purports to protect. The legislation should have made it explicit that to qualify for protection, a piece of information should not only be secret, but also a trade secret.[10]

[10] It is instructive to consider, at this point in time, the manner in which other legal systems deal with the same problem. For example, Art.8(2) of the Protection Against Unfair Competition Act of 1998 of Barbados defines the term "secret information" as follows:

" For the purpose of this Act, information shall be considered "secret information" if

(a) it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons that normally would have knowledge of or access to the kind of information in question;

(b) it has commercial value because it is a secret; and

Finally, I wish to point out one substantive loophole in the Proclamation. In this regard, no where in the text of the Proclamation, unlike the Commercial Code, is it provided that a violation of any provisions thereof constitutes a fault. Of course, there is no question that any infringement of a specific and explicit provision of a law constitutes a civil offence by virtue of Article 2035 of the Civil Code. Consequently, it is doubtful whether a judicial remedy is available for a plaintiff claiming under Art.10 of the Proclamation in the first instance, rather than under Art.2035 of the Civil Code, as long as the only type of remedy mentioned by the Proclamation is administrative measure or/and penalty.

Trade Practice Investigation Commission

In 2003, through the enactment of the Trade Practice Proclamation No.329, the House of Peoples' Representatives created the Trade Practice Investigation Commission and charged it with the duty to prevent and eliminate "…anti-competitive and unfair trade practices [and]…any restraints on the efficient supply and distribution of goods and services."[11] To this end, the five-

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(c) the rightful holder has taken responsible steps under the circumstances to keep it secret."

Cf. Sub-art.(1) of same to see how the law of Barbados attempts to establish the nature of the secret information.

The Uniform Trade Secrets Act, §1(4) (1979), defines trade secret as "information including a formula, pattern, compilation, program, device, method technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

See also Art.39 (1) and (2) of Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which reads:

(1) In the course of ensuring effective protection against unfair competition as provided in Art.10bis of the Paris Convention (1967), Members shall protect undisclosed information….

(2) Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:

   (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

   (b) has commercial value because it is secret; and

   (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

[11] Art. 3, Trade Practice Proclamation

member commission, representing the public sector, the private sector, and consumers' association and being appointed by the Prime Minister upon nomination by the Minister of Trade Industry, is empowered to conduct appropriate investigations and hearings and to take against violators administrative measures and penalties. Sub-art.(2) of Article 15 provides the following.

1. The Commission shall have powers to:
    a. investigate complaints submitted to it by any aggrieved party in violation of the provisions of this Proclamation;
    b. compel any person to submit information and documents necessary for the carrying out of the commission's duties;
    c. compel witnesses to appear and testify at hearings;
    d. take oaths or affirmations of persons appearing before it, and examine any such persons;
    e. enter by showing the commission's Id card and search the premises of any undertaking during working hours, in order to obtain information or documents necessary for its investigation;
    f. appoint or employ, upon the approval of minister, experts to undertake professional studies as may be necessary;
    g. take administrative measures or/and give penalty decisions on any complaints submitted to it.

The said legislation also requires that in order to execute any decision for administrative measures and penalties, it must be endorsed by the Minister of Trade and Industry which has the discretion to approve, amend, or remand the same.

The Proclamation provides for four distinct kinds of administrative measures. Article 25 stipulates that:

> The Commission may impose the following administrative measures, where any person violate the provisions of this Proclamation, Regulations, Public Notice or Directives issued for the implementation of the same.

i. Suspend, correct or eliminate the practice in question;
ii. Suspend or cancel business license;

iii. Take any appropriate measure that enable the victim's competitive position to be reinstated;
iv. Seizure and selling of goods that are subject to price regulations, provided that the proceeds less any selling expense shall be paid to the owner, who in no case shall demand interest or any other payments.

Moreover, the Proclamation imposes fines upon defendants who have been proven to have violated any provision thereof by way of penalty. Article 26 reads:

> Without prejudice administrative measures that may be taken pursuant to Article 25 of this Proclamation, the Commission may impose the following penalties where any person violates the provisions of this Proclamation or Regulations, Public Notice or Directives issued for the implementation of the same.
>
> 1. Fine upto 10% of the value of the total assets of the violator or 15% of yearly total gross sales of the violator, alternatively.
> 2. Fine from 5,000.00(five thousands) upto Birr 50,000.00(fifty thousands) where the direct or indirect cooperation of any individual in any prohibited practice is proven.

In addition, the Proclamation, in its Article 27, sets forth factors that the Trade Practice Investigation Commission should take into account while assessing the amount of fines. As a result, the Commission is expected to take stock of such factors as the extent of the damaged caused, the market share of the violator, the size of the market affected, and the financial status of the violator.

At this point in time, I should draw particular attention to an important procedural lacuna in the Trade Practice Proclamation. In connection with the procedural issue, neither the Civil Procedure Code nor the Proclamation has a rule on pendency which precludes an administrative tribunal from adjudicating a matter brought before it at any time subsequent to the institution of a civil

matter in a competent court of law. The Proclamation incorporates a rule on appeal, instead of one on pendency. According to Article 17(1), any party may appeal to the Federal High Court against any administrative measures or/and penalty decisions within 30 days from the date that he was aware of the approval of the execution. Besides, sub-Art.(2) of the same prohibits the Ministry of Trade and Industry from executing any decision before the expiry of the 30 days period. In this connection, I wish to raise the following issues. First, what is the legal ramification of sub-Art.(1) of Article 17? Does it divest Federal First Instance Courts of their jurisdiction to hear and decide unfair competition claims under Article 10 in the first instance? As long as all that the said provision talks about is the appellate power of the Federal High Court and as long as there is no explicit provision prohibiting Federal First Instance Courts from assuming jurisdiction over lawsuits for unfair competition in the first instance, the author contends that Federal First Instance Courts must have competence to adjudicate such matters. If so, at this point, the procedural problem pointed out earlier figures in prominently, viz. if it is the case that both forums, the judiciary and the administrative tribunal, have competence to hear and decide claims for unfair competition in the first instance, will it be fair and expeditious to allow the parties continue litigating in two different forums on the same matter? Does the Trade Practice Investigation Commission have the power to award damages? Can't damages be read into sub-art.(3) of Art.25 that provides for the Commission's power to "[t]ake any appropriate measure that enable the victim's competitive position to be reinstated" ? What if both forums reach inconsistent decisions, say, the civil court decides on the merits that the defendant is not liable whilst the Commission holds him liable? Does it not give plaintiffs ample opportunity to harass and vex defendants by instituting judicial and administrative proceedings at the same time?

The Trade Practice Investigation Commission has, of course, made its position unambiguously clear on this point. In INTERNATIONAL COMMISSION AGENCY PVT. LTD. CO. AND ALEM INTERNATIONAL COMMISSION AGENCY PVT LTD CO. v. GARAD ENTERPRISE AND SHEMSU HASSEN[12], one of the defendants invoked pendency as a defence, stating that the Commission did not have competence to hear and decide the case, as it had been being entertained, under Civ/F/No.1983, by the Second Division of the Federal First Instance Court at Arada, which adjourned for Hamle 13, 1997 EC to pass judgement. Having framed the said objection as one of its issues, the Commission overruled the objection as long as

[12] Trade Practice Investigation Commission, 1997, File No. 3/1997, Addis Ababa

pendency does not obliterate its jurisdiction and as long as the cause of action does not give rise to a criminal or civil liability for damages.

Criminal Unfair Competition

In addition to the civil and administrative remedies discussed above, the Ethiopian legal system affords victims of unfair competition a criminal remedy. Although Article 719 of the Criminal Code defines criminal unfair competition, Articles 720 and 721 also criminalize such specific cases of unfair competition as infringements of intellectual property rights. In connection with Article 720, it has to be noted that it "is essentially a form of unfair competition, in that it emphasizes the misconduct of the wrongdoer in misleading the purchasing public. But its scope is both broader and narrower than Article 133 of the Commercial Code."[13] These differences in the scope of the said articles have a major advantage from the vantage point of the victim as long as a violation of Article 720 brings about extra-contractual liability in accordance with Article 2035 of the Civil Code.[14] Commenting on the similarities and differences between Article 674 of the Penal Code (which Article 720 of the Criminal Code mimics) and Article 133 of the Commercial code, Goldberg has this to say:

> Insofar as the act of imitation, the likelihood of misleading customers and the involvement of products are concerned, there is little difference between Article 674 and Article 133. Article 674 speaks of infringement and passing off as well as imitation, but for purposes of this discussion these words essentially mean the same thing. Article 674 says, "in such a manner as to deceive the public," instead of "likely to mislead customers," but the two phrases should be interpreted the same way. One might argue that the phrase in the Penal Code requires actual confusion, but such a strict construction is unsound in light of the difficulty of proving actual confusion and the relation of Article 674 to unfair competition generally. A strict reading is not justified by the fact that penal sanctions are more severe than civil sanctions, since the requirement of intent adequately protects the offender's interests in this regard. …

[13] GOLDBERG, supra at n.5, p. 141
[14] Ibid

> The major differences between Article 674 and Article 133 are that Article 674 *may* apply even if the offender and victim are not competitors and that it will *not* apply unless the offender actually intended to imitate the victim's mark in such a manner as to deceive the public.[15] (Italics in the original)

Article 719 stipulates:

> Whoever intentionally commits against another an abuse of economic competition by means of direct or any other process contrary to the rules of good faith in business, in particular:
>
> (a) by discrediting another, his goods or dealings, his activities or business or by making untrue or false statements as to his own goods, dealings, activities or business in order to derive a benefit therefrom against his competitors; or
> (b) by taking measures such as to create confusion with the goods, dealings or products or with the activities or business of another; or
> (c) by using inaccurate or false styles, distinctive signs, marks or professional titles in order to induce a belief as to his particular status or capacity; or
> (d) by granting or offering undue benefits to the servants, agents or assistants of another, in order to induce them to fail in their duties or obligations in their work or to induce them to discover or reveal any secret of manufacture, organization or working; or
> (e) by revealing or taking advantage of such secrets obtained or revealed in any other manner contrary to good faith, is punishable, upon complaint, with a fine of not less than one thousand Birr, or simple imprisonment for not less than three months.

With respect to the above definitional article, the following words are in order. First, I propose to re-organize the 5 sub-articles in Article 719 into three categories for the purpose of this paper. (1) using false or discrediting statements; (2) misleading acts; and (3) trade secrets.

[15] Ibid,pp141-142

UNIT THREE
BUSINESS ORGANIZATIONS

3.1. Introduction

In a free market economy, business organizations are a familiar part of every day life. Business organizations run the supermarkets from which we buy our foods and attires; they supply the water, gas, and petroleum products we depend on; they publish the books and newspapers we read. We deal with them so often as consumers of their products and services that the image which the phrase "business organizations" brings to mind is usually of entity concerned with marketing and collecting payments for products and services which they have offered. It is

necessary to go behind this image to get to the entities which are the subject of the Law of Business Organizations.

Most, if not all, of the business organizations with which lawyers are concerned are legal entities which have firm-names and head office; they can acquire rights and incur liabilities, and can sue and be sued under their firm names. Business organizations, from a legal viewpoint, are undertakings with more than one member, having assets distinct from the private assets of the members and a formal system of management, which may or may not include members of the organization. The first feature, initial plurality of membership, distinguishes the business organization from the business owned by one man; in the latter case the trader can do as he pleases with its assets, since he is personally liable for debts and obligations incurred in connection with the business, no special rules are needed to protect its creditors beyond the ordinary provisions of bankruptcy law.

The second feature, the possession of distinct assets, is essential for two purposes: to identify the assets to which creditors of the organization can resort to satisfy their claims (though in the case of some organizations, such as the partnerships they can also compel the member to make good any deficiency), and to make clear what assets the managers of the organization may use to carry on business for the member's benefit. The assets of an organization are brought in directly by its members by way of contribution. Contributions may be made in cash, kind, and service in all forms of business organizations other than the share company or private limited company.

The third essential feature, a system of management, varies greatly. In a simple form of business organization the members are entitled to participate in the management, and each member has an equal voice in management decisions.

Business organizations are affected by the legal environment in which they operate. Accordingly, two aspects of the Law of Business Organizations should be noted. First, the law facilitates various combinations of labor, capital and management. Certain business or economic goals may be better served by one organizational form than another. The second noteworthy feature of the Law of Business Organizations is that each form of organization imposes varying degrees of legal formalities on its participants. Further, one's business relationship may have different legal consequences, depending on which organizational form is selected.

In subsequent sections, the concept of business organizations will be elaborated in the light of the Commercial Code provisions regulating business organizations, it will be contrasted with associations and cooperatives, the basic legal structure of each form of business organizations will be outlined, and the factors that distinguish one form from another will be examined. In addition the legal implications of conducting business under certain organizational form will be discussed.

3.1. 1 Definition

What is a Business Organization ?

Article 210 of the Commercial Code defines a business organization as "any association arising out of a partnership agreement." A partnership agreement, pursuant to Article 211 of the Code, is "a contract where by two or more persons who intend to join together and to cooperate undertake to bring together contribution for the purpose of carrying out activities of an economic nature and of participating in the profits and losses arising out there or ,if any."

A cursory look at Articles 210 and 223 reveals two important aspects of business organizations, namely the contractual and institutional (or, organizational) aspects. According to article 210 a business organization is an association stemming from a contract known as "partnership agreement." Here it is important to note that the word "association" is a mistranslation of the original French term "le groupment" Article 223 suggests that even if a business organization emanates from a partnership agreement, the mere fact of concluding a valid partnership agreement is not enough to create a business organization at law. There is more to the formation of a business organization *de jure* than the conclusion of a partnership agreement. In the words of Everett F. Goldberg, "[a] business organization has an institutional aspect with an existence dependent upon, but separate from, the partnership agreement."

A business organization is a contractual association of two or more persons who undertake to bring in contribution with a view to carrying out an economic activity. 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.

3.1.2 Distinguishing Between Business Organizations and Associations

Article 404 of the Civil Code defines an association as " a grouping formed between two or more persons with a view to obtaining a result other than the securing or sharing of profits. " What transpires from this definition is the most important distinctive feature of associations, namely profit. If 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, literary clubs, local and international NGOS, etc.

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. Accordingly, 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 or the respective offices of the Regional States' Justice Bureaus, business organizations fall within the jurisdiction of the Ministry of Trade and Industry or the respective Regional States' Bureaus.

Associations are expressly prohibited from engaging in any of the commercial activities listed in Article 5 of the Commercial Code. Article 25(1) provides that "associations may not carry on any trade. " A question may be raised in connection with this ban. Assume that a not-for profit association is formed and it eventually engages in profit-seeking activities. Sufficiently, this would serve as a ground for dissolution of the association by court, on motion of its board of management, or one-fifth of the associates, or of the office of associations of the Ministry of Justice pursuant to Article 461 of the Civil Code.

3.1.3 Cooperative Societies Distinguished

Cooperative Societies are groupings that are organized to provide an economic service without profit to their members. Cooperative societies are governed by the Cooperative Societies Proclamation No.147/1998. According to Article 4 of the Cooperative Societies Proclamation, Cooperative Societies shall have one or more of the following objectives:

1) to solve problems collectively which members cannot individually achieve;

2) to achieve a better result by coordinating their knowledge, wealth and labor;
3) to promote self-reliance among members;
4) to collectively, withstand and solve economic problems;
5) to improve the living standards of members by reducing production and service costs by providing input or service at a minimum cost or finding a better price to their products or services;
6) to expand the mechanism by which technical knowledge could be put into practice;
7) to develop and promote savings and credit services;
8) to minimize and reduce the individual impact of risks and uncertainties;
9) to develop the social and economic culture of the members through education and training.

This form of groupings is generally adopted by groups of individuals who wish to pool their resources to gain some advantage in the marketplace. Consumer purchasing cooperatives are formed to obtain lower prices through quantity discounts. Seller marketing cooperatives are formed to control the market and thereby obtain higher sales prices from consumers. Credit cooperatives and farmers' cooperatives are other examples of this form of groupings.

3.2. Classification of Business Organizations

3.2.1 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. Insofar as intimate personal collaboration is expected of each partner, only persons who know each other very closely may enter into a partnership agreement giving rise to a partnership firm. Consequently, partnerships are suitable for small business involving a relationship of mutual trust and confidence.

The partners are agents for each other. Therefore, they are normally jointly and severally liable fort 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.

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.

Finally, 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.

With respect to transfer of shares, shares in a company are freely transferable unless the company's articles of association otherwise provides. Thus, a shareholder can transfer his share and ordinarily the transferee becomes a member.

Members of a company are not entitled to take part directly in the management of the company unless they become directors. 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.

3.2.2. Forms of Business Organizations

Though the main classification is between partnerships and companies, partnerships can be further broken down into four legal forms: ordinary partnership, joint venture, general partnership, and limited partnership. Companies comprise of two legal forms, namely, share

company and private limited company. Totally, there are six legal forms of business organizations provided for in Article 212 of the Commercial Code:

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

3.2.3. Distinguishing between Commercial and Non-Commercial Business Organizations

Just as the individual may be classified by Ethiopian law as either a trader or a non-trader, so business organizations may be either commercial or non-commercial. Article 10(1) of the Commercial Code defines a commercial business organization as one in which the objects under the memorandum of association or in fact are to carry on any of the activities specified in Article 5 of this Code. Article 10(2) stipulates that "share companies and private limited companies shall always be deemed to be of a commercial nature whatever their objects." This definition is supplemented by Article 214 which provides that any of the six business organizational forms listed in Article 212 may be commercial except for an ordinary partnership. Hence, an ordinary partnership may not be a commercial business organization, and, as such, may not engage in any of the activities listed in Article 5. Share companies and private limited companies are always commercial, whether or not their objects include any of the commercial activities listed in Article 5. General partnerships, limited partnerships and joint ventures may or may not be commercial, depending on whether one of the objects under the memorandum of association or in fact is to carry on any of the activities listed in Article 5. As per Article 213(2), if a commercial business organization is formed in the form of an ordinary partnership, or if its form is not specified, the organization is deemed to be a commercial general partnership.

Generally, this distinction rests on two criteria. The first is the same as that which determines whether or not an individual is a trader just as the trader is a person whose profession is the doing of acts of commerce, so a business organization is commercial which devotes itself, either under its memorandum of association or in fact, to commercial operations specified in Article 5. However, in the case of business organizations, the general rule for determining the commercial character by reference to objects has been made subordinate to two exceptions. On the one hand,

for whatever its objects, any business organization will be regarded as commercial as long as it adopts either of the two legal forms for commercial business organizations, namely the share company or the private limited company. On the other hand, ordinary partnerships are prohibited from engaging themselves in the commercial activities listed under Article 5.

The general distinction between commercial and non-commercial business organizations entails several legal consequences. Accordingly, business organizations are subject to differential treatment of the law depending on whether they are commercial or non-commercial. Nevertheless, the scope of this differential treatment varies from one language version to another version of the Commercial Code. In the words of Everett Goldberg:
In the French version, only commercial business organizations are required to keep accounts and to register and be publicized, only commercial business organization may go through bankruptcy and only commercial business organizations are generally subject to the provisions governing traders.

In the English version, only commercial business organizations are required to keep accounts and only they may go through bankruptcy. But all business organizations other than joint ventures must register and be publicized and all business organizations are subject to the provisions governing traders. In the Amharic version, only commercial business organizations are required to keep accounts. But all business organizations other than joint ventures must register; all other than joint ventures may go through bankruptcy and all are subject to the provisions governing traders.

3.3 Formation

Generally, any business organization must be formed by a contract known as partnership agreement.. Article 211 of the Commercial Code defines the partnership agreement as Article 211 of the Commercial Code defines the partnership agreement "a **contract** whereby **two or more persons** intend **to joint together and to cooperate** undertake to bring together **contributions** for the purpose of carrying out **activities of an economic nature** and of **participating in the profits and losses** arising out thereof."[Emphasis added]

The Key elements in the definition of the partnership agreement

(j) A Partnership agreement is a contract

The partnership agreement is a contract concluded between at least two persons who wish to carry on an enterprise in an organized manner. Thus, the partnership agreement, being a contract, is subject to the Civil Code provisions governing contracts in general, in addition to the pertinent provisions of the Commercial Code. Accordingly, in order for a contract to be a valid partnership agreement, the parties to it must fulfill the substantive and formal conditions set down by Article 1678 et seq of the Civil Code. That, is, the parties must be persons, physical or juristic, having capacity to enter into contracts. They must also give their free consent. Besides, their business objects must be sufficiently defined, lawful and moral, and possible. Furthermore, a valid contract has to be made in the required form, if any. Article 214 of the Commercial Code provides that "formation of any business organization other than a joint venture shall be of no effect unless it is made in writing" Under this sub-topic we see also about the case of two people: Persons incapable to carryon trade and sponses.

(a) Persons Incapable Under the Civil Code

The validity of a partnership agreement is affected by the incapacity of a party to it in the same way as in any other contract. In this regard, the Commercial Code contains a few provisions that supplement the Civil Code.

Article 11(1) prohibits persons incapable under the Civil Code from carrying on any trade. Sub-article(2) of the same provides that if an incapable person carries on a trade, any of his acts related to the trade may be invalidated in accordance with the pertinent civil code provisions. The provisions of article 11 also apply mutatis mutandis to the incapacity of a party to become a member of a business organization in which one has the status of a trader. A general partner in a commercial general partnership or commercial limited partnership is deemed to be a trader.

Article 12 prohibits the tutor of a minor or an interdicted person from carrying on a trade in the name and on behalf of the minor or interdicted person, except in the cases provided in article 288 of the Civil Code. The effect of this provision is to preclude the tutor from joining, in the name of a minor or an interdicted person, a business organization which would make the minor or interdicted person a trader. According to Article 288 of the Civil Code, a tutor may carry on commercial, industrial or other enterprises forming part of the estate of the incapable if is so instructed by the family council. Also under article 276 of the Revised Family Code, the tutor

shall do so if is enjoined to do that by a court. The family council or the court, as the case may be, must instruct the tutor whether to liquidate or to keep them going, having regard to the time for which the tutorship is to last, the abilities and potentialities of the tutor, and the interest of the incapable.

Article 13 provides that emancipated minors may not carry on a trade unless authorized in writing by the family council.

Beware that protection of the addressee is the purpose of the rules on incapacity. The law extends protection also to third parties against the risks of having dealings with incapables and thereby promoting security of commercial transactions. Pursuant to Article 14, minority cannot be set up against third parties where a minor who carries on a trade got himself entered in the commercial register as though he were of age. According to Article 15, judicial interdiction does not affect third persons unless notice of the incapacity is entered in the commercial register.

(b)Spouses

As per Article 16, married couples may become members of a business organization as if they were not married. A spouse may object in the interest of the family to the other spouse's becoming a member of a business organization which bestows upon the latter the status of trader. The effect of such objection is to limit the trading spouse's liability for business debts only to the extent of his personal property. As long as such debts are normally considered to be of the marriage, and, thus, recoverable against the personal property of each spouse and the matrimonial regime, such objections do not preclude the trading spouse from becoming a member of the business organization. The objections can be set up against third parties if only entered in the commercial register.

(ii) Two or more persons, physical or juristic, can be parties

Generally, nothing prevents a business organization from becoming a member of another business organization. An association may not become a general partner of a commercial general partnership or commercial limited partnership, since, pursuant to Article 25, it " may not carry on any trade." Whether it may become a member of another business organization depends on whether it thereby acquires as one of its purposes the making of profits. If it does, it may not

become such a member. Nevertheless, noting seems to prevent an association from joining a share company or private limited company as a means of investing extra funds or acquiring more funds to carry out its legitimate purposes.

The minimum requirement of two persons is true for all business organizations except the share company, for which there must be at least five. The automatic effect of the operation of the rule on the minimum number of persons who can enter into the partnership agreement is the exclusion of sole proprietorships from the Law of Business organizations. Put differently, one person cannot form a business organization by himself.

On the other hand, a question arises as to the maximum number of persons who can be members of a business organization. There is no general limit on the maximum membership size of business organizations, except in the private limited company where it is fixed at fifty.

(iii) Intent to Join Together and Cooperate

For a partnership agreement to be valid, the parties to it must have had the intention "to join together and to cooperate." In effect, this is to mean that the parties to the partnership agreement acted in the way they did with a view to forming a business organization. In addition, they must have intended to collaborate on an equal footing though they all need not intend to participate in the management and control of the business organization. The degree of collaboration expected from members varies from one form of business organization to another.

(iv) Contributions

The parties must undertake to bring in contributions in order that a contract subsists as a valid partnership agreement. Contributions can be made in cash, kind, or services. In all business organizations, except in a share company or private limited company, they should be made in cash or kind. Capital contribution includes intangible property. Cases in point are copyrights, utility models, patents, trademarks, service marks, and trade secrets, including debts owed to and the use of property belonging to the contributor.

(v) For the purpose of carrying out economic activities

The objective of the parties to a valid partnership agreement must be to engage in economic activities. The formulation under article 211 which stipulates that "activities of an economic nature" is so broad that it would appear to cover almost any profitable human endeavor, provided that it is possible, moral and lawful. At this stage, it has to be pointed out that economic activities include, but not limited to, all of the commercial activities mentioned under Article 5. However, you should bear in mind that all non-economic activities are excluded outright by virtue of the above-mentioned requirement.

(vi) Participating in the profits and losses arising out thereof

Every party to the partnership agreement must have the intention to share in the profits and losses. Profits and losses will be distributed between the members in the proportion stipulated in the partnership agreement. In the absence of such stipulation, every partner shall have an equal share in the profits and losses, irrespective of his contribution [Article 252 (1)]. Any stipulation giving all the profits to one partner or relieving one or more of the partners of his share in the losses is null and void (Article 215).

3.3.1.2 Publicity

A further formality requirement imposed on the parties to a valid partnership agreement is publicity. According to Article 219(1) of the Commercial Code "any business organization other than a joint venture shall be made known to third parties." The policy consideration behind the publicity requirement is to protect third parties. Members are required to bring to the attention of the public that they have formed a business organization. This requirement is unique to partnership agreements, as distinct from other contracts, because the very existence of the business organization depends on its fulfillment.

Publicity consisted in cumulative fulfillment of the requirements relating to publication of notice, deposit of documents, and registration in the commercial register [Articles 220-224, Com.C.]. However, Proclamation No.376/2003 does away with the first element of publicity, namely

publication of notice. Article 2(2) of the same provides that "Business organizations shall acquire legal personality by registering in the commercial register without being publicized in a newspaper as provided for under Article 87,219,220,223, and 224 of the commercial code for their establishment and amendments to their memorandum of associations."

i. Legal Personality and its Attribute

As far as the law is concerned, it is not only human beings who count as persons. In some cases, the law creates artificial persons, such as bodies corporate under public law, associations, cooperative societies, and business organizations, which are dealt with legally as if they were people; this is called having legal personality. Only when an entity has legal personality can it have legal rights and duties. A human being has legal personality from the beginning to the end of his life. Article 1 of the Civil Code provides that "the human person is the subject of rights from its birth to its death." In addition to individuals, groups of people can have legal personality. They are broadly called business organizations, and they allow the law to treat the group as separate from the individuals who operate or own it. Article 210(2) of the Commercial Code stipulates that "any business organization other than a joint venture shall be deemed to be a legal person." 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. Business organizations are, pursuant to Article 22 of the Commercial Code, expressly invested with the capacity to "carry on any trade in accordance with the provisions regulating such trade." Nevertheless, no express rule exists pertaining to the capacity of business organizations to carry out other activities and to enter into juridical acts in general.

With respect to scope of the capacity of business organizations with legal personality, we can put forward the following argument by drawing on the general rules for physical persons as well as associations provided in Articles 192 and 454(1) of the Civil Code respectively. Business organizations with legal personality should be capable of performing all the acts of civil life consistent with their nature unless declared incapable by law.

Since a business organization is basically a combination of individual members and initial capital, the members would be co-owners of the property if the organization does not have a separate legal existence. Any liability incurred, in the normal business practice, by one or more of the members in their name shall rest with them. However, if the law bestows upon the organization legal personality, it may acquire right of ownership over the property and incur liability in its name. Furthermore, it can litigate legal proceedings in its firm-name. Also, it is primarily liable on its property, income & taxable activities.

(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. The Commercial Code contains specific requirements for names of all business organizations except an ordinary partnership. The name of any business organization other than the ordinary partnership must indicate the form of organization: whether it is- "General partnership," " share company," etc. Besides the firm-name of a general partnership should include the names of at least two partners and the name of a limited partnership may only consist of the names of the general partners. A share company and private limited company may be operated under assumed names chosen freely, provided that they do not offend public morals and the rights of third parties.

(c) Head Office. The head office of a business organization is the place where its principal organs of administration and management are situated. The legal effects of the place of its head office are the same as those of residence for the physical person. The significance of the location of its head office figures prominently in procedural matters in particular in relation to judicial jurisdiction and service of process. Moreover, it determines nationality of the business organization under consideration.

(c) Nationality: The general principle concerning bodies corporate whose head offices are situate abroad is that they have such nationality as is given to them by the laws of that country. Consequently, a legal person with its head office in Ethiopia is presumably of Ethiopian nationality in spite of the absence of an express provision. As can be gathered from a reading of Articles 545-549 of the Civil Code in conjunction with Articles 555-560 of the Commercial Code, the formation or operation of a business organization and its enjoyment of rights in

Ethiopia depend upon the following three factors; the place where its principal business purpose is situate, and the country under whose law it is formed.

A business organization with its head office in Ethiopia is subject to Ethiopian law with respect to its formation and operation. An organization with its head office abroad is subject to Ethiopian law if it is formed in accordance with Ethiopian law or if its principal business object is in Ethiopia. An organization formed abroad (and, presumably, with its head office and principal object of business abroad) must register in Ethiopian offices.

UNIT FOUR
ORDINARY PARTNERSHIP

Introduction

This unit examines the ordinary partnership form of business organizations. It explores the basic structures of this type of business. This includes a discussion of the authority generally vested in partners as well as the distinction between the rights of partnership creditors and those belonging to creditors of the individual partners. After a survey of the rights and duties of the partners there is a discussion of the procedures involved in terminating a partnership.

An ordinary partnership is one of the various forms of partnerships. The major distinction between an ordinary partnership and other partnership forms is that commercial business organizations cannot adopt this form of business organization. Article 213(2) provides that "where a commercial business organization is created in the form of an ordinary partnership or where the form of the organization is not specified, the commercial business organization shall be deemed to be a general partnership." The ordinary partnership, as business organizational form is a partnership which lacks in legal characteristics that make it a commercial partnership. (Art.227) Therefore, even if it cannot engage in commercial activities(i.e., those listed in Art.5), it can carry out any other economic activities which the ordinary partnership may legitimately carry out are virtually unlimited.

Article 228(1) of the Commercial Code excludes application of the Code provisions regulating ordinary partnerships to a case of joint ownership in which property is held by several persons for reasons outside their control. The only case in which the provisions governing ordinary partnerships are applicable is where the joint owners have entered into a partnership agreement for the management of the property jointly owned [Art.228 (2).] The purpose of Art.228 is nothing but clarification, insofar as it does not alter the barest minimum condition for the existence of any business organization, including ordinary partnerships, i.e., concluding a partnership agreement. As we shall see, the existence of co-ownership may be prima facie evidence as to the existence of ordinary partnership. What is conclusive, however, is the making of a valid partnership agreement. For instance, co-heirs of a deceased trader are co-owners of the hereditary estate until partition. It is only when they enter into a partnership agreement concerning the hereditary estate that they can form an ordinary partnership, and, hence, the provisions dealing with ordinary partnerships apply. But, here we should not lose sight of the special formality that the heirs of the deceased need to comply with.

Article 113 reads:

(1) The heirs of a deceased trader shall apply for the registration to be cancelled within two months from the death.

(2) Where the heirs carry on the trade under joint ownership, they shall apply for a new registration to be entered.

(3) Where the joint ownership is dissolved, the entry made under sub- art. (2) shall be cancelled and the person to whom the business is assigned shall apply for a new registration to be entered.

4.1 Contributions

Every partner must make a contribution, which may be in money, debts, other property or skill. Where contribution is made in kind, the use only of such property may be contributed. In the absence of a contrary agreement, contributions are deemed to be equal and of the nature and extent required for carrying out the purposes of the partnership [Article 2229]. In cases where contribution is made in kind, the contributor must extend to the co-partners warranty against defect and dispossession in a manner a seller does. If the use only of a property has been contributed, the contributor must perform the duties owed by a lessor. Where a partner contributes a debt, he guarantees only the existence of the debt and not the solvency of the debtor, unless otherwise agreed [Article 230]. With regard to transfer of risk, the risk passes to

the partnership by delivery in case the contribution has been made in kind. However, the risk shall remain with the contributing partner in case where the use only of a property has been contributed. [Art.231]

4.2 Partnership Capital

Article 80(1) stipulates that "The capital is the original value of the elements put at the disposal of the undertaking by the…partners by way of contributions in cash or in kind". In view of the foregoing, capital refers not to the money or property contributed as such, rather to its value. The value has to be the original value of the contributions in cash or in kind. Calculation needs to be made based on the value of the property on the day of contribution. Also, it ought to be borne in mind that partnership capital consists only of contributions in cash or kind, to the exclusion of contributions in skill or service. Consequently, the partnership capital, being the original value of the total money and property that the partners contribute and dedicate to use in the enterprise, is a fixed amount that may change only through amendment to the partnership agreement.

4.3 Partnership Property

Partnership property must be distinguished from partnership capital. The term "partnership property", as found in the caption of article 245, refers to "property, debts and rights brought into or acquired by the partnership". Therefore, partnership property, being the sum of the value of the partnership's assets, includes all the cash, corporeal and incorporeal property and rights originally brought into the partnership or subsequently acquired by the partnership. In addition, any property acquired with partnership funds on account of the partnership must a fortiori be part of partnership property. A more technical definition of the term is provided in Articles 74-85 of the Code.

4.4 Ownership and Possession of Partnership Property

Partnership property, pursuant to Article 245, belongs to the partners in common under the terms of the partnership agreement. That is to say, partnership property is held by the partners as joint

owners. Every partner is a co-owner with all other partners of specific partnership property, such as office equipment, office supplies, and vehicles. Article 245(2) provides that "every partner may use partnership property in accordance with usual partnership practice." This normally means every partner has equal rights to possess partnership property for business purposes or in satisfaction of firm debts, but not for any other purpose without the consent of all the other partners. Sub- article (3) of the same provides that "No partner may use partnership property against the interests of the partnership or so as to prevent his co-partners form using such property in accordance with their rights." In view of the above provision, it would seem that a strong case can be made for partners' right to take possession of partnership property for personal use in the absence of a statutory clause prohibiting them from taking possession of such property for personal purposes, so long as they do not use it against the interests of the partnership or so as to prevent their co-partners from using such property in accordance with their rights under the partnership agreement, unless otherwise agreed.

4.5 Creditors of the Partnership

Article 255(1) stipulates that "The creditors of the partnership may claim against partnership assets." Sub-article (2) of the same bestows upon the creditors of the partnership the right to "claim against the personal property of the partners who shall, unless otherwise agreed, be jointly and severally liable to them for the obligations of the partnership." At this point, it has to be emphasized that joint and several liability of the partners can be avoided by a contrary agreement. Also, it should be borne in mind that this feature marks off ordinary partnerships from other partnership forms.

Sub-article (2) of Article 255 further stipulates that "a partner who is sued on his personal property may require, as though he were a guarantor, that the creditor first distrain the property of the partnership." That is to say, a partner who is sued on his personal property for the debts of the partnership can invoke the benefit of discussion pursuant to Articles 1934-1935 of the Civil Code like a simple guarantor. Sub-article (3) of same provides that "Any provision relieving the partners or some of them of joint and several liability may not be set up against third parties unless it is shown that such parties were aware of such provision." It goes on to stipulate that "Notwithstanding any provision to the contrary, the partners who acted in the name of the partnership shall always be jointly and severally liable." The net effect of these two provisions is such that partners can invoke a statutory clause relieving them of joint and several liability

against third parties as long as they can make a showing of awareness on part of such parties of the existence of such clause on condition that they did not act in the name of the partnership.

4.6 Creditors of the Partners

According to Article 256 (1), personal creditors of the partners may not attach any of the partnership property; however, a partner may assign his partnership interest to a creditor or to anyone else in pursuance of Article 250. This entitles the assignee to receive that partner's share of the profits. It does not give the assignee a right to any information about partnership affairs or a right to look at its books.

A creditor who gets a judgment against a partner may obtain from the court an order against the partner's interest in the firm. The court may appoint a receiver to look after the creditor's interests. If profits are insufficient to pay off the creditor, the court may order that the partner's share be sold [Art. 256(3)]. The purchase may dissolve the partnership if it is to exist for an indefinite time. If it is for a term of years that has not expired, the partnership will continue as originally agreed. The purchase will not be a partner, nor can he exercise any of the partner's rights except to receive the share of the profits [Art 260(2) and (3)]

4.7 Management

4.7.1 Types of Managers

(i). Statutory managers. These are managers specifically designated in the partnership agreement or following an amendment thereto and, as such, their names appear in the text of the partnership agreement. Partners or third parties may be appointed to be managers[Art. 236]. Partners, as opposed to third parties, appointed as managers under the partnership agreement, enjoy special entitlements. Article 239 provides that "A partner appointed as manager under the partnership agreement may carry out all acts of management in disagreement with the other partners in the absence of fraud." Besides, Article 240(1) stipulates that "The appointment of a manager appointed under Art. 239 may not be revoked or his powers restricted by the other partners, save for good cause." This provision contradicts with Article 233 which reads: "The partnership agreement may be varied only with the consent of all the partners." This is because revoking or restricting the management

powers of a partner appointed under the partnership agreement by a decision of the other partners amounts to varying the partnership agreement by any vote short of unanimity. Indeed, a valid variation of the terms of the partnership agreement may be made by a majority vote on condition that a clause to that effect is inserted therein. To illustrate the problem posed by Article 240, imagine a situation where two partners in a partnership designated one of them to be a manager under the partnership agreement. In the course of the partnership a dispute arose between the partners over a certain transaction made by the manager. Later, the other partner revoked the appointment of the manager on the allegation that the latter entered into such transaction fraudulently. This suffices to show that revocation might be made unilaterally. Therefore, according to Article 240, a partner statutory-manager whose management powers have been revoked can challenge his revocation before a court on the ground that the reason for such revocation does not constitute good cause.

(ii). Subsequently appointed managers. These are managers appointed by decisions of the partners at any point in time subsequent to the making of the partnership agreement.

(iii). Managers at law. Every partner, as per Article 236, has the right to act as a manager in the absence of both statutory and subsequently appointed managers.

(iv). Sole manager. It refers to a situation where a single individual has been appointed a manager. Where a single individual has been appointed a manager, he will act alone.

(v). Several managers. It refers to a situation in which two or more persons have been appointed managers and their duties have not been specified or where it has not been specified that they act jointly. In such cases, they may each carry out acts of management. Each manager may object to dealings contemplated by other managers. And the objection shall be decided on by a majority vote of all the partners [Art.237].

(vi). Joint mangers. In cases where joint managers have been appointed, decisions shall be taken by consensus. However, where an act of management is of an urgent nature and the other joint managers cannot be consulted, one of them may act alone as if she were a sole manager [Art. 238].

4.7.2 The Authority of Managers

Article 3 of the Commercial Code renders articles 33-36 applicable to business organizations except to the extent they are expressly or impliedly modified by provisions on business organizations. A cumulative reading of articles 216(1) cum 2189(1) reveals that a bus organization is bound by any contracts or other acts made in its name by an agent acting within the scope of his powers. The two levels of authority are:

(i). Express Authority: The authority which acts as:

a) as specified in the partnership agreement.

b) as stipulated in the contract of employment.

(ii). Implied authority

Implied authority means the authority to bind the firm which arises, by operation of the law, from the fact of partnership. This is in line with 2179 of the Civil Code, which provides that "the authority to act on behalf of another may derive from the law or a contract." Illustrations of a power of attorney which stem from the law are those to be had by partners of the various forms of partnerships as under Articles 236,275(2) and 286(2) of the commercial code. As per article 2202(1), the scope of partner's implied authority is to be determined "according to the nature of the business to which it relates." Thus, the business purposes/objects clause of the partnership agreement serves as a starting point in deciding the scope of the partner's implied power of attorney. As a contrario reasoning of Art. 235 discloses, a partner has an implied authority to carry out any act which is within the "normal partnership practice." It would follow that implied authority is influenced by customs and usages of the particular partnership and those of similar business in the area.

4.8 Relationships among Partners

4.8.1 Rights and Duties of Partners

The mutual rights and duties of the partners may be determined by the partnership agreement, subject to the mandatory provisions of the law. The mutual rights and duties may be altered any time with the consent of all the partners.

The Commercial Code, coupled with the Civil Code provisions applied mutatis mutandis, lays down the following rules regarding the conduct of the partners to one another.

(i). General Duties. Partners are bound to:

- exercise the **diligence and skill** which they use in conducting their private affairs [Art 243(1)].
- act in the " **strictest good faith" or "utmost good faith**" towards the partnership [Art 2208(1), 2263(1),Civ.C.].
- exercise the same **diligence** as a *bonus pater familias* [Art.2211(1)].
- be with the same **care** as a *bonus pater familias* .

Sanction: Indemnity

- Every partner shall be liable to the other partners in respect of any damage which he caused by his default (Art.243(2),Com.C.).

(ii). Specific Duties

In addition to the above general duties, the partners have the following specific duties. These are duty to:

1. account for her management of affairs [Arts. 2213 & 2210,Civ.C.]
2. refrain from engaging in businesses that are in competition with or otherwise likely to injure the partnership [Art.244].
3. refrain from using the partnership property against the interests of the partnership or so as to prevent his co-partners from using such property in accordance with their rights [Art. 245(3)].
4. share in such expenses as may be necessary to preserve the partnership property [Art.246].
5. pay interest on loans as well as damages, if any [247(2)].
6. pay interest on delayed payment of contribution in money [Art. 232].

In fine, subject to any agreement to the contrary, the mutual rights and duties of the partners are as follows:

- A partner is not entitled to receive remuneration for taking part in the conduct of business;
- The partners are entitled to share equally in the profits earned and shall contribute equally to the losses sustained by the firm [Art.251&252].

- A partner making, for purpose of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of 9% per annum [Art. 247(1)].
- Receiving payments from the debtors and issuing receipts against them
- Engagement and dismissal of employees of the firm.
- Accepting, drawing, and issuing negotiable instruments on behalf of the firm.
- Borrowing money and pledging the firm's goods or chattels as security. If the firm's chattels or goods are pledged for a purpose not connected with the ordinary course of business, the firm is not bound unless specific authority has been given.

4.9. Mode of doing act to bind a firm

Article 2189(1) provides that in order to bind a firm, an act or instrument done or executed by a partner must be done or executed in the name of the partnership.

Examples: (a) If a partner of a horticulture firm purchases fertilizers on credit in the firm's name, the firm is bound to pay for the fertilizers.

(b) If the partner of a firm of floriculture purchases a greenhouse on credit in the firm's name, the firm is bound to pay for the green-house.

(c) If Y, the partner of a firm of floriculture, purchases a race-horse on credit in the name of the firm, the firm is not bound by the act of the partner because this act does not come within the scope of the floriculture's ordinary business.

(d) If the partner of a firm borrows money in his personal name: the firm is not bound, because it is not an act of the firm.

4.9.1. Liability of Partners to Outsiders

(i)Liability of a partner for acts of the firm. Every partner is liable, jointly with all the other partners and also severally for all acts of the firm done while he is a partner [Art. 255].

(ii) Liability of the firm for wrongful acts of a partner. Where by the wrongful act or omission of a partner acting in the ordinary course of the business of a firm, or with the

authorities of his partners loss or injury is caused to any third-party, or any liability is incurred, the firm is liable therefore to the same extent as the partner [Art.2222].

4.10 Dissolution, Winding up, and Termination

The extinguishment of a partnership consists of three stages:

(1) Dissolution
(2) Winding up or liquidation, and
(3) Termination.

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 the remaining assets are distributed to the partners. Termination occurs when the process of winding up has been completed.

4.10.1 Dissolution

Dissolution is defined by the Uniform Partnership Act of the United States as the change in the relation of the partners caused by any partners ceasing to be associated in the carrying on, as distinguished from the winding up, of the business. It designates the point in time when the partners cease to carry on the business together. The business is not automatically terminated upon dissolution, but has to go through the winding up procedure.

4.10.1.1 Grounds of Dissolution

(i) Grounds of Dissolution Applicable to All Forms of Business Organizations

The grounds of dissolution which are a set out in Articles 217-218 can be grouped into three categories as follows:

(a). Legal Dissolution

- Where the business purpose has been achieved or cannot be achieved [Art.217(a)];
- Where the term for which the business organization was formed expires, unless the partners agree to continue the business organization [Art.2179c)).

(b).Consenual Dissolution

- Where the partners agree to dissolution prior to the expiry of the term for which the business organization was formed [Art.217 (b)].

(c) Judicial Dissolution

- A business organization may be dissolved for good cause by the court on the application of a partner [Art. 218(1)]. Pursuant to Sub-art (2) of the same, there shall be good cause in particular where a partner seriously fails in his duties or becomes through infirmity or permanent illness or for any reason incapable of carrying out his duties or where serious disagreement exists between the partners.

(ii). Grounds of Dissolution Specific to Partnerships

(a). Dissolution by Notice

Partnership may be dissolved at any time by any partner by giving six months 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 P/P agreement.

(Art. 258).

(b). Dissolution due to Death, Incapacity, and Bankruptcy of a partner

Article 260(1) provides that the partnership shall be dissolved where one of the partners dies or is no longer able, under the law, to be a partner. Sub-article (2) of the same stipulates that 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 256(3).

4.10.1.2 Continuation upon Dissolution

Even if a partnership is to be dissolved, the partners can prevent dissolution by various ways. One such way is that the partners may agree at any time that the interest of the indebted/insolvent Partner shall be purchased by another partner. Another way is that 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. The two situations in which continuation is possible in Ethiopia are:

1. Where a partner has given notice to dissolve under Art.258, his partners may prevent dissolution by paying out his share; (Art. 259).
2. Where a partner is declared bankrupt or where one of his personal creditors causes his share to be disposed of under Art. 256(3);

4.10.2 Winding up (Arts. 264-270)

Whenever a dissolved partnership is not to be continued, the partnership must be liquidated. The Process of liquidation, called winding up, involves completing unfinished business, collecting debts, taking inventory, reducing assets to cash, auditing the partnership books, paying creditor, and distributing the remaining assets to the partners.

Winding up may be carried out by one or more liquidators appointed under the partnership agreement (statutory liquidators), or , in default, by liquidators appointed by all the partners (consensual liquidators), or, in default, by court appointed liquidators(judicial liquidators).

Duties and Responsibilities of Liquidators

- In the absence of a contrary clause in the partnership agreement or by law, the liquidators shall have the same duties and responsibilities as managers.(Art.265)

- Draw up an inventory of the assets and liabilities of the partnership (Art. 266)

Powers of Liquidators

- The liquidators shall take all steps necessary to complete the winding-up of the partnership.

- The liquidators may sell the property of the partnership, represent the partnership in legal proceedings and may compromise or refer to arbitration any matters in issue.

- The liquidators may not undertake new business in the name of partnership but may complete business already started. [Art. 267]

The purpose of the winding up is to liquidate the assets at their highest value and bring the affairs of the partnership promptly to an end. This may involve completing contracts of the partnership. For example, in a partnership involved in construction business, it may be desirable to finish contracts for constructing large buildings that may take two or three years to complete. In order to finish these jobs, the liquidators would have authority to enter into new contracts with subcontractors, with material supplies, and with workers. As a result, it may be necessary that the liquidators borrow money on behalf of the partnership in order to complete these contracts.

4.10.3 Distribution of Assets

After all the partnership assets have been collected and reduced to cash, they are distributed to creditors and the partners. When the partnership has been profitable, the order or distribution is not critical; however, when liabilities exceed assets, the order of distribution has great importance.

Article 268-270 of the Commercial Code stipulates:

Art. 268. – Settlement with creditors.

(1) The liquidators shall pay the creditors of the partnership, where necessary calling upon the partners for contributions.

(2) They shall settle with the partners debts which they hold against the partnership and restore to partners property whose use only was contributed to the partnership.

Art. 269. – Restitution of contributions.

(1) A partner who has contributed property may not claim it back in kind.

(2) He shall have a claim to the value of his contribution as accepted in the partnership's accounts.

(3) If the value has not been so fixed, restitution shall be made on the basis of the actual value at the time the contribution was made.

Art. 270. – Distribution of profits and losses.

(1) Where there is a surplus after all claims have been met and contributions returned, the surplus shall be distributed among the partners.
(2) Where the assets are insufficient to repay contributions after payment of debts, expenses and advances, the loss shall be distributed among the partners.
(3) The distribution of profits and losses is to be made among the partners in equal shares, where no other proportion has been specified in the partnership agreement.

The above-cited provisions set forth the rules for settling accounts between the parties after dissolution. Accordingly, the liabilities of a partnership are to be paid out of partnership assets in the following order:

1. amounts owing to creditors other than partners [art 268(1)];
2. amounts owing to partners other than for capital and profits, and restoration of properties whose use only were contributed to the partnership [Art 268(2)];
3. amounts owing to partners for capital [Art.269)];
4. amounts owing to partners for profits [(Art 270(1)].

The partners may by agreement among themselves change the internal priorities of distribution (number 2, 3, & 4) but not the preferred position of third parties (number 1)
In addition, Art. 270 provides that, in the absence of any contrary agreement, each partner shall have equal share in the profits and surplus remaining after all liabilities (number 1,2, and 3) are satisfied and must contribute toward the partnership losses according to his share in the profits. Thus, the proportion in which the partners bear losses depends not on their respective capital contributions but on their agreement. If no specific agreement exists, losses are borne in the same proportion in which profits are shared.

If the partnership is insolvent, the individual partners must contribute their respective share of the losses in order to pay the creditors (Art. 268(1)).

Alfred JAUFFRET, (1974) GENERAL REPORT: BOOK II, (1 MARCH 1958) (EXCERPTS) in Peter WINSHIP Background Documents of the Ethiopian Commercial Code of 1960, Artistic Printers, Addis Ababa,
The following is stated in Alfred JUAFFRET (1974):

1. The distinction between an ordinary partnership and the other forms of business organization did not appear clearly. I thought it useful, therefore, to make the distinction clearer... : after all, what the Swiss and Italian Codes call "ordinary partnerships" (*societe simple*) is nothing other than the "civil partnership" (s*ociete civlile*) found in the French and German Codes.

2. Although certain articles refer to general principles governing business organization, these general principles were not found in the prior draft. I thought it indispensable, therefore, to begin Book II with a new Title I devoted to General provisions, the articles of which (provisionally labeled "A" to "Q") contain these general principles. Among these principles are the rules governing publicity which were not included in the earlier draft. I thought it necessary to co-ordinate these rules with those in Book I regulating the commercial register. I have provided therefore, not only publication in a newspaper empowered to publish legal notices but also several formalities to be completed before the local official in charge of the commercial register: the deposit of two copies of the memorandum of association and complementary documents, and the application for registration in the commercial register.

UNIT FIVE

Joint Venture

A joint venture is a grouping of people arising out of a partnership agreement, which is also known as a joint venture agreement in which two or more persons combine their labour and/or capital for the purpose of carrying out economic activities and participating in the profits and losses arising out thereof (Art.271 cum 211).

The joint venture is the simplest form of business organization. It is regulated by title III 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.

Joint ventures have the following merits:

1. Transactions or projects can remain secret by virtue of the secretive nature of the organization;
2. Joint ventures are exempted from registration, unlike the remaining legal forms of business organizations;

5.1 CHARACTERSTICS OF JOINT VENTURES

A joint venture, being one variant of partnerships, is subject to the general principles of law relating to partnerships [Art.271]. Exceptions to the application of partnership principles to joint ventures include the following:

1. A joint venture is not made known to third parties. What is more, a joint venture agreement need not be in writing and is not subject to registration (Art.272)
2. A joint venture does not have legal personality [Art.272(3)]. Thus, it is not going to be considered as a legal entity. That is to say, a joint 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.

Now, let's attempt to elaborate on the legal ramifications of the above-mentioned two exceptions. First, one general principle of law relating to partnership is such that any business organization other than a joint venture must not be made known to third parties.

([Art.219 (1)]. Also, sub-article (1) of Art. 272 provides that a joint venture is not made known to third parties. Nevertheless, where a joint venture is made known to third parties, it shall be deemed, insofar as such parties are concerned, to be an actual partnership [art. 272(4)]. That is, in case third parties happen to be aware of the existence of a commercial joint venture, it will be presumed to be a *de facto* general partnership. It shall be deemed to be a general partnership, because it is commercial. And it is a *de facto* business organization, because it has not been registered.

Here we can raise two questions in connection with the effect of non-compliance with the requirement of what is referred to as "absence of divulgation" for persons to engage in business in the form of a joint venture. Article 272(4) of the Commercial Code stipulates simply that " where a joint venture is made known to third parties, it shall be deemed, insofar as such parties are concerned, to be an actual partnership." This provision goes no further than providing a sanction for the said requirement. The first question, thus, is as to the time when the joint venture is considered to have been divulgated to third parties. Put differently, when should the knowledge of third parties exist in order that the joint venture will be presumed to be an actual partnership? The time has to be before they enter into a business dealing with the manager. The reasons are two-fold:

One is third parties ought not to claim that they were misled unless there exists reliance. This is so, because it might be the case that at the time when they entered into transaction with the manager they had relied only on the individual manager and did not know of the joint carrying on of the business as between the venturers and did not still know of the identity of the venturers. Thus, what matters most is prior knowledge as long as assimilating all cases of subsequent knowledge would defeat the rationale behind the provision. Also inclusion of subsequent knowledge into the solution would render it one-dimensional. This is so, because if the manager could bind the members, they would be liable with him all the time.

The second question can be put as follows: undisclosed joint venturers enjoy ownership right over their contributions as per Article 273 of the Commercial Code. However, if the joint venture

is made known to third parties, it will be presumed to be an actual partnership. Now, the question is what is the effect of this legal presumption as to the change in the form of the business organization on the venturers' liability?

There still is a possibility in which partners in the de facto partnership can enjoy the privilege granted them by virtue of Article 273 of the Commercial Code. Despite the fact that a joint venture does not have legal personality and is not registered, some of the venturers may not get misled as to their status. There is no reason why the partners in the *de facto* partnership should be denied of limited liability, so long as the policy of protecting the interests of third parties remains intact. Hence, the issue of whether third parties might have been misled will be resolved on a case by case basis. Nevertheless, the likelihood that third parties will be misled is higher in cases of *de facto* partnerships. It is submitted that, non-manager joint venturers may enjoy the privilege granted them by Article 273 even if the joint venture is divulgated, so long as third parties are not misled, none the less.

Besides, it is important to note that what has been disclosed to third parties matters a lot. If third parties were informed that the partners have formed a joint venture, this would be immaterial. But, if third parties were aware only of the joint carrying on of the business in the form of a partnership, the solution will apply as stated above.

With respect to the second exception the following comment is worth noting. Since a joint venture has no legal personality, ownership right over the capital contributions shall remain with individual contributors in the absence of an agreement to the contrary (Art.273). The joint ventures will merely put certain goods or assets at the disposal of the manager, who does not become the owner except in the case of fungibles, especially cash. If the manger acquires goods with the funds placed at his disposal by the venturers, he retains ownership of these goods but is obliged to account to the venturers for his acquisitions, and if he resells these goods at a profit he must share the profit with the ventures. Just in case the manager goes insolvent, the goods placed at his disposal by the ventures do not form part of the assets of the bankrupt manager and hence each joint venturer may reclaim his contribution. Being the owners of their contributions, the venturers may freely transfer them to third parties. Finally, each joint venture takes back the assets which he placed at the disposal of the manager if he still has them in kind upon dissolution.

The joint ventures may conclude a contrary agreement as regards ownership of their contributions. First, they may provide for transfer of title over their contributions to the manager. Therefore, the manager will become the owner from the moment the venturers explicitly or implicitly show that they want to transfer ownership. In case of cash contributions, the manager becomes owner thereof. Any way, the manager is duty-bound to use the goods placed at his disposal exclusively for the business purposes of the joint venture. Second, the joint venturers are at liberty to provide for a regime of co-ownership pertaining to their contributions, thereby rendering each venture a co-owner of the common property.

5.2 MANAGEMENT

A joint venture may be managed by one or more managers, who need not be venturers. Many times, the manager is a venturer. In the absence of an appointed manager, each venturer shall have the status of a manager. Where there is a statutory manager, his/her powers should be specified in the memorandum of association. But, a statutory clause restricting the powers of the manager, may not be set up against third parties. This is so, because the memorandum of association, otherwise known as joint venture agreement, is not required to be registered. And, as such, third parties are divested of the opportunity to have access to such information. Furthermore, a statutory manager may not be revoked without good cause (Art. 275)

The manager enters into legal relationships with third parties in his own name. Acts of the managers can be set up against the venturers themselves. For instance, if he sells for his own benefit a good given him by a venturer, the sale of the good cannot be challenged unless the purchaser knew the manager was exceeding his powers. But even in this case the burden of proof will be on the venturer-owner to show that the manager knew of the situation. If he cannot show this, the venturer-owner only has an action for damages against the manager. With regard to the venturers, the managers are duty-bound to act within the scope of powers specified in the joint venture agreements. As for the rest, he acts in his own name and not in the name of the joint venture because the organization does not have legal personality.

The venturers who are not appointed to be managers enjoy the right to supervise the work of the manager. They may not actively participate in the external management, but in case they do participate they are jointly and severally liable with the manager. Venturers who are not managers and who deal with third parties can only do so in their own name. A manager is

obliged to account to the partners. Any provision relieving the manager from this duty shall be of no effect. [Arts.276-277]

5.3 DISSOLUTION

Article 278 sets out various grounds for the dissolution of joint ventures. These are:

a) the expiry of the term fixed by the memorandum of association unless there is provision for its extension;
b) the completion of the venture:
c) failure of the purpose or impossibility of performance;
d) a decision of all the partners for dissolution taken at any time;
e) a request for dissolution by one partner where no fixed term has been specified;
f) dissolution by the court for good cause at the request of one partner;
g) the acquisition by one partner of all the shares;
h) death, bankruptcy, or incapacity of a partner, unless otherwise lawfully agreed;
i) a decision of the manager, if such power is conferred upon him in the memorandum of association.

5.4 EXPULISION OF A PARTNER in lieu of DISSOLUTION

According to Article 279(1) the court may grant an order for of the expulsion of the wrongful venturer in lieu of dissolution upon application by the other venturers, where dissolution is requested for reasons attributable to one venturer. Such expulsion could also be provided for in the memorandum of association (Art. 279(2)). A person who is expelled is entitled to be paid what is due to him on the day of expulsion.

Jean ESCARRA, EXPOSE DES MOTIFS; BOOK II (COMM.C.DOC.NO.3B) (31MAY 1954), in Peter Winship(trans.), Background Documents of the Commercial Code of Ethiopia of 1960(HSIUC, Addis Ababa:1971), pp……

The present document is devoted to the joint venture and includes 9 articles.

1. The joint venture (*association en participation*) is the simplest form of business organization.
2. Although in practice the joint venture is frequently used for a single business transaction, it can also be used for a number of transactions and for a more or less long period of time.

This form of organization is not adapted to industrial enterprises, but commercial transactions in which great amounts of capital are involved are often dealt with by means of a joint venture.

In countries which have a developed banking system, financial syndicates coming together to establish large share companies frequently form a joint venture in order to subscribe to the capital.

For although the joint venture is a rudimentary form of business organization it does have two considerable advantages:

1. transactions can remain secret because of the secret nature of the joint venture, only the manager being made known to the public while the members remain in the shadows:
2. the members are exempted from the publicity formalities imposed on commercial business organizations.
3. From the legal point of view the essential characteristic of the joint venture is that it does not have legal personality .It therefore does not have a firm-name; does not possess capital, assets or liabilities; does not have a head office; cannot be declared bankrupt. Being essentially an organization of persons, the joint venture cannot issue transferable securities representing shares in the organization. Unless otherwise provided, shares may only be assigned with the consent of all the members. The members are free to decide on the terms of their joint venture except in the cases discussed below. The venture is dissolved on the death, bankruptcy or incapacity of any of the members.
4. I have the following comments on the specific articles of the avant- projet:

    i. As stated in the second paragraph of Article [272 (2)], a commercial joint venue need not be in writing. By stressing the word “commercial” I mean to emphasize that even though a joint venture carries out commercial activates the agreement establishing the venture does not have to be in writing. This provision assumes a number of problems have been resolved, such as the distinction between civil and commercial matters, etc. The final draft of the text will necessarily be adjusted to the rules set out in the Civil Code.
    ii. The last paragraph of the same Article [272(4)] sets out the rule that if a joint venture is made known to third parties it shall be deemed to be a de facto business organization. The meaning of this provision will be explained in the chapter on the general rules governing business organizations

5. Unless otherwise provided, every member retains ownership of the property which he contributes to the joint venture. Since the organization has neither legal personality nor capital, the contribution of the members cannot become the property of the joint venture. The members merely place certain goods or assets at the disposal of the manager who does not become the owner except in the case of fungible goods, especially cash. If the manager acquires good with the funds placed at his disposal by the members he retains ownership of these goods but is obliged to account to the members for his acquisitions, and if he resells these goods at a profit he must share the profit with the members.
6. If the manager becomes bankrupt-which assumes that he has the status of trader (and also that it will be decided that bankruptcy is limited to persons with this status) – the goods placed at his disposal by the member (unless they are fungible goods) do not form part of the assets of the bankruptcy and each the members may reclaim his contribution. Being the owners of their contributions, the members may freely transfer them to third parties. Finally, when the venture is dissolved, each of the members takes back the goods which he placed at the disposal of the manager if he still has them in kind.
7. The above solutions can be considered as the usual law governing contributions to a joint venture. The members may provide in their agreement, however, for a different set of rules governing their contributions. First of all, they may transfer title of the goods they are contributing. The goods will not become the properly of the joint venture since it dose not have legal personality It will be, therefore, the manager who will become the owner from the moment the members explicitly or implicitly show that they want to transfer ownership. If the contribution is in cash the manager acquires the property by virtue of the laws governing fungible goods. In any case, the manager has the obligation to use the goods placed at his disposal exclusively for the business purposes of the joint venture.The members are also free to agree that the goods contributed to the venture will be common property, each member becoming joint owner of the common properly.
8. Articles 5-7 [275-277] relate to the management of the joint venture. Without touching on the appointment, revocation and remuneration of the manager, nor on his rights and duties, it is desirable to underline the nature of his relation with third parties and with the members.

   With regard to third parties, the manager acts in his own name. His actions can be set up against the members. If , for example, he sells for his own benefit a good given him by a member, the sale of the good can not be attacked unless the purchaser knew the manager

was exceeding his powers. But even in this case the burden of proof will be on the member- owner to show that the purchaser knew of the situation. If he cannot show this, the member-owner only has an action for damages against the manager.

In his relation with the members the manager is obliged to act within the scope of the powers granted him in the agreement establishing the joint venture. As for the rest he acts in his own name and not in the name of the joint venture because the organization does not have legal personality.

The members who are not managers retain their right to supervise the work of the manager in accordance with general legal rules. They may not take part in the management, at least in the external management, but if they do take part they are jointly and severally liable with the manager. This last solution is arrived at by applying the rule that in commercial affairs joint liability (solidarity) is derived only from the law. The elaboration of this rule itself comes from civil law. In addition members who are not managers and who deal with third parties can only do so in their own name.

Article 7 [277] emphasizes one of the essential obligation of the manager to account of the members for his management. This rule is a matter of public policy and members are not permitted to agree otherwise.

9. Article 8 [278] enumerates the grounds for the dissolution of joint ventures. These grounds are numerous and many are common to all forms of business organization. One might ask, therefore, whether it is opportune to enumerate these grounds among the provisions regulating a single form of business organization, especially an elementary form. One could reply that since the rules governing joint ventures should appear logically at the beginning of the part of the code dealing with the different kind of business organization it would be normal to indicate the grounds for dissolution of business organization in general while treating joint ventures. But, on reflection, one could just as well bring together the grounds for dissolution in the chapter of general rules. This is a problem of legislative technique, the solution of which can reasonably be put off for the moment.

For this reason I have also provisionally kept Article [279], dealing with judicial dissolution for good cause, in this Title. This important method of dissolution is allowed for all forms of business organization. This admission tends to tip the balance towards putting together all the reasons for dissolution in one place.

Similar considerations lead one to eliminate provisionally from this title provisions concerning liquidation and periods of limitation. These concepts obviously have such a general character that they are dealt with more logically in a general section.

UNIT SIX
GENERAL PARTNERSHIP

A general partnership is the typical partnership form. Partners in a general partnership, as per article 280(1) of the Code are, "personally, jointly, severally and fully liable as between themselves and to the partnership for the partnership firm's undertakings." The same sub-article further stipulates that "Any provision to the contrary in the partnership agreement shall be of no effect with regard to third parties." Thus, it can be argued that a statutory clause relieving the partners or some of them from joint and several liability, if any, may only be effective as between themselves.

Partners in a commercial general partnership have the status of traders [Art. 280(2)]. 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 firm-names may not contain names of persons who are not partners [Art. 281(1)]. Sub-articles (2) and (3) of Article 281 regulate situations in which a person whose name is mentioned in the firm name ceases to be a partner and or ,without being a partner, allows his name to be mentioned in the firm-name. In these cases, the person is going to be liable as a partner.

6.1 Contributions

As has been discussed in the preceding units, the partners must make contributions, which can be in cash, kind, debt, and skill. If a partner wishes to make property (corporeal) contribution, he can either convey the corporeal good or its use only, while retaining his title. This has to be

specified in the partnership agreement. In the absence of such stipulation, the issue will be resolved according to the circumstances, having regard to the partners' opinion as well as the usual partnership practice, so long as the law does not provide for a presumption.

6.2 Transfer of shares

In principle, a unanimous vote of the partners is required in order that a share belonging to a partner is assigned or transferred to an outsider and thereby he becomes a partner of the general partnership firm. Nonetheless, a share may be transferred or assigned to a third party and thereby the latter is rendered a partner in the strictest sense of the term by virtue of a decision taken by a majority vote of the partners to the same effect [Art. 282(1) and (2)]. At this point in time, I would like to draw your attention to a particular lacuna in the law regulating the ordinary partnership. That is, no where in Title I of Book II may be found a provision parallel to the second paragraph of Article 282. By comparison, an analogous provision is to be found in the rules governing the joint venture in the second paragraph of Article 274, which reads: "unless otherwise provided, shares may be assigned only with the agreement of all the partners." In the absence of a contrary agreement by the firm's creditors, a partner whose share has been transferred or assigned, as the case may be, is going to be liable for the firm's debts up to the date of assignment or transfer [Art, 282(3)]. Put differently, the transferee or assignee has limited liability for whatever debts and obligations the firm incurred prior to the transfer or assignment.

However, beneficial interests in shares may be assigned or transferred, in exchange for a value or for free, to a third party without the partners' unanimous or majority vote requirement as the case may be. The transferee or assignee, for example, being creditor or the partner, is entitled to receive only the share in the profits belonging to the debtor partner. Since such transfer or assignment does not render the transferee or assignee a partner he "has none of the rights of a partner." [Art.283].Such rights include the right to check the state of the firm's business, to consult the books and papers of the partnership and to draw up a statement of the financial position." [Art.248] In addition, a partner has the right to require the management report to be prepared in accordance with Article 249 of the Code.

6.3 Memorandum of Association and Registration

A general partnership arises out of a partnership agreement, otherwise known as 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 listed in Article 284, 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. The firm is presumed to be formed as between the partners, insofar as the memorandum of association has been drawn up and signed and comes into legal existence only when an entry into commercial registry and deposit of two copies of the memorandum of association along with all complementary documents are made, without the need to have notice published in a newspaper empowered to publish legal notices [Art.8(1) of Proclamation No. 67/97, as amended]

Accordingly, once the partners in a general partnership have gone through the registration and deposit procedures, the firm is said be a legal person, which has to do with the enjoyment of rights and obligations. For instance, it enjoys ownership right against the partnership property; has the right to sue and be sued in its firm-name [Art. 286].

6.4. Powers of Managers

Managers of a general partnership may, in accordance with the law, act for and bind their firm [Art 289(1)]. They assume management responsibilities and powers in the partnership business. But insofar as their powers are not unlimited, attempts shall be made to delimit the scope of such powers.

6.4.1. Scope of the Powers of Statutory Managers

More often than not, there will be a stipulation in the partnership agreement specifying the powers of the manager. Through registration, third parties become aware of the scope of the powers of the managers appointed in the partnership agreement. Also, any restriction on the powers of a manager should be entered in the commercial register. [Art 289(2)].

In view of the foregoing, a problem arises where the manager exceeds his powers. The title regulating general partnerships does not incorporate an express solution to the above problem, unlike Article 242 of the code, which stipulates that: " …where a manage exceeds his powers, the rules relating to unauthorized agency shall apply." For want of another workable solution, I recommend that we should apply unauthorized agency to analogous cases.

(i). Where the Partnership Agreement Fails to Specify the Powers of the Manager

(a.) Implied authority

General partnerships, being typical partnerships, are required to be registered, and, as a result, are legal entities. 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 contract, such scope shall be fixed according to the nature of the transaction to which it relates."

To apply this provision to the instant case, it can be re-read as follows: " where the scope of the powers of the manager is not expressly fixed in the partnership agreement, such scope shall be fixed according to *the nature of the business* to which it relates." [Emphasis added]

Article 295 renders Article 235 applicable to general partnerships. A contrario reading of Article 235 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 practice. Therefore, a cumulative reading of articles 2201(1) of the Civil Code and 235 of the Commercial Code would seem to suggest that the powers of the manager can be determined by implication from the nature of the business according to the usual or normal partnership practice of the locality in which it is situate.

Accordingly, the business purposes clause of the memorandum of association constitutes a good starting point. For instance, if the business purpose of a general partnership firm is warehousing, the firm's usual/normal business activities cannot be carried out unless the manager has the power to issue warehousing receipts. The extent of implied authority is generally broader for partners than for ordinary managers. The character and scope of the partnership business and the customary nature of the particular business operation determine the scope of implied powers. For

example, each partner in commercial general partnership that has goods in inventory and makes profits buying and selling those goods has a wide range of implied powers to borrow money in the firm-name.

In a general partnership, partners can exercise all implied powers reasonably necessary and customary to carry on that particular business. Some customarily implied powers include the authority to make warranties on goods in the sales business, the power to convey real property in the firm-name when such conveyances are part of the ordinary cause of partnership business, and the power to enter contracts consistent with the firm's regular course of business.

If a partner acts within the scope of authority, the partnership is bound to third parties. For example, a partner's authority to sell partnership products carries with it the implied authority to transfer title and to make usual warranties. Hence, in a partnership that operates a retail electronics store, any partner negotiating a contract with a customer for the sale of a TV set can warrant that "each TV set is warranted against defect for 2 years."

This same partner, however, does not have the authority to sell office furniture's, fixtures or the partnership office building without the consent of all the other partners. In addition, because partnerships are formed for profit, a partner does not generally have the authority to make charitable contributions without the consent of the other partners. No such action is binding on the partnership unless it is ratified by all the other partners [Art.35]

(b) 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 manger and principal are jointly liable. The manager would be exempted form liability in cases where he acted in good faith, not knowing the reason by which his authority has come to an end.

6.4.2. Several Managers

Article 288(1) Provides that "where all the partners are managers, or where several persons have been appointed managers and their duties have not been specified or it has not been specified that they act jointly, there may each carry out acts of management." Article 2204 of the Civil code defines " acts of management" as "acts done for the preservation or maintenance of property, leases for not exceeding three years, the collection of debts, the investment of income and the discharge of debts." "Sub-article (2) of the same stipulates further that" the sale of crops, goods intended to be sold perishable commodities shall be deemed to be acts of management."

Each manger may object to dealings contemplated by other managers. And such objection shall be decided by a majority vote of all the partners. In cases where there are significant differences in the amount of contributions of the partners, majority vote of the partners may not be a settled issue. Since a contrary provision is not to be found in the rules on general partnership, Art 234(2) may be extended to apply to general partnership. And the partnership agreement may provide that majority holding in the partnership. With respect to a statutory clause providing for the separation of duties of managers, Article 288(2) provides that "such separation shall only affect third parties where it has been entered in the commercial register or if it is shown that the third parties were aware of such separation."

6.4.3. Employee Mangers

An employee manager of a general partnership is required to observe strictly his contract of employment. A manager who acts outside the scope of his employment shall alone be liable, as he cannot bind the partnership. If the contract of employment goes to the extent of reducing the powers of the manager below what he as a manager is expected to perform in the circumstances of his case, it ends up in being a restriction within the meaning of article 289(2) of the Commercial Code, and, as such, should be entered in the commercial register to be invoked against third parties, or such third parties should be actually aware of such a provision.

6.5. Liability of Partners

Article 294 provides that "No action may be taken against individual partners for debts due by the partnership until after payment has been demanded from the partnership." The proviso clause allows the creditors to bring a direct action against partners for the repayment of fictitious dividends which they have received. The concept of good faith, as can be seen, has no place in

the case of the general partnership. This is so, because, in the general partnership, which is a business organization with few members, it is difficult to believe that partners could receive fictions dividends when the accounts are constantly at their disposal and when the members are both judge and parties when determining the distribution of the profits.

ESCARRA, EXPOSE DES MOTIFS: BOOK II (COMM.C. DOC.NO.9B) (9 OCTOBER/NOVEMBER 1954) in Peter Winship(transl.), Background Documents of the Ethiopian Commercial Code of 1960 Artistic Printers, Addis Ababa:1974.

1. Insofar as the general partnership is concerned, Article 10 [280] sets out its fundamental characteristics. There is still a question as to whether partners have the status of traders in all cases, even when the purposes of the partnership are civil in nature. This is a point on which a decision must be taken when the definitive text of the second paragraph of Article [280(2)] is drafted.
2. Article [282] contains the usual exceptions to the principle that the contributions in organizations of persons, such as general or limited partnerships, are not assignable or transferable, while Article [283] regulates the rights of the parties when a partner grants a beneficial interest in his share to a third party. In France, this kind of agreement is fairly frequent, a partner agreeing with a third person that the latter shall have a right to take part of the profits received by the partner himself. Is this practice widespread in Ethiopia? If not, the deletion of Article [283] will cause no problems.
3. Although as a rule most laws do not impose any obligatory rules on the contents of the memorandum of association of so-called organizations of persons. I thought it is desirable to indicate at least the minimum provisions which must be included in the memorandum in as much as these provisions must be entered in the commercial register. This is the goal of Article [284].

Article 15 and following [287-293] govern the management of the general partnership. As for the appointment of the manager, I have thought it desirable to omit without comment the subtle (but, in my opinion. superfluous) distinction which French law makes between the case where the

manager is named in the memorandum of association and where a separate agreement is entered into later which does not have the same status as the memorandum. These distinctions – accompanied by a further distinction between the case where the manager is a partner makes it far more difficult and even, in theory, impossible to dismiss the manager were it not for the escape allowed by an appeal to the courts. In Article [293], therefore, I have omitted- provisionally- the formula which appears in certain modern codes of Arab countries: "Managers may be dismissed by the same procedure by which they were appointed." This is a question which must be examined again.

The second paragraph of Article [289(2) states that provisions in the memorandum of association limiting the powers of managers cannot be set up against third parties. For this proposed solution one might prefer another solution which would state that clauses of this kind can never be set up against third parties even if they are registered in the commercial register, this question is of interest above all in the case of private limited companies and we will come back to this provision in our discussion of that form of business organization. It would be best no doubt if the provisions on this point were uniform.

Article [290] is devoted to the important distinctions between the different ways in which the manager may use his powers. Normally in his dealings with third parties he uses the partnership's firm-name. But there may be times when he does not do so. In either case he may be acting on his own behalf although he gives the impression of dealing on behalf of the partnership. Finally, he may act outside the scope of the powers granted him or those which normally would be attributed to a manager. All these subtle problems require equally subtle solution.

Article 23 [294] sets out the rules governing the liability of the partners. Along traditional lines, creditors first demand payment of partnership debts from the partnership before bringing action against the partners. The second paragraph of this Article [the provision clause of Art. 294] allows the creditors to bring a direct action against partners for the repayment of fictitious dividend which they have received. As is normally the case, the question of good faith does not enter into the picture. In a business organization with few members, as is the case of a general partnership, it is really difficult to believe that partners could receive in good faith dividends which were not justified by the accounts when the accounts are constantly at their disposal and when the members are both judges and parties when determining the distribution of the profits.

Questions

1. Contrast general partnerships with ordinary partnerships.
2. Who drafted Title II of Book II of the Commercial Code? Why was it drafted?
3. Why are general partnerships dubbed as the typical partnership firms?

UNIT SEVEN
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. [Art. 296 and Art 300]

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 284, must contain a clause indicating the identity of the general partners as well as the limited partners. [Arts 298 and 299] 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. [Art.297]

Article 30(1) provides that the creditors of the partnership may have a direct action against the limited partners to require them to pay up any part of their contribution which they have not yet paid. Sub-article (2) of the same exempts the limited, partners from having to repay fictitious dividends received in good faith on the basis of an approved balance sheet. The concept of good faith has a prominent place here, as long as limited partners remain in the dark, without a voice in the management and being likely to be misled by the managers, and being without the means to check any of the statement made by them. When the balance sheet is prepared regularly they can legitimately believe that the profit shown is a real profit and that the dividends they receive are not fictitious.

Sub-articles (3).(4), and (5) of the same provide that limited partners may never take part in external management and give third parties the illusion that they are dealing with partners who are fully, jointly and severally liable. The reason why a limited partner is prohibited from acting as a manager even under a power of authority is that it is dangerous to allow them to act as a manager, because it leads to confusion as to the legal status of the partner in his relations with third parties. Sub-article(4) provides us with a list of acts which the legislature deems to be not acts of management and, as such raise no question as to the status of the limited partners. Consequently, limited partners can conduct the following activities without forfeiting their privilege of limited liability. These are:

(a) consultation with co-partners
(b) dealings with the firm
(c) investigation of managerial acts
(d) advising and counseling to the firm
(e) giving permission to do acts outside the manager's powers

Subject to the limitations that have been discussed, limited partners have essentially the same rights as general partners, including the right of inspection of the books of the firm and may call for the accounts; they may be employed in the firm and bind themselves by contracts of employment [art.301 (5),(6)]

Sub-article (7) stipulates that "unless of otherwise agreed, nothing affecting limited partners shall be a ground for dissolution." That is, in the absence of a contrary agreement death, incapacity, or bankruptcy of a limited partner does not constitute a ground for dissolution.

With regard to assignment of shares pursuant to a cumulative reading of Article 302 and 303, shares may be assigned by the consent of the managers, the general partners, and the majority of the limited partners.

ESCARRA, EXPOSE DES MOTIFS: BOOK II (COMM.C. DOC.NO.9B) (9 OCTOBER/NOVEMBER 1954) in Peter Winship (transl.), Background Documents of the Ethiopian Commercial Code of 1960 (Artistic Printers, Addis Ababa: 1974).

> 4. Among the provisions devoted to the limited partnership only article 28 [301] is important because it collects in one place all the traits- which characterize the unique element of this form of business organization: the limited partners.

The first paragraph of this article [301(1)] sets out the principle that the creditors of the partnership have a direct action against the limited partners to require them to pay up any part of their contribution which they have not yet paid. However, limited partners have the advantage of the short period of limitation which will be provided for in a special article to be included in the general provisions governing business organization.

The second paragraph [301(2)] dispenses the limited partners from having to repay dividends received in good faith on the basis of an approved balance sheet. The concept of good faith must be retained here because limited partners remain "in the dark", taking no part in the management of the partnership and being liable to be led into error by the managers without having the means to check any of the statements made by them. Even when the balance sheet is prepared regularly they can legitimately believe that the profit shown is a real profit and that the dividends they receive are not fictitious. In cases where they are not in good faith (the burden of proving bad faith falling on the creditors of the partnership) and they are sued for repayment of the dividends received, the limited partners may take advantage of the brief period of limitation mentioned above.

The three subsequent paragaraphs of Article [301(3). (4), (5)]are devoted to the traditional rule that limited partners may never take part in external management and give third parties the illusion that they are dealing with partners who are fully, jointly and severally liable. …Although this solution is permitted by some laws, it is dangerous because it leads to confusion as to the legal status of the partner in his relation with third parties. The sanction for this prohibition against taking part in the management is also a traditional one. Similarly, the list of acts which are not acts of management and raise no question as to the status of the limited partners is a list of acts traditionally permitted to the limited partners.

The last paragraph of Article [301(7)] sets out as a legislative principle a solution which is found in the memorandum of association of most limited partnerships.

Finally, the solution found in Article [299&302] concerning the assignment of shares is that given in the first paragraph of Article 40 of the Law of Business Organizations (12 July 1933). It ought to be re-examined before approval of the final text of the Code.

UNIT EIGHT

Share Companies

8.1. Companies in General

As we have seen in preceding chapters, the sole proprietor and partnership have certain limitation and disadvantages which make them unsuitable for large scale business operation with business opportunities growing at a faster pace as a result of discovery and exploitation of natural resources. Man has been forced to think up of alternative forms of business ownership in keeping with the rapidly changing political, legal economic and technological scenarios. And came to the company form of business organization which opened up new vistas in hersening the potential business opportunities and widened the frontiers of business to contain and satisfy man's greatest ambitions economic and even political. The British East Indian Company is the case in point.

The western world had bequeathed to the man kind many a great invention or innovation and the company form of business ownership in one such innovation which created ripples not only in the business world but in the political area as well. The company form had its humble beginning in the late 16^{th} or early 17^{th} century and since then on, it grew in size and power in different measures in different counties. In USA it came to be known as corporations or a multi-national which grew to the dizziest and most formidable heights that man has ever known.

The company form is the right answer to over come the short comings or limitations of the sole proprietorship and partnership both of which can not be expected to exploit the vast business potential thrown up by the tremendous technological progress in all fields of human activity. In this part we will study the two types of companies, namely Share Company and private limited company. Share Company is defined as (a) one which does not have restriction on maximum number of members (b) inviting public to subscribe for shares or debentures of the company (c) transferability of shares are free.

A minimum of five persons are required to form a share company. On the other hand, private limited company is one which, by its status: (a) restricts the right of its members to transfer their share is

(b) The number of members limited to 50

(c) No invitation to the public to subscribe for any shares or debentures of the company. A minimum of two members are required to form a private limited company.

Distinction between Private Limited and Share Company

1. **Membership: -** only two persons are required to form a private limited company while a share company requires a minimum of five members to start with. There is no limit on the maximum number of members in Share Company. Whereas a private limited company can have only 50 members at most.
2. **Directors:-** A private limited company is managed by one or more managers while Share Company is managed by directors whose minimum number shall be three.
3. **Public subscription :-** while a share company can invite public to subscribe to its shares and debentures, a private limited company can not go to public to raise its capital.
4. **Prospectus: -** A share company which goes to public to raise its capital is required to file a prospectus while a private limited company is exempt from this requirement because it can not invite public to subscribe to its capital.
5. **Minimum subscription:-** in share company all capital must be subscribed and 25% of the capital must be paid-up before registration. Private Limited Company be registered by fully paid-up capital.

Distinction between a Company and a Partnership

No	Basis of comparison	Company	Partnership
1	Legal status	Separate legal entity	Separate legal entity with exception of joint- venture
2	Number of members	Pvt. Ltd. Co –minimum -2 - maximum -50 Share Company – minimum -5	Minimum – 2 Maximum no limit

		- minimum no lint	
3	Liability	Limited	Unlimited
4	Transferability of interest	Subject to some restrictions	Can not transfer interest without the consent of all other partners
5	Management	Share company vests in the board of directors Pvt. Ltd. Co managers	- Ownership and management in the same hands. All partners being owners are entitled to participate in management - Sometimes managers
6	Implied agency	No member can act as an implied agent and bind the company	- Every partner has an implied authority to bind the firm by his act.
7	Stability	Perpetual succession ensures stability and continuity	- Comes to an end with the death, retirement insolvency of partner. Hence unstable

Some Merits of Company

1. **Financial Resource**: - If a business venture is to be promoted on a large scale, none of the partnership or sole proprietorship form of business organization can prove equal to the task of raising funds to the required level. It is only the company forms both private limited company and share company, which can mobilize huge funds, required by big business. This is possible mainly because of the large number of members who can own the company by subscribing to its capital in small and affordable quantities. Another favorable point is that a share company can collect money from numerous small investors by issuing securities (Share and debentures) in smaller denominations and with different but with attractive features. Thus, a share company and private limited company are much more capable of raising large capital than any of the rest. In fact, the Share Company and private limited company are comparable to an ocean and a sea respectively while the rest all like a small river or canal in so far as the financial resources and catering to the needs of society are concerned.
2. **Limited liability: -** company became more popular with investors these days it is largely because of its limited liability clause only. Other factors like profitability of the business venture and confidence in the management etc. also, play their part. In such companies

the shareholders is not liable to pay anything more than the face value of the shares held by him. Even when the company becomes insolvent he will not be called upon to pay from his personal property to service the debts of the company. So, when compared with the partnership or sole proprietorship where the liability in unlimited, the company form is far more preferable for small investor because of the "low-risk and high return factor."

3. **Scope of growth:**- unlike the partnership and sole proprietorship forms of business organization, where the growth is stunted for lack of adequate funds, the company form of organization need not suffer for lack of financial resources with a huge capital at its disposal, collected from investors spread all over the country and even abroad also, the company can grow and expand at a rapid pace and reach the break-even point faster than expected.
4. **Professional management:**- in order to achieve the targeted rates of growth and expansion of a company, competent and professional management of the company is no less important than the availability of adequate finance. One great advantage of company form of organization is that it allows for insulation of management from ownership. The management of the company can be left to a group of professionals who, with their competence, specialized knowledge or skills, qualifications of training, can show better results in production, distribution or marketing etc. the over all performance of the company and the profitability of the business venture can greatly improve with professional management of the company.
5. **Stability of the company:**- for the success of any business venture, continuity and stability of business are equally important and neither can be self-supporting without the other. With its perpetual succession of ownership theory, only the company form can ensure both continuity and stability whereas the partnership or sole proprietorship form may have to close the shop due to the death of sole trader, a partner or die to any other reason including the internecine quarrels amongst the partners it is mainly because of these twin factors (continuity and stability) that the company enjoys the confidence and support of a large number of investors and creditors who look forward to a fruitful association with the company for a pretty long period.
6. **Positive social benefits:-** a company is beneficial not only to its members, creditors and employees but also to the public at large. It supplies goods and services at a competitive rates by introducing new and sophisticated technologies and by exploiting the natural resources in a most efficient and economic manner. That part, it provides employment opportunities both direct and indirect to the needy and competent persons in the society.

It also helps channellise the small savings of people into productive investments there by serving the twin objectives of diffusing the business risks and democratizing or socializing the business ownership. It contributes to the exchequers also handsomely by way of direct and indirect taxes and duties. These social benefits make the company form far more desirable than the partnership and sole proprietorship form of business organization

8.2. Share Company

8.2.1. Nature

Limited liability: - limited liability of members is one of the most common characteristics of Share Company. Share company is a separate legal entity. It is the owner of its assets and liable to pay its liability (Art 304(1)). In other words liability of the members is limited. No member is liable to contribute anything more than the nominal value of the shares held by him.

Suppose A, has subscribed for 100 shares in a share company and the normal value of each share is Birr 10. He paid up birr 500 at the formation of the company. He is bound to pay the rest when the company makes the call. Then what would be the extent as liability is only the unpaid amount, ie Birr 500 and nothing more. If the asset of the company is insufficient to meet the claims of the creditors of the share company, the members can not be asked to pay any thing more than what is due on the shares of the company by them.

The privilege of limited liability for business debts is one of the important advantages of doing business under Share Company since the liability will not extend to the private property of the member, unlike that of partnership.

Perpetual succession:- unlike partnership share company will not be dissolved by the death or incapacity of its members. It is an entity with a perpetual succession. Its life is not measured by the life of any member. It is independent of the lives of its members. Members may come and members may go, but the company continues its operation unless it is wound-up.

Transferability of shares:- Even though it is possible to restrict free transfer of shares in the articles of association (Art. 333(1). As a general principle shares of Share Company are freely transferable and can be sold or purchased in the share market. This is one of the reasons why people prefer to form companies than partnerships.

Transferability of company shares is an added advantage both to the institution of the share company as well as to the investor. The share company's share capital becomes a permanent and stable feature of the company because the shareholders can not with draw any thing out of it. The shareholder gets a marketable security.

8.2.2. Founders (Art. 307)

Before a share company can be formed, there must be some persons who have an intention to form a share company and who take the necessary steps to carry that intention into operation. Such persons are called founders. The word 'founder' has not been defined any where in the commercial code.

The founder is a person who brings a share company into existence. He/she is one who undertakes to form a share company with reference to a given object and to set it going and who takes the necessary steps to accomplish that purpose. The founders decide the scope and business of the share company. They prepare the necessary documents. They make arrangements for advertising and circulating the prospectus..

Share Company may have several founders. A founder may be an individual or body corporate. One existing body corporate may be founder of new share company. A person who is not member of the newly formed share company, but acts in a professional activity (such persons being solicitor, engineer, accountant or valuer) for the founding of the company are also founders of the share company. Founder under Art. 307 are the following:

- Founders are persons who sign the memorandum of association and subscribe the whole of the capital or.
- where the company is formed by issuing shares to the public, founders are persons who sign the prospectus, bring in contribution in kind persons who are allocated special shares in the profit or
- Any person outside of the company who intiated the plans of facility the formation of the company

Roles, Rights and Liabilities of Founders

Roles: - As to the exact position of the founders the code is silent. They are not agents because there is no principal. However, founders from the moment they start to act with the name of the company they stand in a fiduciary position to wards the share company under formation. They have the power of creating and modifying the company. They may enter into commitments with third parties in the name of the company, but they may be refunded after the company has taken over this commitments and the company may only take over if the commitments taken by the founders were necessary for the formation of the company (Art 308/2/)

Rights:-The nature of the founders work in the formation of the share company call for the considerable skill for which he should be paid a share which shall not exceed one fifth of the net profits in the balance sheet (Art 310). Such amount must be stated in memorandum of association. In the absence of such statement, a founder has no right against the company for his payment. If it is stated it is presumed that there is a contract which gives the directors power to pay the preliminary expenses out of the company's funds. Such benefit may not extend for more than three years and the founders have no any other right than the one stated in this paragraph.

Liabilities: - concerning liabilities of the founders the law does not stat transfer of such liabilities as stated under Art 309/1/. The violation of those acts may lead into the violation of stated provision and this in turn may result into criminal liability and criminal liability is borne by the doer personally not to be transferred to third party. If the required capital and subscription is not fulfilled (Art 309/1/a/) it is violation of law. For example, The minimum capital required to form Share Company with less than stated amount. Similarly, the capital of Share Company should fully subscribe upon formation. If founders formed share company without fully subscribed, such will lead to the violation of the law. As to the contribution in kind, it must be done by an expert (Art 315), and be verified. If the amount does not conform to exact value then there is violation of the law by the founders. The same is true if false prospectus is advertised.

8.2.3. Memorandum and Articles of Association

(a) **Memorandum of association**:- It is a document which sets out the constitution of the business organization and is really the foundation on which the structure of the business organization is based. It contains the fundamental conditions upon which alone the business organization is allowed to be incorporated. Its five clauses provide the basic features of the business organization's constitution. Business organization may pursue only such objects and exercise only such powers as are conferred expressly in the memorandum or by implication therefrom, ie, such powers as are incidental to the attainment of the objects. A business organization can not depart from the provisions contained in its memorandum, however, great the necessity may be. If it does, it would be ultra virus the business organization and therefore wholly void. If defines its relation with the outside world and the scope of its activities.

It defines as well as confines the powers of the business organization; it not only shows the object of its formation but also the at most possible scope of its operation beyond which its actions can not go. Inside that area the shareholders may make such regulations for their own government as they think fit.

After registration of the business organization, the memorandum becomes a public document (Art 92) while the memorandum must comply with the provisions of the commercial code, all other documents of the company must comply with the memorandum.

(i) Purpose of memorandum: - The memorandum of association is a public document available for inspection. It services two purposes:

1. The intending partner/ shareholder, who contemplate the investment of his capital shall know within what field it is to be put at risk. Thus, he can find out from the memorandum the field in, or the purpose for which his money is going to be used by the company and what risk he is taking in making the investment.
2. Any one who deals with the company shall know without reasonable doubt whether the contractual relation into which he contemplates entering with the company is one relating to a matter within its corporate objects. Thus a supplier of goods or money will know whether the transaction he intends to make with the company is within the objects of the company and not ultra virus its objects. In short, the memorandum enables the

shareholders/ partners, creditors and all those who deal with the company/ to know what its powers are and what the range of its activities is:-

(ii) Contents of memorandum

The following are very important and common for memorandum

(a) Name clause:- A company being a legal person, must have a name to establish its identify. The general rule is that a company may be registered with any name it likes. But no company registered by name which in the opinion of the registration office is undesirable and in particular which is identical with or which too nearly resemble the name of an existing company. A company which carries on or proposes to carry on business under a name calculated to deceive the public by confusion with the name of an existing concern commits civil wrong of unfair trade computation and can be restrained by injunction from doing so.

Every company must write the word, Share Company, "Private Limited Company," "limited partnership" after its name

(b) Registered office clause:- this clause states the name of the state where the registered office of the company is situate. The registered office clause is important for two reasons. Firstly, it ascertains the domicile and nationality of the company. This juridction of a court is also determined with reference to the registered office of the company. Secondly, it is the place where various registers relating to the company must be kept and to which any communications and notice must be sent. A company need not carry on its business at its registered office. There is no bar to having a registered office of a company in regional state and carrying on business in different state or in overseas countries.

(c) Object clause: this clause is the most important clause in the memorandum of association of a company, because it not only shows the object or objects for which the company is formed but also determines the extent of the powers which the company can exercise in order to achieve the object or objects. Stating the object of the company in the memorandum is not a mere legal technicality but is a necessity of great practical important. It is essential that the public who purchase its share should know clearly what are the objects for which they are paying and which they want to encourage. To give this

information the statement of the objects should be clear. It must not be too vague and too general and too wide for in that case it will defeat its very purpose and object.

The object clause in the memorandum is construed positively and negatively. Objects not mentioned in it are not the object of the company. But this clause should not be construed too strictly and the company may do any thing which is fairly incidental to the main objects specified in it. Thus a company which has its main object the making of steel may want to run its own transport in order to supply its products to its purchasers. The transport aspect of the business would really be ancillary to the running of the business of making of the steel and ought to be implied so that it should not be necessary to provide for transport business in the memorandum.

(d) **Liability clause**:- This clause has to state the nature of liability that the members incur. In the cause of a company limited by shares, the members are liable only to the amount unpaid on the shares taken by them. If his shares are fully paid up his liability is nil. Where a shareholder holding 10 shares each par-vale being birr 100, and paid for five shares, then he can be called upon to pay the balances of the rest five which is birr 500. In case he has paid the full value of 10 shares, he can not be required to pay anything more even if the company owes huge debts to its creditors. The liability clause in the memorandum has both practical and legal significance. By this clause member knows the extent of his financial liability to the company as long as he remains as members.

Any alteration in the memorandum compelling a member to take up more shares, or which increases his liability would be null and void.

(e) **Capital Clause**:- The memorandum of a company limited by shares must state the prescribed and paid-up capital and nominal value of each share.

The usual way to state the capital in the memorandum is:- "the capital of the company is birr 100,000 divided into 1000 shares of Birr 100 each" this amount lays down the capital of the company beyond which the capital can not be reduced without altering memorandum of association.

The memorandum has to be signed by each subscriber in front of officer of notary office.

(b) Articles of association

The articles of association are the rules and regulations of a company framed for the purpose of internal management of its affairs. It deals with the rights of members of the company inter se. The articles are framed for carrying out the aims and objects of the memorandum of association.

The articles are subordinate to and are controlled by the memorandum of association. The memorandum of association contains only the fundamental conditions up on which alone the company is allowed to be incorporated. The memorandum is as it were, the area beyond which a company cannot go, inside that area, the shareholders may make such regulations for their own government as they think fit.

Though the articles are subordinate to the memorandum, yet if there be any ambiguity in the memorandum, the articles may be used to explain it. Articles must not contain any thing the effect of which is to alter a condition contained in the memorandum or which is contrary to its provisions.

Furthermore, the articles play a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter, of incorporation of the company and so accepting it, the articles proceed to define the duties, the rights and the powers of the governing body as between themselves and the company. At large and the mode and the form in which changes in the internal regulations of the company may from time to time be made.

The articles should also not authorize the company to do anything which contravenes the provision of commercial code of Ethiopia. If they do, they would be ultra virus the memorandum of the law and will be null and void.

The articles must be signed by each subscriber to the memorandum in front of officer of notary office.

(b) **Articles in relation to memorandum:- T**he memorandum of association is the charter of the company and an extremely important document in relation to the affairs of the company. The articles are subject to the memorandum and cannot confer wider powers on the company than those given in the memorandum. The memorandum contains the

most important provisions setting out the sort of activities which the company can carry on. The articles contain rules governing the internal management of the company and for carrying out the objects of the company as defined in the memorandum. Thus the memorandum is, as it were, an area beyond which the actions of the company cannot go, inside that area, shareholders may made such regulations for thus own government as they think fit. The memorandum is of interest to outsiders who wish to deal with the company, while the articles are of interest mainly to shareholders and directors.

Where there is a conflict between the memorandum and articles the provisions of the farmers shall prevail. However, if the memorandum is ambiguous, or silent on any point, reference may be made to articles to explain the ambiguity or to supplement where it is silent. Where, however, there is no ambiguity or lacuna in the memorandum, its terms can not be controlled or modified by the provisions of the articles.

(i) Articles and Memorandum Distinguished:- Memorandum and articles are public documents. They are interring linked and required to be registered for the formation of the company. Where there is any ambiguity or where the memorandum is silent on any point, the articles may serve to explain or supplement the memorandum. Beyond this the two documents have nothing in common and differ from one another in the following respects.

1. Memorandum of association is the charter of the company and defines the scope of its activities. Articles of association of the company are documents which regulate the internal management of the company. These are the rules made by the company for carrying out the objects of the company and set out in the memorandum.
2. Memorandum of association defines the relation of the company with outside world, whereas articles of the association deal with the rights of the members of the company inter se and also establishes the relationship of the company with the members.
3. Memorandum is a supreme document of the company where as articles are subordinate to the memorandum; they can not alter or control the memorandum.
4. A company can not depart from the provisions contained in its memorandum, and if it does, it would be ultra virus the company. Any thing

done against the provisions of articles, but which is intra virus the memorandum, can be ratified.

(ii) Effect of Articles and Memorandum:- The memorandum and articles shall, when registered bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member and contained covenants by the company and each member to observe all the provisions of the memorandum and the articles. The memorandum and the articles bind.

a) The members to the company
b) The company to the members
c) The member inter se,
d) The company to the outsiders

(a) **Members to the company:-** The memorandum and articles constitute a contract between the company and each member. Each member of the company is bound to observe the various provisions of the memorandum and articles of association as if he had actually signed the same. The company can therefore, enforce articles of association against any member.

(b) Company to the members:- The company is bound to the members by the various provisions contained in the memorandum and the articles of association in the same way as the members are bound to the company. The company can, therefore, exercise its rights as against any member only in pursuance of and in accordance with the articles and the memorandum; every member is entitled to sue the company to prevent any breach of the articles which would affect his right as a member of the company. Thus, where a right is enforced by the articles on shareholder to record his vote at a company meeting the chairman of the meeting cannot deprive him of his right.

Similarity, a shareholder can enforce his right to recover dividend which has been declared or receive notice of any general meeting in pursuance to the articles, if he is denied any of these right by the company.

(c) Members inter se:- The articles and memorandum do not constitute express agreement between the members of the company. Yet each member of the company is bound by the memorandum and articles on the basis of an implied contract to the other members. The articles regulate the rights of the members inter se but such right can be enforced only through the company or through the liquidator for representing the company.

(d) Company to the outsiders:- Articles do not constitute, any contract between the company and outsider. This is because an outside is not a party to the contract, and therefore, cannot

sue on it. An outsider is not entitled to enforce the articles against the company for any breach of right that is enforced on him by the articles. The term insider 'means' a person who is not a member of the company. Even a member will be regarded as an outsider and he will not in a position to enforce a right against the company if he enjoys the right in the capacity of a solicitor or director and not in the capacity of a member.

The purpose of the memorandum and articles is to define the position of the shareholder as shareholder, not to bind him in his capacity as individual.

Constructive Notice of Memorandum and Articles of Association (Art 92)

The memorandum and articles of association of every company are required to be registered with registration of office. The office of the registrar is a public office and consequently the memorandum and articles on registration become public documents. They are open and accessible to all.

These documents are open for public inspection against payment. Every one dealing with the company, whether a shareholder or an outsider is presumed to have read two documents. This deemed knowledge of the two documents and their contents is known as the constructive notice of memorandum and articles.

The parties dealing with the company must be taken not only to have read these documents but also to have understood them according to their proper meaning. When a person deals with a company in a manner which is inconsistent with the provisions of the memorandum or articles, or enters into a transaction which is beyond the scope of the powers of the company, he must take the consequences in respect of such dealings.

The doctrine of constructive notice of the memorandum and articles, however, is not a positive doctrine but a negative one. It does not operate against the company. It operates only against an outsider dealing with the company. It prevents him from alleging that he did not know that the memorandum and articles rendered a particular act ultra virus the company.

Doctrine of indoor management:- The doctrine of indoor management is an exception to the rule of constructive notice. A person dealing with a company. So, if he enters into a transaction with the company which is ultra virus of the memorandum or articles, he can not treat the transaction as binding on the company. On the other hand, if the transaction appears to the proper one, when compared with the memorandum and articles, it would be grossly unfair if the

company could escape liability under it by showing that there was some irregularity in the conduct of the company's affairs leading into the transaction, when the other party did not know of the irregularity and had no means of discovering it. This rules is described as the "Doctrine of indoor management". Persons transacting business with the company are deemed to have notice of what they would have discovered by making a search at the office of the registrar of companies, and they would be stopped from asserting that they had not read the documents. But such persons are not deemed to have notice of, nor are they under a duty to inquire into the internal proceedings of the company. Thus the outsider is presumed to know the constitution of a company, but not what may or may not have taken place within the doors that are closed to him.

The doctrine of constructive notice protects the company against outsiders; the doctrine of indoor management seeks to protect outsiders against the company.

Deposit and Registration (Art 323)

The following documents must be deposited at the office of registrar that is Ministry of Trade and Industry at Federal level and Trade and Industry Bureau's at regional level.

1. The memorandum of association
2. The articles of association
3. The prospectus, if any
4. The minutes of the subscribers' meeting and all complementary documents.

These documents are accompanied by an application demanding the registration of the company in the books of commercial register. The registration is of capital importance, for the company does not require legal personality until it has been entered in the registry of commercial registration. So, company acquires legal personality as soon as it is entered in the registry of commercial registration. This means that it is there up on it acquires the legal capacity as provided by Law. These include:-

- a name specified in its statutes
- a registered office, which is the main address where the management of the company is located. This registered office must be specified in the statutes.
- the power to do acts with legal effect:- In that it may acquire property and may acquire or become subject to rights and liabilities. The assets of the company are therefore separate

from the assets of its members, and the latter have rights in the company but not directly in its assets.

- the power to sue and to defend legal proceedings against it.

Amendment

A company has a statuary right to amend its memorandum and articles of association by extra general meeting of the shareholders

.

Procedure:- The general provisions applied to the shareholders meeting (Art 388-416) is similarly applied to the extra general meeting that is called for the amendment of the memorandum and articles of association. The provision of Art 422-425 in also applied to the extra general meeting called for the amendment of the memorandum and articles of association.

For the amendment of the nationality and increase of the shareholder's investment in the company a rigid procedure is to be followed and strict compliance of the procedure is demanded by law. So, such amendment can only be adopted where the holders of all shares are personally present or represented and the vote is unanimous.

Thus, a company can amend its statute at any time by passing special resolution. The basic requirement is that the power of alteration must be exercised in good faith in the interest of the company. Therefore, the company exercises its power of amendment subject to the following limitations.

- Must not be against the provisions of law. The amendment must not authorize any thing expressly or impliedly forbidden by the commercial law. For example, the amendment cannot authorize a company to pay dividends out of capital
- No increase in the liability of members no amendment may be made in either the memorandum or the articles compelling a person who is a member at the date of the alteration to take or subscribe for more shares or increase his liability to the company unless he agrees to such amendment.
- Amendment by special resolution only. Amendment will be made only by a special resolution of extraordinary meeting as stated in Art 422-425 of the commercial code.
- Should not cause breach of contract. A company can not make by amendment its statute escape liability for breach of contract into which it has entered. It can not plead its altered

statute as a defense in an action for a breach of contract. The rights which have already accrued under the contract can not be disturbed by its amendment.

8.3. Securities

Share Company can issue two kinds of securities, equity securities and debt securities

8.3.1 Equity securities

Equity securities are described as the counter part of the shareholders contributions to the capital of the company and could include common stocks preferred stocks etc. Equity securities give to their holders pecuniary rights which usually depend on the financial situation of the company and mainly consist of the right to receive dividends, liquidation profits (if any), to exercise preferred subscription rights in the context of capital increase. Equity securities also give to their holders personal rights which allow the shareholder to be informed on the management of the company and to participate in shareholders' meetings. Equity securities are in real sense shares that are issued by the company.

8.3.2 Shares

A share is the interest of a shareholder in a definite position of the capital. It expresses a proprietary relationship between the company and the shareholder. A shareholder is proportionate owner of the company but he does not own the company's assets which belong to the company as a separate legal entity.

A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second but also consisting of series of mutual covenants entered into by all the shareholders interest.

A share is a personal estate capable of being transferred in the manner laid down in the articles of association. It is movable property which can either be mortgaged or pledged. It is in corporeal in nature and it consists of bundle of rights and obligations.

The nature of share can be summed up:-

1. Share gives rights and liabilities to the holder

2. Shareholders is not part-owner of the company or property of the company
3. The share is movable property. The movable property of person can be a "chose in action or" chase in possession"
4. Share is goods

8.3.2.1 Issuance

When a company is formed, an application for issuance of shares is made by prospective shareholders. It is an offer by prospective shareholders. When application is accepted it is an issuance of shares. Issuance creates a binding contract between the parties. Till such issuance is made, shares as such do not exist. It is only by an issuance in this sense that shares come into existence. A company issues a share certificate, a document, stating that the person named therein is registered holder of specified number of shares of certain classes and that they are fully paid-up or paid-up to a stated amount.

A share certificate has to be issued whether the shares are partly paid-up or fully paid-up. The share certificate enables the shareholder to deal more easily in the market. Particulars that are indicated on the share certificate are the following

1. The name, head office and period for which the company is established.
2. The amount of capital and par value of the share
3. The date of the memorandum of association and of registration of the company in commercial register and the place of registration
4. The serial number of share, its series class, whether it is ordinary or preferential and the kind of preferential share
5. The amount of part payment on shares not fully paid up or a statement that the share is fully paid; and
6. A statement showing whether a share may be transferred to a foreigner.

8.3.2.2 Forms /Art 325 & 326/

Forms of shares are either registered in the name of a shareholder or the bearer. Where the bearer shares are not prohibited the holders have always the right to require that their shares be in registered form.

The main difference between shares in the bearer form and shares in the registered form is that in the first instance, the issuer does not know the identity of the persons holding its shares and can communicate with them only by way of press releases, whereas, in the second case the issuer has full access to the shareholders list. Particularly, the shares that are issued in Ethiopia are registered shares, statutes of share companies prohibits bearer share from the very beginning and therefore, it is very difficult to find bearer shares in circulation.

Shares are issued in their par value. They may not be issued in less than their value. When it is permitted by the statutes it may be issued in greater than par value and the difference in known as premium.

8.3.2.3 Classes /Art 335/

The law empowers the company to issue several classes of share with different rights. Mainly there are two classes of shares. They are equity and preference shares. Equity shares are shares which are not preference. Equity shareholders get more if the company is prosperous or get nothing if the business of the company flops.

Preference share /Art 336/ typically confer up on this holders a priority on annual profits in the form, cumulative or non-cumulative preference dividends, of a preferential repayment right upon liquidation of the company or the right to receive a liquidation bonus. The terms of the preference shares can be established either in the initial statutes or after words by a decision of extraordinary meeting. Preference share, therefore, should fulfill the following

1. It shall carry a preferential right as to the payment of dividend at a fixed rate and
2. In the event of winding up, there must be a preferential right to the payment of the paid up capital

8.3.2.4 Rights and duties of shareholders

Rights: When once a person becomes a member of Share Company he or she is entitled to exercise all the rights of member until he/she ceases to be a member in accordance with the provisions of the commercial code or statues of the company. Such rights can not be taken away from members unless they give their consent. Some of these rights can be exercised by single shareholder individually and others along with other members. Rights of members of

shareholders can be divided into two categories namely (1) individual rights (2) corporate member rights.

(i) Individual rights: Include members' rights to:

- Participate in annual net profit
- Share in the net proceeds on a winding –up
- vote except preference shares
- Preferential right of allotment of new shares based on shareholder's holding of share /or preferential right of subscription of cash share in proportion to number of shares held.
- transfer shares subject to any restriction
- inspect the registers, indexes, returns and copies of certificate etc. Kept by the company and obtain extracts or copy thereof
- obtain copies of memorandum and articles on request and payment of the prescribed fee.
- receive a copy of statutory report
- remove directors by joining with others
- obtain a copy of the profit and loss account and the balance sheet with the auditor's report
- attend meetings of shareholders, receive proper notices and vote at the meeting
- receive a share in the capital of company and the surplus assets, if any, on the company's liquidation

(ii) Corporate membership rights:- Members have also certain rights as a group. These rights can be exercised only by the majority and not by the single shareholder or minority shareholders. Corporate membership rights are rights which the member has agreed to submit to the will of the majority provided that the will is expressed in accordance with the law and statutes. Thus, the shareholders in majority determine the policy of the company or exercise control over the management of the company. With respect to these rights the principle of supremacy of the majority applies (Art 416(1)).

However, if and when the decision is contrary to the statute or law Art 416/2/ confers right to apply to the court to set aside the majority decision within three months from the date of such decision has been made.

Art 391/2/ of the commercial code confers on members holding not less than one-tenth of the capital of the company right to apply to the court for the meeting of general assembly of shareholders.

Duties in the case of liability of the company the liability of a shareholder of a company is in liable to the amount. If any, unpaid on his share, if his shares are fully paid his liability is nil for all purpose; therefore, shareholder has the duty to pay his subscripted shares.

All money payable by any member to the company under the memorandum or articles shall be a debt due for him to the company. In the case of the death of shareholder, his estate remains liable in respect of his shares.

8.3.2.5 Temporary Warrants /Art 343/

These warrants are bearer and registered. There are conditions that are to be fulfilled in order to issue temporary warrants. These are:

- The shares shall be fully paid-up. Temporary warrants in respect of registered shares shall be registered and its transfer follows the same to that of the registered share. In the case of temporary bearer warrants the transfer is by mere delivery. Share warrants should contain the number of shares in respect of which they have been issued. Such warrants must state that the bearer of its entitled to the shares specified therein
- A share warrant can be issued only when the shares are fully paid up
- A share warrant is a negotiable instrument
- A share warrant is the share security itself capable of easy transfer
- Coupons for dividends may be attached to the share warrant and dividend in paid to the bearer of the coupons.

8.3.2.6 Joint Holdings /Art 344/

It is possible to hold certain capital of one. Share Company by another. Art 344/1/ states that suppose company. A holds ten percent or more of capital of B Company, B can not hold any share from A, because it results in reduction of capital of company B. Such reduction of capital can only be effected by extra general meeting of the shareholders. It is to be noted that such

reduction of capital may affect the rights of 3rd partiers or creditors, since the company's liability is only covered by its capital. Capital of the company must always be intact.

8.3.3 Debt Securities

Debt securities differ from equity securities in that:-

(a) holders of debt securities are creditors and rank prior to the shareholders
(b) debt securities are remunerated by fixed interest where as the income from equity security is uncertain
(c) only bond issues may be secured by issuers
(d) debt securities are remunerated before equity securities, and
(e) debt securities are issued for a defined term and are reimbursed to their holders

8.3.3.1 Debentures /Art 429/

Debentures are among debt securities. No definition is provided in Commercial Code of Ethiopia. However, looking into different legal literature gives us a clue to understand debentures.

Debenture is a document given by a company as evidence of debt to the holder usually arising out of loan and most commonly secured by a charge. In the ordinary business sense a debenture is generally understood to be a document usually but necessarily under seal, a acknowledging a debt and securing repayment thereof by mortgage or charge on the company's property or undertaking, and providing that until payment, interest will be paid there on at a fixed rate payable usually either half-yearly or yearly on fixed dates.

Characteristics of a debenture

- It is in the form of a certificate, like a share certificate. In other words, it is an instrument in writing
- The certificate is an acknowledgement of indebtedness
- It is usually under the seal of the company but it is not necessarily
- It usually provides for the repayment of a specified principal sum at a specified date

- It provides for the payment of interest at a specified rate until the principal sum is paid back. But this is not essential. Interest may be made payable subject to contingencies of uncertain nature.
- The debentures carry no voting rights at any meeting of the company

8.3.3.2 Issuance

Debentures are issued in accordance with the provisions of the articles, usually by a resolution of Board of directors. Once a decision is taken by the board of directors to issue debentures, the next step will be to draft prospectus relating to the issue.

Debentures may be issued at par, at a premium, or at a discount if permitted by the articles of the company. Debentures unlike shares may not be issued at a discount without any restriction. The reason is that they do not form part of the capital of the company. But all sums allowed by way of discount must be stated in every balance sheet of the company until written off.

Debentures may be redeemable at par, at a premium but their redemption at a discount is not permitted.

As it is stated under Art 429 of commercial code, it is issued by Share Company provided Company's capital is fully paid and if a company has issued a balance sheet in respect of its first financial year.

The content of debenture is stated under Art 432. They are the following

(a) The company's name, its objects the head office of the company, and the place where the company was registered
(b) When the company was formed and for how long
(c) The paid-up capital on the date of issue
(d) The date of resolution of the general meeting and its entry in the register
(e) The serial number and nominal value of the certificate, the rate and date of interest payments and the terms for redemption
(f) The amount of the issue and the special guarantors, attaching to the debentures and date of deed setting up such guarantees.
(g) The amount of debentures or loan stock issued previously and not amortized, indicating the guarantees attaching thereto. -Where appropriate the period or periods of time within

which debentures may convert their debenture into shares and the provisions for such conversion.

Debenture that is issued by the company may not exceed the amount of paid-up capital shown in the last adopted balance sheet. But such amount may be exceeded if the company's immoveable property is mortgaged and the debentures issued do not exceed two thirds of the value of the mortgaged or where the excess over paid-up capital is guaranteed an introductory statement is missing.

- By registered securities or security issued or guaranteed by the state and the date of redemption is not earlier than that of debenture, or
- By government or public authorities annuities

8.3.3.3 Forms

Debenture is always issued in written form. An oral acknowledgement of a debt is not a debenture. There are two forms of debentures /Art 434 cum 325/

1. **Registered debentures** – A registered debenture is one which is registered in the name of a holder in the books of the company. It is transferable in the same way as a share or in accordance with the conditions endorsed on their back, but a transfer to be completed has to be registered with a company. These debentures are not negotiable instruments. Interest on such a debenture is payable to the registered holder or to the order of the registered holders.
2. **Bearer debentures** – A company may issue debentures payable to the bearer. These are negotiable instruments and the title to them is, therefore, transferable by mere delivery of the debenture to the transferee. In case of bearer debentures, the company keeps no register of debenture holders in respect of them; the coupon is attached to the bearer debenture for payment of interest and must be presented for payment to the company's bankers when the date of payment arrives. The company can communicate with holders of bearer debentures only by advertisement.

8.3.3.4 Debenture holders' meeting

Debenture holders' meeting can be called at any time by the debenture holders' representatives, by the board of directors of issuing company, or at lest 20% of the debenture holder of the same

class (Art.436). Debenture holders' meetings are called and held under substantially the same conditions as to form and time as shareholders ordinary meetings (Art. 432)

Debenture holders must be consulted on three types of issues (438)

5. On issues pertaining to the performance of the debenture issue such as the appointment, removal or remuneration of the representatives or any action required to protect the debenture holders' interests and give effect to the rights and remedies conferred to the debenture holders under the terms and conditions of the debenture issue.
6. On proposal made by the issues to modify the terms and conditions of the debenture issues (i.e. waive the guarantees given to the debenture holders, modify interest rates, redemption conditions or any other term of the issue or post phone the payment of interest). The meeting's decision to refuse or accept the issuer's proposal is binding on the issuer and the terms and conditions of the debenture issue can be modified only if the holders' meeting approves the issuer's proposal.
7. On decision made by the issuer's shareholders to (a) modify the purpose or legal form of the company or (b) issue debenture having priority over the existing debenture. Furthermore, the debenture holders' meeting may appoint debenture holders' representative (Art. 432)

The term of office and remuneration of debenture holder representatives is determined by the meeting of the holders. Debenture representative may be dismissed at any time by the meeting. The authority to represent debenture holders can not be granted to the issuer, its management or its employee's related companies or to companies guaranteeing the issuer's commitments (Art. 436(3-6)

Subject to any limitation prescribed by the debenture holders meeting, the representatives have the power to carry out any action necessary to protect the rights of the debenture holders (Art 443). They have the right to attend shareholders meetings and have access to the documents made available to the shareholders under the same conditions as shareholders, but they do not have the right to vote as debenture holder themselves do not have voting right. Or interfere in the management of the company's business.

8.4 Corporate Management

Management of the company is carried on by the shareholders' meeting and board of directors as well as general manager.

There are two approaches of conferring powers to the board of directors and general meeting of shareholders. They are the "liberal and restrictive" approaches. The liberal approach which is mostly followed by USA legal system is to confer specific power to general meeting such as the power of altering statute of the company, appointment and removal of the directors, and conferring all other powers to the board of directors. The restrictive approach on the other hand is to confer the power to the board of directors and general meeting by specifying in the memorandum or articles of association. According to this approach board of directors has limited power. This approach is, adopted by the continental Europe legal system i.e. civil law.

French company law, which is one of the models of Continental European Legal System, and which is also the model of Commercial Code of Ethiopia, confers the powers specifically to the board of directors. Now, we will examine the power of each organ in respect to the management of the company.

8.4.1 Shareholders' meetings

When two or more than two persons come together to discuss matters of common interest, there is said to be a meeting. It follows that to constitute a meeting there must be two or more persons. Generally, the purpose of a meeting is to consider issues of common interest to its attendants.
The proper functioning of any association of persons, large or small, requires that the members of the association come together from time to time to discuss matters of common interest and to take decisions by common consent or by a majority as may be possible. Like any others association, a company must also hold meetings for its proper functioning. A company meeting may be defined as an assembly of persons connected with the company who wish to discuss and decide matters related to it.

Distinguishing between various types of meetings /Art 39./

The meetings of shareholders are classified into general and special

(a) General meetings:- are meetings which consists of shareholders or all classes. General meetings are in turn classified into *ordinary* and *extra ordinary* general meetings.

Ordinary general meeting – This meeting of the shareholders is held once every year to discuss financial and administrative affairs of the company

Extra ordinary general meeting – this is a meeting of the shareholders to consider a particular matter specially amendment of the statutes

(b) Special meeting:- is a meeting that consists of shareholder's of particular class to transact business affecting their interest only.

Procedural rules common to all meetings

Calling of meetings

The rules governing of calling of the meetings are laid down in the statutes of the company but subject to the rules of commercial code. Meeting may be called by the board of directors the auditors, the liquidators or by officer of the court (Art 391/1/). In the case of urgency shareholders holding at least one-tenth of the share capital of the company, can also apply to the court for the appointment of an officer of the court to call a meeting (Art 391/2/).

Meetings can be called by publication in a legal newspaper notice setting out the name and form of the company, date, times, place and nature of the meeting and the agenda. In practice, where the companies share are registered the publication of notice in legal newspaper is often replaced by individual notice of meeting sent to each shareholders by normal postal service sent by registered letter at the company expense. Any shareholder may also demand notice to be sent to him by registered letter against payment of an expense.

t least 15 days must elapse the day when the notice of the meeting is published and the date of meeting if a quorum is not present at the first meeting, and at least eight day must elapse between the dispatch of the notice for a new meeting and the date on which such meeting is held /Art 395/.

Setting of agenda /Art 397/

The agenda of the meeting is determined by the person calling the meeting. Meetings can only pass resolutions on the questions set out in the agenda. If the meeting has to be called for a second time because a quorum is not present on the first occasion, the agenda cannot be amended for the second meeting. However, meetings may remove any director and appoint other persons to replace them without these matters appearing in the agenda.

Voting by proxy /Art 398/

Any shareholder may take part in and vote at meetings either personally or by proxy. Where the shareholder appoints proxy, he may not vote personally. The form of the proxy is determined by board of directors. The place and time of deposit of proxy is also determined by the board directors /Art 402/

Substantial rules common to all meetings

Right to information

Shareholders are entitled to be given relevant information in advance of any meeting in order to enable them to take fully informed decisions /Art 406/ Before any annual shareholders' meeting, shareholders are entitled to inspect the company's balance sheet, profit and loss accounts, reports of directors and auditors in the three preceding financial years, minutes and attendance sheets of these meetings etc.

The shareholder's inspection rights can be exercised by any shareholder at the company's registered office or main place of business with the assistance of any expert selected

Right to vote

Basically each share carries one vote, and the number of votes which any shareholder may cast at general meetings is calculated accordingly (Art 407) However, there are certain exception to this rule.

1. A company can not vote on shares issued by it which it has purchased (Art 400)
2. The statutes may limit the number of votes which any shareholder may cast, provided that the limitation applies equally to all shareholders (art 408)
3. Where the interest of shareholder conflicts with the interest of the company, such shareholder may not exercise his right to vote (Art 409/1/)
4. Directors may not vote on resolution relating to the directors duties and liabilities (Art 409/3/)

Furthermore, every shareholder is free to vote as he wishes. Agreements or resolution restricting the free exercise of the right to vote shall be null and void (Art 389/2/). Shareholder must exercise their voting rights in the collective interests of all the members of the company, and not in order to promote individual is interest.

Resolution of the meeting binds all shareholders whether absent, dissenting or having no right to vote. (Art 388/2/). Courts may decide to nullify a decision of the shareholders meeting when there is evidence that the decision was detrimental to the interest of the company (Art 418/2/) or to the minority or majority shareholders' interests and was dictated only by the self-interest of certain shareholders. Ex the following decision may be held to be abuse of voting rights:

Continuous refusal to distribute dividends over a period of many years when the major profits made by the company were not invested in company's operations but were merely held in bank accounts.

Transfer of the company's assets or activities to another company indirectly controlled by the majority shareholders. Excessive compensation paid to the company's senior management.

Conversely, if minority shareholders abuse their power by obstructing the passing of resolutions (ie by refusing to vote for necessary amendments to the company's statutes), courts may disregard their adverse votes or abstention from voting, and declare the resolution passed.

Meetings /Art 390/

Ordinary general meeting

Ordinary general meeting can be held only if the shareholders present or represented represent at least one-quarter of the shares of the voting shares. If this quorum requirement is not met, the meeting must be called a second time, and on that occasion no quorum is required. Resolution is passed at ordinary meeting by a simple majority of the voter held by the shareholders present or represented. Accordingly, a shareholder who abstains is disregarded (Art 421)

Ordinary general meetings may take all decisions within the competence of the shareholders, except those which are required to be taken by an extra ordinary meeting. Decisions made by ordinary meeting mainly concern financial questions (other than alteration of the capital) and matters concerned with the administration of the company. (Art 419) The most important kind of ordinary meeting is, of course the annual meeting, which must be held within four months after the end of each financial year (Art 418)

Extraordinary meetings /Art 425/

Extraordinary meetings are subject to stricter rules as to quorum and majority than ordinary meetings. At least half of the holders of all shares having voting rights of the company must be represented at the meeting by shareholders or their proxies, if such quorum is not present the meeting must be called for the second or third time, and the quorum is reduced to one third, or one tenth respectively. Resolutions are passed at extra ordinary meetings by two-thirds majority of the votes held by shareholders present or represented.

An extra ordinary meeting may alter any provision of the company statues. Provided it does not increase the financial obligations of the shareholders, take away the basic rights of the shareholder, such as the right to transfer his shares of the right to vote at meetings or change. The change of the nationality of the company or shareholder to increase investment in company needs the present of all holders of all shares having voting right and unanimous voted.

Special meeting /Art 426

Unlike meetings which may be attended by all shareholders of any class, special meetings may be attended by only the holders of a particular class of shares. For example, the holders of preference share, special meetings must be called to approve decisions of general meetings modifying the special rights attached to shares of the class in question. The decision of the meeting become effective only if the special meeting has given its approval.

The rules as to quorum for special meeting and majority required to pass resolutions are the same as the rules governing extraordinary meeting.

8.4.1.2 Distinguishing between Various of Resolutions

As there are distinctions between various types of meetings there are also distinctions between resolutions by different meetings

A. Resolution by Ordinary general meeting: - It is held annually, within four months after the end of each financial year (Art 418)

It passes resolution on

Financial matters:- In this regard it approves the annual accounts and the management report.

At the end of each fiscal year the board of directors must prepare annual accountant and management report for submission to the general meeting. The annual accounts which the board

of directors must prepare are balance sheet, profit and loss statement and notes on the accounts. The management of the board of directors must describe the company's financial condition

Administration of the company; - The ordinary meeting appoints the directors, determines their remuneration and approves any transactions entered into by the company in which they are interested and approves the payment of the dividend. It also appoints auditors and determines their remunerations. A resolution of an ordinary meeting is required to authorize the board of directors to issue bonds.

B. Resolution by extra ordinary meeting:- aAn extra ordinary meeting may pass resolution on altering any provision of the company statutes. Provided it does not increase the financial obligations of the shareholders, take away the basic rights of the shareholder such as the right to transfer his shares or the right to vote at meetings or the change of the nationality of the company or shareholder to increase investment in the company needs the present of all holder of shares having voting right and unanimously voted.

C. Resolution by special meeting:- Special meeting passes resolution on the approval of decisions of general meetings to modify the special rights attached to shares of the class in question. The decision of the general meeting becomes effective only if the special meeting gives its approval. The rules as to the quorum for special meeting and majority required to pass resolutions are the same as the rules governing extra ordinary meetings.

8.4.2 Directors /Art 347/

Share Company being legal person can not act by itself. It must act through some human agency. The persons by whom the business of the company is carried on are, termed as directors and group of directors as an institution is termed board of directors. The board of directors is the managerial body. It is established by general assembly from among the shareholders. The number of directors is set in the statutes, but must be not less than three and not more than twelve; all directors must be shareholders of the company. They must have the real ownership and deposit of certain number of share as may be fixed in the statutes. Such share should be deposited in the company until directorship is ceased and liability is discharged, if any /Art 349/. Individuals or legal entities can become directors. If a legal entity is appointed as a director of Share Company, it must appoint an individual person /Art 347/4/.

8.4.2.1 Appointment /Art 350/

The first directors may be appointed in the statute. Their appointment shall be submitted to the first meeting of subscribers for conformation. If the meeting does not conform the appointment, other directors may be appointed. Subsequent directors are appointed by ordinary general meeting of shareholders.

The term of office of the director can not exceed three years provided that he can be eligible for re-election.

Directors may appoint new directors to replace departing or resignating directors during a financial year /Art 351/. Such replacement of directors is effective only for the remaining duration of the replaced director's term of office and must be ratified by the next ordinary meeting of shareholders in order to be valid.

If the replacement is not conformed, general meeting may appoint other directors. However, when a director's appointment is considered void, the decisions and acts carried out by the person are appointed (or replaced) by the directors remain valid. When there is no surviving director, auditors must call a shareholders meeting in order to appoint directors. Where the surviving directors are less than half of the number of directors they call shareholders meeting in order to appoint additional directors.

8.4.2.2 Powers, Duties and Liabilities of the Board of Directors (Art 360 - 362)

The board of directors has power given to it by the law of statute and decision of general meeting of the shareholders. In general, the board of directors posses the power to act in all circumstances on behalf of the company subject to the limit of the company business purpose and to the powers which are expressly reserved by law to meetings of shareholders (ie mainly approval of the annual accounts amendments of statute) In practice, however, the business of the company is taken care of by the chairman and general manager and the board of directors merely defines the general policies to be followed by the company; takes or approves strategic decisions and controls the chairman of the board.

A company is bound by all business arrangements entered into by its board of directors provided these businesses are within the scope of business purpose of the company, provisions of the statutes restricting the powers of the board may not be invoked against a person who deals with the company, whether such person knows of them or not. Provision in the statute limiting the company's purpose or restricting the powers of the board of directors merely enable the company or its shareholders to claim damage against a director if such provisions are not complied with but does not affect third party with good faith.

The following are some of the duties of the board

- Organizing management and meeting records
- Keeping of accounts and books
- Calling shareholder's meeting each year after closing of the fiscal year in order to approve management report, account and allocation of profits also meeting should be called where three quarters of the capital are last.
- Establishing reserve fund required by the law and statutes
- Applying to the court where the company is unable to pay debt with the view of composition, bankruptcy or winding - up.
-

Agreements between company and directors (Art 355-357)

This is to regulate company's business transaction in order to take into account potential conflicts of interest between the company and their directors. There are two types of agreements

1. **Prohibited agreements** /Art 353 & 357/

Directors are strictly prohibited to be partners with joint and several liabilities in rival companies nor do they compete against the company on their own behalf or on behalf of third party.

Directors can not enter any form of loan agreement with the company, be granted an over draft by the company in current account or have their obligations toward third parties guaranteed by the company agreements violating this prohibition are void.

The prohibition of entering into contract of loan or guarantee does not apply when the director is legal entity or the company operates a banking business.

2. **Regulated agreements** /Art 356/

The basic purpose of regulation provided under Art 356 is to ensure full disclosure of potentially conflicting relationship between a director and entities with which the company is doing business and to ensure that the other directors have the power to approve. The regulation applies to agreements which are entered into

(a) directly or indirectly between the company and its directors

(b) between the company and another entity in which one of the directors is owner, partner, agent, director or manager of such entity

1. Any such agreement must be obtained a prior approval by broad of directors before being executed
2. notice shall be given to the auditors
3. The auditors must prepare special report on agreement came within this scope to general meeting of the shareholders, irrespective of their execution date. This report must contain, a listing of all such agreements describe this content and purpose and mention the names of the directors concerned.
4. The meeting must consider the agreements and approve or reject them
5. Agreement approved by the meeting is effective unless set aside on ground of fraud.
6. Agreements not approved will also be in force but the director concerned will be liable for damage the company suffered from fraud. In the case the concerned director fails to fulfill his liability, the board of directors will be liable.

Directors' liability /Art 364-367/

Directors may render themselves liable to the company and to the third party.

Liability towards the company directors are agents and trustees of the company as such they owe certain duties to the company to exercise the duties imposed on them by law the statues and resolutions of the meetings. Breach; of these duties or failure to carry out these duties make directors to be liable jointly and severally to the company and its shareholders.

Directors specifically are jointly and severally responsible when they fail to take appropriate measure within their knowledge to prevent or mitigate damage that may happen to the company in relation to general management.

A director, who is not at fault while decision is taken by board of director, provided he is dissenting and such has been entered in the book of minute of register of board of directors may not be liable.

Liability to the creditors:- one of the duties of the directors in to preserve the capital of the company intact. This is to make payment to the creditor suppose the company is wound up. In such cause directors are liable to pay creditors for any demands.

Proceedings against the directors in the case of proceeding by the shareholder against the directors; no proceeding may be taken against directors unless resolution is passed by general meeting at least voted 1/5 of the capital. In such cases directors may be removed and new directors may be appointed by the same meeting. Where the resolution to institute is passed the company may bring the case to the court within three months and if the company fails to bring the case to the court, shareholders who voted for the resolution may jointly bring the case to the court.

Creditors may bring the case to the court specially where the capital of the company is insufficient to cover the debt of the creditors. If shareholders meeting passes resolution not to bring the case against directors, it is may not affect the right of the creditors. On the other hand, any shareholder or third party can bring cases against directors is there is damage against them.

8.4.2.3 Removal /Art 354/

The law empowers the company to remove a director by general meeting before the expiry of term of office. Even if there is no agenda regarding removal of directors (Art 397/2/). However, a director so removed shall not be deprived of any compensation payable to him in respect of the termination of his appointment in the absence of good cause.

8.4.3 General Manager

8.4.3.1 Appointment

As a general rule, day to day activities are carried on by general manage, under commercial code of Ethiopia. The general manager is appointed by the board (Art 348/1/). It is also general rule that general manager is not member of the board directors (Art 348/4/). This is to avoid potential conflict of interest and to ensure that the appointment of directors may always be freely revoked by the board of directors. However, a close examination of art 362/2/ may lead to different result

which is exception to the principle stated above. It states that articles of association of a company may specify that directors or one director may be responsible as a manager.

This indicates that one director or more directors can be responsible as a manager. The code further states that they are exercising their power in the name of the company. From these provisions we can conclude that manager can be appointed from among the board of directors provided it is stated in articles of association.

8.4.3.2 Duties, powers and liabilities

Powers:- the power of the manager is the power that is delegated by the board of directors. Board of directors decides on substantial policy issues. Such is implemented by general manager. The general manager carries on day today activities of the company. It represents the company in relation to third parties. It enters into contract on behalf of the company. Hire and fire of employee of the company sign on negotiable instruments is day to day activities of general managed.

Duties:- general manager has to perform all his activities according to the power delegated to him, and according to the statutes and the law.

Furthermore, general manager occupies the position of a trustee for the company and he has to safeguard the interest of the shareholders and the company.

Liabilities general manager is liable for damage resulting from infringement of his power or violation of law, statutes and from deliberate or negligent acts of mismanagement. Such liability may be incurred to the company or third party as well as individual shareholders. In such case he is liable to the company and third party.

8.4.3.3 Removal

The law empowers the board of directors to appoint general manager for such period as stated in the statues or law. The power to appoint the general manager, conferred on the board carries with it by implication the power to terminate the appointment. The general manager functioning under the law is an employee of the company.

However, such power must be exercised for good causes after due enquiry held in accordance with the rules of natural justice. The company will be liable for damages if such removal is breach of contact.

8.5 Accounts and audit

8.5.1 out of capital payment

At the end of each fiscal year the board of directors must prepare annual accounts and a management report for submission to the general meeting (Art 446). The annual accounts which the board of directors must prepare are balance sheet, profit and loss statement, and report on the activities and affairs of the company which should show remuneration of the directors and auditors and proposal for the distribution of dividend, if any,

Payment as dividend is only paid where there is profit and such profit is declared to be paid by the general assembly. (Art 458) When there is no profit payment of dividend out of capital is strictly prohibited. If dividend is paid from capital it shall be deemed as a fictions dividends and the persons making the distribution shall be criminally and civilly liable.

8.5.2 Reserve funds /Art 453/

The legal reserve which is made from net profit mandatory be allocated on a long-term basis to the company's operation.

The first one is legal reserves required by law. It is five percent of any annual profit that must be allocated to the legal reserve until the amount of legal reserve is equal at least 10 percent. The amount reserved is not less than one twentieth of the profit. The legal reserve can not be distributed to the shareholders nor be used for the repurchase or redemption of the company shares.

The second type of reserve fund is the supplementary reserve which must be allocated to the company's operation on long-term basis by application of the articles of association. They can not be distributed to the shareholders. The third one is optional reserves which correspond to profits allocated to the company's operation by a decision of the shareholders meeting in accordance with the articles of association.

The fourth one is free reserve that is created by an ordinary general meeting. Some time it is known as "revaluation reserve", which unlike the other reserves referred to above, is not extracted from profits realized by the company, corresponds to any difference revealed in the

context of an asset revaluation between the historical book value of certain tangible assets (such as immoveable or trade marks) and their real market value.

8.5.3 Profits and dividends

The profit of the company is the net receipts for the financial year after deduction of general costs and other changes (Art 452/11/). Any profits realized during the fiscal year of which the accounts are submitted to the meeting must be allocated by the meeting. As stated above, first the company must allocate to legal reserve until it reaches one tenth of the capital of the company. After the legal reserve and if appropriate other reserves have been funded, the annual meeting is free to use any remaining part of the profit by allocating them to the shareholder as dividends. Dividend is the return that a shareholder gets from, the company, out of its profits, on his shareholder. It is the portion of the profits of the company which is allocated to the holders of shares in the company or it is as portion of the distributable profits of the company. It may be a fixed annual percentage as in the case of preference shares or it may be variable as in the case of equity shares. It is only, payable out of distributable profits only distribution of fictitious dividends (it is dividends in excess of available profits) is a criminal offence as well as civilly makes liable (Art 458/2/).

The time and manner of payment of dividends is decided on by the annual meeting (Art 458/3/).

In general, right to claim dividend arises only after the same is declared by the company in general meeting and unless it is declared, no shareholder has any claim against the company in respect of it. It is usual practice for the board of directors to recommend, and the annual general meeting to declare the dividend. And once the dividend is lawfully declared, the amount due to each shareholder on account of dividend become a debt, and shareholder creditors of the company (Art 458/5/)

8.5.4 Appointment of auditors

Auditors are appointed by shareholders and are entrusted with the external control of the company. Their main functions are to audit the accounts of the company, certify certain information provided to the shareholders, and prepare reports which must be submitted to the shareholders.

Company may elect one or more auditors and one more assistant auditor. The first auditors of the company shall be appointed by the subscribers of the company and subsequently be appointed by the general meeting of the company (Art 369/1/). The auditors appointed by subscriber shall hold the office until the first annual general meeting. Auditors elected at annual general meeting may hold office for three years (Art 369/2/). Persons disqualified

The following person are prohibited to be elected as an auditor (Art 370)

(a) the founders, contributors in kind, beneficiaries enjoying special benefits /preferred rights/ directors of a company or one of its subsidiaries or its holding company,
(b) the blood relatives or in-laws of any person mentioned in (a)
(c) persons who receive from persons mentioned in (a) a salary or periodical remuneration in connection with duties other than those of an auditor,

In addition, the law prohibits auditors not to be appointed as a directors or managers of the company which they audit, nor of one of its subsidiaries of its holding company with in three years from the date of the termination of their function.

Art 371 of commercial code states that auditors may be removed by general meeting at any time subject to demand compensation, if they are removed not for good cause. It is to ensure that auditors cannot be removed at will by management or shareholders.

8.6 dissolution and wind up

Companies are rarely dissolved. Rather than dissolve a company shareholders usually prefer to sell their shares. In certain cases however, dissolution can not be avoided.

There are many causes of dissolution of a company /or partnership/, Causes common to all kinds of business organization /Art 217-218/

Dissolution may result from the application of rules of law, from provisions in the statutes of the company/ partnership from the common agreement of the members to dissolve/ or from a judicial decision dissolving the companies for just cause.

Dissolution by a rule of law

Commercial code of Ethiopia recognizes business organization to be formed at least by two persons. So, one person business organization does not exist. In the case of Share Company the minimum number of shareholders is five and if a number is reduced it may not be considered as a company and members will be liable personally, as though it was not a company and be dissolved by the court upon application by any interested party (Art 311)

In the case of reduction in member or where organ of the company failed to function Art 311 and 511 regularize the situation. The court may make some provisional arrangements, in which if the companies comply with such arrangement may be survived from dissolution. If the companies complied the provision measures, taken by the court they still exist and retain their corporate personality, but if not complied, the companies may be dissolved by the court.

Dissolution under provisions of the statues

Causes of dissolution may be laid down in the statues of the company /partnership/ they may relate to its duration or its objects.

The members are free to fix the duration of the company or partnership.

If the statute of a company /partnership provides that it shall endure for a fixed term, it is dissolved automatically at the end of that term. However, the members may prolong the duration of the company or partnership by modifying its statues /Art 217/e/

The dissolution of the company /partnership may be automatic where the company's/ partnership purpose could not achieve. (Art 217/a/) or where it accomplishes its object for which it was formed.

The company may not met its purpose where the assets or undertakings of the company totally ceasing to exist either by being physically destroyed, or by becoming unusable for the purpose originally intended. Generally speaking dissolution takes place only if the loss of the relevant assets makes it absolutely impossible for the company /partnership/

The accomplishment of the objects for which the company/ partnership was formed occurs when it was formed to carry out one or series of transactions, which have been completed, a company

/partnership may be dissolved for these reasons even if it was formed for a fixed term which has not yet expired.

Dissolution resulting from the agreements of the members

A company or partnership may be dissolved prematurely if all its members agree, or if the appropriate majority resolves to alter its statutes so as to bring abut its immediate dissolution. In the case of Share Company, the company may be dissolved by resolution of an extra -ordinary general meeting without alteration of its statutes (Art 495/d)

Dissolution by the order of the court

The court may dissolve a partnership or (a company) if there is just cause to do so (Art 218/1/) on application of partner only for partnership. When a member fails to fulfill his obligation as such (eg a member fails to his agreed contribution to capital, when prolonged infirmity renders a member incapable of attending the affairs of the partnership) only for partnership (Art 260, 278/1/h/, 295, 303). In carrying on business of the partnership will be seriously harmed, because of this, prolonged infirmity is a cause of dissolution

In the case of a partnership may apply for judicial dissolution if he has a legitimate interest to protect. The court's jurisdiction was created in consideration of the public interest as well as for the protection of private rights, and it can not therefore be excluded by the provision in the statutes of the company or partnership.

Dissolution of share company

Share Company may be dissolved by the court on the application of any member or creditor where member of the company reduced less than legal minimum and the company does not possess the prescribed organ (Art 495/1/(f)) however, it may remain as a company for six months in such reduction (Art 311(1)). Further, the court may give provisional order as it deemed necessary.

The other conditions of dissolution are also stated under Art 495 which are self explanatory.

Liquidation of share company liquidation and its procedure is only stated under Share Company. This procedure can also be applied for all other business organization impliedly, and

therefore be discussed here in under. The liquidation comprises all the operations required to complete its current transaction, to collect and realize its assets, to discharge its liabilities and repay its capital and to distribute any surplus of assets among its members.

The company continues to exist and has corporate personality for the purpose of the liquidation until liquidation in completed, this rule has general consequences. In the first place, the company continues to be entitled to the exclusive use of its name, although this must be followed by the words "in liquidation" (Art 497/11/) secondary, the company retains its registered office and the ownership of its assets.

The survival of the corporate personality of the company is however limited to the needs of the liquidation is to those operations which will be necessary or useful for winding up its affairs (Art 497(2)).The dissolved company will therefore only be able to complete unfinished current transactions and to enter into new transactions to the extent they are consistent with the object of winding up its affairs (Art 500)

Appointment /Art 496/

The manner of appointment may be stated in the memorandum and articles of association. Where it is not stated in accordingly it may be appointed by the general meeting which decided the dissolution of the company, if the member do not appoint a liquidator, an appointment is made by the court on the application of members, directors or auditors. A liquidator may be removed by the general meeting or by the court on the application of members or auditors and be replaced by the same procedure stated for the appointment.

Powers (Art 500)

The liquidator has wide powers to carry out the liquidation. He may sell the assets of the company by private agreement or public auction. He may institute, deemed or compromise, recover debts owed to the company and call for payment of capital unpaid on shares issued for cash. He can not enter into new business transactions for carrying on the company's business, unless required for the performance of the contracts still running or where the interests of the winding-up so require. Liquidators are personally, jointly or severally liable if they act outside of their power.

Review Questions

(1) State the difference between limited and unlimited liability?

(2) What are the distinctive features of Share Company?

(3) Define memorandum and articles of association. What are their contents?

(4) Compare and contract memorandum and articles of association

(5) Discuss the effect of the memorandum and articles of association up on their registration with registrar?

(6) Explain the doctrine of constructive notice and indoor management?

(7) What are the out comes of legal personality of the company?

(8) How do you define shares?

(9) How do you understand forms of shares and classes of shares?

(10) Rights of shares holders are classified into individual and corporate membership right. What is the purpose of such classification?

(11) Explain temporary warrants and compare and contrast with share certificate?

(12) What is debenture? Does it have any relation with government issuance of Treasury bond?

(13) Who are corporate managers?

(14) State various kinds of shareholders' meetings and distinguishing feature among each of them?

(15) Why directors are always among shareholders?

(16) What is the difference between prohibited and regulated agreements of the director in relation to the company in which he is directorship?

(17) Discuss director's liability?

(18) If directors pay dividend from the capital of the company they are criminally and civilly liable, why do you think?

(19) Explain ways of dissolutions?

(20) Discuss the appointment and powers of liquidator?

(21) Compare and contrast company and partnership

(22) Compare and contrast share and Pvt. Ltd. Co

UNIT NINE

Private limited company

9.1 Nature

Private limited company is the most popular form of company in Ethiopia. One reason is that it is particularly well adapted to small and medium–sized business and currently, the Ethiopian business is at these stages. The other point is that it is hybrid of Share Company and partnership. On one hand it is limited liability, its members liability is limited to the extend of their contribution, on the other hand shares are not freely transferred to the outsiders, which is

chief chrematistics of partnership. Thus, this company is middle way between Share Company and partnership.

Private Limited Company may be formed to pursue any purpose or to carry on any activities, however, it may not take banking, insurance and similar activities, such business must be carried out by Share Company (Art 513)

Furthermore, the form of private limited company is always of commercial nature even if it intends to carry on civil activities (Art 10(2) and 510(2))

9.2 formations

Private limited company cones into existence when two or more persons but not greater than fifty persons (Art 510/2/) come together with a view to exploit some business opportunity.

Documents to be filed with the registrar

Registration of business organization is conducted in Ministry of trade and industry and trade and industry Bureau at Federal and regional level respectively (see Art 4 of pr. 67/97)

These organs are registrar of business organization. The application for Registration of private limited company should be accompanied with the following documents.

1. The memorandum of association
2. the articles of association
3. document that states the evaluation of in kind contribution, if any

These documents shall be evaluated by the registrar and be entered, into book of registry. This formality is of capital important for this company does not acquire legal personality until it has been entered in the registry of book of registrar. This company acquires legal capacity as provided by after it acquires legal personality. The following are the out comes of legal personality

- A name as specified in the statutes
- A registered office which is the main address where the main management of the company is located

- Nationality of the company
- The power to do acts with legal effect acquiring of property and becoming subject to rights and obligations
- The power to sue and to defend legal proceedings against it

The capital of this company must be at least Birr 15,000 (Art 512/1/) the whole capital of private limited company must be paid-up when the company in formed (Art 517/g/)

The memorandum of the company must contain a valuation of asset contributed in kind (art 519/t). The method of evaluation is determined by the members. Members contributing in kind are liable for the excess of the value evaluated. Members are also jointly and severally liable to such over evaluated amount. The face value of share capital may not be less than Birr 10.00 private limited company issues shares of equal value. It does not issue transferable securities.

9.3 liabilities of members for the company's obligation

Earlier it has been stated that one chief characteristics of this company is limited liability. The liability of the members is limited to the amount if any, unpaid on the shares respectively held by them. The liability can be enforced during the existence of the company as well as during wind-up. Where the shares are fully paid up, no further liability rests on them. As we have already stated it is this principle of liability which makes this type of company, the most popular form of business organization.

9.4 members' meetings

The essential role of the members of Private Limited Company is to take the major decisions which the company has to take. For this reason members are entitled to be kept permanently informed about the affairs of the company. In particular they are entitled to inspect and copy the principal records and documents inventory, the balance sheet and the auditors' report (Art 537)

Shareholders are above all entitled to be consulted on major matters, either by the holding of general meetings or by their wishing being solicited individually (Art 532 & 533 respectively).

In company consisting more than twenty members a general meeting of shareholders must be held every year at the date fixed in the articles of association. This date is usually six months after the end of financial year to approve the annual accounts of the company and the managers' annual report (Art 532/1/). Other meeting may also be held when called by shareholders numbering more than one half of the capital, or by the manager or auditor (Art 532/2/)

Where holding of the meeting is not required by the law or articles of association, managers may send the text of the resolution and demand each shareholder to give vote in written form. However, there appears to be nothing to prevent the statutes providing that certain specified matters shall be decided by written vote and others by general meetings.

Decisions of ordinary meetings are taken on the first call by the votes of shareholders more than half of the company capital, and on the second call decisions are taken by simple majority disregarding the capital represented.

Ordinary resolution and majority ordinary resolution are used for natters which involve no alteration of the company's statutes. They include, for example, resolutions authorizing the managers to enter into a transaction which the statues require the prior approval of the members, resolutions appointing or remaining one or more non-statutory managers and resolutions ratifying contracts entered into between the company and one of its managers or members.

Extra ordinary resolution resolutions that need to alter the nationality of the company must be decided by unanimous vote. Resolutions involving alternation of the company, transfer of share to outsiders (Art 523(2)), change of statutory manager (Art 527(1)) must be passed by the votes of members who together hold at least three quarters of the capital of the company unless a larger majority is required by articles of association. It is also clear that unanimity is required for an increase in the committeemen's of shareholders to subscribe or increase in his contributions.

Voting (Art 534) the member of votes which each shareholder may cast at general meeting is equal to number of shares he holds. Any other provision as to voting rights in the statutes is null and void. It is not therefore possible to confer multiple voting rights on certain shares, or to deprive other shares of voting rights.

9.5 role of management

Private limited company is managed by one or more managers under the direction and control of shareholders (Art 525) manager is a person who by virtue of an agreement with the company or resolution passed by the company in general meeting or by virtue of its memorandum or articles of association, is entrusted with powers of management which would not otherwise be exercised by him (Art 428).

Appointment and dismissal of manager /Art 526 & 527/

Managers of private limited company need not be members of the company. They can be appointed either among the shareholders or outside the shareholders.

There are two types of managers. Managers who are appointed in the statues, which are known as a statutory managers, and those who are not appoint in the statues, known as non-statutory managers.

Members of private limited company may appoint one or more managers. The appointment of the first managers may be made in the statutes of the company, and all other appointments are made by the resolutions passed by the members in general meeting. The majority required to pass such a resolutions must comprise the holders of at least half of the capital of the company (Art 535(1)), but if such majority is not obtained a second poll must be called by registered letter and decision shall be taken by simple majority without regard to the capital represent.

Removal of the managers /Art 527/

Previously, we have discussed that there are two types of managers, statutory and non-statutory. Accordingly, there are two types of removal. The removal of statutory manager needs minimum of majority vote of the numbers representing three quarter of the capital unless a larger majority is provided in the articles of association (Art 536(2)) Dismissal of the statutory manager needs the amendment of the statute, and amendment of the statute required minimum of three quarter's majority. In the case of dismissal of non-statutory manager it requires a majority of members representing more than one half of the capital and in the second call, decision is passed by simple majority without regard to the capital represented (Art 535).

However, members may agree in the articles of association that manager may be dismissed at the pleasure of the members irrespective of the types of manager (Art 527(4)). The removal of the manager is for good cause even though the law is silent as to what constitute good cause. Manager, there fore may be dismissed for mismanagement, incompetence or physical disability which may be considered as good cause. If removal is not justified, the dismissed manager may claim compensation.

Powers of managers /Art 538/

Managers of private limited company have extensive powers. They may act on behalf of the company in all circumstances, provided that they do not infringe the provisions of its statutes and that they do not act outside the scope of the objects of the company business purpose.

However, such wide scope powers of managers may be limited by the statues of the company. Thus, the statues may limit the powers of managers by restrictive provision. The statutes may for example prohibit the sale or mortgage of land possessed by the company, forbid the managers to borrow more than a certain amount of money in the company's name.

Manager liability (Art 530) managers are liable for damage resulting from infringements by them of the law governing private limited company, from violation of the statutes of their company, and from deliberate or negligent acts of mismanagement. Such liability may be incurred to the company as well as to the third parties

When several managers are responsible for the act. They shall be liable individually, or jointly and severally, as the case may be, being participating in the share of damages which each must pay is fixed in proportion to their respective degrees of responsibility or degree of involvement.

Managers' remuneration(Art 529) the remuneration of the managers shall be fixed by the resolution of the members of the company. It may be in fixed salary of share in the profit or both fixed salary and share in the profit. In practices managers are usually paid a fixed salary.

9.6 Shares and transactions in shares

The contributions of cash or in kind for shares of the company constitute its capital. The capital is divided into shares with the same nominal value, which may not be less than birr ten (Art 512(2). Previously, we have discussed that in principle the shares of private limited company confer uniform rights. Unlike the shares of Share Company, the shares of private limited company are not transferable by the normal commercial forms of transfer, and can not be represented by registered and beaver share certificate transferable in the sane way as shares of Share Company, shares in private limited company, must be made in writing (Art 523). Shares in private limited company, are freely transferred among the company members (Art 523(1)). However, free transferability may be restricted by a provision in the articles of association.

Shares can be transferred to outsiders with the consent of majority of the members representing at least three-quarters of the capital unless a larger majority or unanimity is required in the articles of association.

9.7 Transfer inter vivos and mortis cause

The transfer of shares has been discussed above that there is restriction of transfer of share to outsiders. This became necessary to enable companies to safeguard their friendly or family identity and to protect themselves from un scrupulous persons attempting to take over control through market operation.

Generally, articles of private limited company provide that any member intending to transfer his shares should offer the shares first to members of the company. Shares can be transferred to nonmembers only if any member is not willing to buy the shares. This is termed as "preemption clause"

When the shareholder dies his shares transmit to his heir (Art 524). Transmission is done by the operation of law. Since it is by the operation of law, transfer deed is not essential for transmission. The articles usually contain provisions relating to transmission of shares.

On the death of a member, the survivor/heirs/ shall be the only persons recognized by the company as having any title to his interest in the shares.

Any person becoming entitled to a share on the death, on production of satisfactory proof as to his title may elect either

- To register himself a holder of share or
- To transfer the shares as the original members could have done

Review questions 1

(2) Compare and contrast private Limited Company and share company

(3) Discuss ordinary and extra ordinary resolution?

(4) Explain appointment and dismissal of statutory and non statutory manager?

(5) State the scopes and liabilities of managers

(6) Explain transfer of shares in private limited company?

UNIT TEN

Conversion and amalgamation of business organization

10.1 conversions

10.1.1 Meaning

The conversion of business organization is an operation by which its legal form is changed without being creating new legal personality (Art 544(1). Thus, private limited company may be changed into Share Company and vice versa. Such conversion does not result in the creation of a new legal person, but is treated for all purpose as a continuation of the original company. Conversion must conform to the rules contained in the law, the statutes of the business organization governing the alternation of the statutes and special rules governing conversions.

10.1.2 Mode procedural rules

The decision of conversion of one business organization into another form may pass by unanimous or majority required by the law or articles of association. A resolution or agreement for conversion of one business organization into another has to be notified through publication. Conversion neither increases any liabilities upon member nor deprives the right of members partially or wholly.

10.1.3 Effects

A conversion takes effect from the date of registration in the commercial registers. It does not affect the continued existence of the original business organization, and therefore causes no interruption of its activities. The assets of the former business organization transfers to the new business organization from the date of registration.

On the other hand, a conversion terminates the appointment of management and powers of directors or managers of the original business organization. Consequently, fresh appointment must be made. Nevertheless, the original office holders cannot treat the conversion as amounting to dismissal without just cause and so claim damages from the converted company unless they can show that the conversion was carried out for the sole purpose of prejudicing their rights.

In relation to the rights of creditors:- conversion is effective when it has been published in three successive monthly issues of the notice /Art 546/3/. The creditors of the former business organization retain all their rights, as regards the new business organization. They may also object and demand their debt to be paid before conversion takes place. In the case of objection, creditors may be paid or guaranteed. No shareholders may be paid from the assets of newly established company until all creditors are paid or guaranteed. It is the duty of managers to implement the provision that protects the rights of creditors.

In relation to the members, the conversion does not discharge member with unlimited liabilities from their former liabilities of the former business organization (Art 548). However, if creditors have been informed the conversion with registered letter and do not dissent from the conversion within thirty days from the date of such notification and approves the conversion, members will be relieved from the liabilities.

10.2 Amalgamation

10.2.1 Meaning

An amalgamation is the operation by which two or more, business organizations group into only one business organization and by which the members of the amalgamated business organization receive shares issued by the business organization benefiting from the amalgamation. It may either result in the creation of a new business organization to which one or more business organization contribute their assets and debts or in the contribution of the assets and debts of one or more business organization to another existing business organization to another existing business organization (Art 549/1/).

In amalgamation, all property and rights forming the assets of the amalgamated business organization are transferred to the beneficiary business organization.
The beneficiary business organization must comply with the undertakings and agreements entered into by the amalgamated business origination and all claims and liabilities of amalgamated business organization will be transferred to the beneficiary business organization.

10.2.2 mode/procedure/

The decision of amalgamation is taken by each business organization. Such decisions have to be approved by different classes of shareholders and debentures (Art 550). The terms of amalgamation is drawn up which transfers all assets and liabilities to the amalgamated business organization the conditions and characteristics of such a transfer is often described as similar to those attached to an inheritance.

10.2.3 Effects

Within three months after completion of amalgamation to the court in order to protect their rights.

When it is presented to the court the court may reject the application in the following conditions:-

Where

- all creditors are agreed to the amalgamation, and
- payment is effected to those who did not consent to the amalgamation or
- such payment has been deposited in the bank for the benefit of those who did not consent to the amalgamation

In addition the court may reject such application by giving order that sufficient guarantee be produced by the beneficiary company to the creditors.

(1) state the nature and application of conversion and amalgamation

(2) Explain the rights of creditors?

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- Commercial Registration and Business Licensing Proclamation No 67/97
- Business Mortgage Proclamation No. 98/1998
- Commercial Registration and Licensing, Council of Ministers Regulation 13/1997
- Addis Ababa/ Dire Dawa Administration Commercial Registration and Licensing Council of Ministers Regulation 14/1997
- Commercial Registration and Licensing Council of Ministers Amendment Regulation 87/2003
- Commercial Registration and Business Licensing Proclamation No. 328/2003
- Trade Practice Proclamation No. 329/2003
- Trade Marks Registration and Protection Proclamation No. 501/2006